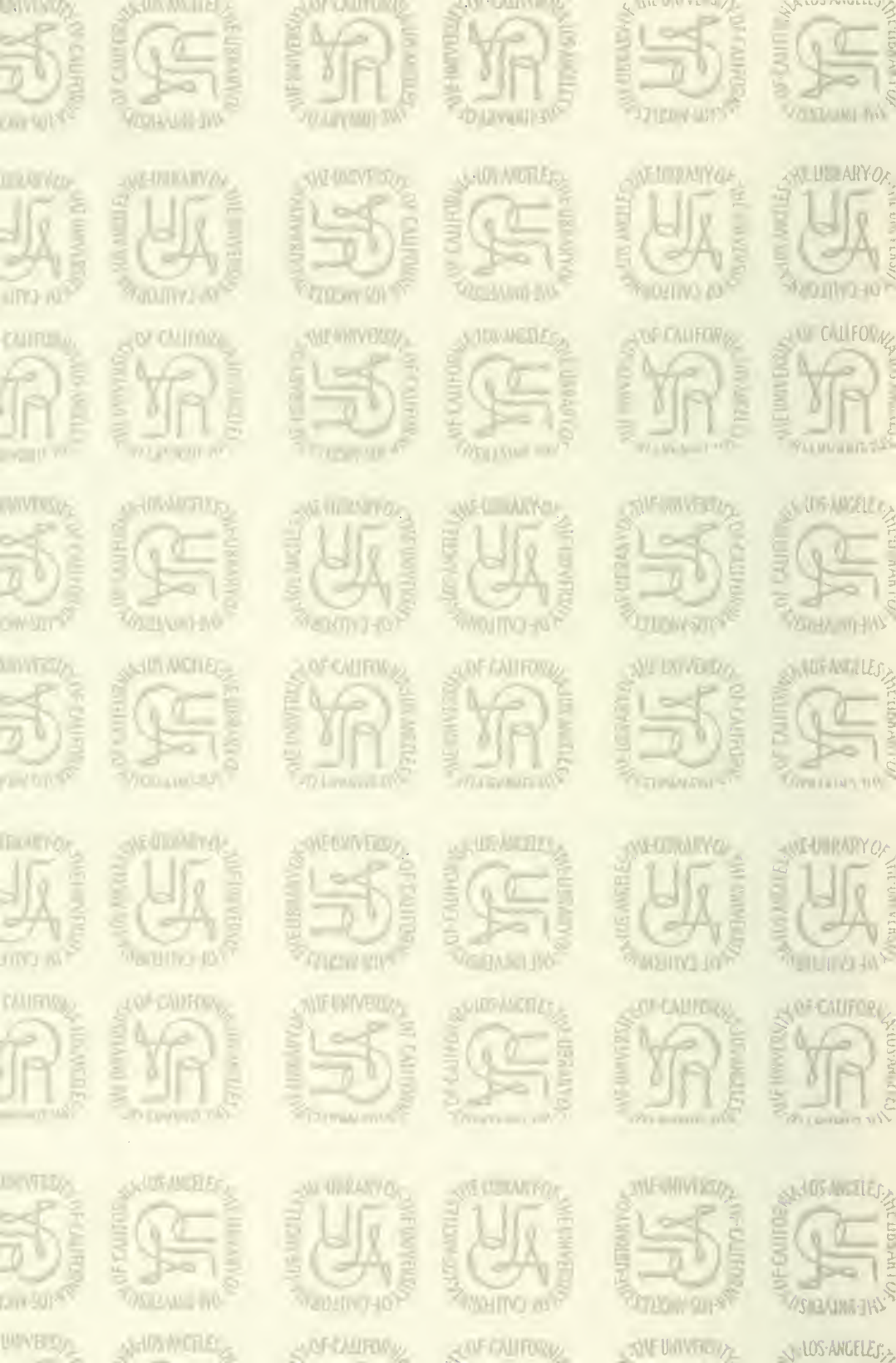

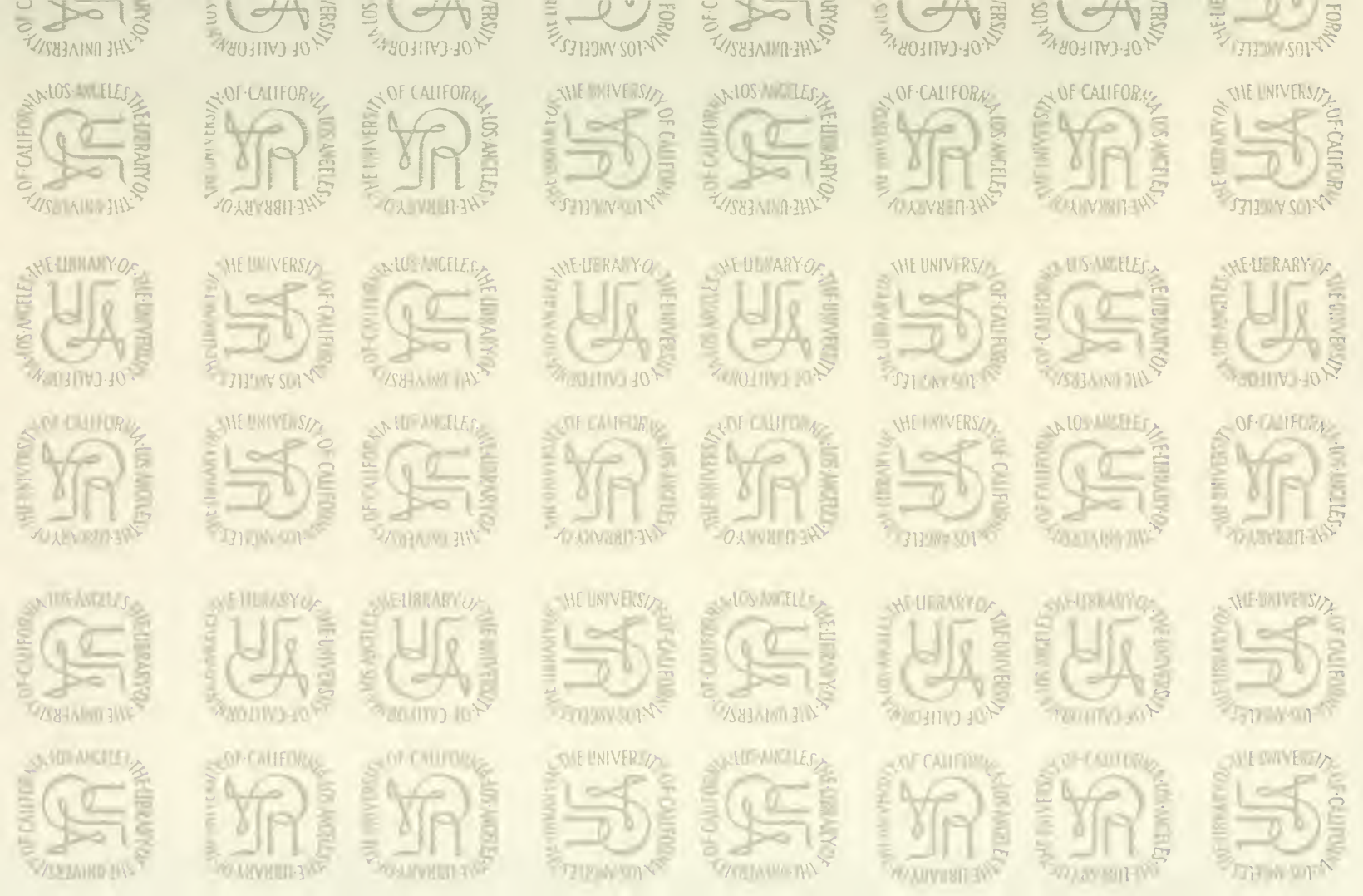
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THE

ENCYCLOPÆDIA

OF

EVIDENCE

EDITED BY

EDGAR W. CAMP AND JOHN F. CROWE

VOL. IX

LOS ANGELES CAL.
L. D. POWELL COMPANY
1906

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En 195
1902

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TIMES-MIRROR PRINTING AND BINDING HOUSE
LOS ANGELES, CAL

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TABLE OF TITLES.

NON EST FACTUM.

CROSS-REFERENCES:

Assumpsit;
Bills and Notes; Bonds;
Debt.

I. ISSUES RAISED.

The plea of *non est factum* puts in issue only the execution of the instrument.[1] It admits every other allegation.[2]

II. BURDEN OF PROOF.

In general, the burden of proof is upon the party suing upon or setting up the instrument.[3]

1. State *v.* Ferguson, 9 Mo. 288; State *v.* Mayson, 2 Nott & McC. (S. C.) 425; Parr *v.* Johnston, 15 Tex. 294. And see cases cited in the following note.

2. Nicholay *v.* Kay, 6 Ark. 59, 42 Am. Dec. 680; Rudesill *v.* Jefferson Co. Court, 85 Ill. 446 (rule applied); Utter *v.* Vance, 7 Blackf. (Ind.) 514; People *v.* Rowland, 5 Barb. (N. Y.) 449; Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307; Adams *v.* Wylie, 1 Nott & McC. (S. C.) 78.

3. For a full discussion of the rules concerning this subject see article "BURDEN OF PROOF."

III. EVIDENCE ON PART OF PLAINTIFF.

Upon *non est factum* being pleaded, plaintiff establishes a *prima facie* case by introducing the instrument and proving the signature.[4] This raises a presumption of delivery.[5]

IV. EVIDENCE ADMISSIBLE.

1. In General. — Upon *non est factum* being pleaded, "every circumstance that goes to show that it is not the deed or contract of the party is provable by parol evidence."[6]

2. Alteration. — Evidence of a material alteration of an instrument after execution is admissible under the plea of *non est factum*.[7]

4. Sawyer *v.* Warner, 15 Barb. (N. Y.) 282. Questions as to the evidence admissible to prove execution are discussed elsewhere. As to proof of signature see article "HANDWRITING," Vol. VI; as to delivery see article "DELIVERY," Vol. IV; as to proof by subscribing witnesses see article "SUBSCRIBING WITNESSES."

Motive. — Evidence showing motive for the execution is admissible. German-American Bank *v.* Stickle, 59 Neb. 321, 80 N. W. 910.

Letters written by the defendant acknowledging liability are admissible. Fordsville Bkg. Co. *v.* Thompson, 23 Ky. L. Rep. 1276, 65 S. W. 6.

Estoppel. — Evidence that the defendant, when shown the instrument, said "That is my name," is admissible under a denial of execution. Central Nat. Bank *v.* Copp, 184 Mass. 328, 68 N. E. 334.

5. Sawyer *v.* Warner, 15 Barb. (N. Y.) 282; Smallwood *v.* Clark, 1 N. C. 117. To the effect that possession raises a presumption of delivery see Pastene *v.* Pardini, 135 Cal. 431, 67 Pac. 681; Schallehn *v.* Hibbard, 64 Kan. 601, 68 Pac. 61; Newlin *v.* Beard, 6 W. Va. 110.

6. Speak *v.* United States, 9 Cranch (U. S.) 28; Owings *v.* Grubb, 6 J. J. Marsh. (Ky.) 31; American Buttonhole, O. & S. M. Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

Evidence of what was said and done at the time the bond was signed is admissible. State *v.* Gregory, 132 Ind. 387, 31 N. E. 952.

Evidence is admissible to the effect that the defendant "was not at the place at the time at which the instrument was executed; that he could not write; that there had never been any business transaction between himself and the payee which formed the basis for the note. So, in the case at bar, we think the defendant should have been permitted to show all business transactions between the parties to the instrument which in any way tended to affect the question as to whether he made the note." Donahue *v.* Wagner, 68 Iowa 358, 27 N. W. 274.

Evidence that the president of the plaintiff corporation was a defaulter; that he forged notes of other parties to cover embezzlements; that he forged other notes of defendant's testator; that all the notes were expedients to cover his delinquency, is admissible. First Nat. Bank *v.* Wisdom, 23 Ky. L. Rep. 530, 63 S. W. 461.

Evidence of forgery of other notes not connected with the note in question is not admissible. Kingsbury *v.* Waco State Bank, 30 Tex. Civ. App. 387, 70 S. W. 551.

7. Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469 (insertion of figure "8" before words "per cent." in a promissory note); Conner *v.* Sharpe, 27 Ind. 41; Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324, 416; Boomer *v.* Koon, 6 Hun (N. Y.) 645 ("The proof that the note produced on the trial had been altered in a material part was clearly proof that it was not his note; that he did not make and deliver such note. It overcame and repelled the

3. Want of Delivery. — The delivery of an instrument is a part of its execution. Hence, the defendant may introduce evidence showing that there has been no delivery under the plea of *non est factum*.[8]

4. Fraud, Etc. — Where "the defense is bottomed on the false, fraudulent and covinous conduct of the obligee in relation to the execution of the instrument, which shows that the obligor, in truth and in fact, never, in the eye of the law, executed the bond — the facts may be given in evidence under the plea of *non est factum*."[9]

prima facie evidence afforded by proof of his signature, and destroyed the cause of action.")

8. Pastene *v.* Pardini, 135 Cal. 431, 67 Pac. 681 (admissible under denial of execution); Palmer *v.* Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Owings *v.* Grubbs, 6 J. J. Marsh. (Ky.) 31; Sawyer *v.* Warner, 15 Barb. (N. Y.) 282; Moyer *v.* Fisher, 24 Pa. St. 513; American Buttonhole, O. & S. M. Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

Delivery in Escrow. — As to whether evidence of an escrow, the terms of which have not been fulfilled, is admissible, there is a conflict of authority. To the effect that such evidence is admissible see Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324, 416; Stuart *v.* Livesay, 4 W. Va. 45 (*dictum*); Newlin *v.* Beard, 6 W. Va. 110. That it is not admissible under a general plea of *non est factum*, but requires a special plea setting out the fact that it was a conditional signing and delivery, see Hall *v.* Smith, 14 Bush (Ky.) 604; Smallwood *v.* Clark, 1 N. C. 117; Anonymous, 3 N. C. 497.

Under a denial of delivery, evidence that the consideration for which a check was to be delivered has not been performed, and evidence of conversations showing non-performance of conditions, is admissible as tending strongly to show that the check was undelivered. Schwartz *v.* Wright (Cal.), 56 Pac. 608.

9. As where it is fraudulently misread, or another instrument fraudulently substituted for the true one, or where the obligee fraudulently induces the obligor to execute the instrument when he is incapable of judging for himself, either by reason of drunkenness or lunacy, or where the obligee does any other fraudulent act which shows that the obligor in truth and in fact never, in the eye of the law, executed the bond. Huston *v.* Williams, 3 Blackf. (Ind.) 170, 25 Am. Dec. 84. See also Woolson *v.* Shirley, 6 Dana (Ky.) 308; Van Valkenburgh *v.* Rouk, 12 Johns. (N. Y.) 337 (substitution of an instrument of a larger amount for the one defendant supposed he was executing); Perry *v.* Fleming, 4 N. C. 344; Stacy *v.* Ross, 27 Tex. 3, 84 Am. Dec. 604 (*dictum*); American Buttonhole, O. & S. M. Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

"The defendant may, under that issue, give in evidence anything which goes to show that the instrument of writing was originally void at common law, as lunacy, fraud, coverture, etc." Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324, 416.

The methods of proof may be summarized as follows: "If there had been a witness to the single bill, the plaintiff would have been bound to call him to an (or to) account for his absence; as there was none, it lay on the plaintiff to prove the handwriting of the defendant. This is to be done, first, by persons who had seen him write; the second mode is, by persons who have seen letters or other documents purporting to be in the handwriting of the party, and having afterwards personally communicated with him respecting them, or acted upon them as his, the party having known and acquiesced in such acts founded on the implied genuineness, or by such adoption of them into the ordinary business transactions of life, as induces a reasonable presumption of their being his own writings." Brobst *v.* Welker, 8 Pa. St. 467.

It is only evidence of fraud *relating to the execution,* however, that is admissible.[10]

V. EVIDENCE NOT ADMISSIBLE.

1. In General. — In general, evidence which does not tend to establish the non-execution of the instrument sued on is not admissible under the plea of *non est factum.*[11]

2. Failure of Consideration. — Evidence of failure of consideration is not admissible under a plea of *non est factum,*[12] except when offered for the purpose of showing the improbability of the execution of the instrument.[13]

3. Illegality. — It has been said that evidence showing that the instrument is, for any reason, illegal is not admissible under the plea.[14]

10. Chambers *v.* Games, 2 Greene (Iowa) 320; Woolson *v.* Shirley, 6 Dana (Ky.) 308 (fraud in consideration not admissible); Van Valkenburgh *v.* Rouk, 12 Johns. (N. Y.) 337; Dorr *v.* Munsell, 13 Johns. (N. Y.) 430 (fraudulent representation of patent right which formed consideration for bond not admissible; only evidence showing substitution or that the instrument has been misread is admissible); Dale *v.* Roosevelt, 9 Cow. (N. Y.) 307 (fraudulent representations as to consideration not admissible); Taylor *v.* King, 6 Munf. (Va.) 358, 8 Am. Dec. 746 (*dictum.*)

Compare Edwards *v.* Brown, 1 Tyrw. (Eng.) 182, where the court said: "I agree that whatever shows that the bond never was the defendant's deed may be given in evidence on the plea of *non est factum;* but if a party actually executes, being competent to execute at the time, and was not deceived as to the actual contents of the bond, though he might be misled as to its legal effect, and though he might be entitled to avoid the bond by stating on the record that he was so misled, he is not at liberty on the plea of *non est factum* to say that it never became by execution his deed." See also Thomas *v.* Ruddell, 66 Ind. 326.

11. Evidence showing an accord and satisfaction is not admissible. Bailey *v.* Cowles, 86 Ill. 333.

Mistake. — Evidence of mistake in a matter other than the execution is not generally admissible. Owings *v.* Grubbs, 6 J. J. Marsh. (Ky.) 31.

Signed in Blank. — Evidence showing that the instrument was signed in blank is inadmissible. Patterson *v.* Patterson, 2 Pen. & W. (Pa.) 200. Evidence that a note was executed for a firm debt is not admissible. Dunning *v.* Rumbaugh, 36 Iowa 566.

Declarations of a deceased attesting witness to an instrument cannot be admitted to show, in disparagement of the evidence of its execution afforded by his signature, that the signature so attested was forged. United States *v.* Boyd, 8 App. D. C. 440.

12. Neely *v.* Chinn, 8 Blackf. (Ind.) 84; Ragsdale *v.* Thorn, 1 McMull. (S. C.) 335; Parr *v.* Johnston, 15 Tex. 294.

13. Upon an issue as to the execution of a promissory note, the defendant may offer evidence to the effect that there was no consideration, upon the theory that it is a most unusual thing for persons to make promissory notes without some supposed consideration. Donahue *v.* Wagner, 68 Iowa 358, 27 N. W. 274.

It is also admissible to prove nondelivery. Schwartz *v.* Wright (Cal.), 56 Pac. 608.

14. Huston *v.* Williams, 3 Blackf. (Ind.) 170, 25 Am. Dec. 84; Chambers *v.* Games, 2 Greene (Iowa) 320. See, however, Downer *v.* Dana, 19 Vt. 338 (defendants may avail themselves of any ground of defense showing that there never was any legal validity to the bond).

4. Infancy. — Matters showing that the instrument is voidable merely, as on account of the infancy of the maker, are not admissible under a plea of *non est factum.*[15]

Illegal by Statute. — Thus a defendant cannot introduce evidence to show that the instrument is illegal because of the application of some statute. Fox *v.* Mensch, 3 Watts & S. (Pa.) 444 (evidence that a bond was signed on Sunday, in violation of statute, is not admissible); Commissioners of Poor *v.* Hanion, 1 Nott & McC. (S. C.) 554 (evidence that bond was not executed in accordance with terms of statute is not admissible).

15. Van Valkenburgh *v.* Rouk, 12 Johns. (N. Y.) 337; Commissioners of Poor *v.* Hanion, 1 Nott & McC. (S. C.) 554.

NONRESIDENCE.—See Domicile; Officers.

NONSUPPORT.—See Divorce.

NOTARIES.—See Acknowledgments; Affidavits; Officers.

NOTES.—See Bills and Notes.

NOTICE.—See Knowledge; Service.

NOVATION.

By A. P. Rittenhouse.

CROSS-REFERENCES:

Accord and Satisfaction;
New Promise;
Payment.

I. BURDEN OF PROOF.

Whether an alleged novation has been made is a question of fact, and the burden of proving it is upon the party who asserts it.[1]

1. A defendant was sued on an original debt. He claimed that he was released therefrom by novation in the substitution of another person as debtor. *Held,* that the burden was upon him to prove that he had been discharged by a novation of the contract. Brewer *v.* Winston, 46 Ark. 163.

The plea of novation admits the debt sued for, and casts upon the defendant the burden of proving the state of facts necessary to its extinguishment. Studebaker Bros. Mfg. Co. *v.* Endom, 51 La. Ann. 1263, 26 So. 90.

The burden of establishing a novation is upon the party who asserts its existence. Novation is not easily proved. It must clearly appear before the court will recognize it. Netterstrom *v.* Gallistel, 110 Ill. App. 352; Garrison *v.* O'Donald, 73 Mo. App. 621; Cutting *v.* Whittemore, 72 N. H. 107, 54 Atl. 1098.

Novation Not Presumed. — In Cockrill *v.* Johnson, 28 Ark. 193, the court declared: "In the substitution of a new debt for an old one, which is denominated in the civil law a novation, the intention of the parties to that effect should be positively de-

II. METHOD OF PROOF.

1. Substitution of New Contract. — A novation may be proved by evidence that a new obligation was substituted for the old one between the same parties.[2]

2. Substitution of New Creditor. — A novation may be established by evidence that a new creditor was substituted for the old one with intent to transfer the rights of the old creditor to the new one.[3]

3. Substitution of New Debtor. — A novation may be established by evidence that a new debtor was substituted for the old one with intent to discharge the old debtor.[4]

clared; or at least, in whatever manner expressed, it should be so evident as not to admit of a doubt; in other words, a novation is not presumed unless the intention to that effect evidently appears."

Novation is not presumed. The intention to effect a novation must clearly appear from the terms of the agreement between the parties, or by a full discharge of the original debt. Sucker State Drill Co. *v.* Henry Loewer & Co. (La. Ann.), 38 So. 399; Gillet *v.* Rachal, 9 Rob. (La.) 276; Smith *v.* Brown, 12 La. Ann. 299; Parker *v.* Alexander, 2 La. Ann. 188; Studebaker Bros. Mfg. Co. *v.* Endom, 51 La. Ann. 1263, 26 So. 90; McLaughlin *v.* Gillings, 18 Misc. 56, 41 N. Y. Supp. 22.

2. A debtor at his creditor's request gave him five new notes for the debt for the purpose of enabling the creditor to sue upon them in justice court. Proof of these facts was held to sustain the claim that the original debt was canceled, and that the five new notes were substituted for it. *In re* Dixon, 13 Fed. 109.

In Hayward *v.* Burke, 151 Ill. 121, 37 N. E. 846, the court said: "In every novation there are four essential requisites: First, a previous valid obligation; second, the agreement of all the parties to the new contract; third, the extinguishment of the old contract, and fourth, the validity of the new one." See also Walker *v.* Wood, 170 Ill. 463, 48 N. E. 919; Hill *v.* Warner, 20 Ind. App. 309, 50 N. E. 582; Sutter *v.* Moore Inv. Co., 30 Wash. 333, 70 Pac. 746.

Insufficient Evidence. — Proof that a debtor obtained an extension of time on a note by giving a new note for the debt, without obtaining a surrender of the old note, does not establish a novation. Hughes *v.* Mattes, 104 La. 218, 28 So. 1006. And giving a note for an open account does not prove a novation. Chambers *v.* Knapp, 48 La. Ann. 1156, 20 So. 677.

3. In Castle *v.* Persons, 117 Fed. 835, the original plaintiff having died *pendente lite*, the action was prosecuted by her executor. The evidence showed that the defendant was indebted to his father in the sum of $5000, and that the indebtedness was not evidenced by any bond, bill or writing; that the father conveyed a large amount of property to the defendant, and directed him to pay the plaintiff the $5000, and that the defendant agreed to do so. *Held*, that this evidence established the fact of a complete novation.

In Parsons *v.* Tillman, 95 Ind. 452, the evidence showed that a partnership became indebted to one of its members and gave notes for the debt; that said member surrendered the notes and took new notes in their stead, payable to his daughter, and gave them to her as an advancement. *Held*, to establish a novation by the substitution of the daughter as creditor of the firm in place of the father.

To establish the fact of novation by the substitution of a new creditor it must be proved that a new contract was made by which the original debt was released. Woodruff *v.* Hensel, 5 Colo. App. 103, 37 Pac. 948; Sutter *v.* Moore Inv. Co., 30 Wash. 333, 70 Pac. 746.

4. Carpy *v.* Dowdell, 131 Cal. 495, 63 Pac. 778.

Implied Acceptance of Debtor. — In proving a novation, the agreement of the creditor to accept a third person as his debtor need not be shown to have been made in express terms; if it can be implied from the facts in the case it will be sufficient.[5]

In order to establish the fact of novation by the substitution of a new debtor it must be shown that the three parties met and agreed to such substitution; that the new debtor assumed and promised to pay the debt of the original debtor, and that the creditor accepted the new debtor and released and discharged the original one. Richardson Drug Co. *v.* Dunagan, 8 Colo. App. 308, 46 Pac. 227.

Colorado. — Charles *v.* Amos, 10 Colo. 272, 15 Pac. 417.

Georgia. — Ferst *v.* Bank, 111 Ga. 229, 36 S. E. 773; Dillard *v.* Dillard, 118 Ga. 97, 44 S. E. 885.

Illinois. — Seymour *v.* Seymour, 31 Ill. App. 227.

Indiana. — Kelso *v.* Fleming, 104 Ind. 180, 3 N. E. 830.

Iowa. — Foster *v.* Paine, 63 Iowa 85, 18 N. W. 699.

Louisiana. — Berges *v.* Daverede, 50 La. Ann. Appendix 1, 23 So. 891.

Massachusetts. — Stowell *v.* Gram, 184 Mass. 562, 69 N. E. 342.

Michigan. — Mulgrew *v.* Cocharen, 96 Mich. 422, 56 N. W. 70.

Minnesota. — Hanson *v.* Nelson, 82 Minn. 220, 84 N. W. 742.

Missouri. — Brown *v.* Croy, 74 Mo. App. 462; Badger Lumb. Co. *v.* Meffert, 59 Mo. App. 437.

Nebraska. — Western White Bronze Co. *v.* Portrey, 50 Neb. 801, 70 N. W. 383.

New Hampshire. — Snow *v.* Lucier, 60 N. H. 32.

Washington. — Sutter *v.* Moore Inv. Co., 30 Wash. 333, 70 Pac. 746.

In Martin *v.* Curtis, 119 Mich. 169, 77 N. W. 690, the appellant brought assumpsit. The case depended upon an item of offset amounting to $116, which was credited to the defendant by the jury. The plaintiff was the assignee of the account against the defendant from the plaintiff's father, Martin, Sr., who owned a sawmill which one Hudson operated on his own account. Hudson's men boarded at the defendant's hotel on Hudson's credit, whereby Hudson became indebted to the defendant for their board. Martin, Sr., owed Hudson. The defendant Hudson and Martin, Sr., made an agreement in parol by which Martin, Sr., promised to pay the board bill in consideration of Hudson's release of his claim against Martin, Sr. Proof of these facts was held to establish a novation.

Substitution of One Partner for the Firm. — In the case of Liehy *v.* Briggs, 33 Ill. App. 534, the evidence showed that one of the partners promised the creditor of a firm to assume and pay the entire debt, and the creditor promised to look to him alone. *Held,* that the evidence established a novation by the substitution of a member of the firm as debtor in place of the partnership. To same effect see Scott *v.* Hallock, 16 Wash. 439, 47 Pac. 968.

5. Warren *v.* Batchelder, 15 N. H. 129.

In the case of Culbertson Irr. & W. P. Co. *v.* Wildman, 45 Neb. 663, 63 Pac. 947, Wildman sued C. J. Jones and A. W. Bond and said company, alleging that Jones and Bond had employed him to work on the Culbertson canal for $100 per month; that afterward said company had succeeded to the rights and liabilities of Jones and Bond, and assumed and ratified the contract with plaintiff, and that the company had failed to pay him for two months' work. The evidence showed that the contract of employment was made by Jones and Bond with Wildman in August, 1890; that the company was incorporated in the latter part of that month, and that it took up the work of constructing the canal on September 1st, and retained Wildman in its employ, and paid him each month at the rate and in the manner provided for in his contract till March 1st, 1901. This evidence was held sufficient to establish a novation and charge the company with the performance of the contract.

III. AGREEMENT OF ALL PARTIES.

To establish a novation it is essential that the evidence should show that there was an agreement among all the parties that there should be a substitution of parties and an extinguishment of the old debt.[6]

IV. WRITTEN AGREEMENT NOT NECESSARY.

It is sufficient to show that parties made a parol agreement to the novation of a debt.[7]

6. *Florida.* — Tyson *v.* Summerville, 35 Fla. 219, 17 So. 567.

Illinois. — Netterstrom *v.* Gallistel, 110 Ill. App. 352; Commercial Nat. Bank *v.* Kirkwood, 172 Ill. 563, 50 N. E. 219.

Iowa. — Lester *v.* Bowman, 39 Iowa 611; Sternberg *v.* Ingham, 14 Iowa 251.

Louisiana. — Studebaker Bros. Mfg. Co. *v.* Endom, 51 La. Ann. 1263, 26 So. 90.

Michigan. — Piehl *v.* Piehl, 101 N. W. 628; Fuller & Rice Lumb. Mfg. Co. *v.* Houseman, 117 Mich. 553, 76 N. W. 77; Dean *v.* Ellis, 108 Mich. 240, 65 N. W. 971.

Missouri. — Lee *v.* Porter, 18 Mo. App. 377; Garrison *v.* O'Donald, 73 Mo. App. 621; Vanderline *v.* Smith, 18 Mo. App. 55.

New York. — Izzo *v.* Ludington, 79 App. Div. 272, 79 N. Y. Supp. 744; Leggat *v.* Leggat, 79 App. Div. 141, 80 N. Y. Supp. 327; Thorman *v.* Polya, 37 N. Y. St. 257, 13 N. Y. Supp. 823.

North Carolina. — Clark *v.* Delaware, L. & W. R. Co., 138 N. C. 25, 50 S. E. 446.

Oklahoma. — Lowe *v.* Blum, 4 Okla. 260.

Pennsylvania. — Wright *v.* Hanna, 210 Pa. St. 349, 59 Atl. 1097; McCartney *v.* Kipp, 171 Pa. St. 644, 33 Atl. 233.

Vermont. — Bacon *v.* Bates, 53 Vt. 30.

Virginia. — State Bank *v.* Domestic Sewing Mach. Co., 99 Va. 411, 39 S. E. 141.

Wisconsin. — Murphy *v.* Hanrahan, 50 Wis. 485, 7 N. W. 436.

Essential Elements. — The essential element necessary to be proved to establish a novation of debt is an extinguishment of the old debt by an agreement among all parties, whereby it becomes the obligation of the new debtor. The discharge of the old debt must be contemporaneous with and result from the consummation of an arrangement with the new debtor. Cornwell *v.* Megins, 39 Minn. 407, 40 N. W. 610.

To establish the fact of novation the evidence must show agreement among three parties — the creditor, the immediate debtor and the intended new debtor — by which the liability of the last named is accepted in the place of the original debtor, in discharge of the original debt, for if the liability of the original debtor continues there is no consideration for the new contract, and no valid substitution takes place. McLaughlin *v.* Gillings, 18 Misc. 56, 41 N. Y. Supp. 22.

Insufficient Evidence. — Franklin *v.* Conrad-Stanford Co., 137 Fed. 737, was an action to recover the amount of a judgment founded upon a promissory note of the defendant. The defendant offered to prove that there was an agreement between him, the plaintiff's assignor and a third party, by which the latter should assume the defendant's obligations, and the defendant be released therefrom, and that a contract to that effect was drawn, without offering to produce such contract, or even to show that it had ever been executed by any one. *Held* incompetent, and properly rejected.

7. *California.* — Welch *v.* Kenny, 49 Cal. 49.

Connecticut. — The Consociated Presbyterian Soc. of Green's Farms *v.* Staples, 23 Conn. 544.

Georgia. — Ferst *v.* Bank of Waycross, 111 Ga. 229, 36 S. E. 773; Western & A. R. Co. *v.* Adams, 55 Ga. 279; Sapp *v.* Faircloth, 70 Ga. 690; Howell *v.* Field, 70 Ga. 592.

Illinois. — Brown *v.* Strait, 19 Ill. 88; Runde *v.* Runde, 59 Ill. 98; Lindley *v.* Simpson, 45 Ill. App. 648.

Iowa. — Lester *v.* Bowman, 39 Iowa 611.

Massachusetts. — Eden *v.* Chaffee, 160 Mass. 225, 35 N. E. 675.

Michigan. — Gleason *v.* Fitzgerald, 105 Mich. 516, 63 N. W. 512.

Mississippi. — Olive *v.* Lewis, 45 Miss. 203.

Missouri. — Lee *v.* Porter, 18 Mo. App. 377.

New York. — Lyon *v.* Clochessy, 43 Misc. 67, 86 N. Y. Supp. 245; Compton *v.* Melliss, 2 Misc. 301, 21 N. Y. Supp. 940; Blunt *v.* Boyd, 3 Barb. 209; Brand *v.* Brand, 48 N. Y. 675.

Wisconsin. — Cotterill *v.* Stevens, 10 Wis. 422; Cook *v.* Barrett, 15 Wis. 596; Putney *v.* Farnham, 27 Wis. 187; Balliet *v.* Scott, 32 Wis. 174.

In Mulcrone *v.* American Lumb. Co., 55 Mich. 622, 22 N. W. 67, the proof was that one Weller was indebted to plaintiffs, and the defendants were indebted to Weller, and by Weller's request the defendants promised to pay the amount which they owed Weller to the plaintiffs instead of to Weller; that plaintiffs relinquished their claim upon Weller in consideration of defendant's promise to them, and the defendants charged the amount to Weller on their books. The transaction was oral. *Held,* to establish a novation, and that such a transaction was not within the statute of frauds. Bowen *v.* Kurtz, 37 Iowa 239; Griffin *v.* Cunningham, 183 Mass. 505, 67 N. E. 660.

NOVELTY.—See Patents.

NUISANCE.

By Edward W. Tuttle.

CROSS-REFERENCES:

Disorderly House, Disturbing of Public Assemblages;
Gaming;
Highways;
Intoxicating Liquors;
Landlord and Tenant;
Municipal Corporations;
Negligence;
Street Railroads;
Waters and Watercourses.

I. BURDEN OF PROOF.

The burden is upon the plaintiff to show that the thing complained of is a nuisance,[1] unless it is of such a character that it is presumed to be a nuisance,[2] and any other facts essential to his cause of action.[3] Plaintiff must also show the defendant's responsibility for the thing complained of,[4] but is not required to show that it was not due to any other cause.[5]

In a Suit To Enjoin the Abatement of a Nuisance the plaintiff must show that the thing sought to be abated is not a nuisance.[6]

1. In an action for creating a nuisance by dumping refuse material upon a vacant lot adjoining the plaintiff's premises, it was held that the burden was upon the plaintiff to show that the deposit complained of was injurious to health, and that the defendant's use of the premises was unreasonable under all the circumstances. Lane *v.* Concord, 70 N. H. 485, 49 Atl. 687.

2. Dubois *v.* Budlong, 15 Abb. Pr. (N. Y.) 443.

A Slaughter-House in a city or town or a place thickly populated is *prima facie* a nuisance, and the burden of showing the contrary is upon the defendant. Pruner *v.* Pendleton, 75 Va. 516, 40 Am. Rep. 738.

3. **Corporate Existence.** — On a prosecution against a corporation for maintaining a nuisance under a statute authorizing such prosecution, the burden is upon the state to establish the necessary allegation that the defendant is a corporation. Acme Fertilizer Co. *v.* State (Ind. App.), 72 N. E. 1037.

4. Munson *v.* Metz, 1 White & W. Civ. Cas. (Tex.) § 244.

5. After the plaintiff has shown that he has been injured by the alleged nuisance he is not required to show that the injury complained of was not due to any other cause; the burden of showing that the injury was due to other cause is upon the defendant. Frost *v.* Berkeley Phosphate Co., 42 S. C. 402, 20 S. E. 280, 46 Am. St. Rep. 736, 26 L. R. A. 693.

6. Pittsburgh, C. C. & St. L. R.

Where the Act Complained of Has Been Authorized by Public Authority there is a presumption that it is proper and lawful, and the burden is on the plaintiff to show the contrary.[7]

II. NOTICE.

The person who creates the alleged nuisance on his own premises is presumed to have notice that it is a nuisance, but no such presumption is indulged against his grantee or successor.[8] It has been held that the owner of land on which a public nuisance exists is presumed to have notice of it.[9] Notice given to the defendant by a third person of the existence of the nuisance is competent to show his knowledge of its existence.[10]

III. EXISTENCE, CAUSE AND EFFECT OF NUISANCE, AND EXCUSE THEREFOR.

1. Generally. — The thing complained of may be of such a nature that it is *prima facie* a common nuisance.[11] Any evidence tending to show that it is a nuisance is competent.[12]

Co. *v.* Crothersville, 159 Ind. 330, 64 N. E. 914.

7. Acts Authorized by Public Authority. — Where the alleged nuisance was a street railway switch and turnout which had been authorized by the state legislature, it was held that the presumption was that such switch and turnout were proper and necessary, and the burden was upon the plaintiff to show the contrary. Carson *v.* Central R. Co., 35 Cal. 325.

Where the use of steam engines and furnaces has been regulated by a proper order of the municipal authorities, the burden is on the party who complains of such works as a nuisance to prove a non-compliance with the order, or an unlawful or improper use of the works. Call *v.* Allen, 1 Allen (Mass.) 137.

8. While the owner who creates the nuisance is presumed to have notice that it is a nuisance, no such presumption is indulged against his grantee or successor, and Civ. Code, § 3483, providing that "every successive owner of property who neglects to abate a continuing nuisance upon or in the use of such property created by a former owner is liable therefor and in the same manner as the one who first created it" does not dispense with the necessity of notice of the nuisance to such successor. Castle *v.* Smith (Cal.), 36 Pac. 859.

9. The owner of land on which a public nuisance exists is presumed to have notice of it. Leahan *v.* Cochran, 178 Mass. 566, 60 N. E. 382, 86 Am. St. Rep. 506, 53 L. R. A. 891.

10. A notice served upon the defendant by the board of health of the city to the effect that the cellar in question was a nuisance because water had accumulated therein was held properly admitted to show his knowledge of the condition of the premises, in an action by a third person for damage to his goods therefrom. Crommelin *v.* Coxe, 30 Ala. 318, 68 Am. Dec. 120.

11. Pruner *v.* Pendleton, 75 Va. 516, 40 Am. Rep. 738 (slaughter-house).

While the operation of a hog-yard, slaughter-house and fat and offal boiling-house is *prima facie* a common nuisance, the presumption may be rebutted by showing that the business is so conducted as not to endanger the health or interfere with the comfort of the neighboring inhabitants. Dubois *v.* Budlong, 15 Abb. Pr. (N. Y.) 445.

12. Where the alleged nuisance was a livery stable, evidence that since its erection there had been a

2. Effect on Other Persons or Property. — Some cases hold that evidence of the effect of the alleged nuisance upon other persons or property is not admissible because tending to introduce collateral issues.[13] In other jurisdictions, however, it is held that evidence as to the effect of the nuisance upon persons or property similarly situated with respect to the nuisance is competent to show the nature and extent of the injury, and that the nuisance objected to is capable of inflicting the injury complained of.[14]

great congregation of flies about the premises was held properly admitted. Robinson *v.* Smith, 53 Hun 638, 7 N. Y. Supp. 38.

13. Evidence offered by the plaintiff as to the effect of smoke, soot and gas from the defendant's works, which were alleged to be a nuisance, upon other persons, their families and premises, was held properly excluded. Harley *v.* Merrill Brick Co., 83 Iowa 73, 48 N. W. 1000.

Where the alleged nuisance was the negligent operation of defendant's electric light plant, evidence by the plaintiff that other houses in the same neighborhood were affected in the same manner as the plaintiff's was held properly excluded. Hughes *v.* General Elec. L. & P. Co., 107 Ky. 485, 54 S. W. 723.

In Lincoln *v.* Taunton Copper Mfg. Co., 9 Allen (Mass.) 181, an action for damages to plaintiff's land and crops caused by the operation of defendant's copper mill and the emanation therefrom of poisonous gases and water, evidence by the plaintiff that other lands in the same vicinity were similarly affected was held properly excluded. "Such inquiries would present as many distinct issues as there were alleged cases, and would involve questions of fact equally difficult and extended with those which would arise in the particular case of the plaintiff. The effect would be, if such evidence was admissible, that the defendants must be prepared to go into a full hearing of any alleged injury attributed to this mill caused to all the lands bordering on the river."

14. Wylie *v.* Elwood, 134 Ill. 281, 25 N. E. 570, 23 Am. St. Rep. 673.

"If other persons than the plaintiff, situated in respect to the defendant's factory substantially as he was, suffered therefrom the same kind of hurt, inconvenience and damage that he did, then the experience of others tended to establish the claim of the plaintiff." Hoadley *v.* Seward, 71 Conn. 640, 42 Atl. 997.

In an action for injury to the water in a well occasioned by the erection of a gas plant, evidence as to the condition of water in wells on other premises in the neighborhood is competent to show the extent and character of the injury sustained by the plaintiff, and as tending to prove that the operation of the gas plant could produce the injury complained of. Belvidere Gaslight & Fuel Co. *v.* Jackson, 81 Ill. App. 424.

In an action for damages due to smoke and cinders from defendant's mill, where the specific injury complained of was an injury to the plaintiff's eye caused solely by a spark emanating from the chimney of such mill, testimony of other persons that they were annoyed and injured by smoke and cinders from the same source was held properly admitted as tending to prove that the nuisance objected to was capable of inflicting the injury complained of. Crane Co. *v.* Stammers, 83 Ill. App. 329.

Testimony of other persons that they were severely nauseated and made sick by odors arising from the nuisance complained of was held properly admitted to show that the odors were capable of producing the sickness and discomfort complained of by the plaintiff. N. K. Fairbank Co. *v.* Bahre, 112 Ill. App. 290.

In an action for damages occasioned by the operation of defendant's mill, evidence that the mill threw dust, smut and other impurities upon other property in the same vicinity was held properly admitted as tending to show the extent and character of the injury sustained by the plaintiff. "If the deposit was

Such evidence may perhaps also be admissible merely as a standard of comparison,[15] or the peculiar circumstances of the case may be such as to make it relevant.[16] And persons similarly situated with reference to the nuisance may testify as to their observation of its effects.[17]

3. Effect of Similar Cause on Other Persons or Property. — Evidence as to the effect which a similar cause has had upon persons or property in a situation similar with respect thereto to that of the defendant with respect to the alleged nuisance is not admissible on behalf of the defendant,[18] especially when the conditions under which they operate are not shown to be alike.[19]

4. Effect Upon Health of Plaintiff's Family. — Where the plaintiff alleges that by reason of the nuisance complained of the health of himself and his family has been injuriously affected, or that the comfortable enjoyment of his home has been rendered impossible, it is competent for him to show the effect of the alleged nuisance upon the health of any member of his family.[20] Where, however,

general in the immediate neighborhood, and large quantities were deposited on other buildings similarly situated, it would be a just inference that the same was true of appellant's house." Cooper *v.* Randall, 59 Ill. 317. See also Rowe *v.* Northport Smelt. & Ref. Co., 35 Wash. 101, 76 Pac. 529.

15. Rowe *v.* Northport Smelt. & Ref. Co., 35 Wash. 101, 76 Pac. 529.

16. Where the damage alleged was the contamination of the plaintiff's well by the waste from the defendant's gas plant, evidence by the plaintiff that other wells in the neighborhood had been contaminated in the same manner was held properly admitted under the circumstances of the case, there being evidence that the plaintiff was compelled to carry water for household use from a great distance because of this fact, and also because there was some evidence that the well had been polluted by the plaintiff himself or some other person. "The admissibility of this evidence under ordinary circumstances would be at least doubtful, but under the circumstances of this case we think the action of the trial judge was correct." Beatrice Gas Co. *v.* Thomas, 41 Neb. 662, 59 N. W. 925, 43 Am. St. Rep. 711.

17. Where the alleged nuisance was stenches arising from defendant's slaughter-house, the testimony of other persons residing in the vicinity, but at a greater distance from the slaughter-house than the plaintiff, that the occupation of their houses was rendered uncomfortable by the noxious smells and odors from the defendant's slaughter-house, was held improperly excluded. "It was not competent for plaintiff to show that the property of other persons was injuriously affected by the cause of which he complained, but he might show the existence of the cause by the testimony of any person who had observed it from any position not peculiarly exposed to its influence." Fay *v.* Whitman, 100 Mass. 76.

18. See Hudson *v.* Densmore, 68 Ind. 391.

Where the alleged nuisance was the vapors and smoke from the defendant's brick-kiln, the testimony of a witness that he had for many years been engaged in the burning of brick, that his house was situated adjacent to his brick-kilns, and that the trees and vegetation on his premises had been in no way injured by the smoke or fumes from his brick-kilns, and that the discomfort to his family had been trivial, was held improperly admitted. Kirchgraber *v.* Lloyd, 59 Mo. App. 59.

19. Randolf *v.* Bloomfield, 77 Iowa 50, 41 N. W. 562, 14 Am. St. Rep. 268.

20. Kearney *v.* Farrell, 28 Conn. 317.

the damages claimed are purely personal, and not for injury to the premises, it has been held that plaintiff cannot show injury to the health of other members of the family residing on the premises.[21]

5. Other Causes. — The defendant may show that the alleged nuisance is due to other causes for which he is not responsible.[22]

Where the plaintiff sued as trustee of the property adjoining the alleged nuisance, evidence of sickness and deaths which had occurred in her family by reason thereof was held competent to show the unhealthful condition of the premises, but not as an element of damage. Cohen *v.* Bellenot (Va.), 32 S. E. 455.

Where the injury alleged was to the physical comfort and deprivation of the enjoyment of a home, because of the maintenance of a livery stable, evidence that the effluvia from the stable injuriously affected the health of the plaintiff's wife was held improperly excluded. "Proof should have been admitted of any fact which would aid the jury in determining whether and to what extent the plaintiff and his family had been deprived of the wholesome and comfortable use of his home by the stenches, noises, etc., from the stable. The effect of such stenches or noises upon any person who might be in plaintiff's house, whether a member of his family or a mere caller, would tend to enlighten the jury upon the question whether his dwelling was rendered physically uncomfortable as a home, and was therefore competent to be proven. Ellis *v.* Council Bluff R. R., 22 Mo. 131; Loughbram *v.* Des Moines, 72 Iowa 382; Pierce *v.* Wagner, 29 Minn. 355." Gempp *v.* Bassham, 60 Ill. App. 84.

In a suit to enjoin a nuisance and for damages, where the complaint alleged that the health of the plaintiff's family had been injuriously affected, evidence offered in support of this allegation was held properly admitted, since the allegation itself was not in support of the right to recover damages, but descriptive of the character and effect of the nuisance, and an allegation which he was entitled to make and support by evidence, the evidence being admissible on the question of whether an injunction should be issued. Hoadley *v.* Seward, 71 Conn. 640, 42 Atl. 997.

21. Where the damage claimed by the plaintiff from the noxious and unhealthful gases and odors arising from the operation of the defendant's factory was sickness and discomfort and the prevention of her comfortable enjoyment of her home, and the damages were claimed for her own separate use and benefit, it was held that she was not entitled to show the injury to the health of her husband, who had died since the institution of the suit. Under the pleadings of the plaintiff she was entitled to recover only personal damages which she herself had sustained by reason of the nuisance. Corsicana Cotton-Oil Co. *v.* Valley, 14 Tex. Civ. App. 250, 36 S. W. 999.

22. Kasper *v.* Dawson, 71 Conn. 405, 42 Atl. 78 (that the offensive odors complained of came from another source); Shain Pack. Co. *v.* Burrus (Tex. Civ. App.), 75 S. W. 838.

Where the alleged nuisance was the vibrations caused by the operation of defendant's factory, and it appeared that four railroad tracks ran along the premises of both the plaintiff and the defendant, evidence as to observations which had been made in various places in the defendant's shops, and at various times, as to the noises and vibrations coming from the defendant's drop hammers, and also as to the noise and vibrations caused by the railroad trains which passed by the defendant's buildings at about the same distance as from the plaintiff's buildings, showing that the vibrations from the railroad trains were many times greater than those from the operation of the hammers, was held improperly excluded because it would tend to show that the alleged injuries resulted, not from the defendant's shops, but from the railroad trains. Eller *v.* Koehler, 68 Ohio St. 51, 67 N. E. 89.

Where the damage alleged was the contamination of plaintiff's well

But whether he may show that other causes contributed to the injury complained of, in conjunction with his own acts, seems to depend upon whether this fact can be considered as a mitigating circumstance.[23]

6. Comparison With Similar Things. — The defendant cannot show as a defense to the action that similar enterprises were operated in the same manner as his own,[24] though it has been held that for the purpose of determining how the defendant's factory was operated,

by seepage from the defendant's gas plant, it was held proper for the defendant company to show that a well had been sunk on the opposite side of the river and the water found therein was contaminated in the same manner as the plaintiff's. "The fact that other wells at a considerable distance were likewise polluted would not conclusively show that the pollution of plaintiff's well was not due to the gas company, but it would tend in that direction, and the greater the distance the stronger the inference would be that the cause in both cases was a general cause affecting the whole region, and not the act of the gas company complained of. We are aware that the introduction of such testimony leads to the danger of introducing collateral issues into the trial. At the same time we think that such evidence was material, and, within reasonable limits, should have been admitted." Beatrice Gas Co. *v.* Thomas, 41 Neb. 662, 59 N. W. 925, 43 Am. St. Rep. 711.

23. It is no answer to a complaint of nuisance that many others are committing similar acts and contributing to the nuisance. Woodyear *v.* Schaefer, 57 Md. 1, 40 Am. Rep. 419. The defendant may show that the disagreeable and unhealthful stench alleged to be due to his packery was partially or entirely due to causes for which other persons were wholly responsible. Shain Pack. Co. *v.* Burrus (Tex. Civ. App.), 75 S. W. 838. In Kasper *v.* Dawson, 71 Conn. 405, 42 Atl. 78, where the alleged nuisance was the odors and noises coming from defendant's barn, evidence as to other barns in the neighborhood in which horses were stabled and from which odors and noises may have come was held properly admitted.

Where the alleged nuisance was a sewer running across the plaintiff's premises and discharging its contents on the border thereof in such a way as to pollute the air and render the locality unhealthful, the exclusion of testimony by the defendant as to the filthy and unhealthful condition of a stream running past the plaintiff's premises was held error on the ground that it tended to show that the damages claimed by the plaintiff were not all caused by the defendant's act. "It was surely the right of the defendant to show that the damages to the plaintiff resulted from other causes than that upon which he founded his action; and it was competent for the city to show that the sewer was not the cause of all the damages complained of, and thus mitigate the damages complained of in the action. If several persons drain their premises into the same ditch, the waters of which are discharged near the premises of another, and produce an injury either to his estate or to its comfortable enjoyment, each of the persons so using the drain is liable for the damage occasioned by his act; but he is not liable for the damage caused by others. Chipman *v.* Palmer, 9 Hun 517; (77 N. Y. 51;) Keyes *v.* Little York Gold Co., 53 Cal. 724." Loughran *v.* Des. Moines, 72 Iowa 382, 34 N. W. 172.

24. Where the alleged nuisance was the offensive condition and operation of defendant's creamery, evidence as to how the management of his creamery and the premises about it compared with the management and condition of other creameries was held properly excluded, since it would be no defense to show that other persons were violating the law. Fisher *v.* Zumwalt, 128 Cal. 493, 61 Pac. 82; Stephens *v.* Gardner Creamery Co., 9 Kan. App. 883, 57 Pac. 1058.

and whether it was operated in a reasonable manner, it is competent to compare it with the operation of other similar factories.[25] The plaintiff, however, may show that similar enterprises are conducted in a manner not injurious to others.[26]

7. Injuries From and Condition of Nuisance Subsequent to Commencement of Action. — Evidence of injuries from, or the condition of, the alleged nuisance subsequent to the commencement of the suit or action, though not admissible as a ground of recovery,[27] may be competent to show the character and extent of the injury previous thereto.[28] The relevancy of such evidence would, however, seem to depend upon whether there has been any material change in the conditions.[29]

25. Where the alleged nuisance was the operation of defendant's paper-mill day and night, evidence by the defendant that the noise made by his mill was not greater than that of other paper-mills of similar character and capacity, and that the machinery used was the ordinary and usual kind of machinery, and that it was the custom of other paper-mills to run day and night, and that a paper-mill could not compete with other mills unless it did run day and night, was held properly admitted to enable the jury to understand how much and what kind of noise was actually made. "When this is in controversy, there is no objection to a witness using any standard of comparison with which the jury may be supposed to be familiar; as, for example, to say that the noise was like the noise of thunder, of a passing train of cars, or heavy wagons upon a paved street, or whistles upon locomotive engines. If one were to say that the noise of a particular grist-mill or sawmill was like that of ordinary grist-mills or sawmills, perhaps no clearer description could be given to one who has lived in the country. Paper-mills are not so familiar, perhaps, as grist-mills or sawmills, but nevertheless the use of such a standard of comparison is not open to legal exception." The evidence was also held admissible upon the question of whether the defendant was operating his mill in an unreasonable manner. The mere fact that a similar unreasonable usage prevailed elsewhere would not excuse the defendant; "but, in determining what was unreasonable in the necessary mode of conducting his business, the jury might properly consider whether he was using such machinery as was commonly used for similar purposes elsewhere." Shepard *v.* Hill, 151 Mass. 540, 24 N. E. 1025.

26. Where the alleged nuisance was blowing sawdust over the plaintiff's premises, the admission of evidence on the part of the plaintiff that other sawmills burn their surplus sawdust instead of scattering or depositing it where it will become a nuisance was held no error, since its tendency was to show that there is another and proper way of disposing of sawdust. Mahan *v.* Doggett, 27 Ky. L. Rep. 103, 84 S. W. 525.

27. See *infra* IV, 3.

28. Polley *v.* McCall, 37 Ala. 20; Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453; Gavigan *v.* Atlantic Ref. Co., 186 Pa. St. 604, 40 Atl. 834; Shepard *v.* Hill, 151 Mass. 540, 24 N. E. 1025, *distinguishing* Quinn *v.* Lowell Elec. L. Corp., 144 Mass. 476, 11 N. E. 732.

Evidence as to the condition of the premises at the time of the trial may be competent, not as a basis for damages for injuries sustained after the commencement of the action, but to furnish the jury with information as to the nature and extent of the injury and enable them by comparison to judge of the amount of damages resulting from the alleged nuisance prior to the commencement of the action, and for the same reason that a view of the premises is permitted. Morris Canal & Bkg. Co. *v.* Ryerson, 27 N. J. L. 457.

29. Shepard *v.* Hill, 151 Mass. 540, 24 N. E. 1025.

8. Character of the Locality. — While it is not a defense that similar nuisances are maintained in the locality in question,[30] yet where the thing complained of is not a nuisance *per se* the character of the locality and the fact that it is largely given up to similar enterprises may be shown.[31]

9. Opinion. — A witness cannot give his opinion as to whether the conditions which have been described constitute a nuisance.[32] A properly qualified expert may, however, give his opinion as to probable effects of the alleged nuisance upon the plaintiff's enjoyment of his premises,[33] or as to whether the effects attributed

30. In a suit to enjoin the abatement of a nuisance consisting of certain stock-pens, the plaintiff cannot show that in the immediate vicinity there were hog-pens kept in such a manner that stenches arose therefrom, since the fact that other persons were at the time maintaining similar nuisances in the vicinity, or that the nuisance in question was caused partly by others, is not an excuse or justification. Pittsburgh, C. C. & St. L. R. Co. *v.* Crothersville, 159 Ind. 330, 64 N. E. 914.

31. Where the alleged nuisance is the operation of a manufacturing plant the defendant may show that the locality in which his works are located is largely given over to such factories and shops. Eller *v.* Koehler, 68 Ohio St. 51, 67 N. E. 89. In Cibulski *v.* Hutton, 47 App. Div. 107, 62 N. Y. Supp. 166, it was held proper to testify to the condition as to buildings and occupancy of the neighborhood where the powder-mill, the alleged nuisance, was located, but not to compare it with other designated portions of the city.

For the Purpose of Estimating Damages.— See *infra* this article, "Damages."

32. Where the condition of things alleged to constitute a nuisance has been fully described to the jury, a witness cannot be asked whether in his opinion that condition of things was a nuisance, because expert testimony is not admissible upon questions of fact which the court or jury can decide for themselves. Metropolitan Sav. Bank *v.* Manion, 87 Md. 68, 39 Atl. 90. See Elliott *v.* Ferguson (Tex. Civ. App.), 83 S. W. 56.

33. In Kearney *v.* Farrell, 28 Conn. 317, it was held competent for witnesses who are acquainted with the effects which privies and pigsties have upon the air about them, and who had examined the premises in question since the commencement of the suit, to give their opinion, together with the facts upon which it was based, that the effluvia from the privy and sty constituting the alleged nuisance must make the plaintiff's house uncomfortable, on the ground that if the subject-matter was such as to require expert testimony they were shown to be experts, and if such was not the character of the subject-matter the witnesses had sufficient knowledge to give an opinion, together with the facts upon which it was based. "Opinion as to the future and permanent offensiveness of the privy and sty was important and admissible. It was therefore clearly proper that testimony should be received." But see Elliott *v.* Ferguson (Tex. Civ. App.), 83 S. W. 56.

In Kirchgraber *v.* Lloyd, 59 Mo. App. 59, where the alleged nuisance was the noxious fumes and smoke from defendant's brick-kiln, it was held that a witness who had operated brick-kilns and lived near them, after examining the plaintiff's premises and location of defendant's brick-kiln, could give his opinion as to the probable effect of the smoke and fumes on the plaintiff's premises. *Citing* Kearney *v.* Farrell, 28 Conn. 317, and *quoting* from Wood on "Nuisances" (3 Ed.) § 610. "To establish the fact of nuisance, where the question is whether the maintenance of a privy, pig-sty, etc., emitting noisome stenches near another's dwelling or place of business is a nuisance, the opinions of witnesses who have personally examined the premises, and are acquainted by

to the nuisance could be produced by it,[34] except where no question of science or skill is involved or opinion evidence is unnecessary.[35]

10. Declarations and Statements of Persons Affected. — The declarations or statements of persons affected by the nuisance while suffering therefrom may be competent as part of the *res gestae*,[36] but the declarations of the plaintiff's tenants while leaving the premises are not competent to show that their action was induced by the nuisance.[37] It is competent, however, for the plaintiff to show that the existence of the alleged nuisance was the subject of unfavorable comment by his customers.[38]

personal observation with the effect which such uses produce upon the air, are competent to show that the effluvia from such uses must necessarily render the plaintiff's premises uncomfortable as a place of abode or of business. And the same principle applies to nuisances arising from other causes, as from smoke, noxious vapors, interference with water courses, etc."

Where the alleged nuisance was odors arising from defendant's barn, it was held proper for him to show the condition in which the barn was kept and then ask a witness of large experience in keeping horses in barns to what extent odors could arise from barns kept in the condition testified to. Kasper v. Dawson, 71 Conn. 405, 42 Atl. 78.

34. In Eidt v. Cutter, 127 Mass. 522, experts were allowed to give their opinions as to whether the fumes and gases from defendant's copperas works produced the discoloration of the paint on plaintiff's house and fence, and also to give the details of experiments made by them showing the effect of such gases upon paint. See articles "EXPERIMENTS" and "EXPERT AND OPINION EVIDENCE," Vol. V.

35. Where the alleged nuisance is the unwholesome stench arising from the operation of defendant's creamery, testimony of witnesses as to whether in their opinion the stench arising from the creamery would penetrate as far as the plaintiff's house is not admissible because involving no question of science or skill and not requiring expert or opinion evidence. Stephens v. Gardner Creamery Co., 9 Kan. App. 883, 57 Pac. 1058.

36. In Kearney v. Farrell, 28 Conn. 317, where the alleged nuisance was the effluvia and stench coming from a privy and pig-sty, evidence that the plaintiff's wife (since deceased) complained of the offensive smells from the alleged nuisance while suffering from them and during the time named in the declaration was held properly admitted, the witnesses testifying that the offensive smells were also perceived by themselves.

37. Where the alleged damage was that the smoke and cinders and jarring from the operation of the defendant's mills caused guests at the plaintiff's hotel to leave, it was held that while it would be competent to show by direct proof the fact that lodgers in the house were disturbed and induced to leave it by reason of the defendant's acts, this could not be shown by their declarations while leaving the house, such declarations being mere hearsay. Wesson v. Washburn Iron Co., 13 Allen (Mass.) 95, 90 Am. Dec. 181.

Contra. — In Hoffman v. Edison Elec. Illuminating Co., 87 App. Div. 371, 84 N. Y. Supp. 437, where the alleged injury was the loss of certain tenants and plaintiff's inability to rent a portion of her apartments because of the nuisance, evidence of a conversation between plaintiff and two tenants showing that they refused to stay on the premises was held properly admitted as part of the *res gestae*, and as explaining the nature of the acts, but not as proof of the facts stated.

38. As evidence that the odors arising from the alleged nuisance were harmful to their business it was held competent for the plaintiffs

11. Public Authorization. — Where the thing complained of is shown to be a nuisance, the fact that it was authorized by the public cannot be shown.[39] The fact, however, that the thing complained of has been authorized by law is ordinarily a competent circumstance in determining whether it is proper and necessary, and therefore not a nuisance.[40]

12. Public Condemnation. — The plaintiff in an action for damages cannot show that the thing complained of has been declared a nuisance by administrative officers of the government.[41] But the fact that it has been declared a nuisance by law is competent, but not conclusive, evidence on the question of reasonable use.[42]

13. Reputation and Newspaper Comment. — Where the alleged nuisance is a disorderly house the courts are in conflict as to whether evidence of its general reputation is admissible.[43] The bad reputation of the house, as well as the fact that it has become the subject of newspaper comment, has been held competent, however, in support of an allegation that the plaintiff has been damaged by reason of these facts.[44]

to show that the odors were the subject of remarks by their customers, no attempt being made to prove any particular statement by any one. "Such evidence was competent as showing the nature and extent of the nuisance complained of and the effect upon appellees' business." Shroyer *v.* Campbell, 31 Ind. App. 83, 67 N. E. 193.

39. Evidence of authority from the municipality to do the act complained of is not admissible where the act is shown to be a nuisance. See Belton *v.* Baylor Female College (Tex. Civ. App.), 33 S. W. 680.

40. Call *v.* Allen, 1 Allen (Mass.) 137. See *supra* "Burden of Proof."

Where the alleged nuisance was a switch-turnout and side-track of a street railway which had been authorized by the state legislature, evidence as to the damage arising therefrom was held incompetent without a preliminary showing that such side-track and switch were not proper and necessary, since having been authorized by the legislature they were presumed to be proper. Carson *v.* Central R. Co., 35 Cal. 325.

41. **The Resolution of a City Board of Health** declaring the buildings in question a nuisance is not admissible in a civil action for damages for such nuisance. Holbrook *v.* Griffis (Iowa), 103 N. W. 479.

42. **City Ordinance.** — In an action against a municipal corporation for creating a nuisance by dumping refuse material upon a vacant lot adjoining plaintiff's premises, a city ordinance prohibiting the acts complained of is competent, but not conclusive, evidence upon the question of reasonable use, although the action is not based upon a violation of the ordinance. Lane *v.* Concord, 70 N. H. 485, 49 Atl. 687, *citing* State *v.* Railroad, 58 N. H. 408, 410; Brember *v.* Jones, 67 N. H. 374; Bly *v.* Street Ry., 67 N. H. 474, 478.

43. See article "DISORDERLY HOUSE," Vol. IV.

44. **Reputation and Newspaper Comment.** — In a suit to enjoin the maintenance of a disorderly beer garden and saloon in the vicinity of plaintiff's residence, where it was alleged that the defendant's premises had become notorious and the subject of newspaper comment because of the open violations of the law thereon, it was held that evidence of the reputation of the saloon and garden and newspaper reports concerning the same were properly admitted. The court, while recognizing the conflict in the authorities as to the competency of evidence of reputation to show the disorderly character of a house and the inmates thereof, says: "In the present case it is expressly alleged that the premises of the appellant have become no-

14. View. — It is proper to allow the jury to view the premises and conditions claimed to be a nuisance.[45]

15. Benefit to Public. — Where the alleged nuisance is the conduct of a particular business the defendant cannot show that the business was one of benefit and profit to the public.[46]

16. Failure to Object to Creation of Nuisance. — Evidence that the plaintiff made no objection to the creation of the nuisance is not competent,[47] unless, perhaps, in support of a claim of a prescriptive right.[48]

17. Custom. — Evidence as to a custom of doing the act complained of is not competent in excuse thereof.[49] The general custom or usage, however, in a particular business complained of may be competent on the question whether it is being carried on in a reasonable and proper manner.[50]

18. Cost or Possibility of Removal. — Evidence as to the cost of moving the thing complained of is not admissible.[51] Where, however, it is not a nuisance *per se* the defendant may show that there is no other reasonably convenient or practicable location for the thing complained of.[52]

torious and the subject of newspaper comment because of the open violations of the law thereon, and that such evil reputation has affected the value of property in the neighborhood, and among others the value of the plaintiff's property and his enjoyment thereof. In view of these averments and of the evidence as to the manner in which the appellant's business was carried on, the testimony as to the evil reputation of the saloon and beer garden and the fact that it had been disseminated through the newspapers was properly admitted." Kissel *v.* Lewis, 156 Ind. 233, 59 N. E. 478.

45. See fully the article "VIEW BY JURY."

Observing Operation of Nuisance. In Com. *v.* Miller, 139 Pa. St. 77, 21 Atl. 138, 23 Am. St. Rep. 170, it was held proper to allow the jury to take a view of the alleged nuisance and to observe its operation. But see article "EXPERIMENTS," Vol. VI.

46. Bowman *v.* Humphrey, 124 Iowa 744, 100 N. W. 854, in which the business complained of as a nuisance was the operation of a creamery so that it polluted a stream flowing through the plaintiff's farm.

47. Failure To Object to Creation of Nuisance. — Evidence that the plaintiff made no objection to the building of the creamery, whose operation is the alleged nuisance, is not competent. Stephens *v.* Gardner Creamery Co., 9 Kan. App. 883, 57 Pac. 1058.

48. See article "PRESCRIPTION."

49. Where the alleged nuisance was the erection of a bay-window by the defendant over land used as a highway, the title to which, however, was in the plaintiff, evidence as to a custom to erect bay-windows over the highways in that locality was held properly excluded. Codman *v.* Evans, 5 Allen (Mass.) 308, 81 Am. Dec. 748.

50. See Shepard *v.* Hill, 151 Mass. 540, 24 N. E. 1025.

51. Cost of Moving. — Evidence as to the cost of moving the factory constituting the alleged nuisance to another place is not admissible, because no defense. Faulkenbury *v.* Wells, 28 Tex. Civ. App. 621, 68 S. W. 327.

52. Possibility of Removal. Where the alleged nuisance was a railroad stock-yard, evidence showing that there was no other reasonably convenient and practicable location in the town in question for the yards was held improperly excluded. Dolan *v.* Chicago, M. & St. P. R. Co., 118 Wis. 362, 95 N. W. 385, *citing* Illinois Cent. R. Co. *v.* Grabill,

19. Previous Judgment. — A previous judgment between the same parties, based upon exactly the same cause and conditions as those complained of as a nuisance in the pending action, is conclusive as to the defendant's liability for the damage arising from such continuing conditions.[53]

20. Injunction To Restrain Nuisance. — A. PRESUMPTION. Where the injunction is sought to restrain a threatened nuisance the presumption is that the defendant will not do or permit any unlawful acts.[54]

B. SUFFICIENCY OF SHOWING. — In a suit to enjoin an alleged nuisance or threatened nuisance the plaintiff must make a clear and satisfactory showing that the thing complained of is or will be a nuisance. If the evidence be conflicting, and the injury to the plaintiff doubtful, the injunction will be refused.[55]

21. Criminal Prosecution. — On a criminal prosecution for maintaining a nuisance in violation of law the defendant cannot show the precautions taken by him, or that the act complained of was not

50 Ill. 241; Dunsmore *v.* Railway Co., 72 Iowa 182, 33 N. W. 456; Shireley *v.* Railway Co., 74 Iowa 169, 37 N. W. 133, 7 Am. St. Rep. 471.

53. Plate *v.* New York Cent. R. Co., 37 N. Y. 472; Kilheffer *v.* Herr, 17 Serg. & R. (Pa.) 319, 17 Am. Dec. 658. See article "JUDGMENTS," Vol. VII.

54. District Attorney *v.* Lynn & B. R. Co., 16 Gray (Mass.) 242.

No Presumption of Future Misconduct. — In an action to enjoin the erection of a livery stable on the ground that it would be a nuisance, it cannot be presumed that the stable would be neglected and filth be allowed to accumulate. Gallagher *v.* Flury, 99 Md. 181, 57 Atl. 672.

55. Dumesnil *v.* Dupont, 18 B. Mon. (Ky.) 800, 68 Am. Dec. 750; Hahn *v.* Thornberry, 70 Ky. 403; Goodall *v.* Crofton, 33 Ohio St. 271, 31 Am. Rep. 535; Thomas *v.* Calhoun, 58 Miss. 80; McCaffrey's Appeal, 105 Pa. St. 253; Lassater *v.* Garrett, 4 Baxt. (Tenn.) 368.

"An injunction will not ordinarily be granted against an anticipated nuisance unless the facts alleged and proven are sufficient to show it will be a nuisance *per se*." Gallagher *v.* Flury, 99 Md. 181, 57 Atl. 672.

In a suit for an injunction to restrain the operation of industries promotive of public utility, the proof must be clear and convincing to warrant the issuance of an injunction. English *v.* Progress Elec. L. & M. Co., 95 Ala. 259, 10 So. 134.

In a suit to enjoin the operation of a hospital adjoining plaintiff's residence on the ground that it is a nuisance, the injunction will be refused if there is such a conflict in the evidence that there remains a substantial doubt whether a nuisance exists, which question must first be determined in a suit at law. Deaconess Hospital *v.* Bountjes, 207 Ill. 553, 69 N. E. 748.

Where the plaintiff seeks an injunction to restrain a nuisance and offers no security for the defendant's damages, the court will require him to make out a case free from all reasonable doubt, especially where the injunction would stop the defendant's entire business. Dubois *v.* Budlong, 15 Abb. Pr. (N. Y.) 445.

Contra. — Proof Beyond Reasonable Doubt Unnecessary. — In a suit to enjoin as a threatened nuisance the location of a public cemetery on land adjoining that of the plaintiffs, the plaintiffs need not show beyond a reasonable doubt that the use of the grounds for cemetery purposes would result in poisoning the water in the plaintiffs' wells and springs or contaminating the atmosphere of their homes. In civil cases proof beyond a reasonable doubt is not required. Elliott *v.* Ferguson (Tex. Civ. App.), 83 S. W. 56.

injurious or dangerous either to particular persons or property which might be immediately affected thereby, since the injury complained of is to the public, and not to particular individuals.[56]

IV. DAMAGES.

1. Generally. — The plaintiff may show the depreciation in the rental value of his property due to the presence of the nuisance,[57] even though he occupies it himself.[58] So he may show the loss in his business caused by the nuisance.[59]

2. Increase of Insurance Rates. — The plaintiff cannot show that the insurance rates on the adjoining property have been increased

56. On a criminal prosecution for maintaining a nuisance in violation of a law declaring the emission of black smoke or cinders from chimneys and smokestacks to be a public nuisance, evidence by the defendant that he had used the best-known smoke-consuming appliance, but that neither it nor any other then known would entirely prevent the emission of such smoke at certain times, was held properly excluded as irrelevant; so also was testimony as to whether such smoke was dangerous to the health, life or property of persons living in the immediate vicinity, or to the public at large. So also was testimony of witnesses engaged in business in close proximity to the defendant's chimney that the smoke therefrom had never been injurious to their property or dangerous to their health and safety, since the question was one of injury to the public, and not to particular individuals. Moses *v.* United States, 16 App. Cas. D. C. 428.

57. Savannah, F. & W. R. Co. *v.* Parish, 117 Ga. 893, 45 S. E. 280; Robinson *v.* Smith, 53 Hun 638, 7 N. Y. Supp. 38.

Where the alleged nuisance was the operation of the defendant's power plant, the vibrations from which rendered plaintiff's dwelling houses untenantable and thereby destroyed their rental value, it was held that evidence as to the average time that a large number of other dwellings in the same city were vacant and could not be rented during the period covered by the alleged nuisance was irrelevant and incompetent for any purpose, as was also evidence that another house on the corner of the same block as plaintiff's had been constantly rented and occupied, but the opinions of experienced real estate agents engaged in renting similar property, who knew from actual observation the condition of plaintiff's houses, were admissible to prove whether or not his houses could have been rented and kept rented. Chamberlain *v.* Missouri Elec. L. & P. Co., 158 Mo. 1, 57 S. W. 1021.

In an action for damages due to the maintenance of the alleged nuisance, a livery stable, it was held that "the character of plaintiff's dwelling house, its value, and its rental value before and after the location of the stable near it, were facts proper to be made known to the jury and proper for their consideration, together with every other fact tending to show that the plaintiff had been deprived of the comfortable use and enjoyment of his home, in order to enable them to correctly estimate the amount necessary to compensate him for the injury inflicted by the appellee." Gempp *v.* Bassham, 60 Ill. App. 84.

58. Swift *v.* Broyles, 115 Ga. 885, 42 S. E. 277.

59. Bates *v.* Holbrook, 89 App. Div. 518, 85 N. Y. Supp. 673.

Where the alleged injury was the befouling of the air by the defendant's starch factory, and the consequent injury to plaintiff's beer made in the vicinity, evidence by the plaintiff as to the difference in his sales before and after the construction of the starch factory was held properly allowed, the plaintiff's theory being

by a particular company, but the opinion of a qualified expert as to the effect which the nuisance would have on the insurance rates in its immediate locality is competent.[60]

3. Injury Subsequent to Commencement of Action. — In an action for injuries occasioned by a nuisance which is permanent in its character, evidence as to the injuries occurring subsequent to the commencement of the action is admissible, because the plaintiff is entitled to recover for all damages, both present and future.[61] Where the nuisance is not a continuing or permanent one, evidence of injuries resulting therefrom subsequent to the suit is not competent upon the question of damages,[62] though it may be admissible to show the character and extent of the injuries previous to the commencement of the action.[63]

4. Character of Locality. — As an aid to the proper assessment of damages it is competent to show the character of the locality in which the nuisance and the property injured are situated with reference to the class of business carried on there and the character of its residences and population.[64]

5. Benefit to Plaintiff. — The defendant may show in reduction of damages that the presence of the alleged nuisance is a pecuniary benefit to the plaintiff in some respects, and that its removal would

that the beer was polluted and rendered unsalable. Cunningham *v.* Stein, 109 Ill. 375.

60. Call *v.* Allen, 1 Allen (Mass.) 137.

61. Belvidere Gaslight & Fuel Co. *v.* Jackson, 81 Ill. App. 424, which was an action for injuries occasioned by the erection and operation of a gas plant. It was held proper to admit evidence as to the conditions surrounding the premises up to the date of the trial. See Robinson *v.* Smith, 53 Hun 638, 7 N. Y. Supp. 38.

In an equitable action by the state for the abatement of a nuisance consisting in keeping for sale and selling intoxicating liquors in violation of law, it was held that evidence of violations of the law after the verification of the petition was competent, since the petition alleged that the nuisance was a continuing one, and evidence of unlawful acts down to the time of the trial was therefore competent. State *v.* Williams, 90 Iowa 513, 58 N. W. 904.

62. Gavigan *v.* Atlantic Ref. Co. 186 Pa. St. 604, 40 Atl. 834; Morris Canal & Bkg. Co. *v.* Ryerson, 27 N. J. L. 457; Polley *v.* McCall, 37 Ala. 20; Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453; Cooper *v.* Randall, 59 Ill. 317; Duncan *v.* Markley, Harp. L. (S. C.) 276.

Confined to Time Subsequent to Previous Decree. — Where the nuisance is not of a permanent character, evidence as to the damages therefrom must be confined to a time subsequent to the entry of a previous judgment or decree for damages for the same nuisance. Holbrook *v.* Griffis (Iowa), 103 N. W. 479.

63. See cases cited in preceding note and *supra* III, 7.

64. In a suit to enjoin and for damages caused by an alleged nuisance consisting of the operation of defendant's engines, furnaces, sawmills and planing-mills in close proximity to plaintiff's house, evidence of the defendant as to the proximity of similar mills, and that the class of business complained of was principally carried on in that neighborhood, and that there was a railroad near by with a large freight depot, and also a large wood yard, was held properly admitted, since to properly estimate the damages it would be important for the jury "to know the general character of the neighborhood in which the plaintiff's

destroy those benefits.[65] The opinion of an expert, however, as to what effect the removal of the nuisance would have on the rental value of plaintiff's property is not competent.[66]

6. Opinion. — Where the damage claimed is depreciation in the value of adjoining real property, a properly qualified expert may give his opinion as to the amount of the depreciation[67] and the cause thereof.[68]

7. Exemplary Damages. — It has been held that the plaintiff cannot show that the defendant was a man of wealth, in aggravation of exemplary damages.[69] He may, however, for this purpose show that the nuisance was continued after the commencement of the suit.[70]

buildings were situated, the various kinds of business carried on there and the class of tenants by whom the dwelling houses in that vicinity were in general or for the most part occupied." Call *v.* Allen, 1 Allen (Mass.) 137.

65. Where the alleged nuisance was the operation of a planing-mill in the vicinity of plaintiff's houses, evidence by the defendant that the removal of his mills would cause a probable loss of rent to the plaintiff from the removal from the neighborhood of the workmen was held properly admitted. Call *v.* Allen, 1 Allen (Mass.) 137.

66. In Wesson *v.* Washburn Iron Co., 13 Allen (Mass.) 95, 90 Am. Dec. 181, the opinion of a real estate expert as to what effect the discontinuance of the defendant's works (the alleged nuisance) would have on the value of the plaintiff's houses was held inadmissible as too speculative and conjectural. The court distinguishes Call *v.* Allen, 1 Allen (Mass.) 137, on the ground that in that case "the inquiry did not extend further, as in the case at bar, so as to embrace the mere abstract opinions of witnesses concerning the extent of such diminution by the introduction of estimates founded on a mere conjectural basis."

67. An expert on realty values may give his opinion as to the effect upon the value of the plaintiff's premises caused by the operation of the factory alleged to be a nuisance. Hoadley *v.* Seward & Son Co., 71 Conn. 640, 42 Atl. 997. Where the nuisance complained of is damage to real property, the opinion of a properly qualified expert is ordinarily admissible as to the amount of the damage. Cooper *v.* Randall, 59 Ill. 317. See articles "Expert and Opinion Evidence," Vol. V, and "Value."

68. A witness who has given his opinion as to the value of the plaintiff's premises before the institution of the nuisance and at the commencement of the suit, showing great depreciation, may be asked what caused the depreciation. Wenona Zinc Co. *v.* Dunham, 56 Ill. App. 351.

In Gauntlett *v.* Whitworth, 2 C. & K. 720, 61 E. C. L. 719, the testimony of an architect who was acquainted with the locality in which the plaintiff's premises were located, that they had depreciated in value because of the alleged nuisance, was held properly admitted.

69. Myers *v.* Malcom, 6 Hill (N. Y.) 292, 41 Am. Dec. 744.

Contrary to General Rule. — On the general question of the right in tort actions to show the defendant's pecuniary circumstances there is a conflict in the authorities, but the general rule seems to be that such evidence is competent. See articles "Damages," Vol. IV, and "Libel and Slander," Vol. VIII.

70. Continuance After Commencement of Suit. — Where the alleged nuisance was the pollution of a stream passing the plaintiff's hotel, and the noisome and noxious odors arising therefrom, evidence that the defendant continued the nuisance

after suit brought was held proper to be considered upon the question of exemplary damages, but not upon the question of the issuance of an injunction. Keiser *v.* Mahonoy City Gas Co., 143 Pa. St. 276, 22 Atl. 759.

NUNCUPATIVE WILLS.—See Wills.

OATHS.—See Affidavits; Atheist; Competency; Objections; Officers; Perjury; Witnesses.

OBJECTIONS.

By Edward W. Tuttle.

CROSS-REFERENCES:

Competency; Cross-Examination;
Depositions; Direct Examination;
Examination of Parties Before Trial;
Offers of Evidence; Order of Proof;
Striking Out Withdrawal and Exceptions;
Trial.

I. RIGHT TO OBJECT.

1. Who May Object. — A. Parties in Default. — It has been held that a party in default can only appear for the purpose of cross-examining the witnesses of the adverse party, and cannot object to the introduction of evidence.[1]

B. Right of Counsel To Object. — a. *Generally.* — Where a party is represented by two attorneys, the fact that the examination in chief of a witness has been conducted by one of them does not warrant the court in refusing to receive objections by the other to questions asked on cross-examination.[2]

b. *Willingness of Party To Testify Over Objection of His Own Counsel.* — Although a party expresses his willingness to answer a question on cross-examination which has been objected to by his counsel, it is not error for the court to sustain the objection and exclude the answer if it would be incompetent.[3]

2. When Answer May or May Not Be Proper. — It is not error to overrule an objection to a question when the answer may or may not be admissible.[4]

3. Remedy for Irresponsive Answers or Incompetency Subsequently Appearing. — The proper remedy for irresponsive matter in the answer to a proper question, for evidence introduced before objection could be interposed, and for incompetency subsequently appearing, is a motion to strike out the objectionable matter,[5] or a

1. Wright *v.* Lacy, 52 Iowa 248, 3 N. W. 47, *citing* Iowa Code, § 2873, and Clute *v.* Hazleton, 51 Iowa 355, 1 N. W. 672.

2. A rule of court providing that "on the trial of issues of fact one counsel only on each side shall examine and cross-examine witnesses" does not warrant the court in refusing to receive objections to questions asked on cross-examination, although the examination in chief was not made by the counsel objecting, but by his colleague under an arrangement by which the latter was to examine the witnesses while the former should look out for the legality of the admission or rejection of testimony. "It is not desirable for the interest of the parties litigant, who have the most at stake in the suit, that this rule should be extended to objections to testimony and arguments thereon." Baumier *v.* Antiau, 65 Mich. 31, 31 N. W. 888.

3. Steinheimer *v.* Coleman, 39 Ga. 119.

4. Stewart *v.* State, 63 Ala. 199.

It is not error to overrule an objection to a question the answer to which may be relevant, though when given it proves not to be. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

The overruling of a general objection to a question which does not necessarily call for an incompetent, irrelevant or immaterial answer is not error, although the answer is objectionable. Mollineaux *v.* Clapp, 99 App. Div. 543, 90 N. Y. Supp. 880.

5. *California.* — Tate *v.* Fratt, 112 Cal. 613, 44 Pac. 1061.

Florida. — Lakeside Press & P. E. Co. *v.* Campbell, 39 Fla. 523, 22 So. 878.

Illinois. — Board of Trade Tel. Co. *v.* Blume, 176 Ill. 247, 52 N. E. 258.

Kansas. — Kansas Farmers F. Ins. Co. *v.* Hawley, 46 Kan. 746, 27 Pac. 176.

New York. — Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696; Payne *v.* Williams, 83 App. Div. 388, 82 N. Y. Supp. 284, *affirmed* 178 N. Y. 589, 70 N. E. 1104; Mersereau *v.* Mersereau,

request for an instruction to the jury to disregard it,[6] and not a mere objection to it. The same rule applies to improper evidence inadvertently admitted without objection.[7]

4. Waiver of Right or Estoppel To Object. — A. GENERALLY. — A party cannot complain of an error in the admission of incompetent evidence over his objection where he has himself invited the error by his own previous conduct.[8] The position which a party has

49 App. Div. 647, 63 N. Y. Supp. 336.

Pennsylvania. — Brodnax *v.* Cheraw & S. R. Co., 157 Pa. St. 140, 27 Atl. 412.

Where the relevancy of evidence depends upon other facts to be developed later in the case, the proper method of attacking such evidence is not by an objection to its admission, but by a motion to strike out, or a request for an instruction to disregard it after its irrelevancy has been clearly determined. Storr *v.* James, 84 Md. 282, 35 Atl. 965.

Where it subsequently appears that testimony already given is objectionable as a privileged communication between attorney and client, the proper remedy is by motion to strike out. Kitz *v.* Buckmaster, 45 App. Div. 283, 61 N. Y. Supp. 64.

Where the testimony of a witness subsequently appears to be mere hearsay it will be stricken out on a motion, but the motion must be made at the time this fact is discovered. Bannen *v.* Clarke Co. Cement Co., 18 Ky. L. Rep. 504, 37 S. W. 76. See also Sharon *v.* Minnock, 6 Nev. 687.

An irresponsive answer or gratuitous remark of the witness is objected to by a motion to strike out, and failure to make this motion is a waiver of the objection. State *v.* Eisenhour, 132 Mo. 140, 33 S. W. 785.

Answer After Objection Sustained. Although a proper objection to a question has been made and sustained, if the witness nevertheless answers the question the objecting party must move to have the answer stricken out, his previous objection not being sufficient to put the court in error for not striking out the answer. Bigelow *v.* Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25.

Grounds of Motion Must Be Specified. — A party moving to strike out the answer of a witness must specify his objection to it in the same way that he is required to specify the grounds of his objection to a question. People *v.* Eckman, 72 Cal. 582, 14 Pac. 359.

6. Rice *v.* Bancroft, 11 Pick. (Mass.) 468.

7. Pippin *v.* State, 9 Tex. App. 269.

8. In a criminal case where defendant testified and the state sought to impeach his character for honesty, the defendant on cross-examination of two character witnesses asked if they had ever known of the defendant's stealing anything or being arrested before, and obtained favorable answers; it was held that he was not in a position to complain of evidence of specific instances of his criminal conduct introduced by the state in rebuttal over his objection, since by his own conduct he had invited the error. State *v.* Beaty, 25 Mo. App. 214.

A party who by his own misconduct compels his adversary to resort to secondary evidence of the note upon which the action is founded is not in a position to take advantage of any error in the admission of such secondary evidence. Sellman *v.* Cobb, 4 Iowa 534.

A party who by objection has secured the exclusion of original homestead papers cannot complain of the admission of the record copy of them over his objection that the evidence is secondary and not original evidence. Larey *v.* Baker, 85 Ga. 687, 11 S. E. 800.

Where a Party Permits the Court To Rule Upon Evidence Under a Misunderstanding as to the Facts, he is estopped from afterward complaining of the admission of the evidence over his objection. Mouat *v.* Wood, 22 Colo. 404, 45 Pac. 389.

previously taken may be such as to estop him from urging objections which might otherwise have been properly made.[9] He cannot object to evidence which is only inadmissible by virtue of irregularities which have previously been waived.[10] A party cannot complain of rulings for which he himself has been responsible.[11] One who objects to and secures the exclusion of competent evidence to prove a fact is estopped to complain that the fact is not proved.[12]

9. Where the probate of a will is contested on the ground that there is a later will, the existence of which is denied by the proponents, they are not in a position to object to secondary evidence of its contents on the ground that the alleged will is itself the best evidence, for it was a part of the proponents' case that no such will had ever existed, and of course could not be produced. Hope's Appeal, 48 Mich. 518, 12 N. W. 682.

An objection to any and all parts of an offered letter is a waiver of the right to subsequently object that the whole letter was not read, but only portions thereof. Whitney Wagon Wks. *v.* Moore, 61 Vt. 230.

A party who introduces certain evidence in his own behalf cannot object to its admission in behalf of his adversary. Thus, where the defendant introduces the plaintiff's account he cannot object to its introduction by the plaintiff. Carter *v.* Fischer, 127 Ala. 52, 28 So. 376.

10. Where a demurrer to an indictment on the ground that the offense was not stated with technical certainty was sustained and the indictment was about to be quashed, but the defendant waived its insufficiency and went to trial by consent, it was held that he was afterward estopped from objecting to the admissibility of testimony on grounds arising from the insufficiency of the allegations. Thomas *v.* State, 71 Ga. 44.

Where a party had given evidence, without objection, of the amount, dates and times when payable of two promissory notes and the consideration therefor, it was held too late to object to evidence of the surrender of the notes on the ground that the notes themselves had not been produced or any notice given requiring their production. "To render the surrender evidence, the notes in general would have to be produced because the witness could not speak of them until they were before the court and jury, and because their identity could alone be established by their production. But here they are by consent offered to the jury and their contents proven by consent, and being so proven, the identity of the notes given and the notes surrendered are just as certainly established as if the notes were present in court." Divers *v.* Fulton, 8 Gill & J. (Md.) 202.

11. New York Elev. R. R. *v.* Fifth Nat. Bank, 135 U. S. 432, in which it was held that the defendant, after securing the exclusion of evidence offered for a particular purpose, could not afterward object to the exclusion of the same sort of evidence when offered by himself for the same purpose. See more fully article "COMPETENCY," Vol. III, p. 188, note 89.

12. Union Pac. R. Co. *v.* Harris, 63 Fed. 800, 12 C. C. A. 598, 27 U. S. App. 450, *citing* Thompson *v.* McKay, 41 Cal. 221; Jobbins *v.* Gray, 34 Ill. App. 208, 218; Insurance Co. of Pennsylvania *v.* O'Connell, 34 Ill. App. 357, 362.

Contra, People's Bank *v.* Rockwood, 59 Minn. 420, 61 N. W. 457. This was an action on a promissory note in which evidence of a demand for payment, and refusal and notice thereof, was objected to, and erroneously excluded. It was contended on appeal that the objecting party was estopped to urge that there was no proof of such demand and notice of non-payment. The court disapproved of Bigelow on Estoppel, § 602, on the ground that it is not sustained by a single case it cites. "We are not willing to adopt the rule contended for; while it would serve the ends of justice in some instances in others it would not. The party ob-

B. Incompetent Evidence Similar to That Introduced by Objector. — A party is not in a position to object to the admission of incompetent evidence where he himself has previously introduced the same kind of evidence.[13] But the failure to object to improper evidence does not give a party the right to introduce similar incompetent evidence.[14]

Similar Evidence in Rebuttal. — The party who himself resorts to evidence of doubtful competency cannot afterward object to evidence of the same kind when introduced by his adversary in rebuttal.[15]

jecting would be in danger of waiving his rights if he did not object, and of losing his rights if he did object, because if his objection was sustained he could not offer evidence to disprove the evidence thus ruled out. Under such a rule the opposite party would often refuse to take the risk of objecting to incompetent evidence, the introduction of which would confuse the issues, prolong the trial and waste the time of the court."

13. Pence *v.* Waugh, 135 Ind. 143, 34 N. E. 860, where the court said: "If a party opens the door for the admission of incompetent evidence he is in no plight to complain that his adversary followed through the door thus opened." See also Perkins *v.* Hayward, 124 Ind. 445, 24 N. E. 1033.

A party who has introduced parol evidence to explain a writing cannot object to similar evidence offered by his adversary for the same purpose. Hand *v.* Shaw, 16 Misc. 498, 38 N. Y. Supp. 965.

Where a party himself introduces testimony of medical witnesses as to what medical books and authorities say upon a particular question he waives the right to object to the same kind of evidence when offered by his adversary. Kreuziger *v.* Chicago & N. W. R. Co., 73 Wis. 158, 40 N. W. 657.

Where one party to a written contract has gone into a full history of the circumstances leading up to its execution he cannot object to parol evidence of the subsequent conduct of the parties showing the interpretation put upon it, since by resorting to parol evidence himself he waived the right to complain of the admission of similar evidence by his adversary. South St. Louis R. Co. *v.* Plate, 92 Mo. 614, 634, 5 S. W. 199.

For a Full Discussion of this general question see article "Competency," Vol. III, pp. 183-188.

14. Manning *v.* Burlington, C. R. & N. R. Co., 64 Iowa 240, 20 N. W. 169; Higgins *v.* Carlton, 28 Md. 115, 92 Am. Dec. 666, holding that certain testimony was not admissible on cross-examination merely because the witness had been permitted without objection to give illegal testimony as to the same matters on his examination in chief.

The mere fact that irrelevant testimony has been given by one party without objection from the other does not give the latter the right to introduce irrelevant evidence in reply. Farmers & Mfrs. Bank *v.* Whinfield, 24 Wend. (N. Y.) 419.

15. Longmire *v.* State, 130 Ala. 66, 30 So. 413; Hobbs *v.* Board of Com'rs, 116 Ind. 376, 19 N. E. 186; Lyon *v.* Lenon, 106 Ind. 567, 7 N. E. 311; Milburn *v.* State, 1 Md. 1; Gorsuch *v.* Rutledge, 70 Md. 272, 17 Atl. 76; Lake Roland Elev. R. Co. *v.* Weir, 86 Md. 273, 37 Atl. 714.

If Irrelevant Testimony is admitted in favor of one party over the objection of the other, the former cannot complain if the latter is afterward permitted to introduce like testimony in contradiction. Budd *v.* Meriden Elec. R. Co., 69 Conn. 272, 37 Atl. 683.

Admissible in Discretion of Court. Evidence in rebuttal on a matter which has been previously improperly gone into by both parties is admissible in the discretion of the trial court. Com. *v.* Storti, 177 Mass. 339, 58 N. E. 1021.

C. Waiver by Stipulation. — A party may waive his right to object to a particular class of evidence by stipulation.[16]

D. Evidence Introduced or Elicited by Objector. — a. *Generally.* — One cannot object to evidence which he has introduced,[17] or to incompetent but responsive answers to questions put by himself.[18] One cannot have stricken out incompetent but responsive matter called out by himself on cross-examination.[19]

16. Walker *v.* Walker, 64 N. H. 55, 5 Atl. 460. See fully article "Competency," Vol. III, p. 192, *et seq.*

Where a party has agreed that certain evidence may be introduced he cannot afterward object to its introduction. Kempner *v.* Beaumont Lumb. Co., 20 Tex. Civ. App. 307, 49 S. W. 412.

Must Be Filed. — A stipulation to waive an objection to evidence will not be noticed unless filed of record. American Saddle Co. *v.* Hogg, Holmes 177, 1 Fed. Cas. No. 316.

17. Wheeler *v.* Wheeler, 63 Mo. App. 298; Murphy *v.* Whitlow, 1 Ariz. 340, 25 Pac. 532; Moyer *v.* Swygart, 125 Ill. 262, 17 N. E. 450; Wallace *v.* Collins, 5 Ark. 41; Greenleaf *v.* Birth, 5 Pet. (U. S.) 132; Gilmore *v.* H. W. Baker Co., 12 Wash. 468, 41 Pac. 124 (in which it was held that a party could not complain of evidence introduced by himself on an issue not raised by the pleadings).

A party who has himself introduced in evidence a memorandum of a contract is not in a position to raise the question of its admissibility. Beckwith *v.* Talbot, 2 Colo. 639.

If the party who has a right to object to the introduction of parol testimony introduces it himself he cannot afterward object to the evidence which it furnishes. Lafon *v.* Gravier, 1 Mart. (N. S.) (La.) 243.

Where the beneficiary under a will introduces it in evidence in support of his title he cannot object that the recital therein of the adoption by the testator of the adverse party is not the best evidence of this fact. White *v.* Holman, 25 Tex. Civ. App. 152, 60 S. W. 437.

A party who has introduced in evidence a judgment in favor of a third person against his adversary cannot afterward object to its admissibility or legal effect. Wheeler *v.* Hill, 16 Me. 329.

A party who has himself introduced an instrument without objection from his adversary and without proving its authenticity cannot afterward question the authenticity of the instrument. Patton *v.* Coen & Ten Broeke C. M. Co., 3 Colo. 265.

Where a party introduces generally in support of his case a written instrument apparently properly executed and delivered, he thus asserts its competency and cannot afterward, to avoid a benefit claimed under it by his adversary, object that there was no proof of its execution and delivery. Evenson *v.* Webster, 5 S. D. 266, 58 N. W. 669.

A Paper Which Has Been Produced Under Notice, inspected by the party calling for it, and put in evidence by him, may be subsequently attacked by him as not being the original of the paper called for if he announces before introducing it that "he contended it was not the original," although he may have given no "formal notice" of an intention to do so. If, however, no mention or notice of such an objection to the paper was made at or before the time of introducing it it cannot afterward be attacked on this ground. Western Union Tel. Co. *v.* Hines, 96 Ga. 688, 23 S. E. 845, 51 Am. St. Rep. 159.

18. Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331; Baxter *v.* State, 15 Lea (Tenn.) 657.

19. Riordan *v.* Guggerty, 74 Iowa 688, 39 N. W. 107; Nagle *v.* Fulmer, 98 Iowa 585, 67 N. W. 369; People *v.* Blase, 57 App. Div. 585, 68 N. Y. Supp. 472; State *v.* Apple, 121 N. C. 584, 28 S. E. 469; Smith *v.* Brabham, 48 S. C. 337, 26 S. E. 651; Board of Trade Tel. Co. *v.* Blume, 176 Ill. 247,

b. *Evidence Introduced on Former Trial.* — A party is not estopped from objecting to the admissibility of particular evidence by having introduced it in evidence himself at a former trial.[20]

E. Objections to Witness Called and Examined by Objector. — a. *Generally.* — One who has called and examined an incompetent witness cannot afterward object to his competency.[21]

b. *Taking Deposition of Witness.* — Taking the deposition of a witness is a waiver of his incompetency, although he would otherwise have been clearly incompetent,[22] and this rule applies even though the party taking the deposition suppresses it before it is filed with the clerk of the court.[23]

F. Effect of Failure To Object to Other Evidence. — a. *Of Same Fact.* — The failure to object to evidence of a particular fact has been held to be a waiver of the right to subsequently object

52 N. E. 258. See also Chicago & A. R. Co. *v.* Fietsam, 24 Ill. App. 210.

Where a witness after testifying to a conversation is asked on his cross-examination what reason he had for remembering the conversation, and gives as a reason a declaration made by one of the parties at the time, no objection being made to the question by the opposite party, the cross-examiner cannot repudiate the testimony after the witness has answered the question. Artcher *v.* McDuffie, 5 Barb. (N. Y.) 147.

Incompetent Opinions called out by a party on cross-examination cannot be objected to by him. Sullivan *v.* Oshkosh, 55 Wis. 508, 13 N. W. 468.

Contra. — Where a witness is called by one party he is such party's witness for all purposes, and the other party may cross-examine the witness on the whole case, and the fact that in response to a question by the cross-examiner he testifies to incompetent declarations does not make such declarations competent, but they may be excluded on objection by the cross-examiner. Diel *v.* Stegner, 56 Mo. App. 535.

20. Wood *v.* Pennell, 51 Me. 52, *citing* Miller *v.* Baker, 1 Metc. (Mass.) 27.

21. Castleman *v.* Stone, 5 Mart. (N. S.) (La.) 282; Buard *v.* Buard, 5 Mart. (N. S.) (La.) 132; Seip *v.* Storch, 52 Pa. St. 210, 91 Am. Dec. 148; Ratliff *v.* Ratliff, 102 Va. 880, 47 S. E. 1007. See also article "Competency," Vol. III, p. 176, note 29.

22. Weil *v.* Silverstone, 6 Bush (Ky.) 698; Tomlinson *v.* Ellison, 104 Mo. 105, 16 S. W. 201. Even though the deposition taken was not used at the trial. Ess *v.* Griffith, 139 Mo. 322, 40 S. W. 930. See also *In re* Soulard's Estate, 141 Mo. 642, 43 S. W. 617; Borgess Inv. Co. *v.* Vette, 142 Mo. 560, 44 S. W. 754 (*holding* that the incompetency is waived for all purposes); Bennett *v.* Williams, 57 Pa. St. 404.

23. Weil *v.* Silverstone, 6 Bush (Ky.) 698.

"Can it differ in principle that, in this case, defendants took plaintiff's deposition, had it duly certified and thereby, in the language of counsel, 'heard what she said and that was all he wanted to know,' and then suppressed the deposition, whereas in the cases cited the deposition was similarly taken and filed, but not used by the party taking it? Can a party thus trifle with the machinery of the law and avail himself of it

to evidence of the same fact or to the same effect.[24] It has also been held, however, that this rule is only applicable where the fact proved is not disputed and no attempt is made to disprove it.[25] And it would seem that it is only true when the objector, because of the previous proof of the same fact, is not prejudiced by the admission of the evidence.[26] Thus the failure to sustain an objection to improper evidence is not prejudicial error where ample evidence to the same effect, establishing the same facts, has been admitted

if it suits his purposes, and reject it if it does not, and yet escape all the consequences of his acts? We hold he cannot. When defendants, forewarned as they were by plaintiff's counsel that he would not permit his client to testify unless her deposition was to be taken in good faith, and they then proceeded to take her deposition, and after it was duly certified took possession of it and retained it in their possession in court, when the court was endeavoring to ascertain the facts about it, they waived all objection to her competency and the court committed no error in so holding." Rice *v.* Waddill, 168 Mo. 99, 67 S. W. 605.

24. Denver & R. G. R. Co. *v.* Morrison, 3 Colo. App. 194, 32 Pac. 859; Downer *v.* Metropolitan St. R. Co., 54 App. Div. 315, 66 N. Y. Supp. 719. See also Boston Woven-Hose & Rubber Co. *v.* Kendall, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781; Seay *v.* Fennell, 15 Tex. Civ. App. 261, 39 S. W. 181; Horton *v.* Brown, 130 Ind. 113, 29 N. E. 414.

Where evidence of hearsay declarations is objected to, but it appeared that others of like import had been introduced without objection, it was held that the error, if any, was waived. Bruce *v.* Bombeck, 79 Mo. App. 231.

Previous Opinions. — Where an objection to opinion evidence was not made until after the same opinion had been repeatedly expressed in the same manner by other witnesses without objection, it was held that the objection came too late; that the right to make it had been waived. McKee *v.* Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384.

The right to object to expert testimony because of insufficient qualifications of the witness is waived where the testimony is only cumulative to the same sort of testimony by witnesses of the same qualifications previously admitted without objection. State *v.* Gage, 52 Mo. App. 464.

Previous Testimony by Same Witness. — The right to object to evidence is waived where the witness has previously been permitted to state the same fact without objection. International & G. N. R. Co. *v.* Quinones (Tex. Civ. App.), 81 S. W. 757; Brice *v.* Miller, 35 S. C. 537, 15 S. E. 272.

25. In Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26, the court attempts to distinguish numerous cases which hold that the introduction of improper evidence will not constitute reversible error where other evidence of the same character is admitted without objection, on the ground that in none of them "does it appear that any attempt was made to disprove what the evidence admitted without objection tended to establish. Therefore the admission of other evidence to prove what was not disputed could not have been prejudicial. This case is not within the rule which controls any such cases."

26. See cases immediately following.

The fact that the testimony of other witnesses to the same effect has been previously admitted without objection does not legalize the testimony when subsequently objected to. Boatright *v.* State, 42 Tex. Crim. 442, 60 S. W. 760.

without objection,[27] or, it has been held, where other evidence of the same fact has been introduced unchallenged.[28]

b. *Objection to Same Species of Evidence Not Waived.* — The fact, however, that a party has failed to object to the introduction of particular evidence is not a waiver of the right to object to the same species of evidence when subsequently offered.[29]

G. Evidence of Same Facts Previously Shown by Objecting Party. — A party is not in a position to object to evidence of a fact where he himself has offered evidence to prove the same fact, and has not withdrawn or attempted to dispute the same.[30]

H. Facts Admitted by Failure To Object and Evidence the Competency of Which Is Based Thereon. — Where the failure to object specifically amounts to an admission or a waiver of proof

27. Hickman *v.* Layne, 47 Neb. 177, 66 N. W. 298; St. Louis & S. W. R. Co. *v.* Huffman (Tex. Civ. App.), 32 S. W. 30. See also Sanger *v.* Craddock (Tex.), 2 S. W. 196; Hunt *v.* Dubuque, 96 Iowa 314, 65 N. W. 319.

A party cannot complain of the admission of incompetent evidence over his objection where every material fact which such evidence has any tendency to prove is conclusively established by other evidence admitted without objection. Panhandle Nat. Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23.

28. Bouknight *v.* Charlotte, C. & A. R. Co., 41 S. C. 415, 19 S. E. 915; Baltimore & O. R. Co. *v.* State, 81 Md. 371, 32 Atl. 201; Butler *v.* Chicago, B. & Q. R. Co., 87 Iowa 206, 54 N. W. 208; Nagle *v.* Fulmer, 98 Iowa 585, 67 N. W. 369; Galveston, H. & S. A. R. Co. *v.* Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939.

The overruling of an objection to a question is harmless where the answer merely states a fact already in evidence without objection, and afterward testified to by several other witnesses. Foster *v.* Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916.

The Overruling of an Objection to Irrelevant Evidence is not prejudicial error where substantially the same evidence has already been admitted without objection. Shrimpton *v.* Philbrick, 53 Minn. 366, 55 N. W. 551; Wallis *v.* Schneider, 79 Tex. 479, 15 S. W. 492.

29. Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26; McLane *v.* Paschal, 74 Tex. 20, 11 S. W. 837; Peyton *v.* State (Tex. Crim.), 32 S. W. 892; State *v.* McGee (S. C.), 33 S. E. 353.

Smith *v.* Woodmen of the World, 179 Mo. 119, 77 S. W. 862, *distinguishing* Bauer Grocery Co. *v.* Smith, 74 Mo. App. 419. The court says: "While we think the judgment in the case at bar should not be reversed because of the ruling of the court, under the circumstances of the case we are unprepared to give assent to the proposition that because a party to the suit sits by and without objection permits a witness introduced by an adverse party to testify to matters which are inadmissible in evidence, and cross-examines him with respect to such matters, he is thereby estopped from thereafter in the same case objecting to the same kind of evidence when offered."

In an action by a lumber merchant he introduced in evidence his log-book without objection from the defendant, but it was held that this did not entitle him to subsequently offer his tally-book, his books of account not being admissible in his own behalf, and the failure of the defendant to object to the first book not being a waiver of his right to object to the second. Lyons *v.* Teal, 28 La. Ann. 592.

30. Texas & P. R. Co. *v.* Gay, 88 Tex. 111, 30 S. W. 543.

of certain facts, evidence of such facts when subsequently offered cannot be objected to,[31] nor can evidence which is objectionable merely because such facts have not been proved.[32]

I. Other Evidence Rendered Admissible by Evidence Admitted Without Objection. — a. *Generally.* — It has been held that evidence rendered admissible by proof of other facts cannot be objected to, although the evidence of such preliminary facts might have been excluded if objected to.[33]

b. *Evidence in Completion of or Subsidiary to Other Evidence Admitted Without Objection.* — Where illegal evidence has been admitted without objection it is not error to permit the introduction of other evidence merely completing that already admitted if the latter has not been stricken out or withdrawn from consideration.[34]

31. Where an objection to a document is not sufficiently specific to raise the point that the signatures of the parties thereto were not proved, evidence as to the genuineness of the signatures cannot afterward be objected to. State *v.* Rue, 72 Minn. 296, 75 N. W. 235.

32. In Sanderson *v.* Osgood, 52 Vt. 309, a letter purporting to have been written by the plaintiff and which had been used as a specimen of plaintiff's handwriting during the examination of witnesses upon the question of the genuineness of certain letters claimed to have been written by the plaintiff, and which had been treated by the court and counsel as genuine, was offered by the plaintiff as a specimen of his handwriting, and it was held that the defendant had waived any right to object to the letter on the ground that it was not shown to have been written by the plaintiff.

Where a party has permitted a witness to testify without objection to the contents of a letter, and has fully cross-examined the witness thereon, he cannot complain of the subsequent admission of substantially the same testimony by another witness over his objection that the letter has not been accounted for. McLeod *v.* Barnum, 131 Cal. 605, 63 Pac. 924.

33. McConnell *v.* Bowdry, 4 T. B. Mon. (Ky.) 392, in which an objection to a deed was held properly overruled where the evidence of the facts necessary to its admission was received without objection, although the deed itself was objected to.

34. Brooks *v.* Sioux City, 114 Iowa 641, 87 N. W. 682; Gulf, C. & S. F. R. Co. *v.* John, 9 Tex. Civ. App. 342, 29 S. W. 558.

After a party has permitted, without objection, the introduction of evidence as to the preliminary conversations leading up to the formation of a written contract he cannot object to other portions of the same conversation forming part of the *res gestae.* Board of Supervisors *v.* Bristol, 99 N. Y. 316, 1 N. E. 878.

Where the defendant in a criminal prosecution had, without objection, permitted the prosecutrix to testify that she was engaged to be married to him, it was held no error for the court to overrule an objection to a question asking the witness when she had become engaged to the defendant, there being no request to withdraw or motion to exclude the previous evidence as to the engagement. Simpson *v.* State, 45 Tex. Crim. 320, 77 S. W. 819.

Where the plaintiff in a personal injury case had been permitted without objection to testify that his wife and two children, a boy and a girl, were dependent upon him for support, and that he had no property, and the following question, "How old is the little girl?" was objected to, it was held that the right to object to this question had been waived, since the same kind of testimony had been received without objection and permitted to go to the jury. "By the admission, with consent, of all the objectionable facts, the defendant

Thus where the principal fact has been given in evidence without objection it is not reversible error to give in evidence a subsidiary corroborative fact.[35]

J. When Offered a Second Time. — Evidence which has been admitted without objection cannot be objected to when offered a second time, since it is already in evidence.[36]

K. On Second Trial. — a. *Generally.* — The failure to object to illegal evidence on the first trial is not a waiver of the right to object to the same evidence on the second trial,[37] even though the witness has since died.[38]

b. *Depositions.* — This, however, does not apply to depositions, except as to the irrelevancy or incompetency of the evidence therein contained.[39]

waived any reversible error in the admission of subsequent testimony of the same character." New York Elec. Equip. Co. *v.* Blair, 79 Fed. 896.

Where a map has been introduced and used without objection by witnesses in explaining their testimony, it is not error to permit a subsequent witness to testify in regard to such map. Miller *v.* Asheville, 112 N. C. 759, 16 S. E. 762. But in Cantor *v.* People, 23 How. Pr. (N. Y.) 243, a prosecution for counterfeiting, a declaration of a third person that he had picked up certain bills which the defendant had thrown away was admitted without objection, although hearsay, but it was held that this was not a waiver of the right to object to the introduction of the bills in evidence and to proof that they were the ones referred to in the declaration.

35. In Bank of Westfield *v.* Inman, 8 Ind. App. 239, 34 N. E. 21, after evidence as to a payment not included in a bill of particulars had been admitted without objection, the admission of the check with which the payment had been made was held no error, although objected to on this ground. See Frost *v.* De Lury, 22 Jones & S. (N. Y.) 113.

In Carstens *v.* Stetson & Post Mill Co., 14 Wash. 643, 45 Pac. 313, it was held no error to permit the defendant to introduce stencil plates used in marking certain lumber after the plaintiff had already introduced testimony as to the marking of the lumber.

36. State *v.* Holmes, 40 La. Ann. 170, 3 So. 564; Republican Val. R. Co. *v.* Hayes, 13 Neb. 489, 14 N. W. 521.

A copy of the record of a deed which has been admitted without any objection that it was not properly certified cannot be objected to when offered in evidence a second time, since it is already in evidence, and there is no necessity for offering it again. Mills *v.* Snypes, 10 Ind. App. 19, 37 N. E. 422.

Where objectionable opinion evidence has already been given without objection, its subsequent admission over objection is not reversible error. Monahan *v.* Kansas City Clay & Coal Co., 58 Mo. App. 68.

37. Meekins *v.* Norfolk & S. R. Co., 136 N. C. 1, 48 S. E. 501; Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70; State *v.* Simons, 39 Or. 111, 65 Pac. 595.

Privileged Communications. Some courts hold that the failure to object to evidence of privileged communications on the first trial is a waiver of the right to object to such evidence on succeeding trials. McKinney *v.* Grand St. P. P. & F. R. Co., 104 N. Y. 352, 10 N. E. 544. But other cases hold to the contrary. Breisenmeister *v.* Supreme Lodge K. of P., 81 Mich. 525, 45 N. W. 977; Grattan *v.* Metropolitan L. Ins. Co., 92 N. Y. 274. But see more fully the article "Privileged Communications."

38. Meekins *v.* Norfolk & S. R. Co., 136 N. C. 1, 48 S. E. 501.

39. Depositions. — For a full discussion of what objections to a depo-

L. STIPULATIONS. — A stipulation that the evidence in one case shall be considered as the evidence in another does not carry with it objections made to testimony in the first case.[40]

II. TIME FOR OBJECTIONS.

1. Generally. — Objections must ordinarily be interposed at the time the evidence is sought to be introduced.[41] Thus a question

sition not made on the first trial may be urged on a new trial, see article "DEPOSITIONS," Vol. IV, p. 558. See also Parker *v.* Parker, 146 Mass. 320, 15 N. E. 902.

40. Where two actions were tried together, and certain testimony was objected to in the first case, at the end of which it was stipulated that the same evidence should be considered and taken to be as evidence in the second case, in so far as applicable, it was held that the objection made in the first case should not be considered as having been raised in the second, no mention of it having been made in the stipulation. Walker *v.* Gray (Ariz.), 57 Pac. 614. See article "COMPETENCY," Vol. III, p. 194, note 15.

41. *United States.* — Benson *v.* United States, 146 U. S. 325; Westinghouse Elec. & Mfg. Co. *v.* Stanley Inst. Co., 133 Fed. 167.

Alabama. — Downey *v.* State, 115 Ala. 108, 22 So. 479; Alabama G. S. R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313; Liverpool & London & Globe Ins. Co. *v.* Tillis, 110 Ala. 201, 17 So. 672; Western Union Tel. Co. *v.* Bowman, 37 So. 493; Jarvis *v.* State, 138 Ala. 17, 34 So. 1025; Hudson *v.* State, 137 Ala. 60, 34 So. 854.

Arkansas. — Peel *v.* Ringgold, 6 Ark. 546.

California. — Willeford *v.* Bell, 49 Pac. 6; Wright *v.* Roseberry, 81 Cal. 87, 22 Pac. 336; People *v.* Rodriguez, 10 Cal. 50.

Colorado. — Morris *v.* Everly, 19 Colo. 529, 36 Pac. 150.

District of Columbia. — De Forest *v.* United States, 11 App. D. C. 458.

Florida. — Schley *v.* State, 37 So. 518.

Georgia. — Parke *v.* Foster, 26 Ga. 465, 71 Am. Dec. 221; King *v.* State, 21 Ga. 220. But see Day *v.* Crawford, 13 Ga. 508.

Illinois. — Kreigh *v.* Sherman, 105 Ill. 49; Gillett *v.* Booth, 95 Ill. 183.

Indiana. — Pence *v.* Waugh, 135 Ind. 143, 34 N. E. 860; Crabs *v.* Mickle, 5 Ind. 145.

Indian Territory. — Long-Bell Lumb. Co. *v.* Thomas, 1 Ind. Ter. 225, 40 S. W. 773.

Kansas. — State *v.* Probasco, 46 Kan. 310, 26 Pac. 749.

Louisiana. — State *v.* Hauser, 112 La. 313, 36 So. 396; Mathias *v.* Lebret, 10 Rob. 94; Pickett *v.* Bates, 3 La. Ann. 627; Heiss *v.* Corcoran, 15 La. Ann. 694.

Maryland. — Davis *v.* Patton, 19 Md. 120.

Massachusetts. — Boyle *v.* Columbian Fire Proof Co., 182 Mass. 93, 64 N. E. 728.

Michigan. — People *v.* Pope, 108 Mich. 361, 66 N. W. 213.

Missouri. — State *v.* Rose, 92 Mo. 201, 4 S. W. 733; Wayne Co. *v.* St. Louis & I. M. R. Co., 66 Mo. 77; Couley *v.* State, 12 Mo. 462; State *v.* Harlan, 130 Mo. 381, 32 S. W. 997; State *v.* Crab, 121 Mo. 554, 26 S. W. 548; Foster *v.* Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916.

Nebraska. — Willis *v.* State, 43 Neb. 102, 61 N. W. 254; Haverly *v.* Elliott, 39 Neb. 201, 57 N. W. 1010; Ford *v.* State, 46 Neb. 390, 64 N. W. 1082; Rupert *v.* Penner, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824.

Nevada. — Sharon *v.* Minnock, 6 Nev. 687.

New Hampshire. — Bassett *v.* Salisbury Mfg. Co., 28 N. H. 438.

New York. — Kemble *v.* National Bank of Rondout, 94 App. Div. 544, 88 N. Y. Supp. 246; Buckley *v.* Westchester Light Co., 93 App. Div. 436, 87 N. Y. Supp. 763; Westervelt *v.* Burns, 27 Misc. 781, 57 N. Y. Supp. 749. But see Southwick *v.* Hayden, 7 Cow. 334.

North Carolina. — Johnson *v.*

must be objected to as soon as it is propounded and before it is answered.[42] An objection after the evidence is in is unavailing

Allen, 100 N. C. 131, 5 S. E. 666; Wiggins *v.* Guthrie, 101 N. C. 661, 7 S. E. 761; McRae *v.* Malloy, 93 N. C. 154.

Rhode Island. — State *v.* Gordon, 1 R. I. 179.

South Carolina. — Powers *v.* Standard Oil Co., 53 S. C. 358, 31 S. E. 276; Burris *v.* Whitner, 3 Rich. 510; Fripp *v.* Williams, 14 S. C. 502.

Texas. — Pippin *v.* State, 9 Tex. App. 269.

Vermont. — Wead *v.* St. Johnsbury & L. C. R. Co., 66 Vt. 420, 29 Atl. 631.

An objection should be made to each particular piece of evidence or testimony when it is offered, and not to the whole mass after it has been introduced. Waldo *v.* Russell, 5 Mo. 387; Darnall *v.* Hazlett, 11 Ind. 494.

Privileged Communications. — An objection to the testimony of a physician as to communications from his patient, without the latter's consent, where the statute makes such consent necessary, must be made when the testimony is offered. Wheelock *v.* Godfrey, 100 Cal. 578, 35 Pac. 317; Breisenmeister *v.* Supreme Lodge K. of P., 81 Mich. 525, 45 N. W. 977.

Items Not in Bill of Particulars. Where a bill of particulars of the damages claimed has been filed, an objection to evidence of other damages than those therein specified must be specifically made when the evidence is offered. Colrick *v.* Swinburne, 105 N. Y. 503, 12 N. E. 427.

An Objection to an Instrument Requiring a Seal on the ground that it contains no seal must be made when it is offered, since the party offering it may be able to obviate the objection. Gillett *v.* Campbell, 1 Denio (N. Y.) 520.

Unstamped Instrument. — An objection to the copy of a contract on the ground that the original was not shown to have been stamped with a revenue stamp must be made when the document is offered, since the objection could be obviated by stamping the instrument if necessary. Illinois Car & Equip. Co. *v.* Linstroth Wagon Co., 112 Fed. 737, 50 C. C. A. 504.

Record. — Insufficient Authentication or Attestation. — An objection to the admission of a record on the ground that it has not been properly authenticated must be made at the time it is offered. Lyon *v.* Bolling, 14 Ala. 753, 48 Am. Dec. 122. So an objection to a parish record on the ground that it is not attested by the parish clerk must be made when the record is offered; otherwise it is waived. Fourth Parish of West Springfield *v.* Root, 18 Pick. (Mass.) 318.

In Equity. — In a court of equity formal and technical objections to testimony must be made at the hearing while there is still an opportunity to obviate them. McClaskey *v.* Barr, 48 Fed. 130.

Objections to Evidence Should All Be Made at Once; hence it is not permissible to object to a question on certain grounds, and later, after the question has been answered, object to the answer on other grounds. Voisin *v.* Jewell, 9 La. 112.

Improper Communications to Jury During View. — It seems that improper communications made to the jury during a view should be objected to at the time they are made, the judge being present, and that it is too late to object after the return to the court room. Underwood *v.* Com., 27 Ky. L. Rep. 8, 84 S. W. 310. See Williams *v.* Com., 93 Va. 769, 25 S. E. 659.

42. *Alabama.* — Lewis *v.* State, 121 Ala. 1, 25 So. 1017; McLeroy *v.* State, 120 Ala. 274, 25 So. 247.

California. — People *v.* Scalamiero, 143 Cal. 343, 76 Pac. 1098.

Florida. — Purdy *v.* State, 43 Fla. 538, 31 So. 229.

Indiana. — Vickery *v.* McCormick, 117 Ind. 594, 20 N. E. 495.

Iowa. — State *v.* McKinistry, 100 Iowa 82, 69 N. W. 267; State *v.* Cater, 100 Iowa 201, 69 N. W. 880; Blackmore *v.* Fairbanks-Morse Co., 79 Iowa 282, 44 N. W. 548.

New Jersey. — Ryan *v.* State, 36 Atl. 706; Cunningham *v.* State (N.

even where the objecting party is entitled to have the evidence excluded, the proper remedy being a motion to strike it out or a request for an instruction to the jury to disregard it.[43]

2. Limitations of Rule. — It has been held, however, that this general rule must be reasonably interpreted and applied, and that an objection interposed in good faith while the evidence is being introduced is made in time.[44] Furthermore, the rule applies only to those objections which go to the admissibility of the evidence when it is offered.[45] It has been held that the trial court may recognize and sustain a mere objection though not made till after the testimony has been given, if the answer was made before an

J. Eq.), 38 Atl. 847; Clark *v.* State, 47 N. J. L. 556, 4 Atl. 327; Willett *v.* Morse (N. J. L.), 58 Atl. 72.

New York. — Zoller *v.* Grant, 56 N. Y. Super. Ct. 279, 3 N. Y. Supp. 539; Tanzer *v.* New York City R. Co., 46 Misc. 86, 91 N. Y. Supp. 334; Perkins *v.* Brainard Quarry Co., 11 Misc. 328, 32 N. Y. Supp. 230.

South Dakota. — Vermillion Etc. Co. *v.* Vermillion, 6 S. D. 466, 61 N. W. 802.

If a question calls for inadmissible evidence and the answer is responsive to the question, an objection made after the answer is given is too late and is unavailing. State *v.* Fitzgerald, 72 Vt. 142, 47 Atl. 403.

43. Smith *v.* Dawley, 92 Iowa 312, 60 N. W. 625; Van Doren *v.* Jelliffe, 1 Misc. 354, 20 N. Y. Supp. 636; Alsing Co. *v.* New England Q. & S. Co., 66 App. Div. 473, 73 N. Y. Supp. 347. See also Sharon *v.* Minnock, 6 Nev. 687.

See More Fully "Remedy for Irresponsive Answer or Incompetency Subsequently Appearing," *supra* this article, I, 3.

44. Where the objection to a copy of a letter was interposed during the reading of the letter after a portion of it had been read, it was held that the overruling of the objection was error, notwithstanding the rule requiring objections to be made at the time the testimony is offered. "This rule does not appear to us to have been infringed in this case by the appellants. It must have a reasonable interpretation. Its object is to prevent a party from knowingly withholding his objection, until he discovers the effect of the testimony, and then if it turns out to be unfavorable to interpose his objection. Such a course could not be allowed. It is very obvious from reading the bill of exceptions in this case that such a purpose could not be justly ascribed to the plaintiffs' attorneys. There is nothing to show that they waived their objection or consented to the copy of the letter being read. It was not submitted to their inspection before it was offered, as is the usual and proper course. But it appears that in the hurry of the trial, probably from a momentary inadvertence on their part, a portion of the letter had been read to the jury, when the objection was interposed in good faith and with reasonable diligence. In our judgment it would be too strict and narrow a construction of the rule to deny them, under such circumstances, the right to make their objection." Marsh *v.* Hand, 35 Md. 123. See North Bros. *v.* Mallory, 94 Md. 305, 51 Atl. 89; Dent *v.* Hancock, 5 Gill (Md.) 120; Lamb *v.* Taylor, 67 Md. 85, 8 Atl. 760.

45. The rule that a party must specify his objections to evidence when offered applies only to those objections which relate to the question whether the evidence is admissible or not, and does not relate to the question of the weight to be given the evidence after it is admitted, or to matters tending to contradict, overthrow or invalidate it. Roberts *v.* Chan Tin Pen, 23 Cal. 259. See *infra*, "Effect of Failure To Object."

objection could be interposed,[46] and that an adverse ruling upon an objection made after the evidence is in will be available on appeal if it was treated by the court and the parties as seasonably made.[47]

3. During Argument, by Instructions, or Later. — It is too late to object to evidence for the first time on the argument[48] or by instructions to the jury[49] or after verdict,[50] or at a later stage of the case.[51]

46. Pratt *v.* New York C. & H. R. R. Co., 77 Hun 139, 28 N. Y. Supp. 463.

47. Although an objection has not been made until the evidence is in, if the court and the opposing counsel do not raise the point that the objection is not timely, but treat the question of its admissibility as still an open question, a ruling upon the objection is available upon appeal, since if the point had been raised the objecting party might have proceeded properly by a motion to strike out. Cunard *v.* Manhattan R. Co., 1 Misc. 151, 20 N. Y. Supp. 724; Blum *v.* Manhattan R. Co., 1 Misc. 119, 20 N. Y. Supp. 722.

48. *United States.* — Russel *v.* Union Ins. Co., 1 Wash. C. C. 409, 4 Dall. 421, 21 Fed. Cas. No. 12,146.

Iowa. — Le Grand Quarry Co. *v.* Reichard, 40 Iowa 161; State *v.* Pratt, 20 Iowa 267; State *v.* Munzemaier, 24 Iowa 87.

Minnesota. — Chamberlain *v.* Porter, 9 Minn. 260.

Missouri. — Singer Mfg. Co. *v.* Clay, 53 Mo. App. 412.

Oregon. — State *v.* McDaniel, 39 Or. 161, 65 Pac. 520.

Texas. — Pippin *v.* State, 9 Tex. App. 269; Bohanan *v.* Hans, 26 Tex. 445; Nalle *v.* Gates, 20 Tex. 315; Robson *v.* Watts, 11 Tex. 764.

Vermont. — Laurent *v.* Vaughn, 30 Vt. 90.

49. Where evidence is suffered to go to the jury without objection and no effort is made to withdraw it from their consideration, it is too late after the argument is closed to ask for an instruction to the jury not to consider it. Harrison *v.* Young, 9 Ga. 359; Ann Berta Lodge *v.* Leverton, 42 Tex. 18.

Where evidence has been received without objection and the witness cross-examined regarding it, it is too late to object to it on the ground of variance by request for instructions to the jury to disregard it. Leavenworth Elec. R. Co. *v.* Cusick, 60 Kan. 590, 57 Pac. 519.

Where a physician is permitted without objection to testify as an expert to the results likely to follow from the plaintiff's injuries, and his testimony is based upon declarations made to him by the plaintiff, but not in evidence, it is too late to object by a request for instructions that the testimony be disregarded. Missouri Pac. R. Co. *v.* Mitchell, 75 Tex. 77, 12 S. W. 810.

By Exception to Instructions. Where evidence of fraudulent representations has been admitted without objection under a general allegation of fraud, the impropriety of such admission cannot be first raised by an exception to an instruction. Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217. See also Gardner *v.* Gooch, 48 Me. 487.

50. *Arkansas.* — Cogswell *v.* McKeogh, 46 Ark. 524.

Georgia. — Carhart Bros. & Co. *v.* Wynn, 22 Ga. 24.

Maine. — Hope *v.* Machias Water Power & M. Co., 52 Me. 535.

North Carolina. — State *v.* Smith, 61 N. C. 302.

Tennessee. — Richmond *v.* Richmond, 10 Yerg. 343; Ewell *v.* State, 6 Yerg. 364.

Texas. — Daffin *v.* State, 11 Tex. App. 76.

51. On Motion for New Trial. An objection to evidence made for the first time on a motion for a new trial is too late. State *v.* Peak, 85 Mo. 190; Cook *v.* Ligon, 54 Miss. 368; Skinner *v.* Collier, 4 How. (Miss.) 396; Manning *v.* Burlington, C. R. & N. R. Co., 64 Iowa 240, 20 N. W. 169.

On Motion in Arrest of Judgment. An objection to evidence cannot be first taken on a motion in arrest of

4. On Appeal. — It is too late to object on appeal for the first time to the admission or consideration of evidence.[52]

5. Premature Objections. — An objection to evidence before it has been offered in some way is premature and properly overruled.[53] So also an objection to evidence at the time it is offered is premature if its inadmissibility is not apparent at that time.[54] The court may properly overrule an objection to a question which may elicit either legal or illegal testimony, or both,[55] when it is necessary to hear the answer to determine its relevancy or competency.[56] Thus an objection to all of the testimony of a witness before he has given any testimony at all is premature, where portions thereof may be competent and it is necessary for the court to be put in possession of the particular matter proposed to be introduced in order to determine its competency.[57]

6. Particular Classes of Objections. — A. Form of Question. An objection to the form of a question as leading must be interposed before the question is answered.[58]

B. Questions by Court. — An objection to questions propounded to a witness by the court need not be made when the questions are asked, but the objecting party may wait until the

judgment. McCoy *v.* Jones, 9 Tex. 363.

52. People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; Hackwith *v.* Damron, 1 T. B. Mon. (Ky.) 235; Citizens St. R. Co. *v.* Dan, 102 Tenn. 320, 52 S. W. 177; Cavitt *v.* State, 15 Tex. App. 190; Hill *v.* Baylor, 23 Tex. 261; Nesbitt *v.* Dallam, 7 Gill & J. (Md.) 494, 28 Am. Dec. 236.

Objections not made before the trial court cannot be urged on appeal, even though the incompetency is apparent upon the record. German *v.* German, 7 Cold. (Tenn.) 180.

53. *In re* Morgan, 104 N. Y. 74, 9 N. E. 861; Krakowski *v.* North New York Bldg. & Loan Ass'n, 7 Misc. 188, 27 N. Y. Supp. 314.

54. Storr *v.* James, 84 Md. 282, 35 Atl. 965.

An objection to evidence at the time it is offered is premature if the facts tending to show its incompetency are not elicited until the cross-examination. Crane *v.* Darling, 71 Vt. 295, 44 Atl. 359, an action for slander, in which an objection made to testimony regarding a conversation between the plaintiff and defendant on the ground that the interview was sought by the plaintiff for the purpose of entrapping the defendant into a slander was held premature, as the testimony tending to show this fact was not elicited until the plaintiff's cross-examination.

55. Western Union Tel. Co. *v.* Bowman (Ala.), 37 So. 493.

If illegal evidence is contained in the reply to such questions the objection should be made to the reply by a motion to strike out. Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459.

56. Louisville, N. A. & C. R. Co. *v.* Jones, 108 Ind. 551, 9 N. E. 476; Wolfe *v.* Pugh, 101 Ind. 293.

57. An objection to the testimony of a physician as to all that was said or done by an injured person at the time he was examined by the witness before the witness had given any testimony as to such matters was held premature, since the court could not be required to anticipate the testimony and discriminate in advance between the admissible and inadmissible. Missouri, K. & T. R. Co. *v.* Johnson, 95 Tex. 409, 67 S. W. 768.

58. Towns *v.* Alford, 2 Ala. 378; Morrissey *v.* People, 11 Mich. 327; Williams *v.* Grand Rapids, 53 Mich. 271, 18 N. W. 811; Jackson *v.* Com. (Va.), 30 S. E. 452.

conclusion of the examination by the court, and then move to have the evidence stricken out.[59]

C. Documentary Evidence. — Objections to documentary evidence must be made when it is offered.[60] Thus the insufficiency of the preliminary showing must be questioned when the document is offered.[61]

D. Secondary Evidence. — Objections to evidence on the ground that it is secondary evidence, for the introduction of which no sufficient preliminary showing has been made, must be taken when the evidence is offered.[62]

59. "We think the rule which requires a party to make his objection to the questions when asked, and precludes him from awaiting the answer of the witness, and then moving to strike them out, ought not to prevail when the examination is conducted by the court. The jurors naturally assume the interrogatories of the presiding judge to be proper, as they are presumed to be, and objections made thereto by counsel are in the nature of mere interruptions. Often the character of the case is such that the attorney might otherwise be compelled to elect whether he will save his record or brook the ill-will of the jury. . . . It was the privilege of defendant to either make objections to the questions of the court when asked, or move to strike out the evidence elicited immediately upon the conclusion of the judge's examination." State *v.* Marshall, 105 Iowa 38, 74 N. W. 763.

60. Yeatman *v.* Erwin, 5 La. 264.

Authentication. — An objection to the exemplification of the record of a judgment on the ground that it is not properly authenticated must be made when it is offered in evidence. Coskery *v.* Wood, 52 S. C. 516, 30 S. E. 475. See also Williams *v.* Rawlins, 33 Ga. 117.

61. Perrott *v.* Shearer, 17 Mich. 48.

Where by statute it is provided that the note on which the action is founded may be introduced in evidence under the general money counts if a copy of the note has been served with the declaration, an objection to the admission of the note on the ground that the copy was not so served must be made when the note is offered. Steuben Co. Bank *v.* Stephens, 14 Wend. (N. Y.) 243.

Proof of Execution. — An objection to documentary evidence on the ground that its execution has not been proved must be made when the document is offered. Colwell *v.* Lawrence, 38 Barb. (N. Y.) 643. See also Hanks *v.* Phillips, 39 Ga. 550.

An Objection to Books of Account on the ground that a proper foundation has not been laid for their admission must be made at the time they are offered. Iowa State Sav. Bank *v.* Black, 91 Iowa 490, 59 N. W. 283.

Document Required To Be Stamped. An objection to a writing on the ground that it is not stamped must be made at the time it is offered, and cannot be urged after it has been received without objection. Chamberlin *v.* Robertson, 31 Iowa 408; Thomson *v.* Wilson, 26 Iowa 120; De Courcey *v.* Collins, 21 N. J. Eq. 357.

Testimony of Subscribing Witnesses. — An objection that a document must be proved by the subscribing witnesses must be made when the document is offered. Rayburn *v.* Mason Lumb. Co., 57 Mich. 273, 23 N. W. 811.

62. *Colorado.* — Cowel *v.* Colorado Springs Co., 3 Colo. 82.

Kansas. — Douthitt *v.* Applegate, 33 Kan. 395, 6 Pac. 575, 52 Am. Rep. 533.

Michigan. — Johnstone *v.* Scott, 11 Mich. 232.

Minnesota. — State *v.* Mims, 26 Minn. 183, 2 N. W. 683.

New Hampshire. — Bassett *v.* Salisbury Mfg. Co., 28 N. H. 438.

New York. — Teall *v.* Van Wyck, 10 Barb. 376; Town *v.* Needham, 3 Paige Ch. 545, 24 Am. Dec. 246; Carson *v.* Murray, 3 Paige Ch. 483, 502.

E. Admissibility Under Pleadings. — An objection to evidence on the ground of variance or because otherwise inadmissible under the pleadings must ordinarily be made when the evidence is offered.[63] Such evidence cannot be objected to for the first time after the trial[64] or on appeal.[65]

F. Depositions. — All questions connected with the time and manner of making objections to depositions and the competency of the deponent are fully discussed elsewhere.[66]

G. Incompetency of Witness. — If the incompetency of a witness is known when he is offered, objection must be made before he has given any testimony;[67] if not known, the objection must be interposed as soon as it appears or is discovered.[68] But it has

Texas. — See also Robertson *v.* Coates, 1 Tex. Civ. App. 664, 20 S. W. 875.

An Objection to the Admission of a Copy of a document must be made when it is offered. Proprietors of Concord *v.* McIntire, 6 N. H. 527.

Impeachment of Witness. — Oral Evidence of His Conviction of an infamous crime must be objected to when offered. Perry *v.* People, 86 N. Y. 353.

63. *Colorado.* — Colorado Mtg. & Inv. Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42.

Connecticut. — State *v.* Basserman, 54 Conn. 88, 6 Atl. 185.

Illinois. — Swift *v.* Rutkowski, 182 Ill. 18, 54 N. E. 1038; Tucker *v.* Burkitt, 49 Ill. App. 278; Williamson *v.* Rexroat, 55 Ill. App. 116; Chatsworth *v.* Rowe, 166 Ill. 114, 46 N. E. 763.

Louisiana. — Wyckoff *v.* Miller, 48 La. Ann. 475, 19 So. 478.

New York. — Brady *v.* Nally, 151 N. Y. 258, 45 N. E. 547.

Vermont. — State *v.* Peach, 40 Atl. 732.

When a general averment of negligence in a petition is followed by an enumeration of specific acts of negligence, the evidence must be restricted to the facts specified, but evidence of other acts of negligence must be objected to when offered or the right to object on this ground will be deemed to have been waived. Dlauhi *v.* St. Louis, I. M. & S. R. Co., 139 Mo. 291, 40 S. W. 890.

64. Knox *v.* Higby, 76 Cal. 264, 18 Pac. 381.

65. Dufolt *v.* Gorman, 1 Minn. 301, 66 Am. Dec. 543.

66. See article "Depositions," Vol. IV, pp. 535-566.

67. Brunswick & W. R. Co. *v.* Clem, 80 Ga. 534, 7 S. E. 84; State *v.* Damery, 48 Me. 327; Benson *v.* United States, 146 U. S. 325; Watson *v.* Riskamire, 45 Iowa 231; Daffin *v.* State, 11 Tex. App. 76.

68. *United States.* — Benson *v.* United States, 146 U. S. 325.

Louisiana. — Canal Bank *v.* McGloin, 10 La. Ann. 240; State *v.* Taylor, 11 La. Ann. 430; State *v.* Williams, 28 La. Ann. 604.

Maine. — State *v.* Damery, 48 Me. 327.

Massachusetts. — Com. *v.* Green, 17 Mass. 515.

Missouri. — Hickman *v.* Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440; State *v.* Crab, 121 Mo. 554, 26 S. W. 548.

New York. — Westervelt *v.* Burns, 27 Misc. 781, 57 N. Y. Supp. 749.

Texas. — Daffin *v.* State, 11 Tex. App. 76.

Virginia. — Spence *v.* Repass, 94 Va. 716, 27 S. E. 583.

See also article "Competency," Vol. III, p. 175, note 25.

An objection to the competency of a witness because he does not believe in the existence of a Supreme Being must be taken before he is sworn. People *v.* McGaren, 17 Wend. (N. Y.) 460.

After Cross-Examination. — It is too late to object to the incompetency of a witness after he is cross-examined with knowledge of his incompetency. Hord *v.* Colbert, 28 Gratt. (Va.) 49. See also article

been held that it is not always necessary to object to the incompetency of a witness before his examination in chief has begun; that it is sufficient that the objection was interposed before the cross-examination commenced if there is nothing in the case to warrant the inference that the objection was delayed for the purpose of obtaining an unfair advantage.[69]

In Case of Partial Incompetency, however, the objection cannot be interposed until the testimony of the witness regarding the particular matter as to which he is incompetent is called for.[70]

III. REPETITION OF OBJECTION.

1. Generally. — Where an objection has once been distinctly made and overruled, it need not be repeated to the same class of evidence, which is open to the same objection, one ruling upon the question being sufficient.[71]

2. Repetition of Same Evidence or Same Question. — After a proper and sufficient objection has been made to a particular piece of evidence or to a particular question, and overruled, it need not

"COMPETENCY," Vol. III, p. 176, note 28.

On Appeal. — It is too late to object to the competency of a witness on appeal. Schmidt *v.* Littig, 69 Iowa 277, 28 N. W. 594; Henshaw *v.* Robertson, Bail. Eq. (S. C.) 311.

See More Fully article "COMPETENCY," Vol. III, p. 174, *et seq.*, as to the old and the modern practice regarding objections to witnesses.

69. Warwick *v.* Warwick, 31 Gratt. (Va.) 70.

"The general rule undoubtedly is that the objection to the competency of a witness ought to be taken before the witness is examined in chief, but the rule is not inflexible. Each case must be determined on its own circumstances." Hill *v.* Postley, 90 Va. 200, 17 S. E. 946.

70. See article "COMPETENCY," Vol. III, p. 175, note 26.

A witness cannot be objected to at the time he is sworn merely because he is incompetent to testify to personal transactions with a person since deceased. Chew *v.* Holt, 111 Iowa 362, 82 N. W. 901.

71. Salt Lake City *v.* Smith, 104 Fed. 457, 43 C. C. A. 637; McKinnon *v.* Gates, 102 Mich. 618, 61 N. W. 74; Green *v.* Southern Pac. R. Co., 122 Cal. 563, 55 Pac. 577; Anglo-American Pack. & Prov. Co. *v.* Baier, 20 Ill. App. 376; Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26; Jordan *v.* Kavanaugh, 63 Iowa 152, 18 N. W. 851; Oppenheimer *v.* Barr, 71 Iowa 525, 32 N. W. 499; Lyons *v.* New York Elev. R. Co., 26 App. Div. 57, 49 N. Y. Supp. 610. But see Frost *v.* Goddard, 25 Me. 414.

In Dilleber *v.* Home L. Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182, a question to a physician calling for the information which he had acquired as to the condition of his patient while attending him professionally was objected to on the ground that it was a privileged communication, but the objection was overruled and the evidence received. It was held that the subsequent reception of the same kind of testimony from other witnesses without objection was not a waiver.

"Where a party has seasonably objected to evidence of a certain character by one witness and his objection is overruled, he is not required or expected to repeat his objection when testimony of the same kind by another witness is offered; indeed, proper decorum would indicate that he should not do so." Schierbaum *v.* Schemme, 157 Mo. 122, 57 S. W. 526.

Where an objection to the com-

be repeated when the same evidence is reoffered[72] or substantially the same question is renewed.[73]

3. Series of Connected Questions. — An objection to the first of a series of questions, if improperly overruled, need not be repeated to questions immediately following and springing naturally from it.[74]

petency of a witness to testify as to transactions with a deceased person had been specifically made, and it appeared that the court understood that all of the class of evidence objected to was admitted under objection and exception, it was held that the objecting party was not required to repeat his objection to any question relating to the same matter. Church *v.* Howard, 79 N. Y. 415.

Where an objection to the admission of confessions has been specifically made on the ground that it has not been shown that they were voluntary, the defendant being in custody at the time, the failure to repeat the same objection to evidence of other confessions is not a waiver of the right to move to have such evidence excluded, where it subsequently appears that the confessions were not voluntary. People *v.* Castro, 125 Cal. 521, 58 Pac. 133.

72. Same Testimony by Another Witness. — An objection properly made is not waived by failing to object to the same testimony when subsequently given by another witness. "One ruling on one question is enough, and a repetition of similar exceptions is not to be required, if, indeed, to be tolerated." Louisville & N. R. Co. *v.* Gower, 85 Tenn. 465, 3 S. W. 824.

When Several Objections Are Made and Some Are Obviated. — Where testimony as to an accident indemnity policy was objected to on the ground of irrelevancy and incompetency, and for the further reason that it was in writing, not produced, the fact that the objection was not repeated when the writing was produced and read was not a waiver of the previous objection. Herrin *v.* Daly, 80 Miss. 340, 31 So. 790.

Contra. — An error in admitting evidence over objection is cured when subsequently the same evidence is admitted without objection. Masonic Mut. Ben. Soc. *v.* Lackland, 97 Mo. 137, 10 S. W. 895, 10 Am. St. Rep. 298.

Where a witness testified to certain matter not responsive to the question and otherwise incompetent, which was objected to, and which the court was asked to rule out, and in response to another question the witness testified to the same facts without objection and was cross-examined thereon, it was held that there was a waiver of the previous objection. Beardstown *v.* Smith, 150 Ill. 169, 37 N. E. 211.

73. Wilson *v.* Nassau Elec. R. Co., 56 App. Div. 570, 67 N. Y. Supp. 486; Schutz *v.* Union R. Co., 181 N. Y. 33, 73 N. E. 491, *reversing* 88 App. Div. 615, 84 N. Y. Supp. 1145; Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26. See Thompson *v.* Manhattan R. Co., 11 App. Div. 182, 42 N. Y. Supp. 896.

Where the same question has been objected to several times and ruled out by the court, it is unnecessary to repeat the objection on every repetition of substantially the same question, but it may be regarded as continuing unless something occurs to show that it is waived. People *v.* Melvane, 39 Cal. 614.

Questions of Similar Nature and Open to Same Objection. — Thomas *v.* Carey, 26 Colo. 485, 58 Pac. 1093; Schutz *v.* Union R. Co., 181 N. Y. 33, 73 N. E. 491.

Repetition of Question by Court. Where a proper objection has been made to testimony which is again repeated in response to a question by the court, it is not necessary to repeat the objection. Sherman *v.* Delaware, L. & W. R. Co., 106 N. Y. 542, 13 N. E. 616.

74. Barton *v.* Kane, 17 Wis. 38, 84 Am. Dec. 728, in which objections were made to the first and third of

4. Questions Within Lines Indicated by Court. — Where the court in ruling upon an objection to a question states the limits within which the examination upon that particular matter may be extended, objection need not be renewed to any question within the limits laid down by the court.[75]

5. Question Not Answered When First Propounded. — An objection interposed to a question which is not answered by the witness must be repeated when the same question is again asked at a later stage of the examination.[76]

6. Evidence Excluded When First Offered. — Where evidence which has been objected to and excluded is reoffered at a later stage of the trial the objection to it must be renewed.[77]

7. Question Withdrawn Upon Objection and Subsequently Repeated. — Where a question which has been withdrawn upon objection before answer is subsequently repeated the objection

a series of three questions, but not to the intermediate question. "Of the three questions asked the witness only two, the first and third, were objected to. Those questions and the answers were merely irrelevant. The second and really obnoxious question was put and answered without objection. If we consider a specific objection to each question necessary, the point is lost. If, however, we regard the objection to the preliminary question, which ought to have been sustained, as going, not merely to that question, but to the improper testimony which immediately succeeds and springs naturally from it, then nothing has been waived by the defendant. The strictest rules might require that the former course should be pursued; but we incline to sustain the latter." See also Gilpin *v.* Gilpin, 12 Colo. 504, 21 Pac. 612.

Succeeding Questions Along Same Lines or Concerning Same Objectionable Subject-Matter need not be objected to. People *v.* Wilmot, 139 Cal. 103, 72 Pac. 838; Graves *v.* People, 18 Colo. 170, 32 Pac. 63; Costigan *v.* Michael Transp. Co., 33 Mo. App. 269; Montignani *v.* Crandall Co., 34 App. Div. 228, 54 N. Y. Supp. 517.

75. Subsequent Questions Within Lines Pointed Out by Court as Proper. — Sharon *v.* Sharon, 79 Cal. 633, 674, 22 Pac. 131. See State *v.* Hendrick (N. J.), 56 Atl. 247.

76. Norris *v.* Norris, 3 Ind. App. 500, 28 N. E. 1014; Schalk *v.* Norris, 7 Misc. 20, 27 N. Y. Supp. 390; Wheeler *v.* Van Sickle, 37 Neb. 651, 56 N. W. 196. In this case a witness, after testifying to having made unsuccessful search for a lost letter, was asked to state its contents, and an objection was interposed and overruled, and no answer was made to the question, but after the examination had continued at some length as to the fact of the receipt of the letter by the witness, a question as to its contents was repeated and answered without objection. It was held that the objection to the question when first asked did not extend to its repetition.

Restatement of Question in Different Manner. — Where upon objection to a question it is restated in a different manner, it seems that the objection should be repeated. See State *v.* Lyons, 113 La. 959, 37 So. 890.

77. Where letters when first offered were objected to and excluded, but when offered a second time under new developments in the progress of the case were admitted without objection, it was held that the failure to object was a waiver of any ground of objection. Bailey *v.* Ogden, 75 Ga. 874.

must be renewed,[78] but the specific grounds of objection need not be restated.[79]

8. Deferred Ruling and Evidence Received on Promise to Connect. A. Generally. — Where testimony objected to as irrelevant is admitted, subject to later developments of the case, or on the understanding that its connection is to be shown, the objection, to be available, must be renewed by a motion to strike out the objectionable evidence when the failure to connect it becomes apparent.[80] So if the consideration of the objection is deferred by consent it must be renewed at the proper time.[81]

B. In Criminal Cases, however, the defendant need not renew his objection to evidence conditionally admitted, but the court must of its own motion strike out such evidence when its incompetency or irrelevancy finally becomes apparent.[82]

78. Wagner *v.* Jones, 77 N. Y. 590, *distinguishing* Dilleber *v.* Home L. Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182, on the ground that in that case the evidence had been admitted under the first objection.

79. Blackstock *v.* Leidy, 19 Pa. St. 335.

80. *United States.* — Central Vermont R. Co. *v.* Soper, 59 Fed. 879, 8 C. C. A. 341, 21 U. S. App. 24. See also United States *v.* Gardner, 42 Fed. 832.

California. — Napa *v.* Howland, 87 Cal. 84, 25 Pac. 247.

Georgia. — Scott *v.* Newsom, 27 Ga. 125.

Iowa. — Gaar-Scott & Co. *v.* Nichols, 115 Iowa 223, 88 N. W. 382.

Michigan. — Williams *v.* Grand Rapids, 53 Mich. 271, 18 N. W. 811.

New Jersey. — Nestal *v.* Schmid, 39 N. J. L. 686.

South Carolina. — State *v.* Cannon, 49 S. C. 550, 27 S. E. 526; Gabel *v.* Rauch, 50 S. C. 95, 27 S. E. 555.

West Virginia. — Hargreaves *v.* Kimberly, 26 W. Va. 787, 53 Am. Rep. 121.

Where the court refuses to rule upon an objection at the time it is made because it desires to hear the evidence before ruling upon its competency, it is the duty of the objecting party to renew his objection by a motion to strike out. Fath *v.* Thompson, 58 N. J. L. 180, 33 Atl. 391.

Where the court upon objection rules that certain evidence is illegal and promises to hear later a motion to exclude it, and no exception is taken, the failure to call the court's attention to the matter before verdict is a waiver of the previous objection. Norfolk & W. R. Co. *v.* Anderson, 90 Va. 1, 17 S. E. 757, 44 Am. St. Rep. 884.

Evidence Received Subject to Objection. — Where the court upon objection to evidence said "evidence received subject to objection," it was held that this statement amounted to nothing more than taking the objection under advisement, and since no further ruling upon the matter appeared, the objecting party had nothing to complain of on appeal. Johanson *v.* Hoff, 67 Minn. 148, 69 N. W. 705.

The court when sitting as a trior of facts may reserve its ruling on an objection to testimony, and although the objecting party is entitled to a ruling before the finding on the whole case is made he should make known his desire for such a ruling, and a mere general objection to the reception of the testimony "subject to objection" is insufficient. Taylor *v.* Cayce, 97 Mo. 242, 10 S. W. 832.

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

82. State *v.* Walker, 124 Iowa 414, 100 N. W. 354; Jenkins *v.* State, 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267, 289; People *v.* Stephenson, 91 Hun 613, 36 N. Y. Supp. 595.

9. Incompetency Subsequently Appearing will not make available an objection previously made when the evidence appeared to be competent; the objection must be renewed.[83]

10. Agreement Dispensing With Necessity of Repetition. — Counsel may agree that an objection to all evidence of a particular class or relating to a particular subject-matter may be treated as continuing without the necessity of repetition to all evidence of the same class or concerning the same subject.[84]

11. Restatement of Grounds of Objection. — Where the objecting party has fairly and fully stated the grounds of his objection to a certain class of testimony he is not compelled to restate the grounds when he subsequently repeats his objection to the same class of testimony,[85] especially when it is apparent from the circumstances

83. Mersereau *v.* Mersereau, 49 App. Div. 647, 63 N. Y. Supp. 336.

In Hoffman *v.* Conner, 76 N. Y. 121, for the purpose of proving the value of the property in question the plaintiff was asked what she paid for it; an objection to this as incompetent was overruled. At the time the objection was made there was nothing to show that the purchase was not recent, but it subsequently appeared on cross-examination that the purchase was made ten years previous. It was held that the previous objection did not cover the incompetency subsequently appearing on cross-examination.

Direct testimony as to the existence of the relation of principal and agent is not open to the objection that it is a mere conclusion; consequently an objection made at the time such testimony is called for is properly overruled, and if the cross-examination shows that the knowledge of the witness is based on mere hearsay, a further objection on this ground must be made. Heusinkveld *v.* St. Paul F. & M. Ins. Co., 106 Iowa 229, 76 N. W. 696.

Where the objection is made to the testimony of a witness on the ground that it relates to transactions with a deceased person, but from the facts in evidence it does not appear that the witness is disqualified, the mere fact that subsequently proof is made showing such disqualification does not render the reception of the testimony erroneous, but the objecting party must move to strike out the testimony. Whitman *v.* Foley, 125 N. Y. 651, 26 N. E. 725.

84. Stipulation. — When counsel agree that objections made to a certain class of testimony may apply to all such testimony without objecting to each question, which agreement is taken down by the stenographer and embodied in the bill of exceptions, the objections and exceptions will be considered as timely made and taken to all that class of testimony. Stevenson *v.* Waltman, 81 Mich. 200, 45 N. W. 825.

85. McGrath *v.* Alger, 43 App. Div. 496, 60 N. Y. Supp. 122; Gray *v.* Brooklyn Union Pub. Co., 35 App. Div. 286, 55 N. Y. Supp. 35. See also Bowen *v.* Sweeney, 63 Hun 224, 17 N. Y. Supp. 752; Donovan *v.* Driscoll, 116 Iowa 339, 90 N. W. 60.

Where an objection and the grounds therefor have been specifically stated, a subsequent objection to evidence relating to the same subject-matter "on the same grounds as before" is sufficiently specific. Hancock *v.* Flynn, 54 Hun 638, 8 N. Y. Supp. 133.

Where Upon Specific Objection the Court Has Excluded Offered Evidence as incompetent, it may properly sustain an objection to an offer of substantially the same evidence without a repetition of the specific grounds of the objection. Griswold *v.* Edson, 32 Minn. 436, 21 N. W. 475.

Where Evidence Is Objected to on Specific Grounds and Is Withdrawn, a general objection to the same evi-

that the two objections are based upon the same grounds.[86] The circumstances may, however, be such as to require a restatement of the grounds of an objection in order to avoid misleading the court.[87]

Objection "As Before." — Where evidence is objected to "as before" the objection will be treated as based upon the same grounds as the last preceding objection.[88] And such an objection is properly disregarded when no previous objection has been made to the testimony of the witness.[89]

IV. NATURE AND FORM OF OBJECTION.

1. Necessity of Specifying Grounds. — A. GENERALLY. — The

dence when it is offered again will be presumed to be upon the same grounds as specified in the first objection. "Where the same evidence is offered twice and twice objected to it must be presumed that both objections are upon the same ground, unless the contrary appears." Blackstock *v.* Leidy, 19 Pa. St. 335. But in this case it was the objecting party who was contending on appeal that the evidence objected to was incompetent on grounds not assigned by him in his first objection.

When Court Rules in Advance of Offer. — Where upon objection to a particular class of testimony the court overrules the objection with the statement to the effect that this class of evidence is competent and will be admitted subject to an exception, the objecting party, when repeating his objection to the same class of evidence, need not restate the grounds of his objection. State *v.* Hendrick (N. J.), 56 Atl. 247.

86. *In re* Will of Eysaman, 113 N. Y. 62, 20 N. E. 613; Schneider *v.* Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752; Carlson *v.* Winterson, 147 N. Y. 652, 42 N. E. 347.

87. Where a witness as a foundation for impeachment had been asked as to whether he had not made a statement inconsistent with his testimony, and such previous statement had been specifically pointed out to him, an objection to the testimony of another witness as to such inconsistent statement as "incompetent, irrelevant and immaterial and also on the ground that sufficient foundation had not been laid," was overruled and exception taken. The testimony of another witness as to similar inconsistent statements made to him by the witness sought to be impeached was admitted "subject to the same objection, ruling and exception," but it appeared that the attention of the witness sought to be impeached had not been specifically called to these statements. It was held, however, that the objection did not sufficiently call the trial court's attention to the distinction between the testimony of the two witnesses and the insufficiency of the foundation in the case of the second witness. "It seems clear that the testimony of both witnesses was put in the same category by the plaintiff's attorney, and the court therefore could not be expected to observe the distinction." Western Union Oil Co. *v.* Newlove, 145 Cal. 772, 79 Pac. 542.

88. State *v.* Hyde, 27 Minn. 153, 6 N. W. 555.

89. Where a party states merely that he "objects as before," and no previous objection has been made during the examination of the witness, although there have been many objections for various reasons during the examination of others, the objection is indefinite. Dunbier *v.* Day, 12 Neb. 596, 12 N. W. 109, 41 Am. Rep. 772.

An objection to testimony as to the contents of certain books that "defendant's counsel renews his objection to allowing the witness to answer what those books show" was held insufficient, it appearing that no such previous objection had been made. Hedges *v.* Payne, 63 Hun 630, 17 N. Y. Supp. 809.

general rule, subject to some qualifications,[90] is that objections to evidence should state the specific grounds upon which they are based, and that the trial court may properly disregard general objections which fail to point out why the evidence is inadmissible.[91] Such objections, if they raise any point at all, go only to the question whether the evidence is admissible under any phase of the case.[92] The court is not obliged to sustain such an objection although a sufficient ground therefor exists.[93]

90. See *infra* IV, I, E and F.

91. *Alabama.* — Ladd *v.* State, 92 Ala. 58, 9 So. 401; Dryer *v.* Lewis, 57 Ala. 551; Louisville & N. R. Co. *v.* Banks, 132 Ala. 471, 31 So. 573; Barron *v.* Barron, 122 Ala. 194, 25 So. 55.

California. — People *v.* Nelson, 85 Cal. 421, 24 Pac. 1006. See People *v.* Joy, 135 Cal. XIX, 66 Pac. 964.

District of Columbia — De Forest *v.* United States, 11 App. D. C. 458.

Florida. — Jacksonville, T. & K. W. R. Co. *v.* Lockwood, 33 Fla. 573, 15 So. 327; Hoodless *v.* Jernigan, 35 So. 656.

Illinois. — Mueller *v.* Kuhn, 59 Ill. App. 353; Indiana, I. & I. R. Co. *v.* Otstot, 113 Ill. App. 37, *affirmed* 212 Ill. 429, 72 N. E. 387; Coffeen Coal & Copper Co. *v.* Barry, 56 Ill. App. 587; Sanitary Dist. *v.* Bernstein, 175 Ill. 215, 51 N. E. 720; Buntain *v.* Bailey, 27 Ill. 409; Peoria & O. R. Co. *v.* Neill, 16 Ill. 269.

Indiana. — Wood *v.* Rice, 68 Ind. 320; Sievers *v.* Peters Box & Lumb. Co., 151 Ind. 642, 50 N. E. 877; Stanley *v.* Holliday, 130 Ind. 464, 30 N. E. 634; Lankford *v.* State, 144 Ind. 428, 43 N. E. 444; Denny *v.* Northwestern Christian University, 16 Ind. 220.

Kansas. — State *v.* Asbell, 57 Kan. 398, 46 Pac. 770; Smith *v.* Morrill, 39 Kan. 665, 18 Pac. 915; Wilson *v.* Fuller, 9 Kan. 176. See also Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620; Cross *v.* Burlington Nat. Bank, 17 Kan. 336; Walker *v.* Armstrong, 2 Kan. 198; Humphrey *v.* Collins, 23 Kan. 549; Stout *v.* Baker, 32 Kan. 113.

Michigan. — Hoard *v.* Little, 7 Mich. 468.

Minnesota. — State *v.* Hyde, 27 Minn. 153, 6 N. W. 555.

Missouri. — Hoselton *v.* Hoselton, 166 Mo. 182, 65 S. W. 1005; State *v.* Harlan, 130 Mo. 381, 32 S. W. 997; State *v.* Moore, 117 Mo. 395, 22 S. W. 1086.

New Hampshire. — Bundy *v.* Hyde, 50 N. H. 116.

New Jersey. — Moran *v.* Green, 21 N. J. L. 562.

New York. — Fountain *v.* Pettee, 38 N. Y. 184.

Tennessee. — Ingram *v.* Smith, 1 Head 411.

Wyoming. — Farrell *v.* Alsop, 2 Wyo. 135.

Where testimony objected to generally is competent in itself, if there are any reasons for its exclusion growing out of the proceedings on the trial or the prior examination and statements of the witness, they should be stated in the objection. Williams *v.* Sargeant, 46 N. Y. 481.

It is not error to admit incompetent evidence over a general objection when if the specific grounds of the objection had been stated the party offering such evidence might have given competent evidence to prove the same fact. State *v.* Norton, 46 Wis. 332, 1 N. W. 22.

Where the General Form of the Objection Tends To Mislead the trial court as to the particular ground relied on, which is not indicated or suggested, the overruling of the objection is not error. Bedal *v.* Spurr, 33 Minn. 207, 22 N. W. 390.

92. Dow *v.* Merrill, 65 N. H. 107, 18 Atl. 317. See also Abenheim *v.* Samuels, 49 Hun 607, 1 N. Y. Supp. 868; Crawford *v.* Chicago, B. & Q. R. Co., 112 Ill. 314; Wilson *v.* King, 83 Ill. 232; Moser *v.* Kreigh, 49 Ill. 84; Buntain *v.* Bailey, 27 Ill. 409; Cantwell *v.* Welch, 187 Ill. 275, 58 N. E. 414; Hicks *v.* Deemer, 187 Ill. 164, 58 N. E. 252.

93. Blackmore *v.* Fairbanks-Morse Co., 79 Iowa 282, 44 N. W. 548.

The Reasons for this rule are that the trial judge is entitled to know the grounds of objection so that he may rule intelligently without searching for possible objections; that the party offering the evidence may withdraw it and substitute unobjectionable evidence, or may obviate the defect if possible, and further that the appellate court may know the basis of the ruling below and not decide the case on a point not raised by the parties or considered by the lower court.[94]

B. Particularity Required. — The particularity required in the statement of the grounds of objection depends largely upon the nature of both the evidence and the objection,[95] but it should be sufficiently specific to point out both to the court and the oppos-

94. Reasons for Rule. — "A specification of the particular reasons upon which a party asks the trial court to exclude or to admit certain testimony is essential for three reasons: First, to prevent a violation of the fundamental rule that a litigant must abide in an appellate court upon the theory which he has advocated at *nisi prius*. Second, to prevent an appellate tribunal from becoming something quite different from a court of review; and lastly, that the opposing party and the trial court may be fairly advised of the force and nature of the objection intended to be urged and have a fair opportunity to consider it and if need be obviate it." Burlington Ins. Co. *v.* Miller, 60 Fed. 254, 8 C. C. A. 612.

"Objections to evidence must be specific. The reasons are obvious and substantial. Parties are entitled to an opportunity to avoid exceptions to the competency or the sufficiency of their evidence, if they can. This they can do by withdrawing the evidence objected to; or, if the evidence is documentary, and the objections are to mere matters of form, by withholding it till the defects can be removed by amendments. These are rights of which parties cannot be rightfully deprived. They have a right to insist that all objections to their evidence shall be made when the evidence is offered, and be specific, so that they can intelligently determine whether they will take the risk of an exception, or avoid it in one of the ways mentioned; or, if not so made, that the objections shall be regarded as waived." Bucksport *v.* Buck, 89 Me. 320, 36 Atl. 456.

The purpose of requiring specific objections is twofold: First, to enable the trial court to understand the precise question upon which he has to rule, and second, to afford the opposite party an opportunity to obviate it if well taken. Bright *v.* Ecker, 9 S. D. 449, 69 N. W. 824.

95. See *infra* IV, 2 and 3.

Degree of Particularity. — "The degree of particularity required in pointing out objections to the testimony, when offered, must depend very much upon the kind of testimony, and the circumstances and attitude of the case. Thus, if it was proposed to prove by parol a contract which was not to be performed within one year from the making of the same, it might be sufficient for the record to show that the complaining party objected *generally* to the competency of such proof, for in such a case the mind of the opposite party and the court would be directed unerringly to the very point raised. So if the wife should be offered as a witness for the husband in a civil case, or a party to the action should offer himself, the opposite party need show no more than that he objected to the introduction of said witnesses and their testimony. But when the testimony offered is apparently of a *kind* that is admissible to prove a particular fact or thing, then a general objection should be held to raise the question only of its competency as a *kind*, and not the technical sufficiency or competency of the particular instrument relied upon. And especially is this true where no motion for a new trial is made, or objection urged to the sufficiency of the testimony to

ing party the real point of the objection.[96] Unless an objection clearly advises the trial court of the specific ground upon which it is made it will not justify a reversal.[97]

C. MERE "OBJECTION." — The mere statement by a party that he objects to evidence is not entitled to consideration,[98] unless

sustain the judgment." Rindskoff *v.* Malone, 9 Iowa 540, 74 Am. Dec. 367.

96. *Kansas.* — Mechanics Sav. Bank *v.* Harding, 65 Kan. 655, 70 Pac. 655; Howard *v.* Howard, 52 Kan. 469, 34 Pac, 1114.

Minnesota. — Stahl *v.* Duluth, 71 Minn. 341, 74 N. W. 143; Vaughan *v.* McCarthy, 63 Minn. 221, 65 N. W. 249; Nelson *v.* Chicago, M. & St. P. R. Co., 35 Minn. 170, 28 N. W. 215; Cannady *v.* Lynch, 27 Minn. 435, 8 N. W. 164; Gilbert *v.* Thompson, 14 Minn. 544.

Missouri. — O'Neill *v.* Kansas City, 178 Mo. 91, 77 S. W. 64.

Nevada. — Sharon *v.* Minnock, 6 Nev. 687.

New Hampshire. — See Hayward *v.* Bath, 38 N. H. 179.

Washington. — Coleman *v.* Montgomery, 19 Wash. 610, 53 Pac. 1102.

In an action of trover for the conversion of certain chattels, the objection to the introduction in evidence of the judgment in a replevin suit on the ground that the "action of replevin does not determine the title to the property in controversy, but only settles the question as to whether the plaintiff was entitled to the possession of it at the commencement of the suit," is sufficiently comprehensive and specific to raise the point that the judgment is *res inter alios.* Lansing *v.* Sherman, 30 Mich. 49.

97. Detzur *v.* B. Stroh Brew. Co., 119 Mich. 282, 77 N. W. 948. This was an action for injuries caused by glass falling from the defendant's windows. Evidence as to a statement by the president of the defendant company in an interview with plaintiff's mother some hours after the accident, that the windows were defective, was objected to on the ground of incompetency. It was held that the objection was not sufficiently specific, since it might have been based upon the lack of authority of the president at the time he made the statement, or that it was an admission made during an attempt to compromise.

98. *United States.* — Baltimore & O. R. Co. *v.* Hellenthal, 88 Fed. 116, 31 C. C. A. 414; New York, N. H. & H. R. R. Co. *v.* O'Leary, 93 Fed. 737, 35 C. C. A. 562; Charleston Ice Mfg. Co. *v.* Joyce, 54 Fed. 332, 4 C. C. A. 368, 8 U. S. App. 309; Tabor *v.* Commercial Nat. Bank, 62 Fed. 383, 10 C. C. A. 429.

Arkansas. — See also Jones *v.* Melindy, 62 Ark. 203, 36 S. W. 22.

Colorado. — Nelson *v.* First Nat. Bank, 8 Colo. App. 531, 46 Pac. 879; Colorado City *v.* Smith, 17 Colo. App. 172, 67 Pac. 909; Hindry *v.* McPhee, 11 Colo. App. 401, 53 Pac. 389; Oakes *v.* Miller, 11 Colo. App. 374, 55 Pac. 193.

Georgia. — Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959; Pool *v.* State, 87 Ga. 526, 13 S. E. 556. See also Sharpton *v.* Johnson, 86 Ga. 443, 12 S. E. 646; Ratteree *v.* State, 78 Ga. 335; Fisher *v.* State, 73 Ga. 595.

Kansas. — Atchison T. & S. F. R. Co. *v.* Hays, 8 Kan. App. 545, 54 Pac. 322; State *v.* Cole, 22 Kan. 474; Humphrey *v.* Collins, 23 Kan. 549; Osborn *v.* Woodford, 31 Kan. 290, 1 Pac. 548.

Maine. — Glidden *v.* Dunlap, 28 Me. 379; State *v.* Savage, 69 Me. 112; White *v.* Chadbourne, 41 Me. 149.

Missouri. — McCartney *v.* Shepard, 21 Mo. 573, 64 Am. Dec. 250; State *v.* Gates, 20 Mo. 400; Mathews *v.* Lecompte, 24 Mo. 545; State *v.* Westlake, 159 Mo. 669, 61 S. W. 243.

North Carolina. — Tilley *v.* Bivens, 110 N. C. 343, 14 S. E. 920.

Tennessee. — Knoxville Iron Co. *v.* Dobson, 15 Lea 409.

Texas. — Andrews *v.* State (Tex. Crim.), 25 S. W. 425; Bailey *v.* State, 37 Tex. Crim. 579, 40 S. W. 281; Morton *v.* Mitchell, 13 Tex. 47.

An objection to evidence by simply saying "I object" is not available on appeal. Hutchinson *v.* Whitmore,

perhaps the evidence is clearly inadmissible for any purpose.[99]

D. When Evidence Is Admissible for Any Purpose. — A general objection is insufficient if the offered evidence is admissible for any purpose in the case;[1] or, as sometimes stated, such an objection is insufficient unless the evidence is wholly inadmissible for any purpose or in any aspect of the case.[2]

95 Mich. 592, 55 N. W. 438; Brown *v.* Weightman, 62 Mich. 557, 29 N. W. 98; San Antonio *v.* Potter (Tex. Civ. App.), 71 S. W. 764; Andrews *v.* State, 118 Ga. 1, 43 S. E. 852.

A mere general objection stating no grounds whatever is not sufficient to question the competency of the testimony of medical witnesses as to what medical books say upon a particular question. Kreuziger *v.* Chicago & N. W. R. Co., 73 Wis. 158, 40 N. W. 657.

99. A mere statement by a party that he "objects" will not be considered unless the question be not calculated to elicit material and competent testimony. Waller *v.* Leonard, 89 Tex. 507, 35 S. W. 1045.

1. *California.* — Sneed *v.* Osborn, 25 Cal. 619.

Kansas. — Smith *v.* Leighton, 38 Kan. 544, 17 Pac. 52, 5 Am. St. Rep. 778.

Minnesota. — Schell *v.* Second Nat. Bank, 14 Minn. 43.

Missouri. — People's Bank *v.* Scalzo, 127 Mo. 164, 29 S. W. 1032.

Nevada. — State *v.* Soule, 14 Nev. 453.

New York. — Bergmann *v.* Jones, 94 N. Y. 51; Tooley *v.* Bacon, 70 N. Y. 34; Dilleber *v.* Home L. Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182.

Tennessee. — East Tennessee, V. & G. R. Co. *v.* Gurley, 12 Lea 46; Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046.

Texas. — Sims *v.* State, 30 Tex. App. 605, 18 S. W. 410; Chambers *v.* State (Tex. Crim.), 65 S. W. 192.

Wisconsin. — State *v.* Norton, 46 Wis. 332, 1 N. W. 22.

Where evidence is offered generally and the objection to it is general, its admission is not error if it is admissible for any purpose, and it will be presumed that the trial court used it only for a proper purpose. Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534.

When objection is made to evidence on the ground that it is irrelevant, the objection is properly overruled if there be any point in the case on which it might be relevant. Moody *v.* Sabin, 9 Cush. (Mass.) 505. See also Dreux *v.* Domec, 18 Cal. 83.

The overruling of a general objection to the reading of the paper in evidence will not be held error if such paper can properly be read as evidence for any purpose. Stansbury *v.* Stansbury, 20 W. Va. 23.

2. *United States.* — Pittsburgh & W. R. Co. *v.* Thompson, 82 Fed. 720, 27 C. C. A. 333.

Alabama. — Bates *v.* Morris, 101 Ala. 282, 13 So. 138.

Arizona. — Rush *v.* French, 1 Ariz. 99, 125, 25 Pac. 816.

Colorado. — Curr *v.* Hundley, 3 Colo. App. 54, 31 Pac. 939.

District of Columbia. — Gilbert *v.* Fay, 4 App. D. C. 38.

Florida. — Williams *v.* State, 34 So. 279.

Missouri. — State *v.* Balch, 136 Mo. 103, 37 S. W. 808.

New York. — People *v.* Place, 157 N. Y. 584, 52 N. E. 576; Quinby *v.* Strauss, 90 N. Y. 664; Bergmann *v.* Jones, 94 N. Y. 51; Tooley *v.* Bacon, 70 N. Y. 34.

Utah. — Snowden *v.* Pleasant Val. Coal Co., 16 Utah 366, 52 Pac. 599; Olson *v.* Oregon S. L. R. Co., 24 Utah 460, 68 Pac. 148.

Where a general objection is made the court may overrule it if the offered evidence is not illegal upon its face, but requires some fact to be brought to the notice of the court to show its illegality, in which case the objection must be specific and the grounds must be stated. Phillips *v.* Kelly, 29 Ala. 628, in which a general objection to declarations of a party offered in his own behalf was held properly overruled because there are circumstances un-

E. Evidence Wholly Inadmissible on Its Face. — Where, however, evidence is wholly inadmissible on its face for any purpose, a general objection to it is sufficient.[3]

der which such declarations would be competent in behalf of the party making them.

3. *Alabama.* — Davis *v.* State, 17 Ala. 415.

California. — Nightingale *v.* Scannell, 18 Cal. 315; Roche *v.* Llewellyn Iron Wks. Co., 140 Cal. 563, 74 Pac. 147; People *v.* Gordon, 99 Cal. 227, 33 Pac. 901; Sneed *v.* Osborn, 25 Cal. 619.

Florida. — Kirby *v.* State, 44 Fla. 81, 32 So. 836; Hoodless *v.* Jernigan, 35 So. 656.

Illinois. — Coles Co. *v.* Messer, 195 Ill. 540, 63 N. E. 391; Sidwell *v.* Schumacher, 99 Ill. 426; Hicks *v.* Deemer, 187 Ill. 164, 58 N. E. 252; Hardin *v.* Forsythe, 99 Ill. 312.

Missouri. — Tygard *v.* Falor, 163 Mo. 234, 63 S. W. 672; State *v.* Prendible, 165 Mo. 329, 65 S. W. 559.

New York. — People *v.* Webster, 59 Hun 398, 13 N. Y. Supp. 14; Wallace *v.* Vacuum Oil Co., 128 N. Y. 579, 27 N. E. 956.

Texas. — Guajardo *v.* State, 24 Tex. App. 603, 7 S. W. 331.

Utah. — Snowden *v.* Pleasant Val. Coal Co., 16 Utah 366, 52 Pac. 599.

General objections which state no grounds of objection "are not entitled to notice unless it happens that the true point of objection is too palpable to call for anything more definite." Stevens *v.* Hope, 52 Mich. 65, 17 N. W. 698.

An objection which states no grounds will be sustained only where the evidence is wholly irrelevant to any of the issues. Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

A general objection on the ground of incompetency is sufficient if the evidence is wholly inadmissible for any purpose. State *v.* Soule, 14 Nev. 453; Beard *v.* American Car Co., 63 Mo. App. 382.

Where evidence on its face is wholly inadmissible for any purpose, a general objection to it as "improper" is sufficient. Kirby *v.* State, 44 Fla. 81, 32 So. 836.

Where an offered declaration is plainly hearsay, a general objection thereto is sufficient. Hodges *v.* Hodges, 106 N. C. 374, 11 S. E. 364, *citing* State *v.* Wilkerson, 103 N. C. 337, 9 S. E. 415.

In Porter *v.* Parks, 2 Hun (N. Y.) 654, a general objection by the defendant to the admission of a letter of plaintiff's agent to plaintiff was held sufficient.

In Cunningham *v.* Cochran, 18 Ala. 479, 52 Am. Dec. 230, the overruling of a general objection to the declarations of a bank president offered to establish the liability of the bank was held error on the ground that the evidence was illegal on its face, and therefore required only a general objection.

An objection to evidence of the declarations of a co-conspirator made after the termination of the conspiracy as incompetent is sufficient, such declarations being wholly incompetent against a co-conspirator. State *v.* Magone, 32 Or. 206, 51 Pac. 452.

On a criminal trial, evidence of a previous plea of guilty by the defendant which the court had refused to receive, and which had not been entered of record, was held improperly admitted, although the objection thereto was merely general, since the evidence was wholly incompetent. State *v.* Meyers, 99 Mo. 107, 12 S. W. 516.

In an action for libel, an objection to the admission of a libelous publication by the defendant subsequent to the commencement of the action as "immaterial and having nothing to do with this case" was held sufficiently specific. In New York it is held that neither the repetition of the libel nor the publication of other libelous matter after the commencement of the action is admissible for any purpose. Eccles *v.* Radam, 75 Hun 535, 27 N. Y. Supp. 486, *distinguishing* Daly *v.* Byrne, 77 N. Y. 182.

Where evidence is illegal upon its face, as evidence of the pecuniary

F. Grounds of Objection Which Could Not Be Obviated. The rule requiring objections to be specific and point out the grounds on which they are based has no application when it is clearly apparent that the grounds of objection are such that they could not be removed or obviated at the trial if pointed out.[4]

condition of the plaintiff in a slander case, a general objection is sufficient. Pool *v.* Deevers, 30 Ala. 672. See also Gabriel *v.* State, 40 Ala. 357.

On a prosecution for larceny, evidence as to a conversation between the prosecuting witness and another person when the defendant was not present was admitted over the defendant's general objection. This was held error because the evidence was hearsay and incompetent for any purpose. "The general rule which requires a party objecting to evidence to specify the ground of objection, is to prevent surprise and to enable the court and the other party, in dealing with the objection, to act understandingly. There are often technical objections to questions, which, upon being suggested, will at once be acquiesced in or induce a change in the form of the question or mode of proof by which the objection is obviated. In such cases common fairness and the due administration of justice requires that the party should, by specifying the ground of the objection, bring the attention of the court directly to the point, and if he omits to do so he is justly deprived of the benefit of his objection. For example, it is a general rule that a party shall not put leading questions to his own witness; and there is another rule, that the best evidence of a fact must be produced. If a party objects to a question, and the only objection is that the question is leading, he must put his objection on this ground; or, if oral evidence of a written contract is offered, the party objecting on account of this mode of proof must so state. In these and like cases, the objection, when specified, may usually be obviated at the time; and at all events, the court and party are apprised of the precise point, and the ruling is made with a full understanding of the objection. We think, however, the general objection made in this case was sufficient. . . . There was no possible view of the case, as it then or afterward stood, in which such a conversation was admissible. When the witness was asked to state the conversation, and counsel objected, both the court and the prosecuting officer must have understood that it was an objection to the competency of the proposed evidence." People *v.* Beach, 87 N. Y. 508.

4. Clauser *v.* Stone, 29 Ill. 114, 81 Am. Dec. 299; Sidwell *v.* Schumacher, 99 Ill. 426; Moser *v.* Kreigh, 49 Ill. 84; Stouter *v.* Manhattan R. Co., 127 N. Y. 661, 27 N. E. 805; Patterson *v.* People, 12 Hun (N. Y.) 137; Tozer *v.* New York C. & H. R. R. Co., 105 N. Y. 659, 11 N. E. 846; Crawford *v.* Metropolitan Elev. R. Co., 120 N. Y. 624, 24 N. E. 305; Larned *v.* Hudson, 57 N. Y. 151; Potter *v.* Greene, 51 Hun 6, 3 N. Y. Supp. 605.

"As the object of requiring a specific objection is to enable the other party to obviate it if possible, if the objection is apparent and it is clear that the defect cannot possibly be obviated a specific objection would not help the adverse party, and in such case a general objection would be sufficient." Rush *v.* French, 1 Ariz. 99, 125, 25 Pac. 816.

In an action for personal injuries a general objection to a question calling for the complaints of the injured person subsequent to the injury is sufficient, since the testimony is wholly incompetent and the question could not have been recast in any way to make it competent. Donohue *v.* Brooklyn, Q. C. & S. R. Co., 53 App. Div. 348, 65 N. Y. Supp. 634.

In an action by an executor on a cause of action arising after the death of the testator, the defendant sought to prove as a set-off an account against the testator, which was objected to by the plaintiff on the ground that "such proof was incompetent under the circumstances of the

G. Grounds of Objection Which Might Be Removed. — But on the other hand a general objection to evidence is not sufficient if the grounds of objection are such that they might be removed or obviated if specifically pointed out.[5]

H. On Appeal. — a. *Generally.* — A general objection which states no grounds is not entitled to consideration on appeal,[6] even

case." The overruling of this objection was held error on the ground that although general in its character it could not have been obviated by the defendant, because an account against a testator cannot be used as a set-off to a cause of action by the executor arising after the testator's death. "The objection was *in the law.* The evidence offered constituted *no defense.*" Merritt *v.* Seaman, 6 N. Y. 168, *reversing* 6 Barb. (N. Y.) 330.

5. *United States.* — Noon *v.* Caledonia Min. Co., 121 U. S. 393.

California. — Dunning *v.* Rankin, 19 Cal. 640; People *v.* Louie Foo, 112 Cal. 17, 44 Pac. 453; Morehouse *v.* Morehouse, 140 Cal. 88, 73 Pac. 738.

Colorado. — Cody *v.* Butterfield, 1 Colo. 377; Cowel *v.* Colorado Springs Co., 3 Colo. 82.

Illinois. — Walcott *v.* Gibbs, 97 Ill. 118; Clevenger *v.* Dunaway, 84 Ill. 367; Moser *v.* Kreigh, 49 Ill. 84; Calumet & C. Canal & Dock Co. *v.* Morawitz, 195 Ill. 398, 63 N. E. 165; Cantwell *v.* Welch, 187 Ill. 275, 58 N. E. 414; Chicago, P. & St. L. R. Co. *v.* Nix, 137 Ill. 141, 27 N. E. 81; Benefield *v.* Albert, 132 Ill. 665, 24 N. E. 634; Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837.

Massachusetts. — New Hampshire F. Ins. Co. *v.* Healey, 151 Mass. 537, 24 N. E. 913.

New Hampshire. — Hayward *v.* Bath, 38 N. H. 179; Haynes *v.* Thom, 28 N. H. 386. See State *v.* Flanders, 38 N. H. 324.

New York. — Crawford *v.* Metropolitan Elev. R. Co., 120 N. Y. 624, 24 N. E. 305.

North Dakota. — Kolka *v.* Jones, 6 N. D. 461, 71 N. W. 558.

Texas. — Croft *v.* Rains, 10 Tex. 520.

A General Objection to an Unstamped Note as "incompetent, irrelevant and immaterial . . . and according to the laws of the United States and the state of Illinois" not competent evidence in any legal proceeding, was held not sufficiently specific to question its admissibility under the United States revenue act requiring certain instruments to be stamped. Richardson *v.* Roberts, 195 Ill. 27, 62 N. E. 840.

A General Objection to Memoranda made by the party offering them was held insufficient to question their competency, since they might have been rendered competent by such party's testimony verifying the entries as original and correct, and showing that he was unable to recollect the items independently of the memoranda. Wilson *v.* Kings Co. Elev. R. Co., 114 N. Y. 487, 21 N. E. 1015.

Lack of Seal. — An objection to the introduction of a notarial protest, no grounds being stated, does not raise the point that it is incompetent because it has no seal, since this difficulty might be obviated at the time of the trial. "We would not hold parties to a rule too strict in this respect, but we do think some degree of particularity is required. Thus if it had been objected that the protest was not properly authenticated, that it was not properly signed and sealed, we say if the bill of exceptions showed anything of this nature we should be inclined to give appellant the benefit of any defect in the instrument which 'would fairly range itself under such objections." Rindskoff *v.* Malone, 9 Iowa 540, 74 Am. Dec. 367.

6. *United States.* — Camden *v.* Doremus, 3 How. 515; Rhodes *v.* United States, 79 Fed. 740, 25 C. C. A. 186; Patrick *v.* Graham, 132 U. S. 627.

Alabama. — Gunter *v.* State, 111 Ala. 23, 20 So. 632.

California. — People *v.* Apple, 7 Cal. 289.

Florida — Edwards *v.* State, 39 Fla. 753, 23 So. 537.

though the evidence was open to objection on grounds which could not have been obviated.[7] This rule, however, is held not to apply

Georgia. — Clarke *v.* State, 90 Ga. 448, 16 S. E. 96.

Indiana. — Cox *v.* Stout, 85 Ind. 422; Litten *v.* Wright School Twp., 127 Ind. 81, 26 N. E. 567; Cincinnati, I. St. L. & C. R. Co. *v.* Howard, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593; McKinsey *v.* McKee, 109 Ind. 209, 9 N. E. 771; Bundy *v.* Cunningham, 107 Ind. 360, 8 N. E. 174; Bowell *v.* De Wald, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. Rep. 240.

Iowa. — O'Hagan *v.* Clinesmith, 24 Iowa 249; Chase *v.* Walters, 28 Iowa 460; Clark *v.* Connor, 28 Iowa 311.

Michigan. — Abbott *v.* Chaffee, 83 Mich. 256, 47 N. W. 216. See People *v.* Pope, 108 Mich. 361, 66 N. W. 213.

Mississippi. — Doe *v.* Natchez Ins. Co., 8 Smed. & M. 197.

Missouri. — Strauss *v.* Ayers, 34 Mo. App. 248; Merchants Nat. Bank *v.* Abernathy, 32 Mo. App. 211; Rhorer *v.* Brockhage, 15 Mo. App. 16; Chaffe *v.* Memphis, C. & N. W. R. Co., 64 Mo. 193; Keim *v.* Union R. & Transit Co., 90 Mo. 314, 2 S. W. 427; Geer *v.* Redman, 92 Mo. 375, 4 S. W. 745; Boston *v.* Murray, 94 Mo. 175, 7 S. W. 273.

Montana. — Helena *v.* Albertose, 8 Mont. 499, 20 Pac. 817; Territory *v.* Bryson, 9 Mont. 32, 22 Pac. 147; Maddox *v.* Teague, 18 Mont. 512, 46 Pac. 535.

Nebraska. — Morgan *v.* Larsh, 1 Neb. 361.

New Jersey. — State *v.* Hendrick, 56 Atl. 247, *citing* Donnelly *v.* State, 26 N. J. L. 463, and other cases.

Oklahoma. — Enid & A. R. Co. *v.* Wiley, 14 Okla. 310, 78 Pac. 96.

South Carolina. — Pearson *v.* Spartanburg Co., 51 S. C. 480, 29 S. E. 193; Riser *v.* Southern Ry., 67 S. C. 419, 46 S. E. 47; Gwynn *v.* Citizens Tel Co., 69 S. C. 434, 48 S. E. 460.

Tennessee. — Furnish *v.* Burge (Tenn. Ch.), 54 S. W. 90; Campbell *v.* Campbell, 3 Head 325; Crane *v.* State, 94 Tenn. 86, 28 S. W. 317.

Utah. — Culmer *v.* Clift, 14 Utah 286, 47 Pac. 85.

"Where various objections may be made to evidence, some of which may be removed by other proof, the party making the objections ought to point out specifically those he insists on, and thereby put the adverse party on his guard, and afford him an opportunity to obviate them. He ought not to be permitted, after interposing a general objection, to insist on particular objections in this court, which, if they had been suggested in the court below, might have been instantly removed. A due regard for the character of the courts and the rights of suitors will not for a moment tolerate such practice. Sargeant *v.* Kellogg, 5 Gil. 281." Swift *v.* Whitney, 20 Ill. 144.

Where no grounds are assigned for the objection no grounds will be considered on appeal unless they relate to the relevancy or competency of the testimony offered. Stiles *v.* Giddens, 21 Tex. 784.

A General Objection to Cross-Examination is not available on appeal. State *v.* Dent, 170 Mo. 398, 70 S. W. 881.

An objection to evidence as not pertinent or material to the issues is too general to be considered on appeal. Furnish *v.* Burge (Tenn. Ch.), 54 S. W. 90.

Where the subject-matter of a question is competent, if the question is capable of a construction which makes it competent, a general objection will not be regarded, although it is also capable of a construction which may render it incompetent, since it does not affirmatively appear that the court decided the precise point claimed as error. Bryant *v.* Trimmer, 47 N. Y. 96.

7. An objection to evidence as incompetent is not sufficiently specific, even though the objection if specifically pointed out could not have been obviated. "It matters not whether it could have been obviated if made below or not; the party intending to rely on it must not content himself with a general objection below and then make a special point of objection for the first time in this court." Clark *v.* Conway, 23 Mo. 438.

in case the evidence objected to is on its face wholly inadmissible.[8]

b. *Admission Subject to Legal Objections.* — Where evidence is admitted subject to all legal objections and exceptions, the appellate court will consider only those specific objections pointed out in the court below.[9]

I. Right of Trial Court To Sustain General Objection. a. *Generally.* — The right of the trial court to sustain a general objection must be distinguished from its power to overrule or disregard such an objection. It is not necessarily error to sustain an objection merely because it is so general that the court might properly have refused it any consideration.[10] Where a general objection is interposed and no request is made for a specification of the grounds of objection it is not error to sustain it if the evidence was objectionable on any grounds, the presumption being that the ruling was based upon the right ground.[11] But if evidence be

8. Nightingale *v.* Scannell, 18 Cal. 315, 324, *distinguishing* and *qualifying* Kiler *v.* Kimbal, 10 Cal. 267. See also Ward *v.* Wilms, 16 Colo. 86, 27 Pac. 247; Lothrop *v.* Roberts, 16 Colo. 250, 27 Pac. 698; Larkin *v.* Baty, 111 Ala. 303, 18 So. 666; Washington *v.* State, 106 Ala. 58, 17 So. 546; Garsed *v.* Turner, 71 Pa. St. 56; Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344.

As a rule a general objection will not be considered on appeal since the court and the opposite party should be informed of the grounds so that they may act intelligently. "But when evidence is not competent for any purpose, or is wholly irrelevant, a general objection would be sufficient." McCadden *v.* Lowenstein, 92 Tenn. 614, 22 S. W. 426, in which an objection to evidence as "irrelevant and incompetent" was held sufficient, the evidence objected to being wholly incompetent for any purpose.

9. Admission Subject to All Objections. — Where counsel agree that certain evidence shall be admitted subject to exceptions, the court on appeal can only act upon objections and exceptions taken in the court below when the evidence was introduced. Levy *v.* Taylor, 24 Md. 282.

Where certain grand list books of a town were admitted in evidence subject to all legal objections, it was held that the objecting party, having failed to specify the grounds of his objection, was not entitled to an exception to the ruling admitting the books, but that the general objection was sufficient merely to save his right to specify rulings on defects that were called to the attention of the court before the case was finally submitted to the jury. Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907.

10. Storms *v.* Lemon, 7 Ind. App. 435, 34 N. E. 644.

11. *Missouri.* — State *v.* Hope, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608; Crow *v.* Stevens, 44 Mo. App. 137.

Nebraska. — Hurlbut *v.* Hall, 39 Neb. 889, 58 N. W. 538; Imhoff *v.* Richards, 48 Neb. 590, 67 N. W. 483.

New York. — Tooley *v.* Bacon, 70 N. Y. 34; Height *v.* People, 50 N. Y. 392; Wilson *v.* Steers, 18 Misc. 364, 41 N. Y. Supp. 550.

North Carolina. — Gidney *v.* Moore, 86 N. C. 484.

It is not error to exclude evidence on a general objection to it as irrelevant, immaterial and incompetent where it appears that the evidence was open to the objection of variance from the pleadings, although this objection was not made. "An objection to evidence is but a reason offered for its exclusion. The objection may be untenable or insufficient, yet, if sustained, and there appears any other reason for which the evidence should have been excluded, the ruling must stand. And even where no objection is made, but the court excludes evidence of its own motion, the ruling will be

competent and admissible for any purpose it is error to sustain a general objection to it.[12]

b. *Evidence Partially Inadmissible.* — There is a conflict in the authorities as to whether a general objection to evidence, a part of which is inadmissible, may be sustained, some holding that it is,[13] and others that it is not,[14] error to sustain such an objection. But a question containing several inquiries, some of which are proper and others improper, may be excluded on a general objection.[15]

sustained, if the evidence was for any reason inadmissible. 'If the court decides correctly in rejecting the testimony, it is not important whether the best objection was made, or whether any objection was made.'" Davey *v.* Southern Pac. Co., 116 Cal. 325, 48 Pac. 117, *reversing* 45 Pac. 170.

Contra, San Luis Water Co. *v.* Estrada, 117 Cal. 168, 48 Pac. 1075. See also Continental Nat. Bank *v.* First Nat. Bank, 108 Tenn. 374, 68 S. W. 497.

Where the grounds of objection were stated as follows: "On all the grounds ever known or heard of," it was held that the trial court should not have entertained the objections and excluded the evidence. "Objections made in that form are unfair both to the court and adverse party, and entertaining such objections tends to lower the dignity of the court." Johnston *v.* Clements, 25 Kan. 376.

12. Chaffe *v.* Memphis, C. & N. W. R. Co., 64 Mo. 193.

13. Curtis *v.* Moore, 20 Md. 93; Moore *v.* McDonald, 68 Md. 321, 12 Atl. 117; Trahern *v.* Colburn, 63 Md. 99; Everett *v.* Neff, 28 Md. 176; United States *v.* McMasters, 4 Wall. (U. S.) 680; Board of Education *v.* Keenan, 55 Cal. 642.

General objections to a question propounded to a witness cannot be lawfully sustained if any part of the testimony which the examiner seeks to elicit by the query is admissible over the objections. Chicago & N. R. Co. *v.* De Clow, 124 Fed. 142.

14. Seaboard Air-Line R. Co. *v.* Phillips, 117 Ga. 98, 43 S. E. 494; Sodusky *v.* McGee, 5 J. J. Marsh. (Ky.) 621; Brantley *v.* Gunn, 29 Ala. 387; McCutchen *v.* Loggins, 109 Ala. 457, 19 So. 810; Murphy *v.* State, 108 Ala. 10, 18 So. 557.

Where an offer of proof includes many different propositions grouped together, it is not error to sustain an objection to it as "incompetent, irrelevant and immaterial" if proof of any one proposition was incompetent, irrelevant or immaterial. Swafford *v.* Board of Education, 127 Cal. 484, 59 Pac. 900.

Not Applicable to Murder Case. The rule that where an offer blends irrelevant and inadmissible matters with matter relevant and admissible, and it is met and rejected as a whole, the rejection of it is not error (as laid down in Sennett *v.* Johnston, 9 Pa. St. 335; Wharton *v.* Douglas, 76 Pa. St. 273), should not apply to sustain a ruling prejudicial to the interests of a defendant on trial for murder. Com. *v.* Bezek, 168 Pa. St. 603, 32 Atl. 109.

15. Where a double inquiry is put to a witness as an entire and inseparable proposition, and is excluded upon an objection that it is incompetent, irrelevant and immaterial, if any branch or element of the inquiry is plainly subject to any ground of the objection the ruling cannot be assailed as error. Jennison *v.* Haire, 29 Mich. 207.

Where a question consists of several parts it is not error for the court to sustain an objection thereto, although some parts of the question are competent. The court, when called on to determine the legality of a question propounded to a witness under oral examination, must decide upon it in its entirety. The obligation rests upon the counsel propounding the question to show that it is free from legal objection, and the *onus* does not rest either upon the court or the party objecting to separate that part of it which may be

c. *Objections Which Might Be Obviated.* — It is error for the trial court to sustain a general objection to evidence which is only objectionable upon some ground which might be obviated.[16]

Secondary Evidence cannot be excluded upon a general objection or upon an objection which does not attack it as secondary, since this ground of objection might be obviated or the parties may be willing to waive it.[17]

J. Sustaining Specific Objection. — It is error for the court to exclude evidence when the specific ground of objection stated is untenable,[18] unless the evidence was wholly inadmissible and could

legal from that which is illegal. Carroll *v.* Granite Mfg. Co., 11 Md. 399.

16. Patterson *v.* People, 12 Hun (N. Y.) 137; McKiernan *v.* Ballin, 26 Misc. 826, 56 N. Y. Supp. 949; Bright *v.* Ecker, 9 S. D. 449, 69 N. W. 824, in which it was held error for the trial court to exclude a record made by statute *prima facie* evidence of the plaintiff's cause of action, in response to a general objection, where it appeared that the real ground of objection was that proper preliminary proof had not been made. "If such was the reason which moved the mind of the trial court to exclude the evidence it was manifestly unjust to plaintiff not to have notified him that he might have an opportunity to supply the defect if any existed. . . . There may be exceptional cases where a trial court may with propriety reject evidence on its own motion, or upon a general objection, but such cases are rare. Rush *v.* Frend, 1 Ariz. 99, 25 Pac. 816; Road Co. *v.* Loomis, 32 N. Y. 127; Corning *v.* Corning, 6 N. Y. 97. Usually it is the duty of the trial court to receive all evidence to which specific objections are not assigned. The case at bar is clearly not one of the exceptions."

Although a question on cross-examination asking the witness whether he has ever been convicted of a criminal offense may be objectionable in form because not fixing the time and place, it is error to sustain a general objection thereto on the ground that the question was inadmissible. Shafer *v.* Eau Claire, 105 Wis. 239, 81 N. W. 409.

Sustaining a general objection to a question calling for material evidence is error, although the question in form may be objectionable as calling for a conclusion. Gerry *v.* Siebrecht (App. Div.), 84 N. Y. Supp. 250.

17. Where the only objection is to the materiality of offered evidence, it was said, though not expressly held, that the trial court should not have excluded the evidence because it was secondary. "No objection was made to its competency or otherwise. While as a general rule the ruling of a court will be sustained upon any good ground, though not stated in the objection or ruling, notwithstanding the one that is stated is insufficient, it is not a universal rule," because even though the evidence offered may be technically incompetent because secondary the parties may not desire to raise any question as to its competency. State *v.* Shelton, 16 Wash. 590, 48 Pac. 258, 49 Pac. 1064.

The court is not justified in excluding secondary evidence otherwise competent and relevant on the ground that a sufficient preliminary showing has not been made, where the objection to the evidence is not based upon this ground. McCarty *v.* Johnson, 20 Tex. Civ. App. 184, 49 S. W. 1098.

18. Tooley *v.* Bacon, 70 N. Y. 34.

Bogan *v.* Finlay, 19 La. Ann. 94, in which a letter was offered to show that the writer had made a manual gift of chattels accompanied with delivery. The exclusion of the letter upon an objection merely on the ground that the pretended gift was not a manual one in the sense of the statute, and could not be proved by the letter offered, was held error, since such ground of objec-

not have been rendered competent, in which case its exclusion is proper.[19]

K. Right to Statement of Grounds of Objection or Exclusion. — Where a general objection is made the party offering the evidence is ordinarily entitled on request to a more specific statement of the grounds upon which the objection is based,[20] and it is

tion was untenable. But see State *v.* West, 45 La. Ann. 14, 12 So. 7.

Where evidence is erroneously excluded on a specific objection, the court on appeal will not consider whether the evidence could not have been properly excluded on other grounds which were not stated. McComb *v.* Turner, 14 Smed. & M. (Miss.) 119.

"Where evidence of previous contradictory statements of witnesses was excluded upon objection that it was improper, immaterial and hearsay, this ruling was held error, since the only proper ground of objection to the evidence, namely, that no foundation had been laid by first calling the witnesses' attention to the statement, was not made and evidently purposely avoided. Where counsel, knowing the purpose of the evidence, objected to it on every ground except the right one, he will be held to have waived the ground not stated, especially where it might have been obviated. Such conduct tends to mislead his adversary." Height *v.* People, 50 N. Y. 392.

Where the testimony of a witness in another action is competent because of the decease of the witness, it is error for the trial court to exclude such testimony, although the proper foundation has not been laid by the production of the record in the other trial, where the objection which was sustained was not made on that ground, since if it had been it could have been obviated. Charlesworth *v.* Tinker, 18 Wis. 633.

19. Spottiswood *v.* Weir, 80 Cal. 448, 22 Pac. 289.

Where evidence is rejected which could in no event become material to the question at issue, its rejection is proper, irrespective of the grounds upon which the ruling was based. It is only important to state the true grounds in cases where it is possible to obviate the difficulty. People *v.* Brandreth, 36 N. Y. 191.

An objection to evidence as immaterial and irrelevant, but not as incompetent, is sufficient to sustain a ruling excluding it if the evidence is of such a nature that it could not have been made competent. Gilroy *v.* Loftus, 21 Misc. 317, 47 N. Y. Supp. 138, *citing* Tooley *v.* Bacon, 70 N. Y. 34.

Although an objection to a question is based on the ground of irrelevancy and immateriality, if the court excludes the question on the ground of the total incompetency of the witness to testify the effect is the same as though the objection had been made upon the latter ground. Mutual L. Ins. Co. *v.* Oliver, 95 Va. 445, 28 S. E. 594.

20. Bandy *v.* Hyde, 50 N. H. 116.

Court May Require Specification. The court may require the objector to make a more specific statement of the grounds of his objection, where this is possible. Miller *v.* State, 12 Lea (Tenn.) 223; Sawyer *v.* Patterson, 11 Ala. 523; Walker *v.* Hoeffner, 54 Mo. App. 554. See also O'Neill *v.* Kansas City, 178 Mo. 91, 77 S. W. 64; Davey *v.* Janesville, 111 Wis. 628, 87 N. W. 813.

Where the objection to questions was that they were incompetent, irrelevant and immaterial, and upon request the objecting party refused to state more specifically the grounds of his objection, the sustaining of the objection without requiring him to do so was held error. "It should be remembered that the object of making objections is not for the sole purpose of enabling the objecting party to insist on error in the appellate court, but that one of the objects is to enable the counsel putting the questions to avoid error and more effectually prove his case or defense. We think the defendant's counsel should have been required to make more specific objections if he

error for the court, after sustaining such an objection, to refuse to explain the grounds of its ruling in response to a *bona fide* request from the party offering the evidence.[21]

2. Particular General Objection. — A. Incompetent, Irrelevant and Immaterial. — The value and sufficiency of the general and all inclusive objection "incompetent, irrelevant and immaterial" depends largely upon the nature of the evidence against which it is urged.[22] It is sometimes said that this objection is not sufficiently specific to be considered,[23] or, on the contrary, that it is

had any; or at least to have been required to state the theory upon which he regarded such questions objectionable." Colburn *v.* Chicago, St. P., M. & O. R. Co., 109 Wis. 377, 85 N. W. 354. See also Wolverton *v.* Com., 7 Serg. & R. (Pa.) 277.

21. Where an objection to a question on the ground that it was incompetent and immaterial had been sustained after the refusal of the objecting party to more specifically state the grounds of his objection, the party offering the evidence appealed to the court to indicate specifically and in such manner "the ground and reason of sustaining the objection" that he might "form questions to meet the court's rulings." The refusal of the court to comply with such a *bona fide* request was held error. "True, counsel of the respective parties are expected to try their own side of the case without the aid of the court, but when counsel on either side is unable to comprehend the ground or reason for excluding evidence, and in good faith appeals to the court to specifically indicate such ground and reason, in order that he may frame his questions in such a manner as to meet such ruling, then in our judgment it becomes the duty of the court to indicate such ground or reason specifically." Colburn *v.* Chicago, St. P., M. & O. R. Co., 109 Wis. 377, 85 N. W. 354.

22. "The stock objection 'incompetent, irrelevant and immaterial' covers a multitude of sins. There is hardly an objectionable question but that can be classified under one or other of these heads. Sometimes the real nature of the objection is so plain that the general phrase will be quite sufficient to indicate it; indeed, it may be quite apparent without any statement of the grounds of objection at all. But there are many other objections which rest upon some particular theory of the case, or upon some single fact in proof, which a judge may readily forget in the course of a long and intricate trial. It is only fair in such cases to require counsel to state clearly to the trial judge on what ground it is that they object. Certainly it is not fair to allow such a general dragnet as 'incompetent, irrelevant and immaterial' to be cast over every bit of evidence in the case which counsel would like to keep out, and then to permit counsel, upon careful analysis of the printed narrative of the trial, to formulate some specification of error not thought of at the time, and which, if seasonably called to the court's attention, might have been avoided or corrected." Sigafus *v.* Porter, 84 Fed. 430, 28 C. C. A. 443.

23. *Illinois.* — See Gage *v.* Eddy, 186 Ill. 432, 57 N. E. 1030.

Indiana. — Mortgage Trust Co. *v.* Moore, 150 Ind. 465, 50 N. E. 72; Miller *v.* Dill, 149 Ind. 326, 49 N. E. 272; State *v.* Hughes, 19 Ind. App. 266, 49 N. E. 393; Swain *v.* Swain, 134 Ind. 596, 33 N. E. 792; Evansville & R. R. Co. *v.* Fettig, 130 Ind. 61, 29 N. E. 407; Johnson *v.* Brown, 130 Ind. 534, 28 N. E. 698; Walter *v.* Walter, 117 Ind. 247, 20 N. E. 148; Metzger *v.* Franklin Bank, 119 Ind. 359, 21 N. E. 973; Stringer *v.* Frost, 116 Ind. 477, 19 N. E. 331, 9 Am. St. Rep. 875, 2 L. R. A. 614; McCullough *v.* Davis, 108 Ind. 292, 9 N. E. 276; Byard *v.* Harkrider, 108 Ind. 376, 9 N. E. 294; Chapman *v.* Moore, 107 Ind. 223, 8 N. E. 80; Indiana, B. & W. R. Co. *v.* Cook, 102

sufficiently definite in the absence of a request for a more specific statement.[24] Generally, however, it is held to be governed by the general rules heretofore discussed.[25] Thus if the grounds of objection are perfectly obvious and the evidence is wholly inadmissible for any purpose, this general objection is sufficient.[26] If, however, the grounds are of such a nature that they are not plainly apparent,[27] or that they might be obviated,[28] or if the evidence is

Ind. 133, 26 N. E. 203; Lake Erie & W. R. Co. *v.* Parker, 94 Ind. 91.

Missouri. — Puth *v.* St. Louis Transit Co. (Mo. App.), 71 S. W. 1055; Three States Lumb. Co. *v.* Rogers, 145 Mo. 445, 46 S. W. 1079; Roe *v.* Bank of Versailles, 167 Mo. 406, 67 S. W. 303; Rice *v.* Waddill, 168 Mo. 99, 120, 67 S. W. 605.

Texas. — Phillips *v.* State (Tex. Crim.), 50 S. W. 378.

24. Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933. See Bennett *v.* McDonald, 59 Neb. 234, 80 N. W. 826. But see Chicago, R. I. & P. R. Co. *v.* Archer, 46 Neb. 907, 65 N. W. 1043.

25. See *supra*, IV, 1.

26. Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878; Arnold *v.* Producers Fruit Co., 128 Cal. 637, 61 Pac. 283; Roche *v.* Llewellyn Iron Wks. Co., 140 Cal. 563, 74 Pac. 147; Alcorn *v.* Chicago & A. R. Co. (Mo.), 14 S. W. 943, 16 S. W. 229; First Nat. Bank *v.* Carson, 30 Neb. 104, 46 N. W. 276; Sparf *v.* United States, 156 U. S. 51.

An objection to evidence as incompetent, irrelevant and immaterial is sufficiently specific where the evidence is so obviously and certainly hearsay that the court "even on its own motion should have stricken it out." Parker *v.* United States, 1 Ind. Ter. 592, 43 S. W. 858.

In an action for personal injuries, evidence of precautions taken by defendant immediately after the accident was objected to as incompetent, irrelevant and immaterial. It was held that the objection was sufficiently specific, since the evidence was wholly inadmissible and misleading. Alcorn *v.* Chicago & A. R. Co., 108 Mo. 81, 18 S. W. 188.

In a criminal case a general objection to the testimony at a former trial of a witness who is absent from the state at the second trial, on the ground that it is incompetent, irrelevant and immaterial, is sufficiently specific, since such testimony is absolutely incompetent. People *v.* Gordon, 99 Cal. 227, 33 Pac. 901. See also People *v.* Bojorquez, 55 Cal. 463.

In State *v.* Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756, a prosecution for homicide, an objection by the defendant to evidence of his previous slander of the deceased's brother on the ground that it was "incompetent, immaterial and irrelevant" was held sufficient in spite of the previous uniform holding that this objection is "no objection at all," since such evidence when offered by the state was "no evidence at all."

27. A general objection to evidence that it is irrelevant, incompetent and immaterial is not sufficient, unless from the offered evidence itself a sufficient reason for excluding it appears. Wabash Val. Protective Union *v.* James, 8 Ind. App. 449, 35 N. E. 919; McCloskey *v.* Davis, 8 Ind. App. 190, 35 N. E. 187; Keesling *v.* Doyle, 8 Ind. App. 43, 35 N. E. 126. Or unless the point intended to be raised thereby was so obvious as to probably occur to the judge's mind on the tender of a general objection. Ward *v.* Ward, 37 Mich. 253.

An objection to testimony as to the expense incurred by the plaintiff for medical treatment, on the ground that "it was incompetent, immaterial and irrelevant," is not sufficiently specific to question the competency of the evidence on the ground that the physicians who gave the treatment are not entitled to practice under the statute. Chicago & E. R. Co. *v.* Holland, 122 Ill. 461, 13 N. E. 141.

28. Crocker *v.* Carpenter, 98 Cal. 418, 33 Pac. 271; Colton L. & W. Co. *v.* Swartz, 99 Cal. 278, 33 Pac. 878; Gage *v.* Eddy, 186 Ill. 432, 57 N. E. 1030; King *v.* Nichols, 53

admissible for any purpose,[29] they must be specifically pointed out in the objection.

B. INCOMPETENT. — It has frequently been held that an objection to evidence as "incompetent," without any specification of the grounds of incompetency, is too general to be considered.[30] But this rule does not apply, at least in some jurisdictions, where the offered evidence is manifestly incompetent for any purpose.[31]

C. IRRELEVANT. — An objection to evidence as "irrelevant" is sufficient where the irrelevancy appears from the evidence itself.[32] But otherwise such a general objection is not regarded as sufficient.[33]

Minn. 453, 55 N. W. 604; Pitts Agr. Wks. *v.* Young, 6 S. D. 557, 62 N. W. 432; New York Elec. Equip. Co. *v.* Blair, 79 Fed. 896.

An objection to a record as incompetent, irrelevant and immaterial is too broad and general to question the competency of the record for a defect which might have been remedied had the objection been specific. State *v.* Board of Supervisors, 71 Wis. 327, 37 N. W. 233.

29. People *v.* Clark, 66 Hun 626, 20 N. Y. Supp. 729; Stearns *v.* Johnson, 17 Minn. 142; Martin *v.* State, 44 Tex. Crim. 279, 70 S. W. 973.

30. *Indiana.* — Weik *v.* Pugh, 92 Ind. 382; McClellan *v.* Bond, 92 Ind. 424; Diether *v.* Ferguson Lumb. Co., 9 Ind. App. 173, 35 N. E. 843; Noftsger *v.* Smith, 6 Ind. App. 54, 32 N. E. 1024.

Missouri. — State *v.* Eisenhour, 132 Mo. 140, 33 S. W. 785; Glenville *v.* St. Louis R. Co., 51 Mo. App. 629.

New York. — Kahnweiler *v.* Smith, 14 Daly 142.

Oklahoma. — Enid & A. R. Co. *v.* Wiley, 14 Okla. 310, 78 Pac. 96.

Texas. — Perkins *v.* Buaas (Tex. Civ. App.), 32 S. W. 240.

An objection to a question as incompetent "is itself 'incompetent' because it states no grounds of objection." Tygard *v.* Falor, 163 Mo. 234, 63 S. W. 672.

An objection to evidence as incompetent, immaterial and irrelevant is insufficient where the evidence is clearly material and relevant, and no grounds of incompetency are stated. Minchen *v.* Hart, 72 Fed. 294.

An objection to evidence as to damages as "incompetent" does not raise the point that it covers a period of time subsequent to the commencement of the action. Wicks *v.* Ross, 37 Mich. 464.

31. Iverson *v.* McDonnell, 36 Wash. 73, 78 Pac. 202; State *v.* Hendrick (N. J.), 56 Atl. 247; Hynes *v.* Hickey, 109 Mich. 188, 66 N. W. 1090.

Where a question put to a witness on cross-examination requiring an answer disclosing his religious belief was objected to as "incompetent under the law," it was held that the objection sufficiently raised the point that the examination of a witness as to his religious belief is not authorized by law. "The thought expressed by the language is that the defendant could not be lawfully required to answer a question intended to disclose his religious belief." Dedric *v.* Hopsom, 62 Iowa 562, 17 N. W. 772.

An objection to evidence of subsequent precautions taken by the defendant in a personal injury action on the ground that it is "not competent" is sufficiently specific to require its exclusion. Texas & P. R. Co. *v.* Gay, 88 Tex. 111, 30 S. W. 543.

32. McDermott *v.* Judy, 67 Mo. App. 647. See also Glenville *v.* St. Louis R. Co., 51 Mo. App. 629.

33. See *infra*, IV, 2, G and H.

An objection to evidence as irrelevant which states no reasons why it is irrelevant is not sufficient if the objection could have been cured by the party offering the testimony. Owen *v.* Frink, 24 Cal. 171.

An objection to evidence as irrelevant and calculated to prejudice the jury is too general to be considered. Stanton *v.* State, 42 Tex. Crim. 269, 59 S. W. 271.

D. IMMATERIAL. — An objection to evidence as "immaterial" is not sufficiently specific to be considered,[34] unless, perhaps, its immateriality is apparent on its face;[35] though it has been held to the contrary.[36]

E. INADMISSIBLE. — An objection that evidence is "inadmissible" is too indefinite to be considered.[37]

F. INCOMPETENT AND IMMATERIAL. — The objection that evidence is "incompetent and immaterial" is not sufficiently specific,[38]

On a prosecution for homicide, an objection to evidence of a difficulty between third persons on the ground that it is irrelevant and hearsay is not sufficient, but it should be objected to as *res inter alios acta,* and because it has no bearing on or relevancy to any issue in the case. Yeary *v.* State (Tex. Crim.), 66 S. W. 1106.

34. Ohio & M. R. Co. *v.* Wrape, 4 Ind. App. 108, 30 N. E. 427; Clark *v.* People's Collateral Loan Co., 46 Mo. App. 248; Barfield *v.* State (Tex. Crim.), 51 S. W. 908.

An objection to evidence as immaterial amounts to no more than saying "I object," and is too general. Hall *v.* Gallemore, 138 Mo. 638, 40 S. W. 891.

35. "Evidence offered may be so manifestly immaterial that merely mentioning the general designation 'immaterial' will direct attention at once to the precise point intended; as if in an action on a promissory note evidence of an assault were offered. But it often happens that evidence otherwise proper may be technically immaterial because of the want of evidence of some fact to connect it with the matters in controversy. Where, as in this case, a considerable time has been occupied and a good deal of evidence taken in the trial, the general objection to evidence offered that it is immaterial may not, and in this case it is evident it did not, direct the attention of the court and opposite party to a defect in the evidence already taken." Cannady *v.* Lynch, 27 Minn. 435, 8 N. W. 164.

An objection to evidence as "immaterial" is not insufficient to be considered on appeal if the evidence objected to is wholly immaterial and the objection is supplemented by a statement of the court as to the only purpose for which the evidence was introduced. Adams *v.* State, 44 Tex. Crim. 64, 68 S. W. 270.

36. Where evidence *is* immaterial, an objection to it as immaterial is sufficiently specific. M. Groh's Sons *v.* Groh, 177 N. Y. 8, 68 N. E. 992, *reversing* 80 App. Div. 85, 80 N. Y. Supp. 438, and *distinguishing* Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Atkins *v.* Elwell, 45 N. Y. 753; Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674; Charlton *v.* Rose, 24 App. Div. 485, 48 N. Y. Supp. 1073, on the ground that in these cases the objections were either general in form or placed upon one ground, while the evidence was inadmissible upon different and distinct grounds.

37. Fowler *v.* Wallace, 131 Ind. 347, 31 N. E. 53. See also Le Bret *v.* Belzons, 13 La. 93.

An objection to evidence as "inadmissible" amounts to no more than the assertion that the evidence is illegal, and should be disregarded. The grounds of the objection should be pointed out. Leet *v.* Wilson, 24 Cal. 398.

An objection to evidence that it is "clearly inadmissible according to law" is too general, vague and indefinite to be considered on appeal. Gantling *v.* State, 40 Fla. 237, 23 So. 857.

An objection to testimony as inadmissible is too general if the testimony is admissible for any purpose whatever. Spiars *v.* State, 40 Tex. Crim. 437, 50 S. W. 947.

38. Vaughan *v.* McCarthy, 63 Minn. 221, 65 N. W. 249; Cannady *v.* Lynch, 27 Minn. 435, 8 N. W. 164; State *v.* Brown, 168 Mo. 449, 68 S. W. 568; Cumberland Tel. & Tel. Co. *v.* Poston, 94 Tenn. 696, 30 S. W. 1040. See *In re* Morgan, 104 N. Y. 74, 9 N. E. 861; Falk *v.* Gast

except, perhaps, where the grounds of objection are apparent on the face of the evidence,[39] and could not have been obviated if pointed out.[40]

G. Incompetent and Irrelevant. — An objection to evidence as "incompetent and irrelevant" is insufficient unless the evidence is clearly inadmissible for any purpose.[41]

H. Irrelevant and Immaterial. — Unless the evidence is obviously irrelevant and immaterial for any purpose in the case,[42] an objection on these general grounds is insufficient.[43]

I. Other General Objections such as "illegal,"[44] "irrelevant and illegal,"[45] "inadmissible and incompetent,"[46] and others of an

Lithograph & Engraving Co., 54 Fed. 890, 4 C. C. A. 648, 14 U. S. App. 15; Eder *v.* Gildersleeve, 85 Hun 411, 32 N. Y. Supp. 1056.

An objection to a question that it is not "material," or that it is "incompetent and immaterial and does not tend to support any of the issues," is not sufficiently specific. Shewalter *v.* Hamilton Oil Co., 28 Ind. App. 312, 62 N. E. 708.

In a prosecution for homicide, an objection to evidence of an article in defendant's newspaper containing a threat against the deceased, on the ground that it is not competent or material, does not raise the point that the article does not on its face refer to the deceased. People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495.

39. Guinotte *v.* Egelhoff, 64 Mo. App. 356.

The objections that testimony is incompetent and immaterial are sufficient where the grounds of objection are discernible, but they are futile to present a ground of objection that is not perceptible without a statement of it. Guarantee Co. of North America *v.* Phenix Ins. Co., 124 Fed. 170, 59 C. C. A. 376.

40. Olson *v.* Burlington, C. R. & N. R. Co., 12 S. D. 326, 81 N. W. 634.

41. Western Coal & Min. Co. *v.* Berberich, 94 Fed. 329, 36 C. C. A. 364; Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837; State *v.* Hilsabeck, 132 Mo. 348, 34 S. W. 38; Neely *v.* State (Tex. Crim.), 56 S. W. 625.

An objection to the admission of a power of attorney that it is irrelevant and incompetent does not raise the question that the authority thereby conferred does not extend to the act in question. Gardiner *v.* Schmaelzle, 47 Cal. 588; Snowden *v.* Pleasant Val. Coal Co., 16 Utah 366, 52 Pac. 599.

42. McKinley *v.* State (Tex. Crim.), 82 S. W. 1042; Barkman *v.* State, 41 Tex. Crim. 105, 52 S. W. 73.

An objection that evidence is immaterial or irrelevant is unavailing on appeal unless the immateriality or irrelevancy appears on the face of the offered evidence. Heap *v.* Parrish, 104 Ind. 36, 3 N. E. 549.

An objection to evidence as immaterial and irrelevant is properly overruled where the evidence is pertinent to any phase of the case. State *v.* Black, 15 Mont. 143, 38 Pac. 674.

43. State *v.* LaCroix, 8 S. D. 369, 66 N. W. 944; Rush *v.* State (Tex. Crim.), 76 S. W. 927; Hamblin *v.* State, 41 Tex. Crim. 135, 50 S. W. 1019, 51 S. W. 1111; Yeary *v.* State (Tex. Crim.), 68 S. W. 1106; Leftwich *v.* State (Tex. Crim.), 55 S. W. 571; Simons *v.* State (Tex. Crim.), 34 S. W. 619; McGrath *v.* State, 35 Tex. Crim. 413, 34 S. W. 127, 941.

An objection to testimony as irrelevant, immaterial and prejudicial is not a sufficient statement of the grounds of objection to be considered. Miller *v.* State (Tex. Crim.), 71 S. W. 20.

44. Ingram *v.* Little, 14 Ga. 173, 53 Am. Dec. 549. See Leet *v.* Wilson, 24 Cal. 398.

45. Bowman *v.* Flowers, 2 Mart. (N. S.) (La.) 267.

46. "Inadmissible and Incompe-

equally general nature[47] have been held not sufficiently specific.

3. Particular Grounds of Objection. — A. Objections to Method of Proof. — a. *Generally.* — A party desiring to object to the method of proving a fact and not the proof of the fact itself should distinctly place his objection on that ground; a general objection is not sufficient.[48]

b. *Form of Question.* — (1.) **Generally.** — Objections to the form of a question must be specifically made on this ground; a general objection is insufficient.[49]

tent." — Cox *v.* Stout, 85 Ind. 422; McKarsie *v.* Citizens' Bldg. & Loan Ass'n (Tenn.), 53 S. W. 1007. See also Andrews *v.* State, 118 Ga. 1, 43 S. E. 852.

47. An objection to testimony that it is "not proper testimony for the jury" is too vague and indefinite to be considered on appeal; the specific grounds of objection should be stated. Withers *v.* Sandlin, 36 Fla. 610, 18 So. 856.

48. See Gelpecke-Winslow & Co. *v.* Lovell, 18 Iowa 17; and *infra* "Secondary Evidence," IV, 3, N.

"When the objection is to the mode of proving a fact, and not to proof of the fact itself, it must be distinctly placed upon that ground. The rule is essential to insure fairness and to prevent artifice and deception in the trial of causes. It governs trials in criminal as well as civil cases, and in our opinion ought to be steadily upheld whenever a case of either class is brought up for review." Murphy *v.* People, 4 Hun (N. Y.) 102, 6 Thomp. & C. 369.

Where the defendant was asked on cross-examination whether he had ever been convicted of a felony, and the question was objected to as "improper cross-examination, irrelevant and immaterial," it was held that the overruling of the objection was no error, since it did not specifically state the grounds of objection, the fact being relevant and material for purposes of impeachment, although the means of showing it were perhaps improper. State *v.* Black, 15 Mont. 143, 38 Pac. 674.

49. *Arkansas.* — Williams *v.* State, 66 Ark. 264, 50 S. W. 517.

Colorado. — Higgins *v.* Armstrong, 9 Colo. 38, 10 Pac. 232.

Illinois. — Tracy *v.* People, 97 Ill. 101; Catlin *v.* Traders Ins. Co., 83 Ill. App. 40. See Maneaty *v.* Steele, 112 Ill. App. 19.

Massachusetts. — Westfield Cigar Co. *v.* Teutonic Ins. Co., 169 Mass. 382, 47 N. E. 1026.

Minnesota. — Kanne *v.* Minneapolis & St. L. R. Co., 30 Minn. 423, 15 N. W. 871.

New Hampshire. — State *v.* Flanders, 38 N. H. 324.

New York. — New Jersey Steamboat Co. *v.* New York, 109 N. Y. 621, 15 N. E. 877.

Texas. — Waller *v.* Leonard, 89 Tex. 507, 35 S. W. 1045.

Wisconsin. — Donovan *v.* Chicago & N. W. R. Co., 93 Wis. 373, 67 N. W. 721. See Valensin *v.* Valensin, 73 Cal. 106, 14 Pac. 397; State *v.* Flanders, 38 N. H. 324.

An objection to a hypothetical question as "incompetent" raises no objection to the form of the question. Detzur *v.* B. Stroh Brew. Co., 119 Mich. 282, 77 N. W. 948.

An objection to the competency of a question does not raise the point that it assumes a fact not in evidence. Bussard *v.* Bullitt, 95 Iowa 736, 64 N. W. 658.

An objection to a question as improper in form because it does not confine the answer within the limits of "reasonable certainty" must be specifically made. Nassau Elec. R. Co. *v.* Corliss, 126 Fed. 355.

In People *v.* Hickman, 113 Cal. 80, 45 Pac. 175, it was held that an objection to testimony calling for the defendant's reputation for truth and veracity, offered for purposes of impeachment, on the ground that it was "irrelevant, immaterial and incompetent," and was an "unwarranted attack upon the character of defendant, which was not in issue," was not sufficient to raise the point that in some

(2.) Question Too Broad. — A general objection or an objection which goes to the competency of the subject-matter of a question is not sufficient to raise the point that the question is improper in form because too broad in its scope.[50]

(3.) Leading Question. — A general objection to a question does not raise the point that it is leading and suggestive, since this ground of objection if specifically pointed out might be obviated by a restatement of the question.[51]

of the questions the word "general" was omitted before "reputation." To the same effect, see People *v.* Bush, 68 Cal. 623, 10 Pac. 169.

A general objection to testimony as to the present value of the stolen property, on a prosecution for larceny, is not sufficient to raise the point that the testimony should be confined to the value at the time of the theft. Little *v.* People, 157 Ill. 153, 42 N. E. 389.

In a prosecution for homicide, a question asking the witness what had been the general feeling as he had observed it between the defendant and the deceased during a certain period preceding the homicide was objected to generally without stating any grounds. The answer to the question detailed facts and circumstances showing the defendant's malice toward the deceased. It was held that the objection was not sufficiently specific to raise the point that the question called for a conclusion, since the general subject-matter of the question was competent. People *v.* Place, 157 N. Y. 584, 52 N. E. 576.

50. Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311.

An objection to a question as incompetent, irrelevant and improper is not sufficiently specific to cover the point that the question is too broad. Pool *v.* Milwaukee Mechanics Ins. Co., 94 Wis. 447, 69 N. W. 65.

In an action for personal injuries, a question as to whether the plaintiff complained of pain, and the answer that she complained of pain more or less, were objected to on the ground that the evidence was a declaration in her own favor. This objection was held properly overruled as not sufficiently specific to raise the point that the evidence should be limited to such complaints as are the natural expressions of present suffering. "The objection was not to the form of the question or answers, but apparently to the proof of any complaints of pain. Had the defendant desired to have the questions or answers limited to such as were natural expressions of existing pain, his objection should have been in such form as to fairly indicate that claim to the court." Martin *v.* Sherwood, 74 Conn. 475, 51 Atl. 526.

An objection to questions as to what effect a cut in the street had upon the value of adjoining property, and to what extent the value was depreciated, on the ground that the questions were incompetent, irrelevant and immaterial, does not raise the point that the opinions of the witnesses should have been limited to the market value of the property before and after the grading, since an objection to the form of the question must be specifically made, since it might be obviated. Eachus *v.* Los Angeles Consol. Elec. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149.

51. *Alabama.* — Yarborough *v.* Moss, 9 Ala. 382.

Illinois. — Dunn *v.* People, 172 Ill. 582, 50 N. E. 137; North Chicago St. R. Co. *v.* Balhatchett, 86 Ill. App. 60; Edmanson *v.* Andrews, 35 Ill. App. 223; Caplin *v.* Traders Ins. Co., 83 Ill. App. 40.

Iowa. — Miller *v.* Mabon, 9 Iowa 484.

New York. — People *v.* Lohman, 2 Barb. 216; People *v.* Nino, 149 N. Y. 317, 43 N. E. 853; Tattersall *v.* Hass, 1 Hilt. 56.

Pennsylvania. — Plank-Road Co. *v.* Ramage, 20 Pa. St. 95.

Tennessee. — Miller *v.* State, 12 Lea 223.

Texas. — Waller *v.* Leonard, 89 Tex. 507, 35 S. W. 1045.

Vermont. — Hathaway *v.* Goslant, 59 Atl. 835.

B. Order of Proof. — A general objection to evidence raises no question as to the order in which it is introduced.[52]

C. Form of Offer. — Objections to the form of an offer of evidence must specifically point out this ground of objection.[53]

D. Limits of Cross-Examination. — A general objection to a question on cross-examination is not sufficient to raise the point that the question goes outside the facts drawn out on the direct examination.[54]

E. Sufficiency of Foundation or Preliminary Proof. a. *Generally.* — A general objection to evidence which is in its nature competent does not raise the point that a sufficient foundation for its admission has not been laid, or that the proper preliminary proof has not been made.[55] Since this ground of objection might

Wisconsin. — Teegarden *v.* Caledonia, 50 Wis. 292, 6 N. W. 875.

An objection to a question as incompetent does not raise the point that it is leading. Wilson *v.* Fuller, 9 Kan. 176.

An objection to a question as incompetent and irrelevant does not raise the point that it is too general and leading. Clague *v.* Hodgson, 16 Minn. 329.

52. A general objection goes to the competency of the evidence, and not to the mere order of time in which it is to be introduced; hence an objection to cross-examination on the ground that it introduces independent matter only proper in the case in chief of the cross-examiner must be specific. Knapp *v.* Schneider, 24 Wis. 70.

An objection to evidence on the general grounds of immateriality and incompetency raises no question as to the order of proof. State *v.* Hyde, 27 Minn. 153, 6 N. W. 555.

A general objection to evidence as immaterial and irrelevant does not raise any question as to the order of its introduction. Whitaker *v.* White, 69 Hun 258, 23 N. Y. Supp. 487.

A general objection to evidence of the deceased's reputation for carrying and using deadly weapons is not sufficient to cover the point that the defendant's knowledge of this fact has not been previously shown, this being merely a question of the order of proof. State *v.* Ellis, 30 Wash. 369, 70 Pac. 963.

Rebuttal. — An objection to evidence on the ground that it is not in rebuttal must be specifically made. Whitney Wagon Wks. *v.* Moore, 61 Vt. 230, 17 Atl. 1007.

An objection to evidence as incompetent, irrelevant and immaterial under the pleadings in the case does not raise the point that it is not competent in rebuttal. Davidson *v.* Dwyer, 62 Iowa 332, 17 N. W. 575.

53. Objection to Form of Offer. An offer of evidence which is not sufficiently definite and specific must be specifically objected to on this ground, and the objection of incompetent, irrelevant and immaterial is a waiver of any objection to the mere form of the offer. Alexander *v.* Thompson, 42 Minn. 498, 44 N. W. 534.

54. Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140, 7 N. E. 435; Knapp *v.* Scheider, 24 Wis. 70.

An objection to cross-examination as irrelevant and immaterial is not sufficient to raise the point that the cross-examination was not restricted to the facts drawn out on the direct examination. Schlencker *v.* State, 9 Neb. 241, 1 N. W. 857.

55. Bennett *v.* Gibbons, 55 Conn. 450, 12 Atl. 99. See also People *v.* O'Brien, 78 Cal. 41, 20 Pac. 359.

A general objection to evidence reaches only the relevancy and competency of the testimony, and does not go to the point that a sufficient foundation for the evidence has not been laid. Railway Co. *v.* Sweet, 60 Ark. 550, 31 S. W. 571. See also Central Coal & Coke Co. *v.* Niemeyer Lumb. Co., 65 Ark. 106, 44 S. W. 1122, 53 S. W. 570.

be obviated it must be specifically stated and the particular defect or deficiency pointed out.[56] Thus the general objections that evidence is "incompetent, irrelevant and immaterial,"[57] or that a sufficient foundation has not been laid for its admission,[58] are too general.

b. *Impeaching Evidence.* — These general rules are applied to evidence offered for purposes of impeachment.[59]

Where the accused objects to evidence of inculpatory declarations by him on the ground that a proper foundation for the same has not been laid, he should specify the defect. State *v.* Perry, 51 La. Ann. 1074, 25 So. 944.

Sufficiency of Identification of Objects. — An objection to the introduction of a pistol claimed to have been used by the defendant in the assault, on the ground that it was incompetent, irrelevant and immaterial and not connected with the defendant, was held insufficient to question the sufficiency of the identification of the pistol. People *v.* Louie Foo, 112 Cal. 17, 44 Pac. 453.

56. People *v.* Louie Foo, 112 Cal. 17, 44 Pac. 453.

57. McCormick *v.* State, 66 Neb. 337, 92 N. W. 606; Goodell *v.* Ward, 17 Minn. 17; People *v.* Louie Foo, 112 Cal. 17, 44 Pac. 453.

Irrelevant and Incompetent. — An objection to evidence as irrelevant and incompetent is not sufficiently specific to raise the point that no proper foundation has been laid for its introduction. People *v.* Frank, 28 Cal. 507.

On a prosecution for forgery, a general objection to the introduction of other forged instruments on the ground that they are incompetent and irrelevant is not sufficient to raise the point that a proper foundation for their introduction has not been laid because the only evidence that they are forgeries is extrajudicial admissions of the defendant. People *v.* Baird, 105 Cal. 126, 38 Pac. 633.

58. In People *v.* Conkling, 111 Cal. 616, 44 Pac. 314, a prosecution for homicide, the introduction in evidence of a vest and shirt worn by the deceased at the time he was killed was objected to on the ground that the proper "predicate" had not been laid for its introduction. This objection was held not sufficiently specific to raise the point that the clothes when offered were not shown to have been in the same condition as when taken from the body.

An objection to evidence as to the testimony on a former trial of a witness, since deceased, on the ground that it is incompetent, irrelevant and immaterial, and that no proper foundation has been laid, is too general to raise the point that it has not been shown that the witness testifying is able to give the testimony of the deceased witness, upon both direct and cross-examination. "The objection 'that the proper foundation has not been laid' was too general to be available to the appellant in this court," since the specific objection might have been obviated at the trial if pointed out. Tanderup *v.* Hansen, 8 S. D. 375, 66 N. W. 1073. See also Walker *v.* Hoeffner, 54 Mo. App. 554.

59. Chicago City R. Co. *v.* Matthieson, 113 Ill. App. 246, *affirmed* 212 Ill. 292, 72 N. E. 443; McDaneld *v.* McDaneld, 136 Ind. 603, 36 N. E. 286; State *v.* West, 95 Mo. 139, 8 S. W. 354; Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310. See McDonald *v.* North, 47 Barb. (N. Y.) 530.

A general objection to impeaching evidence on the ground that it is incompetent, irrelevant and immaterial, and that sufficient foundation has not been laid for its introduction, is not sufficiently specific, but should point out the particulars in which the foundation is insufficient. "An objection that the proper foundation has not been laid for the introduction of evidence otherwise competent and relevant should point out the particular and specific grounds upon which such general objection rests so as to apprise the court and the party offering the evidence of the precise

c. *Confessions.* — They have been applied in a criminal trial to evidence of a confession,[60] though they have also been held inapplicable.[61]

F. Hearsay. — A general objection to evidence which is clearly hearsay is sufficient.[62] It is incumbent on the party offering the evidence to show that it is admissible in spite of its hearsay character.[63]

G. Dying Declarations. — An objection to dying declarations as hearsay and incompetent,[64] or on the ground that a proper

ground of objection to it." *In re* Wong Sing, 83 Fed. 147. See also Pittsburgh & W. R. Co. *v.* Thompson, 82 Fed. 720, 27 C. C. A. 333.

Where one party has made a witness for the other party his own witness and then attempts to impeach his general reputation for honesty and integrity, a general objection to such impeaching evidence as incompetent, irrelevant and immaterial is not sufficiently specific to raise the point that a party cannot impeach his own witness, the testimony being "undoubtedly competent in the general sense, and only incompetent because of the fact that defendant had made the impeached witness his own." Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310.

60. A general objection to the admission of a confession in a criminal case does not cover the point that the confession was obtained by promises or threats, the confession being *prima facie* admissible. State *v.* Brooks, 30 N. J. L. 356.

61. An objection to the admission of a confession on the ground that the evidence is "irrelevant, immaterial, incompetent and illegal" is sufficiently specific to require preliminary proof that the confession was voluntary. The reason for this is that confessions in criminal cases are *prima facie* inadmissible, and "will not be received until the court, proceeding with great care and caution, is made satisfied by evidence that they were entirely voluntary;" consequently a general objection is sufficient to require this preliminary proof. Bradford *v.* State, 104 Ala. 68, 16 So. 107. See also Amos *v.* State, 83 Ala. 1, 3 So. 749, in which a general objection which specified no grounds was held sufficient.

62. State *v.* Hathorn, 166 Mo. 229, 65 S. W. 756; Parker *v.* United States, 1 Ind. Ter. 592, 43 S. W. 858; People *v.* Beach, 87 N. Y. 508; Hodges *v.* Hodges, 106 N. C. 374, 11 S. E. 364. But see State *v.* Sexton, 10 S. D. 127, 72 N. W. 84; State *v.* Murphy, 9 Nev. 394.

In State *v.* Patrick, 107 Mo. 147, 17 S. W. 666, a trial for rape, evidence of conversations between the prosecutrix and third persons tending to show a conspiracy to spirit her away to prevent her testifying, which conversations were wholly unconnected with the defendant, was held erroneously admitted, although the objection to it was a general one, since the evidence was incompetent for any purpose.

63. Where the testimony of a witness as to hearsay declarations offered to prove heirship was objected to as "hearsay and incompetent to prove heirship," it was held that the objection was sufficiently specific and should have been sustained because the evidence on its face clearly did not come within any of the exceptions to the hearsay rule. "If an objection is made which is *prima facie* valid, and in general applicable to the evidence as offered, it is sufficient, and should be sustained, although there are special and particular phases of such testimony where, or exceptional cases in which, it may be admissible. In such cases it is incumbent upon the party offering it to meet such general objections by showing that in the case on trial, or by reason of the special and particular phase of the testimony as presented, it should be admitted." Johns *v.* Northcutt, 49 Tex. 444.

64. Dying Declarations. — An objection to evidence of a dying declaration on the ground that no sufficient foundation for its admission

foundation has not been laid for their admission,[65] is ordinarily sufficient.

H. Privileged Communications. — A general objection to a question does not raise the point that it calls for a privileged communication.[66]

I. Declarations of Agent. — A general objection to the declarations of an agent is not sufficient to question his authority to thus bind his principal.[67]

J. Remoteness. — A general objection to evidence which is in its nature competent and relevant does not raise the point that the facts to be shown thereby are too remote.[68]

has been laid is sufficient to cover the point that it has not been shown to have been made under the expectation of immediate death. Carver *v.* United States, 160 U. S. 553.

Contra. — An objection to a dying declaration as "hearsay" is not sufficiently specific to raise the point that it does not relate to the cause of, or the circumstances surrounding, the declarant's approaching death, since all dying declarations are hearsay. State *v.* Murphy, 9 Nev. 394.

65. In a prosecution for homicide a question was asked by the prosecution calling for the declarations of the deceased as to the cause of her sufferings, made during her illness and after she had abandoned hope of recovery. This was objected to as hearsay, incompetent and inadmissible, and on the ground that no proof had been made to bring them within the rule of dying declarations. The declarations testified to were shown to have been made *in extremis,* but were incompetent because they were mere conclusions of the declarant. It was contended that since an exception was taken merely to the question, which was in proper form, and not to the answer, the defendant was not in a position to avail himself of the error, not having moved to strike out the testimony. It was held, however, that since the question called for the conversations of the deceased "about the cause of her sickness or her condition," and the answer was directly responsive to the question, the objection of "incompetent and inadmissible" was sufficient. Shaw *v.* People, 3 Hun (N. Y.) 272, 5 Thomp. & C. 439.

66. Tooley *v.* Bacon, 70 N. Y. 34; *In re* Morgan, 104 N. Y. 74, 9 N. E. 861; Satterlee *v.* Bliss, 36 Cal. 489, 507.

An objection to the testimony of an attorney as incompetent under a statute prohibiting his testimony as to communications from a client without the latter's consent must be specifically made. Faylor *v.* Faylor, 136 Cal. 92, 68 Pac. 482.

67. An objection to testimony as incompetent, immaterial and not proper as evidence in chief is not sufficient to raise the point that it was an admission by an agent which he had no authority to make, since such evidence is not in its "essential nature incompetent," and if the specific objection had been made it might have been obviated by showing the authority of the agent. Washington Gaslight Co. *v.* Poore, 3 App. D. C. 127.

An objection to testimony as to the declarations of certain members of the defendant board of commissioners that the "question was improper and the answer will be hearsay and not by leave of the defendants," was held not sufficiently specific to raise the point that the declarations of individual members of the board out of the presence of the other members, while they were not in session, are not binding on the county. Board of Commissioners *v.* O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

68. Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411; Pollock *v.* Brennan, 7 Jones & S. (N.Y.) 477.

An objection of irrelevant and immaterial is not sufficiently specific to cover the point that the question calls for facts which, though in their nature competent and relevant, are

K. Incompetency Under Statute of Frauds. — A general objection to evidence which is incompetent under the statute of frauds is sufficient.[69]

L. Defects in or Variance From Bill of Particulars. — A general objection to evidence does not question its admissibility because of defects in the bill of particulars,[70] or on account of a variance between the evidence and the bill of particulars.[71]

M. Documentary Evidence. — a. *Generally.* — A general objection to the admission of documentary evidence is insufficient to question its admissibility unless it is plainly inadmissible on its face and the grounds of objection are such that they could not be obviated.[72]

too remote. Steele *v.* Pacific Coast R. Co., 74 Cal. 323, 15 Pac. 851.

In an action for breach of contract to put a machine in good repair and condition, an objection to evidence on the ground that it is too remote from the time of the contract must be specifically made, and a general objection is not sufficient to raise this point. King *v.* Nichols, 53 Minn. 453, 55 N. W. 604.

69. Where the question calls for parol evidence as to a conveyance required by the statute of frauds to be in writing, a general objection is sufficient because the testimony is illegal on its face, though if the evidence were objectionable merely because there existed written evidence of the same matter, it would be necessary to point out this specific objection. Lecroy *v.* Wiggins, 31 Ala. 13.

Where oral evidence as to the terms of the contract was objected to merely as incompetent and irrelevant, but not on the ground that the contract sought to be proved was void under the statute of frauds, it was held that the right to subsequently raise the question of the validity of the contract was not waived by a failure to make a specific objection to the evidence. Reed *v.* McConnell, 133 N. Y. 425, 31 N. E. 22.

70. An objection to evidence on the ground that a proper bill of particulars has not been served must specifically point out the defects in the bill of particulars. Laraway *v.* Fischer, 49 Hun 611, 3 N. Y. Supp. 691. See Colrick *v.* Swinburne, 105 N. Y. 503, 12 N. E. 427.

71. A general objection to the admission of the account sued upon does not raise the question of a variance between the account and the bill of particulars. White *v.* Craft, 91 Ala. 139, 8 So. 420.

72. McDonald *v.* Bear River & A. W. & M. Co., 13 Cal. 220; Tuscaloosa Cotton Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Stevens *v.* Atchison, T. & S. F. R. Co., 87 Mo. App. 26.

An objection to records and documents on the ground that they are "incompetent, irrelevant and immaterial" is too general. "A general objection to the introduction of an instrument of evidence raises only questions of its relevancy. If obnoxious to special objection the objection must be stated, unless the objection is intrinsic and from its nature cannot be removed by proof." Gage *v.* Eddy, 186 Ill. 432, 57 N. E. 1030. See also Schmucker *v.* Spelbrink, 25 Mo. App. 356.

A general objection to the admission of a will is sufficient to question its competency on the ground that it has never been probated, since such a will is not competent evidence of a devise in any event, and a more specific objection is not required. Hicks *v.* Deemer, 187 Ill. 164, 58 N. E. 252.

Instrument Not Filed as Required by Law. — A general objection to a paper offered in evidence on the ground that it is incompetent and irrelevant does not raise the specific point that it was not placed on file a certain number of days before the trial as required by statute. Kuntz *v.* Tempel, 48 Mo. 71. Nor does an

b. *Preliminary Proof.* — **(1.) Generally.** — A general objection to documentary evidence is not ordinarily sufficient to question the failure to make the proper preliminary showing[73] unless the grounds could not have been obviated if stated.[74] The particular deficiencies in the preliminary proof should be specifically pointed out.[75]

(2.) Execution. — (A.) GENERALLY. — A general objection to the introduction of a document or written instrument does not question the failure to prove its execution.[76] This ground of objection must

objection to documentary evidence on the ground that it was "not filed in court according to law" raise the point that the notice of its filing required by rule of court was not given. Ingram *v.* Smith, 1 Head (Tenn.) 411.

73. Crocker *v.* Carpenter, 98 Cal. 418, 33 Pac. 271; Morris *v.* Murray, 22 Misc. 697, 49 N. Y. Supp. 1093.

An objection to documentary evidence as incompetent and immaterial does not raise the point that no proper foundation has been laid for its introduction. Priest *v.* Robinson, 64 Kan. 416, 67 Pac. 850.

A general objection to the admission of assigned notes does not question the failure to prove their execution and assignment. Wilson *v.* King, 83 Ill. 232.

A general objection to a map does not raise the point that its official character has not been proved. Com. *v.* King, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536.

A general objection to the admission of orders of the court authorizing the selling of land by a guardian is not sufficient to question the failure to introduce preliminary proof of the jurisdictional facts warranting the order. Benefield *v.* Albert, 132 Ill. 665, 24 N. E. 634.

74. A general objection to a party's books of account offered by him was held sufficient to question their competency on the ground that the proper foundation had not been laid, where it appeared that this objection if specifically pointed out could not have been obviated. Dooley *v.* Moan, 57 Hun 535, 11 N. Y. Supp. 239.

Record of Former Conviction. — A general objection to the admission in evidence of the record of a former conviction of a person of the same name as the defendant is not sufficiently specific to question the failure to prove the identity of the defendant with the person formerly convicted. Sullivan *v.* People, 122 Ill. 385, 13 N. E. 248.

75. McElroy *v.* Williams, 14 Wash. 627, 45 Pac. 306.

An objection to the reading of the entries in a justice's docket respecting the proceedings in a particular case, on the ground that the party offering the evidence had not proved all the preliminary facts as to the issuing, service and return of the summons in that case as particularly as the same were set out in his notice of defense, was held not sufficient because it did not specifically point out what particular preliminary facts alleged were not proved. Rash *v.* Whitney, 4 Mich. 495.

76. Ballow *v.* Collins, 139 Ala. 543, 36 So. 712; Creagh *v.* Savage, 9 Ala. 959; Sargeant *v.* Kellogg, 10 Ill. 273; Crawford *v.* Chicago, B. & Q. R. Co., 112 Ill. 314; Hoffman *v.* Pack, 114 Mich. 1, 71 N. W. 1095; Clark *v.* Conway, 23 Mo. 438; Drew *v.* Drum, 44 Mo. App. 25.

Proof by Subscribing Witnesses. An objection to the introduction of a lease on the ground that it is "incompetent and immaterial" is not sufficient to raise the point that its execution has not been proved by the subscribing witnesses. Jochen *v.* Tibbells, 50 Mich. 33, 14 N. W. 690.

Promissory Note. — Cody *v.* Butterfield, 1 Colo. 377; Wilson *v.* King, 83 Ill. 232.

Deed. — Morris *v.* Henderson, 37 Miss. 492; Gregory *v.* Langdon, 11 Neb. 166, 7 N. W. 871.

Assignment of a Judgment. — King *v.* Chicago, D. & V. R. Co., 98 Ill. 376.

be specifically pointed out.[77] The stock objection, "incompetent, irrelevant and immaterial," is not sufficiently specific to raise this point.[78]

(B.) Authority of Agent. — A general objection to a document does not raise the point that it was executed or signed by one person for another without authority.[79]

(3.) Genuineness. — A party desiring to question the genuineness of an offered document,[80] or of the signatures subscribed thereto,[81] must specifically object to its introduction on these grounds.

77. **Objection That no Foundation Has Been Laid.** — An objection to a written instrument as irrelevant, incompetent and immaterial and because no proper foundation has been laid for its introduction is not sufficient to question the failure to prove its execution. This objection, if specifically pointed out, might have been obviated. McElroy *v.* Williams, 14 Wash. 627, 45 Pac. 306.

Defects in the Form of Execution of a deed must be specifically pointed out. Maul *v.* Drexel, 55 Neb. 446, 76 N. W. 163.

78. **Incompetent, Irrelevant and Immaterial.** — MacKinstry *v.* Smith, 16 Misc. 351, 38 N. Y. Supp. 93; Jewett *v.* Black, 60 Neb. 173, 82 N. W. 375; McDonald *v.* Peacock, 37 Minn. 512, 35 N. W. 370; Gregory *v.* Langdon, 11 Neb. 166, 7 N. W. 871.

An objection to the admission of a mortgage on the ground that it is incompetent, immaterial and irrelevant and has no reference to the property in controversy is insufficient to raise any question as to its execution. Park *v.* Robinson, 15 S. D. 551, 91 N. W. 344.

An objection to the admission of a contract on the ground that it is incompetent and immaterial is a waiver of the right to complain of the failure to prove its execution. Falk *v.* Gast Litho. & Eng. Co., 54 Fed. 890, 4 C. C. A. 648, 14 U. S. App. 15.

79. See Craig *v.* Cook, 28 Minn. 232, 9 N. W. 712; Porter *v.* Valentine, 18 Misc. 213, 41 N. Y. Supp. 507.

Deed. — An objection to a deed on the ground of incompetency, irrelevancy and immateriality does not question the failure to prove the authority by which it was executed. Long-Bell Lumb. Co. *v.* Martin, 11 Okla. 192, 66 Pac. 328; nor does the objection "illegal and incompetent." Clark *v.* Conway, 23 Mo. 438.

Authority of Corporation President. — An objection to the note sued upon as incompetent and improper, and that the indorsements show that it is owned by a person other than the plaintiff, does not raise the question of the authority of the president of the corporation payee to indorse the note. Barnard State Bank *v.* Fesler, 89 Mo. App. 217.

Where an assignment purports to be executed by a corporation by its president, who in his sworn acknowledgment recites that the corporate signature and seal were affixed by order of the board of trustees, an objection to its admission in evidence on the ground that it is incompetent and immaterial is not sufficient to question the truth of the recital of the president of his authority. Eder *v.* Gildersleeve, 85 Hun 411, 32 N. Y. Supp. 1056.

80. An objection to the admission of a judgment roll on the ground that it is incompetent, immaterial and irrelevant and not binding upon the objecting party does not question the genuineness of the documents. Schrader *v.* Musical Mut. Protective Union, 55 Hun 608, 8 N. Y. Supp. 706.

Incompetent and Irrelevant. — An objection to documentary evidence as incompetent and irrelevant does not question its genuineness, but impliedly admits it. Young *v.* Stephens, 9 Mich. 500, *per* Manning, J.; Daugherty *v.* Fowler, 44 Kan. 628, 25 Pac. 40, 10 L. R. A. 314 (letter).

81. An objection to a written instrument to which are appended the names of several persons on the ground that it is incompetent, immaterial and irrelevant, is too gen-

c. *Defects in Form of Document.* — **(1.) Generally.** — Particular defects in the form of an offered document must be specifically pointed out, and a general objection to the introduction of the evidence is not sufficient.[82]

(2.) Defects Apparent on Face of Document. — It has been held, however, that a general objection to the admission of a written instrument is sufficient to cover every defect apparent on its face, and therefore such grounds of objection need not be specified.[83]

eral to be considered, and does not raise the question of the genuineness of the signatures to the instrument. Krull *v.* State, 59 Neb. 97, 80 N. W. 272; Jewett *v.* Black, 60 Neb. 173, 82 N. W. 375; Thompson *v.* Ellenz, 58 Minn. 301, 59 N. W. 1023; Schwartz *v.* Germania L. Ins. Co., 21 Minn. 215.

Tax Receipts. — A general objection to the admission of tax receipts is not sufficient to question the signing by the collector. Walcott *v.* Gibbs, 97 Ill. 118.

82. Margrave *v.* Ausmuss, 51 Mo. 561. See also People's Bank *v.* Scalzo, 127 Mo. 164, 29 S. W. 1032.

A general objection to the admissibility of a record or a certified document will not avail as to any defect in form, for the opposite party is entitled to the opportunity to correct the defect. Ingram *v.* Smith, 1 Head (Tenn.) 411.

An objection to the admission of articles of association of several companies on the ground that they are incompetent, irrelevant and immaterial is not sufficiently specific to point out any defect not apparent to the trial court on inspection, and for that reason is not entitled to consideration on appeal. Rodgers *v.* Wells, 44 Mich. 411, 6 N. W. 860.

An objection to the admission of a record on the ground that it could only be proved by a duly certified copy, and that the record was "insufficient, irrelevant and incompetent and did not prove anything," is not sufficiently specific to question its admissibility for the want of *placita.* Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837. See also Hyde *v.* Heath, 75 Ill. 381.

An objection that a certified copy of a will offered in evidence is incompetent, irrelevant and immaterial is not sufficient to raise the point that the certificate of probate is not in proper form. Hall *v.* Connecticut Mut. L. Ins. Co., 76 Minn. 401, 79 N. W. 497.

Absence of Seal. — A general objection which states no grounds is not sufficient to raise the point that a comptroller's certificate is not admissible because not under seal. Carlton *v.* State, 8 Heisk. (Tenn.) 16.

Writ of Execution. — A general objection to a writ of execution on the ground that it is not in proper form is not sufficient; it should point out the specific defect relied on. Jennison *v.* Haire, 29 Mich. 207.

Unstamped Document. — An objection to a document not stamped, as required by law must point out this specific objection to its competency. Richardson *v.* Roberts, 195 Ill. 27, 62 N. E. 840.

Printed Compilation of Municipal Ordinances. — A general objection to the admission of a printed pamphlet offered in proof of a municipal ordinance under the statute making competent printed compilations of ordinances purporting to be published by proper authority is not sufficient to question the failure of such pamphlet to meet the requirements of the statute, but its deficiency in this respect must be specifically pointed out. Illinois Cent. R. Co. *v.* Burke, 112 Ill. App. 415.

83. In Wood *v.* American L. Ins. & T. Co., 7 How. (Miss.) 609, 633, it was held that a notarial certificate was improperly admitted over a general objection, because it appeared that the notary resided in the county where the trial was held, it being unnecessary to point out this particular ground of objection, since it appeared on the face of the certificate itself.

(3.) Defects in Authentication and Acknowledgment or Proof. — A general objection to documentary evidence does not raise the point that it is not properly or sufficiently authenticated,[84] or that the certificate of its acknowledgment or proof is defective.[85] The particular defect in the certificate of acknowledgment must be specifically pointed out.[86]

d. *Authority of Officer Taking Acknowledgment.* — A general objection to the admission of an acknowledged instrument is not sufficient to question the authority of the officer to take the acknowledgment.[87]

e. *Deeds.* — The admission of a deed in evidence is governed by the general rules requiring objections thereto to specifically point out the grounds relied on.[88]

84. Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67; Ryan *v.* Jackson, 11 Tex. 391; Pennsylvania Co. *v.* Horton, 132 Ind. 189, 31 N. E. 45.

An Objection to a Will as Immaterial and Incompetent for any purpose is not sufficiently specific to question the sufficiency of its authentication or proof. Crawford *v.* Witherbee, 77 Wis. 419, 46 N. W. 545, 9 L. R. A. 561.

An objection to the introduction of a certified copy of articles of incorporation as immaterial, irrelevant and incompetent does not raise the point that it is not sufficiently authenticated. Noonan *v.* Caledonia Min. Co., 121 U. S. 393.

85. Mabbett *v.* White, 12 N. Y. 442; Western *v.* Flanagan, 120 Mo. 61, 25 S. W. 531; Adler *v.* Lange, 21 Mo. App. 516, in which an objection to the admission of a deed on the ground that "it was invalid" was held insufficient to raise the point that the certificate of acknowledgment was defective.

An objection to a deed on the ground "that it was not executed in form to admit it to record; that in form the deed was an absolute nullity, as it was not in the form required for conveyances of real estate," is not sufficiently specific to raise the point that the acknowledgment is defective. Gilbert *v.* Thompson, 14 Minn. 544.

An Objection to a Deed as Irrelevant, Immaterial and Incompetent is not sufficient to reach defects in the form, execution or acknowledgment of the deed. Gregory *v.* Langdon, 11 Neb. 166, 7 N. W. 871.

86. An objection to a deed on the ground that it is not acknowledged as required by law is too general; it should specify the particular defect relied upon. Leon & H. Blum Land Co. *v.* Dunlap, 4 Tex. Civ. App. 315, 23 S. W. 473; Maul *v.* Drexel, 155 Neb. 446, 76 N. W. 163; Cowell *v.* Colorado Springs Co., 3 Colo. 82.

87. Hewitt *v.* Watertown Steam Engine Co., 65 Ill. App. 153; McCarthy *v.* Hetzner, 70 Ill. App. 480.

An objection that an offered sheriff's deed was not acknowledged before a proper officer must be specifically made, since it may be obviated by proving the signature of the sheriff. Osgood *v.* Blackmore, 59 Ill. 261.

A general objection to the admission in evidence of a mortgage is not sufficient to question the failure to prove the official character of the justice of the peace before whom it purports to have been acknowledged. Weber *v.* Mick, 131 Ill. 520, 23 N. E. 646; Wright *v.* Smith, 82 Ill. 527.

88. Moore *v.* Worley, 24 Ind. 81.

An objection to the introduction of a deed as "incompetent" is not sufficiently specific to be considered on appeal. Helena *v.* Albertose, 8 Mont. 499, 20 Pac. 817.

An objection to a sheriff's deed as "incompetent, irrelevant and immaterial" is worthless unless some specific defect is pointed out. Michigan State Ins. Co. *v.* Soule, 51 Mich. 312, 16 N. W. 662.

An objection to the admission of a deed on the ground that it bears upon its face unmistakable evidence

f. *Books of Account.* — A general objection to the admission of books of account is not sufficient to question their admissibility[89] unless the grounds of objection are apparent and cannot be obviated.[90]

g. *Municipal Ordinance.* — A general objection to the admission of a city ordinance does not question its validity; any objection to its introduction on this ground should be specifically made.[91]

h. *Record.* — (1.) **Generally.** — A general objection to what purports to be a record is not ordinarily sufficient to question its genuineness[92] or its defectiveness in certain particulars.[93]

of fraud is not sufficiently specific, since the objection should point out particularly what those marks of fraud are. Thomas *v.* Lawson, 21 How. (U. S.) 331.

Uncertainties and Imperfections in Description. — A general objection to the introduction of a deed is not sufficient to question the uncertainty and imperfection of the description of the land thereby conveyed. Preston *v.* Davis, 112 Ill. App. 636.

Defects in Form which might be obviated must be specifically pointed out. Gilbert *v.* Thompson, 14 Minn. 544.

An objection to a deed made by a Chickasaw Indian on the ground that "it was not made and certified to accord to the requirements of the treaty with the Chickasaw Indians" is not sufficiently specific, but should point out specifically and distinctly in what respect the deed and certificate were not in accordance with the treaty. New Orleans, J. & G. N. R. *v.* Moye, 39 Miss. 374.

89. An objection to a party's account books offered by him to show to whom certain charges had been made, stating no specific ground, is insufficient. M. *v.* W., 21 Misc. 656, 48 N. Y. Supp. 277.

A general objection to the admission of books of account is not sufficiently specific to raise the point that they are inadmissible to prove the payment of money. Califf *v.* Hillhouse, 3 Minn. 311.

90. Dooley *v.* Moan, 57 Hun 535, 11 N. Y. Supp. 239.

91. Wabash R. Co. *v.* Kamradt, 100 Ill. App. 203.

A general objection is not sufficiently specific to question the failure to prove that the city ordinance admitted in evidence was published, or was in fact an ordinance. Chicago & E. I. R. Co. *v.* People, 120 Ill. 667, 12 N. E. 207. Or that it does not appear to have been approved by the president of the village board. Payne *v.* South Springfield, 161 Ill. 285, 44 N. E. 105.

An objection to a city ordinance as "incompetent, irrelevant and immaterial" is too general to be available on appeal (Churchman *v.* Kansas City, 49 Mo. App. 366), if it is admissible for any purpose (George *v.* St. Joseph, 97 Mo. App. 56, 71 S. W. 110).

92. An objection to a record purporting to be a registry of licensed physicians and surgeons, on the ground that it is "incompetent, immaterial and irrelevant," does not question its authenticity as a record. Accetta *v.* Zupa, 54 App. Div. 33, 66 N. Y. Supp. 303.

93. Grimm *v.* Gamache, 25 Mo. 41. See Anderson *v.* Fry, 6 Ind. 76.

An objection to the docket entry of proceedings before a justice of the peace that the entry has been changed is not sufficiently specific, but should point out the particulars in which it has been changed. Stratton *v.* Lockhart, 1 Ind. App. 380, 27 N. E. 715.

In an action for the value of merchandise seized on attachment, an objection to the files and records in the attachment suit as "immaterial" does not raise the point that they are informal or defective. Krolik *v.* Graham, 64 Mich. 226, 31 N. W. 307.

An objection to the admission of the record entry of a judgment on the ground that it was not properly rendered is too general. The objection should specifically point out the

(2.) **Transcripts and Certified Copies.** — A general objection to the introduction of what purports to be a certified copy[94] or transcript[95] of a record raises no question as to defects in the authentication or certification. But such an objection would seem to be sufficient where a copy containing no certification whatever is offered without any preliminary proof.[96]

The Incorrectness of such a copy or transcript can only be questioned by a specific objection on this ground.[97]

N. SECONDARY EVIDENCE. — a. *Generally.* — A general objection to evidence does not question its competency as being secondary and not the best evidence, but this ground of objection must be specifically stated.[98]

defect relied upon. Jennison *v.* Haire, 29 Mich. 207.

An objection which states no grounds does not raise the point that a transcript of a justice's docket is inadmissible because it contains only part of the record or proceedings in the cause; the objection should be specific so that the opposite party may have an opportunity to cure it. Garner *v.* State, 5 Lea (Tenn.) 213.

94. Best *v.* Davis, 18 Wis. 386.

Incompetent, Immaterial and Irrelevant. — An objection to the admission of a certified copy of the record of a deed on the ground that it is incompetent, immaterial and irrelevant is not sufficient to raise the point that the transcript is not properly certified. Wood *v.* Weimar, 104 U. S. 786. See also Huber *v.* Ehlers, 76 App. Div. 602, 79 N. Y. Supp. 150.

Absence of Certificate by Judge. The point that a copy of the order of court appointing a receiver is not attested by the certificate of the judge of the court as well as the clerk is not raised by an objection to the evidence as incompetent, irrelevant and immaterial. "The imperfection for which the competency of documentary evidence is challenged must be specifically pointed out." Stevens *v.* Atchison, T. & S. F. R. Co., 87 Mo. App. 26.

95. Kansas Pac. R. Co. *v.* Cutter, 19 Kan. 83.

An objection to what purports to be a transcript of a judgment on the ground that it is incompetent, irrelevant and immaterial is not sufficiently specific to raise the point that it is not properly certified, or not certified at all. Mechanics Sav. Bank *v.* Harding, 65 Kan. 655, 70 Pac. 655.

An objection to the transcript of a judgment of another state that it contains no certificate of the presiding judge "that the attestation is in due form of law" must be specifically made. Dworak *v.* More, 25 Neb. 735, 41 N. W. 777.

96. The objection "immaterial, irrelevant, incompetent and hearsay," was held sufficiently specific in such a case. Bella *v.* New York L. & W. R. Co., 24 N. Y. St. 921. 6 N. Y. Supp. 552. But see Mechanics Sav. Bank *v.* Harding, 65 Kan. 655, 70 Pac. 655.

97. Folts *v.* Ferguson (Tex. Civ. App.), 24 S. W. 657; Merchants Exchange Nat. Bank *v.* Cardozo, 3 Jones & S. (N. Y.) 162.

An objection to a certified transcript of a record on the ground that no predicate has been laid for its introduction is too indefinite to raise the question that it is not a true copy. Bohanon *v.* Hans, 26 Tex. 445.

98. *Alabama.* — Emrich *v.* Gilbert Mfg. Co., 138 Ala. 316, 35 So. 322.

Illinois. — Rich *v.* Trustees, 158 Ill. 242, 41 N. E. 924; Huntington *v.* Aurand, 70 Ill. App. 28; Cooper *v.* Cooper, 29 Ill. App. 356.

Indiana. — Fleming *v.* Potter, 14 Ind. 486.

Iowa. — Weis *v.* Morris, 102 Iowa 327, 71 N. W. 208; Gelpecke-Winslow & Co. *v.* Lovell, 18 Iowa 17.

Massachusetts. — Niles *v.* Patch, 13 Gray 254; Westfield Cigar Co. *v.* Reliance Ins. Co., 169 Mass. 382, 47 N. E. 1026.

Defects in the Notice To Produce a Document must be specifically pointed out if secondary evidence is objected to on this ground.[99]

b. *Copy.* — A general objection to a copy does not question its competency on the ground that it is secondary evidence, for the introduction of which no sufficient foundation has been laid.[1] And an objection to a copy on the ground that the original is the best evidence raises no question as to the correctness of the copy,[2] nor

Mississippi. — Routh *v.* Agricultural Bank, 12 Smed. & M. 161, 185.

New Hampshire. — Currier *v.* Boston & M. R. R., 34 N. H. 498; Haynes *v.* Thom, 28 N. H. 386.

New York. — Murphy *v.* People, 6 Thomp. & C. 369; Trankla *v.* McLean, 18 Misc. 221, 41 N. Y. Supp. 385.

Tennessee. — Campbell *v.* Campbell, 3 Head 325.

Texas. — Croft *v.* Rains, 10 Tex. 520.

A general objection to the introduction of a record of a patent to land as "incompetent" is not sufficient to raise the point that no proper foundation has been laid for the use of the record by showing that the original is not available. Enid & A. R. Co. *v.* Wiley, 14 Okla. 310, 78 Pac. 96.

An Objection to Evidence as "Incompetent" does not raise the point that it is secondary and not the best evidence. Matthews *v.* J. H. Luers Drug Co., 110 Iowa 231, 81 N. W. 464; Walser *v.* Wear, 141 Mo. 443, 42 S. W. 928; Topeka Capital Co. *v.* March, 10 Kan. App. 40, 61 Pac. 876.

An Objection to Evidence as "Incompetent and Immaterial" does not raise the point that it is not the best evidence. Asbestos Pulp Co. *v.* Gardner, 39 App. Div. 654, 57 N. Y. Supp. 353.

An Objection to Evidence as "Irrelevant and Immaterial" is too general to raise the point that it is secondary and not the best evidence. Clark *v.* State, 40 Tex. Crim. 127, 49 S. W. 85.

An Objection to Evidence as "Incompetent, Irrelevant and Immaterial" does not raise the point that it is not the best evidence. Buettner *v.* Steinbrecher, 91 Iowa 588, 60 N. W. 177; Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933; Taylor *v.* Wendling, 66 Iowa 562, 24 N. W. 40; The Iowa Homestead Co. *v.* Duncombe, 51 Iowa 525, 1 N. W. 725.

99. Minchen *v.* Hart, 72 Fed. 294.

1. Eversdon *v.* Mayhew, 85 Cal. 1, 21 Pac. 431; Smith *v.* Leighton, 38 Kan. 544, 17 Pac. 52, 5 Am. St. Rep. 778; Watson *v.* Hahn, 1 Colo. 494; McDonald *v.* Stark, 176 Ill. 456, 52 N. E. 37; Crawford *v.* Chicago, B. & Q. R. Co., 112 Ill. 314; Conway *v.* Case, 22 Ill. 127; Russell *v.* Whiteside, 5 Ill. 7.

An objection to copies of deeds as improper, immaterial and irrelevant is not sufficiently specific to raise the point that they are only secondary evidence. Cunningham *v.* Cunningham, 75 Conn. 64, 52 Atl. 318.

Incompetent and Immaterial. An objection to the admission of a copy as "incompetent and immaterial" does not raise the question that the paper was improperly admitted because a copy and not the original. Atkins *v.* Elwell, 45 N. Y. 753.

Incompetent, Irrelevant and Immaterial. — An objection to a copy of a record as incompetent, irrelevant and immaterial does not raise the point that it is secondary evidence, for the admission of which no foundation has been laid. Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933. And the same is true of a similar objection to a copy of a letter. St. Vincent's Institution *v.* Davis, 129 Cal. 20, 61 Pac. 477; Ackley *v.* Welch, 85 Hun 178, 32 N. Y. Supp. 577.

2. Where a witness was shown what purported to be a copy of a letter and asked if it was a copy, the objection to the testimony on the ground that the original was not produced was held not sufficient to cover the point that the copy was not shown to be in fact a copy. Toplitz *v.* Hedden, 146 U. S. 252.

does it raise the point that secondary evidence is absolutely inadmissible.[3]

c. *Must Appear That There Is Better Evidence.* — It is not sufficient merely to object to evidence on the ground that it is secondary and not the best evidence, but it must appear either from the evidence itself or from the objection that there is better evidence.[4]

O. Parol Evidence. — Incompetent parol evidence varying the terms of a written instrument must be objected to specifically on this ground.[5]

P. Opinion Evidence. — a. *Generally.* — A mere general objection to a question calling for an opinion is not sufficient to question the competency of opinion evidence upon the matter in question, nor the competency of the particular opinion called for.[6]

3. Where it appeared that a deposition regularly taken, sealed and transmitted to the clerk of the court and by him opened and filed, had disappeared, and that the copy offered in evidence was a true copy taken under the direction of the court and by him compared and certified, it was held that an objection to the admission of the copy "on the ground that it was not the original" was properly overruled because not sufficiently specific to raise the point that the deposition should have been retaken, and that secondary evidence of its contents was inadmissible. "Here the objection was that the copy was not the original. This as a fact was self-evident, but as a ground of objection it was wholly indefinite." Burton *v.* Driggs, 20 Wall. (U. S.) 125.

4. Duplessis *v.* Kennedy, 6 La. 231; Lewinsohn *v.* Stevens, 70 Ill. App. 307.

An objection that "there was better evidence," without stating in what the better evidence consisted, was held properly overruled, being too vague and indefinite. Levens *v.* Smith, 102 Ga. 480, 31 S. E. 104.

In Andrews *v.* State, 123 Ala. 42, 26 So. 522, an objection to a question on the ground that there "is better evidence of the facts sought to be proved" was held properly overruled because it did not appear that there was any better evidence than the answer of the witness disclosed.

When oral evidence of a fact is offered and objection is raised on the ground that there is written and better evidence of the fact, it is incumbent on the objector to produce the writing itself or prove that it was once in existence. Allen *v.* State, 8 Tex. App. 67.

Oral Evidence of Incorporation. Sufficiency of Objection. — An objection to a question as to whether a particular concern is a foreign corporation, on the ground "that it is not the proper way to prove whether it is a corporation," is sufficiently specific to raise the point that the fact of incorporation cannot be proved by parol testimony. Nicoll *v.* Clark, 13 Misc. 128, 34 N. Y. Supp. 159.

5. An objection to testimony that it is incompetent, irrelevant, immaterial and inadmissible under the pleadings does not raise the point that it varies the terms of a written contract. Union Cash Register Co. *v.* John, 49 Minn. 481, 52 N. W. 48.

On Appeal the Writing Must Appear. — An objection to oral evidence on the ground that it varies the terms of a written contract is not available on appeal where the written contract was not introduced in evidence by either party and is not before the appellate court. Kirby *v.* Berguin, 15 S. D. 444, 90 N. W. 856.

6. Walker *v.* Erie R. Co., 63 Barb. (N. Y.) 260. See People *v.* Mahoney, 77 Cal. 529, 20 Pac. 73.

A general objection to a question calling for an opinion does not question the competency of opinion evi-

Defects in the Form of the Question must be specifically pointed out in the objection.[7]

dence upon the matter in question, since the form of the question might have been changed, or the party might have acquiesced in the incorrectness of the evidence and have withdrawn the question entirely. Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674.

Insufficient Foundation. — An objection to a question calling for the opinion of a non-expert as to the mental capacity of a testator as "incompetent" is too indefinite to raise the point that the witness had not shown sufficient facts upon which to base an opinion. Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566.

An Objection That a Question Calls for a "Conclusion" does not raise the point that expert testimony of the kind called for is inadmissible, since all opinions are conclusions. McLain *v.* British & Foreign M. Ins. Co., 16 Misc. 336, 38 N. Y. Supp. 77.

Expert Testimony. — An objection to a question calling for expert opinion on the ground that it is incompetent, immaterial, irrelevant and leading does not raise the point that expert testimony is not admissible on the point in question. Wilson *v.* Harnette, 32 Colo. 172, 75 Pac. 395.

Objection to Opinion as to Depreciation in Value Due to Railroad. In an action for damages caused by the proximity of an elevated railroad, an objection to a question calling for the opinion of a witness as to the rental value of plaintiff's premises in the absence of the elevated railroad was objected to as "incompetent, irrelevant, immaterial and conjectural, as not within the competency of this witness and not within the competency of any witness." This objection was held sufficiently specific to raise the point that the subject to which the question related was not one upon which expert evidence was admissible. Jefferson *v.* New York Elev. R. Co., 132 N. Y. 483, 30 N. E. 981, *citing* Roberts *v.* New York Elev. R. Co., 128 N. Y. 455, 28 N. E. 486; Doyle *v.* Manhattan R. Co., 128 N. Y. 488, 28 N. E. 495; Gray *v.* Manhattan R. Co., 128 N. Y. 499, 28 N. E. 498, and *distinguishing* McGean *v.* Manhattan R. Co., 117 N. Y. 219, 22 N. E. 957, in which an objection to a similar question as "incompetent, irrelevant, hypothetical," and because the witness was not competent to give an opinion, was held insufficient. The objection did not raise the point that opinion evidence on this question is not admissible, but on the contrary seemed to imply that opinions were competent on the subject.

But in Carter *v.* New York Elev. R. Co., 134 N. Y. 168, 31 N. E. 514, an objection to a question calling for an opinion as to the difference in value of the property in question with or without the elevated railroad, that the evidence called for "is immaterial, incompetent, hypothetical, and that the difference in value is not the measure of damages," was held insufficient. See also Mortimer *v.* Manhattan R. Co., 129 N. Y. 81, 29 N. E. 5; Kernochan *v.* New York Elev. R. Co., 128 N. Y. 559, 29 N. E. 65; Blum *v.* Manhattan R. Co., 1 Misc. 119, 20 N. Y. Supp. 722.

Sufficient Objection. — An objection to a question calling for an opinion that it is "incompetent, improper and speculative and not the proper method of proving damages" is sufficiently specific to raise the point that it calls for an inadmissible opinion. Pratt *v.* New York C. & H. R. R. Co., 77 Hun 139, 28 N. Y. Supp. 463.

7. See Stouter *v.* Manhattan R. Co., 127 N. Y. 661, 27 N. E. 805; Brown *v.* Third Ave. R. Co., 19 Misc. 504, 43 N. Y. Supp. 1094; and *supra*, "Form of Question," IV, 3, A, b.

An objection to a question calling for expert testimony on the ground that it is incompetent, immaterial and irrelevant does not raise the point that the question assumes facts not in evidence. State *v.* Ginger, 80 Iowa 574, 46 N. W. 657.

An objection to a question calling for expert testimony on the ground that it is incompetent is not sufficient to reach a defect in the question, in that it is not sufficiently re-

b. *Wholly Incompetent on Its Face.* — It has been held that when the opinion called for is wholly incompetent on its face for any purpose, and the grounds of objection could not be obviated, a general objection is sufficient.[8]

c. *Conclusion.* — A general objection does not raise the point that the question is so framed as to call for the mere conclusion of the witness.[9]

d. *Hypothetical Question.* — **(1.) Generally.** — An objection to a hypothetical question should show wherein the question is defective.[10]

(2.) Foundation. — A general objection does not raise the point that it is based upon an incorrect or incomplete statement of the evidence. The objection should point out specifically the particulars in which the statement is incomplete or incorrect.[11]

stricted to prevent the witness from going outside the field of scientific knowledge. Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311.

A general objection to a question to an expert calling for the results which might follow from certain injuries is not sufficiently specific, since expert testimony as to results which are reasonably certain to ensue is competent, and the court's attention should be called to the fact that the witness is testifying as to a result which may or is liable to occur, rather than to one which is reasonably certain to follow from the injury. Dow-Currier *v.* Henderson, 85 Hun 300, 32 N. Y. Supp. 953.

8. Wallace *v.* Vacuum Oil Co., 128 N. Y. 579, 27 N. E. 956. See *supra*, IV, 1, E.

Where a question calls merely for the opinion of a witness as to the amount of damages caused by a trespass, a general objection is sufficient since such testimony is never admissible. Rodgers *v.* Fletcher, 13 Abb. Pr. (N. Y.) 299, *citing* 5 Hill 603, and *distinguishing* 3 Hill 609.

9. Lake Erie & W. R. Co. *v.* Parker, 94 Ind. 91.

The sustaining of a general objection to a question calling for testimony which may be material to the issue is error, although the question in form may be objectionable as calling for a conclusion. Gerry *v.* Siebrecht (App. Div.), 84 N. Y. Supp. 250.

An objection to evidence as incompetent and immaterial does not raise the point that it calls for a conclusion. Asbestos Pulp Co. *v.* Gardner, 39 App. Div. 654, 57 N. Y. Supp. 353.

A general objection to a question that it is "illegal" does not raise the point that it calls for a legal conclusion. Steiner *v.* Tranum, 98 Ala. 315, 13 So. 365. See also Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459.

10. Shirley *v.* State, 37 Tex. Crim. 475, 36 S. W. 267; Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

An objection to a hypothetical question as incompetent and immaterial is insufficient. State *v.* Wright, 134 Mo. 404, 35 S. W. 1145.

A general objection to hypothetical questions as incompetent is not sufficient to question their defects in form, especially if the party objecting refuses on request to make the objection more specific. Davey *v.* Janesville, 111 Wis. 628, 87 N. W. 813.

11. Cornell *v.* State, 104 Wis. 527, 80 N. W. 745; Aledo *v.* Honeyman, 208 Ill. 415, 70 N. E. 338; O'Neill *v.* Kansas City, 178 Mo. 91, 77 S. W. 64; People *v.* Foglesong, 116 Mich. 556, 74 N. W. 730; Gilbert *v.* Kennedy, 22 Mich. 117, 143; McCooey *v.* Forty-Second St. & G. St. Ferry R. Co., 79 Hun 255, 29 N. Y. 368.

An objection to a hypothetical question put to an expert witness on the ground that it is incompetent, immaterial and irrelevant is too general to raise the point that the question is based on an erroneous statement of the evidence. Chicago, R. I. & P. R. Co. *v.* Archer, 46 Neb. 907,

(3.) Scope of Specific Objection. — An objection to a hypothetical question on specified grounds is limited to the grounds stated.[12]

Q. Admissibility Under Pleadings. — a. *Generally.* — A general objection to evidence does not raise the point that it is not admissible under the pleadings[13] as on account of a variance.[14] An objection on the latter ground should point out in what particulars there is a variance,[15] that an amendment may be made.

b. *Limitations of Rule.* — The foregoing general rule, however, does not apply where the variance is of such a nature that it could

65 N. W. 1043; Missouri Pac. R. Co. *v.* Hall, 66 Fed. 868.

An objection to a hypothetical question on the ground that it assumes facts not proved must point out what particular assumed facts have not been proved. Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622; People's Cas. Claim Adjust Co. *v.* Darrow, 172 Ill. 62, 49 N. E. 1005.

An objection to a hypothetical question that it does not state the evidence on material matters and assumes conditions not existing is not sufficient, but should specifically point out the particulars wherein the question is defective. Prosser *v.* Montana Cent. R. Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814.

It is not error to overrule an objection to a hypothetical question on the ground that it assumes facts not proven, where the objection does not correctly state the facts claimed to be assumed. M'Cready *v.* Staten Island Elec. R. Co., 51 App. Div. 338, 64 N. Y. Supp. 996.

12. See *infra* V, 6, H, b.

13. Illinois Cent. R. Co. *v.* Prickett. 210 Ill. 140, 71 N. E. 435; Schwarz *v.* Oppold, 74 N. Y. 307; Russell *v.* Davis, 51 Minn. 482, 53 N. W. 766. See Detroit, Hillsdale & I. R. Co. *v.* Forbes, 30 Mich. 165, 178.

An objection to evidence as incompetent, irrelevant and immaterial is not sufficiently specific to raise the point that it is inadmissible under the pleadings. Keigher *v.* St. Paul, 73 Minn. 21, 75 N. W. 732.

An objection to testimony on the ground that it is "inadmissible under the pleadings" is not sufficient, but should point out the particular defects in the pleadings. Heymes *v.* Champlin, 52 Mich. 25, 17 N. W. 226.

A general objection that evidence is irrelevant or incompetent is not sufficient to raise the question of its competency under the special form of the issues joined. Columbus Safe-Deposit Co. *v.* Burke, 88 Fed. 630, 32 C. C. A. 67.

An objection to evidence on the ground that it is not in any manner responsive to the charge in the indictment is too general. Simons *v.* State (Tex. Crim.), 34 S. W. 619.

14. A variance between a lease offered in evidence and the pleadings cannot be covered by a general objection. Richards *v.* Bestor, 90 Ala. 352, 8 So. 30.

The question of variance is not raised by an objection to testimony as incompetent, irrelevant and immaterial. Burlington Ins. Co. *v.* Miller, 60 Fed. 254, 8 C.C.A. 612, 19 U. S. App. 588. *Compare* Shrimpton *v.* Dworsky, 2 Misc. 123, 21 N. Y. Supp. 461.

15. *United States.* — Illinois Car & Equip. Co. *v.* Linstroth Wagon Co., 112 Fed. 737, 50 C. C. A. 504; Walsh *v.* Colclough, 56 Fed. 778, 6 C. C. A. 114.

Alabama. — Alabama M. R. Co. *v.* Darby, 119 Ala. 531, 24 So. 713.

Illinois. — Swift *v.* Rutkowski, 182 Ill. 18, 54 N. E. 1038; Murchie *v.* Peck, 160 Ill. 175, 43 N. E. 356; Richelieu Hotel Co. *v.* Military Encamp. Co., 140 Ill. 248, 29 N. E. 1044; Lake Shore & M. S. R. Co. *v.* Ward, 135 Ill. 511, 26 N. E. 520; St. Clair Co. Benev. Soc. *v.* Fietsam, 97 Ill. 474; Espen *v.* Hinchliffe, 131 Ill. 468, 23 N. E. 592; Chicago & A. R. Co. *v.* Morgan, 69 Ill. 492; Ohio & M. R. Co. *v.* Brown, 49 Ill. App. 40.

Louisiana. — Hennen *v.* Wetzel, 12 La. 265.

Vermont. — Hills *v.* Marlboro, 40 Vt. 648.

In an action to foreclose a mechanic's lien, the introduction in evidence of the notice of lien was ob-

not be obviated,[16] or, it has been held, where the variance is plainly apparent on the face of the evidence.[17] And some courts hold that a variance must necessarily be apparent when the evidence is offered, and therefore a general objection is sufficient.[18]

c. *Evidence Not Within the Issues.* — A general objection to evidence does not raise the point that it is not within the issues made by the pleadings.[19] A general statement of this ground of objection is, however, sufficient.[20]

jected to on the ground "it was incompetent, irrelevant and immaterial, and that it was a variance from the allegation of the complaint, no such lien having been pleaded and no contract set out in the complaint such as is described or attempted to be described in said lien." This objection was held insufficient because it did not point out wherein a variance existed or was supposed to exist. Georges *v.* Kessler, 131 Cal. 183, 63 Pac. 466.

An objection to evidence on the ground that it is immaterial, irrelevant and incompetent in that it does not support the allegations of the complaint is not sufficient to raise the point that the evidence varies from the allegations of the complaint. Knox *v.* Higby, 76 Cal. 264, 18 Pac. 381.

16. In an action for the recovery of the possession of real estate, with damages for the withholding thereof, a general objection to evidence as to the value of the use and occupation of the premises was held sufficiently specific since there was no cause of action alleged authorizing the introduction of such evidence, and the complaint could not have been amended so as to obviate the objection, since that would have required the inserting of a new and independent cause of action. Larned *v.* Hudson, 57 N. Y. 151.

An objection to evidence showing a different contract than the one alleged on the ground that it is "irrelevant, immaterial and incompetent" was held sufficiently specific, where it appeared that there could have been no amendment of the complaint which would have made the testimony relevant. Morehouse *v.* Morehouse, 140 Cal. 88, 73 Pac. 738.

17. In Gabriel *v.* State, 40 Ala. 357, a general objection to a confession was held sufficient where the evidence was on its face illegal, because of variance from the facts charged in the indictment.

In an action upon a bill of exchange payable to "Bart" W., which is described in the declaration as payable to "Bartholomew" W. without any averment that Bart and Bartholomew were one and the same person, or that the former was an abbreviation of the latter, a general objection to the admission of the instrument in evidence on the ground of variance without stating in what the variance consisted was held sufficient, since the objection could not be obviated on the trial, the declaration lacking the necessary averments under which to admit the requisite proof. Curtiss *v.* Marrs, 29 Ill. 508.

18. Gabriel *v.* State, 40 Ala. 357. But see Sawyer *v.* Patterson, 11 Ala. 523.

In Gilbert *v.* Kennedy, 22 Mich. 117, 142, a general objection to evidence as to special damages not alleged in the complaint was held sufficient. "Though the objection made to the evidence was general, yet the court trying the cause must always be supposed to know what is in issue by the pleadings. The ground of objection should, therefore, I think, be considered too obvious to require it to be specifically stated; and it is one which could not be cured without at least striking out the testimony or expressly withdrawing it from the jury."

19. Claflin *v.* New York Standard Watch Co., 7 Misc. 668, 28 N. Y. Supp. 42, 28 N. Y. Supp. 1143.

The objection of "irrelevant, immaterial and incompetent" does not raise the point that no issue is made by the pleadings which renders the evidence objected to admissible. Walker *v.* Gray (Ariz.), 57 Pac. 614.

20. In Kitchen Bros. Hotel Co. *v.* Dixon (Neb.), 98 N. W. 816, an

d. *Insufficiency of Complaint To State Cause of Action.* — It has been held that an objection to the admission of any evidence on the ground that the complaint does not state facts sufficient to constitute a cause of action need not specify in what respects the complaint is deficient, since this objection can be raised in the appellate court for the first time.[21] But the contrary has also been held.[22]

e. *Fact Not Alleged.* — A general objection is not sufficient to question the admissibility of evidence of a particular fact on the ground that it has not been pleaded.[23]

R. OBJECTIONS TO WITNESS. — a. *Generally.* — An objection to the competency of a witness must specifically point out the ground

objection to evidence as incompetent and irrelevant and not within the issues was held sufficient to call the attention of the court to the fact that the evidence was not within the issues made by the pleadings, and it was therefore error to overrule the objection. But see Shewalter *v.* Hamilton Oil Co., 28 Ind. App. 312, 62 N. E. 708. See Weatherford *v.* Union Pac. R. Co. (Neb.), 98 N. W. 1089.

In an action for damages to property caused by the erection of an elevated railroad in its vicinity, an objection to testimony comparing the rental value of the premises in question with that of other properties located in widely separated territory, on the ground that the evidence called for was "not within the issues," was held sufficiently specific to raise the point decided in Jamieson *v.* Kings Co. Elev. R. Co., 147 N. Y. 322, 41 N. E. 693, that such evidence is incompetent because it raises collateral issues. Stuyvesant *v.* New York Elev. R. Co., 4 App. Div. 159, 38 N. Y. Supp. 595. But in Innes *v.* Manhattan R. Co., 3 App. Div. 541, 38 N. Y. Supp. 286, the same sort of an action, similar evidence was objected to on the ground that the property as to which the evidence was offered was entirely dissimilar in character, location and use from the property in suit, "and also on other grounds." This objection was held insufficient.

21. Wylly *v.* Grigsby, 11 S. D. 491, 78 N. W. 957.

22. An objection to the admission of any evidence under the complaint on the ground that it fails to state a cause of action should point out the specific defect in the complaint. Bromberg *v.* Minnesota Fire Assn., 45 Minn. 318, 47 N. W. 975.

In an action on a replevin bond, the defendant objected to the admission of any evidence on the ground that the breaches were not sufficiently set out, but the objection was overruled. It was held on appeal that the objection was too indefinite to present to the court any distinct point to be passed upon. Jennison *v.* Haire, 29 Mich. 207.

23. Waite *v.* Trustees, 34 App. Div. 625, 54 N. Y. Supp. 511.

A general objection to evidence as incompetent and immaterial does not raise the point that the fact sought to be shown is not pleaded. Merrick *v.* Hill, 77 Hun 30, 28 N. Y. Supp. 237.

Evidence of Special Damage Not Alleged. — A general objection does not raise the point that the complaint is not specific enough to warrant proof of special damage, this being the nature of the evidence offered. Bergman *v.* Jones, 94 N. Y. 51. *Contra*, Gilbert *v.* Kennedy, 22 Mich. 117, 142.

Defense Not Pleaded. — An objection to evidence as immaterial and irrelevant does not raise the point that the defense to which it relates has not been pleaded. Cranford *v.* Brooklyn, 13 App. Div. 151, 43 N. Y. Supp. 246.

An objection that the evidence tends to prove a different defense from that stated in the answer should be taken specifically on this ground so that the court may exercise its discretion as to permitting an amendment. Bowman *v.* Van Kuren, 29 Wis. 209.

of objection,[24] unless perhaps the latter is of such a nature that it cannot be obviated.[25]

b. *Witness Partially Competent.* — Where a witness is competent as to some matters and incompetent as to others, a specific objection to his competency to testify to the latter must be made, and the reason stated.[26]

S. In Criminal Case. — Although, in applying the rules relating to objections in a criminal case the courts are inclined to relax them in favor of the defendant,[27] nevertheless even in such cases objections must be made in accordance with the rules applicable to civil trials.[28]

24. Hoodless *v.* Jernigan (Fla.), 35 So. 656; Carroll *v.* Ridgaway, 8 Md. 328; Bernard *v.* Vignaud, 10 Mart. (O. S.) (L. A.) 633.

25. In Irwin *v.* Shumaker, 4 Pa. St. 199, a party was called as a witness and objected to on the ground of interest, but it was shown that he had released all his interest and the exception was overruled, when the objection was renewed generally without assigning any reason. The overruling of this objection was held error on the ground that the witness was incompetent because a party to the suit. "The defendant not requiring any further specification of the ground of objection, we must look at the whole case and find a sufficient reason to exist for excluding the witness. We must presume that the defendant intended to object on that ground."

26. Peters *v.* Horbach, 4 Pa. St. 134.

An objection generally to the competency of a witness is not sufficient to raise the question of the partial incompetency of the witness. Holmes *v.* Fond du Lac, 42 Wis. 282; Chunot *v.* Larson, 43 Wis. 536, 28 Am. Rep. 567. See also State *v.* Cole, 22 Kan. 474; County *v.* Leidy, 10 Pa. St. 45.

A general objection to the competency of a husband as a witness on behalf of his wife is too broad to raise the question of whether certain testimony comes within the rule permitting him to testify for his wife as to matters in which he acted as her agent. Arndt *v.* Harshaw, 53 Wis. 269, 10 N. W. 390.

Transactions With Deceased Person. — An objection to the testimony of a witness as to transactions with a deceased person must be specifically made. Mousseau *v.* Mousseau, 42 Minn. 212, 44 N. W. 193; Foxton *v.* Moore (Iowa), 87 N. W. 492; Levin *v.* Russell, 42 N. Y. 251. But for a full discussion of the necessity and nature of objections to this class of testimony, see article "Transactions With Deceased Persons."

27. The fact that objections made by the defendant could have been put in a better form, and could thus have presented the point in a clearer light, is no ground for disregarding them. "Technicalities should be liberally viewed when urged against the defendant in a criminal case." People *v.* Yee Fook Din, 106 Cal. 163, 39 Pac. 530.

"If any doubt could be entertained as to the technical sufficiency of the objection we should be disinclined in a criminal case to deprive the defendant of the benefit of an exception by the strict application of the rule more especially applicable to civil cases, when we can see that its application would produce injustice." People *v.* Beach, 87 N. Y. 508.

28. Miller *v.* State, 12 Lea (Tenn.) 223. See also People *v.* Sehorn, 116 Cal. 503, 48 Pac. 495; People *v.* Gordon, 99 Cal. 227, 33 Pac. 901; People *v.* Frank, 28 Cal. 507; McKinley *v.* State (Tex. Crim.), 82 S. W. 1042; Adams *v.* State, 44 Tex. Crim. 64, 68 S. W. 270; Rush *v.* State (Tex. Crim.), 76 S. W. 927; Neely *v.* State (Tex. Crim.), 56 S. W. 625.

Under a statute providing that the provisions of law in civil cases relative to the attendance and testimony of witnesses, their examination and

V. SCOPE OF OBJECTION.

1. Generally. — An objection will not be extended to points not coming within its express terms,[29] but will, however, be held to cover any matter fairly included within the meaning of the words used.[30]

2. General Objection Followed by Particular Specification. Where a general objection is made, followed by a particular specification of the grounds of the objection, it will be confined to the grounds specified.[31]

the administration of oaths and affirmations, etc., shall extend to criminal cases so far as they are in their nature applicable thereto, it is necessary for the defendant in a criminal case to interpose specific objection to testimony in order to preserve the ruling for review. State *v.* Hope, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608, *overruling* State *v.* O'Connor, 65 Mo. 374, which holds that it is the duty of the trial court in a criminal case to exclude improper evidence, although the objection interposed is only a general one.

Where evidence is objected to by the words "objected to" it will not be available on appeal unless the ground therefor it reasonably apparent, even in a criminal case. People *v.* Moore, 86 Mich. 134, 48 N. W. 693.

29. An objection to the testimony of a witness on the ground that he "did not so testify" before the grand jury does not raise the point that the witness had not testified before the grand jury. State *v.* Bernstein, 99 Iowa 5, 68 N. W. 442.

Matters Not Part of Record Objected To. — An objection to the admission in evidence of the record of a certain case raises no question as to the admissibility of the bill of exceptions in such case, since the latter forms no part of the record. State *v.* Hawkins, 81 Ind. 486.

An objection to a transcript of the record in another action does not cover a copy of the note upon which such action was founded, and which was introduced as a part of the transcript, since the note is no part of the record and should have been objected to specifically. Chance *v.* Summerford, 25 Ga. 662.

An objection to a question preliminary to the offer and introduction of a record is not an objection to the admission of the record itself. Kern *v.* Cummings, 10 Colo. App. 365, 50 Pac. 1051.

30. In People *v.* Shattuck, 109 Cal. 673, 42 Pac. 315, an objection to a question calling for testimony as to what the deceased did on a particular occasion was held sufficient to cover testimony as to what he said upon that occasion, for it was clear from the circumstances that the objection was so intended and so understood.

An objection to the admission of a mortgage on the ground that the subscribing witness has not been produced to prove his "attestation" is equivalent to an objection that the execution of the instrument is not proved by the subscribing witness, since the terms of "attestation" and "execution" are used synonymously by the authorities. Hewitt *v.* Morris, 5 Jones & S. (N. Y.) 18.

An objection to the admission of a letter against the defendant in a criminal case upon the ground that it was taken from his person and against his will at the time of his arrest was held sufficient to cover the question of the illegality of the search, it appearing that the letter was taken by an officer engaged in serving the warrant of arrest, and that the search was made by virtue of the warrant. State *v.* Slamon, 73 Vt. 212, 50 Atl. 1097.

31. In Mathews *v.* Herron, 102 Iowa 45, 67 N. W. 226, 70 N. W. 736, an account book, and especially certain pages thereof, was offered to show the payment of certain cash items therein contained. This offer was objected to in the following words: "To which offer the defendants objected as incompetent and immaterial as to each and every

3. Objection to Question as Extending to Answer. — A. Generally. — An objection to a question calling for illegal and irrelevant testimony of course covers responsive matter embraced in the answer.[32] But an objection to a proper question does not extend to any improper matter contained in the answer.[33]

B. Irresponsive Answer. — An objection to a question does not cover irresponsive matter contained in the answer,[34] even though the question itself was objectionable.[35] And where the question was a proper one the objection to it does not extend to irresponsive matter in the answer, although such irresponsive matter is open to the objection made to the question.[36]

4. Objection to Substance of Evidence no Objection to Medium of Communication. — A. Generally. — Where objection is made to

item in said testimony, and to each and every item on the book and on the pages referred to as incompetent and immaterial. The proper foundation has not been laid for the introduction of the testimony offered." This was held to amount only to an objection on the ground that no proper foundation had been laid for the admission of the book and the items therein contained.

An objection to evidence as incompetent and immaterial for certain specified reasons is limited to the reasons set forth in the objection. Weis *v.* Morris, 102 Iowa 327, 71 N. W. 208.

An objection to opinion evidence on the ground that it is "incompetent and irrelevant, no foundation being laid for the testimony," merely questions the sufficiency of the foundation and not the competency of the opinion if given. People *v.* Mahoney, 77 Cal. 529, 20 Pac. 73.

An objection to a question calling for the opinion of a witness as to the extent to which the rental value of certain premises had been diminished by the operation of an elevated railroad in its immediate vicinity, that the question is "improper, irrelevant and immaterial," as assuming that the property has been injured in that way, and as requiring the witness to separate such injury from that due to other causes, was held not to raise the point that opinion evidence upon this subject is not competent. Mortimer *v.* Manhattan R. Co., 129 N. Y. 81, 29 N. E. 5, *distinguishing* Roberts *v.* New York Elev. R. Co., 128 N. Y. 455, 28 N. E. 486.

32. Gilmer *v.* City Council, 26 Ala. 665.

33. Eagle & Phoenix Mfg. Co. *v.* Gibson, 62 Ala. 369; Holmes *v.* Roper, 141 N. Y. 64, 36 N. E. 180; Partridge *v.* Russell, 50 Hun 601, 2 N. Y. Supp. 529; Pollock *v.* Brennan, 7 Jones & S. (N. Y.) 477; Galveston, H. & S. A. R. Co. *v.* Hertzig, 3 Tex. Civ. App. 296, 22 S. W. 1013.

34. Barnhardt *v.* Smith, 86 N. C. 473; Gould *v.* Day, 94 U. S. 405; Manspeaker *v.* Pipher, 5 Kan. App. 879, 48 Pac. 868; Standard L. & Acc. Ins. Co. *v.* Davis, 59 Kan. 521, 53 Pac. 856; Malcolm *v.* Metropolitan Elev. R. Co., 36 N. Y. St. 741, 13 N. Y. Supp. 283.

Even though matter not responsive to the question is apparently suggested by it, the objection to the question does not cover the independent matter. Barnes *v.* Ingalls, 39 Ala. 193.

35. Louisville & N. R. Co. *v.* Binion, 107 Ala. 645, 18 So. 75; Hannum *v.* Pownall, 187 Pa. St. 292, 41 Atl. 29.

Where a question is obnoxious to objection, which is duly interposed, and the witness makes an answer to it not strictly responsive but apparently suggested by it, the objection to the question does not cover the independent matter thus elicited. It is only where the answer itself is irrelevant or illegal evidence and is called for by the question propounded that no separate objection to the answer is required. East Tennessee, Va. & Ga. R. Co. *v.* Bayliss, 74 Ala. 150.

36. Burt *v.* Olcott, 33 Mich. 178.

the substance of the evidence and not to the medium, the competency of the medium is not in question.[37]

B. Objection to Testimony as Extending to Witness. a. *Generally.* — An objection to the testimony of a witness is not an objection to the witness himself.[38] An objection to a question as incompetent raises no question as to the competency of the witness to whom the question is propounded.[39] The general objection "incompetent, irrelevant and immaterial" goes only to the evidence, and not to the witness through whom it is offered.[40]

b. *Objection to Question Calling for Opinion.* — An objection to a question calling for an opinion does not question the competency of the witness to give the opinion.[41] Thus an objection to a ques-

37. Where a memorandum was sought to be introduced and it was objected to on the ground that the contents were but hearsay declarations, the point raised for decision was not whether the given sayings or declarations could be proved in the manner proposed, but whether in and of themselves they were admissible evidence. Pearson *v.* Forsyth, 61 Ga. 537.

38. Coles *v.* Shepard, 30 Minn. 446, 16 N. W. 153; Garsed *v.* Turner, 71 Pa. St. 56; United States Leather Co. *v.* Aldrich, 75 App. Div. 616, 78 N. Y. Supp. 3; State *v.* Hughes, 106 Iowa 125, 76 N. W. 520, 68 Am. St. Rep. 288; State *v.* Brown (Iowa), 102 N. W. 799. See Stevens *v.* Brennan, 79 N. Y. 259.

An objection to evidence on the ground that it reveals confidential communications to a physician goes to the competency of the evidence and not to that of the witness. Winters *v.* Winters, 102 Iowa 53, 71 N. W. 184.

39. Tygard *v.* Falor, 163 Mo. 234, 63 S. W. 672.

An objection to a question as "incompetent" goes only to the testimony, and not to the competency of the witness. Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69.

"The objection of incompetency, without more, goes to the evidence and not to the witness." Burdick *v.* Raymond, 107 Iowa 228, 77 N. W. 833.

A general objection to testimony as incompetent does not raise the question that the witness has not sufficient knowledge of the contents of the lost papers to which he is testifying. Stuart *v.* Mitchum, 135 Ala. 546, 33 So. 670.

40. Ball *v.* Keokuk & N. W. R. Co., 74 Iowa 132, 37 N. W. 110; Adair *v.* Mette, 156 Mo. 496, 57 S. W. 551; Topeka *v.* Griffey, 6 Kan. App. 920, 51 Pac. 296. See also *infra* next section, "Objection to Question Calling for Opinion."

An objection to a question calling for testimony as to the value of particular premises, on the ground that it is "incompetent, immaterial and irrelevant testimony," does not raise the point that the witness has not been shown to be qualified to testify as to values. White *v.* Smith, 54 Iowa 233, 6 N. W. 284.

An objection to testimony as incompetent and immaterial is not sufficient to question the competency of the witness to testify in behalf of her husband. Byrnes *v.* Clark, 57 Wis. 13, 14 N. W. 815.

41. Chicago, P. & St. L. R. Co. *v.* Nix, 137 Ill. 141, 27 N. E. 81; New Jersey Steamboat Co. *v.* New York, 109 N. Y. 621, 15 N. E. 877; Young *v.* Kansas City, F. S. & M. R. Co., 52 Mo. App. 530. See Nelson *v.* Young, 91 App. Div. 457, 87 N. Y. Supp. 69.

An objection that a question calls for the expression of an opinion is not sufficient to raise the point that the witness has not been shown to be sufficiently experienced to give the opinion called for. Railway Co. *v.* Shoecraft, 56 Ark. 465, 20 S. W. 272.

An objection to a question calling for an opinion that it is incompetent, irrelevant and immaterial as asking for a conclusion, and as not the

tion calling for expert testimony does not question the competency of the witness as an expert upon the subject.[42]

5. Objection to Witness as Extending to Testimony. — An objection to the competency of a witness is not an objection to the competency of his testimony.[43]

6. Objections Upon Specific Grounds. — A. GENERALLY. — An objection upon one ground does not go to other grounds not stated,[44]

proper way to prove damages, was held not to question its competency on the ground that the witness was not shown to possess the requisite knowledge. Brumley *v.* Flint, 87 Cal. 471, 25 Pac. 683.

42. Mallory *v.* Perkins, 9 Bosw. (N. Y.) 572; Watriss *v.* Trendall, 74 Vt. 54, 52 Atl. 118. See also Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57.

An objection to a question on the ground that the matter called for is not a proper subject for expert testimony does not question the competency of the witness or the materiality of the testimony. McConnell *v.* Osage, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778.

An objection to expert testimony as "incompetent and improper" is too general to question the qualifications of the witness as an expert. Schlereth *v.* Missouri Pac. R. Co., 115 Mo. 87, 21 S. W. 1110.

An objection to a question calling for expert testimony as "incompetent and as calling for an opinion" does not question the competency of a witness on the ground of lack of knowledge. Sigafus *v.* Porter, 84 Fed. 430, 28 C. C. A. 443.

"Incompetent, Irrelevant and Immaterial." — An objection to a question calling for an opinion as incompetent, irrelevant and immaterial is not sufficient to raise the point that the witness is not competent to give an expert opinion. Chicago, K. & N. R. Co. *v.* Behney, 48 Kan. 47, 28 Pac. 980. *In re* New York Elev. R. Co., 58 Hun 610, 12 N. Y. Supp. 857; Missouri Pac. R. Co. *v.* Hall, 66 Fed. 868; State *v.* Rue, 72 Minn. 296, 75 N. W. 235; Friedman *v.* Breslin, 51 App. Div. 268, 65 N. Y. Supp. 5, *affirmed* 169 N. Y. 574, 61 N. E. 1129.

Contra. — In State *v.* Simonis, 39 Or. 111, 65 Pac. 595, an objection to the testimony of a medical expert as irrelevant, incompetent and immaterial was held sufficient to cover the point that the witness was not shown to be qualified as an expert upon the matter in question, and that he failed to detail the symptoms upon which his opinion was based.

43. Gage *v.* Eddy, 179 Ill. 492, 53 N. E. 1008.

An Insufficient Objection to the Competency of a Witness cannot be considered as an objection to the competency or relevancy of his testimony. Lincoln Supply Co. *v.* Graves (Neb.), 102 N. W. 457.

Qualifications as Expert. — An objection to a question on the ground that the witness has not been shown to be an expert does not raise the point that it calls for a mere conclusion of the witness, since the question goes to the qualifications of the witness, and not to the competency or admissibility of his testimony. Larrison *v.* Payne, 52 Hun 612, 5 N. Y. Supp. 22.

An objection merely to the competency of a handwriting expert is not an objection to the use by him, as a basis of comparison, of a paper on which is written the name of the person whose handwriting is in question, on the ground that there is not sufficient proof that the standard used is authentic. State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497.

An Objection to a Witness Before His Examination Has Been Commenced must be to the competency of the witness and not to the admissibility of his testimony, for until his testimony has been offered no question as to its admissibility can arise. Carroll *v.* Ridgaway, 8 Md. 328.

44. *Alabama.* — Ballow *v.* Collins, 139 Ala. 543, 36 So. 712; Sharp *v.* Hall, 86 Ala. 110, 5 So. 497, 11 Am. St. Rep. 23.

and is a waiver of all grounds of objection not specified.[45] A party

Colorado. — Whitehead *v.* Jessup, 2 Colo. App. 76, 29 Pac. 916.

Georgia. — Cox *v.* Cody, 75 Ga. 175.

Iowa. — Blackmore *v.* Fairbanks-Morse Co., 79 Iowa 282, 44 N. W. 548; Puth *v.* Zimbleman, 99 Iowa 641, 68 N. W. 895.

Kentucky. — Murphy *v.* Murphy, 23 Ky. L. Rep. 1460, 65 S. W. 165.

Louisiana. — See State *v.* Allen, 113 La. 705, 37 So. 614.

New York. — Newton *v.* Harris, 6 N. Y. 345; Horn *v.* New Jersey Steamboat Co., 23 App. Div. 302, 48 N. Y. Supp. 348.

An objection to testimony as "incompetent, irrelevant, immaterial, hearsay and not the best evidence" does not raise the point that the witness is incompetent to testify to the matter because it is a transaction with a person since deceased. Burdick *v.* Raymond, 107 Iowa 228, 77 N. W. 833.

45. *Alabama.* — Garrett *v.* Garrett, 27 Ala. 687; Levison *v.* State, 54 Ala. 520; Alabama G. S. R. Co. *v.* Bailey, 112 Ala. 167, 20 So. 313; Garrett *v.* Trabue, 82 Ala. 227, 32 So. 149.

Arizona. — Rush *v.* French, 1 Ariz. 99, 124, 25 Pac. 816.

Arkansas. — St. Louis, I. M. & S. R. Co. *v.* Hackett, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105.

California. — Clavey *v.* Lord, 87 Cal. 413, 25 Pac. 493; Brumley *v.* Flint, 87 Cal. 471, 25 Pac. 683; Cochran *v.* O'Keefe, 34 Cal. 554.

Connecticut. — Leonard *v.* Charter Oak L. Ins. Co., 65 Conn. 529, 33 Atl. 511.

Georgia. — Goodtitle *v.* Roe, 20 Ga. 135.

Iowa. — Clark *v.* Connor, 28 Iowa 311; Ford *v.* Independent Dist. of Stuart, 46 Iowa 294. See State *v.* Gunn, 106 Iowa 120, 76 N. W. 510.

Kentucky. — Murphy *v.* Murphy, 23 Ky. L. Rep. 1460, 65 S. W. 165.

Louisiana. — Pratt *v.* Flowers, 2 Mart. (N. S.) 333; Ball *v.* Ball, 15 La. 173.

Massachusetts. — Holbrook *v.* Jackson, 7 Cush. 136.

Michigan. — Detzur *v.* B. Stroh Brew. Co., 77 N. W. 948; Michigan State Ins. Co. *v.* Soule, 51 Mich. 312, 16 N. W. 662.

Minnesota. — Johnson *v.* Schulin, 73 N. W. 147; Nelson *v.* Chicago, M. & St. P. R. Co., 35 Minn. 170, 28 N. W. 215.

Missouri. — Wilbracht *v.* Annan, 89 Mo. App. 363; Drew *v.* Drum, 44 Mo. App. 25.

New Hampshire. — Sanborn *v.* Wilder, 68 N. H. 471, 41 Atl. 172.

New York. — Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 651; Barber *v.* Rose, 5 Hill 76; Wilson *v.* Steers, 18 Misc. 364, 41 N. Y. Supp. 550, *citing* Marston *v.* Gould, 69 N. Y. 220. See Hawkins *v.* Ringler, 47 App. Div. 262, 62 N. Y. Supp. 56; McCulloch *v.* Hoffman, 73 N. Y. 615.

South Dakota. — Bailey *v.* Chicago, M. & St. P. R. Co., 3 S. D. 531, 54 N. W. 596, 19 L. R. A. 653.

Texas. — Ann Berta Lodge *v.* Leverton, 42 Tex. 18.

Vermont. — Luce *v.* Hassan, 76 Vt. 450, 58 Atl. 725; Willett *v.* St. Albans, 69 Vt. 330, 38 Atl. 72.

Wisconsin. — Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67.

An objection to a question upon one specific ground is a waiver of objection on other grounds, even though such other grounds could not have been obviated. Gill *v.* New York Cab Co., 48 Hun 524, 1 N. Y. Supp. 202.

An objection to evidence as "incompetent" for certain specified reasons is deemed an objection on the grounds specified, and will not cover others not specified. Triggs *v.* Jones, 46 Minn. 277, 48 N. W. 1113.

Subsequent Motion Presumed To Be Based on Same Grounds. — Where a specific ground of objection is stated, all other grounds of objection are thereby waived, and when a subsequent general motion to exclude the same evidence is made without stating any particular grounds it will be presumed that the motion was based upon the particular ground stated in the first objection. Floyd *v.* State, 82 Ala. 16, 2 So. 683.

on appeal cannot urge objections or grounds of objection not stated in the court below.[46]

Exception to General Rule. — It has been held that there is an exception to the foregoing general rules in the case of evidence which is by express provision of law made improper proof of a particular fact.[47]

B. Competency, Relevancy and Materiality. — There is a fundamental difference between the competency, relevancy and materiality of evidence, and objections to evidence should indicate which one of these grounds is relied on.[48] An objection to the competency of evidence is a waiver of any other grounds of objection, such as its immateriality or irrelevancy.[49] So an objection

46. *United States.* — Hinde *v.* Longworth, 11 Wheat. 199.

Louisiana. — Miller *v.* Breedlove, 1 La. 321; Balfour *v.* Chew, 5 Mart. (N. S.) 517.

Missouri. — Grievaud *v.* St. Louis, C. & W. R. Co., 33 Mo. App. 458.

Nebraska. — Western Union Tel. Co. *v.* Church, 90 N. W. 878.

North Carolina. — Kidder *v.* McIlhenny, 81 N. C. 123.

Pennsylvania. — Mills *v.* Buchanan, 14 Pa. St. 59.

Vermont. — State *v.* Noakes, 70 Vt. 247, 40 Atl. 249.

Where the objection to incompetent evidence is based on insufficient grounds, other grounds cannot be raised in the appellate court, although the evidence is clearly incompetent. Monteeth *v.* Caldwell, 7 Humph. (Tenn.) 13; Shea *v.* Mabry, 1 Lea (Tenn.) 319; Graham *v.* McReynolds, 90 Tenn. 673, 18 S. W. 272; Harris *v.* Panama R. Co., 5 Bosw. (N. Y.) 312.

Where a Specific Objection Is Made to Books of Account on the ground that they are not books of original entry, no other objection to them can be raised on appeal; the objection being specific, all other grounds not covered by it are waived. Ladd *v.* Sears, 9 Or. 244.

47. **Exceptions.** — There are some exceptions to the general rule that where the objecting party has assigned a bad ground for his objection below he cannot assign a good ground in the appellate court; and one of these exceptions is that when the law makes the evidence offered improper to prove the fact for which it is offered — that is, to prove a fact which cannot be proved by such evidence — it becomes the duty of the court to exclude it without objection. Presnell *v.* Garrison, 121 N. C. 366, 28 S. E. 409, *holding* that oral evidence of title to land, although objected to on an untenable ground, should have been excluded by the trial court. "This evidence, being offered to prove a fact it was unlawful to prove by parol, should not have been allowed, although the objection was put on improper grounds."

48. M. Groh's Sons *v.* Groh, 177 N. Y. 8, 68 N. E. 992. "When evidence is immaterial, and is objected to on that specific ground, the objection is well taken, because it points out the precise ground upon which the evidence should be excluded, and that is all the objector is required to do. It frequently happens that evidence which is immaterial is also incompetent and irrelevant, and in that event it may properly be objected to on all or either of these grounds. It is equally true that evidence may be incompetent, but neither immaterial nor irrelevant, or *vice versa,* in which case the objection may and should be urged upon the precise ground that provokes it."

49. See McConnell *v.* Osage, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778.

An objection to a copy of a telegram on the ground that it is secondary evidence is a waiver of any possible objection to its materiality. "Confining the objection to the question of competency must be taken as

to evidence as irrelevant[50] or immaterial[51] does not question its competency.

C. Form of Question. — An objection to the form of a question is a waiver of any ground of objection based on the character of matter called for; and conversely an objection to the relevancy, competency or materiality of the subject-matter of the question waives any defects in its form.[52]

D. Order of Proof. — An objection to evidence because not offered in its proper order raises no question as to its competency[53] or materiality.[54]

E. Documentary Evidence. — a. *Generally.* — The making of a specific objection to the introduction of documentary evidence is

a concession that if competent the evidence is admissible as against any other objection, including any that might go to its materiality." Magie *v.* Herman, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660.

A general objection to testimony of a witness as to a conversation with a person since deceased is not sufficient to cover objections that afterward arise as to the materiality or propriety of some particular part of the conversation, where it is determined that the conversation itself is not objectionable as being a transaction with a deceased person. Christiansen *v.* Dunham, T. & W. Co., 75 Ill. App. 267.

An objection to evidence on the ground that it varies the terms of a written contract does not question its relevancy. Surles *v.* State, 89 Ga. 167, 15 S. E. 38.

50. Story *v.* Black, 5 Mont. 26, 1 Pac. 1, 51 Am. Rep. 37.

An objection to evidence as irrelevant does not question its competency, and where the evidence objected to on this ground is relevant it is not error to overrule the objection, although the evidence is incompetent. Berliner *v.* Travelers Ins. Co., 121 Cal. 451, 53 Pac. 922.

Immaterial and Irrelevant. — An objection to evidence as immaterial and irrelevant does not question its competency as a privileged communication. Campbell *v.* State, 133 Ala. 158, 32 So. 635; Satterlee *v.* Bliss, 36 Cal. 489, 507. Or as an offer of compromise. Taussig *v.* Shields, 26 Mo. App. 318. Nor does such an objection to a document question the sufficiency of the proof of its execution. Craig *v.* Cook, 28 Minn. 232, 9 N. W. 712.

51. Story *v.* Black, 5 Mont. 26, 1 Pac. 1, 51 Am. Rep. 37; Campbell *v.* State, 133 Ala. 158, 32 So. 635; Brown *v.* Wakeman, 45 N. Y. St. 671, 18 N. Y. Supp. 363.

An objection to evidence as "immaterial" does not question its competency. "There is a wide distinction between immaterial and incompetent evidence. It may be material and tend to prove the issue, but incompetent for that purpose under the rules of law. On the other hand, it may be competent evidence in a proper case, but immaterial to any issue before the court." People *v.* Manning, 48 Cal. 335.

An objection to evidence as immaterial does not raise the point that it is secondary. Cullman *v.* Bottcher, 58 Minn. 381, 59 N. W. 971.

52. United Oil Co. *v.* Roseberry, 30 Colo. 177, 69 Pac. 588.

An objection to a question merely as leading is a waiver of any grounds of objection to its relevancy. McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375. Or to its competency in other respects. Kansas Farmers F. Ins. Co. *v.* Hawley, 46 Kan. 746, 27 Pac. 176; Buttrick *v.* Gilman, 22 Wis. 356.

53. An objection to evidence as not proper in rebuttal is not sufficient to raise the point that it is incompetent because showing other specific acts of misconduct by the defendant. State *v.* Owens, 15 Wash. 468, 46 Pac. 1039.

54. See People *v.* Durfee, 62 Mich. 487, 29 N. W. 109.

a waiver of other grounds of objection not stated,[55] at least such as might have been obviated.[56]

b. *Execution.* — An objection to the admission of a document on the ground that its execution has not been proved is a waiver of any other grounds of objection.[57] And conversely an objection on specific grounds other than the failure to prove execution waives the necessity of such proof.[58] An objection to the manner of proving the execution of a document is not an objection to the admission of the document itself.[59]

F. Secondary Evidence. — An objection going to the competency or relevancy of the substance of offered evidence raises no question as to its secondary character and the sufficiency of the preliminary foundation therefor;[60] nor does a specific objection to the

55. An objection to the admission of a deed or other instrument upon one specific ground is an admission that in other respects such instruments are competent. Creagh *v.* Savage, 9 Ala. 959; Gaston *v.* Weir, 84 Ala. 193, 4 So. 258.

An objection to a record for certain specific defects therein does not question its materiality under the pleadings, and the specific objection made being untenable it is not error to admit the evidence, although objectionable as not material to any of the issues. Cox *v.* Cody, 75 Ga. 175.

An objection to the admission of a tax bill because "not sufficient on its face to show tax charge for the items or amounts charged in the petition as against the land described in said petition," does not raise the point that the tax bill does not properly describe the land. State *v.* Lounsberry, 125 Mo. 157, 28 S. W. 448.

An Objection to the Reading of a Letter by counsel, on the ground that it is not "in evidence," raises no question as to the competency of the letter. MacKinstry *v.* Smith, 16 Misc. 351, 38 N. Y. Supp. 93.

56. Garrick *v.* Chamberlain, 97 Ill. 620.

57. Alexander *v.* Wheeler, 78 Ala. 167.

58. Botkin *v.* Livingston, 16 Kan. 39; Myers *v.* State, 47 Ind. 294.

Where the introduction of a letter was objected to as irrelevant, it was held that the objection that the signature of the writer was not proved could not be made on appeal. General Elec. Co. *v.* Blacksburg Land & Imp. Co., 46 S. C. 75, 24 S. E. 43.

An objection to the admission of receipts merely on the ground that they do not show payment is a waiver of an objection for the failure to prove their authenticity and execution. Beebe *v.* Redward, 35 Wash. 615, 77 Pac. 1052.

Where the only objection to the introduction of a deed was that the alleged grantor, a corporation, had not been shown to have title, it was held that the objection was not broad enough to cover the point that the corporate seal had not been proved, nor any authority shown for affixing it to the deed. Sharon *v.* Minnock, 6 Nev. 687.

59. In an action upon a special tax bill, it appeared that the plaintiff, while testifying, was handed the tax bill and asked as to the signatures of the president of the board of public improvements and comptroller respectively, as shown by the tax bill. This question was objected to as incompetent, irrelevant and immaterial, but it was held that such objection did not go to the introduction in evidence of the tax bill itself. Heman *v.* Allen, 156 Mo. 534, 57 S. W. 559.

60. An objection to a copy of an instrument going merely to the competency of the instrument itself does not raise the point that the copy was not sufficiently authenticated. Dearman *v.* Marshall, 88 App. Div. 41, 84 N. Y. Supp. 705.

An objection that a registry copy

incompetent form of the evidence in other respects.[61] An objection to evidence as secondary does not question the relevancy[62] or materiality[63] of the evidence or its competency in other respects, either intrinsic or formal.[64] And an objection to a copy because not sufficiently shown to be a correct copy is a waiver of other deficiencies in the necessary preliminary showing,[65] and *vice versa*.[66]

G. Parol Evidence. — An objection to parol evidence on the ground that it varies the terms of a written agreement is a waiver of all other grounds of objection.[67]

H. Opinion Evidence. — a. *Generally*. — An objection to the form of a question calling for an opinion, or to the character of the

of a deed is not admissible without notice to produce the original is waived by placing the objection to the admission of such deed on other grounds. Com. *v.* Mead, 153 Mass. 284, 26 N. E. 855.

On a prosecution for passing counterfeit coin, an objection to evidence of the defendant's possession and passing of counterfeit bank notes does not question the competency of such testimony as being secondary evidence of the contents of the notes. Lane *v.* State, 16 Ind. 14.

Insufficient Authentication. Where the specific objections made to the copy of a record do not question the sufficiency of its authentication, the appellate court will not inquire into the legality of the authentication, but will presume that all objections thereto were waived. Huling *v.* Fort, 2 Litt. (Ky.) 193.

61. An objection to the admission of a certified copy of a recorded instrument on the ground that it is "not duly certified and proved" is a waiver of any objection which might have been made on the ground that the original was not produced or accounted for. Mayor *v.* Mazeaux, 38 Cal. 442.

62. The admission of a copy of a mortgage was held not error, although it was irrelevant, where the only objection to its admission was that the original had not been sufficiently accounted for, which objection was untenable. Waxelbaum *v.* Berry, 99 Ga. 280, 25 S. E. 775.

63. Magie *v.* Herman, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660.

64. An objection to oral evidence of a writing merely on the ground that it is secondary is not sufficient to question the competency of the subject-matter of the writing. Liebenthal *v.* Price, 8 Wash. 206, 35 Pac. 1078.

An objection to evidence as secondary does not raise the point that it is incompetent because it is parol evidence varying a writing. Blount *v.* Bowne, 82 Ga. 346, 9 S. E. 164.

An objection to the admission of a certified copy on the ground that the original should be produced raises no question as to the form of the certificate. Nicolai *v.* Davis, 91 Wis. 370, 64 N. W. 1001.

65. An objection to a copy on the ground that it is not a true copy of the original is a waiver of the ground of objection that the original has not been accounted for. "When a specific objection only is made to the receipt of evidence, either documentary or otherwise, all other objections are considered waived." Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67.

66. An objection to a certified copy of a Mexican grant on the ground that it was not duly authenticated and that the original was not accounted for was held insufficient to raise the point that the paper offered did not purport to be a copy of the original. Natoma Water & Min. Co. *v.* Clarkin, 14 Cal. 544.

67. Sharp *v.* Hall, 86 Ala. 110, 5 So. 497, 11 Am. St. Rep. 23; Surles *v.* State, 89 Ga. 167, 15 S. E. 38.

foundation therefor, does not go to the intrinsic incompetency of the opinion[68] and *vice versa*.[69]

b. *Hypothetical Question.* — An objection to a hypothetical question on specified grounds raises no question as to its competency or sufficiency in other respects.[70]

I. Admissibility Under Pleadings. — An objection to evidence on the ground of variance or as inadmissible under the pleadings waives any other grounds of objection,[71] and *vice versa*.[72]

J. Declarations. — An objection to the subject-matter of declarations does not question the qualifications of the declarant.[73]

68. Stahl *v.* Duluth, 71 Minn. 341, 74 N. W. 143. See also United Oil Co. *v.* Roseberry, 30 Colo. 177, 69 Pac. 588.

An objection to a question calling for an opinion on the ground that it is based on facts not proved does not raise the point that opinion evidence on the subject is not competent. Erickson *v.* Smith, 38 How. Pr. (N. Y.) 454.

69. An objection to the opinion of a witness as to the depreciation from specified causes in the value of certain property on the ground that it is immaterial and incompetent and does not involve the proper elements of damage, is insufficient to raise the point that the question assumes facts not proved. Stillman *v.* Northern Pac. F. & B. H. R. Co., 34 Minn. 420, 26 N. W. 399.

70. An objection to a hypothetical question on the ground that it assumes facts not found in the evidence does not raise the point that certain facts shown by the evidence are omitted from the question (O'Neill *v.* Kansas City, 178 Mo. 91, 77 S. W. 64), and *vice versa*. Mount *v.* Brooklyn Union Gas Co., 72 App. Div. 440, 76 N. Y. Supp. 533.

An objection to a hypothetical question on the ground that it is not properly framed and that no foundation for it has been laid does not raise the point that the question is based upon an erroneous statement of the evidence. Chicago, R. I. & P. R. Co. *v.* Archer, 46 Neb. 907, 65 N. W. 1043.

An objection to a hypothetical question on the ground that it is incompetent, irrelevant and immaterial, that no proper foundation has been laid, and that it assumes facts not shown by the evidence, does not raise the point that it asks for the testimony of one expert as to what another expert should have concluded. Stahl *v.* Duluth, 71 Minn. 341, 74 N. W. 143.

An objection to a hypothetical question as "irrelevant, immaterial and incompetent and not a proper hypothetical" question is not sufficiently specific to raise the point that the question called for the opinion of one expert based upon the opinion of another expert. Howland *v.* Oakland C. St. R. Co., 110 Cal. 513, 42 Pac. 983.

71. McDonald *v.* Smith (Mich.), 102 N. W. 668. See also Union Cash Reg. Co. *v.* John, 49 Minn. 481, 52 N. W. 48.

An objection to evidence of acts of misconduct on the ground that they are not in the declaration does not raise the point that such evidence is not relevant to the issue. To raise this question the objection should have been on the ground of irrelevancy. McDonald *v.* Smith (Mich.), 102 N. W. 668.

72. An objection to evidence as hearsay does not question its admissibility upon the ground of variance. Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998.

The objection that a question is incompetent, irrelevant and immaterial, or that it calls for secondary evidence, does not raise the objection that it is not admissible under the pleadings. Smith *v.* Kingman, 70 Minn. 453, 73 N. W. 253.

73. An objection to evidence of a deceased person's declaration concerning a boundary line on the ground that "the subject-matter of the examination as inquired about was not admissible," does not question the qualifications of the declar-

K. Transactions With Deceased Person. — In order to exclude the testimony of an interested witness as to his transactions with a person since deceased the objection should be to the competency of the witness to testify to such transactions against the representative of the deceased,[74] though the contrary has been held.[75]

L. Use of Memoranda. — An objection to the introduction in evidence of a writing is not an objection to its use by the witness to refresh his memory.[76] And an objection to the secondary character of the writing does not go to the lack of the witness' independent knowledge or recollection.[77] An objection to the witness' use of a writing to refresh his memory does not raise the point that his testimony as to the contents of the writing is secondary.[78]

VI. EFFECT OF FAILURE TO OBJECT.

1. Generally. — The failure to object to evidence at all or at the proper time or in a proper manner is a waiver of the grounds of objection and the right to subsequently question the admissibility of the evidence.[79]

ant on the ground of lack of knowledge of the subject-matter. Hathaway *v.* Goslant (Vt.), 59 Atl. 835.

74. An objection to the relevancy, materiality or competency of the testimony of an interested witness as to transactions with a deceased person is not sufficient to require its exclusion, but the objection to be effectual must be to the competency of the witness to testify to such transactions. Sucke *v.* Hutchinson, 97 Wis. 373, 72 N. W. 880; Union Nat. Bank *v.* Hicks, 67 Wis. 189, 30 N. W. 234. See State *v.* Cole, 22 Kan. 474. See article "Transactions with Deceased Persons."

75. An objection to testimony as to transactions with a deceased person on the ground that it was incompetent was held sufficient to warrant its exclusion, since it was the testimony and not the witness which was incompetent. Farley *v.* Lisey, 55 Ohio 627, 45 N. E. 1103.

76. See Waters *v.* Gilbert, 2 Cush. (Mass.) 27.

Where on the trial the introduction of a memorandum itself as evidence is objected to, the objecting party cannot on appeal change his objection to the use of the memorandum by the witness to refresh his memory. Springs *v.* South Bound R. Co., 46 S. C. 104, 24 S. E. 166.

77. An objection to the testimony of a witness based upon copies of original entries made by him, on the ground that the originals and not copies must be used for the purpose of refreshing the memory, does not raise the point that the witness has no knowledge or recollection of the facts testified to except that gained with reference to the entries. Erie Preserving Co. *v.* Miller, 52 Conn. 444, 52 Am. Rep. 607.

78. Rice *v.* Williams, 18 Colo. App. 330, 71 Pac. 433.

79. *United States.* — Hunt *v.* United States, 61 Fed. 795, 10 C. C. A. 74; Benson *v.* United States, 146 U. S. 325.

Alabama. — Ladd *v.* Smith, 10 So. 836; Mary Lee Coal & R. Co. *v.* Knox, 110 Ala. 632, 19 So. 67; Miller *v.* State, 130 Ala. 1, 30 So. 379; Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159.

California. — People *v.* Scalamiero, 143 Cal. 343, 76 Pac. 1098; Wheelock *v.* Godfrey, 100 Cal. 578, 35 Pac. 317; People *v.* Smith, 121 Cal. 355, 53 Pac. 802; Bullard *v.* Stone, 67 Cal. 477, 8 Pac. 17.

Georgia. — Morrison *v.* Hays, 19 Ga. 294; Bishop *v.* State, 9 Ga. 121; Brown *v.* Robinson, 25 Ga. 144.

Illinois. — Miller *v.* Potter, 59 Ill. App. 125; Graham *v.* People, 115 Ill. 566, 4 N. E. 790; Smith *v.* Forth, 24 Ill. App. 198.

2. Particular Evidence Made Incompetent by Express Statute To Prove Particular Fact. — It has been held that where the law pro-

Indiana. — Wood *v.* State, 130 Ind. 364, 30 N. E. 309; Crawford *v.* Anderson, 129 Ind. 117, 28 N. E. 314.

Iowa. — Robinson *v.* Holley, 124 Iowa 443, 100 N. W. 328; State *v.* Lee, 95 Iowa 427, 64 N. W. 284; State *v.* O'Brien, 81 Iowa 88, 46 N. W. 752.

Kansas. — Grandstaff *v.* Brown, 23 Kan. 176.

Kentucky. — Outen *v.* Merrill, 2 Litt. 305; Edwards *v.* Morris, 2 A. K. Marsh. 65; Helton *v.* Com., 16 Ky. L. Rep. 464, 29 S. W. 331.

Maine. — State *v.* Savage, 69 Me. 112.

Massachusetts. — Wait *v.* Maxwell, 5 Pick. 217, 16 Am. Dec. 391; Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60.

Mississippi. — Tucker *v.* Donald, 60 Miss. 460, 45 Am. Rep. 416.

Missouri. — Ring *v.* Canada Southern Line, 14 Mo. App. 579.

Montana. — Story *v.* Black, 5 Mont. 26, 1 Pac. 1, 51 Am. Rep. 37.

New York. — Whiting *v.* Edmunds, 94 N. Y. 309; Steuben Co. Bank *v.* Stephens, 14 Wend. 243; Walker *v.* Erie R. Co., 63 Barb. 260; Carr *v.* Mayor, 11 Jones & S. 158.

South Carolina. — See Simmons *v.* Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700.

South Dakota. — Balcom *v.* Brien, 13 S. D. 425, 83 N. W. 562.

Texas. — Newman *v.* State (Tex. Crim.), 64 S. W. 258.

Washington. — Price *v.* Scott, 13 Wash. 574, 43 Pac. 634.

An Objection Which Is Not Interposed at the Time the Evidence Is Offered is waived, unless there be some legal reason for the failure to object at that time.

United States. — Fischer *v.* Neil, 6 Fed. 89.

Iowa. — Walrod *v.* Webster Co., 110 Iowa 349, 81 N. W. 598, 47 L. R. A. 480.

Maine. — Bucksport *v.* Buck, 89 Me. 320, 36 Atl. 456; Kimball *v.* Irish, 26 Me. 444.

Mississippi. — Phillips *v.* Lane, 4 How. 122. See also Exum *v.* Brister, 35 Miss. 391.

South Carolina. — Smith *v.* Youmans, 26 S. E. 651.

Texas. — Mayo *v.* State, 7 Tex. App. 342.

See *supra* "Time for Objections."

A Failure To Object to a Question calling for incompetent testimony until after the answer has been received is a waiver of the right to object. Dunn *v.* State (Neb.), 79 N. W. 719; Hutton *v.* Doxsee, 116 Iowa 13, 89 N. W. 79. See *supra* "Time for Objections."

During Recess. — An objection made during a recess in the trial will not be noticed on appeal because not made at the proper time. State *v.* Duncan, 116 Mo. 288, 22 S. W. 699.

Objection to Irrelevancy. — An objection to evidence as irrelevant if not made when the evidence is offered is waived. Hutchinson *v.* Washburn, 80 App. Div. 367, 80 N. Y. Supp. 691.

An Objection to Hearsay must be made when the evidence is offered; otherwise it is waived. Fischer *v.* Neil, 6 Fed. 89; Rice *v.* Bancroft, 11 Pick. (Mass.) 468. See *infra* "Consideration and Value of Evidence Admitted Without Objection. — Hearsay," VI, 6, F.

An Agreed Statement as to the Testimony of a Supposedly Absent Witness is rendered incompetent by the appearance in court of the witness, but if no objection is interposed to the reading of the statement the right to object is waived. Allred *v.* Kennedy, 74 Ala. 326.

Objection to the Declarations of an Agent as to the fact and character of his agency, if not made at the trial, is waived. St. Paul F. & M. Ins. Co. *v.* McGregor, 63 Tex. 399. See also Dean *v.* Aetna L. Ins. Co., 48 How. Pr. (N. Y.) 36.

Cross-Examination. — Where a party while cross-examining a witness fails to object to an answer immediately upon receiving it, but proceeds to question the witness with reference thereto, he waives his right to object to its admissibility. People *v.* Myring, 144 Cal. 351, 77 Pac. 975.

Evidence Competent for Particular Purpose Admitted Generally. Where evidence competent for a par-

vides that a particular fact cannot be proved by a particular kind of evidence, it is the duty of the trial court to exclude such evidence when offered to prove this fact, although no proper objection is interposed.[80]

3. Objection on Wrong Grounds. — An objection to evidence on wrong grounds is a waiver of other grounds not relied upon.[81]

4. Grounds of Objection Subsequently Appearing. — Only those grounds of objection which are apparent or known when the evidence is offered are waived by a failure to object at that time.[82] It

ticular purpose is admitted without objection, and no request is made that it be limited to the particular purpose for which it is competent, the party against whom it is admitted cannot afterward complain that it is inadmissible for some other purpose. People *v.* Collins, 48 Cal. 277.

Acquiescence in General Ruling. Where the court has ruled without objection that a particular fact is relevant and material under the issues, a party who has objected generally to certain evidence of this fact cannot on appeal raise the point that the evidence objected to was inadmissible because the fact itself was immaterial. Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534.

In Empire *v.* Empire, 35 App. Div. 51, 54 N. Y. Supp. 402, an action for prospective expenses under a bond for life support, the plaintiff proposed that the referee should determine the value of prospective medical and funeral expenses from his experience as a surrogate, and it was held that the failure of the defendant to object to this method of proof was a waiver of any objection which might have been made.

80. Presnell *v.* Garrison, 121 N. C. 366, 28 S. E. 409, *holding* that the admission of evidence of an agreement changing the boundary line of land as stated in a deed was error, although the objection thereto was on untenable ground. See also *infra*, VI, 8; and Johnson *v.* Allen, 100 N. C. 131, 5 S. E. 666.

81. Sullivan *v.* Richardson, 33 Fla 1, 14 So. 692.

See More Fully, *supra*, V, 6, A.

Contra. — In Russell *v.* Schurmeier, 9 Minn. 28, the fact that a party had objected to evidence on the wrong ground was held to be no waiver of his right to subsequently object to it on the right ground in his request to the court for instructions to the jury. "The best practice doubtless would be to make the proper objection at the time the evidence is offered; but in case that is not done we are not aware that the rule is that he shall be held to have waived the right of objection or be precluded from offering it before the cause has been submitted to the jury. It not unfrequently occurs that at the time evidence is offered it is impossible to determine whether it is or will be material and competent or not; and the adoption of such a rule would, in many cases, certainly defeat the ends of justice. At the same time it is probably true that in some cases it would be improper to permit a party to lie by without objection at the time improper evidence is introduced, and urge its exclusion after all the evidence is in. This, however, manifestly is not such a case, and it is impossible to see in what manner the plaintiff is prejudiced from the delay in asking the evidence to be excluded until the case was ready to be submitted to the jury. Perhaps no general rule can be laid down on the subject, but each case must rest, to some extent at least, in the discretion of the judge trying the case."

82. Patterson Gas Gov. Co. *v.* Glenby, 4 Misc. 532, 24 N. Y. Supp. 575. See *supra* I, 3.

A party cannot object to evidence fairly responsive to questions asked without objection, but when the legal objection to testimony is not apparent from the question, but is developed later in any way, the omis-

is only when the grounds of objection have become apparent that the failure to object is a waiver of the right.[83]

5. Right To Have Evidence Stricken Out or Excluded From Consideration. — If a timely and proper objection has not been interposed to incompetent evidence it cannot afterward be stricken out or excluded from the consideration of the jury.[84] It has been held, however, that the court may in its discretion entertain an objection not seasonably made if the delay was due to inadvertence or mistake.[85]

sion to object when the question is asked is not a waiver of the right to have the answer excluded. State *v.* Hope, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608.

Where evidence when offered is not objectionable because it may be followed by proof showing its relevancy and materiality, the failure to object to its introduction is not a waiver of the right to subsequently move to have it stricken out, since the court might properly overrule the objection. State *v.* Carter, 112 Iowa 15, 83 N. W. 715.

Irresponsive Matter in the Answer. Objection thereto is not waived by failure to object to the question. Malm *v.* Thelin, 47 Neb. 686, 66 N. W. 650.

83. State *v.* Hope, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608; State *v.* Foley, 144 Mo. 600, 46 S. W. 733.

84. *California.* — Wheelock *v.* Godfrey, 100 Cal. 578, 35 Pac. 317.

Indiana. — Ginn *v.* State, 161 Ind. 292, 68 N. E. 294; Campbell *v.* Conner, 15 Ind. App. 23, 42 N. E. 688, 43 N. E. 453.

Iowa. — But see Davis *v.* Strohm, 17 Iowa 421.

Massachusetts. — Henshaw *v.* Davis, 5 Cush. 145.

Missouri. — Roe *v.* Bank of Versailles, 167 Mo. 406, 67 S. W. 303; State *v.* McAfee, 148 Mo. 370, 50 S. W. 82.

Nebraska. — Brown *v.* Cleveland, 44 Neb. 239, 62 N. W. 463.

New York. — *In re* Morgan, 104 N. Y. 74, 9 N. E. 861.

"When evidence has been duly taken, bearing upon the issues, on a trial, without objection, I know of no right on the part of the circuit judge to strike it out, or to exclude it from the consideration of the jury. If it is proper in kind though not in degree, or if objectionable otherwise upon some technical ground, all right of exception to it is waived by the parties by not objecting in time, and all rightful control over it by the court gone. It is only when evidence is received upon some *condition, mistake* or *contingency* that the judge can properly direct the jury to disregard it and treat it as not received; but when it has been absolutely given and received it cannot in any way, in my opinion, be stricken out of the case or disregarded." Hall *v.* Earnest, 36 Barb. (N. Y.) 585.

Where the testimony of a party as to transactions between himself and a deceased person, of whom the opposing party is the representative, is objected to generally without specifying the ground of incompetency, a motion to strike out the testimony is properly denied, since the failure to properly object was a waiver. Levin *v.* Russell, 42 N. Y. 251.

If improper evidence gets to the jury without the fault or acquiescence of the complaining party he may have it excluded on motion or by instruction, but if he acquiesces by remaining silent when he should speak he waives his objection. Hall *v.* Jennings, 87 Mo. App. 627.

Incompetency Apparent. — Where evidence showing its objectionable nature on its face is admitted without objection, it cannot afterward be excluded by instruction. McVey *v.* Barker, 92 Mo. App. 498. Or by motion. People *v.* Scalamiero, 143 Cal. 343, 76 Pac. 1098; Storms *v.* Lemon, 7 Ind. App. 435, 34 N. E. 644.

85. Inadvertence or Mistake. — If the omission to object at the proper time was occasioned by inadvertence or mistake, the trial court may in its discretion grant a motion to ex-

6. Consideration and Value of Evidence Admitted Without Objection. — A. GENERALLY. — Incompetent evidence which is introduced without objection becomes evidence in the particular case and must be treated as any other competent evidence, not only against the party failing to object,[86] but as against the person introducing

clude all objectionable evidence, or allow the objection to be entered as of the proper time, and the exercise of this discretion will not be reviewable on appeal. Johnson *v.* Allen, 100 N. C. 131, 5 S. E. 666.

86. *Alabama.* — Moon *v.* Crowder, 72 Ala. 79.

Indiana. — Webb *v.* Sweeney, 32 Ind. App. 54, 69 N. E. 200; Hyatt *v.* Cochran, 69 Ind. 436; Judah *v.* Mieure, 5 Blackf. 171.

Louisiana. — Marks *v.* New Orleans Cold Storage Co., 107 La. 172, 31 So. 671.

Maine. — Moore *v.* Protection Ins. Co., 29 Me. 97, 48 Am. Dec. 514; Brown *v.* Moran, 42 Me. 44.

Massachusetts. — Brightman *v.* Buffington, 184 Mass. 401, 68 N. E. 828.

Missouri. — Secrist *v.* Eubank, 104 Mo. App. 113, 78 S. W. 315.

New Jersey. — Smith *v.* Delaware & A. Tel. & Tel. Co., 63 N. J. Eq. 93, 51 Atl. 464.

New York. — Flora *v.* Carbean, 38 N. Y. 111.

South Carolina. — State *v.* Washington, 13 S. C. 453; Hyland *v.* Southern Bell Tel. & Tel. Co., 70 S. C. 315, 49 S. E. 879; State *v.* Hicks, 20 S. C. 341.

Vermont. — Porter *v.* Gile, 44 Vt. 520.

Where evidence is admitted without objection it may be considered as evidence of any fact which it tends to establish. People *v.* Smith, 121 Cal. 355, 53 Pac. 802.

The jury is bound to consider even illegal testimony if it goes before them without objection. Thomas *v.* Ellis, 25 Ga. 137.

Evidence which is in the case by virtue of a failure to make a proper objection to its admission must be considered and allowed its full force. Lamb *v.* Taylor, 67 Md. 85, 8 Atl. 760.

Incompetent evidence admitted without objection must be allowed to have such weight and force as the triors of fact may see fit to accord it. McVey *v.* Barker, 92 Mo. App. 498, *citing* Farber *v.* Missouri Pac. R. Co., 139 Mo. 272, 40 S. W. 932.

Failure by a witness to object to direct testimony as to his intention is a waiver of this method of proving this fact, and the evidence when so introduced is legal and relevant. Fuller *v.* Whitlock, 99 Ala. 411, 13 So. 80.

The court properly refuses to instruct the jury to disregard incompetent evidence admitted without objection. Baines *v.* Higgins, 2 La. 220; Maxwell *v.* Hannibal & St. J. R. Co., 85 Mo. 95.

Entries in Account Books read without objection become evidence of the facts shown thereby, and it is the duty of the court to submit them to the consideration of the jury. Brahe *v.* Kimball, 5 Sandf. (N. Y.) 237.

Testimony as to a Transaction With a Person Since Deceased, though incompetent for this reason, if admitted without objection must be considered as part of the evidence (Chew *v.* Holt, 11 Iowa 362, 82 N. W. 901), and cannot be stricken out (Becker *v.* Becker, 45 Iowa 239), even though objected to generally, if the grounds of objection were not specified. Levin *v.* Russell, 42 N. Y. 251.

It Is Error To Allow a Non-Suit although the only evidence sustaining the plaintiff's case would have been excluded as inadmissible if it had been objected to. Jones *v.* Mobile & G. R. Co., 55 Ga. 122.

Evidence of Erroneous or Irregular Survey. — In Peters *v.* Gracia, 110 Cal. 89, 42 Pac. 455, evidence of a survey of a boundary line which was admitted without objection, although inadmissible if it had been objected to because not commencing at the proper point, was held sufficient to support a finding in accordance therewith. See also Gerhardt

it.[87] When evidence has been offered for a particular purpose and no objection is made thereto it must be treated as competent evidence for the purpose for which it is offered.[88]

Comment by Counsel. — Where evidence has been admitted without objection the court has no right to prevent counsel from reading it to the jury in his argument,[89] and commenting upon it.[90]

B. Consideration in Instructions. — If illegal evidence is admitted without objection the court may properly charge the jury with reference thereto.[91]

Evidence Inadmissible Under Pleadings. — Where evidence which is not properly admissible under the pleadings has been introduced

v. Swaty, 57 Wis. 24, 14 N. W. 851.

Limitations of Rule. — It is generally true that if incompetent evidence be received without objection it must go to the jury. But this is only true on condition that, first, the party against whom the testimony was offered might when it was offered have objected to it, and second, that when received it made a case on which the jury might legally find for the party offering it. Nesbitt *v.* L. C. & C. R. Co., 2 Spears (S. C.) 697.

In Appellate Court. — Evidence which has been admitted without objection is evidence in the case, and must be treated as such in the appellate court, though it would have been rejected as inadmissible if properly objected to. Atwell *v.* Grant, 11 Md. 101; Farmers Bank *v.* Duvall, 7 Gill & J. (Md.) 78.

87. See *supra*, I, 4, D and E.

State *v.* Hicks, 20 S. C. 341. In this case it was held that a party who has been permitted without objection to cross-examine an impeaching witness as to certain specific offenses with which the witness sought to be impeached had been charged, his adversary was entitled in reply to further interrogate the witness as to those offenses, since the evidence, having been admitted without objection, must be regarded as competent testimony.

88. Ecklund *v.* Toner, 123 Mich. 302, 82 N. W. 62. In this case a portion of the record of the proceedings of the board of supervisors was offered to show their action upon a particular matter, and upon inquiry by the court as to whether there was any objection to its admission the opposing party answered "Not as I can discover." It was held that the objection could not thereafter be made that the evidence was not shown to be a part of a valid record, since proof of authentication of the record had been waived by the failure to object.

89. Where a transcript of the records in another suit was offered in evidence and received without objection, "submitted to the jury and filed in evidence," it was held error for the court to prevent counsel who introduced the evidence from reading a portion of the transcript to the jury in his argument. "No objection seems to have been made to its introduction, and being thus in evidence, the accused was entitled to use, to refer to or to read the whole or any part of it. . . . We think it was sufficient that the record was before the jury in evidence, no matter for what purpose, to entitle the accused to read it before the jury, and he could read the whole or any part of it, as he thought proper." State *v.* Thompson, 32 La. Ann. 796.

90. Moree *v.* State (Tex. Crim.), 83 S. W. 1117.

In Free *v.* State, 1 McMull. (S. C.) 494, where testimony was received without objection showing that the witness relied upon by the state to prove the offense alleged in the indictment had stolen two greatcoats, it was held error to refuse to allow counsel for the defendant to comment on the testimony showing that the witness had stolen the coats, on the ground that the testimony, having been received without objection, must be regarded as competent testimony.

91. Scott *v.* Sheakley, 3 Watts (Pa.) 50.

without objection the court may properly base instructions thereon, at least where such conduct amounts to a waiver of this ground of objection.[92]

C. Objections to Legal Effect of Evidence Not Waived. Although the failure to interpose a proper and timely objection to evidence may be a waiver of its incompetency it is not a waiver of the right to question its legal effect or its legal sufficiency.[93]

D. Right to Question Sufficiency. — The fact that evidence is admitted without objection does not preclude a party from afterward questioning its sufficiency,[94] unless he has permitted a verdict to be founded upon it without objecting to its sufficiency.[95]

92. Arons *v.* Smit, 173 Pa. St. 630, 34 Atl. 234. See Coon *v.* Brashear, 7 La. 265.

Where a mortgage was alleged in the answer to an action on account by way of set-off, and the reply was a general denial and a plea of the statute of limitations, but evidence showing that the mortgage was made to defraud creditors was admitted without objection, it was held proper for the court to instruct the jury upon the legal effect of such evidence, although it would not have been competent if objected to because establishing facts not put in issue by the pleadings. Collins *v.* Collins, 46 Iowa 60.

Evidence Raising an Issue Not Made by the Pleadings. — Madison *v.* Missouri Pac. R. Co., 60 Mo. App. 599.

Evidence Tending To Establish a Defense Not Pleaded. — Tomlinson *v.* Wallace, 16 Wis. 224.

Evidence of Special Damages Not Pleaded. — Twelkemeyer *v.* St. Louis Transit Co., 102 Mo. App. 190, 76 S. W. 682.

93. Bartlett *v.* O'Donoghue, 72 Mo. 563; State *v.* Kaufman, 45 Mo. App. 656.

An objection to a deed executed under a special power on the ground that it is not in compliance with such power is not waived by a failure to make the objection when the deed is offered in evidence. "It is never too late to ask the court to determine the legal effect of any instrument of writing introduced in evidence in a cause. Formal objections may be waived, but the question of the legal effect of evidence may be raised at any stage of the trial." Pettis Co. *v.* Gibson, 73 Mo. 502.

An objection to the invalidity of the record of a levy of execution is not waived by a failure to object to the admission of the record in evidence. Stanton *v.* Bannister, 2 Vt. 464.

The failure to object to the admission of a bill of lading signed by the defendant carrier's station agent is not a waiver of the necessity of showing the authority of the agent to bind the carrier beyond its own line. Minter Southern Kansas R. Co., 56 Mo. App. 282.

In an action upon a promise to pay money, which promise is non-negotiable, a consideration must be proved, and the fact that the instrument is admitted in evidence without objection does not dispense with the necessity of such proof. The failure to object to the introduction of the instrument is an admission that it is evidence and that it was duly executed, but not that it was sufficient evidence to warrant a recovery. Lowe *v.* Bliss, 24 Ill. 168, 76 Am. Dec. 742. But see Bilderback *v.* Burlingame, 27 Ill. 337; Hill *v.* Todd, 29 Ill. 101; Hoyt *v.* Jaffray, 29 Ill. 104, as to the effect of a recital "for value received."

94. Pace *v.* Roberts, Johnson & Rand Shoe Co., 103 Mo. App. 662, 78 S. W. 52. See Jacobs *v.* Finkel, 7 Blackf. (Ind.) 432.

95. Where the plaintiff, to show that notice of protest had been forwarded in due season from one bank to another and from that to the indorser, introduced, without objection to its competency or sufficiency, evidence of certain circumstances and the usage of banks from which he claimed that the jury had a right to infer in the absence of all contradic-

E. Irrelevant Evidence acquires no probative force merely because it is not objected to, hence it is not entitled to consideration, and the court may properly so instruct the jury.[96]

F. Hearsay. — a. *Generally.* — There is some conflict as to the value and effect of hearsay evidence admitted without objection. The general rule is that it becomes evidence which may be considered for what it is worth,[97] and that it may be sufficient to support a verdict or judgment.[98] Some cases hold, however, that since

tory evidence that the notice had been duly forwarded, it was held that defendant was not in a position to question the sufficiency of the evidence to support the verdict. "After the parties have voluntarily left it to the jury to infer from the circumstances, which, perhaps, if objected to, would be considered insufficient for that purpose, whether a particular fact existed they cannot properly call on this court to interfere with the result." New Haven Co. Bank *v.* Mitchell, 15 Conn. 206, 225.

96. Bradley *v.* State, 121 Ga. 201; Hamilton *v.* New York Cent. R. Co., 51 N. Y. 100.

Although a party has not objected to the admission of irrelevant evidence he is not thereby precluded from afterward insisting that the jury should not take it into consideration, and the court commits no error in telling the jury that they ought not to consider it. Lutton *v.* Vernon, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 589.

97. Boyle *v.* Columbian Fire Proof Co., 182 Mass. 93, 64 N. E. 726; Eastman *v.* Harris, 4 La. Ann. 193; Daniel *v.* Harvin, 10 Tex. Civ. App. 439, 31 S. W. 421; State *v.* Cranney, 30 Wash. 594, 71 Pac. 50. See also State *v.* Smith, 26 Wash. 354, 67 Pac. 70.

Hearsay testimony admitted without objection is in the case for all purposes, and the court must give it the same effect as if it had in fact been legally admissible. Struth *v.* Decker (Md.), 59 Atl. 727, *citing* Slingluff *v.* Andrew Volk Builders Supply Co., 89 Md. 557, 43 Atl. 759. See also Hatch *v.* Pullman Sleeping Car Co. (Tex. Civ. App.), 84 S. W. 246.

98. A Judgment or a Verdict Will Not Be Set Aside Because a Material Fact Is Shown Only by Hearsay Evidence, since such evidence "if admitted without objection is not wholly without probative force." Western Union Tel. Co. *v.* Hirsch (Tex. Civ. App.), 84 S. W. 394.

In Damon *v.* Carrol, 163 Mass. 404, 40 N. E. 185, which was an action on a recognizance alleged to have been executed before a commissioner of insolvency by a debtor when arrested on execution, the only evidence of the recognizance was the officer's original return and the certificate of the commissioner, both indorsed upon the execution and both stating that such a recognizance had been entered into. It was held that this evidence, which had been introduced without objection, was sufficient to support a verdict, though mere hearsay. "The return was the statement of a sworn officer, and the commissioner's certificate, although not required by statute to be indorsed upon the execution, was also a statement of a sworn officer, and no statute forbade him to put it upon the execution. Papers signed by trustworthy persons, if put in evidence before a jury, although not competent if objected to, naturally tend to induce belief of the matters contained in them. Hearsay evidence usually is rejected because it lacks the corroboration of an oath or affirmation, and not because it has no natural tendency to induce belief. When hearsay evidence is incompetent, the reason for its exclusion is the same in principle as that which formerly excluded testimony from interested witnesses. It was thought that the effect of interest made it unsafe to consider the testimony of such witnesses, just as the lack of an oath makes it unsafe to consider hearsay evidence. But it was always held that, if testimony incompetent by

ordinary hearsay testimony is not only inadmissible, but wholly without probative value, its introduction without objection gives it no weight or force whatever.[99]

reason of the interest of a witness was allowed to go before the jury, they might consider it as they would any other testimony."

On Appeal. — Where the only question on appeal is whether the finding and judgment is contrary to the evidence, the appellate court must consider both the legal and illegal testimony admitted without objection in order that the case may be the same as that presented to the court below, but this does not confer upon incompetent hearsay evidence "any new attribute in point of weight, its nature and quality in this respect remaining the same so far as its intrinsic weakness and incompetency to satisfy the mind are concerned." But the trial court is not compelled to give any weight to such incompetent hearsay testimony, though admitted without objection. State Bank *v.* Wooddy, 10 Ark. 638.

99. Eastlick *v.* Southern R. Co., 116 Ga. 48, 42 S. E. 499, was an action for causing the death of plaintiff's husband. Plaintiff introduced evidence warranting the finding that the deceased was killed by the running of defendant's train. She also introduced declarations of the engineer made after the homicide to the effect that the deceased was sitting on the track in a particular posture when his presence was discovered. The defendant brought out on cross-examination without objection the details of all that the engineer said on that occasion, which declarations, if true, clearly showed the exercise of such diligence by him as would relieve the company from all liability. The plaintiff was nonsuited, which ruling was, on appeal, held error, since the evidence as to the cause of death in connection with the legal presumption of negligence was sufficient to make out a *prima facie* case if the hearsay declarations of the engineer were not considered. "Ought she to have been denied the privilege of having the jury pass upon the case merely because of the introduction of the hearsay testimony above pointed out? We think not. Such testimony, save as to well-defined exceptions, is inadmissible for any purpose, because it is wholly without probative value. The fact that it is admitted cannot give it any such value. In other words, testimony of this character which does not come within any of the exceptions just referred to is, in legal contemplation, wholly worthless, and has been so regarded and treated through all the ages of the English law. While a party who permits hearsay testimony to be introduced without objection, or who has himself introduced such testimony, will not be heard to complain of the fact that it went to the jury, and must suffer whatever disadvantage may come of their giving it sufficient weight to turn the scale against him when there is enough legal testimony before them to support a finding in favor of his adversary, it will not do to say that such a finding, resting upon hearsay testimony alone, can lawfully stand merely because the losing party did not object to such testimony when offered by his adversary, or himself introduced the same. No plaintiff should ever, under any circumstances, lose his case when there is evidence to warrant a recovery by him, and the verdict or judgment in favor of the opposite party has nothing upon which to rest but inadmissible hearsay testimony. . . . The present case ought to have gone to the jury. Had it been submitted to them, and the engineer had as a witness testified without contradiction to the truth of the statements embraced in his alleged declarations, a verdict for the defendant would have been well warranted."

In Dwyer *v.* Dwyer, 26 Mo. App. 647, an action for divorce on the ground of the defendant husband's vagrancy and failure to support, it was held that the court could not consider a mere hearsay statement as to the defendant's conduct, although admitted without objection. "The mere statement of the plaintiff, testifying as a witness, that another person had told her that he [defendant] had driven all his chil-

b. *Testimony Based on Hearsay,* if admitted without objection, is entitled to consideration and may be sufficient to establish the fact stated.[1]

G. Opinions and Conclusions. — Inadmissible conclusions or opinions of witnesses, if not properly and seasonably objected to, become evidence in the case and should be given the weight to which they are entitled.[2]

H. Documentary Evidence. — a. *Generally.* — The incompetency of documentary evidence is waived by the failure to interpose a timely objection, or otherwise properly and seasonably question it, and the evidence becomes in effect competent.[3] Thus the failure

dren away from home, although not objected to, is not evidence which we can consider at all, as triors of the facts. The law ascribes to such evidence no probative force; and it would be a misuse of our functions to determine a controversy of this importance upon such evidence, though not objected to."

On a prosecution for counterfeiting, evidence of the declaration of a third person that he had picked up certain bills which the defendant had thrown away was held insufficient to establish that fact because merely hearsay, even though no objection to the evidence was made. Cantor *v.* People, 23 How. Pr. (N. Y.) 243.

1. The Fact of Agency may be proved by the testimony of a witness whose knowledge is founded wholly on hearsay if no objection is made to his testimony. "Where . . . no objection is made, hearsay evidence, like any other evidence, is to be considered and given the importance it deserves." Smith *v.* Delaware & A. Tel. & Tel. Co., 63 N. J. Eq. 93, 51 Atl. 464; Heusinkveld *v.* St. Paul, F. & M. Ins. Co., 106 Iowa 229, 76 N. W. 696.

2. Nichols *v.* Turney, 15 Conn. 101.

If no objection is made to expert testimony on the ground that the witness is not an expert, his testimony is admissible and should be left to the jury for what it is worth. Langfitt *v.* Clinton & P. H. R. Co., 2 Rob. (La.) 217.

Legal Conclusion of Witness. — In Brightman *v.* Buffington, 184 Mass. 401, 68 N. E. 828, testimony of the understanding of a third person as to the legal effect of certain transactions admitted without objection was held to be evidence, although it would not have been competent if objected to.

Where an Incompetent Conclusion of a witness has been received without objection, that it was considered by the jury is no cause for a new trial. Jacobs *v.* Bangor, 16 Me. 187, 33 Am. Dec. 652.

Where a Report of Experts as to damages sustained, made in accordance with the statute providing for the determination of damages by experts appointed in a certain way, was received without objection, it was held that the report was entitled to weight as testimony, even though the act under which it was taken was unconstitutional. Gagnet *v.* New Orleans, 23 La. Ann. 207.

3. United States *v.* Homestake Min. Co., 117 Fed. 481, 54 C. C. A. 303. And see also *supra,* "Consideration and Value of Evidence Admitted Without Objection," and *infra* "Proof of Execution."

"When a paper goes to the jury or to the court . . . without objection it must be held to be admitted by the consent of both parties to the action, and to be what on its face it purported to be." Patton *v.* Coen & Ten Broeke C. M. Co., 3 Colo. 265.

Defects in the Certificate of a Recorder are waived by a failure to object to its admission in evidence, and when so admitted it must be taken as proving whatever can be reasonably and fairly implied from it, the signature of the recorder being judicially noticed by the court Scott *v.* Jackson, 12 La. Ann. 640.

to object to the introduction of a document because a sufficient or proper preliminary showing has not been made is a waiver of this ground of objection.[4]

b. *Proof of Execution.* — The necessity of proving the legal execution of a document is waived by a failure to insist upon such proof by a proper objection to the introduction of the document,[5] and it is evidence in the case the same as though its execution had been proved.[6]

4. Boughton *v.* Smith, 67 Hun 652, 22 N. Y. Supp. 148.

In an Action Upon Promissory Notes the failure to object to the introduction of notes answering to the description of those alleged is an admission that they are the notes in suit. Fitzgerald *v.* Barker, 85 Mo. 13.

In a suit by trustees upon promissory notes made to them as such the defendant pleaded *non est factum.* After proof of the defendant's signature the notes were admitted without objection that the plaintiffs had not proved their official character as trustees; it was held that necessity of such proof was waived by a failure to object to the evidence on this ground. Clanton *v.* Laird, 12 Smed. & M. (Miss.) 568.

The Correctness of a Diagram which has been introduced and used by the witness without objection is deemed to be acquiesced in by the failure to require preliminary proof of its correctness. Gavigan *v.* State, 55 Miss. 533.

5. McKay *v.* Lane, 5 Fla. 268; Dupuis *v.* Thompson, 16 Fla. 69 (deed); Perrott *v.* Shearer, 17 Mich. 48; Bartlett *v.* O'Donoghue, 72 Mo. 563; Randolph *v.* Doss, 3 How. (Miss.) 205 (deed); Tyler *v.* Marcelin, 8 La. Ann. 312. See Thornton *v.* Alliston, 12 Smed. & M. (Miss.) 124.

Assignment. — A failure to object to the introduction of an assignment of a judgment is a waiver of the necessity of proving its execution, or the signature of the assignor. Eisenhart *v.* McGary, 15 Colo. App. 1, 61 Pac. 56.

Promissory Note. — Where notes are admitted without objection the necessity of proving their execution is waived. Bowen *v.* Frick, 75 Ga. 786.

Indorsement on Note by Agent. Where a note was indorsed with the corporate name by G., as manager, the failure to object to its introduction in evidence was held a waiver of the necessity of proving that the indorsement was made by G. J. D. Spreckels & Bros. Co. *v.* Bender, 30 Or. 577, 48 Pac. 418.

Where the note in suit was admitted in evidence without objection and was indorsed with the name of the payee by another as his attorney in fact, it was held that no objection could thereafter be made that there was no proof that such person was the attorney in fact. Balcom *v.* O'Brien, 13 S. D. 425, 83 N. W. 562.

Contra. — The mere failure to object to the admission of a document in evidence is not a waiver of the necessity of proving its execution, but there must be actual consent to its being read. Skillman *v.* Quick, 4 N. J. L. 113. See also Armstrong *v.* Boylan, 4 N. J. L. 84.

6. A deed admitted without objection must be considered as evidence of title, although its genuineness has not been proved. Harris *v.* Granger, 4 B. Mon. (Ky.) 369.

Where a deed is admitted without objection that its proper execution has not been proved the authority to execute it is admitted. Sharon *v.* Minnock, 6 Nev. 687.

Deed Improperly Witnessed. — Although a deed is not witnessed as required by law, if admitted without objection on this ground it becomes legitimate evidence. Summer *v.* Bryan, 54 Ga. 613; Tillotson *v.* Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95; Rupert *v.* Penner, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824.

The Certificate of a Notary, although not in the form required by

c. *Indorsement on Document.* — An indorsement on a document admitted in evidence without objection becomes evidence in the case,[7] even though the indorsement itself is specifically objected to if no request is made for its obliteration.[8]

d. *Affidavits,* though not in the form or taken in the manner required by law, if admitted without objection have the same evidentiary value as though taken in the proper form and manner.[9]

I. SECONDARY EVIDENCE. — a. *Generally.* — Any possible objection to the competency of evidence because of its secondary char-

law, if received without objection, is legal evidence. Fougard *v.* Tourregaud, 3 Mart. (N. S.) (La.) 464. But see article "ACKNOWLEDGMENT" for the evidentiary value of a defective acknowledgment.

Contra. — Where a statute requires the genuineness of the signature to a note or other security which is the foundation of a suit, to be put in issue by a verified plea, if such a plea is filed, the failure to object to the admission and reading of the note is not a waiver of the necessity of proving the genuineness of the signature. "It is true that either party may waive an objection to testimony and thus make that competent which the court on motion would have rejected; but that can only apply when the evidence conduces to prove or disprove the issue. There is no obligation on either party to a suit to object to the introduction of testimony which has no influence on the question before the jury." The issue being as to the genuineness of the signature, plaintiff is not entitled to a verdict without proving this fact merely because the introduction of the note was not objected to. Gilmer *v.* Branch Bank, 1 Ala. 538.

7. Damon *v.* Carroll, 163 Mass. 402, 40 N. E. 185.

In an action by a sheriff upon a bond the whole instrument was offered and received in evidence without objection; it was held that indorsements thereon importing a transfer of the bond to the plaintiff by his predecessor in office must be considered as proved under the ruling in the case of Maxwell *v.* Kennedy, 10 La. Ann. 798; Bell *v.* Maillot, 12 La. Ann. 340.

An Indorsement on a Note admitted without objection must be considered for what it is worth, although inadmissible if objected to. Wallach *v.* Kind, 16 N. Y. Supp. 204.

8. **Indorsement on Document.** Where the only objection to the admission in evidence of a warrant of arrest was to the return indorsed thereon, which objection was sustained, and the warrant was then put in evidence without any request that the objectionable part be obliterated or otherwise concealed from the eyes of the jury, or any objection to its going to the jury in the form in which it then was, it was held that an objection at the close of the trial to the warrant going to the jury with the other exhibits in the case because it had indorsed upon it the objectionable return was too late, the right to object having been waived by the failure to make the objection at the time the warrant was introduced. State *v.* Yourex, 30 Wash. 611, 71 Pac. 203.

9. Where an affidavit is received in evidence without objection under a statute allowing evidence to be given by affidavit, the affidavit becomes evidence in the case, although it might properly have been objected to and excluded because materially variant from the requirement of the statute. Locke *v.* Farley, 41 Mich. 405, 1 N. W. 955, *distinguishing* those cases in which the validity of the affidavit is essential to jurisdiction.

Ex Parte Affidavits, if not objected to, must be considered as legitimate evidence. Norton *v.* Sanders, 3 J. J. Marsh. (Ky.) 3.

A failure to object to an affidavit on the ground that no opportunity has been given for cross-examination

acter is waived if not seasonably and properly made.[10] The party failing to object cannot afterward complain that the original or best evidence was not produced.[11] Secondary evidence thus ad-

of the person who verified it, and that his testimony has not been so taken and returned as to make it competent evidence, is a waiver of this ground of objection. "Forms and rules are prescribed by statutes, courts and decisions for the taking and production of testimony which give to the opposing party the right and the opportunity of cross-examination and the security of an oath. But this right, this opportunity and this security may be waived by stipulation for, consent to or silent acquiescence in the introduction of testimony; and when this is done the statement or affidavit admitted becomes as competent evidence of the facts it details as though every formality had been complied with." United States *v.* Home State Min. Co., 117 Fed. 481, 54 C. C. A. 303.

In Appellate Court. — If an affidavit taken without the notice required by law is read without objection in the court below it will be considered as evidence in the appellate court, but will not have the weight it might have had if regularly taken on notice. Adams *v.* Hubbard, 25 Gratt. (Va.) 129.

10. *Colorado.* — Cowell *v.* Colorado Springs Co., 3 Colo. 82.

Illinois. — Clay *v.* Boyer, 10 Ill. 506.

Kansas. — Berry *v.* Carter, 19 Kan. 135.

Louisiana. — Brent *v.* Ervin, 3 Mart. (N. S.) 303, 15 Am. Dec. 157.

Maryland. — Shanks *v.* Dent, 8 Gill 120.

New Jersey. — Roll *v.* Rea, 57 N. J. L. 647, 32 Atl. 214.

West Virginia. — Washington *v.* Burnett, 4 W. Va. 84.

Wisconsin. — Manning *v.* McClurg, 14 Wis. 350.

Although oral testimony of the sheriff to prove a levy is incompetent because secondary, its incompetency is waived where no objection to its admission is made. Yetzer *v.* Young, 3 S. D. 263, 52 N. W. 1054.

Oral Evidence of Conviction of Witness. — An objection to oral evidence of the conviction of the witness for an infamous crime on the ground that this fact must be proved by the record is waived by a failure to make the objection when the evidence is offered or the question asked. Perry *v.* People, 86 N. Y. 353.

Failure to Object to Mere Preliminary Evidence Not a Waiver. Where evidence is admitted without objection as to the ownership of a particular judgment merely as preliminary to the introduction of other proof, and not as evidence of the judgment itself, the failure to object is no waiver of the right to require the production of the best evidence of the judgment. Hawkins *v.* Rice, 40 Iowa 435.

11. Fritz *v.* Crean, 182 Mass. 433, 65 N. E. 832; Seaman *v.* Benson, 4 Barb. (N. Y.) 444; Elrod *v.* State, 72 Ind. 292.

Where a party expressly states that he does not object to evidence as secondary, but for other reasons, he cannot afterward complain of the failure to produce the best evidence. Bennett *v.* North Colorado Springs L. & I. Co., 23 Colo. 470, 48 Pac. 812.

The abstract entry in a judgment docket is only secondary evidence of the judgment, but when introduced without objection it becomes in effect primary evidence, and it cannot afterward be objected that there is no proper evidence of the rendition of the judgment because the record itself has not been shown. Moore *v.* McKinley, 60 Iowa 367, 14 N. W. 768.

Promissory Note. — A party who has not objected to the introduction of secondary evidence of a note cannot complain that the note itself was not introduced or its absence accounted for. Leonard *v.* Leonard, 138 Cal. XIX, 70 Pac. 1071; Filippini *v.* Trobock (Cal.), 62 Pac. 1066; Hommel *v.* Gamewell, 5 Blackf. (Ind.) 5.

mitted without objection becomes competent[12] and sufficient[13] evidence of the facts shown thereby, and cannot be stricken out on motion or disregarded unless there be some legally sufficient excuse for the failure to object.[14]

b. *Copy.* — If a copy has been admitted without objection no complaint can afterward be made that it is not a true copy,[15] that a sufficient foundation for its admission has not been laid,[16] or that

12. Buettner *v.* Steinbrecher, 91 Iowa 588, 60 N. W. 177; Moore *v.* McKinley, 60 Iowa 367, 14 N. W. 768; Aultman *v.* Traunor, 74 Iowa 417, 38 N. W. 126; Jaffray *v.* Thompson, 65 Iowa 323, 21 N. W. 659; Paxson *v.* Brown, 61 Fed. 874, 10 C. C. A. 135, 27 U. S. App. 49; Harris *v.* Eggleston, 47 App. Div. 169, 62 N. Y. Supp. 221.

13. Perry *v.* People, 86 N. Y. 353; Burke *v.* Wilber, 42 Mich. 327, 3 N. W. 861; Kinion *v.* Kansas City, F. S. & M. R. Co., 39 Mo. App. 574; Edge *v.* Keith, 13 Smed. & M. (Miss.) 295.

Secondary evidence of a material fact, if not objected to, is sufficient to sustain the judgment. Norton *v.* Mitchell, 13 Tex. 47.

The court may properly base a charge upon, and the jury find, facts shown by secondary evidence admitted without objection. Goodwin *v.* Goodwin, 20 Ga. 600.

Oral Evidence of Incorporation is sufficient if not objected to. Orr & Lindsley Shoe Co. *v.* Hance, 44 Mo. App. 461.

The Consolidation of Two Railroad Corporations was held sufficiently established by the oral testimony of an attorney for one of the companies. Kinion *v.* Kansas City, F. S. & M. R. Co., 39 Mo. App. 382.

Official Capacity. — Oral testimony of a witness that he is a police judge is sufficient proof of his official capacity if no objection is made to its admission. De Soto *v.* Brown, 44 Mo. App. 148.

Oral Evidence of the Appointment of an Administrator is sufficient to establish this fact if objection is not made to it as secondary evidence. Ellsworth *v.* Low, 62 Iowa 178, 17 N. W. 450.

Former Adjudication. — Where in an action before a justice the defendant pleaded in bar a former action brought by him before the justice, and a recovery, in which action the plaintiff should have set off his demand, and the only evidence of the former action was a statement by the justice to the jury to which no objection was made, it was held that the statement, though not legal evidence if it had been objected to, was sufficient to sustain the plea. Lawrence *v.* Houghton, 5 Johns. (N. Y.) 128.

14. Langfitt *v.* Clinton & P. H. R. Co., 2 Rob. (La.) 217; Ames *v.* People's Tel., 5 La. Ann. 183; Davis *v.* Strohm, 17 Iowa 421; Brown *v.* Lessing, 70 Tex. 544, 7 S. E. 783; Phelan *v.* Bonham, 9 Ark. 389.

It is error for the court to instruct the jury to disregard oral evidence of a record which has been admitted without objection, although the record itself is the best evidence. Com. *v.* Whalen, 147 Mass. 376, 17 N. E. 881.

Title to Land may be sufficiently shown by oral evidence admitted without objection. Fish *v.* Chicago, R. I. & P. R. Co., 81 Iowa 280, 46 N. W. 998; Cairo & St. Louis R. Co. *v.* Woosley, 85 Ill. 370.

Contra. — Oral evidence of the contents or effect of a deed is not ordinarily sufficient, even though not objected to. Warren *v.* Syme, 7 W. Va. 474.

15. Chance *v.* Summerford, 25 Ga. 662; Proprietors of Concord *v.* McIntire, 6 N. H. 527.

Where a certified copy of a patent from the state is admitted without objection, it cannot afterward be contended that it is not what it purports to be, namely, a copy of the patent. Hoffman *v.* Pack, 114 Mich. 1, 71 N. W. 1095.

16. Paine *v.* Trask, 56 Fed. 233, 5 C. C. A. 497; Chance *v.* Summerford, 25 Ga. 662; Dingle *v.* Mitchell, 20 S. C. 202.

the original has not been introduced.[17] And such copy has the same legal effect as the original.[18]

J. Parol Evidence. — a. *Generally.* — Objection to parol evidence, if not seasonably made, is waived.[19]

b. *Consideration and Effect of the Evidence.* — Where parol evidence varying the terms of a written contract has been received without a timely objection to or motion to exclude the same, such evidence must be considered in determining the terms of the contract.[20]

17. Johnstone *v.* Scott, 11 Mich. 232.

18. A Copy of a Deed, if admitted without objection and shown to be a correct copy of the original, must be given the same effect as the original itself. Pannell *v.* Coe, 1 Mart. (N. S.) (La.) 614.

A Copy of a Copy of a deed, if admitted and read in evidence without objection, has the same legal effect as the original. Blight *v.* Atwell, 7 T. B. Mon. (Ky.) 264.

An Account Purporting To Be a Copy from account books, if admitted without objection, becomes competent evidence. Kyle *v.* Kyle, 1 Gratt. (Va.) 526.

Copy of Will. — In an action involving the validity of a will, where a copy of the will has, without objection, been admitted in evidence in place of the original, it is error for the court to instruct the jury that such copy is no evidence because the original should have been produced. James *v.* Langdon, 7 B. Mon. (Ky.) 193.

19. Highlander *v.* Fluke, 5 Mart. (O. S.) (La.) 442.

A party cannot complain that parol evidence is not admissible to show that several pieces of paper form one note or memorandum of a contract, where such evidence has been admitted without his objection. Beckwith *v.* Talbot, 2 Colo. 639.

20. *Louisiana.* — Babineau *v.* Cormier, 1 Mart. (N. S.) 456; Clark *v.* Farrar, 3 Mart. (O. S.) 247; Huey *v.* Dinkgrave, 19 La. 482.

New York. — Austin *v.* Southworth, 13 Misc. 45, 34 N. Y. Supp. 88; American Gas Co. *v.* Kramer, 21 Misc. 57, 46 N. Y. Supp. 871.

Texas. — Hunt *v.* Siemers, 22 Tex. Civ. App. 94, 53 S. W. 387.

Vermont. — Davis *v.* Goodrich, 45 Vt. 56. See also Hills *v.* Malboro, 40 Vt. 648.

But see *contra*, Presnell *v.* Garrison, 121 N. C. 366, 28 S. E. 409.

Where testimony has been admitted without objection to show that a covenant in a lease was intended to be personal and not to run with the land, such evidence must be considered in determining the meaning of the covenant. "If the testimony be in the cause it must be considered and allowed its full force." Gibbs *v.* Gale, 7 Md. 76, construing and applying the act of 1832, ch. 302, requiring all objections to the admissibility of evidence to be made in the trial court.

Reason of Rule. — In Brady *v.* Nally, 151 N. Y. 258, 45 N. E. 547, evidence of an oral agreement preliminary to the execution of the written contract was received without objection, and later the writing itself was introduced. But when evidence was offered based on the assumption that the preliminary oral agreement was part of the contract it was objected to as varying the terms of the writing. The court held that the failure to object to the parol evidence or to move that it be excluded was a waiver of the rule excluding such evidence to vary the terms of the written contract. "We think the plaintiff waived his right to object to the consideration of that testimony by failing to make objection when it was received, and by neither moving to strike it out nor directly challenging its effect in any way. . . . It is, however, insisted that in view of the conclusive nature of the presumption that the written agreement embraced the entire contract between the parties, the parol evidence, although received by consent, cannot over-

K. Evidence Incompetent Under Statute of Frauds. — Oral evidence, although incompetent under the statute of frauds, if admitted without objection is, in the absence of a special plea of the statute, competent and sufficient evidence of the contract shown thereby.[21]

L. Failure To Object to Evidence Bearing on Issues Not Made When Also Admissible on Issues Made. — The failure to object to the admission of evidence bearing on an issue not made by the pleadings will not authorize the adjudication of that issue when the evidence admitted is relevant to other issues made by the pleadings.[22] Thus the failure to object to evidence which is clearly competent as a part of the *res gestae* under the issues in the case is not a waiver of the right to have a particular defense specially pleaded, although the evidence admitted without objection establishes the defense not pleaded.[23]

come that presumption. The answer to this position is that the parties may, by agreement, express or implied, accept oral testimony instead of the presumption ordinarily arising from written evidence. They have the right to make a rule of evidence for their own case, and they are presumed to have done so when testimony, otherwise incompetent, is received without objection and without any effort to have it stricken from the minutes, or disregarded by the trial court. They may waive the rules established by the courts to govern the admission of evidence, the same as they may waive the rule established by the legislature that certain contracts must be in writing, and a waiver may be inferred from the failure of the party for whose benefit the rule was made to object in due season, or in some way to insist upon compliance with the law."

21. Crane *v.* Powell, 139 N. Y. 379, 34 N. E. 911. See also Howard *v.* Sexton, 4 N. Y. 157; Hawley *v.* Dawson, 16 Or. 344, 18 Pac. 592. But see Reed *v.* McConnell, 133 N. Y. 425, 31 N. E. 22.

Parol evidence of a contract of sale is sufficient if admitted without objection, although the contract is required by law to be proved by writing, since the parties may waive this requirement. Strawbridge *v.* Warfield, 4 La. 20; Hopkins *v.* Lacouture, 4 La. 64.

Where parol evidence of the rescission of a sale has been received without objection it cannot afterward be objected that such a rescission must be proved by writing. Effect must be given to the oral proof received without objection. Gaiennie *v.* Freret, 14 La. Ann. 488.

A Sale of Land may be proved by parol evidence, although the statute requires such a contract to be proved by writing. Brown *v.* Frantum, 6 La. 39.

Evidence of Oral Ratification, if introduced without objection, is sufficient, although if objected to it would have been excluded because not in writing under seal. Martin *v.* Bray (Pa.), 16 Atl. 515.

22. McAdam *v.* Soria, 31 La. Ann. 862.

23. Gunther *v.* Liverpool & London & Globe Ins. Co., 85 Fed. 846. This was an action on an insurance policy. The defendant in its answer set out the conditions of the policy, among which was one that kerosene lamps used on the premises must be filled by daylight, otherwise the policy should be void. The answer further contained a general allegation that the conditions of the policy had been broken, but also specified the particulars in which they were broken, omitting the drawing of oil during other than daylight hours. As a part of the circumstances of the fire evidence was admitted without objection showing that coal oil had been drawn by lamp-light. Defendant contended that the admission of this evidence without objection was a waiver of the requirement

7. Failure To Object to Incompetent Witness. — A. GENERALLY. The failure to interpose a proper and timely objection to an incompetent witness is a waiver of the right to complain of his testimony on the ground of his incompetency.[24] Thus the failure to object to the testimony of one spouse for or against the other is a waiver of this ground of objection.[25] The party failing to make a timely objection to the witness cannot afterward have his testimony stricken out.[26]

B. CONSIDERATION OF TESTIMONY OF INCOMPETENT WITNESS. The testimony of an incompetent witness to whose competency no proper or timely objection was made and which has not been subsequently excluded by motion or instruction, remains as evidence in the case and is entitled to consideration by the court and jury.[27]

C. FAILURE TO TAKE OATH. — The failure of a witness to take an oath previous to giving his testimony, or any irregularity in the

that the breaches of conditions in the policy must be specially pleaded. "The court got no idea at all that such a breach was to be relied upon until the request to direct a verdict on account of it was made. The evidence in respect to it did go in without objection, and, had there been no other ground for its admission that fact would have been deemed a waiver of any more full pleading on this ground; but there were other grounds. The plaintiff was required to prove the loss, and this involved proving the circumstances of the fire, and the proof on this subject went in as part of those circumstances. There was no opportunity for the plaintiff to object on the ground that it was proving this defense not pleaded, and the failure to object on that ground could be no waiver of it."

24. Wood *v.* American L. Ins. & Trust Co., 7 How. (Miss.) 609, 633.

The testimony of an incompetent witness, if not objected to, becomes evidence in the case. Patrick *v.* Badger (Tex. Civ. App.), 41 S. W. 538.

Where the sufficiency of a release of his interest by a witness is not objected to at the time he gives his testimony, all objections to his competency on this ground are waived. Bullen *v.* Arnold, 31 Me. 583.

Testimony of Trial Judge. — In a case tried without a jury, if the judge is permitted to testify without objection any cause of complaint on this ground is waived. Wright *v.* McCampbell, 75 Tex. 644, 13 S. W. 293.

Transaction With Deceased Person. For the effect of permitting a witness to testify without objection as to transactions with a deceased person as to which he is incompetent, see article "TRANSACTIONS WITH DECEASED PERSON."

25. Watson *v.* Riskamire, 45 Iowa 231; Curtis *v.* Tyler, 90 Mo. App. 345; Texas & P. R. Co. *v.* Casey, 52 Tex. 112.

Failure of Counsel To Object Not Binding on Absent Wife. — Under the statutory rule that a husband may not testify against his wife without her consent, the mere failure of her attorney in her absence to object to the husband's testimony is not a waiver of her privilege. "There may be cases where both parties are present and one is called as a witness where a failure to object might be deemed a waiver, but in the absence of such party we are of opinion that her silence could not supply the place of her actual consent." Hubbell *v.* Grant, 39 Mich. 641.

26. State *v.* Williams, 28 La. Ann. 604. See *infra*, VI. 7. B.

27. Rothrock *v.* Rothrock, 195 Pa. St. 529, 46 Atl. 90; Patrick *v.* Badger (Tex. Civ. App.), 41 S. W. 538.

administration of the oath, if not properly objected to as soon as discovered, is waived.[28]

8. In Criminal Case. — As a general rule the failure of the defendant in a criminal case to make proper and timely objection to incompetent evidence[29] or witnesses[30] is a waiver of the ground of

28. Slauter *v.* Whitelock, 12 Ind. 338; Cady *v.* Norton, 14 Pick. (Mass.) 236. See Nesbitt *v.* Dallam, 7 Gill & J. (Md.) 494, 28 Am. Dec. 236.

In Com. *v.* Valsalka, 181 Pa. St. 17, 37 Atl. 405, it appeared that several witnesses were sworn in English without the intervention of an interpreter; that they held up their hands without any manifestation of ignorance on their part as to what they were doing; that they were of the same nationality as the defendant himself and spoke the same language. No objection was made at the time to the method of swearing them, and the examination and cross-examination of them continued for several days, either directly in English, as was the case with some in whole or in part, or indirectly in their native language, as was the case with others. On a motion by the defendant, after the commonwealth's case was closed, to strike out the testimony of these witnesses on the ground that they did not understand the oath which was administered to them in English, it was held that any right to object on this ground had been waived by the failure to make the objection as soon as the error was discovered.

On Motion for New Trial. — Where no objection is made to a witness who has not been sworn, it is too late to raise the question on a motion for a new trial. Goldsmith *v.* State, 32 Tex. Crim. 112, 22 S. W. 405.

Where a witness has been examined and cross-examined it cannot be objected on a motion for new trial that he was not sworn, if there is nothing in the record to show when this irregularity was discovered. State *v.* Hope, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608.

After Verdict. — An objection that a witness was not sworn cannot be made after the verdict, where this fact was known to the parties during the course of the argument. Cady *v.* Norton, 14 Pick. (Mass.) 236; Cogswell *v.* Hoguet, 40 Ill. App. 645.

On Appeal. — It is too late to object for the first time on appeal that a witness testified without being sworn, at least where there is nothing in the record to show that the irregularity was not discovered in time to have corrected it. Leach *v.* Ackerman, 2 Ind. App. 91, 28 N. E. 216; Cogswell *v.* Hoguet, 40 Ill. App. 645.

29. Sterne *v.* State, 20 Ala. 43; Daffin *v.* State, 11 Tex. App. 76; State *v.* Moats, 108 Iowa 13, 78 N. W. 701; Com. *v.* Vasalka, 181 Pa. St. 17, 37 Atl. 405.

It is not the duty of the trial court in a criminal case to interfere of its own motion to prevent the introduction of incompetent testimony against the accused. State *v.* Ripley, 32 Wash. 182, 72 Pac. 1036.

A conviction will not be reversed for the admission of improper evidence where no objection thereto was made by the defendant. Taylor *v.* State (Ark.), 83 S. W. 922.

Although circumstantial evidence of the non-consent of the owner to the taking of property in a larceny case is not admissible if direct or positive proof is available, the defendant cannot complain of the introduction of such evidence if no objection was interposed at the time it was offered. Schultz *v.* State, 20 Tex. App. 308.

An objection to the admission of a confession in a criminal case should be made when the evidence is offered. Couley *v.* State, 12 Mo. 462.

30. Benson *v.* United States, 146 U. S. 325; State *v.* Damery, 48 Me. 327; Daffin *v.* State, 11 Tex. App. 76; Com. *v.* Vasalka, 181 Pa. St. 17, 37 Atl. 405.

An Objection to the Testimony of an Accomplice must be made when it is offered. The testimony cannot

objection the same as in civil cases. Some courts, however, are more lenient in this respect in criminal than in civil cases, and do not hold the defendant in the former to the same strict compliance with the rules applied in the latter class of cases, if the evidence is manifestly inadmissible and prejudicial.[31]

And Where the Defendant Is an Infant of Tender Years it is the duty of the court, in the absence of the defendant's counsel, or upon his failure to make proper objection, to manifestly illegal evidence, to exclude such evidence of its own motion.[32]

Evidence Made Incompetent by Express Statute. — It has been held that where evidence is made incompetent by express statute its incompetency is not waived by a failure to object to its admission.[33]

9. Failure of Infant to Object. — It has been held that failure of an infant to object to incompetent testimony or witnesses does not

be stricken out if it has been given without objection. State *v.* Hauser, 112 La. 313, 36 So. 396.

After Verdict. — It is too late to object to a witness after verdict. State *v.* Scott, 1 Bail. L. (S. C.) 270.

Witnesses Not on Indictment. An objection to the testimony of witnesses whose names are not on the indictment cannot be raised for the first time after conviction. State *v.* Houston, 50 Iowa 512.

31. See People *v.* Blase, 57 App. Div. 585, 68 N. Y. Supp. 472.

Where by oversight no objection is made by the defendant in a criminal case to hearsay evidence at the time it is offered, the court should exclude such evidence when its attention is subsequently called thereto. Lightfoot *v.* State (Tex. Crim.), 78 S. W. 1075.

Where evidence is admitted without objection and is of such a nature that its relevancy may be shown at a later stage of the evidence, the fact that no objection is made when the evidence closes and its irrelevancy is apparent is not a waiver of the right to raise the objection and ask for the exclusion of the evidence during the argument, since in a criminal case "if the testimony is clearly inadmissible and is hurtful it is the duty of the trial court to exclude it at any time during the argument, or even in the charge to the jury." Morton *v.* State, 43 Tex. Crim. 533, 67 S. W. 115.

The Failure to Object to the Examination of the Defendant by the Jury While Making His Statement to them is not a waiver of the impropriety of this proceeding, if a proper exception is taken to the failure of the court of its own motion to prevent such irregularity. Hawkins *v.* State, 29 Fla. 554, 10 So. 822.

32. McClure *v.* Com., 81 Ky. 448, a prosecution for grand larceny against two boys, both under fourteen years of age, in which the failure of the court to exclude illegal evidence was held error, although the evidence was not objected to by the defendant's counsel.

33. State *v.* Ballard, 79 N. C. 627, *holding* that since the statute defining the offense of adultery declares that the admissions or confessions of one of the parties shall not be received as evidence against the other, it is the duty of the court in such case of its own motion to limit such evidence to the defendant against whom it is competent. "We are not to be understood as expressing or intimating an opinion that in a criminal action a person on trial may be silent and acquiesce in the introduction of any evidence which on objection made in apt time would have been ruled out and permit it to be heard and acted upon by the jury, and then complain of its admission; in such case he must abide the result and cannot complain after conviction. Belonging to this class may be mentioned as illustrating the distinction the admission of secondary in place of original and primary evidence of a fact, but here the statute

amount to a waiver of the ground of objection[34] for the reason that an attorney or guardian *ad litem* cannot waive the rights of the infant whom he represents.[35]

VII. EVIDENCE ADMISSIBLE IN PART.

1. Generally. — Where offered evidence is partly legal and partly illegal, a general objection to it as a whole is insufficient to question the admissibility of the objectionable portion and is properly overruled. The objection should specifically point out the part of the evidence against which it is directed.[36]

in direct terms declares that the confessions of one shall not be evidence against the other, and so the judge without a prayer to this effect should have instructed the jury." But see State *v.* Berry, 24 Mo. App. 466. See *supra,* VI, 2.

34. Barnard *v.* Barnard, 119 Ill. 92. And see McClure *v.* Com., 81 Ky. 448. See *supra* VI, 8, note 32.

35. Chicago, R. I. & P. R. Co. *v.* Kennedy, 70 Ill. 364.

36. *Alabama.* — Weaver *v.* State, 139 Ala. 130, 36 So. 717; Richmond & D. R. Co. *v.* Jones, 92 Ala. 218, 9 So. 276; Stitt *v.* State, 91 Ala. 10, 8 So. 669, 24 Am. St. Rep. 853; Bell *v.* Kendall, 93 Ala. 489, 8 So. 492; Hamilton *v.* Maxwell, 133 Ala. 637, 32 So. 13; Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54. See Wright *v.* State, 136 Ala. 139, 34 So. 233; Harper *v.* State, 109 Ala. 28, 19 So. 857.

Arkansas. — Central Coal & Coke Co. *v.* Niemeyer Lumb. Co., 65 Ark. 106, 44 S. W. 1122, 53 S. W. 570.

California. — People *v.* Glenn, 10 Cal. 33.

Colorado. — Ward *v.* Wilms, 16 Colo. 86, 27 Pac. 247.

Connecticut. — State *v.* Alford, 31 Conn. 40; Fitch *v.* Woodruff & Beach Iron Wks., 29 Conn. 82.

Florida. — Anthony *v.* State, 44 Fla. 1, 32 So. 818.

Georgia. — Sweeney *v.* Sweeney, 119 Ga. 76, 46 S. E. 76; McCrary *v.* Pritchard, 119 Ga. 876, 47 S. E. 341; Bass Dry Goods Co. *v.* Granite City Mfg. Co., 116 Ga. 176, 42 S. E. 415; Gully *v.* State, 116 Ga. 527, 42 S. E. 790; Southern R. Co. *v.* Gilmore, 115 Ga. 890, 42 S. E. 220; Maynard *v.* Interstate Bldg. & L. Ass'n, 112 Ga. 443, 37 S. E. 741; Smalls *v.* State, 99 Ga. 25, 25 S. E. 614; Hixon *v.* Asbury, 120 Ga. 385, 47 S. E. 901; Ray *v.* Camp, 110 Ga. 818, 36 S. E. 242; Powell *v.* Augusta & S. R. Co., 77 Ga. 192, 3 S. E. 757.

Illinois. — Myers *v.* People, 26 Ill. 173.

Indiana. — State *v.* Hughes, 19 Ind. App. 266, 49 N. E. 393; McGuffey *v.* McClain, 130 Ind. 327, 30 N. E. 296.

Kansas. — State *v.* Cole, 22 Kan. 474; Colvin *v.* Warford, 20 Md. 357; Wright *v.* Brown, 5 Md. 37; Wilson *v.* Pritchett, 99 Md. 583, 58 Atl. 360; Wheeler *v.* Harrison, 94 Md. 147, 50 Atl. 523.

Michigan. — Timmerman *v.* Bidwell, 62 Mich. 205, 28 N. W. 866.

Minnesota. — Craig *v.* Cook, 28 Minn. 232, 9 N. W. 712.

Missouri. — State *v.* Johnson, 76 Mo. 121.

New York. — Gaffney *v.* People, 50 N. Y. 416; Costello *v.* Herbst, 18 Misc. 176, 41 N. Y. Supp. 574; Stever *v.* New York, C. & H. R. R. Co., 7 App. Div. 392, 39 N. Y. Supp. 944; People *v.* Rose, 52 Hun 33, 4 N. Y. Supp. 787.

North Carolina. — State *v.* Stanton, 118 N. C. 1182, 24 S. E. 536; State *v.* Ledford, 133 N. C. 714, 45 S. E. 944; Hammond *v.* Schiff, 100 N. C. 161, 6 S. E. 753.

Pennsylvania. — Martin *v.* Kline, 157 Pa. St. 473, 27 Atl. 753; Peters *v.* Horbach, 4 Pa. St. 134.

Tennessee. — Baxter *v.* State, 15 Lea 657.

Texas. — Rhodes-Haverty Furn. Co. *v.* Henry (Tex. Civ. App.), 67 S. W. 340; Houston *v.* Perry, 5 Tex. 462; Galveston, H. & S. A. R. Co. *v.* Gormley, 91 Tex. 393, 43 S. W. 877; Paul *v.* Chenault (Tex. Civ.

2. Documentary Evidence. — A. GENERALLY. — An objection to offered documentary evidence as a whole is too broad to cover the incompetency or irrelevancy of particular portions thereof and is properly overruled, since the objection should point out the particular objectionable matter.[37]

B. LETTERS. — An objection to a letter as a whole is properly overruled if only particular portions of it are open to the objection made.[38]

App.), 44 S. W. 682; Holt *v.* Hunt, 18 Tex. Civ. App. 363, 44 S. W. 889; Fant *v.* Willis (Tex. Civ. App.), 23 S. W. 99; Rio Grande R. Co. *v.* Cross, 5 Tex. Civ. App. 454, 23 S. W. 529, 1004; Sun Mfg. Co. *v.* Egbert (Tex. Civ. App.), 84 S. W. 667.

Virginia. — Trogdon *v.* Com., 31 Gratt. 862; Washington S. R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834, *citing* Harriman *v.* Brown, 8 Leigh 697; Parsons *v.* Harper, 16 Gratt. 64; Trogdon's Case, 31 Gratt. 863, 881.

Washington. — State *v.* Douette, 31 Wash. 6, 71 Pac. 556; Spurlock *v.* Port Townsend S. R. Co., 13 Wash. 29, 42 Pac. 520.

West Virginia. — Brown *v.* Point Pleasant, 36 W. Va. 290, 15 S. E. 209.

Wisconsin. — Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081; University of Notre Dame du Lac *v.* Shanks, 40 Wis. 352.

An objection to a question as a whole which contains several interrogatories is properly overruled if any one of the several questions is proper. Kann *v.* Minneapolis & St. L. R. Co., 30 Minn. 423, 15 N. W. 871.

In an action against a railroad company for personal injuries, a general objection to the admission of the rules of the company is properly overruled, since a specific objection should be made to any particular rule deemed inapplicable. Fairman *v.* Boston & A. R. Co., 169 Mass. 170, 47 N. E. 613.

An Objection to Evidence as Hearsay is properly overruled where a portion of the offered evidence is not open to this objection. Spurrier *v.* McLennan, 115 Iowa 461, 88 N. W. 1062; Bamford *v.* Lehigh Zinc & Iron Co., 33 Fed. 677.

A general objection to a dying declaration is not good if any portion thereof is competent evidence. Archibald *v.* State, 122 Ind. 122, 23 N. E. 758.

An Objection to Evidence as "Improper Rebuttal" is properly overruled if a part of the evidence is proper matter in rebuttal. Drexel *v.* True, 74 Fed. 12, 20 C. C. A. 265, 36 U. S. App. 611; Duckworth *v.* Duckworth, 98 Md. 92, 56 Atl. 490.

A General Objection to the Admission of Any Evidence Under a Complaint composed of several causes of action is properly overruled if any evidence was properly admissible in support of any of the causes of action. White *v.* Harrigan, 41 Minn. 414, 43 N. W. 89.

37. Hoodless *v.* Jernigan (Fla.), 35 So. 656; Cox *v.* State, 64 Ga. 374, 37 Am. Rep. 76; State *v.* Brady, 100 Iowa 191, 69 N. W. 290, 36 L. R. A. 693; Malcolm *v.* Metropolitan Elev. R. Co., 36 N. Y. St. 741, 13 N. Y. Supp. 283; Sherlock *v.* German-American Ins. Co., 21 App. Div. 18, 47 N. Y. Supp. 315, *affirmed* 162 N. Y. 656, 57 N. E. 1124; Dysart *v.* Forsythe, 84 Mo. App. 190; Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625.

An objection to a paper as a whole is not sufficient to question the competency of particular statements therein contained as matters of opinion. Rowland *v.* Philadelphia, W. & B. R. Co., 63 Conn. 415, 28 Atl. 102.

An objection to a whole section of a city ordinance is properly overruled where a portion of such section is competent. Wilkins *v.* St. Louis, I. M. & S. R. Co., 101 Mo. 93, 13 S. W. 893.

38. *Alabama.* — Badders *v.* Davis, 88 Ala. 367, 6 So. 834.

Arkansas. — St. Louis, I. M. & S. R. Co. *v.* Stroud, 67 Ark. 112, 56 S. W. 112.

Colorado. — Denver *v.* Cochran, 17 Colo. App. 72, 67 Pac. 23.

C. Records and Transcripts. — An objection to an offered record or transcript as a whole is too broad when only particular portions thereof are inadmissible.[39]

D. Account Books. — If offered account books are not entirely inadmissible, the objection should point out the particular objectionable portions.[40]

E. Affidavits. — A general objection to an affidavit as a whole is properly overruled if any portion of its contents is not subject to objection.[41]

VIII. WITNESS PARTIALLY INCOMPETENT.

An objection to a witness' testifying is properly overruled if the witness is not wholly incompetent for all the purposes of the case.[42]

IX. EVIDENCE ADMISSIBLE AS AGAINST SOME PARTIES OR FOR SOME PURPOSES.

1. Evidence Admissible Only as Against Certain Co-Parties. A. Generally. — Evidence which is admissible against one of two or more co-parties cannot be excluded,[43] and its competency against particular parties is not brought in question by a general objection.

Connecticut. — Bissell *v.* Beckwith, 32 Conn. 509.

Iowa. — Perin *v.* Cathcart, 115 Iowa 553, 89 N. W. 12.

Michigan. — Ranson *v.* Weston, 110 Mich. 240, 68 N. W. 152.

Missouri. — Grimm *v.* Dundee Land & Inv. Co., 55 Mo. App. 457; Wright *v.* Gillespie, 43 Mo. App. 244.

New Hampshire. — Tabor *v.* Judd, 62 N. H. 288.

An objection to a letter as a whole is insufficient to question the competency of particular portions of it on the ground that they are mere conclusions of the writer, other parts of the letter being competent. State *v.* Hasty, 121 Iowa 507, 96 N. W. 1115.

A General Objection to a Series of Letters offered in evidence is properly overruled if any one of the series is competent for any purpose. Day *v.* Roth, 18 N. Y. 448.

39. Harrall *v.* State, 26 Ala. 52; Coveny *v.* Hale, 49 Cal. 552; Shatto *v.* Crocker, 87 Cal. 629, 25 Pac. 921; Mock *v.* Muncie, 9 Ind. App. 536, 37 N. E. 281.

40. Buckley *v.* Buckley, 12 Nev. 423; Skow *v.* Locks (Neb.), 91 N. W. 204.

In an action for work and labor, a general objection to the introduction by the plaintiff of his ledger is properly overruled if any portion thereof is competent. Morrison *v.* Whiteside, 17 Md. 452, 79 Am. Dec. 661.

41. Walker *v.* Maddox, 105 Ga. 253, 31 S. E. 165; Walrod *v.* Webster Co., 110 Iowa 349, 81 N. W. 598, 47 L. R. A. 480.

A general objection to an affidavit on the ground that it consists of mere conclusions and statements of matters of record is not sufficiently specific to be considered, unless the whole affidavit is open to these objections. Long *v.* Kasebeer, 28 Kan. 226.

A general objection to affidavits because the facts stated therein are illegal and irrelevant will not be sustained if any of the facts are legal and relevant. Davis *v.* Covington & M. R. Co., 77 Ga. 322, 2 S. E. 555.

42. Brown *v.* Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823.

43. For a Full Discussion of the admissibility of evidence competent against only one of two or more co-

The party or parties against whom it is inadmissible should specifically object to its admission or consideration as against themselves[44] and request an instruction limiting its effect to those parties against whom it is admissible,[45] except in a criminal case.[46]

B. JOINT OBJECTION. — Joint objection by several co-parties does not question the competency of the evidence as against one of such parties if it be competent against any of them,[47] except in a criminal case.[48]

parties, see article "COMPETENCY," Vol. III, p. 188.

44. *Arkansas.* — Howson *v.* State, 83 S. W. 933.

Connecticut. — Starr Burying Ground Ass'n *v.* North Lane Cemetery Ass'n, 77 Conn. 83, 58 Atl. 467.

Illinois. — Miller *v.* Potter, 59 Ill. App. 125.

Iowa. — Allen *v.* Barrett, 100 Iowa 16, 69 N. W. 272.

Missouri. — Union Sav. Bank Ass'n *v.* Edwards, 47 Mo. 445.

New York. — Gardner *v.* Friederich, 25 App. Div. 521, 49 N. Y. Supp. 1077, *affirmed* 163 N. Y. 568, 57 N. E. 1110; Fox *v.* Erbe, 100 App. Div. 343, 91 N. Y. Supp. 832; Stowell *v.* Hazelett, 66 N. Y. 635; Cowing *v.* Greene, 45 Barb. 585; Snyder *v.* Lindsey, 92 Hun 432, 36 N. Y. Supp. 1037.

Pennsylvania. — Long *v.* Maguire, 22 Pa. St. 163.

Texas. — See Gulf C. & S. F. R. Co. *v.* Holt, 30 Tex. Civ. App. 330, 70 S. W. 591.

"Incompetent, Irrelevant and Immaterial." — A general objection to evidence by one of two co-parties as incompetent, irrelevant and immaterial is not sufficiently specific where the evidence is competent against his co-party. Lee *v.* Murphy, 119 Cal. 364, 51 Pac. 549. See also Cronfeldt *v.* Arrol, 50 Minn. 327, 52 N. W. 857, 36 Am. St. Rep. 648.

45. Keowne *v.* Love, 65 Tex. 152; Allen *v.* Barrett, 100 Iowa 16, 69 N. W. 272; Howson *v.* State (Ark.), 83 S. W. 933.

46. See fully the article "COMPETENCY," Vol. III, p. 189.

Objection by Counsel Representing One of Two Codefendants. — Where counsel who has appeared and acted for only one of two codefendants in a criminal case objects generally to evidence as incompetent, it is error for the court to admit the evidence generally without limitation if it is wholly inadmissible on its face against the defendant represented by the objecting counsel, even though it is admissible against his codefendant. State *v.* Soule, 14 Nev. 453.

47. A Joint Objection by several co-parties to evidence which is admissible as against one of them is properly overruled. Appleton Mill. Co. *v.* Warder, 42 Minn. 117, 43 N. W. 791; Black *v.* Foster, 28 Barb. (N. Y.) 387.

48. Objection by Counsel Representing Both Codefendants. — An objection by counsel representing two joint defendants in a criminal prosecution to evidence of the declarations of one of the defendants, competent against himself, but clearly incompetent on its face against the other defendant because made after the end of the conspiracy, on the general ground that the evidence was irrelevant, immaterial and incompetent, was held sufficiently specific to require its exclusion as to the defendant against whom it was incompetent, since in no state of the case were the declarations competent against him. "We are of opinion that as the declarations of Hansen to Sodergren were not, in any view of the case, competent evidence against Sparf, the court, upon objection being made by counsel representing both defendants, should have excluded them as evidence against him, and admitted them against Hansen. The fact that the objection was made in the name of both defendants did not justify the court in overruling it as to both, when the evidence was obviously incompetent and could not have been made competent against Sparf, and was obviously competent against Hansen. It was not necessary that counsel should have made the ob-

2. Evidence Admissible for Some and Inadmissible for Other Purposes. — A. GENERALLY. — Where evidence admissible for some and inadmissible for other purposes is offered generally, a general objection to its admission is properly overruled.[49] The proper practice is to request that it be restricted to the particular purpose for which it is competent.[50]

jection on behalf of one defendant and then formally repeated it, in the same words, for the other defendant. If Sparf had been tried alone, a general objection in his behalf on the ground of incompetency would have been sufficiently definite. Surely, such an objection coming from Sparf when tried with another ought not to be deemed ineffectual because of the circumstance that his counsel, who by order of the court represented also his co-defendant, incautiously spoke in the name of both defendants." Sparf *v.* United States, 156 U. S. 51.

49. *Alabama.* — Gill *v.* Daily, 105 Ala. 323, 16 So. 932; Martin *v.* Hill, 42 Ala. 275.

Connecticut. — State *v.* Wadsworth, 30 Conn. 55.

Iowa. — Citizens Nat. Bank *v.* Converse, 105 Iowa 669, 75 N. W. 506.

Kansas. — Parker *v.* Richolson, 46 Kan. 283, 26 Pac. 729.

Massachusetts. — Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60.

Missouri. — Brennan *v.* St. Louis, 92 Mo. 482, 2 S. W. 481.

Pennsylvania. — Klein *v.* Franklin Ins. Co., 13 Pa. St. 247; Cullum *v.* Wagstaff, 48 Pa. St. 300; Richardson *v.* Stewart, 4 Binn. 198.

Vermont. — State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

Wisconsin. — McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375.

Where Testimony Is Offered for Several Purposes and is admissible for any one of them, a general objection will not be sustained, such an offer being regarded as a *general* offer, and as such is good. It is the duty of counsel in such case to specifically point out the purpose to which the testimony has no legal application and to ask its exclusion for such purpose. Carroll *v.* Ridgaway, 8 Md. 328; Pegg *v.* Warford, 7 Md. 582, 607.

An objection to testimony as to negotiations leading up to the execution of written contracts on the ground that such evidence is incompetent to vary the writing is not sufficient to require the exclusion of the testimony or an instruction limiting its effect, where it is competent for the purpose of determining whether there were three written contracts or one contract and two duplicates. Hand *v.* Miller, 58 App. Div. 126, 68 N. Y. Supp. 531.

An objection to the admission of a final settlement of an executor as proof in his favor of any of the credits shown therein is too broad, and is therefore properly overruled when the settlement establishes his right to some of those credits. Lycan *v.* Miller, 56 Mo. App. 79.

A general objection to an account book is properly overruled if the book is admissible for any purpose in the case. Christian *v.* Dripps, 28 Pa. St. 271.

An objection to the published copy of an election proclamation on the ground that it is secondary evidence, for the admission of which a sufficient preliminary showing had not been made, is properly overruled where the printed copy with the affidavit of its publication annexed is relevant and competent to prove the publication of a proclamation, and no request is made to limit the evidence to the purpose for which it is admissible. San Luis Obispo Co. *v.* Hoyt, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756.

Where the Specific Purposes for Which Testimony Is Offered Are Stated by the party offering it, a general objection to its admission is properly overruled if it is admissible for any of the purposes stated. Nutwell *v.* Tongue, 22 Md. 419.

50. Park *v.* Wooten, 35 Ala. 242; Schlicker *v.* Gordon, 19 Mo. App. 479; Fagan *v.* Inter Urban St. R. Co. (App. Div.), 85 N. Y. Supp. 340; Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60.

A general objection to evidence

B. In Criminal Case. — In a criminal case, however, the weight of authority seems to require the court of its own motion to limit such evidence to its proper purpose without the necessity of an objection or request.[51]

X. WAIVER OF OBJECTIONS ALREADY MADE.

1. Generally. — A party may waive objections previously made, either expressly[52] or, by his conduct, impliedly.[53] The failure, however, to request that the evidence objected to be stricken out, or that the court charge thereon, is not a waiver of the objection.[54]

2. Preventing Withdrawal of Incompetent Evidence. — Although evidence has been admitted over objection, if the objecting party afterward opposes and prevents its withdrawal or the rectification of the error he is deemed to have waived his previous objection.[55]

3. Subsequent Introduction of Same Evidence or Evidence to Same Point. — An objection to evidence is waived by the subsequent intro-

which is admissible for some purposes is not sufficient to require the court to limit the application of the evidence to those purposes for which it is competent, but it is the duty of the party offering the evidence to ask for an instruction to this effect. Baker *v.* Varney (Cal.), 59 Pac. 778; McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375.

Rights of Objecting Party. Where evidence competent for some particular purpose has been admitted over a general objection, the party objecting cannot move to have it excluded, but may ask for instructions limiting its operation. Ponder *v.* Cheeves, 104 Ala. 307, 16 So. 145.

51. See **Fully** article "Competency," Vol. III, p. 188, *et seq.*

52. Objections which were withdrawn at the trial will not be considered on appeal. State *v.* Melvern, 32 Wash. 7, 72 Pac. 489.

Where the defendant in a criminal case withdraws all objections to certain evidence and invites its introduction, he cannot afterward complain of its admission as error. State *v.* Baker, 136 Mo. 74, 37 S. W. 810.

53. Waiver by Conduct. — An objection to the admission of a written instrument on the ground that its execution has not been proved may be waived by the conduct of the objector inducing the court and the opposing counsel to believe that the objection has been waived. Thomasson *v.* Wilson, 146 Ill. 384, 34 N. E. 432.

Waiver by Changing Ground of Objection. — Where plaintiff objects to certain oral evidence as incompetent because contained in a writing, which is the best evidence, but subsequently he objects to the production of the writing as immaterial and his objection is sustained, he will be held to have waived his former objection. Nat. State Bank *v.* Delahaye, 82 Iowa 34, 47 N. W. 999.

54. Barnard *v.* State, 44 Tex. Crim. 67, 73 S. W. 957.

55. Mitchell *v.* Davis, 23 Cal. 381; Jackson *v.* State, 94 Ala. 85, 10 So. 509. See also Young *v.* Harrison, 17 Ga. 30; New York, C. & St. L. R. Co. *v.* Blumenthal, 160 Ill. 40, 43 N. E. 809; Wilson *v.* Branning Mfg. Co., 120 N. C. 94, 26 S. E. 629.

In an action for an assault, evidence of an assault a few hours previous was admitted over defendant's objection, the court supposing such assault to be the one relied upon. On learning of its mistake the court offered to call a new jury and commence *de novo*, which the defendants declined. It was held that they thereby waived their exception to the evidence. Howland *v.* Day, 56 Vt. 318.

duction of the same evidence by the objecting party,[56] or of evidence to the same effect or tending to prove the same facts.[57]

4. Cross-Examination of Witness. — An objection to improper evidence is not waived by a cross-examination of the witness in respect thereto;[58] nor is an objection to the competency of a witness

56. Chicago, K. & N. R. Co. *v.* Wiebe, 25 Neb. 542, 41 N. W. 297; Mealer *v.* State, 32 Tex. Crim. 102, 22 S. W. 142; Albert *v.* Mutual L. Ins. Co., 122 N. C. 92, 30 S. E. 327.

Upon a trial involving a question of church government, the plaintiff, to maintain his theory, read in evidence extracts from a certain book over the objection that it was not shown that the book was recognized by the church as authority upon the question. The defendant afterward, to maintain his theory, read in evidence other extracts from the same book upon the same point. This was held to be a waiver of his previous objection, being such indorsement of the book as to prevent him from questioning its authority. Gaff *v.* Greer, 88 Ind. 122, 45 Am. Rep. 449.

Where an objection to cross-examination on the ground that it had no relation to the examination in chief was erroneously overruled, it was held that the action of the objecting party in re-examining the witness as to the same matter, and actually introducing in evidence the instrument concerning which the objectionable cross-examination was made, was a waiver of the previous objection. Cropsey *v.* Averill, 8 Neb. 151, *distinguished* in Marsh *v.* Snyder, 14 Neb. 237, 15 N. W. 341.

A party who has been cross-examined over his objection as to certain matters waives his objection thereto by subsequently voluntarily testifying to the same matter. State *v.* Eifert, 102 Iowa 188, 65 N. W. 309, 63 Am. St. Rep. 433, 38 L. R. A. 485.

Where a party objects to the admission of an administrator's deed because there is no proof of its authorization or confirmation, the objection is waived by the subsequent introduction of the same deed by the objecting party in his own behalf. Dohoney *v.* Womack, 1 Tex. Civ. App. 354, 20 S. W. 950.

57. South St. Louis R. Co. *v.* Plate, 92 Mo. 614, 5 S. W. 199. See Packard *v.* Johnson (Cal.), 4 Pac. 632.

"If one who has objected to incompetent evidence which tends to the proof of certain facts afterward proves the same facts himself, he may well be held to have waived the error, but he does not waive it by simply giving evidence to the same points, for he may feel compelled to do that in order to disprove the incompetent evidence. If, for instance, a question of value is in dispute and one side gives incompetent evidence to prove it very great, the other side does not waive this error by giving competent evidence to prove it to be less." *Per* Cooley, J., in Kost *v.* Bender, 25 Mich. 515.

An objection to cross-examination on the ground that it calls for facts which should be proved on direct examination because forming part of the cross-examiner's own case, is waived by the subsequent introduction of similar testimony by the objecting party. State *v.* McGee (S. C.), 33 S. E. 353.

58. *Alabama.* — Scarborough *v.* Blackman, 108 Ala. 656, 18 So. 735.

California. — Laver *v.* Hotaling, 46 Pac. 1070.

Illinois. — Aetna Ins. Co. *v.* Paul, 23 Ill. App. 611.

Iowa. — Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26; Peacock *v.* Gleason, 117 Iowa 271, 90 N. W. 610; Donnell *v.* Braden, 70 Iowa 551, 30 N. W. 777.

Missouri. — Pugh *v.* Ayres, 47 Mo. App. 590; Costigan *v.* Michael Transp. Co., 33 Mo. App. 269, 291.

Nebraska. — Marsh *v.* Snyder, 14 Neb. 237, 15 N. W. 341, *distinguishing* Cropsey *v.* Averill, 8 Neb. 151.

New Jersey. — Boylan *v.* Meeker, 28 N. J. L. 274.

New York. — Duff *v.* Lyon, 1 E. D. Smith 536. But see Danenbaum *v.* Person, 3 N. Y. Supp. 129.

waived by cross-examining him if the cross-examination is confined to the matters elicited by the examination in chief.[59] But where the cross-examination of a witness as to matters not brought out on the examination in chief makes the witness the witness of the cross-examiner, it is a waiver of the latter's previous objection to the competency of the witness.[60]

5. Introduction of Evidence in Rebuttal or Contradiction. — A party does not waive an objection to incompetent or irrelevant evidence by offering similar improper evidence in contradiction or rebuttal.[61]

South Carolina. — Horres *v.* Berkeley Chemical Co., 57 S. C. 189, 35 S. E. 500.

An objection to testimony is not waived by requiring the witness on cross-examination to repeat the testimony. Barker *v.* St. Louis, I. M. & S. R. Co., 126 Mo. 143, 28 S. W. 866, 47 Am. St. Rep. 646, 26 L. R. A. 843.

Effect of Failure To Cross-Examine. — Where the question objected to was in form improper because calling for a conclusion, but the objecting party failed to cross-examine the witness to determine whether his answer was a mere conclusion, it was held that he could not complain on appeal that the evidence was merely the witness' conclusion. Shaefer *v.* Missouri Pac. R. Co., 98 Mo. App. 445, 72 S. W. 154.

59. An objection to the competency of a witness to testify to transactions with a deceased person against the latter's representatives is not waived by cross-examining such witness only as to matters covered by his examination in chief. Johnston *v.* Johnston, 173 Mo. 91, 120, 73 S. W. 202, 61 L. R. A. 166.

60. Miller *v.* Miller, 92 Va. 510, 23 S. E. 891.

61. *United States.* — Salt Lake City *v.* Smith, 104 Fed. 457, 43 C. C. A. 637.

Alabama. — Kansas City M. & B. R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262.

California. — Laver *v.* Hotaling, 46 Pac. 1070.

Colorado. — T. & H. Pueblo Bldg. Co. *v.* Klein, 5 Colo. App. 348, 38 Pac. 608.

Illinois. — Chicago C. R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195.

Indiana. — Washington Etc. Co. *v.* McCormick, 19 Ind. App. 663, 49 N. E. 1085.

Iowa. — Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26; Sims *v.* Moore, 61 Iowa 128, 16 N. W. 58.

Michigan. — McKinnon *v.* Gates, 102 Mich. 618, 61 N. W. 74.

Missouri. — Barker *v.* St. Louis I. M. & S. R. Co., 126 Mo. 143, 28 S. W. 866, 47 Am. St. Rep. 646, 26 L. R. A. 843. But in Ruth *v.* St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055, an objection to the opinion of an expert as to the genuineness of a coin was held to be waived by the objecting party subsequently introducing the same character of evidence in its defense.

New Jersey. — Boylan *v.* Meeker, 28 N. J. L. 274.

New York. — Winters *v.* Manhattan R. Co., 15 Misc. 8, 36 N. Y. Supp. 772; Lyons *v.* New York Elev. R. Co., 26 App. Div. 57, 49 N. Y. Supp. 610; Worrall *v.* Parmelee, 1 N. Y. 519, 49 Am. Dec. 350; Woods *v.* Buffalo R. Co., 35 App. Div. 203, 54 N. Y. Supp. 735.

South Carolina. — Horres *v.* Berkeley Chemical Co., 57 S. C. 189, 35 S. E. 500.

Texas. — San Antonio & A. P. R. Co. *v.* De Ham (Tex. Civ. App.), 54 S. W. 395.

Wisconsin. — Pfeil *v.* Kemper, 3 Wis. 315.

In Martin *v.* New York, N. H. & H. R. R. Co., 103 N. Y. 626, 9 N. E. 505, objection was made to the declarations of an injured person subsequent to the injury; it was held that proof of contrary declarations in rebuttal was not a waiver of the objection. "A party excepting to the admission of testimony is not bound

6. Commission of Similar Error by Objector. — A party does not waive his objection to incompetent evidence by resorting to the use of similar incompetent evidence.[62]

7. Failure to Except. — An objection is of course waived by a failure to except when it is overruled.[63]

XI. EXCLUSION BY COURT OF ITS OWN MOTION WITHOUT OBJECTION.

Since the trial judge is more than a mere umpire, he may of his own motion exclude improper evidence, although no objection thereto is made by the party against whom it is offered,[64]

to concede its truth or to refrain from combating it in order to retain his exception."

In Nebonne *v.* Concord R. R., 67 N. H. 531, 38 Atl. 17, it was held that an objection to incompetent declarations was not waived by calling the declarant in support of the contention that no such declarations were made by him.

An objection to the admission of evidence to prove a sale is not waived by the introduction of rebutting testimony to show that the sale was fraudulent. Gage *v.* Wilson, 17 Me. 378.

The mere fact that a party objecting to evidence of contributory negligence, because not pleaded, introduces in rebuttal evidence on the same question does not amount to a waiver of the objection. Kansas City M. & B. R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262.

But an objection to testimony on the ground that it is not admissible under a plea of the general denial is waived by obtaining time to rebut the testimony. Cockerham *v.* Perot, 48 La. Ann. 209, 19 So. 122.

62. An objection to evidence of the conviction of a witness for a misdemeanor is not waived by the subsequent introduction by the objecting party of evidence of like character with reference to a witness of his adversary. Gardner *v.* St. Louis & S. F. R. Co., 135 Mo. 90, 36 S. W. 214.

An objection is not waived by the fact that the objecting party subsequently commits the same error in putting in his evidence as the one he has complained of. Russ *v.* Wabash W. R. Co., 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823.

63. East St. Louis Con. R. Co. *v.* Eggmann, 71 Ill. App. 32; Vance *v.* Cowing, 13 Ind. 460; Davis *v.* Patton, 19 Md. 120; People *v.* Guidici, 100 N. Y. 503, 3 N. E. 493; Stansbury *v.* Stansbury, 20 W. Va. 23.

Failure to Except to Parol Evidence. — Where parol evidence of a written contract has been improperly admitted over objection, but no exception has been taken, the court must consider both the parol evidence and the writing in determining the terms of the contract. "When . . . the evidence had been permitted to go into the case without exception the court was bound . . . to deal with it as properly in the case, whether legally admissible or not, and give it the same effect as if it had in fact been legally admissible." Slingluff *v.* Andrew Volk Builders Supply Co., 89 Md. 557, 43 Atl. 759.

64. State *v.* Clarkson, 96 Mo. 364, 9 S. W. 925; Durrett *v.* State, 62 Ala. 434; Spottiswood *v.* Weir, 80 Cal. 448, 22 Pac. 289; People *v.* Turcott, 65 Cal. 126, 3 Pac. 461; Davey *v.* Southern Pacific Co., 116 Cal. 325, 48 Pac. 117. But see Bright *v.* Ecker, 9 S. D. 449, 69 N. W. 824.

"A trial is not a mere *lutte* between counsel, in which the judge sits merely as an umpire to decide disputes which may arise between them. It is his duty to see that the trial is conducted lawfully and fairly, to contribute to the eliciting of the truth, and, as we recently said, 'to take care that neither party shall suffer unlawfully.' State *v.* Green, 36 Ann. 186; State *v.* McGee, *Id.* 206. Thus, he may supplement the deficiencies of counsel on either side by putting questions to witnesses

and he may also state the legal reasons for its exclusion.[65]

XII. TRIAL BY COURT.

1. Waiver of Objection. — Where the trial is by the court, objections not properly or seasonably made are waived the same as in jury trials.[66]

2. Consideration of Evidence Introduced Without Objection. Where relevant and material evidence has been admitted without objection it cannot be disregarded by the court in arriving at its conclusions or findings, although it might have been excluded as incompetent if a proper objection had been interposed.[67]

XIII. ON REFERENCE.

In a proceeding before a referee objections to evidence must be made when it is offered, and if not so made are waived,[68] unless the parties otherwise stipulate.[69] And it seems that such objections should be renewed at the trial or called to the attention of the trial court.[70]

XIV. PROCEEDINGS BEFORE ARBITRATORS.

A party is not required to object to incompetent evidence offered against him in a proceeding before arbitrators, and his failure to take objection is not a waiver of the right to object to the admission of the evidence on an appeal to the court.[71]

which they have omitted. . . . We think, therefore, he has equal right, of his own motion, to require counsel on either side to put their questions in legal form, and to prevent the introduction of improper evidence, whether objected to by opposing counsel or not. A trial is not intended as a mere test of the capacity of counsel, but has the higher objects of eliciting truth and securing justice. The rules of evidence have been framed with the view of advancing these objects, and, when they are violated, it is the privilege and duty of the judge to enforce them." State *v.* Crittenden, 38 La. Ann. 448.

If Issues Are Made by the Pleadings Which Are Wholly Immaterial and impertinent to the merits of the case, the court may of its own motion exclude evidence offered in support thereof, although no objection is made by the parties. Corning *v.* Corning, 6 N. Y. 97.

65. State *v.* Clarkson, 96 Mo. 364, 9 S. W. 925.

66. Rupert *v.* Penner, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824.

67. Rupert *v.* Penner, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824.

68. Bucksport *v.* Buck, 89 Me. 320, 36 Atl. 456; Patten *v.* Hunnewell, 8 Me. 19; Hill *v.* Bailey, 8 Mo. App. 85; Leach *v.* Kelsey, 7 Barb. (N. Y.) 466; Cardwell *v.* Brewer, 19 S. C. 602.

At a reference to take testimony, the objecting party, in stating his objection to certain evidence, expressly stated that it was not based on the ground that it was secondary, but he reserved the right to object on any other ground. At the hearing the evidence was objected to as secondary, but it was held that the objecting party had by his conduct waived this ground of objection. McGahan *v.* Crawford, 47 S. C. 566, 25 S. E. 123.

69. Johnson *v.* McIntosh, 31 Barb. (N. Y.) 267.

70. Illstad *v.* Anderson, 2 N. D. 167, 49 N. W. 659; Silver Valley Min. Co. *v.* Baltimore Gold & Sil. Min. & Smelt. Co., 99 N. C. 445, 6 S. E. 735.

71. Cox *v.* Norton, 1 Pen. & W. (Pa.) 412. See also the article

XV. CONSIDERATION OF INCOMPETENT EVIDENCE RECEIVED OVER OBJECTION.

Where incompetent evidence has been received in proof of a material fact, upon objection thereto being overruled it must be considered as evidence in the case in spite of its incompetent nature, if it has not been stricken out or excluded from consideration during the trial.[72]

"ARBITRATION AND AWARD," Vol. I, p. 955, note 21.

72. "If testimony tending to establish a material fact, although incompetent in its nature, is received without objection, or if, as in this case, it being objected to, is received notwithstanding the objection, the party has a right to insist upon the facts shown thereby. And it will not be just to say, on appeal, that such evidence ought not to have been received, and may therefore be now disregarded. Such a view of the subject would be manifestly unjust. First, it would mislead and entrap the party to his prejudice. Second, if the court, upon the trial, excluded the evidence, he could have his exception and bring the correctness of the ruling under review. And, third, which is most of all important, if the evidence had been rejected, he would have had the opportunity to supply the defect by other proof. Nothing is more common than for testimony to be given which is not, in its nature, strictly competent, upon matters about which both parties are conscious that there is no dispute—matters which both fully understand to be true. And such evidence is taken because the adverse party makes no question of the fact it tends to establish. He can never be permitted to say, on appeal, that the fact was not proved because the evidence offered and received was not competent testimony, and ought to have been objected to and rejected. And if objected to and the objection is overruled, the ruling for all the purposes of a review of the case by the party giving the evidence must be taken to be correct." Flora *v.* Carbean, 38 N. Y. 111.

In Smith *v.* Kirtland, 45 App. Div. 25, 60 N. Y. Supp. 812, an action against a husband and wife to set aside an alleged fraudulent conveyance by the former to the latter, the failure of the referee to consider as evidence against the wife the declarations and testimony of the husband given in supplementary proceedings, was held error, although such evidence had been improperly admitted against the wife over objection and exception. "Although it was clearly error to receive such evidence as against the wife, nevertheless, having so received it, it was error for the referee to refuse to consider it. Although improperly in the case under objection and exception the plaintiff had the right to suppose it would be considered as evidence properly there and to act upon that supposition." To same effect Meyers *v.* Betts, 5 Denio (N. Y.) 1.

OBLITERATION.—See Alteration of Instruments; Boundaries; Deeds; Records; Wills.

OBSCENITY.—See Adultery; Fornication; Libel and Slander.

OBSTRUCTING JUSTICE.

CROSS-REFERENCES:

Assault and Battery;
Contempt;
Homicide;
Officers;
Sheriffs and Constables.

Scope of Article. — This article deals with prosecutions for obstructing justice by resisting arrest, obstructing the service of a legal writ, tampering with jurors and witnesses, and other similar acts.

I. PRESUMPTIONS.

1. As to Authority of Officer. — If an officer be duly commissioned and found acting in the duties of his office, the law presumes that he has taken the required oaths and is duly qualified until the contrary is shown.[1] And it seems that evidence that the alleged officer has performed the duties of the office and worn the uniform is *prima facie* evidence of authority.[2]

2. As to Legality of Service. — It is presumed that an officer who has served a legal writ has done so in a legal manner.[3]

1. United States *v.* Hudson, 1 Hask. 527, 25 Fed. Cas. No. 15,412. The same rule was applied to an inspector of customs in United States *v.* Bachelder, 24 Fed. Cas. No. 14,490.

2. In Com. *v.* Kane, 108 Mass. 423, 11 Am. Rep. 373, and in Com. *v.* Tobin, 108 Mass. 426, 11 Am. Rep. 375, it was held that evidence that the alleged officer had acted as such for a number of years, and had worn the uniform, was sufficient. In the former case the court said: "It is well settled that the rule applies to prosecutions for injuries to a public officer in resisting him in the discharge of his duty. In the leading *case of the Gordons* in 1789, all the judges of England were of opinion that, on the trial of an indictment for the murder of a constable in the execution of his office, while attempting to arrest the defendant, evidence that at the time he had his constable's staff with him and gave notice of his business, and that he was generally known as the constable of the parish, was sufficient. 1 Leach (4th ed.) 515; *S. C.* 1 East P. C. 315; 4 T. R. 366 note. In a suit by the United States for a penalty for rescuing goods seized by a collector of customs, Chief Justice Marshall held that evidence that he had notoriously acted as collector was sufficient. Jacob *v.* United States, 1 Brock. 520. And in a criminal prosecution of the owner of cattle for an assault and battery in taking them from a person who had found them at large without a keeper, and was driving them along the highway, this court decided that his testimony that he was a field driver of the town, and acted as such in taking the cattle and for many years before, was sufficient *prima facie* evidence of his authority. Commonwealth *v.* McCue, 16 Gray, 226."

3. Putman *v.* State, 49 Ark. 449, 5 S. W. 715; State *v.* Freeman, 8 Iowa 428, 74 Am. Dec. 317. In the latter case a statute required an of-

3. As to Legality of Writ. — For the purposes of the prosecution, it will be presumed that the writ, if valid on its face, is in all respects legal.[4]

4. As to Legality of Acts. — The law presumes the rightfulness of a sheriff's proceedings in entering a defendant's house to make an arrest.[5]

5. As to Malice. — The presumption of malice and the consequences of the crime attach equally to all who knowingly aid, abet or take part in the act of resistance.[6]

II. MODE OF PROOF.

1. Necessary Proof. — A. OFFICIAL CHARACTER. — The evidence must show that the person resisted was an officer,[7] and that he was acting as such when resisted.[8]

B. KNOWLEDGE OF DEFENDANT. — The evidence must show knowledge of some legal proceeding or process that has been interfered with; the intent will not be inferred merely from the act.[9]

ficer making an arrest to inform the defendant that he acted under the authority of a warrant, and, if required, to produce and show it. It was held that in serving the writ he will be presumed to have discharged his duty.

4. If facts existed which justified the act, such as the illegality of the warrant, the defendant should have shown them; otherwise the validity of the warrant and the correctness of its issue will be presumed. Kernan *v.* State, 11 Ind. 471.

5. "If the circumstances which would legally authorize an arrest and search without warrant did not exist, it devolved on the defendant to show their non-existence. This instruction is based on the familiar rule that when the unlawful act which would constitute the offense is proven, anything that goes to show innocence comes from the accused. It is not for a prosecution to exclude any possible defense in order to a conviction." People *v.* Nash, 1 Idaho 206.

6. State *v.* Zeibart, 40 Iowa 169. "While engaged in their unlawful resistance of the officer, the two defendants were as one, and each was accountable not only for his own acts, but for the acts of the other, done in the execution of their unlawful resistance."

7. Merritt *v.* State (Miss.), 5 So. 386.

8. In Jones *v.* State, 60 Ala. 99, the defendant was indicted for resisting an officer while in the execution of legal process. The constable testified that while attempting to stop a fight between the defendant's brother and another person, having no writ or process in his hands, and after he had commanded the peace, the defendant resisted and struck him. *Held*, that resisting or striking a constable when commanding the peace, there being no writ or process in his hands, is not resisting an officer in the execution of legal process, although it may be assault and battery.

Evidence that the officer resisted was illegally arresting a third party without warrant was held to establish a defense in People *v.* Hochstim, 36 Misc. 562, 73 N. Y. Supp. 626. "The first thing that has to be proved is that the officer was 'in the performance of his duty.' If, instead, he was committing a high-handed outrage on the rights and liberties of an individual, as was the case with this officer, then he was not in the performance of his duty."

9. *Massachusetts.* — Com. *v.* Kirby, 2 Cush. 577.

Missouri. — State *v.* Hilton, 26 Mo. 199.

2. Official Character of Officer. — A. Parol Evidence. — The official character of the officer may be shown by parol; record evidence is not necessary.[10]

B. Lack of Qualification. — Evidence that the officer had not taken the oath, or otherwise had failed to qualify, is incompetent.[11]

C. Where no Allegation of Character in Indictment. Where a peace officer has been killed, evidence that he was such officer is competent, although the fact is not alleged in the indict-

New York. — Yates *v.* People, 32 N. Y. 509.

Oregon. — State *v.* Smith, 11 Or. 205, 8 Pac. 343.

Rhode Island. — State *v.* Maloney, 12 R. I. 251.

Tennessee. — Duncan *v.* State, 7 Humph. 148.

Texas. — Horan *v.* State, 7 Tex. App. 183.

Vermont. — State *v.* Carpenter, 54 Vt. 551.

Virginia. — Com. *v.* Israel, 4 Leigh 675.

"It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such. And the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court." Pettibone *v.* United States, 148 U. S. 197, 206.

10. State *v.* Zeibart, 40 Iowa 169. This is because it is held to be sufficient to show that the officer resisted was a *de facto* officer. See also Cockerham *v.* State (Miss.), 19 So. 195 (although statute required appointment to be in writing).

Evidence that the officer was a town constable is sufficient to sustain an allegation that he was an officer of police. State *v.* Pickett, 118 N. C. 1231, 24 S. E. 350.

Although it is generally sufficient to prove the *de facto* character of the officer, under an allegation that he was legally appointed and duly qualified, the facts constituting him an officer *de jure* must be proved. "Where there is unnecessary particularity in the description of whatever is necessary to be mentioned, all the particulars of the description must be proved, because they are made essential to the identity." State *v.* Sherburne, 59 N. H. 99.

11. "The evidence would be proper if Lascells, instead of the people, was the party complaining of an injury. If he were suing to recover damages for the assault, it would probably be a good answer to the action that he was not a legal officer, but a wrongdoer, who might be resisted. And clearly, he cannot recover fees, or set up any right of property on the ground that he is an officer *de facto,* unless he be also an officer *de jure.* . . . When one man attempts to exercise dominion over the person or property of another, it becomes him to see that he has an unquestionable title. But it is equally well settled that the acts of an officer *de facto,* though his title may be bad, are valid so far as they concern the public, or the rights of third persons who have an interest in the things done. Society could hardly exist without such a rule." People *v.* Hopson, 1 Denio (N. Y.) 574.

See also Gunn *v.* Tackett, 67 Ga. 725; Stephens *v.* State, 106 Ga. 116, 32 S. E. 13; Brown *v.* State, 42 Tex. Crim. 417, 60 S. W. 548.

The defendant cannot be heard to question the validity of the appointment of the officer. Parish *v.* State, 130 Ala. 92, 30 So. 474.

Evidence that the officer had not filed his appointment and oath with the county clerk, as required by law, does not constitute a defense. State *v.* Quint, 65 Kan. 144, 69 Pac. 171.

ment.[12] It is unnecessary to prove that he was an officer *de jure*, but it is sufficient to show that he was a *de facto* officer, and any evidence is competent which tends to establish this fact.[13]

3. Authority of Officer in Particular Case. — A. WRIT. — The writ under which the officer acted is admissible to show his authority, although it has not been returned.[14] And it has been held necessary either to produce a warrant or account for its absence.[15] But a writ void on its face is not admissible:[16] although evidence tending to show a writ to be voidable or informal is not admissible.[17]

12. Dilger *v.* Com., 88 Ky. 550, 11 S. W. 651; Boyd *v.* State, 17 Ga. 194; Lyons *v.* State, 9 Tex. App. 636.

"In Mackalley's case, reported in 9 Coke's Rep. 65, 111, it was, among other things, resolved by all the judges of England, who had assembled at the King's command, and by all the Barons of the Exchequer, that when an officer in the discharge of his duty was slain, 'there needs not a special indictment on all the matter drawn, but a general indictment, that such a party *ex malitia sua precogitata percussit, etc.*,' would be sufficient. It was further declared 'that if any sheriff, under-sheriff, sergeant, or other officer, who hath execution of process, be slain in doing his duty, it is murder in him who kills him, although there was not any former malice betwixt them; for the execution of process is the life of the law, and therefore he who kills him shall lose his life; for that offense is *contra potestatem regis et legis*, and therefore, in such case, there needs not be any inquiry of malice.'" State *v.* Green, 66 Mo. 631, 645.

13. Martin *v.* State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91; State *v.* Zeibart, 40 Iowa 169; State *v.* Holcomb, 86 Mo. 371; Temple *v.* State, 15 Tex. App. 304, 49 Am. Rep. 200; State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648.

14. State *v.* Moore, 39 Conn. 244. In this case the writ was admitted to show that the person who served it was deputed to levy an attachment. As to the necessity of a return, the court held it unnecessary, distinguishing cases where an officer is sued. "The officer is commanded to return the writ, as well as to serve it on the defendant and his property, and if he obeys a part of the mandate and disregards the remainder, inasmuch as the whole command is one entire thing, the law will afford him no protection unless he can show a legal excuse. . . . The crime laid to the defendant's charge was committed when he obstructed Glover in the performance of his duty. It was then complete, and was not dependent upon the question whether the process should afterward be returned to the court."

15. "The warrant of arrest said to have been resisted by the prisoner was the best evidence, and should have been offered in evidence on the trial, or its non-production accounted for. Other and inferior proof cannot be resorted to until it be shown that the best evidence cannot be produced." Scott *v.* State, 3 Tex. App. 103.

This rule applies, of course, only to cases where the arrest is made under authority of the warrant. United States *v.* Pignel, 1 Cranch C. C. 27 Fed. Cas. No. 16,049.

16. Searcy *v.* State, 114 Ga. 270, 40 S. E. 235.

17. Witherspoon *v.* State, 42 Tex. Crim. 532, 61 S. W. 396. In this case the court said: "Defendant could not be prosecuted for resisting a void writ, but an informal or voidable writ, where it comes from a court of competent jurisdiction, as the writ alleged in the information in this case, would justify and authorize an officer to execute the writ, and if defendant resists that character of writ he would be guilty, regardless of any mere informalities in the writ."

It is no defense that the defendant's initials, and not his Christian name, were given in the warrant.

B. Evidence Showing Commission of Misdemeanor. — Where an officer arrests without warrant for a misdemeanor, evidence showing an offense in his presence is admissible.[18]

4. Evidence of Knowledge. — Intent is an essential element of the offense of obstructing justice, as it is of most other offenses known to the law. To show it, any evidence tending to prove that the defendant had knowledge of the character and authority of the officer,[19] or knowledge that the party with whom he tampered was connected with an action[20] is admissible.

5. Ownership of Property Seized. — It has been held that where an officer has attempted to levy upon property in the defendant's possession, as that of another, the defendant may present evidence that he is the real owner;[21] but elsewhere such evidence is held incompetent.[22]

6. Incompetent Evidence. — A. Other Offenses. — Evidence that the defendant had been indicted for another and different offense is not usually admissible.[23]

Spear *v.* State, 120 Ala. 351, 25 So. 46.

It is not necessary to show a valid affidavit upon which the writ is based. "That process may be said to be fair on its face which proceeds from a court, magistrate, or body having the authority of law to issue process of that nature, and which is in legal form, and on its face contains nothing to notify or appraise the official that it is issued without authority." Meador *v.* State, 44 Tex. Crim. 468, 72 S. W. 186.

18. People *v.* Rounds, 67 Mich. 482, 35 N. W. 77. In this case the defendant was disturbing the peace when arrested.

19. In United States *v.* Terry, 42 Fed. 317, a marshal was ordered by the judge to remove from the court room the defendant, a party to the suit then before the court. The defendant claimed as an excuse for assaulting the officer that she was so excited she did not hear the order. To rebut this, evidence that she entered the court room with a loaded revolver was held competent.

It may be shown that the officer was wearing his uniform. To rebut the inference arising from this the defendant may show that the night was dark and he could not see. Yates *v.* People, 32 N. Y. 509.

If the evidence does not show knowledge, a conviction cannot be sustained. Jones *v.* State, 114 Ga. 73, 39 S. E. 861.

20. Thus, in a prosecution for attempting to prevent a witness from testifying before the grand jury, evidence that in the conversation with the witness the defendant discussed the character of the proceeding, showing that he knew an investigation was contemplated, and that the other was a material witness, is competent. It may also be shown that he made a false statement as to why he was sent. The fact that the investigation resulted in an indictment is also competent. State *v.* Desforges, 47 La. Ann. 1167, 17 So. 811.

21. Oliver *v.* State, 17 Ark. 508. In this case the defendant was sitting upon the horse when the officer attempted to levy under an execution against another. The defendant drew a knife on the officer and then rode off. He was allowed to show that he was the real owner.

22. State *v.* Fifield, 18 N. H. 34, an attachment proceeding. The admissibility of such evidence depends upon the substantive law as to whether such facts constitute a defense. The case cited gives excellent statements of the reasons for the rules of substantive law *pro* and *con*.

23. Miers *v.* State, 34 Tex. Crim. 161, 29 S. W. 1074. In this case the defendant had killed an officer who was making an illegal arrest. It was

B. Threats by Others. — Evidence of threats against the defendant made by persons other than the arresting officer or those accompanying him are incompetent where the resistance appears not to have originated in fear of personal violence.[24]

7. Matters Which Need Not Be Proven. — A. Tampering With Witness. — a. *Materiality of Witness Approached.* — In a prosecution for tampering with a witness it is not necessary for the prosecution to prove the materiality of the witness.[25]

b. *Character of Offense.* — On a prosecution for bribing a witness it is not necessary to show the character of the offense for which a prosecution was actually pending, or that the witness had been subpoenaed.[26]

B. Exact Name of Officer Resisted. — A conviction may be had in some jurisdictions although the evidence shows that the officer resisted was misnamed in the indictment.[27]

C. Name of Person Arrested When Offense Was Committed. — Where the defendant is accused of assaulting an officer

held incompetent to show that the defendant had been indicted in another county for burglary.

As a general rule, whether the proceeding be civil or criminal, only evidence of the particular matters laid to the party's charge can be given; but for the purpose of showing guilty knowledge, or making out the intent with which an act was done, other acts of the same nature, and done about the same time, may sometimes be given in evidence; and this whether the proceeding be civil or criminal in its form. People *v.* Hopson, 1 Denio (N. Y.) 574.

24. State *v.* Estis, 70 Mo. 427. In this case, evidence that threats had been made against the defendant by certain persons in the county, to the effect that they were looking for him, and upon finding him would not allow him a trial before a justice of the peace, but would kill him, was rejected, the evidence distinctly showing that neither the officer nor those with him had ever indulged in any threats, and that the conduct of the defendant did not originate from any fear of personal violence.

25. "If it be so, the very success of this offense might prove its immunity from punishment; for, if the witness be kept off, his materiality can never be known. The fact that he is summoned by the process of the court is evidence that his attendance is material for the purposes of justice, and it is an offense against justice for anyone to prevent his attending:" State *v.* Early, 3 Har. (Del.) 562.

26. Jackson *v.* State, 43 Tex. 421. See also State *v.* Bringgold (Wash.), 82 Pac. 132.

27. State *v.* Flynn, 42 Iowa 164. In this case the officer was alleged to be Patrick Ryan. The proof showed his name to be Patrick Ryder. A conviction was sustained, the court relying upon a statute providing that when an offense "is described in other respects with sufficient certainty to identify the act, an erroneous allegation of the name of the person injured, or attempted to be injured, is immaterial."

It is sufficient if it be proved that the person named in the indictment and in the commission is the same. Com. *v.* Beckley, 3 Metc. (Mass.) 330. In this case the indictment alleged an assault on A. B., a deputy sheriff. The proof showed that the person upon whom the assault was committed was commissioned as deputy sheriff by the name of A. B. Junior. Upon objection for variance the court held as above quoted.

who was arresting another person it is not necessary to prove the name of the person arrested.[28]

D. Guilt of Person Arrested. — It is not necessary for the prosecution to prove the guilt of the person arrested.[29]

28. State *v.* Garrett, 80 Iowa 589, 46 N. W. 748.

29. State *v.* Bates, 23 Iowa 96.

"The time and place for the plaintiff to test the question of Hart's liability to arrest was not in the streets of the city, in an angry and excited crowd of persons. His duty as a citizen was to allow the officer of the law to take his own course, and answer therefor to the proper party if he acted maliciously and oppressively, or without probable cause." Montgomery *v.* Sutton, 58 Iowa 697, 12 N. W. 719; *Id.* 67 Iowa 497, 25 N. W. 748.

See also State *v.* Garrett, 80 Iowa 589, 46 N. W. 748.

OBTAINING GOODS UNDER FALSE PRETENCES.—See False Pretences.

OFFENSES AGAINST POSTAL LAWS.

By E. S. Page.

I. RULES APPLICABLE GENERALLY.

1. Evidence of Mailing. — A. Circumstantial Evidence. Mailing need not be proved by direct evidence, but may be proved by circumstances.[1]

B. Newspaper Advertisement. — A portion of a newspaper stating defendant to be the proprietor thereof is admissible in connection with other evidence to show that he caused the paper to be mailed.[2]

2. Identity of Party Mailing. — Evidence that matter was sent through the mail in response to a letter addressed to defendant, and that it purported to come from him, is admissible to show that the mailing was done by defendant.[3]

3. Decoy Letters and Answers Thereto. — It is no objection to the admission of evidence of the theft of a letter from the mail that it was sent as a decoy;[4] and letters sent in response to decoy letters are admissible in prosecutions for improper use of the mails.[5]

II. IMPROPER USE OF THE MAILS.

1. Use of Mails To Defraud. — A. Evidence of Fraud. — To show fraud, evidence of the defendant's conduct, his letters and

1. Hanley *v.* United States, 127 Fed. 929, 62 C. C. A. 561, *reversing* 123 Fed. 849.

Postmark.—A post-office stamp or mark on an envelope is *prima facie* evidence that the letter had been in the mail. The fact that a postmark is sometimes affixed before mailing does not render the evidence inadmissible. United States *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

Evidence of Mailing of Large Number of Copies. — Proof that a certain edition of a newspaper was mailed in large numbers every day at a certain post-office is competent evidence that papers received by the parties mentioned in the indictment, purporting to be of that edition, were in fact among the number that were mailed upon that date. Dunlop *v.* United States, 165 U. S. 486.

2. Dunlop *v.* United States, 165 U. S. 486 (admissible in connection with evidence "that defendant had stated that he was the proprietor and publisher of this paper; that a paper of this name had been for a long time printed and circulated by him, that it had been for a long time and in large numbers passed through the post-office; that he had negotiated for the renting of a building for the purpose of publishing a paper called the Dispatch; that he had conversations with witnesses in regard to the publication of a paper of that name; that, as proprietor, he had caused papers, similar to these, to be sent through the post-office, and that the accounts for postage had been rendered to him").

3. United States *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554 (evidence that order for tickets was sent to accused in fictitious name, that a letter containing the tickets was posted in compliance with the order, that accused was engaged in selling lottery tickets, and that his business card was inclosed, admissible). See also United States *v.* Duff, 6 Fed. 45, 19 Blatchf. 9 (evidence similar to that in above case held sufficient).

4. United States *v.* Wight, 38 Fed. 106.

5. Andrews *v.* United States, 162 U. S. 420.

It is universally held, as a matter of substantive law, that the use of a decoy letter is no defense. For cases upholding the doctrine see those cited in the cases given above,

telegrams, false advertisements in newspapers, and the like, may be admitted.[6]

B. Belief in Scheme. — To show that the use of the mails was proper the defendant may introduce evidence showing his honest belief in the scheme.[7]

C. Evidence of Other Crimes. — Evidence of other or similar crimes committed by the defendant is not admissible.[8]

2. Information Where Obscene Matter May Be Obtained. A. Extrinsic Evidence Admissible. — In a prosecution for mailing a letter conveying information where obscene pictures or literature may be obtained, the government is not confined to the letter itself, but may show by any competent extrinsic testimony that the letter gives prohibited information.[9]

3. Postal Card Containing Obscene or Threatening Matter. A. Extrinsic Evidence Inadmissible. — In a prosecution for violating the statute prohibiting the mailing of a postal card containing indecent or threatening matter, evidence of extrinsic facts is not admissible upon behalf of the defendant to show that he did not intend it to be obscene or threatening.[10]

and in the note in Bates *v.* United States, 10 Fed. 97.

6. Balliet *v.* United States, 129 Fed. 689; Kellogg *v.* United States, 126 Fed. 323.

Where a defendant is charged with using the mails to defraud by making use of fraudulent letter-head, whereby he represented himself to be in a certain business, it is error to admit against him letter-heads of a party of the same surname, in connection with evidence that the credit of the latter was good. Booth *v.* United States, 139 Fed. 252.

Financial Condition of the Defendant. — Evidence of the financial condition of the defendant is not relevant on the question of the intent to defraud. Bass *v.* United States, 20 App. D. C. 232.

7. United States *v.* Durland, 65 Fed. 408. See also United States *v.* Stickle, 15 Fed. 798; Bass *v.* United States, 20 App. D. C. 232.

United States *v.* Ried, 42 Fed. 134 (spiritualist may show his honest belief); but he cannot show by the testimony of those sending him sealed letters that he has satisfactorily answered them in particular instances, and that the questions were of such character that he could not have answered them except by supernatural power.

8. Bass *v.* United States, 20 App. D. C. 232. In this case evidence of improper use of the mails in another state was excluded. It was urged that it should be admitted because the statute provides that in pronouncing sentence "the punishment is to be based somewhat upon the extent of the abuse of the post-office." Answering this, the court said: "The sentence is to be pronounced upon conviction for the crime for which the person is convicted. The appellant was tried in the District of Columbia, and proof that he was not guilty of a crime in South Carolina would not have been material or relevant; and therefore, if the testimony was relevant for the purpose indicated by the justice, the appellant's punishment would have been intensified because of evidence to which he could not reply."

9. United States *v.* Grimm, 50 Fed. 528. "If the character of a letter cannot be thus shown by extrinsic facts, the statute under which this indictment is drawn could be easily evaded and would prove a dead letter."

10. Griffin *v.* Pembroke, 2 Mo. App. Rep. 980, 64 Mo. App. 263. "This statute takes no notice of the covert meaning intended. It asks not the question how did the party

4. Sending Lottery Matter Through the Mails. — In a prosecution for sending lottery matter through the mails, existence of the lottery must appear; but it may be shown by circumstantial evidence.[11]

III. OFFENSES AGAINST THE MAILS.

1. Officers Presumed To Do Their Duty. — Until the contrary is shown, post-office clerks are presumed to have done their duty.[12]

2. Circumstantial Evidence. — In an action for abstracting articles from the mail, circumstantial evidence is admissible, and is sufficient to sustain a conviction if the circumstances are incapable of explanation upon any other reasonable hypothesis than that of guilt.[13]

3. Presumption of Intent To Steal From Failure To Deliver. Failure to deliver a letter may justify an inference of intent to steal it.[14]

mailing the postal card *intend* it, nor how did the party addressed *understand* it; but the law is concerned in what way it may be understood by the postal clerks, the carriers, children and neighbors, through whose hands the offensive card may pass."

11. That the business referred to in circulars was a lottery may be shown by evidence outside the circulars. MacDonald *v.* United States, 63 Fed. 426, 12 C. C. A. 339, 24 U. S. App. 25.

Other papers contained in the same envelope are admissible as part of the *res gestae* to show that the paper set forth in the indictment related to a lottery. It is not necessary to show the existence of a lottery of and concerning which the papers in question were written or made by other evidence where the papers themselves bear on their face strong evidence of the fact. United States *v.* Noelke, 1 Fed. 426, 17 Blatchf. 554.

12. "All public officers are presumed to do their duty faithfully until the contrary appears by proof. The postmaster at Temperance is presumed to have done his duty; in other words, is presumed to have locked the mail-pouch, and to have seen that it was in good order. The mail carrier is presumed, in the absence of proof to the contrary, not to have stolen that check or the letter which contained it from the mail-pouch, but to have carried it safely. The postmaster at Poplar Hill is presumed to have seen that the pouch was received in good order, that it was locked; and, if the pouch was in bad order, it is presumed that he delivered the pouch and the mail safely to the postmaster at Chauncey. The postmaster at Chauncey is presumed likewise to have done his duty, and to have delivered the mail to Macon safely to Henry Jones; and Henry Jones is also entitled to the presumption of having done his duty faithfully, and to have safely delivered the mail to the postmaster at Macon, unless there is proof in the evidence before you which would have the effect of destroying the presumption in his favor." United States *v.* Jones, 31 Fed. 718.

13. United States *v.* Crow, 1 Bond. 51, 25 Fed. Cas. No. 14,895; United States *v.* Randall, Deady 524, 27 Fed. Cas. No. 16,118.

"The government relies for conviction upon circumstantial evidence. A conviction may be had upon such evidence provided the circumstances so directly point to the guilt of the accused as to have no reasonable explanation consistent with the theory that he is innocent. In other words, the existence of the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt." United States *v.* McKenzie, 35 Fed. 826, 13 Sawy. 337.

14. "If a person takes a letter

4. Evidence Must Show That Stolen Article Was Intended To Be Mailed. — The evidence must show that an article alleged to have been stolen from the mail was intended to be carried by mail.[15] The fact of deposit in the post-office is evidence of this,[16] although not conclusive.[17]

5. Evidence Must Show That Stolen Articles Had Value. — Under a statute making it a felony to open, embezzle or destroy any mail containing any article of value, it is necessary to show that articles contained in a stolen letter were of some value.[18]

6. Receiving or Buying Articles Stolen From the Mail. — Record Admissible. — In a prosecution for receiving an article stolen from

out of the post-office addressed to another, without the authority or direction of the person to whom it was addressed, with the declared purpose of delivering, and does not deliver it the first opportunity he has, the law raises the inference by that fact, that when he got the letter he did not intend to so deliver it. . . . But that inference, like every other presumption of the law, may be overthrown by showing facts and circumstances that occurred between the parties afterward, showing what was the original design and purpose." United States *v.* Nutt, 27 Fed. Cas. No. 15,904.

Where a postmaster charged with embezzling a letter claims to be the agent of the addressee he will be held to strict proof. United States *v.* Bramham, 3 Hughes 557, 24 Fed. Cas. No. 14,636.

15. United States *v.* Matthews, 35 Fed. 890, 1 L. R. A. 104.

It is sufficient evidence that letters are "intended to be carried by a letter carrier," that they are deposited in pillar boxes to be carried to the post-office, although it be intended to intercept them after they have passed through the hands of a suspected employe. United States *v.* Wight, 38 Fed. 106.

If it does not appear that the package has ever been in the mail the evidence is insufficient to warrant a conviction. Harvey *v.* United States, 126 Fed. 357.

16. "The fact that any letter, packet, bag, or mail of letters has been deposited in any post-office or branch post-office established by authority of the postmaster general, or in any other authorized depository for mail matter, or in charge of any postmaster, assistant clerk, carrier, agent, or messenger employed in any department of the postal service, shall be evidence that the same was intended to be conveyed by mail." Rev. Stat., § 5468.

17. United States *v.* Matthews, 35 Fed. 890, 1 L. R. A. 104.

18. If a note contained in such a letter were counterfeit, the offense would not be made out.

"It is clearly not necessary to prove the handwriting of the presidents and cashiers, whose signatures appear on the face of the notes, by one who has seen them write. Any one whose business or profession leads him to an acquaintance with such notes may prove them to be genuine. And the jury, in the exercise of their judgment, may find them to be genuine from an inspection of them, and the acts of the defendant." United States *v.* Nott, 27 Fed. Cas. No. 15,900, 1 McLean 499

Evidence that the accused uttered the note as genuine and paid it to a creditor for five dollars is admissible to prove that it really was a bank note, and of the value of five dollars. United States *v.* Foye, 1 Curt. 364, 25 Fed. Cas. No. 15,157.

Other Letters in Broken Package Admissible. — When it is alleged that a mail clerk has wrongfully opened a "straight" package and has extracted letters therefrom, the other letters are admissible as evidence of the opening of the package, and as showing the intent of the defendant. United States *v.* Falkenhainer, 21 Fed. 624.

the mail, the record of the conviction of the thief is admissible to show that the article was stolen; and it is sufficient if the article is identified.[19]

IV. IMPROPER USE OF STAMPS.

In a prosecution of a post-master for using stamps in the purchase of merchandise, the evidence must show that the stamps used had been received by him from the government.[20]

19. United States *v.* Keene, 5 McLean 509, 26 Fed. Cas. No. 15,512. In this case the court also charged the jury that "When an individual is found in possession of stolen property, and fails to show how he acquired it, or gives inconsistent or contradictory accounts, how he came by it, the presumption of guilt is strengthened."

20. In United States *v.* Williamson, 26 Fed. 690, Hughes, J., held that there must be proof that the stamps used had been received by the postmaster officially from the government. The phrase "of them," employed in the statute, confined its operations to stamps "intrusted" to postmaster; and unless the indictment charged and the evidence proved, that the stamps used by the postmaster for the purchase of merchandise had been received by him from the government there could be no conviction.

OFFENSIVE OCCUPATIONS.—See Nuisance.

OFFER.—See Contract; Dedication.

OFFER OF EVIDENCE.

CROSS-REFERENCES:

Cross-Examination;
Direct Examination;
Objections;
Striking Out Withdrawal and Exceptions;
Trials;
Witnesses.

I. DEFINITION.

An offer to prove, or of evidence, has been defined as a proposal made to the court by counsel, at the trial of the cause, to put in as evidence testimony then about to be adduced.[1]

II. THE RIGHT TO MAKE AN OFFER.

1. In General. — In order that the question of the admissibility of the facts sought to be proved by a witness may fairly be presented to the trial judge for his determination, the examining party has the right to make an offer to prove the facts which he assumes his question will elicit.[2]

1. Anderson's Law Dict., title "OFFER," p. 727.

2. Eagon *v.* Eagon, 60 Kan. 697, 57 Pac. 942. The court said: "A question of practice is involved in the refusal of the trial court to permit counsel for the defendant below to make the offer of proof above mentioned. He was required to ask the witness questions calling forth the testimony he desired to get before the jury. This requirement has left the record of the testimony sought to be elicited in an unsatisfactory condition. It is difficult in most cases to present to the court explicitly in the form of questions, the exact proof offered. Where the questions do not clearly show the nature of the testimony an offer of proof ought to be received. In fact, the precise question involved can thus be more clearly presented to the trial court, and preserved in the record for review. We approve the practice of making the tender. . . . We think the court should have permitted counsel for the defendant below to make an offer to prove those facts which were so imperfectly developed by the several questions asked of the witnesses."

In Fidelity & Casualty Co. *v.* Weise, 80 Ill. App. 499, after the cause had been argued to the jury the court permitted the appellee's counsel to offer in the presence of the jury to prove certain facts by a witness who had previously testified in the case, which offer the court overruled. The permitting of the offer to be made was complained of as error. It appeared that the appellee's counsel, while the witness was previously on the stand during the trial, attempted to state what was expected to be proved by him, but the court on objection by appellant's counsel refused to permit an offer of proof. The court said: "Counsel have the right to make an offer of proof for the twofold purpose of informing the court of what is expected to be proved, and of preserving exception to the exclusion of the offered evidence, and there was no error in permitting the offer to be made. Counsel for appellant, having caused the offer to be excluded by objecting to it when properly made on the trial and in apt time, cannot be heard to complain that the court eliminated its former error by subsequently permitting the offer."

In Maxwell *v.* Habel, 92 Ill. App. 510, during the course of the trial appellants' counsel asked one of their witnesses who had testified that he

2. Presence of Jury. — In the case of Oral Testimony it is largely discretionary with the trial judge whether or not the offer of the expected testimony shall be made in the presence of the jury.[3] A party is not entitled, as matter of right, to have an offer made privately to the trial judge.[4] But the character of the offer and the

was present when the property in question was taken by the constable, what the husband of appellee said at that time in her presence. An objection to the question was sustained by the court, whereupon counsel for appellants proceeded to state to the court what he expected to prove by the witness, but the court refused to allow him to make such statement. In holding this to be error the court said: "This was error, because we are unable to tell from anything in the record but that the proposed evidence of the witness was both competent and material, and we are unable to perceive how the trial judge could determine that matter any better than we can. It has been repeatedly held by this and the supreme court that it is not reversible error for a court to sustain an objection to a question where it cannot be determined from the record what was the evidence which was attempted to be elicited by the question, for the reason that the reviewing court was unable to determine the relevancy or the materiality of such evidence to the issues. When an objection to a question is sustained and there is no statement of counsel as to what it is expected to prove by the witness, it is impossible for a reviewing court to tell whether there was error in sustaining the objection or not. It necessarily follows that it is error for the trial judge to refuse counsel an opportunity to state what he expects to prove by any particular question or series of questions. If the court should be of opinion that such statement of counsel is not made in good faith, or that it is calculated to improperly influence the jury, the jury may be ordered to retire while the statement is being made, or it may be made to the court so as not to be heard by the jury."

3. Sievers *v.* Peters Box & L. Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399, holding further that unless it is clearly shown by the record that such discretion has been abused the decision of the trial judge will not be disturbed.

The trial court may, in its discretion, require offers of evidence objected to, to be made in such a manner as not to reach the ears of the jury, and should adopt this course where the offer to be made threatens to prejudice the party objecting, if heard by the jury. A verdict will not, however, be disturbed because of the refusal of the trial court to so order, unless it is apparent from the record that there was an abuse of discretion. Omaha Coal, Coke & Lime Co. *v.* Fay, 37 Neb. 68, 55 N. W. 211.

In Philadelphia *v.* Reeder, 173 Pa. St. 281, 34 Atl. 17, where it was objected that an offer having been made in the hearing of the jury, that fact of itself, to some degree, had the same effect as if the evidence had been introduced, and therefore it was error to state the offer in open court, the court said: "It is doubtless true, an overruled offer in the hearing of the jury to prove certain facts often prejudices them against the party to whom the proposed proof is unfavorable. The jury may and often do conclude the party making the offer is able to prove the facts stated in it, and but for the adverse ruling of the court would have done so; and this is the reason for side bar and written offers. But when the oral offer is admitted, and the proof of it wholly fails, surely the adverse party has no reason to complain that the jury may have been prejudiced. If any prejudice resulted, the natural tendency was to arouse it against the party making the unfounded offer or groundless accusation."

4. Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287.

It is within the discretion of the trial judge to have the jury retire from the court room so as not to hear the argument in regard to the ad-

circumstances attending it may be such, even though rejected, as to require a reversal of the judgment, where the party making it obtained a verdict and judgment.[5]

In the Case of Documentary Evidence it ought, if the offer would be likely to influence the jury, to be submitted to the trial judge and opposing counsel for examination without stating its purport.[6]

missibility of evidence offered, and counsel have no right to insist that the jury hear his questions and that the court rule on the objection in their presence. Birmingham Nat. Bank *v.* Bradley, 108 Ala. 205, 19 So. 791.

In State *v.* Allen, 37 La. Ann. 685, the correctness of the ruling of the judge in hearing the testimony of a witness in the absence of the jury was questioned, but it was held that as the testimony went simply to the question of the admissibility of certain evidence it was addressed to the judge alone, to be acted upon only by him, and accordingly there was no error.

5. Counsel may offer evidence to obtain, in cases of doubt, a distinct ruling as to its admissibility, and may vary the form of the offer or include other matters in order that the particular question desired may be distinctly raised; but when an adverse ruling has once been obtained other offers covered by such ruling must not be made. Scripps *v.* Reilly, 38 Mich. 10. In this case the court said: "Once offered in proper form, a ruling thereon and an exception thereto taken, the question may be passed upon in the court of review as fully and completely as though an infinite number of exceptions had been taken covering the same point. If counsel proceed beyond this and make the offers in the presence and hearing of the jury, and the court permits them to be made in this manner, the character of the offers so made may be such, even although they were rejected below, as to require on error a reversal of the judgment, where the party making such rejected offers obtains a verdict and judgment in the case. Everything having a tendency to prejudice or influence a jury in their deliberations which is not legally admissible in evidence on the trial of the cause, should be, so far as possible, kept from coming to their knowledge during the trial. An impression once made upon the mind of a juror, no matter how, will have more or less influence upon him when he retires to deliberate upon the verdict to be given, and no matter how honest or conscientious he may be, or how carefully he may have been instructed by the court to not permit such incompetent matters to influence him, or have any bearing in the case, it will be very difficult, if not impossible, for him to separate the competent from the incompetent, or to say to what extent his impressions or convictions may be attributed to that which properly should not have been permitted to come to his knowledge. . . . The essence of the wrong consists in the fact that such incompetent testimony is brought to the attention of the jury, more than in the method adopted in communicating the fact. No matter how the information is derived, the result is the same."

In Jones *v.* Village of Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437, a suit to recover damages for injuries caused by defective crosswalk, plaintiff's attorney offered to show the general unsafe condition of the walks of the village, and coupled the offer with the statement that the walks along the street where the accident happened, for eighty rods, were not safe for a man who was in any way infirm, or for a lady, to pass along there at night without being injured or tripped up half a dozen times, which proposed testimony was objected to and excluded, but nothing was said by the court to the jury to correct the error in practice thus committed, which offer and statement were held reversible error.

6. Polk *v.* Robertson, 1 Overt. (Tenn.) 456, 19 Fed. Cas. No. 11,250. In Scripps *v.* Reilly, 38 Mich. 10, after counsel had obtained a clear

III. NECESSITY OF OFFER.

1. General Rule. — If it is not apparent from the question as put to a witness whether the answer would be material and relevant, if objection be interposed, it is the duty of the examining counsel to make a formal offer of the expected evidence.[7] And in the ab-

and distinct ruling of the court as to the inadmissibility of a certain class of publications, a large number of the same class were offered, and in making each separate offer, counsel stated the purport of the article or read the headings. This course was objected to, but permitted by the court, and the articles offered were all excluded, the objection as to their admissibility having been sustained. The court said: "We think the course adopted was not correct, and that, although perhaps not fully covered by the letter of the previous decision in this case, yet that it comes clearly within the reason and spirit of the rules there laid down. Where the offer is likely to be of such a character that it would have a tendency to prejudice or influence the jury, the correct practice would be to present the article, if in writing, to the court and counsel for examination, without stating either the purport or substance of it. The cases are but few where such objectionable articles are likely to come up on the trial, and when such a case arises, the good sense of court and counsel will not only see the necessity, but will readily discover and adopt the means requisite to keep them from the reach of the jury. That counsel acted in entire good faith in offering these articles in the manner in which he did we are willing to concede, but in the ardor of his zeal he went farther than the law would protect him in doing. The presiding judge, not similarly affected, will, we think, have no difficulty in permitting counsel, without resorting to any undue formalities, to present and have all questions properly arising in the case passed upon in such a manner as not to interfere with the rights of the opposite party."

In Gould *v.* Weed, 12 Wend. (N. Y.) 12, an action of libel, where the defendant offered in evidence previous publications by the plaintiff, on objection that they were irrelevant and inadmissible it was held proper for the presiding judge in his discretion to require that the publications, instead of being read in the hearing of the jury, be submitted to his perusal to enable him to determine as to their admissibility, and that if the defendant declined to submit to such request the judge might reject the offer.

7. *California.* — *In re* Wax, 106 Cal. 343, 39 Pac. 624.

Colorado. — John V. Farwell Co. *v.* McGraw, 13 Colo. App. 467, 59 Pac. 231; Baldwin *v.* Central Sav. Bank, 17 Colo. App. 7, 67 Pac. 179.

District of Columbia. — De Forest *v.* United States, 11 App. D. C. 458.

Georgia. — Hawkinsville Bank & Trust Co. *v.* Walker, 99 Ga. 242, 25 S. E. 205; Bush *v.* State, 109 Ga. 120, 34 S. E. 298; Windsor *v.* Delbondio, 99 Ga. 749, 27 S. E. 750.

Illinois. — Cook *v.* Haussen, 51 Ill. App. 269; Howard *v.* Tedford, 70 Ill. App. 660; Chicago & E. R. Co. *v.* Binkopski, 72 Ill. App. 22; Nonotuck Silk Co. *v.* Levy, 75 Ill. App. 55; Gaffield *v.* Scott, 33 Ill. App. 317; James T. Hair Co. *v.* Manly, 102 Ill. App. 570.

Indiana. — Comstock *v.* Grindle, 121 Ind. 459, 23 N. E. 494; Kern *v.* Bridwell, 119 Ind. 226, 21 N. E. 664, 12 Am. St. Rep. 409; Famous Mfg. Co. *v.* Harmon, 28 Ind. App. 117, 62 N. E. 306; Huntington *v.* Burke, 21 Ind. App. 655, 52 N. E. 415.

Kentucky. — Morris *v.* Com., 27 Ky. L. Rep. 145, 84 S. W. 560; Palatine Ins. Co. *v.* Weiss, 22 Ky. L. Rep. 994, 59 S. W. 509; Reed *v.* Lilly, 23 S. W. 955; Todd *v.* Louisville & N. R. Co., 10 Ky. L. Rep. 864, 11 S. W. 8.

Massachusetts. — Geary *v.* Stevenson, 169 Mass. 23, 47 N. E. 508; Smethhurst *v.* Barton Square Church, 148 Mass. 261, 19 N. E. 387, 22 L. R. A. 695; Shinners *v.* Proprietors of Locks & Canals, 154 Mass. 168, 28 N. E. 10; Leland *v.* Converse, 181

sence of such offer it is not error to exclude the question.[8]

2. Necessity of Offer Obviated. — When, however, the materiality and relevancy of the question asked is apparent it is not necessary upon objection to make an offer to prove.[9] Nor is a formal offer

Mass. 487, 63 N. E. 939; Lawlor *v.* Wolff, 180 Mass. 448, 62 N. E. 973; Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551.

Minnesota. — Nichols & Shepard Co. *v.* Weidemann, 72 Minn. 344, 75 N. W. 208; State *v.* Staley, 14 Minn. 105; Tillman *v.* International Harv. Co., 93 Minn. 197, 101 N. W. 71; McAlpine *v.* Foley, 34 Minn. 251, 25 N. W. 452; Scofield *v.* Walrath, 35 Minn. 356, 28 N. W. 926.

Missouri. — Jackson *v.* Hardin, 83 Mo. 175.

Nebraska. — Yates *v.* Kinney, 25 Neb. 120, 41 N. W. 128; Masters *v.* Marsh, 19 Neb. 458, 27 N. W. 438; Mathews *v.* State, 19 Neb. 330, 27 N. W. 234; Savary *v.* State, 62 Neb. 166, 87 N. W. 34; Denise *v.* Omaha, 49 Neb. 750, 69 N. W. 119; Wittenberg *v.* Mollyneaux, 60 Neb. 583, 83 N. W. 842; Green *v.* Tierney, 62 Neb. 561, 87 N. W. 331; Riley *v.* Missouri Pac. R. Co., 95 N. W. 20.

New York. — Nightingale *v.* Eiseman, 121 N. Y. 288, 24 N. E. 475, *affirming* 50 Hun 189, 2 N. Y. Supp. 779.

North Dakota. — Halley *v.* Folsom, 1 N. D. 325, 48 N. W. 219.

South Carolina. — Allen *v.* Cooley, 53 S. C. 77, 30 S. E. 721.

Vermont. — State *v.* Buck, 74 Vt. 20, 51, Atl. 1087; Mullin *v.* Flanders, 73 Vt. 95, 50 Atl. 813; State *v.* Noakes, 70 Vt. 247, 40 Atl. 249; Carpenter *v.* Willey, 65 Vt. 168, 26 Atl. 488; Gregg *v.* Willis, 71 Vt. 313, 45 Atl. 229.

8. Houghton *v.* Clarke, 80 Cal. 417, 22 Pac. 288; Bank of British Columbia *v.* Frese, 116 Cal. 9, 47 Pac. 783; Tootle *v.* Petrie, 8 S. D. 10, 65 N. W. 43; Hanson *v.* Red Rock Twp., 7 S. D. 38, 63 N. W. 156.

In McCormick *v.* St. Louis, 166 Mo. 315, 65 S. W. 1038, where the question itself furnished no indication as to whether the expected answer would be admissible or material as testimony, and counsel offered no suggestion then, the court said: "Appellate courts should never reverse a case for a new trial on account of the simple refusal of the trial court to permit a question to be answered, the materiality of which is purely conjectural, and that might, on a retrial, turn out to be wholly immaterial and incompetent. The action of a trial court in refusing testimony offered will be reviewed by this court on appeal only when the bill of exceptions is made to show what the appellant expected to have proven by it, that its materiality or admissibility might be determined here; or unless the question propounded is itself such as to indicate what the answer would be, or what was expected to be shown by it."

9. Votaw *v.* Diehl, 62 Iowa 676, 13 N. W. 757, 18 N. W. 305; Mitchell *v.* Harcourt, 62 Iowa 349, 17 N. W. 581; Armstrong *v.* Farrar, 8 Mo. 627.

Where the question is in itself proper and pertinent it is unnecessary for the examiner to state the purpose for which the testimony sought to be adduced is offered. Calvert Co. *v.* Gantt, 78 Md. 286, 28 Atl. 101, 29 Atl. 610, characterizing statements in Taylor *v.* Brown, 65 Md. 366, 4 Atl. 888; Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266, to the effect that refusal to permit a witness to answer a question was not of itself sufficient to warrant reversal, unless there was shown either the purport or effect of the answer as mere *dictum* and not supportable on principle.

In James T. Hair Co. *v.* Manly, 102 Ill. App. 570, the court said: "The question on appeal, in this regard, is, does the record show the materiality of the proffered evidence? If it does, the rejection of it may be urged as error. C. & A. R. R. Co. *v.* Shenk, 131 Ill. 283. The question before the trial court, when objection is made, is, does the question call for testimony apparently relevant and material to the matter at issue. One is not obliged, upon the sustaining of an objection to such a

necessary where the circumstances under which the question is propounded make it apparent that the examining party may not be supposed to know to what the witness will testify.[10] Where a question is excluded because the fact sought to be proved is not pleaded, counsel are not bound to make an offer to prove the fact, nor is it necessary to follow up the excluded question with other questions tending in the same direction.[11] Where the ruling of the court in excluding offered evidence is a plain and decisive declaration to the party offering it that, although he should prove all the other facts as alleged in his pleading, he cannot recover on the theory on which he is proceeding, he need not, in the absence of notice requiring him to do so, offer further evidence.[12]

question, to offer to prove that which he believes the witness will answer. Indeed, offers to prove after an objection has been sustained are not infrequently, in jury trials, made a method of getting before a jury that which ought not to be presented or allowed to influence the jury. Scripps *v.* Reilly, 38 Mich. 12. We are not considering the right of a court to require counsel to state what they expect to prove but the necessity for such statement, in order that error may be urged as to the sustaining of objections to relevant questions, concerning matters material to the issue."

In Daley *v.* People's Bldg., L. & Sav. Ass'n, 172 Mass. 533, 52 N. E. 1090, where it was claimed that the exclusion of evidence offered was proper because it did not appear what the party expected to prove, it was held that the rule requiring a statement of the expected testimony was a rule of substance and not of form, and that there must be reasonable ground to believe that the excepting party has been harmed by the exclusion of a question, but that there need not be a formal tender of proof. In this case the series of questions put and excluded showed the purpose and expectation so clearly that "it would be unjust not to deal with the offer of evidence on its merits." Whether the court intended to hold that there need be no formal offer to prove in such case, or whether the offer to prove was unnecessary because the questions themselves clearly indicated the testimony expected is not clear, but the latter would seem to be the rational deduction in view of other Massachusetts cases requiring an offer to prove where the question does not of itself indicate the expected testimony.

10. Starr *v.* Hunt, 25 Ind. 313; Feldman *v.* McGraw, 1 App. Div. 574, 37 N. Y. Supp. 434.

11. Feldman *v.* McGraw, 1 App. Div. 574, 37 N. Y. Supp. 434.

Where the court at the outset of the trial announces its intention to limit the introduction of testimony to a particular issue, a party is relieved from the necessity of making an offer of evidence on other matters which he may regard as being in issue. The ruling of the court in thus defining and limiting the issue should properly be regarded as its refusal to allow evidence on any other than the indicated issues. Pastene *v.* Pardini, 135 Cal. 431, 67 Pac. 681.

12. In Brundage *v.* Mellon, 5 N. D. 72, 63 N. W. 209, the court said: "Where a fundamental objection is interposed, where it strikes at the very heart of the case, and where logically it must, if sustained, result in the exclusion of evidence of sequent facts which hang upon it and have no meaning or force in the case without proof of this main fact on which they rest for their significance in the cause, then, when the ruling of the court is adverse, the baffled litigant need proceed no further in the hopeless effort of establishing a cause of action. The attitude of the court in such a case is that, assuming that all the other allegations of the complaint are true, the plaintiff, as a matter of law, cannot recover on the theory of the case on which he

Where an Offer Would Be Useless, and would merely involve a repetition of the ruling already made by the court upon objection to the question, it is not necessary to make it.[13]

3. Production of Witness or Documents. — An offer of oral testimony may be rejected if the witness is not present and the circumstances indicate that the offer is not made in good faith.[14] And

is seeking to recover at the trial. It would be waste of time for him to proceed further; and, unless the trial court notifies him that it desires him to offer proof of the other facts necessary to sustain his action, he has a right to assume in such a case that, for the purpose of testing the correctness of the ruling of the court, the other facts are deemed by the court to be capable of proof."

A party litigant who has induced the court to exclude competent evidence of his adversary upon the sole ground that no evidence in support of the latter's claim is admissible cannot sustain that ruling on the inconsistent ground that his opponent did not go through the useless form of offering to prove all the facts necessary to sustain his claim. Plattner Imp. Co. *v.* National Harv. Co., 133 Fed. 376, 66 C. C. A. 438.

Compare Zimmerman *v.* Lamb, 7 Minn. 421, where it was held that a remark by the trial judge that a ruling excluding certain evidence offered by the defendant must put an end to the defense does not excuse the defendant from offering any other proper evidence which he desires to introduce. He must offer it and get a ruling thereon. The court said: "That the defendants did not consider themselves precluded from offering such testimony is shown from the fact that after such decision testimony was offered by them, and received without objection, bearing upon that point. In these circumstances they should have made a definite offer of all evidence which they desired to introduce on the subject, and required a direct and positive ruling of the court as to its admissibility. It would be unjust to permit a party to introduce some evidence upon a particular issue, and, when defeated upon it, to claim the benefit of a new trial, on the ground that he was not required to offer all his evidence, from a belief induced by a remark of the court that the same would or might be excluded."

13. Starr *v.* Hunt, 25 Ind. 313. See also Johnson *v.* Russell, 144 Mass. 409, 11 N. E. 670.

Where counsel have obtained the ruling of the court that evidence offered is incompetent and have saved their exception, he is not bound to press the question further in order to preserve the error. Mackin *v.* Blythe, 35 Ill. App. 216. In this case the court had refused to permit the defendant's counsel to inquire of the plaintiff on cross-examination as to certain matters which the appellate court held to be legitimate cross-examination, the trial court stating to counsel when he stated his offer of proof "to ask his question," but it appeared that counsel did not question the witness further. The court said: "We think it plainly apparent from the context that the court in so stating did not intend to rule that questions on that subject were admissible, but to indicate to counsel that he preferred to rule on questions than on offers of proof. Neither does the suggestion that counsel for appellant had other opportunities on the trial for [inquiring into the matters in question], which he did not avail himself of, meet the objection." And it was accordingly held that the action of the trial court was error.

Where the court has ruled that it will not hear a party's witnesses, it is not incumbent upon such party thereafter to present each witness before the court. Tathwell *v.* Cedar Rapids, 114 Iowa 180, 86 N. W.

14. Peacock *v.* State, 50 N. J. L. 653, 14 Atl. 893; Robinson *v.* State, 1 Lea (Tenn.) 673. See also John R. Davis Lumb. Co. *v.* First Nat. Bank, 90 Wis. 464, 63 N. W. 1018.

An offer to prove certain facts is

if, when called upon to do so, counsel refuses to produce the witness and have him sworn, it is not error to reject the offer.[15] It has been held, however, that although a mere general offer of evidence

properly refused where the witnesses by whom it is expected to make the proof are not produced. Sauntman *v.* Maxwell, 154 Ind. 114, 54 N. E. 397.

Rule Stated. — "It was not competent for him simply to make an offer of proof which he had no witnesses to sustain, and insist upon the court deciding the question which that offer raised, for that would be invoking from the court below and from this court a decision upon a mere moot question. If such a practice were allowed it would be quite possible for a party, without having any witnesses at all to the point, to raise any controverted or difficult questions as to the admissibility of evidence, which the cause on trial admitted of, and obtain a reversal of the judgment against him, if the court below should, in the opinion of this court, have ruled erroneously on such a question. Nor was it competent for the defendant, as the exception shows was the case, to make an offer of proof without stating he could sustain it by a competent witness, and *for the purpose of sustaining it,* produce a witness who could only prove quite a different thing and whose testimony was clearly inadmissible, and then because the court rejected the testimony of such a witness, complain that besides rejecting it the court expressed an opinion that the proof contained in such general offer would be inadmissible even if witnesses should be called who could support it by their testimony." Eschbach *v.* Hurtt, 47 Md. 61.

An offer to prove is not sufficient "without having the witness present and calling him, or asking leave to call him, or without affirmatively showing that the offer is made in good faith, and with the means of doing or trying to do what is desired." State *v.* Bowser, 21 Mont. 133, 53 Pac. 179; Schilling *v.* Curran, 30 Mont. 370, 76 Pac. 998.

An offer of the oral testimony of a witness who has not been sworn and is not in court is properly rejected; and the rejection of such an offer is not error, even though the witness came into the court room while the offer was being made, where it does not appear that the court was informed of his presence or that there was any refusal to allow him to be sworn. Lewis *v.* Newton, 93 Wis. 405, 74 N. W. 724.

In Scotland Co. *v.* Hill, 112 U. S. 183, it was contended that error could not be assigned on an exception to the exclusion of oral testimony because the record did not show that any witness was actually called to the stand to give the evidence, or that any one was present who could be called for that purpose if the court had decided in favor of admitting it. But the court in overruling the contention said: "If the trial court has doubts about the good faith of an offer of testimony it can insist on the production of the witness and upon some attempt to make the proof before it rejects the offer; but if it does reject it, and allows a bill of exceptions which shows that the offer was actually made and refused, and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made, and govern itself accordingly."

A Proper Question to Which the Offered Evidence Is Responsive is essential to enable the party to raise any question upon it. Gray *v.* Elzroth, 10 Ind. App. 587, 37 N. E. 551, 53 Am. St. Rep. 400. See also Smith *v.* Gorham, 119 Ind. 436, 21 N. E. 1096; Beard *v.* Lofton, 102 Ind. 408, 2 N. E. 129; Erickson *v.* Schmill, 62 Neb. 368, 87 N. W. 166.

In Ralston *v.* Moore, 105 Ind. 243, 4 N. E. 673, the defendant proposed to prove by a witness named certain facts pleaded by him, but it was held that since no question was asked the witness, and nothing done except the mere proposal to prove, no question for review was presented.

15. Lisonbee *v.* Monroe Irr. Co., 18 Utah 343, 54 Pac. 1009.

to prove, without producing the witness, is an improper method of presenting offered evidence, yet, where no objection is made to the form of the offer, but objection is only taken to the evidence offered, it will be presumed upon appeal that the method used in making the offer was by consent.[16] So, too, where the offered facts are to be established by documentary evidence the offer must be accompanied by the documents if it is demanded.[17]

4. Renewal of Offer. — Where evidence has been rejected on the ground that at that stage of the trial it is irrelevant or immaterial, if at a subsequent stage of the trial the evidence becomes relevant or material by the admission of other evidence a renewal of the offer is necessary.[18]

A Postponement of a Ruling as to the admissibility of offered testimony is not an exclusion. When the admissibility of evidence is thus reserved for further consideration and it is not again offered, nor the attention of the court again called to it, an exception cannot be sustained on the ground that it was excluded.[19] But a renewal

16. If the evidence offered is improperly rejected, the judgment will be reversed for the erroneous ruling. Biddick *v.* Kobler, 110 Cal. 191, 42 Pac. 578.

17. Lincoln-Lucky & Lee Min. Co. *v.* Hendry, 9 N. M. 149, 50 Pac. 330.

18. Main *v.* Gordon, 12 Ark. 651; Jones *v.* St. Louis, I. M. & S. R. Co., 53 Ark. 27, 13 S. W. 416, 22 Am. St. Rep. 175; Powers *v.* Boston & M. R. R., 175 Mass. 466, 56 N. E. 710; Melcher *v.* Merriman, 41 Me. 601; Baker *v.* McKinney, 87 Mo. App. 361; State *v.* Yokum, 11 S. D. 544, 79 N. W. 835. See also Flanagan *v.* Mitchell, 32 N. Y. St. 303, 10 N. Y. Supp. 234.

Where the trial court excludes offered evidence because he thinks it incompetent in the light of facts then appearing, but on further developments concludes to admit it, and so informs the party offering it before the evidence is closed, and the latter declines to put in the evidence, he waives his former exception. Mann *v.* Maxwell, 83 Me. 146, 21 Atl. 844.

In Idaho & Oregon Land Imp. Co. *v.* Bradbury, 132 U. S. 509, *affirming* 2 Idaho 239, 10 Pac. 620, where the defendant corporation had offered evidence tending to show that the plaintiffs had been informed that an officer of the defendant had no authority to vary the terms of the contract between the parties sued upon, but at the time of the offer there was no evidence that such officer had in fact no authority, but such evidence was subsequently given, it was held that since the defendant did not renew the offer the exclusion of the testimony offered was proper.

After evidence has been excluded upon objection, but the objection has been subsequently withdrawn, the refusal to offer the evidence again may perhaps be construed as a waiver of any exception to the previous ruling excluding it. Com. *v.* Robinson, 1 Gray (Mass.) 555.

In Field *v.* Magee, 122 Mich. 556, 81 N. W. 354, the court after having excluded certain testimony when offered thereafter intimated to counsel that he would consider a new offer of the testimony, which, however, was not made, and it was held that the party was in no position to complain of the ruling of the trial court.

19. Dudley *v.* Poland Paper Co., 90 Me. 257, 38 Atl. 157; State *v.* Taylor, 134 Mo. 109, 35 S. W. 92.

In State *v.* Goddard, 162 Mo. 198, 62 S. W. 697, where counsel for the defendant had offered certain documents, but the court had reserved its ruling as to their admissibility, it was held that counsel should have renewed the offer. The court said: "Counsel for defendant have not indicated where anything further was

of an offer of testimony which has been rejected is not necessary where such renewal would involve merely the asking for a reversal of a former ruling rejecting the testimony.[20]

IV. TIME OF MAKING OFFER.

In Indiana an offer to prove must be made before the objection to the question has been sustained.[21] And this rule applies as well where the objection is to the competency of the witness as when it goes to the admissibility of the evidence.[22]

V. FORM OF OFFER.

Whether or not an offer of oral testimony may be made orally or be reduced to writing is a matter resting in the discretion of the trial judge.[23]

said or done. The offer was not subsequently renewed. It is plain the court did not absolutely exclude the checks, but simply deferred its ruling thereon. That the defendant so understood it there can be no doubt, because no exception was taken to the court's action on the assumption that it was a refusal to admit the evidence. In this state of the record we must hold that if defendant desired to save the point in this court it was his duty to have the record affirmatively show that the offer as made was renewed and a ruling insisted upon, and if adverse his exceptions were saved."

20. Johnson *v.* Russell, 144 Mass. 409, 11 N. E. 670.

When an offer to prove is once fully made and the question sought to be saved is fully presented, there is no necessity to repeat the offer to prove, and indeed a repetition of the offer is at least subject to censure whether a ground for reversal or not. Sievers *v.* Peters Box & Lumb. Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399.

21. Hoover *v.* Patton, 158 Ind. 524, 64 N. E. 10; Gunder *v.* Tibbits, 153 Ind. 591, 55 N. E. 762; Pittsburgh C. C. & St. L. R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229; Wilson *v.* Carrico, 155 Ind. 570, 58 N. E. 847; Menaugh *v.* Bedford Belt R. Co., 157 Ind. 20, 60 N. E. 694, where the court said: "It has been repeatedly held by this court that the only mode of saving a question for review on the exclusion of testimony is this: The examiner propounds his question. The opposite party objects to the question. This forms an issue for the court to decide. Before the court pronounces his judgment, the examiner, in support of his question, and for the enlightenment of the judge, must state to the court what the witness on the stand will testify if permitted to answer. With the information thus obtained, the court rules, to which ruling the losing party at the time excepts. The matter is then fully closed. A subsequent offer to prove has nothing to rest upon, and amounts to nothing." See also State *v.* Cox, 155 Ind. 593, 58 N. E. 849.

Offer Following Exclusion Comes Too Late. — Matter should be offered when the principal fact is under consideration, not after said fact has been determined. Kruse *v.* Chester, 66 Cal. 353, 5 Pac. 613.

22. In Toner *v.* Wagner, 158 Ind. 447, 63 N. E. 859, a question to a witness was objected to on the ground that the witness was incompetent to testify to the matters called for under the rule prohibiting testimony of transactions with deceased persons. The objection was sustained, and after the decision had been made an offer was made of what was expected to be proved by the witness, but it was held that the offer came too late.

23. Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310.

VI. SUBSTANCE OF THE OFFER.

1. Statement or Disclosure of Evidence. — A. Necessity. — a. *In General.* — When it is impossible to determine from the question as put whether the answer may be material or relevant, an offer to prove is not available unless the facts expected to be elicited by the question propounded and objected to, or from a series of which that is the first, are stated to the court at the time of making the offer.[24]

In Quinn *v.* White, 26 Nev. 42, 62 Pac. 995, 64 Pac. 818, it was held to be within the discretion of the trial judge of his own motion to require a statement from counsel containing the substance of the evidence about to be offered in order that he might properly determine its admissibility.

The court may demand a statement in writing of questions to be put to a witness in order that no illegal evidence may be heard by the jury that may make an undue impression. United States *v.* Callender, 25 Fed. Cas. No. 14,709.

In McFarland *v.* Schuler, 12 S. D. 83, 80 N. W. 161, counsel for plaintiff made an offer to prove by a witness on the stand certain facts, and the refusal of the trial judge to require the facts to be reduced to writing before being stated was assigned as error. In sustaining the action of the trial judge the court said: "Whether the offer was made in the presence and hearing of the jury is not shown, but it does appear to have been taken down by the official stenographer and in any event the point is wholly without merit."

24. *Alabama.* — Tolbert *v.* State, 87 Ala. 27, 6 So. 284.

Arizona. — Snead *v.* Tietjen, 24 Pac. 324.

California. — Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224.

Colorado. — John V. Farwell Co. *v.* McGraw, 13 Colo. App. 467, 59 Pac. 231; Baldwin *v.* Central Sav. Bank, 17 Colo. App. 7, 67 Pac. 179.

District Columbia. — De Forest *v.* United States, 11 App. D. C. 458.

Georgia. — Leverett *v.* Bullard, 121 Ga. 534, 49 S. E. 591; Grant *v.* Noel, 118 Ga. 258, 45 S. E. 279; Bush *v.* State, 109 Ga. 120, 34 S. E. 298; Hawkinsville Bank & Trust Co. *v.* Walker, 99 Ga. 242, 25 S. E. 205; Windsor *v.* Delbondio, 99 Ga. 749, 27 S. E. 750.

Illinois. — Stewart *v.* Kirk, 69 Ill. 509; Hobbie *v.* Ogden, 72 Ill. App. 242; Nonotuck Silk Co. *v.* Levy, 75 Ill. App. 55; Chicago & E. R. Co. *v.* Binkopski, 72 Ill. App. 22; Cook *v.* Haussen, 51 Ill. App. 269; Corcoran *v.* Poncini, 35 Ill. App. 130; Gaffield *v.* Scott, 33 Ill. App. 317.

Indiana. — State *v.* Cox, 155 Ind. 593, 58 N. E. 849; Taylor *v.* Calvert, 138 Ind. 67, 37 N. E. 531; Comstock *v.* Grindle, 121 Ind. 459, 23 N. E. 494; Kern *v.* Bridwell, 119 Ind. 226, 21 N. E. 664, 12 Am. St. Rep. 409; Board of Com'rs of Sullivan Co. *v.* Arnett, 116 Ind. 438, 19 N. E. 299; Cincinnati, I. St. L. & C. R. Co. *v.* Lutes, 112 Ind. 276, 11 N. E. 784, 14 N. E. 706; Ford *v.* Ford, 110 Ind. 89, 10 N. E. 648; Higham *v.* Vanosdol, 101 Ind. 160; Whitehead *v.* Mathaway, 85 Ind. 85; Conden *v.* Morningstar, 94 Ind. 150; Noe *v.* State, 92 Ind. 92; Bake *v.* Smiley, 84 Ind. 212; Tedrowe *v.* Esher, 56 Ind. 443; Robinson Mach. Wks. *v.* Chandler, 56 Ind. 575; Mitchell *v.* Chambers, 55 Ind. 289; Cones *v.* Binford, 54 Ind. 516; Graeter *v.* Williams, 55 Ind. 461; Mitchell *v.* Chambers, 55 Ind. 289; Toledo & W. R. Co. *v.* Goddard, 25 Ind. 185; Rinkenberger *v.* Meyer, 155 Ind. 152, 56 N. E. 913; Famous Mfg. Co. *v.* Harmon, 28 Ind. App. 117, 62 N. E. 306; Huntington *v.* Burke, 21 Ind. App. 655, 52 N. E. 415.

Iowa. — Haney-Campbell Co. *v.* Preston Creamery Ass'n, 119 Iowa 188, 93 N. W. 297; Tuttle *v.* Wood, 115 Iowa 507, 88 N. W. 1056; Donnelly *v.* Burkett, 75 Iowa 613, 34 N. W. 330; Paddelford *v.* Cook, 74 Iowa 433, 38 N. W. 137; Kuhn *v.*

b. *Exceptions to the Rule.* — No statement of the evidence expected to be elicited is required where the question is of such a

Gustafson, 73 Iowa 633, 35 N. W. 660; Jenks *v.* Knotts Mexican Sil. Min. Co., 58 Iowa 549, 12 N. W. 588.

Kansas. — State *v.* Barker, 43 Kan. 262, 23 Pac. 575.

Kentucky. — Morris *v.* Com., 27 Ky. L. Rep. 145, 84 S. W. 560; Palatine Ins. Co. *v.* Weiss, 22 Ky. L. Rep. 994, 59 S. W. 509; Reed *v.* Lilly, 23 S. W. 955; Nichols *v.* Com., 11 Bush 575; Todd *v.* Louisville & N. R. Co., 10 Ky. L. Rep. 864, 11 S. W. 8.

Massachusetts. — Shinners *v.* Proprietors of Locks & Canals, 154 Mass. 168, 28 N. E. 10; Leland *v.* Converse, 181 Mass. 487, 63 N. E. 939; Lawlor *v.* Wolff, 180 Mass. 448, 62 N. E. 973; Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551; Smethhurst *v.* Barton Square Church, 148 Mass. 261, 19 N. E. 387, 22 L. R. A. 695.

Minnesota. — Tillman *v.* International Harv. Co., 93 Minn. 197, 101 N. W. 71; Nichols & Shepard Co. *v.* Weidemann, 72 Minn. 344, 75 N. W. 208; Scofield *v.* Walrath, 35 Minn. 356, 28 N. W. 926; McAlpine *v.* Foley, 34 Minn. 251, 25 N. W. 452; State *v.* Staley, 14 Minn. 105.

Missouri. — Jackson *v.* Hardin, 83 Mo. 175.

Nebraska. — Murry *v.* Hennessey, 48 Neb. 608, 67 N. W. 470.

Nevada. — State *v.* Lewis, 20 Nev. 333, 22 Pac. 241.

New York. — Nightingale *v.* Eiseman, 121 N. Y. 288, 24 N. E. 475, *affirming* 50 Hun 189, 2 N. Y. Supp. 779.

North Dakota. — Halley *v.* Folsom, 1 N. D. 325, 48 N. W. 219.

Oregon. — Tucker *v.* Constable, 16 Or. 407, 19 Pac. 13.

Tennessee. — Hagan *v.* State, 5 Baxt. 615.

Vermont. — Hathaway *v.* Goslant, 77 Vt. 199, 59 Atl. 835; State *v.* Noakes, 70 Vt. 247, 40 Atl. 249; Westcott *v.* Westcott, 69 Vt. 234, 39 Atl. 199; Carpenter *v.* Willey, 65 Vt. 168, 26 Atl. 488.

Virginia. — Taylor *v.* Com. 90 Va. 109, 17 S. E. 812.

Wisconsin. — Plano Mfg. Co. *v.* Frawley, 68 Wis. 577, 31 N. W. 768.

The general rule is that, to reserve an available exception to the exclusion of the testimony of a witness, a proper question must be asked, and, upon objection thereto, an offer must be made, stating the testimony which the witness will give if permitted to answer the question, and an exception must be taken to the exclusion of the evidence as shown by the question and offer. Carpenter *v.* Willey (Vt.), 26 Atl. 488.

In Brewer *v.* National Union Bldg. Ass'n, 64 Ill. App. 161, it appeared that at the convening of court after a noon recess the appellant appeared, but his attorney did not; that the case of the appellant was not yet closed, and that he took the witness stand, whereupon the court directed the attorney for the appellee to proceed to the jury. Upon the appellant asking the court if he was not to be permitted to testify, the court answered, "No, your attorney is not here, and we can't wait any longer." In sustaining the action of the trial judge, the court said: "Undoubtedly a party may conduct his own case without the aid of an attorney, but he is not relieved from rules of proceeding which his attorney would be required to observe. One of those rules is that to make the exclusion of offered testimony error the offer must state what the testimony is expected to be. Gaffield *v.* Scott, 33 Ill. App. 317. Here was no such offer."

Merely Inquiring if the Court Will Hear Evidence, to which the court replies that he will not, is not sufficient. Benson *v.* State, 39 Tex. Crim. 56, 44 S. W. 167, 1091.

In Corcoran *v.* Poncini, 35 Ill. App. 130, where the propriety of the refusal of the court to permit a boy of ten years old to testify was in question, the only question put to the witness related to his competency, and it was held that because no statement was made by counsel as to what he intended to prove by the witness, and no question was put to him from which it could possibly

character as to show what that expected evidence is.[25] Where the question is not the competency of the testimony expected to be elicited, but the competency of the witness to testify at all, the party offering the witness is not required to state what he expects to prove by the witness.[26]

B. Requisites and Sufficiency. — a. *In General.* — Where a witness is offered, but is competent to testify only to certain matters, and not competent to testify generally, the offer should embrace only those matters to which the witness is competent to testify.[27]

be inferred that he knew anything of the material facts, the ruling could not be said to have been injurious even if error.

In the trial of an ordinary civil action, or criminal prosecution, when a witness is called to the stand the party calling him is presumed to know, when he propounds a question, the answer that the witness will make to the question; and it is but just and proper that the party calling the witness inform the court as to the testimony which he expects to elicit, if the witness is permitted to answer the question. This works no hardship to the party calling the witness, and it may be that when the court is informed as to what the testimony will be if the witness is permitted to answer, its mind may be changed as to the propriety of the question. Comstock *v.* Grindle, 121 Ind. 459 23 N. E. 494.

In Berkowsky *v.* Cahill, 72 Ill. App. 101, where the appellant had asked a witness to state the contents of certain letters to which an objection was sustained, the court, in holding that there was no error, said: "Appellant's counsel made no statement as to what appellant claimed was contained in the alleged April letters or either of them, nor did he offer to prove that they, or either of them, contained anything relevant or material to the issues in the case. This, of itself, was sufficient reason for the exclusion of secondary evidence of their contents. Had the claimed April letters been produced, it would have been a question for the court, on inspection of the letters, whether they were relevant and material, and when secondary evidence was offered it was clearly necessary for the court to be informed, in advance, what was proposed to be proved, in order to pass intelligently on the question of the admissibility of the evidence."

25. Swanson *v.* Allen, 108 Iowa 419, 79 N. W. 132; Armstrong *v.* Farrar, 8 Mo. 627; Calvert Co. *v.* Gantt, 78 Md. 286, 28 Atl. 101, 29 Atl. 610; Votaw *v.* Diehl, 62 Iowa 676, 13 N. W. 757, 18 N. W. 305; Mitchell *v.* Harcourt, 62 Iowa 349, 17 N. W. 581.

26. State *v.* Thomas, 111 Ind. 575, 13 N. E. 35; Mutual L. Ins. Co. *v.* Oliver, 95 Va. 445, 28 S. E. 594. *Compare* Corcoran *v.* Poncini, 35 Ill. App. 130.

27. Teats *v.* Flanders, 118 Mo. 660, 24 S. W. 126; Reynolds *v.* Reynolds, 45 Mo. App. 622. See also Krumrine *v.* Greenoble, 165 Pa. St. 98, 30 Atl. 824; Hoffman *v.* Joachim, 86 Wis. 188, 56 N. W. 636.

In Kischman *v.* Scott, 166 Mo. 214, 65 S. W. 1031, where the plaintiff's wife had been offered as a witness on his behalf, but she was held to be incompetent as a witness for any purpose, the plaintiff's counsel thereupon remarked that "the plaintiffs offered to prove by this witness in behalf of the other parties to this suit," when the court again observed that she was not competent for any purpose. The matter was not pressed further, nor was any offer made to show that, if permitted to do so, she could testify to any material fact, or with respect to any matter to which she was competent to testify. In holding the action of the trial judge proper, the court said that "if there were matters with respect to which [she] was competent to testify, it should have, in fairness to the court, been so stated, and as this was not done we are unable to

And the offer to prove several negative conclusions, not facts, may be rejected; the offer should be to prove the facts from which the conclusions were to be drawn.[28]

An Offer to Prove Must Be Responsive to the question asked; otherwise the rejection of the question is proper.[29] But where the question is merely a preliminary one the offer need not be confined to the same limits as the answer.[30]

b. *Certainty, Definiteness, Etc.* — In making an offer to prove it is requisite that counsel should be distinct and clear. The offer should embody the specific fact or facts in such connection and in such terms as to be apprehended and ruled upon in the intended sense by the trial judge, and be examined and applied in the appellate court in the proper light to test the accuracy of the ruling, if adverse.[31]

say whether it was material, and if so, whether she was competent to testify to it or not."

28. Manning *v.* Den (Cal.), 24 Pac. 1092.

In De St. Aubin *v.* Marshall Field & Co., 27 Colo. 414, 62 Pac. 199, an action of replevin by the purchaser of a stock of goods against the seller, it was held proper to refuse the defendant's offer of evidence which he claimed would show that the consideration which he was to receive had never been paid because the offer did not specify what the testimony would be tending to prove that conclusion nor the ultimate fact upon which he relied to support his contention upon that point.

29. Sauntman *v.* Maxwell, 154 Ind. 114, 54 N. E. 397; Brennan-Love Co. *v.* McIntosh, 62 Neb. 522, 87 N. W. 327; Keens *v.* Robertson, 46 Neb. 837, 65 N. W. 897; Barr *v.* Post, 56 Neb. 698, 77 N. W. 123.

Upon an offer to prove certain facts, if a pending question is permitted to be answered, such question should be so clearly pertinent that a favorable, relevant answer thereto must obviously tend to establish the existence of some fact material to the issues being tried. If these essentials are lacking in the question propounded they cannot be supplied by mere offers to make proofs foreign to the scope of such question. Cutting *v.* Baker, 43 Neb. 470, 61 N. W. 726.

30. As, for example, where the question is for the purpose of establishing the qualification of the witness as an expert. Johnson *v.* Winston (Neb.), 94 N. W. 607.

31. *United States.* — Johnson *v.* Merry Mountain Granite Co., 53 Fed. 569.

Colorado. — Pendleton *v.* Smissaert, 1 Colo. App. 508, 29 Pac. 521.

District of Columbia. — Bradley *v.* District of Columbia, 20 App. D. C. 169.

Illinois. — Russell *v.* Lake, 68 Ill. App. 440.

Indiana. — Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91; Taylor *v.* Calvert, 138 Ind. 67, 37 N. E. 531.

Iowa. — Kilburn *v.* Mullen, 22 Iowa 498.

Massachusetts. — Johnson *v.* Russell, 144 Mass. 409, 11 N. E. 670.

Michigan. — Reynolds *v.* Continental Ins. Co., 36 Mich. 131.

Minnesota. — Wolford *v.* Farnham, 47 Minn. 95, 49 N. W. 528; Conlan *v.* Grace, 36 Minn. 276, 30 N. W. 880; Jackson *v.* Kansas City Pack. Co., 42 Minn. 382, 44 N. W. 126; Austin *v.* Robertson, 25 Minn. 431; Knatvold *v.* Wilkinson, 83 Minn. 265, 86 N. W. 99; Lucy *v.* Wilkins, 33 Minn. 441, 23 N. W. 861; Norris *v.* Clark, 33 Minn. 476, 24 N. W. 128.

Missouri. — Berthold *v.* O'Hara, 121 Mo. 88, 25 S. W. 845.

Montana. — Palmer *v.* McMaster, 10 Mont. 390, 25 Pac. 1056.

New Jersey. — Middleton *v.* Griffith, 57 N. J. L. 442, 31 Atl. 405.

New York. — Pratt *v.* Strong, 33 How. Pr. 287; Van Arsdale *v.* Buck, 82 App. Div. 383, 81 N. Y. Supp. 1017.

A Mere General Proposition in So Many Words To Make Out the Case set forth in the pleadings is not one that the court is bound to take

North Carolina. — Bland *v.* O'Hagan, 64 N. C. 471.

Pennsylvania. — Kerrigan *v.* Pennsylvania R. Co., 194 Pa. St. 98, 44 Atl. 1069; Lewis *v.* Nenzel, 38 Pa. St. 222.

Tennessee. — Carlton *v.* State, 8 Heisk. 16.

Washington. — Kennedy *v.* Currie, 3 Wash. 442, 28 Pac. 1028.

See also Matter of Bateman, 145 N. Y. 623, 40 N. E. 10, where the offer was "loose and broad, stating no purpose and confined to no point, obviously immaterial to any known issue in the case, and improper on the face of the writing itself."

Reynolds *v.* Continental Ins. Co., 36 Mich. 131, where the court said: "The object is to economize time by getting an admission of the facts or a ruling on their admissibility without the tedious process of examination, and the facts proposed ought to be indicated with sufficient clearness in regard to identity and sense to enable the court and adverse counsel to judge intelligently concerning their admissibility. Common fairness, as well as the nature of the proceeding, demand this. If the judge is compelled to rule upon the offer he may possibly go beyond its obvious import and concede an intent not fairly indicated. This, however, is not to be intended. It must be clearly shown. He must be supposed to have passed upon the statement in view of what it actually seemed, and in case of exclusion, his decision, if correct when applied to the proposition as it appeared, cannot be questioned in an appellate court upon the claim of the party who made the offer, that the proposition covered some meaning which required a different ruling."

To make an exception on account of the rejection of evidence available, the party must make his offer in such plain terms as to leave no room for doubt as to what is intended. If the offer is open to two constructions he cannot, in a court of review, insist on that construction which is most favorable to himself, unless it appear that it was so understood by the court which rejected the evidence. Daniels *v.* Patterson, 3 N. Y. 47.

In Ives *v.* Farmers Bank, 2 Allen (Mass.) 236, an action by the plaintiff as indorsee against the maker of a promissory note payable in New York and executed in and by a resident of New York, and indorsed in and by a resident of Connecticut, it was held that the defendant was not injured by the rejection of an alternative offer of evidence by him to show that the note was taken by the indorsee upon a consideration usurious by the laws of Connecticut or New York.

A statement of counsel that "I would like to have the record in the case of [naming the case] in order to show our *lis pendens* was filed, and our decree," made in connection with his motion to dismiss does not amount to an offer of evidence; nor from the language employed can it be told what the "record" so offered contains. Nason *v.* Northwestern Mill. & Power Co. (Wash.), 49 Pac. 235.

In Dwyer *v.* Rippetoe, 72 Tex. 520, 10 S. W. 668, it appeared by the bill of exceptions that the court had excluded certain deeds referred to in certain interrogatories which it was claimed would have supported the recitals therein, but it did not appear exactly what deeds they were, how they were offered or how proved. In holding their exclusion to be proper under the showing by the record the court said: "If after the witness had testified orally it was proposed to repeat, add to or confirm his testimony by reading an old deposition of the same witness found among the papers, and offer all deeds referred to in the deposition instead of offering them separately with proper proof of their execution and explanations of their relevancy, as seems to have been the case, we think the offer was too general and that the evidence was properly excluded."

A judgment will not be reversed for a refusal to admit evidence of a thing of which no offer is made ex-

into consideration and rule upon as an offer of proof; it is no more than the pleading has already proffered, and in better form.[32]

2. Statement of Purpose or Object of Evidence. — A. General Rule. — Where evidence is offered generally, the party offering it is not required to declare the purpose for which it is offered, and if admissible for any purpose it is error to reject it.[33] So, too, where the purpose for which the evidence is offered is apparent from the evidence itself and the connection in which it is offered, it is not necessary that the offer point out in terms the purpose of the evidence.[34] But where evidence is admissible not generally, but for

cept by its name, and of which the record disclosed nothing but the name. Chicago General St. R. Co. *v.* Capek, 68 Ill. App. 500.

An offer in the trial of a civil cause to show that in prior criminal proceedings the plaintiff had sworn to statements which were false without specifying any particular that is alleged to be false, is properly rejected. Cole *v.* High, 173 Pa. St. 590, 34 Atl. 292.

In Reeves *v.* McComeskey, 168 Pa. St. 571, 32 Atl. 96, an action for rent, it was held that an offer by the tenant to prove "that he was told previously to his removal that they would take the property and that he might leave it" was incompetent for vagueness, inasmuch as the offer did not state by whom the tenant was told that the property would be taken.

Offer of Residue of Conversation Partly in Evidence. — In Lyon *v.* Batz, 42 Mo. App. 606, where the plaintiff had offered in evidence portions of a conversation containing admissions of the defendant having reference to a certain fact, it was held that although the defendant was entitled to show everything that was said by him in the same conversation on the subject to which the admission related, his offer of evidence for that purpose should have been restricted accordingly, and that his offer, made as it was to show *everything that was said about the case,* was properly rejected.

32. Alexander *v.* Thompson, 42 Minn. 498, 44 N. W. 534. In Reynolds *v.* Continental Ins. Co., 36 Mich. 131, an action to charge an insurance company upon an alleged agreement for insurance, claimed to have been made with their agent, the case had failed for lack of proof of authority in the agent to take the specific risk, and the plaintiff had been three times upon the stand as a witness and had testified to the payment of the premium to the agent, but that he did not know whether the agent had paid it over to the defendant. The rejection, at the close of the trial, of a general offer to prove by the plaintiff as a witness the necessary facts to entitle him to recover of defendant, etc., and "that they received the money for the insurance and kept it," was held not error, where the offer was so presented as fairly to appear rather as a compendious reassertion of positions already ruled than as a regular offer of proof of facts to make out a case.

In Stevens *v.* Newman, 68 Ill. App. 549, where the appellants had offered to prove the "allegations of their petition," it was held insufficient; that "the witnesses should be called and questioned or documentary evidence produced. A mere statement of an offer to prove is not anything upon which a court is called upon to act."

33. Byers *v.* Horner, 47 Md. 23; Winter *v.* Donovan, 8 Gill (Md.) 370; King *v.* Faber, 51 Pa. St. 387.

Where the party offering evidence is called upon to state for what purpose it is offered he will be confined to the point proposed to be proved; but if the evidence be objected to *generally,* all that is incumbent upon the party offering it is to show that it is proper for some purpose. Benner *v.* Hauser, 11 Serg. & R. (Pa.) 352.

34. Stanton *v.* State, 42 Tex. Crim. 269, 59 S. W. 271.

some specific purpose, and objection is interposed, the offer should designate the purpose.[35] And if counsel, when he asks a question, states that he asks it for a particular purpose for which it is not competent, it is not error to overrule it, although it may be compe-

35. *Alabama.* — Hicks *v.* Lawson, 39 Ala. 90; Johnson *v.* Marshall, 34 Ala. 522; Kenan *v.* Holloway, 16 Ala. 53, 50 Am. Dec. 162.

California. — People *v.* Totman, 135 Cal. 133, 67 Pac. 51; Howard *v.* Howard, 134 Cal. 346. 66 Pac. 367; Stevens *v.* San Francisco & N. P. R. Co., 100 Cal. 554, 35 Pac. 165; Smith *v.* East Branch Min. Co., 54 Cal. 164.

Connecticut. — State *v.* Kelly, 77 Conn. 266, 58 Atl. 705.

Illinois. — Davis *v.* Gibson, 70 Ill. App. 273.

Kansas. — State *v.* Asbell, 57 Kan. 398, 46 Pac. 770.

Louisiana. — Succession of Pasquier, 12 La. Ann. 758.

Maryland. — Bauernschmidt *v.* Maryland Trust Co., 89 Md. 507, 43 Atl. 790; DuVal *v.* DuVal, 21 Md. 149; Budd *v.* Brooke, 3 Gill 198, 43 Am. Dec. 321; McTavish *v.* Carroll, 13 Md. 429; Green *v.* Caulk, 16 Md. 556; Stewart *v.* Spedden, 5 Md. 433.

Massachusetts. — Atherton *v.* Atkins, 139 Mass. 61, 29 N. E. 223.

Minnesota. — Young *v.* Otto, 57 Minn. 307, 59 N. W. 199; Holman *v.* Kempe, 70 Minn. 422, 73 N. W. 186.

New York. — Enright *v.* Franklin Pub. Co., 24 Misc. 180, 52 N. Y. Supp. 704; Jaeckel *v.* David, 34 Misc. 791, 69 N. Y. Supp. 998; Seidenspinner *v.* Metropolitan L. Ins. Co., 70 App. Div. 476, 74 N. Y. Supp. 1108.

Pennsylvania. — Hall *v.* Patterson, 51 Pa. St. 289; Carskadden *v.* Poorman, 10 Watts 82, 36 Am. Dec. 145.

Texas. — Pearson *v.* State (Tex. Crim.), 33 S. W. 224.

Washington. — Thorne *v.* Joy, 15 Wash. 83, 45 Pac. 642.

Wisconsin. — Wilson *v.* Noonan, 35 Wis. 321.

It is not error to refuse to permit counsel, in examining a witness, to ask questions the answers to which would apparently be irrelevant to the issue on trial, when the purpose for which the questions are asked is not disclosed to the court, though the counsel asking the questions is requested to do so by the judge. This is true even if it may subsequently appear that the answers to these questions might, in connection with other evidence, be admissible and material. Keller *v.* State, 102 Ga. 506, 31 S. E. 92. In this case the accused complained that the court refused to permit his counsel to ask the prosecutrix, on her cross-examination, concerning her physical condition on a specified date some two years or more after her alleged seduction, or as to the birth of a second child with which she was then pregnant. The purpose for which counsel sought to elicit testimony on this line was not stated to the court at the time, but was for the first time disclosed when the accused filed his amended motion for a new trial. The court, in holding the action of the trial court to be correct, said: "As counsel therein undertakes to explain, he intended to follow up his questions to the prosecutrix by showing that her pregnancy was not known to the accused when he then made to her an offer of marriage; that she had stated to her attending physician, who was present in court as a witness for the accused, that the father of both of the children born to her was the same man; and that from the admitted absence of connection of the prosecutrix with the accused for over a year before the birth of the second child, 'it was a natural impossibility for the defendant to be father of the second child, and therefore, according to her admission, not the father of the first one.' The questions which counsel proposed to ask the prosecutrix were apparently totally irrelevant to the issue on trial. That he was not allowed to put them to the witness can afford no just cause of complaint, as he voluntarily chose not to reveal to the court the supplemental evidence which he now claims it was in his power to produce (but which he did not thereafter offer), in connection with

tent for some other purpose not stated.[36] And where evidence offered for one purpose is rejected, the offer must be repeated if it is desired to use the evidence for another purpose.[37] An offer cannot be enlarged by a statement of its purpose, although it may be explained; it must stand or fall as made.[38]

B. Conclusiveness of Statement as Made at Trial. — Where evidence offered for a specific purpose has been ruled out, the party cannot on appeal shift his ground and claim that the evidence should have been received for some other purpose not stated.[39]

which the answers he expected to elicit from the prosecutrix might have had some bearing on the case. It appears rather that the accused did not deal fairly with the court, than that the court did not deal fairly with the accused, with regard to the matter under discussion."

In Pryor *v.* Morgan, 170 Pa. St. 568, 33 Atl. 98, an action to recover securities which the plaintiff claimed as a gift from her aunt plaintiff offering evidence showing a long continued friendly intercourse between her aunt and herself, it was held improper to admit evidence that the aunt shortly before her last illness had told the plaintiff that she could not keep her any longer, and that she would have to get out, because the offer contained no reason why the aunt had told her this, nor was the purpose of the offer disclosed."

36. Delaware, L. & W. R. Co. *v.* Dailey, 37 N. J. L. 526.

37. Maxwell Land Grant Co. *v.* Dawson, 7 N. M. 133, 34 Pac. 191.

See also Stearns *v.* Cox, 17 Ohio 590, where it was held that although the evidence when first offered was rejected because not competent for the purpose stated, it was error on the part of the court to reject the evidence when offered again on the correct ground.

Where a party asked a question the apparent *purpose* of which was incompetent, an objection on this ground was properly sustained, though there was another purpose not apparent which counsel stated *after* the court ruled on the objection. Since counsel did no more than state this purpose after the ruling, and *made no further offer*, there was no error. Young *v.* Otto, 57 Minn. 307, 59 N. W. 199.

Questions as to the admissibility of evidence will be considered and responded to by the court in the very terms in which they are propounded. If evidence proposed is not admissible for the purpose for which it is proposed, on objection to its admissibility the court will not inquire whether it might be received for another purpose. O'Brien *v.* Hilburn, 22 Tex. 616.

Counsel must rest on the competency for the purpose he assigns for his evidence in his offer, and if he misleads the court by stating an objectionable purpose he will not be allowed to argue that there was error in the rejection because the evidence may have been competent for some other purpose. Colby *v.* Colby, 64 Minn. 549, 67 N. W. 663.

38. Mentel *v.* Hippely, 165 Pa. St. 558, 30 Atl. 1021, an action for malicious prosecution for larceny, wherein it was held that an offer to show that after a statement made by the plaintiff to the magistrate of the occurrences upon which the charge of larceny was based, the officer took the information and issued the warrant, does not go to the extent of showing that the prosecution was commenced under the advice of the magistrate, and that the offer was not helped by an explanation of what was intended to be shown by it.

39. *Connecticut.* — State *v.* Kelly, 58 Atl. 705.

Illinois. — *In re* Storey, 20 Ill. App. 183.

Maine. — Stewart *v.* Morton, 71 Me. 128.

Massachusetts. — Hathaway *v.* Tinkham, 148 Mass. 85, 19 N. E. 18; Wheeler *v.* Rice, 8 Cush. 205.

Michigan. — Reynolds *v.* Continental Ins. Co., 36 Mich. 131.

3. Statement Showing Materiality or Relevancy of Evidence. A. General Rule. — Where an offer shows that the evidence is pertinent, although insufficient, the trial judge should not assume that the party has no further proof to offer and reject the evidence offered.[40] But when the evidence is not apparently material, there

Minnesota. — Bond *v.* Corbett, 2 Minn. 248.

New Hampshire. — Tabor *v.* Judd, 62 N. H. 288.

New Jersey. — Roop *v.* State, 58 N. J. L. 479, 34 Atl. 749.

New York. — Mook *v.* Parke, 29 N. Y. Supp. 32, *affirming* 27 N. Y. Supp. 1134.

Pennsylvania. — Martin *v.* Jennings, 29 S. E. 807.

Tennessee. — Jones *v.* State, 11 Lea 468.

Vermont. — Richardson *v.* Sanborn, 33 Vt. 75.

An offer of evidence for a specified purpose or purposes must be regarded as an admission that the evidence is incompetent for any other purpose, and the party will not be permitted in the appellate court to allege its competency on a ground not presented to the trial court. Thompson *v.* Drake, 32 Ala. 99, where the court said: "A different decision would open the door for the misleading of the circuit judges by the presentation of feigned grounds of objection, and would impose upon this court the duty of reversing judgments where the court below had correctly decided the points presented to it."

Where the Introduction of a Document is claimed in the lower court for a purpose for which it is incompetent, and it is for that reason rightly excluded by that court, the party will not be permitted to change his ground in the appellate court, and insist that the lower court erred in not admitting it for a purpose not disclosed to that court, and upon which its judgment was not invoked. German Ins. Co. *v.* Frederick, 58 Fed. 144, 7 C. C. A. 122. The court said: "If such a practice were permissible, it would be an easy matter for every party to lay the foundation for a reversal by stating to the lower court that the evidence was wanted for a purpose for which it was clearly incompetent, and afterward showing in the appellate court that there was a purpose for which it was competent and material. A party cannot ambush the court and his adversary in any such way."

In Irwin *v.* Miller, 23 Ill. 348, an action of ejectment wherein the defendant, for the purpose of showing color of title, offered in evidence a judgment, execution and sale and sheriff's deed which the court held to be improper, it was held that the defendant could not then shift his ground and urge that the evidence offered was competent for the purpose of showing title in himself.

40. Wicks *v.* Smith, 18 Kan. 508; Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491.

There is "no principle of evidence, nor of any decision, which would justify the court in excluding evidence *prima facie* relevant and material, until assurances are given that other evidence will be given which the court may think necessary to enable the party to recover." Wellersburg & West Newton Plank R. Co. *v.* Bruce, 6 Md. 457, where the court, *quoting* from Davis *v.* Calvert, 5 Gill & J. (Md.) 173, said: "Nothing that is pertinent or material to the issue joined, and tending to prove or disprove it, is inadmissible if offered to be established by competent testimony; and it is the duty of the judge, in the exercise of a sound discretion, to discriminate between such facts as are merely collateral and foreign to the issue and such as are connected with it. It is sometimes difficult to ascertain whether a particular fact offered in evidence is connected with the issue, and will or will not become material in the progress of the investigation. In such cases, the court not clearly seeing that it is wholly foreign and irrelevant to the issue, and cannot be connected with it by evidence of other facts and circumstances, it is proper and usual in practice to admit the proof on the assurance of the counsel

must be a statement or offer showing its materiality.[41] So, too, where the relevancy of evidence offered is not apparent, or is apparently irrelevant, but other facts may make it relevant, it is the duty of the party offering it to state its connection with the other facts of which he proposes to make proof in order that its relevancy may be disclosed to the court.[42] In disclosing the facts to estab-

who tenders it, that it will turn out to be pertinent and material." This is the extent to which the authorities go, and they are confined to cases in which the relevancy is not apparent.

In Marshall *v.* Haney, 4 Md. Rep. 510, it was said: "Evidence relative to the issue is admissible, though it be insufficient unless followed and supported by other evidence." When such evidence has been admitted, if it should not be followed by proof establishing its sufficiency, the opposite party may, when the evidence is closed, obtain from the court an instruction to the jury to disregard the admitted evidence upon the ground of its insufficiency. Carroll *v.* Quynn, 13 Md. 379.

41. *Alabama.* — Bromley *v.* Birmingham Min. R. Co., 95 Ala. 397, 11 So. 341; Warrior Coal & Coke Co. *v.* Mabel Min. Co., 112 Ala. 624, 20 So. 918; Innerarrity *v.* Byrne, 8 Port. 176.

California. — Baum *v.* Roper, 132 Cal. 42, 64 Pac. 128.

Colorado. — Baldwin *v.* Central Sav. Bank, 17 Colo. App. 7, 67 Pac. 179; John V. Farwell Co. *v.* McGraw, 13 Colo. App. 467, 59 Pac. 231.

Florida. — McLean *v.* Spratt, 20 Fla. 515.

Minnesota. — Nichols & Shepard Co. *v.* Weidemann, 72 Minn. 344, 75 N. W. 208; Tillman *v.* International Harv. Co., 93 Minn. 197, 101 N. W. 71; State *v.* Scott, 41 Minn. 365, 43 N. W. 62; Warner *v.* Fischbach, 29 Minn. 262, 13 N. W. 47; McAlpine *v.* Foley, 34 Minn. 251, 25 N. W. 452.

Missouri. — Best *v.* Hoeffner, 39 Mo. App. 682; Lowman *v.* Maney, 65 Mo. App. 619.

New York. — Erdman *v.* Upham, 70 App. Div. 315, 75 N. Y. Supp. 241; Blum *v.* Langfeld, 37 App. Div. 590, 56 N. Y. Supp. 298.

Pennsylvania. — Williams *v.* Williams, 34 Pa. St. 312.

Wisconsin. — Mechelke *v.* Bramer, 59 Wis. 57, 17 N. W. 682.

See also Haussknecht *v.* Claypool, 1 Black (U. S.) 431; Florida R. R. Co. *v.* Smith, 21 Wall. (U. S.) 255, where the court said: "If the exception is to the refusal of an interrogatory not objectionable in form the record must show that the answer related to a material matter involved; or if no answer was given the record must show the offer of the party to prove by the witness particular facts to which the interrogatory related, and that such facts were material."

An offer of evidence not containing sufficient to show its materiality to any of the issues or points in controversy in the suit, but containing substantive matter, irrelevant and inapplicable to any of such issues or points in controversy, was held properly rejected. Davis *v.* Getchell, 32 Neb. 792, 49 N. W. 776.

42. *United States.* — Idaho & Oregon Land Imp. Co. *v.* Bradbury, 132 U. S. 509, *affirming* 2 Idaho 239, 10 Pac. 620; Central Pac. R. Co. *v.* California, 162 U. S. 91.

Alabama. — Thompson *v.* Drake, 32 Ala. 99; Shields *v.* Henry, 31 Ala. 53; Crenshaw *v.* Davenport, 6 Ala. 390; Ashley *v.* Robinson, 29 Ala. 112, 65 Am. Dec. 387; Abney *v.* Kingsland, 10 Ala. 355, 44 Am. Dec. 491; Floyd *v.* Hamilton, 33 Ala. 235.

California. — McGarrity *v.* Byington, 12 Cal. 426.

Colorado. — Holman *v.* Boston Land & Sec. Co., 8 Colo. App. 282, 45 Pac. 519.

Dakota. — Cheatham *v.* Wilber, 1 Dak. 335, 46 N. W. 580.

District Columbia. — Clark *v.* Read, 12 App. D. C. 343.

Georgia. — Greer *v.* Caldwell, 14 Ga. 207, 58 Am. Dec. 553.

Kentucky. — Winlock *v.* Hardy, 4 Litt. 272; Hudson *v.* Com., 24 Ky. L. Rep. 785, 69 S. W. 1079.

lish the relevancy of evidence the facts themselves should be stated,

Louisiana. — Succession of Pasquier, 12 La. Ann. 758.

Massachusetts. — Fiske *v.* Cole, 152 Mass. 335, 25 N. E. 608.

Michigan. — Wyngert *v.* Norton, 4 Mich. 286.

Minnesota. — Rhodes *v.* Pray, 36 Minn. 392, 32 N. W. 86.

Missouri. — McAllister *v.* Barnes, 35 Mo. App. 668; Fitzgerald *v.* Barker, 96 Mo. 661, 10 S. W. 45, 9 Am. St. Rep. 375.

New Hampshire. — Saucier *v.* New Hampshire Spinning Mills, 72 N. H. 292, 56 Atl. 545.

New York. — Van Buren *v.* Wells, 19 Wend. 203.

Pennsylvania. — Hall *v.* Patterson, 51 Pa. St. 289; Davenport *v.* Wright, 51 Pa. St. 292; Hill *v.* Truby, 117, Pa. St. 320, 11 Atl. 89.

Vermont. — Gregg *v.* Willis, 71 Vt. 313, 45 Atl. 229.

Wisconsin. — Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164.

"It is certainly a fundamental principle in the law of evidence that it is always incumbent on the party offering proof to show its relevancy to the questions at issue. It often happens, however, that proof wholly irrelevant *per se* may be made relevant and admissible by connecting it with other evidence which is relevant; and in such case it is the duty of the party offering the evidence not appearing of itself to be relevant to accompany it with a proffer to follow it with such other proof as will make its relevancy appear; and if he fails to do this he cannot complain that his proof is rejected. Baker *v.* Swan, 32 Md. 355.

In Boland *v.* Louisville & Nashville R. Co., 106 Ala. 641, 18 So. 99, an action against a railroad company to recover damages for personal injuries sustained while attempting to couple cars, and alleged to have been caused by the engineer backing the engine with unnecessary force, it was held that a question calling for the rate of speed at which cars ordinarily move in coupling was held properly excluded because the testimony was not *prima facie* relevant; that before such question could be answered the party asking it should have stated the connection thereof with other facts of which he proposed to make proof.

In Middle Georgia & A. R. Co. *v.* Reynolds, 99 Ga. 638, 26 S. E. 61, a personal injury action, it was held that the rejection of evidence offered by the defendant to show that certain bandages were removed from a broken limb of the plaintiff a week earlier than the attending physician had directed was not error, the defendant contending that if the bandages had remained another week the pain and suffering would have been materially lessened, but not offering to prove affirmatively that such would have been the result.

In State *v.* Spiers, 103 Iowa 711, 73 N. W. 343, a prosecution for unlawfully keeping and selling intoxicating liquors, it was claimed that the court erred in permitting objectionable questions asked Mrs. Farrand to be answered. The state sought to prove by her that she had sent an agent to the place where the defendants were doing what was claimed to be an illegal business, and that he procured something there for her. What was thus procured, if anything, was not shown, and the court permitted questions of which complaint was made to be asked and answered only on condition that the state should prove that whatever the agent delivered to the witness was obtained at the place kept by the defendants; and, when it became apparent that the required fact would not be shown, it was held that the evidence in regard to the sending of the agent to the place specified was properly stricken out.

In Chase *v.* Ainsworth, 135 Mich. 119, 97 N. W. 404, an action to recover the balance claimed to be due on the purchase price of personal property, one of the defendants was asked, "You may state to the jury what is the meaning of the term 'he to have advance for two weeks' [a phrase found in the memorandum of purchase given by the defendant to the plaintiff] in your business," but it was held that because there was no showing or offer to show that the

and not the conclusions or results from the evidence offered.[43]

B. Documentary Evidence. — And the rule requiring a showing of the relevancy of evidence applies not only to the oral testimony of witnesses, but to written evidence as well.[44]

Voluminous Document or Documents. — Where a voluminous document which upon its face is irrelevant is offered in evidence and its

expression in question had any definite trade meaning the refusal to permit the question to be answered was proper.

43. In Howard *v.* Coshow, 33 Mo. 118, for the purpose of showing that a certain trust debt was fictitious, the plaintiff offered to prove that in a conversation between the witness and the alleged creditor a day or two before making the deed of trust, and in the absence of the defendant debtor, the creditor stated that the only money the defendant owed him was a certain amount for a certain debt. Objection was made to the competency of the evidence, and to obviate the objection the plaintiff stated to the court that he expected to show by the statements of the creditor, and other testimony, but without specifying what particular facts were to be proved, except that the creditor had said that the deed was given without a legal consideration, that it was made for the purpose of defrauding the defendant's creditors, and that the creditor in question was a party to the fraud. Thereupon the trial court admitted the evidence against the renewed objection of the defendant. In holding the action of the trial court to be error the court said: "The question is a question of practice rather than of evidence. It cannot be affirmed that the statements of Murdock are evidence against Coshow, in the absence of proof tending to establish a conspiracy between them to defraud the creditors of Coshow; nor is it denied by the defendant's counsel that the statements are competent if such a state of case be established. The question is, where the declarations of the supposed conspirator are offered, in anticipation of proof tending to establish the conspiracy, whether it is enough for the party offering the declarations to state to the court generally the conclusion or result of the proof to be offered, as in this case, or whether he ought to disclose the particular facts or circumstances which he expects to prove to establish the result. We think the safer and better practice would require the facts to be proved first to be disclosed, so as to enable the court to judge of their sufficiency if proved; and if insufficient, to relieve the case from any improper influence of the impertinent matter. If the opposite practice, however, was adopted, this court would not for that cause interfere with the judgment of the lower court, except where manifest injury had resulted therefrom to the adverse party."

44. Willis *v.* Sanger, 15 Tex. Civ. App. 655, 40 S. W. 229.

A paper that does not show upon its face any connection with the case, nor with any evidence already adduced, is properly excluded unless the party offers to show its connection. Grover & B. S. M. Co. *v.* Newby, 58 Ind. 570.

In Jones *v.* Stevens, 5 Metc. (Mass.) 373, an action to recover for work and labor wherein the defense was that the work was done jointly by the plaintiff and another, the defendant offered various letters written to him by the person claimed to have been the plaintiff's partner as evidence tending to show a partnership, but it was held that as the plaintiff was not a party to the correspondence, and no evidence was offered by the defendant to show that the letters had been communicated to him as they were received, their exclusion was proper.

Whenever the offer in its description of a paper proposed to be given in evidence differs from the paper, the paper itself is to determine whether it be admissible. Keedy *v.* Newcomer, 1 Md. 241. See also Hammond *v.* O'Hara, 2 Har. & G. (Md.) 111.

introduction objected to, it is the duty of the party offering it to state the object or purpose of its introduction, or point out its relevancy or materiality.[45]

4. Separating Legal From Illegal Evidence. — Where an offer of proof as made involves matters not proper, and a timely and sufficient objection is interposed, it is the duty of the party to separate the legal from the illegal evidence and make proper offer of the former; otherwise he is in no position to complain of the exclusion of the whole.[46] But the trial judge may separate the legal from the

45. In German Ins. Co. *v.* Frederick, 58 Fed. 144, 7 C. C. A. 122, the court said: "Under these circumstances it was not the duty of the court to explore this voluminous document to ascertain whether it might not be competent evidence for some purpose. A mere offer to introduce a voluminous record in evidence, which upon its face has no relation to the cause on trial, does not impose on the court the obligation of examining such record and a mass of previous evidence, for the purpose of ascertaining whether such record, or some part of it, is not relevant and competent to prove some direct or collateral issue in the case. Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91; Railroad Co. *v.* Smith, 21 Wall. 255. Good faith to the court and the opposing party requires, when the admission of the document is objected to and its competency is not apparent, that the party offering it shall state the purpose for which it is offered."

46. *Alabama.* — Pike Co. *v.* Hanchey, 119 Ala. 36, 24 So. 751; Jeans *v.* Lawler, 33 Ala. 340; Barlow *v.* Lambert, 28 Ala. 704, 65 Am. Dec. 374; Smith *v.* Wooding, 20 Ala. 324; Melton *v.* Troutman, 15 Ala. 535; West *v.* Kelly, 19 Ala. 353, 54 Am. Dec. 192; Johnson *v.* Cunningham, 1 Ala. 249.

Arkansas. — George *v.* Norris, 23 Ark. 121.

California. — Board of Education *v.* Keenan, 55 Cal. 642; Bostwick *v.* Mahoney, 73 Cal. 238, 14 Pac. 832.

Georgia. — Skellie *v.* Central R. & B. Co., 81 Ga. 56, 6 S. E. 811; Herndon *v.* Black, 97 Ga. 327, 22 S. E. 924.

Illinois. — Cressey *v.* Kimmel, 78 Ill. App. 27.

Indiana. — Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91; Sohn *v.* Jervis, 101 Ind. 578, 1 N. E. 73; Cuthrell *v.* Cuthrell, 101 Ind. 375; Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686; Cincinnati, I. St. L. & C. R. Co. *v.* Roesch, 126 Ind. 445, 26 N. E. 171.

Maine. — Tibbetts *v.* Baker, 32 Me. 25.

Minnesota. — Reynolds *v.* Franklin, 47 Minn. 145, 49 N. W. 648; Beard *v.* First Nat. Bank of Minneapolis, 41 Minn. 153, 43 N. W. 7; Steel *v.* Leonard, 20 Minn. 494; Mueller *v.* Jackson, 39 Minn. 431, 40 N. W. 565.

Montana. — Farleigh *v.* Kelley, 28 Mont. 421, 72 Pac. 756; Yoder *v.* Reynolds, 28 Mont. 183, 72 Pac. 417.

New York. — Hosley *v.* Black, 26 How. Pr. 97; Walmsley *v.* Darragh, 14 Misc. 566, 35 N. Y. Supp. 1075.

Pennsylvania. — Sennett *v.* Johnson, 9 Pa. St. 335; First Nat. Bank *v.* Peltz, 176 Pa. St. 513, 35 Atl. 218, 53 Am. St. Rep. 686, 36 L. R. A. 832; Mease *v.* United Trac. Co., 208 Pa. St. 434, 57 Atl. 820; Wharton *v.* Douglass, 76 Pa. St. 273.

South Dakota. — First Nat. Bank *v.* North, 2 S. D. 480, 51 N. W. 96.

Vermont. — Gregg *v.* Willis, 71 Vt. 313, 45 Atl. 229.

Wyoming. — Stickney *v.* Hughes, 12 Wyo. 397, 75 Pac. 945.

In Clark *v.* Ryan, 95 Ala. 406, 11 So. 22, an action to recover damages for breach of contract of employment, it was held proper to exclude an offer on the part of the defendant to show that the plaintiff was addicted to the excessive use of intoxicating liquors and that he had been indicted for the offense of public drunkenness; that "offered as a whole as this testimony was there was no error in the ruling. The second clause was not legal evidence, and it was not the duty of the court to separate the legal

illegal, if in the exercise of his discretion he sees fit so to do.[47] And this rule requiring counsel offering evidence to separate the legal from the illegal and offer the former applies with equal force to written evidence.[48]

from the illegal, and thus do for the appellant what he should do for himself."

A party who mingles competent with incompetent evidence has no just reason to complain if the whole offer be rejected. It is uniformly held that a party must in offering evidence separate the competent from the incompetent and offer only the former, for he has no right to impose that duty upon the court. Shewalter *v.* Bergman, 123 Ind. 155, 23 N. E. 686.

In Maryland the rule is that in the case of evidence offered as a whole it is not to be rejected simply because some portion of the evidence embraced in the offer is not admissible. Gorsuch *v.* Rutledge, 70 Md. 272, 17 Atl. 76; Percy *v.* Clary, 32 Md. 245. See also Carroll *v.* Granite Mfg. Co., 11 Md. 399; Waters *v.* Dashiell, 1 Md. 455.

47. Smith *v.* Arsenal Bank, 104 Pa. St. 518; Citizens & Miners Sav. Bank *v.* Gillespie, 115 Pa. St. 564, 9 Atl. 73; Stickney *v.* Hughes, 12 Wyo. 397, 75 Pac. 945.

In Mundis *v.* Emig, 171 Pa. St. 417, 32 Atl. 1135, it was held that while the general rule is that when an offer is made as a whole of evidence partly admissible and partly inadmissible the judge may reject it all and is not bound to separate the good from the bad, yet he may do so; and that where an offer is clearly competent in substance and the objection goes only to a small or unimportant part it may be the duty of the judge to point out, or at least call upon the party objecting to specify, the parts objected to.

48. *Alabama.* — Pritchett *v.* Munroe, 22 Ala. 501; Crutcher *v.* Memphis & C. R. Co., 38 Ala. 579.

Arkansas. — St. Louis, I. M. & S. R. Co. *v.* Faisst, 68 Ark. 587, 61 S. W. 374; Nicks *v.* Rector, 4 Ark. 251.

Connecticut. — Dunham *v.* Boyd, 64 Conn. 397, 30 Atl. 62.

Georgia. — Burch *v.* Swift, 118 Ga. 931, 45 S. E. 698.

Iowa. — Hidy *v.* Murray, 101 Iowa 65, 69 N. W. 1138.

Maine. — Stewart *v.* Norton, 71 Me. 128.

New York. — Duchess Co. *v.* Harding, 49 N. Y. 321; Gardner *v.* Barden, 34 N. Y. 433.

Vermont. — Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907.

The rejection of written evidence on the ground of its voluminous character and that it contains a large amount of matter not relevant is not error where the party offering it does not designate the parts relevant and which he desires to have read to the jury. McGrew *v.* Missouri Pac. R. Co., 109 Mo. 582, 19 S. W. 53.

Counsel cannot throw upon the court the duty of inspecting files of papers or manuscript volumes offered in bulk to see whether there is anything in them which is properly admissible, nor complain if, when thus offered, they are excluded. It is the duty of counsel to select the parts of such documents which they claim to be admissible, and point them out to the opposite counsel, and to the court, so that it may be known in the first place whether the opposite party will object, and, if he does, that the court may pass upon the objection without waste of time in ascertaining whether in a mass of irrelevant matter there may be something that might have a bearing upon the case. A different practice would tend more to confuse than enlighten the jury, and if counsel were at liberty to offer evidence of this description in gross and take their chance of having it admitted without objection, or sustaining exceptions if it turned out that there was something in it that might be deemed admissible, we should expect to see it always so presented as to afford the greatest scope for vehement assertion as to what appeared by it, assertion that it would be difficult for the opposing counsel or the jury either to verify or disprove in any reasonable time, and which

5. Offer of Portion of Document. — A party offering a document need offer only such portion thereof as he may deem pertinent and material to his case,[49] subject, of course, to the right of his adversary

accordingly true or false, ought to have no influence in the determination of the case, but might or might not have such influence according to the prejudices of the jury touching the veracity of counsel. Virgie *v.* Stetson, 73 Me. 452.

In Hamberg *v.* St. Paul F. & M. Ins. Co., 68 Minn. 335, 71 N. W. 388, an action on a fire insurance policy, defendant offered in evidence the two written examinations of plaintiff, each taken after the loss at the instance of defendant, pursuant to provisions in the policy, and signed by the plaintiff before a notary public. The court, on plaintiff's objection, rejected the offer. Then defendant offered each written examination separately, and, this being refused, proceeded to offer separately each question and answer in each document. These offers were also refused, and all of these rulings were assigned as error. In holding the action of the trial judge to be proper, the court said: "The examinations in question were very long, and the statements taken thereon are largely a mere repetition of the evidence which plaintiff had already given on the trial. There are a number of discrepancies and contradictions between some of plaintiff's evidence as given on the trial and some of his statements made on these examinations, and defendant was entitled to introduce in evidence these particular statements, not merely for the purpose of impeachment, but as original evidence, for these statements are material admissions made by the plaintiff himself, which tended to contradict his evidence given on the trial. It was the duty of defendant, not of the court, to pick these statements out of the large amount of immaterial matter offered, and defendant could not evade that duty by offering separately each question and answer."

Letters When Offered as a Whole, a part of which are irrelevant, are properly excluded in mass. Robinson *v.* Stuart, 73 Tex. 267, 11 S. W. 275.

Offering Two Instruments in Connection With Each Other cannot have the effect of removing the objections to the inadmissible one, but necessarily has the effect of rendering the other inadmissible also, although it may be clearly admissible if offered disconnected from, and independent of, the inadmissible instrument. Hill *v.* Taylor, 77 Tex. 295, 14 S. W. 366. But where two documents offered in evidence are not joint, one having no connection with the other, and not being offered at the same time, it is error upon the part of the court to exclude both because one of them is not admissible. St. Louis, I. M. & S. R. Co. *v.* Faisst, 68 Ark. 587, 61 S. W. 374.

In Warshauer *v.* Jones, 117 Mass. 345, a writ of entry to recover land, it was held that a deed offered by the tenant should have been received notwithstanding it contained recitals which did not affect the demandant; that that fact did not warrant its exclusion altogether, and that "any improper influence from those recitals should have been guarded against by suitable directions as to the use to be made of the deed."

49. Slingloff *v.* Bruner, 174 Ill. 561, 51 N. E. 772; Thayer *v.* Hoffman, 53 Kan. 723, 37 Pac. 125; Imperial Hotel Co. *v.* H. B. Claflin Co., 55 Ill. App. 337.

Contra First Nat. Bank *v.* Taliaferro, 72 Md. 164, 19 Atl. 364, where it is held that in the case of an offer of the printed part of a document, thus implying that there is some other part in writing, the offer is properly rejected; it should embrace the entire document. "If admissible at all it was only admissible in its entirety." And the same principle was applied in Haddaway *v.* Post, 35 Mo. App. 278, in the case of an offer of the written portion.

But a Fragment of a Letter from which alone it cannot be determined just what it means and what weight should be given to it may properly be excluded where there is no offer to show the contents of the whole of the letter. Anderson *v.* Anderson,

to offer and read the remainder so far as may be pertinent and material.[50] But in offering a part of a writing it is at least necessary to point out definitely the part offered.[51]

13 Tex. Civ. App. 527, 36 S. W. 816.

50. Glover *v.* Stevenson, 126 Ind. 532, 26 N. E. 486; Thayer *v.* Hoffman, 53 Kan. 723, 37 Pac. 125; Noble *v.* Fragnant, 162 Mass. 275, 38 N. E. 507.

Where a part of a record in a suit which was compromised is offered to prove the judicial admission of one of the parties thereto, it is competent for the other party to offer the compromise in evidence to show the final disposition of the suit and the matters settled by the compromise and which were at issue in the litigation. Moniotte *v.* Lieux, 41 La. Ann. 528, 6 So. 817.

In Wilkerson *v.* Eilers, 114 Mo. 245, 21 So. 514, plaintiff's counsel was permitted on cross-examination of defendant's witnesses to call their attention to statements made by them in certain depositions, and to ask them if they had not at that time made certain statements in apparent conflict with those testified to by them on the trial, whereupon defendant offered and asked permission of the court to read the whole of the deposition, which was refused. In holding this to be error the court said: "When a witness has been examined in regard to the contents of any paper writing, written or signed by himself, then, as a matter of justice and fairness to him, the entire paper should be read, or at least as much of it as has any bearing upon the questions in regard to which he has been interrogated. The witness would have the unquestionable right to see the paper before answering if he had not made certain statements contained therein, and the party using it would have no right to take an unfair advantage of him by making garbled extracts therefrom, and calling his attention thereto, for the purpose of contradicting him, when, if the whole instrument was read, such apparent contradiction would not appear, or rather would be dispelled. This is so even though no part of the deposition should be read to the jury by counsel conducting the examination at the time. By calling the attention of the witnesses to such statements in the presence of the jury, and then not reading the depositions at all, or any part thereof, so that the jury might know whether or not the statements were in conflict, was treating the witnesses unfairly, and leaving the jury to draw their own inferences from insinuations and impressions made therefrom which may have been erroneously formed by reason of the intimations of counsel in regard to the statements in the depositions."

51. That is, the pages, paragraphs, sentences or words, and when this is not done the whole or none should go to the jury. Jones *v.* Grantham, 80 Ga. 472, 5 S. E. 764.

"OFFICE COPY."—See Records.

OFFICE FOUND.—See Escheat.

OFFICERS.

By Glenda Burke Slaymaker, LL. B.

CROSS-REFERENCES:

Bribery;
Corporations;
Elections; Extortion;
False Personation;
Municipal Corporations;
Obstructing Justice;
Sheriffs and Constables.

I. ELIGIBILITY.

Burden of Proof. — Where one claims an office under statutory authority, he must show that he has the qualifications required by such statute.[1] The election and commission of one to a particular office, however, is strongly presumptive of one's eligibility.[2] That a certificate of election is even *prima facie* evidence of eligibility has, however, been denied.[3]

II. APPOINTMENT AND ELECTION.

1. Presumptions and Burden of Proof. — A. In General. — If one has acted as a public officer and is generally recognized to be such, in the absence of countervailing evidence it will be presumed that he has been regularly appointed to the office which he assumes to exercise.[4]

B. As to Preliminary Matters From Ultimate Fact. When the legality of an appointment by the executive depends upon the existence of a particular state of facts, it will be presumed, from the exercise of the power of appointment, that the facts req-

1. Burnham *v.* Sumner, 50 Miss. 517; State *v.* Williamstown Etc. Co., 24 N. J. L. 547.

2. People *v.* Connell, 28 Ill. App. 285; Hannon *v.* Grizzard, 96 N. C. 293, 2 S. E. 600. But see Smith *v.* People, 44 Ill. 16.

In State *v.* Ring, 29 Minn. 78, 11 N. W. 233, a criminal prosecution, the court said: "It is claimed that the conviction is erroneous because there was no evidence that Baumhager was eligible to the office to which he was appointed. From an appointment to a public office regular in form, by a body or officer in whom rests the appointing power, the eligibility of the appointee is presumed. It is not necessary, unless it be so in a case directly involving the issue of his eligibility, to prove that he was a citizen of the United States, or had declared his intentions to become such, that he was twenty-one years of age, and had resided in the state four months prior to such appointment."

3. Patterson *v.* Miller, 2 Metc. (Ky.) 493; Hoglan *v.* Carpenter, 4 Bush (Ky.) 89.

4. State *v.* Nield, 4 Kan. App. 626, 45 Pac. 623; Nalle *v.* Austin, 23 Tex. Civ. App. 595, 56 S. W. 954; Carter *v.* Sympson, 8 B. Mon. (Ky.) 155; McCoy *v.* Curtice, 9 Wend. (N. Y.) 17; Allen *v.* State, 21 Ga. 217, 68 Am. Dec. 457; Bowley *v.* Barnes, 8 A. & E. 1037, 55 E. C. L. 1037; Spaulding *v.* Vincent, 24 Vt. 501.

Prosecution for Assaulting Police Officer. — Com. *v.* Kane, 108 Mass. 423.

As against a collateral attack, the presumption of a compliance with all the conditions authorizing an appointment is conclusive where an appointment has been duly made, with qualification thereunder, and an entering upon the discharge of the duties of the particular office. Board of Com'rs *v.* Gould, 6 Colo. App. 44, 39 Pac. 895.

"Acting County Clerk Pro Tem." Presumption of appointment of officer as provided where duties of office are exercised;" Hendricks *v.* Huffmeyer (Tex. Civ. App.), 27 S. W. 777. And this presumption will be stronger still if the official character assumed has been recognized by the appointing power. Callison *v.* Hedrick, 15 Gratt. (Va.) 244.

De Jure Officer. — The presumption, from the undisturbed exercise of a public office, of the valid-

uisite to a valid appointment existed at the time the appointment was made, and that the appointment so made was regular and valid.[5]

C. Appointment as Presumptive of Vacancy. — The exercise of the power of appointment and the issuing of a commission to an appointee is presumptive, but not conclusive, evidence of the existence of a vacancy in the office to which the appointment is made.[6]

2. Mode of Proof. — A. Certificate of Election. — A certificate of election issued by the proper authority is evidence in a proceeding in which the question arises collaterally that the party to whom the same has been issued has been elected to the office therein designated.[7]

B. Commission. — A commission is not of itself the appointment to office, but *prima facie* evidence only of the holder's right to exercise the office to which he is commissioned.[8] Where title

ity of the appointment to the office so exercised is sufficient to sustain a finding that such officer is a *de jure* officer, Delphi School District *v.* Murray, 53 Cal. 29; Colton *v.* Beardsley, 38 Barb. (N. Y.) 29.

5. Thus in a case in which the governor was authorized to make an appointment to the office of territorial treasurer during a recess of the territorial council upon the death or resignation of the incumbent, it will be presumed that the prior incumbent was dead or had resigned, or when the prior incumbent is a party to the proceeding, that he had resigned before the appointment of his successor was made. Eldodt *v.* Territory, 10 N. M. 141, 61 Pac. 105.

6. Vacancy Prima Facie Presumed From Appointment.

Alabama. — Hill *v.* State, 1 Ala. 559.

California. — People *v.* Shorb, 100 Cal. 537, 35 Pac. 163, 38 Am. St. Rep. 310; People *v.* Marin Co., 10 Cal. 344.

Indiana. — Board of Com'rs *v.* Johnson, 124 Ind. 145, 24 N. E. 148, 19 Am. St. Rep. 88; State *v.* Harrison, 113 Ind. 434, 16 N. E. 384.

Kentucky. — Tompert *v.* Lithgow, 1 Bush. 176; Page *v.* Hardin, 8 B. Mon. 648, 669.

Missouri. — State *v.* Seay, 64 Mo. 89, 27 Am. Rep. 206.

Texas. — Honey *v.* Graham, 39 Tex. 1.

7. The certificate of election issued by a board of election examiners to a candidate is conclusive evidence of the fact of his having been elected, unless overcome in some manner provided by the statute. Patterson *v.* Miller, 2 Metc. (Ky.) 493.

8. *Alabama.* — Thompson *v.* State, 21 Ala. 48; Hill *v.* State, 1 Ala. 559; Wammack *v.* Holloway, 2 Ala. 31.

Arkansas. — State *v.* Johnson, 17 Ark. 407.

Colorado. — Union Depot & R. Co. *v.* Smith, 16 Colo. 361, 27 Pac. 329.

Georgia. — State *v.* Towns, 8 Ga. 360; Hardin *v.* Colquitt, 63 Ga. 588; Allen *v.* State, 21 Ga. 217, 68 Am. Dec. 457.

Indiana. — State *v.* Chapin, 110 Ind. 272, 11 N. E. 317; State *v.* Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228.

Louisiana. — State *v.* Wrotnowski, 17 La. Ann. 156; State *v.* Blankston, 23 La. Ann. 375.

Massachusetts. — Com. *v.* Kane, 108 Mass. 423; Com. *v.* Tobin, 108 Mass. 426, 11 Am. Rep. 375.

New Mexico. — Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.

Pennsylvania. — Ewing *v.* Filley, 43 Pa. St. 384; Kerr *v.* Trego, 47 Pa. St. 292.

South Carolina. — Jeter *v.* State, 1 McCord 233; State *v.* Lylies, 1 McCord 238.

Where, in a contest for an office,

to an office is derived solely from executive appointment, the commission of the executive is the only legal evidence of such title. But it is otherwise when the office is elective, and the omission of the executive in the latter circumstances to issue a commission is not necessarily fatal to a claim of title.[9]

C. By Letter. — The making of an appointment to office may be proven by a letter written by the appointing officer, or by another at his direction, when the agency and authority of the other are proven.[10]

D. Proof by Parol. — Unless by statute otherwise provided, an appointment to office need not be evidenced by a writing, but may be proved by parol.[11]

E. Of Appointment to Foreign Office. — The appointment of a foreign officer is established in the same manner in which the appointment of a domestic officer is proven.[12]

F. Secondary Evidence of Letter of Appointment. — When the written appointment of a deputy to office is lost or cannot be produced, upon laying proper ground therefor parol or other secondary evidence of the appointment may be received.[13]

3. Sufficiency of Evidence. — Proof that an authority invested with the power of appointment has exercised such power by an

commissions have been issued to each of the contestants, the later commission reciting that the former had been issued in error, the second commission is the higher authority, and confers *prima facie* right to the office. State *v* Capers, 37 La. Ann. 747 (under the "Intrusion Into Office Act").

"The transmission of the commission to the officer is not essential to his investiture of the office. If by any inadvertence or accident it should fail to reach him, his possession of the office is as lawful as if it were in his custody. It is but evidence of those acts of appointment and qualification which constitute his title, and which may be proved by other evidence where the rule of law requiring the best evidence does not prevent." United States *v.* Le Baron, 19 How. (U. S.) 73.

9. Hardin *v.* Colquitt, 63 Ga. 588; Shannon *v.* Baker, 33 Ind. 390; State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367; Beal *v.* Morton, 18 Ind. 346.

10. Florance *v.* Richardson, 2 La. Ann. 663.

11. Allen *v.* State, 21 Ga. 217, 68 Am. Dec. 457; State *v.* Meder, 22 Nev. 264, 38 Pac. 668.

12. Spaulding *v.* Vincent, 24 Vt. 501.

13. **Deputy Clerk of Court.** "The second error is assigned to the admission of oral proof to show the appointment of a deputy clerk. We think the loss of the writing was sufficiently shown to admit secondary evidence. The clerk making the appointment, who was the custodian of the record, aided by the attorney for appellee, had made diligent search in his office for the writing prior to the first trial, and failed to find it, and had never seen it since, though he had removed all the papers in his office from one office to another." Cabell *v.* Holloway, 10 Tex. Civ. App. 307, 31 S. W. 201.

Deputy United States Marshal. When the written authority of a deputy is shown to be lost, parol evidence of the fact of his appointment and of the services he has rendered under it is competent to prove his appointment. Wright *v.* United States, 158 U. S. 232.

open and unequivocal act in favor of the party claiming the right to an office is sufficient to establish the appointment.[14]

III. ACCEPTANCE AND QUALIFICATION.

1. Presumptions and Burden of Proof. — Qualification for and acceptance of office, like appointment, may be presumed in favor of third parties from one's assuming to exercise the functions and to perform the duties of such office.[15]

2. Proof of Acceptance. — In the absence of a statute requiring particular evidence of acceptance, the fact may be established by indirect evidence and implied from the officer's conduct or other appropriate facts and circumstances manifesting an intention to accept the office.[16]

14. Hoke *v.* Field, 10 Bush. (Ky.) 144, 19 Am. Dec. 58.

Temporary Power of Appointment. — In Clark *v.* Trenton, 49 N. J. L. 349, 8 Atl. 509, the relator in a proceeding by mandamus sought to establish his right to the office of a member of the respondent board by virtue of an appointment by the president of the common council, acting as mayor, under the statute authorizing the president of the common council to act as mayor only when the mayor was unable to discharge his duties by reason of absence from the city or other cause. It was held that the relator should show not only the exercise of the power of appointment by the president, but also his right to act in the mayor's stead.

When the question arises whether a commission, issued by the governor of a state, was an exercise of the appointing power vested in the executive, or was made at the direction of the legislature, where that body has usurped the power of appointment, the records in the executive office are competent to show that such commission was issued on account of the election by the legislature. The issuing of the commission by the governor will not, under such circumstances, be taken to have been to his own appointee by reason of the presumption that the governor knew the law, and that the power of appointment therefore was in him. State *v.* Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228.

15. Allen *v.* State, 21 Ga. 217, 68 Am. Dec. 457.

In *quo warranto* the holding of a certificate of election is *prima facie* evidence that the possessor qualified, as are also giving bond and taking the oath. People *v.* Clingan, 5 Cal. 389.

The acceptance of an office by a person appointed or elected thereto may be proved, so as to make him at least an officer *de facto*, by the acts of the officer. Johnson *v.* Wilson, 2 N. H. 202, 99 Am. Dec. 50.

Protection of Public. — This presumption, it will be noted, is indulged only in the interest and for the protection of the public. If one assuming to be a public officer relies upon his character as such, whether as affirmative or defensive matter, he must by appropriate evidence show that he has duly qualified therefor. Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100; Blake *v.* Sturtevant, 12 N. H. 567; Rounds *v.* Mansfield, 38 Me. 586; Rounds *v.* Bangor, 46 Me. 541, 74 Am. Dec. 469. See, however, People *v.* Clingan, 5 Cal. 389.

16. Johnston *v.* Wilson, 2 N. H. 202, 99 Am. Dec. 50.

The taking of the proper official oath and giving bond as required by the statute are evidence of acceptance. Smith *v.* Moore, 90 Ind. 294.

Even when a written acceptance is required the courts have in general construed such statutes to be directory only. State *v.* Weatherby, 17 Neb. 553, 23 N. W. 512. In Frans *v.* Young, 30 Neb. 360, 46 N. W. 528, 27 Am. St. Rep. 412, the court said:

3. Oath of Office. — The taking of the oath of office, as one of the essential elements of qualification, may be presumed from the fact that the officer has received his commission or certificate of election and has entered upon the discharge of the duties of his office.[17] It will not be presumed that a *de facto* officer neglected to take any step essential to his qualifying, so that if the record of the appropriate authority is silent as to the taking of the oath of office it will not be presumed that the oath was not administered, especially when the taking of the oath is not required so to appear.[18] *A fortiori* would the taking of the proper statutory oath

"Did the failure of the relator to file his written acceptance of the office within ten days create a vacancy in the office? Section 3 of subdivision 3 of the school laws reads as follows: 'Within ten days after the election, these several officers shall file with the director a written acceptance of the office to which they shall have been respectively elected, which shall be recorded by said director.' The section contains no provision that the office shall become vacant if the acceptance is not filed. . . . It is evident that it was not the intention of the legislature that the failure of a school district officer to file his acceptance should create a vacancy. The object and purpose of the law requiring school district officers to file written acceptance was to apprise the public that the person elected intended to discharge the duties of the office. The pleadings show that the relator, immediately after his election, entered upon the performance of the duties of moderator by presiding at school district meetings, countersigning orders on the county and school district treasurers for moneys belonging to his district, and discharging all other duties required of him by law for more than one year, without objection from any one. This was as much an acceptance of the trust as would have been the filing of a written acceptance."

Except where the failure so to accept is expressly declared to have the effect of a refusal to serve. Bentley *v.* Phelps, 27 Barb. (N. Y.) 524.

17. Panton Tpke. Co. *v.* Bishop, 11 Vt. 198, People *v.* Clingan, 5 Cal. 389.

The certificate that an officer "was qualified by" a person named is not evidence of the taking of the statutory oath of office. Ainsworth *v.* Dean, 21 N. H. 400.

Referee. — When a referee is required to be sworn, in the absence of evidence to the contrary, it will be presumed that he was duly sworn. Story *v.* De Armond, 77 Ill. App. 74.

18. In the absence of a statute requiring it to appear of record that a secretary *pro tem.* of a township board was sworn, it cannot be presumed, the record being silent, that he was not sworn. First Nat. Bank *v.* St. Joseph, 46 Mich. 526, 9 N. W. 838. The court says: "If the clerk is not present, then some one else must necessarily act in that capacity; because otherwise the clerk might defeat the lawful action of the board by his resignation or absence. The power to appoint a temporary secretary is a necessary incident to corporate meetings, and his record and doings in that capacity must be held valid, if he has been intrusted with the functions, and cannot be invalidated by any presumption of his not being sworn. Hutchinson *v.* Pratt, 11 Vt. 402. We have no statute which declares the acts of an officer *de facto* invalid for any such reasons. And in Sibley *v.* Smith, 2 Mich. 486, it was held that there could be no presumption that an oath required by law was not taken by an officer where there is nothing requiring it to appear. Whether we regard Hatch as a regularly appointed clerk to fill a vacancy under section 693 of the Compiled Laws, or as a merely temporary substitute for particular purposes, makes no difference in this regard. We cannot presume that he

be presumed where the record thereof recites that the officer took the oath of office;[19] though a record merely that an officer was sworn or duly sworn[20] or that he qualified[21] is not sufficient to show that the prescribed oath was taken. The official certificate or the testimony of the officer administering the oath is more authentic than the mere statement in the report of such officer that he had been duly sworn. Such a statement might be regarded as *prima facie* evidence, but it could not be taken to be conclusive.[22] To entitle one claiming an office to be sworn as an officer it is sufficient that he present to the proper authority *prima facie* evidence of his rights in the premises.[23]

4. The Bond. — A. In General. — When an officer is required to give an official bond, if sued for an act which he justifies as having been done by him in an official capacity he must show that a proper bond was given and duly approved.[24] When the giving and approval of a bond are essential to a liability against the officer, such facts may be presumed from the officer's exercise of the functions of the office with relation to which he is sued, under an apparent authority.[25] When an officer has not qualified as re-

has failed to make any necessary qualification."

19. Harwood *v.* Marshall, 9 Md. 83; Scammon *v.* Scammon, 28 N. H. 419.

An entry showing the number of votes received by the various candidates for office, with a recital after the name of one of the candidates that he was declared elected and was sworn, is sufficient proof of the fact that such officer was sworn as required by law. Com. *v.* Sullivan, 165 Mass. 183, 42 N. E. 566.

20. Bennett *v.* Treat, 41 Me. 226; Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100; Blake *v.* Sturtevant, 12 N. H. 567; Cardigan *v.* Page, 6 N. H. 182.

21. Gibson *v.* Bailey, 9 N. H. 168; Ainsworth *v.* Dean, 21 N. H. 406.

22. Dollarhide *v.* Board of Com'rs of Muscatine Co., 1 Greene (Iowa) 158.

23. Fox *v.* McDonald, 101 Ala. 51, 13 So. 416; People *v.* Dean, 3 Wend. (N. Y.) 438; People *v.* Straight, 128 N. Y. 545, 28 N. E. 762.

24. Rounds *v.* Mansfield, 38 Me. 586.

Where the taking of an oath and the giving of a bond are required by the statute, the doing of these things is necessary to give title *de jure*. Taking the oath only, followed by a failure to give bond with proper sureties, is a non-acceptance of the trust. Morrell *v* Sylvester, 1 Me. 248.

Implied Approval Sufficient. People *v.* Breyfogle, 17 Cal. 504; Rogers *v.* Pugh, 1 Disney (Ohio) 443; People *v.* Blair, 82 Ill. App. 570, *affirmed* 181 Ill. 460, 54 N. E. 1024.

The approval of a bond may be inferred from the fact that it is received and retained by the approving authority for a considerable time without objection. Postmaster General *v.* Norvell, Gilp. 106, 19 Fed. Cas. No. 11,310; Pepper *v.* State, 22 Ind. 399; Young *v.* Com., 6 Binn. (Pa.) 88; Apthorp *v.* North, 14 Mass. 167.

The following testimony given by an approving officer was held incompetent as being the mere opinion of the witness: "Finding the bond in this condition, without an indorsement of approval, makes me think it may have been presented to me for approval and rejected." McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315.

25. State *v.* Fredericks, 8 Iowa 553; McClure *v.* Colclough, 5 Ala. 65; Apthorp *v.* North, 14 Mass. 167.

quired by law by giving bond within the time named, by reason of which under the statute the office to which he was elected becomes vacant, the burden is upon the officer, if he would retain the office, to show an excuse for having failed to give bond as required.[26]

B. Proceedings To Compel Approval. — In a proceeding to compel the approval of a bond tendered, the officer has the burden to establish every fact upon which his right to have the same approved and to enjoy the office is founded.[27]

IV. TITLE AND TENURE.

1. Presumptions and Burden of Proof. — In a proceeding brought by the state, in its own name or in the name of its own officer, and in its own behalf, for the ouster of an alleged usurper, the respondent has the burden to establish his title to the office in controversy.[28] But if the proceeding is on the relation and for the benefit of another party who claims the office for himself, then the relator has the burden to establish his title.[29]

The execution of a proper official bond may be presumed from the fact that the one claiming an office is acting as an officer under a certificate of election thereto. People *v.* Clingan, 5 Cal. 389.

When a bond is required to be given to the approval of the clerk of court, an indorsement on a bond tendered that it is approved as to the sufficiency of the sureties is a sufficient approval of the bond in the absence of any evidence showing the bond to be defective. State *v.* Bokien, 14 Wash. 403, 44 Pac. 889.

When one in possession of an office executes and delivers a bond conditioned according to law, the state will be presumed to have waived any past delinquency as to the time and manner of giving the bond. State *v.* Cooper, 53 Miss. 615.

Notwithstanding an officer may have failed to qualify before a date named, whereby, *ipso facto,* under the statute the office became vacant, if thereafter he qualifies by giving a bond, that is accepted by the proper authority, and enters upon the discharge of the duties of the office, the officer and his sureties will be bound on the bond. The defense resting on such facts, he is estopped, in the public interest, to assert. Kelly *v.* State, 25 Ohio St. 567-577.

26. State *v.* Johnson, 100 Ind. 489.

27. McMillin *v.* Richards, 45 Neb. 786, 64 N. W. 242.

In a mandamus proceeding by a re-elected officer to compel the approval of an official bond the relator has the burden to show, before his bond shall be approved, that he has complied with the statute requiring a re-elected officer to produce or account for all public funds coming into his hands during the previous term. Woodward *v.* State, 58 Neb. 598, 79 N. W. 164.

28. **Burden in Action by State on Its Own Behalf.** — Relender *v.* State, 149 Ind. 283, 49 N. E. 30; Tillman *v.* Otter, 93 Ky. 600, 20 S. W. 1036, 29 L. R. A. 110; State *v.* Harris, 3 Ark. 570; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358; Stack *v.* Com. (Ky.), 26 Ky. L. Rep. 343, 81 S. W. 917.

29. **Action for Benefit of Claimant.** — Toney *v.* Harris, 85 Ky. 453, 3 S. W. 614; McCall *v.* Webb, 125 N. C. 243, 34 S. E. 430; Relender *v.* State, 149 Ind. 283, 49 N. E. 30.

If the complaining party in such action prevail at all, he is required to do so on the strength of his own title. McGee *v.* State, 103 Ind. 444, 3 N. E. 139; Reynolds *v.* State, 61 Ind. 392, 403.

In Tillman *v.* Otter, 93 Ky. 600, 20 S. W. 1036, 29 L. R. A. 110, the court said: "A question has been raised as to the burden of proof,

2. Necessary Evidence of Title. — Proof of appointment or election to an office and a proper commission to the party claiming under such election or appointment is *prima facie* evidence of title to the office.[30] When the question arises collaterally only, and not in a proceeding brought to try title directly, such proof will be conclusive.[31] The commission is the best and highest evidence of title to an office when one is authorized to be issued.[32] When the question of official character or title arises collaterally it may be established by parol and without the production of the record evi-

and, without discussing the sufficiency of the answer, it is sufficient to say that as the plaintiff, Otter, was asserting his title to the office, it was incumbent on him to make out his case, as it is well settled that such a proceeding is like the enforcement of any other private right, when prosecuted by or in the name of the party claiming to have been injured; but when in the name of the Commonwealth, alleging the usurpation of an office by one of its citizens, the burden is on the defendant to show by what authority he holds it. State *v.* Harris, 3 Ark. 570; People *v.* Utica Ins. Co., 15 Johns. 358; Miller *v.* English, 21 N. J. L. 317."

30. State *v.* Johnson, 35 Fla. 2, 16 So. 786.

The commission of a captain of a light infantry company raised at large by enlistment is sufficient evidence of the organization of such company. Lowell *v.* Flint, 20 Me. 401.

Under the Louisiana statute, a party commissioned to an office is *prima facie* entitled to the office he claims under such commission. Hughes *v.* Pipkin, 25 La. Ann. 127.

Relender *v.* State, 149 Ind. 283, 49 N. E. 30; Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.

Commission Not Conclusive. — The governor's commission does not conclusively fix or determine the term of office of the one to whom it is issued, but is merely *prima facie* evidence of the facts it recites. State *v.* Chapin, 110 Ind. 272, 11 N. E. 317.

Statutory Proceeding. — Tennessee. — In the statutory proceeding in the nature of *quo warranto* to oust an alleged usurper, when the relator makes proof that he has received a majority of the votes actually returned to the commissioner, by the judges of the election, evidence to attack the *prima facie* title so made is not competent. State *v.* Wright, 10 Heisk. (Tenn.) 237.

Presumption When Two Commissions Have Been Issued. — When commissions have been issued to two parties for the same office the presumption is that the later commission is the one legally in force. And this presumption is strengthened by a recital in the later commission that a prior incumbent has been removed. The presumption is only *prima facie*, however. Dubuc *v.* Voss, 19 La. Ann. 210, 92 Am. Dec. 526.

31. The court will not, upon an application for mandamus, go behind the certificate of election and try the actual title to the office. State *v.* Johnson, 35 Fla. 2, 16 So. 786.

32. The commission of the proper officer is the best and highest evidence of who is such officer until in an appropriate proceeding it is annulled and set aside. State *v.* Johnson, 35 Fla. 2, 16 So. 786.

A commission granted by the proper authority on an election certificate founded on a proper certificate disclosing a vacancy in an office is the best and highest evidence of title to such office. Thompson *v.* Hoet, 52 Ala. 491.

In State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367, it was said: "It is probably the law that where the title to an office is solely derived from executive appointment, the commission of the executive is the only legal evidence of such title. Beal *v.* Morton, 18 Ind. 346; while, on the

dence of the title or character involved.[33] If title is directly in issue, then the record evidence of it, if any, should be produced as being the best evidence.[34] Where the question arises collaterally

other hand, where the title to an office is derived from popular election, the commission of the executive is not absolutely necessary to the right to exercise the duties of such office. Glascock *v.* Lyons, 20 Ind. 1."

33. Proof by Parol.

United States. — Dunlop *v.* Monroe, 7 Cranch 242; Bank of United States *v.* Benning, 4 Cranch C. C. 81, 2 Fed. Cas. No. 908.

Alabama. — Rodgers *v.* Gaines, 73 Ala. 218.

Arkansas. — James *v.* State, 41 Ark. 451; Hardage *v.* Coffman, 24 Ark. 256.

Connecticut. — Goshen *v.* Stonington, 4 Conn. 209, 10 Am. Dec. 121.

Indiana. — Hall *v.* Bishop, 78 Ind. 370; Brown *v.* Connelly, 5 Blackf. 390.

Iowa. — Gourley *v.* Hankins, 2 Iowa 75.

Massachusetts. — Webber *v.* Davis, 5 Allen 393.

Michigan. — Druse *v.* Wheeler, 22 Mich. 439; Scott *v.* Detroit Young Men's Society, 1 Doug. 119.

Woolsey *v.* Village of Rondout, 4 Abb. Dec. (N. Y.) 639; Dominick *v.* Hill, 6 N. Y. St. 329; State *v.* Lyon, 89 N. C. 568; Stocksberry *v.* Swann, 12 Tex. Civ. App. 66, 34 S. W. 369; Biencourt *v.* Parker, 27 Tex. 558; Dow *v.* Hinesburgh, 2 Aik. (Vt.) 18.

In an action in trespass against a constable, to show that he was such officer, he may show by parol that he had given a bond, which was duly accepted and approved, without produsing the bond itself. Taylor *v.* Moore, 63 Vt. 60, 21 Atl. 919.

In an action against an officer for neglect of his official duties, notwithstanding there is record evidence of his appointment, evidence of his acts in the official capacity alleged may be received against him to establish the fact that he holds the office, and to show that the particular official district has been created, though there is record evidence of that fact also. Dean *v.* Gridley, 10 Wend. (N. Y.) 254.

When the question is collateral to the main issue, one assuming official power may state that he is the officer he assumes to be. Moody *v.* Keener, 7 Port. (Ala.) 218.

34. Benninghoof *v.* Finney, 22 Ind. 101; De Soto *v.* Brown, 44 Mo. App. 148; O'Donnel *v.* Dusman, 39 N. J. L. 677; *In re* Prickett, 20 N. J. L. 134; Crowley *v.* Conner, 1 City Ct. Rep. (N. Y.) 162; Bovee *v.* McLean, 24 Wis. 225.

As Negative Evidence. — To show that one is not such an officer as he assumes to be, the certified copy of the record of commissions issued to the particular class of officers to which such person claims to belong is the best evidence of his non-official character. Fain *v.* Garthright, 5 Ga. 6.

Secondary Evidence in Absence of Proper Record. — If no record has been made of an appointment, parol or other competent secondary evidence of the fact may be received. Poweshiek Co. *v.* Stanley, 9 Iowa 511; Johnson *v.* Stedman, 3 Ohio 94.

When the acts of an intruder into public office are called into question he may not justify upon proof that he is in possession of the office or of the books belonging to it. People *v.* Dike, 71 App. Div. 620, 76 N. Y. Supp. 1027.

In People *v.* Dike, 37 Misc. Rep. 401, 75 N. Y. Supp. 801, the court say: "The contention of counsel for respondent Dike that he is at least sheriff *de facto* is without foundation. It is impossible in law for there to be two sheriffs of the county acting at the same time, one *de jure* and the other *de facto*. One of them must be an intruder or usurper. Bordman *v.* Halliday, 10 Paige, 223; Croin *v.* Stoddard, 97 N. Y. 271; Throop, Pub. Off. sec. 641, 644. And the mere intrusion into public office does not suffice to make the intruder an officer *de facto*. The doctrine of officer *de facto* has no application to a case like the present. 'It applies for the protec-

his acts in such capacity are likewise competent evidence of his official character.[35] Evidence of one's general reputation as an officer may in such circumstances be received, and may suffice to establish the necessary title.[36]

tion of third persons or the public, who have acquired rights upon the faith of an appearance of authority, and who will be harmed by the actual truth. It does not apply where the official action is challenged at the outset and before any person has been or can be misled by it, and where no rights have, as yet, accrued upon his faith, either of a public or private character.' William *v.* Boynton, 147 N. Y. 426, 42 N. E. 184; People *v.* Peabody, 6 Abb. Prac. 228; Throop, Pub. Off. sec. 649."

35. *United States.* — Bank of the United States *v.* Benning, 4 Cranch C. C. 81, 2 Fed. Cas. No. 908.

Arkansas. — Hardage *v.* Coffman, 24 Ark. 256.

Connecticut. — Vernon *v.* East Hartford, 3 Conn. 475.

Indiana. — Brown *v.* Connelly, 5 Blackf. 390.

Kentucky. — Elliot *v.* Burke, 24 Ky. L. Rep. 292, 68 S. W. 445; Noland *v.* Moore, 2 Litt. 365.

Maine. — Dover *v.* Deer Isle, 15 Me. 169; New Portland *v.* Kingfield, 55 Me. 172; Dillingham *v.* Smith, 30 Me. 370.

Massachusetts. — Webber *v.* Davis, 5 Allen 393.

Michigan. — Druse *v.* Wheeler, 22 Mich. 439.

New Jersey. — Peck *v.* Freeholders of Essex, 20 N. J. L. 457; Conover *v.* Solomon, 20 N. J. L. 295; Stout *v.* Hopping, 6 N. J. L. 125.

New York. — Woolsey *v.* Village of Rondout, 4 Abb. Dec. 639.

North Carolina. — Tatom *v.* White, 95 N. C. 453; State *v.* Lyon, 89 N. C. 568.

Ohio. — Harrison *v.* Castner, 11 Ohio St., 339; Eldred *v.* Sexton, 5 Ohio 215; Johnson *v.* Stedman, 3 Ohio 94.

It may be shown, when the question of one's official character arises collaterally, that one was acting in the particular official capacity. Colton *v.* Beardsley, 38 Barb. (N. Y.) 29; Lowell *v.* Flint, 20 Me. 401; Swindell *v.* Warden, 52 N. C. 575.

It will be presumed without evidence to the contrary that one whose name is attached to a return to a writ as deputy was duly authorized to act as such. Nelson *v.* Nye, 43 Miss. 124; State *v.* Rost, 47 La. Ann. 53, 16 So. 776.

The fact that a party did a particular act in an official capacity may be proved not only by showing that he exercised the office before or at the time in question, but by evidence of his having exercised it afterward. Hopley *v.* Young, 8 A. & E. 63, 55 E. C. L. 63, 15 L. J. Q. B. 9, 9 Jur. 941.

36. Reputation. — Jacob *v.* United States, 13 Fed. Cas. No. 7157; Stout *v.* Hopping, 6 N. J. L. 125; Potter *v.* Luther, 3 Johns. (N. Y.) 431; Eldred *v.* Sexton, 5 Ohio 215; Johnson *v.* Stedman, 3 Ohio 94; Chapman Twp. *v.* Herrold, 58 Pa. St. 106; Tomilson *v.* Darnall, 2 Head 538.

When the question of one's official character arises collaterally, the particular official character may be proved by reputation. If, however, official character is the point directly in issue, stricter proof is required. In the one case reputation is sufficient proof; in the other his commission, or other competent evidence of the appointment, is required. Allen *v.* McNeel, 1 Mill. Rep. Const. Ct. (S. C.) 459.

When an officer is sued for his official acts and seeks to justify as an incumbent of the office, evidence that the defendant has been reputed to be such officer and has acted as such is admissible. Colton *v.* Beardsley, 38 Barb. (N. Y.) 29.

Semble, that one has acted notoriously as a public officer is *prima facie* evidence of the official character assumed, and his commission need not be produced. Bryan *v.* Walton, 14 Ga. 185.

Cannot Contradict Record. — But when the title to an office is evidence by documents the officer will

3. Appointment by Executive. — Duration of Term. — What Competent. — When several members of a board whose respective terms of office are different are nominated by the governor and confirmed by the senate, if the nominating message is ambiguous as to tenure and succession, not showing when the several terms begin or end, the records in the office of the governor and secretary of state in regard to such appointments, as well as the commissions issued to and accepted by the several appointees, are admissible.[37]

4. Abandonment. — The abandonment of an office may be established by parol and is dependent on all the circumstances attending the transaction.[38] Abandonment will not be presumed from the failure of one appointed or elected to an office immediately to qualify,[39] and, to establish abandonment, cogent proof is required.[40] If one absents himself from his official district beyond the limit of time fixed by the statute the cause of the absence is immaterial.[41]

5. Resignation. — The resignation of an office may be established by parol unless differently provided by statute.[42] So the acceptance of a resignation need not be in writing, but may be manifested by the appointment of another to fill the vacancy so created.[43]

6. Impeachment. — In a proceeding to impeach an officer the defendant's guilt must be established by proof beyond a reasonable doubt.[44]

7. Suspension and Removal. — A. Presumption From Fact of Removal. — The removal or suspension of an officer by the gov-

not be permitted to falsify the record of his title for the purpose of showing that he was not a *de jure,* but only a *de facto,* officer. Crawford *v.* Dunbar, 52 Cal. 36.

37. Lease *v.* Clark, 55 Kan. 621, 40 Pac. 1002.

38. In State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367, the court, in considering this question, says: "An office may be vacated by abandonment, which is a constructive resignation. An office may be resigned by parol, and, of course, acts may speak that resignation."

Burden. — When an officer is required to reside, during the term of his office, within the district that he serves, upon a removal therefrom the defendant, in a proceeding by the state for ouster, has the burden to show that his removal was only temporary and to overcome the presumption of abandonment of the office. Relender *v.* State, 149 Ind. 283, 49 N. E. 30.

39. The abandonment of an office by an appointee or elected candidate will not be presumed by his failure to qualify within thirty days from the date of his commission. State *v.* Peck, 30 La. Ann. 280.

40. In Selby *v.* Portland, 14 Or. 243, 12 Pac. 377, Thayer, J., says: "I presume instances have occurred in which officers have abandoned their offices, but they have been so rare that it requires cogent proof to establish them as matters of fact."

41. People *v.* Shorb, 100 Cal. 537, 35 Pac. 163, 38 Am. St. Rep. 310. But see McGregor *v.* Allen, 33 La. Ann. 870, where an enforced absence by reason of sickness and for treatment was held not to affect the officer's tenure.

42. State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367; Van Orsdall *v.* Hazard, 3 Hill (N. Y.) 243; Barbour's Case, 17 Court of Claims 149.

43. If no particular mode of resigning an office is provided and the appointment is not by deed, neither the resignation nor its acceptance need be in writing. Van Orsdall *v.* Hazard, 3 Hill (N. Y.) 243.

44. State *v.* Tally, 102 Ala. 25, 15 So. 722.

ernor of a state, or by the president, in cases in which he is vested with the power to remove or suspend will be *prima facie* presumed to have been done upon proper cause.[45]

B. Presumption of Innocence. — In at least one jurisdiction the proceeding for the removal of an officer is criminal in its nature, and the officer is entitled to the benefit of the customary presumption of innocence.[46]

C. Summary Proceedings. — a. *Order of Proof.* — In conducting summary proceedings before a non-judicial body for the removal of an officer for misconduct the order of the examination of witnesses is within the discretion of the triers.[47]

b. *Rules Obtaining in Reception of Evidence.* — In summary proceedings for the removal of subordinate officers by their superiors, the same correctness and accuracy in rulings on questions of evidence as in trials at law are not required.[48]

45. State *v.* Prince, 45 Wis. 610. **Removal by Governor.** — Evans *v.* Populus, 22 La. Ann. 121.

Suspension by President. — *In Re* Marshalship for the Southern and Middle Districts of Alabama, 20 Fed. 379.

It has been held, however, that where the record in a proceeding for removal shows merely the removal the presumption of a removal for cause shown will not in such circumstances be indulged. Welchans *v.* Shirk, 98 Pa. St. 17; State *v.* Police Com'rs, 88 Mo. 144; People *v.* Board of Police, 35 Barb. (N. Y.) 535.

46. **Removal of Policeman. — Indecent Exposure.** — In People *v.* Board of Police Com'rs, 13 App. Div. 69, 43 N. Y. Supp. 118 (appeal dismissed in 153 N. Y. 657), where the court considered the evidence in a proceeding to remove a police officer for the indecent exposure of his person, it was said: "Under the statutes relating to the city of Schenectady, the police board thereof had power to remove him on proof of charges preferred against him, in writing, of illegal, corrupt or otherwise improper conduct. . . . The proceeding was criminal in its nature. People *v.* Wurster, 91 Hun, 233-235, 36 N. Y. Supp. 160. And hence the relator was entitled to the same presumption in his favor that would have existed if the said charge had been made against him in a criminal court. He had acted as chief of police for over twenty-three years, and it does not appear that he had before been convicted of any offense of malfeasance in office. Under all the circumstances, the presumption was rather that the exposure of his person was unintentional, than that it was a willful, lewd and wanton act. The relator, on the trial before the police commissioners, was entitled to the benefit of this presumption."

47. In People *v.* McClave, 123 N. Y. 512, 25 N. E. 1047, the court was called upon to review the proceedings before the police commissioners of the city of New York for the removal of a policeman for misconduct. The commissioners had sworn the policeman, and tried and examined him as to the transaction before any evidence was introduced against him, to which the officer objected. "His objection was, in effect, that the commissioners ought to make out a case against him before he should be compelled to testify. We see no propriety in that, and, if the commissioners chose in their investigation to question the accused first about the circumstances of the case, there was no rule of law which militated against their doing so. It is in their power to proceed, in their investigation of the facts, in any manner they choose; and if in the course of so doing the legal rights or privileges of the accused are violated, he has the right to a review of the proceedings in the courts."

48. People *v.* Wright, 7 App. Div.

c. *Necessity of Administering Oath to Witnesses.* — In summary proceedings before an officer for the removal of his subordinates

185, 40 N. Y. Supp. 285; People *v.* Dooling, 60 App. Div. 321, 70 N. Y. Supp. 26.

Protecting Reformed Women. Identity. — In the case of People *v.* Martin, 32 N. Y. Supp. 933, the board of police commissioners of New York City, in a proceeding for the removal of a police officer, refuses to compel some witnesses against the accused, who had reformed, to disclose their identity. In disposing of an exception taken to such action the court says: "Their evidence was placed before the tribunal in which the relator was being tried as that of credible and respectable witnesses; the board was asked to believe such evidence because they were credible and respectable; and the relator was given no opportunity, as already suggested, to identify the witnesses, so as to ascertain to what extent these pretentions were true. It is perfectly clear that in a trial before a civil court no judgment could possibly stand which was founded upon evidence of witnesses in respect to whose identity such rulings had been made. It is, however, to be considered that, in proceedings before the board of police, entirely strict and accurate rulings in regard to questions of evidence are not always to be expected; and, in determining the question as to whether a conviction should be sustained or not, the record generally should be examined, and the appellate court should determine upon such examination whether it discloses reasonable grounds for the conclusion arrived at, and one which has not been the result of the erroneous rulings in respect to the admission or exclusion of evidence."

In People *v.* Roosevelt, 16 App. Div. 364, 44 N. Y. Supp. 1003, the court again says: "It is urged that error was committed in permitting one Hyatt to testify that some time in the fall previous to the period covered by these charges he saw 'fornication in two or three rooms right along.' This evidence was received in the first place without any objection, but was subsequently stricken out on a motion of the counsel for the accused upon the ground that it was not within the period covered by the specifications. Subsequently, on cross-examination by the relator's counsel, the witness testified that he had not seen anything of the kind in the house after January 1st, and that in the meantime shades had been put up, so that he could not look in. Then the counsel for the prosecution insisted that the door had been so far opened on the cross-examination as to authorize him now to ask the witness what he had seen before the shades were put up, and the evidence was admitted. It is, perhaps, a close question whether the inquiries on cross-examination were of such a character as to render this evidence admissible; but the question is so near the border line as to make it the duty of the court, if it be necessary, to invoke the rule which found expression in the opinion of Presiding Justice Van Brunt *in re* Cross, 85 Hun 343, 32 N. Y. Supp. 933, that 'entirely strict and accurate rulings in regard to evidence are not always to be expected in proceedings before the board of police commissioners.' "

When Errors Available on Review. — In People *v.* Wright, 7 App. Div. 185, 40 N. Y. Supp. 285, the court say: "It is undoubtedly the rule that in hearings of this character the same correctness and accuracy on rulings upon questions of evidence are not required as upon ordinary trials at law. But where the conclusion arrived at has plainly resulted from such erroneous rulings it is impossible to sustain the finding. Such a finding is then necessarily made upon one-sided or partial facts, with all the other facts tending in the opposite direction excluded and consequently ignored, and refused consideration. Here, then, the relator was substantially denied the right of cross-examination as to one of the most crucial parts of the accusation. It may well be, if the commissioner had permitted an adequate cross-examination upon the

the witnesses need not be sworn when the statute does not so require.[49]

d. *Right of Cross-Examination.* — In a summary proceeding for removal under a statute providing that an officer may be removed only for cause shown after hearing had, the respondent is entitled to cross-examine the witnesses produced against him.[50]

e. *Production and Examination of Witnesses.* — Where the statute authorizes a removal only for cause on a hearing duly had, the respondent has the right also to produce witnesses in his own behalf.[51] Nor may a witness offered by an officer be rejected by the examining authority because during the proceedings his credibility has been adversely affected.[52]

points as to which exceptions to his rulings were taken, that the charge of cruel and inhuman treatment would have been entirely dissipated."

Record of Police Officer Incompetent Against Him. — People *v.* York, 52 App. Div. 295, 65 N. Y. Supp. 130; People *v.* Roosevelt, 168 N. Y. 488, 61 N. E. 783, *affirming* 4 App. Div. 611, 40 N. Y. Supp. 1147; People *v.* York, 50 App. Div. 359, 64 N. Y. Supp. 2.

49. In People *v.* Brookfield, 6 App. Div. 445; 39 N. Y. Supp. 677, an action by an inspector of paving of the city of New York for mandamus, after such a proceeding resulting in removal by the commissioner of public works, it was said: "The particular point made on the appeal to us from the decision of the court below is that the witnesses against the relator at the investigation were not sworn. The record does not show that an oath was administered to anybody, but the law does not seem to require that the witnesses be sworn in such a proceeding. The relator's own denial and statements were not attested by oath, but were recorded and considered without it. Having acquiesced in all that was done, and having deliberately made himself a party to the whole proceeding in the form and manner in which it was conducted, and there being nothing to show that there was any unfairness in the conduct of the commissioner, or that he has suffered from any prejudice or any wrong, we think the action of the court below in dismissing the proceeding under the writ was right."

50. People *v.* Jones, 112 N. Y. 597, 608, 20 N. E. 577; *In re* Emmet 65 How. Pr. (N. Y.) 266.

Removal of Veteran. — In the case of People *v.* Wright, 7 App. Div. 185, 40 N. Y. Supp. 285, *affirmed* 150 N. Y. 444, 44 N. E. 1036, it was sought to remove a veteran of the civil war from the office of warden of the city prison. In considering the rights of the respondent the court said: "As such veteran, the relator could be removed only for incompetency, and conduct inconsistent with his position, after a hearing had. . . . The respondent's power, as was said in People *v.* Nicholas, 79 N. Y. 558, was 'not an arbitrary one to be exercised at pleasure, but only upon just and reasonable grounds,' a doctrine which was quoted with approval, and reaffirmed in People *v.* Jones, 112 N. Y. 608, 20 N. E. 577. *A fortiori* should the rules laid down in these cases be applied to the attempted removal of these public servants for whom the people, through their representatives, have evinced such tender consideration. 'The proceeding,' said Judge Danforth in the Nichols case, 'must be instituted upon specific charges, sufficient in their nature to warrant the removal; and then, unless admitted, be proven to be true. Defendant might also cross-examine the witnesses produced to support the charge, call others in his defense, and in these and other steps in the proceeding be represented by counsel."

51. People *v.* Nichols, 79 N. Y. 582, *reversing* 18 Hun 530.

52. Rejecting Witness. — Credibility. — In People v. French, 51 Hun 427, 3 N. Y. Supp. 841, the po-

f. *Compelling Officer To Testify.* — It has been held, in such a proceeding, that the officer sought to be removed may not be compelled to testify as a witness against himself.[53]

g. *Sufficiency of Evidence.* — In the hearing accorded a party in a summary proceeding for removal the substance of the ground of removal alleged, but the substance only, need be proved.[54] The authority charged with the power of removal must in such circumstances act only on evidence properly before it, and not upon its own knowledge of the case.[55]

lice commissioners of New York City in a proceeding for the removal of a police officer, rejected a witness and refused to receive his testimony further because in an early part of his examination the testimony of the witness tended to show that he was unworthy of belief. The witness was called in behalf of the respondent officer. In holding such action error the court says: "The last witness called was for the defendant, whom he succeeded. He was examined by one of the commissioners, and asked questions as to his business, his connection with the post-office department, and his removal. This sufficiently appears from the record, indeed conclusively so, and as a result of such examination the commissioner said: 'I do not want your testimony.' The relator had asked no question, although the witness was called on his behalf, but taken in hand by the commissioners at once, and put aside. It does not appear that the defendant did not want his testimony. On the contrary, having been called on his behalf, it must be presumed that he did want it, and it may be that if given it would have satisfied the commissioners that the charge made was not sufficiently sustained to warrant the relator's dismissal. However that may be, no tribunal proceeding according to the course of the common law, or subjected to its rules in part, can arbitrarily reject a witness called by the accused before he has given any evidence, merely from developments which might affect his credibility with the tribunal in which he appears."

53. Thurston *v.* Clark, 107 Cal. 285, 40 Pac. 435; United States *v.* Collins, 1 Woods 499, 25 Fed. Cas. No. 14,837.

People *v.* McClave, 123 N. Y. 512, 25 N. E. 1047, *affirming* 32 N. Y. St. 824, 10 N. Y. Supp. 764.

In People *v.* French, 29 N. Y. St. 305, 8 N. Y. Supp. 456, the supreme court of New York said: "It is claimed that the return shows a clear violation by the commissioners of a fundamental principle of law; that is, that the relator was sworn by the commissioners and examined as the very first witness. But there is nothing in the record to show that the commissioners required the relator to be sworn as the first witness. The record simply states, 'charge read, defendant sworn,' and then the testimony goes on. What the relator's right would have been had he objected to being sworn and testifying, before any proof was given of the truth of the charge for which he was to be tried, it is not necessary now to determine. But he did not so object, and he admitted upon his examination that the charge that he was off the post was true. No objection having been taken to this course of procedure, there is no ground upon which the action of the police commissioners can be reversed. It does not appear but that the defendant offered himself as a witness, and it was his wish and request that he was sworn and examined as to the truth of the charge."

54. People *v.* McClave, 123 N. Y. 512, 25 N. E. 1047.

Where a particular ground is alleged as a cause for removal the officer may not be removed on any other. Com. *v.* Arnold, 3 Litt. (Ky.) 309; People *v.* Doolittle, 44 Hun (N. Y.) 293.

55. People *v.* French, 119 N. Y. 502, 23 N. E. 1061; People *v.* Roosevelt, 168 N. Y. 488, 61 N. E. 783, *af-*

D. Degree of Proof Required. — Proof beyond a reasonable doubt is required in a prosecution for malfeasance; but where misfeasance only is charged, a preponderance is sufficient.[56]

V. RIGHTS, POWERS AND DUTIES.

1. Presumptions and Burden of Proof. — A. In General. — It is presumed, but only *prima facie,* that power assumed is in fact possessed, and that official duty has been rightly and regularly performed, so that the party asserting the contrary has the burden to prove it.[57] The doing of a final act carries with it a presumption

firming 4 N. Y. App. Div. 611, 40 N. Y. Supp. 1147.

56. Colburn *v.* Newfarth, Ohio Prob. Rep. 24, 16 W. L. Bull. 54. Habitually neglecting to account for small sums as a public officer, authorizes the presumption that sinister and selfish purposes induced their retention, and his gross negligence is inexcusable. Com. *v.* Rodes, 6 B. Mon. (Ky.) 171, 176.

57. *United States.* — Dunlop *v.* Munroe, 1 Cranch C. C. 536, 8 Fed. Cas. No. 4167, *affirmed* 7 Cranch 242; Russell *v.* Beebe, Hempst. 704, 21 Fed. Cas. No. 12,153; United States *v.* Crusell, 14 Wall. 1; Butler *v.* Maples, 9 Wall. 766; Lea *v.* Polk Co. Copper Co., 21 How. 493; Hoyt *v.* Hammerkin, 14 How. 346.

Alabama. — Brandon *v.* Snows, 2 Stew. 255; Guesnard *v.* Louisville & N. R. Co., 76 Ala. 453.

Arkansas. — Dawson *v.* State Bank, 3 Ark. 505; Rice *v.* Harrell, 24 Ark. 402.

California. — Ballerino *v.* Mason, 83 Cal. 447, 23 Pac. 530; Guy *v.* Washburn, 23 Cal. 111; Rice *v.* Cunningham, 29 Cal. 492.

Florida. — Scott *v.* State, 43 Fla. 396, 31 So. 244; Dupuis *v.* Thompson, 16 Fla. 69.

Georgia. — Vaughn *v.* Biggers, 6 Ga. 188.

Indiana. — Heagy *v.* Black, 90 Ind. 534; Mullikin *v.* Bloomington, 72 Ind. 161; Talbot *v.* Hale, 72 Ind. 1.

Illinois. — Regent *v.* People, 96 Ill. App. 189; Union Cent. L. Ins. Co. *v.* Durfee, 164 Ill. 186, 45 N. E. 441; Spring *v.* Kane, 86 Ill. 580; Cook *v.* Chicago, 57 Ill. 268.

Iowa. — Collins *v.* Valleau, 79 Iowa, 626, 44 N. W. 904; Eggers *v.* Redwood, 50 Iowa 289; Spitler *v.* Scofield, 43 Iowa 571; Budd *v.* Durall, 36 Iowa 315.

Kansas. — Valley Twp. *v.* King Iron Bridge & Mfg. Co., 4 Kan. App. 622, 45 Pac. 660.

Kentucky. — Bate *v.* Speed, 10 Bush 644; Phelps *v.* Ratcliffe, 3 Bush 334; Anderson *v.* Sutton, 2 Duv. 480, Buckner *v.* Bush, 1 Duv. 394, 85 Am. Dec. 634.

Louisiana. — Soniat *v.* Miles, 32 La. Ann. 164; Elder *v.* New Orleans, 31 La. Ann. 500; Hefner *v.* Hesse, 29 La. Ann. 149; Grand *v.* Cox, 24 La. Ann. 462; Ledoux *v.* Jamieson, 18 La. Ann. 130; New Orleans *v.* Halpin, 17 La. Ann. 185.

Maine. — Snow *v.* Weeks, 75 Me. 105; Brackett *v.* Ridlon, 54 Me. 426; Mills *v.* Gilbreth, 47 Me. 320, 74 Am. Dec. 487; Barker *v.* Fogg, 34 Me. 392; Shorey *v.* Hussey, 32 Me. 579.

Massachusetts. — Gilmore *v.* Holt, 4 Pick. 257; Bruce *v.* Holden, 21 Pick. 187.

Michigan. — Clark *v.* Axford, 5 Mich. 182; Peck *v.* Cavell, 16 Mich. 9; Hall *v.* Kellogg, 16 Mich. 135; Blair *v.* Compton, 33 Mich. 414.

Minnesota. — St. Peter's Church *v.* Scott Co., 12 Minn. 395.

Mississippi. — Davany *v.* Koon, 45 Miss. 71; Hamblen *v.* Hamblen, 33 Miss. 455, 69 Am. Dec. 358; Cooper *v.* Granberry, 33 Miss. 117; Nebbett *v.* Cunningham, 5 Cushm. 292.

Missouri. — Ivy *v.* Yancey, 129 Mo. 501, 31 S. W. 937; State *v.* Mastin, 103 Mo. 508, 15 S. W. 529; Bryson *v.* Johnson Co., 100 Mo. 76, 13 S. W. 239; Sutherland *v.* Holmes, 78 Mo. 399.

Nebraska. — Brown *v.* Helsley, 96 N. W. 187; Red Willow Co. *v.* Davis, 49 Neb. 796, 69 N. W. 138; Johnson Co. *v.* Tierney, 76 N. W.

of the doing of all preliminary acts essential to the validity of the ultimate act.[58] But this does not apply to the exercise of usurped powers.[59] Nor will the general presumption be indulged to sustain the acts of an officer outside of, or contrary to, the usual and well-recognized duties and functions of the office.[60] The presump-

1090; Blaco *v.* State, 58 Neb. 557, 78 N. W. 1056.

New Hampshire. — Wheelock *v.* Hall, 3 N. H. 310; Shackford *v.* Newington, 46 N. H. 415.

New Jersey. — West Jersey Trac. Co. *v.* Camden Horse R. Co. 52 N. J. Eq. 452. 29 Atl. 333; State *v.* Morristown, 33 N. J. L. 57; Batten *v.* Newark, 32 N. J. L. 453.

New York. — Hand *v.* Board of Supervisors of Columbia Co., 31 Hun 531; Leland *v.* Cameron, 31 N. Y. 115; People *v.* Phoenix Bank, 4 Bosw. 363; Smith *v.* Hill, 22 Barb. 656; Hill *v.* Draper, 10 Barb. 454.

North Carolina. — Clifton *v.* Wynne, 80 N. C. 145.

North Dakota. — Pine Tree Lumb. Co. *v.* Fargo, 12 N. D. 360, 96 N. W. 357; Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132.

Ohio. — Ward *v.* Barrows, 2 Ohio St. 241.

Oregon. — Barnhart *v.* Ehrhart, 33 Or. 274, 54 Pac. 195.

Pennsylvania. — Murphy *v.* Chase, 103 Pa. St. 260; Smith *v.* Walker, 98 Pa. St. 133; Lackawanna Iron & Coal Co. *v.* Fales, 55 Pa. St. 90; Kelly *v.* Creen, 53 Pa. St. 302.

South Carolina. — Dawkins *v.* Smith, 1 Hill Eq. 369; Douglass *v.* Owens, 5 Rich. L. 534; Riley *v.* Gaines, 14 S. C. 454; Woody *v.* Dean, 24 S. C. 499.

Tennessee. — Frierson *v.* Galbraith, 12 Lea. 129.

Texas. — Howard *v.* Perry, 7 Tex. 259; Sadler *v.* Anderson, 17 Tex. 245; Poer *v.* Brown, 24 Tex. 34.

Vermont. — Lycoming Ins. Co. *v.* Wright, 60 Vt. 515, 12 Atl. 103; Drake *v.* Mooney, 31 Vt. 617, 76 Am. Dec. 145; Bank of United States *v.* Tucker, 7 Vt. 134.

Wisconsin. — State *v.* Prince, 45 Wis. 610; Van Buren *v.* Downing, 41 Wis. 122; Tainter *v.* Lucas, 29 Wis. 375; Ely *v.* Cram, 17 Wis. 537; Clark *v.* Janesville, 10 Wis. 136.

Wyoming. — State *v.* State Board of Land Com'rs, 7 Wyo. 478, 53 Pac. 292.

Choice of Two Modes for Exercise of Power. — Where two modes are opened for the doing of an act, one legal, the other illegal, it will be presumed that the legal mode was followed. Sheafer *v.* Mitchell, (Tenn.) 71 S. W. 86.

Taking of Assessment List. Where the levy and collection of regular taxes are sought to be enjoined on the ground that the assessment list was not taken by the proper officer, it will be presumed that the listing was done as required by the statute, and the party asserting the contrary has the burden to establish clearly the same. Pentecost *v.* Stiles, 5 Okla. 500, 49 Pac. 921.

Increase of Indebtedness. — Statutory Statement. — It will not be presumed that the officers of a county, acting under oath, failed to make the requisite statutory statement in increasing the county's indebtedness. Safe Deposit Bank of Pottsville *v.* Schuylkill Co., 190 Pa. St. 188, 42 Atl. 539.

58. *In re* Tecumseh Townsite Case, 3 Neb. 267; Titus *v.* Kimbro, 8 Tex. 210; Pine Tree Lumb. Co. *v.* Fargo, 12 N. D. 360, 96 N. W. 357.

When a city council is empowered to levy taxes for a particular purpose, the fact of the making of the levy is *prima facie* evidence of the existence of such facts as warranted the council in exercising the power to make such levy. Nalle *v.* Austin, 23 Tex. Civ. App. 595, 56 S. W. 954.

Where school directors are authorized to employ only teachers who are legally qualified, it will be presumed, nothing to the contrary appearing, that a teacher so employed was possessed of the proper certificate of qualification, and that in contracting for the employment the directors performed their legal duty. McShane *v* School Dist., 70 Mo. App. 624.

59. Houston *v.* Perry, 3 Tex. 390.

60. Jones *v.* Muisbach, 26 Tex. 235.

tion will not operate to dispense with proof of the regularity of an official act involving a forfeiture of the rights of the individual and the bestowal of such rights upon another.[61] Nor will it be presumed that an officer has complied with an unconstitutional law.[62]

B. Discretionary Duties. — When an officer is charged with the performance of a duty involving discretion it will be presumed that a sound discretion has been exercised, and the party attacking such action has the burden to show an abuse of discretion with such clearness as would justify equitable interference for like cause.[63]

C. Action by Boards. — Majority. — Number. — When the statute provides for action, in certain circumstances only, by a number of a board less than the whole, it will not be presumed that the condition of valid action by the smaller number was fulfilled, but it must be shown that less than the whole number were authorized to act.[64]

D. Character of Officer as De Jure or De Facto. — When an officer seeks to assert a right or to establish a defense founded on his official character he must show that he is an officer *de jure*.[65]

61. Watkins *v.* Havighorst, 13 Okla. 128, 74 Pac. 318.

In Irwin *v.* Mayes, 31 Tex. Civ. App. 517, 13 S. W. 33, an action involving the forfeiture of a lease of school lands by a commissioner for failure to record the same within the statutory time, the court said: "It is first insisted that in the absence of evidence, it will be presumed that the commissioner did not act without a proper certificate, under the general presumption indulged in favor of the regularity of official acts. We concede the force of this rule in a proper case, but we think it has never been extended to hold that where an officer is authorized in a certain manner to forfeit rights in one person, and bestow them upon another, the mere proof that he has attempted to confer the rights upon such other person will render unnecessary any proof that he has enforced the forfeiture in a legal manner."

Exception to General Rule. — In Morton *v.* Reeds, 6 Mo. 64, the court said as an exception to the general rule that in all summary and *ex parte* proceedings the person claiming under them must make strict proof of every material fact.

62. Deering *v.* Peterson, 75 Minn. 118, 77 N. W. 568.

63. A. H. Pugh Print. Co. *v.* Yeatman, 22 Ohio Civ. Ct. Rep. 584, 12 O. C. D. 447.

64. In Lyon *v.* Mason & Foard Co., 102 Ky. 594, 44 S. W. 135, it was said: "By section 20 of act May 3, 1880, it is provided that, when any duty is required of the commissioners of the sinking fund by that act, it shall be competent for a majority of them to act if all cannot be present and participate, except as to the appointment of officials, and in the advertisement for the acceptance of bids, and making contracts and taking bond from the contractors for the labor of convicts. As to these matters, all of said commissioners must participate, unless prevented by unavoidable casualty. As it does not appear that a full board of commissioners might not have been present, the attempted appointment of appellant as an inspector—an imposition *ex post facto* upon appellee of an obligation to pay for his services —by three only of the board was manifestly illegal and unauthorized."

65. *Illinois.* — Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100; People *v.* Weber, 89 Ill. 347.

Evidence showing him to be an officer *de facto* is competent, however, in such circumstances, as proof of a *de facto* character is *prima facie* evidence of a *de jure* character.[66] But proof merely of one's assuming to act officially in the particular matter or in matters incidental thereto is not sufficient.[67]

E. Right of Transfer to Another Office. — Under the New York statutes a veteran holding office and seeking a transfer to another has the burden to show his fitness for the latter office.[68]

F. As to Compensation. — When the compensation of an officer is to be determined by proof *de hors* the statute governing it, the officer suing for his fees or compensation has the burden to show

Kentucky. — Rodman *v.* Harcourt, 4 B. Mon. 224; Patterson *v.* Miller, 2 Metc. 493.

Mississippi. — Kimball *v.* Alcorn, 45 Miss. 151.

New Hampshire. — Blake *v.* Sturtevant, 12 N. H. 567; Roberts *v.* Holmes, 54 N. H. 560.

New York. — Colton *v.* Beardsley, 38 Barb. 29; Dolan *v.* New York, 68 N. Y. 274.

Pennsylvania. — Riddle *v.* Bedford Co., 7 Serg. & R. 386.

Tennessee. — Pearce *v.* Hawkins, 2 Swan 87; Venable *v.* Curd, 2 Head 582; Shepherd *v.* Staten, 5 Heisk, 79.

Vermont. — Courser *v.* Powers, 34 Vt. 517; Cummings *v.* Clark, 15 Vt. 653.

When, however, an officer has paid out public funds he is entitled to credit for moneys expended lawfully upon proof that he is a *de facto* officer merely. McCracken *v.* Soucy, 29 Ill. App. 619.

Penalty. — When an officer sues for a penalty under the authority of a statute annexing a penalty to an offense, the officer, to recover, must show that he is an officer *de jure.* People *v.* Nostrand, 46 N. Y. 375; Horton *v.* Parsons, 37 Hun (N. Y.) 42; Commissioners *v.* Peck, 5 Hill (N. Y.) 215; Gould *v.* Glass, 19 Barb. (N. Y.) 179; Supervisors *v.* Stimson, 4 Hill (N. Y.) 136.

66. Short *v.* Symmes, 150 Mass. 298, 23 N. E. 42, 15 Am. St. Rep. 204.

When a person, sued for an act, justifies as having done the same as a public officer, he may establish his authority by proof that he had acted as such officer on other occasions. Hutchings *v.* Van Bokkelen, 34 Me. 126.

When one defends an act done by himself as one done in his official capacity, he may show by parol that at the time in question he was an officer *de facto,* as this makes out a *prima facie* case that he was an officer *de jure.* Willis *v.* Sproule, 13 Kan. 257.

67. "If one who has assumed to interfere with the person or property of another is sued therefor, and attempts to justify his act on the ground that it was properly done by him as a public officer, it is for him to show, not merely that he was an officer *de facto,* but that he was duly and legally qualified to act as such officer. . . . But it is urged that an officer *de facto* is *prima facie* an officer *de jure,* and that, where the facts relating to the appointment to office do not fully appear, an inference of its validity may be drawn from proof of his having acted as such. However this may be in a case where the party seeking to justify his act produces evidence that he publicly acted and was recognized as an officer in other instances, before or even after the act which is brought into question, it certainly is not sufficient for him to show merely that he assumed to act as an officer in doing the very thing which he seeks to justify, or in other proceedings which are only incidental thereto. If that were so, his authority to do the act might be inferred simply from his having assumed to do it." Short *v.* Symmes, 150 Mass. 298, 23 N. E. 42, 15 Am. St. Rep. 204.

68. Jones *v.* Wilcox, 80 App. Div. 167, 80 N. Y. Supp. 420.

the amount due him.[69] Conformably to the rule generally obtaining, an officer cannot maintain an action for salary except upon proof of title *de jure*.[70] When to an action by the officer to recover his salary or fees due him a set-off is pleaded, the defendant has the burden to establish the set-off.[71]

G. RATIFICATION. — The unauthorized acts of a public officer, like those of a private agent, may be ratified by the principal authority.[72]

2. Proceedings for Recovery of Books, Records, Etc. — In a proceeding by the claimant of an office to recover the books, records and other property belonging to such office, the applicant for the writ for their delivery is only required to make out a *prima facie* case of title in himself.[73]

69. Inspector of Oils. — In an action by an inspector of oils of a municipal corporation to recover fees, fixed at so much per gallon of oil inspected, the officer has the burden to show the number of gallons of oil inspected. Ford *v.* Standard Oil Co., 32 App. Div. 596, 53 N. Y. Supp. 48.

70. When salary is sought to be recovered the officer must show himself to be such *de jure*.

California. — People *v.* Potter, 63 Cal. 127.

Connecticut. — Plymouth *v.* Painter, 17 Conn. 585.

Illinois. — Mayfield *v.* Moore, 53 Ill. 428.

Massachusetts. — Dolliver *v.* Parks, 136 Mass. 499.

Mississippi. — Christian *v.* Gibbs, 53 Miss. 314; Kimball *v.* Alcorn, 45 Miss. 151.

Nevada. — Meagher *v.* Storey Co., 5 Nev. 244.

Oregon. — Selby *v.* Portland, 14 Or. 243, 12 Pac. 377.

Pennsylvania. — Philadelphia *v.* Given, 60 Pa. St. 136; Com. *v.* Slifer, 25 Pa. St. 23; Neale *v.* Overseers, 5 Watts. 538.

Utah. — Hamer *v.* Weber Co., 37 Pac. 741.

71. Jones *v.* United States, 39 Fed 410.

72. With the distinction, however, that stricter or a higher degree of proof is required to create the presumption of ratification than in the case of a private agent. Baltimore *v.* Reynolds, 20 Md. 1; Wilhelm *v.* Cedar Co., 50 Iowa 254; Delafield *v.* Illinois, 26 Wend. (N. Y.) 192.

73. *California.* — Doane *v.* Scannell, 7 Cal. 393.

Minnesota. — State *v.* Sherwood, 15 Minn. 221, 2 Am. Rep. 116; Crowell *v.* Lambert, 10 Minn. 369.

New Mexico. — Eldodt *v.* Territory, 10 N. M. 141, 61 Pac. 105; Conklin *v.* Cunningham, 7 N. M. 445, 38 Pac. 170.

New York. — *In re* Baker 11 How. Pr. 418; *In re* Whiting, 2 Barb. 513; *In re* Devlin, 5 Abb. Pr. 281; *In re* Bradley, 141 N. Y. 527, 36 N. E. 598.

Oklahoma. — Cameron *v.* Parker, 2 Okla. 277, 38 Pac. 14; Ewing *v.* Turner, 2 Okla. 94, 35 Pac. 951.

South Carolina. — Verner *v.* Seibels, 60 S. C. 572, 39 S. E. 274; *Ex parte* Whipper, 32 S. C. 5, 10 S. E. 579.

In a summary proceeding for the books and papers pertaining to an office, the petitioner's title to warrant the granting of relief to him, must be free from any reasonable doubt. People *v.* Allen, 42 Barb. (N Y.) 203.

Under the Alabama statute entitling an officer to a writ compelling a delivery to him of the books and property of a public office, the officer asking for such a writ was compelled to exhibit a clear *prima facie* title in himself to the officer, free from all *reasonable doubt*. Such *prima facie* title is issued on a certificate of election made out by a commission from the governor, or a certificate disclosing a vacancy in office made by an officer having authority in the premises. This showing is conclusive in such a proceed-

3. Personal Custody of Records. — Judicial Notice. — Judicial notice will be taken of the fact that an officer charged with the duty of caring for public books and records does not have them in his manual custody, and that he acts through clerks and other subordinates.[74]

4. Admissibility and Relevancy. — A. Course of Business of Office. — A public officer may give evidence of the uniform course of business in his office for the purpose of showing the performance of a specific official act which it was his duty to perform, but concerning which he has no independent recollection.[75]

B. Varying Statutory Duties by Parol. — When the duties of an officer are fixed by statute, the nature of his duties must be determined from the statute alone, and evidence for such purpose or to vary the statute will not be received.[76]

VI. CIVIL LIABILITIES.

1. Presumptions and Burden of Proof. — A. In General. a. *Nature of Act. — Individual or Official.* — When one known to be a public officer contracts with reference to the public matters committed to his charge he is presumed to contract in his official

ing. If the certificate is false, the matter must be corrected by *quo warranto*. Plowman *v.* Thornton, 52 Ala. 559.

74. "The law does not contemplate that the public officer who is charged with the duty of caring for public books and records has the manual custody of them. He acts through clerks and other subordinates, and the court will take judicial notice of the fact. The consolidation act should not have such a construction as would prevent the public records and books from having an actual custodian. The public interests would not permit us to so construe it, unless the language used actually compelled it."— People *v.* Palmer, 6 App. Div. 19, 39 N. Y. Supp. 631. See article "Judicial Notice" Vol VII., p. 981, note 64.

75. In Gate City Abstract Co. *v.* Post, 55 Neb. 742, 76 N. W. 471, Post brought a suit against the Abstract Co. and others on an abstracter's bond, given pursuant to the statute, for the making of a false certificate as to the existence of unsatisfied judgments. To show that a certain judgment was indexed, though not noted in the certificate, evidence of the custom of the clerk in the office to index the judgments in the appropriate record was received, and held properly, so, the court in the course of its opinion saying: "To show that the Cammenzind judgment was indexed in the office of the clerk of the district court on the day the transcript thereof was filed, the plaintiff introduced evidence of the uniform custom of the clerk in regard to such matters. This evidence was properly received to supplement the legal presumption that the clerk faithfully discharged the duties imposed on him by the statute in relation to transcribed judgments. 1 Greenl. Ev., 40; Owen *v.* Baker, 101 Mo. 407, 14 S. W. 175."

76. Under the New York statutes bringing certain officers under the civil service where the duties involved are not confidential in their nature, parol evidence was held incompetent, in *quo warranto* to determine the title to the office of clerk of the police court of a city, to show that the duties, outlined by statute were of a confidential nature, or that the clerk was called upon to discharge confidential duties. People *v.* Tobey, 153 N. Y. 381, 47 N. E. 800.

capacity only, notwithstanding the contract does not in terms refer to the capacity in which he contracts, unless the officer, by unmistakable language, assumes a personal responsibility, or is guilty of fraud or misrepresentation.[77]

b. *In Absence of Record of Receipts and Disbursements.* — If an officer fails to keep a record of fees collected, as required by statute, in a suit against him for fees collected he has the burden of showing the amount actually received; and if he fails to show the exact amount he will be liable for such fees as he should have collected.[78] When an officer has deceased, leaving no official record of the receipt and disbursement of certain funds, which he in fact received, it will be presumed that he converted the missing funds at the time he received them so as to charge his sureties who were liable at such times.[79]

c. *Possession of Public Funds.* — Where an officer has died during his term of office it will be presumed that all the public funds were in his custody at the time of his death.[80]

d. *As to Accounting.* — It will be presumed that the authority with whom an officer has made the settlement required of him has counted the money which the officer's report showed to have been on hand.[81]

e. *Request for Performance of Official Duty.* — When damages are sought against an officer for a failure to perform properly a duty to the claimant of damages, the plaintiff must show a request for the performance of such duty.[82]

77. Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502.

78. In State *v.* King, 136 Mo. 309, 36 S. W. 681, where this rule was announced, the court said: "It was undoubtedly the duty of defendant to faithfully perform these duties, and, failing to do so, the burden rested upon him to show the amount of fees received. He stood in the character of a trustee for the county, and, as such, it was his duty to faithfully account for all fees received. By reason of the suppression of evidence, he might properly be charged with what he ought to have collected, but the referee enforced this rule strictly in taking the account."

79. Doolittle *v.* Atchison, T. & S. F. R. Co., 20 Kan. 329.

80. Where a county treasurer dies while in office, it will be presumed, in the absence of anything to the contrary that everything belonging to his office, including money, was in the office at the time of his death; but where his successor in office, on taking possession, finds that more than $11,000 belonging to the various funds of the office is missing, and cannot be accounted for, such presumption is effectually overthrown; and where, in addition to the foregoing facts, it appears that such late treasurer received certain money, and failed to keep any account thereof in the records of his office, and there is nothing whatever in the office tending to show that said money was ever received by him, it will be presumed, in the absence of anything to the contrary, that said treasurer converted said money to his own use at the time he so received it. Doolittle *v.* Atchison, T. & S. F. R. Co., 20 Kan. 329.

81. Independent School Dist. of Sioux City *v.* Hubbard, 110 Iowa 58, 81 N. W. 241; Boone Co. *v.* Jones, 54 Iowa 699, 2 N. W. 987.

82. In an action against a clerk for negligence in failing properly to enter a transcript of a judgment on the judgment record to bind real es-

B. Actions on Official Bonds. — a. *Burden in General.* — In an action against sureties on an official bond the plaintiff must prove the defendant's breach and the loss or injury on which he counts,[83] so that, where a conversion of funds is alleged, the plaintiff must prove, not only the receipt of his funds by the officer, but the fact of their non-payment to him.[84]

b. *Official Character of Principal.* — In an action on a bond of an officer reciting the official character of the principal, proof of his election to such office is not required.[85]

tate the plaintiff must show that the clerk was requested to make such entry. Such request is shown, however, upon proof of its delivery to him for that purpose followed by an ineffectual entry. In Ryan *v.* State Bank, 10 Neb. 524, 7 N. W. 276, a case of this character, the court says: "Several of the alleged errors rest upon the assumption that it was not proved that the clerk was requested to enter this transcript on the judgment record. It is probably true that, taking the oral testimony alone, there was no sufficient evidence of such request. The only witness upon this point was the president of the bank, who could only swear that he took the transcript to the clerk's office for the purpose of having it so entered, delivered it to the clerk or his deputy and paid fifty cents, the customary fee for such service. But taking this, together with the fact disclosed by the judgment record, that a defective entry of this identical transcript was made by the deputy clerk on the day of its presentation, and there is no want of evidence in this particular. The taking of the fee and the erroneous entry place this matter beyond question." See also People *v.* Swineford, 77 Mich. 573, 43 N. W. 929.

83. In State *v.* Hughes, 19 Ind. App. 266, 49 N. E. 393, it was said: "By section 253, Horner's Rev. St. 1897 (section 253, Burns' Rev. St. 1894), it is provided that actions on official bonds shall be brought upon the relation of the party interested. An official bond is obligatory upon the principal and sureties for the faithful discharge of all duties required of the officer by law, for the use of any person injured by any breach of the condition thereof. Horner's Rev. St. 1897, sec. 5528 (Burns' Rev. St. 1894, sec. 7543). It was not enough for the relator to show merely a breach of official duty on the part of the sheriff. It was necessary to a recovery on the bond to show also injury to the relator through such breach — that he had sustained damages by reason of the breach of the condition of the official bond."

84. State *v.* Peterson (Mo.) 39 S. W. 453.

The general denial does not avoid the necessity of proof of non-payment by the plaintiff. Barker *v.* Wheeler, 62 Neb. 150, 87 N. W. 20.

85. King *v.* Ireland, 68 Tex. 682, 5 S. W. 499; Burnett *v.* Henderson, 21 Tex. 589.

The production of the officer's commission or a certified copy thereof is not required in such an action to prove his appointment. The recital of the officer's appointment in the bond sued on is sufficient evidence of the appointment, and will estop both principal and sureties from asserting his non-appointment. Bruce *v.* United States, 17 How. (U. S.) 437.

Recital in Bond. — De Facto Officer. — In Boone Co. *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, it was said: "It appears in evidence that the bond was filed and recorded in the auditor's office, and a day or two after the bond was filed a certificate of election, approved by the chairman of the board of supervisors, was delivered to said Jones. The bond was indorsed 'Approved November 18, 1876.' These words were in the handwriting of the chairman of the board. There was no other record made of the approval of the bond. We think it is not material to inquire whether the defendant Jones was entitled to hold over for

c. *Execution of Bond.* — In a joint action against an officer and his sureties for the negligence of the officer in discharging his official duties, proof of the execution of the bond is not necessary to a recovery against the officer alone,[86] though it is otherwise as to the sureties. In some jurisdictions proof of execution is, by force of statute, supplied by an acknowledgment of the execution.[87] When recovery is sought on an additional official bond the plaintiff is not required to explain why such additional bond was required or given.[88] The recital of one's name in the body of a bond as one of the obligors implies that the other obligors expect him to execute it along with them.[89]

d. *Delivery, Acceptance and Approval of Bond.* — The authority of an officer to deliver a bond executed by sureties is presumed

the full term for which Snell was elected, nor to determine whether his election to fill a vacancy was regular and authorized by law. We are united in the opinion that Jones and his sureties are concluded by the recitals in this bond, and cannot be heard to dispute the regularity of the election. Under the recitals of this bond he was, as between the parties thereto, *de facto* the treasurer of this county. If public officers are allowed to escape the consequences of malfeasance in office after the full term of their election has expired, because of an alleged illegal election, it would be a bolder and more glaring instance of allowing a man to take advantage of his own wrong than any case that has come under our observation."

86. In Ryan *v.* State Bank, 10 Neb. 524, 7 N. W. 276, the court said on this question: "This petition doubtless shows a joint cause of action against all of the defendants; therefore, under the rule just stated, which we believe to be sound, a recovery against them all, or even against any of those names as sureties, would have required proof of all of its material allegations, including those showing the execution and delivery of the bond. As to the sureties, the petition, without the averments relative to the bond, stated no cause of action. Not so, however, as to the defendant Ryan. He was the principal in all these transactions, and it was his negligence that caused the injury complained of. His liability in no wise depended upon having given a bond; and if everything relating to that instrument had been omitted, or stricken from the petition, a good cause of action as against him would have remained."

87. By the Illinois statutes, an official bond is required to be acknowledged and the acknowledgment is made *prima facie* evidence of the execution of the bond, with the same force and effect as evidence given to deeds of conveyance. And it has been held under such a statute in an action against an estate on an official bond signed by the deceased, that extrinsic proof of the signature would not be required notwithstanding the provision of an act in regard to the administration of estates requiring proof of handwriting in suits against an estate on an instrument executed by the deceased. Ramsay *v.* People, 197 Ill. 572, 64 N. E. 549, *affirming* 97 Ill. App. 283.

Affixing Seal. — Presumption. When the seal of a surety on an official bond will be presumed to have been placed thereon by the surety, see Moses *v.* United States, 166 U. S. 571.

88. Treasurers of State *v.* Taylor, 2 Bail. (S. C.) 524.

89. In such circumstances it will be presumed that the attaching of such obligor's signature to the bond was with the consent of the other obligors, so as not to invalidate the bond, unless there be proof to the contrary. Kelly *v.* State, 25 Ohio St. 567, 578.

to continue until there has been an act of revocation.[90] Though the delivery and acceptance of an official bond are required to give it validity, express delivery and acceptance are not essential.[91] The approval need not be evidenced by any entry on the bond itself or other record unless required by statute, but may be implied from circumstances.[92] Indeed, it has been held that an approval of the bond is not required to charge the sureties on it.[93] It will be pre-

90. Paxton *v.* State, 59 Neb. 460, 81 N. W. 383.

91. If the officer in fact enters upon the discharge of his duties of his office, and the bond comes into the custody of the proper authorities, a *prima facie* case of delivery and acceptance is made out. Ramsay *v.* People, 197 Ill. 572, 64 N. E. 549, *affirming* 97 Ill. App. 283.

In an action on a county treasurer's bond, which was required to be approved by the county judge, the sureties defended on the ground of a non-delivery and non-acceptance of the bond. In considering the evidence, the court, reviewing it, said: "It is urged that the court erred in admitting the bond in evidence, and that the verdict of the jury is contrary to the evidence, because the delivery and approval of the bond were not sufficiently shown. The bond was found, after the expiration of the term of office of the treasurer and of the county judge, whose duty it was to have taken the bond, in a tin file box in the office of the clerk, among other official bonds of the county. This was the proper place to deposit. It had no file mark and no indorsement of approval upon it, and bore date —— day of November, 1892, which was the time at which McFarlane was elected. McFarlane testified that he had never delivered it to the county judge, nor to any one, as his official bond. The person who was county judge at the time of McFarlane's election testified by deposition, and could not remember positively whether or not the bond had ever been delivered to and approved by him, but stated circumstances tending to show that it had not. McFarlane held his office for two years, and received the school funds in that capacity without objections from any quarter, and there was no other bond which entitled him to do so. We are of the opinion that the court did not err in admitting the bond in evidence, and we cannot say that the jury were not warranted in finding for the plaintiff on this issue." McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315.

92. Formal Entry of Approval Not Required. — That a bond is upon the files of a court charged with the duty of approving it, without any accompanying evidence of its rejection or disapproval combining with the fact that the principal has executed the duties of his office, is presumptive, if not conclusive, evidence of the acceptance and approval of the bond in an action against the sureties. McClure *v.* Colclough, 5 Ala. 65.

When a bond has been received by the proper authority and acted upon by the parties, its approval will appear sufficiently. An indorsement on the bond, or an entry of record, of the approval is not required, and parol may be received for such purpose. Bartlett *v.* Board of Education 59 Ill. 364.

93. Paxton *v.* State, 59 Neb. 460, 81 N. W. 383.

In Ramsay *v.* People, 197 Ill. 572, 64 N. E. 549, *affirming* 97 Ill. App. 283, the court said: "The requirement that an official bond shall be approved by some representative of the government is for the purpose of furnishing some means by which the public may be assured that the bond tendered is sufficient and is properly executed. The duty of thus approving the bond is a duty which is due to the public, and not to the principal in the bond or to his sureties. It follows 'that where, by virtue of the bond, the officer has been induced to the office, his sureties cannot escape liability for his defaults because the bond was not approved by the proper

sumed *prima facie* that a bond has been taken by the proper authority,[94] and that an indorsement of approval is regular.[95]

e. *Proof of Breach.* — To charge the sureties of an officer for a misappropriation of funds it must appear that such funds were in the officer's hands when the bond sued on was given,[96] or that they came into his hands in point of fact or in judgment of law before the expiration of his term of office.[97] The breach of duty which is made the ground of the plaintiff's action must be shown to have occurred during the period covered by the bond sued on, and on this issue the plaintiff has the burden.[98] A *prima facie* case is made for the plaintiff, suing on a bond, by producing the bond and the official books and records of the officer showing the amount of public funds on hand when the bond was given, the amount afterward received by him and the sums paid out.[99] When defalcations previous to the time when the particular bond was given are admitted there is no presumption as against the sureties on such a bond that the amount shown by the officer's books to be due from him is the amount for which they are liable.[1] When an officer, succeeding himself, accounts to himself for bank credits, treating them as cash items on his books, the liability for such items is *prima facie* on the second term bondsmen.[2]

f. *As to Time of Misappropriation.* — **(1.) Different Bonds for Single Term.** — In the absence of proof to the contrary it will be pre-

officer or was not approved at all.'"

94. Com. *v.* Davis, 9 B. Mon. (Ky.) 128.

95. When a bond bears an indorsement of approval in open court over the signature of the county judge, it will be presumed that there has been approval by the full court as required by the statute. Combs *v.* Breathitt Co., 18 Ky. L. Rep. 809, 38 S. W. 138.

96. Myers *v.* United States, 1 McLean 493, 17 Fed. Cas. No. 9996.

97. Bryan *v.* United States, 1 Black (U. S.) 140.

98. Com. *v.* Tate, 17 Ky. L. Rep. 1045, 33 S. W. 405; Smith *v.* Whiteside (Tex. Civ. App.), 39 S. W. 381.

99. Mahon *v.* Kinney Co. (Tex. Civ. App.), 28 S. W. 1024.

Proof of bond and certified account from controller's office showing an indebtedness. Arbuckle *v.* State, 81 Tex. 191, 16 S. W. 876.

1. In Com. *v.* Tate, 17 Ky. L. Rep. 1045, 33 S. W. 405, it was said: "The presumption, in the absence of this admitted defalcation, would have been that the books of the treasurer and the auditor evidenced the real amount in the hands of the treasurer at the time the bond was signed; but when these defalcations were undenied, and, no doubt, existed, no such presumption should be indulged, and the burden was on the state to show the real amount for which the appellees were liable; . . . and it is incumbent on the state, when the surety is sought to be made liable, and certainly so in a case like this, to show the amount for which a recovery should be had. A surety stands upon the terms of his bond, and his liability is confined to the period for which he has made himself liable; and when there is a defalcation by the same official in the same office for terms not only preceding the term for which the sureties are attempted to be held, but for subsequent terms, it would be extending the liability of the surety to a great extent to require him to show what defaults occurred before, and what after, the expiration of the term for which he is sought to be made liable."

2. Paxton *v.* State, 59 Neb. 460, 81 N. W. 383.

sumed that an officer who, at the end of his term of office, fails to account for funds coming into his hands misappropriated such funds at the close of his term so as to charge the sureties liable at that time.[3] The report of an officer as to funds in his hands, made and approved during a second term, does not conclude his sureties on an issue as to when the default occurred, but they may show, notwithstanding the report, that the default occurred during the earlier term.[4]

(2.) As Between Sureties for Successive Terms. — When a general default is proven against an officer holding for successive terms with different sureties, in an action against the sureties for a second or other subsequent term the sureties have the burden to show that the default occurred during a prior term for which they are not liable, and to separate their own from the liability of others.[5] If

3. In Stoner *v.* Keith Co., 48 Neb. 279, 67 N. W. 311, the court said: "It is further claimed that the shortages, if any were shown, existed prior to the time the second bond was given, and the parties who signed it cannot be held to their payment. The testimony shows that the treasurer received the proceeds of these bonds, and of these moneys he failed and refused to turn over, in the aggregate, the sum of $1180 thereof. The page of the book introduced in evidence showed that at the date which closed his term of office the amounts which made the above stated sum were charges against the treasurer of moneys which should have been turned over to his successor. So much being shown, it devolved upon the opposite parties to prove the contrary. It was the duty of the treasurer to turn over to his successor all moneys in his hands belonging to the county, or for which he was liable to account. In the absence of proof as to when it was misappropriated, the presumption must be that it was at the end of the term, and the liability would accrue at such time. Heppe *v.* Johnson, 73 Cal. 265, 14 Pac. 833; United States *v.* Stone, 106 U. S. 525, 1 Sup. Ct. 287."

4. Salazar *v.* Territory, 8. N. M. 1, 41 Pac. 531.

5. If the surety relies on the fact that moneys, admittedly received by the principal, came into his possession before the bond sued on was given, the surety has the burden to prove such as a defense. Faulkner *v.* State, 9 Ark. 14.

The sureties on the last bond of an officer who has given several bonds are *prima facie* liable for such funds as are chargeable to their principal as shown by his official records at the time of his retirement from office, and the burden is upon the sureties to show that the defalcation in fact occurred during a prior term. Pine Co. *v.* Willard, 39 Minn. 125, 39 N. W. 71.

In Board of Education *v.* Robinson, 81 Minn. 305, 84 N. W. 105, it was said: "It may be stated, as a general rule or principle of law, that where a person holds a public office for two or more successive terms, and executes a new bond with new sureties for each term, and a defalcation occurs on the part of the officer, the sureties on the bond given for the term during which the defalcation occurred are alone liable. Throop Pub. Off. 205 *et seq.*; 2 Brandt, Sur. sec. 543. But where the officer fails to account for and pay over to his successor the funds chargeable to him as shown by his books and final account, the sureties on the last bond are *prima facie* liable therefor, and, to relieve themselves, must show that the defalcation in fact occurred during a prior term. Pine Co. *v.* Willard, 39 Minn. 125, 39 N. W. 71; City of Hartford *v.* Franey, 47 Conn. 76; Brandt, Sur. sec. 522. In such case the sureties are *prima facie* liable, and the burden is upon them when the defalcation in

the sureties rely upon the crediting improperly of funds received during the term for which they are liable to another term they have the burden of establishing the specific items they rely upon.[6] In some cases it has been held that there is no presumption in such circumstances, but that the question is one of fact only, to be determined from all the facts and circumstances in the particular case.[7]

fact occurred. The only exceptions to this principle are based upon peculiar statutes or some special condition of the bond."

In an action on an official bond covering one only of several successive periods, for a defalcation of the principal, the sureties, their principal having the means of so doing by receipt taken by him or by other modes, have the burden to show what part of the deficit belonging to other periods for which they are not liable, and the particular deficit for the period during which they are bound. Readfield *v.* Shaver, 50 Me. 36, 79 Am. Dec. 592.

In an action against the sureties of an officer for a second or other successive term, a default will not be presumed to have occurred during a prior term from the fact that he had a balance of public funds in his hands at the beginning of the particular term. The burden rests upon the sureties to show a default during the prior term for which they were not liable. Bruce *v.* United States, 17 How. (U. S.) 437.

When the plaintiff sues on an official bond, accompanied by an account as a part of the complaint, showing an indebtedness of the officer at the time the bond sued on was given, it will be presumed, on proof of the account, that the funds so in the principal's hands were had and held by him officially, and the sureties must thereupon take the burden to show the misappropriation of such funds prior to the execution of the bond sued on. The fact that at the date the bond was given there was a balance against the officer is not sufficient evidence that at that date he had misapplied such amount. Hetten *v.* Lane, 43 Tex. 279-289.

When an officer holding for several consecutive terms is found to be a defaulter at the expiration of his last term, it will be presumed, in the absence of evidence to the contrary, that the entire default occurred during the last term. Kelly *v.* State, 25 Ohio St. 567, 578, 579; Arbuckle *v.* State, 81 Tex. 191, 16 S. W. 876.

The burden is on the sureties on an official bond to show that official moneys proven to have been received by the principal were not received during the period for which they are liable. Weakley *v.* Cherry Twp., 62 Kan. 867, 63 Pac. 433; Clark *v.* Douglas, 58 Neb. 571, 79 N. W. 158.

It will be presumed, in the absence of proof to the contrary, that funds collected by an officer during a preceding term, and not paid over at the beginning of a new and succeeding term, were at such latter time in his hands. Hartford *v.* Traney, 47 Conn. 76.

Contra.— Where the default of an officer holding several consecutive terms is proved, with no evidence as to the time of the defalcation, in an action against the sureties on his bond covering the first term it will not be presumed that at the time of his second appointment he had all the public funds in his hands. It may as well be presumed that the defalcation occurred during the first, as during the second term. Trustees of Schools *v.* Smith, 88 Ill. 181.

6. A surety seeking to avoid liability on an official bond on the ground that the officer was in default for a preceding term, and that funds received during the later term were improperly credited on his accounts for the earlier term, must show such appropriations by dates, items and amounts, and that specific items were improperly credited. State *v.* Hays, (Tenn.) 42 S. W. 266.

7. Board of Administrators *v.* McKowen, 48 La. Ann. 251, 19 So. 328, 553.

Where an officer has received into his custody during a term of office preceding that covered by a particular official bond, funds which he has converted, there is no legal presump-

g. *Replacement of Misappropriated Funds.* — When in an action on an official bond a misappropriation of public funds has been shown, the defendants have the burden to show that the funds have been replaced to avoid liability.[8]

h. *To Show Disbursement.* — Sureties, to exonerate themselves upon their bond, as well as the officer himself when sued alone, must show that he has properly paid out or disposed of the sum or sums coming into his official custody.[9] When an officer has been elected to succeed himself, his sureties for the earlier term, when sued for their principal's defalcation, likewise have the burden to show as matter of defense that moneys coming into the officer's hands during the term for which they are sureties were paid over to himself as his own successor.[10]

i. *Making of Official Settlement Before Entering Upon Succeeding Term.* — Proof of the making of an official settlement by a re-elected officer, in compliance with the statute, before entering

tion that the conversion took place prior to the execution of the bond, or that it occurred afterward. But the question is one of fact only to be determined by the jury from all of the facts and circumstances before it. McPhillips *v.* McGrath, 117 Ala. 549, 23 So. 721; Governor *v.* Robbins, 7 Ala. 79; Williams *v.* Harrison, 19 Ala. 277.

To render a surety liable for the misapplication of moneys received by the officer prior to the time when the surety became liable on the principal's bond, there must be proof that such moneys were in the principal's hands at the time the subsequent surety's liability attached. This must be shown, not presumptively, but in fact. Proof of the defalcation only does not in such circumstances fix the liability. Myers *v.* United States, 1 McLean 493, 17 Fed. Cas. No. 9996.

If there are different sureties for the several periods, the plaintiff has the burden to show the deficit for each period, and where the deficit is in an aggregate sum only there can be no recovery. Com. *v.* Piroth, 17 Pa. Super. Ct. 586.

8. Board of Com'rs *v.* Pabst, 70 Wis. 352, 35 N. W. 337; Supervisors *v.* Ehlers, 45 Wis. 281.

9. Trustee of Schools *v.* Smith, 88 Ill. 181; State *v.* Hays (Tenn.), 42 S. W. 266.

As to Officer. — In People *v.* Swineford, 77 Mich. 573, 43 N. W. 929, where this question was considered, the court, stating the facts, said: "It now clearly appears that the only means of proving the fact of the payment rests with the defendant himself. He is in possession of full and plenary proof to disprove the negative averment and entirely rebut the evidence arising from the circumstances surrounding the case adduced by the plaintiff upon the question. It would therefore be most reasonable and just that he should be required to adduce it, or, upon his failure to do so, to presume that it does not exist; which of itself, would establish the negative."

10. In the case of Morgan *v.* Smith, 95 N C. 396, the court says: "The governing principle is this: The obligation to hold and pay over the money to the party entitled to it when called on is incurred when the money is received, and if not so paid over, without other proof, the bond then in force is responsible. It is matter of defense and excuse that it has been paid over to the successor, and this the defendant ought to show. The failure of the clerk to pay over when the fund is demanded is cogent evidence of a devastavit committed at some previous stage, and to shift the liability from one term to another, and from the bond formerly liable to another, proof ought to come from the delinquent, or from his sureties."

upon a second or other subsequent term, need not be made against a surety. Such a provision is made for the benefit of the public, not the surety.[11]

2. Admissibilty. — A. Declarations and Admissions of Officer. — The written statements made by an officer at the time of the settlement of his accounts with the proper authority are admissible against him and his sureties as part of the *res gestae*.[12]

11. In Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241, where this matter was thoroughly considered, the court said in part: "The statute provided that, when a 're-elected officer has had public funds or property in his control, under color of his office, his bond shall not be approved until he has produced and fully accounted for such funds and property to the proper person to whom he should account therefor.' Section 690, Code 1973. See section 1193, Code. If the settlement of Hubbard was made, and all the funds and property of the district were actually produced, as required by law, such settlement, in the absence of fraud or mistake, is conclusive, and no inquiry will be tolerated concerning the source from whence any of the necessary money was derived. Boone Co. *v.* Jones, 54 Iowa, 699, 2 N. W. 987, and 7 N. W. 155; Morley *v.* Town of Metamora, 78 Ill. 394; Gage *v.* City of Chicago, 2 Ill. 332. This duty of settling and requiring the production of funds before approving the bond, however, is due to the public and not to the surety. Even in the absence of settlement he is liable for any defalcation during the life of the bond."

12. In Paxton *v.* State, 59 Neb. 460, 81 N. W. 383, the court said: "Error is assigned on the admission in evidence of 'Exhibit 23' tendered by the state for the purpose of showing the balance with which Bartley was chargeable at the end of his second term. This exhibit is a statement prepared by the auditor of public accounts, and purports to show the moneys and securities for which Bartley, as treasurer, was accountable to his successor on January 7, 1897. It was produced by Bartley, and handed to his successor, J. B. Meserve, in the office of the treasurer, on the morning of January the 8th, at the time the office was being turned over, and in connection with the accounting which was then being made by the outgoing to the incoming treasurer. It was, in substance, a declaration by Bartley, while in the act of accounting, that the amounts mentioned in the document were the amounts for which he should account. It was the duty of Bartley to account to his successor, and to turn over all moneys and securities with which he was chargeable. The sureties contracted that this should be done. It was an official duty, the performance of which was necessary to their exoneration. The accounting was made at the very time the law required it to be made, and we therefore think that, although Bartley had ceased to be the *de jure* treasurer by reason of Meserve's having qualified, his declaration as to the amount of moneys and securities which he should turn over to his successor was admissible as evidence against the sureties. It was a declaration made during the transaction of business, for which they were liable, and so became part of the *res gestae*."

In Boone Co. *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, the court say: "At the time Jones made his final settlement with the board, and when he surrendered the books and effects of the office to his successor, he took the money on hand from the safe, counted it, and handed it over. It amounted to $4726.91. The plaintiff introduced the members of the board as witnesses, and they were permitted, against defendant's objection, to state what Jones said at the time as to the amount of money there should have been on hand. The argument of counsel for the appellants is that the declarations of Jones are not binding upon the sureties, but liabil-

The declarations of an officer made while he is acting officially in the receipt of money,[13] as well as his admission while in office of the receipt of public moneys,[14] are admissible against his sureties. Subsequent declarations, however, are incompetent.[15]

B. Receipts and Vouchers. — Receipts given by an officer for sums of money are admissible against his surety, and are *prima facie* proof that the moneys mentioned therein came into the principal's hands.[16] So the original receipts received by an officer from the proper authority in making an official statement are *prima facie* evidence of the amount paid over by him.[17] A receipt in the form of an I. O. U. given by a county treasurer to a tax collector is

ity upon the bond must be fixed by the books of the treasurer, and the records of the board of supervisors, showing the amount of defalcation, a settlement with Jones, and a demand for the deficiency. We know of no rule which requires liability upon the bond to be made matter of record. The fact to be ascertained is, did Jones pay over to his successor all the money with which he was properly chargeable? If he did not, he and his sureties are liable upon the bond."

13. Dumas *v.* Patterson, 9 Ala. 484.

14. Butte Co. *v.* Morgan, 76 Cal. 1, 18 Pac. 115.

The admission of a sheriff while in office of the receipt of money is competent evidence to charge his sureties. *Semble,* Treasurers *v.* Bates, 2 Bail. L. (S. C.) 362, 381.

15. Dumas *v.* Patterson, 9 Ala. 484.

The admission of an officer after the expiration of his term of office, of a shortage in his accounts, while competent against the officer himself, is not competent against his sureties. McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315.

The admissions or declarations of an officer, not made in the course of any business pertaining to his office or as a part of any act or transaction with which the surety is connected by his bond, but narrative of a past transaction, are hearsay merely, and are incompetent against the sureties whether sued alone or jointly with the officer. To be admissible it seems they must be part of the *res gestae.* Lewis *v.* Lee Co., 73 Ala. 148. But see *contra,* Treasurers *v.* Bates, 2 Bail. L. (S. C.) 362, 380.

16. People *v.* Huson, 78 Cal. 154, 20 Pac. 369; King *v.* Ireland, 68 Tex. 682, 5 S. W. 499.

The official receipt of an officer, though undated, is such an admission as is competent and sufficient *prima facie* to charge his sureties for moneys received by the officer and with a defalcation. Town Council of Sumter *v.* Lewis, 10 Rich. L. (S. C.) 171.

17. In Albertson *v.* State, 9 Neb. 429, 2 N. W. 742, 892, the court, after setting out the statute relating to settlements of county treasurers, considering the receipt given him, said: "It will thus be seen that the account with the county treasurer is kept in the county, and the settlement is to be made *with the county commissioners.* The state taxes are to be collected and paid to the state treasurer, and the receipt received therefor is to be used as a voucher in his settlement with the commissioners. This receipt, given by the state treasurer, is the original; a duplicate thereof, it is shown by the testimony, is filed in the auditor's office and a copy retained in the treasurer's office. While the auditor is the general accountant of the state, and is required [Gen. Stat. 1011] to keep all 'public accounts, vouchers, documents, and all papers relating to the accounts and contracts of the state, and its revenue, debt and fiscal affairs, not required by law to be placed in some other office, or kept by some other officer or person,' yet, in a contest as to the amount paid to the state treasurer by a county treasurer, the original

admissible against the sureties of the treasurer, since deceased, and it may be shown in such circumstances by parol that the writing was intended as a receipt for so much of the county tax, to be accounted for in a settlement with the collector at the end of the month.[18] Where certificates of non-indebtedness are given an officer by the proper authority they are not conclusive evidence in favor of the sureties.[19]

C. Officer's Settlements, Reports and Records Made Thereon. — When it is made the duty of an officer or his legal representative to settle his accounts during or at the end of his term of office, a settlement made conformably to the statutory duty is competent *prima facie* evidence against the officer's sureties of the state of his official accounts at such time.[20] The record of the approval of the report made by the officer is likewise competent against the officer's sureties.[21] In some jurisdictions the reports and settlements made by the officer, showing the amount with which he is chargeable at a particular time, are by statute or decision made conclusive against both the officer and his sureties.[22] The

receipt of the state treasurer, filed with the county commissioners, *prima facie* will control."

18. Coleman *v.* Pike Co., 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746.

19. Moses *v.* United States, 166 U. S. 571.

20. *United States.* — United States *v.* Eckford, 1 How. 250; United States *v.* Boyd, 5 How. 29; Watkins *v.* United States, 9 Wall 759; Williams *v.* United States, 1 How. 290.

Alabama. — Kilpatrick *v.* Pickens Co., 66 Ala. 422; Townsend *v.* Everett, 4 Ala. 607; Coleman *v.* Pike Co., 83 Ala. 326, 3 So. 755; 3 Am. St. Rep. 746.

Arkansas. — State *v.* Newton, 33 Ark. 276.

Indiana. — Lowry *v.* State, 64 Ind. 421; Heagy *v.* State, 85 Ind. 260; Hunt *v.* State, 93 Ind. 311, 321; Rogers *v.* State, 99 Ind. 218. (The Indiana rule exists by force of statute, and the cases of State *v.* Grammer, 29 Ind. 530, and State *v.* Prather, 44 Ind. 287 are overruled.)

Iowa. — Boone Co. *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155.

Illinois. — Cawley *v.* People, 95 Ill. 249; Stern *v.* People, 102 Ill. 540.

Mississippi. — Lipscomb *v.* Postell, 38 Miss. 476.

Massachusetts. — Hatch *v.* Attleborough, 97 Mass. 553; Rochester *v.* Randall, 105 Mass. 295; Williamsburgh Ins. Co. *v.* Frothingham, 122 Mass. 391.

Missouri. — Nolly *v.* Callaway Co., 11 Mo. 447; State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204. In Clark Co. *v.* Hayman, 142 Mo. 430, 44 S. W. 237.

Nevada. — State *v.* Rhoades, 6 Nev. 352.

New York. — Bissell *v.* Saxton, 66 N. Y. 55; Supervisors *v.* Bristol, 99 N. Y. 316, 1 N. E. 878.

North Carolina. — State *v.* Fullenweider, 4 Ired. L. 364.

Statements of moneys on hand made by a treasurer to the county commissioners, at the beginning of a term, are competent *prima facie* evidence against the sureties, but may be impeached and contradicted by them. Van Sickle *v.* Buffalo Co., 13 Neb. 103, 13 N. W. 19.

21. Stern *v.* People, 102 Ill. 540.

22. Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182; Longan *v.* Taylor, 130 Ill. 412, 22 N. E. 745; Wycough *v.* State, 50 Ark. 102; State *v.* Wood, 51 Ark. 205; 14 S. W. 624; Morley *v.* Metamora, 78 Ill. 394, 20 Am. Rep. 266; Roper *v.* Sangamon Lodge, 91 Ill. 518.

In an action for defalcation on an officer's additional bond, a settlement made by the officer at the time such bond was given, and an accounting to the proper authority for all funds

fact alone that the minutes of the body to whom an officer is required to make his reports contain an entry that the officer at the conclusion of one term and before entering upon another made his report to them, and that the same was carefully examined, is not evidence that the officer had at such time in his custody all the funds belonging to the office.[23]

D. Certificates and Statements of Accounts. — When the statute authorizes the reception in evidence of a transcript of official books and records, in particular circumstances, or a report founded thereon, the admissibility of such evidence will be restricted by the language of the statute to the instance of admissibility stated, as such evidence is competent only when made so by statute, or when its correctness is admitted and its reception consented to by the party against whom it is offered.[24] An objection to the certified state-

in his official custody, are conclusive evidence, even against the sureties, in the absence of a mistake in his books or in the settlement, that there was no deficit at the time the additional bond was given, but that the defalcation occurred afterward and and under the additional bond. Boone Co. *v.* Jones, 54 Iowa 699, 2 N. W. 987.

Under the act of March 30, 1811, of the general assembly of Pennsylvania, a settlement of the account of a public officer was conclusive evidence against the officer and his sureties of the amount due from such officer, in an action on his official bond, where the account purported to embrace such funds only as the officer had received and disbursed during the time covered by the particular bond. It was open to a surety, however, to show that the funds charged in such settlement were received before the time when his liability attached. Spangler *v.* Com., 8 Watts (Pa.) 57; Com. *v.* Reitzel, 9 Watts & S. (Pa.) 109.

23. Trustees of Schools *v.* Smith, 88 Ill. 181.

24. Bruce *v.* United States, 17 How. (U. S.) 437.

Section 886, Rev. Stat. U. S. providing for the use of certified transcripts from the treasury department as evidence in an action arising out of the delinquency of a revenue officer or other officer accountable for public money, does not render admissible such a transcript in an action on the official bond of the superintendent of a mint, where the theory of his liability is the failure to keep safely money and bullion intrusted to his care. United States *v.* Bosbyshell, 73 Fed. 616.

Where a judgment has been rendered against a disbursing officer of the federal government for a large part of a defalcation, in a subsequent suit on his bond the transcripts of the defaulter's accounts from the treasury department are competent to be received in connection with the prior judgment against him to identify the items entering into the judgment as being the items of the defalcation. Howgate *v.* United States, 3 App. Cas. D. C. 277, 293-294.

In an action on the bond of a treasurer for a defalcation, the certificate of the comptroller showing the amount paid to the treasurer during the year when the defalcation occurred is admissible under sections 2308, 2436, Tex. Rev. Stat. 1895, and it will not affect the admissibility of such a certificate for this purpose that it showed the amounts paid to him in other years to which no defalcation is alleged. McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315.

See Com. *v.* Tate, 17 Ky. L. Rep. 1045, 33 S. W. 405.

The report of a committee of the result of its examination of the books and records of an alleged defaulting officer is not competent evidence against the officer or his sureties, without the aid of a statute, un-

ment of an officer's accounts from the books and records of the treasury department, offered in evidence under the statute by the plaintiff, and not arising upon the face of the accounts, but only after a comparison between them and evidence of the same kind offered by the defendants, lies to the effect, and not to the competency, of the evidence offered.[25] An expert's report as to the state of an officer's accounts after examining the officer's reports and records is not, of course, to be received as conclusive evidence of the matters reported in an action against the officer and his sureties for defalcation.[26] Likewise, without the aid of a statute, the books required to be kept by one officer showing the state of another officer's account with the county, the debit entries of which are made up from the latter officer's receipts given as required, are inadmissible against the officer or his sureties.[27] The certificate of the proper authority, made as required by law, that an officer has in his custody a stated amount, is presumptively correct, and, where a default is shown, is presumptive evidence that it occurred subsequent to the date of such receipt.[28]

E. Officer's Entries in Official Books and Records. Official books and records kept by an officer, showing his receipts

less it shall be assented to or admitted to be correct by the party, principal or surety against whom it is offered. It is only *res inter alios acta*. An admission of its correctness by the officer will not render it admissible against his sureties. Lewis *v.* Lee Co., 73 Ala. 148.

Federal Officer. — The restatement of an officer's account disallowing credits which had been previously given the officer during his term upon forged vouchers is admissible against the officer's sureties, notwithstanding the restatement of the account is made after the officer has resigned his office. Moses *v.* United States, 166 U. S. 571.

25. United States *v.* Stone, 106 U. S. 525.

26. Clark Co. *v.* Hayman, 142 Mo. 430, 44 S. W. 237.

27. In King *v.* Ireland, 68 Tex. 682, 5 S. W. 499, where this question was considered, the court say: "On the trial of the cause the appellee introduced in evidence the 'county ledger' to show the state of the account between King and the county, and the extent of King's defalcation. This was objected to, but the objection was overruled by the court. We find in our revised statutes a requirement that such a book shall be kept by the county clerk, but we find no statute making it admissible in evidence against the collector to show the amount of his indebtedness to the county on tax account. The entries in the ledger of the debit of the collector are taken from receipts given by him for the tax rolls when they are delivered to him. These receipts are of course good evidence against him; but the account made from them is the mere statement of the clerk that he had given such receipts, and is of course no more than hearsay evidence, and inadmissible. It falls within none of the rules of the common law which admit this species of testimony in exceptional cases, and, no statute having been provided for its being received, it should have been ruled out in this case. The certified copy of an inadmissible record is of course incompetent as evidence. In the case of Allbright *v.* Governor, 25 Tex. 687, a similar account kept with a tax collector by the comptroller of public accounts was declared to have been improperly admitted in evidence, and the case is full authority for the rejection of the present account."

28. Butte Co. *v.* Morgan, 76 Cal. 1, 18 Pac. 115.

and disbursements of public funds, are presumed, as against both him and his sureties, to show correctly the state of his accounts.[29] And this has been held to apply to entries made before the bond sued on was given,[30] and to entries made by the officer's clerk or agent as well as by himself.[31] When the records and papers showing the state of an officer's accounts have become lost or destroyed, he may give secondary evidence of their contents.[32] Such entries and records do not conclude the officer's sureties, but make out a *prima facie* case against them.[33] The officer's own entries are,

29. *Alabama.* — Coleman *v.* Pike Co., 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746.

Illinois. — Cassady *v.* Trustees of Schools, 105 Ill. 560; Pike *v.* People, 84 Ill. 80; Bartlett *v.* Board of Education, 59 Ill. 364; *Iowa* Independent School District *v.* Hubbard, 110 Iowa 58, 81 N. W. 241.

Kansas. — Rizer *v.* Callen, 27 Kan. 339.

Massachusetts. — Locke *v.* Bennett 7 Cush. 445.

Nebraska. — Blaco *v.* State, 58 Neb. 557, 78 N. W. 1056; Paxton *v.* State, 59 Neb. 460, 81 N. W. 383; New Jersey Union *v.* Bermes, 44 N. J. L. 269.

South Carolina. — Brown *v.* Brown, 45 S. C. 408, 23 S. E. 137.

Written statements and entries in his books, made by an officer, since deceased, are admissible against his representative and the sureties on his official bond. State *v.* Teague, 9 Rich. L. (S. C.) 149.

The books of a county treasurer are presumed to show the amount due from that officer to the county. State Bank *v.* Chapelle, 40 Mich. 447.

30. Cassady *v.* Trustees of Schools, 105 Ill. 560.

31. Cawley *v.* People, 95 Ill. 249. The account book of an officer showing the amounts of public funds variously received by him is competent against the officer and his sureties. The rule is not otherwise when the entries therein have been made by the officer's clerk, and *a fortiori* is this true when the officer has sworn that he has in his custody a sum equal to the aggregate of the amounts shown by the entries in his books. Bartlett *v.* Board of Education, 59 Ill. 364.

Entries made by an officer or his agent are *prima facie* evidence against him and his sureties; but entries made by the agent after the termination of the agency (as after the death of the officer) are wholly incompetent. Coleman *v.* Pike Co., 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746.

32. United States *v.* Laub, 12 Pet. (U. S.) 1.

33. Paxton *v.* State, 59 Neb. 460, 81 N. W. 383; Pike *v.* People, 84 Ill. 80; Rizer *v.* Callen, 27 Kan. 339; Locke *v.* Bennett, 7 Cush. (Mass.) 445; Union *v.* Bermes, 44 N. J. L. 269; Mann *v.* Yazoo City, 31 Miss. 574; Ohning *v.* Evansville, 66 Ind. 59; Lowry *v.* State, 64 Ind. 421, *overruling* State *v.* Parther, 44 Ind. 287, and State *v.* Grammer, 29 Ind. 530; Broad *v.* City of Paris, 66 Tex. 119, 18 S. W. 342; Muniford *v.* Overseers of the Poor, 2 Rand. (Va.) 313; Bissell *v.* Saxton, 66 N. Y. 55; Board *v.* Bristol, 99 N. Y. 316; Jacobs *v.* Hill, 2 Leigh (Va.) 393; Craddock *v.* Turner, 6 Leigh (Va.) 116; Crawford *v.* Turk, 24 Gratt. (Va.) 176; Baker *v.* Preston, Gilmer (Va.) 235, *holding* that the books of a treasurer were conclusive against sureties is overruled. See State *v.* Rhoades, 6 Nev. 352, according with later Virginia decisions.

In Wilkes-Barre *v.* Rockafellow 171 Pa. St. 177, 33 Atl. 269, on this proposition the court says: "It is contended that, as the law requires the city treasurer to keep accounts of his receipts and disbursements of the revenues of the city, and to make at stated intervals transcripts of these accounts for the information of the municipal government, the transcripts so made should be held to be conclusive upon him and his sureties as to the amount of public moneys received by him. This

however, the clearest evidence of his liability for funds received, and strong proof against them will be required to add to or vary them in the officer's favor or in favor of his sureties.[34]

F. Competency and Effect of Judgment Against Officer. In a limited number of cases a judgment against the officer alone, in an action to which the surety was not a party, has been held wholly inadmissible against the surety.[35] The later cases, however, in the main treat the judgment against the officer as competent

is putting the effect of the entries by the treasurer upon his books too strongly. They should be held to make a case, *prima facie,* against him and those who are in privity with him. They cannot, however, preclude the defendants from showing that the items, or some of them, have been erroneously entered—that their principal was mistaken in his view of his own liability, or was disposed, unfairly, to make them responsible for sums of money for which no recovery could otherwise be had against them. Their liability is limited, as we have seen, by the terms of the bond, to a breach of official duty."

In a recent case in which an officer at the beginning of a second term had transferred to himself on his books certain bank credits in lieu of cash, but which were treated as subsisting credits, the court says: "That the bank credits transferred by Bartley to himself represented money in solvent banks is shown by the entries in the books of the treasurer's office. These records show that on January 31, 1895, Bartley had on hand, as cash, the money represented by the bank vouchers turned over on January 8th. Other records subsequently made by Bartley as treasurer testified to the same fact. These records are competent evidence against the sureties, and, in the absence of countervailing proof, would be conclusive. Van Sickle *v.* Buffalo Co., 13 Neb. 103, 13 N. W. 19; Albertson *v.* State, 9 Neb. 429, 2 N. W. 742, 892; Ohio & M. R. Co. *v.* People, 119 Ill. 207, 10 N. E. 545; Rizer *v.* Callen, 27 Kan. 339; Locke *v.* Bennett, 7 Cush. 445; Town of Union *v.* Bermes, 44 N. J. L. 269; Paxton *v.* State, 59 Neb. 460, 81 N. W. 383.

The acts, entries and reports of an officer are not conclusive against, or do not estop, his sureties, to show the true amount for which their principal is liable. Goodwine *v.* State, 81 Ind. 109.

See Chicago *v.* Gage, 95 Ill. 593, 35 Am. Rep. 182, wherein it was held, in the case of a city treasurer elected as his own successor, that entries in his books of the receipts of balances from a previous term which he continues to report from time to time as in his hands, are conclusive on his sureties. Cawley *v.* People, 95 Ill. 249; Morley *v.* Metamora, 78 Ill. 394, 20 Am. Rep. 266.

34. In Clark Co. *v.* Hayman, 142 Mo. 430, 44 S. W. 237, court says: "The statements and settlements filed by Mr. Penn as treasurer were unquestionably strong evidence against his executors and sureties on his bond. He was bound by his bond to faithfully perform the duties which his sureties undertook he should perform, among which was to keep a faithful and just account of all moneys payable into the county treasury which he received, and keep an account of the receipts and expenditures. Having charged himself with the moneys thus received upon the books of his office, it is the clearest and most satisfactory evidence of his liability therefor and he and his sureties are only to be discharged from a liability therefor by showing disbursements on lawful warrants, or such satisfactory evidence of mistake in so doing as would justify a court of equity in correcting the account, and of this there is not the semblance of evidence in this record."

35. Beall *v.* Beck, 3 Har. & McH. (Md.) 242; Pico *v.* Webater, 14 Cal. 203; Governor *v.* Shelby, 2 Blackf. (Ind.) 26; Bailey *v.* Butterfield, 14 Me. 112; People *v.* Russell, 25 Hun (N. Y.) 524.

Thomas *v.* Hubbell, 15 N. Y.

prima facie evidence against the surety,[36] and in some instances it

405, 35 N. Y. 120; Rodini *v.* Lytle, 17 Mont. 448, 43 Pac. 501, 52 L. R. A. 165.

In Lucus *v.* Governor, 6 Ala. 826, where this question was presented, the court said: "We have looked in these decisions, and, so far as they held the judgment against the sheriff to be *prima facie* evidence against the sureties, it is impossible to perceive on what principle they rest. Doubtless, there are cases where the acts or admissions of the sheriff have the effect to bind his sureties; but it will probably be ascertained, whenever these are necessary to be examined, that the acts and admissions are a part of, or immediately connected with, his official duty. The case of a judgment against him is certainly not of this description; and we can conceive of no reason why it should have any effect against his sureties, unless they are concluded by it. If such a judgment is *prima facie* evidence, any one will perceive the difficulty there is rebutting it; and why should any greater effect be given to a judgment obtained by default against a sheriff, or, by his confession, against his surety, when it is certain that his confession, by itself, would not be so? The judgment against the sheriff is not essential, in this state, to enable the party to proceed against the surety, and therefore seems to have no bearing in an action upon his bond. It may be remarked that the case of a sheriff is entirely different from that of an administrator and guardian, inasmuch as a part of their duty is the settlement with the court."

"When the condition is to abide the order or judgment of a court, the action of the court binds the surety, though he had no opportunity to influence it; but if it be to perform an act *in pais*, then such a judgment against the principal is not evidence against the surety." People *v.* Zingraf, 43 Ill. App. 337.

36. *United States.* — Moses *v.* United States, 166 U. S. 571; Washington Ice Co. *v.* Webster, 125 U. S. 426; McLaughlin *v.* Bank of Potomac, 7 How. 220; Bergen *v.* Williams, 4 McLean 125, 3 Fed. Cas. No. 1340; Howgate *v.* United States, 3 App. Cas. D. C. 277.

Georgia. — Taylor *v.* Johnson, 17 Ga. 521; Haddock *v.* Perham, 70 Ga. 572.

Iowa. — Charles *v.* Haskins, 14 Iowa 471, 83 Am. Dec. 378.

Kansas. — Graves *v.* Bulkley, 25 Kan. 249, 37 Am. Rep. 249; Fay *v.* Edmiston, 25 Kan. 439.

Louisiana. — Whitehead *v.* Woolfork, 3 La. Ann. 42; Mullen *v.* Scott, 9 La. Ann. 173; Heath *v.* Shrempp, 22 La. Ann. 167.

Massachusetts. — Lowell *v.* Parker, 10 Metc. 309, 43 Am. Dec. 436.

Michigan. — People *v.* Mersereau, 74 Mich. 687, 42 N. W. 153.

Minnesota. — Beauchaine *v.* McKinnon, 55 Minn. 318, 56 N. W. 1065.

Missouri. — Stewart *v.* Thomas, 45 Mo. 42.

Mississippi. — Lipscomb *v.* Pastell, 38 Miss. 476.

Maine. — Dane *v.* Gilmore, 49 Me. 173; Dane *v.* Gilmore, 51 Me. 544; Foxcroft *v.* Nevens, 4 Me. 72.

Nebraska. — Barker *v.* Wheeler, 60 Neb. 470, 83 N. W. 678.

New Jersey. — De Greiff *v.* Wilson, 30 N. J. Eq. 435.

New York. — Taylor *v.* Barnes, 69 N. Y. 430; Bridgeport F. & M. Ins. Co. *v.* Wilson, 34 N. Y. 275.

North Carolina. — State *v.* Woodside, 7 Ired. L. 296.

Ohio. — State *v.* Colerick, 3 Ohio 487; Miller *v.* Rhoades, 20 Ohio St. 494; Brown Co. Comr's *v.* Butt, 2 Ohio, 348.

Pennsylvania. — Carmack *v.* Com., 5 Binn. 184.

South Carolina. — Norton *v.* Wallace, 1 Rich. L. 507, 2 Rich. L. 460; State *v.* Cason, 11 S. C. 392; Treasurers *v.* Burch, 2 Hill L. 519; Treasurers *v.* Temples, 2 Spears L. 48; Treasurers *v.* Bates, 2 Bail. L. 362, 380.

South Dakota. — Connor *v.* Corson, 13 S. D. 550, 83 N. W. 588.

Tennessee. — Atkins *v.* Baily, 9 Yerg, 111.

Virginia. — Carr *v.* Meade, 77 Va. 142; Muniford *v.* Overseers of the Poor, 2 Rand. 313.

In Stephens *v.* Shafer, 48 Wis. 54, 3 N. W. 835, 33 Am. Rep. 793, where the authorities are reviewed, it was

has been treated as conclusive of the default of the officer and the extent thereof.[37] Judgments in amercement or other summary proceedings are generally treated as only *prima facie* evidence against the surety,[38] though in some cases they are made conclusive.[39] The

said: "The exceptions of the appellants present the question whether the sureties in an official bond are bound in any way by a judgment against their principal, and an action not brought upon such bond, for a breach of duty which they have covenanted against in such bond. After examining a great number of decisions, in which the question has been discussed and decided, we think the great weight of authority, as well as the better reasons, are in favor of holding that the judgment against the principal is admissible as evidence against the sureties; and without deciding how far, and upon what points, the same is conclusive, we hold that the same is at least presumptive evidence of the right of the plaintiff to recover, and the amount of such recovery, when the execution of the bond is proved or admitted, and the record of the former judgment shows that the recovery was for acts or omissions, the proof of which would be a breach of some one or more of the conditions of the bond."

37. *Alabama.* — McBroom *v.* Governor, 4 Port. 90; Ragland *v.* Calhoun, 36 Ala. 606.

Massachusetts. — Heard *v.* Dodge, 20 Pick. 53, 32 Am. Dec. 197 (dependent on language of particular bond); Dennie *v.* Smith, 129 Mass. 143. See Fall River *v.* Riley, 140 Mass. 488, 5 N. E. 481.

New Jersey. — Lower Alloways Creek *v.* Moore, 15 N. J. L. 146.

Pennsylvania. — McMicken *v.* Com., 58 Pa. St. 213; Com. *v.* Rhoads, 37 Pa. St. 60; Musselman *v.* Com., 7 Pa. St. 240; Masser *v.* Strickland, 17 Serg. & R. 354, 17 Am. Dec. 668; Eagles *v.* Kern, 5 Whart. 144; Evans *v.* Com., 8 Watts 398, 34 Am. Dec. 477.

In Tracy *v.* Goodwin, 5 Allen (Mass.) 409, which was an action on the bond of a constable, the court, reviewing the early cases, said: "The question whether the judgment obtained by Marden against the defendant Goodwin is conclusive evidence against the sureties of Goodwin is not without difficulty. That it is not to be regarded as *res inter alios*, and therefore incompetent, is settled in Lowell *v.* Parker, 10 Met. 309, 43 Am. Dec. 436. We think it more in conformity with the true intent and spirit of their obligation to hold that it is a guaranty to the plaintiff for such amount as he has legally established to be due to himself from the constable; and that, in the absence of fraud or collusion, the judgment against him settles conclusively against his sureties, as well as himself, not only the right of the plaintiff to recover against him, but the amount of the damages."

38. Taylor *v.* Johnson, 17 Ga. 521; Fay *v.* Edmiston, 25 Kan. 439; Graves *v.* Bulkley, 25 Kan. 249, 37 Am. Rep. 249; Mullen *v.* Scott, 9 La. Ann. 173; Fire Ass'n of Philadelphia *v.* Ruby, 49 Neb. 584, 68 N. W. 939.

In an action under the North Carolina statute against an officer and certain of his sureties, the record of a former judgment against the officer and others of his sureties on the same bond and for the same demand is competent against the defendants in the later action. It is not conclusive against the sureties, however. Morgan *v.* Smith, 95 N. C. 396 (Code, § 1345).

The record of a judgment against an officer for the default of his deputy, entered upon a confession of judgment by the officer, to which the deputy in open court assents, in a summary proceeding against the officer, is competent *prima facie* evidence against the sureties of the deputy in a like summary proceeding by the officer against the deputy and his sureties. Jacobs *v.* Hill, 2 Leigh (Va.) 393.

The record of the proceedings for amercement against an officer (sheriff) are competent against the sureties on his official bond to prove the amercement, but not to establish the officer's default. The Governor *v.* Montfort, 1 Ired. L. (N. C.) 155.

39. State *v.* McBride, 76 Ala. 51;

judgment against the officer is competent in the surety's favor, it need hardly be said, to limit the recovery against the surety.[40] In an action on the bond of a deputy officer the judgment against the principal officer for the act or default of the deputy has been held conclusive evidence against the sureties of the deputy of the facts on which it rests in the absence of fraud or collusion,[41] though in other sections such a judgment has been given only a *prima facie* effect against the deputy's sureties.[42]

G. Record of Another Action for Same Defalcation. When the bondsmen for a particular term are sued, a transcript of proceedings instituted by the proper authority on a bond for a different term, for the same defalcation, is admissible as an admission in favor of the defendant in the particular action.[43]

Towns *v.* Hicks, 6 Ga. 239; Wyche *v.* Myrick, 14 Ga. 584; Tute *v.* James, 50 Vt. 124; Bradley *v.* Chamberlain, 35 Vt. 277.

Under the early Alabama statutes authorizing a summary judgment to be rendered against the sureties on an official bond, without notice, the judgment is conclusive evidence of every matter found by it, and, as against the sureties, conclusive as to all matters except the *factum* of the bond and its legal sufficiency. McClure *v.* Colclough, 5 Ala. 65.

40. Thomas *v.* Hubbell, 15 N. Y. 405, 35 N. Y. 120; United States *v.* Allsbury, 4 Wall. (U. S.) 186; Brown *v.* Bradford, 30 Ga. 927; Hobbs *v.* Middleton, 1 J. J. Marsh. (Ky.) 176.

41. Fay *v.* Ames, 44 Barb. (N. Y.) 327 (an action on a bond containing a clause of indemnity); Hand *v.* Taylor, 4 Ind. 409 (an action in which the sureties were given notice to come in and defend).

42. Thomas *v.* Hubbell, 15 N. Y. 405 (where the bond of the deputy did not, however, contain the indemnity clause found in such bonds generally); Jacobs *v.* Hill, 2 Leigh (Va.) 393; Cox *v.* Thomas, 9 Gratt. (Va.) 323; Stephens *v.* Shafer, 48 Wis. 54, 3 N. W. 835, 33 Am. Rep. 793.

43. In considering such evidence the court says: "The action proceeded on the theory that Bartley had fully accounted for the treasury balance with which he was chargeable at the end of his first term. To prove that he had not so accounted, the defendants gave in evidence a transcript of a record of the district court of Lancaster county, showing the institution and pendency of a suit brought in behalf of the state by the attorney general on his own motion, and at the request of the governor, to recover from the first-term bondsmen an alleged shortage of $335,000. The petition was verified by the attorney general on information and belief, but, according to his testimony, without any personal knowledge of the facts. The bringing of the action in Lancaster county was, in effect, a declaration by the state that Bartley had not accounted for moneys received by him, as treasurer, during his first term. . . . Being the admissions of the party against whom they are offered, or else the admissions of an agent having authority to make them, they possess evidential value; they afford some probability of the existence of the facts admitted. In this case the question does not arise whether a particular admission in a pleading was made with the suitor's authority, or permitted to stand with his approval. The broad question is whether the institution of the suit in Lancaster county is evidence against the state that a right of action existed. We think it is. The attorney general had express statutory authority to sue the first-term bondsmen, and the governor had like authority to direct such a suit to be brought. Comp. St. c. 83, art. 5. Manifestly, then, the bringing of the action was a declaration by the state that a defalcation had occurred during Bartley's first term. It im-

H. Officer's Conduct and Mode of Life. — In an action against sureties, evidence of the general conduct of the officer in the discharge of his official duties, his mode of life and pecuniary condition is not competent.[44]

I. Approval of Bond. — Parol evidence may be received to establish the acceptance and approval of a bond to sustain an action on it.[45] But on an issue whether an officer charged with the duty of approving an official bond had approved the bond sued on the extra-judicial statements of the approving officer that he had approved such bond may not be received against the sureties as affirmative evidence of the approval.[46] In some jurisdictions the statute provides for proof of the bond sued on by the production of a certified copy.[47]

J. Varying Bond by Parol. — Parol evidence is not admissible to vary or explain the terms of an unambiguous official bond.[48]

K. Unauthorized Cancellation of Bond. — The cancellation of an official bond by an officer having no authority to cancel it is not evidence of its satisfaction.[49]

L. Official Record of Officer's Removal. — The record, by the proper authority, reciting the fact and the cause of the removal of an officer, as for a defalcation, is competent evidence and the best evidence of the fact and ground of the removal against his sureties in an action on his official bond.[50]

M. Explanation of Written Entry by Parol. — The entries in the books of an officer may be explained by parol when their meaning is not readily clear to the average juror.[51]

plied, logically, that either the attorney general, or the governor, or both, had made an investigation into the treasurer's accounts, and had, as a result of such investigation, concluded that there was a shortage for which the first-term sureties are liable." Paxton *v.* State, 59 Neb. 460, 81 N. W. 383.

44. United States *v.* Wood, 13 Blatchf. 252, 28 Fed. Cas. No. 16,752. In an action against a surety on the bond of an officer, the condition of the officer at a particular time with reference to intoxication is immaterial. American Bonding & Trust Co. *v.* Milstead, 102 Va. 683, 47 S. E. 853.

In a civil action on an official bond, evidence of the officers' manner of life and of his personal extravagance is not competent. Clark *v.* Douglas, 58 Neb. 571, 79 N. W. 158.

45. Kelly *v.* State, 25 Ohio St. 567, 577.

46. McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315.

47. Treasurers *v.* Bates, 2 Bail. L. (S. C.) 362, 364, 274.

By the provisions of the Illinois statutes the certified copy of an official bond deposited in the office of the secretary of state is admissible in evidence without preliminary proof of the loss of the original. Ramsay *v.* People, 197 Ill. 572, 64 N. E. 549, *affirming* 97 Ill. App. 283.

48. It is not competent to sureties on a second or subsequent bond to prove on an agreement or understanding with the board taking a bond that the bond is to apply to one fund only, and not generally, as provided in the bond. Stoner *v.* Keith Co., 48 Neb. 279, 67 N. W. 311.

49. Ford *v.* Jefferson Co., 4 Greene (Iowa) 273.

Nor can such an act affect the liability of the sureties on the bond. Rocherean *v.* Jones, 29 La. Ann. 82.

50. Stern *v.* People, 102 Ill. 540.

51. "Mr. Meserve was called as

N. Summary Proceedings. — The statutory requirement in some jurisdictions that the testimony of witnesses in suits in chancery shall be in writing has no application to summary proceedings for the correction of official delinquencies, but rules in that regard relating to proceedings in courts of law control.[52]

O. Officer's Account With Banker. — When sureties on an official bond are sought to be charged with moneys received by an officer and not accounted for, evidence of the state of the officer's accounts with his banker at the time the bond sued on was executed is not admissible to limit liability without the additional proof that all official funds were on deposit with such banker.[53]

P. Failure To Keep Account of Fees Collected. — Notwithstanding an officer is required to keep an account of fees collected by him, if from the record kept in his office the amount he has collected may be certainly ascertained, his failure to produce account books of fees, when sued for an excess of fees over salary, is not so far a suppression of evidence as to warrant the imposition of a penalty against him.[54]

3. Defenses. — A. In General. — It is no defense to an action against sureties that the principal in the bond had, during a prior term, to the knowledge of the authorities accepting the bond sued on, and unknown to the sureties, embezzled public moneys.[55] The

a witness for the state, and permitted, over objection, to explain the meaning of certain entries in the books kept by Bartley as treasurer. The objection to the evidence is that the books speak for themselves, and that the witness was not shown to possess the qualifications of an expert. There was no error in the ruling. While it is true the books speak for themselves, their meaning is not apparent at once to the average juror. Mr. Meserve had, at the time of the trial, been state treasurer for more than two years, and was, therefore, presumably competent to give an opinion as to the meaning of entries evidencing business transactions in the treasurer's office." Paxton *v.* State, 59 Neb. 460, 81 N. W. 383.

52. In Cowan *v.* Lay (Tenn.), 42 S. W. 68, the court says: "We think on matters of this kind—summary proceedings for the correction of official delinquencies—the same rules apply as in like proceedings from courts of law, and we do not think the requirements of section 4456, Code (section 5205, Mill. & B. Code), that the testimony of witnesses must be in writing, apply to cases of this character. Motions and judgments in the summary proceedings of various kinds, in furtherance and aid of the jurisdiction and power of the court to compel prompt and efficient compliance with its orders, decrees, and judgments, especially on the part of its officers, have long been in constant use and practice, and, as we think, in their very nature preclude the idea of depositions taken on notice, etc., being resorted to, as any of the facts necessary for the exercise of the jurisdiction in such matters would appear from the inspection of the court's own record, and might well be judicially known to the court."

53. Mahon *v.* Kinney Co., (Tex. Civ. App.), 28 S. W. 1024.

It may be shown against the sureties of a defaulting officer that the official funds were deposited in a bank, which became insolvent, and that the officer was given credit on the books of the bank for the funds so deposited. Great Falls *v.* Hanks, 21 Mont. 83, 52 Pac. 785.

54. State *v.* King, 136 Mo. 309, 36 S. W. 681.

55. Independent School District

surety may ordinarily show in defense of liability that the defalcation for which he is sued occurred during an earlier term.[56] It is not open to a surety to set up that funds received by the officer were received by him for duties irregularly performed[57] or through an irregular proceeding.[58] When a re-elected officer has made set-

v. Hubbard, 110 Iowa 58, 81 N. W. 241.

In Pine Co. *v.* Willard, 39 Minn. 125, 39 N. W. 71, it was said: "The appellants admit and claim that the deposit of the funds, as above indicated, in itself constituted an embezzlement; and they contended that, inasmuch as the county commissioners knew that Willard had so kept the public money during the prior term, it was a fraud upon these sureties to accept their bond; and that this avoided the bond. This position cannot be sustained. If the board did know that Willard had embezzled money during the former term, they were under no obligations to voluntarily warn these defendants by declining to accept their tendered suretyship. If the bond was sufficient, it was their duty to accept it."

The authorities charged with the duty of approving a bond do not have to communicate precedent defaults of the officer to the sureties, and failing to do so will not release the sureties. Cawley *v.* People, 95 Ill. 249.

56. Webster Co. *v.* Hutchinson, 60 Iowa 721, 9 N. W. 901, 12 N. W. 534; Farrar *v.* United States, 5 Pet. (U. S.) 373.

When a re-elected officer has not settled as the law contemplates by producing the money in specie with which he is chargeable, but by producing drafts, certificates, or other evidence of debt, his sureties during the succeeding term will not be estopped from showing that the defalcation with which they are charged occurred during the earlier term. Independent School District *v.* Hubbard, 110 Iowa 58, 81 N. W. 241; Boone Co. *v.* Jones, 54 Iowa 699, 2 N. W. 987.

57. When the statute provides that sureties on an official bond shall occupy the relation of principals on the bond in the sense that they may not set up a defense not available to the officer himself, in an action on the bond, it is no defense to the sureties that moneys received were irregularly paid to the officer. Hogue *v.* State, 28 Ind. App. 285, 63 N. E. 799.

In Blaco *v.* State, 58 Neb. 557, 78 N. W. 1056, the court says: "It is said, however, that Hilton did not in fact subject gasoline to the Foster test, and that he usually failed to brand the vessels in which it was contained. It is true that the Foster test was not applied, and that frequently — perhaps most frequently — the inspector's brand was not affixed by the hand of either himself or a deputy. But this surely is no answer to an action on the bond. How can the irregularity of the inspection concern the sureties? The person called upon to pay fees might, indeed, demand the effective test for which the law provides; but if he waive the test, and consent that his oil may be marked, 'Rejected for illuminating purposes,' no one else can justly complain. The object of the statute was accomplished, and the interests of the public properly safeguarded, when the inspector, by his own act, or by an act done at his instance and under his supervision, placed the statutory brand of condemnation upon the oil inspected. Whether the fees were received for services regularly or irregularly performed is not material in this action. . . . Such is the doctrine of State *v.* Moore, 56 Neb. 82, 76 N. W. Rep. 474, where it is said: 'For all wrongful acts or omissions of a public officer, within the limits of what the law authorizes or enjoins upon him as such officer, his sureties are liable.' See also King *v.* United States, 99 U. S. 229; Berrien County *v.* Bunbury, 45 Mich. 79, 7 N. W. Rep. 704; Marquette County *v.* Ward, 50 Mich. 174, 15 N. W. 70."

58. "We think it altogether clear that, when it is shown that moneys

tlement and produced all the funds and property chargeable to him before entering upon a second term, such settlement is conclusive against his sureties during the second term, in the absence of fraud or mistake.[59] In some jurisdictions a surety on an official bond can make such defenses only against liability on an official bond as are available to the officer.[60]

B. Official Character of Principal. — Neither principal nor surety may set up as a defense the irregularity of the officer's appointment or election,[61] that he was ineligible[62] or had not qualified,[63] or anything attacking his official character.[64] The officer and his sureties are alike concluded by the execution of the bond from defending on the ground that it was not approved by the proper authority.[65]

C. Non-Residence of Surety. — It is not a defense to an action

have actually come into the hands of the treasurer as treasurer, neither he nor his bondsmen can avoid liability by showing either that irregularities exist in the proceedings by which such moneys were collected, or that there was no authority to enter into the agreement which resulted in the receipt of the money by the county. It is enough to impose upon the treasurer an active duty that the county *has* received the money, and the obligation on the bond exists when the moneys finds its way into his hands as treasurer. Had the treasurer, on his own motion, and without the concurrence of the supervisors, attempted to borrow money, as in *Leigh v. Taylor,* 7 Barn. & C. 491, a different question would be presented, upon which we express no opinion." Cheboygan Co. *v.* Erratt, 110 Mich. 156, 67 N. W. 1117.

59. Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241; Morley *v.* Metamora, 78 Ill. 394, 20 Am. Rep. 266.

60. Boone Co. *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155; McCabe *v.* Raney, 32 Ind. 309.

61. People *v.* Huson, 78 Cal. 154; People *v.* Jenkins, 17 Cal. 500; Boone Co. *v.* Jones, 54 Iowa 699, 2 N. W. 987; Billingsley *v.* State, 14 Md. 369; Taylor *v.* State, 51 Miss. 79; State *v.* Clark, 1 Head (Tenn.) 369; Borden *v.* Houston, 2 Tex. 594.

62. Jones *v.* Gallatin Co., 78 Ky. 491; School Directors *v.* Judice, 39 La. Ann. 896, 2 So. 792.

63. People *v.* Huson, 78 Cal. 154, 20 Pac. 369; School Directors *v.* Judice, 39 La. Ann. 896, 2 So. 792; St. Helena Parish *v.* Burton, 35 La. Ann. 521; State *v.* Cooper, 53 Miss. 615; Horn *v.* Whittier, 6 N. H. 88; Lyndon *v.* Miller, 36 Vt. 329; Lane *v.* Harrison, 6 Munf. (Va.) 573.

64. *California.* — People *v.* Jenkins, 17 Cal. 500.

Illinois. — Shaw *v.* Havekluft, 21 Ill. 127.

Kentucky. — Basham *v.* Com., 13 Bush. 36.

Mississippi. — Byrne *v.* State, 50 Miss. 688.

Nevada. — State *v.* Rhoades, 6 Nev. 352.

New York. — Hall *v.* Luther, 13 Wend. 491.

Ohio. — Kelly *v.* State, 25 Ohio St. 567.

South Carolina. — Commissioners of Treasury *v.* Muse, 3 Brev. 150.

Texas. — Borden *v.* Houston, 2 Tex. 594.

Virginia. — Monteith *v.* Com., 15 Gratt. 172.

Vermont. — Lyndon *v.* Miller, 36 Vt. 329; State *v.* Bates, 36 Vt. 387.

65. In Boone Co. *v.* Jones, 54 Iowa 699, 2 N. W. 987, 7 N. W. 155, the court said: "In regard to the want of a record of the approval of the bond, and the want of such certificate indorsed thereon, as the statute requires, we think the defendants are also concluded by executing and delivering the bond to the board. . . . Laches are not imputable to the public authorities, and the failure of the supervisors

against a surety that he is not a resident of the state, notwithstanding the statute requires that the surety shall be a resident.[66]

4. Weight and Sufficiency. — A. Misapplication and Liability in General. — In an action against his bondsmen, the mere failure of an officer's property return to show the disposal of certain property coming into his possession is not alone sufficient to show a misapplication of such property.[67] The fact that there has been no service on the officer will not affect the *quantum* or character of proof required to make out a case against the sureties.[68] If the plaintiff counts on numerous breaches he may nevertheless recover on proof of a single breach.[69]

B. Authority of Officer To Deliver Bond. — An officer's possession of his official bond on a day subsequent to that fixed by the statute for its delivery is *prima facie* evidence of authority to him from his sureties to have it approved and delivered as a subsisting obligation according to its tenor.[70]

C. Proof of Malice. — When the plaintiff's action is founded upon the malice of the defendant in doing an act complained of, strong evidence will be required to sustain a recovery.[71]

to perform their duties, in matters not inhering in the bond, will not discharge the sureties."

66. Such a provision is designed only to protect the public, and a failure to comply with such in giving the bond will not operate to relieve the irregular surety from liability. Madison Parish School Directors *v.* Brown, 33 La. Ann. 383.

67. **Indian Agent.** — United States *v.* McClane, 74 Fed. 153.

68. Cassady *v.* Trustees of Schools, 105 Ill. 560.

69. Emmett *v.* Crawford, 10 Lea (Tenn.) 21.

70. In Paxton *v.* State, 59 Neb. 460, 81 N. W. 383, in considering a case in which this issue was presented, the court said: "Having reached the conclusion that Mr. Bartley's bond was still in his hands, and subject to his control, on January 9th, we will inquire whether he had, on that day, authority to deal with it so as to make it a binding contract between the sureties and the state. It is, we believe, a doctrine of universal recognition that the principal in an official bond has an implied agency to deliver it as the contract of his sureties. They intrust it to him for that purpose. See *Pequawket Bridge v. Mathes*, 8 N. H. 139; *Stephens v. Crawford*, 1 Ga. 574; *King Co. v. Ferry*, 19 L. R. A. [Wash.] 500. The obligation in suit was given by all the sureties to Bartley, to be by him presented for approval, and filed in the office of the secretary of state. There is nothing in the record to indicate that any of the sureties signed conditionally, or that there was any actual limitation upon Bartley's implied authority to use the bond in furtherance of the purpose for which it was signed. Possession of the bond on January 9th carried with it, *prima facie*, the right to have it approved and delivered. See *Sampson v. Barnard*, 98 Mass. 359; *State v. Rhodes*, 6 Nev. 352. The sureties had the right to revoke their principal's authority at any time before the bond was delivered; but without such revocation the right to deliver continued, and, as we have said, possession of the instrument was evidence of the right. Until the sureties were accepted, they were at liberty to recede; but until they signified an intention to recede the state might bind them by accepting their offer to answer for the official misconduct of their principal. *State v. Dunn*, 11 La. Ann. 550."

71. Gregory *v.* Brooks, 37 Conn. 365.

D. Effect of Settlement Before Entering Upon New Term. Proof of a settlement by a re-elected officer, before entering upon another term, makes a *prima facie* case against the sureties for the second term for a defalcation, and the burden is cast on the surety to show a failure to produce the requisite funds at the time of such settlement and their misappropriation prior to the taking effect of the bond sued on.[72]

E. Proof of Conversion. — If an officer having money in his custody belonging to the state denies, in a letter to the controller, that he ever had any such funds, and refuses to make payment to the state, such denial and refusal to pay are sufficient evidence to establish a conversion.[73]

VII. CRIMINAL PROSECUTIONS.

1. Presumptions and Burden of Proof. — A. Eligibility and Qualification. — In a criminal prosecution against a party for a crime an essential element of which is his official capacity, the officer's eligibility will be presumed from the appointment.[74] Likewise, qualification may be presumed from the exercise of the functions of the office.[75]

72. Independent School District *v.* Hubbard, 110 Iowa 58, 81 N. W. 241.

73. People *v.* Van Ness, 79 Cal. 84, 21 Pac. 554.

74. In State *v.* Ring, 29 Minn. 78, 11 N. W. 233, the court said: "It is claimed that the conviction is erroneous because there was no evidence that Baumhager was eligible to the office to which he was appointed. From an appointment to a public office regular in form, by a body or officer in whom rests the appointing power, the eligibility of the appointee is presumed. It is not necessary, unless it be so in a case directly involving the issue of his eligibility, to prove that he was a citizen of the United States, or had declared his intentions to become such, that he was 21 years of age, and had resided in the state four months prior to such appointment."

75. In Com. *v.* Pate, 22 Ky. L. Rep. 1890, 61 S. W. 1009, the court say: "In this case the record shows the appointment of appellee as supervisor of public roads. He accepted the appointment by executing the bond required by law, and actually took possession of the office, and undertook by virtue of that appointment and qualification to serve the public in that capacity. In Johnston *v.* Wilson, 2 N. H. 202, cases are cited supporting the doctrine that, 'when a person has distinctly admitted or recognized the official capacity of another he cannot afterwards offer evidence against the validity of his appointment; and, where a person has acted in an official capacity, he himself cannot afterwards offer evidence against the validity of his own appointment.' And this seems to us to be sound doctrine; for one should not be suffered to enjoy the emoluments and benefits of a public office without being subject to the pains and penalties for a breach of its duties. If the oath was a prerequisite to appellee's investure of the office, his accepting the appointment, entering upon and engaging in a discharge of its public duties, and enjoying its benefits, in a controversy between third persons, as well as in a controversy between him and third persons, or him and the public, raises the conclusive presumption that he took the prescribed oath where the indulgence of such presumption will tend to protect the rights of such third persons or the public."

B. As to Intent. — An officer will be presumed to intend the consequences of his action, and to have assumed the risk of acting on his own responsibility, where he was given an opportunity to ascertain what his duty would be under circumstances expected to arise, but failed to do so.[76] The habitual neglect of an officer to account for small sums of money coming into his official custody authorizes, and indeed requires, the presumption that the sums retained and not accounted for were so retained for sinister purposes.[77]

C. Medium of Payment. — When payments are proved to have been made to an officer, such payments will be *prima facie* presumed to have been made in money, so that the defendant will have the burden to prove the contrary if he relies upon it.[78]

76. In State *v.* Colton, 9 Houst. (Del.) 530, 33 Atl. 259, where the defendant was prosecuted for refusing to accept a legal vote, the defense being that the defendant did not consider the naturalization papers of the proposed voter sufficient, the court says: "But the plea is made for the defendant that he was misled by the blank which was delivered to him by one of those officious persons who obtained it from the office of the district court, and who were themselves, it is most likely, quite sharp enough to know it only applied to one class of cases of naturalization. The slightest comparison of that form with the certificate of Stepanes would have made it manifest that they were dissimilar, and that the paper in possession of the defendant was not, in any respect, authenticated. Now before he adopted the latter as his guide of validity, his obvious duty was to ascertain that it was genuine, and was a safe guide to go by. This he did not do. Now, when an officer, judicial or otherwise, had the opportunity to ascertain what, under circumstances arising or which are expected to arise, is his duty, and yet neglects to avail himself of it, and chooses to act without such knowledge, he takes the risk of acting on his own responsibility and must be held to intend, upon a well-known legal principle, the consequence of such action, as the result of his own determination to go by his own will."

77. Com. *v.* Rodes, 6 B. Mon. (Ky.) 171, 176.

78. In State *v.* Ring, 29 Minn. 78, 11 N. W. 233, a prosecution for embezzlement, the court said: "It appears from the case, that the amount which the evidence charges defendant with having was not all money, but consisted in part of county orders, and, as is claimed, of a considerable amount of town orders. It does not, however, distinctly appear from the record before us that such town orders were received; but the argument proceeded upon that assumption, and we will consider it so. It is claimed that there can be no conviction of embezzlement of money in such case without proof on the part of the state as to a specific sum received in money and converted by defendant. This position is deemed to be erroneous. All taxes are payable in money, and ordinarily are so paid; and although, for convenience, the treasurer is to receive in lieu of money payment certain orders to a certain extent, he is still made chargeable on account thereof as with the receipt of money. By the terms of the statute (Gen. St. 1878, c. 11, sec. 56,) the treasurer is required, upon the payment of any taxes, to give a receipt therefor, and to make a duplicate stub showing the fact and date of such payment. These duplicate stubs are to be returned to the auditor at the end of each month, and thereupon the auditor is required to charge the treasurer the amount thereof, and this is to be done whether payment is made in money or in orders. Thus by the law itself the treasurer is made chargeable with the receipt of money to the amount of all taxes paid, and is required to account for the sums

2. Relevancy and Admissibility. — A. Documentary Evidence. The records kept and reports made by an officer in the discharge of his official duties as required by the statute are competent evidence against him.[79]

B. Acts of Clerk. — Conspiracy. — Where it appears, in a prosecution against a coroner for presenting a claim for inquests not held, that the officer's clerk had attached a detailed statement of inquests, many of which were fictitious, evidence of a conspiracy between the officer and his clerk may be received.[80]

C. Proof of Other Acts. — Guilty Knowledge and Intent. In a prosecution against a city auditor for conniving by the auditing of fraudulent claims against the city, evidence that the accused, while holding another office under the city government, had certified for audit other claims for the same work, is admissible to show guilty knowledge of the fraudulent character of the particular claim.[81]

D. Similar Acts of Predecessors. — In a prosecution against an officer for exceeding his authority in a particular case, evidence that his predecessors had done the same thing in similar circumstances is not competent in the officer's behalf.[82]

3. Defenses. — In an action against a subordinate, evidence that he acted in obedience to the orders of his superior officer is not competent in defense when the superior had no authority to issue the order under which the subordinate would justify.[83] It is not a defense to a criminal prosecution for the non-performance of a

so charged to him. He is presumed, in the absence of proof of the fact, to have received payment in money. Again, when payments are made otherwise than in money, the manner of payment is a matter particularly within the knowledge of the treasurer, and of which the state cannot ordinarily be informed. It is, perhaps, for this reason, in part, that the treasurer is by law made chargeable with the receipt of money to the amount of all payments made to him, and left to meet such presumption with proof of the manner of payment if made otherwise than in money. See *State v. Munch*, 22 Minn. 67."

79. In a prosecution against a coroner for presenting a false claim for services at inquests never held, certificates filed by the officer with the proper board containing particulars of such fictitious inquests, corresponding to the fictitious ones included in the claim, are admissible in evidence against the accused as constituting part of the same transaction. People *v.* Coombs, 36 App. Div. 284, 55 N. Y. Supp. 276.

Though not returned to the auditor, as required by statute, the stubs in a treasurer's book of tax receipts, kept conformably to law, may be received in evidence against the treasurer to establish the amount he has received from such source. State *v.* Ring, 29 Minn. 78, 11 N. W. 233.

80. People *v.* Coombs, 36 App. Div. 284, 55 N. Y. Supp. 276.

81. People *v.* Fielding, 36 App. Div. 401, 55 N. Y. Supp. 530.

82. On an issue whether an officer had exceeded his authority in the letting of contracts by letting the work in separate contracts in the aggregate, although not singly exceeding his authority, evidence that his predecessors in office did the same thing in similar circumstances is inadmissible. People *v.* Fielding, 36 App. Div. 401, 55 N. Y. Supp. 530.

83. Jones *v.* Com., 1 Bush (Ky.) 34, 89 Am. Dec. 605.

statutory duty that the default was not covered by the officer's official bond,[84] nor that the officer believed he was not bound to do the act,[85] nor that he had never taken the required oath.[86]

4. Weight and Sufficiency of Evidence. — The offense of presenting a fraudulent claim for payment is complete when the presentation is made.[87] So the actual motive and intent of an officer in doing or refusing to do an act is not material when not made material by the statute.[88] Fraud and misbehavior in office may be sufficiently established by proof of gross negligence in the discharge of a fiduciary trust.[89]

84. Holt *v.* McLean, 75 N. C. 347.

85. People *v.* Brooks, 1 Denio (N. Y.) 457, 43 Am. Dec. 704.

86. State *v.* Cansler. 75 N. C. 442.

87. People *v.* Coombs, 36 App. Div. 284, 55 N. Y. Supp. 276. (Evidence of the payment of such a claim, though incompetent, is harmless error).

88. So where a statute forbids a general deposit of public funds, providing a penalty, it is not essential to a conviction that there be proof of an intent feloniously and corruptly to cheat or wrong the public. Proof of the making of the prohibited deposit is alone sufficient. State *v.* Browne, 4 Idaho 723, 44 Pac. 552.

When the statute makes the willful omission, neglect or refusal of an officer to discharge his official duty a misdemeanor, proof of a corrupt intent is not required to sustain a conviction under the statute; nor is honesty of purpose and good intent a full defense where the statutory omission is proved. State *v.* Hatch, 116 N. C. 1003, 21 S. E. 430.

Under a statute punishing a public officer for failing to turn over moneys in his official custody to his successor, the omission to perform the duty constitutes the crime, and the motive and intent of the officer so refusing is immaterial. State *v.* Assmann, 46 S. C. 554, 24 S. E. 673.

89. Com. *v.* Rodes, 6 B. Mon. (Ky.) 171, 174.

The selling of public property, at a grossly inadequate price, by an officer without opportunity for competition, and for less than could have been obtained by reasonable effort, is *prima facie* evidence of negligence or misconduct in the performance of the official duty to make a fair sale. State *v.* Hatch, 116 N. C. 1003, 21 S. E. 430.

OFFICIAL BONDS.—See Officers.

OLOGRAPHIC WILLS.—See Wills.

ONCE IN JEOPARDY.—See Former Jeopardy.

OPEN ACCOUNTS.—See Accounts; Accounting and Accounts Stated.

OPENING THE CASE.—See Trial.

OPINION EVIDENCE.—See Expert and Opinion Evidence.

OPTIONS.—See Contracts.

ORDER OF PROOF.

By Glenda Burke Slaymaker, LL.B.

CROSS-REFERENCES:

Cross-Examination;
Direct Examination;
Leading Questions.

I. IN GENERAL.

1. Discretion of Trial Court. — The order of the reception of evidence is a matter resting largely in the sound discretion of the trial court.[1] This rule applies in both civil and criminal

1. *United States.* — Putnam *v.* United States, 162 U. S. 687; Swensen *v.* Bender, 114 Fed. 1, 51 C. C. A. 627; Theide *v.* Utah, 159 U. S. 510; Turner *v.* United States, 66 Fed. 280, 13 C. C. A. 436; Olmstead *v.* Webb, 5 App. Cas. D. C. 38; Atchison, T. & S. F. R. Co. *v.* Phipps, 125 Fed. 478.

Alabama. — Tullis *v.* Kiad, 12 Ala. 648; Drum *v.* Harrison, 83 Ala. 384, 3 So. 715; Conoly *v.* Gayle, 61 Ala. 116.

California. — People *v.* Shainwold, 51 Cal. 468; Gordon *v.* Searing, 8 Cal. 49.

Connecticut. — Doane *v.* Cummins, 11 Conn. 152; State *v.* Main, 31 Conn. 572.

Dakota. — Cheatham *v.* Wilber, 1 Dak. 335, 46 N. W. 580.

Georgia. — Gress Lumb. Co. *v.* Coody, 94 Ga. 519, 21 S. E. 217; Metchell *v.* State, 71 Ga. 128; White *v.* Wallen, 17 Ga. 106.

Illinois. — Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Board of Com'rs of Cook Co. *v.* Harlev, 174 Ill. 412, 51 N. E. 754, *affirming* 75 Ill. App. 218; Bussey *v.* Hemp, 48 Ill. App. 195.

Indiana. — Pittsburg C. & St. L. R. Co. *v.* Noel, 77 Ind. 110; Lautman *v.* Pepin, 26 Ind. App. 427, 59 N. E. 1073; Miller *v.* Dill, 149 Ind. 326, 49 N. E. 272; Zook *v.* Simonson, 72 Ind. 83.

Iowa. — Fitch *v.* Mason City & C. L. Trac. Co., 124 Iowa 665, 100 N. W. 618; Clement *v.* Houck, 113 Iowa 504, 85 N. W. 765; Rutledge *v.* Evans, 11 Iowa 287; Wells *v.* Kavanagh, 74 Iowa 372, 37 N. W. 780; Pearson *v.* South, 61 Iowa 232, 16 N. W. 99.

Louisiana. — State *v.* Woods, 31 La. Ann. 267.

Maryland. — Bannon *v.* Warfield, 42 Md. 22; Mills *v.* Bailey, 88 Md. 320, 41 Atl. 780.

Massachusetts. — Emerson *v.* Lowell Gaslight Co., 6 Allen 146, 83 Am. Dec. 621; Com. *v.* Dam, 107 Mass. 210; Com. *v.* Piper, 120 Mass. 185; Burnside *v.* Everett, 186 Mass. 4, 71 N. E. 82; Cushing *v.* Billings, 2 Cush. 158.

Michigan. — Watson *v.* Watson, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111; Brown *v.* Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728; People *v.* Wilson, 55 Mich. 506, 21 N. W. 905; Hoffman *v.* Harrington, 44 Mich. 183, 6 N. W. 225.

Minnesota. — Foster *v.* Berkey, 8 Minn. 351; Groff *v.* Ramsey, 19 Minn. 44; Crandall *v.* McIlrath, 24 Minn. 127; McDonald *v.* Peacock, 37 Minn. 512, 35 N. W. 370; Bradley *v.* Dinneen, 88 Minn. 334, 93 N. W. 116.

Missouri. — State *v.* Linney, 52 Mo. 40; State *v.* Pratt, 98 Mo. 482, 11 S. W. 977; State *v.* Murphy, 118 Mo. 7, 25 S. W. 95; St. Louis Public Schools *v.* Risley, 40 Mo. 356; Rucker *v.* Eddings, 7 Mo. 115; Seibert *v.* Allen, 61 Mo. 482; Ober *v.* Carson, 62 Mo. 209; Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609; Garland *v.* Smith, 127 Mo. 583, 28 S. W. 191, 29 S. W. 836; Jefferson *v.* Ummelmann, 56 Mo. App. 440; Dozier *v.* Jerman, 30 Mo. 216; Powell *v.* Hannibal & St. J. R. Co., 35 Mo. 457.

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

Nebraska. — Yeoman *v.* State, 21 Neb. 171, 31 N. W. 669; McDermott *v.* Manley, 65 Neb. 194, 90 N. W. 1119; Ponca *v.* Crawford, 18 Neb. 551, 26 N. W. 365; Ponca *v.* Crawford, 23 Neb. 662, 37 N. W. 609, 8 Am. St. Rep. 144; Western Mattress Co. *v.* Potter, 95 N. W. 841.

In Ream *v.* State, 52 Neb. 727, 73 N. W. 227, the court said: "Finally, it is urged that the court erred in permitting the state to introduce evidence in chief in connection with its testimony in rebuttal. The order of proof, it has been often held, is within the discretion of the trial court, which may, in a proper case, permit the introduction of original evidence, even after both parties have rested. Tomer *v.* Densmore, 8 Neb. 384; Trust Co. *v.* Reiter, 47 Neb. 592, 66 N. W. 658. We discover no error in the record."

New Jersey. — Donnelly *v.* State, 26 N. J. L. 601; Foley *v.* Brunswick Trac. Co., 69 N. J. L. 481, 55 Atl. 803.

New York. — People *v.* Williams, 92 Hun 354, 36 N. Y. Supp. 511; Blake *v.* People, 73 N. Y. 586; Merchants Exchange Nat. Bank *v.* Wallach, 20 Misc. 309, 45 N. Y. Supp. 885, *affirming* 19 Misc. 711, 43 N. Y. Supp. 1159; Lanahan *v.* Henry Zeltner Brew. Co., 20 Misc. 551, 46 N. Y. Supp. 431; Johnston *v.* Mutual Reserve L. Ins. Co., 43 Misc. 251, 87 N. Y. Supp. 438, *affirmed* 90 N. Y. Supp. 539; Bedell *v.* Powell, 13 Barb. 183; Marks *v.* King, 67 Barb. 225, *affirmed* 64 N. Y. 628; Totten *v.* New York, L. E. & W. R. Co., 57 Hun 585, 10 N. Y. Supp. 572; Duffus *v.* Schwinger, 7 Misc. 499, 27 N. Y. Supp. 949; American Encaustic Tiling Co. *v.* Reich, 35 N. Y. St. 579, 12 N. Y. Supp. 927.

North Carolina. — Smith *v.* Smith, 30 N. C. 29.

North Dakota. — Bransetter *v.* Morgan, 3 N. D. 290, 55 N. W. 758.

Ohio. — Webb *v.* State, 29 Ohio St. 351.

Oregon. — Jones *v.* Peterson, 44 Or. 161, 74 Pac. 661.

Pennsylvania. — Hagan *v.* Carr, 198 Pa. St. 606, 48 Atl. 688; Levers *v.* Van Buskirk, 4 Pa. 309; Garrigues *v.* Harris, 17 Pa. St. 344; Bowers *v.* Still, 49 Pa. St. 65; Columbia Bridge *v.* Kline, 6 Pa. L. J. 317.

Rhode Island. — Spink *v.* New York, N. H. & H. R. R. Co., 26 R. I. 115, 58 Atl. 499.

South Carolina. — State *v.* Clyburn, 16 S. C. 375.

Tennessee. — Morris *v.* Swaney, 7 Heisk. 591.

Texas. — Hennessy *v.* State, 23 Tex. App. 340, 5 S. W. 215; Rains *v.* Hood, 23 Tex. 555; Harvey *v.* Edens, 69 Tex. 420, 6 S. W. 306; Withee *v.* Fearing, 23 Tex. 503; Caraway *v.* Citizens Nat. Bank (Tex. Civ. App.), 29 S. W. 506; Myers *v.* Maverick (Tex. Civ. App.), 27 S. W. 1083.

Utah. — Stephens *v.* Union Assur. Soc., 16 Utah 22, 50 Pac. 626, 67 Am. St. Rep. 595.

Virginia. — Norfolk & A. T. Co. *v.* Morris, 101 Va. 422, 44 S. E. 719.

Vermont. — Clayes *v.* Ferris, 10 Vt. 112; State *v.* Magoon, 50 Vt. 333; Goss *v.* Turner, 21 Vt. 437; Chamberlin *v.* Fuller, 59 Vt. 247, 9

proceedings.[2] The discretion in this regard has been said to be a large one.[3] Only an abuse of it resulting in prejudice to the complaining party will warrant a reversal,[4] and an abuse of such discretion will not be presumed.[5] Subject to the discretion of the trial court, a party may introduce his evidence in any order he choose.[6]

Atl. 832; Pingry *v.* Washburne, 1 Aik. (Vt.) 264, 15 Am. Dec. 676.

Statutory. — Under a statute authorizing the admission of testimony at any time before the conclusion of the argument of counsel, evidence offered by the prosecution tending to prove conflicting statements of a material witness may not be excluded on account of being admitted out of its proper order, if the offer is made within the time named by the statute. Bostick *v.* State, 11 Tex. App. 126 (Code Crim. Proc., § 661).

When a deed is alleged to be a forgery, proof that the signature of one of the attesting witnesses is not in his own handwriting may be shown without preliminay proof that such person is the same that purported to be a subscribing witness. Such fact may be shown by testimony subsequently received. West *v.* State, 22 N. J. L. 212.

2. See cases cited in note 1 *supra.*

3. Yeoman *v.* State, 21 Neb. 171, 31 N. W. 669.

4. State *v.* Main, 31 Conn. 572; Miller *v.* Dill, 149 Ind. 326, 49 N. E. 272; Pearson *v.* South, 61 Iowa 232, 16 N. W. 99; McDermott *v.* Manley, 65 Neb. 194, 90 N. W. 1119; Dosch *v.* Diem, 176 Pa. St. 603, 35 Atl. 207; State *v.* Bridgman, 49 Vt. 202, 24 Am. Rep. 124; Gulf, C. & S. F. R. Co. *v.* Dunlap (Tex. Civ. App.), 26 S. W. 655; Lynd *v.* Picket, 7 Minn. 184, 82 Am. Dec. 79; Jefferson *v.* Ummelmann, 56 Mo. App. 440; Western Union Tel. Co. *v.* Buskirk, 107 Ind. 549, 8 N. E. 557; Pingry *v.* Washburn, 1 Aik. (Vt.) 264, 15 Am. Dec. 676.

Preventing Introduction of Competent Evidence. — Receiving evidence out of its order is not reversible error where neither party was prevented from introducing competent evidence. Kassing *v.* Walter (Iowa), 65 N. W. 832.

Ejectment. — Cross-Examination of Defendant. — Rebuttal Evidence. It is not an abuse of discretion for the trial court to permit the plaintiff in ejectment to introduce in evidence, during the cross-examination of the defendant, the record of a deed executed to him tending to show that the instrument recorded conveyed no title to him of the premises in controversy. Patton *v.* Fox, 179 Mo. 525, 78 S. W. 804.

Statutory. — In some states it is provided by statute that the order of proof shall be within the discretion of the trial court. And under such a statute it has been held that, in an action for assault and battery, evidence as to the services of a physician was competent, without preliminary proof of the value of such services. Jones *v.* Peterson, 44 Or. 161, 74 Pac. 661.

To constitute reversible error in rulings respecting the order of proof there must be an abuse of discretion or the deprivation of a substantial right. McCleneghan *v.* Reid, 34 Neb. 472, 51 N. W. 1037.

It must appear that by the court's action respecting the order of proof the complaining party was deprived of a fair trial. Cincinnati, N. O. & T. P. R. Co. *v.* Third Nat. Bank, 1 Ohio Cir. Ct. 199.

When a ruling on the reception of evidence is right on the whole case, technical error will not be available because it did not seem justified at the time the evidence was received. Knox *v.* State, 164 Ind. 226, 73 N. E. 255.

A strong case of injustice is required to induce an appellate court to interfere with the discretion of the trial court as to the order of proof. Brown *v.* State, 40 Fla. 459, 25 So. 63.

5. Proprietors of Liverpool Wharf *v.* Prescott, 4 Allen (Mass.) 22.

6. *Illinois.* — Mix *v.* Osby, 62 Ill. 193.

Indiana. — Heilman *v.* Shanklin, 60 Ind. 424; Throgmorton *v.* Davis, 4

If the evidence offered should at the time of the offer be irrelevant on the state of the proof then made, the court may direct at what part of the chain of evidence the party shall begin.[7] Different points of fact may be so connected as not to be separable, and in such circumstances it may be proper to submit the whole at the same time.[8]

2. Right To Introduce All One's Evidence Consecutively. — It is the right of a party, in civil and criminal actions alike, to introduce his evidence and to conclude his case without interruption by the

Blackf. 174; Fowler *v.* Hawkins, 17 Ind. 211; Hadden *v.* Johnson, 7 Ind. 394.

Iowa. — Huey *v.* Huey, 26 Iowa 525; Cook *v.* Robinson, 42 Iowa 474.

Kentucky. — Cotton *v.* Haskins, 16 Ky. 151; Sidwell *v.* Worthington's Heirs, 8 Dana 74.

Louisiana. — Brander *v.* Ferriday, 16 La. 296; Jones *v.* Young, 19 La. 553; Maurin *v.* Chambers, 16 La. 207; Doyle *v.* Estornet, 13 La. Ann. 318; Gordon *v.* Millaudon, 16 La. Ann. 347.

Maryland. — Warner *v.* Hardy, 6 Md. 525; Wellesburg & West Newton Plank Road Co. *v.* Bruce, 6 Md. 457; Caton *v.* Carter, 9 Gill & J. 476.

Massachusetts. — Hodgkins *v.* Chappell, 128 Mass. 197; Com. *v.* Dam, 107 Mass. 210.

Michigan. — Platt *v.* Stewart, 10 Mich. 260.

Mississippi. — Lea *v.* Guice, 21 Miss. 656; Pegram *v.* Newman, 54 Miss. 612; Timnin *v.* Garrett, 4 Smed. & M. 207.

Missouri. — Powell *v.* Hannibal & St. J. R. Co., 35 Mo. 457.

New Jersey. — Lusk *v.* Colvin, 8 N. J. L. 62.

North Carolina. — Ripley *v.* Arledge, 94 N. C. 467.

North Dakota. — Bowman *v.* Eppinger, 1 N. D. 21, 44 N. W. 1000.

Vermont. — Jenne *v.* Joslyn, 41 Vt. 478.

West Virginia. — Winkler *v.* Chesapeake & O. R. Co., 12 W. Va. 699.

A party may show process verbal of sale before showing his compliance with the terms of the sale. Perkins *v.* Nettle, 17 La. 253.

Insufficiency of Evidence. — Effect. A party may follow his own order in offering proof, and his evidence may be received although not sufficient to maintain the issue on his part. Taylor *v.* State, 79 Md. 130, 28 Atl. 815.

The discretion of counsel in the order of producing his proof is limited to cases in which the fact subsequently to be made relevant is itself established by competent evidence. Wilson *v.* Barkalow, 11 Ohio St. 470.

Not Necessary That Offered Evidence Should Go to Entire Action or Defense. — A party may in general pursue his own order in making his proof, and it is no objection to evidence when offered that, if unaided by other testimony, it would be insufficient to make his case or his defense. Palmer *v.* McCafferty, 15 Cal. 334.

A party may introduce his evidence in any manner he wishes upon the assurance by counsel that he will connect his evidence so as to make a related case or defense. McCurdy *v.* Terry, 33 Ga. 49.

Limitation of Rule. — The order of admission of testimony is governed by the party himself unless it is made to appear that he seeks thereby to take advantage of his opponent. McDaneld *v.* Logi, 143 Ill. 487, 32 N. E. 423.

Exception as to Secondary Evidence. — A party may determine for himself the order in which he will introduce his evidence, except when it is desired to lay the foundation for secondary evidence. Byrd *v.* State, 1 How. (Miss.) 247.

A party may introduce evidence in whatever he desires, subject to the control of the court in the exercise of a sound discretion. Crosett *v.* Whelan, 44 Cal. 200.

7. United States *v.* Flowery, 25 Fed. Cas. No. 15,122, 1 Spr. 109.

8. Allen *v.* Parish, 3 Ohio 107.

introduction by the other party of evidence in rebuttal.[9] It is not proper to permit the examination of a witness for the defendant before the plaintiff has opened his case, unless, of course, the plaintiff consents that such may be done. The plaintiff is entitled to conclude his case before the defendant enters upon his.[10] Irregularity in this regard has been held, however, not to be reversible error,[11] and especially would this be true when the trial court is by statute vested with a discretion in the matter.[12]

3. Anticipation of Defense. — The trial court may, in the exercise of its discretion, permit evidence, rebuttal in its nature, to be received during the examination in chief in anticipation of the case sought to be made in defense.[13]

4. Rebuttal Evidence as Part of Cross-Examination. — The trial court may in its discretion, before defendant has rested, permit the plaintiff, in connection with a cross-examination, to introduce evidence that is rendered legitimate in rebuttal by

9. Yazoo & M. V. R. Co. *v.* Grant (Miss.), 38 So. 502; Wilson *v.* Hoffman, 123 Fed. 984; Bowen *v.* White, 26 R. I. 68, 58 Atl. 252; Field *v.* Schuster, 26 Pa. Super. Ct. (Pa.) 82; McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124.

Where in a criminal prosecution the state offers preliminary evidence of a confession of the defendant, the defendant's evidence of his mental condition at the time of the confession, offered before the confession is itself introduced, may be excluded, the defendant's rights in that regard being restricted to cross-examination until the prosecution closes its case. State *v.* Haworth, 24 Utah 398, 68 Pac. 155.

Introduction of Writing. — After a party has made a *prima facie* case of the execution of a writing he is entitled to introduce it in evidence before rebutting evidence, offered by the opposite party, will be received. Verzan *v.* McGregor, 23 Cal. 339.

10. Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234.

11. Alquist *v.* Eagle Iron Wks., 126 Iowa 67, 101 N. W. 520; Chicago City R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443.

12. Under a statute authorizing the court in its discretion to direct the order in which a trial shall proceed, it is not an abuse of such discretion for the trial court to permit the plaintiff to introduce evidence showing the invalidity of an instrument offered by the defendant at the time the writing is received in evidence. Board of Regents *v.* Linscott, 30 Kan. 240, 1 Pac. 81.

13. Neilson *v.* Nebo Brown Stone Co., 25 Utah 37, 69 Pac. 289.

Self-Defense. — The prosecution may in a criminal action anticipate the defense of self-defense, wherein the defendant relies upon the ground that his antagonist brought on the difficulty, and introduce competent evidence to the contrary. Stevens *v.* State, 138 Ala. 71, 35 So. 122.

When Defense Rests on Testimony Of One Witness Only. — When the defense rests wholly upon the testimony of one witness the prosecution may anticipate this in its examination in chief and introduce evidence to show the falsity of the testimony of such witness. Gibson *v.* State, 23 Tex. App. 414, 5 S. W. 314.

Libel and Slander. — Where the defendant, in an action for slander, defends on the ground of justification, the slanderous statement being that the plaintiff had confessed the crime stated, it is not prejudicial for the plaintiff, before defendant attempts to prove the confession, to introduce evidence showing that the alleged confession was not made. Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935.

testimony introduced by the defendant.[14] A party may not, however, as matter of right, introduce evidence in his own behalf during the cross-examination of a witness for his adversary.[15] When the plaintiff, suing on an implied contract, discloses on his cross-examination that there was a written contract between the parties covering the subject-matter, the writing may be received in evidence before the defendant has entered upon his defense.[16]

5. Attacking Competency of Evidence Offered. — If facts offered to be proved by one party are *prima facie* evidence, it is irregular to interfere with the course of such evidence by the introduction of evidence of the opposite party in support of an objection to its admissibility.[17]

6. Evidence Should Not Be Offered Piecemeal. — The plaintiff, if he have the burden, and especially the prosecution in a criminal case, is required to put in the whole case in the opening and to confine it in the close to testimony tending to rebut the evidence

14. In Ranney *v.* St. Johnsbury & L. C. R. Co., 67 Vt. 594, 32 Atl. 810, where this question was presented, the court says: "It does not appear that the objection to the inquiries made of the witness Ward was disposed of otherwise than as a matter of discretion. It was within the discretion of the court to permit the plaintiff to prove matters pertaining to his case in connection with the cross-examination. The testimony already introduced by the defendant had made this evidence legitimate in rebuttal, and the court could permit its introduction before the defendant had rested. The order of testimony, both as regards the examination of the particular witness and the general course of the trial, is within the discretion of the court. Pingry *v.* Washburn, 1 Aikens 264; Goss *v.* Turner, 21 Vt. 437; State *v.* Magoon, 50 Vt. 333; State *v.* Hopkins, 56 Vt. 250."

15. Wheeler & Wilson Mfg. Co. *v.* Barrett, 70 Ill. App. 222.

The exclusion of evidence sought to be elicited by a party on the cross-examination of another's witness is not prejudicial error where no offer is made subsequently to make the same proof. Putnam *v.* United States, 162 U. S. 687.

Evidence of the contents of a note written by deceased, expressing a purpose to take her own life, is not admissible as matter of defense on the cross-examination by having the same read to the jury, but should be introduced when the evidence for the accused in usual order is received. Puryear *v.* Com., 83 Va. 51, 1 S. E. 512.

16. In Tietz *v.* Tietz, 90 Wis. 66, 62 N. W. 939, on this question, it was said: "The plaintiff's objection that it was error to receive the written agreement in evidence before the plaintiff had rested his case and the defendant had entered upon his defense is not tenable. It was competent for the defendant to show by cross-examination of the plaintiff that there was a written contract between the parties in respect to the subject-matter of his demand, and, when the plaintiff had identified the contract, it properly became a part of his cross-examination and part of his case."

17. Introduction of Evidence in Support of Objection to Admissibility. — Roland *v.* Miller, 3 Watts & S. (Pa.) 390.

Where there was a controversy as to a contract, and a witness called by the defendant to state its terms testified that it was not in writing, the plaintiff has no right to interrupt the course of the trial by cross-examining such witness and introducing other evidence upon that point before the witness concludes his testimony. Jenness *v.* Berry, 17 N. H. 549.

of the defendant, though in this regard the trial court is vested with a discretion to receive original evidence even after the defendant has rested.[18] It is likewise the duty of the defendant to complete his proofs before resting, but upon proper ground, in the exercise of the trial court's discretion, the defendant may give additional evidence even after having rested.[19] The party upon

18. Philadelphia & T. R. Co. *v.* Stimpson, 14 Pet. (U. S.) 448; Braydon *v.* Goulman, 1 T. B. Mon. (Ky.) 115; Ricketts *v.* Pendleton, 14 Md. 320; Dave *v.* State, 22 Ala. 23; Clinton *v.* McKenzie, 5 Strob. (S. C.) 36; Sartorious *v.* State, 24 Miss. 602; Somerville *v.* Richards, 37 Mich. 299; Detroit & M. R. Co. *v.* Van Steinberg, 17 Mich. 99; State *v.* Buchler, 103 Mo. 203, 15 S. W. 331; Kalle *v.* People, 4 Park. Crim. 591; Leland *v.* Bennett, 5 Hill (N. Y.) 286.

It is within the discretion of the trial court to receive original evidence on behalf of the plaintiff or the prosecution after the defense has concluded its case:

Alabama. — Gilbert *v.* Gilbert, 22 Ala. 529, 58 Am. Dec. 268.

California. — Priest *v.* Union Canal Co., 6 Cal. 170.

Florida. — Hooker *v.* Johnson, 6 Fla. 730.

Georgia. — Wells *v.* Walker, 29 Ga. 450; Green *v.* State, 119 Ga. 120, 45 S. E. 990; Georgia R. & B. Co. *v.* Churchill, 113 Ga. 12, 38 S. E. 336.

Illinois. — Chicago City R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087.

Indiana. — Coats *v.* Gregory, 10 Ind. 345.

Iowa. — Des Moines Sav. Bank *v.* Colfax Hotel Co., 88 Iowa 4, 55 N. W. 67.

Massachusetts. — Ray *v.* Smith, 9 Gray 141.

Mississippi. — Wood *v.* Gibbs, 35 Miss. 559.

Missouri. — Dozier *v.* Jerman, 30 Mo. 216.

New York. — Ford *v.* Niles, 1 Hill 300; Barson *v.* Mulligan, 77 App. Div. 192, 79 N. Y. Supp. 31; Jarvis *v.* New York House Wrecking Co., 84 N. Y. Supp. 191.

Pennsylvania. — Moloney *v.* Davis, 48 Pa. St. 512.

Rhode Island. — Hopkinton *v.* Waite, 6 R. I. 374.

Texas. — Pridgen *v.* Hull, 12 Tex. 374.

Virginia. — Brooks *v.* Wilcox, 11 Gratt. 411.

Continuance to Supply Omissions. After the prosecution has closed its case, upon objection from the defendant that the prosecution has omitted to prove some part of its case, the trial court may in its discretion grant time to the prosecution to supply the omitted proof. United States *v.* Noelke, 17 Blatchf. (U. S.) 554.

19. Clayes *v.* Ferris, 10 Vt. 112, was an action in trespass for the taking of two horses, in which the defendants relied upon their right to the horses under a writ against a former owner, the purchase thereof by the plaintiff being asserted to have been a fraudulent trust, though professedly for the benefit of creditors. In the course of the opinion the court say: "It is settled as a rule of practice, that whilst the plaintiff is entitled to rest, on making a *prima facie* case, and afterward to adduce additional as well as rebutting testimony, the defendant is in general required to go through with his proofs before resting. In ordinary cases, a departure from this course is matter of indulgence and discretion with the court, and a refusal to permit it is, therefore, no ground of error. The rule supposes, however, that the case, as first made by the plaintiff, shall be calculated to apprise the defendant of the ground on which the right of recovery is finally to be supported. If a new case is made in the close, without any previous notice to the defendant, he should be allowed to go into evidence in answer to it. Now, it would seem that these defendants mistook the ground on which the plaintiffs intended ultimately to rely. Had the plaintiffs met them on the ground anticipated,

whom rests the burden of proof is required to proceed first with his evidence to make his case, and if no testimony is given to disprove the fact thus attempted to be established, no further evidence should be received on that point, except in the trial court's discretion.[20] If evidence in chief is introduced out of its order — that is, if original evidence has been introduced after the party has closed his case — the opposite party should be given the opportunity to offer rebutting evidence to meet that irregularly received.[21]

7. Special Instances.— A. BREACH OF CONTRACT. — In an action for damages for a breach of contract the plaintiff may prove the defendant's breach before showing his own performance. The court is authorized to assume when such evidence is offered that the plaintiff before closing his evidence will make out his case.[22]

B. CHARACTER IN LIBEL AND SLANDER. — In an action for dam-

by endeavoring to sustain the supposed trust as available against the process of creditors, the rule would have fully justified the court in refusing supplementary evidence on the part of the defendants. Indeed, upon such a view of the case the evidence offered could have had little or no influence. But when the plaintiffs placed themselves upon an absolute purchase at a given price, evidence of the value of the property became material; since a gross inadequacy of price is a circumstance, among others, from which to infer a trust for the vendor himself — a feigned and fraudulent purchase."

20. Pingry *v.* Washburne, 1 Aik. (Vt.) 264, 15 Am. Dec. 676 (but a disregard of this rule is not reversible error unless the order of proceeding shall have been such as is evidently calculated to give an undue advantage to such party).

If the counsel for the defendant opens facts to the jury, but calls no witness to prove them, the plaintiff may not, rightfully, reply, though the court may in its discretion permit a reply. Crerar *v.* Sodo, 3 C. & P. 10, 1 M. & M. 85, 14 E. C. L. 424.

After the prosecution has closed its case, the defendant offering no evidence, it is reversible error for the court to permit the prosecution, over the defendant's objection, to give further evidence, whether by re-examining witnesses or by offering the testimony of new witnesses. Mary *v.* State, 5 Mo. 71, 80.

21. State *v.* Buchler, 103 Mo. 203, 15 S. W. 331; Keffer *v.* State, 12 Wyo. 49, 73 Pac. 556.

22. In Peterson *v.* Walter A. Wood Mowing & Reaping Co., 97 Iowa 148, 66 N. W. 96, 59 Am. St. Rep. 399, the court said: "We proceed to a discussion of the questions as to which proper assignments of error are made. Plaintiff offered, and read in evidence against defendant's objections, the depositions of Magnus Larsen and Nels Rasmussen. Defendant objected to the reading of these depositions, because, as he claimed, it had not then been shown that plaintiff had complied with the terms of the warranty. These depositions tended to show that McRoberts was present when the machine was first started, that it did not work well, and that McRoberts admitted that fact. Now, the fact, if such it was, that plaintiff had not then shown such a compliance on his part with the conditions of the warranty as would authorize a recovery, was no reason for excluding these depositions. Plaintiff had not finished his case, and the court might well assume that, if any fact remained to be established, to entitle plaintiff to recover, evidence of it would be thereafter introduced. Furthermore, the order of the introduction of evidence is so largely a matter within the discretion of the trial court that we should not interfere with the rulings relating thereto unless it clearly appeared that the

ages for libel or slander the receiving of evidence of the plaintiff's general character before other evidence has been received has been held to be erroneous.[23]

C. Correspondence. — Letters should be received in evidence in the order they are written. This order may, of course, be varied, and it is not prejudicial that a party, offering a letter written to himself and his answer to it, is required to read his own letter first.[24]

D. Fraud. — When the issue is as to the truth of certain representations, the court may in its discretion exclude evidence of their falsity until the making of them has been proven.[25] So in an action by the assignee of a note, in defense to which fraud is alleged in the inception of the note, after evidence of the *bona fides* of the plaintiff, before evidence of the fraud is introduced, the defendant should introduce some evidence of *mala fides*.[26]

II. EVIDENCE DEPENDENT ON PRELIMINARY PROOF.

1. In General. — When the competency and relevancy of particular evidence depend upon proof of some preliminary fact, it is necessary that such preliminary proof shall be made before the

court had abused its discretion in that respect."

23. Aetna L. Ins. Co. *v.* Paul, 23 Ill. App. 611.

24. Mudge *v.* Pierce, 32 Me. 165.

25. In Bradley *v.* Dinneen, 88 Minn. 334, 93 N. W. 116, an action on notes given for the rental of a farm, warranted to be in good farming condition, the court says: "Defendant specifically alleged that certain representations had been made regarding the character of the farm he held under a lease constituting the consideration for the notes upon which the suit was brought, and whether the representations and defendant's reliance thereon be treated as a warranty of the condition of the farm, or such statements be considered as having been fraudulently made, in either event it was essential that they be established substantially as pleaded, to authorize their consideration by the jury to sustain defendant's claims; and it was within the discretion of the trial court to direct the order of introducing the evidence at the trial, and to require that evidence tending to show such representations be offered before the quality of the land could be shown. Therefore the exclusion of the testimony to show the character of the soil, under the conditions imposed by the court, went no further than to regulate the order of introducing the proofs, for the representations must have been made, to authorize a finding for defendant. The defendant declined to submit evidence tending to establish a material allegation in his answer, though notified by the court that he must do so before the evidence objected to could be received, and cannot now be heard to complain of the ruling upon the order of proof, which was discretionary."

26. In Fredonia Nat. Bank *v.* Tommei, 131 Mich. 674, 92 N. W. 348, the court, in a case in which this question was considered, said: "We think the evidence on the part of the plaintiff conclusively established that it was a *bona fide* purchaser of these notes. It paid for them by crediting the amount thereof upon White's account, and permitting him to check it all out before their maturity. Defendant gave notice of fraud in the inception of the notes. Plaintiff then assumed the burden of showing *bona fides*. It was then incumbent upon defendant to first show some evidence of *mala fides*, before introducing evidence of fraud."

evidence offered may be received.[27] It is within the discretion of the trial court, however, to admit such evidence subject to its being rendered competent by subsequent proof and upon the statement of counsel offering it that proper connecting and preliminary proof will be made.[28] If evidence so received is not followed by the

27. Wiswall *v.* Ross, 4 Port. (Ala.) 321; Goings *v.* Chapman, 18 Ind. 194; Nordyke *v.* Shearon, 12 Ind. 346; Sloan *v.* Sloan (Or.), 78 Pac. 893; Johnson *v.* Brown, 25 Tex. Supp. 120.

Evidence irrelevant at the time it is offered may be excluded unless accompanied by an offer to follow with proof of other facts necessary to show its materiality. Cheatham *v.* Wilber, 1 Dak. 335, 46 N. W. 580.

Homicide. — Proof of Threats. Evidence of threats made by the defendant in a prosecution for homicide is not admissible against the defendant without preliminary proof that they were directed against the deceased. State *v.* Walsh, 5 Nev. 315.

28. *United States.* — United States *v.* Gardner, 42 Fed. 832.

Alabama. — Jordan *v.* State, 79 Ala. 9.

California. — White *v.* Spreckels, 75 Cal. 610, 17 Pac. 715.

Illinois. — Rogers *v.* Brent, 10 Ill. 573, 50 Am. Dec. 422.

Indiana. — Nordyke *v.* Shearman, 12 Ind. 346; Goings *v.* Chapman, 18 Ind. 194; Stephenson *v.* Doe, 8 Blackf. 508, 46 Am. Dec. 489.

Maine. — State *v.* McCallister, 24 Me. 139.

New Hampshire. — Tilton *v.* Tilton, 41 N. H. 479.

New Jersey. — American L. Ins. Co. *v.* Day, 39 N. J. L. 89, 23 Am. Rep. 198.

New York. — Staring *v.* Bowen, 6 Barb. 109.

North Carolina. — State *v.* Cherry, 63 N. C. 493.

Oregon. — State *v.* Foot You, 24 Or. 61, 32 Pac. 1031.

Tennessee. — Owens *v.* State, 16 Lea 1.

Evidence apparently immaterial may be received upon the assurance of the offerer that subsequent evidence will render it material. Phillips *v.* State, 22 Tex. App. 139, 2 S. W. 601.

It is discretionary with the trial court to admit evidence not relevant at the time it is offered for lack of other preliminary proof, upon the promise of counsel that it will subsequently be rendered competent. Pierson *v.* State, 18 Tex. App. 524.

Testimony of Expert. — Homicide. Chemical Analysis. — An expert may testify respecting a particular matter or object before evidence of the identity of the object has been offered. Thus an expert may state the result of a chemical analysis of the contents of a human stomach, to be followed by evidence that the stomach was that of the defendant's victim in the particular case. Johnson *v.* State, 20 Tex. App. 178.

Rules of Insurance Company. Knowledge of Insured. — Where, in an action on a policy of insurance, an agent's manual containing the insurer's rules is excluded for lack of evidence that the insured knew of the rules sought to be proved, subsequent proof that the insured had knowledge of such rules will not render the previous ruling on the offer erroneous. Going *v.* Mutual Ben. L. Ins. Co., 58 S. C. 201, 36 S. E. 556.

Conversations With Third Party. Communication. — It is discretionary with the trial court to permit evidence of conversations between a party to the action and a third party, to be received without proof first of their having been communicated to the other party, upon condition of such communication being subsequently proven. Downings *v.* De Klyn, 1 E. D. Smith (N. Y.) 563.

Action Against Husband on Note of Wife. — Proof of Oral Promise. In an action against a husband on his deceased wife's note, the verbal promise of the husband, subsequent to the death of the wife, to pay the note, may be received, to be followed by evidence that the husband appropriated his wife's estate without administration. Leipird *v.* Stotler, 97 Iowa 169, 66 N. W. 150.

proper proof to render it relevant and competent it should thereafter on motion be stricken out.[29] Evidence not relevant or competent at the time it is offered may be rendered competent by subsequent evidence, and the error in receiving the earlier evidence may thus be cured.[30] When in a capital case evidence has been received the competency of which depends upon the making of subsequent proof, if such proof is not made and the incompetent evidence is not withdrawn at a time and in a way that makes it certain that the accused was not prejudiced, the error will be reversible.[31]

2. Degree of Proof of Preliminary Fact Required. — When the relevancy and competency of evidence offered depend upon the existence of some preliminary and extrinsic fact, it is not necessary that such fact be established conclusively or by a preponderance to warrant the reception of the dependent evidence. It is sufficient that the existence of the preliminary fact be made to appear *prima facie*.[32]

29. Dillin *v.* People, 8 Mich. 357; State *v.* Clayton, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565; Little Klamath Water Ditch Co. *v.* Ream, 27 Or. 129, 39 Pac. 998; Zell *v.* Com., 94 Pa. St. 258.

Arson. — Previous Attempts to Commit.— In a prosecution for arson, evidence of previous attempts to commit the same unlawful act should be stricken out without supplementary proof connecting the defendant with such other attempts. State *v.* Freeman, 49 N. C. 5.

It is no objection to the admissibility of evidence offered, dependent on proof of another fact, that such other fact has not been proved at the time such offer is made, but if evidence of this nature is received, and the other fact on which it depends is not proved, the whole should be stricken out as irrelevant. Spears *v.* Cross, 7 Port. (Ala.) 437.

30. Collins *v.* State, 137 Ala. 50, 34 So. 993; Allen *v.* State, 134 Ala. 159, 32 So. 318; McDermott *v.* Judy, 67 Mo. App. 647.

31. Zell *v.* Com., 94 Pa. St. 258, 274.

32. Phoenix Ins. Co. *v.* Moog, 78 Ala. 284, 56 Am. Rep. 31; Walton *v.* State, 88 Ind. 9; Com. *v.* Crowinshield, 10 Pick. (Mass.) 497.

Prima Facie Case Sufficient. Question for Trial Court. — In State *v.* McGee, 81 Iowa 17, 46 N. W. 764, the court says: "A theory of the prosecution is that there was a conspiracy among the defendants, and on the trial it was permitted to prove the statements of David Cooper and George Burk made in defendant's absence. Two objections are urged against the admissibility of the testimony: First, that there was no such proof of a conspiracy as to render the admission of such statements competent, and, second, that the declarations are not such as are admissible when made by a co-conspirator, conceding the existence of the conspiracy. The rule is as to a conspiracy, to justify such evidence, that the proof must show *prima facie*, in the opinion of the judge, its existence. 1 Greenl. Ev. sec. 111; Rosc. Crim. Ev. (7 Amer. Ed. 1874), secs. 417, 418; State *v.* George, 7 Ired. 321; Card *v.* State, 9 N. E. Rep. (Ind.) 591. The question of the sufficiency of such proof is one peculiarly for the determination of the trial court. Card *v.* State, *supra*. It should be borne in mind that the question of the actual existence of a conspiracy is one to be finally submitted to the jury, and that the finding or conclusion of the trial judge is only a basis for the admission of evidence. Without any intimation as to what the ultimate finding on that question should have been, we are of the opinion that the district court did not err in holding that the acts and declarations of the co-defendants in the indictment could be admitted in evidence against the defendant on trial."

3. Waiver of Objection by Failure To Move To Strike Out. When evidence has been admitted out of the regular order, over objection from the opposing party, upon the assurance of counsel that it will be made competent thereafter, the failure of the opposite party to move to strike out the objectionable evidence, when such subsequent proof is not made, is a waiver of his right in the premises.[33]

4. Duty of Court in Rejecting Evidence Offered. — If evidence is rejected as being out of its proper order, the court in rejecting the offer should state the ground upon which it is rejected, to avoid misleading or surprising the party making the offer.[34]

5. Best and Secondary Evidence. — Secondary evidence may, consistently with the general rule, be received without preliminary proof of a ground for the reception of the inferior evidence, to be followed by such proof as will render it competent.[35]

6. Documentary Evidence. — The rule relating to the order of proof applies to documentary as well as to oral evidence, so that when a writing, dependent for its relevancy upon other proof, is offered, it may be received, and its admission followed by proper evidence showing its competency.[36] The omission of preliminary

Some Evidence of Preliminary Fact. — Evidence of the acts and statements of an alleged co-conspirator may be received when *some* evidence of the conspiracy has been offered. F. R. Patch Mfg. Co. *v.* Protection Lodge No. 215, 77 Vt. 294, 60 Atl. 74, 107 Am. St. Rep. 668.

33. United States *v.* Gardner, 42 Fed. 832; State *v.* Rothschild, 5 Mo. App. 411; Leipird *v.* Stotler, 97 Iowa 169, 66 N. W. 150.

Telegraph Message. — Use Against Defendant in Prosecution. — In McCarney *v.* People, 83 N. Y. 408, 38 Am. Dec. 456, it was said: "There being no error in receiving the message at first, as a discretionary direction of the order of proof, that it should be stricken out afterward if not made material, was a right of the prisoner which he might ask for or waive. It was a privilege not to be denied to him, nor the use of it to be forced upon him. It was for him to call upon the court to put the case right before the jury, by striking out the testimony, or by charging them to disregard it. There is doubtless a general duty upon a trial court to see that a prisoner has his rights before it; but when he appears with skillful counsel to aid him, it is not error to suppose that all will be done in his behalf that caution and ingenuity can suggest, and the court is not called upon to watch that no lapse like this takes place. A passive course that does not refuse a motion or request of the prisoner, is not the committal of error. The party against whom such testimony is introduced is protected against prejudice by his right to call on the court to instruct the jury to disregard it. Where he fails to do this, the court may assume that he does not think it of importance enough to need that caution."

34. Schuylkill Nangaleon Co. *v.* Farr, 4 Watts & S. (Pa.) 362.

35. State *v.* Black, 51 N. C. 510. See article "BEST AND SECONDARY EVIDENCE," Vol. II, page 343. See, however, Byrd *v.* State, 1 How. (Miss.) 247.

36. Eisenhart *v.* Slaymaker, 14 Serg. & R. 153; Jackson *v.* Feather River & G. Water Co., 14 Cal. 18; Hovey *v.* Chase, 52 Me. 304, 83 Am. Dec. 514; Corlyon *v.* Lannan, 4 Nev. 156; Consaul *v.* Sheldon, 35 Neb. 247, 52 N. W. 1104.

Receiving Writing Without Proof of Execution. — The erroneous ad-

proof of the correctness of a plat, exhibited and used for reference, is not reversible error, when proof of its correctness is subsequently made.[37]

7. Connecting Party With Evidence Offered. — Evidence offered, the competency of which depends upon the fact being communicated to the party against whom it is offered, or upon his relation to or connection with a person or fact, may be received, in the court's discretion, before proof of the fact rendering it competent is made,[38] subject to the general limitation that if suitable pre-

mission of a writing in evidence without proof of its execution is cured by subsequently proving its execution. Jones *v.* Loree, 37 Neb. 816, 56 N. W. 390.

Interest of Assignee. — A party claiming under an instrument as an assignee thereof may introduce the instrument in evidence before proving his title to it, or his interest in it. Louden *v.* Vinton, 108 Mich. 313, 66 N. W. 222; Van Orman *v.* Spafford, 16 Iowa 186.

Trespass. — Distress for Rent. Proof of Tenancy. — Where the defendant in trespass for taking chattels justifies under a distress for rent, the landlord's warrant under which the distress was made may be received in evidence without proof first of the written agreement under which the premises were held or that there was rent due and unpaid. Lusk *v.* Colvin, 8 N. J. L. 62.

Production of Mortgage Before Offering Note Secured. — In an action by a mortgagee for the wrongful seizure of the mortgaged property, the mortgage may be received in evidence without the note it secures being first offered. Louden *v.* Vinton, 108 Mich. 313, 66 N. W. 222.

Quieting Title. — Possession Following Deed. — In a suit to quiet title, a regular deed of general warranty for the premises in controversy is admissible in the defendant's behalf without first introducing evidence of possession under the deed. English *v.* Openshaw, 28 Utah 241, 78 Pac. 476.

Policy of Insurance and Application. — When an application for insurance and the policy issued thereon together from the contract, any error in receiving the policy in evidence without the introduction, at the time of the application, also, is cured by the introduction subsequently of the application. Mutual L. Ins. Co. of New York *v.* Selby, 72 Fed. 980, 19 C. C. A. 331.

Mining Claim. — Location. — The trial court may in its discretion permit the introduction of the certificate of location of a mining claim before proof of the location and marking of the claim or the recording of the certificate. Walton *v.* Wild Goose Min. & Trad. Co., 123 Fed. 209.

37. **Correctness of Plat.** — Williams *v.* Carterville, 97 Ill. App. 160.

38. Dillin *v.* People, 8 Mich. 357.

Action for Work and Labor. — Authority. — In an action for work and labor performed, the doing of the work may be proved before it is shown to have been authorized by the defendant. Foley *v.* Tipton Hotel Ass'n, 102 Iowa 272, 71 N. W. 236.

Payment of Debts Assumed by Another. — In an action for money paid for debts which the defendant had assumed, proof of what the debts were for may be made before evidence that plaintiff paid them is received. Roberts *v.* Roberts, 91 Iowa 228, 59 N. W. 25.

Offer of Reward to Prosecuting Witness Not to Prosecute. — Evidence of an offer of reward to a prosecuting witness not to prosecute the defendant, made by a person other than the defendant, is not competent, without connecting the defendant with the party offering the reward; and in such circumstances the state's attorney should state his intention so to connect the defendant with such party and so frame his

liminary proof is not made it shall be stricken from the record.[39] Of course the court may, in the exercise of such discretion, exclude evidence of this nature until the proper preliminary proof is made.[40]

questions as to confine the answer to offers made by the defendant or his authorized agent. People *v.* Choy Ah Sing, 84 Cal. 276, 24 Pac. 379.

Criminal Law. — Tampering With Witness. — It may be shown that a witness for the state has been tampered with without proof in the first instance of the defendant's connection with such conduct. State *v.* Rothschild, 5 Mo. App. 411.

Action by Wife. — Civil Damage Laws. — In an action by the wife under the civil damage laws the fact of the intoxication of the husband may be proven before the defendant's connection with it is shown. Woolheather *v.* Risley, 38 Iowa 486.

In an action under the civil damage laws by the wife against one who has sold liquors to her husband, the intoxication and its effect on the husband may be proven before evidence of the defendant's connection with the sale is received. Hall *v.* Barnes, 82 Ill. 228.

In Trespass. — The trespass, and the amount of the damage done thereby, may be proved without proof first connecting the defendant with the wrongful acts done or alleged to have been done by him. Louisville & N. R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163.

Trespass by Third Person as Party's Agent. — The plaintiff suing for trespass on land may prove the trespass by a third party without first proving that he was the agent of the defendant. Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515.

Proof of Assignment. — Notice. The assignment of a contract, pleaded as a defense, may be proved before it is shown that the plaintiff had notice of the assignment. Doll *v.* Anderson, 27 Cal. 248.

Proof of Nuisance. — Maintenance by Defendant. — The existence of a nuisance and the resulting damage may be proved before there has been any evidence that the defendant produced or maintained it. Watson *v.* New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345.

39. Criminal Law. — Defendant's Connection With Quarrel. — In a prosecution for murder, evidence of a quarrel between the deceased and other persons charged with the crime under separate indictments should be stricken out upon the failure of the prosecution to connect the defendant with the other parties to such quarrel. Wright *v.* State, 43 Tex. 170. See cases cited note 38 *supra*.

40. Communication of Fact Offered in Evidence. — When the admissibility of offered evidence depends upon the fact having been communicated to the party against whom it is offered, the offer may be rejected unless the communication is first shown. State *v.* Scott, 41 Minn. 365, 43 N. W. 62. The case cited was a prosecution for murder, in which the court considered the admissibility of evidence of certain conversations of the deceased. In the course of the opinion it was said: "The court properly refused to receive in evidence, in the order in which it was offered, the conversations of the deceased with the witness Parker, referred to in the first assignment of error. It was enough to justify the ruling of the court that it was proposed, first, to prove the statements or conversation of the deceased, and afterwards to show that the same had come to the knowledge of the defendant. The ruling of the court that this order of proof was objectionable was a proper and reasonable exercise of judicial discretion. As to statements of the deceased, the admissibility of which depended upon the fact that they had been communicated to the defendant, it was well to require some proof of such communication having been made, before allowing the statements to be given in evidence. It should be assumed that the statements of the deceased, referred to (excepting such as were received in

8. Other and Similar Matters and Transactions. — Before evidence of the value of other property may be received for the purpose of showing the value of particular property, the court may in its discretion require the differences and similarities of such other lands to be first shown.[41] When the plaintiff sues for the negligence of the defendant he may show that the same act occurred previously, before showing that the particular act was the result of negligence.[42]

9. Agency. — A. In General. — The rules in general obtaining apply when the acts or declarations of an agent are sought to be shown. It is essential to the competency of such evidence that the authority of the agent to bind the party against whom his acts and declarations are offered should be first established.[43] Proof of the agency may, however, in the discretion of the presiding judge, follow the evidence of the acts and declarations of the alleged agent.[44] When an agent has submitted to arbitration a controversy

evidence), were such as would not have been admissible unless knowledge of them had come to the defendant; for the offer is coupled with the proposal to show the latter fact."

41. Other Land Values. — Damage by Street Improvement. — Millard *v.* Webster City, 113 Iowa 220, 84 N. W. 1044.

42. Proof of Other Negligent Acts. — Stock *v.* Le Boutillier, 19 Misc. 112, 43 N. Y. Supp. 248.

43. Jos. Schlitz Brew. Co. *v.* Grimmon (Nev.), 81 Pac. 43; Sloan *v.* Sloan (Or.), 78 Pac. 893.

Agency of Foreman To Give Release. — In an action for personal injuries arising from the defendant's negligence, evidence that after the accident the defendant's foreman brought a release to the plaintiff for him to sign is not admissible when it is not shown that the foreman was the defendant's agent or authorized to take such release. St. Louis, A. & T. R. Co. *v.* Jones, (Tex.), 14 S. W. 309.

Agency To Take Additional Insurance. — When an insurer defends against liability on a contract of insurance on the ground of other insurance procured by one other than the insured, proof of the agency must be made, or the trial court satisfied that such proof will subsequently be made, before proof of the additional insurance may be received. Virginia F. & M. Ins. Co. *v.* Buck, 88 Va. 517, 13 S. E. 973.

44. *California.* — Bates *v.* Tower, 103 Cal. 404, 37 Pac. 385.

Connecticut. — Stirling *v.* Buckingham, 46 Conn. 461; Electric Motor Co. *v.* Frisbie, 66 Conn. 67, 33 Atl. 604.

Colorado. — Robert E. Lee Sil. Min. Co. *v.* Englebach, 18 Colo. 106, 31 Pac. 771.

Indiana. — Shepard *v.* Goben, 142 Ind. 318, 39 N. E. 506; Haller *v.* Gibson, 30 Ind. App. 10, 65 N. E. 293.

Missouri. — Taylor *v.* Penquite, 35 Mo. App. 389; Gage *v.* Averill, 57 Mo. App. 111.

Minnesota. — Woodbury *v.* Larned, 5 Minn. 339.

New York. — Platner *v.* Platner, 78 N. Y. 90.

North Dakota. — Bowman *v.* Eppinger, 1 N. D. 21, 44 N. W. 1000.

Vermont. — Chamberlin *v.* Fuller, 59 Vt. 247, 9 Atl. 832 (an agent's declarations and admissions are competent before proof of the agency is made).

The acts of an agent may be proved, to be followed by proof of the agency. Starr *v.* Gregory Consol. Min. Co., 6 Mont. 485, 13 Pac. 195, 6 Mont. 491, 13 Pac. 198.

The letters of an agent are admissible before proof of the agency is made. Kraus *v.* J. H. Mohlman Co., 18 Misc. 430, 42 N. Y. Supp. 23.

Acts and declarations of an agent may be received conditionally upon the agency being shown subse-

in which his principal is interested, proof of the agency must precede proof of the submission and award.[45] When evidence of the statements of a third party offered by the plaintiff is excluded because his agency is not shown, proof of the agency subsequently by the defendant will not entitle the plaintiff to introduce the excluded testimony in reply when the evidence sought to be elicited is not in regard to any matter elicited by the plaintiff's testimony in chief or by the defendant in rebuttal.[46]

B. Contracts Executed by Agents. — When a contract made by the agent of a party is in issue, the proper order is to establish the making of the contract and the means of its execution, and thereafter the agency and authority.[47]

10. Evidence Dependent on Agreement. — When the relevancy of evidence offered depends upon the existence of an agreement between the parties, proof of the agreement on which its relevancy depends should be made before the evidence offered is received.[48]

quently. Bates *v.* Tower, 103 Cal. 404, 37 Pac. 385.

Acts and statements of one claiming to be another's agent may be proven against his supposed principal, if followed by proof of the agency, and that the agent was acting within the scope of his authority. Mix *v.* Osby, 62 Ill. 193.

45. Submission to Arbitration. Gibbs *v.* Holcomb, 1 Wis. 23.

46. Ludden & Bates Southern Music House *v.* Sumter, 47 S. C. 335, 25 S. E. 150.

47. When the authority of an agent in the making of a contract is in issue the regular order of proof is first to establish the making of the agreement, by proof of its terms, and the names of the parties instrumental in procuring its execution, and then to prove the authority of the parties acting in that behalf, if not themselves the parties bound. Erie & Pacific Despatch *v.* Cecil, 112 Ill. 180.

In an action on a contract executed by an agent the contract may be read in evidence, to be followed by proof of the agency and of the agent's authority. Miller *v.* New Orleans Canal & Bkg. Co., 8 Rob. (La.) 236.

In an action against a common carrier for the value of goods lost there must be some evidence of the contract for the carriage of the goods before the agency of shipper for the plaintiff may be shown. Peek *v.* Dinsmore, 4 Port. (Ala.) 212.

In an action on a contract executed by an agent, the agency may be proved subsequently to proof of his acts or of the making of the contract and its introduction in evidence. Hazleton *v.* Le Duc, 10 App. Cas. D. C. 379.

Order of Proof Reversed. — Where the making of a contract by a party through his agent is averred, it is immaterial whether the agency or the acts of the agent are first proved. Rainey *v.* Potter, 120 Fed. 651, 57 C. C. A. 113.

48. Lungerhausen *v.* Crittenden, 103 Mich. 173, 61 N. W. 270.

Declarations of Architect. — Contract for Labor and Materials. In an action for the value of materials furnished and labor performed, alleged by the defendant, but denied by the plaintiff, to have been under a contract providing that the same should be to the satisfaction of the defendant's architect, it was held that the declarations of the architect relating to the items of labor and material were incompetent in the defendant's behalf without proof of the making of the contract set up by him. Oberlander *v.* Carstens, 151 Mass. 18, 23 N. E. 575. In the case cited the court said: "When the defendant offered to prove by the cross-examination of

11. Hypothetical Questions to Experts. — A party offering the opinion of an expert witness on a hypothetical question is not required first to establish the facts involved in the hypothetical question, if it appear that the party offering the expert testimony *bona fide* intends to make proof of such facts.[49]

12. Identity. — When the question of identity arises on the offer of a writing or other thing in evidence, identity may, in the trial court's discretion, be shown subsequently to the reception of the evidence dependent upon such proof being made.[50]

13. Jurisdiction as Preliminary Fact. — The testimony of the members of a municipal board, charged with a particular duty, as to their acts respecting a matter within their province, may be received before proof that the action taken was within their jurisdictional power.[51] When a judgment in garnishment, rendered against the defendant in another state, is pleaded, the plaintiff may give evidence as to his residence, but such evidence has been held to be premature, until evidence of the judgment is given.[52]

14. Lack of Consideration. — When the consideration of a writing is in issue the writing should, in regular order, be introduced, and thereafter the consideration shown.[53]

the plaintiff the declarations and statements of the architect, no evidence had been offered that the fasteners and openers which were the subject of the controversy were to be made to his satisfaction or approval. On the contrary, this had been distinctly denied by the plaintiff. The declarations of the architect were, therefore, properly excluded as incompetent until some evidence was offered to show that the fasteners and openers were to be made to his satisfaction. Without such evidence, his declarations were simply those of a third person. If this were otherwise, as the order of the trial in the admission of evidence is in the discretion of the presiding judge, and as at a subsequent time, after evidence had been offered tending to show that the fasteners and openers were to be made to the satisfaction of the architect, the defendant had ample opportunity, of which he availed himself, to cross-examine the plaintiff on this subject, it is not easy to see how he could have any ground of exception."

49. Earl *v.* Tupper, 45 Vt. 275.

50. Jackson *v.* Feather River & G. Water Co., 14 Cal. 18.

In an action on a policy of insurance a deed of assignment by the insured to another of property similarly described is inadmissible without proof of the identity of the property assigned with that insured. Germania F. Ins. Co. *v.* McKee, 94 Ill. 494.

51. Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183.

52. The Terre Haute & I. R. Co. *v.* Baker, 122 Ind. 433, 24 N. E. 83, the court said: "Over the objection of the appellant, the appellee was permitted to prove that he was, and for a long time prior to the 15th day of March, 1887, had been, a resident householder of Carroll County, Indiana, and that Smelcer, who commenced the attachment proceedings against the appellant, was, and for a long time prior thereto had been, a merchant residing in said county. This evidence was, to say the least, prematurely admitted. No evidence upon the subject of residence could properly be introduced until the appellant had introduced some evidence of the judgment set up in the third paragraph of its answer."

53. **Consideration of Note.** Where the consideration of a note is denied, the note should be first introduced in evidence, and thereafter

15. Notice of Unrecorded Instrument. — When a right is claimed under a prior unrecorded instrument against subsequent purchasers with notice, the plaintiff should first prove his right and the execution to him of the writing relied on before offering proof of notice to the later purchaser.[54]

16. Part Performance Under Statute of Frauds. — When the specific performance of an oral contract for the conveyance of lands is sought, parol evidence of the terms of the contract may be received before proof of part performance to take the contract out of the operation of the statute is made.[55]

17. Partnership. — The acts and declarations of a partner should not be proven against the partnership before proof of the partnership relation is made.[56] But in enforcing a debt or demand against

the consideration shown. Pennington *v.* Woodall, 17 Ala. 685.

54. Proof of a prior sale not of record must be made before evidence may be received that subsequent purchasers had notice of the same. Lee *v.* Wharton, 11 Tex. 61.

55. Conveyance of Lands. — Statutory Power as to Order of Proof. Where by statute the order of proof is within the discretion of the trial court, the statute of frauds does not operate to require the plaintiff, suing for the specific performance of an oral contract for the conveyance of lands, to prove performance on his part before evidence of the parol agreement will be received. Barrett *v.* Schleich, 37 Or. 613, 62 Pac. 792.

In Shahan *v.* Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517, the Ohio court said: "The circuit court, on the trial of the action, admitted, over the objection of plaintiff in error, parol testimony of the terms of the alleged contract, before evidence was introduced showing acts of part performance. This, it is claimed, is error, for which the judgment should be reversed. In support of this view, they cite the cases of Lindsay *v.* Lynch, 2 Sch. & L. 1; Maddison *v.* Alderson, 8 L. R. App. Cases, 467; Dale *v.* Hamilton, 5 Hare, 369, and some others, as well as the most distinguished text-writers on the subject of the specific performance of contracts. The authorities are too numerous to render practicable their review in detail, but an examination of them will show that the order in which evidence should be admitted was not under discussion, but rather, the effect to be given to it when received, and the holdings and opinions were, that parol proof of the terms of the parol contract should not be considered as affecting the rights of the parties, until part performance of the contract had been established. The statement of the case, as well as the language used by the chancellor in the case first cited, (Lindsay *v.* Lynch, 2 Sch. & L. 1,) discloses that the parol evidence of the contract had in fact been admitted; the lord chancellor (Lord Redesdale) saying, 'The statute of frauds prohibits my entering into the evidence of Blake on the subject;' Blake having already testified to the terms of the parol contract in dispute. In practice, it would be impracticable to defer hearing parol evidence of the terms of a parol contract respecting land, until the court ascertained that it had been partly performed. It would involve the necessity of hearing the case in detail, and considering one branch of the evidence before the remainder of it was admitted at all; and, whatever the rule may be elsewhere, in Ohio the practice is to permit a party to introduce all the evidence he can produce, that is pertinent to the issue on trial, the order of its introduction to be determined by the court in the exercise of a sound discretion."

56. Smith *v.* Bye, 116 Mich. 84.

a partnership,[57] or in suing on a contract made by one member of the partnership only in the firm name,[58] proof of the debt and the contract may precede proof of the existence of the partnership.

18. Sheriff's Deed. — Proof of the existence of a valid judgment and the execution issued thereon may follow the introduction of the sheriff's deed issued to a purchaser at the sale had.[59]

19. Waiver as Condition of Proof. — When the waiver of the opposite party is relied on to render admissible certain evidence otherwise irregular and unavailable, the waiver should be shown before the primary evidence is received.[60]

20. In Criminal Prosecutions. — A. THE CORPUS DELICTI.

74 N. W. 302, was an action in trover in which the defendant claimed that the plaintiff and the one from whom he bought the property in question were partners. In considering the competency of evidence as to a settlement with one of the partners before the supposed partnership had been proved, the court says: "While the defendant was on the stand he was asked by his counsel: 'When was it you settled with Johnson or with these parties for the shingles?' This was objected to, on the ground that any settlement with Johnson, unless in Smith's presence, would not bind Smith. The court held this testimony incompetent at that stage of the proceedings, on the ground that the plaintiff had denied that a partnership existed between himself and Johnson, and that the defendant had not introduced at that time any testimony tending to show such partnership. The court finally remarked: 'I think you had better proceed in the proper order. First introduce some proof that there was some partnership between these parties.'"

57. **Partnership Note.** — When, in an action on a note purporting to have been given by a partnership, the fact of the partnership is made an issue, the note may be introduced in evidence, to be followed by proof of the existence of the partnership. Lea *v.* Guice, 13 Smed. & M. (Miss.) 656.

58. **Goods Sold and Delivered.** In an action for goods sold and delivered to partners, a sale of the goods to only one of them may be proved to be followed by proof of the partnership. Mauney *v.* Coit, 86 N. C. 463.

Partnership Note. — So in an action against partners on a note executed by one member only of the alleged partnership, the note may be received in evidence, to be followed by evidence to connect the other parties therewith as liable on such note. Haughey *v.* Strickler, 2 Watts & S. (Pa.) 411.

A writing signed by one only of a partnership may be received in evidence against the partnership upon the statement of counsel that it will be followed up by proof of prior assent or subsequent ratification. Martin *v.* Bray (Pa.), 16 Atl. 515.

59. Catterlin *v.* Douglass, 17 Ind. 213.

60. **Irregular Proofs of Loss. Waiver.** — When an insured has made irregular proofs of loss, but relies on a waiver, the regular order of proof is to receive evidence of the waiver before passing upon the admissibility of the proofs of loss; but proof of the waiver may follow the admission of the proofs of loss in the trial court's discretion. Gould *v.* Dwelling House Ins. Co., 134 Pa. St. 570, 19 Atl. 793, 19 Am. St. Rep. 717. Mitchell, J., said, in disposing of the question: "In regard to the first assignment of error, to the overruling of the defendant's objection to the proofs of loss, it would have been more regular and much better practice to have heard the evidence of a waiver first, and then passed upon the admissibility of the proofs of loss. But if the evidence of waiver was in fact, though subsequently given, sufficient to take that question to the jury, then it was a mere matter of the order of proof, which is

a. *In General.* — It is generally held in criminal prosecutions, especially for homicide, that the *corpus delicti* must be proven before other evidence against the defendant may be received.[61] Evidence of the defendant's motive to commit the particular crime should follow proof of the *corpus delicti*.[62] A conviction for homicide will not be set aside, however, because evidence of little consequence against the accused, relating to matters occurring before the death of the victim, was admitted before the *corpus delicti* was proved.[63] Admissions made by the defendant may be competent against him, before proof of the *corpus delicti*, when they are so interwoven with the crime itself as practically to make them inseparable.[64]

within the discretion of the judge."

61. Corpus Delicti To Be First Shown. — The proper order for the introduction of evidence in a criminal prosecution is to establish first the *corpus delicti* and thereafter to introduce evidence connecting the defendant with the crime shown to have been committed. Traylor *v.* State, 101 Ind. 65.

In Cases of Homicide, and in other prosecutions in which the justice of the case demands it, the regular order of proof requires that the *corpus delicti* shall be first proven before other evidence against the accused may be received. People *v.* Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. St. Rep. 477. In this case the court said: "In many and perhaps in most cases the order of proof is not very essential. But in cases of homicide, and in others where justice demands it, the prosecution should not be allowed to proceed further until the death and its character shall have been shown, as far as the testimony can be separately given, and especially so far as can be shown from the *post-mortem* examinations. Under our system of informations the prosecution must always have knowledge, in advance of the trial, concerning the case intended to be made out, and there can be no good reason for pursuing the course which was allowed to be taken here. Instead of showing in the outset the death of Mrs. Hall, the examinations of her remains and their several analyses, and the medical opinions, indicating or not indicating death by poison, the first testimony introduced was for the only and obvious purpose of creating a prejudice against the accused by raising suspicions — which this particular testimony was not legally sufficient to establish — that he had been at some former period intimate with another woman. The testimony did not tend to prove any lack of harmony or kindness between the prisoner and his wife before her death; but had it done so, it was improper to show it until the evidence that she had been poisoned and died from poison had been introduced. All the malice imaginable is no proof in itself tending to show that death was caused by crime. When there is legal evidence leading to the belief that homicide has been committed, the motive of the criminal becomes important, and the relations of parties may therefore become relevant."

In a Prosecution for Burglary, charged to have been committed by the defendant and others, the testimony of such other parties to the burglary, though tending to show that they alone and without the defendant committed the burglary, is competent to establish the *corpus delicti*, and may properly precede evidence of the defendant's connection with the crime. State *v.* Harrison, 66 Vt. 523, 29 Atl. 807, 44 Am. St. Rep. 864.

62. People *v.* Millard, 53 Mich. 63, 18 N. W. 562.

63. People *v.* Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512.

64. "There are some cases where the *corpus delicti* — generally in homicide — is clearly separated and distinct from the question as to who committed the offense, if any is found to have been committed. In such cases the evidence to establish the *corpus delicti* must first be given, before acts or admissions of the ac-

b. *Confessions.* — The confession of a defendant is in general not competent to be proved against him until evidence tending reasonably to establish the *corpus delicti* has been received.[65]

B. Order in Which Defendant Shall Testify. — The trial court may, in the exercise of its discretion, refuse to allow a defendant to testify after the evidence has been concluded and the argument begun, especially when no statement of the proposed testimony is made to the court.[66] Nor may the defendant testify, except in the trial court's discretion, after the court has begun to instruct the jury.[67] A defendant wishing to testify in his own behalf may not be compelled to testify before other witnesses have testified, in the absence of a statute so providing.[68]

cused can be put in evidence. But the present case is one where the body of the offense — the uttering of a forged instrument, knowing it to be false — is so intimately connected with the question whether or not the respondent is guilty of the crime that there can be no such separation. The *corpus delicti* in this case depends entirely for its existence upon the acts and intent of the respondent, so that her acts and admissions, if admissible at all, were admissible at any stage of the proceedings upon the trial." People *v.* Swetland, 77 Mich. 53, 43 N. W. 779.

On a prosecution for uttering forged indorsements of checks, the checks, and the invoices of goods for which they were drawn, are admissible before proof of the *corpus delicti* is made, being relevant testimony to establish the forgery and uttering of the paper. People *v.* Kemp, 76 Mich. 410, 43 N. W. 439.

65. The confessions of a defendant are not admissible against him before the introduction of evidence tending reasonably to show that the crime confessed has been committed. State *v.* Laliyer, 4 Minn. 368.

But see *In re* Steel, 5 City H. Rec. (N. Y.) 5, where it was held that a confession may be received before proof of the *corpus delicti* is made.

66. After Argument Is Begun. Matters Offered To Be Proved. — In Richards *v.* State, 34 Tex. Crim. 277, 30 S. W. 229, the court says: "The bill of exceptions to the refusal of the court to allow the defendant to testify on his own behalf shows that the offer of defendant to testify was after the evidence had closed, and while the argument was in progress; and, moreover, the defendant did not at any time state to the court what testimony he proposed to offer. We think the defendant in this respect stands in the same attitude as any other witness, and it must be shown by the character of the testimony offered, so that the court may judge whether same is necessary to a due administration of justice. As the character of the evidence offered was not stated to the judge at the time, we see no abuse of his discretion in refusing to permit the defendant to testify on his own behalf."

67. People *v.* Christensen, 85 Cal. 568, 24 Pac. 888.

68. Bell *v.* State, 66 Miss. 192, 5 So. 389.

Oversight of Counsel. — Limiting Testimony to New Matters. — In Clemons *v.* State, 92 Tenn. 282, 21 S. W. 525, the court, on this question, says: "After the state's evidence was closed, and two witnesses, Virgie Brown and Lou Brown, had been examined in behalf of the defendant, his counsel offered to put him on the stand as a witness for himself, 'stating that he had intended introducing defendant as a witness, but, by oversight, had failed; that it for the time escaped his mind, and he never thought of it till Lou Brown was testifying; and that defendant would not testify on any subject that his two witnesses had testified on.' That offer of counsel, though supported by his affidavit, was refused, and the defendant was not permitted to testify. That action of the court is now assigned as error. The ruling of the court was right. The only

C. Threats. — Evidence of threats made by the defendant to commit the crime charged is admissible at any stage of the prosecution.[69] A threatening letter, written by the defendant to the prosecuting witness, is not improperly received after the defendant has testified.[70]

III. COMPETENCY OF WITNESSES.

1. In General. — When the competency of a witness is brought into question, to testify to matters which he is prohibited from testifying to by statute, the court may vary the regular order to receive evidence going to the competency of the witness.[71] When an expert witness is offered to testify out of his order his evidence may, in the trial court's discretion, be received without a preliminary showing of its competency, upon the assurance of counsel that its competency will be made subsequently to appear.[72]

2. Privilege. — When a witness is offered by one party and the adverse party claims that the testimony sought to be elicited is a privileged communication between himself and the witness,

authority in this state for allowing a defendant in a criminal case to give evidence in his own behalf is found in chapter 79 of the Acts of 1887; and that statute gives him the right to testify (section 1) only on condition that he 'shall do so before any other testimony for the defense is heard by the court trying the case.' (section 2). The terms of the statute are so plain as to admit of but one construction; they are imperative, and must be enforced by the courts in every case. The provision is that the defendant may be the first witness in his own behalf, but not the second, third, or fourth. He may testify at one particular stage of the case, but at none other, under any circumstances. This is the rule established by the positive words of the act. The legislature made no exception; the courts can make none. It follows that the defendant, in the case at bar, was not entitled to be heard at the time he was offered as a witness, and that the action of the trial judge in refusing to permit him to testify was correct."

69. In the case of State *v.* Day, 79 Me. 120, 8 Atl. 544, the court says: "The next objection relates to the introduction of threats by the respondent before proof was offered to connect him with the crime. 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. Such evidence, when connected with the subject of investigation, is admissible, because from it, in connection with other circumstances, and on proof of the *corpus delicti*, guilt may be logically inferred."

70. Com. *v.* Smith, 162 Mass. 508, 39 N. E. 111.

71. In Singer Mfg. Co. *v.* Benjamin, 55 Mich. 330, 21 N. W. 358, the court said: "Where the suit is not brought against the defendant in his representative character, and his defense is based upon his being an administrator, it is within the province of the trial judge, in order to enable him to rule correctly upon the admissibility of testimony under the statute, to permit proof of such character out of the regular order."

72. Earnhardt *v.* Clement, 137 N. C. 91, 49 S. E. 49.

the court should permit an examination of the witness to ascertain whether the testimony sought to be elicited is privileged.[73]

IV. IMPEACHMENT AND CREDIBILITY OF WITNESSES.

1. In General. — Impeaching evidence is not admissible until after the party whose witness is sought to be impeached has rested his case.[74] So a witness may not be supported by proof of his having made similar declarations out of court until he is first attacked by the opposing party.[75] To render competent evidence of contradictory statements, for the purpose of impeachment, proper foundation must be laid.[76] But any error in this regard at the time such evidence is received may be cured by subsequently mak-

73. Physician. — Action for Personal Injuries. — In an action for personal injuries, when a physician is called to testify by one party to the condition of the other party, the party against whom such evidence is sought to be given may, before the witness testifies, examine him to ascertain whether the witness was his physician, on the question of privilege. Tracey *v.* Metropolitan St. R. Co., 49 App. Div. 197, 63 N. Y. Supp. 242.

74. Impeaching Witness for Prosecution. — Reading Affidavit During Examination in Chief. — It is proper to refuse to permit the defendant to introduce evidence to impeach a witness for the prosecution before the prosecution has rested its case. Thus a defendant may not read to the jury an affidavit forming part of the files of the case to impeach the affiant, who is a witness for the prosecution, during the progress of the state's case. State *v.* Druitt, 42 Kan. 469, 22 Pac. 697.

Testimony affecting the credibility of a witness in behalf of the plaintiff is not competent if offered before the plaintiff has closed his case. Bowen *v.* White, 26 R. I. 68, 58 Atl. 252.

For the purpose of contradicting him as a witness, the defendant may interrogate the plaintiff concerning his answers to interrogatories, but it is not competent for the defendant to introduce the plaintiff's interrogatories in evidence before the plaintiff has closed his case. Wilson *v.* Hoffman, 123 Fed. 984.

Introduction of Writing for Purpose of Impeachment. — When a witness for the defendant admits on his cross-examination his signature to a document, which tends to impeach his testimony, such instrument is properly excluded as evidence until offered as rebuttal. Peyton *v.* Morgan Park, 172 Ill. 102, 49 N. E. 1003.

75. In Riojas *v.* State, 36 Tex. Crim. 182, 36 S. W. 268, the court say: "We are of opinion that the objection to the admission of the testimony of Mrs. Reed that the state's witness, Miguel Rios, told her how the homicide occurred on the next morning thereafter, should have been sustained. This evidence to support the state's witness by proving that he had made the same statement the next morning after it occurred was introduced as original testimony. In no case can this be done, except in cases of rape and assault with intent to rape. If, however, the defendant attempted to show, upon cross-examination or otherwise, that his testimony on the trial was recently fabricated, or that he was induced to so testify from some motive or improper influence, then he could be supported by proof that he made the same statement before the influences were brought to bear, or soon after the transaction, and such testimony would go to solve the issue as to whether his testimony was recently fabricated, or whether it was the result of these improper influences and motives. See Robb *v.* Hackley, 23 Wend. 56; People *v.* Doyell, 48 Cal. 85; Hotchkiss *v.* Insurance Co., 5 Hun, 90."

76. See article "IMPEACHMENT OF WITNESSES."

ing proof of matters of foundation.[77] The order of proof here also is within the trial court's sound discretion.[78] When the plaintiff on his examination in chief denies having made a certain statement, and in rebuttal details the entire conversation in which the statement attributed to him is asserted to have been made, the court, in its discretion, may on surrebuttal receive impeaching evidence going to the plaintiff's reputation for veracity.[79]

77. In Cooper *v.* Hayward, 79 Minn. 23, 81 N. W. 514, the court says: "The wife of the plaintiff, the heir of William H. Hayward, was a witness in his behalf, and gave testimony tending to show that the money with which the defendant's debts were paid, and for which the note was given, was the money of her deceased husband, William H. Hayward. The defendant then called Mrs. Freeman as a witness, who testified (the plaintiff objecting that the proper foundation therefor had not been laid) to an admission by plaintiff's witness (stating the time and place approximately) to the effect that the money belonged to the father. Thereupon the plaintiff recalled his witness, who testified that she had just heard the testimony of Mrs. Freeman, and denied that she ever made the admission. It is a fact that when the admission was given in evidence the proper foundation had not been laid by first calling the witness' attention to the time and place of making the alleged admissions. The basis of the rule requiring such foundation to be laid before prior inconsistent statements or admissions can be given in evidence is justice to the witness, which requires that he be given an opportunity to recall the facts, by calling his attention to details as to when and where, and to whom, the alleged statements were made. Hence the ruling of the trial court was error when made; but was it reversible error (that is, prejudicial error), in view of the fact that the time, place and details of the alleged admissions were stated in the hearing of the witness, who thereafter voluntarily and unqualifiedly denied that she ever made the admission? We are of the opinion that it was not, for the witness was given an opportunity to recall the facts as to the alleged admission after her recollection had been refreshed by hearing the alleged details as to the conversation in which, it was claimed the admission was made. The reason of the rule was satisfied in an irregular manner. But the order in which the evidence was received could harm no one."

78. The trial court may receive impeaching evidence out of the usual order without abusing its discretion in that regard. Bryan *v.* State, (Fla.), 34 So. 243.

79. Devonshire *v.* Peters, 104 Mich. 501, 63 N. W. 973.

ORDINANCES.—See Judicial Notice; Municipal Corporations.

ORDINARY CARE.—See Negligence.

ORIGINAL PROCESS.—See Service.

OWNERSHIP.

By John F. Crowe.

CROSS-REFERENCES:

Adverse Possession; Animals;
Burglary;
Eminent Domain;
Insurance;
Larceny;
Title.

Scope of Article. — This article deals only with ownership of personal property; for ownership of real property see article "TITLE."

I. BURDEN OF PROOF.

The burden of proving ownership is upon the one alleging it,[1] but that burden is met *prima facie* by proof of possession.[2] Such possession, however, must be a quiet and peaceable one, and not held in subordination to the right of another.[3]

II. PRESUMPTION OF OWNERSHIP.

1. From Possession. — A. COMMERCIAL PAPER. — a. *Promissory Notes.* — **(1.) Generally.** — Possession of a promissory note, either payable to bearer or indorsed in blank, is *prima facie* evidence that the holder is the proper owner and lawful possessor of the same,[4]

1. See article "BURDEN OF PROOF," Vol. II, p. 792.

2. *Alabama.* — Ross *v.* Lawson, 105 Ala. 351, 16 So. 890.
Arkansas. — Norton *v.* McNut, 55 Ark. 59, 17 S. W. 362.
California. — Wright *v.* Solomon, 19 Cal. 64, 76, 79 Am. Dec. 196.
Colorado. — Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391.
Delaware. — Stockwell *v.* Robinson, 9 Houst. 313, 32 Atl. 528.
Illinois. — Amick *v.* Young, 69 Ill. 542; Downey *v.* Arnold, 97 Ill. App. 91.
Indiana. — Magel *v.* Milligan, 150 Ind. 582, 50 N. E. 564.
Iowa. — Rubey *v.* Culbertson, 35 Iowa 264.
Maine. — Vining *v.* Baker, 53 Me. 544.
Massachusetts. — Magee *v.* Scott, 9 Cush. 148, 55 Am. Dec. 49.
Michigan. — Trevorrow *v.* Trevorrow, 65 Mich. 234, 31 N. W. 908.
Missouri. — Horton *v.* Bayne, 52 Mo. 531; State *v.* Boone, 70 Mo. 649.
Nebraska. — Saunders *v.* Bates, 54 Neb. 209, 74 N. W. 578.
Nevada. — Hanson *v.* Chiatovich, 13 Nev. 395.
New York. — Fish *v.* Skut, 21 Barb. 333.
Pennsylvania. — Entreken *v.* Brown, 32 Pa. St. 364.
South Carolina. — Cone *v.* Brown, 15 Rich. L. 262, 271.
Vermont. — Blaney *v.* Pelton, 60 Vt. 275, 13 Atl. 564.
Virginia. — Bell *v.* Moon, 79 Va. 341, 351.
Possession of Personal Property. Possession of property unexplained, or not shown to be held in subordination to the rights of another, is *prima facie* evidence of title in the possessor. The Wausau Boom Co. *v.* Plumer, 35 Wis. 274.

3. Threadgill *v.* Commissioners, 116 N. C. 616, 21 S. E. 425.
Where one party broke into the inclosure of another and took possession of the property in dispute, he could acquire no legal advantage by such possession so obtained. Cumberledge *v.* Cole, 44 Iowa 181.
Unexplained Possession. — Possession of property unexplained, or not shown to be in subordination to the rights of another, is *prima facie* evidence of title in the possessor. The Wausau Boom Co. *v.* Plumer, 35 Wis. 274.
Subordinate and Qualified Possession. — Possession of personal property is *prima facie* evidence of ownership; but it is not sufficient if that possession is of a subordinate and qualified character. Linscott *v.* Trask, 35 Me. 150.

4. *United States.* — Collins *v.* Gilbert, 94 U. S. 753.
Alabama. — Anniston Pipe Works *v.* Mary Pratt Furnace Co., 94 Ala. 606, 10 So. 259.
California. — Bank of California *v.* Mott Iron Works, 113 Cal. 409, 45 Pac. 674.

and nothing short of fraud, not even gross negligence, if unattended with *mala fides,* is sufficient to overcome that evidence or invalidate the title of the holder supported by that presumption.[5]

Colorado. — Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391; Reed *v.* First Nat. Bank, 23 Colo. 380, 48 Pac. 507.

Kansas. — First Nat. Bank *v.* Elliott, 46 Kan. 32, 26 Pac. 487.

Maine. — Lord *v.* Appleton, 15 Me. 270.

Maryland. — Griffith *v.* Shipley, 74 Md. 591, 599, 22 Atl. 1107.

Massachusetts. — Magee *v.* Scott, 9 Cush. 148, 55 Am. Dec. 49.

Michigan. — Barnes *v.* Peet, 77 Mich. 391, 43 N. W. 1025.

Missouri. — Horton *v.* Bayne, 52 Mo. 531.

New Hampshire. — Newmarket Sav. Bank *v.* Hanson, 67 N. H. 501, 32 Atl. 774.

New York. — Steinhart *v.* Boker, 34 Barb. 436; Belmont Bank *v.* Hoge, 35 N. Y. 65; Hall *v.* Wilson, 16 Barb. 548; Magee *v.* Badger, 34 N. Y. 247, 90 Am. Dec. 691.

Nebraska. — Saunders *v.* Bates, 54 Neb. 209, 74 N. W. 587.

Pennsylvania. — Phelan *v.* Moss, 67 Pa. St. 59; 5 Am. Rep. 402.

Rhode Island. — Atlas Bank *v.* Doyle, 9 R. I. 76, 98 Am. Dec. 368.

South Carolina. — Cone *v.* Brown, 15 Rich. L. 262, 271.

Vermont. — Blaney *v.* Pelton, 60 Vt. 275, 13 Atl. 564.

Extent of Presumption. — The mere possession of a negotiable instrument, payable to order and properly indorsed, is *prima facie* evidence that the holder is the owner thereof, that he acquired the same in good faith, before maturity, for full value, in the usual course of business, without notice of any circumstance that would impeach its validity, and that he is entitled to recover upon it its full face value as against any of the antecedent parties. Mann *v.* Second Nat. Bank, 34 Kan. 746, 10 Pac. 150. See also N. O. C. & B. Co. *v.* Montgomery, 95 U. S. 16.

Note Not Negotiable. — The rule that the custody of a note indorsed in blank is *prima facie* evidence of ownership does not apply to a note which does not possess the qualities of commercial paper. Mitchell *v.* St. Mary, 148 Ind. 111, 47 N. E. 224.

5. Collins *v.* Gilbert, 94 U. S. 753; Lehman Bros. *v.* Tallahassee Mfg. Co., 64 Ala. 567, 593; Hall *v.* Wilson, 16 Barb. (N. Y.) 548: Cone *v.* Brown, 15 Rich. L. (S. C.) 262, 271.

In Hotchkiss *v.* National Bank, 21 Wall. (U. S.) 354, Mr. Justice Field said: "The law is well settled that a party who takes negotiable paper before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or willful ignorance, and the burden of proof lies on the assailant of the title."

The old, established rule of law that the holder of bills, bank notes, etc., can give a title that he does not possess to a person taking them *bona fide* for value is not to be qualified by treating it as essential that the person should take them with due care and caution, except so far as a want of such care and caution may affect the *bona fides* and honesty of the transaction. Steinhart *v.* Boker, 34 Barb. (N. Y.) 436.

Upon Grounds of Public Policy growing out of the commercial necessities and wants of the community, a holder of negotiable paper may, under certain circumstances, be entitled to recover upon it, notwithstanding any defect or infirmity in the title of the person from whom he procured it, even though such person may have acquired it by fraud, theft or robbery. Hall *v.* Wilson, 16 Barb. (N. Y.) 548.

A holder of a negotiable note *bona fide* for value and without notice can recover on it, notwithstanding he took it under circumstances which ought to excite the suspicion of a prudent man. In order to destroy

Unindorsed Note. — Some courts have held that the presumption of ownership attaches to the holder of an unindorsed note not made payable to bearer,[6] but others have held to the contrary.[7]

(2.) Exception to the Rule. — To the general rule that the holder of negotiable paper is presumed to have taken it for value, and that the burden of proof to overthrow this presumption is on the maker, there is the exception that if the note was fraudulently put into circulation it is incumbent on the indorsee to prove that he gave value for it.[8]

such holder's title it must be shown that he took the note in *mala fide*. Phelan *v.* Moss, 67 Pa. St. 59, 5 Am. Rep. 402.

One having possession, however acquired, of a promissory note, bill of exchange, check or other instrument negotiable by mere delivery is presumed to be the owner, or right holder, and any stranger having no notice to the contrary may safely act upon this presumption, and taking it thus in good faith and for value will acquire a title good in law. Cone *v.* Brown, 15 Rich. L. (S. C.) 262, 271.

6. Rubey *v.* Culbertson, 35 Iowa 264; Magel *v.* Milligan, 150 Ind. 582, 50 N. E. 564.

Possession of an unindorsed note is *prima facie* evidence of ownership. Martin *v.* Martin, 174 Ill. 371, 51 N. E. 691.

The person having possession of a promissory note is presumed to be the equitable owner of it, although it is not indorsed by the payee. Tam *v.* Shaw, 10 Ind. 469.

Indorsed Note in Hands of Payee. When an indorsed note gets back into the hands of the payee the presumption is that he has paid the indorsee, and that he is remitted to his original title, and may sue thereon, and the burden of showing absence of title is on the defendant. Anniston Pipe Wks. *v.* Mary Pratt Furnace Co., 94 Ala. 606, 10 So. 259.

7. Possession of a note payable to another or to order, and not indorsed by the payee, does not, without other proof, give the holder a right to judgment on the note. Ross *v.* Smith, 19 Tex. 171, 70 Am. Dec. 327. So in Welch *v.* Lindo, 7 Cranch (U. S.) 159, it is said that the mere possession of a note by an indorsee who had assigned it to another could not, while that assignment remained, be evidence that the note was his property — some reassignment or receipt from the last assignee was necessary to prove his title.

8. The reason given for the exception is that the presumption is that the guilty party transferred it in order that he might recover on it for his own use, but in the name of a third party. Sperry *v.* Spaulding, 45 Cal. 544.

Fraud in Inception of Note. Where a fraud in the inception of a note is established, it is incumbent upon the holder, in an action upon the note, to show that the note came to him before maturity, *bona fide*, and for value. Griffith *v.* Shipley, 74 Md. 591, 599, 22 Atl. 1107.

Note in Escrow. — Evidence that a note was delivered in escrow and that it was fraudulently put in circulation is admissible, and, when the fact is shown, the holder will be bound to prove that he came fairly by the note and paid value for it. Vallett *v.* Parker, 6 Wend. (N. Y.) 615.

To the effect that in the hands of an innocent holder, taking before maturity, for value, a note is valid though the terms of the escrow were violated, see Garrett *v.* Campbell, 2 Ind. Ter. 301, 51 S. W. 956; Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497. In Chipman *v.* Tucker, 38 Wis. 43, 20 Am. Rep. 1, the court even went so far as to hold a note and mortgage void in the hands of a purchaser in good faith, for value, before maturity when the custodian had turned the instruments over to the payee without any authority so to do.

Principal and Agent. — Where a principal furnished an agent money

b. *Bonds and Drafts.* — The mere possession of bonds without any assignment is *prima facie* evidence of ownership;[9] and the holder of a draft, in the absence of any evidence tending to show the contrary, will be presumed to be a holder for value.[10]

c. *Stocks.* — A stock certificate, issued by a corporation having power so to issue, is a continuing affirmation of the ownership of the specific amount of stock by the person designated therein, or his assignee, until it is withdrawn in some manner recognized by law; and a purchaser in good faith has a right to rely thereon and to claim the benefit of an estoppel in his favor as against the corporation.[11]

B. CHATTELS GENERALLY. — Where a person is in undisputed possession of goods or chattels, the law presumes that they are his, and he cannot be deprived of them unless the claimant, by direct proof, shows a better right to their possession.[12] But unlike the

to buy up claims against the principal, which he did, and afterward held them adversely to the principal, such possession gives him no advantage, but the burden is upon him to show ownership. Threadgill *v.* Commissioners, 116 N. C. 616, 21 S. E. 425.

9. Bell *v.* Moon, 79 Va. 341, 351; Comer *v.* Comer, 120 Ill. 420, 11 N. E. 848.

Good Faith Presumed. — The holder of bonds is presumed to have acquired them in good faith for value. But if in a suit upon them the defense be such as to require him to show value paid, it is not in every case essential to prove that he paid it; for his title will be sustained if any previous holder gave value. Montclair *v.* Ramsdel, 107 U. S. 147.

Coupon Bonds. — Coupon bonds pass by delivery, and a purchaser of them in good faith is unaffected by want of title in the vendor. The burden of proof on the question of good faith rests on the party who assails the possession. Murray *v.* Lardner, 2 Wall. (U. S.) 110.

10. "The rule at law is, as we understand it, that the holder of a draft will, in the absence of any evidence tending to show the contrary, be presumed to be a *bona fide* holder for value." Hall *v.* First Nat. Bank of Emporia, 133 Ill. 234, 24 N. E. 546.

11. Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616. In this case the court also says (p. 623) upon the question whether a purchaser, for value, of stock is bound to show affirmatively that the certificates were delivered by a former owner to his grantor: "Such a rule would extend to any member of intermediate transfers, and he would be obliged to fortify his chain of title by showing the completeness of every link," and deciding that to be unnecessary they further say: "The presumption is that the stock was transferred in the course of business, unless there is some evidence to the contrary."

When No Transfer of shares appears on the books of a corporation, ownership of the same may be presumed to continue accordingly. Barron *v.* Burrill, 86 Me. 72, 29 Atl. 938.

12. *Arkansas.* — Norton *v.* McNut, 55 Ark. 59, 17 S. W. 362.

Delaware. — Stockwell *v.* Robinson, 9 Houst. 313, 32 Atl. 528.

Illinois. — Downey *v.* Arnold, 97 Ill. App. 91.

Maine. — Vining *v.* Baker, 53 Me. 544; Linscott *v.* Trask, 35 Me. 150.

Michigan. — Trevorrow *v.* Trevorrow, 65 Mich. 234, 31 N. W. 908.

Missouri. — State *v.* Boone, 70 Mo. 649; Vogel *v.* St. Louis, 13 Mo. App. 116.

New York. — Fish *v.* Skut, 21 Barb. 333.

Pennsylvania. — Philadelphia Trust Etc. Co. *v.* Philadelphia & E. R. Co., 177 Pa. St. 38, 35 Atl. 688.

Wisconsin. — The Wausau Boom Co. *v.* Plumer, 35 Wis. 234; Cum-

case of negotiable paper, this presumption never prevails against the true owner.[12]

mings *v.* Friedman, 65 Wis. 183, 26 N. W. 575.

The fact that a person was in actual possession of a building, which was personal property, making and paying for repairs upon it, offering to sell it, and exercising other acts of ownership, furnished presumptive evidence of ownership in him subject to be rebutted by the adverse claimant. Amick *v.* Young, 69 Ill. 542.

Rule Uniform. — The rule of law that possession of property is *prima facia* evidence of ownership is uniform in its application. The question of the ownership of a vessel creates no exception. Bailey *v.* steamer New World, 2 Cal. 370; Stacy *v.* Graham, 3 Duer (N. Y.) 444.

Open Account. — The possession of an open account in favor of another has never been held to be evidence of ownership in the holder. Gregg *v.* Mallet, 111 N. C. 74, 15 S. E. 936.

The possession of property levied upon is *prima facie* evidence of ownership in the possessor, and the bare assertion by him that the property belongs to another is not sufficient to rebut this presumption. Roberts *v.* Haskell, 20 Ill. 59.

In Burglary. — The proof of the exclusive possession, occupancy and control of a car by the express company is sufficient proof of ownership when the indictment alleges the ownership of the railroad car to be in the express company. Nicholls *v.* State, 68 Wis. 416, 423, 32 N. W. 543.

Infancy of Joint Possessor. — Possession of chattels is evidence of ownership; and the infancy of one of two joint possessors, though it may weaken the presumption of joint ownership, is not decisive against it. Entreken *v.* Brown, 32 Pa. St. 364.

Possession of Defendant in Execution. — In case of a trial of right of property levied on under execution, plaintiff is entitled to a verdict when he shows that defendant in execution was in possession of the property when it was levied upon. The burden then is upon the claimant to show title in himself. Ross *v.* Lawson, 105 Ala. 351, 16 So. 890.

Violent Possession. — Where one entered the inclosure of another and took what he claimed to be his property it was held that the burden was on him to establish his title to the property, and that he could acquire no legal rights from a possession thus obtained. Cumberledge *v.* Cole, 44 Iowa 181.

13. Hanson *v.* Chiatovich, 13 Nev. 395.

Unauthorized Sale. — Possession is not conclusive evidence of title, and an unauthorized sale of personal property does not prejudice the owner unless he has done some act which is calculated to mislead the purchaser. Hoppin *v.* Avery, 87 Mich. 551, 49 N. W. 887.

Possession of personal property is only *prima facie* evidence of ownership, and never prevails against the true owner except with reference to negotiable instruments and whatever comes under the general denomination of currency. The principle that no one can be divested of his property without his consent, and the maxim that no one can transfer a better title than he has himself, control all questions arising as to property of which a transfer is attempted, with the exception stated. Wright *v.* Solomon, 19 Cal. 64, 76, 79 Am. Dec. 196.

Exceptional Case. — Mayor Etc. of New York *v.* Lent, 51 Barb. (N. Y.) 19, was an action to recover an autograph letter written by George Washington in reply to an address, from the common council, sent him, together with the freedom of the city, in a gold box. At a subsequent meeting of the common council the mayor produced and read a letter from General Washington replying to the address of the corporation, which was addressed to the "Honble. The Mayor, Recorder, Aldermen and Commonalty of the city of New York," and subscribed "Geo. Washington." By order of the common council the address and the reply

C. Possession Referable to Title. — When two or more persons are jointly in possession of property, the legal title being in only one of them, the law refers the possession to the title;[14] and where a husband and wife living together have a community of possession of property, the legal title of which is in the wife, the possession of such property will be referred to the wife.[15]

2. Presumption of Continuance. — When a party has once shown ownership the presumption is that it continues, until there is evidence that he has parted with that ownership.[16]

III. MODE OF PROOF.

1. Direct Evidence. — Ownership of personal property is a fact

were published and entered upon the minutes. One John Allen had possession of the letter about thirty years previous to the trial of the action, and at his death it passed to his daughter, who placed it in the hands of an auctioneer, who sold it at auction to the defendant. Verdict for plaintiff. In upholding the verdict the court said: "The rule of general application, that possession of personal property implies ownership against the world must be regarded as exceptional in certain cases. In the present action the letter was a particular and peculiar species of property. Its style, address and responsive character to a legislative act, should of itself be regarded as having imparted notice to all that from the moment of its reception and sending it became the property of the corporation to whom it was addressed. . . . This letter, so written in such terms and so addressed, held Allen to constantly recurring notice of its ownership by the corporation. His possession was wholly unexplained, and the jury have charitably found that he became possessed of it, but without title, by any alienation from the corporation who were originally and rightfully its possessors and owners."

14. Lenoir *v.* Rainey, 15 Ala. 667; Scruggs *v.* Decatur, M. & L. Co., 86 Ala. 173, 5 So. 440; Miller *v.* Fraley & Greenwood Co., 23 Ark. 735.

15. Cole *v.* Varner, 31 Ala. 244, 251; Hawkins *v.* Ross, 100 Ala. 459, 14 So. 278.

Where husband and wife are jointly in possession, the law refers the possession to the title because the possession is where it ought to be if it is under the title. Larkin *v.* Baty, 111 Ala. 303, 18 So. 666.

16. Laubenheimer *v.* Bach, 19 Mont. 177, 183, 47 Pac. 803.

Where personal property is shown to have been the property of a party prior to his death, the law will presume, in the absence of evidence to the contrary, that it continued to be his until the time of his death. Hanson *v.* Chiatovich, 13 Nev. 395.

Permitted Possession in Another. Ownership once proved is presumed to continue till alienation is shown. A party having this ownership does not lose it by permitting another to be in possession. The ordinary mode of proving property is by proving that it was purchased and paid for, and it will be deemed in law to be the purchaser's until something is shown to change the title, and merely parting with the possession affords no conclusive evidence of such change. Possession is *prima facie* evidence of title, good against everybody but one proving property; that is, against any one but the right owner. Magee *v.* Scott, 9 Cush. (Mass.) 148, 55 Am. Dec. 49.

Once Fixed, Remains. — It being shown that the property was jointly owned by heirs, the condition of indivision and joint ownership will continue, unless it be satisfactorily proven that the parties have parted with their title. Block *v.* Melville, 10 La. Ann. 784.

Not Evidence of Prior Ownership. Proof of ownership is not evidence of ownership at a time prior thereto.

that can be proved by oral testimony given by one who has adequate knowledge.[17]

2. Circumstantial Evidence. — Circumstances that are the ordinary *indicia* of ownership, or that tend to indicate ownership, are admissible as evidence thereof.[18]

State *v.* Dexter, 115 Iowa 678, 87 N. W. 417.

17. Nelson *v.* Iverson, 24 Ala. 9, 60 Am. Dec. 442; Daffron *v.* Crump, 69 Ala. 77; Archer *v.* Hooper, 119 N. C. 581, 26 S. E. 143; De Wolf *v.* Williams, 69 N. Y. 621.

Ownership of personal property is a fact to which a witness may testify; and on cross-examination he may be required to state facts on which the claim of ownership rests. Steiner *v.* Tranum, 98 Ala. 315, 13 So. 365.

Ownership of Stock. — A stockholder may testify as to his ownership of stock in a corporation without producing the stock book. Wolfe *v.* Underwood, 97 Ala. 375, 12 So. 234.

Fact as Well as an Opinion. — A statement by a witness that certain property in controversy belonged to him is not inadmissible as a conclusion, since the question calls for a fact as well as for a conclusion. Murphy *v.* Olberding, 107 Iowa 547, 78 N. W. 205.

Proof of Possession. — Evidence by an assumed principal that her husband was acting as her agent, and the inquiry of another witness whether the wife had been in possession of a farm on which she and her husband lived, are not objectionable on the ground that they involve a legal conclusion. Knapp *v.* Smith, 27 N. Y. 277. To the same effect see Rocke *v.* Meiner, 2 Jones & S. (N. Y.) 158.

18. Avery *v.* Chemons, 18 Conn. 306, 46 Am. Dec. 323.

Chattel Mortgage. — The execution and delivery of a chattel mortgage standing alone and uncontrolled fairly tends to prove that the mortgagor was at the time owner of the property, but the presumption arising from these facts could be overcome by other evidence. Chillingworth *v.* Eastin Tinware Co., 66 Conn. 306, 33 Atl. 1009.

Assessment and Payment of Taxes. Proof that property was taxed to a party and that he paid the taxes is admissible as it tends to prove ownership of the property in question. Carr *v.* Dodge, 40 N. H. 403. But in Iowa it is held that assessors' books are immaterial and not competent evidence to prove title to the assessed property. Adams *v.* Hickox, 55 Iowa 632, 8 N. W. 485; Hetch *v.* Eherke, 95 Iowa 757, 64 N. W. 650. And see Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217, where the assessors' books were admitted over objection; but no exception was saved.

Acts of Ownership. — The payment of taxes, procuring a policy of insurance describing the property and naming the person to be insured, the giving of a note to secure against losses, and the payment of assessment to meet losses, are all proper tests of ownership — not conclusive, but competent to be submitted and weighed by the jury. Hodgdon *v.* Shannon, 44 N. H. 572.

Initials of Railway Company. If an engine bears the initials of a railway company, it is, in the absence of contradictory evidence, sufficient proof of ownership by that company. Ryan *v.* Baltimore & O. R. Co., 60 Ill. App. 612.

While in the case of railways a presumption of ownership may arise from the fact that the name of the corporation is painted on cars or locomotives, such presumption is not conclusive. Chicago General St. R. Co. *v.* Capek, 68 Ill. App. 500.

The fact that the engine which caused plaintiff's injury was not running upon defendant's tracks at the time, but upon a track used by several railway companies, does not destroy, although it may weaken, the presumption of ownership arising from the fact that the engine bore defendant's corporate name. East St. Louis Connecting Ry. *v.* Altgen, 210 Ill. 213, 71 N. E. 377.

Where a wagon which was the

3. Declarations of Party in Possession. — A. Of Owners. — The declarations made by a party in possession of personal property, explanatory of that possession, or of the right in which such possession was held, are generally admitted in evidence.[19] But there are

cause of the accident was painted like the other wagons of the defendant company and marked with the company's name and device, "a plain inference could be drawn from the evidence that the wagon in question was in the ownership of the company. If that inference be drawn it is sufficient to establish *prima facie* that the wagon, being owned by the company, was in its possession, and that whoever was driving it was doing so for the company." Edgeworth *v.* Wood, 58 N. J. L. 463, 33 Atl. 940.

Bill of Lading. — A presumption of ownership obtains in the consignee of goods from a bill of lading which makes the goods deliverable to him or his assigns. Lawrence *v.* Minturn, 17 How. (U. S.) 100, 107.

Insurance. — Insurance of property in one's own name is admissible in evidence to show that the insured managed and controlled the property in his own name. Bettes *v.* Magoon, 85 Mo. 580.

Application for License. — The fact that a man applied for a license to keep a dog is competent evidence that he was the owner of the dog. Cone *v.* Gorman, 16 Gray (Mass.) 601.

Marriage Contract. — The acknowledgment by husband and wife, in a marriage contract, that the wife is possessed of paraphernal funds is not proof thereof against third persons. Block *v.* Melville, 10 La. Ann. 784.

"Subject to Order." — The defendant in a letter to plaintiffs said a fund in his hands would be held by him "subject to your order." *Held*, that the letter was sufficient evidence of their title and his liability. Stacy *v.* Graham, 3 Duer (N. Y.) 444.

19. *United States.* — Fourth Nat. Bank *v.* Albaugh, 188 U. S. 734.

Alabama. — Cole *v.* Varner, 31 Ala. 244, 250.

Connecticut. — Avery *v.* Chemons, 18 Conn. 306, 46 Am. Dec. 323.

Illinois. — Randegger *v.* Ehrhardt, 51 Ill. 101.

Indiana. — Boone Co. Bank *v.* Wallace, 18 Ind. 82; Bunberry *v.* Brett, 18 Ind. 343, 81 Am. Dec. 362; Campbell *v.* Coon, 51 Ind. 76.

Kentucky. — Forsyth *v.* Kreakbaum, 7 T. B. Mon. 97.

Maine. — Holt *v.* Walker, 26 Me. 107, 45 Am. Dec. 98; McLanathan *v.* Patten, 39 Me. 142.

Pennsylvania. — Magee *v.* Raignel, 64 Pa. St. 110.

Vermont. — Downs *v.* Belden, 46 Vt. 674; Alger *v.* Andrews, 47 Vt. 238.

Declarations of Vendor made while in possession of the property sold are competent to prove both the fact of possession and control, and to explain the extent and purpose of the possession. Kirby *v.* Masten, 70 N. C. 540.

The declarations of a person who is in possession of personal property that it belongs to his son are competent evidence; but his declaration as to the source of his son's title are not. Rawles *v.* James, 49 Ala. 183.

The declarations of a guardian concerning the ownership of property purchased by him, made at the time of such purchase, are admissible in evidence as a part of the *res gestae*. Personal property on the land of a ward, purchased and placed there by his guardian, must *prima facie* be considered as the ward's. Such presumption may be overcome by evidence, and to that end the declarations of the guardian, as indicating his intent, may be given in evidence. Tenney *v.* Evans, 14 N. H. 343, 40 Am. Dec. 194.

Against Subsequent Purchaser. The declarations of a party while in possession of property as to the ownership, when it was against his interest to make them, may be given in evidence against one who subsequently acquires title from the declarant. Maxwell *v.* Harrison, 8 Ga. 61, 52 Am. Dec. 385.

In Roebke *v.* Andrews, 26 Wis.

cases in which the competency of such evidence has been denied.[20]

B. Of Agents. — The declaration of a party in possession of personal property that he holds as agent for another are admissible in evidence to prove such ownership.[21]

4. Best Evidence. — Where a contract of sale, upon which ownership depends, is reduced to writing, the terms cannot be established by parol evidence.[22]

311, 320, the court said: "His statements that he had bought the cattle were not evidence of that fact; but it was in its nature explanatory of his possession and of the title he claimed. It was equivalent to a direct assertion of ownership, and such assertion the law allows to be given in evidence accompanied by evidence of possession, and to both it gives the effect of *prima facie* evidence of title."

In Bunnell *v.* Studebaker, 88 Ind. 338, a suit for conversion of property, the defendant replied that he had borrowed the property from H. and returned it to him without knowledge of plaintiff's claim of ownership. *Held,* that the statements of H. while in possession as owner, made in the absence of the plaintiff, that he owned the property, and showing the circumstances under which, and why, the defendant obtained it from him, were proper evidence.

Declarations of Owner. — The declarations of a party while in the possession of personal property that it belonged to him, and it being marked with his name, furnished some evidence in proof of his title. Hanson *v.* Chiatovich, 13 Nev. 395.

20. In Dodge *v.* Freedman Savings & Trust Co., 93 U. S. 379, the court, while fully recognizing the rule as stated in the text to be universally true as applied to real property, said: "It has been long 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." But an examination of that New York case renders it doubtful whether this proposition was sustained by it. See note at the end of the case 7 Hill 384. Mr. Wigmore says of this case: "No useful policy seems to support it, and it has thus far remained a distinctly local rule." Wigmore on Ev. §1083.

Declarations of Decedent. — In an action by an executor to establish the ownership of property claimed by him to be the property of the testator, declarations made by the testator to a third person are not evidence to establish the executor's claim. Philadelphia Trust Etc. Co. *v.* Philadelphia & E. R. Co., 177 Pa. St. 35, 35 Atl. 688.

21. Drum *v.* Harrison, 83 Ala. 384, So. 715.

The declarations of a father who was in possession of the goods, though made in the absence of plaintiff, were material to show in what capacity he was in possession, whether in his own right or as clerk for plaintiff. Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200.

22. Baldwin *v.* McKay, 41 Miss. 358; Dunn *v.* Hewitt, 2 Denio (N. Y.) 637.

Opinion of Effect. — Whether any interest was reserved to the seller depended upon the terms of the bill of sale and deductions to be drawn from what the parties did afterward with reference to the property; and it was not for the witness to state his conclusion or opinion that the sale was without any reservation of interest to the seller. Ward *v.* Shirley, 131 Ala. 568, 32 So. 489.

Property Bought at Sheriff's Sale. In an action to recover possession of personal property, title in plaintiff cannot be established by parol evidence that he purchased the same at a sheriff's sale without some proof of the judgment under which such sale took place. Dane *v.* Mallory, 16 Barb. (N. Y.) 46. And in Yates

5. Marks and Brands. — Marks and brands upon animals are competent evidence of ownership of such animals,[23] and are discussed elsewhere in this work.[24]

v. St. John, 12 Wend. (N. Y.) 74, the court said he must make proof of the judgment as well as the execution.

Best Evidence. — Ownership of personal property, as a rule, can be proved to be a fact by oral testimony without producing the documentary evidence that creates the titles unless the question of such transfer arises between the alleged parties to the conveyance. When that is the case the highest and best evidence must be produced or its absence accounted for. Street *v.* Nelson, 67 Ala. 504.

23. The identification and ownership of cattle may be proved by the brands and marks on the hides therefrom. State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433.

In Thurmond *v.* State, 37 Tex. Crim. 422, 35 S. W. 965, it was held that on a trial for theft of a calf, not branded or marked, it was competent to introduce a record copy of marks and brands to show the ownership of the cow to which the calf belonged, and thus establish the ownership of the calf.

Marks Unrecorded. — A mark is admissible as proof of the ownership of a hog, though the mark was not recorded. Dixon *v.* State, 19 Tex. 134.

24. See Article "ANIMALS," Vol. I.

PAPER TITLE.—See Adverse Possession: Quieting Title.

PARENT AND CHILD.

By E. W. Philbrick.

CROSS-REFERENCES:

Descent and Distribution;
Executors and Administrators;
Incest.

I. THE RELATIONSHIP.

The relation of parent and child may be established *prima facie* by proof that the parties have lived together as such, and have, by their acts, implied the existence of such a relation.[1]

II. PROCEEDINGS FOR CUSTODY OF CHILD.

1. Presumptions and Burden of Proof. — A. In General. — The father, being the natural guardian of his minor children, is presumed to be entitled to their custody.[2]

B. Actual Custody; no Presumption From. — Where the parents are voluntarily living apart, the actual custody of their children by either of them gives rise to no presumption as to which of them is entitled to such custody.[3]

C. Regaining Custody of Child by Fraud. — Where a parent, having abandoned his minor children, resorts to deceit or fraud for the purpose of regaining custody of them, the presumption is that he knew that the custody of those who had them in charge was rightful.[4]

2. Evidence Admissible. — A. In General. — All questions may be inquired into that are likely to affect the interests of the child.[5]

B. Character and Habits of Father. — In contests between parents for the custody of children, evidence as to the character and the habits of the father, and his treatment of his wife before separation, is admissible.[6]

1. Mitchell *v.* McElvin, 45 Ga. 558; Illinois Land and Loan Co. *v.* Bonner, 75 Ill. 315; Dalton *v.* Bethlehem, 20 N. H. 505; Young *v.* Foster, 14 N. H. 114; *In re* Turnbull, 51 Hun 642, 4 N. Y. Supp. 607; Neilson *v.* Ray, 44 N. Y. St. 125, 17 N. Y. Supp. 500.

2. Where the wife chose to absent herself from the family residence without showing any reason therefor, it was presumed that none existed, and that the father was entitled to the custody of the children. Bermudez *v.* Bermudez, 2 Mart. (O. S.) (La.) 180.

In State *v.* Nishwitz, 1 Ohio Dec. 370, it was held that the burden was on the wife to show that she did not desert her husband until after living with him became intolerable by reason of his tyranny, oppression and abuse.

This presumption may be rebutted. *In re* Clifton, 47 How. Pr. (N. Y.) 172.

3. People *v.* Brooks, 35 Barb. (N. Y.) 85.

4. Where a father, who had abandoned his children, went to their grandmother, who had them in charge, and asked permission to take them out to buy them some candy, which request was complied with, whereupon he took them to his own home, it was held that the law would presume from this that he knew that the custody of the grandmother of such children was rightful. *In re* Vance, 92 Cal. 195, 28 Pac. 229.

5. Including the character and the habits of the parties seeking custody. Garner *v.* Gordon, 41 Ind. 92; Bustamento *v.* Analla, 1 N. M. 255. And the probable treatment and influences to which the child would be subjected if intrusted to their care. *In re* Pray, 60 How. Pr. (N. Y.) 194; People *v.* Brown, 35 Hun (N. Y.) 324.

6. Hutchinson *v.* Hutchinson, 124 Cal. 677, 57 Pac. 674.

C. Character and Habits of Mother. — And evidence as to the character and the habits of a mother seeking the custody of her minor children is admissible.[7]

D. As Between Parent and Guardian. — In contests between parent and guardian it is always competent to show how the child would fare in the custody of either.[8]

E. Declarations of Child. — The question of the admission of the declarations of the child as to its preference is one of discretion for the court.[9]

3. Weight and Sufficiency of Proof. — A. In General. — The weight to be given the evidence and what will be deemed sufficient to determine the question of custody of children, are questions which rest within the discretion of the court.[10]

"As a man is to his wife in this regard [ill treatment] so would he be to his children." *In re* Pray, 60 How. Pr. (N. Y.) 194.

Evidence that spiritualism was practiced in the father's house, and that his second wife was intemperate, was held admissible. People *v.* Brown, 35 Hun (N. Y.) 324.

7. In a contest between a paternal grandfather and a mother for the custody of an infant, the reputation of the mother as to chastity, truth, veracity and honesty, is competent. Ward *v.* Ward, 34 Tex. Civ. App. 104, 77 S. W. 829.

Length of Time Reputation Was Established. — Where a widow claiming custody of her two daughters, aged nine and eleven years, respectively, in a contest with their guardian, was charged, first, with specific acts of unchastity, and second, with a general bad reputation for chastity, it was held that the guardian, having shown such reputation to exist, was not confined in his proof to two years, as provided in the divorce laws, but that he might show the length of time that such reputation had been established. Garner *v.* Gordon, 41 Ind. 92.

8. Garner *v.* Gordon, 41 Ind. 92, holding competent evidence as to how children had been treated by their guardian, and those to whom he had intrusted them, and how they would likely be treated in the hands of either contestant.

9. This discretion will be exercised in accordance with the facts in each particular case, due regard being given to the legal rights of the respective parties. The general rule is that if the child is of years of discretion its wishes will be consulted; otherwise not. Ellis *v.* Jesup, 11 Bush (Ky.) 403; Coffee *v.* Black, 82 Va. 567.

Wishes Not Consulted. — Where Child Is Held In Restraint. Where the mother alleged that her child was held by the respondent as a peon or servant, such allegation not being denied by the pleadings, it was held that the testimony of the child that she was willing to remain in the respondent's service was properly excluded. Bustamento *v.* Analla, 1 N. M. 255.

10. The rule is that the welfare and best interests of the child are the primary object to be secured in proceedings for custody, and, to secure this result, courts will consider all questions which tend to show what such interests are, such as the moral character of the parents, or those who seek custody (Garner *v.* Gordon, 41 Ind. 92; Home of the Friendless *v.* Berry, 79 Mo. App. 566); the care and attention the parents have given the child (Young *v.* State, 15 Ind. 480); their ability to support the child (Townsend *v.* Warren, 99 Ga. 105, 24 S. E. 960); the choice of the child (*In re* Stockman, 71 Mich. 180, 38 N. W. 876; Coffee *v.* Black, 82 Va. 567); and rights of persons in *loco parentis* (Norval *v.* Zinsmaster, 57 Neb. 158, 77 N. W. 373).

B. Character of Parent. — The character of a parent or of a person seeking the custody of a child will be given weight by the courts.[11]

C. Neglect of Child by Parent. — Where it appears that the parent has neglected the children so as to expose them to immoral influences he will be adjudged unfit to be intrusted with their custody.[12]

D. Ability of Parent To Support Child. — The ability of a parent, as compared with that of the party contesting for its custody, to support his child, will be given consideration.[13]

11. Although there may not have been abandonment on the part of the parent, and his financial inability to support the child may not be shown, yet if his moral turpitude is such as to render him unfit to care for and raise the child in a decent or respectable manner, he will not be intrusted with its custody. Home of the Friendless *v.* Berry, 79 Mo. App. 566.

Moral Turpitude. — "To deprive a father of the custody of his child on the ground of immorality, the immorality must be of a gross nature, so that the child would be in serious danger of contamination by living with him." *In re* G., L. R. 1 Ch. Div. (1892), 292, 296; Rex *v.* Clarke, 7 E. & B. (Eng.) 186, 200.

Immorality of Mother. — A mother who was impure and unchaste in her life and associations, keeping in her possession immoral and vile publications, wandering about from place to place with evil company, and having no home for her children, was held to be an unfit person to have custody of them. Garner *v.* Gordon, 41 Ind. 92.

Though a widow be financially able to support her children, if her moral character is bad the court will decree their custody to a guardian. Home of the Friendless *v.* Berry, 79 Mo. App. 566.

Lewd and Abandoned Woman. In a contest between a mother and an orphan asylum for custody of a female child, there being evidence to warrant a finding that the mother was a lewd and abandoned woman, it was held that there was no abuse of discretion in awarding the child to the asylum. Hunter *v.* Dowdy, 100 Ga. 644, 28 S. E. 387.

Under a trust to pay the income of the testator's estate to his widow, "she maintaining, educating and bringing up" his children, the widow does not fulfill the implied obligation thrown on her in such case if she is bringing up the children in the home in which she is living in adultery, and the court will withdraw them from her custody and apportion the income between the widow and children and apply the children's portion for the proper bringing up of the children elsewhere. *In re* G., 68 L. J. Ch. (Eng.) 374, L. R. 1 Ch. Div. 719.

Bad Reputation. — In *habeas corpus* by a father for the custody of a child, an allegation in the return that the father's reputation for truth and honesty was bad, and that he had relinquished custody by writing, was held a sufficient answer. Plahn *v.* Dribred, 36 Tex. Civ. App. 600, 83 S. W. 867.

12. Where a father placed his daughter, thirteen years of age, under the care of a woman of notorious character living near him, whose reputation he might easily have ascertained, it was held that his conduct justified the presumption that he was indifferent as to the destination or employment of his child, and that he was unfit to be trusted with her custody. *In re* Clifton, 47 How. Pr. (N. Y.) 172.

13. Townsend *v.* Warren, 99 Ga. 105, 24 S. E. 960.

See also Richards *v.* Collins, 45 N. J. Eq. 283, 17 Atl. 831; Miller *v.* Wallace, 76 Ga. 479; State *v.* Banks, 25 Ind. 495; Rust *v.* Vanvacter, 9 W. Va. 600; State *v.* Libbey, 44 N. H. 321; Chapsky *v.* Wood, 26 Kan. 650; Moore *v.* Christian, 56 Miss.

E. Relinquishment of Custody by Parent. — The giving away of a child by a parent will be considered in determining the custody of such child where the parent again seeks custody.[14] The rule in such cases is that the parent, in order to regain custody, must show that the welfare of the child will be promoted thereby.[15]

408; *In re* Scarritt, 76 Mo. 565; State *v.* Deaton, 93 Tex. 243, 54 S. W. 901.

Financial Considerations. — The fact that minor children might be better educated and cared for by a stranger, to whose custody the mother, who had been divorced, had committed them, is entitled to no weight as against the rights of the father. *In re* Neff, 20 Wash. 652, 56 P. 383.

In proceedings between a father and a grandmother for the custody of a child, the fact that the grandmother can give the child more comfort and luxuries and a better education than the father can is not a controlling consideration. Dunkin *v.* Seifert, 123 Iowa 92, 98 N. W. 558; Watts *v.* Lively (Tex. Civ. App.), 60 S. W. 676.

14. Townsend *v.* Warren, 99 Ga. 105, 24 S. E. 960.

An answer that there was a written agreement by the father, giving the custody of his child to the grandparents, with an allegation in the answer that the father was unfit to have the custody of such child, being of bad reputation for truth and honesty, was held a sufficient answer to a petition for *habeas corpus* by the father to regain custody of the child. Plahn *v.* Dribred, 36 Tex. Civ. App. 600, 83 S. W. 867.

15. Where a mother, with the consent of the husband, expressed in her will the wish that their child be reared by her sisters, who, at her death, took it and cared for it for nearly six years, it was held, on application of the husband, that the wife's sisters should retain the child, it appearing that its welfare would be best promoted thereby. Stringfellow *v.* Somerville, 95 Va. 701, 29 S. E. 685.

An agreement by a father committing the custody of his infant child to another, which agreement was acted on in good faith by such other, was held binding as against the father in the absence of proof that the child's welfare would be best promoted by returning to its father. Fletcher *v.* Hickman, 50 W. Va. 244, 40 S. E. 371.

Religious Differences. — Where a father, a Roman Catholic, permitted his daughter to be reared in the home of her maternal aunt, where she was instructed in the Protestant faith until fourteen years of age, it was held that he was not entitled to her custody for the purpose of compelling her to embrace the Roman Catholic faith. *In re* Marshall, 33 N. S. (Can.) 104.

Purpose of Relinquishment. — A mother, having obtained a divorce, in which she was given the custody of the children, upon hearing that the father was taking legal proceedings to obtain custody of them, voluntarily surrendered them to their paternal grandparents, who kept them for a few months; when the father returned to the home of his parents and to the children, it was held, on application of the mother, that the children should be restored to her. Norval *v.* Zinsmaster, 57 Neb. 158, 77 N. W. 373.

An oral agreement by a father that another should have the custody of his minor daughter during her infancy does not preclude him from regaining her custody. Hussey *v.* Whiting, 145 Ind. 580, 44 N. E. 639.

Parent Preferred. — In Casanover *v.* Massengale (Tex. Civ. App.), 54 S. W. 317, where a mother, a person of good moral character but reduced in circumstances, released the custody of one of her minor children to friends, and afterward procured a divorce and remarried, and the second husband, who had children of his own, was willing to receive his wife's children into his home, it was held that the custody of the child so released should be awarded to the mother, although it was being well taken care of and those who had it in charge were in somewhat

The length of time that the child has been kept by its foster parents, and the expense incurred by them, will be given much weight by the court.[16] But in all cases, relinquishment of custody, to be effective, must be clearly expressed.[17] An agreement to relinquish, fairly made by a parent having a right to make it, is conclusive as against such parent, unless he can show that the welfare of the child demands that it be returned to his custody.[18]

better circumstances than its mother and stepfather.

Contra. — In State *v.* Deaton (Tex. Civ. App.), 52 S. W. 591, a mother, who was unable to properly care for a young child, gave another custody of it, agreeing that such custody should continue during minority if he would support it, and he took it and cared for it, and mutual sentiments of affection developed between him and the child. When the mother, upon a change in circumstances, became able to care for the child herself in a suitable manner, it was held that she could not regain custody of the child without showing that its welfare and interests required such a change to be made.

16. Where an unmarried mother in Belgium gave her child to her married sister, who had no children and who, at the request of the mother, brought the child to the United States, taking care of it without assistance from the mother until it was eight years of age, it was held that the court would not order the foster parents to surrender the child to its mother in Belgium, it not appearing that the best interests of the child required such action. United States *v.* Sauvage, 91 Fed. 490.

Where at the death of her mother, and at the mother's request, a child was given to her grandparents who kept her until she was six years of age, it was held, on application of the father, that the grandparents were entitled to keep her. Hussey *v.* Whiting, 145 Ind. 580, 44 N. E. 639.

Financial Matters. — In Noval *v.* Zinsmaster, 57 Neb. 158, 77 N. W. 373, the court said: "The court has never deprived a parent of the custody of a child merely because, on financial or other grounds a stranger might better provide." In the opinion in this case much stress is laid upon the fact that the grandparents had had custody of the children but a short time, and had not been put to much expense, and it is intimated that if they had had them for a longer period, the finding awarding custody to the mother, might have been different.

17. The relatives of the wife, at the wife's funeral, requested the husband, in the name of the departed wife, to give them custody of the infant child, and on his remaining silent they asked him to shake hands with them if he would not speak; whereupon he shook their hands and left the child in their custody, where it remained for twenty-one months, during which time the father paid its expenses and constantly claimed the right of its custody. *Held,* that he had not surrendered his right to custody. Markwell *v.* Pereles, 95 Wis. 406, 69 N. W. 798.

Presumed Temporary. — It will be presumed that the surrender of custody of a minor child by its father is intended to be temporary, unless the contrary clearly appears. Miller *v.* Miller, 123 Iowa 165, 98 N. W. 631.

Wife Cannot Relinquish as Against Husband. — A contract made during coverture by a mother, disposing of her child, is void. Ellis *v.* Jesup, 11 Bush (Ky.) 403.

Public Policy. — A contract made by a mother on her death bed, the father assenting, whereby the custody of the children was given to relatives of the mother, was held void on grounds of public policy. Hibbette *v.* Baines, 78 Miss. 695, 29 So. 80, 51 L. R. A. 839.

Disposal of Child by Will. — *In re* Neff, 20 Wash. 652, 56 Pac. 383, holding that a mother, to whom minor children had been awarded by divorce proceedings, could not by will deprive their father of their custody after her death.

18. Where a parent, by a fair

F. Abandonment of Child. — The abandonment of a child of tender years by a parent is generally held to be conclusive evidence that such parent is unfit to be intrusted again with its custody.[19] Where a parent permits his child to remain in the custody of others, and he contributes nothing to its support, and takes no interest in its welfare, he may be said to have abandoned the child.[20] Where the mother abandons the father, if the fault is her own, his relations with respect to the children are in no way affected, and as against the father, she will not be entitled to the custody of the children, unless she can show that she is a proper person to have such custody, and that the father is not; nor should the custody be awarded to a third person.[21]

G. Choice of Child. — Where children have arrived at the age

agreement, has relinquished to another the custody of his infant child, and the agreement has been acted on by such other, to the welfare of the child, the parent will not be permitted to regain custody of the child, unless he can show that a change of custody will materially promote the child's welfare. Stringfellow *v.* Somerville, 95 Va. 701, 29 S. E. 685.

Adopted Children. — One who legally adopts a child is entitled to its custody and control, and an agreement to relinquish the same, to be enforced, must be clearly established by proof. Monk *v.* McDaniel, 116 Ga. 108, 42 S. E. 360.

19. Where a mother left her infant child in a sick condition on the steps of the respondents, who took it in and nursed it back to health, becoming attached to it, it was held, on application of the mother, that the respondents should retain it, being suitable persons, while the mother was not. Young *v.* State, 15 Ind. 480.

20. Hibbette *v.* Baines, 78 Miss. 695, 29 So. 80, 51 L. R. A. 839.

Not Abandonment. — Where a father allowed his children to remain for ten years in the custody of their maternal grandparents, in accordance with an arrangement made by their mother at her death, he consenting and contributing to their support, *held,* not abandonment of such children. Hibbette *v.* Baines, 78 Miss. 695, 29 So. 80, 51 L. R. A. 839.

Loses Paternal Rights. — A father who abandons his wife and child loses his paternal rights, and the guardianship of the child devolves upon the mother, whose domicile is the child's domicile. People *v.* Dewey, 23 Misc. 267, 50 N. Y. Supp. 1013.

21. Where the mother, who was unfit to have custody of a child three years of age, left the father without sufficient cause, taking the child with her, the father subsequently regaining custody of it, it was held error to award the child to a third person in the absence of proof that the father was unfit to have custody of the child, or unable to care for it. Miller *v.* Miller, 38 Fla. 227, 20 So. 989.

Where a wife left her husband's house at his command, and remained away, he never having asked her to return, it was held that such facts did not show such misconduct on her part as to deprive her of the custody of their children of tender years, where it appeared that their welfare and happiness would be promoted by being in her custody. Carson *v.* Carson (N. J.), 54 Atl. 149.

Moral Grounds Sufficient Vindication for Wife. — Where the wife is living apart from the husband it is sufficient for her to show, in proceedings for custody of the children, that she is justified in so living apart from him on moral grounds, although such grounds would be insufficient for the procuring of a divorce. People *v.* Sternberger, 12 App. Div. 398, 42 N. Y. Supp. 423.

of discretion their wishes as to who shall be intrusted with their custody will be consulted.[22]

H. Persons Standing in Loco Parentis. — The rights of persons standing in *loco parentis* will be considered by the court in determining the custody of children.[23]

I. Witnesses. — The testimony of disinterested witnesses as to a parent's general dealings with and conduct toward, and their effect upon, his children, is sufficient to determine the question of their custody.[24]

III. PERSONS STANDING IN LOCO PARENTIS.

1. Presumptions and Burden of Proof. — A. Assent of Parent to Relation. — Where a child, without interference on the part of his parents, enters the family of another, in which he continues to live as an adopted son until his majority, his parents will be presumed to have assented to the relation.[25]

B. As Between Relatives and Strangers. — Where the parties are closely related by blood, the presumption that the support furnished, or the services rendered, were intended to be gratuitous is much stronger than it is where they are strangers, or but distantly related.[26]

22. The choice of an infant of sufficient mental capacity should generally control on the question of his custody. Ellis *v.* Jesup, 11 Bush (Ky.) 403.

In re Stockman, 71 Mich. 180, 38 N. W. 876; Vincent *v.* Vincent, 8 Ohio Com. Pl. 160, 6 Ohio N. P. 474; Coffee *v.* Black, 82 Va. 567.

Discretion of Court. — An expression of choice by children, aged ten and thirteen respectively, that they remain with their aunt in preference to going with their father, was not followed by the court in Hibbette *v.* Baines, 78 Miss. 695, 29 So. 80, 51 L. R. A. 839.

An expression of choice of a female child eleven years of age was held not controlling in Beall *v.* Bibb, 19 App. D. C. 311.

23. *Colorado.* — McKercher *v.* Green, 13 Colo. App. 270, 58 Pac. 406.

Georgia. — Townsend *v.* Warren, 99 Ga. 105, 24 S. E. 960.

Indiana. — Young *v.* State, 15 Ind. 480.

Nebraska. — Norval *v.* Zinsmaster, 57 Neb. 158, 77 N. W. 373.

Texas. — State *v.* Deaton (Tex. Civ. App.), 52 S. W. 591.

W. Va.—Fletcher *v.* Hickman, 50 W. Va. 244, 40 S. E. 371.

24. Testimony of disinterested witnesses tending to show that a father was too weak mentally to transact business intelligently, was excitable, profane, and frequently called his children, two girls, aged seven and nine years respectively, bad names, the effect being that they were becoming unmanageable, was held sufficient to show that he was unfit to be intrusted with their custody. Lemmin *v.* Lorfeld, 107 Wis. 264, 83 N. W. 359.

25. Where, on the death of his father, a child was adopted into the family of his uncle, who stood to him in *loco parentis,* and to whom he sustained the relation of an adopted child till he became of age, it was presumed, nothing appearing to the contrary, after the lapse of twenty years from his majority, that the mother assented to his arrangement with his uncle, whatever it was, and to his emancipation from parental control or rights that she might have asserted at the time. Sword *v.* Keith, 31 Mich. 247.

26. Relationship between the par-

2. Stepchildren. — A. Presumptions and Burden of Proof. a. *In General.* — Whether a stepfather has admitted his stepchildren into his family and treated them as his own, so that he stands in *loco parentis* to them, and they have reciprocal rights, duties and responsibilities, is largely a question of intent;[27] and where he maintains his stepchildren and accepts their services he will be regarded as having dealt with them as a parent, and, in the absence of an express agreement, he can claim no compensation for their support.[28] But the contrary has been held.[29]

b. *Allowing Personal Property To Go Into Possession of Stepchild.* — Where a stepfather allows personal property to go into the possession of a stepchild, and permits it to remain, a gift of such property is not to be presumed.[30]

ties is not necessary in order to create the relation of *loco parentis.* Sanders *v.* Rutland, 1 McCord (S. C.) 143.

Where a near relative is taken into the family and treated as a member thereof it requires clear and satisfactory proof that their relation was one of master and servant. Greenwell *v.* Greenwell, 28 Kan. 675; Williams *v.* Hutchinson, 3 N. Y. 312, 319.

The nearer the relation the stronger is the presumption that they regard themselves, and are to be treated, as members of the same family, and not as master and servant. Shane *v.* Smith, 37 Kan. 55, 14 Pac. 477.

Where a grandson was raised and cared for by his grandfather until he was fifteen years of age, *held,* that the relation rebutted the implication of a promise to pay for work and labor performed by the boy on his grandfather's farm. Hudson *v.* Lutz, 50 N. C. 217.

27. Englehardt *v.* Young, 76 Ala. 534.

Where one voluntarily assumes the care and custody of children, or receives them into his family, and treats them as his own, the presumption is that he stands in *loco parentis* to them, and that they deal as parent and child, and not as master and servant. Larsen *v.* Hansen, 74 Cal. 320, 16 Pac. 5 (see Cal. Civ. Code, § 209); Brush *v.* Blanchard, 18 Ill. 46; Sharp *v.* Cropsey, 11 Barb. (N. Y.) 224, *overruling* Gay *v.* Ballou, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158; Mull *v.* Walker, 100 N. C. 46, 6 S. E. 685; Gerber *v.* Bauerline, 17 Or. 115, 19 Pac. 849; Appeal of Brown, 112 Pa. St. 18, 18 Atl. 13.

Presumption Does Not Arise. "Where a stepfather receives [step] children into his family as their legally appointed guardian, and as such renders his account for expenditures from year to year, and such accounts are allowed by the county court, the presumption [that he stands in *loco parentis* to them] does not arise." *Per Curiam* in Bond *v.* Lockwood, 33 Ill. 212.

Where a stepfather, having qualified as guardian of his stepchildren, who lived in his family from the time they were small until of age, charged such children for support, as guardian of their estate, in his final account as such guardian, *held,* that the presumption that he acted or intended to act in *loco parentis* was rebutted. Gerber *v.* Bauerline, 17 Or. 115, 19 Pac. 849.

Plea of Set-off for Support of Child. — Schwartz *v.* Schwartz, 33 Ill. 81 (pleading in set-off by a stepfather for board, maintenance, and education of a stepson, in a suit by the latter to recover for labor performed for the former; *held* to be an admission, in effect, that the parties were dealing on the footing of contract, and not of relationship).

28. Dixon *v.* Hosick, 101 Ky. 231, 41 S. W. 282.

29. Eiken *v.* Eiken, 79 Minn. 360, 82 N. W. 667, holding that there was no presumption that the support of stepchildren, by a stepfather having charge of the family, was gratuitous.

30. The presumption of a gift

c. *Gifts to Stepchild. — Earnings of so Presumed. — When.* — It is a rule of equity that where two persons stand in such relation to each other that an obligation rests upon one of them to make provision for the other, a purchase or investment by the former in the name of the latter will of itself afford evidence of a gift; and the presumption of a gift will arise from the moral obligation to give.[31] And this rule applies to the use by a stepfather of the earnings of his stepchildren.[32]

d. *Conveyances From Stepchild to Stepfather.* — A conveyance of real estate to a stepfather, made by a stepchild without advice as to his legal rights, and while under the stepfather's influence and a member of his family, is *prima facie* void.[33]

that arises where a parent allows personal property to go into the possession of a child, and to remain there, results from the relationship of the parties and the natural obligation of a parent to support his child, an obligation which the law recognizes and enforces. But this obligation does not extend to stepchildren, and the law will not enlarge or increase burdens or duties which neither nature nor the law enjoins. Willis *v.* Snelling, 6 Rich. (S. C.) 280.

31. Bennet *v.* Bennet, 10 L. R. Ch. Div. 474; Capek *v.* Kropik, 129 Ill. 509, 21 N. E. 836.

32. If one stands in *loco parentis* to his wife's minor children by a former marriage he is entitled to their services and earnings, and, therefore, the manner in which he disposes of such earnings cannot be questioned; but if he does not stand in such a relation, and, after the death of the wife, he uses their earnings for the purpose of discharging an incumbrance on real estate which he and his wife owned as tenants in common, and in which the children have an interest as her heirs, the amount of their earnings so used, at least in excess of the necessary expenditures for their maintenance, will be presumed to be a gift to such children, and will inure to their benefit. Capek *v.* Kropik, 129 Ill. 509, 21 N. E. 836.

33. In Berkmeyer *v.* Kellerman, 32 Ohio St. 239, 30 Am. Rep. 577, a young lady, on the day she became of age, conveyed all of her real estate to her mother and stepfather, the latter acting as her guardian, in pursuance of an alleged family settlement made for her by those who had no authority to bind her, such conveyance being made while she was still under the influence and control of the stepfather, and without advice as to her rights; *held,* that the conveyance was invalid, and that it could only be sustained in equity upon proof that it was just and equitable, and made in the utmost good faith, and that the burden of showing this was on the claimant.

Result of Representations by Stepfather. — In Bradshaw *v.* Yates, 67 Mo. 221, the plaintiff's mother had intermarried with the defendant when the plaintiff was nine years of age, from which time she lived in the defendant's family as a member thereof, he being also her guardian. The plaintiff had been taught by her mother to look upon the defendant as her father, and she had entire confidence in him. In the partition of the real estate of her deceased father certain land was assigned to the mother as her dower, while other lands were set apart to the children in fee, including the plaintiff. By repeated representations and importunities of the defendant the plaintiff was made to believe that a wrong had been done in making said partition, whereupon she promised, when she became of age, to convey to the defendant her interest in the dower land of her mother; and, accordingly, when she was twenty-two years of age, and still a member of the defendant's family and under his influence, and impressed with the belief that she was doing but an act of justice, she carried out her promise,

IV. EMANCIPATION.

1. Presumptions and Burden of Proof. — A. In General. Emancipation of a minor child is never presumed; it must be proved.[34]

B. Upon Gaining Majority. — By the weight of authority, so far as the American courts are concerned — and by what appears the better opinion — a child is presumed to be emancipated upon reaching his majority.[35]

C. Circumstantial Evidence. — a. *Generally.* — Emancipation need not be proved by direct evidence; it may be proved by circumstantial evidence;[36] and the acts of the parties tending to show that the child acted for himself, with the knowledge and approval

and conveyed her interest in such dower land to the defendant. *Held*, that such facts constituted at least a *prima facie* case of legal fraud, and imposed upon the defendant the burden of showing that absolute fairness, adequacy and equity characterized the transaction.

It is not material whether the conveyance proceeds from a child to one who stands to him in the relation of *loco parentis*, or to a natural parent. In any event it must be characterized by fairness and equity, or it will be set aside, and the burden of proving such fairness and equity is upon the grantee. Everitt *v.* Everitt, L. R. 10 Eq. 405; Prideaux *v.* Lusdale, 1 De Gex J. & C. (Eng.) 433; Whitridge *v.* Whitridge, 76 Md. 54, 24 Atl. 645; Miskey's Appeal, 107 Pa. St. 611.

34. Sumner *v.* Sebec, 3 Me. 223; Wells *v.* Kennebunk, 8 Me. 200; Hardwick *v.* Pawlet, 36 Vt. 320.

Inferred From Circumstances. Where both parents died, leaving the child destitute and without a home, it was held that such child was emancipated. Lubec *v.* Eastport, 3 Me. 220.

Inferred From Acts of the Parties. Dennysville *v.* Trescott, 30 Me. 470; Sword *v.* Keith, 31 Mich. 247; Lisbon *v.* Lyman, 49 N. H. 553; Canovar *v.* Cooper, 3 Barb. (N. Y.) 115; Shute *v.* Dorr, 5 Wend. (N. Y.) 204; Geringer *v.* Heinlein, 29 Wkly. Law Bul. (Ohio) 339.

35. Hardwick *v.* Pawlet, 36 Vt. 320; Poultney *v.* Glover, 23 Vt. 328; Springfield *v.* Wilbraham, 4 Mass. 493.

Not Ipso Facto. — That it is the right of a child, at his election, to be emancipated upon gaining his majority, provided he is of sufficient mental caliber to make such an election, is not disputed; but it is held that he is not *ipso facto* emancipated from the mere fact of gaining his majority, because he might, with the assent of the parent, remain at home, receiving support from such parent and rendering services therefor as before, in which case he is not emancipated. Brown *v.* Ramsay, 29 N. J. L. 117.

In some of the English cases the principle is maintained that proof that the child, upon gaining his majority, still continues to reside uninterruptedly with the parent as a part of his family, rendering services without wages, and receiving support without compensation, in the same manner as before, rebuts the presumption of emancipation. Rex *v.* Roach, 6 T. R. (Eng.) 245, 251.

36. *California.* — Lackman *v.* Wood, 25 Cal. 147.

Indiana. — Haugh *v.* Duncan, 2 Ind. App. 264, 28 N. E. 334.

Maine. — Dennysville *v.* Trescott, 30 Me. 470; Clinton *v.* York, 26 Me. 167; Sumner *v.* Sebec, 3 Me. 223.

New Hampshire. — Lisbon *v.* Lyman, 49 N. H. 553.

New Jersey. — Brown *v.* Ramsay, 29 N. J. L. 117.

New York. — Canovar *v.* Cooper, 3 Barb. 115.

Texas. — Washington *v.* Washington (Tex. Civ. App.), 31 S. W. 88.

of the parent, are admissible as tending to show an implied emancipation.[37]

b. *Child Engaging in Business.* — The fact that a minor engages in business for himself is admissible to prove emancipation.[38]

c. *Actions by Child with Approval of Parent.* — Where a child, after gaining his majority, brings suit, with the approval of the parent, to recover for services rendered by said child during minority, it is sufficient evidence of emancipation.[39] But the fact that the parent permits the child to go away from home to seek employment, and to make contracts for his services, does not prove emancipation,[40] even where there is an express agreement between them that the child shall have his future earnings.[41]

37. The emancipation of a minor may be proved by the act of the father in allowing him to draw his own wages, as well as by other acts, no proof of a formal contract being necessary. Haugh *v.* Duncan, 2 Ind. App. 264, 28 N. E. 334.

38. Where a minor was in the habit of doing business on his own account and in his own name, purchasing supplies of provisions, and becoming responsible therefor, it was held that such acts were admissible in evidence to prove emancipation. Lackman *v.* Wood, 25 Cal. 147.

39. The Lucy Anne, 3 Ware 253, 15 Fed. Cas. No. 8596.

40. Where a minor left his home in one state, obtaining employment in another, and upon gaining his majority brought suit for services so rendered, it was held that proof that his father permitted him to leave his home and to make the contract for his services so rendered did not raise a presumption of emancipation. But the court said: "Though the father had not emancipated the plaintiff, yet if he had given him the time during which he worked for the defendant, or had waived his right to the plaintiff's earnings while in the defendant's service, then the plaintiff was entitled to recover in this action." *Per* Metcalf, J. in Stiles *v.* Granville, 6 Cush. (Mass.) 458.

Testifying in Behalf of Child. Emancipation will be presumed where a father testifies in behalf of a minor son and treats as belonging to the son a claim upon which suit is brought by him after gaining his majority for services rendered while a minor. Aulger *v.* Badgely, 29 Ill. App. 336, holding such action by a child, after gaining his majority, properly brought where the father testified for the son, no evidence to rebut the presumption of emancipation arising having been offered.

41. A widow told her minor son that he might go and take care of himself, and have his time and earnings, to which the son assented, and it was agreed between them that there need be no pecuniary consideration for such contract. The son thereupon left his mother and found employment in different places, returning to her in two instances and boarding with her through the winter, paying his board and attending school. *Held,* not to show an emancipation of the son. Torrington *v.* Norwich, 21 Conn. 543.

Arnold *v.* Norton, 25 Conn. 92 (parent employing the child himself, and paying him wages).

All such acts are evidence of emancipation, and will generally be held to be sufficient proof thereof. Arnold *v.* Norton, 25 Conn. 92; Torrington *v.* Norwich, 21 Conn. 543; Haugh *v.* Duncan, 2 Ind. App. 264, 28 N. E. 334; Canovar *v.* Cooper, 3 Barb. (N. Y.) 115.

"Payment of a minor's wages to a minor child by authority of the parent has been considered of itself a virtual act of emancipation, and sufficient to entitle the minor to sue the employer for his own services, and to recover the wages as his own money." Berla *v.* Meisel (N. J.), 52 Atl. 999.

d. *Collection of Wages by Child with Approval of Parent.* — The fact that a parent pays the child wages, or allows him to collect his own wages, is admissible to prove emancipation.[42]

e. *Marriage of Minor.* — The marriage of a minor, with the father's consent, constitutes one mode of emancipation; and where the marriage is solemnized in the state in which the parent resides the law presumes that the parent had notice of the intention of the child to marry.[43]

f. *Refusing To Support Child.* — The refusal of a parent to support or harbor a child for any particular reason is not sufficient evidence of emancipation of such child, even though the child lives out and is self-supporting much of the time during minority.[44]

g. *Support of Imbecile After Majority.* — The fact that a parent continues to support his imbecile child after the imbecile gains his majority is evidence of the parent's assent to the unemancipated state of the child.[45]

h. *Allowing Child To Be Adopted.* — The fact that a parent permits a child to be adopted into the family of another, allowing an unreasonable length of time to lapse without making any interference, will establish emancipation.[46]

i. *Absence of Parent.* — If a parent is absent for an unreasonable length of time without taking any part in the affairs of a minor

42. Occasionally Working. — The fact that a minor has occasionally worked out and received his own wages is not of itself proof of emancipation. Brown *v.* Ramsay, 29 N. J. L. 117.

43. Implied Consent of Parent to Marriage of Minor. — Emancipation is sufficiently proved by showing the implied consent of the parent to the marriage of a minor, where the circumstances show that the parent knew of such marriage and made no objection thereto, as where the marriage was solemnized in the house of the bride's father, and she and her husband resided with him during the first year thereafter. Bucksport *v.* Rockland, 56 Me. 22.

Mere Kindness Not Enough. Where a minor daughter married against the expressed wishes of her mother, who treated the daughter with kindness and her husband with courtesy on their return to her home, it was held that such facts showed no implied consent to such marriage, and that there was no emancipation. Gullebert *v.* Grenier, 107 La. 614, 32 So. 238.

44. Where it appeared that a minor daughter had "lived about in a good many places since she was a child;" that during her minority her father said "that he would not have her at his house; that his wife was quarreling with her, and that he was not able to take care of her under the circumstances she was then in;" and that she was taken to the house of her brother, and there delivered of a child while a minor, it was held that this did not show that she had been emancipated. Clinton *v.* York, 26 Me. 167.

45. Brown *v.* Ramsay, 29 N. J. L. 117.

46. Sword *v.* Keith, 31 Mich. 247.

No Emancipation if Parent Has Power To Reclaim. — Where a parent, on removing to a distant part of the state, left his minor daughter in the care of a resident of her native town, to live with him as his adopted daughter until she was eighteen years of age, it was held that this was not emancipation, since the father still had the power to reclaim her." Sumner *v.* Sebec, 3 Me. 223.

child, such as attempts to collect his wages, or to control his actions in making contracts, and contributes nothing to his support or education, emancipation of the child may be inferred.[47]

V. ABANDONMENT OR NEGLECT TO SUPPORT.

1. Presumptions and Burden of Proof. — A. Proof of Marriage. In a prosecution for abandonment of children, proof of marriage of the parties is necessary in order to show the legitimacy of such children.[48]

B. Intent to Abandon. — Evidence of the conduct of a parent toward his family subsequent to the time of the alleged abandonment,[49] as well as of his declarations,[50] is admissible, to show his intentions at the time, in a prosecution against him for such abandonment.

VI. ENTICING AWAY OR HARBORING OF CHILD.

1. Presumptions and Burden of Proof. — A. In General. — In order to maintain an action for unlawfully enticing away or har-

47. Where the father was absent for three years without taking any part in the affairs of the minor son, who continued to work for others and collect his own wages during such time without interference from the father, it was held that the "rational inference" was that the son was to receive the proceeds of his own labor for his support, because he could not clothe himself unless he could obtain at least a part of his wages; and that these facts were admissible in evidence, in an action by the son to recover for his labor, as tending to prove his emancipation. Canovar *v.* Cooper, 3 Barb. (N. Y.) 115.

48. Firmeis *v.* State, 61 Wis. 140, 20 N. W. 663, holding competent to prove marriage, testimony of wife as to such marriage, and admissions of husband that children were legitimate.

Abandonment. — What To Be Proved in Criminal Cases. — In order to convict of willful and voluntary abandonment of a child, proof of actual desertion is necessary to complete the offense. Gay *v.* State, 105 Ga. 599, 31 S. E. 569. And it must also be shown that the child was not only dependent upon the deserting parent, but destitute. Dalton *v.* State, 118 Ga. 196, 44 S. E. 977.

In setting aside a conviction in Williams *v.* State, 121 Ga. 195, 48 S. E. 938, on an indictment for desertion, the court said: "There was no evidence that at the time of the desertion the children's mother was not able to, and did not in fact, maintain them." See also State *v.* Beers (Conn.) 58 Atl. 745.

49. Firmeis *v.* State, 61 Wis. 140, 20 N. W. 663.

50. At the trial of an indictment charging a father with neglecting to support his minor child, a witness for the prosecution testified that he had a conversation with the defendant shortly before the statute on which the indictment was founded went into effect, such conversation being about such statute and the future support of the defendant's child. The witness also testified that the defendant told him that he (the defendant) "would do nothing about supporting the child; that he would break up his business and leave the country first, unless he could control his mother-in-law's property." *Held*, that this evidence was admissible as tending to show that the defendant intentionally neglected to support his child. Com. *v.* Burlington, 136 Mass. 435.

boring a minor child it is necessary for the plaintiff to prove all of the material facts which constitute such a cause of action.[51]

B. Declarations of Child. — The child's declarations to the defendant at the time of the act complained of, representing that the parent was willing for him to engage with the defendant, are admissible.[52]

C. Where Parties Are Strangers. — Where the party who stands in *loco parentis* is a stranger, the presumption that the support furnished was gratuitous may be rebutted by showing that he was in impecunious circumstances.[53]

51. In Caughey *v.* Smith, 47 N. Y. 244, it was held that it was necessary for the plaintiff to allege and prove knowledge on the part of the defendant that the minor owed services to the plaintiff and wrongfully deserted that service; that knowledge of the minority, and that the father was living, was sufficient to charge the defendant with the legal inference therefrom that the father was entitled to the custody, labor and services of the minor; but if there was an honest belief on the part of the defendant that the minor had left his father's service with the father's consent, he was not liable.

Actual Force. — In trespass *vi et armis* for taking away the plaintiff's son *per quod servitium amisit,* the plaintiff must either prove actual force, or knowledge on the part of the defendant that the son was under age. Somboy *v.* Loring, 2 Cranch C. C. 318, 23 Fed. Cas. No. 13,168.

Conduct of Parent Toward Child. In Loomis *v.* Deets (Md.), 30 Atl. 612, the plaintiff's minor son was hired to the defendant by the plaintiff, the son continuing in the defendant's employ for several years. The plaintiff went to collect some of the son's wages, when he was told by the defendant that he had paid the money to the son, upon which the plaintiff said that the son should go home with him, to which the defendant consented, and the son refused to go. The defendant refused to allow the plaintiff to enter the house to get the son's money and clothes; plaintiff then went away, and, on returning, found that the child had gone. The son testified, in an action by the father, that the defendant had never advised him as to how to act toward his father. *Held,* that there was no evidence that the defendant, intending to deprive the plaintiff of the control and services of his son, had harbored him, and refused to allow the plaintiff to get control and possession of him.

Harboring, Not Enticing. — Where a son fled from his father's service to a seaside town, where he was engaged to go upon a fishing voyage, the hirer having full knowledge of the son's going without the knowledge or consent of the father, action in proper form will lie against hirer for harboring; but not for enticing. Butterfield *v.* Ashley, 2 Gray (Mass.) 254.

52. Wodell *v.* Coggeshall, 2 Metc. (Mass.) 89, 35 Am. Dec. 391; Whiting *v.* Earle, 3 Pick. (Mass.) 201, 15 Am. Dec. 207; Morse *v.* Welton, 6 Conn. 547, 16 Am. Dec. 73.

53. Where both parents of an infant died intestate, leaving property, but no one to care for the child, which was taken by a woman who was very poor and who cared for it for a year, or until administration on the father's estate was taken out, it was held, in an action against the administrator by the woman for the trouble and expense incurred, that she was entitled to recover; that her poverty refuted the presumption that her services were gratuitous, and that the policy of the law and humanity required that she be paid. Sanders *v.* Rutland, 1 McCord (S. C.) 143.

VII. ACTIONS TO COMPEL SUPPORT OR EDUCATION OF CHILD, OR TO RECOVER FOR NECESSARIES FURNISHED.

1. Implied Contracts of Parent to Support Child. — A. In General. — The moral duty of a parent to support and educate his minor child is sufficient to support a promise made by him to a third person to pay for services rendered, or necessaries furnished, to such child;[54] and such a promise may be inferred from circumstances, slight evidence being sufficient to warrant the inference that the parent has contracted to pay for services or necessaries so furnished.[55]

B. Child of Full Age and Married. — Where a married daughter, living away from her father's home, is brought to his

54. Tilton *v.* Russell, 11 Ala. 497; Jordan *v.* Wright, 45 Ark. 237; Conboy *v.* Howe, 59 Conn. 112, 22 Atl. 35; Brown *v.* Deloach, 28 Ga. 486.

Agreement To Support Child Without Pay. — Where the plaintiff took an infant child, agreeing to care for it for an indefinite time for no other compensation than the society and services of the child, and voluntarily surrendered it to the parent after eight years, with the understanding that the contract was at an end, and made no claim for compensation until a year afterward, it was held that there could be no recovery. Young *v.* Heater, 63 Iowa 668, 19 N. W. 827.

55. *Alabama.* — Where a child was sent to school by its mother, a widow, the child having no guardian, it was held sufficient to imply a promise by the mother to pay the child's tuition. Tilton *v.* Russell, 11 Ala. 497.

Arkansas. — Taking a child to raise, at the parent's request, was held sufficient to raise the presumption of a promise by the parent to pay for the child's support in Jordan *v.* Wright, 45 Ark. 237.

Connecticut. — Evidence that the father permitted his son to bring home some of the articles of clothing purchased by him may be considered on the question of ratification by the father, but it is not conclusive. Conboy *v.* Howe, 59 Conn. 112, 22 Atl. 35.

Georgia. — The making of a conditional promise by a father to pay a debt contracted by his son was held evidence of a previous authority to the son to contract such debt. Brown *v.* Deloach, 28 Ga. 486.

Massachusetts. — A minor, living with his father, applied to a dentist for treatment, which he had charged to the father, and the dentist twice sent the father bills therefor that were ignored; *held* that the jury was justified in finding that the father authorized the son to procure the services rendered on the father's credit. Lamson *v.* Varnum, 171 Mass. 237, 50 N. E. 615.

New York. — Evidence that the defendant's minor son, who was well provided for by the defendant, had previously ordered clothing from the plaintiff, for which the father had paid, was held sufficient to warrant an implied authority from the father to the son to make such purchase. Henry *v.* Betts, 1 Hilt. (N. Y.) 156.

So where a parent engaged his sister-in-law to care for his infant child for a consideration, who, in turn, engaged the plaintiff to take care of it, the plaintiff not knowing of the arrangement with the sister-in-law, it was held that the parent was liable to the plaintiff, notwithstanding such arrangement, since he knew that the child was being harbored and fed by the plaintiff. Hazard *v.* Taylor, 38 Misc. 774, 78 N. Y. Supp. 828.

Wisconsin. — Where a parent permits a stranger to maintain, support or instruct his children, in no way objecting thereto, but rather assenting and advising therein, the law will presume that he knew his obligations, accepted the services, and assumed to

home for care when sick, a special request made by the father to a physician to attend his child raises no implied promise on the father's part to pay for the services so rendered.[56]

2. Presumptions and Burden of Proof. — A. Duty of Parent to Furnish Necessaries. — In an action against a parent for necessaries furnished to his minor child, the burden is on the plaintiff — where there is no evidence of assent or authority from such parent — to prove that the articles furnished were necessaries, and that the parent had failed to furnish them.[57]

B. One Standing in Loco Parentis. — Where one is in *loco parentis,* no claim for support furnished on the one hand, or for services rendered on the other, can be allowed, in the absence of an express contract therefor.[58]

pay therefor. McGoon *v.* Irvin, 1 Pin. (Wis.) 526, 44 Am. Dec. 409.

56. Where a physician attended the defendant's daughter, who was of full age, married and living in her own home, but while sick was brought to her father's home to receive the care of her mother, the defendant being present when the physician made his calls, giving him a history of the case and receiving directions as to the patient's treatment, telling others of the frequency and length of such calls and of his own opinion of the case, without any disclaimer of liability, it was held that these facts were insufficient to imply a promise on the part of the defendant to pay for such services. Crane *v.* Baudouine, 55 N. Y. 256, *reversing* 65 Barb. (N. Y.) 260.

57. McGoon *v.* Irvin, 1 Pin. (Wis.) 526, 44 Am. Dec. 409.

Brown *v.* Deloach, 28 Ga. 486; McGoon *v.* Irvin, 1 Pin. (Wis.) 526, 44 Am. Dec. 409; Conboy *v.* Howe, 59 Conn. 112, 22 Atl. 35; Finch *v.* Finch, 22 Conn. 411; Dumser *v.* Underwood, 68 Ill. App. 121; Lamson *v.* Varnum, 171 Mass. 237, 50 N. E. 615.

Absolute Necessity. — If a father neglects to furnish his infant children with necessaries, a person who supplies them confers a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of such parent. Some assent or authority from the parent is necessary unless there is proof that the articles were to keep the child from absolute want, or that there was absolute necessity for them. But what is actually necessary will depend upon the precise situation of the infant, with which the party giving the credit must be acquainted at his peril, and which he must prove to maintain his action. Poock *v.* Miller, 1 Hilt. (N. Y.) 108.

Express Promise. — In McCrady *v.* Pratt (Mich.), 101 N. W. 227, an action against a father to recover for his son's board, contracted for by the son, it was held the burden was on the plaintiff to prove, by a preponderance of the evidence, that the son was authorized by the father to procure such board, and that she relied solely on the credit of the father.

In Brown *v.* Deloach, 28 Ga. 486, it was held to be discretionary with the father to say what quality of clothing should be provided for his minor son.

58. The law presumes that the support so furnished or the services so rendered were gratuitous, and casts upon the plaintiff, seeking to recover for such support or services, the burden of proving the existence of an express contract for compensation therefor.

Illinois. — Fetrow *v.* Krause, 61 Ill. App. 238.

Kansas. — Shane *v.* Smith, 37 Kan. 55, 14 Pac. 477.

Missouri. — Castle *v.* Edwards, 63 Mo. App. 564.

New Hampshire. — Whitaker *v.* Warren, 60 N. H. 20, 49 Am. Rep. 302.

North Carolina. — Hudson *v.* Lutz, 50 N. C. 217.

3. Evidence Admissible. — A. Parent's Failure To Supply. Before evidence may be received to charge the parent for necessaries furnished to the child, it is necessary to show that such articles have not been furnished the child by the parent.[59] When this is shown, evidence as to the parent's financial condition may be received.[60]

B. Earnings of Child and His Ability To Pay. — The earnings of a child and his ability to pay for necessaries furnished him by third persons will be considered in actions against the parent to recover therefor.[61]

C. Value of Service and Expectancy of Child. — But on the question of the value of the service rendered the child, in an action against the parent therefor, the expectancy of the child and the standing of the parent are inadmissible.[62]

4. Weight and Sufficiency of Proof. — A. Implied Assent of Parent. — Evidence of any acts of the parent which imply his assent to the furnishing of necessaries to his minor child is given great weight.[63]

B. Charging Goods to Parent by Direction of Child. — The mere fact that the seller of the goods charges them to the parent by direction of the infant making the purchase is not sufficient to charge the parent with liability.[64]

Texas. — Schrimpf *v.* Seltegast, 36 Tex. 296.

Vermont. — Ormsby *v.* Rhoades, 59 Vt. 505, 10 Atl. 722.

59. Brown *v.* Deloach, 28 Ga. 486; Conboy *v.* Howe, 59 Conn. 112, 22 Atl. 35; McGoon *v.* Irvin, 1 Pin. (Wis.) 526, 44 Am. Dec. 409; Van Valkinburg *v.* Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395.

60. Children of divorced parents, living with their mother who had remarried, were educated with the knowledge and implied consent of the father at the expense of the second husband; it was held that the father was liable therefor, and that evidence as to his pecuniary condition was admissible. McGoon *v.* Irvin, 1 Pin. (Wis.) 526, 44 Am. Dec. 409.

61. Bartels *v.* Moore, 9 Daly (N. Y.) 235.

62. In an action against a father for board and care furnished his child, evidence as to the standing of the father and the expectancy of the child was held incompetent on the question of value of the services rendered. Leisemer *v.* Burg, 106 Mich. 124, 63 N. W. 999.

63. In an action by a physician against a parent for medical services rendered his daughters while at a boarding school, it appeared that the defendant had paid a prior bill through the treasurer of the school to the plaintiff for like services rendered, and that the daughters had spoken of the defendant as "papa" to a music teacher, who had sent the defendant bills for tuition, which he had paid, and these facts were held sufficient to show that they were defendant's daughters, and that the services were impliedly authorized by him. Neilson *v.* Ray, 17 N. Y. Supp. 500.

64. In the absence of some evidence of actual or implied authority, neglect of the child, ratification on the part of the parent, or proof that the child was in actual want, the parent is not liable for necessaries furnished the child, and where the plaintiff sold clothing to the minor son of the defendant, charging it to the father by direction of the son, and it appeared that the son spent most of his time away from home, receiving the most of his earnings for his own use, and there was no evi-

C. Declarations of Parent. — Alleged declarations of the parent, tending to show authority from him to the child to make purchases on the credit of the parent, when not corroborated by other evidence, are looked upon with suspicion.[65]

VIII. SERVICES AND NECESSARIES FURNISHED PARENT.

1. Presumptions and Burden of Proof. — A. In General. Where a child renders services to his parents, the law presumes that such services were gratuitous, and implies no promise to pay therefor; nor can recovery for such services be had unless a contract for payment be clearly proved.[66] The presumption is against a claim presented by a child against the parent's estate for services rendered during minority,[67] and emancipation, or waiver by the father of the services rendered, must be proved in an action against the father.[68]

B. Liability of Child for Necessaries Furnished Parents.

dence of actual or implied authority, ratification or neglect on the part of the father, or showing that the articles furnished were necessaries, it was held that the jury should have been instructed to find for the defendant. Tyler *v.* Arnold, 47 Mich. 564, 11 N. W. 387.

65. In an action against a father for clothing sold to his son, it appeared that the plaintiff had charged the goods to the son, receiving part payment from him and sending him bills for the balance due; it was held that such evidence was not overcome by alleged declarations of the father authorizing the son to make such purchase. Bartels *v.* Moore, 9 Daly (N. Y.) 235, the court characterizing such declarations as suspicious, easily manufactured and entitled to little weight.

66. *Alabama.* — Borum *v.* Bell, 31 So. 454.

Delaware. — Bradley *v.* Kent, 7 Houst. 372, 32 Atl. 286.

Georgia. — O'Kelly *v.* Faulkner, 92 Ga. 521, 17 S. E. 847.

Illinois. — Schwachtgen *v.* Schwachtgen, 65 Ill. App. 127.

Indiana. — Niehaus *v.* Cooper, 22 Ind. App. 610, 52 N. E. 761; Adams *v.* Adams, 23 Ind. 50; Williams *v.* Resenter, 25 Ind. App. 132, 56 N. E. 857.

Iowa. — McGarvy *v.* Roods, 73 Iowa 363, 35 N. W. 488.

Michigan. — Harris *v.* Harris, 106 Mich. 246, 64 N. W. 15.

Missouri. — Smith *v.* Myers, 19 Mo. 433.

Nebraska. — Bell *v.* Rice, 50 Neb. 547, 70 N. W. 25.

New Mexico. — Garcia *v.* Candelaria, 9 N. M. 374, 54 Pac. 342.

New York. — Wamsley *v.* Wamsley, 48 App. Div. 330, 62 N. Y. Supp. 954.

Virginia. — Nicholas *v.* Nicholas, 100 Va. 660, 42 S. E. 866.

The question always is, whether the parties contemplated payment and dealt with each other as debtor and creditor, and the burden of proving this is on the child seeking to recover for support furnished or services rendered to a parent. Miller's Appeal, 100 Pa. St. 568, 45 Am. Rep. 394.

67. Williams *v.* Resener, 25 Ind. App. 132, 56 N. E. 857; Enger *v.* Lofland, 100 Iowa 303, 69 N. W. 526; Kloke *v.* Martin, 55 Neb. 554, 76 N. W. 168; Avitt *v.* Smith, 120 N. C. 392, 27 S. E. 91.

The burden is on the child to overcome this presumption by proving an express contract for compensation, (Titman *v.* Titman, 64 Pa. St. 480), or by proving circumstances from which a contract to compensate may be inferred. Engleman *v.* Engleman, 1 Dana (Ky.) 437; Forester *v.* Forester, 10 Ind. App. 680, 38 N. E. 426.

68. Duveneck *v.* Kutzer, 17 Tex. Civ. App. 577, 43 S. W. 541.

A child may be charged for necessaries furnished his parents at his request,[69] but such a request must be proved. It cannot be infered from his natural duty to provide for his parents, or from other collateral facts or circumstances.[70]

2. Weight and Sufficiency of Proof. — A. In General. — Where there is evidence of an expressed contract for compensation which is also corroborated by circumstantial evidence tending to prove a contract by inference, the plaintiff will be entitled to recover;[71] and a verdict rendered on evidence of either class will not be disturbed unless such evidence is clearly insufficient.[72]

B. Promise of Parent To Pay. — a. *Declarations Generally.* A promise by a parent to compensate a child for caring for and supporting him creates a valid claim against his estate.[73] But it must appear that the parent assumed a legal obligation, capable of being enforced against him.[74]

69. Becker *v.* Gibson, 70 Ind. 239; Lebanan *v.* Griffin, 45 N. H. 558; Stone *v.* Stone, 32 Conn. 142.

70. Lebanan *v.* Griffin, 45 N. H. 558; Stone *v.* Stone, 32 Conn. 142.

71. A father abandoned his wife and homestead, and his son cared for and supported the mother and transacted all of the father's business for twenty-five years, in accordance with an agreement with the father by which the son was to be compensated therefor, the father having made several wills devising the homestead to the son and repeatedly promising him compensation; it was held on the death of the father intestate that the son was entitled to recover from the estate for the services so rendered. Robinson *v.* Raynor, 28 N. Y. 494.

72. Where there is any evidence tending to prove an express contract by a father to pay his son for services, or circumstances from which such contract may be inferred, a verdict in favor of the son will not be disturbed on the ground that in such cases the law requires positive proof that compensation was intended and expected. Forester *v.* Forester, 10 Ind. App. 680, 38 N. E. 426.

Evidence tending to show that a mother, living with her daughter, expected to pay her board, and that the daughter expected she would pay, will be allowed to sustain a verdict rendered against the mother's estate in favor of the daughter. McGarvy *v.* Roods, 73 Iowa 363, 35 N. W. 488.

Insufficient. — Where a son married during his minority, and brought his wife and two of her slaves to his father's farm, which he managed until his majority, it was held insufficient to justify a verdict for the son against the father for services rendered during his minority. Engleman *v.* Engleman, 1 Dana (Ky.) 437.

Fabricated Documentary Evidence. — A book kept by a son, without the knowledge of his father, purporting to contain an account of his services for the father, while a member of the family, and consisting of entries evidently not made at the time they purported to be, and memoranda of alleged settlements, all made at one time, together with the son's testimony, was held not sufficient to overcome the presumption that the services were gratuitous, the father denying the existence of a contract. Enger *v.* Lofland, 100 Iowa 303, 69 N. W. 526.

73. "If a father promise to pay a son for keeping him, it is a valid debt." Harris *v.* Orr, 46 W. Va. 261, 33 S. E. 257; Riley *v.* Riley, 38 W. Va. 283, 18 S. E. 569; Plate *v.* Durst, 42 W. Va. 67, 24 S. E. 580; Davis *v.* Gallagher, 37 App. Div. 626, 55 N. Y. Supp. 1060.

74. Declarations of a parent that he might as well move to his son's house "as to hire some one to take care of him and the old woman;" and after moving, "I have to pay our board;" that he was "paying for his

b. *Surrounding Circumstances.* — The circumstances under which such a promise is made often furnish strong evidence tending to support it.[75] And a promise of any particular or specific property as compensation for support or services rendered is strong evidence of a contract.[76]

c. *Loose Declarations of Intent To Pay.* — But loose declarations, made by a parent to a child, or to third persons, expressing an intent to compensate a child for support or services rendered, are insufficient to prove a contract for compensation.[77]

C. Circumstantial Evidence. — a. *Generally.* — A contract for support of a parent by a child, or for services rendered, may be proved by circumstantial evidence, provided the circumstances relied on are so clearly proved as to be equivalent to direct and positive

boarding," "we are paying for our boarding," were held sufficient, with the attendant circumstances, to prove an express contract to pay board for himself and wife. Miller's Appeal, 100 Pa. St. 568, 45 Am. Rep. 394.

75. It must either affirmatively appear that such support or services were rendered under an express contract that they were to be paid for, or the surrounding circumstances must plainly indicate that it was the intention of both parties that there should be compensation. O'Kelly *v.* Faulkner, 92 Ga. 521, 17 S. E. 847.

Sufficient. — A promise by a sick father, who had been abandoned by his wife, made to two of his sons, that if they would support and care for him they might have a certain sum of money belonging to him, with frequent declarations to his neighbors that all of his personalty was to go to such sons, was held to clearly prove a contract. Harris *v.* Orr, 46 W. Va. 261, 33 S. E. 257.

Testimony of several witnesses that they had heard the decedent, who had been taken care of by her son-in-law for three years preceding her death, say that she wanted him well paid, that she would not stay at his house unless he consented to take pay, and asked him to make out his bill, leaving the amount to him, was held sufficient to show an agreement for compensation. Hutcheson *v.* Tucker (Miss.), 15 So. 132.

76. A promise by a parent to give his child certain property in consideration for care and nursing was held sufficient to rebut the presumption that the service of the child was gratuitous. Stewart *v.* Small, 11 Ind. App. 100, 38 N. E. 826.

77. Such declarations are only expressive of an intent to pay, and are not evidence of an agreement therefor. If he intended to pay, and often said so to the child, or to others, he would not be bound by such declarations. It must appear that he assumed a legal obligation, capable of being enforced against him. Miller's Appeal, 100 Pa. St. 568, 45 Am. Rep. 394.

Evidence that a grandfather, who had taken and supported his grandchild until he reached his majority, said that he was a good boy, that he could not get along without him, that he should have wages, and that he intended to pay him, was held not to establish a contract. Jackson *v.* Jackson, 96 Va. 165, 31 S. E. 78.

Declarations by a father living in his son's family, made to third persons, that he intended to make it right with his son some day when he sold his land, were held insufficient, being the only evidence to prove a contract for support. Traver *v.* Shiner, 65 Iowa 57, 21 N. W. 159.

Declarations of an old man that if his son would take care of him he should be well paid were held insufficient to prove a contract to pay for services naturally due from child to parent. Zimmerman *v.* Zimmerman, 129 Pa. St. 229, 18 Atl. 129, 15 Am. St. Rep. 720.

proof.[78] And there may be recovery where the circumstantial evidence relied upon is of sufficient strength to justify the belief that the parent, or those representing him, might reasonably have expected to pay for the services rendered, although no declarations on the subject were made,[79] or even if those made indicate an intent not to pay.[80]

b. *Pecuniary Condition of Parties.* — The financial condition of the parties will be considered in determining the existence of a contract for compensation for support furnished or services rendered.[81]

IX. ACTIONS FOR LOSS OF SERVICES OF CHILD

1. Presumptions and Burden of Proof. — A. NEGLIGENCE.— Allowing a child of tender years, who is unable to understand its surroundings so as to be able to appreciate danger, to be on a public

Expressions of Gratitude. — Declarations of a deceased mother that her son was good to her, giving her nearly all his wages, and that he was her main support, are evidence that she received such wages to help maintain the family in which the son made his home, and not that she understood them to be loans for which her estate was liable. *In re* Delaney's Estate, 27 Misc. 398, 58 N. Y. Supp. 924.

Where a mother, making a visit to her son, who resided in another state, had remained there some time, and died there, evidence that she said she intended to pay what was right for her board was held not evidence of a contract. Lynn *v.* Lynn, 29 Pa. St. 369.

78. *Georgia.* — O'Kelly *v.* Faulkner, 92 Ga. 521, 17 S. E. 847.

Indiana. — Williams *v.* Resener, 25 Ind. App. 132, 56 N. E. 857; Adams *v.* Adams, 23 Ind. 50.

Iowa. — McGarvy *v.* Roods, 73 Iowa 363, 35 N. W. 488.

Michigan. — Harris *v.* Harris, 106 Mich. 246, 64 N. W. 15.

Missouri. — Falls *v.* Jones, 107 Mo. App. 357, 81 S. W. 455.

Nebraska. — Bell *v.* Rice, 50 Neb. 547, 70 N. W. 25.

Virginia. — Jackson *v.* Jackson, 96 Va. 165, 31 S. E. 78.

"Circumstantial evidence, and evidence by which a contract may be implied in the absence of direct and positive evidence of an express contract, if sufficiently clear and satisfactory, may establish an express contract." But only such circumstances, clearly proved, as are equivalent to direct and positive proof, are sufficient. Pritchard *v.* Pritchard, 69 Wis. 373, 34 N. W. 506.

Such circumstances are to be found in the acts of the parties and their course of dealings with each other, and vary in each particular case. Adams *v.* Adams, 23 Ind. 50.

79. Where a stepdaughter furnished board, lodging and medicine for her imbecile stepfather, who was taken to her home by those having his property in charge, it was held that she was entitled to recover. Bell *v.* Rice, 50 Neb. 547, 70 N. W. 25.

80. A son upon attaining his majority left home, but afterward returned to his father's farm and assumed the entire control of it and worked it for nearly twelve years. He expended $1000 of his own money on improvements and more than doubled the value of the estate. Upon the son's death the father claimed to own the whole estate, and that he was indebted to the son only for the money expended by him for improvements. *Held,* that the son's estate was entitled to recover for the services rendered. Adams *v.* Adams, 23 Ind. 50.

81. The poverty of a child with whom a parent of ample means chose to make his home, in preference to any of his other children, is circumstantial evidence that the father intended to pay his board. Pritchard *v.* Pritchard, 69 Wis. 373, 34 N. W. 506.

street unattended, raises a presumption of negligence on the part of those having the child in charge.[82]

B. Discretionary Age of Child. — And where, as a matter of law, it can be said that the injured child is old enough to understand and appreciate danger it must be shown that he was in the exercise of due care at the time of the injury in order that there may be recovery.[83]

2. Evidence Admissible. — A. In General. — In an action to recover for the loss of services of a child, and for care and nursing rendered necessary by the injuries sustained, evidence as to the circumstances under which such injuries were inflicted is admissible as part of the *res gestae*.[84]

B. Extent of Injury. — a. *Generally.* — And evidence which tends to show the extent to which the parent has been subjected to trouble and expense or to loss of service of the child as a result of the injury is admissible.[85]

82. The fact that a child two years of age passes, unattended, across a public street traversed by a horse railroad is, in and of itself, necessarily *prima facie* evidence of neglect in those who have it in charge. Wright *v.* Malden & M. R. Co., 4 Allen (Mass.) 283.

In an action by a parent to recover for loss of services of a young child by reason of injuries sustained, it was held that the fact that such child, having parents living, was found on the street alone and unprotected was presumptive evidence that it was so exposed voluntarily and negligently by the parents, or those having it in charge. Glassey *v.* Hestonville, M. & F. P. R. Co., 57 Pa. St. 172; Hampton *v.* Borough, 6 Lanc. Law Rev. (Pa.) 25.

This presumption must be rebutted. Del Rossi *v.* Cooney, 208 Pa. St. 233, 57 Atl. 514.

Not Contributing Negligence of Parent. — That a boy six years old was on a railroad track near a street crossing is not proof of contributory negligence on his father's part, although it is shown that the father saw him going a short time before he was struck by a train. Johnson *v.* Chicago & N. W. R. Co., 56 Wis. 274, 14 N. W. 181.

A father is not guilty of contributory negligence in allowing his son, eleven years old, to go on the street alone, and to stroll along railroad tracks a block and a half from his home. Enright *v.* Pittsburg Junction R. Co., 204 Pa. St. 543, 54 Atl. 317. See article "Negligence."

83. Ciriack *v.* Merchants Woolen Co., 151 Mass. 152; 23 N. E. 829; Gaudet *v.* Stanfield, 182 Mass. 451, 65 N. E. 850; Baltimore & O. S. W. R. Co. *v.* Keck, 89 Ill. App. 72.

So far as civil proceedings are concerned, the law has never attempted to fix, arbitrarily, any age when an infant will be deemed either capable or incapable of exercising judgment and discretion, but courts have frequently held children of tender years to be incapable of contributory negligence, as matter of law, and refused to submit the question of such negligence to the jury. Chicago & A. R. Co. *v.* Gregory, 58 Ill. 226; Chicago W. D. R. Co. *v.* Ryan, 131 Ill. 474, 23 N. E. 385; Gavin *v.* Chicago, 97 Ill. 66, 37 Am. Rep. 99; Walters *v.* Chicago R. I. & P. R. Co., 41 Iowa 71; Mangam *v.* Brooklyn R. Co., 38 N. Y. 455, 98 Am. Dec. 66; Pennsylvania Co. *v.* James, 81 Pa. St. 194; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269; Norfolk & P. R. Co. *v.* Ormsby, 27 Gratt. (Va.) 455.

84. Illinois Cent. R. Co. *v.* Henon, 24 Ky. L. Rep. 298, 68 S. W. 456.

85. Illinois Cent. R. Co. *v.* Henon, 24 Ky. L. Rep. 298, 68 S. W. 456; Arnold *v.* Norton, 25 Conn. 92.

Damage After Suit Brought. — In an action by a father to recover for loss of service of his child resulting

b. *Value of Services in Care and Nursing.* — And also evidence as to the value of the services rendered in caring for and nursing the child is admissible, although performed by a member of the family.[86]

C. Pecuniary Condition of Parent. — The authorities are not in harmony as to whether evidence as to the pecuniary condition of a parent, suing for loss of services of his minor child, is admissible as bearing on the question of the parent's negligence in not exercising more care over the child.[87]

D. Care of Child by Parent. — The degree of care and watchfulness that a parent has exercised over a child that has been injured is a material question to be considered in an action by the

from injuries sustained by the child, he may show that the effects of such injuries continued after suit was brought. Hoover *v.* Heim, 7 Watts (Pa.) 62.

Evidence as to the cost of clothing and educating the child is incompetent, because the obligation of the parent to do this is the same after as before the injury. Birkel *v.* Chandler, 26 Wash. 241, 66 Pac. 406.

86. Where plaintiff alleges that defendant negligently and wilfully injured his minor child, and seeks to recover for loss of services and expenses in the child's care and treatment, evidence of the value of the services of the plaintiff's wife in caring for the child is admissible, there being no objection that loss in that respect is not specifically stated in the complaint. Martin *v.* Wood, 52 Hun 613, 5 N. Y. Supp. 274.

There is no presumption, in case of injury to the child, that such services are gratuitous, for which recovery cannot be had, in the absence of an express contract for compensation. Blackwell *v.* Hill, 76 Mo. App. 46. See also St. Louis S. W. R. Co. *v.* Gregory (Tex. Civ. App.), 73 S. W. 28, where the court said: "It is not necessary that the parent engage a stranger to administer medical treatment to the child, if, as in this case, the parent himself is a physician competent to perform such medical services. If he performs such services he is entitled to recover from the wrongdoer a reasonable compensation therefor, for such wrongdoer has made it necessary because of his tort."

87. In an action by a parent to recover for the death of his child, resulting from its falling into an excavation left open by defendant's negligence, evidence of the poverty of the plaintiff is not competent to show freedom from contributory negligence in not employing some one to guard and care for the child. Mayhew *v.* Burns, 103 Ind. 328, 2 N. E. 793.

Contra. — In an action to recover for the death of a child six years of age, caused by the caving in of a bank of an excavation, about which the child was playing and which was not properly guarded by the defendant city, it was held that evidence as to the pecuniary condition of the plaintiff, to show that he was unable to keep a more vigilant watch over his children, was proper. Aurora *v.* Seidelman, 34 Ill. App. 285.

And see Del Rossi *v.* Cooney, 208 Pa. St. 233, 57 Atl. 514, where evidence as to the poverty of the father of a child four years of age was considered on the question of the father's contributory negligence.

Same Rule Not Applied. — In Chicago & A. R. Co. *v.* Gregory, 58 Ill. 226, the court said: "The same rule should not be applied to persons depending upon their labor for support, and to those whose means enable the mother of the family to give a constant personal attention to the care of children, or to employ a nurse for that purpose."

parent to recover for such injury, and may be shown by either party where the question is properly before the court.[88]

E. Consent of Parent to Employment of Child. — The question of the parent's consent to the risks of the child's employment is material, and evidence thereof is not incompetent as being an uncommunicated mental status.[89]

F. Instructions From Parent to Child. — Instructions from parent to child not communicated to the employer are inadmissible in evidence against such employer in an action by the parent.[90]

G. Discretion of Child. — The tests of the capacity of a child for contributory negligence are his age, his intelligence, his ability to know and understand his surroundings and the danger to which he may be exposed.[91]

H. Emancipation of Child. — Emancipation of the child for the loss of whose services the parent seeks to recover is a valid defense to such an action.[92]

88. In an action by a father to recover for the negligent killing of his child, his contributory negligence having been pleaded in defense, it was held that he could show that his wife and son, in whose care the child was left, were accustomed to exercise the greatest care and watchfulness over it. San Antonio & A. P. R. Co. *v.* Vaughn, 5 Tex. Civ. App. 195, 23 S. W. 745.

In an action by a parent to recover for the death of a child, alleged to have been negligently caused by the defendant, on account of a defect in a railroad crossing, evidence of negligence on the part of the parent, or those having charge of the child, in allowing it to ride on an unprotected footboard of a wagon, from which it was jolted and killed, is admissible on the part of the defense to show the proximate cause of such child's death. Lake Erie & W. R. Co. *v.* Pike, 31 Ill. App. 90.

89. A parent who consents to the employment of his child in a particular occupation accepts the risks of such occupation, whether they be known to him or not. Dimmick Pipe Wks. *v.* Wood, 139 Ala. 282, 35 So. 885.

90. Where a boy fifteen years of age, with his father's consent, obtained employment in the defendant's planing mill, where he was injured while oiling the machinery, it was held that instructions from the father to the boy to do only a particular kind of work, not including that of oiling such machinery, and not communicated to the defendant, were inadmissible in an action against him by the father to recover for such injury. Sinclair *v.* Elizabethtown Mill. Co., 13 Ky. L. Rep. 120, 16 S. W. 450. See also Hamilton *v.* G. H. & S. A. Ry., 54 Tex. 556.

91. Exclusive of the question of his prudence or recklessness in meeting the danger. Bridger *v.* Ashville & S. R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653.

92. A father sued to recover for injuries sustained by his minor daughter while employed in a factory, and the defense, in support of the claim that the child had been emancipated, introduced evidence to show that her semi-weekly wages were paid to her, from which the rent of the house occupied by his family was paid; it was held that it was competent to show in rebuttal that she regularly accounted for and paid her wages to her father. Augusta Factory *v.* Barnes, 72 Ga. 217, 53 Am. Rep. 838.

Where a father drove his son from home, his general conduct toward the son implying emancipation, it was held, in a subsequent action by the father to recover for loss of the son's wages, that he could not be allowed to testify that it was not his

I. Judgment in Favor of Child. — A judgment recovered in favor of a child for injuries sustained is not admissible in evidence in an action by the parent to recover for loss of services of the child, or for care and nursing necessitated by such injuries.[93]

J. Character of Mother. — The character of the mother, in an action by her to recover the earnings of a minor child, is a material question, and subject to judicial inquiry.[94]

X. CONTRACTS, CONVEYANCES AND OTHER TRANSACTIONS BETWEEN PARENT AND CHILD.

1. In General. — A contract between parents and children, some of whom are unemancipated and all living together as members of the same family, may be inferred from circumstances.[95]

2. Presumptions and Burden of Proof. — A. In General. There is a conflict of authority as to the presumptions that the law raises with respect to voluntary conveyances and other transactions between parent and child. In some cases it is held that they deal with each other as ordinary debtor and creditor, and that in order to vitiate a contract between them fraud must be clearly proved.[96]

intention to emancipate his son. McCarthy *v.* Boston & L. R. Corp., 148 Mass. 550, 20 N. E. 182, 2 L. R. A. 608.

93. Neither the cause of action nor the parties being the same. Hooper *v.* Southern R. Co., 112 Ga. 96, 37 S. E. 165; Karr *v.* Parks, 44 Cal. 46. The maxim *res inter alios acta alteri nocere non debet* applies in such cases. Bridger *v.* Ashville & S. R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653.

94. The presumption is that she is a fit person to have custody of the minor children after the father's death, and, consequently, entitled to their services and earnings. Union News Co. *v.* Morrow, 20 Ky. L. Rep. 302, 46 S. W. 6.

Where a statute provides that the mother shall receive the earnings of the minor children in case the father neglects to provide for them, if she be of suitable character to have custody of them, her character, under such a statute, is in issue in proceedings by her to recover the earnings of the children. Eustice *v.* Plymouth Coal Co., 120 Pa. St. 299, 13 Atl. 975.

95. Where the mother held the title to land conveyed to her in trust for the children, the whole family, including the husband, living thereon and cultivating it for the benefit of the children, by whose labor farm products were produced, it was held, in an action between the children and judgment creditors of the parents to determine the ownership of such products, that if, by agreement or understanding between the parties, the land was so occupied and cultivated for the benefit of the children, some of whom were unemancipated, and those not emancipated were, with the consent of the parents, working for their own benefit, and not for their parents, then the products of their labor belonged to them, and not to the parents; and that an agreement for such a purpose could be inferred from the acts and transactions between the parents and children. Bener *v.* Edgington, 76 Iowa 105, 40 N. W. 117.

96. "Business dealings between parents and children and other near relatives are not *per se* fraudulent; they must be treated just as are the transactions between ordinary debtors and creditors, and where the *bona fides* of their transactions is attacked, the fraud must be clearly proved." *In re* Coleman's Estate,

while others hold that a voluntary conveyance from child to parent is *prima facie void*;[97] and others, that while such a conveyance is not *prima facie* void, it is liable to be so held from some particular circumstance which may indicate fraud or undue influence on the part of the donee,[98] whether parent or child.[99]

B. Conveyances From Parent to Child. — a. *Generally.* — A voluntary conveyance from parent to child is not *prima facie* void by reason of the fact of the relationship of the parties,[1] and if it is attacked on the ground of fraud or undue influence on the part of the child, the burden of proof is upon the one alleging it to show the fraud or undue influence.[2]

193 Pa. St. 605, 44 Atl. 1085; Reehling *v.* Byers, 94 Pa. St. 316; Story Eq. Jur. § 309. *Compare* Miskey's Appeal, 107 Pa. St. 611.

97. Savery *v.* King, 5 H. L. C. 627, holds that a son might give all or any part of his property to his father without consideration, but that it was incumbent on the father accepting such a benefit to satisfy the court that the son fully understood what he was doing, and that he had competent means of forming an independent judgment. See also Everitt *v.* Everitt, L. R. 10 Eq. (Eng.) 405; Prideaux *v.* Lusdale, 1 De Gex J. & S. (Eng.) 433; Bauer *v.* Bauer, 82 Md. 241, 33 Atl. 643; Whitridge *v.* Whitridge, 76 Md. 54, 24 Atl. 645.

Suspicious Circumstances. — "Unless there is something suspicious in the circumstances, or the nature and amount of the gift is such that it ought not to have been accepted, even if freely tendered, the donee will not be called upon to show that the transaction was in all respects fair and honest, and in no respect tainted by fraud or undue influence." Worrall's Appeal, 110 Pa. St. 349, 365, 1 Atl. 380, 765.

98. "Though the relation of parent and child may not necessarily and of itself alone cast a burden of proof upon the one receiving the gift or conveyance from the other, so as to bring the rule of law as to the burden of proof in cases of relations of trust and confidence into play, it is so far liable to abuse that a strong presumption of fact may arise, from circumstances of a particular transfer, which will require close scrutiny of the transaction, and cast a burden upon the grantee." Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500; Davis *v.* Dean, 66 Wis. 100, 26 N. W. 737.

All such conveyances are looked upon with suspicion by courts of equity; that is, where a confidential relation, as that of parent and child, or principal and agent, is shown to have existed at the time of the transaction, the burden is upon the beneficiary to show its fairness. Street *v.* Gess, 62 Me. 226; Trust & Guarantee Co. *v.* Hart, 31 Ont. (Can.) 414.

99. Trust & Guarantee Co. *v.* Hart, 31 Ont. (Can.) 414; Street *v.* Goss, 62 Mo. 226; Miskey's Appeal, 107 Pa. St. 611; Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500.

1. *Arkansas.* — McCulloch *v.* Campbell, 49 Ark. 367, 5 S. W. 590.

Iowa. — Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452; Chambers *v.* Brady, 100 Iowa 622, 69 N. W. 1015.

Maryland. — Bauer *v.* Bauer, 82 Md. 241, 33 Atl. 643.

Nebraska. — Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500.

Pennsylvania. — Carney *v.* Carney, 196 Pa. St. 34, 46 Atl. 264; *In re* Coleman's Estate, 193 Pa. St. 605, 44 Atl. 1085; Rechling *v.* Byers, 94 Pa. St. 316; Knowlson *v.* Fleming, 165 Pa. St. 10, 30 Atl. 519; Worrall's Appeal, 110 Pa. St. 349, 1 Atl. 380, 765.

Wisconsin. — Davis *v.* Dean, 66 Wis. 100, 26 N. W. 737.

2. Evidence Required. — Ordinarily one who seeks to set aside such a conveyance on the ground of fraud or undue influence on the part of

b. *Unjust Gift to One Child by Invalid Parent.* — If the circumstances surrounding the gift suggest fraud and undue influence, the burden is on the donee to overcome the presumption.[3]

c. *Confidential Relation Between the Parties.* — Where a confidential relation, other than that of kinship, exists between the parent and the child at the time of the transaction, the law presumes that such transaction was procured through such confidential relation, and casts upon the child the burden of proving that the parent had independent advice, or that he adopted the transaction after the influence of the relation, or equivalent circumstances, was removed.[4]

the child, has the burden of proving the fact, and by evidence which shows that the influence was so strong as to overcome the will of the grantor. Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452.

Time of Exercising Influence. It must be shown that such influence was exercised at the time the conveyance assailed was made. Herster *v.* Herster, 122 Pa. St. 239, 16 Atl. 342, 9 Am. St. Rep. 95.

Where there is nothing in the nature of the transaction suggestive of fraud or undue influence on the part of the child, the presumption as to the invalidity of such a conveyance cannot be raised, unless either the incompetency of the parent to convey, or some act of the child amounting to fraud in procuring the conveyance, is first shown. Yeakel *v.* McAtee, 156 Pa. St. 600, 27 Atl. 277.

3. Where an aged widow, much weakened by illness, conveyed property of the value of $10,000, out of a total estate of $18,000, to one of her eight children, it was held that the burden was upon the donee to prove absence of fraud and undue influence. Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500.

An aged and infirm woman, a few days before her death, and while in a prostrated and precarious condition, conveyed the bulk of her property to a young man who stood in the relation of an adopted son, having married her grandchild, and in whom she trusted, thus disinheriting her daughter and grandchildren, with whom her relations were friendly, and the circumstances of the transaction suggesting an effort on the part of the grantee to keep those most interested in ignorance of the fact that she was about to convey her property to him, it was held that the burden of proof was upon him to show absence of fraud and undue influence. "Because of the suspicious circumstances under which the conveyances were made, and the injustice which will be inflicted upon the heirs of the grantor if the conveyances are held valid, the law casts upon the grantee the burden of showing that the conveyances are untainted with undue influence or other fraud, but were the intelligent and deliberate act of the grantor." Davis *v.* Dean, 66 Wis. 100, 26 N. W. 737.

Acts of Grantee. — The suspicion of fraud and undue influence is especially strong where the grantee has taken an active part in procuring the conveyance to be made. Disch *v.* Timm, 101 Wis. 179, 77 N. W. 196.

4. Where one who for years has managed his father's business and has done all of his banking under power of attorney, draws a check in his own favor for a large amount, claiming that it is a gift to his children from his father, it will be presumed that the gift, even though freely made, was the effect of the influence induced by the confidential relationship existing, throwing upon him the burden of showing that his father had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances. Trust & Guarantee Co. *v.* Hart, 31 Ont. (Can.) 414.

Agent or Advisor. — Where the evidence showed that one of the grantees was the grantor's son-in-

d. *Irrevocable Gift, Donor Surviving Donee.* — But the fact that the gift or conveyance is irrevocable, or that the parent survives the child, does not affect the burden of proof so far as the child or his legal representatives are concerned.[5]

e. *Possession of Property by Child at Parent's Death.* — The possession of a parent's property by a child after the parent's death, the child holding the property under an alleged contract made with the parent during his lifetime, is a suspicious circumstance which is deemed sufficient to cast upon such child the burden of proving that such contract was fair and untainted with fraud.[6]

C. Conveyances From Child to Parent. — By reason of the influence that may be presumed to be exercised by a parent over a child, a voluntary conveyance from a child to a parent does not stand on the same footing as a like conveyance from parent to child,[7] and such a conveyance from a child to a parent has been

law, and also his agent and adviser, and that the other was his daughter, it was held that the burden was upon the grantees, and all persons claiming under them, except purchasers and incumbrancers for valuable consideration, without notice, to show that the transaction was absolutely fair and equitable. Street *v.* Goss, 62 Mo. 226.

It is a familiar rule of equity jurisprudence, that all transactions where there are grounds for holding that influence has been acquired and abused, or that confidence has been reposed and betrayed, will be scanned with great care. Smith *v.* Kay, 7 H. L. C. 750, 759.

"The rule that a gift obtained by a person standing in a confidential or fiduciary relation to the donor is *prima facie* void is well settled, and it has often been applied to transactions between parent and child." Samson *v.* Samson, 67 Iowa 253, 25 N. W. 233; Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500.

5. "It is not incumbent upon a child who receives a gift from a parent to prove affirmatively, in a proceeding to annul the gift, that the donor was told she might outlive the donee, and it would be a harsh rule which allowed the donor to recover the gift from the estate of the deceased child, on the ground that her legal representatives failed to make such proof." Yeakel *v.* McAtee, 156 Pa. St. 600, 27 Atl. 277.

In Miskey's Appeal, 107 Pa. St. 611, it was held that the absence of a power of revocation in a voluntary deed from son to father was a circumstance to be considered in casting the burden of proof on the father to sustain the transaction.

6. The children of the decedent were found, after the decedent's death, to have in their possession certain notes and mortgages of the decedent, which the widow, as administratrix, claimed as assets of the estate, the children claiming that the decedent, before his death, transferred such property to them in consideration of an undertaking by them to pay him, semi-annually, a certain sum during his lifetime; it was held that the burden of proof was upon such children to establish such fact. Samson *v.* Samson, 67 Iowa 253, 25 N. W. 233. See also Grey *v.* Grey, 47 N. Y. 552.

7. "Where a gift is made by a child to a parent while the paternal authority and influence still continue, it may well be that a presumption arises against the validity of such gift." Yeakel *v.* McAtee, 156 Pa. St. 600, 27 Atl. 277.

Paternal Influence. — Where a voluntary deed was made from a son to his father, under which the father took an estate valued at $70,000, with a reservation of $10,000 to the grantor's children, and nothing to his wife, and it appeared that he was under paternal influence at the time, it was held that the burden of proof was on the father to show that he

held to be *prima facie* void because of the confidential relation.[8]

had taken no advantage of his influence or knowledge, and that the transaction was fair and conscionable. Miskey's Appeal, 107 Pa. St. 611.

Gift by One in Poor Health. Where a young man, who was usually in poor health, shortly after becoming of age, while he was so ill it was believed he would not recover, for the nominal consideration of fifteen dollars executed a deed of real estate worth thirteen thousand dollars to a woman who had become a member of his father's household when the grantor was four months old, who had nursed him in infancy and sickness and instructed him when young, and who testified that as a mother her feelings for him were very strong, who also had managed his property, and in whom he confided; it was held that the burden of proof was upon her to show that the transaction was fair and honest, and that the deed was not procured by undue influence. Worrall's Appeal, 110 Pa. St. 349, 1 Atl. 380, 765.

8. "It is well-settled law that a gift or voluntary conveyance between parties standing in the confidential relation of child to parent is *prima facie* void, and can only be upheld upon proof that it was the free, voluntary and unbiased act of the person making it. . . . But a voluntary conveyance of property from a parent to a child rests upon a different principle and it is not *prima facie* void." Bauer *v.* Bauer, 82 Md. 241, 33 Atl. 643.

Strong Proof Required When Made Soon After Majority. — Prideaux *v.* Lusdale, 1 De Gex J. & S. (Eng.) 433; Whitridge *v.* Whitridge, 76 Md. 54, 24 Atl. 645. In Everitt *v.* Everitt, L. R. 10 Eq. 405, the court said: "It is very difficult indeed for any voluntary settlement made by a young lady so soon after she attains twenty-one, to stand, if she afterwards changes her mind and wishes to get rid of the fetters she has been advised to put upon herself."

Federal Courts. — This view is maintained by the English and American authorities above cited; but the federal courts have held that a voluntary conveyance from a child of full age to a parent is not *prima facie* void, on the ground of public policy growing out of the relation of the parties; not even when made near the time of the gaining of majority of such child. Jenkins *v.* Pye, 12 Pet. (U. S.) 241; Sullivan *v.* Sullivan, 23 Fed. Cas. No. 13,598.

Paternal Influence. — If the child is shown to have been under the influence or dominion of the parent at the time of the transaction, the burden of proof to sustain it is on such parent. Miskey's Appeal, 107 Pa. St. 611. And such influence or dominion on the part of the parent has been held to be presumed at or near the gaining of majority of the child making the conveyance. In Bauer *v.* Bauer, 82 Md. 241, 33 Atl. 643, the court, in speaking of the invalidity of a voluntary conveyance from child to parent, made at or near the gaining of majority of the child, said: "This is so, because a child is presumed to be under the control of paternal influence, as long as the dominion of the parent lasts, and whilst that dominion exists, it lies on the parent maintaining the gift to disprove the exercise of paternal influence, by proof that the child had independent advice or in some other way." See also Everitt *v.* Everitt, L. R. 10 Eq. 405.

The Rule, as would seem to be supported by the weight of authority, is that in all cases where the relations of the parties, or the condition of the donor, were such that an undue influence may have been exerted by the donee, the conveyance will be held *prima facie* void. Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500; Davis *v.* Dean, 66 Wis. 100, 26 N. W. 737; Worrall's Appeal, 110 Pa. St. 349, 1 Atl. 380, 765. And this rule will be applied to all transactions where a confidential relation—besides that of the relationship—is shown to have existed between the parties, as principal and agent. Samson *v.* Samson, 67 Iowa 253, 25 N. W. 233. And it is immaterial, under such circumstances, whether the conveyance is from child to parent or

D. Declarations of Deceased Testator. — Prior declarations of a deceased testator contrary to a subsequent disposition by deed are not admissible to show undue influence as to the disposition of his property by deed.[9]

3. Weight and Sufficiency of Proof. — A. Fraud, or Undue Influence. — The age and physical condition of the grantor, and the value of the property conveyed to one child, in comparison to the value of that retained for distribution among the other children, are circumstances that are given much weight in determining the question of undue influence.[10]

B. Possession by Child of Parent's Land. — The mere possession by a child of land belonging to the parent is not sufficient to raise the legal presumption that he is to occupy it without the payment of rent, although slight additional evidence may warrant such a presumption.[11]

XI. GIFTS BETWEEN PARENT AND CHILD.

1. Presumptions and Burden of Proof. — A. In General. Whenever a parent voluntarily transfers or delivers personal property to a child without reservation or explanation indicating what his intentions are with reference to the property so disposed of, the presumption is that a gift, and not a loan, was intended; and it devolves upon the parent, wherever the question as to his intent arises, to prove, by clear and satisfactory evidence, that the transaction was a loan, and not a gift.[12]

from parent to child. Street *v.* Goss, 62 Mo. 226; Trust & Guarantee Co. *v.* Hart, 31 Ont. (Can.) 414.

9. Mallow *v.* Walker, 115 Iowa 238, 88 N. W. 452.

10. Gibson *v.* Hammang, 63 Neb. 349, 88 N. W. 500. See also Worrell's Appeal, 110 Pa. St. 349, 1 Atl. 380, 765; Miskey's Appeal, 107 Pa. St. 611.

The Relationship. — But love and affection between parent and child, arising from the relationship, and resulting in a conveyance of property from the parent to such child by reason of the influence of such affection, is not sufficient to avoid the conveyance. Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928.

11. Oakes *v.* Oakes, 16 Ill. 106.

12. Hooe *v.* Harrison, 11 Ala. 499; Nichols *v.* Edwards, 16 Pick. (Mass.) 62; Henry *v.* Harbison, 23 Ark. 25; Falconer *v.* Holland, 5 Smed. & M. (Miss.) 689.

Where a father, without explanation, sent a slave to the house of his daughter, who had been a long time married, permitting such slave to remain until the parent's death, it was held that the law would presume that a gift was intended, but that the presumption was not so strong as it would have been if the daughter had been recently married. Merriwether *v.* Eames, 17 Ala. 330.

Where personal property, by permission of the parent, goes into the possession of his daughter upon her marriage, or afterward, and remains for some years, it will be construed as a gift, in the absence of express conditions attached to the delivery at the time. Carter *v.* Buchanan, 9 Ga. 539.

The presumption arises without regard to the age of the child or the surrounding conditions at the time of delivery; but it applies only to personal estate that has been voluntarily surrendered by the parent. Hugus *v.* Walker, 12 Pa. St. 173; Cox *v.* Cox, 26 Pa. St. 375; Harri-

B. Where Child Is of Tender Years. — Where a gift is made by a parent to a child of tender years, necessarily incapable of exercising discretion in the matter of acceptance of such gift, the law will presume acceptance on the part of the child, provided it clearly appears that such gift was beneficial to the child.[13]

C. At or Near Date of Marriage. — Where the property is transferred or delivered at or near the date of marriage of the child receiving it, without explanation or qualifying statements, a strong presumption arises that it was intended as a gift, and not a loan.[14]

D. Becoming Surety for Child. — Where a parent becomes surety for a child, merely guaranteeing his obligations to pay, before conveyance, the purchase price of property purchased by the child, there is no presumption that the parent was to pay the purchase price of such property as a gift to the child.[15]

E. Purchase by Parent in Name of Child. — The doctrine of resulting or presumptive trusts does not arise in favor of a parent who purchases property in the name of a child.[16]

son *v.* Harrison, 36 W. Va. 556, 15 S. E. 87.

At or Near Time of Gaining Majority. — The delivery of property to a child, by the parent, at or near the time when such child gains his majority, and allowing the child to retain possession of it for some length of time, treating it as his own, without interference from the parent, raises a presumption of a gift that can be rebutted only by express evidence that the transaction was a loan. Hollowel *v.* Skinner, 26 N. C. 165. See article "Gifts," Vol. VI.

13. Davis *v.* Garrett, 91 Tenn. 147, 18 S. W. 113, holding acceptance of a gift from a parent to a child seven years of age to be a presumption of law, it appearing that such acceptance was beneficial to the child. See article "Gifts," Vol. VI.

14. *Alabama.* — Hooe *v.* Harrison, 11 Ala. 499; Caldwell *v.* Pickens, 39 Ala. 514.

Arkansas. — Henry *v.* Harbison, 23 Ark. 25.

Massachusetts. — Nichols *v.* Edwards, 16 Pick. 62.

Missouri. — Mulliken *v.* Greer, 5 Mo. 489; Martin *v.* Martin, 13 Mo. 37.

Nebraska. — Johnson *v.* Ghost, 11 Neb. 414, 8 N. W. 391.

New Jersey. — Betts *v.* Francis, 30 N. J. L. 152.

South Carolina. — Bell *v.* Strother, 3 McCord 207; McCluney *v.* Lockhart, 4 McCord 251; Edings *v.* Whaley, 1 Rich. Eq. 301; Davis *v.* Duncan, 1 McCord 213.

Tennessee. — Wade *v.* Green, 3 Humph. 547.

"The time at which the property was sent may strengthen or weaken the presumption. If sent home with the child immediately on the marriage it is almost conclusive. If a long time after, still the presumption may arise, although it is not so conclusive." Henry *v.* Harbison, 23 Ark. 25; Merriwether *v.* Eames, 17 Ala. 330.

Strongest Possible Presumption. "The case of the furniture of a house seems to raise the strongest possible presumption of a gift—much stronger than putting the son in possession of a horse or a slave." Betts *v.* Francis, 30 N. J. L. 152. See article "Gifts," Vol. VI.

15. Where a father signed a bond to secure the purchase price of property purchased by his son, no conveyance thereof having been made, it was held that there was no presumption that the father was to pay such purchase price as a gift to the son. Smith *v.* Smith, 40 N. C. 34.

16. On a purchase of land by a father in the name of the son, a trust will not result in favor of the father unless there be other evidence to rebut the presumption of a gift or

F. Possession by Child of Parent's Property. — a. *Real Estate.* — A parent's intention to give real estate to a child will not be presumed from the fact that the child has possession of it with the assent of the parent.[17]

b. *Personal Estate.* — Independent of statutory provisions, title to personal property originally belonging to a parent may become perfected in the child by continuous and uncontrolled possession and use thereof by the child, with the knowledge and assent of the parent.[18]

2. Evidence Admissible. — A. Declarations of Parent. Where a parent delivers or transfers possession of personal property to a child, his declarations made at or near the time of the transaction, explaining his intention with reference to the property, are admissible in evidence on the question of title to such property.[19]

advancement arising from the relation of parent and child. Betts *v.* Francis, 30 N. J. L. 152; Smith *v.* Smith, 40 N. C. 34.

17. Edings *v.* Whaley, 1 Rich. Eq. (S. C.) 301.

Nor will a gift be presumed, in the absence of other evidence, where the child, with the assent of the parent, goes into possession of the parent's real estate, making extensive improvements thereon. Hugus *v.* Walker, 12 Pa. St. 173; Cox *v.* Cox, 26 Pa. St. 375; Harrison *v.* Harrison, 36 W. Va. 556, 15 S. E. 87.

Georgia Statute. — In Georgia a statue provides that a specified period of exclusive occupancy of a parent's real estate by a child, without the payment of rent, shall create a conclusive presumption of a gift from the parent to the child of the real estate so occupied.

All of the requirements of such a statute must be complied with in order to perfect title in the child. The occupancy must be continuous and exclusive, without the payment of rent, and without alienation for the full statutory period. Thus, where a statute created a conclusive presumption of a gift, by exclusive possession without paying rent, for the period of seven years, and a son in adverse possession of land of his father, and without the payment of rent, conveyed it to his wife and children before the seven years had expired, and continued in possession, with his family, during the remainder of the term, it was held that the father was not divested of title. Johnson *v.* Griffin, 80 Ga. 551, 7 S. E. 94.

Full Statutory Time. — Under a statute providing for a presumptive gift of land of a parent to a child who should hold exclusive possession of it for seven years without paying rent, where the father died before such period had expired from the time his son began such possession, it was held that the son's title was not perfected. McKee *v.* McKee, 48 Ga. 332.

18. *Alabama.* — Pharis *v.* Leachman, 20 Ala. 662; Hill *v.* Duke, 6 Ala. 259.

Georgia. — Carter *v.* Buchanan, 9 Ga. 539.

Mississippi. — Falconer *v.* Holland, 5 Smed. & Md. 689.

Missouri. — Martin *v.* Martin, 13 Mo. 36.

North Carolina. — Hollowel *v.* Skinner, 26 N. C. 165.

South Carolina. — Davis *v.* Duncan, 1 McCord 213.

The period prescribed by the statute of limitations has been held a sufficient length of time for raising the presumption of a gift. Edings *v.* Whaley, 1 Rich. Eq. (S. C.) 301.

19. The declarations of a parent made at or about the time of sending property to a child, at or near the date of marriage of such child, and explanatory of his purpose in so doing, are competent evidence on the question as to his intent to make a gift or a loan of the property. Caldwell *v.* Pickens, 39 Ala. 514; Powell

B. Usages of Parent. — Where it is shown that it was a custom or practice with a parent to give or loan property to his children at any particular time, as at marriage, evidence of such gifts or loans to other children is admissible as bearing on the question of the parent's intent in a particular case.[20]

C. Testimony of Child. — A child who has received property from a parent on the occasion of his marriage is competent to testify as to the nature of the transaction, and whether or not it was a loan or a gift, however suspicious may be the circumstances under which the testimony is offered.[21]

3. Rebutting Evidence. — A. In General. — The presumption that the transfer or delivery of property by a parent to a child was

v. Olds, 9 Ala. 861; Miller *v.* Eatman, 11 Ala. 609.

Other Declarations. — On the question of the gift of a slave to a child by a deceased parent, evidence that he declared, when making similar gifts to other children, that he would not again make such gifts to his daughters at marriage, and that whatever advancements he made should be loans, was held competent. Smith *v.* Montgomery, 5 T. B. Mon. (Ky.) 502.

It has been held that declarations of the parent explanatory of his purpose in transferring property to a child are not admissible, unless made to the child personally, or to some other person who communicated them to the child within a reasonably short period of time. Watson *v.* Kennedy, 3 Strob. Eq. (S. C.) 1.

Written Declarations. — Where a parent, before sending property to his son-in-law, declared it to be a loan, and made his will at or near the same time, and while the property was still in his possession, in which he made the same declaration, it was held that the will was competent evidence on the question of intent of the parent. Miller *v.* Eatman, 11 Ala. 609.

20. On the question whether a parent gave or loaned slaves to a married daughter, evidence of a general custom or practice of the parent to loan, and not to give, slaves to his children when they married, was held competent. Lockett *v.* Mims, 27 Ga. 207.

On the question whether a father had given or loaned a slave to his daughter at her marriage, evidence that he had given similar property to his other daughters when they were married was held competent. Smith *v.* Montgomery, 5 T. B. Mon. (Ky.) 502.

On the question whether a gift to a child was intended by a deceased parent, evidence of gifts to other children was held admissible. Brock *v.* Brock, 92 Va. 173, 23 S. E. 224.

Contra. — On the question as to whether a loan or a gift was intended, where property had been sent to a daughter by the parent on the occasion of her marriage, evidence as to what had been the practice with the other daughters when they were married was held incompetent. Adams *v.* Hayes, 24 N. C. 361.

Evidence that it was a custom among old French settlers to give their farms to their eldest sons was held inadmissible in an action between parties belonging to this class of citizens for the purpose of establishing a gift, there being no direct evidence of such gifts. Gilman *v.* Riopelle, 18 Mich. 145. The court said: "It is plain that the frequency of the practice would not warrant an inference of a similar gift in any other case where no direct evidence of it had been given."

21. Where a son, who had received slaves from his parents at the date of his marriage, became financially embarrassed, it was held that his testimony that such slaves were intended as a loan was admissible in evidence for what it was worth in an action by his creditors. Watson *v.* Kennedy, 3 Strob. Eq. (S. C.) 1.

intended as a gift may be rebutted by proof that the parent, at the time of delivery, expressly declared the property to be a loan.[22]

B. Agreements Between the Parties. — An agreement entered into between the parent and the child at the time of, or subsequent to, the transfer or delivery of the property, and providing for the future ownership of such property, or for the manner of executing a conveyance thereof, rebuts the presumption of a gift of the property.[23]

C. Admissions of Child. — An admission by a child that the property was intended as a loan fully rebuts the presumption of a gift.[24]

XII. AGENCY OF CHILD FOR PARENT.

1. Presumptions and Burden of Proof. — A. In General. There is no presumption that a child is the agent of the parent.[25]

22. Stewart *v.* Cheatham, 3 Yerg. (Tenn.) 60, holding sufficient to rebut the presumption of a gift, a declaration by the father, made at the time of delivering a slave to his daughter and son-in-law at their marriage, that such slave was to be a loan.

"The declaration [that the intention was not a gift] should be open and clear, and not left to be inferred from doubtful or ambiguous circumstances, which the donor might avail himself of or suppress at his pleasure." Miller *v.* Eatman, 11 Ala. 613.

It must be made contemporaneously with the transfer or delivery of the property. Caldwell *v.* Pickens, 39 Ala. 514.

23. A father and son-in-law, upon the marriage of the latter, agreed that certain slaves that had been delivered to the son-in-law were to be the property of the wife, to be secured by deed of trust for her and her children; it was held that such an agreement repelled the presumption of a gift of the property to the son-in-law; and that a subsequent deed, executed in pursuance of such agreement, vested the legal title to the property in the trustee, as against the son-in-law. Gunn *v.* Barrow, 17 Ala. 743.

Must Be Express. — In a suit by a son against his father's estate it was held that money advanced by the father to the son prior to and after gaining his majority, for the purpose of paying his debts, could not be pleaded in set-off, in the absence of an understanding that such money was to be refunded. Thurber *v.* Sprague, 17 R. I. 634, 24 Atl. 48.

24. Rich *v.* Mobley, 33 Ga. 85, holding the presumption of a gift of personal property from father to daughter at her marriage completely overcome and destroyed by a declaration of the son-in-law that such property was a loan.

Where slaves were transferred by a mother to her son-in-law at his marriage, and possession thereof subsequently resumed by the mother and retained by her for a number of years, it was held, in an action against the son by his creditors, that the resumption of possession by the mother, and the testimony of the son-in-law that the transfer to him was a loan, sufficiently rebutted the presumption of a gift. Watson *v.* Kennedy, 3 Strob. Eq. (S. C.) 1.

In Writing. — And the presumption may be rebutted by an instrument in writing, made at or near the time of delivery of the property, and signed by the child, acknowledging the property to be a loan. Nichols *v.* Edwards, 16 Pick. (Mass.) 62.

25. Ritch *v.* Smith, 82 N. Y. 627.

Not even for the purchase of necessaries where the child lives at home with, and is supported by, the parent. Peacock *v.* Linton, 22 R. I. 328, 47 Atl. 887.

The burden of proving the existence of such an agency gen-

B. Continuance of Agency of Child. — But where the agency or authority of the child to bind the parent by contract is shown once to have existed, it is presumed to continue until the contrary is shown.[26]

2. Evidence Admissible. — A. Dealings of the Parties. — The authority of a child to bind the parent may be proved by showing the conduct or course of dealings of the parties in similar transactions with third persons.[27]

B. Declarations of Child. — And where the agency of the child to purchase goods on the credit of the parent is once established, the declarations of the child with reference to such purchases made at the time of purchasing, are admissible in evidence in actions against the parent for the price of the goods, as part of the *res gestae*.[28]

3. Weight and Sufficiency of Proof. — A. As To Necessaries. The amount of evidence that may be required to prove the parent's authority for the purchase of goods by a minor child often depends upon the character of the goods purchased.[29]

erally rests upon them who allege it. White *v.* Mann, 110 Ind. 74, 10 N. E. 629.

26. Where it was shown that the son had purchased goods on his father's credit, by permission of the latter, it was held that the fact that the son had left the father did not prevent a recovery against the father by one who had trusted the son for goods, acting on the faith of the agency, and without notice of the change in the relation of the parties, or circumstances to put him upon inquiry. Murphy *v.* Ottenheimer, 84 Ill. 39, 25 Am. Rep. 424.

The authority of the son to bind the father for goods purchased being shown to have once existed, it was held that the lapse of fifteen months would not overcome the presumption of the continuance of such authority, so as to discharge the father from liability for goods subsequently purchased, where it appeared that, during such time, the son was absent from the place where the accounts were contracted by him. McKenzie *v.* Stevens, 19 Ala. 691.

27. "To prove the authority of an agent in a particular transaction it is competent for the other party under certain limitations to give evidence of his conduct and dealings in other contemporaneous affairs of the principal from which an agency may be inferred." Cobb *v.* Lunt, 4 Me. 503; Wilkes *v.* McClung, 32 Ga. 507.

If the parent pays without objection, it is held to be equivalent to a recognition by him of the child's authority to bind him in similar transactions. McKenzie *v.* Stevens, 19 Ala. 691; Bailey *v.* King, 41 Conn. 365; Bryan *v.* Jackson, 4 Conn. 288; Murphy *v.* Ottenheimer, 84 Ill. 39, 25 Am. Rep. 424.

Nor is such evidence restricted to the acts of the parent in allowing the child to purchase goods of a plaintiff in a particular action against such parent. On the contrary, it is competent to establish the parent's liability in a particular action by showing the general practice or habit of the child in purchasing goods, on the credit of the parent, of the different merchants of a particular locality, and the habit or practice of such parent in paying therefor. Fowlkes *v.* Baker, 29 Tex. 135, 94 Am. Dec. 270.

"Presumptions from a man's conduct operate in the nature of admissions for or against him. It is to be presumed that a man's actions and representations correspond to the truth." Wilkes *v.* McClung, 32 Ga. 507; Starkie on Ev. § 1253.

28. McKenzie *v.* Stevens, 19 Ala. 691; Cobb *v.* Lunt, 4 Me. 503.

29. Where the evidence showed that the defendant's minor son had

B. Where Necessaries Are Not Involved. — And where a purchase of goods other than necessaries has been made by the child, on the credit of the parent, the parent will be held liable therefor if the child has made purchases for him before of the same person, with the parent's consent, and he knows of such purchase on his credit, and remains silent for an unreasonable length of time.[30]

C. Supposition That Child Had Authority From Parent. But a parent cannot be held liable on his presumed authority to the child to make contracts on the credit of the parent, for the benefit of the parent's property; and one who makes repairs on such property on the presumption that the child had authority to order them acts at his peril.[31]

XIII. TORTS OF CHILD.

1. Presumptions and Burden of Proof. — A. Agency of Child. There is no presumption that a child is the agent of the parent by reason of the fact of the relationship merely;[32] and, generally, the burden of proving such agency is upon him who alleges it.[33]

been in the habit of purchasing supplies, in his father's name, at various stores in the locality in which the plaintiff did business, the defendant regularly paying therefor without objection, it was held that these facts were sufficient to prove the son's authority to purchase of the plaintiff. "The question, whether the articles purchased by the minor are necessaries or not, becomes important only as it regulates the amount of evidence necessary to establish the father's liability. The authority of the parent to make the purchases must be proved in the one case, and in the other it is inferred, unless rebutted by circumstances showing that the parent had supplied the infant himself, or was ready to supply him." Fowlkes *v.* Baker, 29 Tex. 135, 94 Am. Dec. 270.

30. In Thayer *v.* White, 12 Metc. (Mass.) 343, the defendant's son, who on several occasions, with the defendant's express consent, had bought goods of the plaintiff in the name and on the credit of the defendant, again bought goods of the plaintiff on a term of credit, the plaintiff charging them to the defendant, immediately informing the defendant of the transaction in writing, stating that he supposed it was correct, but thought it proper to give him notice, to which the defendant made no reply. *Held,* in an action to recover for the goods, that the jury were warranted in inferring, from the defendant's silence, his consent to the transaction.

31. Where a wagon belonging to the parent had been sent by a child to a carriage builder to be sold, upon which the builder made certain repairs, presuming that the child had authority to order them, it was held that the builder could not recover therefor, the only evidence being his testimony that he presumed a man's son had authority, and it appearing that if any one ordered such repairs it was the son. Walsh *v.* Curley, 16 N. Y. Supp. 871.

It might be different, however, in case of food or other care supplied to a dumb animal of the parents, left in the plaintiff's charge by the child. White *v.* Edgman, 1 Tenn. 17.

32. Peacock *v.* Linton, 22 R. I. 328, 47 Atl. 887; White *v.* Mann, 110 Ind. 74, 10 N. E. 629; Ritch *v.* Smith, 82 N. Y. 627.

33. White *v.* Mann, 110 Ind. 74, 10 N. E. 629.

Burden on the Parent. — "The presumption is that a minor child, living with his father, and using his team and conveyance in and about the business of such father, is acting on his behalf and upon his directions," until the contrary is made

B. Knowledge of Parent of Prior Acts of Child. — Where it is sought to charge a parent with liability for damages resulting from a tortious act of his minor child, living with the parent, evidence is admissible to show what the prior habits of the child were with reference to the commission of the act complained of; and it may be shown, in such an action, that the child had been guilty of such acts before, with the parent's knowledge.[34]

to appear by evidence. Gerhardt *v.* Swaty, 57 Wis. 24, 14 N. W. 851.

"This fact [use of father's team by child, in father's business] established, and the burden to show that his son was not his servant is imposed upon the father." Schaefer *v.* Osterbrink, 67 Wis. 495, 30 N. W. 922, 58 Am. Rep. 875.

When young minor children commit a tortious act with the knowledge or implied approval of the parent, and for which the parent is liable in damages as a matter of law, it is not necessary to prove that such children were the agents of the parent, his liability in such cases being founded on his presumed power of parental control over his children, and his failure to prevent them from doing the act complained of when it was within his power to have done so. But, apart from these exceptional aspects of the question of proof, it is necessary to show the conferring of authority from the parent to the child to perform some act for the parent, within the scope of which is the tort alleged. Kumba *v.* Gilham, 103 Wis. 312, 79 N. W. 325.

34. Where a horse had been frightened by the acts of the defendant's minor children, by shouting and firing pistols on the defendant's premises when the plaintiff was passing, it was held, in an action for damages occasioned thereby, that it was proper to show that the children had previously done such acts, and sometimes in their father's presence. Hoverson *v.* Noker, 60 Wis. 511, 19 N. W. 382, 50 Am. Rep. 381.

Proof of Parent's Knowledge of Acts of Child. — In an action against a parent to recover for injuries inflicted by his minor child through the reckless use of a gun, where there was evidence tending to show that the parent had knowledge of similar prior acts of the child, it was held that evidence as to his prior reckless acts with such gun was properly admitted. Johnson *v.* Glidden, 11 S. D. 237, 76 N. W. 933.

PAROL AGREEMENT.—See Assignments; Limitation of Actions; Mortgages.

PAROL EVIDENCE.

By J. A. and H. C. Joyce.

I. GENERAL RULE.

In defining the parol evidence rule it has been broadly stated that when any judgment of any court, or any judicial or official proceeding, or any contract, agreement, grant or other disposition of property has been reduced to a document or series of documents, parol evidence is inadmissible to contradict, vary, alter or add to the contents of such document or documents.[1] This comprehensive statement, it will be observed, not only includes those cases of contracts, agreements or other undertakings into which parties have voluntarily entered, but also those cases of judicial and official records or documents which are required by law to be kept, and which rest upon a somewhat different basis than the former, as will be seen hereafter.

II. CONTRACTS OR OTHER VOLUNTARY WRITINGS.

1. General Rules and Principles. — A. GENERAL RULE. — Where parties have entered into a contract or agreement which has been reduced to a writing, it is a general rule that in the absence of fraud or mistake,[2] if the writing is complete upon its face and unambiguous,[3] parol evidence is not admissible to contradict, vary,

1. Stephens' Digest of the Law of Evidence, Article 90.

2. *Alabama.* — Dexter *v.* Ohlander, 89 Ala. 262, 7 So. 115.

California. — Harrison *v.* McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; Tyler *v.* Stone, 81 Cal. 236, 22 Pac. 598.

Georgia. — Liverpool & L. & G. Ins. Co. *v.* Morris, 79 Ga. 666, 5 S. E. 125.

Illinois. — Flower *v.* Brunbach, 30 Ill. App. 294; Union Nat. Bank *v.* International Bank, 22 Ill. App. 652.

Kansas. — Chicago B. & Q. R. Co. *v.* Imhoff, 3 Kan. App. 765, 45 Pac. 627.

Kentucky. — Vansant *v.* Runyon, 19 Ky. L. Rep. 1981, 44 S. W. 949.

Louisiana. — St. Landry State Bank *v.* Meyers, 52 La. Ann. 1769, 28 So. 136.

Michigan. — Smith *v.* Walker, 57 Mich. 456, 22 N. W. 267.

Missouri. — Sims *v.* Greenfield & N. R. Co., 102 Mo. App. 29, 74 S. W. 421; Procter *v.* Loomis, 35 Mo. App. 482.

Nebraska. — Martens *v.* Pittock, 3 Neb. Unof. 770, 92 N. W. 1038; McLaughlin *v.* Equitable L. Assur. Soc., 38 Neb. 725, 57 N. W. 557.

New Jersey. — Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380; Ellison *v.* Gray, 55 N. J. Eq. 581, 37 Atl. 1018, 38 Atl. 424; Leslie *v.* Leslie, 50 N. J. Eq. 155, 24 Atl. 1029; Society for Establishing Useful Manufactures *v.* Haight, 1 N. J. Eq. 393.

New York. — Strong *v.* Waters, 80 Hun 73, 61 N. Y. St. 807, 30 N. Y. Supp. 64.

Ohio. — Eleventh Street Church of Christ *v.* Pennington, 10 Ohio Cir. Ct. 408, 10 O. C. D. 74.

Pennsylvania. — Sidney School Furniture Co. *v.* Warsaw School Dist., 130 Pa. St. 76, 18 Atl. 604; Butler *v.* Keller, 19 Pa. Super. Ct. 472.

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

Texas. — Moore *v.* Giesecke, 76 Tex. 543, 13 S. W. 290; Cotton States Bldg. Co. *v.* Rawlins (Tex. Civ. App.), 62 S. W. 805; Willis *v.* Byars, 2 Tex. Civ. App. 134, 21 S. W. 320.

Utah. — Haskins *v.* Dern, 19 Utah 89, 56 Pac. 953.

Wisconsin. — Coman *v.* Wunderlich, 122 Wis. 138, 99 N. W. 612.

3. *United States.* — Kessler *v.* Perilloux, 132 Fed. 903, 66 C. C. A. 113; Cold Blast Transp. Co. *v.* Kan-

alter, add to or detract from the terms of the instrument.[4]

B. Rule in Pennsylvania. — In the earlier cases in Pennsylvania it was decided that the parol evidence rule did not exist in

sas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; Blake *v.* Pine Mountain Iron & C. Co., 76 Fed. 624, 43 U. S. App. 490; Sheffield *v.* Page, 1 Sprague 285, 21 Fed. Cas. No. 12,743.

Alabama. — Pierce *v.* Tidwell, 81 Ala. 299, 2 So. 15.

Arkansas. — Moore *v.* Terry, 66 Ark. 393, 50 S. W. 998.

Georgia. — Heard *v.* Tappan, 116 Ga. 930, 43 S. E. 375; Foote & Davies Co. *v.* Malony, 115 Ga. 985, 42 S. E. 413; Maxwell *v.* Willingham, 101 Ga. 55, 28 S. E. 672.

Idaho. — Tyson *v.* Neill, 8 Idaho 603, 70 Pac. 790.

Illinois. — Rector *v.* Hartford Deposit Co., 190 Ill. 380, 60 N. E. 528, *affirming* 92 Ill. App. 175; Telluride Power Transmission Co. *v.* Crane Co., 103 Ill. App. 647; Sexton *v.* Barrie, 102 Ill. App. 586; Wolsey *v.* Neeley, 46 Ill. App. 387; Kemp *v.* Freeman, 42 Ill. App. 500.

Indiana. — Consolidated Coal & L. Co. *v.* Mercer, 16 Ind. App. 504, 44 N. E. 1005.

Iowa. — Warbasse *v.* Card, 74 Iowa 306, 37 N. W. 383.

Kansas. — Rose *v.* Lanyon Zinc Co., 68 Kan. 126, 74 Pac. 625; Atchison, T. & S. F. R. Co. *v.* Truskett, 67 Kan. 26, 72 Pac. 562.

Massachusetts. — Worthington *v.* Plymouth Co. R. Co., 168 Mass. 474, 47 N. E. 403.

Michigan. — Hallwood Cash Register Co. *v.* Millard, 127 Mich. 316, 86 N. W. 833; Crane *v.* Bayley, 126 Mich. 323, 85 N. W. 874.

Missouri. — Halliday *v.* Lesh, 85 Mo. App. 285.

Nebraska. — Agnew *v.* Montgomery, 99 N. W. 820.

New Jersey. — Commonwealth Roofing Co. *v.* Palmer Leather Co., 67 N. J. L. 566, 52 Atl. 389; Van Horn *v.* Van Horn, 49 N. J. Eq. 327, 23 Atl. 1079.

New York. — Thompson *v.* Erie R. Co., 96 App. Div. 539, 89 N. Y. Supp. 92; Hand *v.* Miller, 58 App. Div. 126, 68 N. Y. Supp. 531; Townsley *v.* Bankers L. Ins. Co. of City of New York, 56 App. Div. 232, 67 N. Y. Supp. 664; Ellis *v.* Seaman, 23 Misc. 758, 50 N. Y. Supp. 685; Smith *v.* Dessar, 14 Misc. 638, 35 N. Y. Supp. 1117.

Oklahoma. — Liverpool L. & G. Ins. Co. *v.* Richardson Lumb. Co., 11 Okla. 579, 69 Pac. 936, *affirmed* 11 Okla. 585, 69 Pac. 938.

Pennsylvania. — Fry *v.* National Glass Co., 207 Pa. St. 505, 56 Atl. 1063; North *v.* Williams, 120 Pa. St. 109, 13 Atl. 723, 6 Am. St. Rep. 695.

South Carolina. — Burwell & Dunn Co. *v.* Chapman, 59 S. C. 581, 38 S. E. 222; Carolina C. G. & C. R. Co. *v.* Seigler, 24 S. C. 124.

South Dakota. — Strunk *v.* Smith, 8 S. D. 407, 66 N. W. 926.

Virginia. — Consumers Ice Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879.

West Virginia. — Martin *v.* Monongahela R. Co., 48 W. Va. 542, 37 S. E. 563; Long *v.* Perine, 41 W. Va. 314, 23 S. E. 611.

Wisconsin. — Johnson *v.* Pugh, 110 Wis. 167, 85 N. W. 641.

4. *England.* — Goss *v.* Lord Nugent, 5 B. & A. 58.

Canada. — Bury *v.* Murray, 24 Can. S. C. 77; Dornville *v.* Crawford, N. B. Eq. Cas. 122; Bank of Upper Canada *v.* Boulton, 7 U. C. Q. B. 235.

United States. — Van Winkle *v.* Crowell, 146 U. S. 42; General Elec. Co. *v.* Gill, 129 Fed. 349, *affirming* 127 Fed. 241; Arnold *v.* Scharbauer, 118 Fed. 1008; Sigafus *v.* Porter, 84 Fed. 430, 28 C. C. A. 443; Hines Lumb. Co. *v.* Alley, 73 Fed. 603, 43 U. S. App. 169; American Elec. Const. Co. *v.* Consumers Gas Co., 47 Fed. 43.

Alabama. — Lakeside Land Co. *v.* Dromgoole, 89 Ala. 505, 7 So. 444; Avery *v.* Miller, 86 Ala. 495, 6 So. 38; Beard *v.* White, 1 Ala. 436.

Arizona. — Burmister & Sons Co. v. Empire Gold M. & M. Co., 71 Pac. 961.

Arkansas. — Colonial & U. S. Mtge. Co. *v.* Jeter, 71 Ark. 185, 71 S. W. 945.

California. — Bryan *v.* Idaho Quartz Min. Co., 73 Cal. 249, 14 Pac.

859; Frink *v.* Roe, 70 Cal. 296, 316, 11 Pac. 820.

Colorado. — St. Vrain Stone Co. *v.* Denver U. & P. R. Co., 18 Colo. 211, 32 Pac. 827; Oil Creek Gold Min. Co. *v.* Fairbanks, Morse & Co., 19 Colo. App. 142, 74 Pac. 543; Hardwick *v.* McClurg, 16 Colo. App. 354, 65 Pac. 405, 408; McIntosh-Huntington Co. *v.* Rice, 13 Colo. App. 393, 58 Pac. 358.

Connecticut. — White Sew. Mach. Co. *v.* Feeley, 72 Conn. 181, 43 Atl. 36; Galpin *v.* Atwater, 29 Conn. 93.

Delaware. — Unruh *v.* Taylor, 2 Pen. 42, 43 Atl. 515; Penn. Steel Castings & Mach. Co. *v.* Willmington Malleable Iron Co., 1 Pen. 337, 41 Atl. 236.

District of Columbia. — Owens *v.* Wilkinson, 20 App. Cas. D. C. 51.

Florida. — Robinson *v.* Hyer, 35 Fla. 544, 17 So. 745.

Georgia. — Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; Polhill *v.* Brown, 84 Ga. 338, 10 S. E. 921.

Idaho. — Jacobs *v.* Shenon, 3 Idaho 274, 29 Pac 44.

Illinois. — Chambers *v.* Prewitt, 172 Ill. 615, 50 N. E. 145, *affirming* 71 Ill. App. 119; Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213, *affirming* 68 Ill. App. 592; Cameron *v.* Sexton, 110 Ill. App. 381; Fidelity F. Ins. Co. *v.* Illinois Trust & Sav. Bank, 110 Ill. App. 92; Telluride Power Transmission Co. *v.* Crane Co., 103 Ill. App. 647; Naugle *v.* Harreld, 100 Ill. App. 524; Onyx Soda Fountain Co. *v.* Druggists Circular Co., 84 Ill. App. 666; Covel *v.* Benjamin, 35 Ill. App. 297.

Indiana. — Hostetter *v.* Auman, 119 Ind. 7, 20 N. E. 506; Fordice *v.* Scribner, 108 Ind. 85, 9 N. E. 122; Sage *v.* Jones, 47 Ind. 122.

Indian Territory. — Fox *v.* Tyler, 3 Ind. Ter. 1, 53 S. W. 462.

Iowa. — Meader *v.* Allen, 110 Iowa 588, 81 N. W. 799; McEnery *v.* McEnery, 110 Iowa 718, 80 N. W. 1071; Fawkner *v.* Smith Wall Paper Co., 88 Iowa 169, 55 N. W. 200, 45 Am. St. Rep. 230; Kramer *v.* Ricke, 70 Iowa 535, 25 N. W. 278.

Kansas. — Rose *v.* Lanyon Zinc Co., 68 Kan. 126, 74 Pac. 625; Cross *v.* Thompson, 50 Kan. 627, 32 Pac. 357; Kansas Refrigerator Co. *v.* Pert, 3 Kan. App. 364, 42 Pac. 943; Richardson *v.* Great Western Mfg. Co., 3 Kan. App. 445, 43 Pac. 809.

Kentucky. — National Mut. Ben. Ass'n *v.* Heckman, 86 Ky. 254, 5 S. W. 565; Cain *v.* Flynn, 4 Dana 499.

Louisiana. — Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 35 So. 539; Arguimbau *v.* Germania Ins. Co., 106 La. 139, 30 So. 148; Gomila *v.* Hibernia Ins. Co., 40 La. Ann. 553, 4 So. 490.

Maine. — Millett *v.* Marston, 62 Me. 477; Bryant *v.* Mansfield, 22 Me. 360.

Maryland. — Ecker *v.* McAllister, 45 Md. 290.

Massachusetts. — Neale *v.* American Elec. Vehicle Co., 186 Mass. 303, 71 N. E. 566; Stillings *v.* Timmins, 152 Mass. 147, 25 N. E. 50; Wakefield *v.* Stedman, 12 Pick. 562.

Michigan. — McLeod *v.* Hunt, 128 Mich. 124, 87 N. W. 101; Mouat *v.* Montague, 122 Mich. 334, 81 N. W. 112; Highstone *v.* Burdette, 61 Mich. 54, 27 N. W. 852; Gage *v.* Meyers, 59 Mich. 300, 26 N. W. 522.

Minnesota. — Mueller *v.* Barge, 54 Minn. 314, 56 N. W. 36; Gasper *v.* Heimbach, 53 Minn. 414, 55 N. W. 559; Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1.

Mississippi. — Kerr *v.* Kuykendall, 44 Miss. 137; Wren *v.* Hoffman, 41 Miss. 616.

Missouri. — Standard Fireproofing Co. *v.* St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008; Boyd *v.* Paul, 125 Mo. 9, 28 S. W. 171; Hunt *v.* Weed, 65 Mo. App. 529, 2 Mo. App. Rep. 1230; Broughton *v.* Null, 56 Mo. App. 231; Deuser *v.* Hamilton, 52 Mo. App. 394.

Montana. — Talbott *v.* Heinze, 25 Mont. 4, 63 Pac. 624; Ming *v.* Pratt, 22 Mont. 262, 56 Pac. 279.

Nebraska. — Norfolk Beet Sugar Co. *v.* Berger, 95 N. W. 336; State *v.* Com'rs of Cass Co., 60 Neb. 566, 83 N. W. 733; Sylvester *v.* Carpenter Paper Co., 55 Neb. 621, 75 N. W. 1092; Delaney *v.* Linder, 22 Neb. 274, 34 N. W. 630.

New Hampshire. — Parsons *v.* Wentworth, 59 Atl. 623; Rollins Engine Co. *v.* Eastern Forge Co., 59 Atl. 382; Libby *v.* Mt. Monadnock M. S. & L. Co., 67 N. H. 587, 32 Atl. 772.

New Jersey. — Hanrahan *v.* National Bldg. L. & P. Ass'n, 66 N. J. L. 80, 48 Atl. 517; Snowhill *v.* Reed, 49 N. J. L. 292, 10 Atl. 737, 60 Am.

that state.[5] In a later case, however, it is declared that it would perhaps be more accurate to say that the rule has been relaxed, for the guards which the courts of that state have thrown around the modification of that rule, have, to some extent, preserved the rule itself. And it also is said that "the cases in this state in which parol evidence has been allowed to contradict or vary written instruments may be classed under two heads: 1st. Where there was fraud, accident or mistake in the creation of the instrument itself; and 2nd. Where there has been an attempt to make a fraudulent use of the instrument, in violation of a promise or agreement made at the time the instrument was signed, and without which it would not have been executed."[6] And in a more recent case it has been

Rep. 615; Naughton *v.* Elliott, 59 Atl. 869.

New Mexico. — Miller *v.* Preston, 4 N. M. 396, 17 Pac. 565.

New York. — Uihlein *v.* Matthews, 172 N. Y. 154, 64 N. E. 792; Amstrong *v.* Lake Champlain Gran. Co., 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683; Tripp *v.* Smith, 50 App. Div. 499, 64 N. Y. Supp. 94; Finck *v.* Bauer, 40 Misc. 218, 81 N. Y. Supp. 625; Morowski *v.* Rohrig, 4 Misc. 167, 23 N. Y. Supp. 880.

North Carolina. — Ward *v.* Gay, 137 N. C. 397, 49 S. E. 884; Hopper *v.* Justice, 111 N. C. 418, 16 S. E. 626; Marshall Foundry *v.* Killian, 99 N. C. 501, 6 S. E. 680, 6 Am. St. Rep. 539.

North Dakota. — Dowagiac Mfg. Co. *v.* Mahon, 101 N. W. 903; Johnson *v.* Kindred State Bank, 12 N. D. 336, 96 N. W. 588; Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576; Luther *v.* Hunter, 7 N. D. 544, 75 N. W. 916.

Ohio. — Tuttle *v.* Burgett, 53 Ohio St. 498, 42 N. E. 427, 53 Am. St. Rep. 649, 30 L. R. A. 214; Nave *v.* Marshall, 6 Ohio N. P. 488.

Oklahoma. — Moorehead *v.* Davis, 13 Okla. 166, 73 Pac. 1103; Liverpool, L. & G. Ins. Co. *v.* Richardson Lumb. Co., 11 Okla. 579, 585, 69 Pac. 936, 938.

Oregon. — Smith *v.* Bayer, 79 Pac. 497; Ruckman *v.* Imbler Lumb. Co., 42 Or. 231, 70 Pac. 811; Looney *v.* Rankin, 15 Or. 617, 16 Pac. 660.

Pennsylvania. — Fuller *v.* Law, 207 Pa. St. 101, 56 Atl. 333; Conrow *v.* Conrow, 16 Atl. 522.

Rhode Island. — Dyer *v.* Cranston Print Wks., 21 R. I. 63, 41 Atl. 1015; Wood *v.* Moriarty, 15 R. I. 518, 9 Atl. 427.

South Carolina. — Arnold *v.* Bailey, 24 S. C. 493; Wood *v.* Ashe, 1 Strob. 407.

South Dakota. — Barnard & Leas Mfg. Co. *v.* Galloway, 5 S. D. 205, 58 N. W. 565; Osborne *v.* Stringham, 1 S. D. 406, 47 N. W. 408.

Tennessee. — Kearley *v.* Duncan, 1 Head 397, 73 Am. Dec. 179; Price *v.* Allen, 9 Humph. 703.

Texas. — Gano *v.* Palo Pinto Co., 71 Tex. 99, 8 S. W. 634; Sanborn *v.* Plowman, 13 Tex. Civ. App. 95, 35 S. W. 193; Parker *v.* American Exch. Bank (Tex. Civ. App.), 27 S. W. 1071.

Utah. — Haskins *v.* Dern, 19 Utah 89, 56 Pac. 953; First Nat. Bank of Nephi *v.* Foote, 12 Utah 157, 42 Pac. 205.

Virginia. — Tait *v.* Central Lunatic Asylum, 84 Va. 271, 4 S. E. 697; Home Ins. Co. *v.* Gwathmey, 82 Va. 923, 1 S. E. 209; Ratcliffe *v.* Allison, 3 Rand. 537.

Washington. — Windson *v.* St. Paul M. & M. R. Co., 37 Wash. 156, 79 Pac. 613; Minnesota Sandstone Co. *v.* Clark, 35 Wash. 466, 77 Pac. 803; Patchen *v.* Parke & Lacy Machinery Co., 6 Wash. 486, 33 Pac. 679.

West Virginia. — Providence Washington Ins. Co. *v.* Board of Education, 49 W. Va. 360, 38 S. E. 679.

Wisconsin. — Erbacher *v.* Seefeld, 92 Wis. 350, 66 N. W. 252.

Wyoming. — Stickney *v.* Hughes, 79 Pac. 922, *affirming* 12 Wyo. 397, 75 Pac. 945.

5. Kostenbader *v.* Peters, 80 Pa. St. 438; Chalfant *v.* Williams, 35 Pa. St. 212.

6. Phillips *v.* Meily, 106 Pa. St. 536, 543, *per* Mr. Justice Paxson.

decided that unless fraud, accident or mistake be averred the writing constitutes the agreement between the parties, and its terms can neither be added to nor subtracted from by parol evidence.[7]

C. Principles on Which Rule Founded. — Where parties have reduced their obligations or agreements to a writing which is upon its face couched in such terms as to import a complete legal obligation with no uncertainty as to the nature, character, object and extent of their agreement, all prior negotiations and agreements are regarded as merged therein, and the conclusive presumption arises that the whole engagement of the parties is expressed in the writing.[8] This, the common-law rule, was intended to guard against fraud and injustice by not permitting parties to deny their solemn written agreements, or overthrow them by the uncertain words and memories of unreliable witnesses.[9]

See also Jackson *v.* Payne, 114 Pa. St. 67, 6 Atl. 340.

7. Wodock *v.* Robinson, 148 Pa. St. 503, 24 Atl. 73.

8. *United States.* — Seitz *v.* Brewers Refrigerating Mach. Co., 141 U. S. 510; De Witt *v.* Berry, 134 U. S. 306; Rucker *v.* Bolles, 133 Fed. 858, 67 C. C. A. 30; Union Selling Co. *v.* Jones, 128 Fed. 672, 63 C. C. A. 224; Godkin *v.* Monahan, 83 Fed. 116, 27 C. C. A. 410.

Colorado. — Nesmith *v.* Martin, 32 Colo. 77, 75 Pac. 590; Randolph *v.* Helps, 9 Colo. 29, 10 Pac. 245.

Connecticut. — Galpin *v.* Atwater, 29 Conn. 93, 97.

Delaware. — Connaway *v.* Wright, 5 Del. Ch. 472.

District of Columbia. — Rogers *v.* Garland, 18 Wash. L. Rep. 381.

Georgia. — Arnold *v.* Malsby, 120 Ga. 586, 48 S. E. 132; Polhill *v.* Brown, 84 Ga. 338, 342, 10 S. E. 921.

Idaho. — Jacobs *v.* Shenon, 3 Idaho 274, 29 Pac. 44.

Illinois. — Telluride Power Transmission Co. *v.* Crane Co., 208 Ill. 218, 70 N. E. 319; Borggard *v.* Gale, 107 Ill. App. 128, *affirmed* in 205 Ill. 511, 68 N. E. 1063; Smith *v.* Rust, 112 Ill. App. 84; Osgood *v.* Skinner, 111 Ill. App. 606, *affirmed* in 211 Ill. 229, 71 N. E. 869; Union Special Sew. Mach. Co. *v.* Lockwood, 110 Ill. App. 387.

Indian Territory. — Swofford Bros. Dry Goods Co. *v.* Smith-McCord Dry Goods Co., 1 Ind. Ter. 314, 37 S. W. 103.

Michigan. — Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665.

Mississippi. — Kerr *v.* Kuykendall, 44 Miss. 137.

Missouri. — Harrington *v.* Brockman Com. Co., 107 Mo. App. 418, 81 S. W. 629; Boggs *v.* Pacific Steam Laundry Co., 86 Mo. App. 616.

Montana. — Taylor *v.* Holter, 1 Mont. 688, 694.

Nebraska. — Bradley & Co. *v.* Basta, 98 N. W. 697; Martens *v.* Pittock, 3 Neb. Unof. 770, 92 N. W. 1038.

New Jersey. — Naumberg *v.* Young, 44 N. J. L. 331, 341, 43 Am. Rep. 380.

New York. — Gormully & J. Mfg. Co. *v.* Cross, 25 Misc. 336, 55 N. Y. Supp. 527; Moores *v.* Glover, 37 N. Y. St. 396, 13 N. Y. Supp. 565, 566; Bopp *v.* Askins, 31 N. Y. St. 555, 10 N. Y. Supp. 539.

Ohio. — Weller Co. *v.* Gordon, 24 Ohio Cir. Ct. 407.

Oklahoma. — Liverpool L. & G. Ins. Co. *v.* Richardson Lumb. Co., 11 Okla. 579, 69 Pac. 936, *affirmed* in 11 Okla. 585, 69 Pac. 938.

Tennessee. — Kearly *v.* Duncan, 38 Tenn. 397, 73 Am. Dec. 179.

West Virginia. — Providence Washington Ins. Co. *v.* Board of Education, 49 W. Va. 360, 38 S. E. 679.

It Is an Elementary Principle of Law that all prior agreements are merged in the written contract. Owens *v.* Wilkinson, 20 App. Cas. D. C. 51, 63; Moorehead *v.* Davis, 13 Okla. 166, 73 Pac. 1103; Liverpool L. & G. Ins. Co. *v.* Richardson Lumb. Co., 11 Okla. 585, 69 Pac. 938.

9. Osborne *v.* Stringham, 1 S. D. 406, 46 N. W. 408.

D. Whether Rule of Evidence or of Law. — Although this rule is in many cases spoken of as a rule of evidence,[10] yet it is declared in a recent case that according to the modern and better view the rule is one of substantive law and not of evidence, parol proof being excluded not because it is lacking in evidentiary value, but because the law for some substantive reason declares that what is sought to be proved by it (being outside the writing by which the parties have undertaken to be bound), shall not be shown.[11] And this latter view has the support of the modern text writers upon the subject.[12]

E. Rule Applies in Equity. — The rule is not confined in its application to actions in a court of law, but is equally applicable in a court of equity.[13]

F. To What Persons the Rule Applies. — a. *General Rules and Principles.* — The rule that parol evidence is not admissible to vary the terms of a written instrument does not exclude its admission in an action between a party to an instrument and a stranger, nor between strangers,[14] as the rule only applies to actions between

The General Rule Has for Its Object the prevention of fraud and perjury in those cases where parties have put their contract in writing, by excluding any other evidence of the terms of the contract than the writing itself. Schindler *v.* Muhlheiser, 45 Conn. 153.

Principle and Policy Both Forbid that written instruments made by the authority of law or by the contract of the parties should be subject to be impeached, contradicted, or annulled by loose collateral parol testimony. Cain *v.* Flynn, 4 Dana (Ky.) 499.

If the Rule Were Otherwise the most solemn instruments of writing would be liable to alteration by oral proof. Warren Glass Wks. *v.* Keystone Coal Co., 65 Md. 547, 551, 5 Atl. 253, 20 Am. Rep. 722.

10. Insurance Co. *v.* Wilkinson, 13 Wall. (U. S.) 222, 231; Reid *v.* Diamond Plate Glass Co., 85 Fed. 193, 195, 29 C. C. A. 110; Ratcliffe *v.* Allison, 3 Rand. (Va.) 537.

11. Pitcairn *v.* Philip Hiss Co., 125 Fed. 110, 61 C. C. A. 657.

12. See 1 Greenl. on Ev. (16th ed.) § 350*a*; Thayer's Prelim. Treat. on Ev., p. 390, *et seq.*

"The Rule Is in No Sense a Rule of Evidence, but a rule of substantive law." 4 Wigmore on Ev. § 2400.

13. *United States.* — Forsythe *v.* Kimball, 91 U. S. 291.

Illinois. — Gibbons *v.* Bressler, 61 Ill. 110.

Kentucky. — Harrison *v.* Talbot, 2 Dana 258.

Maine. — Eveleth *v.* Wilson, 15 Me. 109.

Maryland. — Watkins *v.* Stocketts, 6 Har. & J. 435; Wesley *v.* Thomas, 6 Har. & J. 24, 27.

Massachusetts. — Dwight *v.* Pomeroy, 17 Mass. 303, 9 Am. Dec. 148.

Ohio. — Eleventh St. Church *v.* Pennington, 18 Ohio Cir. Ct. 408, 10 O. C. D. 74.

14. *United States.* — Barreda *v.* Silsbee, 21 How. 146; Central Coke & Coal Co. *v.* Good, 120 Fed. 793, 57 C. C. A. 161; Sigua Iron Co. *v.* Greene, 88 Fed. 207, 31 C. C. A. 477.

Alabama. — British & Amer. Mtge. Co. *v.* Cody, 135 Ala. 622, 33 So. 832; Robinson *v.* Moseley, 93 Ala. 70, 9 So. 372; Carter *v.* Wilson, 61 Ala. 434.

Arkansas. — Gates *v.* Steele, 48 Ark. 539, 4 S. W. 53.

California. — Dunn *v.* Price, 112 Cal. 46, 44 Pac. 354; Ellis *v.* Crawford, 39 Cal. 523.

Connecticut. — Johnson *v.* Blackman, 11 Conn. 342.

Georgia. — Dickey *v.* Grice, 110 Ga. 315, 35 S. E. 291; Ford *v.* Smith, 25 Ga. 675.

Illinois. — Washburn & Moen Mfg.

the parties thereto or their privies.[15] The grounds upon which the exception is founded in the case of strangers is that they have not

Co. *v.* Chicago Galvanized Wire Fence Co., 109 Ill. 71; Aleshire *v.* Lee Co. Sav. Bank, 105 Ill. App. 32; Chicago S. & St. L. R. Co. *v.* Beach, 29 Ill. App. 157.

Indiana. — Burns *v.* Thompson, 91 Ind. 146; Smith *v.* Moore, 2 Ind. Ter. 126, 48 S. W. 1025.

Iowa. — Livingston *v.* Heck, 122 Iowa 74, 94 N. W. 1098; Livingston *v.* Stevens, 122 Iowa 62, 94 N. W. 925; De Goey *v.* Van Wyk, 97 Iowa 491, 66 N. W. 787.

Kentucky. — Edwards *v.* Ballard, 14 B. Mon. 289; Strader *v.* Lambeth, 7 B. Mon. 589.

Louisiana. — Cary *v.* Richardson, 35 La. Ann. 505; Blake *v.* Hall, 19 La. Ann. 49.

Maryland. — Fant *v.* Sprigg, 50 Md. 551.

Massachusetts. — Walker Ice Co. *v.* American Steel & Wire Co., 185 Mass. 403, 70 N. E. 937.

Michigan. — Highstone *v.* Burdette, 61 Mich. 54, 27 N. W. 852; Busch *v.* Pollock, 41 Mich. 64, 1 N. W. 921.

Minnesota. — Horn *v.* Hansen, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617; Buxton *v.* Beal, 49 Minn. 230, 51 N. W. 918; National Car & L. Builder *v.* Cyclone Steam Snow-Plow Co., 49 Minn. 125, 51 N. W. 657.

Missouri. — McKee *v.* St. Louis, 17 Mo. 184.

Nebraska. — First Nat. Bank *v.* Tolerton & Stetson, 97 N. W. 248; Sheehy *v.* Fulton, 38 Neb. 691, 57 N W. 395, 41 Am. St. Rep. 767; Crockett *v.* Miller, 2 Neb. Unof. 292, 96 N. W. 491.

Nevada. — Bank of California *v.* White, 14 Nev. 373.

New Hampshire. — French *v.* Westgate, 71 N. H. 510, 53 Atl. 310; Wilson *v.* Sullivan, 58 N. H. 260; Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207; Woodman *v.* Eastman, 10 N. H. 359.

New Jersey. — Elliott *v.* Moreland 69 N. J. L. 216, 54 Atl. 224.

New York. — Folinsbee *v.* Sawyer, 157 N. Y. 196, 51 N. E. 994; Hankinson *v.* Vantine, 152 N. Y. 20, 46 N. E. 292, *reversing* Hankinson *v.* Riker, 10 Misc. 185, 30 N. Y. Supp. 1040; McMaster *v.* Insurance Co. of North America, 55 N. Y. 222, 14 Am. Rep. 239; Emmett *v.* Penoyer 76 Hun. 551, 58 N. Y. St. 232, 28 N. Y. Supp. 234; McArthur *v.* Soule, 66 Barb. 423; Overseers of Poor of New Berlin *v.* Overseers of Poor of Norwich, 10 Johns. 229; Dumois *v.* New York, 37 Misc. 614, 76 N. Y. Supp. 161; Emerald & Phoenix Brew. Co. *v.* Leonard, 22 Misc. 120, 48 N. Y. Supp. 706; Spingarn *v.* Rosenfeld, 4 Misc. 523, 24 N. Y. Supp. 733; Fox *v.* McComb, 45 N. Y. St. 754, 18 N. Y. Supp. 611.

Ohio. — Clapp *v.* Huron Co. Bkg. Co., 50 Ohio St. 528, 35 N. E. 308.

Oregon. — Pacific Biscuit Co. *v.* Dugger, 42 Or. 513, 70 Pac. 523.

South Dakota. — Jewett *v.* Sundback, 5 S. D. 111, 58 N. W. 20.

Tennessee. — August *v.* Seeskind, 6 Cold. 166.

Texas. — Kahle *v.* Stone, 95 Tex 106, 65 S. W. 623; Johnson *v.* Portwood, 89 Tex. 235, 34 S. W. 596, 787.

Vermont. — Fonda *v.* Burton, 63 Vt. 355, 22 Atl. 594.

Virginia. — Bruce *v.* Roper Lumb. Co., 87 Va. 381, 13 S. E. 153, 24 Am. St. Rep. 657.

Washington. — Carmack *v.* Drum, 32 Wash. 236, 73 Pac. 377, 785; Elliott *v.* Puget Sound & Central A. S. S. Co., 22 Wash. 220, 60 Pac. 410.

Wisconsin. — Simanek *v.* Nemetz, 120 Wis. 42, 97 N. W. 508.

A Fraudulent Vendee cannot rely upon the written instrument against creditors of a vendor of previous purchasers. Edwards *v.* Ballard, 14 B. Mon. (Ky.) 289.

15. *United States.* — Sigua Iron Co. *v.* Greene, 88 Fed. 207, 31 C. C. A. 477, 59 U. S. App. 555; Pim *v.* Wait, 32 Fed. 741.

Alabama. — Holly *v.* Pruitt, 77 Ala. 334; Holland *v.* Kimbrough, 52 Ala. 249.

California. — Hussman *v.* Wilke, 50 Cal. 250.

Florida. — Roof *v.* Chattanooga W. S. P. Co., 36 Fla. 284, 18 So. 597.

assented to the truth of the statements in the instrument, or that it should be a memorial of facts admitted to exist, and they are therefore not bound by it.[16] So a party to a contract may be a competent witness, in behalf of a stranger to the instrument, to contradict it.[17] And where, in such a case, evidence has been introduced to impeach the writing or to show that it is other than it purports to be, the other party may then introduce evidence to support the same, and to show that the true intent of the parties was expressed therein.[18]

b. *Where One Not a Party to an Instrument Claims Under It.* One who bases his claim upon or under an instrument to which he is not a party does not come within the rule as to strangers,[19] but is as much concluded by the terms of the instrument as are the parties thereto.[20]

c. *Right of Party Where Evidence Introduced by Other Party.* Where one of the parties to a writing introduces parol evidence in

Illinois. — Northern Assur. Co. *v.* Chicago Mut. B. & L. Ass'n, 198 Ill. 474, 64 N. E. 979, *affirming* 98 Ill. App. 152; Harts *v.* Emery, 184 Ill. 560, 56 N. E. 865; Salter *v.* Hines Lumb. Co., 77 Ill. App. 97.

Indian Territory. — Central Coal & Coke Co. *v.* Good, 64 S. W. 677.

Iowa. — Livingston *v.* Heck, 122 Iowa 74, 94 N. W. 1098; Logan *v.* Miller, 106 Iowa 511, 76 N. W. 1005.

Kentucky. — Provident Sav. L. Assur. Soc. *v.* Johnson, 115 Ky. 84, 72 S. W. 754.

Maine. — Burnham *v.* Dorr, 72 Me. 198.

Minnesota. — Pfeifer *v.* National Live Stock Ins. Co., 62 Minn. 536, 64 N. W. 1018; Van Eman *v.* Stanchfield, 10 Minn. 255.

Mississippi. — Whitney *v.* Cowan, 55 Miss. 626.

Nebraska. — Barbar *v.* Martin, 67 Neb. 445, 93 N. W. 722.

New Jersey. — First Nat. Bank of Plainfield *v.* Dunn, 55 N. J. L. 404, 27 Atl. 908.

New York. — Hankinson *v.* Vantine, 152 N. Y. 20, 46 N. E. 292; Juilliard *v.* Chaffee, 92 N. Y. 529; City Trust. Safe Deposit & Surety Co. *v.* American Brew. Co., 70 App. Div. 511, 75 N. Y. Supp. 140; Norton *v.* Keogh, 42 Hun 611.

Tennessee. — Myers *v.* Taylor, 107 Tenn. 364, 64 S. W. 719.

Texas. — Brokel *v.* McKechnie, 69 Tex. 32, 6 S. W. 623; Hughes *v.* Sandal, 25 Tex. 162; Belcher Land Mtge. Co. *v.* Norris, 34 Tex. Civ. App. 111, 78 S. W. 390.

Utah. — Moyle *v.* Congregational Soc. of Salt Lake City, 16 Utah 69, 50 Pac. 806.

Washington. — Carmack *v.* Drum, 32 Wash. 236, 73 Pac. 377.

A Stranger Cannot Make the Rule as against a party to the instrument. Dunn *v.* Price, 112 Cal. 46, 44 Pac. 354.

16. British & Amer. Mtge. Co. *v.* Cody, 135 Ala. 622, 33 So. 832; Dickey *v.* Grice, 110 Ga. 315, 35 S E. 291; Sigua Iron Co. *v.* Greene, 88 Fed. 207, 31 C. C. A. 477.

17. Luther *v.* Hunter, 7 N. D. 544, 75 N. W. 916.

18. Smith *v.* Moore, 2 Ind. Ter. 126, 48 S. W. 1025.

19. Sayre *v.* Burdick, 47 Minn. 367, 50 N. W. 245; Schneider *v.* Kirkpatrick, 80 Mo. App. 145; Libby *v.* Mt. Monadnock Min. S. & L. Co., 67 N. H. 587, 32 Atl. 772; Selchow *v.* Stymus, 26 Hun (N. Y.) 145; Spingarn *v.* Rosenfeld, 4 Misc. 523, 24 N. Y. Supp. 733; Belcher Land Mtge. Co. *v.* Norris (Tex. Civ. App.), 78 S. E. 390.

20. McLellan *v.* Cumberland Bank, 24 Me. 566.

"The position of one for whose benefit a promise is made cannot be better than that of the one who procures it to be made and to whom it is made." Schneider *v.* Kirkpatrick, 80 Mo. App. 145, 152.

respect to such writing the other party may introduce evidence of a like character to rebut its effect.[21] If a plaintiff does not rely entirely upon a writing, but introduces evidence affecting the same, he thereby opens the way for the defendant to use the same kind of evidence.[22] And where evidence is admitted on behalf of a plaintiff to validate an instrument void on its face, parol evidence is admissible on behalf of the defendant to rebut or contradict the same.[23]

G. As to Intention. — Where a written instrument is valid, clear, and unambiguous upon its face, and purports to contain the complete agreement of the parties, parol evidence is not admissible to show that the actual or secret intent of the parties thereto was other than is expressed in the writing, as in such a case the terms of the instrument alone must be looked to to ascertain the intention.[24]

21. Arbeiter *v.* Day, 39 Conn. 155; Hand *v.* Shaw, 16 Misc. 498, 38 N. Y. Supp. 965.

"Where one party is allowed to produce evidence *aliunde* to aid in determining the meaning of a written agreement susceptible of different constructions, the other party must be allowed the like privilege." McPhee *v.* Young, 13 Colo. 80, 21 Pac. 1014, *per* Pattison, C.

Where it was claimed that a writing was a merger of another writing, and a party was allowed to introduce evidence to support such contention, it was declared by the court that "it would seem clear that if the party relying upon the merger or extinguishment of the simple contract as a defense to an action upon it, is compelled to resort to evidence other than that furnished by the higher security in order to show the purpose for which it was executed and accepted, then the party claiming that it was given as collateral security, and not in satisfaction of the simple contract, should have the right to introduce parol evidence also to sustain his contention." Witz *v.* Fite, 91 Va. 446, 22 S. E. 171, *per* Buchanan, J.

22. Hallenbeck *v.* Garst, 96 Iowa 509, 65 N. W. 417; Barranco *v.* Touner, 11 Misc. 666, 32 N. Y. Supp. 914.

But see Gorsuch *v.* Rutledge, 70 Md. 272, 17 Atl. 76, *holding* that the admission of incompetent evidence of previous negotiation in behalf of a plaintiff does not authorize introduction of testimony of same kind on behalf of defendant.

23. Perkins *v.* Adams, 30 Vt. 230.

24. *United States.* — Phenix Ins. Co. *v.* Wilcox & Gibbs Guano Co., 65 Fed. 724, 13 C. C. A. 88; Chambers *v.* United States, 24 Ct. Cl. 387.

Alabama. — Morris *v.* Robinson 80 Ala. 291.

California. — Swift *v.* Occidental Min. & P. Co., 141 Cal. 161, 74 Pac. 700; Swain *v.* Grangers Union of San Joaquin Co., 69 Cal. 186, 10 Pac. 404.

Connecticut. — West Haven Water Co. *v.* Redfield, 58 Conn. 39, 18 Atl. 978.

Delaware. — Dale *v.* Smith, 1 Del Ch. 1, 12 Am. Dec. 64.

Georgia. — Home Ins. Co. *v.* Harrington, 95 Ga. 759, 22 S. E. 666; Slater *v.* Demorest Spoke & Handle Co., 94 Ga. 687, 21 S. E. 715; Chambers *v.* Walker, 80 Ga. 642, S. E. 165.

Illinois. — Duggan *v.* Uppendahl, 197 Ill. 179, 64 N. E. 289; Rigdon *v.* Conley, 141 Ill. 565, 30 N. E. 1060; Wetenkamp *v.* Billigh, 27 Ill. App. 585.

Indiana. — Barney *v.* Indiana R Co., 157 Ind. 228, 61 N. E. 194; Miller *v.* Indianapolis, 123 Ind. 196, 24 N. E. 228.

Iowa. — Gongower *v.* Equitable Mut. L. & Endow. Ass'n, 72 N. W. 416.

Kansas. — Citizens Bank *v.* Brigham, 61 Kan. 727, 60 Pac. 754; Kansas City *v.* Hart, 60 Kan. 684, 57 Pac. 938.

H. Conversations and Negotiations. — The general rule applies to conversations and negotiations prior to or in connection with the execution of a writing,[25] as in such cases all negotiations

Maryland. — Ecker *v.* McAllister, 45 Md. 290.

Massachusetts. — McCabe *v.* Swap, 14 Allen 188; West Boylston Mfg. Co. *v.* Searle, 15 Pick. 225.

Michigan. — Baker *v.* Baird, 79 Mich. 255, 44 N. W. 604.

Minnesota. — George *v.* Conhaim 38 Minn. 338, 37 N. W. 791; King *v.* Merriman, 38 Minn. 47, 35 N. W. 570.

Missouri. — O'Brien *v.* Ash, 169 Mo. 283, 69 S. W. 8.

New Hampshire. — Bancroft *v.* Union Embossing Co., 72 N. H. 402, 57 Atl. 97; Peasley *v.* Gee, 19 N. H. 273.

New York. — American Surety Co. *v.* Thurber, 121 N. Y. 655, 23 N. E. 1129; Palmer *v.* Gurnsey, 7 Wend. 248.

Oregon. — Beezley *v.* Crossen, 16 Or. 72, 17 Pac. 577.

South Carolina — Coates & Sons *v.* Early, 46 S. C. 220, 24 S. E. 305; Watson *v.* Watson, 24 S. C. 228.

Tennessee. — Garner *v.* Taylor, 58 S. W. 758.

Texas. — Farley *v.* Deslonde, 69 Tex. 458, 6 S. W. 786; Johnson *v.* Morton, 28 Tex. Civ. App. 296, 67 S. W. 790; Pasteur Vaccine Co. *v.* Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804.

Vermont. — *In re* Haynes Estate, 69 Vt. 553, 38 Atl. 240.

25. *United States.* — DeWitt *v* Berry, 134 U. S. 306; Arthur *v.* Baron De Hirsch Fund, 121 Fed. 791, 58 C. C. A. 67; Coloritype Co. *v.* Williams, 78 Fed. 450, 24 C. C. A. 163, 45 U. S. App. 330; Mack *v.* Porter, 72 Fed. 236, 18 C. C. A. 527, 25 U. S. App. 595; Union Stock Yards & Transit Co. *v.* Western Land & Cattle Co., 59 Fed. 49, 7 C. C. A. 660.

Colorado. — Randolph *v.* Helps, 9 Colo. 29, 10 Pac. 245; Drummond *v.* Carson, 4 Colo. 13; Colorado City *v.* Townsend, 9 Colo App. 249, 47 Pac. 663.

Connecticut. — Excelsior Needle Co. *v.* Smith, 61 Conn. 56, 23 Atl. 693; Tyler *v.* Waddington, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657.

District of Columbia. — Rogers *v.* Garland, 18 Wash. L. Rep. 381.

Georgia. — Bass Dry Goods Co. *v.* Granite City Mfg. Co., 113 Ga. 1142, 39 S. E. 471.

Illinois. — Ellis *v.* Conrad Seipp Brew. Co., 207 Ill. 291, 69 N. E. 808; Telluride Power Transmission Co. *v.* Crane Co., 103 Ill. App. 647; Colwell *v.* Brown, 103 Ill. App. 22; Robbins *v.* Conway, 92 Ill. App. 173; Morris *v.* Calumet & C. C. & D. Co., 91 Ill. App. 437; Columbia Casino Co. *v.* World's Columbian Exposition, 85 Ill. App. 369; Lord *v.* Haufe, 77 Ill. App. 91.

Indiana. — Henry School Twp. *v.* Meredith, 32 Ind. App. 607, 70 N. E. 393.

Kansas. — McMullen *v.* Carson, 48 Kan. 263, 29 Pac. 317; Huston *v.* Peterson, 2 Kan. App. 315, 43 Pac. 101.

Louisiana. — Tenney *v.* Abraham, 43 La. Ann. 240, 9 So. 40.

Maine. — McLeod *v.* Johnson, 96 Me. 271, 52 Atl. 760.

Maryland. — Warren Glass Wks. Co. *v.* Keystone Coal Co., 65 Md. 547, 5 Atl. 253, 20 Am. Rep. 722; Lazear *v.* National Union Bank, 52 Md. 78, 36 Am. Rep. 355.

Massachusetts. — Morton *v.* Clark, 181 Mass. 134, 63 N. E. 409; Sirk *v.* Ela, 163 Mass. 394, 40 N. E. 183.

Michigan. — Rough *v.* Breitung, 117 Mich. 48, 75 N. W. 147; Sheley *v.* Brooks, 114 Mich. 11, 72 N. W. 37; Eaton *v.* Gladwell, 108 Mich. 678, 66 N. W. 598; Dikeman *v.* Arnold, 78 Mich. 455, 44 N. W. 407.

Minnesota. — Aultman *v.* Falkum, 47 Minn. 414, 50 N. W. 471.

Missouri. — O'Brien *v.* Ash, 169 Mo. 283, 69 S. W. 8.

Nebraska. — Miller *v.* Gunderson, 48 Neb. 715, 67 N. W. 769; Watson *v.* Roode, 43 Neb. 348, 61 N. W. 625.

New Hampshire. — Saddlery Hdw. Mfg. Co. *v.* Hillsborough Mills, 68 N. H. 216, 44 Atl. 300, 73 Am. St. Rep. 569.

New Jersey. — Camden & T. R, Co. *v.* Adams, 62 N. J. Eq. 656, 51 Atl. 24; White *v.* Tide Water Oil Co., 33 Atl. 47.

and conversations are presumed to be merged in the writing.[26]

I. Prior or Contemporaneous Agreements. — It is a general rule that evidence of a prior or contemporaneous agreement which is inconsistent with the terms of a written instrument, complete upon its face, and unambiguous,[27] is, in the absence of fraud or mistake,[28] inadmissible to contradict, vary or in any way alter the

New York. — Uihlein *v.* Matthews, 172 N. Y. 154, 64 N. E. 792; Jackson *v.* Helmer, 73 App. Div. 134, 77 N. Y. Supp. 835; Smith *v.* Coe, 55 App. Div. 585, 67 N. Y. Supp. 350; Liebel *v.* Light, 30 Misc. 434, 62 N. Y. Supp. 535; Morowski *v.* Rohrig, 4 Misc. 167, 53 N. Y. St. 220, 23 N. Y. Supp. 880.

North Carolina. — Patterson *v.* Wilson, 101 N. C. 594, 8 S. E. 341.

Ohio. — Tuttle *v.* Burgett, 53 Ohio St. 498, 42 N. E. 427, 53 Am. St. Rep. 649, 30 L. R. A. 214; Harley *v.* Weber, 1 O. C. D. 360.

Pennsylvania. — Harris *v.* Sharpless, 15 Pa. Super. Ct. 643; Russell *v.* Spring City Glass Wks., 6 Pa. Super. Ct. 118.

South Carolina. — Fishburne *v.* Smith, 34 S. C. 330, 13 S. E. 525.

Tennessee. — Price *v.* Allen, 9 Humph. 703.

Virginia. — Hardin *v.* Kelly, 89 Va. 332, 15 S. E. 894.

Washington. — Hindle *v.* Holcomb 34 Wash. 336, 75 Pac. 873; Ross *v.* Portland Coffee & Spice Co., 30 Wash. 647, 71 Pac. 184.

West Virginia. — Knowlton *v.* Campbell, 48 W. Va. 294, 37 S. E. 581; Long *v.* Perine, 41 W. Va. 314, 23 S. E. 611; Scraggs *v.* Hill, 37 W. Va. 706, 17 S. E. 185.

Wisconsin. — Vogt *v.* Shienbeck, 122 Wis. 491, 100 N. W. 820, 106 Am. St. Rep. 989, 67 L. R. A. 756; Ninman *v.* Suhr, 91 Wis. 392, 64 N. W. 1035; Taylor *v.* Davis, 82 Wis. 455, 52 N. W. 756.

26. *United States.* — De Witt *v.* Berry, 134 U. S. 306; Wolff *v.* Wells, Fargo & Co., 115 Fed. 32.

Illinois. — Silberschmidt *v.* Silberschmidt, 112 Ill. App. 58; Rector *v.* Hartford Deposit Co., 102 Ill. App. 554; Lord *v.* Haufe, 77 Ill. App. 91.

Indiana. — Smith *v.* McClain, 146 Ind. 77, 45 N. E. 41.

Maryland. — Scott *v.* Baltimore & O. R. Co., 93 Md. 475, 49 Atl. 327.

Michigan. — Leffel *v.* Piatt, 126 Mich. 443, 86 N. W. 65.

Missouri. — Ijams *v.* Provident Sav. L. Assur. Soc., 185 Mo. 466, 84 S. W. 51; Minnesota Thresher Mfg. Co. *v.* Grant City Lumb. & Hdw. Co., 81 Mo. App. 255.

Nebraska. — Norfolk Beet Sugar Co. *v.* Berger, 95 N. W. 336.

Oklahoma. — Liverpool, L. & G. Ins. Co. *v.* Richardson Lumb. Co., 11 Okla. 585, 69 Pac. 938.

Texas. — Union Cent. L. Ins. Co. *v.* Chowning, 8 Tex. Civ. App. 455, 28 S. W. 117.

Wisconsin. — Tietz *v.* Tietz, 90 Wis. 66, 62 N. W. 939.

27. *United States.* — Montgomery *v.* Aetna L. Ins. Co., 97 Fed. 913, 38 C. C. A. 553.

Indiana. — Singer Mfg. Co. *v.* Sults, 17 Ind. App. 639, 47 N. E. 341.

Michigan. — National Cash Register Co. *v.* Blumenthal, 85 Mich. 464, 48 N. W. 622.

New York. — Fuller & Co. *v.* Schrenk, 171 N. Y. 671, 64 N. E. 1126, *affirming* 58 App. Div. 222, 68 N. Y. Supp. 781.

Texas. — Saunder *v.* Weekes, (Tex. Civ. App.), 55 S. W. 33; Sanborn *v.* Murphy, 5 Tex. Civ. App. 509, 25 S. W. 459.

Washington. — Pacific Nat. Bank *v.* San Francisco Bridge Co., 23 Wash. 425, 63 Pac. 207.

West Virginia. — Buena Vista Co. *v.* Billmyer, 48 W. Va. 382, 37 S. E. 583.

28. *United States.* — Ferguson Contracting Co. *v.* Manhattan Trust Co., 118 Fed. 791, 55 C. C. A. 529; Arnold *v.* Scharbauer, 118 Fed. 1008.

Georgia. — Richmond & D. R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220.

Idaho. — Stein *v.* Fogarty, 4 Idaho 702, 43 Pac. 681.

Kentucky. — Crane *v.* Williamson, 23 Ky. L. Rep. 689, 63 S. W. 610.

Missouri. — Mechanics Bank *v.* Terry, 67 Mo. App. 12.

terms of the written instrument,[29] as all such agreements are pre-

Pennsylvania. — Hoffman *v.* Bloomsburg & S. R. R., 157 Pa. St. 174, 27 Atl. 564; Commonwealth *v.* Folz, 19 Pa. Super. Ct. 28.

Texas. — Scarbrough *v.* Alcorn, 74 Tex. 358, 12 S. W. 72.

Utah. — Wallace *v.* Richards, 16 Utah 52, 50 Pac. 804; Groome *v.* Ogden City Corp., 10 Utah 54, 37 Pac. 90.

Wisconsin. — Custeau *v.* St. Louis Land Imp. Co., 88 Wis. 311, 60 N. W. 425.

29. *England.* — New London Credit Syndicate *v.* Neale, (1898) 2 Q. B. 487, 67 L. J. Q. B. N. S. 825.

United States. — Culver *v.* Wilkinson, 145 U. S. 205; Johnson *v.* St. Louis I. M. & S. R. Co., 141 U. S. 602; Cowles Elec. Smelt. & Aluminum Co. *v.* Lowrey, 79 Fed. 331, 24 C. C. A. 616, 47 U. S. App. 531; Church *v.* Proctor, 66 Fed. 240, 13 C. C. A. 426; Earle *v.* Enos, 130 Fed. 467.

Alabama. — Forbes *v.* Taylor, 139 Ala. 286, 35 So. 855; Alabama Nat. Bank *v.* Rivers, 116 Ala. 1, 22 So. 580, 67 Am. St. Rep. 95; Bolling *v.* Vandwer, 91 Ala. 375, 8 So. 290; Allen *v.* Turnham, 83 Ala. 323, 3 So. 854.

Arizona. — Stewart *v.* Albuquerque Nat. Bank, 30 Pac. 303.

Arkansas. — Tisdale *v.* Mallett, 73 Ark. 431, 84 S. W. 481; Anderson *v.* Wainwright, 67 Ark. 62, 53 S. W. 566.

California. — Harrelson *v.* Tomich, 107 Cal. 627, 40 Pac. 1032; Beall *v.* Fisher, 95 Cal. 568, 30 Pac. 773; Booth *v.* Hoskins, 75 Cal. 271, 17 Pac. 225.

Colorado. — Mackey *v.* Magnon, 28 Colo. 100, 62 Pac. 945; Durkee *v.* Jones, 27 Colo. 159, 60 Pac. 618; Neuman *v.* Dreifurst, 9 Colo. 228, 11 Pac. 98; Hardwick *v.* McClurg, 16 Colo. App. 354, 65 Pac. 405, 408; Cooper *v.* German Nat. Bank, 9 Colo. App. 169, 47 Pac. 1041.

Connecticut. — Adams *v.* Turner, 73 Conn. 38, 46 Atl. 247.

Delaware. — Gam *v.* Cordrey, 4 Pen. 143, 53 Atl. 334; Unruh *v.* Taylor, 2 Pen. 42, 43 Atl. 515.

District of Columbia. — Randle *v.* Davis Coal & Coke Co., 15 App. D. C. 357.

Georgia. — Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; Walton Co. *v.* Powell, 94 Ga. 646, 19 S. E. 989.

Illinois. — Osgood *v.* Skinner, 211 Ill. 229, 71 N. E. 869, *affirming* 111 Ill. App. 606; Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213, *affirming* 68 Ill. App. 592; Halliday *v.* Mulligan, 113 Ill. App. 177; Wheaton *v.* Bartlett, 105 Ill. App. 326; Frank *v.* McDonald, 86 Ill. App. 336.

Indiana. — Stevens *v.* Flannagan 131 Ind. 122, 30 N. E. 898; Bailey *v.* Briant, 117 Ind. 362, 20 N. E. 278; Tucker *v.* Tucker, 113 Ind. 272, 13 N. E. 710; Carr *v.* Hays, 110 Ind. 408, 11 N. E. 25; Fordice *v.* Scribner, 108 Ind. 85, 9 N. E. 122.

Iowa. — Piano Mfg. Co. *v.* Eich, 97 N. W. 1106; Younie *v.* Walrod, 104 Iowa 475, 73 N. W. 1021; Barrett *v.* Wheeler, 71 Iowa 662, 33 N. W. 230; Nichols *v.* Wyman, 71 Iowa 160, 32 N. W. 258; Paddock *v.* Bartlett, 68 Iowa 16, 25 N. W. 906.

Kansas. — Trice *v.* Yoeman, 60 Kan. 742, 57 Pac. 955; Smith *v.* Deere, 48 Kan. 416, 29 Pac. 603; Miller *v.* Edgerton, 38 Kan. 36, 15 Pac. 894.

Kentucky. — Beattyville Bank *v.* Roberts, 25 Ky. L. Rep. 1796, 78 S. W. 901; Citizens Bank *v.* Millett 20 Ky. L. Rep., 44 S. W. 366, 44 L. R. A. 664.

Maine. — Gatchell *v.* Moore, 81 Me. 205, 16 Atl. 662; Millett *v.* Marston, 62 Me. 477.

Massachusetts. — Carlisle *v.* Libby, 185 Mass. 445, 70 N. E. 423; Merrigan *v.* Hall, 175 Mass. 508, 56 N. E. 605; Radigan *v.* Johnson, 174 Mass. 68, 54 N. E. 358; Kinnard Co. *v.* Cutter Tower Co., 159 Mass. 391, 34 N. E. 460.

Michigan. — McLeod *v.* Hunt, 128 Mich. 124, 87 N. W. 101; Osborne *v.* Wigent, 127 Mich. 624, 86 N. W. 1022; Dowagiac Mfg. Co. *v.* Corbit, 127 Mich. 473, 86 N. W. 954; Wilbur *v.* Stoepel, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568.

Minnesota. — Calmenson *v.* Equitable Mut. F. Ins. Co., 92 Minn. 390, 100 N. W. 88; Baylor *v.* Butterfass, 82 Minn. 21, 84 N. W. 640; Bell *v.* Mendenhall, 78 Minn. 57, 80

sumed to be merged in the writing,[30] or if not embraced therein, to have been rejected by the parties.[31]

J. Legal Effect. — The rule excluding parol evidence is applicable not only to the terms of the instrument, but also excludes

N. W. 843; Aultman *v.* Brown, 39 Minn. 323, 40 N. W. 159.

Mississippi. — Hightower *v.* Henry, 85 Miss. 476, 37 So. 745; Chicago Bldg. & Mfg. Co. *v.* Higginbotham, 29 So. 79.

Missouri. — Gorton *v.* Rice, 153 Mo. 676, 55 S. W. 241; McCormack Harv. Mach. Co. *v.* Mackey, 100 Mo. App. 400, 74 S. W. 388; First State Bank *v.* Noel, 94 Mo. App. 498, 68 S. W. 235; Howser *v.* Newman, 65 Mo. App. 367; Fisher *v.* Chitty, 62 Mo. App. 405; Dick Bros. Quincy Brew. Co. *v.* Finnell, 39 Mo. 276.

Montana. — Armington *v.* Stelle, 27 Mont. 13, 69 Pac. 115, 94 Am. St. Rep. 811.

Nebraska. — Peterson *v.* Ferbrache, 93 N. W. 1011; Garneau *v.* Cohn, 61 Neb. 500, 85 N. W. 531; Te Poel *v.* Shutt, 57 Neb. 592, 78 N. W. 288; United States Bank *v.* Geer, 55 Neb. 462, 75 N. W. 1088, 70 Am. St. Rep. 390, 41 L. R. A. 444.

New Jersey. — Hallenbeck *v.* Chapman, 71 N. J. L. 477, 58 Atl. 1096; Mott *v.* Rutter, 54 Atl. 159; Buchanon *v.* Adams, 49 N. J. L. 636, 10 Atl. 662, 60 Am. Rep. 666; Foley *v.* Emerald & Phoenix Brew. Co., 61 N. J. L. 428, 39 Atl. 650; Hanrahan *v.* National Bldg. L. & P. Ass'n, 66 N. J. L. 80, 48 Atl. 517.

New York. — Genett *v.* Delaware & H. Canal Co., 122 N. Y. 505, 25 N. E. 922; Grabfelder *v.* Vosburgh, 90 App. Div. 307, 85 N. Y. Supp. 633; Block *v.* Stevens, 72 App. Div. 246, 76 N. Y. Supp. 213; Washington Sav. Bank *v.* Ferguson, 43 App. Div. 74, 59 N. Y. Supp. 295; Thomas *v.* Dingleman, 45 Misc. 379, 90 N. Y. Supp. 436.

North Carolina. — Woodcock *v.* Bostic, 128 N. C. 243, 38 S. E. 881; McAbsher *v.* Richmond & D. R. Co., 108 N. C. 344, 12 S. E. 892; Meekins *v.* Newberry, 101 N. C. 17, 7 S. E. 655.

North Dakota. — First Nat. Bank *v.* Prior, 10 N. D. 146, 86 N. W. 362.

Ohio. — Curran *v.* Hauser, 6 Ohio N. P. 288.

Oklahoma. — Neverman *v.* Bank of Cass Co. of Plattsmouth, Nebraska, 14 Okla. 417, 78 Pac. 382.

Oregon. — Edgar *v.* Golden, 36 Or. 448, 60 Pac. 2.

Pennsylvania. — Melcher *v.* Hill, 194 Pa. St. 440, 45 Atl. 488; Hallowell *v.* Lierz, 171 Pa. St. 577, 33 Atl. 344; Philler *v.* Esler, 1 Pa. Dist. Rep. 282, 29 W. N. C. 258; Winans *v.* Bunnell, 13 Pa. Super. Ct. 445; Wodock *v.* Robinson, 9 Pa. Co. Ct. 503.

Texas. — Earle *v.* Marx, 80 Tex. 39, 15 S. W. 595; Bailey *v.* Rockwall Co. Nat. Bank (Tex. Civ. App.), 61 S. W. 530; Weathered *v.* Golden (Tex. Civ. App.), 34 S. W. 761; Crystal Ice Mfg. Co. *v.* San Antonia Brew. Ass'n, 8 Tex. Civ. App. 1, 27 S. W. 210.

Utah. — First Nat. Bank of Nephi *v.* Foote, 12 Utah 157, 42 Pac. 205.

Vermont. — Nelson *v.* Godfrey, 74 Vt. 470, 52 Atl. 1037; Rickard *v.* Dana, 74 Vt. 74, 52 Atl. 113.

Virginia. — Scott *v.* Norfolk & W. R. Co., 90 Va. 241, 17 S. E. 882.

Washington. — Sibson *v.* Hamilton & Rourke Co., 22 Wash. 449, 61 Pac. 162.

West Virginia. — Maupin *v.* Scottish Union & Nat. Ins. Co., 53 W. Va. 557, 45 S. W. 1003; Martin *v.* Monongahela R. Co., 48 W. Va. 542, 37 S. E. 563; Hukill *v.* Guffey, 37 W. Va. 425, 16 S. E. 544.

Wisconsin. — O'Brien Lumb. Co. *v.* Wilkinson, 117 Wis. 468, 94 N. W. 337; Davy *v.* Kelley, 66 Wis. 452, 29 N. W. 232.

30. Housekeeper Pub. Co. *v.* Swift, 97 Fed. 290, 38 C. C. A. 187; Jacobs *v.* Shenon, 3 Idaho 274, 29 Pac. 44; Cannon *v.* Michigan Mut. L. Ins. Co., 103 Ill. App. 414; Riddell *v.* Peck-Williamson Heat. & Vent. Co., 27 Mont. 44, 69 Pac. 241; Gormully & Jeffery Mfg. Co. *v.* Cross, 25 Misc. 336, 55 N. Y. Supp. 527.

31. Osgood *v.* Skinner, 111 Ill. App. 606, *affirmed* in 211 Ill. 229, 71 N. E. 869.

such evidence where it will operate to contradict or vary the legal effect thereof. If the instrument as executed by the parties is clear and unambiguous in its meaning, and has a well-settled legal construction or effect, such construction or effect will control, and is not subject to contradiction by parol evidence,[32] in the absence of fraud, accident or mistake.[33]

2. Exceptions to, and Qualifications of, Rule. — A. To Invalidate or Avoid. — a. *General Rule.* — The rule excluding parol evidence to vary, contradict, add to or detract from the terms of a written instrument is not applicable in those cases where it is sought to show that the writing is void or in fact never came into existence as a valid obligation. In such cases the court is not confined to the language of the instrument, but parol evidence is admissible to show the true nature of the transaction, and thus to establish the fact that the instrument has no binding force.[34] And evidence of

32. *United States.* — McMaster *v.* New York L. Ins. Co., 99 Fed. 856, 40 C. C. A. 119; Godkin *v.* Monahan, 83 Fed. 116, 27 C. C. A. 410.

Alabama. — Moragne *v.* Richmond Locomotive & Mach. Wks., 124 Ala. 537, 27 So. 240; Alabama Nat. Bank *v.* Rivers, 116 Ala. 1, 22 So. 580, 67 Am. St. Rep. 95.

Arkansas. — Rector *v.* Bernaschina, 64 Ark. 650, 44 S. W. 222; Jenkins *v.* Shinn, 55 Ark. 347, 18 S. W. 240.

Illinois. — Union Special Sew. Mach. Co. *v.* Lockwood, 110 Ill. App. 387.

Indiana. — Colles *v.* Lake Cities Elec. R. Co., 22 Ind. App. 86, 53 N. E. 256.

Iowa. — Wetherell *v.* Brobst, 23 Iowa 586.

Maine. — Maine Bank *v.* Smith, 18 Me. 99; Lowell *v.* Robinson, 16 Me. 357.

Massachusetts. — Warren *v.* Wheeler, 8 Metc. 97; Salisbury *v.* Andrews, 19 Pick. 250.

Minnesota. — Knolbauch *v.* Foglesong, 39 Minn. 352, 37 N. W. 586.

Mississippi. — Campe *v.* Renandine, 64 Miss. 441, 1 So. 498.

Montana. — Riddell *v.* Peck-Williamson Heat. & Vent. Co., 27 Mont. 44, 69 Pac. 241.

New York. — Kaven *v.* Chrystie, 84 N. Y. Supp. 470; La Farge *v.* Rickert, 5 Wend. 187, 21 Am. Dec. 209; Thompson *v.* Ketcham, 8 Johns. 189; Thomas *v.* Truscott, 53 Barb. 200.

Ohio. — Douglass *v.* Campbell, 24 Ohio Cir. Ct. 241.

Pennsylvania. — Hennershotz *v.* Gallagher, 124 Pa. St. 1, 16 Atl. 518.

Texas. — Self *v.* King, 28 Tex. 552; Loonie *v.* Tillman, 3 Tex. Civ. App. 332, 22 S. W. 524.

Vermont. — Butler *v.* Gale, 27 Vt. 739.

Wisconsin. — Cliver *v.* Heil, 95 Wis. 364, 70 N. W. 346.

The phrase to vary the legal effect of an instrument is not very precise or definite. McGhee *v.* Rump, 37 Ala. 651, 655, *per* Stone, J.

So it is said that the general rule "is applicable to oral negotiations and agreements which vary the legal construction and import of a written contract, although they do not contradict its express terms." Riddell *v.* Peck-Williamson Heat. & Vent. Co., 27 Mont. 44, 58, 69 Pac. 241, *per* Mr. Justice Pigott.

"Parol evidence of an intention . . . directly in the face both of the language and legal effect of the written agreement must be disregarded." Wetherell *v.* Probst, 23 Iowa 586, 589, *per* Dillon, C. J.

33. McMaster *v.* New York L. Ins. Co., 99 Fed. 856, 40 C. C. A. 119; Colles *v.* Lake Cities Elec. R. Co., 22 Ind. App. 86, 53 N. E. 256; Hennershotz *v.* Gallagher, 124 Pa. St. 1, 16 Atl. 518; Loonie *v.* Tillman, 3 Tex. Civ. App. 332, 22 S. W. 524.

34. *Alabama.* — Corbin *v.* Sistrunk, 19 Ala. 203.

conversations between the parties prior to and in connection with the execution of an instrument is admissible where it has no reference to the contents thereof, but its sole purpose is to impeach the writing.[35]

b. *Instrument Not Intended To Be Binding.* — Parol evidence is admissible to show that an instrument was never intended by the parties to become operative as a valid binding obligation.[36]

c. *Fraud.* — **(1.) In General.** — In all cases where a person has fraudulently procured the execution of a writing by another, or induced him to affix his signature to an instrument which by reason of fraud fails to express the true contract of the parties, it is competent to go behind the language used therein, and the party defrauded may show any facts or circumstances, though contrary to the terms of the writing, which will prove the fraud alleged.[37]

Illinois. — Robinson *v.* Nessell, 86 Ill. App. 212.

Iowa. — Bowman *v.* Torr, 3 Iowa 571.

Kentucky. — Edrington *v.* Harper, 3 J. J. Marsh. 353, 20 Am. Dec. 145.

Louisiana. — Leblanc *v.* Boucherau, 16 La. Ann. 11.

Maine. — Marston *v.* Kennebec Mut. L. Ins. Co., 89 Me. 266, 36 Atl. 389, 56 Am. St. Rep. 412.

Maryland. — Southern St. Ry. Ad. Co. *v.* Metropole Shoe Mfg. Co., 91 Md. 61, 46 Atl. 513.

Massachusetts. — Earle *v.* Rice, 111 Mass. 17; Stackpole *v.* Arnold, 11 Mass. 27; Baker *v.* Briggs, 8 Pick. 122, 19 Am. Dec. 311.

New Jersey. — Boulevard Globe & Lamp Co. *v.* Kern Incandescent Gaslight Co., 67 N. J. L. 279, 51 Atl. 704.

New York. — Thomas *v.* Scutt, 127 N. Y. 133, 27 N. E. 961; Carraher *v.* Mulligan, 28 N. Y. St. 439, 8 N. Y. Supp. 42.

Utah. — Gregg *v.* Groesbeck, 11 Utah 310, 40 Pac. 202, 32 L. R. A. 266.

Vermont. — Cameron *v.* Estabrooks, 73 Vt. 73, 50 Atl. 638; Webster *v.* Smith, 72 Vt. 12, 47 Atl. 101; Bradley Fertilizer Co. *v.* Caswell, 65 Vt. 231, 26 Atl. 956.

"If it were otherwise—if the manner of the transaction could *gild over and conceal the truth*—this great conservative principle of the law, essential to the purity of the administration of justice, of public morals and the general welfare, would be evaded at the pleasure of the designing, the wicked, and the corrupt." Robertson *v.* Robinson, 65 Ala. 610, 39 Am. Rep. 17.

One Who Attacks the Validity of a Contract Has the Burden of showing its invalidity. Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28.

35. Waid *v.* Hobson, 17 Colo. App. 54, 67 Pac. 176.

36. Robinson *v.* Nessell, 86 Ill. App. 212; Southern St. R. Ad. Co. *v.* Metropole Shoe Mfg. Co., 91 Md. 61, 46 Atl. 513; Earle *v.* Rice, 111 Mass. 17; Grierson *v.* Mason, 60 N. Y. 394. See Sigafus *v.* Porter, 84 Fed. 430, 28 C. C. A. 443, 51 U. S. App. 693.

37. *United States.* — Chandler *v.* Von Roeder, 24 How. 224; Howison *v.* Alabama Coal & Iron Co., 70 Fed. 683, 17 C. C. A. 339; Chandler *v.* Thompson, 30 Fed. 38.

Alabama. — Bank of Guntersville *v.* Webb, 108 Ala. 132, 19 So. 14; Nelson *v.* Wood, 62 Ala. 175; Townsend *v.* Cowles, 31 Ala. 428; Waddell *v.* Glassell, 18 Ala. 561; Turnipseed *v.* McMath, 13 Ala. 44.

California. — Willey *v.* C. Clements, 146 Cal. 91, 79 Pac. 580; Langley *v.* Rodriguez, 122 Cal. 580, 55 Pac. 406, 68 Am. St. Rep. 70; Maxson *v.* Llewellyn, 122 Cal. 195, 54 Pac. 732; Cummings *v.* Ross, 90 Cal. 68, 27 Pac. 62; Hays *v.* Gloster, 88 Cal. 560, 26 Pac. 367.

Colorado. — Johnson *v.* Cummings, 12 Colo. App. 17, 55 Pac. 269.

Connecticut. — Gustafson *v.* Rustemeyer, 70 Conn. 125, 39 Atl. 104, 66 Am. St. Rep. 92, 39 L. R. A. 644; Fox *v.* Tabel, 66 Conn. 497, 34 Atl. 101; Wainright *v.* Talcott, 60 Conn. 43, 22 Atl. 484.

District of Columbia. — Cotharin *v.* Davis, 4 Mack. 146.

Georgia. — Gore *v.* Malsby, 110 Ga. 893, 36 S. E. 315; Barrie *v.* Miller, 104 Ga. 312, 30 S. E. 840; Bride *v.* Macon Tel. Pub. Co., 102 Ga. 422, 30 S. E. 999; Rives *v.* Thompson, 41 Ga. 68.

Illinois. — Grand Tower & C. R. Co. *v.* Walton, 150 Ill. 428, 37 N. E. 920; Tyler *v.* Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642; Supreme Council C. K. & L. of America *v.* Beggs, 110 Ill. App. 139; Hartley *v.* Gilhofer, 109 Ill. App. 527; Barrie & Son *v.* Frost, 105 Ill. App. 187.

Indiana. — Moore *v.* Harmon, 142 Ind. 555, 41 N. E. 599; Ewing *v.* Smith, 132 Ind. 205, 31 N. E. 464; McCormick *v.* Smith, 127 Ind. 230, 26 N. E. 825; Catalani *v.* Catalani, 124 Ind. 54, 24 N. E. 375, 19 Am. St. Rep. 73; Jones *v.* Pincheon, 6 Ind. App. 460, 32 N. E. 577.

Indian Territory. — Fox *v.* Tyler 3 Ind. Ter. 1, 53 S. W. 462; Swofford Bros. Dry Goods Co. *v.* Smith-McCord Dry Goods Co., 1 Ind. Ter. 314, 37 S. W. 103.

Iowa. — Sisson *v.* Kaper, 105 Iowa 599, 75 N. W. 490; Murdy *v.* Skyles, 101 Iowa 549, 70 N. W. 714, 63 Am. St. Rep. 411; Humbert *v.* Larsen, 99 Iowa 275, 68 N. W. 703; Scroggin *v.* Wood, 87 Iowa 497, 54 N. W. 437; Stanhope *v.* Swafford, 80 Iowa 45, 45 N. W. 403.

Kansas. — Brook *v.* Teague, 52 Kan. 119, 34 Pac. 347; Lewis *v.* Burnham, 41 Kan. 546, 21 Pac. 572.

Kentucky. — Tribble *v.* Oldham, 5 J. J. Marsh. 137; Huston *v.* Noble, 4 J. J. Marsh. 130; Edrington *v.* Harper, 3 J. J. Marsh. 353, 20 Am. Dec. 145.

Louisiana. — Hoffman *v.* Ackerman, 110 La. 1070, 35 So. 293; Le Bleu *v.* Savoie, 109 La. 680, 33 So. 729; Montgomery *v.* Chaney, 13 La. Ann. 207.

Maine. — Holley *v.* Young, 66 Me. 520.

Maryland. — Watkins *v.* Stockett, 6 Har. & J. 435.

Massachusetts. — Trambly *v.* Richard, 130 Mass. 259; Holbrook *v.* Burt, 22 Pick. 546; Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150.

Michigan. — Rambo *v.* Patterson, 133 Mich. 655, 95 N. W. 722; Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665; Peck *v.* Jenison, 99 Mich. 326, 58 N. W. 312; Match *v.* Hunt, 38 Mich. 1.

Minnesota. — Clerihew *v.* West Side Bank, 50 Minn. 538, 52 N. W. 967; Lewis *v.* Willoughby, 43 Minn. 307, 45 N. W. 439; Cooper *v.* Finke, 38 Minn. 2, 35 N. W. 469.

Mississippi. — Howie Bros. *v.* Pratt, 83 Miss. 15, 35 So. 216; Butler *v.* State, 81 Miss. 734, 33 So. 847; Grayson *v.* Brooks, 64 Miss. 410, 1 So. 482; Optical Co. *v.* Jackson, 63 Miss. 21.

Missouri. — Hall *v.* Knappenberger, 6 S. W. 381; Poindexter *v.* McDowell, 110 Mo. App. 233, 84 S. W. 1133; Leicher *v.* Keeney, 98 Mo. App. 394, 72 S. W. 145; Gribble *v.* Everett, 98 Mo. App. 32, 71 S. W. 1124; Koffman *v.* Southwest Missouri Elec. R. Co., 95 Mo. App. 459, 68 S. W. 212; Culp *v.* Powell, 68 Mo. App. 238.

Montana. — Sathre *v.* Rolfe, 31 Mont. 85, 77 Pac. 431; Fitschen *v.* Thomas, 9 Mont. 52, 22 Pac. 450.

Nebraska. — Bauer *v.* Taylor, 96 N. W. 268.

New Hampshire. — Anderson *v.* Scott, 70 N. H. 350, 47 Atl. 607.

New Jersey. — Brewster *v.* Brewster, 38 N. J. L. 119; Wooden *v.* Shotwell, 23 N. J. L. 465.

New York. — Hall *v.* Erwin, 66 N. Y. 649; Miller *v.* Barber, 66 N. Y. 558; Van Alstyne *v.* Smith, 82 Hun 382, 63 N. Y. St. 595, 31 N. Y. Supp. 277; Mattes *v.* Frankel, 65 Hun 203, 47 N. Y. St. 507, 20 N. Y. Supp. 145; Olivill *v.* Verdenhalven, 39 N. Y. St. 200, 15 N. Y. Supp. 94.

North Carolina. — Gwaltney *v.* Provident Sav. L. Assur. Soc., 132 N. C. 925, 44 S. E. 659; Cutler *v.* Roanoke R. & L. Co., 128 N. C. 477, 39 S. E. 30; Knight *v.* Houghtalling, 85 N. C. 17; Ward *v.* Ledbetter, 21 N. C. 496.

Pennsylvania. — Sidney School Furn. Co. *v.* Warsaw School Dist., 130 Pa. St. 76, 18 Atl. 604; McAboy *v.* Johns, 70 Pa. St. 9; Meyers *v.* Meyers, 24 Pa. Super. Ct. 603; Volkenand *v.* Drum, 6 Kulp. 519, 2 Pa. Dist. R. 161.

And for this purpose evidence is admissible of negotiations, conversations and declarations of the parties prior to and in connection with the execution of the instrument,[38] and of a parol agreement.[39] And it has been decided that it is not essential to the admission of evidence to establish fraud, that a fraud should have been originally intended, for, though the parties acted in good faith at the inception of the transaction, yet a subsequent attempt to use an instrument for a purpose other than was intended and for which it was obtained, is as much fraud as to practice falsehood and deceit in its procurement, and will subject the instrument to the influence of parol evidence.[40] Parties will not, however, merely upon an allegation of fraud, without any proof to support the averment, be permitted to offer parol testimony to contradict the writing which

Rhode Island — Atwood *v.* Lester, 20 R. I. 660, 40 Atl. 866.

South Carolina. — Willcox *v.* Priester, 68 S. C. 106, 46 S. E. 553; Featherston *v.* Dagnell, 29 S. C. 45, 6 S. E. 897.

South Dakota. — National Cash Register Co. *v.* Pfister, 5 S. D. 143, 58 N. W. 270; Osborne *v.* Stringham, 1 S. D. 406, 46 N. W. 408.

Tennessee. — Barnard *v.* Roane Iron Co., 85 Tenn. 139, 2 S. W. 21; Fine *v.* Stuart, 48 S. W. 371.

Texas. — Chatham *v.* Jones, 69 Tex. 744, 7 S. W. 600; Hallwood Cash Register Co. *v.* Berry, 35 Tex. Civ. App. 554, 80 S. W. 857; American Cotton Co. *v.* Collier, 30 Tex. Civ. App. 105, 69 S. W. 1021; Davis *v.* Driscoll, 22 Tex. Civ. App. 14, 54 S. W. 43; Herring *v.* Mason, 17 Tex. Civ. App. 559, 43 S. W. 797.

Vermont. — Mallory *v.* Leach, 35 Vt. 156, 82 Am. Dec. 625; Winn *v.* Chamberlin, 32 Vt. 318, 321.

Virginia. — Didier *v.* Patterson, 93 Va. 534, 25 S. E. 661; Broughton *v.* Coffer, 18 Gratt. 184.

Washington. — O'Connor *v.* Lighthizer, 34 Wash. 152, 75 Pac. 643; Griffith *v.* Strand, 19 Wash. 686, 54 Pac. 613.

West Virginia. — Casto *v.* Fry, 33 W. Va. 449, 10 S. E. 799; Depue *v.* Sergent, 21 W. Va. 326.

Wisconsin. — Hurlbert *v.* Kellogg Lumb. & Mfg. Co., 115 Wis. 225, 91 N. W. 673; McKesson *v.* Sherman, 51 Wis. 303, 8 N. W. 200.

Evidence To Show the Real Agreement between the parties is admissible where fraud has been alleged and proven. Vansant *v.* Runyon, 19 Ky. L. Rep. 1981, 44 S. W. 949. *Compare* Koffman *v.* Southwest Missouri Elec. R. Co., 95 Mo. App. 459, 68 S. W. 212.

38. *United States.* — Tinsley *v.* Jemison, 74 Fed. 177, 20 C. C. A. 371, 38 U. S. App. 665; Howison *v.* Alabama Coal & Iron Co., 70 Fed. 683, 17 C. C. A. 339, 30 U. S. App. 473.

Colorado. — Johnson *v.* Cummings, 12 Colo. App. 17, 55 Pac. 269.

Illinois. — Johnson *v.* Glover, 121 Ill. 283, 12 N. E. 257.

Indiana. — Moore *v.* Harmon, 142 Ind. 555, 41 N. E. 599.

Maryland. — Farrell *v.* Bean, 10 Md. 217.

Missouri. — Leicher *v.* Keeney, 98 Mo. App. 394, 72 S. W. 145.

Texas. — Fairbanks *v.* Simpson (Tex. Civ. App.), 28 S. W. 128.

39. *United States.* — Breyfogle *v.* Walsh, 80 Fed. 172, 25 C. C. A. 357, 53 U. S. App. 30.

Connecticut. — Wainwright *v.* Talcott, 60 Conn. 43, 22 Atl. 484.

Missouri. — Poindexter *v.* McDowell, 110 Mo. App. 233, 84 S. W. 1133; Byrne *v.* Carson, 70 Mo. App. 126.

New Jersey. — Busick *v.* Van Ness, 44 N. J. Eq. 82, 12 Atl. 609.

Pennsylvania. — McAboy *v.* Johns 70 Pa. St. 9.

Texas. — Chatham *v.* Jones, 69 Tex. 744, 7 S. W. 600.

40. Rearich *v.* Swinehart, 11 Pa. St. 233, 51 Am. Dec. 540.

The Mere Fact That an Agreement Was Made and Not Kept does not establish fraud in the inception of a contract. Concord Bank *v.* Rogers 16 N. H. 9.

purports to be the evidence of the contract between them.[41] And to establish fraud there must be evidence of it other than that which may be derived from the mere difference between the parol and written terms.[42]

(2.) **Fraudulent Representations.** — Evidence of fraudulent representations made to induce the execution of a writing by another, and which were relied upon by the latter, who acted upon the faith of such representations, is admissible where made in respect to a material matter[43] of which the other party had not equal means of knowing the truth.[44] And it is decided that such evidence will

41. Vansant *v.* Runyon, 19 Ky. L. Rep. 1981, 44 S. W. 949; Callanan *v.* Judd, 23 Wis. 343, 353.

42. Thorne *v.* Warfflein, 100 Pa. St. 519, 527.

43. *California.* — Willey *v.* Clements, 146 Cal. 91, 79 Pac. 850; Cummings *v.* Ross, 90 Cal. 68, 27 Pac. 62.

Connecticut. — Gustafson *v.* Rustemeyer, 70 Conn. 125, 39 Atl. 104, 66 Am. St. Rep. 92, 39 L. R. A. 644; Fox *v.* Tabel, 66 Conn. 397, 34 Atl. 101.

Georgia. — McCrary *v.* Pritchard, 119 Ga. 876, 47 S. E. 341; Gore *v.* Malsby, 110 Ga. 893, 36 S. E. 315; McBride *v.* Macon Tel. Pub. Co., 102 Ga. 422, 30 S. E. 999.

Illinois. — Grand Tower & C. G. R. Co. *v.* Walton, 150 Ill. 428, 37 N. E. 920; Telluride Power Transmission Co. *v.* Crane Co., 103 Ill. App. 647; Young *v.* Heffernan, 67 Ill. App. 354.

Iowa. — Sisson *v.* Kaper, 105 Iowa 599, 75 N. W. 490; McCormick Harv. Mach. Co. *v.* Williams, 99 Iowa 601, 68 N. W. 907; Scroggin *v.* Wood, 87 Iowa 497, 54 N. W. 437; Stanhope *v.* Swafford, 80 Iowa 45, 45 N. W. 403.

Kansas. — Schoen *v.* Sunderland, 39 Kan. 758, 18 Pac. 913; Pioneer Sav. & Loan Co. *v.* Kasper, 7 Kan. App. 813, 52 Pac. 623.

Michigan. — Rambo *v.* Patterson 133 Mich. 655, 95 N. W. 722; Peck *v.* Jenison, 99 Mich. 326, 58 N. W. 312.

Minnesota. — Vilett *v.* Moler, 82 Minn. 12, 84 N. W. 452.

Mississippi. — Howie Bros. *v.* Pratt, 83 Miss. 15, 35 So. 216; Tufts *v.* Greenewald, 66 Miss. 360, 6 So. 156.

Missouri. — Phoenix Ins. Co. *v* Owens, 81 Mo. App. 201.

Nebraska. — Bauer *v.* Taylor, 96 N. W. 268.

New Jersey. — State *v.* Cass, 52 N. J. L. 77, 18 Atl. 972.

New York. — Mayer *v.* Dean, 115 N. Y. 556, 22 N. E. 261, 5 L. R. A. 540.

Pennsylvania. — American Home Sav. Bank *v.* Guardian Trust Co. 210 Pa. St. 320, 59 Atl. 1108; Machin *v.* Prudential Trust Co., 210 Pa. St. 253, 59 Atl. 1073.

South Dakota. — National Cash Register Co. *v.* Pfister, 5 S. D. 143, 58 N. W. 270.

Tennessee. — Barnard *v.* Roane Iron Co., 85 Tenn. 139, 2 S. W. 21; Waterbury *v.* Russell, 8 Baxt. 159.

Texas. — Davis *v.* Driscoll, 22 Tex. Civ. App. 14, 54 S. W. 43; Herring *v.* Mason, 17 Tex. Civ. App. 559, 43 S. W. 797; Turner *v.* Grobe (Tex. Civ. App.), 44 S. W. 898; Halsell *v.* Musgrave, 5 Tex. Civ. App. 476, 24 S. W. 358.

Washington. — Griffith *v.* Strand, 19 Wash. 686, 54 Pac. 613.

Wisconsin. — Hurlbert *v.* Kellogg Lumb. & Mfg. Co., 115 Wis. 225, 91 N. W. 673.

It Must Appear that the false representations were relied upon. Holbrook *v.* Burt, 22 Pick. (Mass.) 546.

44. Durkin *v.* Cobleigh, 156 Mass. 108, 30 N. E. 474, 32 Am. St. Rep. 436, 17 L. R. A. 270; Medbury *v.* Watson, 6 Metc. (Mass.) 246, 260, 39 Am. Dec. 726; Van Velsor *v.* Seeberger, 35 Ill. App. 598; Martin *v.* Harwell, 115 Ga. 156; Castenholz *v.* Heller, 82 Wis. 30, 51 N. W. 432. See article "FRAUD," Vol. VI, p. 71, *et seq.*

not be excluded by the fact that there is a provision in the contract that no representations not contained therein will be binding.[45] Evidence, however, that certain representations inconsistent with the terms of a writing were made by a party thereto to induce another to affix his name to the instrument is not admissible in the absence of some averment or proof that they were fraudulently made.[46]

(3.) Evidence as to Fraud Admissible in Law or Equity. — The rule as to the admission of evidence showing fraud applies in courts of law as well as in courts of equity,[47] especially in common-law courts administering equitable remedies,[48] though in some cases it has been decided that, in those jurisdictions where the distinction between law and equity is still preserved, evidence of fraud is admissible in a court of law only in connection with the execution of an instrument, and that evidence of fraudulent transactions or representations preceding the execution is not admissible.[49]

d. *Illegality.* — **(1.) In General.** — Courts will not aid the enforcement of illegal contracts, and evidence is admissible to show that a contract was made in furtherance of objects forbidden by statute, by common law, or by the general policy of the law,[50] as where

45. Barrie *v.* Miller, 104 Ga. 312, 30 S. E. 840, 69 Am. St. Rep. 171; Peck *v.* Jenison, 99 Mich. 326, 58 N. W. 312.

46. *Connecticut.* — New Idea Pattern Co. *v.* Whelan, 75 Conn. 455, 53 Atl. 953.

Georgia. — Burch *v.* Augusta, G. & S. R. Co., 80 Ga. 296, 4 S. E. 850.

Illinois. — Howell *v.* Methodist Episcopal Church, 61 Ill. App. 121.

Kentucky. — Singer Mfg. Co. *v.* Witt, 26 Ky. L. Rep. 213, 80 S. W. 1124.

Massachusetts. — Stevens *v.* Pierce, 151 Mass. 207, 23 N. E. 1006.

Tennessee. — Anderson *v.* Middle & E. T. C. R. Co., 91 Tenn. 44, 17 S. W. 803.

Washington. — Staver *v.* Rogers, 3 Wash. 603, 28 Pac. 906.

Fraud Should Be Averred in order that proof thereof may be admissible.

California. — Harrison *v.* McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469.

Georgia. — Miller *v.* Cotten, 5 Ga. 341.

Kentucky. — Morris *v.* Morris, 2 Bibb. 311.

Louisiana. — Johnson *v.* Flanner, 42 La. Ann. 522, 7 So. 455.

Maryland. — Watkins *v.* Stockett, 6 Har. & J. 435.

Nebraska. — Bauer *v.* Taylor, 96 N. W. 268.

Pennsylvania. — Krueger *v.* Nicola, 205 Pa. St. 38, 54 Atl. 494. But see Thomas *v.* Grise, 1 Pen. (Del.) 381, 41 Atl. 883, holding that fraud may be proved under the general issue, and need not be specially pleaded.

47. Terrell Coal Co. *v.* Lacey (Ala.), 31 So. 109; Tarver *v.* Rawkin, 3 Ga. 210; Chambovet *v.* Cagney, 35 N. Y. Super. Ct. 474; Barnhart *v.* Riddle, 29 Pa. St. 92, 97; Cameron *v.* Estabrooks, 73 Vt. 73, 50 Atl. 638.

48. Hartshorn *v.* Day, 19 How. (U. S.) 211, 223; Young *v.* Stampfler, 27 Wash. 350, 67 Pac. 721.

49. Windett *v.* Hurlbut, 115 Ill. 403, 5 N. E. 589. See Whiting *v.* Withington, 3 Cush. (Mass.) 413; Koffman *v.* Southwest Missouri Elec. R. Co., 95 Mo. App. 459. But see "Fraudulent Representations" herein.

50. *England.* — Collins *v.* Blantern, 2 Wils. 341, 350.

United States. — McMullen *v.* Hoffman, 174 U. S. 639.

Alabama. — Allen *v.* Turnham, 83 Ala. 323, 3 So. 854.

California. — Buffendeau *v.* Brooks, 28 Cal. 641.

Georgia. — Southern Express Co. *v.* Duffey, 48 Ga. 358.

an instrument is executed to defraud creditors,[51] or in violation of a statute relating to banking institutions,[52] or to compound a felony,[53] or is champertous.[54] And for the purpose of establishing illegality, evidence is admissible of conversations and the understanding of the parties,[55] and of their negotiations in respect to the instrument.[56] And where illegality of consideration is alleged, evidence showing such fact is not precluded by a recital in the instrument of a money consideration.[57]

(2.) In Restraint of Trade and in Violation of Anti-Trust Laws. In determining whether a contract in restraint of trade and in violation of the anti-trust laws is of such a character, parol evidence is admissible of the circumstances attending the making of the contract, the object in view, and the construction placed on it by the parties as evidenced by their dealings under it.[58]

(3.) Usury. — Parol evidence is admissible to show the usurious nature of a contract.[59] And though the instrument bears a legal

Illinois. — Ryan *v.* Potwin, 60 Ill. App. 637.

Kansas. — Friend *v.* Miller, 52 Kan. 139, 34 Pac. 397.

Maine. — Gould *v.* Leavitt, 92 Me. 416, 43 Atl. 17.

Massachusetts. — Russell *v.* DeGrand, 15 Mass. 35; Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150.

Minnesota. — Lewis *v.* Willoughby, 43 Minn. 307, 45 N. W. 439.

Nebraska. — Luce *v.* Foster, 42 Neb. 818, 60 N. W. 1027.

New Hampshire. — Wheeler *v.* Metropolitan Stock Exch., 72 N. H. 315, 56 Atl. 754.

New Jersey. — Paterson *v.* Baker, 51 N. J. Eq. 49, 26 Atl. 324.

Rhode Island. — Martin *v.* Clarke, 8 R. I. 389, 5 Am. Rep. 586.

South Carolina. — Groesbeck *v.* Marshall, 44 S. C. 538, 22 S. E. 743.

Texas. — Sanger *v.* Miller, 26 Tex. Civ. App. 111, 62 S. W. 425.

51. Tyler *v.* Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642.

52. Lime Rock Bank *v.* Hewitt, 50 Me. 267.

53. Friend *v.* Miller, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340.

54. Wilhite *v.* Roberts, 4 Dana (Ky.) 172.

55. Clemens Elec. Mfg. Co. *v.* Walton, 173 Mass. 286, 52 N. E. 132.

56. Field Cordage Co. *v.* National Cordage Co., 6 Ohio C. C. 615.

57. Wooden *v.* Shotwell, 23 N. J. L. 465.

58. Detroit Salt Co. *v.* National Salt Co., 134 Mich. 103, 96 N. W. 1.

59. *United States.* — New England Mtge. Security Co. *v.* Gay, 33 Fed. 636.

Arkansas. — Roe *v.* Kiser, 62 Ark. 92, 34 S. W. 534, 54 Am. St. Rep. 288.

Connecticut. — Reading *v.* Weston, 7 Conn. 409.

Kentucky. — Bright *v.* Wagle, 3 Dana 252; Edrington *v.* Harper, 3 J. J. Marsh. 353, 20 Am. Dec. 145.

Mississippi. — Grayson *v.* Brooks, 64 Miss. 410, 1 So. 482; Newsom *v.* Thighen, 30 Miss. 414.

New York. — Mudgett *v.* Goler, 18 Hun 302.

Texas. — Peoples Bldg. Loan & Sav. Ass'n *v.* Keller, 20 Tex. Civ. App. 616, 50 S. W. 183.

Vermont. — Jackson *v.* Kirby, 37 Vt. 448.

"If the rule were otherwise, the cunning devices and schemes of the usurer could never be exposed, and the law against his grasping avarice would remain a dead letter upon our statute books." Southern Home Bldg. & Loan Ass'n *v.* Winans, 24 Tex. Civ. App. 544, 547, 60 S. W. 825, *per* Hunter, J.

"If parol evidence was not admissible to uncover and disclose the real usurious contract, where one existed, the salutary purpose of the law forbidding usury could be defeated by entering into a written contract reserving only legal interest, but at the

rate of interest upon its face it may be shown that there was a contemporaneous agreement that an usurious rate should be paid.[60]

(4.) **Wagering Contracts.** — A contract may be shown, by parol evidence, to be a wagering contract,[61] and for this purpose evidence is admissible of the facts and circumstances surrounding the execution of the instrument.[62]

(5.) **Duress.** — That a contract was executed under duress may be shown by parol evidence.[63] So a wife may show by parol evidence that the instrument in question was executed by her under duress of her husband.[64]

e. *Want of Authority.* — Parol evidence is admissible to show that there was a want of authority on the part of a person who affixed the signature of another to a writing.[65]

f. *Want of Execution.* — Parol evidence is admissible to show that the person whose signature is affixed to an instrument never

same time agreeing verbally to pay usurious interest and carrying out and executing the verbal contract." McGuire *v.* Campbell, 58 Ill. App. 188, 191, *per* Green, J.

Payment and Receipt of Usurious Interest is *prima facie* evidence of an usurious contract. Densye *v.* Crawford, 18 N. J. L. 325.

60. Roe *v.* Kiser, 62 Ark. 92, 34 S. W. 534, 54 Am. St. Rep. 288; Denyse *v.* Crawford, 18 N. J. L. 325; Smith *v.* Stevens, 81 Tex. 461, 16 S. W. 986; Cotton States Bldg. Co. *v.* Rawlins (Tex. Civ. App.), 62 S. W. 805. But see Allen *v.* Turnham, 83 Ala. 323, 3 So. 854.

61. Beadles *v.* McElrath, 85 Ky. 230, 3 S. W. 152; Kent *v.* Miltenberger, 13 Mo. App. 503; Wheeler *v.* Metropolitan Stock Exch., 72 N. H. 315, 56 Atl. 754.

62. Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862.

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

Georgia. — Southern Express Co. v. Duffey, 48 Ga. 358.

Illinois. — Crane *v.* Crane, 81 Ill. 165.

Iowa. — Veach *v.* Thompson, 15 Iowa 380.

Kentucky. — Hall *v.* Bank of Commonwealth, 5 Dana 258, 30 Am. Dec. 685.

Louisiana. — Linkswiler *v.* Hoffman, 109 La. 948, 34 So. 34.

Michigan. — McAllister *v.* Engle, 52 Mich. 56, 17 N. W. 694.

New York. — Mills *v.* Young, 23 Wend. 314.

Pennsylvania. — Heeter *v.* Glasgow, 79 Pa. St. 79.

Tennessee. — McLin *v.* Marshall, 1 Heisk. 678.

Texas. — Horton *v.* Reynolds, 8 Tex. 284.

64. Vicknair *v.* Trosclair, 45 La. Ann. 373, 12 So. 486; Moore *v.* Rush, 30 La. Ann. 1157; Louden *v.* Blythe, 27 Pa. St. 22, 67 Am. Dec. 442; Springfield Engine & Thresher Co. *v.* Donovan, 147 Mo. 622, 49 S. W. 500.

65. *United States.* — Thompson *v.* First Nat. Bank, 111 U. S. 529; Starr *v.* Galgate Ship Co., 68 Fed. 234.

California. — Hendrie *v.* Berkowitz, 37 Cal. 113, 99 Am. Dec. 251.

Colorado. — Harper *v.* Lockhart, 9 Colo. App. 430, 48 Pac. 901.

Georgia. — Stilwell *v.* Woodruff, 76 Ga. 347.

Iowa. — Smith *v.* Tramel, 68 Iowa 488, 27 N. W. 471.

Maryland. — Whiteford *v.* Munroe, 17 Md. 135.

Massachusetts. — Remick *v.* Sandford, 118 Mass. 102; Hall *v.* Huse, 10 Mass. 39; Coddington *v.* Goddard, 16 Gray 436.

New York. — Meserole *v.* Archer, 3 Bosw. 376.

Pennsylvania. — Hunter *v.* Reilly, 36 Pa. St. 509.

Texas. — Wilson *v.* Skaggs, 10 Tex. 298.

Wisconsin. — Hubbard *v.* Lyndon, 28 Wis. 674.

executed the same,[66] and that the signature purporting to be his is a forgery.[67] And where the question of the execution of an instrument is in issue evidence is admissible of what was said and done at the time.[68]

g. *Want of Capacity.* — Parol evidence is admissible for the purpose of showing that a person whose name is affixed to an instrument was legally incapable of executing the same by reason of mental incapacity,[69] coverture,[70] or infancy.[71] And parol evidence, in many cases, is admissible to show that a person was, at the time he executed an instrument, in an intoxicated condition.[72]

h. *Alterations.* — Parol evidence is admissible to show a fraudulent or unauthorized material alteration in the terms of a written instrument by which some change is effected in the terms, identity or operation of the instrument, thus creating a contract other than that entered into by the parties.[73]

66. Marsh *v.* Nichols, 128 U. S. 605; Hedge *v.* Talbott, 8 Ind. App. 597, 36 N. E. 437; Fox *v.* Tyler, 3 Ind. Ter. 1, 53 S. W. 462; Pierce *v.* Georger, 103 Mo. 540, 15 S. W. 848; Flowers *v.* Fletcher, 40 W. Va. 103, 20 S. E. 870; Parroski *v.* Goldberg, 80 Wis. 339, 50 N. W. 191.

67. Tyler *v.* Todd, 36 Conn. 218; Parker *v.* Waycross & F. R. Co., 81 Ga. 387, 8 So. 871; Sibley *v.* Haslam, 75 Ga. 490; Ehrler *v.* Braun, 120 Ill. 503, 12 N. E. 996; Camp *v.* Carpenter, 52 Mich. 375, 18 N. W. 113; Farmers & Mechanics Bank *v.* Butchers & Drovers Bank, 14 N. Y. 623; Porter *v.* Hardy, 10 N. D. 551, 88 N. W. 458; Ellis *v.* Watkins, 73 Vt. 371, 50 Atl. 1105.

68. "Upon the issue of execution *vel non*, what was said and done at the time and by whom done, are the very vital facts." White *v.* Kahn, 103 Ala. 308, 15 So. 595, *per* Head, J.

69. McClain *v.* Davis, 77 Ind. 419; Van Patton *v.* Beals, 46 Iowa 62; Taylor *v.* Dudley, 5 Dana 308; Mitchell *v.* Kingman, 5 Pick. (Mass.) 431; Rice *v.* Peet, 15 Johns. (N. Y.) 503; Hosler *v.* Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720, 35 L. R. A. 161; Moore *v.* Hershey, 90 Pa. St. 196; Sentance *v.* Poole, 3 C. & P. (Eng.) 1.

70. *Alabama.* — Fry *v.* Hammer, 50 Ala. 52.

District of Columbia. — Jackson *v.* Hulse, 6 Mack. 548.

Florida. — Dollner *v.* Snow, 16 Fla. 86.

Georgia. — Perkins *v.* Rowland, 69 Ga. 661.

Indiana. — Lackey *v.* Boruff, 152 Ind. 371, 53 N. E. 412.

Iowa. — Jones *v.* Crosthwaite, 17 Iowa 393.

Louisiana. — Leblanc *v.* Boucher-eau, 16 La. Ann. 11.

Maine. — Wyman *v.* Whitehouse, 80 Me. 257, 14 Atl. 68.

Michigan. — Johnson *v.* Sutherland, 39 Mich. 579.

Missouri. — Comings *v.* Leedy, 114 Mo. 454, 21 S. W. 804.

New Jersey. — National Bank *v.* Brewster, 49 N. J. L. 231, 12 Atl. 769.

New York. — Linderman *v.* Farquharson, 101 N. Y. 434, 5 N. E. 67; Scudder *v.* Gori, 3 Rob. 661.

South Carolina. — Pelzer *v.* Durham, 37 S. C. 354, 16 S. E. 46.

Vermont. — Bradley Fertilizer Co. *v.* Caswell, 65 Vt. 231, 26 Atl. 956.

71. Buzzell *v.* Bennett, 2 Cal. 101; Howard *v.* Simpkins, 70 Ga. 322; Ayers *v.* Burns, 87 Ind. 245, 44 Am. Rep. 759; Des Moines Ins. Co. *v.* McIntire, 99 Iowa 50, 68 N. W. 565; Willis *v.* Twambly, 13 Mass. 204; Fitts *v.* Hall, 9 N. H. 441.

72. Taylor *v.* Purcell, 60 Ark. 606, 31 S. W. 567; Burroughs *v.* Richman, 13 N. J. L. 233, 23 Am. Dec. 717; Berkley *v.* Cannon, 4 Rich. L. (S. C.) 136; Reynolds *v.* Dechaums, 24 Tex. 174, 76 Am. Dec. 101; Gore *v.* Gibson, 13 M. & W. (Eng.) 623.

73. Neiswanger *v.* McClellan, 45

B. MISTAKE. — a. *In General.* — The fact that by reason of a mistake the actual agreement of the parties is not expressed therein, as that something is contained in the writing which should not be there, or that some provision or term of the agreement is omitted therefrom, may be shown by parol evidence,[74] especially in a proceeding in equity[75] to cancel[76] or reform the instrument,[77] or as a

Kan. 599, 26 Pac. 18; Everman *v.* Robb, 82 Miss. 653, 24 Am. Rep. 682; Curtice *v.* West, 50 Hun 47, 2 N. Y. Supp. 507. See article "ALTERATION OF INSTRUMENTS," Vol. I, p. 774.

74. *Canada.* — Schwersenski *v.* Vineberg, 19 Can. S. C. 243.

Alabama. — Avery *v.* Miller, 86 Ala. 495, 6 So. 38.

California. — Kee *v.* Davis, 137 Cal. 456, 70 Pac. 294; Lassing *v.* James, 107 Cal. 348, 40 Pac. 534.

Connecticut. — Parsons *v.* Hosmer, 2 Root, 1, 1 Am. Dec. 58.

Georgia. — Bedgood *v.* McLain, 89 Ga. 793, 15 S. E. 670.

Illinois. — Kuck *v.* Fulfs, 68 Ill. App. 134.

Indiana. — Equitable Trust Co. *v.* Milligan, 31 Ind. App. 20, 65 N. W. 1044.

Iowa. — Van Dusen *v.* Parley, 40 Iowa 70.

Kentucky. — Huston *v.* Noble, 4 J. J. Marsh. 130; Garten *v.* Chandler, 2 Bibb 246.

Maryland. — Popplein *v.* Foley, 61 Md. 381.

Michigan. — Chambers *v.* Livermore, 15 Mich. 381.

Mississippi. — Butler *v.* State, 81 Miss. 734, 33 So. 847.

Missouri. — Denser *v.* Walkup, 43 Mo. App. 625.

New Jersey. — Society for Establishing Useful Manufactures *v.* Haight, 1 N. J. Eq. 393.

Nevada. — Travis *v.* Epstein, 1 Nev. 116.

New York. — Meyer *v.* Lathrop, 73 N. Y. 315; National L. Ass'n *v.* Sturtevant, 78 Hun 572, 61 N. Y. St. 206, 29 N. Y. Supp. 529.

North Carolina. — Ray *v.* Blackwell, 94 N. C. 10; Koomce *v.* Bryan, 21 N. C. 227.

Ohio. — Clayton *v.* Freet, 10 Ohio St. 544.

Pennsylvania. — Cooper *v.* Potts, 185 Pa. St. 115, 39 Atl. 824; Hyndman *v.* Hogsett, 111 Pa. St. 643, 4 Atl. 717; Lippincott *v.* Whitman, 83 Pa. St. 244; Wharton *v.* Douglas, 76 Pa. St. 273.

South Carolina. — Brock *v.* O'Dell, 44 S. C. 22, 21 S. E. 976; Gibson *v.* Watts, 1 McCord Eq. 490.

Tennessee. — Jones *v.* Sharp, 9 Heisk. 660.

Texas. — Farley *v.* Deslovede, 59 Tex. 458, 6 S. W. 786; White *v.* Simonton, 34 Tex. Civ. App. 464, 79 S. W. 621; Bumpas *v.* Zachary (Tex. Civ. App.), 34 S. W. 672; Hilliard *v.* White (Tex. Civ. App.), 31 S. W. 553; Meriwether *v.* Asbeck (Tex. Civ. App.), 25 S. W. 1100.

Vermont. — King *v.* Woodbridge, 34 Vt. 565; White *v.* Miller, 22 Vt. 380.

Virginia. — Elliott *v.* Horton, 28 Gratt. 766.

75. McKinstry *v.* Elliott, 89 Ill. App. 599; Stone *v.* Ramsey, 4 T. B. Mon. (Ky.) 236; Huston *v.* Noble, 4 J. J. Marsh. (Ky.) 130; Chambers *v.* Livermore, 15 Mich. 381; Gill *v.* Pelkey, 54 Ohio St. 348, 43 N. E. 991; Allen *v.* Yeater, 17 W. Va. 128.

76. Gun *v.* McCarthy, 13 L. R. Ir. 304.

77. *Alabama.* — Paysant *v.* Ware, 1 Ala. 160.

California. — Kee *v.* Davis, 137 Cal. 456, 70 Pac. 294; Murray *v.* Dake, 46 Cal. 644.

Illinois. — Gray *v.* Merchants Ins. Co., 113 Ill. App. 537.

Indian Territory. — Byrne *v.* Ft. Smith Nat. Bank, 1 Ind. Ter. 680, 43 S. W. 957.

Maryland. — Bond *v.* Dorsey, 65 Md. 310, 4 Atl. 279; Popplein *v.* Foley, 61 Md. 381.

North Carolina. — Finishing & Warehouse Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681; Koonce *v.* Bryan, 21 N. C. 227.

Pennsylvania. — Fisher *v.* Deibert, 54 Pa. St. 460.

Tennessee. — Barnes *v.* Gregory, 1 Head 230.

defense to a proceeding for the specific performance of a writing.[78] And whether the action is at law or in equity the mistake alleged must be made out by clear and convincing proof.[79]

b. *May Show Mistake in Law or Equity.* — Though in many cases the rule is affirmed that such evidence is only admissible in a court of equity,[80] yet this rule is by no means universal,[81] and, in fact, the weight of authority supports the doctrine that evidence of this character is also admissible in an action at law.[82]

c. *What Essential To Render Evidence of Mistake Admissible.* In order to render evidence for this purpose admissible, it is decided that the mistake must have been a mutual one,[83] even though the proceeding is in a court of equity,[84] that it must have been alleged in the pleadings,[85] and that the party alleging it must not have been guilty of negligence in signing the same.[86] The mistake must also have been in reference to a matter of fact and not

78. Parsons *v.* Hosmer, 2 Root (Conn.) 1, 1 Am. Dec. 58; Chambers *v.* Livermore, 15 Mich. 381; Keisselbrach *v.* Livingston, 4 Johns. Ch. (N. Y.) 144.

79. Knowlton *v.* Campbell, 48 W. Va. 294, 37 S. E. 581.

80. *Connecticut.* — Noble *v.* Comstock, 3 Conn. 295.

Illinois. — Over *v.* Walzer, 103 Ill. App. 104.

Kentucky. — Tribble *v.* Oldham, 5 J. J. Marsh. 137, 142.

Maine. — Linscott *v.* Fernald, 5 Me. 496.

Maryland. — Boyce *v.* Wilson, 32 Md. 122.

Mississippi. — Young *v.* Jacoway, 9 Smed. & M. 212.

New York. — Ferree *v.* Ellsworth, 47 N. Y. St. 119, 19 N. Y. Supp. 659.

West Virginia. — Knowlton *v.* Campbell, 48 W. Va. 294, 37 S. E. 581.

81. Bassett *v.* Glover, 31 Mo. App. 150.

82. *England.* — Wake *v.* Harrop, 6 H. & N. 768.

Georgia. — Ham *v.* Parkerson, 68 Ga. 830; Sutton *v.* Sutton, 25 Ga. 383.

Illinois. — McLean Co. Bank *v.* Mitchell, 88 Ill. 52; Kuck *v.* Fulfs, 68 Ill. App. 134.

Indiana. — Equitable Trust Co. *v.* Milligan, 31 Ind. App. 20, 65 N. E. 1044.

Iowa. — Van Dusen *v.* Parley, 40 Iowa 70.

Missouri. — Sparks *v.* Brown, 46 Mo. App. 529; Bassett *v.* Glover, 31 Mo. App. 150.

Nebraska. — Lloyd *v.* Reynolds, 26 Neb. 63, 41 N. W. 1072.

New York. — Meyer *v.* Lathrop, 73 N. Y. 315.

Pennsylvania. — Moliere *v.* Pennsylvania F. Ins. Co., 5 Rawle 342, 28 Am. Dec. 675.

South Carolina. — Gwaltney *v.* Provident Sav. L. Assur. Soc., 132 N. C. 925, 44 S. E. 659.

Vermont. — White *v.* Miller, 22 Vt. 380.

Virginia. — Elliott *v.* Horton, 28 Gratt. 766.

83. Deering *v.* Russell, 5 N. D. 319, 65 N. W. 691; Knowlton *v.* Campbell, 48 W. Va. 294, 37 S. E. 581; Riha *v.* Pelnar, 86 Wis. 408, 57 N. W. 51.

84. Knowlton *v.* Campbell, 48 W. Va. 294, 37 S. E. 581.

85. Morris *v.* Morris, 2 Bibb (Ky.) 311; Huff *v.* Thomas, 1 T. B. Mon. (Ky.) 158; Krueger *v.* Nicola, 205 Pa. St. 38, 54 Atl. 494; Eldridge *v.* McAdams (Tex. Civ. App.), 24 S. W. 310; McDonald *v.* Rose, 17 Grant's Ch. (Can.) 657.

86. For if he was negligent he cannot avail himself of a mistake, as it is not the duty of courts to relieve parties from their own negligence. Bostwick *v.* Duncan, 60 Ga. 383.

a mere matter of law, as parol evidence will not be received to show a mistake of the latter character.[87]

C. WHERE INSTRUMENT INCOMPLETE. — a. *In General.* — Where parties have made a verbal contract, partially reducing it to writing, and the writing evidencing it is not a complete and final statement of the entire transaction, parol evidence consistent with the written instrument is admissible to show the full agreement;[88] as where it

87. Wheaton *v.* Wheaton, 9 Conn. 96; Potter *v.* Sewall, 54 Me. 142; Meckley's Estate, 20 Pa. St. 478.

88. *England.* — Davis *v.* Jones, 17 C. B. 625, 25 L. J. C. P. 91, 4 Wkly. Rep. 248, 84 E. C. L. 625.

United States. — Seitz *v.* Brewers Refrigerating Mach. Co., 141 U. S. 510; Harman *v.* Harman, 70 Fed. 894, 17 C. C. A. 479, 34 U. S. App. 316; The Poconoket, 67 Fed. 262; Camden Iron Wks. *v.* Fox, 34 Fed. 200; The Wanderer, 29 Fed. 260.

Alabama. — Sayre *v.* Wilson, 86 Ala. 151, 5 So. 157; Powell *v.* Thompson, 80 Ala. 51; Brown *v.* Isbell, 11 Ala. 1009.

Arkansas. — Kelly *v.* Carter, 55 Ark. 112, 17 S. W. 706; Fitzpatrick *v.* Moore, 53 Ark. 4, 16 S. W. 7; Rapley *v.* Price, 9 Ark. 428.

California. — Kreuzberger *v.* Wingfield, 96 Cal. 251, 31 Pac. 109.

Colorado. — De St. Aubin *v.* Field, 27 Colo. 414, 62 Pac. 199.

Connecticut. — Caulfield *v.* Hermann, 64 Conn. 325, 30 Atl. 52; Averill *v.* Sawyer, 62 Conn. 560, 568, 27 Atl. 73; Pacific Iron Wks. *v.* Newhall, 34 Conn. 67.

Georgia. — Morrison *v.* Dickey, 119 Ga. 698, 46 S. E. 863; Roberts *v.* Mathews, 77 Ga. 458; Claflin *v.* Duncan, 74 Ga. 348.

Illinois. — Ebert *v.* Arends, 190 Ill. 221, 60 N. E. 211; Platt *v.* Aetna Ins. Co., 153 Ill. 113, 38 N. E. 580, 46 Am. St. Rep. 877; Osgood *v.* Skinner, 111 Ill. App. 606, *affirmed* in 211 Ill. 229, 71 N. E. 869; Union Special Sew. Mach. Co. *v.* Lockwood, 110 Ill. App. 387; Casner's Estate *v.* Stafford, 86 Ill. App. 469; Hess *v.* Board of Education, 33 Ill. App. 440.

Indiana. — Barton *v.* Anderson, 104 Ind. 578, 4 N. E. 420; Henry School Twp. *v.* Meredith, 32 Ind. App. 607, 70 N. E. 393; Kentucky & I. Cement Co. *v.* Cleveland, 4 Ind. App. 171, 30 N. E. 802.

Iowa. — Meader *v.* Allen, 110 Iowa 588, 81 N. W. 799; Baldwin *v.* Hill, 97 Iowa 586, 66 N. W. 889; Peterson *v.* Chicago R. I. & P. R. Co., 80 Iowa 92, 45 N. W. 573.

Kansas. — Peters *v.* McVey, 59 Kan. 775, 52 Pac. 896.

Kentucky. — Providence Sav. L. Assur. Soc. *v.* Bailey, 80 S. W. 452; Blackerby *v.* Continental Ins. Co., 83 Ky. 574; Locke *v.* Lyon Medicine Co., 27 Ky. L. Rep. 1, 84 S. W. 307; Wells *v.* Hodge, 4 J. J. Marsh 120.

Louisiana. — Pharr *v.* Gall, 108 La. 307, 32 So. 418.

Maine. — Gould *v.* Boston Excelsior Co., 91 Me. 214, 39 Atl. 554, 64 Am. St. Rep. 221; Bradstreet *v.* Rich, 72 Me. 233.

Maryland. — Bladen *v.* Wells, 30 Md. 577; Dorsey *v.* Eagle, 7 G. & J. 321.

Massachusetts. — Durkin *v.* Cobleigh, 156 Mass. 108, 30 N. E. 474, 32 Am. St. Rep. 436, 17 L. R. A. 270.

Michigan. — Locke *v.* Wilson, 135 Mich. 593, 98 N. W. 400; Stahelin *v.* Sowle, 87 Mich. 124, 49 N. W. 529; Bird *v.* Pope, 73 Mich. 483, 41 N. W. 514.

Minnesota. — Potter *v.* Easton, 82 Minn. 247, 84 N. W. 1011; Aultman *v.* Clifford, 55 Minn. 159, 56 N. W. 593, 43 Am. St. Rep. 478; Phoenix Pub. Co. *v.* Riverside Clothing Co., 54 Minn. 205, 55 N. W. 912; Alexander *v.* Thompson, 42 Minn. 498, 44 N. W. 534.

Missouri. — State *v.* Cunningham, 154 Mo. 161, 55 S. W. 282; Norton *v.* Bohart, 105 Mo. 615, 16 S. W. 598; Black River Lumb. Co. *v.* Warner, 93 Mo. 374, 6 S. W. 210; Brown *v.* Bowen, 90 Mo. 184, 2 S. W. 398; Boggs *v.* Pacific Steam Laundry Co., 86 Mo. App. 616; Sanders Pressed Brick Co. *v.* Columbia Real Estate & Bldg. Co., 86 Mo. App. 169; Newman *v.* Bank of Watson, 70 Mo. App. 135; Dunn *v.* McClintock, 64 Mo.

is silent as to some matter, knowledge of which is essential to a proper understanding and interpretation of the writing.[89] But

App. 193, 3 Mo. App. Rep. 1059; Miller *v.* Goodrich Bros. Bkg. Co., 53 Mo. App. 430.

Montana. — Landt *v.* Schneider, 31 Mont. 15, 77 Pac. 307.

Nebraska. — Bell *v.* Wiltson, 98 N. W. 1049; Modern Woodmen Acc. Ass'n *v.* Kline, 50 Neb. 345, 69 N. W. 943; Peaks *v.* Lord, 42 Neb. 15, 60 N. W. 349.

New York. — Rochester Folding Box Co. *v.* Browne, 179 N. Y. 542, 71 N. E. 1139; Routledge *v.* Worthington Co., 119 N. Y. 592, 23 N. E. 1111; Doty *v.* Thomson, 116 N. Y. 515, 22 N. E. 1089; Vaughan Mach. Co. *v.* Lighthouse, 64 App. Div. 138, 71 N. Y. Supp. 799; Brantingham *v.* Huff, 43 App. Div. 414, 60 N. Y. Supp. 157; Baring *v.* Waterbury, 10 App. Div. 1, 41 N. Y. Supp. 612; Behrman *v.* Linde, 47 Hun 530; Falk *v.* Wolfsohn, 7 Misc. 313, 27 N. Y. Supp. 903.

North Carolina. — Doubleday *v.* Asheville Ice & Coal Co., 122 N. C. 675, 30 S. E. 21; Nissen *v.* Genessee Gold Min. Co., 104 N. C. 309, 10 S. E. 512; Meekins *v.* Newberry, 101 N. C. 17, 7 S. E. 655; Cumming *v.* Barber, 99 N. C. 332, 5 S. E. 903.

North Dakota. — Johnson *v.* Kindred State Bank, 12 N. D. 336, 96 N. W. 588.

Oregon. — Burkhart *v.* Hart, 36 Or. 586, 60 Pac. 205; American Bridge & Contract Co. *v.* Bullen Bridge Co., 29 Or. 549, 46 Pac. 138.

Pennsylvania. — Anderson *v.* National Surety Co., 196 Pa. St. 288, 46 Atl. 306; Selig *v.* Rehfuss, 195 Pa. St. 200, 45 Atl. 919; Centenary M. E. Church *v.* Cline, 116 Pa. St. 146, 9 Atl. 163; White *v.* Black, 14 Pa. Super. Ct. 459.

Rhode Island. — Putman Foundry & Mach. Co. *v.* Canfield, 25 R. I. 548, 56 Atl. 1033.

South Carolina. — Buist Co. *v.* Lancaster Merc. Co., 68 S. C. 523, 47 S. E. 978; Virginia-Carolina Chemical Co. *v.* Moore, 39 S. E. 346, 61 S. C. 166.

Texas. — Sherman Oil & Cotton Co. *v.* Dallas Oil & Ref. Co. (Tex. Civ. App.), 77 S. W. 961; Howell *v.* Denton (Tex. Civ. App.), 68 S. W. 1002; Henry *v.* McCardell, 15 Tex. Civ. App. 497, 40 S. W. 172.

Vermont. — Kinney *v.* Hooker, 65 Vt. 333, 26 Atl. 690, 36 Am. St. Rep. 864; Hadley *v.* Bordo, 62 Vt. 285, 19 Atl. 476.

Virginia. — Witz *v.* Fite, 91 Va. 446, 22 S. W. 171; Broughton *v.* Coffer, 18 Gratt. 184, 191.

West Virginia. — Johnson *v.* Burns, 39 W. Va. 658, 20 S. E. 686.

Wisconsin. — Fosha *v.* O'Donnell, 120 Wis. 336, 97 N. W. 924; Lynch *v.* Henry, 75 Wis. 631, 44 N. W. 837.

That a Writing Is a Mere Memorandum of the Agreement or contract may be shown. Lafitte *v.* Shawcross, 12 Fed. 519; Kreuzberger *v.* Wingfield, 96 Cal. 251, 31 Pac. 109; Peneix *v.* Rodgers, 20 Ky. L. Rep. 1469, 49 S. W. 447.

89. *United States.* — The Poconoket, 70 Fed. 640, 17 C. C. A. 309, 28 U. S. App. 600.

Illinois. — Ebert *v.* Arends, 190 Ill. 221, 60 N. E. 211; Halliday *v.* Mulligan, 113 Ill. App. 177.

Indiana. — Henry School Twp. *v.* Meredith, 32 Ind. App. 607, 70 N. E. 393.

Iowa. — Meader *v.* Allen, 110 Iowa 588, 81 N. W. 799.

Maine. — Gould *v.* Boston Excelsior Co., 91 Me. 214, 39 Atl. 554, 64 Am. St. Rep. 221; Bradstreet *v.* Rich, 72 Me. 233.

Maryland. — Bladen *v.* Wells, 30 Md. 577.

Michigan. — Bird *v.* Pope, 73 Mich. 483, 41 N. W. 514.

Missouri. — Davis *v.* Tandy, 107 Mo. App. 437, 81 S. W. 457; Lowenstein *v.* Wabash R. Co., 63 Mo. App. 68, 1 Mo. App. Rep. 592.

New York. — Bien *v.* Parsons, 15 Misc. 457, 72 N. Y. St. 789, 37 N. Y. Supp. 209.

Pennsylvania. — Real Estate Title Ins. & Trust Co.'s Appeal, 125 Pa. St. 549, 17 Atl. 450, 11 Am. St. Rep. 920.

South Carolina. — Buist Co. *v.* Lancaster Merc. Co., 68 S. C. 523, 47 S. E. 978.

Texas. — Head *v.* Cleburne Bldg. & Loan Ass'n (Tex. Civ. App), 25 S. W. 810.

where part is omitted in order to introduce evidence thereof there should be an allegation in the pleadings in respect thereto.[90] So it is decided that a place of performance may be shown where none is specified.[91] And evidence is admissible, where an obligation for the payment of money does not designate a place of payment, to show that a certain place of payment was agreed upon by the parties.[92] And likewise parol evidence may be admitted to show the manner of performance agreed upon where an instrument is silent in this respect,[93] or the mode or manner of performance.[94]

Must Be Consistent. — It is essential in order to render evidence admissible of a part of an agreement not expressed in the writing that the part sought to be proven be consistent with the terms of the instrument.[95]

b. *Mode of Determining Question of Completeness.* — The courts are not in harmony as to when evidence is admissible of an omitted part of an agreement. In some cases it is decided that the incompleteness must appear upon the face of the writing itself,[96] or on

90. American Bridge & Contract Co. *v.* Bullen Bridge Co., 29 Or. 549, 46 Pac. 138; Virginia-Carolina Chemical Co. *v.* Moore, 39 S. E. 346. 61 S. C. 166; Putman Foundry & Mach. Co. *v.* Canfield, 25 R. I. 548, 56 Atl. 1033; Buist Co. *v.* Lancaster Merc. Co., 68 S. C. 523, 47 S. E. 978; Sherman Oil & Cotton Co. *v.* Dallas Oil & Ref. Co. (Tex. Civ. App.), 77 S. W. 961.

91. Benson *v.* Peebles, 5 Mo. 132.

92. Specht *v.* Howard, 16 Wall. (U. S.) 564; Ebert *v.* Arends, 190 Ill. 221, 60 N. E. 211; Blackerby *v.* Continental Ins. Co., 83 Ky. 574; Bigham *v.* Talbot, 51 Tex. 450. See article "Bills and Notes," Vol. II, p. 439.

93. Havana *v.* Walsh, 85 Ill. 58; Razor *v.* Razor, 39 Ill. App. 527; Lyon *v.* Western New York & P. R. Co., 88 Hun 27, 34 N. Y. Supp. 32.

94. Cunningham *v.* Banta, 2 Ind. 604; Paul *v.* Owings, 32 Md. 402; Foulks *v.* Rhodes, 12 Nev. 225; Buchanan *v.* Adams, 49 N. J. L. 636, 10 Atl. 662, 60 Am. Rep. 666; Jones *v.* Keyes, 16 Wis. 562. See article "Bills and Notes." Vol. II, p. 441.

95. *United States.* — Seitz *v.* Brewers Refrig. Mach. Co., 141 U. S. 510; Chicago Lumb. Co. *v.* Comstock, 71 Fed. 477, 18 C. C. A. 207, 34 U. S. App. 414; The Wanderer, 29 Fed. 260.

Alabama. — Sayre *v.* Wilson, 86 Ala. 151, 5 So. 157.

Georgia. — Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28.

Illinois. — Halliday *v.* Mulligan, 113 Ill. App. 177.

Iowa. — Mt. Vernon Stone Co. *v.* Sheely, 114 Iowa 313, 86 N. W. 301.

Maine. — Bradstreet *v.* Rich. 72 Me. 233.

Maryland. — Dorsey *v.* Eagle, 7 Gill. & J. 321.

Michigan. — Hutchison Mfg. Co. *v.* Pinch, 107 Mich. 12, 64 N. W. 729.

Minnesota. — Phoenix Pub. Co. *v.* Riverside Clothing Co., 54 Minn. 205, 55 N. W. 912.

Missouri. — Minnesota Thresher Mfg. Co. *v.* Grant City Lumb. & Hdw. Co., 81 Mo. App. 255.

New York. — Rochester Folding Box Co. *v.* Browne, 179 N. Y. 542, 71 N. E. 1139; Baring *v.* Waterbury, 10 App. Div. 1, 41 N. Y. Supp. 612.

North Carolina. — Cumming *v.* Barber, 99 N. C. 332, 5 S. E. 903.

Oregon. — American Bridge & Contract Co. *v.* Bullen Bridge Co., 29 Or. 549, 46 Pac. 138.

Pennsylvania. — White *v.* Black, 14 Pa. Super. Ct. 459.

Wisconsin. — Vogt *v.* Shienebeck, 122 Wis. 491, 100 N. W. 820, 106 Am. St. Rep. 989, 67 L. R. A. 756.

96. Union Selling Co. *v.* Jones, 128 Fed. 672, 63 C. C. A. 224; Millett *v.* Marston, 62 Me. 477; Bandholz *v.* Judge, 62 N. J. L. 526, 41 Atl. 723; Looney *v.* Rankin, 15 Or. 617,

an inspection of the instrument,[97] or that such evidence is inadmissible where there is nothing in the contract to suggest that it is incomplete.[98] There are other cases, however, in which it is held that the incompleteness may be shown by going outside the writing, and that evidence of an omitted part is admissible though the instrument does not appear to be complete upon its face.[99] Many of the former cases refer to and seem to depend to a certain extent upon an early case in Minnesota which declared that the only criterion of the completeness of a written instrument is the writing itself, and that if it imports upon its face to be a complete expression of the whole agreement, parol evidence is not admissible to add another term.[1] This statement has, however, to a certain extent, been modified or explained by later cases in the same state, which hold that while it is true it is incomplete in not adverting to the rule which controls in the construction of contracts — that is, that the writing is to be construed in the light of the subject-matter and the circumstances under which and the purposes for which it was executed.[2] And this would seem to be, and is ac-

16 Pac. 660; Collins *v.* Dignowity (Tex.), 8 S. W. 326; Hei *v.* Heller, 53 Wis. 415, 10 N. W. 620.

97. Chicago Lumb. Co. *v.* Comstock, 71 Fed. 477, 18 C. C. A. 207, 34 U. S. App. 414; Case *v.* Phoenix Bridge Co., 134 N. Y. 78, 31 N. E. 254; Thomas *v.* Scutt, 127 N. Y. 133, 27 N. E. 961; Williamson *v.* Seeley, 22 App. Div. 389, 48 N. Y. Supp. 196.

"When the writings show upon inspection a complete legal obligation, without any uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included in the writings. The fact that a point has been omitted which might have been embodied therein will not open the door to the admission of parol evidence in that regard." Telluride Power Transmission Co. *v.* Crane Co., 208 Ill. 218, 226, 70 N. E. 319, *per* Wilkin, J.

98. Hurst *v.* Cresson & Clearfield Coal & Coke Co., 86 Hun 189, 33 N. Y. Supp. 313.

99. Barker *v.* Prentiss, 6 Mass. 430; Wheaton Roller Mill Co. *v.* Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854; Sanders Pressed Brick Co. *v.* Columbia Real Estate & Bldg. Co., 86 Mo. App. 169; Juilliard *v.* Chaffee, 92 N. Y. 529; Lutz *v.* Thompson, 87 N. C. 334; Winn *v.* Chamberlin, 32 Vt. 318.

1. "The only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed." Thompson *v.* Libby, 34 Minn. 374, 377, 26 N. W. 1, *per* Mitchell, J., *quoted* with approval in Ehrsam *v.* Brown, 64 Kan. 466, 67 Pac. 867. See also Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380.

2. "The point upon which the courts have sometimes differed is as to how the incompleteness of the written contract may be made to appear. Some cases seem to go to the length of holding that this may be done by going outside of the writing, and proving that there was a stipulation entered into but not contained in it, and hence that only part of the contract was put in writing. If any such doctrine is to obtain, there would be very little left of the rule against varying written contracts by parol. Such is not the

cepted in many jurisdictions as, the true rule in determining the question of completeness.[3]

c. *Where Omission Supplied by Implication of Law.* — In the case of an omission from an instrument which is supplied by implication or presumption of law parol evidence is not admissible to supply the same.[4] So where an instrument does not specify a time for performance, it has been decided that the law implies that it is to be performed in a reasonable time, and that the legal import of the instrument cannot be varied by parol evidence,[5] though such

law. Other cases seem to go almost to the other extreme, by holding that the incompleteness of the writing must appear on the face of the document from mere inspection. But to furnish a basis for the admission of parol evidence the incompleteness need not be apparent on the face of the instrument.

"If the written contract, construed in view of the circumstances in which, and the purpose for which, it was executed—which evidence is always admissible to put the court in the position of the parties—shows that it was not meant to contain the whole bargain between the parties, then parol evidence is admissible to prove a term upon which the writing is silent, and which is not inconsistent with what is written; but if it shows that the writing was meant to contain the whole bargain between the parties, no parol evidence can be admitted to introduce a term which does not appear there. In short the true rule is that the only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself, but, in determining whether it is thus complete, it is to be construed, as in any other case, according to its subject-matter, and the circumstances under which and the purposes for which it was executed.

"What was said on this subject in Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1, is perhaps incomplete, in not specifically adverting to this rule of construction, and for that reason capable of being understood as meaning that the incompleteness must appear on the face of the document from mere inspection." Wheaton Roller Mill Co. *v.* Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854, *per* Mitchell, J. See also Potter *v.* Easton, 82 Minn. 247, 84 N. W. 1011.

3. Caulfield *v.* Hermann, 64 Conn. 325, 30 Atl. 52; Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; Peabody *v.* Bement, 79 Mich. 47, 44 N. W. 416; Potter *v.* Easton, 82 Minn. 247, 84 N. W. 1011; Eighmie *v.* Taylor, 98 N. Y. 288.

4. Driver *v.* Ford, 90 Ill. 595; Union Special Sew. Mach. Co. *v.* Lockwood, 110 Ill. App. 387; Warren *v.* Wheeler, 8 Metc. (Mass.) 97; Blake Mfg. Co. *v.* Jaeger, 81 Mo. App. 239; Thompson *v.* Ketcham, 8 Johns. (N. Y.) 190, 5 Am. Dec. 332.

5. *Illinois.*— Driver *v.* Ford, 90 Ill. 595.

Michigan. — Stange *v.* Wilson, 17 Mich. 342.

Minnesota. — Liljengren Furn. & Lumb. Co. *v.* Mead, 42 Minn. 420, 44 N. W. 306.

Missouri. — Blake Mfg. Co. *v.* Jaeger, 81 Mo. App. 239.

New York. — Boehm *v.* Lies, 60 N. Y. Super. Ct. 436, 18 N. Y. Supp. 577; Morowsky *v.* Rohrig, 4 Misc. 167, 23 N. Y. Supp. 880.

Texas. — Self *v.* King, 28 Tex. 552. But see Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528; Benson *v.* Peebles, 5 Mo. 132.

Time for Payment under an obligation for the payment of money in which no time is specified cannot be shown, as the law implies that it is payable immediately or on demand. Warren *v.* Wheeler, 8 Metc. (Mass.) 97; Thompson *v.* Ketcham, 8 Johns. (N. Y.) 190, 5 Am. Dec. 332; Boehm *v.* Lies, 60 N. Y. Super. Ct. 436, 18 N. Y. Supp. 577.

evidence may perhaps be admissible in connection with other facts as bearing on the question of reasonable time.[6]

d. *Where Writing Required by Law.* — Where the contract is one which the statute requires to be in writing, the writing must be complete in itself, and parol evidence is not admissible to show that only a part was reduced to writing and then to supply the residue. The evidence in such case to supply part of the contract must be of the same grade as that which evidences the remainder.[7]

e. *Where Words Are Stricken Out.* — The fact that a clause in a writing, stating that it contains the whole agreement between the parties, is stricken out does not have the effect of making the contract an incomplete one.[8]

f. *Question of Completeness One for Court.* — The question whether the writing is upon its face a complete expression of the agreement of the parties is one of law for the court.[9]

D. PAROL AGREEMENTS. — a. *Admissibility of in General.* — The rule that parol evidence is inadmissible to contradict, vary, add to or detract from the terms of a written instrument does not exclude parol evidence showing the existence of an independent oral agreement as to any matter on which the writing is silent and which is not inconsistent with its terms.[10] This question as to the admis-

But see Sivers *v.* Sivers, 97 Cal. 518, 32 Pac. 571; Ashe *v.* Carolina & N. W. R. Co., 65 S. C. 134, 43 S. E. 393.

6. Atwood *v.* Cobb, 16 Pick. (Mass.) 227, 26 Am. Dec. 657.

7. Smith *v.* Mason, 122 Cal. 426, 55 Pac. 143; Fowler *v.* Lewis, 3 A. K. Marsh. (Ky.) 443; Newman *v.* Bank of Watson, 70 Mo. App. 135; Seymour *v.* Warren, 59 App. Div. 120, 69 N. Y. Supp. 236; Potter *v.* Hopkins, 25 Wend. (N. Y.) 417; Allison *v.* Rutledge, 5 Yerg. (Tenn.) 193; Henry v. McCardell, 15 Tex. Civ. App. 497, 40 S. W. 172.

8. Hand *v.* Miller, 58 App. Div. 126, 68 N. Y. Supp. 531.

9. Harrison *v.* McCormick, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469; Naumberg *v.* Young, 44 N. J. L. 331; 339, 43 Am. Rep. 380.

10. *England.* — De Lassalle *v.* Guildford, 84 L. T. N. S. 549. (1901) 2 K. B. 215, 49 Wkly. Rep. 467; Erskine *v.* Adeane, L. R. 8 Ch. App. 756, 29 L. T. N. S. 234; Morgan *v.* Griffith, L. R. 6 Exch. 70, 23 L. T. N. S. 783; Jeffery *v.* Walton, 1 Stark. 267.

Canada. — McGinness *v.* Kennedy, 29 U. C. Q. B. 93.

United States. — Burke *v.* Dulaney, 153 U. S. 228; Godkin v. Monahan, 83 Fed. 116, 27 C. C. A. 410, 53 U. S. App. 604; Chicago Lumb. Co. *v.* Comstock, 71 Fed. 477, 18 C. C. A. 207, 34 U. S. App. 414; Union Stock Yards & Transit Co. *v.* Western Land & Cattle Co., 59 Fed. 49, 7 C. C. A. 660.

Alabama. — White *v.* Kahn, 103 Ala. 308, 15 So. 595; Brown *v.* Isbell, 11 Ala. 1009.

Arkansas. — Ramsey *v.* Capshaw, 71 Ark. 408, 75 S. W. 479; Jenkins *v.* Shinn, 55 Ark. 347, 18 S. W. 240; Weaver *v.* Fletcher, 27 Ark. 510.

California. — Richter *v.* Union Land & Stock Co., 129 Cal. 367, 62 Pac. 39; Savings Bank of Southern California *v.* Asbury, 117 Cal. 96, 48 Pac. 1081.

Colorado. — Mosier *v.* Kershow, 16 Colo. App. 453, 66 Pac. 449.

Connecticut. — O'Keefe *v.* St. Francis Church, 59 Conn. 551, 22 Atl. 325.

District of Columbia. — Main *v.* Aukam, 12 App. D. C. 375, 26 Wash. L. Rep. 339.

Florida. — Chamberlain *v.* Lesley, 39 Fla. 452, 22 So. 736; Branch *v.* Wilson, 12 Fla. 543.

sibility of a parol agreement arises frequently where the agreement

Georgia. — Carter *v.* Griffin, 114 Ga. 321, 40 S. E. 290; Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; Denham *v.* Walker, 93 Ga. 497, 21 S. E. 102.

Illinois. — Saffer *v.* Lambert, 111 Ill. App. 410; Aleshire *v.* Lee Co. Sav. Bank, 105 Ill. App. 32.

Indiana. — First Nat. Bank *v.* New, 146 Ind. 411, 45 N. E. 597; Singer Mfg. Co. *v.* Forsyth, 108 Ind. 334, 9 N. E. 372; Equitable Trust Co. *v.* Milligan, 31 Ind. App. 20, 65 N. E. 1044.

Indian Territory. — Fox *v.* Tyler, 3 Ind. Ter. 1, 53 S. W. 462.

Iowa. — Sutton *v.* Weber, 101 N. W. 775; Sutton *v.* Griebel, 118 Iowa 78, 91 N. W. 825; Mt. Vernon Stone Co. *v.* Sheely, 114 Iowa 313, 86 N. W. 301; Brennecke *v.* Heald, 107 Iowa 376, 77 N. W. 1063; Gray *v.* Anderson, 99 Iowa 342, 68 N. W. 790, 61 Am. St. Rep. 243.

Kansas. — Schoen *v.* Sunderland, 39 Kan. 758, 18 Pac. 913; Shepard *v.* Haas, 14 Kan. 443; Slatten *v.* Konrath, 1 Kan. App. 636, 42 Pac. 399.

Kentucky. — Jamison *v.* Keith, 19 Ky. L. Rep. 511, 41 S. W. 33.

Louisiana. — Rivers *v.* Oak Lawn Sugar Co., 52 La. Ann. 762, 27 So. 118; Webre *v.* Beltran, 47 La. Ann. 195, 16 So. 860.

Maine. — Cook *v.* Littlefield, 98 Me. 299, 56 Atl. 899; Neal v. Flint, 88 Me. 72, 33 Atl. 669; Catland v. Hoyt, 78 Me. 355, 5 Atl. 775; Bonney v. Morrill, 57 Me. 368.

Maryland. — Hawley Down-Draft Furnace Co. *v.* Hooper, 90 Md. 390, 45 Atl. 456; Stallings *v.* Gottschalk, 77 Md. 429, 26 Atl. 524; Williams *v.* Kent, 67 Md. 350, 10 Atl. 228.

Massachusetts. — Kelley *v.* Thompson, 175 Mass. 427, 56 N. E. 713; Rackemann *v.* Riverbank Imp. Co., 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427; Durkin *v.* Cobleigh, 156 Mass. 108, 30 N. E. 474, 32 Am. St. Rep. 436, 17 L. R. A. 270; Rohan *v.* Hanson, 11 Cush. 44.

Michigan. — Helper *v.* MacKinnon Mfg. Co., 101 N. W. 804; Buhl *v.* Mechanics' Bank, 123 Mich. 591, 82 N. W. 282; Stahelin *v.* Sowle, 87 Mich. 124, 49 N. W. 529.

Minnesota. — King *v.* Dahl, 82 Minn. 240, 84 N. W. 737; Germania Bank *v.* Osborne, 81 Minn. 272, 83 N. W. 1084; American Bldg. & Loan Ass'n *v.* Dahl, 54 Minn. 355, 56 N. W. 47; Rugland *v.* Thompson, 48 Minn. 539, 51 N. W. 604; Stein *v.* Swenson, 46 Minn. 360, 49 N. W. 55, 24 Am. St. Rep. 234.

Missouri. — Newman *v.* Bank of Watson, 70 Mo. App. 135; Byrne *v.* Carson, 70 Mo. App. 126; Culp *v.* Powell, 68 Mo. App. 238.

Montana. — Armington *v.* Stelle, 27 Mont. 13, 19, 69 Pac. 115, 94 Am. St. Rep. 811.

Nebraska. — Huffman *v.* Ellis, 64 Neb. 623, 90 N. W. 552.

Nevada. — Travis *v.* Epstein, 1 Nev. 116.

New Jersey. — Buchanon *v.* Adams, 49 N. J. L. 636, 10 Atl. 662, 60 Am. Rep. 666.

New York. — Reynolds *v.* Robinson, 110 N. Y. 654, 18 N. E. 127; Chapin *v.* Dobson, 78 N. Y. 74; Hamblen *v.* German, 93 App. Div. 464, 87 N. Y. Supp. 642; Van Pub. Co. *v.* Westinghouse, 72 App. Div. 121, 76 N. Y. Supp. 340; Weigley *v.* Knelland, 18 App. Div. 47, 45 N. Y. Supp. 388; Daly *v.* Piza, 45 Misc. 608, 90 N. Y. Supp. 1071.

North Carolina. — Hardwood Log Co. *v.* Coffin, 130 N. C. 432, 41 S. E. 931; Currie *v.* Hawkins, 118 N. C. 593, 24 S. E. 476; Penniman *v.* Alexander, 111 N. C. 427, 16 S. E. 408; Cumming *v.* Barber, 99 N. C. 332, 5 S. E. 903; Manning *v.* Jones, 44 N. C. 368.

North Dakota. — Johnson *v.* Kindred State Bank, 12 N. D. 336, 96 N. W. 588.

Oregon. — Looney *v.* Rankin, 15 Or. 617, 622, 16 Pac. 660.

South Carolina. — Virginia-Carolina Chemical Co. *v.* Moore, 61 S. C. 166, 39 S. E. 346; McAteer *v.* McAteer, 31 S. C. 313, 9 S. E. 966.

South Dakota. — Schuler *v.* Citizens Bank, 13 S. D. 188, 82 N. W. 389; National Ref. Co. *v.* Miller, 1 S. D. 548, 47 N. W. 962.

Tennessee. — Quigley *v.* Shedd, 104 Tenn. 560, 58 S. W. 266; Hines *v.* Willcox, 96 Tenn. 148, 33 S. W. 914,

was an inducement to the signing of the instrument,[11] or formed a part of the consideration,[12] in which cases they have been generally held admissible.

b. *The Rule in Pennsylvania* is that such evidence is admissible though it may vary, change or reform the instrument, but such agreement must be shown by evidence that is clear, precise and indubitable.[13] But in such a case it is held that the agreement must not only have been the basis of the execution, but must be explicitly set forth as the moving cause to induce its execution, and the circumstances must be such that its enforcement would be a fraud on the maker.[14]

c. *Limitations on Rule.* — The rule as to the admission of evidence of a parol contemporaneous collateral agreement is limited

54 Am. St. Rep. 823, 34 L. R. A. 824; Leinau *v.* Smart, 11 Humph. 308; Chicago Bldg. & Mfg. Co. *v.* Barry, 52 S. W. 45.

Texas. — Thomas *v.* Hammond, 47 Tex. 42; Eastern Mfg. Co. *v.* Brenk, 32 Tex. Civ. App. 97, 73 S. W. 538; Cotton States Bldg. Co. *v.* Rawlins, (Tex. Civ. App.), 62 S. W. 805; Green *v.* Gresham, 21 Tex. Civ. App. 601, 53 S. W. 382; Eikel *v.* Randolph, 6 Tex. Civ. App. 421, 25 S. W. 62.

Vermont. — Gilman *v.* Williams, 74 Vt. 327, 52 Atl. 428; Redfield *v.* Gleason, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. Rep. 889.

Washington. — Johnson *v.* McCart, 24 Wash. 19, 63 Pac. 1121.

West Virginia. —Rymer *v.* South Penn. Oil Co., 54 W. Va. 530, 46 S. E. 559; Clator *v.* Otto, 38 W. Va. 89, 18 S. E. 378.

Wisconsin. — Riemer *v.* Rice, 88 Wis. 16, 59 N. W. 450; Gilbert *v.* Stockman, 76 Wis. 62, 44 N. W. 845, 20 Am. St. Rep. 23.

11. *England.* — Lloyd *v.* Sturgeon Falls Pulp Co., 85 L. T. N. S. 162.

Connecticut. — Quinn *v.* Roath, 37 Conn. 16.

Maine. — Neal *v.* Flint, 88 Me. 72, 33 Atl. 669; Bonney *v.* Merrill, 57 Me. 368.

Massachusetts. — Snow *v.* Alley, 156 Mass. 193, 30 N. E. 691.

Minnesota. — American Bldg. & Loan Ass'n *v.* Dahl, 54 Minn. 355, 56 N. W. 47.

Montana. — Armington *v.* Stelle, 27 Mont. 13, 69 Pac. 115, 94 Am. St. Rep. 811.

Nebraska. — Barnett *v.* Pratt, 37 Neb. 349, 55 N. W. 1050.

New York. — Tocci *v.* Arata, 35 N. Y. St. 42, 12 N. Y. Supp. 287.

South Carolina. — Brice *v.* Miller, 35 S. C. 537, 15 S. E. 272.

Texas. — Pishkos *v.* Wortek (Tex. App.), 18 S. W. 788.

Vermont. — Proctor *v.* Wiley, 55 Vt. 344.

West Virginia. — Faulkner *v.* Thomas, 48 W. Va. 148, 35 S. E. 915. "To deny the admission of evidence in such case, if relevant to the issues made by the pleadings, would be to allow one of the parties to induce another to enter into the engagement under false representations, and to aid him to enforce it against his adversary notwithstanding the fraud practiced upon him by holding out to him the fraudulent inducement." Armington *v.* Stelle, 27 Mont. 13, 19, 69 Pac. 115, 94 Am. St. Rep. 811.

12. *United States.* — Lafitte *v.* Shawcross, 12 Fed. 519.

Arkansas. — Kelly *v.* Carter, 55 Ark. 112, 17 S. W. 706; Weaver *v.* Fletcher, 27 Ark. 510.

Indiana. — Welz *v.* Rhodius, 87 Ind. 1, 44 Am. Rep. 747.

Massachusetts. — Ayer *v.* Bell Mfg. Co., 147 Mass. 46, 16 N. E. 754.

Nebraska. — Norman *v.* Waite, 30 Neb. 302, 46 N. W. 639.

New York. — Andrews *v.* Brewster, 56 Hun 640, 9 N. Y. Supp. 114.

13. Sutch's Estate, 201 Pa. St. 305, 50 Atl. 943; Thomas *v.* Loose, 114 Pa. St. 35, 6 Atl. 326; Phillips *v.* Meily, 106 Pa. St. 536.

14. Patton *v.* Fox, 22 Pa. Super Ct. 416.

to those cases where either from the circumstances of the case,[15] or from an inspection of the instrument itself, the court may infer that it was not intended by the parties that the writing should be a complete memorial of the entire transaction between them.[16] But if, when so viewed, the writing appears to be complete such evidence is then inadmissible.[17]

d. *Where Oral Agreement Referred To.* — Where there is a direct reference in the writing to a verbal agreement such agreement may be proved by parol evidence,[18] even though the effect be to add material terms and conditions to the writing.[19]

e. *Collateral Agreement on Distinct Matter.* — Even when the contract appears to be complete, a collateral agreement may be shown by parol when it relates to a subject distinct from that to which the written contract applies;[20] that is, it must not be so closely connected with the original transaction as to form part and parcel of it.[21]

E. CONDITIONS. — a. *Affecting Delivery.* — (1.) **In General.** — Parol evidence is admissible which tends to show that an instrument was never in fact delivered as a present contract, unconditionally binding according to its terms from the time of delivery, but that it was delivered to become an absolute obligation upon the happening of a certain event or contingency, and that such event or contingency has never occurred. Such evidence does not contradict

15. Maness *v.* Henry, 96 Ala. 454, 11 So. 410; Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; Hand *v.* Ryan Drug Co., 63 Minn. 539, 65 N. W. 1081.

16. *United States.* — Chicago Lumb. Co. *v.* Comstock, 71 Fed. 477, 18 C. C. A. 207, 34 U. S. App. 414.

Georgia. — Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28.

Indiana. — Diven *v.* Johnson, 117 Ind. 512, 20 N. E. 428, 3 L. R. A. 308.

Minnesota. — Hand *v.* Ryan Drug Co., 63 Minn. 539, 65 N. W. 1081.

New Jersey. — Naumberg *v.* Young, 44 N. J. L. 331.

New York. — Thomas *v.* Scott, 127 N. Y. 133, 27 N. E. 961.

Oregon. — Looney *v.* Rankin, 15 Or. 617, 16 Pac. 660.

Wisconsin. — O'Brien Lumb. Co. *v.* Wilkinson, 117 Wis. 468, 94 N. W. 337; Hei *v.* Heller, 53 Wis. 415, 10 N. W. 620.

17. Reynolds *v.* Louisville, N. A. & C. R. Co., 143 Ind. 579, 40 N. E. 410; Thisler *v.* Mackey, 65 Kan. 464, 70 Pac. 334; Mead *v.* Dunlevie, 174 N. Y. 108, 66 N. E. 658.

18. Work *v.* Beach, 59 Hun 625, 13 N. Y. Supp. 678, *affirmed* 129 N. Y. 651, 28 N. E. 1028.

19. Ruggles *v.* Swanwick, 6 Minn. 526.

20. *United States.* — Sun Print. & Pub. Ass'n *v.* Edwards, 113 Fed. 445, 51 C. C. C. A. 279; Godkin *v.* Monahan, 83 Fed. 116, 27 C. C. A. 410, 53 U. S. App. 604.

Kansas. — Ehrsam *v.* Brown, 64 Kan. 466, 67 Pac. 867.

Minnesota. — Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1.

New Jersey. — Church of Holy Communion *v.* Paterson Extension R. Co., 63 N. J. L. 470, 43 Atl. 696; Bandholz *v.* Judge, 62 N. J. L. 526, 41 Atl. 723; Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380.

North Dakota. — Johnson *v.* Kindred State Bank, 12 N. D. 336, 96 N. W. 588.

But see King *v.* Dahl, 82 Minn. 240, 84 N. W. 737.

21. Seitz *v.* Brewers Refrig. Mach. Co., 141 U. S. 510.

or vary the terms of the writing, but tends to show that the instrument has never had any legal inception rendering it valid and binding as between the parties.[22]

22. *England.* — Leaf *v.* Gibbs, 4 C. & P. 466.

United States. — Burke *v.* Dulaney, 153 U. S. 228; Ware *v.* Allen, 128 U. S. 590; Tug River Coal & Salt Co. *v.* Brigel, 86 Fed. 818, 30 C. C. A. 415, 58 U. S. App. 320; Cowen *v.* Adams, 80 Fed. 448, 24 C. C. A. 198, 47 U. S. App. 439; Minah Consol. Min. Co. *v.* Briscoe, 47 Fed. 276.

Alabama. — First Nat. Bank *v.* Dawson, 78 Ala. 67.

Arkansas. — Graham *v.* Remmel, 88 S. W. 899.

California. — Jefferson *v.* Hewitt, 103 Cal. 624, 37 Pac. 638; McLaughlin *v.* Clausen, 85 Cal. 322, 24 Pac. 636.

Colorado. — Denver Brew. Co. *v.* Barets, 9 Colo. App. 341, 48 Pac. 834.

Connecticut. — Norman Printers' Supply Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499; Trumbull *v.* O'Hara, 71 Conn. 172, 41 Atl. 546; McFarland *v.* Sikes, 54 Conn. 250, 7 Atl. 408; 1 Am. St. Rep. 111.

District of Columbia. — Knight *v.* Walker Brick Co. 23 App. D. C. 519.

Georgia. — Hansford *v.* Freeman, 99 Ga. 376, 27 S. E. 706.

Illinois. — Belleville *v.* Bornman, 124 Ill. 200, 16 N. E. 210; Harding *v.* Commercial Loan Co., 84 Ill. 251; Hartley *v.* Gilhofer, 109 Ill. App. 527; Condit *v.* Dady, 56 Ill. App. 545.

Indiana. — Singer Mfg. Co. *v.* Forsyth, 108 Ind. 334, 9 N. E. 372; Carlisle *v.* Terre Haute & R. R. Co., 6 Ind. 316.

Indian Territory. — Mehlin *v.* Mutual Reserve Fund L. Ass'n, 2 Ind. Ter. 396, 51 S. W. 1063.

Iowa. — Oakland Cemetery Ass'n *v.* Lakins, 126 Iowa 121, 101 N. W. 778; McCormick Harv. Mach. Co. *v.* Morlan, 121 Iowa 451, 96 N. W. 976; Ware *v.* Smith, 62 Iowa 159, 17 N. W. 459.

Kentucky. — Caudle *v.* Ford, 24 Ky. L. Rep., 72 S. W. 270; Murphy *v.* Hubble, 2 Duv. 247.

Maine. — Goddard *v.* Cutts, 11 Me. 440.

Maryland. — Devries *v.* Shumate, 53 Md. 211.

Massachusetts. — Elastic Tip Co. *v.* Graham, 185 Mass. 597, 71 N. E. 117; Boston Woven Hose & Rubber Co. *v.* Graham, 185 Mass. 597, 71 N. E. 117.

Massachusetts. — Wilson *v.* Powers, 131 Mass. 539; Watkins *v.* Bowers, 119 Mass. 383.

Michigan. — Fulton *v.* Priddy, 123 Mich. 298, 82 N. W. 65; 81 Am. St. Rep. 201; Farwell *v.* Ensign, 66 Mich. 600, 33 N. W. 734; Gibson *v.* Miller, 29 Mich. 355, 18 Am. Rep. 98.

Minnesota. — Mendenhall *v.* Ulrich, 101 N. W. 1057; Clarke *v.* Williams, 61 Minn. 12, 62 N. W. 1125; Smith *v.* Mussetter, 58 Minn. 159, 59 N. W. 995; Merchants Exchange Bank *v.* Luckow, 37 Minn. 542, 35 N. W. 434.

Missouri. — Barrett *v.* Davis, 104 Mo. 549, 16 S. W. 377.

Nebraska. — Gregory *v.* Littlejohn, 25 Neb. 368, 41 N. W. 253.

New Hampshire. — Porter *v.* Pierce, 22 N. H. 275, 55 Am. Dec. 151.

New York. — Pratt & Whitney Co. *v.* American Pneumatic Tool Co., 166 N. Y. 588, 59 N. E. 1129; Benton *v.* Martin, 52 N. Y. 570; Holbrook *v.* Truesdel, 100 App. Div. 9, 90 N. Y. Supp. 911; Gallo *v.* New York, 15 App. Div. 61, 44 N. Y. Supp. 143; Rosenstock *v.* Montague, 28 Misc. 483, 59 N. Y. Supp. 500; Parmerter *v.* Colrick, 20 Misc. 202, 45 N. Y. Supp. 748; Plant *v.* Hernreich, 19 Misc. 308, 44 N. Y. Supp. 477; Norris *v.* Tiffany, 6 Misc. 380, 26 N. Y. Supp. 750.

North Carolina. — Western Carolina Bank *v.* Moore, 138 N. C. 529, 51 S. E. 79; Kelly *v.* Oliver, 113 N. C. 442, 18 S. E. 698.

Ohio. — Eleventh St. Church of Christ *v.* Pennington, 18 O. C. D. 74; Horekamp *v.* Elshoff, 1 Ohio L. D. 171, 3 Ohio N. P. 158.

Pennsylvania. — Donnelly *v.* Rafferty, 172 Pa. St. 587, 33 Atl. 754; Sidney School Furn. Co. *v.* Warsaw Twp. School Dist., 158 Pa. St. 35, 27 Atl. 856.

Rhode Island. — Sweet *v.* Stevens, 7 R. I. 375.

(2.) Delivery in Escrow. — Though an instrument purports upon its face to be delivered absolutely, it may be shown by parol evidence to have been delivered in escrow and that there was a delivery of the instrument in violation of the conditions imposed.[23]

(3.) Instrument Under Seal. — Parol evidence is admissible to show that a sealed instrument was delivered to a grantee or obligee as an escrow to take effect upon a condition not appearing on the face of the instrument.[24] In New York this is not the case as applied to writings relating to or conveying real estate, for as to these, delivery operates at once and the condition is unavailable;[25] but as to other writings not relating to real estate, parol evidence is admissible to show a condition not appearing on the face of the instrument.[26]

b. *Making Delivered Instrument Dependent on a Condition or Contingency.* — While parol evidence is admissible to show that the instrument never took effect, it is not admissible to show that it was to become void or inoperative upon the happening of some future event or contingency which has occurred.[27]

South Dakota. — Barton *v.* Anderson, 4 Rich. 507; McCormick Harv. Mach. Co. *v.* Faulkner, 7 S. D. 363, 64 N. W. 163, 58 Am. St. Rep. 839; Osborne *v.* Stringham, 1 S. D. 406, 47 N. W. 408.

Tennessee. — Alexander *v.* Wilkes, 11 Lea. 221; Breedon *v.* Grigg, 8 Baxt. 163.

Texas. — Merchants Nat. Bank *v.* McAnulty (Tex. Civ. App.), 31 S. W. 1091; Wheeler & W. Mfg. Co. *v.* Briggs, 18 S. W. 555.

Utah. — State Bank *v.* Burton-Gardner Co., 14 Utah 420, 48 Pac. 402.

Vermont. — King *v.* Woolbridge, 34 Vt. 565; Jarvis *v.* Rogers, 3 Vt. 336.

Virginia. — Catt *v.* Olivier, 98 Vt. 580, 36 S. E. 980.

Washington. — Elwell *v.* Turney, 81 Pac. 1047; Reiner *v.* Crawford, 23 Wash. 669, 63 Pac. 516, 83 Am. St. Rep. 848; Young *v.* Smith, 14 Wash. 565, 68 Pac. 1036.

Wisconsin. — Curry *v.* Colburn, 99 Wis. 319, 74 N. W. 778, 67 Am. St. Rep. 860; Nutting *v.* Minnesota F. Ins. Co., 98 Wis. 26, 73 N. W. 432.

23. *Colorado.* — Davis *v.* Bower, 29 Colo. 422, 68 Pac. 292.

District of Columbia. — Hutchinson *v.* Brown, 19 D. C. 136.

Indiana. — Stringer *v.* Adams, 98 Ind. 539.

Iowa. — Dean *v.* Nichols & Shepard Co., 95 Iowa 89, 63 N. W. 582.

Maryland. — Gorsuch *v.* Rutledge, 70 Md. 272, 17 Atl. 76.

Nebraska. — Gregory *v.* Littlejohn, 25 Neb. 368, 41 N. W. 253.

Ohio. — Brown *v.* Willis, 13 Ohio 26.

South Carolina. — Mills *v.* Williams, 16 S. C. 593.

24. Mowry *v.* Heney, 86 Cal. 471, 25 Pac. 17; Newman *v.* Baker, 10 App. Cas. (D. C.) 187; Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213; Chicago Pressed Steel Co. *v.* Clark, 87 Ill. App. 658; Braman *v.* Bingham, 26 N. Y. 483; Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; McClendon *v.* Brockett, 32 Tex. Civ. App. 150, 73 S. W. 854.

25. Gilbert *v.* North American Ins. Co., 23 Wend. (N. Y.) 43; 35 Am. Dec. 543; Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; Braman *v.* Bingham, 26 N. Y. 483; Wallace *v.* Burdell, 97 N. Y. 13, 25.

26. Blewitt *v.* Boorum, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. Rep. 600. See also Reynolds *v.* Robinson, 110 N. Y. 654, 18 N. E. 127.

27. *England.* — Ranson *v.* Walker, 1 Stark. 161; Free *v.* Hawkins, 8 Taunt. 92, 1 Moore 535.

United States. — Gorrell *v.* Home L. Ins. Co., 63 Fed. 371, 11 C. C. A. 240.

F. Subsequent Agreements. — a. *When Admissible.* — (1.) **In General.** — The rule that parol evidence is not admissible to contradict, vary or alter the terms of a written instrument does not exclude the introduction of evidence to show that a written contract has been modified, altered, or in fact entirely rescinded by a

Alabama. — West *v.* Kelly, 19 Ala. 353, 54 Am. Dec. 192.

California. — Prouty *v.* Adams, 141 Cal. 304, 74 Pac. 845.

District of Columbia. — Knight *v.* Walker Brick Co., 23 App. D. C. 519.

Georgia. — Lunsford *v.* Malsby, 101 Ga. 39, 28 S. E. 496; Stafford *v.* Staunton, 88 Ga. 298, 14 S. E. 479; Rodgers *v.* Rosser, 57 Ga. 319; Burch *v.* Augusta G. & L. R. Co., 80 Ga. 296, 4 S. E. 850.

Illinois. — Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213; Walker *v.* Crawford, 56 Ill. 444, 8 Am. Rep. 701; Kempshall *v.* Vedder, 79 Ill. App. 368; Singer Mfg. Co. *v.* Leeds, 48 Ill. App. 297.

Indiana. — Swank *v.* Nichols, 24 Ind. 199.

Iowa. — McCormick Harv. Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33; Marquis *v.* Lauretson, 76 Iowa 23, 40 N. W. 73.

Kansas. — Getto *v.* Binkert, 55 Kan. 617, 40 Pac. 925; Slatten *v.* Konrath, 1 Kan. App. 636, 42 Pac. 399.

Maine. — Boody *v.* McKenny, 23 Me. 517.

Maryland. — McSheny *v.* Brooks, 46 Md. 103.

Massachusetts. — Torpey *v.* Tebe, 184 Mass. 307, 68 N. E. 223; Wood's Sons Co. *v.* Schaefer, 173 Mass. 443, 53 N. E. 881, 73 Am. St. Rep. 305; Lilienthal *v.* Suffolk Brew. Co., 154 Mass. 185, 28 N. E. 151.

Michigan. — Hyde *v.* Tenwinkel, 26 Mich. 93.

Minnesota. — McCormick Harv. Mach. Co. *v.* Wilson, 39 Minn. 467, 40 N. W. 571; Curtice *v.* Hokanson, 38 Minn. 510, 38 N. W. 694.

Missouri. — Jones *v.* Shaw, 67 Mo. 667; Henshaw *v.* Dutton, 59 Mo. 139, 143; Neville *v.* Hughes, 104 Mo. App. 455, 79 S. W. 735; Trustees of Christian University *v.* Hoffman, 95 Mo. App. 488, 69 S. W. 474; Third Nat. Bank *v.* Reichert, 101 Mo. App. 242, 73 S. W. 893; Houck *v.* Frisbee, 66 Mo. App. 16.

Nebraska. — Western Mfg. Co. *v.* Rogers, 54 Neb. 456, 74 N. W. 849; Van Etten *v.* Howell, 40 Neb. 850, 59 N. W. 389; Kaserman *v.* Fries, 33 Neb. 427, 50 N. W. 269.

New York. — Pratt & Whitney Co. *v.* American Pneumatic Tool Co. 50 App. Div. 369, 63 N. Y. Supp. 1062; Cluster Gaslight Co. *v.* Baker, 90 N. Y. Supp. 1034; Ely *v.* Kilborn, 5 Denio 514; Hess *v.* Liebmann, 84 N. Y. Supp. 178; Richards *v.* Day, 63 Hun 635, 18 N. Y. Supp. 733.

North Carolina. — Hill *v.* Shields, 81 N. C. 250, 31 Am. Rep. 499.

Ohio. — Monnett *v.* Monnett, 46 Ohio St. 30, 17 N. E. 659; Van Arsdale *v.* Brown, 18 Ohio Cir. Ct. 52, 9 O. C. D. 488.

Oklahoma. — Neverman *v.* Bank of Cass Co., of Plattsmouth, Nebraska, 14 Okla. 417, 78 Pac. 382.

Pennsylvania. — Rogers *v.* Donovan, 13 Phila. 51.

South Carolina. — McGrath *v.* Barnes, 13 S. C. 328, 36 Am. Rep. 687.

Tennessee. — Williams *v.* Terrell, 7 Humph. 551; Deport *v.* Metcalf, 3 Head 424.

Texas. — Faires *v.* Cockerell, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528; Ablowich *v.* Greenville Nat. Bank, 22 Tex. Civ. App. 272, 54 S. W. 794; East Texas F. Ins. Co. *v.* Clarke, 1 Tex. Civ. App. 238, 21 S. W. 277.

Vermont. — Hatch *v.* Hyde, 14 Vt. 25, 39 Am. Dec. 203.

Virginia. — Watson *v.* Hurt, 6 Gratt. 633.

West Virginia. — Little Kanawha Nav. Co. *v.* Rice, 9 W. Va. 636.

Wisconsin. — Davy *v.* Kelley, 66 Wis. 452, 29 N. W. 232; Wayland University *v.* Boorman, 56 Wis. 657, 14 N. W. 819.

Compare State *v.* Chamber of Commerce of City of Milwaukee, 121 Wis. 110, 98 N. W. 930.

subsequent oral agreement,[28] the evidence not being for the purpose of varying the terms of the written instrument, but to show that it has become inoperative either in whole or in part by reason

28. *United States.* — Bradford *v.* Union Bank, 13 How. 57; Pecos Valley Bank *v.* Evans-Snider-Buel Co., 107 Fed. 654, 46 C. C. A. 534; McElroy *v.* British American Assur. Co., 94 Fed. 990, 36 C. C. A. 615.

Alabama. — Andrews *v.* Tucker, 127 Ala. 602, 29 So. 34; Watson *v.* Kirby, 112 Ala. 436, 20 So. 624.

California. — Guidery *v.* Green, 95 Cal. 630, 30 Pac. 786; Katz *v.* Bedford, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826; Adler *v.* Friedman, 16 Cal. 138.

Colorado. — Hurlburt *v.* Dusenbery, 26 Colo. 240, 57 Pac. 860; Cerrusite Min. Co. *v.* Steele, 18 Colo. App. 216, 70 Pac. 1091; Calliope Min. Co. *v.* Herzinger, 21 Colo. 482, 42 Pac. 668.

Connecticut. — Barber *v.* Brace, 3 Conn. 9; Hall *v.* Stewart, 5 Day 428.

Florida. — Wilson *v.* McClenny, 32 Fla. 363, 13 So. 873.

Georgia. — Mitchell *v.* Universal L. Ins. Co., 54 Ga. 289.

Illinois. — Sharkey *v.* Miller, 69 Ill. 560; McMillan *v.* De Tamble, 93 Ill. App. 65; Watkins *v.* Newman, 71 Ill. App. 196; Robison *v.* Hardy, 22 Ill. App. 512.

Indiana. — Toledo S. L. & K. C. Co. *v.* Levy, 127 Ind. 168, 26 N. E. 773; Prudential Ins. Co. *v.* Sullivan, 27 Ind. App. 30, 59 N. E. 873.

Indian Territory. — Fox *v.* Tyler, 3 Ind. Ter. 1, 53 S. W. 462.

Iowa. — Walker *v.* Camp, 63 Iowa 627, 19 N. W. 802.

Kansas. — Todd *v.* Allen, 18 Kan. 543, 545; Logan *v.* Hartwell, 5 Kan. 649.

Kentucky. — Illinois Cent. R. Co. *v.* Manion, 23 Ky. L. Rep. 2267, 67 S. W. 40.

Louisiana. — Janney *v.* Brown, 36 La. Ann. 118; Cain *v.* Pullen, 34 La. Ann. 511.

Maine. — Low *v.* Treadwell, 12 Me. 441; Brock *v.* Sturdwant, 12 Me. 81.

Maryland. — Kribs *v.* Jones, 44 Md. 396; Allen *v.* Sowerby, 37 Md. 410; Coates *v.* Sangston, 5 Md. 121.

Massachusetts. — Thomas *v.* Barnes, 156 Mass. 581, 31 N. E. 683.

Michigan. — Town *v.* Jepson, 133 Mich. 673, 95 N. W. 742; Mouat *v.* Bamlet, 123 Mich. 345, 82 N. W. 74; Liggett Spring & Axle Co. *v.* Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466.

Minnesota. — Smith *v.* Roberts, 43 Minn. 342, 46 N. W. 336.

Missouri. — Davis *v.* Scovern, 130 Mo. 303, 32 S. W. 986; Brown *v.* Bowen, 90 Mo. 184, 2 S. W. 398; Finks *v.* Hathaway, 64 Mo. App. 186; McLaran Real Estate & Inv. Co. *v.* Lindsay, 50 Mo. App. 225; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147.

Nebraska. — Strahl *v.* Western Grocer Co., 98 N. W. 1043; Bryant *v.* Thesing, 46 Neb. 244, 64 N. W. 967; Fitzgerald *v.* Fitzgerald & Mallory Constr. Co., 41 Neb. 374, 59 N. W. 838; Delaney *v.* Linder, 22 Neb. 274, 34 N. W. 630.

New Hampshire. — Cummings *v.* Putnam, 19 N. H. 569.

New Jersey. — Society for Establishing Useful Manufactures *v.* Haight, 1 N. J. Eq. 393.

New York. — Corse *v.* Peck, 102 N. Y. 513, 7 N. E. 810; Farrington *v.* Brady, 11 App. Div. 1, 42 N. Y. Supp. 385; Grange *v.* Palmer, 56 Hun 481, 31 N. Y. St. 612, 10 N. Y. Supp. 201; Nightingale *v.* Eiseman, 50 Hun 189, 19 N. Y. St. 169, 2 N. Y. Supp. 779; Weeks *v.* Binns, 66 N. Y. St. 26, 32 N. Y. Supp. 644.

North Carolina. — Foreign Hardwood Log Co. *v.* Coffin, 130 N. C. 432, 41 S. E. 931; Harris *v.* Murphy, 119 N. C. 34, 25 S. E. 708, 56 Am. St. Rep. 656.

Oregon. — Keller *v.* Bley, 15 Or. 429, 15 Pac. 705.

Pennsylvania. — Holloway *v.* Frick, 149 Pa. St. 178, 24 Atl. 201

Rhode Island. — Putnam Foundry & Mach. Co. *v.* Canfield, 25 R. I. 548, 56 Atl. 1033; Smith *v.* Lilley, 17 R. I. 119, 20 Atl. 227.

Tennessee. — Rogers *v.* Bedell, 97 Tenn. 240, 36 S. W. 1096; Chicago Bldg. & Mfg. Co. *v.* Barry, 52 S. W. 451; Bryan *v.* Hunt, 4 Sneed 543, 70 Am. Dec. 262.

of a subsequent and independent agreement.[29] It is immaterial how soon after the execution of the written instrument the new agreement was made. If it was in fact subsequent thereto and is otherwise unobjectionable it may be proved.[30] And evidence of such a modification is admissible even though it be an adoption in terms of an agreement contemporaneous with the writing, which is inadmissible.[31]

(2.) Necessity of Consideration. — A consideration is held essential to render evidence admissible of a subsequent agreement which modifies or alters the terms of a prior written instrument,[32] Though it has been decided that the mutual waiver of the rights of parties to a contract is a sufficient consideration for the cancellation of such contract.[33]

Texas. — Liner *v.* Watkins Land Mtge. Co., 29 Tex. Civ. App. 187, 68 S. W. 311.

Virginia. — Towner *v.* Lucas, 13 Gratt. 705, 713.

West Virginia. — Shepherd *v.* Wysong, 3 W. Va. 46.

Wisconsin. — Bannon *v.* Aultman, 80 Wis. 307, 49 N. W. 967, 27 Am. St. Rep. 37; Grace *v.* Lynch, 80 Wis. 166, 49 N. W. 751.

"Parties who have made contracts may vary them afterward as much as they please, and if the nature of their agreements is not such that the law requires them to be in writing, the fact that a previous arrangement relating to the same subject, and which would be varied by the new contract, was in writing, cannot make it imperative that the new contract should be reduced to writing also. The written and the oral contract thus made at different times may both be valid so far as they are not inconsistent, and when they are inconsistent, the one latest in time will control." Seaman *v.* O'Hara, 29 Mich. 66, *per* Cooley, J.

"Executed Oral Agreement" Under California Code. — The "executed oral agreement" which may be proved for the purpose of altering a previous contract must consist in the doing or the suffering of something not required to be done or suffered by the terms of the writing. Mackenzie *v.* Hodgkin, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209, decided under Cal. Civ. Code, §§ 1595, 1605, 1661, 1668.

29. Marshall *v.* Baker, 19 Me. 402.

30. Rogers *v.* Atkinson, 1 Ga. 12; Bunce *v.* Beck, 43 Mo. 266.

Though Made at the Same Interview at which the contract was reduced to writing and delivered, it may be shown if made after delivery of the instrument. Smith *v.* Lilley, 17 R. I. 119, 20 Atl. 227; Field *v.* Mann, 42 Vt. 61. *Compare* Kimball *v.* Bradford, 9 Gray (Mass.) 243, wherein it was decided that evidence of a modification at the same interview at which the agreement was delivered and immediately after delivery, was not admissible.

31. Courtenay *v.* Fuller, 65 Me. 156.

32. *England.* — Hewet *v.* Goodrick, 2 C. & P. 468.

Alabama. — Tuskaloosa Cotton-Seed Oil Co. *v.* Perry, 85 Ala. 158, 4 So. 635; Phillips *v.* Longstretch, 14 Ala. 337.

Florida. — Spann *v.* Baltzell, 1 Fla. 301, 46 Am. Dec. 346.

Indiana. — Davis *v.* Stout, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565.

Maryland. — Ives *v.* Bosley, 35 Md. 262, 6 Am. Dec. 411.

Massachusetts. — Jennings *v.* Chase, 10 Allen 526.

Montana. — Arnington *v.* Stelle, 27 Mont. 13, 69 Pac. 115, 94 Am. St. Rep. 811.

New Hampshire. — Bailey *v.* Adams, 10 N. H. 162.

Texas. — Self *v.* King, 28 Tex. 552.

But see Andrews *v.* Tucker, 127 Ala. 602, 29 So. 34, *holding* that no other consideration is required than the mutual assent.

33. Bryant *v.* Thesing, 46 Neb.

(3.) As to Performance. — (A.) WHERE INSTRUMENT SILENT. — Where an instrument is silent as to the time, manner or place of performance of the terms of a contract, parol evidence is admissible of a subsequent oral agreement, as to the time or manner in which,[34] or place where, it is to be performed.[35]

(B.) TO EXTEND OR ENLARGE PROVISIONS AS TO. — Though there is a provision in the instrument in regard to performance of the same, it may be shown by parol evidence that by a subsequent oral agreement the time or manner of performance was enlarged or extended,[36] as in the case of an extension of the time for the payment of money under a contract.[37] And likewise a change in the place of performance may be so shown.[38]

(4.) Evidence Showing Renewal of a Contract by a subsequent oral agreement is admissible where a contract provides that it shall continue for a certain time, and that at the expiration of the period stated it may be renewed by mutual consent.[39]

(5.) To Show Rescission. — Parol evidence is admissible to show the rescission of a contract in writing by a subsequent parol agreement between the parties thereto.[40] And it is decided that though a writing is under seal, it may be shown that it has been abrogated,

244, 64 N. W. 967; Champion Empire Min. Co. *v.* Bird, 7 Colo. App. 523, 44 Pac. 764; Osborne *v.* Taylor 58 Conn. 439, 20 Atl. 605; Converse *v.* Moulton, 2 Root (Conn.) 195.

34. Davis *v.* Talcott, 14 Barb. (N. Y.) 611; Putnam Foundry & Mach. Co. *v.* Canfield, 25 R. I. 548, 56 Atl. 1033.

35. Miles *v.* Roberts, 34 N. H. 245.

36. *United States.* — Emerson *v.* Slater, 22 How. 28.

Florida. — Branch *v.* Wilson, 12 Fla. 543.

Georgia. — Savannah, F. & W. R. Co. *v.* Wideman, 99 Ga. 245, 25 S. E. 400.

Illinois. — Baker *v.* Whiteside, 1 Ill. 174, 12 Am. Dec. 168.

Kentucky. — Chiles *v.* Jones, 3 B. Mon. 51.

Maryland. — Coates *v.* Sangston, 5 Md. 121.

Massachusetts. — Stearns *v.* Hall, 9 Cush. 31.

Missouri. — Chambers *v.* Board of Education, 60 Mo. 370.

New York. — Lawrence *v.* Miller, 86 N. Y. 131.

Vermont. — Barker *v.* Troy & R. R. Co., 27 Vt. 766.

37. *Alabama.* — Ferguson *v.* Hill, 3 Stew. 485, 21 Am. Dec. 641.

Colorado. — Drescher *v.* Fulham, 11 Colo. App. 62, 52 Pac. 685.

New Hampshire. — Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566.

Ohio. — Peck *v.* Beckwith, 10 Ohio St. 497.

South Carolina. — Solomons *v.* Jones, 3 Brev. 54, 5 Am. Dec. 538.

Wisconsin. — Grace *v.* Lynch, 80 Wis. 166, 49 N. W. 751; Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

38. Coates *v.* Sangston, 5 Md. 121.

39. Pasteur Vaccine Co. *v.* Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804.

40. *Colorado.* — Calliope Min. Co. *v.* Herzinger, 21 Colo. 482, 42 Pac. 668.

Illinois. — Alschuler *v.* Schiff, 164 Ill. 298, 45 N. E. 424.

Indiana. — Toledo, S. L. & K. C. R. Co. *v.* Levy, 127 Ind. 168, 26 N. E. 773; Rhodes *v.* Thomas, 2 Ind. 638.

Kentucky. — Hawkins *v.* Lowry, 6 J. J. Marsh. 245.

Louisiana. — Andrus *v.* Chretien, 7 La. 318.

Nebraska. — Bryant *v.* Thesing, 46 Neb. 244, 64 N. W. 967.

New Hampshire. — Buel *v.* Miller, 4 N. H. 196.

canceled and surrendered by a subsequent executed agreement.[41]

b. *When Not Admissible.* — **(1.) Where Law Requires a Writing.** Evidence of a subsequent parol agreement is not admissible where the contract or agreement is one required by law to be in writing.[42]

(2.) Instrument Under Seal. — Where the instrument is one under seal, parol evidence is not admissible to show that it was subsequently modified or altered by an oral agreement,[43] as a specialty can only be modified or altered by an instrument of as high a nature.[44] This rule, however, is held not to exclude evidence of an executed parol agreement,[45] or as to some matter in respect to which the writing is silent, such as the time of performance,[46] or of payment.[47]

G. CUSTOM OR USAGE. — a. *In General.* — Parol evidence is admissible to show a general and uniform custom or usage in the trade or business to which a contract relates, at the place where it was made or is to be performed, in those cases where the instrument is silent, or the terms and language employed are of doubtful import, or where such evidence is essential in order to give effect to the writing.[48] But evidence is not admissible to engraft upon

41. Alschuler *v.* Schiff, 164 Ill. 298, 45 N. E. 424.

42. *United States.* — Reid *v.* Diamond Plate-Glass Co., 85 Fed. 193, 29 C. C. A. 110, 54 U. S. App. 619.

California. — Adler *v.* Friedman, 16 Cal. 138.

Georgia. — Mitchell *v.* Universal Life Ins. Co., 54 Ga. 289.

Kentucky. — Illinois Cent. R. Co. *v.* Manion, 23 Ky. L. Rep. 2267, 67 S. W. 40.

Michigan. — Seaman *v.* O'Hara, 29 Mich. 66.

Minnesota. — Thompson *v.* Thompson, 78 Minn. 379, 81 N. W. 204, 543.

Missouri. — Boggs *v.* Pacific Steam Laundry Co., 86 Mo. App. 616.

Nebraska. — Strahl *v.* Western Grocer Co., 98 N. W. 1043.

New York. — Farrington *v.* Brady, 11 App. Div. 1, 42 N. Y. Supp. 385.

43. *Illinois.* — Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213, *affirming* 68 Ill. App. 592; Baltimore & O. & C. R. Co. *v.* Illinois Cent. R. Co., 137 Ill. 9, 27 N. E. 38; Dauchy Iron Wks. *v.* Toles, 76 Ill. App. 669; Alschuler *v.* Schiff, 59 Ill. App. 51; Leavitt *v.* Stern, 55 Ill. App. 416.

Maryland. — Zihlman *v.* Cumberland Glass Co., 74 Md. 303, 22 Atl. 271.

New Hampshire. — McMurphy *v.* Garland, 47 N. H. 316.

New York. — Stokes *v.* Polley, 30 App. Div. 550, 52 N. Y. Supp. 406; Delacroix *v.* Bulkley, 13 Wend. 71; Kuhn *v.* Stevens, 7 Rob. 544; Thomson *v.* Poor, 67 Hun 653, 22 N. Y. Supp. 570.

North Dakota. — Merchants State Bank *v.* Ruettell, 12 N. D. 519, 97 N. W. 853.

But see Adams *v.* Battle, 125 N. C. 152, 34 S. E. 245.

44. McMurphy *v.* Garland, 47 N. H. 316.

45. Worrel *v.* Forsyth, 141 Ill. 22, 40 N. E. 673.

46. Lawrence *v.* Miller, 86 N. Y. 131.

47. McEowen *v.* Rose, 5 N. J. L. 672.

48. *England.* — Lilly *v.* Smalls (1892), 1 Q. B. 456; Baker *v.* Paine, 1 Ves. 456, 27 Eng. Rep. 1140.

United States. — Albion Phosphate Min. Co. *v.* Wyllie, 77 Fed. 541, 23 C. C. A. 276, 42 U. S. App. 214; Eddy *v.* Northern S. S. Co., 79 Fed. 361.

Alabama. — Haas *v.* Hudmon, 83 Ala. 174, 3 So. 302; Kinney *v.* South & N. A. R. Co., 82 Ala. 368, 3 So. 113; McClure *v.* Cox, 32 Ala. 617, 70 Am. Dec. 552; Hibler *v.* McCartney, 31 Ala. 501.

the terms of an instrument a custom or usage which will vary the character and extent of the obligations imposed where the writing is unambiguous and excludes any idea of a contract with reference to the custom.[49] And a party who relies upon a custom or usage, either to show performance by him or non-performance by the other party to the contract, must plead the same.[50]

b. *Meaning of Words or Terms by Local Usage or Custom.* Where a word or phrase has, by reason of a custom or usage, a particular or technical meaning in a particular neighborhood or locality, and is used in an instrument made at that place or in that

Arkansas. — McCarthy *v.* McArtur, 69 Ark. 313, 63 S. W. 56.

Illinois. — Leavitt *v.* Kennicott, 157 Ill. 235, 41 N. E. 737.

Indiana. — Lane *v.* Union Nat. Bank, 3 Ind. App. 299, 29 N. E. 613.

Iowa. — Hughes *v.* Stanley, 45 Iowa 622.

Louisiana. — Destrehan *v.* Louisiana Cypress Lumb. Co., 45 La. Ann. 920, 13 So. 230, 40 Am. St. Rep. 265.

Nebraska. — McKee *v.* Wild, 52 Neb. 9, 71 N. W. 958.

New Hampshire. — Cummings *v.* Blanchard, 67 N. H. 268, 36 Atl. 556, 68 Am. St. Rep. 664.

New York. — Atkinson *v.* Truesdell, 127 N. Y. 230, 27 N. E. 844; Lawrence *v.* Gallagher, 73 N. Y. 613; White *v.* Ellisburgh, 18 App. Div. 514, 45 N. Y. Supp. 1122; Neff *v.* Klepfer, 16 Misc. 49, 73 N. Y. St. 273, 37 N. Y. Supp. 654; DeCernea *v.* Cornell, 3 Misc. 241, 52 N. Y. St. 136, 22 N. Y. Supp. 941.

Texas. — Dwyer *v.* Brenham, 70 Tex. 30, 7 S. W. 598; Schaub *v.* Dallas Brew. Co., 80 Tex. 634, 16 S. W. 429; Schleicher *v.* Runge (Tex. Civ. App.), 37 S. W. 982.

Utah. — Sharp *v.* Clark, 13 Utah 510, 45 Pac. 566.

Virginia. — Hansbrough *v.* Neal, 94 Va. 722, 27 S. E. 593; Allen *v.* Crank, 23 S. E. 772; Richlands Flint Glass Co. *v.* Hiltebeitel, 92 Va. 91, 22 S. E. 806.

49. *United States.* — DeWitt *v.* Berry, 134 U. S. 306; The Gazelle, 128 U. S. 474; Albion Phosphate Min. Co. *v.* Wyllie, 77 Fed. 541, 23 C. C. A. 276, 42 U. S. App. 214; Kalamazoo Corset Co. *v.* Simon, 129 Fed. 144.

Alabama. — Richmond & D. R. Co. *v.* Hissong, 97 Ala. 187, 13 So. 209; Haas *v.* Hudmon, 83 Ala. 174, 3 So. 302.

California. — Swift *v.* Occidental Min. & P. Co., 141 Cal. 161, 74 Pac. 700; Withers *v.* Moore, 140 Cal. 591, 74 Pac. 159.

Illinois. — Corrigan *v.* Herrin, 44 Ill. App. 363.

Indiana. — Scott *v.* Hartley, 126 Ind. 239, 25 N. E. 826; Seavey *v.* Shurick, 110 Ind. 494, 11 N. E. 597.

Iowa. — Shaw *v.* Jacobs, 89 Iowa 713, 55 N. W. 333, 48 Am. St. Rep. 411, 21 L. R. A. 440.

Maryland. — Lazard *v.* Merchants & M. T. Co., 78 Md. 1, 26 Atl. 897.

Massachusetts. — Menage *v.* Rosenthal, 175 Mass. 358, 56 N. E. 579.

Missouri. — Keller *v.* Meyer, 74 Mo. App. 318.

Nebraska. — McKee *v.* Wild, 52 Neb. 9, 71 N. W. 958.

New Hampshire. — Cummings *v.* Blanchard, 67 N. H. 268, 36 Atl. 556, 68 Am. St. Rep. 664.

New York. — O'Donohue *v.* Leggett, 134 N. Y. 40, 31 N. E. 269; Morowsky *v.* Rohrig, 4 Misc. 167, 23 N. Y. Supp. 880.

North Dakota. — Deacon *v.* Mattison, 11 N. D. 190, 91 N. W. 35.

Pennsylvania. — Needy *v.* Western Maryland R. Co., 22 Pa. Super. Ct. 489.

South Carolina. — Coates *v.* Early, 46 S. C. 220, 24 S. E. 305.

Texas. — San Antonio & A. P. R. Co. *v.* Barnett (Tex. Civ. App.), 27 S. W. 676.

Wisconsin. — Mowatt *v.* Wilkinson, 110 Wis. 176, 85 N. W. 661.

See article "CUSTOMS AND USAGES," Vol. III.

50. Goldsmith *v.* Sawyer, 46 Cal. 209.

locality, the meaning of such word or term may be shown by parol evidence.[51] And to authorize the admission of such evidence it is not necessary that the custom or usage should have existed for any considerable length of time, it being sufficient if known to the parties at the time they entered into the contract.[52] Such evidence is not, however, admissible to contradict or alter the legal effect of an instrument which is clear and unambiguous.[53] And it has been held that where words have a definite and general meaning parol evidence is not admissible to show a local meaning.[54]

H. DIFFERENT WRITINGS. — a. *Where Separate, Distinct and Complete.* — Where writings are separate, distinct, independent and complete upon their face it has been decided that parol evidence is not admissible to connect them where there is nothing in the instrument to show such connection,[55] especially if the admission in evidence of the other writing would operate to vary the instrument, the construction of which is in issue.[56] But if there is a reference to the subject-matter of the writing, though giving no description of the writing referred to, this has been held sufficient to authorize the admission of proof consistent with the writing to show they were simultaneously executed and are part of the same transaction and contract.[57] And if the party sought to be charged has introduced evidence showing the mutual relation between several writings, he cannot raise the objection that parol evidence was necessary to connect them.[58]

51. Broadwell *v.* Broadwell, 6 Ill. 599; Wood *v.* Allen, 111 Iowa 97, 82 N. W. 451; Pilmer *v.* Branch of the State Bank at Des Moines, 16 Iowa 321; Brown *v.* Brown, 8 Metc. (Mass.) 573; Petrie *v.* Phoenix Ins. Co., 132 N. Y. 137, 30 N. E. 380; Stillman *v.* Burfeind, 21 App. Div. 13, 47 N. Y. Supp. 280; O'Donohue *v.* Leggett, 29 N. Y. St. 983, 8 N. Y. Supp. 426; Tatum *v.* Sawyer, 9 N. C. 226, 230; Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104; Dewees *v.* Lockhart, 1 Tex. 535; Moore *v.* Hill, 62 Vt. 424, 19 Atl. 997.

"In such a case parol evidence is admitted of necessity for the same reason that an interpreter must be employed to translate a paper written in an unknown tongue, and it has always been admitted." Smith *v.* Clayton, 29 N. J. L. 357, 361. See article "CUSTOMS AND USAGES," Vol. III.

52. Rastetter *v.* Reynolds, 160 Ind. 133, 66 N. E. 612.

53. Dewees *v.* Lockhart, 1 Tex. 535.

54. Tatum *v.* Sawyer, 9 N. C. 226. See Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 284.

55. Reynolds *v.* Louisville, N. A. & C. R. Co., 143 Ind. 579, 40 N. E. 410; Dillingham *v.* Estill, 3 Dana (Ky.) 21; Fortesque *v.* Crawford, 105 N. C. 29, 10 S. E. 910.

Compare Welsh *v.* Edmisson, 46 Mo. App. 282; Hanford *v.* Rogers, 11 Barb. (N. Y.) 18.

Where a Signed Memorandum of Sale was not attached to the printed advertisement of sale and not referred to in it, it was held that parol evidence was not admissible to connect them. Mayer *v.* Adrian, 77 N. C. 83.

Where Made at Different Times parol evidence is not admissible to connect them if there is no reference in the writing. Hennershotz *v.* Gallagher, 124 Pa. St. 1, 16 Atl. 518.

56. Singer Mfg. Co. *v.* Hester, 6 Fed. 804.

57. Dillingham *v.* Estill, 3 Dana (Ky.) 21, 23.

58. Beckwith *v.* Talbot, 2 Colo. 639.

b. *Where Another Writing Is Referred To.* — Where a written instrument refers to another writing parol evidence is admissible to identify the one referred to.[59] So evidence is admissible to identify a note as the one described or referred to in a mortgage,[60] or deed of trust;[61] to identify a bond referred to in a mortgage;[62] to identify a mortgage as the one referred to in a letter enclosing it;[63] to identify an account referred to;[64] a map or plat;[65] to identify an agreement as to mode or manner of payment, referred to in notes;[66] to identify specifications referred to in a building contract;[67] to identify a warranty deed referred to in another deed,[68] or to supply a deficient description of property by resort to a deed referred to in a writing.[69]

c. *Different Writings Evidencing One Transaction.* — It is not necessary that a whole contract should be on one paper, but it may be evidenced by several writings, and where they are executed at the same time and relate to the same subject-matter parol evidence is admissible to connect them,[70] and all the writings so executed and connected are admissible in evidence,[71] and are to be read to-

59. McConaughy *v.* Wilsey, 115 Iowa 589, 88 N. W. 1101; Wichita University *v.* Schweiter, 50 Kan. 672, 32 Pac. 352; Dillingham *v.* Estill, 3 Dana (Ky.) 21; Brown *v.* Holyoke, 53 Me. 9; Rorabacher *v.* Lee, 16 Mich. 169; Clough *v.* Bowman, 15 N. H. 504; Monocacy Bridge Co. *v.* American Iron Bridge Mfg. Co., 83 Pa. St. 517.

60. *Maine.* — Hoey *v.* Candage, 61 Me. 257; Williams *v.* Hilton, 35 Me. 547, 58 Am. Dec. 729; Bourne *v.* Littlefield, 29 Me. 302.

Massachusetts. — Goddard *v.* Sawyer, 9 Allen 78; Clark *v.* Houghton, 12 Gray 38; Johns *v.* Church, 12 Pick. 557, 23 Am. Dec. 651.

Missouri. — Aull *v.* Lee, 61 Mo. 160.

New Hampshire. — Colby *v.* Dearborn, 59 N. H. 326; Cushman *v.* Luther, 53 N. H. 562.

Texas. — The Howards *v.* Davis, 6 Tex. 174.

Wisconsin. — Paine *v.* Benton, 32 Wis. 491.

61. Morrison *v.* Taylor, 21 Ala. 779; Posey *v.* Decatur Bank, 12 Ala. 802; Williams *v.* Moniteau Nat. Bank, 72 Mo. 292; Stanford *v.* Andrews, 12 Heisk. (Tenn.) 664; Fitzpatrick *v.* School Com'rs, 7 Humph. (Tenn.) 224, 46 Am. Dec. 76.

62. Baxter *v.* McIntire, 13 Gray (Mass.) 168; Harlan Co. *v.* Whitney, 65 Neb. 105, 90 N. W. 993, 101 Am. St. Rep. 610.

63. Ward *v.* Hayes, 12 Grant's Ch. (Up. Can.) 239.

64. Des Brisay *v.* Glencross, 12 N. B. (Can.) 105.

65. Redd *v.* Murry, 95 Cal. 48, 24 Pac. 841; Penry *v.* Richards, 52 Cal. 496; Way *v.* Arnold, 18 Ga. 181; Zimpleman *v.* Stamps, 21 Tex. Civ. App. 129, 51 S. W. 341; Snooks *v.* Wingfield, 52 W. Va. 441, 44 S. W. 277.

66. Wilson *v.* Tucker, 10 R. I. 578.

67. Bergin *v.* Williams, 138 Mass. 544.

68. Adams *v.* Morgan, 150 Mass. 143, 22 N. E. 708.

69. Hoffman *v.* Port Huron, 102 Mich. 417, 60 N. W. 831; McGuffie *v.* Burleigh, 78 L. T. N. S. 264.

70. Pascault *v.* Cochran, 34 Fed. 358; First Nat. Bank of Florida *v.* Ashmead, 23 Fla. 379, 2 So. 657; Willis *v.* Hammond, 41 S. C. 153, 19 S. E. 310; Masterson *v.* Burnett, 27 Tex. Civ. App. 370, 66 S. W. 90. See H, "Different Writings," *ante.*

71. Gould *v.* Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896; Bernheimer *v.* Prince, 29 Misc. 308, 60 N. Y. Supp. 449; Atlantic Phosphate Co. *v.* Sullivan, 34 S. C. 301, 13 S. E. 539.

gether and construed as one contract.[72] And where two papers executed at the same time as a part of the same transaction or contract are in some respects inconsistent, and it is not apparent on their face which one expresses the real intention of the parties, parol evidence is admissible to show which may be regarded as the true expression of their contract.[73] But where separate papers are connected as one contract they are subject to the same general rules as if the contract were evidenced by one paper, and parol evidence is inadmissible to contradict or vary their terms in the absence of fraud or mistake,[74] or to explain the same if unambiguous.[75]

d. *Writings Introduced Collaterally.* — Where a writing is introduced for a collateral purpose, and not in an endeavor to enforce it, parol evidence is admissible to vary the terms of the written instrument.[76] And when papers and documents are introduced collaterally in the trial of a cause, the purpose and object for which they were executed and the reason why they were made in a particular form may be explained by parol evidence,[77] or their terms

72. *United States.* — Bailey *v.* Hannibal & St. J. R. Co., 17 Wall. 96; Woodward *v.* Jewell, 25 Fed. 689.
Alabama. — Prater *v.* Darby, 24 Ala. 496; Sewall *v.* Henry, 9 Ala. 24.
Arkansas. — St. Louis, I. M. & S. R. Co. *v.* Beidler, 45 Ark. 17.
Colorado. — O'Reilly *v.* Burns, 14 Colo. 7, 22 Pac. 1090.
District of Columbia. — Gibbons *v.* Duley, 7 Mack. 320.
Florida. — Howard *v.* Pensacola & A. R. Co., 24 Fla. 560, 5 So. 356.
Illinois. — Gardt *v.* Brown, 113 Ill. 475, 55 Am. Rep. 434; Denby *v.* Graff, 10 Ill. App. 195.
Iowa. — First Nat. Bank *v.* Snyder, 79 Iowa 191, 44 N. W. 356; Myers *v.* Munson, 65 Iowa 423, 21 N. W. 759.
Kentucky. — Parks *v.* Cooke, 3 Bush 168; Knott *v.* Hogan, 4 Metc. 99.
Massachusetts. — Hunt *v.* Frost, 4 Cush. 54; Hunt *v.* Livermore, 5 Pick. 395.
Michigan. — Power *v.* Power, 91 Mich. 587, 52 N. W. 60; Ferguson *v.* Davis, 65 Mich. 677, 32 N. W. 892; Dudgeon *v.* Haggart, 17 Mich. 273.
Minnesota. — Brackett *v.* Edgerton, 14 Minn. 174, 100 Am. Dec. 211.
Missouri. — Waples *v.* Jones, 62 Mo. 440.
New Hampshire. — Hill *v.* Huntress, 43 N. H. 480.
New York. — Hanford *v.* Rogers, 11 Barb. 18; Leonard *v.* Vredenburgh, 8 Johns. 29, 5 Am. Dec. 317.
North Carolina. — Howell *v.* Howell, 29 N. C. 491, 47 Am. Dec. 335.
Ohio. — White *v.* Brocaw, 14 Ohio St. 339.
Oregon. — Dean *v.* Lawham, 7 Or. 422.
Texas. — Atcheson *v.* Hutchison, 51 Tex. 223; Wallis *v.* Beauchamp, 15 Tex. 303.
Vermont. — Strong *v.* Barnes, 11 Vt. 221, 34 Am. Dec. 684.
Wisconsin. — Hagerty *v.* White, 69 Wis. 317, 34 N. W. 92.

73. Payson *v.* Lamson, 134 Mass. 593, 45 Am. Rep. 348. See Thomas *v.* Austin, 4 Barb. (N. Y.) 265.

74. Pierce *v.* Tidwell, 81 Ala. 299, 2 So. 15; Carr *v.* Hayes, 110 Ind. 408, 11 N. E. 25; Myers *v.* Munson, 65 Iowa 423, 21 N. W. 759.

75. Harrison *v.* Tate, 100 Ga. 383, 28 S. E. 227.

76. Pacific Biscuit Co. *v.* Dugger, 42 Or. 513, 70 Pac. 523.

77. Bank *v.* Kennedy, 17 Wall. (U. S.) 19; Wooster *v.* Simonson, 20 Fed. 316; Stackhouse *v.* Zunts, 23 La. Ann. 481; Shedrick *v.* Young, 72 App. Div. 278, 76 N. Y. Supp. 56; Harrison *v.* Castner, 11 Ohio St. 339; Pacific Biscuit Co. *v.* Dugger, 42 Or. 513, 70 Pac. 523; Holly *v.* Blackman, 32 S. C. 584, 10 S. E. 774.

may, under these circumstances, be even contradicted or varied.[78]

I. To Sustain an Instrument. — a. *In General.* — Since parol evidence is admissible to establish the fact that an instrument is void and of no binding effect it follows as a necessary consequence that where an instrument is so attacked for reasons not apparent on its face parol evidence is likewise admissible to support the instrument, to show that it expresses the true intent of the parties, and generally to establish the good faith of the transaction and to rebut the charge of invalidity.[79]

b. *As to Particular Grounds Alleged.* — **(1.) Fraud, Illegality, Usury or Duress.** — Parol evidence is admissible to rebut a charge of fraud,[80] illegality,[81] usury[82] or duress,[83] provided in each case the charge to be rebutted has been supported by evidence *dehors* the record.

(2.) Want of Authority. — (A.) In General. — Where it is alleged that an instrument has no binding effect by reason of want of authority on the part of the one signing it to bind the person sought to be charged thereunder, the inquiry is not confined to the face of the instrument itself, but parol evidence is admissible to show actual and complete authority.[84]

(B.) Ratification of Unauthorized Signature. — Though an instrument may not be binding upon a person at the time of its execution by reason of the fact that his name was affixed thereto by another without authority, yet he may subsequently ratify the same in express terms or be estopped by his acts and conduct thereunder from setting up the defense of want of authority, and parol evidence is

78. Barber *v.* Hildebrand, 42 Neb. 400, 60 N. W. 594; Harrison *v.* Castner, 11 Ohio St. 339. But see Clark *v.* Gregory, 87 Tex. 189, 27 S. W. 56.

79. *United States.* — Case Mfg. Co. *v.* Soxman, 138 U. S. 431.

Alabama. — Abercrombie *v.* Bradford, 16 Ala. 560.

Indian Territory. — Smith *v.* Moore, 2 Ind. Ter. 126, 48 S. W. 1025.

Massachusetts. — Rundell *v.* La Fleur, 6 Allen 480.

Michigan. — Gage *v.* Sanborn, 106 Mich. 269, 64 N. W. 32.

Pennsylvania. — Nixon *v.* McCalmont, 6 Watts & S. 159.

Texas. — Cain *v.* Mack, 33 Tex. 135.

Virginia. — Porterfield *v.* Coiner, 4 Gratt. 55.

80. *Alabama.* — Abercrombie *v.* Bradford, 16 Ala. 560.

Illinois. — Andes Ins. Co. *v.* Fish, 71 Ill. 620.

Indian Territory. — Smith *v.* Moore, 2 Ind. Ter. 126, 48 S. W. 1025.

Michigan. — Walton *v.* Mason, 109 Mich. 486, 67 N. W. 692.

North Carolina. — Potter *v.* Everitt, 42 N. C. 152.

Ohio. — Taylor *v.* Leigh, 26 Ohio St. 428.

Pennsylvania. — Cameron *v.* Paul, 11 Pa. St. 277.

Virginia. — Sloan *v.* Rose, 101 Va. 151, 43 S. E. 329.

81. Rundell *v.* La Fleur, 6 Allen (Mass.) 480.

82. Joyner *v.* Vincent, 20 N. C. 512; Porterfield *v.* Coiner, 4 Gratt. (Va.) 55.

83. Hardin *v.* Hardin, 38 Tex. 616.

84. Case Mfg. Co. *v.* Soxman, 138 U. S. 431; Mechanics Bank *v.* Bank of Columbia, 5 Wheat. (U. S.) 326; Cain *v.* Mack, 33 Tex. 135.

admissible to show such a waiver or the acts or conduct constituting the estoppel.[85]

(3.) Want of Proper Execution. — Parol evidence is admissible to show that a scrawl was intended for a seal where an instrument is assailed on the ground that there is no seal affixed thereto.[86] And where the sealing of an instrument is the essential part of its execution by a corporation and the essential facts to be proved are that the seal affixed thereto was in fact the corporate seal of the company, and that it was duly and properly affixed, parol evidence is admissible to prove such facts.[87]

c. *Where Instrument Void on Face.* — Where an instrument is void on its face, as where it is in violation of or does not conform to the requirements of some statute, parol evidence is inadmissible for the purpose of validating or otherwise affecting the instrument.[88] And where an instrument is void on its face for uncertainty it cannot be aided by the admission of parol evidence to supply that which has been omitted.[89]

J. Evidence Showing an Election as to Performance. Where a party to an instrument has the right to make an election as to the manner of performance, parol evidence is admissible to show that an election has been made by him.[90]

K. Where Parol Evidence Not Objected To. — Where parol evidence is introduced which tends to vary or contradict the terms of a writing, and no objection is made to the introduction of such testimony, it is to be considered in the determination of the issues.[91]

85. *California.* — Goetz *v.* Goldbaum, 37 Pac. 646.
Colorado. — Williams *v.* Uncompahgre Canal Co., 13 Colo. 469, 22 Pac. 806.
Illinois. — Paul *v.* Berry, 78 Ill. 158.
Massachusetts. — Wellington *v.* Jackson, 121 Mass. 157.
Missouri. — First Nat. Bank *v.* Bodger Lumb. Co., 54 Mo. App. 327.
Pennsylvania. — Bond *v.* Aitkin, 6 Watts & S. 165, 40 Am. Dec. 550.
Rhode Island. — Crout *v.* DeWolf, 1 R. I. 393.
Texas. — McClintoch *v.* Huges Bros. Mfg. Co. (Tex. App.), 15 S. W. 200.
Wisconsin. — Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

86. Relph *v.* Gist, 4 McCord (S. C.) 267.

87. Zihlman *v.* Cumberland Glass Co., 74 Md. 303, 22 Atl. 271.

88. *Alabama.* — Nelson *v.* Shelby Mfg. & Imp. Co., 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116.
Arkansas. — Pack *v.* Crawford, 29 Ark. 489.
Illinois. — Ennor *v.* Thompson, 46 Ill. 214.
Louisiana. — Bethel *v.* Hawkins, 21 La. Ann. 620.
Mississippi. — McGuire *v.* Stevens, 42 Miss. 724.
New York. — Seymour *v.* Warren, 59 App. Div. 120, 69 N. Y. Supp. 236.
Pennsylvania. — Jourdan *v.* Jourdan, 9 Serg. & R. 268, 11 Am. Dec. 724.
South Carolina. — Stephens *v.* Winn., 3 Brev. L. 17. But see Griffin *v.* New Jersey Oil Co., 11 N. J. Eq. 49.

89. Gaston *v.* Weir, 84 Ala. 193, 4 So. 258; Augustine *v.* McDowell, 120 Iowa 401, 94 N. W. 918; George *v.* Conhaim, 38 Minn. 338, 37 N. W. 791; Holcombe *v.* Munson, 103 N. Y. 682, 9 N. E. 443; Norris *v.* Stephens, 46 Pa. St. 200.

90. Norton *v.* Webb, 35 Me. 218.

91. White *v.* Balta, 7 Misc. 311, 27 N. Y. Supp. 902; Ashe *v.* Carolina & N. W. R. Co., 65 S. C. 134, 139, 43 S. E. 393.

L. Waiver or Estoppel. — Provisions in an instrument which inure to the benefit of a person may be waived by him, and parol evidence is admissible for the purpose of showing a waiver or that a party has by his own acts or conduct become estopped from insisting upon a compliance with or performance of some provision of the writing by the other party thereto.[92]

M. To Contradict Recitals or Statements Not Part of Contract. — a. *In General.* — Parol evidence is admissible which contradicts or varies recitals or statements of fact in a writing where they constitute no part of the contract.[93]

b. *Place Where Executed.* — Parol evidence may be introduced to show that a writing was executed at a place other than that designated therein, as the place of execution is not ordinarily to be regarded as an essential part of the contract.[94]

N. As to Date. — a. *In General.* — Where the date of an instrument is not a material part thereof, parol evidence is admissible to show the true date.[95] So where the date of an instrument and

92. *United States.* — McElroy *v.* British American Assur. Co., 94 Fed. 990, 36 C. C. A. 615.

Alabama. — Watson *v.* Kirby, 112 Ala. 436, 20 So. 624.

Connecticut. — O'Keefe *v.* St. Francis Church, 59 Conn. 551, 22 Atl. 325; Sheldon *v.* Connecticut Mut. L. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565.

Illinois. — Morehouse *v.* Terrill, 111 Ill. App. 460; Chicago & E. I. R. R. Co. *v.* Moran, 85 Ill. App. 543.

Louisiana. — Edson *v.* McGraw, 37 La. Ann. 294.

Maine. — Medonak Bank *v.* Curtis, 24 Me. 36.

Maryland. — Franklin F. Ins. Co. *v.* Hamill, 5 Md. 170.

Massachusetts. — Leathe *v.* Bullard, 8 Gray 545; Thompson *v.* Catholic Congregational Soc., 5 Pick. 469.

Michigan. — Duplanty *v.* Stokes, 103 Mich. 630, 61 N. W. 1015.

Minnesota. — Smith *v.* Roberts, 43 Minn. 342, 46 N. W. 336.

New York. — Brady *v.* Cassidy, 145 N. Y. 171, 39 N. E. 814; Granger *v.* Palmer, 56 Hun 481, 10 N. Y. Supp. 201; Mead & Parker, 41 Hun 577; O'Brien *v.* Prescott Ins. Co., 32 N. Y. St. 579, 11 N. Y. Supp. 125.

Pennsylvania. — Raffensberger *v.* Cullison, 28 Pa. St. 426.

93. The Nith, 36 Fed. 86; Dickey *v.* Grice, 110 Ga. 315, 35 S. E. 291; McNamara *v.* Estes, 22 Iowa 246; Rose *v.* Madden, 1 Kan. 417; Bancroft *v.* Parker, 13 Pick. (Mass.) 192; Glover *v.* Ruffin, 6 Ohio 255.

Recitals as to consideration, see article "Consideration," Vol. III, p. 380. Recitals in deeds, see article "Deeds," Vol. IV.

94. Keys *v.* Powell, 9 La. 572.

95. *England.* — Hall *v.* Cazenove, 4 East 477.

Canada. — Connel *v.* Dickinson, 12 New Bruns. 459.

United States. — District of Columbia *v.* Camden Iron Wks., 181 U. S. 453; Pascault *v.* Cochran, 34 Fed. 358.

Alabama. — Hauerwas *v.* Goodloe, 101 Ala. 162, 13 So. 567.

Arkansas. — Merrill *v.* Sypert, 65 Ark. 51, 44 S. W. 462; Howell *v.* Rye, 35 Ark. 470.

Georgia. — Kiser *v.* Carrollton Dry Goods Co., 96 Ga. 760, 22 S. E. 303.

Illinois. — Blake *v.* Fash, 44 Ill. 302; School Dist. No. 4 *v.* Stilley, 36 Ill. App. 133; Horn *v.* Booth, 22 Ill. App. 385.

Indiana. — Briggs *v.* Fleming, 112 Ind. 313, 14 N. E. 86.

Iowa. — Barlow *v.* Buckingham, 68 Iowa 169, 26 N. W. 58.

Kansas. — McFall *v.* Murray, 4 Kan. App. 554, 45 Pac. 1100.

Louisiana. — Clauss *v.* Burgess, 12 La. Ann. 142.

Maine. — Bird *v.* Munroe, 66 Me.

of a recital therein conflict the true date may be shown.[96] Likewise where different instruments relate to the same subject-matter and only operate from the date of delivery.[97] And this rule is held to be true in the case of a contract required by the statute of frauds to be in writing.[98] But where the parties to a written agreement have made the date of the instrument a material part of the contract, as when the time of performance is fixed with reference to it, parol evidence is not admissible to vary or change it.[99]

b. *Where Date Omitted.* — Where the date of an instrument is omitted therefrom the actual date may be shown by parol evidence,[1] except where the date is an essential part of a contract which is required by law to be in writing.[2]

O. Discharge, Satisfaction and Performance. — a. *Discharge and Satisfaction.* — **(1.) In General.** — Parol evidence is admissible

337, 22 Am. Rep. 571; Partridge *v.* Swazey, 46 Me. 414.

Maryland. — Stockham *v.* Stockham, 32 Md. 196.

Massachusetts. — Shaughnessey *v.* Lewis, 130 Mass. 355; Battles *v.* Fobes, 21 Pick. 239.

Mississippi. — McComb *v.* Gilkey, 29 Miss. 146, 190.

Missouri. — Hall *v.* Huffman, 32 Mo. 519.

New York. — Draper *v.* Snow, 20 N. Y. 331, 75 Am. Dec. 408.

North Carolina. — Cutlar *v.* Cutlar, 3 N. C. 154.

Pennsylvania. — Lee *v.* Drake, 10 Pa. Co. Ct. 276; Finney's Appeal, 59 Pa. St. 398.

South Carolina. — Barmore *v.* Jay, 2 McCord L. 371, 13 Am. Dec. 736; McDowell *v.* Chambers, 1 Strob. Eq. 347, 47 Am. Dec. 539.

South Dakota. — Erickson *v.* Brookings Co., 3 S. D. 434, 53 N. W. 857, 18 L. R. A. 347.

Tennessee. — Biggs *v.* Piper, 86 Tenn. 589, 8 S. W. 851; Rogers *v.* Cawood, 1 Swan 142, 55 Am. Dec. 729.

Texas. — Pacific Mut. Ins. Co. of California *v.* Shaffer, 30 Tex. Civ. App. 313, 70 S. W. 566.

Vermont. — Goodwin *v.* Perkins, 39 Vt. 598.

Wisconsin. — Moore *v.* Smead, 89 Wis. 558, 62 N. W. 426.

The True Date of a Bill or Note may be shown by parol evidence. See article "Bills and Notes," Vol. II, p. 426.

96. Kelly *v.* Thompson, 7 Watts (Pa.) 401.

97. Robbins *v.* Webb, 68 Ala. 393.

98. Draper *v.* Snow, 20 N. Y. 331, 75 Am. Dec. 408.

99. Huston *v.* Young, 33 Me. 85; Cushman *v.* Waite, 21 Me. 540; Milliken *v.* Coombs, 1 Me. 343, 10 Am. Dec. 70; Kingsley *v.* Siebrecht, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486; Joseph *v.* Bigelow, 4 Cush. (Mass.) 82.

"It is certainly true that when the parties to a written agreement have made the date of the instrument a material part of the contract, as when the time of performance is fixed with reference to it, parol evidence is not admissible to vary or change it." Barlow *v.* Buckingham, 68 Iowa 169, 171, 26 N. W. 58, *per* Reed, J.

1. Rapley *v.* Price, 9 Ark. 428; Lambe *v.* Manning, 171 Ill. 612, 49 N. E. 509; Burditt *v.* Hunt, 25 Me. 419, 43 Am. Dec. 289; Draper *v.* Snow, 20 N. Y. 331, 75 Am. Dec. 408; Kincaid *v.* Archibald, 10 Hun (N. Y.) 9; Perry *v.* Smith, 34 Tex. 277. *Compare* Hubert *v.* Morean, 12 E. C. L. 248.

2. Kingsley *v.* Siebrecht, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486, so holding in the case of a lease. The court said: "The date of a lease for years, the remaining time it has to run, is obviously an essential item in the description of the interest created by it. Without that being fixed, the whole interest under the lease is indeterminate. It is an essential element of the contract, and must be completely stated in the memoran-

to show the satisfaction and discharge of the obligations imposed by a writing,[3] as that it has been discharged in accordance with the terms of a collateral oral agreement.[4]

(2.) Discharge Other Than by Payment. — Parol evidence is admissible to show a satisfaction and discharge of an obligation other than by the payment of money as provided in the instrument.[5]

b. *As to Performance.* — **(1.) In General.** — It may be shown by parol that an instrument has been discharged by performance in accordance with its terms.[6]

(2.) Performance of Agreement Which the Writing Was Given to Secure. — Where a writing is given to secure the performance of another agreement, parol evidence is admissible to show a discharge of any liability under the writing by the performance of such agreement.[7] This rule applies where a writing is given to secure the performance of an obligation to pay money, in which case evidence of payment is admissible.[8]

(3.) Payment of a bill or note may be shown by parol evidence.[9]

P. In Proceedings in Equity Generally. — a. *Specific Performance.* — In an action in equity for specific performance of a contract, it is for the court to determine whether in equity and good conscience the agreement should be enforced, and for this purpose evidence is admissible in respect to the subject-matter, the circumstances under which the writing was executed and of other extrinsic facts.[10] And though the instrument is under seal parol evidence is admissible to show any good reason why it should not be enforced.[11] So parol evidence is admissible to show that a writ-

dum. The want of it cannot be supplied by parol."

3. Jones *v.* Trawick, 31 Ala. 253; Howard *v.* Gresham, 27 Ga. 347; Levering *v.* Langley, 8 Minn. 82; Baile *v.* St. Joseph F. & M. Ins. Co., 73 Mo. 371; Walters *v.* Walters, 34 N. C. 28, 55 Am. Dec. 401; Reynolds *v.* Scott, Brayt. (Vt.) 75.

"It is always competent to show by parol evidence that a written agreement is totally discharged." Baile *v.* St. Joseph F. & M. Ins. Co., 73 Mo. 371, *per* Sherwood, C. J. See article "Accord and Satisfaction," Vol. I.

4. Sutton *v.* Griebel, 118 Iowa 78, 80, 91 N. W. 825; Whitney *v.* Wall, 17 Up. Can. C. P. 474.

5. Denham *v.* Walker, 93 Ga. 497, 21 S. E. 102; Zimmerman *v.* Adee, 126 Ind. 15, 25, N. E. 828; Tucker *v.* Tucker, 113 Ind. 272, 13 N. E. 710.

A Set-Off may be shown by parol evidence. Noyes *v.* Estate of Hall, 28 Vt. 645.

6. Henry *v.* Herschey, 9 Idaho 548, 75 Pac. 266; Harrington *v.* Samples, 36 Minn. 200, 30 N. W. 671; Louisana Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280; Pairo *v.* Bethell, 75 Va. 825.

7. Oakland Cemetery Ass'n *v.* Lakins, 126 Iowa 121, 101 N. W. 778; Louisville Tobacco Warehouse Co. *v.* Stewart, 24 Ky. L. Rep. 934, 70 S. W. 285; Crosman *v.* Fuller, 17 Pick. (Mass.) 171; Juilliard *v.* Chaffee, 92 N. Y. 529.

8. Stadeker *v.* Jones, 52 Miss. 729.

9. Ober & Sons Co. *v.* Drane, 106 Ga. 406, 32 S. E. 371; Derouin *v.* Segura, 5 La. Ann. 550. See articles "Bills and Notes," Vol. II, p. 517, and "Payment."

10. Espert *v.* Wilson, 190 Ill. 629, 60 N. E. 923; O'Connor *v.* Lighthizer, 34 Wash. 152, 75 Pac. 643; Boles *v.* Welch, 94 Wis. 189, 68 N. W. 655. See article "Specific Performance."

11. Herren *v.* Rich, 95 N. C. 500.

ing does not express the true agreement of the parties for the purpose of resisting its enforcement according to its terms.[12] Likewise a parol rescission of the contract may be set up in equity in bar of such an action, but it is decided that such rescission must be clearly and satisfactorily made out and the terms of it fully complied with and executed.[13]

b. *To Cancel or Reform.* — The court is not confined to the terms of an instrument, but parol evidence may be admitted to determine the rights of the parties in a proceeding to cancel,[14] or to reform the same.[15] In such a proceeding a party may show that the writing does not express the true intention or purpose of the parties,[16] and in this connection evidence is admissible of parol negotiations prior to the execution of the instrument.[17] And in a proceeding in equity to reform a contract so as to make it express the intention of the parties at the time it was executed, where there has been an innocent omission or insertion of a material stipulation contrary to the intention of the parties and under a mutual mistake, parol evidence is admissible to correct such mistake.[18] In order, however, to entitle a party to a reformation of an instrument on the ground that it does not express the actual intention or complete agreement of the parties, the evidence must be clear, convincing and satisfactory.[19]

3. Evidence for Interpretation of Writings. — A. GENERAL RULE. Where the meaning of an instrument or a part thereof is doubtful or uncertain by reason of a difficulty in construing or interpreting the language, parol evidence may be admitted as an aid in construction of the language used and to explain the same, so as to enable

12. *United States.* — Newton *v.* Wooley, 105 Fed. 541.
Connecticut. — Osborn *v.* Phelps, 19 Conn. 63.
Kentucky. — Harrison *v.* Talbot, 2 Dana 258.
Massachusetts. — Dwight *v.* Pomeroy, 17 Mass. 303, 9 Am. Dec. 148.
Michigan. — Chambers *v.* Livermore, 15 Mich. 381.
Montana. — Fitschen *v.* Thomas, 9 Mont. 52, 22 Pac. 450.
New Jersey. — King *v.* Ruckman, 21 N. J. Eq. 599.
Vermont. — Redfield *v.* Gleason, 61 Vt. 220, 17 Atl. 1075, 15 Am. St. Rep. 889.
Virginia. — Ratcliffe *v.* Allison, 3 Rand. 537.

13. Walker *v.* Wheatley, 2 Humph. (Tenn.) 119.

14. Conner *v.* Groh, 90 Md. 674, 45 Atl. 1024. See article "CANCELLATION OF INSTRUMENTS," Vol. II.

15. McLennan *v.* Johnston, 60 Ill. 306; Merchants Bank *v.* Morrison, 19 Grant's Ch. (Can.) 1. See article "REFORMATION OF INSTRUMENTS."

16. Hausbrandt *v.* Hofler, 117 Iowa 103, 90 N. W. 494, 94 Am. St. Rep. 289; Western Wheeled Scraper Co. *v.* McMillen (Neb.), 99 N. W. 512.

17. Cotton States L. Ins. Co. *v.* Carter, 65 Ga. 228.

18. Wieneke *v.* Deputy, 31 Ind. App. 621, 68 N. E. 921; Bryne *v.* Fort Smith Nat. Bank, 1 Ind. Ter. 680, 43 S. W. 957; Marsh *v.* McNair, 48 Hun (N. Y.) 117; Regan *v.* Milby, 21 Tex. Civ. App. 21, 50 S. W. 587; Fudge *v.* Payne, 86 Va. 303, 10 S. E. 7. See II, B, herein as to evidence showing mistake.

A Mistake in Description of Subject-Matter or as to Date of a writing may be shown in a proceeding in equity to reform an instrument. Jones *v.* Sweet, 77 Ind. 187.

19. Forester *v* Van Auken, 12 N. D. 175, 96 N. W. 301.

the court to reach a true understanding of the instrument, and thus interpret it in accordance with the intention of the parties, so far as it may, consistent with the language they have employed.[20] If, however, the language of the instrument is clear, definite and com-

20. *England.* — Bank of New Zealand *v.* Simpson, 69 L. J. P. C. 22, 82 L. T. N. S. 102; King *v.* Laindon, 8 Term R. 379.

Canada. — McAdie *v.* Sills, 24 Up. Can. C. P. 606; Currier *v.* Crosby, 17 New Bruns. 464.

United States. — Bell *v.* Bruen, 1 How. 169; Wilson *v.* Higbee, 62 Fed. 723; The Wanderer, 29 Fed. 260; Phelps *v.* Clasen, Woolw. 204, 19 Fed. Cas. No. 11,074.

Alabama. — McGhee *v.* Alexander, 104 Ala. 116, 16 So. 148; Redwine *v.* Sides, 95 Ala. 567, 11 So. 210; Cowles *v.* Garrett, 30 Ala. 341.

Arkansas. — Parker *v.* Norman, 65 Ark. 333, 335, 46 S. W. 134; Merrill *v.* Sypert, 65 Ark. 51, 44 S. W. 462; Glanton *v.* Anthony, 15 Ark. 543.

California. — Daly *v.* Ruddell, 137 Cal. 671, 70 Pac. 784; Balfour *v.* Fresno Canal & Irr. Co., 109 Cal. 221, 41 Pac. 876; Brewster *v.* Lathrop, 15 Cal. 21.

Colorado. — Rhodes *v.* Wilson, 12 Colo. 65, 20 Pac. 746; Hubbard *v.* Mulligan, 13 Colo. App. 116, 57 Pac. 738; Lee *v.* Cravens, 9 Colo. App. 272, 48 Pac. 159.

District of Columbia. — Whelan *v.* McCullough, 4 App. Cas. 58.

Florida. — Robinson *v.* Barnett, 18 Fla. 602, 43 Am. Rep. 327.

Georgia. — Florida Cent. & P. R. Co. *v.* Usina, 111 Ga. 697, 36 S. E. 928; Follendore *v.* Follendore, 110 Ga. 359, 35 S. E. 676; Barrie *v.* Miller, 104 Ga. 312, 30 S. E. 840, 69 Am. St. Rep. 171; Turner *v.* Berry, 74 Ga. 481.

Idaho. — Vincent *v.* Larson, 1 Idaho 241.

Illinois. — Bradish *v.* Yocum, 130 Ill. 386, 23 N. E. 114; Schmohl *v.* Fiddick, 34 Ill. App. 190.

Indiana. — Martindale *v.* Parsons, 98 Ind. 174; Lemmon *v.* Reed, 14 Ind. App. 655, 43 N. E. 454; Marion School Twp. *v.* Carpenter, 12 Ind. App. 191, 39 N. E. 878.

Iowa. — Parno *v.* Iowa Merchants Mut. Ins. Co., 114 Iowa 132, 86 N. W. 210.

Kansas. — Mason *v.* Ryus, 26 Kan. 464.

Kentucky. — Edrington *v.* Harper, 3 J. J. Marsh. 353, 20 Am. Dec. 145; Harmon *v.* Thompson, 27 Ky. L. Rep. 181, 84 S. W. 569.

Maine — Lancey *v.* Phoenix F. Ins. Co., 56 Me. 562, 565.

Maryland. — Fryer *v.* Patrick, 42 Md. 51; Criss *v.* English, 26 Md. 553.

Massachusetts. — Hebb *v.* Welch, 185 Mass. 335, 70 N. E. 440; Yorston *v.* Brown, 178 Mass. 103, 59 N. E. 654; Sweat *v.* Shumway, 102 Mass. 365, 3 Am. Rep. 471.

Michigan. — Germain *v.* Central Lumb. Co., 116 Mich. 245, 74 N. W. 644; Germain *v.* Central Lumb. Co., 120 Mich. 61, 78 N. W. 1007; Stoddard Mfg. Co. *v.* Miller, 107 Mich. 51, 64 N. W. 948; Tyler *v.* Stack, 103 Mich. 268, 61 N. W. 496.

Minnesota. — Reeves *v.* Cress, 80 Minn. 466, 83 N. W. 443; Board of Trustees of Ripon College *v.* Brown, 66 Minn. 179, 68 N. W. 837; Bingham *v.* Bernard, 36 Minn. 114, 30 N. W. 404.

Missouri. — Edwards *v.* Smith, 63 Mo. 119; Consolidated Coal Co. *v.* Mexico Fire Brick Co., 66 Mo. App. 296.

Montana. — Taylor *v.* Holter, 1 Mont. 688.

New Jersey. — Thayer *v.* Torrey, 37 N. J. L. 339; Sandford *v.* Newark & Hudson R. Co., 37 N. J. L. 1.

New Mexico. — Miller *v.* Preston, 4 N. M. 396, 17 Pac. 565.

New York. — Fargis *v.* Walton, 107 N. Y. 398, 14 N. E. 303; Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75; Woodruff *v.* Klee, 47 App. Div. 638, 62 N. Y. Supp. 350; Tilden *v.* Tilden, 8 App. Div. 99, 40 N. Y. Supp. 403; Mosel *v.* Frank Brew. Co., 2 App. Div. 93, 37 N. Y. Supp. 525; Beemer *v.* Packard, 92 Hun 546, 38 N. Y. Supp. 1045; Rodger *v.* Toilettes Co., 37 Misc. 779, 76 N. Y. Supp. 940; Vogel *v.* Weissmann, 23 Misc. 256, 51 N. Y. Supp. 173.

North Carolina. — Coffin *v.* Smith.

plete, and the intention of the parties may be gathered therefrom, parol evidence will not be admitted on the ground that it will aid in the construction, when in fact it will operate to alter the express terms thereof,[21] for if the meaning in law of the parties can be

128 N. C. 252, 38 S. E. 864; Echerd *v.* Johnson, 126 N. C. 409, 35 S. E. 1036.

Ohio. — Masters *v.* Freeman, 17 Ohio St. 323; Kelsey *v.* Hibbs, 13 Ohio St. 340.

Oregon. — Oliver *v.* Oregon Sugar Co., 42 Or. 276, 70 Pac. 902; Burkhart *v.* Hart, 36 Or. 586, 60 Pac. 205.

Pennsylvania. — Caley *v.* Philadelphia & C. C. R. Co., 80 Pa. St. 363; Cox *v.* Wilson, 25 Pa. Super. Ct. 635; Easton Power Co. *v.* Sterlingworth R. S. Co., 22 Pa. Super. Ct. 538.

South Carolina. — Murray *v.* Northwestern R. Co., 64 S. C. 520, 42 S. E. 617.

South Dakota. — Small *v.* Elliott, 12 S. D. 570, 82 N. W. 92; 76 Am. St. Rep. 630; Blood *v.* Fargo & S. Elev. Co., 1 S. D. 71, 45 N. W. 200.

Texas. — Frazier *v.* Waco Bldg. Ass'n, 25 Tex. Civ. App. 476, 61 S. W. 132; Pasteur Vaccine Co. *v.* Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804; Meyers *v.* Maverick (Tex. Civ. App.), 28 S. W. 716.

Utah. — Brown *v.* Markland, 16 Utah 360, 52 Pac. 597, 67 Am. St. Rep. 629; Thompson *v.* Avery, 11 Utah 214, 39 Pac. 829.

Vermont. — Young *v.* Young, 59 Vt. 342, 10 Atl. 528.

Virginia. — Coutt *v.* Craig, 2 Hen. & M. 618.

Washington. — Carr *v.* Jones, 29 Wash. 78, 69 Pac. 646; Langert *v.* Ross, 1 Wash. 250, 24 Pac. 443.

West Virginia. — Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Pancake *v.* George Campbell Co., 44 W. Va. 82, 28 S. E. 719; Crislip *v.* Cain, 19 W. Va. 438, 483.

Wisconsin. — Murray Hill Land Co. *v.* Milwaukee L. H. & T. Co., 110 Wis. 555, 86 N. W. 199; Boden *v.* Maher, 105 Wis. 539, 81 N. W. 661; Whitworth *v.* Brown, 85 Wis. 375, 55 N. W. 422.

See article "AMBIGUITY," Vol. I.

21. *England.* — Attorney-General *v.* Clapham, 4 DeG. M. & G. 591; Coker *v.* Guy, 2 B. & P. 565.

United States. — Holmes *v.* Montauk Steamboat Co., 93 Fed. 731, 35 C. C. A. 556; Ivison *v.* School Com'rs, 39 Fed. 735.

Alabama. — Donehoo *v.* Johnson, 113 Ala. 126, 21 So. 70; Vann *v.* Lunsford, 91 Ala. 576, 8 So. 719; Powell *v.* State, 84 Ala. 444, 4 So. 719; Thorpe *v.* Sughi, 33 Ala. 330.

California. — Braun *v.* Woollacott, 129 Cal. 107, 61 Pac. 801.

Colorado. — Hager *v.* Rice, 4 Colo. 90, 34 Am. Rep. 68; Hardwick *v.* McClurg, 16 Colo. App. 354, 65 Pac. 405.

Connecticut. — Excelsior Needle Co. *v.* Smith, 61 Conn. 56, 23 Atl. 693; Burr *v.* Spencer, 26 Conn. 159, 68 Am. Dec. 379.

Delaware. — Tatman *v.* Barrett, 3 Houst. 226.

Georgia. — Southern Bell Tel. & Tele. Co. *v.* Harris, 117 Ga. 1001, 44 S. E. 885; Carter *v.* Williamson, 106 Ga. 280, 31 S. E. 651; Adams *v.* Ft. Gaines, 80 Ga. 85, 5 S. E. 241; Bowe *v.* Dotterer, 80 Ga. 50, 4 S. E. 253.

Illinois. — Walton *v.* Follansbee, 165 Ill. 480, 46 N. E. 459; Sanitary Dist. of Chicago *v.* McMahon & Montgomery Co., 110 Ill. App. 510; Chambers *v.* Prewitt, 71 Ill. App. 119.

Iowa. — Van Husen *v.* Omaha Bridge & Terminal R. Co., 118 Iowa 366, 92 N. W. 47.

Louisiana. — Weinberger *v.* Merchants Ins. Co., 41 La. Ann. 31, 5 So. 728.

Maine. — Porter *v.* Porter, 51 Me. 376.

Maryland. — Lazar *v.* National Union Bank, 52 Md. 78, 36 Am. Rep. 355.

Massachusetts. — Alvord *v.* Cook, 174 Mass. 120, 54 N. E. 499; Com. *v.* Wellington, 146 Mass. 566, 16 N. E. 446.

Michigan. — Brown *v.* Schiappacasse, 115 Mich. 47, 72 N. W. 1096; Pettyplace *v.* Groton Bridge & Mfg. Co., 103 Mich. 155, 61 N. W. 266.

Minnesota. — National Gaslight &

fairly gathered, with a certainty satisfying the judicial mind, the courts will consult the writing alone and will reject parol evidence as an aid in construing it.[22]

B. WHERE INTENTION DOUBTFUL. — It is frequently impossible to ascertain the intention of the parties from an inspection of the instrument, and in such a case parol evidence is admissible to explain the same and enable the court more clearly to understand the intention with which it was executed.[23] And such intention so

Fuel Co. *v.* Bixby, 48 Minn. 323, 51 N. W. 217.

Mississippi. — Jordan *v.* Neal, 33 So. 17.

Missouri. — Blakely *v.* Bennecke, 59 Mo. 193; Grisham Merc. & Lumb. Co. *v.* Rabich, 84 Mo. App. 544.

Nebraska. — State *v.* Board of Com'rs of Cass Co., 60 Neb. 566, 83 N. W. 733; Latenser *v.* Misner, 56 Neb. 340, 76 N. W. 897.

New Hampshire. — Remick *v.* Rumery, 69 N. H. 601, 45 Atl. 574.

New Jersey. — Camden & T. R. Co. *v.* Adams, 62 N. J. Eq. 656, 51 Atl. 24.

New York. — House *v.* Walch, 144 N. Y. 418, 39 N. E. 327; Wilson *v.* Randall, 67 N. Y. 338; Dent *v.* North American S. S. Co., 49 N. Y. 390; Barry *v.* New York, 38 App. Div. 632, 56 N. Y. Supp. 1049.

North Carolina. — Chard *v.* Warren, 122 N. C. 75, 29 S. E. 373.

Ohio. — Johnson *v.* Pierce, 16 Ohio St. 472.

Oregon. — Tallmadge *v.* Hooper, 37 Or. 503, 61 Pac. 349, 1127.

Pennsylvania. — King *v.* New York & Cleveland Gas Coal Co., 204 Pa. St. 628, 54 Atl. 477.

South Carolina. — Coates *v.* Early, 46 S. C. 220, 24 S. E. 305.

Texas. — Lessing *v.* Grimland, 74 Tex. 239, 11 S. W. 1095; Curtis Bros. *v.* Kelley, 24 Tex. Civ. App. 540, 60 S. W. 265.

Vermont. — Herrick *v.* Noble, 27 Vt. 1.

Virginia. — Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4.

Washington. — Carr *v.* Jones, 29 Wash. 78, 69 Pac. 646.

West Virginia. — Knowlton *v.* Campbell, 48 W. Va. 294, 37 S. E. 581.

22. Harmon *v.* Thompson, 27 Ky. L. Rep. 181, 84 S. W. 569.

"The first resort in all cases is the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the writing have placed them. If thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the writing, is the one which alone we are at liberty to say was the one intended to be conveyed. In such a case there is no room for construction." Blythe *v.* Gibbons, 141 Ind. 332, 344, 35 N. E. 557, *per* McCabe, J.

23. *United States.* — Hall *v.* The Barnstable, 84 Fed. 895.

Arkansas. — Glanton *v.* Anthony, 15 Ark. 543.

California. — Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867; Brannan *v.* Mesick, 10 Cal. 95.

Iowa. — Ruthven Bros. *v.* Clarke, 109 Iowa 25, 79 N. W. 454.

Kentucky. — Price *v.* Rodman, 2 Ky. L. Rep. 213.

Massachusetts. — Callender McAuslan & Troup Co. *v.* Flint, 187 Mass. 104, 72 N. E. 345; Foster *v.* Woods, 16 Mass. 116.

New Hampshire. — Downes *v.* Union Congregational Soc., 63 N. H. 151.

New York. — Bowery Bank of New York *v.* Hart, 37 Misc. 412, 75 N. Y. Supp. 781.

North Carolina. — Egerton *v.* Carr, 94 N. C. 648, 55 Am. Rep. 630.

Oregon. — Kanne *v.* Otty, 25 Or. 531, 36 Pac. 537.

Rhode Island. — Thomas Machine Co. *v.* Voelker, 23 R. I. 441, 50 Atl. 838; Phetteplace *v.* British & Foreign M. Ins. Co., 23 R. I. 26, 49 Atl. 33.

South Carolina. — Murray *v.* Northwestern R. Co., 64 S. C. 520, 42 S. E. 617.

South Dakota. — Miller *v.* Way, 5 S. D. 468, 59 N. W. 467.

ascertained will be taken as the meaning of the parties expressed in the instrument if it be a meaning which may be distinctly derived from a fair and rational interpretation of the words actually used.[24]

C. Surrounding Circumstances. — In construing a writing, evidence is admissible of the facts and circumstances surrounding its execution, not for the purpose of adding other words, nor changing or altering the terms employed by the parties, nor of importing into the instrument an intention not expressed therein,[25] but to enable the court, by thus placing it in the situation of the parties at the time the writing was executed, to read and construe it in the light of such facts and circumstances and to correctly interpret it in accordance with their actual intention.[26] This rule

Texas. — Walker *v.* McDonald, 49 Tex. 458.

"The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps a corollary, to the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself." Shore *v.* Wilson, 9 Cl. & F. 566, *per* Tindall, C. J., *quoted* with approval in Sandford *v.* Newark & H. R. Co., 37 N. J. L., 1, 4.

"If the language employed be fairly susceptible of either one of two interpretations contended for, without doing violence to its usual and ordinary import, or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining. This is not allowing evidence for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intention of the parties." Balfour *v.* Fresno Canal & Irr. Co., 109 Cal. 221, 41 Pac. 876, *per* Van Fleet, J.

24. Board of Trustees of Ripon College *v.* Brown, 66 Minn. 179, 68 N. W. 837; Case *v.* Young, 3 Minn. 140.

25. *United States.* — Standard Sewing Mach. Co. *v.* Leslie, 78 Fed. 325, 24 C. C. A. 107, 46 U. S. App. 680; Chandler *v.* Thompson, 30 Fed. 38.

Illinois. — Seymour *v.* Bowles, 172 Ill. 521, 50 N. E. 122; Cameron *v.* Sexton, 110 Ill. App. 381.

Kansas. — Erie Cattle Co. *v.* Guthrie, 56 Kan. 754, 44 Pac. 984.

Michigan. — Powers *v.* Hibbard, 114 Mich. 533, 72 N. W. 339.

New York. — Humphreys *v.* New York, L. E. & W. R. Co., 121 N. Y. 435, 24 N. E. 695, 31 N. Y. Supp. 229.

South Carolina. — Lagrone *v.* Timmerman, 46 S. C. 372, 24 S. E. 290.

Texas. — McHugh *v.* Gallagher, 1 Tex. Civ. App. 196, 20 S. W. 1115.

West Virginia. — Camden *v.* McCoy, 48 W. Va. 377, 37 S. E. 637.

"It is as an aid to interpretation that we may look to surrounding circumstances, but never for the purpose of adding a new term, or contradicting or varying the writing." Dennis *v.* Slyfield, 117 Fed. 474, 478, 54 C. C. A. 520, *per* Lurton, C. J.

26. *England.* — Bank of Australasia *v.* Palmer, P. C. 1897, App. Cas. 540; Pryor *v.* Petre, C. A. 1894, 2 Ch. Div. 11; Oliver *v.* Hunting L. R., 44 Ch. Div. 205; Bainbridge *v.* Wade, 16 Q. B. 89, 71 E. C. L. 89.

Canada. — Christie *v.* Burnett, 10 Ont. 609; Baskerville *v.* Doan, 12 Up. Can. C. P. 127.

United States. — Bogk *v.* Gassert, 149 U. S. 17; Kilby Mfg. Co. *v.* Hinchman Renton Fireproofing Co., 132 Fed. 957, 66 C. C. A. 67; Ameri-

does not permit of the admission in evidence, as surrounding circumstances, of oral declarations of a party to a written instrument,

can Bond. & Trust Co. *v.* Takahashi, 11 Fed. 125, 49 C. C. A. 267; Cowles Elec. Smelt. & Aluminum Co. *v.* Lowrey, 79 Fed. 331, 24 C. C. A. 616; 47 U. S. App. 531; Standard Sew. Mach. Co. *v.* Leslie, 78 Fed. 325, 24 C. C. Union Tel. Co. *v.* American Bell Tel. A. 107, 46 U. S. App. 680; Western Co., 105 Fed. 684; Fenlon *v.* United States, 17 Ct. Cl. 138.

Alabama. — Dexter *v.* Ohlander 89 Ala. 262, 7 So. 115; Holland *v.* Kimbrough, 52 Ala. 249.

Arizona. — Burnmister *v.* Empire Gold Min. Co., 71 Pac. 961.

California. — Daly *v.* Ruddell, 137 Cal. 671, 70 Pac. 784; Dunn *v.* Price, 112 Cal. 46, 44 Pac. 354; Lassing *v.* James, 107 Cal. 348, 40 Pac. 534.

Colorado. — Fisk *v.* Reser, 19 Colo. 88, 34 Pac. 572; Rollins *v.* Pueblo County Com'rs, 15 Colo. 103, 25 Pac. 319; Cross *v.* Kistler, 14 Colo. 571, 23 Pac. 903; Hardwick *v.* McClurg, 16 Colo. App. 354, 65 Pac. 405.

Connecticut. — Hotchkiss *v.* Barnes, 34 Conn. 27, 91 Am. Dec. 713; Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735.

District of Columbia. — Mason *v.* Spalding, 17 Wash. L. Rep. 421.

Florida. — L'Engle *v.* Scottish Union & Nat. F. Ins. Co., 37 So. 462, 67 L. R. A. 581; Solary *v.* Webster, 35 Fla. 363, 17 So. 646; Robinson *v.* Barnett, 18 Fla. 602, 43 Am. Rep. 327.

Georgia. — Wells *v.* Gress, 118 Ga. 566, 45 S. E. 418; Dwelle *v.* Blackwood, 106 Ga. 486, 32 S. E. 593; Fraser *v.* Dillon, 78 Ga. 474, 3 S. E. 695.

Idaho. — Westheimer *v.* Thompson, 3 Idaho 560, 32 Pac. 205.

Illinois. — Gage *v.* Cameron, 212 Ill. 146, 72 N. E. 204; Mann *v.* Bergmann, 203 Ill. 406, 67 N. E. 814; Irwin *v.* Powell, 188 Ill. 107, 58 N. E. 941; Seymour *v.* Bowles, 172 Ill. 521; 50 N. E. 122; Pool *v.* Phillips 167 Ill. 432, 47 N. E. 758; Hogan *v.* Wallace, 166 Ill. 328, 46 N. E. 1136, Hartshorn *v.* Byrne, 147 Ill. 418, 35 N. E. 622; Wood *v.* Clark, 121 Ill. 359, 12 N. E. 271; Johnson *v.* Glover, 121 Ill. 283, 12 N. E. 257; First Nat. Bank *v.* Rothschild, 107 Ill. App. 133; Browne & Manzanares Co. *v.* Sampson, 44 Ill. App. 308.

Indiana. — Ransdel *v.* Moore, 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753; Duncan *v.* Wallace, 114 Ind. 169, 16 N. E. 137; Hubbard *v.* Harrison, 38 Ind. 323; Loeb *v.* McAlister, 15 Ind. App. 643, 41 N. E. 1061.

Iowa. — Ruthven Bros. *v.* Clarke, 109 Iowa 25, 79 N. W. 454; Clement *v.* Drybread, 108 Iowa 701, 78 N. W. 235; Beroud *v.* Lyons, 85 Iowa 482, 52 N. W. 486; Grimes *v.* Simpson Centenary College, 42 Iowa 589.

Kansas. — Jenkins *v.* Kirtley, 79 Pac. 671; Smith *v.* Holden, 58 Kan. 535, 50 Pac. 447; Erie Cattle Co. *v.* Guthrie, 56 Kan. 754, 44 Pac. 984; Bell *v.* Rankin, 1 Kan. App. 209, 40 Pac. 1094.

Kentucky. — Crane *v.* Williamson, 111 Ky. 271, 63 S. W. 610; Gross *v.* Houchin, 6 Ky. L. Rep. 442.

Louisiana. — Lee *v.* Carter, 52 La. Ann. 1453, 27 So. 739; Vinet *v.* Bres, 48 La. Ann. 1254, 20 So. 693.

Maine. — Hartwell *v.* California Ins. Co., 84 Me. 524, 24 Atl. 954; Herrick *v.* Bean, 20 Me. 51.

Maryland. — Morrison *v.* Baechtold, 93 Md. 319, 48 Atl. 926.

Massachusetts. — Alvord *v.* Cook, 174 Mass. 120, 54 N. E. 499; Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466; Locke *v.* Locke, 166 Mass. 435, 44 N. E. 346; Minchin *v.* Minchin, 157 Mass. 265, 32 N. E. 164; Moore *v.* Stinson, 144 Mass. 594, 12 N. E. 410; Salisbury *v.* Andrews, 19 Pick. 250.

Michigan. — Gregory *v.* Village of Lake Linden, 130 Mich. 368, 90 N. W. 29; Powers *v.* Hibbard, 114 Mich. 533, 72 N. W. 339; White *v.* Rice, 112 Mich. 403, 70 N. W. 1024; Peabody *v.* Bement, 79 Mich. 47, 44 N. W. 416.

Minnesota. — Ham *v.* Johnson, 51 Minn. 105, 52 N. W. 1080; Mohr *v.* Miesen, 47 Minn. 228, 49 N. W. 862; King *v.* Merriman, 38 Minn. 47, 35 N. W. 570.

Mississippi. — Ham *v.* Cerniglia, 73 Miss. 290, 18 So. 577.

Missouri. — Arnoldia *v.* Childs, 70 Mo. App. 530; Dick Bros. Quincy

made before or at the time of its execution, of an intention or purpose not expressed therein or different from that to be derived from

Brew. Co. *v.* Finnell, 39 Mo. App. 276.

Montana. — Taylor *v.* Holter, 1 Mont. 688, 694.

Nebraska. — Little *v.* Giles, 25 Neb. 313, 41 N. W. 186.

New Hampshire. — Grant *v.* Lathrop, 23 N. H. 67; Webster *v.* Atkinson, 4 N. H. 21.

New Jersey. — Sullivan *v.* Visconti, 68 N. J. L. 543, 547, 53 Atl. 598; Collins *v.* Corson, 30 Atl. 862.

New York. — Barney *v.* Forbes, 118 N. Y. 580, 23 N. E. 890; Schmittler *v.* Simon, 114 N. Y. 176, 21 N. E. 162, 11 Am. St. Rep. 621; Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75; State Bank of Syracuse *v.* Lighthall, 46 App. Div. 396, 61 N. Y. Supp. 794; Garvin Mach. Co. *v.* Hammond Typewriter Co., 12 App. Div. 294, 42 N. Y. Supp. 564; Immaculate Conception Church *v.* Sheffer, 88 Hun 335, 34 N. Y. Supp. 724; Lattimer *v.* Buxton, 17 Misc. 202, 40 N. Y. Supp. 1033; Perkins *v.* Goodman, 21 Barb. 218; Johnson *v.* Williams, 63 How. Pr. 233; Austin *v.* Southworth, 13 Misc. 45, 68 N. Y. St. 91, 34 N. Y. Supp. 88; Hilliard *v.* Smith, 14 Misc. 239, 70 N. Y. St. 452, 35 N. Y. Supp. 717.

North Carolina. — Wade *v.* Carter, 76 N. C. 171.

Ohio. — Masters *v.* Freeman, 17 Ohio St. 323.

Oregon. — Baker Co. *v.* Huntington, 79 Pac. 187; Wills *v.* Leverich, 20 Or. 168, 25 Pac. 398; Hicklin *v.* McClear, 18 Or. 126, 22 Pac. 1057.

Pennsylvania. — Douthett *v.* Ft. Pitt Gas Co., 202 Pa. St. 416, 51 Atl. 981; *In re* Young's Estate, 166 Pa. St. 645, 31 Atl. 373; Wanner *v.* Landis, 137 Pa. St. 61, 20 Atl. 950; Centenary M. E. Church *v.* Clime, 116 Pa. St. 146, 9 Atl. 163; White *v.* Black, 14 Pa. Super. Ct. 459.

South Carolina. — Lagrone *v.* Timmerman, 46 S. C. 372, 24 S. E. 290; Sullivan *v.* Williams, 43 S. C. 489, 21 S. E. 642; Pelzer *v.* Durham, 37 S. C. 354, 16 S. E. 46.

South Dakota. — Osborne *v.* Stringham, 1 S. D. 406, 47 N. W. 408.

Texas. — Peet *v.* Commerce & E. S. R. Co., 70 Tex. 522, 8 S. W. 203; Missouri K. & T. R. Co. of Texas *v.* Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781; Marx *v.* Luling Co.-Op. Ass'n, 17 Tex. Civ. App. 408, 43 S. W. 596; McHugh *v.* Gallagher, 1 Tex. Civ. App. 196, 20 S. W. 1115.

Utah. — Hawley *v.* Corey, 9 Utah 175, 33 Pac. 695; Buford *v.* Lonergan, 6 Utah 301, 22 Pac. 164.

Vermont. — Kinney *v.* Hooker, 65 Vt. 333, 26 Atl. 690, 36 Am. St. Rep. 864; Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253; Lawrence *v.* Dole, 11 Vt. 549.

Virginia. — Richardson *v.* Planters Bank, 94 Va. 130, 26 S. E. 413; French *v.* Williams, 82 Va. 462, 4 S. E. 591; Knick *v.* Knick, 75 Va. 12; Crawford *v.* Jarrett, 2 Leigh 630.

Washington Territory. — Brewster *v.* Baxter, 2 Wash. Ter. 135, 3 Pac. 844.

West Virginia. — Newman *v.* Kay, 57 W. Va. 98, 49 S. E. 926; Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; McClanahan *v.* McClanaham, 36 W. Va. 34, 14 S. E. 419; Ambach *v.* Armstrong, 29 W. Va. 744, 3 S. E. 44; Crislip *v.* Cain, 19 W. Va. 438, 483.

Wisconsin. — Excelsior Wrapping Co. *v.* Messinger, 116 Wis. 549, 93 N. W. 459; Murray Hill Land Co. *v.* Milwaukee L. H. & T. Co., 110 Wis. 555, 86 N. W. 199; Johnson *v.* Pugh, 110 Wis. 167, 85 N. W. 641; Boden *v.* Maher, 105 Wis. 539, 81 N. W. 661; Stahl *v.* Lynn, 81 Wis. 668, 51 N. W. 879; Lego *v.* Medley, 79 Wis. 211, 48 N. W. 375, 24 Am. St. Rep. 706; Whitney *v.* Robinson, 53 Wis. 309, 10 N. W. 512.

"It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made." Merriam *v.* United States, 107 U. S. 437, 441, *per* Mr. Justice Woods.

"The court may, by admitting in evidence the extrinsic circumstances under which the writing was made, place itself in the situation of the

its terms.[27] Nor do surrounding circumstances include the prior representations, proposals and negotiations of a promissory character leading up to and superseded by the written agreement.[28] Such evidence has been admitted in the case of an agreement executed in consideration of a relinquishment of dower;[29] a contract to pay any indebtedness;[30] to drill an oil or gas well;[31] a conveyance in writing purporting to transfer money;[32] a grant of a right of way;[33] in the case of a defective contract of apprenticeship;[34] where there is an implied trust;[35] where an instrument in the form of a lease is in fact a conditional sale;[36] and in the case of other particular contracts.[37]

D. When Conversations and Negotiations Admissible. Though it is a general rule that conversations and negotiations prior to or in connection with the execution of an instrument are inadmissible to contradict or vary its terms,[38] yet in many cases evidence of this character is admitted as an aid in the construction of an instrument where its meaning is uncertain or ambiguous,[39] or does

party who made it, and so judge of the meaning of the words and of the correct application of the language to the things described. Such evidence is received, not for the purpose of importing into the writing an intention not expressed therein, but simply with the view of elucidating the meaning of the words employed; and in its admission, the line which separates evidence which aids the *interpretation* of what is in the instrument, from direct evidence of intention independent of the instrument, must be kept steadily in view —the duty of the court being to declare the meaning of what is written in the instrument, not of what was *intended* to be written." Hughes *v.* Wilkinson, 35 Ala. 453, *per* R. W. Walker, J.

27. Tuttle *v.* Burgett, 53 Ohio St. 498, 42 N. E. 427, 53 Am. St. Rep. 649, 30 L. R. A. 214.

28. Union Selling Co. *v.* Jones, 128 Fed. 672, 63 C. C. A. 224.

29. Irwin *v.* Powell, 188 Ill. 107, 58 N. E. 941.

30. Lattimer *v.* Buxton, 17 Misc. 202, 40 N. Y. Supp. 1033.

31. Douthett *v.* Ft. Pitt Gas Co., 202 Pa. St. 416, 51 Atl. 981.

32. Minchin *v.* Minchin, 157 Mass. 265, 32 N. E. 164.

33. Missouri, K. & T. R. Co. *v.* Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781; Kinney *v.* Hooker, 65 Vt. 333, 26 Atl. 690, 36 Am. St. Rep. 864.

34. King *v.* Laindon, 8 Term R. (Eng.) 379.

35. Moore *v.* Stinson, 144 Mass. 594, 597, 12 N. E. 410.

36. Ham *v.* Cerniglia, 73 Miss. 290, 18 So. 577.

37. See H, "To Show True Character of Transaction," *post.*

38. See II, 1, H, *supra.*

39. *United States.* — Arthur *v.* Baron De Hirsch Fund, 121 Fed. 791, 58 C. C. A. 67; Wolff *v.* Wells, Fargo & Co., 115 Fed. 32, 52 C. C. A. 626; Western Union Tel. Co. *v.* American Bell Tel. Co., 105 Fed. 684; Gray *v.* Harper, 1 Story 574, 10 Fed. Cas. No. 5,716.

California. — Snyder *v.* Holt Mfg. Co., 134 Cal. 324, 66 Pac. 311; Chicago First Nat. Bank *v.* California Nat. Bank, 35 Pac. 639.

Illinois. — Gould *v.* Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896, *affirming* 108 Ill. App. 203.

Massachusetts. — Proctor *v.* Hartigan, 139 Mass. 554, 2 N. E. 99; Keller *v.* Webb, 125 Mass. 88, 28 Am. Rep. 209.

Michigan. — Butler *v.* Iron Cliffs Co., 96 Mich. 70, 55 N. W. 670.

New York. — New York House Wrecking Co. *v.* O'Rourke, 92 App. Div. 217, 86 N. Y. Supp. 1116; New York & N. H. Automatic Sprinkler Co. *v.* Andrews, 38 App. Div. 56, 55 N. Y. Supp. 1020; La Chicotte *v.* Richmond R. & Elec. Co., 15 App. Div. 380, 44 N. Y. Supp. 75; Cassidy

not embrace the entire agreement of the parties,[40] or where the evidence is necessary to identify persons or subject-matter,[41] or will invalidate the instrument on the ground of illegality,[42] or fraud in its procurement.[43] And in some cases evidence of subsequent conversations or declarations of the parties has been held admissible where the instrument is ambiguous.[44]

E. Understanding of Parties. — Where the language of an instrument is unambiguous it cannot be varied by parol evidence

v. Foutham, 38 N. Y. St. 177, 14 N. Y. Supp. 151.

Ohio. — Clements *v.* Baldwin Quarry Co., 1 Cleve. Law. Rep. 130, 4 Ohio Dec. 218.

South Carolina. — Colvin *v.* McCormick Cotton Oil Co., 66 S. C. 61, 44 S. E. 380; Bruce *v.* Moon, 57 S. C. 60, 35 S. E. 415.

Texas. — Parker *v.* Chancellor, 78 Tex. 524, 15 S. W. 157.

But see Hansford *v.* Chesapeake Coal Co., 22 W. Va. 70.

Such Evidence Has Been Admitted to explain expressions in a deed of conveyance (Dann *v.* Pitt, 6 New Bruns. (Can.) 385); ambiguous provisions in a charter party (Flagler *v.* Hearst, 62 App. Div. 18, 70 N. Y. Supp. 956); to explain a contract which requires transfer of money to one as trustee, but does not state for whom or for what purpose such person is trustee (American Bonding & Trust Co. *v.* Takahashi, 111 Fed. 125, 49 C. C. A. 267); to show whether a general warranty was intended to cover liens upon property sold or defects therein (Skinner *v.* Moye, 69 Ga. 476); whether a sum mentioned in a contract is liquidated damages or penalty (Kelly *v.* Fejervary, 111 Iowa 693, 83 N. W. 791); and what kind of indulgence was meant in a writing requesting an officer to show indulgence to a prisoner (Ely *v.* Adams, 19 Johns. (N. Y.) 313).

On the Question Whether a Transaction Was a Purchase or Payment of notes and mortgages, evidence of all the negotiations which finally culminated in the transfer or surrender of them is competent as tending to show the character of the transaction and the understanding and intention of the parties when it was finally concluded. Balohradsky *v.* Carlisle, 14 Ill. App. 289.

Where a Term or Phrase is susceptible of more than one interpretation, parol evidence of this character is admissible to explain the same. Brown *v.* Markland, 16 Utah 360, 52 Pac. 597, 67 Am. St. Rep. 629.

For the Purpose of Throwing Light Upon the Question of Execution, evidence of this character is admissible. Wilbur *v.* Stoepel, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568; Gholson *v.* Finney (Tenn. Ch. App.), 46 S. W. 345.

40. Camden Iron Wks. *v.* Fox, 34 Fed. 200; Story *v.* Carter, 27 Ill. App. 287; Thomas *v.* Barnes, 156 Mass. 581, 31 N. E. 683; Liggett Spring & Axle Co. *v.* Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466; Selig *v.* Rehfuss, 195 Pa. St. 200, 45 Atl. 919.

41. Parish *v.* Vance, 110 Ill. App. 57; Purkiss *v.* Benson, 28 Mich. 538.

42. Clemens Electrical Mfg. Co. *v.* Walton, 173 Mass. 286, 52 N. E. 132, 53 N. E. 820; Field Cordage Co. *v.* National Cordage Co., 6 Ohio C. C. 615.

43. Tinsley *v.* Jemison, 74 Fed. 177, 20 C. C. A. 371, 38 U. S. App. 665; Howison *v.* Alabama Coal & Iron Co., 70 Fed. 683, 17 C. C. A. 339, 30 U. S. App. 473; Johnson *v.* Cummings, 12 Colo. App. 17, 55 Pac. 269; Van Alstyne *v.* Smith, 82 Hun 382, 63 N. Y. St. 595, 31 N. Y. Supp. 277; Mattes *v.* Frankel, 65 Hun 203, 47 N. Y. St. 507, 20 N. Y. Supp. 145.

44. Jenkinson *v.* Monroe, 61 Mich. 454, 28 N. W. 663; Sabin *v.* Kendrick, 58 App. Div. 108, 68 N. Y. Supp. 546. But see Caperton *v.* Caperton, 36 W. Va. 479, 15 S. E. 257.

of an understanding which is inconsistent therewith.[45] But where the meaning of the language used is doubtful or ambiguous parol evidence of the understanding of the parties is admissible in many cases to explain or as an aid in interpreting the same.[46] So such evidence has been admitted to explain such phrases in a writing as "to work a street,"[47] "white westerly granite"[48] and "winter strained lamp oil."[49]

F. Practical Construction by Parties. — Where the meaning of the parties to a contract cannot be collected from the instrument itself by reason of its ambiguity or illegibility, evidence of the practical construction put upon the instrument as shown by

45. *United States.* — Green *v.* Chicago & N. W. R. Co., 92 Fed. 873, 35 C. C. A. 68.
Arkansas. — Freed *v.* Brown, 41 Ark. 495.
California. — Swift *v.* Occidental Min. & Petroleum Co., 141 Cal. 161, 74 Pac. 700.
Colorado. — Dawson *v.* Woodhams, 11 Colo. App. 394, 53 Pac 238.
Connecticut. — Hartford Bldg. & Loan Ass'n *v.* Goldreyer, 71 Conn. 95, 41 Atl. 659.
Georgia. — Courier - Journal v. Howard, 119 Ga. 378, 46 S. W. 440; Hill *v.* King Mfg. Co., 79 Ga. 105, 3 S. E. 445.
Illinois. — Burgess *v.* Badger, 124 Ill. 288, 14 N. E. 850.
Indiana. — Keller *v.* Orr, 106 Ind. 406, 7 N. E. 195.
Iowa. — Hurd *v.* Gallaher, 14 Iowa 394.
Massachusetts. — Neale *v.* American Elec. Vehicle Co., 186 Mass. 303, 71 N. E. 566.
Michigan. — Mouat *v.* Montague, 122 Mich. 334, 81 N. W. 112; Fosdick *v.* Van Arsdale, 74 Mich. 302, 41 N. W. 931.
New York. — Kelly Co. *v.* Conlon, 6 Misc. 548, 27 N. Y. Supp. 514.
Pennsylvania. — Dougherty *v.* Norwood, 196 Pa. St. 92, 46 Atl. 384; Easton Power Co. *v.* Sterlingworth R. Sup. Co., 22 Pa. Super. Ct. 538.
South Carolina. — Coates *v.* Early, 46 S. C. 220, 24 S. E. 305.
Texas. — Myer *v.* Fruin, 16 S. W. 868; Greenhill *v.* Hunton (Tex. Civ. App.), 69 S. W. 440; Pasteur Vaccine Co. *v.* Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804; Fletcher *v.* Underhill, 83 S. W. 726.
Vermont. — Smith *v.* Fitzgerald, 59 Vt. 451, 9 Atl. 604.
Virginia. — Sloan *v.* Rose, 101 Va. 151, 43 S. E. 329.
West Virginia. — Knowlton *v.* Campbell, 48 W. Va. 294, 37 S. E. 581.
Wisconsin. — Hart *v.* Hart, 117 Wis. 639, 94 N. W. 890; Wussow *v.* Hase, 108 Wis. 382, 84 N. W. 433.

46. *United States.* — Union Bank *v.* Hyde, 6 Wheat. 572.
Georgia. — Neal *v.* Wilson, 79 Ga. 736, 5 S. E. 54.
Indiana. — Spencer *v.* Robbins, 106 Ind. 580, 5 N. E. 726.
Iowa. — Hathaway *v.* Rogers, 112 Iowa 638, 84 N. W. 674.
New York. — Eager *v.* Crawford, 76 N. Y. 97; New York House Wrecking Co. *v.* O'Rourke, 92 App. Div. 217, 86 N. Y. Supp. 1116.
Pennsylvania. — Cummins *v.* German-American Ins. Co., 197 Pa. St. 61, 46 Atl. 902; Quingley *v.* De Haas, 98 Pa. St. 292; Selden *v.* Williams, 9 Watts 9, 42 Am. Dec. 312; Easton Power Co. *v.* Sterlingworth R. Sup. Co., 22 Pa. Super. Ct. 538.
Vermont. — Hubbard *v.* Moore, 67 Vt. 532, 32 Atl. 465.
"It is not competent to contradict or vary the written words which the parties have selected as the exponent of their contract, but where the language used is susceptible of different meanings, the law says it means what the parties understood it to mean." Tufts *v.* Greenewald, 66 Miss. 360, 6 So. 156, *per* Cooper, J.

47. *In re* Curtis, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200.

48. New England Granite Wks. *v.* Bailey, 69 Vt. 257, 37 Atl. 1043.

49. Hart *v.* Hammett, 18 Vt. 127.

their acts and doings thereunder contemporaneous with or subsequent to its execution is admissible.[50] But the acts and conduct of the parties and not some vague general conversation between them in regard to what they meant by the contract must be looked to in order to determine its meaning.[51] And in admitting such evidence no regard should be given to loose declarations or equivocal or isolated acts.[52] Nor is the refusal of a party to perform his part of a contract admissible as evidence showing the practical interpretation by the parties.[53] Nor is evidence of this character admissible to contradict or vary the plain and unambiguous terms of a writing,[54] as the acts of the parties under a contract will never be allowed to overthrow the plain terms thereof.[55]

50. *United States.* — Consolidated Dental Mfg. Co. *v.* Holliday, 131 Fed. 384; Potter *v.* Phenix Ins. Co., 63 Fed. 382.

Alabama. — Watson *v.* Kirby, 112 Ala. 436, 20 So. 624.

California. — Vejar *v.* Mound City Land & Water Ass'n, 97 Cal. 659, 32 Pac. 713; Truett *v.* Adams, 66 Cal. 218, 5 Pac. 96.

Connecticut. — Bray *v.* Loomer, 61 Conn. 456, 23 Atl. 831.

Illinois. — First Nat. Bank *v.* Rothschild, 107 Ill. App. 133; Western R. Equip. Co. *v.* Missouri Malleable Iron Co., 91 Ill. App. 28.

Indiana. — Wilson *v.* Carrico, 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213; Lyles *v.* Lescher, 108 Ind. 382, 9 N. E. 365; Jaqua *v.* Witham & Anderson Co., 106 Ind. 545, 7 N. E. 314; Bell *v.* Golding, 27 Ind. 173; Bates *v.* Dehaven, 10 Ind. 319.

Maine. — Bradford *v.* Cressey, 45 Me. 9; Haven *v.* Brown, 7 Me. 421, 22 Am. Dec. 208.

Massachusetts. — Dodd *v.* Witt, 139 Mass. 63, 29 N. E. 475, 52 Am. Rep. 700; Fowle *v.* Bigelow, 10 Mass. 379; Stone *v.* Clark, 1 Metc. 378, 35 Am. Dec. 370.

Michigan. — Gregory *v.* Village of Lake Linden, 130 Mich. 368, 90 N. W. 29.

Minnesota. — Engel *v.* Scott & Holston Lumb. Co., 60 Minn. 39, 61 N. W. 825.

Missouri. — Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198; St. Louis Gaslight Co. *v.* St. Louis, 46 Mo. 121.

New York. — Kinney *v.* McBride, 88 App. Div. 92, 84 N. Y. Supp. 958.

Pennsylvania. — Jones *v.* Western Pennsylvania Natural Gas Co., 146 Pa. St. 204, 23 Atl. 386; Wright *v.* Monongahela Natural Gas Co., 2 Pa. Super. Ct. 219, 39 W. N. C. 91, 27 Pitts. L. J. N. S. 126.

Rhode Island. — Phetteplace *v.* British & Foreign M. Ins. Co., 23 R. I. 26, 49 Atl. 33.

Texas. — Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244.

West Virginia. — Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Knowlton *v.* Campbell, 48 W. Va. 294, 37 S. E. 581; Crislip *v.* Cain, 19 W. Va. 438, 483.

Wisconsin. — Wussow *v.* Hase, 108 Wis. 382, 84 N. W. 433; Meade *v.* Gilfoyle, 64 Wis. 18, 24 N. W. 413.

See article "Ambiguity," Vol. I, 837.

"The practical interpretation which the parties, by their conduct, have given to a written instrument in cases like this is always admitted, and is entitled to weight. There is no better test of the intention of the instrument. None are less likely to be mistaken. There is no danger of too large an admission. Safer testimony can hardly be presented in relation to any transaction occurring in human affairs." Cavazos *v.* Trevino, 6 Wall. (U. S.) 773, 785, *per* Swayne, J.

51. Ingraham *v.* Mariner, 194 Ill. 269, 62 N. E. 609.

52. St. Louis Gaslight Co. *v.* St. Louis, 46 Mo. 121.

53. Davis *v.* Sexton, 35 Ill. App. 407.

54. Soell *v.* Hadden, 85 Tex. 182, 19 S. W. 1087; Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4.

55. Western Ry. Equipment Co.

G. Previous and Contemporaneous Transactions. — Previous and contemporaneous transactions between the parties may properly be taken into consideration to ascertain the subject-matter of the contract and the sense in which the parties have used particular terms, but not to alter or modify the plain language which they have used.[56] Evidence, however, of a prior course of dealing between the parties is not admissible where the writing is so clearly drawn as to leave no uncertainty or ambiguity open to explanation by parol evidence.[57]

H. To Show True Character of Transaction. — The general rule as to the exclusion of parol evidence is said to have reference to the language of the instrument, which must speak for itself, and not to preclude an inquiry into the object of the parties in executing such an instrument.[58] Therefore parol evidence is generally admissible, not to vary or contradict the language used to express the agreement, but to show the true character of the transaction, and thus give effect to the writing in accordance with the actual intention of the parties.[59] To hold otherwise would in many cases operate to aid the perpetration of a fraud, and not to prevent

v. Missouri Malleable Iron Co., 91 Ill. App. 28.

56. Brawley *v.* United States, 96 U. S. 168, 173; Peck *v.* United States, 14 Ct. Cl. 84, 107; Spooner *v.* Cummings, 151 Mass. 313, 23 N. E. 839; Bourne *v.* Gatliff, 11 Cl. & F. (Eng.) 45.

57. Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147, wherein it is said: "It is to be observed . . . that the rights of the parties are to be governed by the written contract which they have made, and that a prior course of dealing, especially between one of the parties and other parties, cannot, on any principle with which we are acquainted, be appealed to as affording an interpretation of this contract — and more especially so as this contract is drawn in such distinct terms as to leave no ambiguities for parol explanation."

58. Brick *v.* Brick, 98 U. S. 514, 516; Robinson *v.* Blood, 10 Kan. App. 576, 62 Pac. 677.

59. *England.* — Rochefoucauld *v.* Boustead, 66 L. J. Ch. 74.

United States. — Brick *v.* Brick, 98 U. S. 514.

Alabama. — Locket *v.* Child, 11 Ala. 640.

California. — Russ *v.* Mebius, 16 Cal. 350; Osborne *v.* Endicott, 6 Cal. 149, 65 Am. Dec. 498.

Colorado. — Davis *v.* Hopkins, 18 Colo. 153, 32 Pac. 70; Rouse *v.* Wallace, 10 Colo. App. 93, 50 Pac. 366.

Connecticut. — Lamkin *v.* Baldwin & Lamkin Mfg. Co., 72 Conn. 57, 43 Atl. 593, 44 L. R. A. 786; Schindler *v.* Muhlheiser, 45 Conn. 153.

Illinois. — Van Housen *v.* Copeland, 180 Ill. 74, 54 N. E. 169; Morton *v.* Murray, 176 Ill. 54, 51 N. E. 767, 43 L. R. A. 529; Dreyfus *v.* Union Nat. Bank, 164 Ill. 83, 45 N. E. 408.

Iowa. — Weis *v.* Morris, 102 Iowa 327, 71 N. W. 208.

Kansas. — Robinson *v.* Blood, 10 Kan. App. 576, 62 Pac. 677.

Maryland. — Price *v.* Gover, 40 Md. 102.

Massachusetts. — Hazard *v.* Loring, 10 Cush. 267.

Michigan. — Hyler *v.* Nolan, 45 Mich. 357, 7 N. W. 910; Hill *v.* Goodrich, 39 Mich. 439.

Nebraska. — Cortelyou *v.* Hiatt, 36 Neb. 584, 54 N. W. 964.

New Hampshire. — Blanchard *v.* Putnam, 16 N. H. 48.

New Jersey. — Isham *v.* Cooper, 56 N. J. Eq. 398, 39 Atl. 760; Hopler *v.* Cutler, 34 Atl. 746.

New York. — Errico *v.* Brand, 9 Hun 654; Weber *v.* Weber, 9 Daly

fraud and injustice, which is one of the objects of the general rule.[60]

I. Purpose for Which Executed. — The purpose for which a writing was executed may frequently be shown by parol evidence in order to explain the instrument and ascertain the actual intention of the parties.[61] In many instances where the plain letter of the contract fixes a liability contended for by one of the parties, courts have admitted parol proof to show that in the execution and acceptance of it something else was intended where such construction accords with the language used.[62]

J. Cause Inducing Execution. — Evidence of the causes inducing the execution of a writing is admissible to explain the purpose and object of the parties where their meaning is doubtful or ambiguous as expressed in the instrument itself.[63]

211; Korneman *v.* Hower Brew. Co., 53 N. Y. St. 450, 4 Misc. 299, 24 N. Y. Supp. 103.

Ohio. — First Nat. Bank *v.* Central Chandelier Co., 17 Ohio C. C. 443.

Oklahoma. — Humphrey *v.* Timken Carriage Co., 12 Okla. 413, 75 Pac. 528.

Oregon. — Walker *v.* First Nat. Bank, 43 Or. 102, 72 Pac. 635.

Pennsylvania. — Moore *v.* Phillips, 6 Pa. Super. Ct. 570.

Rhode Island. — Smith *v.* Ballou, 1 R. I. 496.

Texas. — Johnson *v.* Portwood, 89 Tex. 235, 34 S. W. 596; Dunham *v.* Chatham, 21 Tex. 231, 73 Am. Dec. 228; Orient Inv. Co. *v.* Barclay, 25 Tex. Civ. App. 543, 64 S. W. 80; Peightal *v.* Cotton State Bldg. Co., 61 S. W. 428.

Wisconsin. — Gardinier *v.* Kellogg, 14 Wis. 605.

That a Note Was a Receipt or Memorandum for an Advancement by a parent to a child may be shown. Brook *v.* Latimer, 44 Kan. 431, 24 Pac. 946, 21 Am. St. Rep. 292, 11 L. R. A. 805; Garner *v.* Taylor (Tenn. Ch. App.), 58 S. W. 758.

60. Klein *v.* McNamara, 54 Miss. 90. See Mercer *v.* Blain, 5 Litt. Sel. Cas. (Ky.) 412.

61. *England.* — Gillespie *v.* Cheney, (1896) 2 L. R. Q. B. Div. 59.

United States. — Brick *v.* Brick, 98 U. S. 514.

Arkansas. — Smith *v.* Childress, 27 Ark. 328.

California. — Pierce *v.* Robinson, 13 Cal. 116.

Colorado. — Rouse *v.* Wallace, 10 Colo. App. 93, 50 Pac. 366.

Connecticut. — Purcell *v.* Burns, 39 Conn. 429.

Georgia. — McCathern *v.* Bell, 93 Ga. 290, 20 S. E. 315.

Idaho. — Kelly *v.* Leachman, 3 Idaho 672, 34 Pac. 813.

Illinois. — Dreyfuss *v.* Union Nat. Bank, 164 Ill. 83, 45 N. E. 408.

Iowa. — Wilts *v.* Mulhall Bros., 102 Iowa 458, 71 N. W. 418.

Kansas. — McWhirt *v.* McKee, 6 Kan. 248.

Maryland. — Price *v.* Gover, 40 Md. 102.

Nebraska. — Donisthorpe *v.* Fremont, 30 Neb. 142, 46 N. W. 240, 27 Am. St. Rep. 387; Collingwood *v.* Merchants Bank, 15 Neb. 118, 17 N. W. 359.

New York. — Crosby *v.* Delaware & H. Canal Co., 128 N. Y. 641, 28 N. E. 363.

Ohio. — First Nat. Bank *v.* Central Chandelier Co., 17 Ohio C. C. 443.

Pennsylvania. — Sheaffer *v.* Sensenig, 182 Pa. St. 634, 38 Atl. 473; Moore *v.* Phillips, 6 Pa. Super. Ct. 570.

Texas. — Johnson *v.* Hamilton, 36 Tex. 270; Oriental Inv. Co. *v.* Barclay, 25 Tex. Civ. App. 543, 64 S. W. 80.

Vermont. — Stewart *v.* Martin, 49 Vt. 266; O'Hear *v.* De Goesbriand, 33 Vt. 593, 80 Am. Dec. 653.

62. Humphrey *v.* Timken Carriage Co., 12 Okla. 413, 434, 75 Pac. 528.

63. Citizens Bank *v.* Brigham, 61 Kan. 727, 60 Pac. 754, wherein it is

K. Words and Terms. — a. *General Rule.* — Where a writing contains words or terms which are not technical in their meaning by reason of their connection with art, science or a trade, and they have a primary meaning which is not ambiguous nor excluded by the context, but is fixed and definite and accords with the language of the instrument, that meaning will be regarded as expressing the intention of the parties, and parol evidence will not be received to show that such words or terms were used in any other sense.[64]

declared that "Where the phraseology of an instrument is doubtful or ambiguous, meaning can be given to it by showing the inducing causes to the making of it."

64. *England.* — Bank of New Zealand *v.* Simpson, 69 L. J. P. C. 22, 82 L. T. N. S. 102; Beacon L. Assur. Co. *v.* Gibb, 7 L. T. N. S. 574.

Canada. — Middleton *v.* Flanagan, 25 Ont. 417; M'Eacheran *v.* Taylor, 6 N. B. 525.

United States. — Mellen *v.* Ford, 28 Fed. 639; Kemble *v.* Lull, 3 McLean 272, 14 Fed. Cas. No. 7,683.

Alabama. — Sullivan *v.* Louisville & N. R. Co., 138 Ala. 650, 35 So. 694.

Connecticut. — Hildreth *v.* Hartford M. & R. Tram. Co., 73 Conn. 631, 48 Atl. 963; Adams *v.* Turner, 73 Conn. 38, 46 Atl. 247.

Illinois. — Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 284.

Indiana. — Langohr *v.* Smith, 81 Ind. 495.

Iowa. — Cash *v.* Hinkle, 36 Iowa 623.

Kansas. — Gowans *v.* Pierce, 57 Kan. 180, 45 Pac. 586; Cross *v.* Thompson, 50 Kan. 627, 32 Pac. 357.

Kentucky. — Coger *v.* McGee, 2 Bibb 321, 5 Am. Dec. 610.

Maine. — Littlefield *v.* Littlefield, 28 Me. 180.

Massachusetts. — Davis *v.* Ball, 6 Cush. 505, 53 Am. Dec. 53.

Michigan. — Chase *v.* Ainsworth, 135 Mich. 119, 97 N. W. 404; Trowbridge *v.* Dean, 40 Mich. 687.

Mississippi. — Howard *v.* Tomicich, 81 Miss. 703, 33 So. 493.

New York. — Armstrong *v.* Lake Champlain Granite Co., 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683; Gray *v.* Shepard, 147 N. Y. 177, 41 N. E. 500.

Ohio. — Thompson *v.* Pruden, 18 Ohio Cir. Ct. 886.

Texas. — Harris *v.* First Nat. Bank (Tex. Civ. App.), 45 S. W. 311.

Vermont. — Herrick *v.* Noble, 27 Vt. 1.

Wisconsin. — Murphey *v.* Weil, 92 Wis. 467, 66 N. W. 532.

"Where language is used in any written instrument which in its primary meaning is unambiguous, and in which that meaning is not excluded by the context, and is sensible with reference to the extrinsic circumstances in which the parties to the instrument were placed at the time the writing was made, such primary meaning must be taken conclusively to be that in which the parties used it; such meaning in that case conclusively states the intention of the parties, and no evidence is receivable to show that in fact the parties used the language in any other sense, or had any other intention." Hildreth *v.* Hartford, M. & R. T. Co., 73 Conn. 631, 636, 48 Atl. 963, *per* Andrews, C. J.

Popular or Common Meaning. "Where there is a popular and common word used in an instrument, that word must be construed *prima facie* in its popular and common sense. If it is a word of a technical legal character, it must be construed according to its technical legal meaning. If it is a word which is of a technical and scientific character, then it must be construed according to that which is the primary meaning in that technical and scientific character; and before you can give evidence of the secondary meaning of the word you must satisfy the court, from the instrument itself or from the circumstances of the case,

b. *Rule Illustrated.* — In the application of this rule it has been decided that parol evidence is inadmissible to explain the meaning of "all castings now on hand,"[65] "assume,"[66] "beerhouse,"[67] "carload,"[68] "commercial purposes" and "suitable and usual sawlogs,"[69] "deal,"[70] "delivered,"[71] "guarantee,"[72] "help,"[73] "incompatibility,"[74] "legitimate railroad purposes,"[75] "liabilities,"[76] "lumber,"[77] "minerals,"[78] "worth help,"[79] "one and two years old heifers,"[80] "payment,"[81] "placing,"[82] "breeder and foal getter,"[83] "ship timber,"[84] "state currency,"[85] "solid rock,"[86] "sound,"[87] "strand,"[88] "thermostat,"[89] "to be advertised until sold,"[90] "to

that the word ought to be construed, not in its popular and primary signification, but according to its secondary intention." Holt *v.* Collyer, 44 L. T. N. S. 214, 216, L. R. 16 Ch. Div. 718, *per* Fry, J.

65. Western Ry. Equip. Co. *v.* Missouri Malleable Iron Co., 91 Ill. App. 28.

66. Wright *v.* United States Mtge. Co. (Tex. Civ. App.), 42 S. W. 789. See Gowans *v.* Pierce, 57 Kan. 180, 45 Pac. 586.

67. Holt & Co. *v.* Collyer, 44 L. T. N. S. 214, L. R. 16 Ch. Div. 718.

68. "The defendants did not attempt by means of these offers to show an understanding or custom as to the use of the terms so well established and so notorious that the plaintiffs ought to have known them, and, perhaps, as a consequence, bound thereby; nor did they propose to show a special understanding or custom in reference to the terms in existence among persons engaged in a different line of business, of which plaintiffs had knowledge. The testimony might have been admissible had a controversy arisen between Jones and these defendants, or between either of the parties just mentioned and the common carrier." Keavy *v.* Thuett, 47 Minn. 266, 50 N. W. 126.

69. Johnson *v.* Hamilton, 24 Or. 320, 33 Pac. 571.

70. First Nat. Bank of Greenfield *v.* Coffin, 162 Mass. 180, 38 N. E. 444.

71. Lippert *v.* Saginaw Mill. Co., 108 Wis. 512, 84 N. W. 831.

72. Phelps *v.* Gamewell Fire Alarm Tel. Co., 72 Hun (N. Y.) 26, 55 N. Y. St. 339, 25 N. Y. Supp. 654.

73. Hooker *v.* Hyde, 61 Wis. 204, 21 N. W. 52.

74. Gray *v.* Shepard, 147 N. Y. 177, 41 N. E. 500.

75. Abraham *v.* Oregon & C. R. Co., 37 Or. 495, 60 Pac. 899, 82 Am. St. Rep. 779, 64 L. R. A. 391.

76. Lloyd *v.* Sturgeon Falls Pulp Co., 85 L. T. (Eng.) 162.

77. Williams *v.* Stevens Point Lumb. Co., 72 Wis. 487, 40 N. W. 154.

78. "The words of a deed, unambiguous in themselves, cannot be controlled by proof that the parties used them with a definite and limited meaning, for the purpose of that particular instrument. Such proof might, under some circumstances, be competent in an action between the parties to reform the instrument, but not in determining the rights of the parties under the instrument as written." Armstrong *v.* Lake Champlain Granite Co., 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683.

79. Butler *v.* Gale, 27 Vt. 739.

80. Harris *v.* First Nat. Bank (Tex. Civ. App.), 45 S. W. 311.

81. Van Vleet *v.* Sledge, 45 Fed. 743.

82. Heiberger *v.* Johnson, 34 App. Div. 66, 53 N. Y. Supp. 1057 (in reference to loans).

83. Cross *v.* Thompson, 50 Kan. 627, 32 Pac. 357.

84. Pillsbury *v.* Locke, 33 N. H. 96, 66 Am. Dec. 711.

85. Ehle *v.* Chittenango Bank, 24 N. Y. 548.

86. Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557.

87. Thompson *v.* Pruden, 18 Ohio Cir. Ct. 886.

88. Stillman *v.* Burfeind, 21 App. Div. 13, 47 N. Y. Supp. 280.

89. Murphey *v.* Weil, 92 Wis. 467, 66 N. W. 532.

90. Wikle *v.* Johnson Laboratories, 132 Ala. 268, 31 So. 715.

be forwarded,"[91] "vigorously pushing,"[92] "well,"[93] and "whole house."[94]

c. *Where Meaning Doubtful.* — **(1.) General Rule.** — Where there is a doubt or uncertainty as to the meaning of words or terms which have been used by the parties to an instrument, or as to their application under the surrounding circumstances, parol evidence is admissible for the purpose of ascertaining the sense in which such words or terms were used, and to enable the court to construe and give effect to the writing in accordance with the intention of the parties.[95] And evidence of the sense in which parties have been in the habit of using particular words and phrases is admissible in this connection.[96]

(2.) Principle Illustrated. — The admission of evidence of this character has been allowed as an aid in the construction of such words or terms as "accepted,"[97] "account,"[98] "all accounts,"[99]

91. Fischer *v.* Merchants Dispatch Transp. Co., 13 Mo. App. 133.

92. Lord *v.* Owen, 35 Ill. App. 382.

93. Strong *v.* Waters, 27 App. Div. 299, 50 N. Y. Supp. 257.

94. Herrick *v.* Noble, 27 Vt. 1.

95. *England.* — Bank of New Zealand *v.* Simpson, 69 L. J. P. C. 22, 82 L. T. N. S. 102; Colbourn *v.* Dawson, 70 E. C. L. 765.

Canada. — Christie *v.* Burnett, 10 Ont. 609.

Alabama. — McKenzie *v.* Wimberly, 86 Ala. 195, 5 So. 468.

California. — Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371.

Connecticut. — *In re* Curtis, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200.

Florida. — Hinote *v.* Brigman, 44 Fla. 589, 33 So. 303.

Georgia. — Atlanta *v.* Schmeltzer, 83 Ga. 609, 10 S. E. 543; Goodman *v.* Henderson, 58 Ga. 567.

Illinois. — Irwin *v.* Powell, 188 Ill. 107, 58 N. E. 941; Peabody *v.* Dewey, 51 Ill. App. 260.

Massachusetts. — Keller *v.* Webb, 125 Mass. 88, 28 Am. Rep. 209.

Mississippi. — Hattiesburg Plumb. Co. *v.* Carmichael, 80 Miss. 66, 31 So. 536.

New Hampshire. — Greenleaf *v.* Kilton, 11 N. H. 530.

New York. — McKee *v.* DeWitt, 12 App. Div. 617, 43 N. Y. Supp. 132; Hutchinson *v.* Root, 2 App. Div. 584, 38 N. Y. Supp. 16; O'Sullivan *v.* Roberts, 42 N. Y. Super. Ct. 282.

Ohio. — Quarry Co. *v.* Clements, 38 Ohio St. 587, 43 Am. Rep. 442.

Oregon. — Abraham *v.* Oregon & C. R. Co., 37 Or. 495, 60 Pac. 899, 82 Am. St. Rep. 779, 64 L. R. A. 391; Sperry *v.* Wesco, 26 Or. 483, 38 Pac. 623.

Texas. — Roberts *v.* Short, 1 Tex. 373.

Wisconsin. — Andrews *v.* Robertson, 111 Wis. 334, 87 N. W. 190, 87 Am. St. Rep. 870, 54 L. R. A. 673; Ganson *v.* Madigan, 15 Wis. 144, 82 Am. Dec. 659.

"Where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself, for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party." Shore *v.* Wilson, 9 Cl. & F. 566, *per* Tindall, C. J.

96. Jaqua *v.* Witham & Anderson Co., 106 Ind. 545, 7 N. E. 314.

97. Colgate *v.* Latta, 115 N. C. 127, 20 S. E. 388, 26 L. R. A. 321.

98. Waldheim *v.* Miller, 97 Wis. 300, 72 N. W. 869.

99. Hawley & Co. *v.* Bader, 15 Cal. 45.

"all who may feel interested,"[1] "appurtenances,"[2] "artesian,"[3] "at a fair wholesale factory price,"[4] "Canada money,"[5] "cost in market,"[6] "current funds,"[7] "debts owing by said firm,"[8] "deed of conveyance,"[9] "dimension stone,"[10] "dollars,"[11] "duebill,"[12] "due diligence,"[13] "duplicate,"[14] "during,"[15] "expenses,"[16] "from the time boxes are cut,"[17] "good custom cowhide,"[18] "horn chains,"[19] "if claimed,"[20] "if required,"[21] "inch of water,"[22] "indebtedness,"[23] "in lieu of privilege,"[24] "lumber,"[25] "mercantile debts,"[26] "merchandise,"[27] "necessary signals and switchmen,"[28]

1. Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588.
2. Lynch *v.* Hunneke, 61 N. Y. Super. Ct. 235, 19 N. Y. Supp. 718. But see Johnson *v.* Nasworthy (Tex. App.), 16 S. W. 758.
3. Hattiesburg Plumb. Co. *v.* Carmichael, 80 Miss. 66, 31 So. 536.
4. Barrett *v.* Allen, 10 Ohio 426.
5. Thompson *v.* Sloan, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546.
6. McGrath *v.* Crouse, 6 Kan. App. 507, 50 Pac. 969.
7. Haddock *v.* Woods, 46 Iowa 433; Sexton *v.* Windell, 23 Gratt. (Va.) 534; Meredith *v.* Salmon, 21 Gratt. (Va.) 762. But see Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 284.
8. Tilden *v.* Tilden, 8 App. Div. (N. Y.) 99, 40 N. Y. Supp. 403.
9. Zantzinger *v.* Ketch, 4 Dall, U. S. 132.
10. Rogers *v.* Straub, 75 Hun (N. Y.) 264, 58 N. Y. St. 287, 26 N. Y. Supp. 1066.
11. This question arose in several cases where contracts were made in the Confederate states during the civil war, when there was a confusion of currency, and when it would have operated in many instances as a hardship and injustice to have refused to receive evidence showing what currency the parties contracted with reference to. The Confederate Note Case, 19 Wall. (U. S.) 548; Thorington *v.* Smith, 8 Wall. (U. S.) 1; Bryan *v.* Harrison, 76 N. C. 360; Neely *v.* McFadden, 2 S. C. 169; Taylor *v.* Bland, 60 Tex. 29.

There are, however, some decisions in which this view was not adopted. Hill *v.* Erwin, 44 Ala. 661; Roane *v.* Green, 24 Ark. 210. And it has been decided that "dollars" is to be construed as meaning lawful money of the United States, and that parol evidence to show otherwise is inadmissible. Howes *v.* Austin, 35 Ill. 396; Noe *v.* Hodges, 3 Humph. (Tenn.) 162. And this latter doctrine is undoubtedly the correct one except in the case of extraordinary conditions such as existed at the time of the war.
12. Andrews *v.* Robertson, 111 Wis. 334, 87 N. W. 190, 87 Am. St. Rep. 870, 54 L. R. A. 673.
13. Bartley *v.* Phillips, 165 Pa. St. 325, 30 Atl. 842.
14. McCann *v.* Preston, 79 Md. 223, 28 Atl. 1102.
15. Bird *v.* Beckwith, 45 App. Div. 124, 60 N. Y. Supp. 1041.
16. Bowery Bank *v.* Hart, 37 Misc. 412, 75 N. Y. Supp. 781.
17. Carmichael *v.* Brown, 97 Ga. 486, 25 S. E. 357.
18. Wait *v.* Fairbanks, Brayt. (Vt.) 77.
19. Sweat *v.* Shumway, 102 Mass. 365, 3 Am. Rep. 471.
20. Stautzenberger *v.* Stautzenberger (Tex.), 17 S. W. 1046.
21. Fenlon *v.* United States, 17 Ct. Cl. (U. S.) 138.
22. Jackson Mill. Co. *v.* Chandos, 82 Wis. 437, 52 N. W. 759; Janesville Cotton Mills *v.* Ford, 82 Wis. 416, 52 N. W. 764, 17 L. R. A. 564.
23. Lattimer *v.* Buxton, 17 Misc. 202, 40 N. Y. Supp. 1033; Scott *v.* Neeves, 77 Wis. 305, 45 N. W. 421.
24. Birch *v.* Depeyster, 4 Camp. (Eng.) 385.
25. McAdie *v.* Sills, 24 Up. Can. C. P. 606.
26. Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198.
27. Hartwell *v.* California Ins. Co., 84 Me. 524, 24 Atl. 954.
28. Louisville & N. R. Co. *v.* Illinois C. R. Co., 174 Ill. 448, 51 N. E. 824.

"net earnings" and "profits,"[29] "old channel,"[30] "premises,"[31] "proceeds,"[32] "reasonable use,"[33] "right of way,"[34] "sales guaranteed,"[35] "subject to the mortgage,"[36] "to work a street,"[37] "under the powers hereby granted,"[38] "waste ground,"[39] "watchmaker's materials,"[40] and "your wool."[41]

d. *Terms of Art, Science or Trade.* — **(1.) General Rule.** — A contract is frequently entered into containing some term of art or science or framed in a language which is peculiar to a particular trade out of which it arises. The intention of the parties, though clear to themselves, would in such cases often be defeated if the instrument were to be construed in strict accordance with the ordinary import of the language used as understood by the world at large. It has therefore become a recognized rule that in such cases parol evidence is admissible as an aid to enable the court to interpret and expound the writing in accordance with the recognized meaning of such word or term as used in the art, science or trade out of which it arises.[42] And in order to introduce evidence in this class

29. Snyder *v.* Seaman, 2 App Div. 258, 73 N Y. St. 137, 37 N. Y. Supp. 696. But see as to profits, Chilberg *v.* Jones, 3 Wash. 530, 28 Pac. 1104.

30. Emery *v.* Webster, 42 Me. 204, 66 Am. Dec. 274.

31. New Jersey Zinc Co. *v.* Boston Franklinite Co., 15 N. J. Eq. 418.

32. Irwin *v.* Powell, 188 Ill. 107, 58 N. E. 941.

33. Bartels *v.* Brain, 13 Utah 162, 44 Pac. 715.

34. Indianapolis & V. R. Co. *v.* Reynolds, 116 Ind. 356, 19 N. E. 141.

35. Newell *v.* Nicholson, 17 Mont. 389, 43 Pac. 180.

36. Merrill *v.* Cooper, 36 Vt. 314.

37. *In re* Curtis, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200.

38. Roden *v.* London Small Arms Co., 46 L. J. Q. B. (Eng.) 213.

39. Prather *v.* Ross, 17 Ind. 495.

40. Maril *v.* Connecticut F. Ins. Co., 95 Ga. 604, 23 S. E. 463, 51 Am. St. Rep. 102, 30 L. R. A. 835.

41. MacDonald *v.* Longbottom, 1 El. & El. (Eng.) 977.

42. *England.* — Spicer *v.* Cooper, 5 Jur. 1036; Hills *v.* Evans, 8 Jur. N. S. 525; Clayton *v.* Gregson, 5 A. & E. 302, 31 E. C. L. 342.

United States. — Loom Co. *v.* Higgins, 105 U. S. 580.

Alabama. — McClure *v.* Cox, 32 Ala. 617, 70 Am. Dec. 552.

Florida. — Hinote *v.* Brigman, 44 Fla. 589, 33 So. 303.

Georgia. — Cannon *v.* Hunt, 116 Ga. 452, 42 S. E. 734.

Illinois. — Myers *v.* Walker, 24 Ill. 133.

Indiana. — Rastetter *v.* Reynolds, 160 Ind. 133, 66 N. E. 612; Seavey *v.* Shurick, 110 Ind. 494, 11 N. E. 597; Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201.

Iowa. — Grasmier *v.* Wolf, 90 N. W. 813; Willmering *v.* McGaughey, 30 Iowa 205, 6 Am. Rep. 673.

Kansas. — Seymour *v.* Armstrong, 62 Kan. 720, 64 Pac. 612.

Louisiana. — Destrehan *v.* Louisiana Cypress Lumb. Co., 45 La. Ann. 920, 13 So. 230, 40 Am. St. Rep. 265.

Massachusetts. — Hill *v.* Rewee, 11 Metc. 268, 273.

Michigan. — Dages *v.* Brake, 125 Mich. 64, 83 N. W. 1039, 84 Am. St. Rep. 556.

Minnesota. — Winona *v.* Thompson, 24 Minn. 199, 208.

Missouri. — Heyworth *v.* Miller Grain and Elev. Co., 174 Mo. 171, 73 S. W. 498; Elliott *v.* Secor, 60 Mo. 163; Long *v.* Armsby Co., 43 Mo. App. 253; Connable *v.* Clark, 26 Mo. App. 162.

Montana. — Cambers *v.* Lowry, 21 Mont. 478, 54 Pac. 816.

New York. — Collender *v.* Dinsmore, 55 N. Y. 200, 206, 14 Am. Rep. 224; O'Connor *v.* Green, 60 App. Div. 553, 69 N. Y. Supp. 1097; Behrman *v.* Linde, 47 Hun 530.

of cases it is not necessary that the term itself should be at all ambiguous on its face.[43] Nor does the fact that the actual meaning of a trade term is for the jury, conflict with the general rule that it is the duty of courts to construe written instruments.[44] Where a word or term has a technical meaning by reason of its being peculiar to art, science, or to some trade or business, it will be presumed that it was used in such sense by the parties, and it has been decided that its legal effect cannot be varied by parol evidence that it was intended to convey a different meaning.[45] If, however, it has an ordinary as well as a technical meaning and it is doubtful in which sense it is used, parol evidence is admissible to show the proper meaning to be given to it.[46]

(2.) Rule Illustrated. — This principle has been applied in the case of such words or terms as "actual stone measured in the wall,"[47] "beds of gravel, sand, or other materials that may be required for said paving,"[48] "brass buttons,"[49] "breeder,"[50] "breeder and foal getter,"[51] "cabinet and mahogany door maker,"[52] "cargo,"[53] "cold

Oregon. — Brauns *v.* Stearns, 1 Or. 367; Abraham *v.* Oregon & C. R. Co., 37 Or. 495, 60 Pac. 899, 82 Am. St. Rep. 779, 64 L. R. A. 391.

Pennsylvania. — Weisenberger *v.* Harmony F. & M. Ins. Co., 56 Pa. St. 442; Brown *v.* Brooks, 25 Pa. St. 210; Glenn *v.* Strickland, 21 Pa. Super. Ct. 88.

Tennessee. — Fry *v.* New York Prov. Sav. L. Assur. Soc. (Tenn. Ch. App.), 38 S. W. 116.

Vermont. — Hart *v.* Hammett, 18 Vt. 127.

Wisconsin. — Chicago St. P. M. & O. R. Co. *v.* Chicago M. & St. P. R. Co., 113 Wis. 161, 87 N W. 1085.

"**Where a Term of Art** is employed or a word connected with some department of the natural world which has become technical and popular in its use among scientific men and men of letters, a court, when called upon to give a construction to such words may avail itself of parol testimony to ascertain the technical and popular use of the word." Hartwell *v.* Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448.

"**Common Terms May, in a Particular Business or Trade,** acquire a peculiar and different signification from that generally given to them. It is perfectly well settled that when parties enter into a contract with reference to a particular business or trade, they are presumed to have contracted with reference to any usages of that business or trade, and their contracts are to be interpreted consistently with such usage. Peculiar expressions are to be given that meaning which they have acquired in such business by common usage, unless, by the express terms of the contract, the usage is excluded or is inconsistent with the contract. Rastetter *v.* Reynolds, 160 Ind. 133, 136, 66 N. E. 612, *per* Monks, J.

43. Eneas *v.* Hoops, 42 N. Y Super. Ct. 517, 521; Myers *v.* Earle, 3 Q. B. 20, 30 L. J. 9.

44. Halsey *v.* Adams, 63 N. J. L. 330, 336, 43 Atl. 708.

45. Hartwell *v.* Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448; Ryan *v.* Goodwyn, McMull. Eq. (S. C.) 451.

46. Seymour *v.* Armstrong, 62 Kan. 720, 64 Pac. 612.

47. Brenneman *v.* Bush (Tex. Civ. App.), 30 S. W. 699.

48. McDonough *v.* Jolly, 165 Pa. St. 542, 30 Atl. 1048.

49. Erhardt *v.* Ullman, 51 Fed. 414, 2 C. C. A. 319, 1 U. S. App. 257.

50. St. Paul & Minn. Trust Co. *v.* Harrison, 64 Minn. 300, 66 N. W. 980.

51. Cross *v.* Thompson, 50 Kan. 627, 32 Pac. 357.

52. Stroud *v.* Frith, 11 Barb. (N. Y.) 300.

53. Houghton *v.* Gillut, 7 C. & P. (Eng.) 701.

storage,"[54] "dangers of the river,"[55] "dry goods,"[56] "excavated and prepared,"[57] "finished and ready for setting,"[58] "Free Preanger Coffee,"[59] "four dollars an order,"[60] "hewn timber to average 120 feet, and to class B, No. 1 good,"[61] "mason work,"[62] "merchantable lumber, mill run,"[63] "merchantable measurement,"[64] "merchantable timber,"[65] "metal plates,"[66] "noiseless steam motor,"[67] "old style roofing tin,"[68] "on margin,"[69] "partition,"[70] "quantity guaranteed,"[71] "reduce,"[72] "reserve dividend fund" and "reserve dividend plan,"[73] "season,"[74] "spitting of blood,"[75] "subject to strikes,"[76] "summerleazes,"[77] "switching," "transfer" and "transportation,"[78] "telephone,"[79] "tontine policy" and "tontine installment policy,"[80] "traveling expenses,"[81] "up to standard,"[82] "wall count, solid measure,"[83] "windows,"[84] "with feed privileges,"[85] and "zinc ores."[86]

e. *To Explain Terms in Cipher.* — Where a writing or a term therein is expressed in cipher, parol evidence is admissible to explain and interpret the same.[87] So parol evidence has been held

54. Behrman *v.* Linde, 47 Hun (N. Y.) 530.

55. McClure *v.* Cox, 32 Ala. 617, 70 Am. Dec. 552; Hibler *v.* McCartney, 31 Ala. 501; Gordon *v.* Little, 8 Serg. & R. (Pa.) 533.

56. Wood *v.* Allen, 111 Iowa 97, 82 N. W. 451.

57. Miller *v.* McKeesport & W. R. Co., 179 Pa. St. 350, 36 Atl. 287.

58. Myers *v.* Tibbals, 72 Cal. 278, 13 Pac. 695.

59. O'Donohue *v.* Leggett, 29 N. Y. St. 983, 8 N. Y. Supp. 426.

60. Newhall *v.* Appleton, 49 N. Y. Super. Ct. 238.

61. Jones *v* Anderson, 82 Ala. 32, 2 So. 911.

62. Elgin *v.* Joslyn, 36 Ill. App. 301.

63. Barnes *v.* Leidigh (Or.), 79 Pac. 51.

64. Gaunt *v.* Pries, 21 Mo. App. 540.

65. Dorris *v.* King (Tenn. Ch. App.), 54 S. W. 683.

66. Rodger *v.* Toilettes Co., 37 Misc. 779, 76 N. Y. Supp. 940.

67. Farnum *v.* Concord Horse R. R., 66 N. H. 569, 29 Atl. 541.

68. Storck *v.* Mesker, 55 Mo. App. 26.

69. Hatch *v.* Douglas, 48 Conn. 116, 40 Am. Rep. 154.

70. Tibbits *v.* Phipps, 30 App. Div. 274, 51 N. Y. Supp. 954.

71. Bissel *v.* Campbell, 54 N. Y. 353.

72. Halsey *v.* Adams, 63 N. J. L. 330, 43 Atl. 708.

73. Fuller *v.* Metropolitan L. Ins. Co., 37 Fed. 163.

74. Myers *v.* Walker, 24 Ill. 133; McIntosh *v.* Miner, 53 App. Div. 240, 65 N. Y. Supp. 735.

75. Singleton *v.* St. Louis Ins. Co., 66 Mo. 63, 27 Am. Rep. 321.

76. Hesser-Milton-Renahan Coal Co. *v.* La Crosse Fuel Co., 114 Wis. 654, 90 N. W. 1094.

77. Tudgay *v.* Sampson, 30 L. T. N. S. (Eng.) 262.

78. Dixon *v.* Central of Georgia R. Co., 110 Ga. 173, 35 S. E. 369.

79. Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201.

80. Thompson *v.* Thorne, 83 Mo. App. 241.

81. Wilcox *v.* Baer, 85 Mo. App. 587.

82. Penn Steel Casting & Mach. Co. *v.* Wilmington Malleable Iron Co., 1 Pen. (Del.) 337, 41 Atl. 36.

83. Long *v.* Davidson, 101 N. C. 170, 7 S. E. 758.

84. Henry *v.* Agostini, 12 Misc. 15, 66 N. Y. St. 536, 33 N. Y. Supp. 37.

85. Missouri K. & T. R. Co. *v.* DeBord, 21 Tex. Civ. App. 691, 53 S. W. 587.

86. New Jersey Zinc Co. *v.* Boston Franklinite Co., 15 N. J. Eq. 418.

87. Wilson *v.* Frisbie, 57 Ga. 269 (so holding in the case of a telegram in cipher); DeBlois *v.* Reiss, 32 La.

admissible to explain slips of paper on which were certain words and figures which were alleged to be a part of the devices in connection with gambling rooms, and which were unintelligible.[88]

f. *Where Writing Is in Foreign Language.* — Courts are not presumed to be acquainted with the peculiar forms of a foreign language,[89] and where a writing or a part thereof is expressed in such a language, evidence is admissible to explain the same, and a witness who is familiar with the language may read and interpret it.[90] And where it has been translated into English the court will not treat the language under consideration otherwise than it would if the original instrument had been written in English, and the general rule as to the admission of parol evidence will control.[91]

g. *Abbreviations, Characters, Marks and Figures.* — Where abbreviations, characters, marks or figures occur in a writing which are unintelligible to persons other than the parties thereto, or to those in the particular business out of which the transaction arises, their meaning may be explained by parol evidence,[92] either by show-

Ann. 586; Wingate *v.* Mechanics Bank, 10 Pa. St. 104.

88. Douglass *v.* State, 18 Ind. App. 289, 48 N. E. 9.

89. Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244.

90. Erusha *v.* Tomash, 98 Iowa 510, 67 N. W. 390, so holding in the case of indorsements in the Bohemian language on a note. It was said in this case: "The courts of this state are not required to know the Bohemian language, and when the judge of a court is not sufficiently familiar with it, the aid of some one who is must necessarily be obtained when there is occasion to interpret it." See Armstrong *v.* Burrows, 6 Watts (Pa.) 266.

Commonwealth Title Ins. & T. Co. *v.* Coleman, 205 Pa. St. 535, 55 Atl. 320, was an action in assumpsit by an attorney at law to recover fees. A payment had been made to the attorney, who shortly afterward wrote to his client a letter in French, which was corrected by a French teacher before it was sent, in which he acknowledged receipt of the money. The evidence as to the meaning of the word "regler" used in the letter was not uniform. Some of the witnesses testified that it meant "pay" and others that it meant "settle." The court construed the word to mean "pay" and refused to permit the French teacher, who had corrected the letter, to testify that it meant "payment on account." It was decided by an equally divided court that there was no error in the ruling, and the judgment was affirmed.

91. Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244.

92. *United States.* — United States *v.* Hardyman, 13 Pet. 176.

Indiana. — Barton *v.* Anderson, 104 Ind. 578, 4 N. E. 420; Lane *v.* Union Nat. Bank, 3 Ind. App. 299, 29 N. E. 613.

Louisiana. — De Blois *v.* Reiss, 32 La. Ann. 586.

Minnesota. — Reeves *v.* Cross, 80 Minn. 466, 83 N. W. 443; Maurin *v.* Lyon, 69 Minn. 257, 72 N. W. 72, 65 Am. St. Rep. 568.

Missouri. — Heideman *v.* Wolfstein, 12 Mo. App. 366.

New York. — Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Arthur *v.* Roberts, 60 Barb. 580.

North Carolina. — White *v.* McMillan, 114 N. C. 349, 19 S. E. 234.

Particular Instances. — The letters "C. O. D." have been held explainable under this rule. Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224. So evidence has been admitted to explain "K. D. & Released" (Mouton *v.* Louisville & N. R. Co., 128 Ala. 537, 29 So. 602); the letters "O. K." (Penn Tobacco Co. *v.* Leman, 109 Ga. 428, 34 S. E. 679); the abbreviation and figures "Sec. 23, 38, 14," in a description of

ing the understanding of the parties in respect thereto, or by general usage,[93] as where they are used in a particular business or trade,[94] in which cases they are spoken of by Baron Parke "as a sort of mercantile shorthand, made up of few and short expressions, which generally express the full meaning and intention of the parties."[95] Such evidence has been received where a telegraph message is on this account unintelligible,[96] to explain entries in a peculiar form in account books,[97] memoranda in abbreviated form,[98] a description of goods by words and abbreviations in a writ of replevin,[99] an abbreviation in connection with a signature,[1] or with the name of a grantee in a deed,[2] or with the name of an indorsee,[3] and where the name of the place at which a note is payable is abbreviated.[4] Evidence, however, will not be admitted to explain the meaning of an abbreviation where it is one of which the court takes judicial notice.[5]

L. To Explain Alteration. — Parol evidence is admissible to explain an alteration of an instrument.[6]

M. To Decipher or Explain Illegible Parts of Instrument. Where upon the face of a writing there are words or figures which are so obscured, erased, or otherwise illegible that an inspection of the instrument will not disclose what these words or figures are, parol testimony, such as the negotiations of the parties or any other testimony to show what was meant by these unintelligible words or figures, is admissible.[7] So evidence is admissible to make plain

property (McChesney *v.* Chicago, 173 Ill. 75, 50 N. E. 191); to show that the abbreviations "C. L. R. P. oats" mean carload Texas rust-proof oats (Wilson *v.* Coleman, 81 Ga. 297, 6 S. E. 693); and to show that the abbreviation "uph." as used in a chattel mortgage means upholstered (Jones *v.* State (Tex. Crim.), 34 S. W. 631).

93. Jaqua *v.* Witham & Anderson Co., 106 Ind. 545, 7 N. E. 314.

94. Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224.

95. Marshall *v.* Lynn, 6 M. & W. (Eng.) 109, 118.

96. Western Union Tel. Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515.

97. Singer Mfg. Co. *v.* Leeds, 48 Ill. App. 297; Sheldon *v.* Benham, 4 Hill (N. Y.) 129, 40 Am. Dec. 271.

98. Sheldon *v.* Benham, 4 Hill (N. Y.) 129, 40 Am. Dec. 271.

99. Dages *v.* Brake, 125 Mich. 64, 83 N. W. 1039, 84 Am. St. Rep. 556.

1. Lacy *v.* Dubuque Lumb. Co., 43 Iowa 510 (where initials were used showing, when explained, that the person signed as agent); First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Rep. 397.

2. Aultman *v.* Richardson, 7 Neb. 1.

3. Farmers & Mechanics Bank *v.* Day, 13 Vt. 36.

4. Comstock *v.* Savage, 27 Conn. 184 (where note was payable at "F. & Mechanics' Bank."); Lane *v.* Union Nat. Bank, 3 Ind. App. 299, 29 N. E. 613.

5. Dages *v.* Brake, 125 Mich. 64, 83 N. W. 1039, 84 Am. St. Rep. 556.

The Abbreviation "F. O. B." has been held unambiguous and not subject to explanation by parol evidence. Sheffield Furnace Co. *v.* Hull Coal & C. Co., 101 Ala. 446, 14 So. 672; National Gaslight & Fuel Co. *v.* Bixby, 48 Minn. 323, 51 N. W. 217. But see Earl Fruit Co. *v.* McKinney, 65 Mo. App. 220.

6. See article "Alteration of Instrument," Vol. I, p. 774.

7. Walrath *v.* Whittekind, 26 Kan. 482; Haven *v.* Brown, 7 Me. 421, 22 Am. Dec. 208.

It is a Matter for the Jury, and not for the court, to decipher illeg-

under like circumstances, a name which is illegible,[8] or a date.[9]

N. Deficiency in Punctuation. — Where an instrument is deficient in punctuation, and its sense may be varied according as the punctuation is one way or another, parol evidence may be introduced to explain its meaning.[10]

O. To Rebut a Presumption or Implication. — If a presumption or implication is by law superadded to an instrument as executed by the parties, parol evidence is admissible for the purpose of rebutting or controlling the same,[11] except in the case of a presumption of law which is absolute or conclusive.[12] The rule has been applied in the case of a presumption arising in favor of an instrument, by showing partial failure of consideration;[13] to repel an inference of illegality drawn from some extrinsic fact brought

ible letters or figures. Armstrong *v.* Burrows, 6 Watts (Pa.) 266, in which the court said: "That the court assumed an exclusive right to decipher the contested letters is both true and fatal. It doubtless belongs to it to interpret the meaning of written words; but this extends not to the letters, for to interpret and to decipher are different things. A writing is read before it is expounded; and the ascertainment of the words is finished before the business of exposition begins. If the reading of a judge were not matter of fact, witnesses would not be heard in contradiction of it; and though he is supposed to have peculiar skill in the meaning and construction of language, neither his business nor learning is supposed to give him a superior knowledge of figures or letters. His right to interpret a paper written in Coptic characters would be the same that it is to interpret an English writing; yet the words would be approached only through a translation. The jury were, therefore, not only legally competent to read the disputed word, but bound to ascertain what it was meant to represent." See also Arthur *v.* Roberts, 60 Barb. (N. Y.) 580, 588.

8. Ambach *v.* Armstrong, 29 W. Va. 744, 3 S. E. 44.

9. Where the date of an instrument is uncertain from its face, as where it is not plain whether the date is January or June, parol evidence is admissible to show the actual date. Jefferson County *v.* Savory, 2 Greene (Iowa) 238; Fenderson *v.* Owen, 54 Me. 372, 92 Am. Dec. 551.

10. Graham *v.* Hamilton, 27 N. C. 428.

11. *England.* — Hurst *v.* Beach, 5 Madd. 351, 360; Oldman *v.* Slater, 6 Eng. Ch. 84, 3 Sim. 84.

Alabama. — Gookin *v.* Richardson, 11 Ala. 889, 46 Am. Dec. 232.

California. — Faylor *v.* Faylor, 136 Cal. 92, 68 Pac. 482; Cook *v.* Cockins, 117 Cal. 140, 48 Pac. 1025; Miller *v.* Van Tassel, 24 Cal. 459.

District of Columbia. — McCartney *v.* Fletcher, 11 App. D. C. 1, 25 Wash. L. Rep. 327; rehearing denied in 11 App. D. C. 15, 25 Wash. L. Rep. 402; Whelan *v.* McCullough, 4 App. Cas. D. C. 58.

Iowa. — Evans *v.* Burns, 67 Iowa 179, 25 N. W. 119; Preston *v.* Gould, 64 Iowa 44, 19 N. W. 834.

Kentucky. — Butler *v.* Suddeth, 6 T. B. Mon. 541.

Massachusetts. — Dodd *v.* Witt, 139 Mass. 63, 29 N. E. 475, 52 Am. Rep. 700; Riley *v.* Gerrish, 9 Cush. 104.

New York. — Davis *v.* Bly, 32 App. Div. 124, 52 N. Y. Supp. 599.

Pennsylvania. — Morrison *v.* Davis, 20 Pa. St. 171, 57 Am. Dec. 695.

Texas. — Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 622; Cage *v.* Tucker, 14 Tex. Civ. App. 316, 37 S. W. 180.

Vermont. — Walston *v.* Smith, 70 Vt. 19, 39 Atl. 252.

12. Bryan *v.* Walton, 20 Ga. 480, 508; United States Nat. Bank *v.* Geer, 55 Neb. 462, 75 N. W. 1088, 70 Am. St. Rep. 390, 41 L. R. A. 444.

13. Braly *v.* Henry, 71 Cal. 481,

to the attention of the court;[14] to rebut a presumption of payment of the consideration;[15] a waiver of counter-claims by acceptance of a draft;[16] that time of performance in a contract is essential;[17] to rebut a presumption arising from indorsement of a note in blank;[18] that an indorsement was made at time of making note;[19] that one as payee and indorser of a note, by writing over an alleged forged signature the words "protest waived," intended to adopt the signature as his own;[20] that a bill or note is *prima facie* conditional payment;[21] that one signing on back of a note of which he is neither payee nor indorsee is a maker;[22] that a note was payable in a certain kind of currency;[23] and that letters of administration were granted.[24]

P. To Identify Subject-Matter. — a. *General Rule.* — An instrument is to be construed with reference to its subject-matter, and where this is not clearly identified by the terms of the writing parol evidence is admissible to fix the application of the language used, so that the nature and qualities of the subject to which the writing refers may be ascertained,[25] or in other words to identify

11 Pac. 385, 12 Pac. 623, 60 Am. Rep. 543.

14. McGehee *v.* Rump, 37 Ala. 651.

15. Solary *v.* Stultz, 22 Fla. 263.

16. Bohn Mfg. Co. *v.* Harrison, 13 Mont. 293, 34 Pac. 313.

17. Thurston *v.* Arnold, 43 Iowa 43; Robinson *v.* Harris, 21 Ont. (Can.) 43.

18. United States Nat. Bank *v.* Geer, 55 Neb. 462, 75 N. W. 1088, 70 Am. St. Rep. 390, 41 L. R. A. 444; Davis *v.* Bly, 32 App. Div. 124, 52 N. Y. Supp. 599; Davis *v.* Morgan, 64 N. C. 570.

19. Way *v.* Butterworth, 108 Mass. 509.

20. Robinson *v.* Barnett, 18 Fla. 602, 43 Am. Rep. 327.

21. Sayre *v.* King, 17 W. Va. 562.

22. Mammon *v.* Hartman, 51 Mo. 168.

23. Sowers *v.* Earnhart, 64 N. C. 96.

24. Bryan *v.* Walton, 20 Ga. 480.

25. Moore *v.* Barber Asphalt Pav. Co., 118 Ala. 563, 23 So. 798; Campbell *v.* Short, 35 La. Ann. 447, 450; Bayley *v.* Denny, 26 La. Ann. 255; Parks *v.* Parks, 19 Md. 323; Emerald & Phoenix Brew. Co. *v.* Leonard, 22 Misc. 120, 48 N. Y. Supp. 706; Cary *v.* Thompson, 1 Daly (N. Y.) 35; Bank of New Zealand *v.* Simpson, 69 L. J. P. C. 22, 82 L. T. N. S. 102.

So where parties contracted to do work upon a drawbridge, but the bridge was not described in the writing and a claim was made for certain work alleged to have been done in consequence of alterations in the plan which were not referred to in the writing, the court said: "The rule invoked is that which forbids the introduction of parol testimony to show anything antecedent to, or contemporaneous with, a written instrument, to qualify or vary its terms. The doctrine is of admitted force and importance, but it does not apply to the facts of the present case. The evidence objected to has no tendency to impair the force or alter any of the terms of the written agreement. Its office is merely to apply that instrument to its subject-matter. The plaintiffs obligated themselves to do the work on a drawbridge, but such bridge was not described, either in a general or particular manner, in the instrument. It is certainly no part of the express stipulation that the plaintiffs will do the work on any kind of a bridge which the defendant may choose to put up; and the introduction of such an obligation, by intendment, would be most forced and unreasonable. . . . In this class of cases contracts are, upon their face, incomplete, and do not become perfectly intelligible until, through the medium of parol evidence, they

the subject-matter of the instrument;[26] and if with the aid of such evidence the identity can be made certain, the instrument will be

are connected with the subject to which they relate. . . . The bridge to which the work appertained not being defined in writing, it became entirely legal to define it by parol proof. Such evidence is generally necessary to show what it is the parties are contracting about." Sandford *v.* Newark & H. R. Co., 37 N. J. L. 1, 3.

26. *England.* — Bank of New Zealand *v.* Simpson, L. R. (1900) A. C. 182, 82 L. T. N. S. 102; Pryor *v.* Petre, C. A. 1894, 2 Ch. Div. 11.

Canada. — Miller *v.* Travers, 8 Bing. 244; Pugsley *v.* Gillespie, 14 New Bruns. 195.

United States. — Doolan *v.* Carr, 125 U. S. 618; Reed *v.* Insurance Co., 95 U. S. 23; Atkinson *v.* Cummins, 9 How. 479; Davis *v.* Turner, 120 Fed. 605, 56 C. C. A. 669.

Alabama. — Edwards *v.* Bender, 121 Ala. 77, 25 So. 1010; Moore *v.* Barber Asphalt Pav. Co., 118 Ala. 563, 23 So. 798; Forst *v.* Leonard, 112 Ala. 296, 20 So. 587.

California. — Ontario Deciduous Fruit Growers Ass'n *v.* Cutting Fruit Packing Co., 134 Cal. 21, 66 Pac. 28, 86 Am. St. Rep. 231, 53 L. R. A. 681; California Title Ins. & T. Co. *v.* Pauly, 111 Cal. 122, 43 Pac. 586; Darby *v.* Arrowhead Hot Springs Hotel Co., 97 Cal. 384, 32 Pac. 454; Carter *v.* Bacigalupi, 83 Cal. 187, 23 Pac. 361; Habenicht *v.* Lissak, 77 Cal. 139, 19 Pac. 260.

Colorado. — Kretschmer *v.* Hard, 18 Colo. 223, 32 Pac. 418; Citizens Coal & Coke Co. *v.* Stanley, 6 Colo. App. 181, 40 Pac. 693.

Connecticut. — Hildreth *v.* Hartford M. & R. T. Co., 73 Conn. 631, 636, 48 Atl. 963.

Georgia. — Johnson *v.* McKay, 121 Ga. 763, 49 S. E. 757; Studstill *v.* Willcox, 94 Ga. 690, 20 S. E. 120; Towner *v.* Thompson, 82 Ga. 740, 9 S. E. 672; Shore *v.* Miller, 80 Ga. 93, 4 S. E. 561, 12 Am. St. Rep. 239.

Idaho. — Kelly *v.* Leachman, 3 Idaho 672, 34 Pac. 813.

Illinois. — Gage *v.* Cameron, 212 Ill. 146, 72 N. E. 204; Webster *v.* Fleming, 178 Ill. 140, 52 N. E. 975, *affirming* 73 Ill. App. 234; Chambers *v.* Prewitt, 172 Ill. 615, 50 N. E. 145, *affirming* 71 Ill. App. 119; Bulkley *v.* Devine, 127 Ill. 406, 20 N. E. 16, 3 L. R. A. 330; Farmers & Merchants Bank *v.* Arnold, 58 Ill. App. 349.

Indiana. — Baldwin *v.* Boyce, 152 Ind. 46, 51 N. E. 334; Clark *v.* Crawfordsville Coffin Co., 125 Ind. 277, 25 N. E. 288; New *v.* Sailors, 114 Ind. 407, 16 N. E. 609, 5 Am. St. Rep. 632; Aetna Ins. Co. *v.* Strout, 16 Ind. App. 160, 44 N. E. 934.

Indian Territory. — Turner *v.* Gonzales, 3 Ind. Ter. 649, 64 S. W. 565; Byrne *v.* Ft. Smith Nat. Bank, 1 Ind. Ter. 680, 43 S. W. 957.

Iowa. — Van Husen *v.* Omaha Bridge & Terminal R. Co., 118 Iowa 366, 377, 92 N. W. 47; State *v.* Manatt, 84 Iowa 621, 51 N. W. 73; Joslin *v.* Sones, 80 Iowa 534, 45 N. W. 917.

Kentucky. — Kentucky Citizens Bldg. & Loan Ass'n *v.* Lawrence, 20 Ky. L. Rep. 1700, 49 S. W. 1059; Broaddus *v.* Eubanks, 18 Ky. L. Rep. 742, 38 S. W. 134; Hood *v.* Mathers, 2 A. K. Marsh. 553.

Louisiana. — Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 35 So. 539; Bayley *v.* Denny, 26 La. Ann. 255; Larue *v.* Hampton, 4 La. Ann. 53.

Maine. — Haskell *v.* Tukesbury, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529; Stevens *v.* Gordon, 87 Me. 564, 33 Atl. 27; Pope *v.* Machias Water Power & Mill. Co., 52 Me. 535.

Maryland. — Castleman *v.* Du Val, 89 Md. 657, 43 Atl. 821; Stockham *v.* Stockham, 32 Md. 196, 207; Criss *v.* English, 26 Md. 553.

Massachusetts. — McManus *v.* Donohoe, 175 Mass. 308, 56 N. E. 291; Eastman *v.* Perkins, 111 Mass. 30.

Minnesota. — Bromberg *v.* Minnesota F. Ass'n, 45 Minn. 318, 47 N. W. 975; Tufts *v.* Hunter, 63 Minn. 464, 65 N. W. 922; Eastman *v.* St. Anthony Falls Water Power Co., 43 Minn. 60, 44 N. W. 882.

Mississippi. — Peacher *v.* Strauss, 47 Miss. 353; Dixon *v.* Cook, 47 Miss. 220; Whitworth *v.* Harris, 40 Miss. 483.

Missouri. — Edwards *v.* Smith, 63 Mo. 119; Welsh *v.* Edmisson, 46 Mo. App. 282.

Nebraska. — Woods *v.* Hart, 50 Neb. 497, 70 N. W. 53; Hanlon *v.*

given effect.[27] For this purpose evidence is held admissible of previous and contemporaneous transactions and of other facts dehors the writing.[28] And likewise evidence is admissible, of circumstances surrounding the execution of the instrument.[29]

Union Pac. R. Co., 40 Neb. 52, 58 N. W. 590; Ballou *v.* Sherwood, 32 Neb. 666, 49 N. W. 790.

New Hampshire. — Gill *v.* Ferrin, 71 N. H. 421, 52 Atl. 558; Locke *v.* Rowell, 47 N. H. 46.

New Jersey. — Crosson *v.* Carr, 70 N. J. L. 393, 57 Atl. 158; Axford *v.* Meeks, 59 N. J. L. 502, 36 Atl. 1036.

New York. — Petrie *v.* Hamilton College, 158 N. Y. 458, 53 N. E. 216, 8 App. Div. 371, 40 N. Y. Supp. 781; Tananbaum *v.* Levy, 83 App. Div. 319, 82 N. Y. Supp. 171; Ernst *v.* Rutherford & Boiling Springs Gas Co., 38 App. Div. 388, 56 N. Y. Supp. 403; Beemer *v.* Packard, 92 Hun 546, 38 N. Y. Supp. 1045; Mittler *v.* Herter, 39 Misc. 843, 81 N. Y. Supp. 494; Thomas *v.* Truscott, 53 Barb. 200, 206.

North Carolina. — Southern Finishing & Warehouse Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681; Harris *v.* Allen, 104 N. C. 86, 10 S. E. 127.

Ohio. — Hurd *v.* Robinson, 11 Ohio St. 232.

Oklahoma. — Ferguson *v.* Blackwell, 8 Okla. 489, 58 Pac. 647.

Oregon. — Reinstein *v.* Roberts, 34 Or. 87, 55 Pac. 90, 75 Am. St. Rep. 564; Hannah *v.* Shirley, 7 Or. 115.

Pennsylvania. — King *v.* New York & Cleveland Gas Coal Co., 204 Pa. St. 628, 54 Atl. 477; Hoffman *v.* Bloomsburg & S. R. Co., 157 Pa. St. 174, 27 Atl. 564; Duquesne Nat. Bank *v.* Williams, 155 Pa. St. 48, 25 Atl. 742; Merriman *v.* Bush, 116 Pa. St. 276, 9 Atl. 345; Harvey *v.* Vandegrift, 89 Pa. St. 346.

Rhode Island. — Lee *v.* Stone, 21 R. I. 123, 42 Atl. 717; Coombs *v.* Patterson, 19 R. I. 25, 27, 31 Atl. 428.

South Carolina. — Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680; Kennedy *v.* Gramling, 33 S. C. 367, 11 S. E. 1081, 26 Am. St. Rep. 676.

Tennessee. — Dorris *v.* King, 54 S. W. 683.

Texas. — Thompson *v.* Cobb, 95 Tex. 140, 65 S. W. 1090, 93 Am. St. Rep. 820; Ft. Worth Nat. Bank *v.* Red River Nat. Bank, 84 Tex. 369, 19 S. W. 517; Bassett *v.* Martin, 83 Tex. 339, 18 S. W. 587; Linnartz *v.* McCulloch (Tex. Civ. App.), 27 S. W. 279.

Utah. — Brown *v.* Markland, 16 Utah 360, 52 Pac. 597, 67 Am. St. Rep. 629.

Vermont. — Rugg *v.* Hale, 40 Vt. 138; Bradley *v.* Pike, 34 Vt. 215; Preston *v.* Robinson, 24 Vt. 583.

Virginia. — Peery *v.* Elliott, 101 Va. 709, 44 S. E. 919; New River Mineral Co. *v.* Painter, 100 Va. 507, 42 S. E. 300.

Washington. — Newman *v.* Buzard, 24 Wash. 225, 64 Pac. 139.

Wisconsin. — Excelsior Wrapper Co. *v.* Messinger, 116 Wis. 549, 553, 93 N. W. 459; Rib River Lumb. Co. *v.* Ogilvie, 113 Wis. 482, 89 N. W. 483; Boden *v.* Maker, 105 Wis. 539, 81 N. W. 661.

Where a Party Contracts To Pay "Obligations Owing" by another, parol evidence is admissible to explain what is covered by such expression. Beemer *v.* Packard, 92 Hun 546, 38 N. Y. Supp. 1045.

In the Case of an Insurance Policy, parol evidence is admissible, where the description of the property covered is ambiguous, to show what was covered thereby (Pfeifer *v.* National Live Stock Ins. Co., 62 Minn. 536, 64 N. W. 1018; Cummins *v.* Germania American Ins. Co., 197 Pa. St. 61, 46 Atl. 902; Connecticut F. Ins. Co. *v.* Hilbrant [Tex. Civ. App.], 73 S. W. 558); or to explain the extent of the interest intended to be insured (Graham *v.* Fire Ins. Co., 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707), where it does not contradict the policy (Franklin F. Ins. Co. *v.* Drake, 2 B. Mon. (Ky.) 47; Lancaster Mills *v.* Merchants Cotton-Press Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586). See article "Insurance," Vol. VII, p. 510, as to identifying subject-matter and interest covered.

27. Turner *v.* Gonzales, 3 Ind. Ter. 649, 64 S. W. 565.

28. Brawley *v.* United States, 96 U. S. 168.

29. United States *v.* Peck, 102 U. S. 64.

b. *What Essential to Admission of Evidence to Identify.* (1.) **General Rule.** — Though parol evidence is admissible to identify the subject-matter of a writing, yet the inquiry is confined to the meaning of the words used. The courts will not permit the introduction of such evidence where its effect would be not to apply the description given in the instrument, but to both supply a description and then to apply it.[30] The evidence will only be received where it tends solely to aid in the application of the description.[31] If the subject-matter is so certainly described and specified that it can be ascertained and rendered sufficiently definite by parol evidence of extrinsic facts — that is, identified as the subject-matter of the writing — then such evidence is admissible.[32] There must, however, be sufficient body in the description to have the writing in its application rest thereon and not essentially on parol testimony,[33] and where the language is expressed in such vague and indefinite terms that the identity of the subject-matter is wholly uncertain, it will be void for uncertainty,[34] and cannot be aided by parol evidence to show what was intended to be expressed.[35]

Statements of the parties contemporaneous with the execution of the writing are admissible for this purpose. Royal Ins. Co. *v.* Walrath, 17 Ohio C. C. 509.

30. Preston *v.* Preston, 95 U. S. 200; Ferguson *v.* Blackwell, 8 Okla. 489, 58 Pac. 647; Peart *v.* Brice, 152 Pa. St. 277, 25 Atl. 537; Ferguson *v.* Staver, 33 Pa. St. 411; Dougherty *v.* Chesnutt, 86 Tenn. 1, 5 S. W. 444.

31. Baldwin *v.* Boyce, 152 Ind. 46, 51 N. E. 334.

32. Ellis *v.* Martin, 60 Ala. 394; Stephens *v.* Tucker, 55 Ga. 543; Conkling *v.* Shelley, 28 N. Y. 360, 84 Am. Dec. 348; Dunning *v.* Stearns, 9 Barb. (N. Y.) 630; Wilkins *v.* Jones, 119 N. C. 95, 25 S. E. 789; Lohff *v.* Germer, 37 Tex. 578.

33. Kernan *v.* Baham, 45 La. Ann. 799, 13 So. 155.

34. *Alabama.* — Gaston *v.* Weir, 84 Ala. 193, 4 So. 258.

Arkansas. — Tatum *v.* Croom, 60 Ark. 487, 30 S. W. 885.

California. — Brandon *v.* Leddy, 67 Cal. 43, 7 Pac. 33.

Indiana. — Munger *v.* Green, 20 Ind. 38.

Iowa. — Augustine *v.* McDowell, 120 Iowa 401, 94 N. W. 918.

Maryland. — Huntt *v.* Gist, 2 Har. & J. 498.

Mississippi. — McGuire *v.* Stevens, 42 Miss. 724, 2 Am. Rep. 649.

Missouri. — Campbell *v.* Johnson, 44 Mo. 247.

North Carolina. — Robeson *v.* Lewis, 64 N. C. 734.

Texas. — Coker *v.* Roberts, 71 Tex. 597, 9 S. W. 665.

35. *Alabama.* — Gaston *v.* Weir, 84 Ala. 193, 4 So. 258.

Georgia. — Gatins *v.* Angier, 104 Ga. 386, 30 S. E. 876.

Idaho. — First Nat. Bank *v.* Sonnelitner, 6 Idaho 21, 51 Pac. 993.

Iowa. — Augustine *v.* McDowell, 120 Iowa 401, 94 N. W. 918.

Minnesota. — Ham *v.* Johnson, 51 Minn. 105, 52 N. W. 1080.

Missouri. — Johnson *v.* Fecht, 94 Mo. App. 605, 68 S. W. 615.

North Carolina. — Farthing *v.* Rochelle, 131 N. C. 563, 43 S. E. 1; Hemphill *v.* Annis, 119 N. C. 514, 26 S. E. 152; Lowe *v.* Harris, 112 N. C. 472, 17 S. E. 539; Fortesque *v.* Crawford, 105 N. C. 29, 10 S. E. 910; State *v.* Garris, 98 N. C. 733, 4 S. E. 633.

Texas. — Cammack *v.* Prather (Tex. Civ. App.), 74 S. W. 354; Pierson *v.* Sanger (Tex. Civ. App.), 51 S. W. 869.

Vermont. — Goodsell *v.* Rutland-Canadian R. Co., 75 Vt. 375, 56 Atl. 7.

Wisconsin. — Elofrson *v.* Lindsay, 90 Wis. 203, 63 N. W. 89.

(2.) Where Language Clear and Definite. — Where there is no ambiguiity in respect to the subject-matter of a writing, but its identity can be ascertained with certainty from the instrument itself, parol evidence affecting the nature, qualities or identity of the subject-matter is not admissible.[36]

(3.) Evidence Not Admissible To Vary or Alter Writing. — The principle controlling the admission of evidence in this class of cases is that it is for the purpose of aiding in the interpretation of the writing. Evidence will not be received under the guise that it tends to identify the subject-matter of the instrument, where it in fact operates to enlarge the subject-matter apparent from the terms of the writing,[37] or to show that certain matters which appear with reasonable certainty to be covered by the description were in fact not included therein,[38] or generally to contradict, vary or alter the terms of the writing by affixing a different description, or showing that the subject was other than is indicated therein,[39] or that the intention of the parties is other than is expressed in the language used.[40]

c. *To Apply Description.* — **(1.) In General.** — Where the description in a writing, of the subject-matter thereof, does not clearly indicate the same, parol evidence is admissible to apply the descrip-

36. *Alabama.* — Donehoo *v.* Johnson, 113 Ala. 126, 21 So. 70.
Delaware. — Tatman *v.* Barrett, 3 Houst. 226.
Georgia. — Oliver *v.* Brown, 102 Ga. 157, 29 S. E. 159.
Illinois. — Mead *v.* Peabody, 183 Ill. 126, 55 N. E. 719.
Iowa. — Van Husen *v.* Omaha Bridge & Terminal R. Co., 118 Iowa 366, 92 N. W. 47.
Maine. — Gatchell *v.* Morse, 81 Me. 205, 16 Atl. 662.
Massachusetts. — Miller *v.* Washburn, 117 Mass. 371.
North Carolina. — McKenzie *v.* Houston, 130 N. C. 566, 41 S. E. 780.
Pennsylvania. — Duffield *v.* Hue, 129 Pa. St. 94, 18 Atl. 566.
Rhode Island. — Segar *v.* Babcock, 18 R. I. 203, 26 Atl. 257.
South Carolina. — Frampton *v.* Wheat, 27 S. C. 288, 3 S. E. 462.
Texas. — Sloan *v.* King, 29 Tex. Civ. App. 599, 69 S. W. 541; Jamison *v.* New York & T. L. Co. (Tex. Civ. App.), 77 S. W. 969; Chew *v.* Zweib, 29 Tex. Civ. App. 311, 69 S. W. 207.

37. Hutton *v.* Arnett 51 Ill. 198; Mayer *v.* Keith, 55 Mo. App. 157; Coombs *v.* Patterson, 19 R. I. 25, 31 Atl. 428; Johnson *v.* Nasworthy (Tex. App.), 16 S. W. 758; Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

38. Lawrence *v.* Comstock, 124 Mich. 120, 82 N. W. 808; Thompson *v.* Smith, 96 Mich. 258, 55 N. W. 886; King *v.* New York & Cleveland Gas Coal Co., 204 Pa. St. 628, 54 Atl. 477.

39. *Alabama.* — Griffin *v.* Hall, 115 Ala. 482, 22 So. 162.
Iowa. — Judd *v.* Anderson, 51 Iowa 345, 1 N. W. 677.
Minnesota. — Beardsley *v.* Crane, 52 Minn. 537, 54 N. W. 740; Carmichael *v.* Foley, 1 How. 591.
Missouri. — New Hampshire Cattle Co. *v.* Bilby, 37 Mo. App. 43.
New Jersey. — Naughton *v.* Elliott, 59 Atl. 869.
New York. — Sanders *v.* Cooper, 115 N. Y. 279, 22 N. E. 212, 12 Am. St. Rep. 801, 5 L. R. A. 638; Gray *v.* Meyer, 88 App. Div. 359, 84 N. Y. Supp. 613.
Ohio. — Johnson *v.* Pierce, 16 Ohio St. 472.
Wisconsin. — Curtis *v.* Brown Co., 22 Wis. 167.

40. McAfferty *v.* Conover, 7 Ohio St. 99; Barton *v.* Morris, 15 Ohio 408.

tion to the subject-matter and thus identify it so as to give effect to the instrument in accordance with the intention of the parties,[41]

41. *Canada.* — Imrie *v.* Archibald, 25 Can. S. C. 368.

United States. — Noonan *v.* Lee, 2 Black 499.

Alabama. — Dorlan *v.* Westervitch, 140 Ala. 283, 37 So. 382, 103 Am. St. Rep. 35; Alabama Mut. F. Ins. Co. *v.* Minchener, 133 Ala. 632, 32 So. 225; Pearson *v.* Adams, 129 Ala. 157, 29 So. 977; Griffin *v.* Hall, 115 Ala. 482, 22 So. 162; Robinson *v.* Allison, 109 Ala. 837, 19 So. 409; O'Neal *v.* Seixas, 85 Ala. 80, 4 So. 745.

Arkansas. — Dorr *v.* School Dist. No. 26, 40 Ark. 237; Swayne *v.* Vance, 28 Ark. 282.

California. — Vejar *v.* Mound City Land & Water Ass'n, 97 Cal. 659, 32 Pac. 713; Cleveland *v.* Choate, 77 Cal. 73, 18 Pac. 875.

Colorado. — Kretschmer *v.* Hard, 18 Colo. 223, 32 Pac. 418; Blair *v.* Bruns, 8 Colo. 397, 8 Pac. 569.

Connecticut. — Watson *v.* New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345.

District of Columbia. — Okie *v.* Person, 23 App. D. C. 170.

Georgia. — Georgia & A. R. *v.* Shiver, 121 Ga. 708, 49 S. E. 700; Tumlin *v.* Perry, 108 Ga. 520, 34 S. E. 171; Chauncy *v.* Brown, 99 Ga. 766, 26 S. E. 763; Gress Lumb. Co. *v.* Coody, 94 Ga. 519, 21 S. E. 217; Stephens *v.* Tucker, 55 Ga. 543; Summerlin *v.* Hesterly, 20 Ga. 689, 65 Am. Dec. 639.

Illinois. — Evans *v.* Gerry, 174 Ill. 595, 51 N. E. 615; Marske *v.* Willard, 169 Ill. 276, 48 N. E. 290; Halliday *v.* Hess, 147 Ill. 588, 35 N. E. 380; Chicago Dock & C. Co. *v.* Kinzie, 93 Ill. 415.

Indiana. — Baldwin *v.* Boyce, 152 Ind. 46, 51 N. E. 334; Roehl *v.* Haumesser, 114 Ind. 311, 15 N. E. 345; Scheible *v.* Slagle, 89 Ind. 323; Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683.

Indian Territory. — Turner *v.* Gonzales, 3 Ind. Ter. 649, 64 S. W. 565.

Iowa. — Colean Imp. Co. *v.* Strong, 126 Iowa 598, 102 N. W. 506; Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247; Haller *v.* Parrott, 82 Iowa 42, 47 N. W. 996; Judd *v.* Anderson, 51 Iowa 345, 1 N. W. 677.

Kansas. — Powers *v.* Scharling, 64 Kan. 339, 67 Pac. 820.

Louisiana. — Murphy *v.* Robinson, 50 La. Ann. 213, 23 So. 323; Kernan *v.* Baham, 45 La. Ann. 799, 13 So. 155; Dickson *v.* Dickson, 36 La. Ann. 870; Moore *v.* Hampton, 3 La. Ann. 192.

Maine. — Eveleth *v.* Wilson, 15 Me. 109.

Massachusetts. — Bigelow *v.* Capen, 145 Mass. 270, 13 N. E. 896; Stone *v.* Clark, 1 Metc. 378, 35 Am. Dec. 370; Sparhawk *v.* Bullard, 1 Metc. 95.

Mississippi. — Reber *v.* Dowling, 65 Miss. 259, 3 So. 654.

Missouri. — Hammond *v.* Johnston, 93 Mo. 198, 6 S. W. 83; Charles *v.* Patch, 87 Mo. 450; Elliott *v.* Abell, 39 Mo. App. 346.

Montana. — Holter Lumb. Co. *v.* Fireman's Fund Ins. Co., 18 Mont. 282, 45 Pac. 207; Taylor *v.* Holter, 1 Mont. 688; Donnell *v.* Humphreys, 1 Mont. 518.

Nebraska. — Abbott *v.* Coates, 62 Neb. 247, 86 N. W. 1058.

New Hampshire. — Bell *v.* Woodward, 46 N. H. 315.

New Jersey. — Morris & E. R. Co. *v.* Bonnell, 34 N. J. L. 474.

New Mexico. — Armijo *v.* New Mexico Town Co., 3 N. M. 427, 5 Pac. 709.

New York. — Orois *v.* Elmira, C. & N. R. Co., 17 App. Div. 187, 45 N. Y. Supp. 367, *affirmed* 172 N. Y. 656, 65 N. E. 1120; Myers *v.* Sea Beach R. Co., 43 App. Div. 573, 60 N. Y. Supp. 284, *affirmed* 165 N. Y. 581, 60 N. E. 1117; Case *v.* Dexter, 106 N. Y. 548, 13 N. E. 449; Miller *v.* Tuck, 95 App. Div. 134, 88 N. Y. Supp. 495; Clark *v.* Wethey, 19 Wend. 320.

North Carolina. — Ward *v.* Gay, 137 N. C. 397, 49 S. E. 884; Stancill *v.* Spain, 133 N. C. 76, 45 S. E. 466; Carpenter *v.* Medford, 99 N. C. 495, 6 S. E. 785, 6 Am. St. Rep. 535; Harrison *v.* Hahn, 95 N. C. 28; Dunkart *v.* Rineheart, 89 N. C. 354.

Oklahoma. — Halsell *v.* Renfrow, 14 Okla. 674, 78 Pac. 118; Powers *v.* Rude, 14 Okla. 381, 79 Pac. 89.

Oregon. — Harrisburg Lumb. Co. *v.* Washburn, 29 Or. 150, 44 Pac. 390.

as where there is a latent ambiguity,[42] or where the description is couched in general terms,[43] or is defective and indefinite,[44] or is in part erroneous,[45] in which case the erroneous part is rejected in accordance with the maxim *falsa demonstratio non nocet.*[46] And for this purpose evidence is admissible of the construction put upon such description by the parties themselves as shown by their acts and conduct under the instrument,[47] or of the understanding of

Pennsylvania. — Peart *v.* Brice, 152 Pa. St. 277, 25 Atl. 537; Palmer *v.* Farrell, 129 Pa. St. 162, 18 Atl. 761, 15 Am. St. Rep. 708; Boice *v.* Zimmerman, 3 Super. Ct. 181; Carroll *v.* Miner, 1 Super. Ct. 439.

South Carolina. — Welborn *v.* Dixon, 70 S. C. 108, 49 S. E. 232; Jones *v.* Quattlebaum, 31 S. C. 606, 9 S. E. 982.

Tennessee. — Turner *v.* Jackson, 63 S. W. 511; Dougherty *v.* Chesnutt, 86 Tenn. 1, 5 S. W. 444; Cannon *v.* Trail, 1 Head 282.

Texas. — Busby *v.* Bush, 79 Tex. 656, 15 S. W. 638; Watson *v.* Baker, 71 Tex. 739, 9 S. W. 867; Reece *v.* Renfro, 68 Tex. 192, 4 S. W. 545; Lohff *v.* Germer, 37 Tex. 578; James *v.* Koy (Tex. Civ. App.), 59 S. W. 295; Minor *v.* Lumpkin (Tex. Civ. App.), 29 S. W. 799.

Vermont. — Coffrin *v.* Cole, 67 Vt. 226, 31 Atl. 313; Gray *v.* Clark, 11 Vt. 583.

Virginia. — Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

Washington. — Newman *v.* Buzard, 24 Wash. 225, 64 Pac. 139; McLennan *v.* Grant, 8 Wash. 603, 36 Pac. 682.

West Virginia. — Snooks *v.* Wingfield, 52 W. Va. 441, 44 S. E. 277.

Wisconsin. — Mendota Club *v.* Anderson, 101 Wis. 479, 78 N. W. 185; Keller *v.* Keller, 80 Wis. 318, 50 N. W. 173; Lynch *v.* Henry, 75 Wis. 631, 44 N. W. 837; Stout *v.* Weaver, 72 Wis. 148, 39 N. W. 375.

"It is a fundamental principle of the law of real property that parol evidence is admissible for the purpose of showing that a description used in a conveyance, as commonly understood in the vicinity, clearly designates the property." Sullivan *v.* Collins, 20 Colo. 528, 39 Pac. 334, *per* Hayt, C. J.

42. *Alabama.* — Robinson *v.* Allison, 109 Ala. 409, 19 So. 837.

District of Columbia. — Okie *v.* Person, 23 App. D. C. 170.

Georgia. — Tumlin *v.* Perry, 108 Ga. 520, 34 S. E. 171.

Indiana. — Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683.

New York. — Myers *v.* Sea Beach R. Co., 43 App. Div. 573, 60 N. Y. Supp. 284, *affirmed* 167 N. Y. 581, 60 N. E. 1117.

South Carolina. — Jones *v.* Quattlebaum, 31 S. C. 606, 9 S. E. 982.

Texas. — Busby *v.* Bush, 79 Tex. 656, 15 S. W. 638. See article "Ambiguity," Vol. I.

43. Scheible *v.* Slagle, 89 Ind. 323; Tucker *v.* Field, 51 Miss. 191; Abbott *v.* Coates, 62 Neb. 247, 86 N. W. 1058; Orois *v.* Elmira C. & N. R. Co., 17 App. Div. 187, 45 N. Y. Supp. 367, *affirmed* 172 N. Y. 656, 65 N. E. 1120; Cox *v.* Rust (Tex. Civ. App.), 29 S. W. 807; Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

44. Cottingham *v.* Hill, 119 Ala. 353, 24 So. 552, 72 Am. St. Rep. 923; Griffin *v.* Hall, 115 Ala. 647, 22 So. 156; Cavanaugh *v.* Casselman, 88 Cal. 543, 26 Pac. 515; Marske *v.* Willard, 169 Ill. 276, 48 N. E. 290, *affirming* 68 Ill. App. 83; Roehl *v.* Haumesser, 114 Ind. 311, 15 N. E. 345; Murphy *v.* Robinson, 50 La. Ann. 213, 23 So. 323; Keller *v.* Keller, 80 Wis. 318, 50 N. W. 173.

45. Dickson *v.* Dickson, 36 La. Ann. 870; Bigelow *v.* Capen, 145 Mass. 270, 13 N. E. 896; Pierce *v.* Parker, 4 Metc. (Mass.) 80; Conlin *v.* Masecar, 80 Mich. 139, 45 N. W. 67; Adamson *v.* Petersen, 35 Minn. 529, 29 N. W. 321; Dodge *v.* Potter, 18 Barb. (N. Y.) 193.

46. Hunt *v.* Shackleford, 56 Miss. 397; Goff *v.* Pope, 83 N. C. 123. See article "Ambiguity," Vol. I, p. 847.

47. Vejar *v.* Mound City Land & Water Ass'n, 97 Cal. 659, 32 Pac. 713; Stone *v.* Clark, 1 Metc. (Mass.) 378, 35 Am. Dec. 370; Clark *v.* Wethey, 19 Wend. (N. Y.) 320;

the parties,[48] of their intention,[49] of statements or declarations by them,[50] and of extrinsic facts and circumstances.[51]

(2.) To Apply Descriptions in Separate Writings to Same Subject-Matter. Where a subject-matter is described by different modes in different writings, parol evidence is admissible to show that such descriptions apply to the same subject-matter.[52]

d. *To Identify Boundaries.* — Where a writing in respect to land describes it by metes and bounds and the identity of the land is not made certain by such description, parol evidence is admissible of the situation and locality of the premises and of their identity according to the description which is given; or in other words, to apply the description to the land in question,[53] but not to alter or vary the boundary stated or to substitute another and different boundary,[54] though it is decided that if the instrument describes the land merely by courses and distances without any other description thereof, parol evidence is admissible to identify the land, though it operate to contradict or vary the courses and distances given.[55]

Wills *v.* Leverich, 20 Or. 168, 25 Pac. 398; Meade *v.* Gilfoyle, 64 Wis. 18, 24 N. W. 413.

48. Adamson *v.* Petersen, 35 Minn. 529, 29 N. W. 321.

49. Hunt *v.* Shackleford, 56 Miss. 397.

50. Okie *v.* Person, 23 App. D. C. 170.

51. Bigelow *v.* Capen, 145 Mass. 270, 13 N. E. 896.

52. Stewart *v.* Chadwick, 8 Iowa 463; Wood *v.* Le Baron, 8 Cush. (Mass.) 471; Jackson *v.* Jackson, 35 N. C. 159.

53. *Canada.* — Scotten *v.* Barthel, 21 Ont. App. 569.

United States. — Atkinson *v.* Cummins, 9 How. 479.

Alabama. — Guilmartin *v.* Wood, 76 Ala. 204; Saltonstall *v.* Riley, 28 Ala. 164.

California. — Ferris *v.* Coover, 10 Cal. 589.

Georgia. — Towner *v.* Thompson, 82 Ga. 740, 9 S. E. 672; Mohr *v.* Dillon, 80 Ga. 572, 5 S. E. 770.

Illinois. — Grubbs *v.* Boon, 201 Ill. 98, 66 N. E. 390; Sheets *v.* Sweeney, 136 Ill. 336, 26 N. E. 648; Kamphouse *v.* Gaffner, 73 Ill. 453.

Kentucky. — Shelby *v.* Lewis, 12 Ky. L. Rep. 428, 14 S. W. 501.

Louisiana. — Purl *v.* Miles, 9 La. Ann. 270.

Massachusetts. — Durr *v.* Chase, 161 Mass. 40, 36 N. E. 741; Reynolds *v.* Boston Rubber Co., 160 Mass. 240, 35 N. E. 677.

Mississippi. — Spears *v.* Burton, 31 Miss. 547.

Missouri. — Diggs *v.* Kurtz, 132 Mo. 250, 33 S. W. 815, 53 Am. St. Rep. 488.

Nebraska. — Hanlon *v.* Union Pac. R. Co., 40 Neb. 52, 58 N. W. 590.

New Hampshire. — Bartlett *v.* La Rochelle, 68 N. H. 211, 44 Atl. 302; Peaslee *v.* Gee, 19 N. H. 273.

New York. — Pettit *v.* Shepard, 32 N. Y. 97.

North Carolina. — Hopper *v.* Justice, 111 N. C. 418, 16 S. E. 626; Davidson *v.* Arledge, 97 N. C. 172, 2 S. E. 378; Huffman *v.* Walker, 83 N. C. 411.

Oregon. — Kanne *v.* Otty, 25 Or. 531, 36 Pac. 537.

Pennsylvania. — Brown *v.* Willey, 42 Pa. St. 205.

Texas. — Lohff *v.* Germer, 37 Tex. 578; State *v.* Hoff (Tex. Civ. App.), 29 S. W. 672; Minor *v.* Kirkland (Tex. Civ. App.), 20 S. W. 932.

Vermont. — Rugg *v.* Ward, 64 Vt. 402, 23 Atl. 726; Wead *v.* St. Johnsbury & L. C. R. Co., 64 Vt. 52, 24 Atl. 361.

54. Guilmartin *v.* Wood, 76 Ala. 204; Olson *v.* Keith, 162 Mass. 485, 39 N. E. 410; Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154; Fuller *v.* Weaver, 175 Pa. St. 182, 34 Atl. 634.

55. McNeil *v.* Dixon, 1 A. K. Marsh. (Ky.) 365, 10 Am. Dec. 740; Francis *v.* Hazlerig, 1 A. K. Marsh. (Ky.) 93, Opdyke *v.* Stephens, 28 N. J. L. 83, 89; Graybeal *v.* Powers,

And for this purpose evidence is admissible of the actual occupation and use of the premises referred to as showing the practical construction of the instrument by the parties,[56] and also the occupation by adjoining owners,[57] or to show that at the time of executing the instrument the parties agreed upon some monument whereby to ascertain the line as the boundary intended.[58] And in this connection it has also been declared that the location of a boundary may be proved by any kind of evidence which is competent to prove any fact.[59]

e. *To Identify Monuments and Calls.* — In locating the monuments, objects and calls of a writing in respect to real property, the court is not confined to the instrument itself, but parol evidence is admissible to establish and identify the same and thus locate the land which is the subject of the writing.[60] So where there are two monuments, either of which may be the one designated, the identity of the one referred to may be so ascertained.[61] And for this purpose evidence is admissible of the declarations of the parties,[62] of the construction put upon the instrument by them as evidenced by their acts and conduct thereunder,[63] and that a certain monument was pointed out by one of the parties, and that the writing was

76 N. C. 66; Baker *v.* Seekright, 1 Hen. & M. (Va.) 177.

56. Graves *v.* Broughton, 185 Mass. 174, 69 N. E. 1083; O'Connell *v.* Cox, 179 Mass 250, 60 N. E. 580; Stewart *v.* Patrick, 68 N. Y. 450; Davidson *v.* Arledge, 97 N. C. 172, 2 S. E. 378; Wills *v.* Leverich, 20 Or. 168, 25 Pac. 398.

57. Reynolds *v.* Boston Rubber Co., 160 Mass. 240, 35 N. E. 677.

58. Horner *v.* Stillwell, 35 N. J. L. 307. See McCaleb *v.* Pradat, 25 Miss. 257.

59. Opdyke *v.* Stephens, 28 N. J. L. 83, 89; Raymond *v.* Coffey, 5 Or. 132, 134.

60. *United States.* — Blake *v.* Doherty, 5 Wheat. 359.

California. — Stinchfield *v.* Gillis, 107 Cal. 84, 40 Pac. 98; Anderson *v.* Richardson, 92 Cal. 623, 28 Pac. 679; Thompson *v.* Southern California M. R. Co., 82 Cal. 497, 23 Pac. 130; Spreckels *v.* Ord, 72 Cal. 86, 13 Pac. 158; Reamer *v.* Nesmith, 34 Cal. 624.

Illinois. — Stevens *v.* Wait, 112 Ill. 544; Colcord *v.* Alexander, 67 Ill. 581; Williams *v.* Warren, 21 Ill. 541.

Indiana. — Caspar *v.* Jamison, 120 Ind. 58, 21 N. E. 743.

Kentucky. — Hall *v.* Conlee, 23 Ky. L. Rep. 177, 62 S. W. 899; Whalen *v.* Nesbit, 16 Ky. L. Rep. 52, 26 S. W. 188.

Maine. — Robinson *v.* White, 42 Me. 209; Wing *v.* Burgis, 13 Me. 111.

Massachusetts. — O'Connell *v.* Cox, 179 Mass. 250, 60 N. E. 580.

Minnesota. — Borer *v.* Lange, 44 Minn. 281, 46 N. W. 358.

Montana. — Metcalf *v.* Prescott, 10 Mont. 283, 25 Pac. 1037.

New Mexico. — Seidler *v.* Maxfield, 5 N. M. 197, 20 Pac. 794; Seidler *v.* La Fave, 5 N. M. 44, 20 Pac. 789.

North Carolina. — Echerd *v.* Johnson, 126 N. C. 409, 35 S. E. 1036; Davidson *v.* Shuler, 119 N. C. 582, 26 S. E. 340; Hartsell *v.* Coleman, 116 N. C. 670, 21 S. E. 392.

Oregon — Boehreinger *v.* Creighton, 10 Or. 42; Raymond *v.* Coffey, 5 Or. 132.

Texas. — Williamson *v.* Simpson, 16 Tex. 433; Sloan *v.* King, 33 Tex. Civ. App. 537, 77 S. W. 48; Minor *v.* Kirkland (Tex. Civ. App.), 20 S. W. 932.

West Virginia. — Warren *v.* Syme, 7 W. Va. 474.

61. Clough *v.* Bowman, 15 N. H. 504.

62. McAfferty *v.* Conover, 7 Ohio St. 99.

63. Jackson *v.* Perrine, 35 N. J. L. 137.

executed with reference thereto.[64] But if the instrument is clear and definite in its description and the monument referred to can be ascertained with certainty from the writing itself, parol evidence is not admissible to show an intention other than that which may be gathered therefrom.[65]

f. *To Identify That Which Is Excepted.* — In the case of an exception or reservation, parol evidence is admissible to identify the subject-matter thereof where its identity is not sufficiently disclosed by the instrument itself,[66] for which purpose evidence of declarations and acts of the parties is admissible.[67]

Q. As to Parties. — a. *To Identify Person.* — **(1.) In General.** Where the identity of a party to an instrument is in doubt, parol evidence is admissible to identify such person,[68] provided it does

64. Robinson *v.* Douthit, 64 Tex. 101.

65. Singer *v.* New York, 47 App. Div. 42, 62 N. Y. Supp. 347, *affirmed* 165 N. Y. 658, 59 N. E. 1130. See Smith *v.* Trustees of Brookhaven, 89 App. Div. 475, 86 N. Y. Supp. 34.

66. *Alabama.* — Moody *v.* Alabama G. S. R. Co., 124 Ala. 195, 26 So. 952.

Colorado. — Pipe *v.* Smith, 4 Colo. 444.

Indiana. — Lanman *v.* Crooker, 97 Ind. 163, 49 Am. Rep. 437.

New Hampshire. — Gardner *v.* Webster, 64 N. H. 520, 15 Atl. 144.

New York. — Harris *v.* Oakley, 130 N. Y. 1, 28 N. E. 530.

Utah. — Buford *v.* Lonergan, 6 Utah 301, 22 Pac. 164.

Wisconsin. — Lego *v.* Medley, 79 Wis. 211, 48 N. W. 375, 24 Am. St. Rep. 706.

67. Harris *v.* Oakley, 130 N. Y. 1, 28 N. E. 530.

68. *England.* — Grant *v.* Grant, 22 L. T. Rep. N. S. 829; Price *v.* Page, 4 Ves. Jr. 679; Shore *v.* Attorney General, 9 Cl. & F. 355, 8 Eng. Rep. 450.

California. — Berniaud *v.* Beecher, 71 Cal. 38, 11 Pac. 802.

Florida. — Harrell *v.* Durrance, 9 Fla. 490, 503.

Illinois. — Hogan *v.* Wallace, 166 Ill. 328, 46 N. E. 1136.

Louisiana. — Shreveport Rod & Gun Club *v.* Caddo Levee Dist. Com'rs, 48 La. Ann. 1081, 20 So. 293.

Maine. — Haskell *v.* Tukesbury, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529.

Mississippi. — Whitworth *v.* Harris, 40 Miss. 483.

Nebraska. — Harlan County *v.* Whitney, 65 Neb. 105, 90 N. W. 993, 101 Am. St. Rep. 610.

New Hampshire. — Smith *v.* Kimball, 62 N. H. 606.

New York. — Woodsey *v.* Morris, 96 N. Y. 311.

South Dakota. — First Nat. Bank *v.* North, 2 S. D. 480, 51 N. W. 96.

Tennessee. — Holmes *v.* Moon, 7 Heisk. 506.

Texas. — Dodd *v.* Templeman, 76 Tex. 57, 13 S. W. 187; Leach *v.* Dodson, 64 Tex. 185; French *v.* Koenig, 8 Tex. Civ. App. 341, 27 S. W. 1079.

Vermont. — Alexander *v.* Wilmorth, 2 Aik. 413.

West Virginia. — Marmet Co. *v.* Archibald, 37 W. Va. 778, 17 S. E. 299.

See article "Ambiguity," Vol. I, p. 850, as to identifying parties generally. See article "Ambiguity," Vol. I, p. 853, as to identifying devisee or legatee.

"To ascertain who are the parties, resort must doubtless be had in the first instance, to the written instrument. If this fail to designate them or either of them, resort must be had to extrinsic evidence to supply the want. If the contract is ambiguous, and the ambiguity is latent, that is, if it results from viewing the instrument in the light of the collateral facts, or what may be called the necessary extrinsic evidence, that ambiguity is to be removed by other evidence from the same source, ac-

not tend to contradict or vary the terms thereof,[69] and provided also that there is a sufficient description therein to identify the person by the aid of such evidence.[70]

(2.) Where Error in Name. — The fact that a person is not designated by his correct name in a writing will not vitiate the instrument, but parol evidence is admissible to show that it was the result of some unintentional act, omission or error, and to identify the person intended by the writing,[71] though in some cases it is held

cording to the familiar maxim of Lord Bacon, *nam quod ex facto oritur ambiguum, verificatione facti tollitur.*" Herring *v.* Boston Iron Co., 1 Gray (Mass.) 134, 138, *per* Thomas J.

"Inquiry to identify the persons and things to satisfy the description contained in a written instrument, even when appearing on its face to be perfectly intelligible, is always in order." Skinker *v.* Haagsma, 99 Mo. 208, 212, 12 S. W. 659, *per* Brace, J.

Where Work Is To Be Performed for a Person Designated "and Others," parol evidence is admissible to show who are the others referred to. Herring *v.* Boston Iron Co., 1 Gray (Mass.) 138.

Where a Widow Made a Settlement in respect to her interest in the estate of her husband in consideration of a sum of money in addition to the benefits of the will, but the agreement did not give the names of the parties thereto, it was held that it was competent to supply such omissions by parol, as the writing did not purport to contain the whole agreement. Baldwin *v.* Hill, 97 Iowa 586, 66 N. W. 889.

Where Money Was Deposited in Bank "in trust for Sarah," parol evidence was held admissible to show who was the beneficiary. Bartlett *v.* Remington, 59 N. H. 364.

Question of Identity Is One of Fact for the Jury. — Chandler *v.* Shehan, 7 Ala. 251; Greene *v.* Barnwell, 11 Ga. 282.

69. Miller *v.* Way, 5 S. D. 468, 59 N. W. 467.

70. Jacobs *v.* Benson, 39 Me. 132, 63 Am. Dec. 609.

71. *Arkansas.* — Wolff *v.* Elliott, 68 Ark. 326, 57 S. W. 1111; Lafferty *v.* Lafferty, 10 Ark. 268.

Connecticut. — Bristol *v.* Ontario Orphan Asylum, 60 Conn. 472, 22 Atl. 848.

Georgia. — Hicks *v.* Ivey, 99 Ga. 648, 26 S. E. 68; Ansley *v.* Green, 82 Ga. 181, 7 S. E. 921; Thompson *v.* Hall, 67 Ga. 627.

Illinois. — Missionary Soc. of M. E. Church *v.* Cadwell, 69 Ill. App. 280.

Indiana. — Louisville N. A. & C. R. Co. *v.* Power, 119 Ind. 269, 21 N. E. 751; Skinner *v.* Harrison Twp., 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137; Rudicel *v.* State, 111 Ind. 595, 13 N. E. 114.

Iowa. — Covert *v.* Sebern, 73 Iowa 564, 35 N. W. 636.

Louisiana. — Robert *v.* Boulat, 9 La. Ann. 29.

Maine. — Andrews *v.* Dyer, 81 Me. 104, 16 Atl. 405; Jacobs *v.* Benson, 39 Me. 132, 63 Am. Dec. 609.

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. — Langlois *v.* Crawford, 59 Mo. 456.

New York. — McArthur *v.* Soule, 5 Hun 63; Jackson *v.* Stanley, 10 Johns. 133, 6 Am. Dec. 319.

North Carolina. — Simmons *v.* Allison, 118 N. C. 763, 24 S. E. 716.

South Dakota. — Salmer *v.* Lathrop, 10 S. D. 216, 72 N. W. 570.

Texas. — Stokes *v.* Riley, 29 Tex. Civ. App. 373, 68 S. W. 703.

Virginia. — Wadsworth *v.* Allen, 8 Gratt. 174, 56 Am. Dec. 137.

West Virginia. — Ambach *v.* Armstrong, 29 W. Va. 744, 3 S. E. 44.

Wisconsin. — Cleveland *v.* Burnham, 64 Wis. 347, 25 N. W. 407.

See article "AMBIGUITY," Vol. I, p. 850.

The uncertainty in such case does not appear on the face of the writ-

that such evidence is admissible only in a proceeding in equity, where the instrument may be reformed.[72]

(3.) To Supply Christian Name. — Where the Christian name of a party to an instrument is not stated therein, parol evidence is admissible to supply such name and thus identify the person referred to.[73]

(4.) To Show Actual Relation of Parties. — In order to enable the court to put itself in the position of the parties to a writing, and to give effect to it in accordance with their intention, parol evidence is frequently admissible, in an action between them, to show their actual relation to each other.[74] Such evidence is not, however, admissible, in the absence of notice or knowledge, to the prejudice of one who is not a party to the writing where he has acquired rights thereunder.[75]

(5.) To Show Real Party in Interest. — Though a person is not designated in an instrument as one of the parties, or his connection therewith does not appear from its terms, he may nevertheless be

ing, but is caused by extrinsic evidence, and is susceptible of explanation or removal by the same kind of evidence. Staak *v.* Sigelkow, 12 Wis. 234.

Different Names in Different Instruments may be shown to relate to the same person. Ferrell *v.* Hurst, 68 Ga. 132; State *v.* Wootton, 4 Har. & J. (Md.) 21.

A Misnomer in Naturalization Papers May Be Shown. — Behrewsmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Beardstown *v.* Virginia, 81 Ill. 541.

A Misnomer of a Corporation will not vitiate a writing executed by it, if in fact the act be a corporate one, and it can always be corrected or explained by proper averments. Brockway *v.* Allen, 17 Wend. (N. Y.) 40.

Where by statute one "duly enlisted and mustered" into service during the civil war as part of the quota from any city or town acquired a settlement in such city or town, one enlisted by a false name may show his identity by parol evidence. Milford *v.* Uxbridge, 130 Mass. 107.

72. Flournoy *v.* Mims, 17 Ala. 36; Gayle *v.* Hudson, 10 Ala. 116; Whitmore *v.* Learned, 70 Me. 276; Crawford *v.* Spencer, 8 Cush. (Mass.) 418; Coleman *v.* Crumpler, 13 N. C. 508.

73. La Vie *v.* Tooze, 43 Or. 590, 74 Pac. 210; Holmes *v.* Jarrett, 7 Heisk. (Tenn.) 506; Leach *v.* Dodson, 64 Tex. 185; Price *v.* Page, 4 Ves. Jr. (Eng.) 679.

74. *United States.* — Davidson *v.* Baldwin, 79 Fed. 95, 24 C. C. A. 453, 47 U. S. App. 589.

New York. — Goodrich *v.* Stevens, 5 Lans. 230; Carraher *v.* Mulligan, 28 N. Y. St. 439, 8 N. Y. Supp. 42.

North Carolina. — Forbes *v.* Sheppard, 98 N. C. 111, 3 S. E. 817; Williams *v.* Glenn, 92 N. C. 253, 53 Am. Rep. 416.

Ohio. — Monnett *v.* Monnett, 46 Ohio St. 30, 17 N. E. 659.

Oregon. — Thompson *v.* Coffman, 15 Or. 631, 16 Pac. 713.

Virginia. — Williams *v.* Macatee, 86 Va. 681, 10 S. E. 1061.

Wisconsin. — Wrigglesworth *v.* Wrigglesworth, 45 Wis. 255; Lyman *v.* Babcock, 40 Wis. 503.

See article "Bills and Notes," Vol. II, p. 464, as to evidence showing relations of parties to negotiable paper.

Where a Contract in Writing Appears To Be a Joint Obligation of all the signers, parol evidence is not admissible to show that it was in fact signed by some as parties of the first part contracting with the others as parties of the second part. Myrick *v.* Dame, 9 Cush. (Mass.) 248.

75. Durkee *v.* Jones, 27 Colo. 159, 60 Pac. 618; Ragsdale *v.* Ragsdale,

connected with the writing as, or shown to be, the real party in interest, by parol evidence,[76] unless the contract be one required by the statute of frauds to be in writing.[77]

b. *To Show Capacity in Which Person Acts.* — (1.) **Whether Individual or Corporate Act.** — Where it is doubtful from the terms of a writing whether the act is that of the individual whose name is affixed thereto or that of the corporation which he has authority to represent, and an interpretation consistent with either view may be given, parol evidence is admissible to show whether it is an individual or corporate act.[78] Where, however, there is nothing in

105 La. 405, 29 So. 906; Campbell *v.* Lowe, 9 Md. 500, 66 Am. Dec. 339; Alderson *v.* Ames, 6 Md. 52; Hannum *v.* Kingsley, 107 Mass. 355; Cooke *v.* Bremond, 27 Tex. 457, 86 Am. Dec. 626; McClanachan *v.* Siter, 2 Gratt. (Va.) 280.

76. *Alabama.* — May *v.* Hewitt, 33 Ala. 161; Lindsay *v.* Hoke, 21 Ala. 542.

California. — Curran *v.* Holland, 141 Cal. 437, 75 Pac. 46.

Colorado. — Johnson *v.* Calnan, 19 Colo. 168, 34 Pac. 905, 41 Am. St. Rep. 224.

Connecticut. — Lewis *v.* Healy, 73 Conn. 744, 48 Atl. 212.

Illinois. — Adams Express Co. *v.* Boskowitz, 107 Ill. 660; Rose *v.* Ruyle, 46 Ill. App. 17.

Iowa. — Baldwin *v.* Hill, 97 Iowa 586, 66 N. W. 889; Stevenson *v.* Polk, 71 Iowa 278, 32 N. W. 340.

Maryland. — Morrison *v.* Baechtold, 93 Md. 319, 48 Atl. 926; Rice *v.* Forsyth, 41 Md. 389, 402.

Missouri. — Brolaski *v.* Aal, 55 Mo. App. 196.

New York. — Woodhouse *v.* Duncan, 106 N. Y. 527, 13 N. E. 334; Ropes *v.* Arnold, 81 Hun 476, 30 N. Y. Supp. 997.

Texas. — Moore *v.* Williams, 26 Tex. Civ. App. 142, 62 S. W. 977.

Utah. — Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253.

Virginia. — Wadsworth *v.* Allen, 8 Gratt. 174, 56 Am. Dec. 137.

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

In the Case of an Insurance Policy the one for whose benefit it was made may be shown by parol evidence. Lancey *v.* Phoenix Fire Ins. Co., 56 Me. 562, 565. See article "Insurance," Vol. VII, p. 510, as to identifying person assured or beneficiary.

77. Where a Contract Must, Under the Statute of Frauds, Be in Writing, it should contain the full terms of the agreement, including the name of the parties, and parol evidence is not admissible to connect a person with such contract where there is no connection without such evidence. Schenck *v.* Spring Lake Beach Imp. Co., 47 N. J. Eq. 44, 19 Atl. 881; Ward *v.* Hasbrouck, 169 N. Y. 407, 62 N. E. 434. See North *v.* Mendel, 73 Ga. 400, 54 Am. Rep. 879.

78. *Colorado.* — Lewis *v.* Mutual L. Ins. Co., 8 Colo. App. 368, 46 Pac. 621.

Illinois. — Scanlan *v.* Keith, 102 Ill. 634, 40 Am. Rep. 624; Hypes *v.* Griffin, 89 Ill. 134, 31 Am. Rep. 71; Miers *v.* Coates, 57 Ill. App. 216.

Indiana. — Swarts *v.* Cohen, 11 Ind. App. 20, 38 N. E. 536.

Kansas. — Kline *v.* Bank of Tescott, 50 Kan. 91, 31 Pac. 688, 34 Am. St. Rep. 107.

Maryland. — Haile *v.* Peirce, 32 Md. 327, 3 Am. Rep. 139.

Michigan. — Armstrong *v.* Andrews, 109 Mich 537, 67 N. W. 567.

Minnesota. — Kraniger *v.* People's Bldg. Soc., 60 Minn. 94, 61 N. W. 904.

Mississippi. — Richardson *v.* Foster, 73 Miss. 12, 18 So. 573, 55 Am. St. Rep. 483.

Missouri. — Marks *v.* Turner, 54 Mo. App. 650.

New Jersey. — Simanton *v.* Vliet, 61 N. J. L. 595, 40 Atl. 595.

New York. — Becker *v.* Lamont, 13 How. Pr. 23.

North Carolina. — Rumbough *v.*

an instrument to imply an undertaking on behalf of a corporation, and its legal effect is to bind the person signing it individually, parol evidence is not admissible to show that he acted with the intention of binding the corporation of which he was an officer.[79]

(2.) Effect of Words of Description. — Where a word such as agent, cashier, treasurer or president follows the name of a person in a writing, and such word may be either descriptive of the person or indicative of the character in which he contracts, while it is ordinarily regarded as *prima facie* descriptive, yet it may be shown by parol evidence that it was affixed to indicate the character in which he contracted.[80] And in this connection it has been decided

Southern Imp. Co., 106 N. C. 461, 11 S. E. 528.

Texas. — Kelley *v.* Collier, 11 Tex. Civ. App. 353, 32 S. W. 428.

Virginia. — Richmond F. & P. R. Co. *v.* Snead, 19 Gratt. 354, 100 Am. Dec. 670.

Wisconsin. — Northern Nat. Bank *v.* Lewis, 78 Wis. 475, 47 N. W. 834.

"Whether an officer of a corporation signing an agreement means to bind himself personally must as a general rule be determined from the face of the paper itself; but where there is such ambiguity on the face of the paper as to be consistent with either construction, whether one means to bind himself personally, or acts only in an official capacity, parol evidence is clearly admissible to prove the circumstances under which the contract was made; or in other words, to prove the true nature of the transaction." Morrison *v.* Baechtold, 93 Md. 319, 328, 48 Atl. 926, *per* Pearce, J.

79. Moragne *v.* Richmond Locomotive & Mach. Wks., 124 Ala. 537, 27 So. 240; Richardson *v.* Scott River W. & M. Co., 22 Cal. 150; Hypes *v.* Griffin, 89 Ill. 134, 31 Am. Rep. 71; McCandless *v.* Belle Plaine Canning Co., 78 Iowa 161, 42 N. W. 635, 16 Am. St. Rep. 429, 4 L. R. A. 396; Sparks *v.* Dispatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714; Anderson *v.* Hoople, 70 N. Y. St. 499, 35 N. Y. Supp. 754.

80. *Alabama.* — Chambers *v.* Falkner, 65 Ala. 448 ("Pres.").

Colorado. — Hager *v.* Rice, 4 Colo. 90, 34 Am. Rep. 68 ("Treas.").

Georgia. — Ghent *v.* Adams, 2 Ga. 214 (note by justices of peace and signature followed by letters "J. I. C.").

Illinois. — Keeley Brew. Co. *v.* Neubauer Decorating Co., 194 Ill. 580, 62 N. E. 923 ("Agent and Superintendent").

Indiana. — Second Nat. Bank *v.* Midland Steel Co., 155 Ind. 581, 58 N. E. 833, 52 L. R. A. 307 ("President").

Kansas. — Gardner *v.* Cooper, 9 Kan. App. 587, 58 Pac. 230 ("Cashier"); Shaffer *v.* Hohenschild, 2 Kan. App. 516, 43 Pac. 979 ("Trustees").

Missouri. — McClellan *v.* Reynolds, 49 Mo. 312 ("Local Director").

Minnesota. — Souhegan Nat. Bank *v.* Boardman, 46 Minn. 293, 48 N. W. 1116 ("Treasurer").

New York. — Hood *v.* Hallenbeck, 7 Hun 362 ("Pres."); Lee *v.* Methodist Episcopal Church, 52 Barb. 116 ("Trustees").

Oklahoma. — Janes *v.* Citizens Bank, 9 Okla. 546, 60 Pac. 290. ("Sec'y").

Vermont. — Michigan State Bank *v.* Peck, 28 Vt. 200, 65 Am. Dec. 234 ("Pres.").

See article "EXECUTORS AND ADMINISTRATORS," Vol. V, p. 430, as to use of words "executor," or "administrator," after name.

"It is well settled in this court that when such a word as 'agent' or 'trustee,' which may be descriptive of the person, or may be indicative of the character in which the signer contracts, is affixed to the name of a party entering into a contract, it is *prima facie* descriptive only; but that it may be shown, by extrinsic evidence, that the attached word was

that the affixing of such a word as president to a person's name creates a doubt or ambiguity as to the character in which he acts.[81] This rule, however, is not accepted in many jurisdictions, it being declared that such words are words of description merely; that by themselves they evidence no intention to indicate a person other than the one named, and that parol evidence is not admissible to show that they are indicative of the character in which one acts.[82]

(3.) To Show One Acted as Fiduciary. — It may be shown that one who is a party to an instrument acted in a fiduciary capacity, such as executor, administrator, guardian or trustee, and that the one for whom he was acting is entitled to the benefits thereof.[83] Such evidence is not, however, admissible to show that the trustee named

understood by all interested as determining the character in which the person using it contracted." Brunswick-Balke-Collender Co. *v.* Boutell, 45 Minn. 21, 47 N. W. 261, *per* Collins, J.

81. Southern Pac Co. *v.* Von Schmidt Dredge Co., 118 Cal. 368, 50 Pac. 650; Holt *v.* Sweetzer, 23 Ind. App. 237, 55 N. E. 254; Small *v.* Elliott, 12 S. D. 570, 82 N. W. 92.

82. *Alabama.* — Richmond Locomotive & Mach. Works *v.* Moragne, 119 Ala. 80, 24 So. 834 ("Board of Business Managers").

California. — Savings Bank *v.* Central Market Co., 122 Cal. 28, 54 Pac. 273 ("as stockholders").

Illinois. — Hately *v.* Pike, 162 Ill. 241, 44 N. E. 441, 53 Am. St. Rep. 304 ("President").

Indiana. — Prescott *v.* Hixon, 22 Ind. App. 139, 53 N. E. 391, 72 Am. St. Rep. 291 ("Prest." or "Sect.")

Iowa. — Mathews *v.* Dubuque Mattress Co., 87 Iowa 246, 54 N. W. 225, 19 L. R. A. 676 ("President"); Heffner *v.* Brownell, 75 Iowa 341, 39 N. W. 640 ("Sec'y").

Kansas. — Merrill *v.* Young, 5 Kan. App. 761, 47 Pac. 187 ("school officers").

Maine. — Sturdivant *v.* Hull, 59 Me. 172, 8 Am. Rep. 409 ("Treas.").

New York. — Soule *v.* Palmer, 49 N. Y. Supp. 475 ("President").

Texas. — Marx *v.* Luling Co-Op. Ass'n, 17 Tex. Civ. App. 408, 43 S. W. 596 ("as board of directors").

Wisconsin. — Liebscher *v.* Kraus, 74 Wis. 387, 43 N. W. 166, 17 Am. St. Rep. 171, 5 L. R. A. 496 ("president").

83. *Alabama.* — Russell *v.* Erwin, 41 Ala. 292; Beasley v. Watson, 41 Ala. 234.

Colorado. — Johnson *v.* Calnan, 19 Colo. 168, 34 Pac. 905, 41 Am. St. Rep. 224.

Kansas. — Graham *v.* Troth, 69 Kan. 861, 77 Pac. 92.

Minnesota. — Mareck *v.* Minneapolis Trust Co., 74 Minn. 538, 77 N. W. 428.

New York. — Rank *v.* Grote, 110 N. Y. 12, 17 N. E. 665; Schmittler *v.* Simon, 114 N. Y. 176, 21 N. E. 162, 11 Am. St. Rep. 621.

South Carolina. — Edwards *v.* Williams, 39 S. C. 86, 17 S. E. 457.

Washington. — Cole *v.* Satsop R. Co., 9 Wash. 487, 37 Pac. 700.

But see American Surety Co. *v.* McDermott, 56 N. Y. St. 725, 5 Misc. 298, 25 N. Y. Supp. 467.

In the Application of This Rule it is decided that it may be shown by parol evidence that a letter to one personally was to him in his representative capacity (Woodbury *v.* District of Columbia, 5 Mackey [D. C.] 127); that one who was payee of a note and who received money on same was trustee for another (Catlin *v.* Birchard, 13 Mich. 110; Graham *v.* Troth, 69 Kan. 861, 77 Pac. 92); that notes and mortgage to a person were taken by her as executrix (Childs *v.* Alexander, 22 S. C. 169); and to show that a person signed a memorandum of sale as executrix (Brewster *v.* Baxter, 2 Wash. Ter. 135, 3 Pac. 844).

See "Executors and Administrators," Vol. V, p. 430, as to use of words "executor" or "administrator" after name.

in a writing,[84] or a third person, was the beneficiary instead of the one designated.[85]

(4.) Whether Contract of Agent or Principal. — Parol evidence is admissible to show whether a person whose name appears to an instrument of writing acted in his individual capacity or in that of an agent representing another; and the true character of the transaction may be shown for that purpose,[86] and thus to identify an undisclosed principal,[87] though it would be inadmissible to dis-

84. Young America Engine Co. *v.* Sacramento, 47 Cal. 594.

85. American Nat. Bank *v.* Harlan, 89 Md. 675, 43 Atl. 756.

86. *United States.* — Brown *v.* Grove, 80 Fed. 564, 25 C. C. A 644, 42 U. S. App. 508; McCracken *v.* Robison, 57 Fed. 375, 6 C. C. A. 400.

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

California. — Curtin *v.* Ingle, 137 Cal. 95, 69 Pac. 836, 1013; Southern Pac. Co. *v.* Von Schmidt Dredge Co., 118 Cal. 360, 50 Pac. 650; Comptoir D'Escompte de Paris *v.* Dresbach, 78 Cal. 15, 20 Pac. 28.

Indiana. — Roehl *v.* Haumesser, 114 Ind. 311, 15 N. E. 345.

Louisiana. — Gumbel *v.* Boyer, 46 La. Ann. 762, 15 So. 84.

Michigan. — Keidan *v.* Winegar, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705; Huntoon *v.* O'Brien, 79 Mich. 227, 44 N. W. 601.

Missouri. — Black River Lumb. Co. *v.* Warner, 93 Mo. 374, 6 S. W. 210; Christian *v.* Smith, 85 Mo. App. 117; Mitchell *v.* Railton, 45 Mo. App. 273.

New York. — Brady *v.* Nally, 151 N. Y. 258, 45 N. E. 547; Sykes *v.* Temple, 69 Hun 448, 23 N. Y. Supp. 425.

Ohio. — Gilbert *v.* First Presbyterian Church of Nottingham, Cleve. Law Rep. 275, 4 Ohio Dec. 312.

Oregon. — Anderson *v.* Portland Flouring-Mills Co., 37 Or. 483, 60 Pac. 839, 82 Am. St. Rep. 771, 50 L. R. A. 235.

West Virginia. — Coulter *v.* Blatchley, 51 W. Va. 163, 41 S. E. 133.

"When it is doubtful from the face of the contract, not *under seal,* whether it was intended to operate as the personal engagement of the party signing, or to impose an obligation upon some third person as his principal, parol evidence is admissible to show the true character of the transaction." May *v.* Hewitt, 33 Ala. 161, 166, *per* Rice, C. J.

"As the forms of words in which contracts may be made and executed, are almost infinitely various, the test question is, whether the person signing professes and intends to bind himself, and adds the name of another, to indicate the capacity or trust in which he acts, or the person for whose account his promise is made; or whether the words referring to a principal, are intended to indicate, that he does a mere ministerial act, in giving effect and authenticity to the act, promise and contract of another. Does the person signing apply the executing hand as the instrument of another, or the promising and engaging mind of a contracting party?" Bradlee *v.* Boston Glass Manufactory, 16 Pick. (Mass.), 347, 350, *per* Shaw, C. J.

87. *United States.* — Exchange Bank *v.* Hubbard, 62 Fed. 112, 116, 10 C. C. A. 295; Boland *v* Northwestern Fuel Co., 34 Fed. 523.

California. — Escondido Oil & Develop. Co. *v.* Glass, 144 Cal. 494, 77 Pac. 1040; Curran *v.* Holland, 141 Cal. 437, 75 Pac. 46.

Illinois. — Haywood Bros. & Wakefield Co. *v.* Andrews, 89 Ill. App. 195.

Maine. — Kingsley *v.* Siebrecht, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486.

New York. — Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617.

South Carolina. — Bickley *v.* Commercial Bank, 43 S. C. 528, 21 S E. 886.

Virginia. — Waddill *v.* Sebree, 88 Va. 1012, 14 S. E. 849, 29 Am. St. Rep. 766.

Washington. — Belt *v.* Washington

charge from liability an agent who had bound himself.[88] Such evidence is not, however, admissible to charge an agent as the principal, where it clearly appears from the writing that it was executed by him with the intention of binding his principal.[89]

(5.) To Show One Signed as Witness. — Where the name of the person apparently bound by a writing appears in the usual and proper place, and the name of another appears on the instrument in the usual and proper place for the name of a subscribing witness, but without any attestation clause to show in what capacity he signed

Water Power Co., 24 Wash. 387, 64 Pac. 525.

Compare Ferguson *v.* McBean, 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65, *holding* that such evidence is not admissible to bind an undisclosed principal unless he was unknown at time of contract.

"In order to charge the real principal, it is always competent, in whatever form a parol or written contract is executed by an agent to ascertain by evidence dehors the instrument who is the principal whether it purports to be the contract of an agent, or is made in the name of the agent as principal; and the real principal may be held, although the other party knew that the person who executed as principal was in fact the agent of another." Exchange Bank *v.* Hubbard, 62 Fed. 112, 116, 10 C. C. A. 295, *per* Wallace, C. J.

"It is well-settled that when a written contract is made by an agent, in his own name, the undisclosed principal may sue upon it and prove by parol evidence that the contract was made for his benefit; and this may be done although the other party had no knowledge of the agency and supposed that he was dealing with one who was acting for himself." Daniels *v.* Citizens Ins. Co., 5 Fed. 425, 428, *per* Gresham, D. J.

"The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction." Ford *v.* Williams, 21 How (U. S.) 287, 298, *per* Mr. Justice Grier.

88. *United States.* — Ford *v.* Williams, 21 How. 287.

Iowa. — Junge *v.* Bowman, 72 Iowa 648, 34 N. W. 612.

Louisiana. — Stierle *v.* Kaiser, 45 La. Ann. 580, 12 So. 839.

Missouri. — Duncan *v.* Kirtley, 54 Mo. App. 655.

New Mexico. — Luna *v.* Mohr, 3 N. M. 63, 1 Pac. 860.

New York. — Coleman *v.* First Nat. Bank, 53 N. Y. 388, 393; Anderson *v.* Conner, 43 Misc. 384, 87 N. Y. Supp. 449; De Remer *v.* Brown, 55 N. Y. Supp. 367, *affirmed* 59 N. E. 129, 165 N. Y. 410.

Oklahoma. — Keokuk Falls Imp. Co. *v.* Kingsland & Douglas Mfg. Co., 5 Okla. 32, 47 Pac. 484.

South Carolina. — Reab *v.* Pool, 30 S. C. 140, 8 S. E. 703.

South Dakota. — Black Hills Nat. Bank *v.* Kellogg, 4 S. D. 312, 56 N. W. 1071.

Texas. — Marx *v.* Luling Co-Op. Ass'n, 17 Tex. Civ. App. 408, 43 S. W. 596.

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

A person cannot shield himself from liability by showing that he acted as agent of another unless he avowed himself as such to him with whom he contracted, or the fact was known to him. Brockway *v.* Allen, 17 Wend. (N. Y.) 40.

89. Benham *v.* Emery, 46 Hun (N. Y.) 156; Heffron *v.* Pollard, 73 Tex. 96, 11 S. E. 165, 15 Am. St. Rep. 764; Marx *v.* Luling Co-Op. Ass'n, 17 Tex. Civ. App. 408, 43 S. W. 596.

it, parol evidence is admissible to show that he signed it as a subscribing witness.[90]

4. Application of Rules and Exceptions to Particular Writings. A. ADVERTISING CONTRACTS. — a. *General Rule.* — Parol evidence is inadmissible to contradict or vary the terms of an advertising contract.[91]

b. *Qualifications of, and Exceptions to, Rule.* — **(1.) To Defeat Operation.** — It may be shown by parol that a writing purporting to be an advertising contract was not intended by the parties to be binding, according to its terms.[92]

(2.) Where Writing Referred To. — Parol evidence is admissible to identify a writing referred to in a contract for advertising.[93]

90. Garrison *v.* Owens, 1 Pin. (Wis.) 471.

An Apparent Indorsement of negotiable paper may be shown to have been a signing of same merely as a witness. Tombler *v.* Reitz, 134 Ind. 9, 33 N. E. 789.

91. James T. Hair Co. *v.* Walmsley, 32 Mo. App. 115; Coleman *v.* Rung, 10 Misc. 456, 31 N. Y. Supp. 456; Quaker City Car. Adv. Co. *v.* Myers, 3 Pa. Co. Ct. 558.

A Contract to Place Advertisements in Street Cars for a party cannot be varied by evidence of a parol agreement that such party may substitute the advertisements of other parties. Wyckoff *v.* Ferree, 168 Pa. St. 261, 31 Atl. 1101.

Where a Contract To Insert an Advertisement in a Theater Programme provided that the publishers were not bound "by any agreement other than that expressed on the face of this contract," and also contained the clause "No verbal agreement recognized," it was decided that evidence was not admissible to show in defense to an action for the contract price that it was also agreed that the advertiser was to have two theater tickets a week, and that the advertisement could be changed by him whenever he desired. Hallowell *v.* Lierz, 171 Pa. St. 577, 33 Atl. 344.

Where an Order Is Given for the insertion of an advertisement in a certain newspaper for a given time at a stated price, to be paid at a specified date, such order possesses all the *indicia* of a contract, though it is not executed by both parties and cannot be varied by parol evidence of a contemporaneous agreement that the advertisement might be discontinued at any time if it did not suit. Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665.

The Clause "Payable in Trade" in an advertising contract is construed as meaning payable in such articles as the advertiser deals in, and parol evidence is not admissible to limit such expression to some special article. Dudley *v.* Vose, 114 Mass. 34.

92. So evidence has been held admissible to show that a writing in the form of a contract for street car advertising contained terms as to the extent of advertising and amount to be paid therefor which were inserted at the request of the agent soliciting the advertisement for the professed purpose of showing the writing to others to induce the payment of the same rates by them, but upon the understanding that the terms so inserted were not to be binding upon the advertiser. The court declared in this case that such evidence was clearly competent "for the purposes offered, that is, not to vary or contradict the terms of the written instrument by parol, but to show that such contract had no force, efficacy or effect, because it was not intended to operate as the record of a binding contract between the parties." Southern Street Ry. Adv. Co. *v.* Metropole Shoe Mfg. Co., 91 Md. 61, 46 Atl. 513, *per* Briscoe, J.

93. The writing in this case stated that it was agreed between the parties that it contained their whole agreement. On the face of the writing it stipulated for the pay-

B. Arbitration and Award. — a. *General Rule.* — Parol evidence is inadmissible to contradict or vary the terms of a submission in writing,[94] or an award.[95]

ment of a certain sum, but on the back of it the following was written: "The within named amount is available as a credit, and is to be deducted from our contract price for glass, other than we have estimated on or contracted for prior to the date hereof which is to be purchased of us by or in consequence of E. S. Hands' connection with the works in which the glass purchased is used. In the event of said contract not being awarded us, we are to be absolutely acquitted of any charge for the advertisement herein named." The court decided that parol evidence was admissible to show what contract was in the minds of the parties and was intended by them, such evidence simply tending to identify the writing referred to, as it was apparent the parties did not intend the instrument executed by them to be a complete and final statement of their contract. Hand *v.* Ryan Drug Co., 63 Minn. 539, 65 N. W. 1081.

94. Payne *v.* Crawford, 97 Ala. 604, 11 So. 725; Townsend *v.* Greenwich Ins. Co., 39 Misc. 87, 78 N. Y. Supp. 897.

So the court said, where a written submission was made to abitrators of certain books, accounts and other claims and matters: "The parties submitted their controversies in writing; and parol testimony was offered to show an enlargement of the powers of the arbitrators, including a subject not mentioned in the written submission. The offered testimony was rejected by the judge. From the motion it does not appear, that the parties *first* made a written submission, and *afterwards* by parol conferred additional powers; but it is merely said, that the defendants offered to prove that *it was also agreed* without specifying *when* such agreement was made; and it is perfectly compatible with this statement that the written submission and the supposed agreement by parol, were contemporaneous. If such were the fact, the testimony by parol could not be received, without varying the effect of the written submission, which must be presumed to comprise the whole intention of the parties." Palmer *v.* Green, 6 Conn. 14, 18, *per* Hosmer, C. J.

The Extent of a Submission cannot be limited (De Long *v.* Stanton, 9 Johns. [N. Y.] 38), or enlarged by parol evidence. Palmer *v.* Green, 6 Conn. 14.

Where a Case Is Referred "Without Exception or Appeal," and there is no stipulation in the agreement to submit, either express or implied, that the referee shall find the facts thereon and the court the law, the parties have put the award of the referees beyond the reach of further inquiry or revision, and parol evidence is held inadmissible to show that a change was made in the powers committed to them. Manhattan L. Ins. Co. *v.* McLaughlin, 80 Pa. St. 53.

95. King *v.* Jemison, 33 Ala. 499; Glade *v.* Schmidt, 20 Ill. App. 157; Buck *v.* Spofford, 35 Me. 526; McNear *v.* Bailey, 18 Me. 251. See article "Arbitration and Award," Vol. I, p. 964.

This Rule Operates to Exclude evidence of oral declarations of the arbitrators though made to one of the parties at the time of the publication of the award (Clark *v.* Burt, 4 Cush. [Mass.] 396); or parol evidence to show that they did not intend what their determination on its face declares (Doke *v.* James, 4 N. Y. 568); or of their understanding as to its effect (Scott *v.* Green, 89 N. C. 278).

In an Action on a Note given by defendant for a sum awarded, it is no defense that one of the arbitrators signed it upon the statement of the chairman, who drew up the award, that it was right, without reading it or knowing its contents, unless it is also shown that the arbitrator was induced by some false representation, fraud or misconduct to sign an award different from that which he intended. Withington *v.* Warren, 10 Metc. (Mass.) 431.

b. *Qualifications of, and Exceptions to, Rule.* — **(1.) To Defeat Operation of Award.** — Parol evidence is admissible in an action on an award to show that the arbitrators exceeded their jurisdiction,[96] though the submission and award are both under seal.[97]

(2.) Mistake. — Parol evidence has been in some cases held inadmissible in an action at law to show a mistake or error in an award.[98] There is, however, a conflict in the decisions upon the admissibility of evidence for this purpose.[99]

c. *To Identify Subject-Matter of Submission.* — Parol evidence is admissible to identify the matters submitted, where their identity is uncertain from the terms of the description.[1]

C. ASSIGNMENTS. — a. *General Rule.* — **(1.) Statement Of.** — An assignment in writing cannot be varied or contradicted by parol evidence.[2]

96. People *v.* Schuyler, 69 N. Y. 242, 247; Briggs *v.* Smith, 20 Barb. (N. Y.) 409.

Compare Ruckman *v.* Ransom, 35 N. J. L. 565, holding that the general rule is that neither fraud, misconduct nor mistake can be set up in an action at law on an award unless apparent on the face of the award, subject to one exception, which is that parol evidence may be admitted in order to show that the arbitrators neglected or refused to consider a matter submitted. See article "ARBITRATION AND AWARD," Vol. I, p. 971.

"It may always be shown by parol evidence, in defense or avoidance of an award, that the arbitrators acted in excess of their jurisdiction. . . . 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, 264, 21 N. E. 398, *per* Brown, J.

97. Butler *v.* Mayor of New York, 7 Hill (N. Y.) 329.

98. Ruckman *v.* Ransom, 35 N. J. L. 565; Perkins *v.* Wing, 10 Johns. (N. Y.) 143; Emmet *v.* Hoyt, 17 Wend. (N. Y.) 410; Efner *v.* Shaw, 2 Wend. (N. Y.) 567; Briggs *v.* Smith, 20 Barb. (N. Y.) 409.

99. See article "ARBITRATION AND AWARD," Vol. I, p. 973.

1. Buck *v.* Spofford, 35 Me. 526.

To Identify Subject-Matter. Where the subject-matter was described in the submission as the "purchase and settlement of a horse," it was held that the description was not too vague and indefinite, but that parol evidence was admissible to apply the description to the subject-matter and thus to identify the same. Riley *v.* Hicks, 81 Ga. 265, 7 S. E. 173.

2. *Arkansas.* — Martin *v.* Taylor, 52 Ark. 389, 12 S. W. 1011.

Colorado. — Hardwick *v.* McClurg, 16 Colo. App. 354, 65 Pac. 405.

Missouri. — State *v.* Hoshaw, 98 Mo. 358, 11 S. W. 759; Tyler Estate *v.* Giesler, 85 Mo. App. 278.

New York. — Enright *v.* Franklin Pub. Co., 24 Misc. 180, 52 N. Y. Supp. 704.

Texas. — Newman *v.* Blum, 9 S. W. 178.

Utah. — Turner *v.* Utah Title Ins. & Trust Co., 10 Utah 61, 37 Pac. 91; Turner *v.* Wells, Fargo & Co., 10 Utah 75, 37 Pac. 94; Turner *v.* Union Nat. Bank, 10 Utah 77, 37 Pac. 95.

Rule Applies to an Assignment of

(2.) Parol Agreements. — Evidence is as a general rule inadmissible to show a parol agreement not contained in, and which is inconsistent with the terms of, a written assignment,[3] though evidence has been held admissible of an oral agreement which is distinct from, and independent of, the writing,[4] and also of an agreement which constitutes the consideration of an assignment.[5]

b. *Qualifications of, and Exceptions to, Rule.* — **(1.) Fraud.** Fraud in the procuring of an assignment may be shown by parol evidence.[6]

(2.) To Support. — Where an assignment is attacked on the ground of fraud, parol evidence is admissible to show the absence of fraud.[7]

(3.) Where Writing Does Not Contain Entire Contract. — If the assignment is incomplete and does not profess to contain the whole agreement of the parties, parol evidence is admissible to show the

a Judgment. — Aetna Iron Wks. *v.* Owen, 62 Ill. App. 603.

A Written Assignment of a Bond Without Recourse cannot be changed in its terms by parol evidence. Houston *v.* McNeer, 40 W. Va. 365, 22 S. E. 80.

Where a Contract for the Sale of Land is assigned by a writing which contains no provision that the assignee is to pay a balance due on the purchase money, it cannot be shown, in an action against the assignee, that there were stipulations between the parties in respect to the payment of such sum which were not expressed in the writing. Osburn *v.* Dolan, 7 Wash. 62, 34 Pac. 433.

Where a Debt Secured by a Mortgage is assigned by a writing under seal without mention of the mortgage, by which a mortgage interest passes as an incident to the debt, it cannot be shown by parol that the assignor intended to reserve the mortgage. Pattison *v.* Hull, 9 Cow. (N. Y.) 747.

The Legal Effect of an assignment cannot be varied by parol evidence. Brown *v.* Isbell, 11 Ala. 1009.

3. Griel *v.* Lomax, 86 Ala. 132, 5 So. 325; Hemstreet *v.* Wheeler, 100 Iowa 290, 69 N. W. 521; Nally *v.* Long, 71 Md. 585, 18 Atl. 811, 17 Am. St. Rep. 547; State *v.* Hoshaw, 98 Mo. 358, 11 S. W. 759.

An Assignment of an Interest in a Mortgage cannot be varied by parol evidence to show an alleged agreement that the assignee, to whom a part of the mortgage notes were sold, was to have priority of lien under the mortgage as security for the payment of the notes. Jennings *v.* Moore, 83 Mich. 231, 47 N. W. 127, 83 Am. St. Rep. 601.

4. Snow *v.* Alley, 151 Mass. 14, 23 N. E. 576; Gray *v.* Bliss, 46 N. Y. St. 281, 19 N. Y. Supp. 7.

5. Brown *v.* Isbell, 11 Ala. 1009; Playa de Oro Min. Co. *v.* Gage, 60 App Div. 1, 69 N. Y. Supp. 702; Nortrip *v.* Hermans, 16 Misc. 313, 39 N. Y. Supp. 415; Barclay *v.* Wainwright, 86 Pa. St. 191; Jewett *v.* Deiter, 59 Vt. 638, 10 Atl. 672.

6. Russell *v.* Tuttle, 2 Root (Conn.) 22; Nicholson *v.* Hendricks, 22 La. Ann. 511; Oliver *v.* Oliver, 4 Rawle (Pa.) 141; Reed *v.* Newcomb, 62 Vt. 75, 19 Atl. 367.

7. Roberts *v* Buckley, 80 Hun (N. Y.) 58, 61 N. Y. St. 561, 29 N. Y. Supp. 873, holding that the circumstances under which the writing was executed may be shown.

"If, then, parol evidence may be used by one of the parties to the suit to vary its terms to show that it is not what it purports to be, that it was fraudulent, and that the true intent of the parties is not expressed by it, is it not equally clear that parol evidence may be used by the other party to support the deed, to show by its terms the true intent of the parties was expressed, and generally to establish the *bona fides* of the transaction? Such is clearly the law." Smith *v.* Moore, 2 Ind. Ter. 126, 133, 48 S. W. 1025.

part omitted,[8] except where the assignment is one required by statute to be in writing.[9]

c. *To Explain and Interpret.* — **(1.) In General.** — Parol evidence of extrinsic facts and circumstances is admissible for the purpose of explaining or interpreting an assignment where its meaning is doubtful or ambiguous.[10]

(2.) True Nature of Transaction. — Though an assignment may be absolute upon its face, parol evidence is admissible to show the true character of the transaction, and that it was given as security for the performance of some obligation,[11] though such evidence is

8. Brown *v.* Isbell, 11 Ala. 1009; Platt *v.* Hedge, 8 Iowa 386.

Though an Assignment on a Certificate of Stock may on its face be absolute and without condition, yet where it is not intended to express the entire contract between the parties, but is a part execution of a contract that requires this, with other things, to be done, for a specific purpose, it is not conclusive as to the transfer being absolute, but parol evidence may be admitted to show the contract under which the assignment was made. Randall *v.* Turner, 17 Ohio St. 262.

9. Where Required by Statute To Be in Writing, parol evidence is not admissible to supply defects in or omission from the instrument. Boyd *v.* Paul, 125 Mo. 9, 28 S. W. 171.

10. Platt *v.* Hedge, 8 Iowa 386; Sullivan *v.* Visconti, 69 N. J. L. 452, 55 Atl. 1133; Sullivan *v.* Visconti, 68 N. J. L. 543, 53 Atl. 598.

That the Word "or" Should Be Read "and" may be shown. Decker *v.* Carr, 11 App. Div. 432, 42 N. Y. Supp. 243.

If Intent as to Nature of Interest taken by an assignment of a mortgage to a husband and wife appears doubtful from the terms of the instrument, recourse may be had to the surrounding circumstances in connection with its execution, and the true character of the entire transaction may be considered in order to interpret it according to the actual intention. *In re* Young's Estate, 166 Pa. St. 645, 31 Atl. 373.

A Statement in an Inventory made at the time of the execution of the assignment as to the amount of the debt has been held not conclusive, it being declared that parol evidence is admissible to show that it was intended to state about what sum was due. Roberts *v.* Buckley, 80 Hun (N. Y.) 58, 61 N. Y. St. 561, 29 N. Y. Supp. 873.

11. *Alabama.* — Hieronymous *v.* Glass, 120 Ala. 46, 23 So. 674.

Indiana. — Ginz *v.* Stumph, 73 Ind. 209.

Iowa. — Ayers *v.* Home Ins. Co., 21 Iowa 185.

Kansas. — Robinson *v.* Blood, 10 Kan. App. 576, 62 Pac. 677; Hamilton *v.* Whitson, 5 Kan. App. 347, 48 Pac. 462.

Louisiana. — Summers *v.* United States Ins. A. & T. Co., 13 La. Ann. 504.

Massachusetts. — Kendall *v.* Equitable L. Assur. Soc., 171 Mass. 568, 51 N. E. 464; Dixon *v.* National L. Ins. Co., 168 Mass. 48, 46 N. E. 430; Butman *v.* Howell, 144 Mass. 66, 10 N. E. 504; Reeve *v.* Dennett, 137 Mass. 315.

Minnesota. — Davis *v.* Crookston Waterworks P. & L. Co., 57 Minn. 402, 59 N. W. 482, 47 Am. St. Rep. 622.

Nebraska. — Scharman *v.* Scharman, 38 Neb. 39, 56 N. W. 704.

New York. — Matthews *v.* Sheehan, 69 N. Y. 585; Farmer *v.* A. D. Farmer & Son Type Founding Co., 83 App. Div. 218, 82 N. Y. Supp. 228; Vickers *v.* Battersball, 84 Hun 496, 32 N. Y. Supp. 314; Robinson *v.* McManus, 4 Lans. 380; Storer *v.* Coe, 2 Bosw. 661; Gilchrist *v.* Cunningham, 8 Wend. 641.

Pennsylvania. — Taylor *v.* Paul, 6 Pa. Super. Ct. 496.

South Carolina. — Westbury *v.* Simmons, 57 S. C. 467, 35 S. E. 764; Fullwood *v.* Blanding, 26 S. C. 312, 2 S. E. 565.

held inadmissible as against third parties if they are thereby prejudiced.[12]

(3.) To Identify Subject-Matter Of. — Parol evidence is admissible to apply the description in an assignment to the subject-matter, and thus to identify the same.[13]

(4.) To Identify Parties. — The identity of the assignee may be established by parol evidence.[14]

D. Bank Deposit Books. — Entries in a passbook given to a depositor by a bank do not constitute a contract and are not con-

Wisconsin. — Gettelman *v.* Commercial Union Assur. Co., 97 Wis. 237, 72 N. W. 627.

This Rule Has Been Applied in the case of an assignment of a lease (Gross *v.* Heckert, 120 Wis. 314, 97 N. W. 952); a judgment (Callender *v.* Drabelle, 73 Iowa, 317, 35 N. W. 240); a fire insurance policy (Merrill *v.* Colonial Mut. F. Ins. Co., 169 Mass. 10, 47 N. E. 439, 61 Am. St. Rep. 268; Matthews *v.* Capitol F. Ins. Co., 115 Wis. 272, 91 N. W. 675); a life insurance policy (McDonald *v.* Birss, 99 Mich. 329, 58 N. W. 359); a claim for labor and services (Davis *v.* Crookston Water Works P. & L. Co., 57 Minn. 402, 59 N. W. 482, 47 Am. St. Rep. 622); and a contract of sale (Lovejoy *v.* Chapman, 23 Or. 571, 32 Pac. 687).

Though an Assignment of Accounts is absolute in form it may be shown that it was understood that the accounts should be collected by the assignee and the proceeds held in trust for the creditors of the assignor. Matthews *v.* Forslund, 112 Mich. 591, 70 N. W. 1105.

Nature and Extent of Lien Under an Assignment. — Where an assignment absolute on its face is admitted to be as a security for money only, parol evidence is admissible to show the extent and nature of the lien of the holder, but it should be clear and satisfactory, if in contradiction of the terms of the writings. Vanmeter *v.* McFaddin, 8 B. Mon. (Ky.) 435.

Where an Assignment of Stock is made, it may be shown to have been made for a certain purpose, and that upon the accomplishment of that purpose the stock was to be returned. Playa de Oro Min. Co. *v.* Gage, 60 App. Div. 1, 69 N. Y. Supp. 702.

12. "Where the rights of the parties to the instrument are alone involved and they agree upon the meaning thereof, a court would be justified in assuming their construction to be correct, without close scrutiny of the legal effect of the language used in the written instrument, but when the parties to the instrument rely thereon, as a means of defeating action taken by third parties, and limiting rights acquired in or to the subject-matter of the contract, then such third parties have the right to insist that as against them, the written instrument cannot be held to mean or intend anything other or different from the purpose which the language of the instrument, read in the light of its attending circumstances, shows to have been the intent of the parties in executing it." Appolos *v.* Brady, 49 Fed. 401, 404, 4 U. S. App. 209, *per* Shiras, J.

13. Halsey *v.* Connell, 111 Ala. 221, 20 So. 445; Long *v.* Long, 44 Mo. App. 141; Cooper *v.* Potts, 185 Pa. St. 115, 39 Atl. 824; Ascarete *v.* Pfaff, 34 Tex. Civ. App. 375, 78 S. W. 974.

To Show What Goods and Effects are covered by an assignment of "all of his goods and effects," parol evidence is admissible of the circumstances surrounding the execution of the writing. Block *v.* Peter, 63 Ga. 260.

To Connect Assignment of Notes and List of Same. — An assignment of notes and accounts and a list of same, though not referring to each other, may be connected to identify the subject-matter of the assignment. Walsh *v.* Edmisson, 46 Mo. App. 282.

14. Where the Name of the Assignee Is Omitted from an assign-

clusive, but may be explained,[15] or contradicted, or varied by parol evidence.[16]

E. Bills of Sale. — a. *General Rule.* — **(1.) Statement Of.** — A bill of sale which is complete and unambiguous cannot be contradicted or varied by parol evidence.[17]

ment, it is held that it may be shown by parol that there was an oral agreement to make the assignment evidenced by the writing to a certain person, and that the name was unintentionally omitted. Owen *v.* Meade, 104 Cal. 179, 37 Pac. 923.

15. Talcott *v.* First Nat. Bank, 53 Kan. 480, 36 Pac. 1066, 24 L. R. A. 737.

16. Kennebec Sav. Bank *v.* Fogg, 83 Me. 374, 22 Atl. 251; Northrop *v.* Hale, 72 Me. 275; Branch *v.* Dawson, 36 Minn. 193, 30 N. W. 545; Anderson *v.* Walker (Tex. Civ. App.), 49 S. W. 937, *modified* 53 S. W. 821.

A Deposit Marked "Special Deposit" in a pass-book may be shown to be a general one. Carr *v.* State, 104 Ala. 43, 16 So. 155.

Parol Evidence Is Admissible To Show the True Ownership of a fund deposited in a bank. Kennebec Sav. Bank *v.* Fogg, 83 Me. 374, 22 Atl. 251; Frank *v.* Kurtz, 4 Pa. Super. Ct. 233; Eberle *v.* Bryant, 63 N. Y. Supp. 963.

17. *Alabama.* — Adams *v.* Garrett, 12 Ala. 229.

Kansas. — Cunningham *v.* Martin, 46 Kan. 352, 26 Pac. 696; Slatten *v.* Konrath, 1 Kan. App. 636, 42 Pac. 399.

Louisiana. — Hebert *v.* Dupaty, 42 La. Ann. 343, 7 So. 580; Goodloe *v.* Hart, 2 La. 446.

Michigan. — Haynes *v.* Hobbs, 136 Mich. 117, 98 N. W. 978.

Minnesota. — Sayre *v.* Burdick, 47 Minn. 367, 50 N. W. 245.

New York. — Kinney *v.* McBride, 88 App. Div. 92, 84 N. Y. Supp. 958; Emmett *v.* Penoyer, 76 Hun 551, 58 N. Y. St. 232, 28 N. Y. Supp. 234.

Texas. — Sanchez *v.* Goldfrank (Tex. Civ. App.), 27 S. W. 204.

Oral Evidence of a Reservation or an Exception is inadmissible. So where a bill of sale was made of "all the materials and working apparatus" which was contained in a photograph gallery, it was held that parol evidence was not admissible to show that a certain camera was excepted. Hodson *v.* Varney, 122 Cal. 619, 55 Pac. 413.

But *compare* Hecht *v.* Johnson, 3 Wyo. 277, 21 Pac. 1080, *holding,* where one gave a bill of sale of cattle of a certain brand to another and the latter reconveyed them to the former, and also executed a mesne conveyance to a third party of all his interest in the herd, that in an action in replevin for certain cattle by the third party against the one executing the bill of sale, it might be shown in defense that the plaintiff was told by his vendor at the time of sale that a part of the cattle were reserved to the defendant, although no such reservation was contained in the bill of sale.

A Condition Cannot Be Engrafted by parol evidence upon a bill of sale which is absolute in form. George *v.* Norris, 23 Ark. 121; Dixon *v.* Blondin, 58 Vt. 689, 5 Atl. 514; Sanborn *v.* Chittenden, 27 Vt. 171.

A Warranty in a bill of sale cannot be varied or contradicted by parol evidence.

Arkansas. — Hanger *v.* Evins, 38 Ark. 334.

Minnesota. — Humphrey *v.* Merrian, 46 Minn. 413, 49 N. W. 199.

Nebraska. — Watson *v.* Roode, 30 Neb. 264, 46 N. W. 491.

North Carolina. — Pender *v.* Fobes, 18 N. C. 250.

South Carolina. — Stucky *v.* Clyburn, Cheves L. 186, 34 Am. Dec. 590.

Tennessee. — Hogan *v.* Carland, 5 Yerg. 283.

Wisconsin. — McQuaid *v.* Rose, 77 Wis. 470, 46 N. W. 892.

Evidence of a Previous Declaration by the vendor to the vendee that he did not own certain fixtures is not admissible to avoid a warranty of title in a bill of sale of such fixtures. Koerper *v.* Jung, 33 Ill. App. 144.

(2.) Parol Agreement. — A parol agreement cannot be shown to vary the terms of a bill of sale which is complete upon its face.[18]

b. *Qualifications of, and Exceptions to, Rule.* — **(1.) Fraud.** — Parol evidence is admissible to show want of good faith and to establish fraud in connection with a bill of sale.[19]

(2.) Where Incomplete. — Where a writing does not profess to be a complete bill of sale embodying the entire terms of the transaction, parol evidence is admissible to show the whole agreement.[20]

One Not a Party or Privy to a bill of sale is not subject to rule. So where plaintiff's agent purchased a stock of goods of a firm and a bill of sale was executed and delivered, parol evidence as to what was said by the parties, when the bill was made, with reference to the possession and control of the property, was held not objectionable in an action by the buyer to recover the goods from a subsequent mortgagee with notice on the ground that the evidence tended to vary or contradict the bill of sale, he not being a party or privy to the writing. Clark *v.* Shannon & Mott Co., 117 Iowa 645, 91 N. W. 923.

Where Introduced for a Collateral Purpose the rule does not apply. Pacific Biscuit Co. *v.* Dugger, 42 Or. 513, 70 Pac. 523.

18. Cook *v.* First Nat. Bank, 90 Mich. 214, 51 N. W. 206; Welever *v.* Advance Shingle Co., 34 Wash. 331, 75 Pac. 863.

A Parol Agreement Not To Engage in Business in a Certain Locality cannot be shown by parol where no such agreement appears from the terms of the instrument. Costello *v.* Eddy, 34 N. Y. St. 565, 58 Hun 605, 12 N. Y. Supp. 236.

A Warranty not expressed in a bill of sale cannot be established by parol evidence.

Alabama. — Bush *v.* Bradford, 15 Ala. 317.

Arkansas. — Hanger *v.* Evins, 38 Ark. 334.

California. — Johnson *v.* Powers, 65 Cal. 179, 3 Pac. 625.

Illinois. — Vierling *v.* Iroquois Furnace Co., 170 Ill. 189, 48 N. E. 1069.

Iowa. — Mast *v.* Pearce, 58 Iowa 579, 8 N. W. 632, 12 N. W. 597, 43 Am. Rep. 125.

Kansas. — Rogers *v.* Perrault, 41 Kan. 385, 21 Pac. 287.

Minnesota. — Wheaton Roller Mill Co. *v.* Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854; Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1.

Missouri. — Jolliffe *v.* Collins, 21 Mo. 338.

New York. — Engelhorn *v.* Reitlinger, 55 N. Y. Super. Ct. 485.

The Rule Excluding Evidence To Show a Warranty implies the absence of fraud in the transaction. Smith *v.* Cozart, 2 Head (Tenn.) 526.

19. George *v.* Norris, 23 Ark. 121; Plant *v.* Condit, 22 Ark. 454; Henny Buggy Co. *v.* Patt, 73 Iowa 485, 35 N. W. 587.

False and Fraudulent Representations may be shown. Cushing *v.* Rice, 46 Me. 303, 71 Am. Dec. 579; Halsell *v.* Musgrave, 5 Tex. Civ. App. 476, 24 S. W. 358.

Evidence of Surrounding Circumstances is admissible where fraud is alleged. Millar & Co. *v.* Plass, 11 Wash. 237, 39 Pac. 956.

20. De St. Aubin *v.* Field, 27 Colo. 414, 62 Pac. 199; Woodcock *v.* Farrell, 1 Metc. (Ky.) 437; Neal *v.* Flint, 88 Me. 72, 33 Atl. 669; Emmett *v.* Penoyer, 76 Hun 551, 28 N. Y. Supp. 234; Burns *v.* Chisholm, 32 New Bruns. (Can.) 588.

To Show a Warranty. — "Where a contract is first concluded by parol, and a paper is afterwards drawn up, not as containing the terms of the contract, but as a mere memorandum or bill of parcels, parol evidence is admissible to show the actual terms of the sale, and that there was a warranty though it does not appear in the memorandum or receipt." Cassidy *v.* Begoden, 38 N. Y. Super. Ct. 180, *per* Monell, C. J.

(3.) Subsequent Agreement. — A subsequent agreement modifying or rescinding the terms of a bill of sale may be shown.[21]

c. *To Explain or Interpret.* — **(1.) Evidence of Surrounding Circumstances.** — Evidence of surrounding circumstances is admissible to show the actual intention of the parties where the instrument is ambiguous.[22]

(2.) To Show True Character of Transaction. — Evidence of the true character of a transaction is in some cases admissible to show the purpose for which it was executed, and that it was intended to create a trust,[23] or that it was given as security for a debt or the performance of some other obligation.[24]

(3.) To Identify. — Parol evidence is admissible to identify the subject-matter of a bill of sale,[25] but not to vary the terms of the

21. Pope *v.* Cheney, 68 Iowa 563, 27 N. W. 754.

22. Locke *v.* Locke, 166 Mass. 435, 44 N. E. 346.

23. Martin *v.* Martin, 43 Or. 119, 72 Pac. 639.

24. *Arkansas.* — Nattin *v.* Riley, 54 Ark. 30, 14 S. W. 1100.

Florida. — Shad *v.* Livingston, 31 Fla. 89, 12 So. 646.

Georgia. — Florida Central & P. R. Co. *v.* Usina, 111 Ga. 697, 36 S. E. 928.

Indiana. — Seavey *v.* Walker, 108 Ind. 78, 9 N. E. 347.

Massachusetts. — Raphael *v.* Mullen, 171 Mass. 111, 50 N. E. 515.

Michigan. — Pinch *v.* Willard, 108 Mich. 204, 66 N. W. 42; Buhl Iron Wks. *v.* Teuton, 67 Mich. 623, 35 N. W. 804.

North Carolina. — Peck *v.* Manning, 99 N. C. 157, 5 S. E. 743.

Oregon. — Pacific Biscuit Co. *v.* Dugger, 42 Or. 513, 70 Pac. 523.

Texas. — Anglin *v.* Barlow (Tex. Civ. App.), 45 S. W. 827.

Washington. — Voorhies *v.* Hennessy, 7 Wash. 243, 34 Pac. 931.

Compare Thomas *v.* Scutt, 127 N. Y. 133, 27 N. E. 961, *affirming* 52 Hun 343, 5 N. Y. Supp. 365.

Circumstances Preceding and Subsequent to Execution of a bill of sale may be shown for this purpose. Anglin *v.* Barlow (Tex. Civ. App.), 45 S. W. 827.

A Bill of Sale of a Stock of Goods and Merchandise may be shown to have been given to secure and satisfy the claims of certain creditors, it being a part of the contract that they should be returned when the claims of such creditors were realized. Rothschild *v.* Swope, 116 Cal. 670, 48 Pac. 911.

25. Martin *v.* Brown, 91 Iowa 574, 60 N. W. 182; Dallas *v.* Berger, 59 Mo. App. 221; Pierce *v.* Johnson (Tex. Civ. App.), 50 S. W. 610; Edwards *v.* Wisconsin Inv. Co., 124 Wis. 315, 102 N. W. 575.

The Words "All the Vendor's Personal Estate of whatever kind or description," where used in a bill of sale, may be explained by parol evidence to show what such estate was. Coale *v.* Harrington, 7 Har. & J. (Md.) 147.

Where a Bill of Sale of "All the Accounts and Bills and Notes Receivable in favor" of the vendor is given, it may be shown by parol evidence that certain purported ledger accounts exhibited by the vendor to the vendee at the time of the negotiations as genuine had previously been paid in part, and in part had never existed, such evidence being held admissible for the purpose of applying the contract to its subject-matter and to identify the accounts purported to have been sold. Shaw Blank Book Co. *v.* Maybell, 86 Minn. 241, 90 N. W. 392. The court said in this case: "The trial court seems to have held, and plaintiff's counsel now contends, that what was said by Boyeson to defendant concerning the existence, validity, and amount of the ledger accounts infringed upon the rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument, which is not true. This writ-

writing in this respect, or to contradict or add to its terms.[26]

F. Bonds. — a. *General Rule.* — **(1.) Statement Of.** — The rule that parol evidence is inadmissible to contradict or vary the terms of an agreement as reduced to writing, applies in the case of bonds,[27] which cannot be varied by evidence of oral statements of

ing was incomplete, in that it did not pretend to specify in detail the amount of each account, and the name of the party against whom it was asserted. . . . Proof could be given as to what accounts were or were not intended to be transferred by the general language used in the bill of sale, and this evidence of what accounts were so transferred was admitted simply to apply the contract to its subject-matter, and to identify the accounts to which the contract applied. . . . In this case the testimony was simply an identification of the accounts purporting to have been sold and transferred, and that they had no valid existence. Its purpose was to apply the clause quoted from the bill of sale to its subject-matter, and when this was done a warranty arose by implication."

26. Schroeder *v.* Schmidt, 74 Cal. 459, 16 Pac. 243; Hogan *v.* Kelly, 29 Mont. 485, 75 Pac. 81.

27. *United States.* — Gavinzel *v.* Crump, 22 Wall. 308.

Alabama. — Vann *v.* Lunsford, 91 Ala. 576, 8 So. 719; Bolling *v.* Vandiver, 91 Ala. 375, 8 So. 290.

California. — Braun *v.* Woolacott, 129 Cal. 107, 61 Pac. 801.

Colorado. — Slater *v.* Jacobitz, 3 Colo. App. 127, 32 Pac. 184.

Georgia. — Neel *v.* Bartow Co., 94 Ga. 216, 21 S. E. 516.

Illinois. — Trogdon *v.* Cleveland Stone Co., 53 Ill. App. 206.

Indiana. — Clifford *v.* Smith, 4 Ind. 377.

Iowa. — State *v.* Coppock, 79 Iowa 482, 44 N. W. 714; Applegate *v.* B. & S. W. R. Co., 41 Iowa 214.

Maine. — Whitney *v.* Slayton, 40 Me. 224; Ayer *v.* Fowler, 30 Me. 347.

Maryland. — Worthington *v.* Bullitt, 6 Md. 172.

Massachusetts. — Speirs Fish Co. *v.* Robbins, 182 Mass. 128, 65 N. E. 25.

Michigan. — Coots *v.* Farnsworth, 61 Mich. 497, 28 N. W. 534.

Minnesota. — Keough *v.* McNitt, 6 Minn. 513.

Missouri. — Lane *v.* Price, 5 Mo. 101; Davis *v.* Gann, 63 Mo. App. 425, 2 Mo. App. 853.

Montana. — Montana Min. Co. *v.* St. Louis Min. & Mill. Co., 20 Mont. 394, 51 Pac. 824.

Nebraska. — Stoner *v.* Keith Co., 48 Neb. 279, 67 N. W. 311.

New Jersey. — Black *v.* Shreve, 13 N. J. Eq. 455.

New York. — American Surety Co. *v.* Thurber, 121 N. Y. 655, 23 N. E. 1129; Mutual L. Ins. Co. of New York *v.* Aldrich, 44 App. Div. 620, 60 N. Y. Supp. 195; Bernard-Beere *v.* Klaw, 35 Misc. 27, 70 N. Y. Supp. 204; Bernard-Beere *v.* Mayer, 32 Misc. 765, 66 N. Y. Supp. 495; Gerard *v.* Cowperthwait, 2 Misc. 371, 50 N. Y. St. 592, 21 N. Y. Supp. 1092.

North Carolina. — Moffitt *v.* Maness, 102 N. C. 457, 9 S. E. 399; Howell *v.* Hooks, 17 N. C. 258.

Pennsylvania. — Frey *v.* Heydt, 116 Pa. St. 601, 11 Atl. 535; Fulton *v.* Hood, 34 Pa. St. 365, 75 Am. Dec. 664; Bartholomay Brew. Co. *v.* Thomeier, 2 Super. Ct. 345.

South Carolina. — Wylie *v.* Commercial & Farmers Bank, 63 S. C. 406, 41 S. E. 504; South Carolina Soc. *v.* Johnson, 1 McCord 41, 10 Am. Dec. 644.

Tennessee. — Nichol *v.* Thompson, 1 Yerg. 151.

Texas. — Flewellen *v.* Ft. Bend Co., 17 Tex. Civ. App. 155, 42 S. W. 775; Page *v.* White Sew. Mach. Co., 12 Tex. Civ. App. 327, 34 S. W. 988; Crouch *v.* Johnson, 7 Tex. Civ. App. 435, 27 S. W. 9.

Wisconsin. — Brinker *v.* Meyer, 81 Wis. 33, 50 N. W. 782.

This Rule Has Been Applied in the case of an appeal bond (Hydraulic Pressed Brick Co. *v.* Neumeister, 15 Mo. App. 592); a contractor's bond (Milliken *v.* Callahan Co., 69 Tex. 205, 6 S. W. 681); executor's bond (McGovney *v.* State, 20 Ohio 93);

the parties as to their intention,[28] or of an assurance that the obligor would not be liable,[29] or of understandings not expressed therein,[30] or of what they considered the meaning of the instrument to be.[31]

(2.) Parties Only Are Subject to the General Rule. — The rule does not apply where the bond comes collaterally in issue between a party to the instrument and a third party.[32]

(3.) Parol Agreements. — Evidence is not admissible of a parol agreement which is inconsistent with the terms of a bond.[33]

b. *Qualifications of and Exceptions to Rule.* — **(1.) To Invalidate.** (A.) In General. — Evidence is admissible to invalidate a bond on the ground of fraud[34] or illegality though not apparent on its face.[35]

fidelity bond (Jones *v.* Smith, 64 Ga. 711); forthcoming bond (Bolling *v.* Vandiver, 91 Ala. 375, 8 So. 290; Brumby *v.* Barnard, 60 Ga. 292); indemnity bond (Gray *v.* Phillips, 88 Ga. 199, 14 S. E. 205; Cowel *v.* Anderson, 33 Minn. 374, 23 N. W. 542); penal bond (Clifford *v.* Smith, 4 Ind. 377); poor debtor's bond (Chase *v.* Collins, 68 Me. 375); replevin bond (Baker *v.* Merriam, 97 Ind. 539); a bond to convey (McCurtie *v.* Stevens, 13 Wend. (N. Y.) 527); a bond for title (Walker *v.* Bryant, 112 Ga. 412, 37 S. E. 749); a bond to purchase and pay a stipulated price (Robinson *v.* Heard, 15 Me. 296); and a marriage agreement in form of a bond (Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735).

28. Hydraulic Pressed Brick Co. *v.* Neumeister, 15 Mo. App. 592.

29. **Evidence That an Obligor Was Assured He Was Not Personally Liable** at the time he signed a bond is not admissible where the instrument shows a personal liability. Wallace *v.* Langston, 52 S. C. 133, 29 S. E. 552.

30. Kelly *v.* Bradford, 3 Bibb (Ky.) 317, 6 Am. Dec. 656; Belloni *v.* Freeborn, 63 N. Y. 383.

31. Sawyer *v.* Hammatt, 12 Me. 391.

32. Coleman *v.* Pike Co., 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746.

33. *United States.* — Shea *v.* Leisy, 85 Fed. 243.

Alabama. — Bolling *v.* Vandiver, 91 Ala. 375, 8 So. 290.

Indiana. — Clifford *v.* Smith, 4 Ind. 377.

Maryland. — Harris *v.* Regester, 70 Md. 109, 16 Atl. 386; Worthington *v.* Bullitt, 6 Md. 172.

Michigan. — Mason & Hamlin Co. *v.* Gage, 119 Mich. 361, 78 N. W. 130.

Missouri. — Norwich Union F. Ins. Co. *v.* Buchalter, 83 Mo. App. 504.

New York. — American Surety Co. *v.* Crow, 22 Misc. 573, 49 N. Y. Supp. 946; McCurtie *v.* Stevens, 13 Wend. 527.

Rhode Island. — Warwick & C. Water Co. *v.* Allen, 35 Atl. 579.

Texas. — Bruel *v.* Leggitt & Meyers Tobacco Co., 29 Tex. Civ. App. 405, 68 S. W. 718.

Virginia. — Barnett *v.* Barnett, 83 Va. 504, 2 S. E. 733.

Compare Houser *v.* West, 39 Or. 392, 65 Pac. 82, holding that a contemporaneous agreement which constitutes a matter of inducement may be shown.

This Rule Excludes Evidence of a parol agreement varying the time of payment (Geddy *v.* Stainback, 21 N. C. 475); or that obligor was not to be held liable (Chetwood *v.* Brittan, 2 N. J. Eq. 438); or of an agreement not to sue (Barnett *v.* Barnett, 83 Va. 504, 2 S. E. 733); or that the bond was to be paid only on the happening of a certain event (Powell *v.* Jones, 12 Smed. & M. [Miss.] 506); or that certain liabilities were not to be covered (McLean *v.* State, 8 Heisk. [Tenn.] 22).

34. McCulloch *v.* McKee, 16 Pa. St. 289.

35. Buffendean *v.* Brooks, 28 Cal. 641 (holding that parol evidence is admissible to show that a bond was given to induce a sheriff to violate

And where illegality is alleged, the real purpose and intent of the parties may be shown in order to support the instrument.[36] And likewise, where the plea of *non est factum* is interposed, evidence is admissible of what took place at the time of the alleged execution.[37]

(B.) Want of Authority. — Where a person signs a blank bond and it is subsequently filled with conditions not authorized, parol evidence is admissible to show a want of authorization to insert such conditions, where the action is between the parties.[38]

(2.) Conditional Signing. — Parol evidence is not admissible, for the purpose of avoiding liability on a bond, to show that a person signed the same on condition that other signatures be obtained,[39] though the contrary is held where the obligee took the instrument with notice of such fact.[40]

existing judicial orders); Wilhite *v.* Roberts, 4 Dana (Ky.) 172 (holding that a secret agreement in violation of the statute of champerty may be shown).

36. Standen *v.* Brown, 152 N. Y. 128, 46 N. E. 167.

37. State *v.* Gregory, 132 Ind. 387, 31 N. E. 952.

38. Richards *v.* Day, 137 N. Y. 183, 33 N. E. 146, 33 Am. St. Rep. 704, 23 L. R. A. 601. In this case the bond was signed in blank and subsequently a condition was inserted requiring the obligor to pay absolutely a certain sum of money. The bond was set up as a counter-claim to an action for services. The plaintiff denied "that he sealed, executed and delivered" the bond as set forth in the counter-claim, and it was decided that parol evidence was admissible to show that the plaintiff did not assent to or authorize the condition as written in the bond, but that by agreement of the parties the payments were to be conditional, and it was directed that the terms of the bond be such as to express this intention. The court said in this case: "Here the plaintiff did not sign any bond. He signed a blank piece of paper, and it would have been sufficient for him on the trial to prove that he simply signed a blank piece of paper, and then it would have been necessary for the defendant to show that he authorized the blank to be filled up, and how and under what circumstances the authority was given and what the authority was. A party who signs a blank piece of paper cannot be bound to the obligation written therein, unless it can be shown that he gave the person who wrote it authority. . . . There might be cases of an estoppel where one who signed a paper in that way would be bound by it. But in this case no estoppel arises, as the action is between one of the original parties and the representative of the other party. So the defendant is not in a position to complain if the bond is given effect according to the true agreement between the parties."

39. Carroll Co. *v.* Ruggles, 69 Iowa 269, 28 N. W. 590, 58 Am. Rep. 223. See article "Officers."

40. Nash *v.* Fugate, 32 Gratt. (Va.) 595, 34 Am. Rep. 780, holding that a bond signed by the principal obligor and sureties, apparently perfect and complete, may be avoided by parol proof that the obligee, at the time he received it from the principal obligor, had notice that other persons were to sign it, in order to make the instrument effectual as to those who did sign it. In such a case, however, it is declared that the evidence ought to be very clear and satisfactory.

See also State *v.* Wallis, 57 Ark. 64, 20 S. W. 811; Hudspeth *v.* Tyler, 108 Ky. 520, 56 S. W. 973.

That a Bond Was Delivered Only as an Escrow by the sureties to the principal obligor may be shown. Pawling *v.* United States, 4 Cranch (U. S.) 219; Crawford *v.* Foster, 6 Ga. 202, 50 Am. Dec. 327.

(3.) Where Incomplete. — Parol evidence is in many cases admissible to show the entire contract of the parties where it is not completely expressed in the bond.[41]

(4.) To Rebut Presumption. — A disputable presumption arising from the form of a bond may be rebutted by parol evidence.[42]

c. *To Explain or Interpret.* — **(1.) In General.** — Parol evidence is admissible to explain, or as an aid in interpreting, a bond where the intention of the parties is doubtful.[43]

(2.) To Identify Agreement Referred To. — An agreement referred to in a bond may be identified by parol evidence.[44]

41. Hall *v.* Maccubbin, 6 Gill & J. (Md.) 107; Woodfin *v.* Sluder, 61 N. C. 200; Daughtry *v.* Boothe, 49 N. C. 87.

42. Safranski *v.* St. Paul, M. & M. R. Co., 72 Minn. 185, 75 N. W. 17, holding that the presumption that sureties did not intend to be bound by a bond purporting to be the obligation of the principal and sureties, but which is not signed by the principal, is disputable and may be rebutted by parol evidence.

A Bond Filed by a Sheriff who is *ex-officio* tax collector, and who is required to file separate bonds for the performance of his duties as sheriff and as tax collector, while presumptively his undertaking as sheriff, may be shown to have been intended to cover the performance of his duties as tax collector. Baker Co. *v.* Huntington (Or.), 79 Pac. 187.

43. Vann *v.* Lunsford, 91 Ala. 576, 8 So. 719; Rhodes *v.* Wilson, 12 Colo. 65, 20 Pac. 746; Wussow *v.* Hase, 108 Wis. 382, 84 N. W. 433.

The Circumstances Under Which and the Purpose for Which, as shown by those circumstances, the bond was executed may be shown. Longfellow *v.* McGregor 56 Minn. 312, 57 N. W. 926.

Real Transaction. — Evidence as to the real character of the transaction is admissible for the purpose of showing that a second bond was given as security for the first bond, and not in place thereof. Deutschman *v.* Battaile (Tex. Civ. App.), 36 S. W. 489.

To Explain an Exception. — Where a bond excepts real estate not described in certain mortgages "or other personal property" from liability, parol evidence is admissible to explain the phrase "or other personal property," and to show that it was the intention of the parties that no personal property of the obligor was to be subject to liability to satisfy the bond. Streeter *v.* Seigman (N. J.), 48 Atl. 907.

44. Where a Bond Refers to an Agreement as to certain matters without specifying the date or otherwise referring to it so as to identify it, parol evidence is properly admissible to identify an agreement in writing corresponding to the recital in the bond for the purpose of identifying it. In this case the bond referred to an agreement to make certain advances of money to the obligor in connection with the canning business in which he was about to engage, and an agreement in writing, corresponding to such recital, was offered and received in evidence. The court said: "Here the bond does not in express terms refer to the agreement by its date, or otherwise in itself identify it, but it does expressly refer to *an agreement* by Nelson to make certain advances of money to him (the obligor) in connection with the business of canning in which he was about to engage, and to pay, if necessary, for certain goods to be used by him in connection with said business. An agreement in writing, corresponding in its terms with the recital of the bond, and bearing even date therewith, was offered in evidence," and it should have been received. "The Court will not presume the existence of more than one agreement; but will call on defendant to furnish proof that there was some other agreement to which the bond did or might refer. And upon the same

(3.) To Identify Subject-Matter. — The subject-matter of a bond may be identified by parol evidence.[45]

(4.) To Identify Parties. — Parol evidence is admissible to identify an undisclosed principal for whom the bond was executed.[46]

G. CARRIAGE CONTRACTS. — a. *Bills of Lading.* — The general rules and exceptions as to the admission of parol evidence to contradict, vary, invalidate or interpret a writing apply to bills of lading.[47]

b. *Passenger Tickets.* — An ordinary passenger ticket is not necessarily a contract within the rule excluding parol evidence of the terms of an agreement which has been reduced to writing;[48] and evidence of statements made by a ticket agent to a purchaser of a ticket as to matters not expressed therein is admissible as going to show what the contract of carriage was.[49] But in so far

authority parol testimony was properly admissible here to identify the agreement referred to in the bond, as the same offered in evidence." Nelson *v.* Willey, 97 Md. 373, 55 Atl. 527, *per* Pearce, J.

45. Chicago Pressed Steel Co. *v.* Clark, 87 Ill. App. 658.

The Subject-Matter of an Exception may be identified by parol evidence. Wussow *v.* Hase, 108 Wis. 382, 84 N. W. 433.

Where Two Bonds Were Given in Replevin proceedings by the same parties and for the same property, parol evidence is admissible to show to which writ each of the bonds applies where such fact is not shown by the returns on the replevin writs. McManus *v.* Donohue, 175 Mass. 308, 56 N. E. 291.

The Nature of the Estate to be given may be shown by parol evidence where a bond to deliver "the possession" of certain land is silent in this respect. Mariner *v.* Rodgers, 26 Ga. 220.

Where a Bond To Pay the Value of Defendant's Interest is given to procure the dissolution of an attachment, the extent of the interest may be shown by parol evidence to be less than an entire ownership. Birdsall *v.* Wheeler, 58 Conn. 429, 20 Atl. 607.

Where a Bond to an Officer for the Joint Benefit of Several Claimants is given and it does not show what property is claimed by each, parol evidence is admissible to show such fact. State *v.* Lentzinger, 41 Mo. 498.

46. City Trust Safe Deposit & Surety Co. *v.* American Brewing Co., 70 App. Div. 511, 75 N. Y. Supp. 140, so holding in an action by one who had paid the penalty for the breach of the condition of a liquor dealer's bond.

47. See article "CARRIERS," Vol. II, p. 873.

48. Coine *v.* Chicago & N. W. R. Co., 123 Iowa 458, 99 N. W. 134.

"A railroad ticket is not a contract expressing all the conditions and limitations usually contained in a written agreement. It is more in the nature of a receipt given by the railroad company as evidence that the passenger has paid his fare for a certain kind of passage on the proper trains of the company, as limited and regulated by its rules. . . . The liability of the carrier, the conditions implied by law, and the conditions upon which the passenger may use the ticket are seldom expressed therein. In such case parol evidence is admissible to show the elements of the contract, if not in conflict with its express terms." Ames *v.* Southern Pac. R. Co., 141 Cal. 728, 75 Pac. 310, 99 Am. St. Rep. 98, *per* Van Dyke, J.

A Statement in a Berth Check as to the berth bought by the passenger may be contradicted by parol evidence. Mann Boudoir Co. *v.* Dupre, 54 Fed. 646, 4 C. C. A. 540.

49. New York, L. E. & W. R. Co. *v.* Winter, 143 U. S. 60, wherein

as a ticket expresses the terms of the contract between the passenger and the railroad company it is not subject to contradiction by parol evidence.[50]

II. Certificates of Deposit. — Parol evidence is not admissible

it was decided that evidence was admissible of what the ticket agent said to the passenger, at the time he purchased his ticket, in regard to an expressed desire to stop over at a certain town. Mr. Justice Lamar said in this connection: "The grounds upon which it is insisted that the evidence referred to was inadmissible are, that the ticket itself and the rules and regulations of the road, with respect to stop-over checks, constitute the contract between the passenger and the road and the only evidence of such contract, and that no representations made by a ticket seller could be received to vary or change the terms of such contract. This contention cannot be sustained, and is opposed to the authorities upon the subject. While it may be admitted, as a general rule, that the contract between the passenger and the railroad company is made up of the ticket which he purchases, and the rules and regulations of the road, yet it does not follow that parol evidence of what was said between the passenger and the ticket seller from whom he purchased his ticket, at the time of such purchase, is inadmissible, as going to make up the contract of carriage and forming a part of it. In the first place, passengers on railroad trains are not presumed to know the rules and regulations which are made for the guidance of the conductors and other employes of railroad companies, as to the internal affairs of the company, nor are they required to know them. . . . In this case there is no evidence, as already stated, that notice or knowledge of the existence of the rules of the defendant company, or what they were, with respect to stop-over privileges, was brought home to the plaintiff at the time he purchased his ticket or at any time thereafter. There was nothing on the face of the ticket to show that a stop-over check was required of the passenger as a condition precedent to his resuming his journey from Olean to Salamanca, after stopping off at the former place. It is shown by the evidence, that Olean was a station at which stop-over privileges were allowed. Under such circumstances, it was entirely proper for the passenger to make inquiries of the ticket agent and to rely upon what the latter told him with respect to his stopping over at Olean." See also Galveston H. & S. A. R. Co. *v.* Kinnebrew, 7 Tex. Civ. App. 549, 27 S. W. 631.

Where a Ticket Contained no Information as to the Route to be taken, and did not advise the passenger of the rule of the company that passengers must go by direct routes, it was held proper to admit evidence of declarations by a ticket agent of the company as to the proper route to take. Illinois Cent. R. Co. *v.* Harper, 83 Miss. 560, 35 So. 764, 102 Am. St. Rep. 469, 64 L. R. A. 283.

An Agreement To Stop a Train at a Station to take on a passenger may be shown. Evansville & T. H. R. Co. *v.* Wilson, 20 Ind. App. 5, 50 N. E. 90.

50. Walker *v.* Price, 62 Kan. 327, 62 Pac. 1001, 84 Am. St. Rep. 392; Simis *v.* New York, L. E. & W. R. Co., 1 Misc. 179, 48 N. Y. St. 687, 20 N. Y. Supp. 639; Missouri, K. & T. R. Co. *v.* Harrison, 97 Tex. 611, 80 S. W. 1139.

Evidence of Conversations with the ticket agent is not admissible to deprive a passenger of rights conferred by his ticket. Illinois Cent. R. Co. *v.* Harris, 81 Miss. 208, 32 So. 309, 95 Am. St. Rep. 466, 59 L. R. A. 742.

Where the Time Within Which a Ticket Must Be Used is fixed by its terms parol evidence is not admissible of statements made by the ticket agent in contradiction thereof. Rolfs *v.* Atchison T. & S. F. R. Co., 66 Kan. 272, 71 Pac. 526; Gulf C. & S. F. R. Co. *v.* Daniels (Tex. Civ. App.), 29 S. W. 426.

to contradict or vary certificates of deposit.[51] Such evidence may, however, be admissible where the certificate does not purport to be a complete expression of the whole agreement,[52] or to show a parol agreement where the certificate comes collaterally in issue.[53]

I. CHARTER PARTIES. — a. *General Rule.* — Where the terms of a charter party are clear and unambiguous, and the instrument purports to express the entire agreement of the parties, parol evidence affecting the same is inadmissible.[54]

51. A Certificate of Deposit Payable in a Specified Time cannot be varied by evidence of a parol agreement that it would be paid before the expiration of the period stated (Citizens Bank *v.* Jones, 121 Cal. 30, 53 Pac. 354), except upon proof of the omission of such agreement from the writing through fraud, accident or mistake (Baer's Appeal, 127 Pa. St. 360, 18 Atl. 1, 4 L. R. A. 609).

An Agreement To Pay Interest cannot be shown where there is no provision in the certificate for the payment of interest. Read *v.* Attica Bank, 55 Hun 154, 28 N. Y. St. 650, 8 N. Y. Supp. 364.

Parol Agreement as to Place of Payment. — Where money was loaned by a citizen of the state of New York to a firm doing business in Iowa, and the money was remitted to them at that place and a certificate of deposit taken, dated in Iowa, by which the borrowers acknowledged the receipt of the money and promised to pay the same to the order of the lender one year from date, on the return of the certificate, with interest at the rate of ten per cent. per annum, a lawful rate of interest in Iowa, it was held that parol evidence was not admissible, in an action on the certificate to prove that it was a part of the contract, that the principal and interest mentioned in the certificate should be payable in New York, and thus bring it within the prohibition of the statute as to usury in the latter state. Potter *v.* Tallman, 35 Barb. (N. Y.) 182.

The One With Whom the Deposit Was Made cannot be shown by parol evidence to be other than is clearly apparent from the certificate. So where a certificate of deposit was signed "C. J. Iredell, Manager," and such person occupied the position of manager of a private bank and of president of a chartered bank, it was decided that evidence was not admissible of conversations that the money was to be deposited with the chartered bank and that the certificate was intended to evidence such fact. Bickley *v.* Commercial Bank, 39 S. C. 281, 17 S. E. 977, 39 Am. St. Rep. 721.

52. Trimble *v.* First Nat. Bank, 101 Ill. App. 75.

53. Hamlin *v.* Simpson, 105 Iowa 125, 74 N. W. 906, 44 L. R. A. 397, holding, in an action for a debt, where the defendant claimed that checks given therefor were held an unreasonable time, that evidence was admissible of a parol agreement that the depositor might issue checks on the deposit for which the certificate was issued.

54. The Augustine Kobbe, 37 Fed. 696; Pitkin *v.* Brainerd, 5 Conn. 451, 13 Am. Dec. 79.

A Charter Party for a Specified Number of Voyages cannot be varied by proof of an oral agreement giving the right to make an additional voyage to another port, where the contract is complete and unambiguous. So in a case in which this question arose the court said: "The engagement between the parties was for the employment of the plaintiff's vessel to ply between specially designated ports, for a compensation fixed for each voyage, together with a designation of the number of voyages to be made. We certainly cannot see that anything was left open in this contract, as to the necessary terms to be embraced in it, which would warrant the contention of the respondent that it was simply 'a mere memorandum.' There is certainly nothing on the face of the agreement from which it might be inferred that it was intended to be

b. *To Explain and Interpret.* — (1.) **In General.** — Parol evidence is admissible to explain, and as an aid in interpreting, the terms of a charter party where the meaning is doubtful or ambiguous.[55]

(2.) **As to Parties.** — Parol evidence is admissible to show in what capacity a person signed a charter party where this is doubtful,[56] or to show that others than the signers were jointly interested as principals.[57]

J. Collateral Security. — a. *General Rule.* — (1.) **Statement Of.** An agreement in writing evidencing the giving of collateral security for the payment of a debt or the performance of some obligation cannot be varied by parol evidence.[58]

made more specific, or that it was intended to be anything else than the complete contract under which they were to act. There is no difficulty in understanding exactly what was meant; there is no ambiguity in it which necessitated an explanation; and there is no uncertainty to which parol evidence could be addressed. So, as the contract does not appear to have omitted any terms necessary to make it complete, but, on the contrary, appears to be definite in its terms, it did not come within the first exception to the general rule asserted by respondent, and parol evidence was not admissible upon that theory.

Neither do we think the evidence was admissible as coming within the second exception to the general rule, which permits proof of a parol contemporaneous agreement as to any matter upon which the writing is silent, and which is not inconsistent with its terms. The evidence admitted not only did not have that tendency in either particular, but was wholly outside the exception and within the general rule. It was addressed exclusively to matters upon which the writing spoke, and in every particular in which it purported to express the terms of the agreement and the intention of the parties, was inconsistent with them. It varied the agreement as to all subjects upon which the contract appeared to be definite — voyages, freight, and ports. The contract called for but three voyages, no more or less. . . . As the agreement was definite that but three voyages should be made, if this parol contract could stand, it would interject into the agreement a fourth voyage. . . . If it is permissible in the face of a contract providing for three voyages to prove a fourth, it is equally permissible to prove a dozen." Johnson *v.* Bibb Lumb. Co., 140 Cal. 95, 73 Pac. 730, *per* Lorigan, J.

A Charter Party Providing Only for the Consignment of a Ship to a Port of Loading cannot be varied by parol evidence to show an obligation to the charterers' agent to stop at a port not of loading but of discharge. The Serapis, 36 Fed. 707.

55. The Wanderer, 29 Fed. 260.

Where a Charterer Is Given the Privilege of an Extension of the voyage specified, parol evidence of the negotiations of the parties in connection with the contract is admissible to explain the uncertainty as to the period of extension, where an action is brought for the conversion of the vessel in failing to return it within a specified time. Flagler *v.* Hearst, 62 App. Div. 18, 70 N. Y. Supp. 956.

56. Esselstyn *v.* McDonald, 98 App. Div. 197, 90 N. Y. Supp. 518.

57. Woodhouse *v.* Duncan, 106 N. Y. 527, 13 N. E. 334.

58. Fay *v.* Gray, 124 Mass. 500; Nelson *v.* Robson, 17 Minn. 284; Bomar *v.* Asheville & S. R. Co., 30 S. C. 450, 9 S. E. 512; People's Building Loan & Sav. Ass'n *v.* Ghio (Tex. Civ. App.), 62 S. W. 560.

Application of Rule. — Parol evidence is not admissible to show that other debts than those designated in the writing are secured (Hyde *v.* German Nat. Bank, 115 Wis. 170, 91 N. W. 230); that notes were sold absolutely and not pledged as the writing indicates (Johnson *v.* Zwei-

(2.) To Show the Purpose. — Where the purpose for which a transfer of securities is made does not sufficiently appear from the instrument of transfer, that purpose may be shown by parol.[59]

b. *Evidence to Explain.* — **(1.) In General.** — Parol evidence to explain a letter or ciphers in a bill of sale is admissible.[60]

(2.) Subsequent Parol Agreement. — A subsequent parol agreement which modifies the terms of the writing may be shown.[61]

K. Compromise or Settlement Agreement. — a. *General Rule.* **(1.) Statement Of.** — A compromise or settlement reduced to writing cannot be varied by parol evidence,[62] though such evidence may be admitted to show that some item was omitted by fraud, accident, or mistake,[63] or to show a non-compliance with the condition of a composition agreement.[64]

(2.) A Parol Agreement which is inconsistent with the terms of a compromise or settlement agreement cannot be shown.[65]

gart, 114 Ky. 545, 71 S. W. 445, 24 Ky. L. Rep. 1323, 71 S. W. 445), or that notice was to be given to the pledgor of any sales of securities pledged where the writing gave authority to the pledges to sell the stock at its discretion (Rutherford *v.* Massachusetts Mut. L. Ins. Co., 45 Fed. 712), or generally of any parol agreement inconsistent with the terms of the instrument (Fay *v.* Gray, 124 Mass. 500; Nelson *v.* Robson, 17 Minn. 284).

59. McCathern *v.* Bell, 93 Ga. 290, 20 S. E. 315.

60. De Blois *v.* Reiss, 32 La. Ann. 586.

61. Wolff *v.* Alpena Nat. Bank, 131 Mich. 634, 92 N. W. 287.

62. *United States.* — Boffinger *v.* Tuyes, 120 U. S. 198; Green *v.* Chicago & N. W. R. Co., 92 Fed. Rep. 873, 35 C. C. A. 68.

Alabama. — Hart *v.* Freeman, 42 Ala. 567.

California. — Clarkson *v.* Hoyt (Cal.) 36 Pac. 382.

Georgia. — Dyar *v.* Walton, 79 Ga. 466, 7 S. E. 220.

Iowa. — Nystuen *v.* Hanson (Iowa), 91 N. W. 1071; Potts *v.* Polk County, 80 Iowa 401, 45 N. W. 775.

Louisiana. — Calhoun *v.* Lane, 39 La. Ann. 594, 2 So. 219.

Nebraska. — Martens *v.* Pittock (Neb.), 92 N. W. 1038.

New Jersey. — McTague *v.* Finnegan, 54 N. J. Eq. 454, 35 Atl. 542.

North Carolina. — Parker *v.* Morrill, 98 N. C. 232, 3 S. E. 511.

Pennsylvania. — Horn *v.* Miller, 142 Pa. St. 557, 21 Atl. 994; Fahey *v.* Howley, 22 Pa. Super. Ct. 472.

South Carolina. — Boyce *v.* Foster, 1 Bailey 540.

Texas. — Taylor *v.* Taylor (Tex. Civ. App.), 54 S. W. 1039; Rubrecht *v.* Powers, 1 Tex. Civ. App. 282, 21 S. W. 318.

Virginia. — Bonsack Mach. Co. *v.* Woodrum, 88 Va. 512, 13 S. E. 994.

Evidence of Conversations prior to the execution of the writing is not admissible. Farrington *v.* Hodgdon, 119 Mass. 453.

Where a Written Settlement Imports That All Matters of Account are included therein, parol evidence is not admissible to show that certain matters of account, then existing, were not included in the settlement. Jackson *v.* Ely, 57 Ohio St. 450, 49 N. E. 792.

That a Certain Debt Was Not Included in a composition agreement cannot be shown by parol to vary the terms of such agreement which purports to be an absolute release of all debt and liabilities. Meyer *v.* McKee, 19 Ill. App. 109.

63. Kuck *v.* Fulfs, 68 Ill. App. 134.

64. Meyer *v.* McKee, 19 Ill. App. 109.

65. Where a written agreement provides that a confession of judgment in a certain sum shall be a full

L. Construction, Building and Working Contracts.

a. *General Rule.* — (1.) **Statement Of.** — Contracts of this character are subject to the general rule that parol evidence is inadmissible to contradict or vary the terms of a writing.[66]

satisfaction to a pending action, a parol agreement to transfer stock in addition to the confession of judgment cannot be shown. Bank of Mobile *v.* Mobile & Ohio R. Co., 69 Ala. 305.

An Agreement Settling a Strike between employer and employes, in which it is provided that future difficulties are to be submitted to arbitration, cannot be varied by evidence of a parol agreement that if certain moneys are not paid by the employer the employes may renew the strike. Eden *v.* Silberberg, 89 App. Div. 259, 85 N. Y. Supp. 781.

A Contract To Construct a Boiler Plant of at Least a specified horse power at so much per horse power cannot be varied by parol evidence that it was the intention of the parties that the plaintiff should furnish all the power that the plant would produce, not less than the horse power specified, and that defendant should pay for all of such power at the rate stated in the contract. Miller *v.* Municipal Elec. L. & P. Co., 133 Mo. 205, 34 S. W. 585.

Where a Contract To Build a Turnpike is clear and specific as to what the contractor is to do, the contract can not be varied by parol evidence of an understanding on the part of the directors of the turnpike company that the contractor was to spread the rock on the grade of the turnpike road, and to take the subscriptions to the capital stock of such company in payment therefor and assume the risk of collection. Linn *v.* East Eagle & H. M. Turnpike Co., 24 Ky. L. Rep. 978, 70 S. W. 401.

66. *California.* — Joost *v.* Sullivan, 111 Cal. 268, 43 Pac. 896.

Colorado. — Flick *v.* Hahn's Peak & E. R. C. & P. M. Co., 16 Colo. App. 485, 66 Pac. 453.

Connecticut. — Hildreth *v.* Hartford M. & R. Tramway Co., 73 Conn. 631, 48 Atl. 963; Hills *v.* Farmington, 70 Conn. 450, 39 Atl. 795; Hartford Bridge Co. *v.* Granger, 4 Conn. 142.

Illinois. — Christopher & Simpson Architectural I. & F. Co. *v.* Yeager, 202 Ill. 486, 67 N. E. 166, *affirming* 105 Ill. App. 126; Coey *v.* Lehman, 79 Ill. 173.

Indiana. — Brown *v.* Langner, 25 Ind. App. 538, 58 N. E. 743.

Iowa. — Meader *v.* Allen, 110 Iowa 588, 81 N. W. 799; Walker *v.* Manning, 6 Iowa 518.

Louisiana — State, New Orleans *v.* Canal & C. St. R. Co., 44 La. Ann. 526, 10 So. 940.

Massachusetts. — Daly *v.* Kingston, 177 Mass. 312, 58 N. E. 1019.

Michigan. — Mouat *v.* Montague, 122 Mich. 334, 81 N. W. 112.

Missouri. — Miller *v.* Municipal Electric Lighting & P. Co., 133 Mo. 205, 34 S. W. 585; Lindemann *v.* Dennis, 65 Mo. App. 511; Storck *v.* Mesker, 55 Mo. App. 26.

New York. — Strong *v.* Walters, 27 App. Div. 299, 50 N. Y. Supp. 257; Case *v.* Phoenix Bridge Co., 134 N. Y. 78, 31 N. E. 254; Camardella *v.* Holmes 97 App. Div. 120, 89 N. Y. Supp. 616; Lewis *v.* Yagel, 77 Hun 337, 28 N. Y. Supp. 833, 60 N. Y. St. 23.

Pennsylvania. — Dougherty *v.* Borough of Norwood, 196 Pa. St. 92, 46 Atl. 384; Dixon-Woods Co. *v.* Phillips Glass Co., 169 Pa. 167, 32 Atl. 432; Book *v.* New Castle Wire Nail Co., 151 Pa. 499, 25 Atl. 120.

Texas. — A. J. Anderson Elec. Co. *v.* Cleburne Water I. & L. Co. (Tex. Civ. App.), 44 S. W. 929.

Washington. — Nelson *v.* Nelson Bennett Co., 31 Wash. 116, 71 Pac. 749.

Statements and Representations as to the Amount of Work To Be Done, made during the negotiations and previous to the execution of the written contract, are presumed to be merged therein. Beers *v.* North Milwaukee Town Site Co., 93 Wis. 569, 67 N. W. 936.

That Other Work Than Contract Specifies was to be done cannot be shown. Pearce *v.* McGowan, 35 Minn. 507, 29 N. W. 176.

(2.) Parol Agreements. — (A.) In General. — Evidence of a parol agreement which is inconsistent with the terms of the writing is inadmissible,[67] though it has been decided that evidence of an independent collateral agreement is admissible where its exclusion would enable one by his own wrong to impose a burden on another.[68]

That One Signing a Building Contract But Not Named in It Intended To Be Bound Jointly with another cannot be shown by parol evidence where the contract contains mutual and dependent stipulations and no inference arises one way or the other and there is nothing in the contract which would lead to the inference that he was a surety for or joint promisor with one rather than the other original party. Blackmer *v.* Davis, 128 Mass. 538.

A Positive Provision in a Contract for the construction of a building will control a mere implication which arises from an omission to indicate a matter of detail in the plans referred to, and such provision cannot be contradicted or varied by parol evidence. Smith *v.* Flanders, 129 Mass. 322.

A Contract to Install a Heating Apparatus which will warm a dwelling to a specified temperature, cannot, where it is complete upon its face, be varied by parol evidence that the contractor's proposal was based on the owner's statement and understanding that he would build a stone wall under the building to be heated. Mouat *v.* Montague, 122 Mich. 334, 81 N. W. 112.

67. *Colorado.* — Flick *v.* Hahn's Peak & Elk R. C. & P. M. Co., 16 Colo. App. 485, 66 Pac. 453.

Iowa. — Marquis *v.* Lauretson, 76 Iowa 23, 40 N. W. 73.

Kansas. — Wilson *v.* Jones, 48 Kan. 767, 30 Pac. 117.

Kentucky. — Voss *v.* Schebeck, 25 Ky. L. Rep. 481, 76 S. W. 21.

Minnesota. — Winslow Bros. Co. *v.* Herzog Mfg. Co., 46 Minn. 452, 49 N. W. 234.

New Jersey. — Bandholz *v.* Judge, 62 N. J. L. 526, 41 Atl. 723.

New York. — Kervan *v.* Townsend, 25 App. Div. 256, 49 N. Y. Supp. 137; Interstate Steamboat Co. *v.* First Nat. Bank of Commerce, 67 N. Y. St. 673, 87 Hun 93, 33 N. Y. Supp. 966; Abramson-Engesser Co. *v.* McCafferty, 86 N. Y. Supp. 185.

Pennsylvania. — Dixon-Woods Co. *v.* Phillips Glass Co., 169 Pa. St. 167, 32 Atl. 432.

Texas. — Stell *v.* Hale, 20 Tex. Civ. App. 39, 48 S. W. 603.

Utah. — Moyle *v.* Congregational Soc., 16 Utah 69, 50 Pac. 806.

A Contract to Decorate and Furnish the interior of a house cannot be varied by evidence of a parol agreement that the work was to be completed to the satisfaction of the wife of the one who owned the house. Pitcairn *v.* Philip Hiss Co., 125 Fed. 110, 61 C. C. A. 657.

Where a Contract to Construct a Railroad contains a provision that no claim for extra work shall be allowed unless the work was done in pursuance of an order in writing from the engineer and unless the claim was presented within a certain time, evidence is not admissible of a parol contemporaneous agreement that any excess of work caused by a change in the plans would be paid for by the defendant (Merritt *v.* Peninsular Construction Co., 91 Md. 453, 46 Atl. 1013). And where a contract provides for the construction of a railroad through a certain canyon if certain conditions are found to exist, but otherwise for its construction outside of the canyon, it cannot be varied by parol evidence that the canyon location was certainly and definitely agreed upon to the exclusion of the other route (St. Vrain Stone Co. *v.* Denver, U. & P. R. Co., 18 Colo. 211, 32 Pac. 827).

Where a Casualty in the Form of a Flood increased the cost of construction, parol evidence was held inadmissible to show a parol agreement that the corporation for whom the work was being done was to construct a slope wall which would have prevented the damage done by the flood. Boyle *v.* Agawam Canal Co., 22 Pick. (Mass.) 381.

68. Gibbons *v.* Bush Co., 52 App. Div. 211, 65 N. Y. Supp. 215, *af-*

(B.) Where Written Offer Orally Accepted. — Where there is an oral acceptance of a written offer to do certain work, the fact that the offer was in writing does not bring the contract within the rule excluding parol evidence of an oral agreement.[69]

b. *Qualifications of, and Exceptions to Rule.* — **(1.) Where Writing Incomplete.** — Where a building or construction contract does not express the complete contract of the parties parol evidence is admissible to show the entire agreement.[70]

(2.) Custom. — Evidence of a custom may be admitted to explain a matter in respect to which the writing is silent,[71] or to explain a word or term therein.[72]

(3.) Subsequent Modification. — (A.) In General. — A subsequent parol modification of a construction contract may sometimes be shown.[73] And evidence is admissible of acts or conduct of a party

firmed 169 N. Y. 574, 61 N. E. 1129, holding that it may be shown in answer to a counterclaim for liquidated damages for delay in the completion of a building that there was an independent collateral agreement between the owner of the building and the contractor that the latter might have the use of docks owned by the former, for the unloading of material, and that the completion of the work was delayed by the owner's violation of such agreement.

69. Bruce *v.* Pearsall, 59 N. J. L. 62, 34 Atl. 982, holding that in such a case evidence was admissible of an oral agreement as to the time of payment.

70. Whatley *v.* Reese, 128 Ala. 500, 29 So. 606; Donlin *v.* Daegling, 80 Ill. 608.

Evidence as to Details of Work to be done is admissible where the writing is silent in this respect. Cunningham *v.* Massena Springs & F. C. R. Co., 63 Hun 439, 18 N. Y. Supp. 600.

Where the Kind of Stone To Be Used in the construction of a building is not specified in the writing, evidence is admissible to show what kind was intended. Centenary M. E. Church *v.* Clime, 116 Pa. St. 146, 9 Atl. 163.

The Kind of Roof to be put on a building may be shown in such a case. Thompson *v.* Brothers, 5 La. 277.

Where a Contract Does Not Specify the Kind of Material to be used in filling in irregularities in brick walls, parol evidence is admissible of an understanding or agreement that they were to be filled in with lime mortar. Adamant Plaster Mfg. Co. *v.* Nat. Bank of Commerce, 5 Wash. 232, 31 Pac. 634.

Where the Time When Title to a Vessel was to pass, under a construction contract, was not stated, evidence was held admissible of an oral agreement in respect thereto. The Poconoket, 70 Fed. 640, 17 C. C. A. 309. But see Interstate Steamboat Co. *v.* First Nat. Bank of Commerce, 87 Hun 93, 67 N. Y. St. 673, 33 N. Y. Supp. 966.

Where the Value of Work is not fixed by the contract, evidence is admissible to establish its value. Joost *v.* Sullivan, 111 Cal. 286, 43 Pac. 896.

71. White *v.* Ellisburgh, 18 App. Div. 514, 45 N. Y. Supp. 1122; Richlands Flint-Glass Co. *v.* Hiltebeitel, 92 Va. 91, 22 S. E. 806; Adamant Plaster Mfg. Co. *v.* Nat. Bank of Commerce, 5 Wash. 232, 31 Pac. 634, holding that where a contract is silent as to the material to be used in filling in irregularities in brick walls evidence is admissible of a custom, known to the parties at the time of the execution of the contract, to fill them in with lime mortar.

72. Neff *v.* Klopfer, 16 Misc. 49, 37 N. Y. Supp. 654, 73 N. Y. St. 273.

73. Andrews *v.* Tucker, 127 Ala. 602, 29 So. 34 (so holding in the case of a contract for the construction of a railroad); Chicago & E.

to such a contract subsequent to its execution, which will estop him from insisting upon compliance with provisions therein.[74]

(B.) Acceptance of work may be shown by parol evidence as this does not constitute a variance from the contract but shows that the one for whom the work was done thereby agreed that it was done as required, or that it had been fully performed and that further performance was waived.[75]

c. *To Explain or Interpret.* — **(1.) In General.** — Where the meaning of the parties to a construction contract is doubtful or uncertain, parol evidence is admissible to explain, or to aid in interpreting, the same.[76] And in this connection evidence is admissible to apply the contract to the subject-matter.[77]

(2.) Technical Words or Terms in a construction or building contract may be explained by parol.[78]

(3.) To Connect Writings. — (A.) In General. — A writing referred to in a construction contract may be identified or connected by parol evidence, or where lost or destroyed, the contents thereof

I. R. Co. *v.* Moran, 187 Ill. 316, 58 N. E. 335, *affirming* 85 Ill. App. 543 (where the contractor agreed to furnish and cut more expensive stone than the contract called for, and the agreement was executed).

Where a Contract Provides That Requests to Make Alterations shall not avoid the contract, evidence is admissible of a subsequent parol agreement by which the building is to be enlarged. White *v.* Soto, 82 Cal. 654, 23 Pac. 210.

74. Kilby Mfg. Co. *v.* Hinchman-Renton Fire Proofing Co., 132 Fed. 957, 66 C. C. A. 67, holding that, though the contract provided that there should be no liability for extra work unless written orders therefor were given and that in such case the compensation should be based on the rate paid for similar work by the terms of the contract, such provisions were waived by the giving of orders for extra work, without writing, the admission of a liability to pay a reasonable value therefor, and the acceptance of such work and the payment of its reasonable value without written orders.

75. Gilliam *v.* Brown, 116 Cal. 454, 48 Pac. 486.

76. *Iowa.* — Kelly *v.* Fejervary, 111 Iowa 693, 83 N. W. 791.

Nebraska. — Doane College *v.* Lanham, 26 Neb. 421, 42 N. W. 405.

New York. — New York & N. H. A. S. Co. *v.* Andrews, 38 App. Div. 56, 55 N. Y. Supp. 1020.

Washington. — Adamant Plaster Mfg. Co. *v.* Nat. Bank of Commerce, 5 Wash. 232, 31 Pac. 634.

Wisconsin. — Beason *v.* Kurz, 66 Wis. 448, 29 N. W. 230.

Evidence of Surrounding Circumstances is admissible for this purpose. Daly *v.* Ruddell, 137 Cal. 671, 70 Pac. 784.

77. Kilby Mfg. Co. *v.* Hinchman-Renton Fire Proofing Co., 132 Fed. 957, 66 C. C. A. 67.

78. Cannon *v.* Hunt, 116 Ga. 452, 42 S. E. 734.

Application of Rule. — In the application of this rule it has been decided that parol evidence is admissible to explain such words or terms as "excavated and prepared" (Miller *v.* McKeesport & W. R. Co. 179 Pa. St. 350, 36 Atl. 287), "partitions" (Tibbits *v.* Phipps, 30 App. Div. 274, 51 N. Y. Supp. 954), "wall count, solid measure" (Long *v.* Davidson, 101 N. C. 170, 7 S. E. 758), "windows" (Henry *v.* Agostini, 12 Misc. 15, 66 N. Y. St. 536, 33 N. Y. Supp. 37), "white Westerly granite" (New England Granite Works *v.* Bailey, 69 Vt. 257, 37 Atl. 1043), "all plumbing" (Hebb *v.* Welch, 185 Mass. 335, 70 N. E. 440), and "brickwork" (Streppone *v.* Lennon, 143 N. Y. 626, 37 N. E. 638).

may be proved to explain the terms of the contract.[79] But an agreement between one of the parties to a construction contract and a third party, in the form of a lease, cannot be connected with such contract where it is not on its face connected, so as to form contract relations between the other party to the contract and the lessee.[80]

(B.) Plans and Specifications. — Where a construction contract refers to plans and specifications annexed to the contract but none are annexed, parol evidence is admissible to identify the plans and specifications referred to.[81] And where the plans so referred to are silent as to a matter of detail parol evidence may be admitted to show the agreement of the parties in respect thereto.[82] Where, however, plans and specifications are not referred to, evidence in reference thereto is inadmissible to contradict the terms of the contract.[83]

M. Deeds. — a. *General Rule.* — **(1.) Statement Of.** — Where a deed is complete and unambiguous parol evidence is inadmissible to contradict, vary, alter, enlarge, or restrict its terms,[84] or to vary

79. Evidence of Contents of Writing Referred To. — Where a contract for the construction of a building provides that the contractor is to tear down old buildings and to deduct from the contract price the value of such materials obtained therefrom as are used, which value is to be reckoned at the amount stated in the contractor's bid, parol evidence is admissible where the bid is lost or destroyed, to show the contents of such bid, in order to explain the contract and show that a certain amount was allowed for such material, and that the price stated in the contract was the amount of the bid less the amount so allowed. Lilly *v.* Person, 168 Pa. St. 219, 32 Atl. 23.

80. Reynolds *v.* Louisville, New Albany & C. R. Co., 143 Ind. 579, 40 N. E. 410.

81. Haag *v.* Hillemeier, 120 N. Y. 651, 24 N. E. 807, *affirming* 47 Hun 636; Mullen *v.* Cohen, 34 Misc. 398, 69 N. Y. Supp. 646.

Evidence That a Letter which constituted one of the specifications of a contract, and which designated the quality of materials and the mode of doing the work, was attached to the contract when executed, is properly admissible. McGeragle *v.* Broemel, 53 N. J. L. 59, 20 Atl. 857.

Where a contract makes specifications a part thereof, and the latter provide that the contractor shall give a bond guaranteeing the work for twelve months, but such stipulation is not carried into the bond, parol evidence is admissible to show whether such stipulation was abandoned or was understood as being in force. City of Waco *v.* McNeill (Tex. Civ. App.), 29 S. W. 1109.

82. Creedon *v.* Patrick (Neb.), 91 N. W. 872.

83. Justus *v.* Myers, 68 Minn. 481, 71 N. W. 667, holding that plans and specifications not referred to are not admissible to contradict a warranty in the contract as to the work. *Compare* Myer *v.* Fruin (Tex.), 16 S. W. 868, holding that plans not attached may be introduced though they vary from one attached to the writing, where it appears that the contractor was informed as to the variance before signing, and was told that the plan not attached was correct, and to have excluded such evidence would have enabled one to take advantage of his own wrong, to the injury of another.

84. *England.* — Brydges *v.* Chandos, 2 Ves. Jr. 417, 30 Eng. Rep. 702.

Canada. — City of Quebec *v.* North Shore R. Co., 27 Can. Sup. Ct. 102; Malott *v.* Carscadden, 31 U. C. Q. B. 363.

United States. — Zimpelman *v.* Hipwell, 54 Fed. 848, 4 C. C. A. 609.

Alabama. — Hess *v.* Cheney, 83 Ala. 251, 3 So. 791; Pettus *v.* McKinney, 74 Ala. 108; Rogers *v.* Peebles, 72 Ala. 529.

Arkansas. — Ferguson *v.* Peden, 33 Ark. 150.

California. — Garwood *v.* Wheaton, 128 Cal. 399, 60 Pac. 961; Smith *v.* Mason, 122 Cal. 426, 55 Pac. 143; Burling *v.* Newlands, 112 Cal. 476, 44 Pac. 810; San Diego Flume Co. *v.* Chase, 32 Pac. 245; Beall *v.* Fisher, 95 Cal. 568, 30 Pac. 773.

Connecticut. — Elliott *v.* Weed, 44 Conn. 19.

District of Columbia. — McCartney *v.* Fletcher, 11 App. D. C. 15, 25 Wash. L. Rep. 402.

Georgia. — Mays *v.* Shields, 117 Ga. 814, 45 S. E. 68.

Illinois. — Walton *v.* Follansbee, 165 Ill. 480, 46 N. E. 459; Kershaw *v.* Kershaw, 102 Ill. 307.

Indiana. — Henry *v.* Stevens, 108 Ind. 281, 9 N. E. 356; Fouty *v.* Fouty, 34 Ind. 433; Turner *v.* Cool, 23 Ind. 56, 85 Am. Dec. 449.

Iowa. — McEnery *v.* McEnery, 110 Iowa 718, 80 N. W. 1071; Beeson *v.* Green, 103 Iowa 406, 72 N. W. 555.

Kansas. — Sill *v.* Sill, 31 Kan. 248, 1 Pac. 556.

Kentucky. — Shaw *v.* Shaw, 15 Ky. L. Rep. 592, 24 S. W. 630; Spurrier *v.* Parker, 16 B. Mon. 274; Morris *v.* Morris, 2 Bibb 311.

Louisiana. — Clark *v.* Hedden, 109 La. 147, 33 So. 116; Jones *v.* Jones, 51 La. Ann. 636, 25 So. 368; Janney *v.* Ober, 28 La. Ann. 281; Boner *v.* Mahle, 3 La. Ann. 600.

Maine. — Morrill *v.* Robinson, 71 Me. 24; Chandler *v.* McCard, 38 Me. 564; Jordan *v.* Otis, 38 Me. 429; Hale *v.* Jewell, 7 Me. 435.

Maryland. — Neal *v.* Hopkins, 87 Md. 19, 39 Atl. 322; Ecker *v.* McAllister, 45 Md. 290; Campbell *v.* Lowe, 9 Md. 500; Clagett *v.* Hall, 9 Gill. & J. 80; Howard *v.* Rogers, 4 Harr. & J. 278.

Massachusetts. — Kelley *v.* Saltmarsh, 146 Mass. 585, 16 N. E. 460; Muhling *v.* Fiske, 131 Mass. 110; Goodrich *v.* Longley, 4 Gray 379; Crafts *v.* Hibbard, 4 Metc. 438.

Michigan. — Dye *v.* Thompson, 126 Mich. 597, 85 N. W. 1113; Adams *v.* Watkins, 103 Mich. 431, 61 N. W. 774.

Minnesota. — McMurphy *v.* Walker, 20 Minn. 382.

Mississippi. — Maxwell *v.* Chamberlin, 23 So. 266.

Missouri. — Hunleth *v.* Leahy, 146 Mo. 408, 48 S. W. 459; McCollum *v.* Boughton, 132 Mo. 601, 33 S. W. 476, 35 L. R. A. 480; Whelan *v.* Tobener, 71 Mo. App. 361; Heitamp *v.* La Motte Granite Co., 59 Mo. App. 244.

New Hampshire. — Gale *v.* Sulloway, 62 N. H. 57; Badger *v.* Story, 16 N. H. 168.

New Jersey. — Clark *v.* Elizabeth, 37 N. J. L. 120; Morris Canal & Bkg. Co. *v.* Ryerson, 27 N. J. L. 457; Collins *v.* Corson (N. J. Ch.), 30 Atl. 862; Beck *v.* Beck, 43 N. J. Eq. 39, 10 Atl. 155.

New York. — *In re* Ogsbury's Estate, 7 App. Div. 71, 39 N. Y. Supp. 978.

North Carolina. — Lowdermilk *v.* Bostick, 98 N. C. 299, 3 S. E. 844; Chamness *v.* Crutchfield, 37 N. C. 148.

Ohio. — Patterson *v.* Lamson, 45 Ohio St. 77, 12 N. E. 531.

Oregon. — Miller *v.* Miller, 17 Or. 423, 21 Pac. 938.

Pennsylvania. — Fuller *v.* Weaver, 175 Pa. St. 182, 34 Atl. 634; Stiffler *v.* Retzlaff, 11 Atl. 876; Merriman *v.* Bush, 116 Pa. St. 276, 9 Atl. 345; Miller *v.* Smith, 33 Pa. St. 386.

South Carolina. — Jones *v.* Swearingen, 42 S. C. 58, 19 S. E. 947.

Tennessee. — Fidelity & C. Co. *v.* O'Brien (Ch. App.), 38 S.W. 417; Vance *v.* Smith, 2 Heisk. 343.

Texas. — Clark *v.* Gregory, 87 Tex. 189, 27 S. W. 56; Hutchinson *v.* Patrick, 22 Tex. 318; Johnson *v.* Morton, 28 Tex. Civ. App. 296, 67 S. W. 790; Voss *v.* Hoffman (Tex. Civ. App.), 40 S. W. 544; Seay *v.* Fennell, 15 Tex. Civ. App. 261, 39 S. W. 181; Caffey *v.* Caffey, 12 Tex. Civ. App. 616, 35 S. W. 738.

Vermont. — Pitts *v.* Brown, 49 Vt. 86, 24 Am. Rep. 114; Abbott *v.* Choate, 47 Vt. 53.

Virginia. — Holston Salt & Plaster Co., *v.* Campbell, 89 Va. 396, 16 S. E. 274; Norfolk Trust Co. *v.* Foster, 78 Va. 413.

West Virginia. — Pusey *v.* Gardner, 21 W. Va. 469; Troll *v.* Carter, 15 W. Va. 567.

Wisconsin. — Powers *v.* Spaulding, 96 Wis. 487, 71 N. W. 891.

Application of Rule. — Parol evi-

the operation and effect of the covenants contained therein.[85]

(2.) To What Persons Rule Applies. — A stranger to a deed is not bound by recitals of fact contained therein and may show that the writing does not express the real truth of the transaction.[86] And in an action between a party to a deed and a stranger evidence may

dence is not admissible to show that the deed did not convey the property mentioned in it, according to its terms (Jacob Tome Inst. *v.* Davis, 87 Md. 591, 41 Atl. 166); to contradict recitals that title has been conveyed (Mays *v.* Shields, 117 Ga. 814, 45 S. E. 68); that a deed vesting title in a husband and wife was intended only for the husband's benefit (Lagorio *v.* Dozier, 91 Va. 492, 22 S. E. 239); to show that a certain water right was not included, where by its terms the deed is broad enough to include all water rights (Dyer *v.* Cranston Print Wks., 19 R. I. 211, 41 Atl. 1014); to affect the right of a grantee to accretions (Gorton *v.* Rice, 153 Mo. 676, 55 S. W. 241); to show that the grantor did not intend to give possession of the land until the youngest grantee became of age (Ford *v.* Boone, 32 Tex. Civ. App. 550, 75 S. W. 353); to show that manure in a barn was to pass with the land conveyed (Proctor *v.* Gilson, 49 N. H. 62); to show a parol warranty as to the character of the land conveyed (McMurphy *v.* Walker, 20 Minn. 382); to show that the word "heirs" means children (Pritchard *v.* James, 93 Ky. 306, 20 S. W. 216); to show in the case of a tax deed that land was sold for the taxes of a different year from that stated in the deed (Bower *v.* Chess & Wymand Co., 83 Miss. 218, 35 So. 444; French *v.* McAndrew, 61 Miss. 187); or to show that a quit-claim deed was not intended to transfer title, but merely to operate as a release of the lien for taxes. Cole *v.* Gray, 139 Ind. 396, 38 N. E. 856.

No Condition, Reservation or Defeasance can be proved to defeat a deed absolute upon its face. Rogers *v.* Sebastian County, 21 Ark. 440.

A Reservation Cannot Be Enlarged by parol evidence. Webster *v.* Webster, 33 N. H. 18, 66 Am. Dec. 705.

Where a Grantee Agrees to Assume and Pay a certain mortgage and to save the grantor harmless therefrom, he cannot in an action upon his agreement, no fraud in the execution or delivery being alleged, show by parol evidence that he never agreed to assume and pay the mortgage, or that he did not authorize or know of the insertion of such an agreement in the deed. Muhlig *v.* Fiske, 131 Mass. 110.

Legal Effect cannot be varied. Elliott *v.* Weed, 44 Conn. 19.

An Intention different from that expressed cannot be shown. Van Husen *v.* Omaha Bridge & T. Co., 118 Iowa 366, 92 N. W. 47.

85. *Indiana.* — Beasley *v.* Phillips, 20 Ind. App. 182, 50 N. E. 488.

Iowa. — Newburn *v.* Lucas, 126 Iowa 85, 101 N. W. 730; Evans *v.* Duncan, 82 Iowa 401, 48 N. W. 922.

Kansas. — Reagle *v.* Dennis, 8 Kan. App. 151, 55 Pac. 469.

Massachusetts. — Smith *v.* Abington Sav. Bank, 171 Mass. 178, 50 N. E. 545; Simanovich *v.* Wood, 145 Mass. 180, 13 N. E. 391.

Michigan. — Edwards *v.* Clark, 83 Mich. 246, 47 N. W. 112, 10 L. R. A. 659.

Minnesota. — Allen *v.* Allen, 48 Minn. 462, 51 N. W. 473; Bruns *v.* Schreiber, 43 Minn. 468, 45 N. W. 861.

Nebraska. — Stanisics *v.* McMurtry, 64 Neb. 761, 90 N. W. 884.

New Hampshire. — Gill *v.* Ferrin, 71 N. H. 421, 52 Atl. 558.

Ohio. — Hott *v.* McDonough, 2 Ohio C. Dec. 100.

86. Dickey *v.* Grice, 110 Ga. 315, 35 S. E. 291; Hart *v.* Meredith, 27 Tex. Civ. App. 271, 65 S. W. 507.

Beneficiaries in a Deed to which they are not parties, which recites that the purchase money was paid out of funds in the hands of the grantee as trustee for them are not bound by the recital, and it is subject to contradiction or explanation. Kahle *v.* Stone, 95 Tex. 106, 65 S. W. 623.

be admissible of a parol agreement between the parties to the deed though inconsistent with its terms.[87]

(3.) Conversations between the parties prior to the execution of the deed are not admissible to contradict its terms or legal effect, as all prior negotiations between the parties are presumed to be merged in the writing.[88]

(4.) Acts and Declarations. — The general rule also operates to exclude any evidence of acts or declarations of the parties in connection with the execution of a deed.[89]

(5.) Parol Agreements. — The agreements of the parties to a deed are presumed to be merged therein and evidence of any parol agreement made prior to or contemporaneous with the execution of the deed and which is inconsistent with its terms, is not as a general rule admissible,[90] though it is held that a parol agreement

87. Oral Agreement. — In an action to collect rents from a tenant for which he is liable under a supersedeas bond given on appeal from a verdict against the tenant for unlawful detainer of the premises in question, the plaintiff, who had conveyed the premises to his wife, offered evidence of a contemporaneous parol agreement that he should have the right to collect the rents for a stipulated period. The trial court excluded this evidence on the ground that it varied and contradicted the terms of the written deed. Upon appeal, however, it was decided that such evidence was properly admissible, as the rule prohibiting the variation of written instruments by contemporaneous oral agreements applies only to the parties thereto, and not to third persons. Carmack *v.* Drum, 32 Wash. 236, 73 Pac. 377, 785.

88. *Illinois.* — Morris *v.* Calumet & C. Canal & D. Co., 91 Ill. App. 437.

Maryland. — Christopher *v.* Christopher, 64 Md. 583, 3 Atl. 296.

Missouri. — O'Brien *v.* Ash, 169 Mo. 283, 69 S. W. 8; Gorton *v.* Rice, 153 Mo. 676, 55 S. W. 241.

New York. — Uihlein *v.* Matthews, 172 N. Y. 154, 64 N. E. 792.

Vermont. — Smith *v.* Fitzgerald, 59 Vt. 451, 9 Atl. 604; Vermont Cent. R. Co. *v.* Hills, 23 Vt. 681.

89. Smith *v.* Fitzgerald, 59 Vt. 451, 9 Atl. 604; Hurst *v.* Hurst, 7 W. Va. 289; Kirch *v.* Davies, 55 Wis. 287, 11 N. W. 689.

90. *Colorado.* — Highland Park Co. *v.* Walker, 13 Colo. App. 352, 57 Pac. 759.

Connecticut. — Butler *v.* Catling, 1 Root 310.

Delaware. — Gam *v.* Cordrey, 4 Pen. 143, 53 Atl. 334.

Georgia. — Brownlee *v.* Warmack, 90 Ga. 775, 17 S. E. 102.

Illinois. — Grubbs *v.* Boon, 201 Ill. 98, 66 N. E. 390; Lane *v.* Allen, 162 Ill. 426, 44 N. E. 831.

Indiana. — Bailey *v.* Briant, 117 Ind. 362, 20 N E. 278; Fouty *v.* Fouty, 34 Ind. 433.

Kansas. — Shattuck *v.* Rogers, 54 Kan. 266, 38 Pac. 280.

Massachusetts. — Drew *v.* Wiswall, 183 Mass. 554, 67 N. E. 666; Flynn *v.* Bourneuf, 143 Mass. 277, 9 N. E. 650, 58 Am. Rep. 135.

Michigan. — Morrill *v.* Morrill (Mich.), 101 N. W. 209; Putnam *v.* Russell, 86 Mich. 389, 49 N. W. 147.

Minnesota. — Castle *v.* Elder, 57 Minn. 289, 59 N. W. 197.

Missouri. — Davidson *v.* Manson, 146 Mo. 608, 48 S. W. 635; Hickman *v.* Hickman, 55 Mo. App. 303.

Nebraska. — Mattison *v.* Chicago, R. I. & P. R. Co., 42 Neb. 545, 60 N. W. 925.

New Jersey. — Lozier *v.* Hill (N. J. Ch.), 59 Atl. 234; Mott *v.* Rutter (N. J. Ch.), 54 Atl. 159.

Pennsylvania. — Leibert *v.* Heitz, 7 Pa. Dist. Rep. 429, 21 Pa. Co. Ct. 179.

South Carolina. — Hartsfield *v.* Chamblin, 42 S. C. 1, 19 S. E. 959, 20 S. E. 65.

which forms a part of the consideration for a deed is not merged therein and may be shown by parol,[91] and likewise that evidence is admissible of a collateral independent agreement,[92] provided it is consistent with the terms of the deed.[93]

(6.) Conditions. — Where a deed is delivered to the grantee by, or

Vermont. — *In re* Perkin's Estate, 65 Vt. 313, 26 Atl. 637.

Wisconsin. — Desmond *v.* McNamara, 107 Wis. 126, 82 N. W. 701.

Application of Rule. — Evidence is not admissible of a parol agreement that the grantor was to purchase an outstanding interest so as to make a perfect title to the interest conveyed (Zimpelman *v.* Hipwell, 54 Fed. 848, 4 C. C. A. 609); that he was to perfect the title by bringing partition proceedings (Whelan *v.* Tobener, 71 Mo. App. 361); to show an agreement to pay an additional amount if the land on admeasurement exceeded a certain quantity (Northrop *v.* Speary, 1 Day [Conn.] 23, 2 Am. Dec. 48); that the grantor was to remain in possession of the premises for a certain time (Hawver *v.* Wright, 21 Misc. 211, 45 N. Y. Supp. 659); that the grantor was to have the right to redeem within a certain time (Peagler *v.* Stabler, 91 Ala. 308, 9 So. 157); that a deed should not be foreclosed in accordance with its terms (Unity Co. *v.* Equitable Trust Co., 204 Ill. 595, 68 N. E. 654); that a private way over land conveyed should exist in favor of the grantor (Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664); or, in the case of a grant of a right of way over land for the construction of a railroad, that it should be constructed by a plan which would cause the least amount of inconvenience and injury to the grantor. Gulf C. & S. F. R. Co. *v.* Richards, 11 Tex. Civ. App. 95, 32 S. W. 96.

Parol Agreement as to Crop of Wheat on Land. — Where land, with a growing crop of wheat thereon, is sold and a deed therefor given to a grantee who goes into possession, the grantor cannot show an oral agreement, not contained in the deed, that the grantee should market the crop of wheat on the land and pay the grantor a certain per cent. of the proceeds. Adams *v.* Watkins, 103 Mich. 431, 61 N. W. 774.

Where Compensation for the Trustees is not provided for in a deed of trust, evidence is not admissible of an oral agreement to pay a certain per cent. Disbrow *v.* Disbrow, 46 App. Div. 111, 61 N. Y. Supp. 614, *affirmed* in 167 N. Y. 606, 60 N. E. 1110.

Where a Right Is Given To Construct a Telephone and Telegraph Line over land which the grantor owns or in which he is interested, parol evidence is not admissible, in a suit to enforce the contract, to show that it was understood or agreed by the parties that the line was to be erected along a specified portion of such property. Southern Bell Teleph. & Teleg. Co. *v.* Harris, 117 Ga. 1001, 44 S. E. 117.

A Covenant of Warranty cannot be modified or its legal operation restricted by parol evidence of an agreement by the grantee to assume and pay a mortgage. Rooney *v.* Koenig, 80 Minn. 483, 83 N. W. 399. *Compare* Hamill *v.* Inventors' Mfg. Co., 55 N. J. Eq. 649, 37 Atl. 773.

See article "DEEDS," VII, 2, C. a.

91. *Connecticut.* — Hall *v.* Solomon, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218.

Massachusetts. — Cole *v.* Hadley, 162 Mass. 579, 39 N. E. 279.

Michigan. — Mowry *v.* Mowry, 100 N. W. 388.

New York. — Beagle *v.* Harby, 73 Hun 310, 26 N. Y. Supp. 375, 58 N. Y. St. 62.

Texas. — Hamilton *v.* Clark (Tex. Civ. App.), 26 S. W. 515.

Virginia. — Coffman *v.* Coffman, 79 Va. 504.

92. Lewis *v.* Turnley, 97 Tenn. 197, 36 S. W. 872, holding that evidence of such an agreement to transfer policies of insurance on the property is admissible.

93. Brader *v.* Brader, 110 Wis. 423, 85 N. W. 681.

with the consent of, the grantor, parol evidence is not admissible to show that its operation and effect is qualified by conditions not appearing therein. Such evidence is not admissible either to show that the deed is not to take effect except upon the happening of some event or contingency,[94] or that it is to become void in such an event.[95] Where a deed is delivered in escrow and the conditions of its delivery are stated in writing, they cannot be varied by parol evidence.[96]

(7.) A Reservation or Exception cannot be shown by parol in contradiction of the terms of a deed.[97] And where a reservation is

94. *Alabama.* — Hargrave *v.* Melbourne, 86 Ala. 270, 5 So. 285.

California. — Mowry *v.* Heney, 86 Cal. 471, 25 Pac. 17.

Colorado. — Omaha *v.* Grant Sm. & R. Co., 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

Florida. — Haworth *v.* Norris, 28 Fla. 763, 10 So. 18.

Georgia. — Hawkins *v.* Bevel, 61 Ga. 262.

Illinois. — Chicago Pressed Steel Co. *v.* Clark, 87 Ill. App. 658.

Indiana. — Fouty *v.* Fouty, 34 Ind. 433.

Iowa. — McGee *v.* Allison, 94 Iowa 527, 63 N. W. 322.

New Jersey. — Black *v.* Shreve, 13 N. J. Eq. 455.

New York. — Rathbun *v.* Rathbun, 6 Barb. 98.

Texas. — Galveston H. & S. A. R. Co. *v.* Pfeuffer, 56 Tex. 66; Schmidt *v.* Brittain (Tex. Civ. App.), 84 S. W. 677; McClendon *v.* Brockett, 32 Tex. Civ. App. 150, 73 S. W. 854; Lambert *v.* McClure, 12 Tex. Civ. App. 577, 34 S. W. 973; Byars *v.* Byars, 11 Tex. Civ. App. 565, 32 S. W. 925.

Wisconsin. — Schwalbach *v.* Chicago M. & St. P. R. Co., 73 Wis. 137, 40 N. W. 579.

Compare Minah Consol. Min. Co. *v.* Briscoe, 47 Fed. 276; Holbrook *v.* Truesdell, 100 App. Div. 9, 90 N. Y. Supp. 911.

"When the possession is obtained from, and by the act of the grantor, or with his consent, without infringing salutary principles of the law of evidence, it is not permissible for him to show that the delivery was not absolute; that it was conditional or qualified. . . . The law declares its operation and effect, which cannot be avoided by parol evidence showing the delivery was not absolute, that it was qualified, or conditional, without a violation of the cardinal rule, that the operation and effect of written instruments cannot be varied or altered by evidence resting in parol." Williams *v.* Higgins, 69 Ala. 517, 522, *per* Brickell, J.

A Deed Cannot Be Delivered as an Escrow to the Grantee. — Hargrave *v.* Melbourne, 86 Ala. 270, 5 So. 285; Campbell *v.* Jones, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783; Foley *v.* Cowgill, 5 Blackf. (Ind.) 18; Worrall *v.* Munn, 5 N. Y. 229.

Parol Evidence Is Not Admissible to show that a deed was to take effect only on the death of the grantor (Mowry *v.* Heney, 86 Cal. 471, 25 Pac. 17); or to show that a deed to an educational corporation was on the condition that a certain sum be raised as an endowment (Marshall County High School Co *v.* Iowa Evangelical Synod, 28 Iowa 360).

As to Delivery to a Third Person see article "DEEDS," III, 11, A, Vol. IV.

95. Warren *v.* Miller, 38 Me. 108; Beers *v.* Beers, 22 Mich. 42; Lambert *v.* McClure, 12 Tex. Civ. App. 577, 34 S. W. 973.

96. Hilgar *v.* Miller, 42 Or. 552, 72 Pac. 319.

97. *District of Columbia.* — Towson *v.* Smith, 13 App. D. C. 48.

Illinois. — Damery *v.* Ferguson, 48 Ill. App. 224.

Iowa. — Van Husen *v.* Omaha Bridge & T. R. Co., 118 Iowa 366, 92 N. W. 47.

New York. — Hutchins *v.* Hutchins, 98 N. Y. 56.

South Carolina. — Jacobs *v.* Mutual Ins Co., 56 S. C. 558, 35 S. E. 221.

made, the terms of the deed must control in ascertaining the intention of the parties.[98]

b. *Qualifications of, and Exceptions to, Rule.* — **(1.) To Invalidate.** Parol evidence is admissible to show that a deed has never had any legal existence because of its non-execution,[99] illegality,[1] or to invalidate it on the ground of fraud.[2] Upon the question of

98. Barataria Canning Co. *v* Ott, 84 Miss. 737, 37 So. 121.

Parol Evidence Is Not Admissible to show that a reservation was not intended (Lear *v.* Durgin, 64 N. H. 618, 15 Atl. 128); or to enlarge (Kansas City *v.* Banks, 9 Kan. App. 885, 61 Pac. 333); or to vary the terms of a deed in this respect. Barrett *v.* Kansas & T. Coal Co., (Kan.) 79 Pac. 150.

99. Davis *v.* Hamblin, 51 Md. 525, holding that evidence of forgery is admissible. See McCartney *v.* McCartney, 93 Tex. 359, 55 S. W. 310.

The Genuineness of a Deed Whether Ancient or Modern may be challenged. Parker *v.* Waycross & Florida R. Co., 81 Ga. 387, 8 S. E. 871.

1. **Illegality.** — A deed executed in consideration of the release of a son who is under arrest on a charge of felony is void. Southern Exp. Co. *v.* Duffey, 48 Ga. 358.

2. *United States.* — Morris *v.* Nixon, 1 How. 118.

Alabama. — Thweatt *v.* McLeod, 56 Ala. 375.

Georgia. — Adams *v.* Jones, 39 Ga. 479.

Indiana. — McCormick *v.* Smith, 127 Ind. 230, 26 N. E. 825; Catalani *v.* Catalani, 124 Ind. 54, 24 N. E. 375, 19 Am. St. Rep. 73.

Louisiana. — Hoffmann *v.* Ackerman, 110 La. 1070, 35 So. 293; Thomas *v.* Kennedy, 24 La. Ann. 209; Willis *v.* Kern, 21 La. Ann. 749.

Michigan. — Eckler *v.* Alden, 125 Mich. 215, 84 N. W. 141.

Minnesota. — Cooper *v.* Finke, 38 Minn. 2, 35 N. W. 469.

Missouri. — Stone *v.* Barrett, 34 Mo. App. 15.

New York. — Van Alstyne *v.* Smith, 82 Hun 382, 31 N. Y. Supp. 277, 63 N. Y. St. 595.

North Carolina. — Cutler *v.* Roanoke R. & L. Co., 128 N. C. 477, 39 S. E. 30.

Pennsylvania. — Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552.

South Carolina. — Willcox *v.* Priester, 68 S. C. 106, 46 S. E. 553.

West Virginia. — Troll *v.* Carter, 15 W. Va. 567.

Parol evidence is admissible to show that by fraud or by error the written instrument was made to embody a different agreement from that entered into by the parties, or that, by the fraud of the other party to the deed, one was induced to agree to something the nature of which he did not rightly understand, as for example, was induced to believe that he was executing a mortgage, when in fact he was executing a sale. Le Bleu *v.* Savoie, 109 La. 680, 33 So. 729.

Rule Illustrated. — Parol evidence is admissible to show a misrepresentation as to the number of acres of land conveyed where the deed does not state the number of acres (Thweatt *v.* McLeod, 56 Ala. 375); to show the fraudulent insertion of a clause in a deed (Fuller *v.* Lamar, 53 Iowa 477, 5 N. W. 606); to show that a person who was illiterate and could not read nor write executed a deed without consideration in the belief that he was executing a mere release of a mortgage to correct one previously given. Cooper *v.* Finke, 38 Minn. 2, 35 N. W. 469.

That a Deed to a Grantee Was Taken by Him in Trust for another, may be shown by parol evidence for the purpose of showing that he committed a fraud on such other by taking title in his own name. "This parol evidence cannot be regarded as admitted to vary, explain or contradict the deed, but simply to charge the conscience of the grantee, and to enforce him to perform a trust which the facts so proven show was bind-

fraud it is competent to show the conversations of the parties,[3] their acts and declarations,[4] and all extrinsic facts and circumstances which tend to prove the true character of the transaction.[5]

(2.) **To Support.** — Parol evidence is admissible to support a deed and to rebut any alleged invalidity.[6] But where a deed is void on its face by reason of a non-compliance with a statute, parol evidence is not admissible to validate it.[7]

(3.) **Mistake.** — Parol evidence is admissible to show a mistake in a deed.[8] And such evidence has been admitted not only in a court of equity,[9] but also in actions at law,[10] to show a misdescription

ing on him in equity and conscience." Troll *v.* Carter, 15 W. Va. 567.

In a Case Between Third Persons the grantor is a competent witness to impeach his deed under which one of the parties claims. Reeves *v.* Brayton, 36 S. C. 384, 15 S. E. 658.

3. Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376; Ewing *v.* Smith, 132 Ind. 205, 31 N. E. 464.

4. Mattes *v.* Frankel, 65 Hun 203, 20 N. Y. Supp. 145, 47 N. Y. St. 507. See article "Fraudulent Conveyances," III, 2, B, n. (1.), Vol. VII.

Declarations of a Predecessor in Title as to the invalidity of a deed which appears to be sufficient in all respects, which has all the insignia of genuineness, and which has been duly recorded, are not admissible. Phillips *v.* Laughlin, 99 Me. 26, 58 Atl. 64, 105 Am. St. Rep. 253.

5. Fleming *v.* Yost, 137 Ind. 95, 36 N. E. 705.

Admissibility of Book Entries. In an action to set aside a conveyance as fraudulent, the grantee may introduce in evidence book entries of various amounts paid to the grantor at various times, the entries being made at the time of payment. Such evidence is admissible as a part of the *res gestae* to illustrate and bring out fully the whole transaction in regard to the transfer and the consideration therefor. Fleming *v.* Yost, 137 Ind. 95, 36 N. E. 705.

6. Featherston *v.* Dagnell, 29 S. C. 45, 6 S. E. 897.

7. Daniels *v.* Case, 45 Fed. 843; Gerlach *v.* Walsh, 41 Ill. App. 83; Landeman *v.* Wilson, 29 W. Va. 702, 2 S. E. 203.

Defective Acknowledgment. Where a statute requires that all that is essential to an acknowledgment shall appear in the certificate in order to bar a wife's dower, an acknowledgment of a deed cannot rest partly in writing and partly in parol, and therefore, where an acknowledgment is defective, parol evidence is inadmissible to supply the defect. Ennor *v.* Thompson, 46 Ill. 214.

8. *Louisiana.* — Wurzburger *v.* Meric, 20 La. Ann. 415.

Mississippi. — Lauderdale *v.* Hallock, 7 Smed. & M. 622.

North Carolina. — Koonce *v.* Bryan, 21 N. C. 227.

Pennsylvania. — Chew *v.* Gillespie, 56 Pa. St. 308.

South Carolina. — Brock *v.* O'Dell, 44 S. C. 22, 21 S. E. 976.

Tennessee. — Jones *v.* Sharp, 9 Heisk. 660.

Texas. — Bumpas *v.* Zachary (Tex. Civ. App.), 34 S. W. 672; Hilliard *v.* White (Tex.Civ.App.), 31 S.W. 553.

The Omission of a Condition by mistake may be shown. Shepphard *v.* Reese, 114 Ga. 411, 40 S. E. 282.

Evidence Is Not Admissible to show a mistake where it has reference to matters that did not take place at or about the time of the transaction, or of which it does not appear that the person to be affected was cognizant. Wager *v.* Chew, 15 Pa. St. 323.

9. *Connecticut.* — Abbe *v.* Goodwin, 7 Conn. 377.

Indiana. — Wieneke *v.* Deputy, 31 Ind. App. 621, 68 N. E. 921.

Mississippi. — Lauderdale *v.* Hallock, 7 Smed. & M. 622.

New Jersey. — McKelway *v.* Armour, 10 N. J. Eq. 115, 64 Am. Dec. 445.

New York. — Gillespie *v.* Moon, 2 Johns. Ch. 585, 7 Am. Dec. 559.

West Virginia. — Allen *v.* Yeater, 17 W. Va. 128.

10. Doe *v.* Pickett, 51 Ala. 584;

of the property conveyed,[11] as that the boundaries and calls are erroneously given,[12] or that there was a mistake in the name of the grantee.[13]

(4.) **The True Date of Delivery** of a deed may be shown by parol evidence.[14]

(5.) **Subsequent Agreement.** — Parol evidence may be admissible to show that the terms of a deed have been modified by a subsequent agreement.[15]

(6.) **Recitals** of fact in a deed may be contradicted or explained by parol evidence.[16]

(7.) **To Rebut Presumption.** — A disputable presumption arising from the terms of a deed may be rebutted by parol evidence.[17]

c. *To Explain or Interpret.* — (1.) **General Rule.** — Parol evidence is admissible to explain the terms of a deed where they are vague,

Terry *v.* Berry, 13 Nev. 514; Elliott *v.* Horton, 28 Gratt. (Va.) 766.

11. *Georgia.* — Bedgood *v.* McLain, 89 Ga. 793, 15 S. E. 670; Way *v.* Lowery, 72 Ga. 63.

Louisiana — Vignie *v.* Brady, 35 La. Ann. 560; Levy *v.* Ward, 33 La. Ann. 1033; Fleming *v.* Scott, 26 La. Ann. 545.

Michigan. — Conlin *v.* Masecar, 80 Mich. 139, 45 N. W. 67.

Nevada. — Terry *v.* Berry, 13 Nev. 514.

New York. — Gillespie *v.* Moon, 2 Johns. Ch. 585, 7 Am. Dec. 559.

Ohio. — Longworth *v.* Bank of U. S., 6 Ohio 537.

Texas. — Clark *v.* Regan (Tex. Civ. App.), 45 S. W. 169; Pope *v.* Riggs (Tex. Civ. App.), 43 S. W. 306; Bumpas *v.* Zachary (Tex. Civ. App.), 34 S. W. 672.

Utah. — Stahn *v.* Hall, 10 Utah 400, 37 Pac. 585.

Wisconsin. — Thompson *v.* Jones, 4 Wis. 106.

Compare Donehoo *v.* Johnson, 120 Ala. 438, 24 So. 888.

12. Capelli *v.* Dondero, 123 Cal. 324, 55 Pac. 1057; Mageehan *v.* Adams, 2 Binn. (Pa.) 109; Koepsel *v.* Allen, 68 Tex. 446, 4 S. W. 856; Chestnut *v.* Chism, 20 Tex. Civ. App. 23, 48 S. W. 549; Meriwether *v.* Asbeck (Tex. Civ. App.), 25 S. W. 1100.

13. *Indiana.* — Louisville N. A. & C. R. Co. *v.* Power, 119 Ind. 269, 21 N. E. 751.

Louisiana. — Robert *v.* Boulat, 9 La. Ann. 29.

Ohio. — Gill *v.* Pelkey, 54 Ohio St. 348, 43 N. E. 991.

South Dakota. — Salmer *v.* Lathrop, 10 S. D. 216, 72 N. W. 570.

Texas. — White *v.* Simonton, 34 Tex. Civ. App. 464, 79 S. W. 621.

14. *Florida.* — Moody *v.* Hamilton, 22 Fla. 298.

Missouri. — Saunders *v.* Blythe, 112 Mo. 1, 20 S. W. 319.

North Carolina. — Vaughan *v.* Parker, 112 N. C. 96, 16 S. E. 908.

Pennsylvania. — Wheelock *v.* Harding, 4 Pa. Super. Ct. 21.

Virginia. — Bruce *v.* Slemp, 82 Va. 352, 4 S. E. 692.

See article "DEEDS," III, 9, A, Vol. IV.

15. Adams *v.* Battle, 125 N. C. 152, 34 S. E. 245.

16. *California.* — Phillips *v.* Hagart, 113 Cal. 552, 45 Pac. 843, 54 Am. St. Rep. 369.

Iowa. — McNamara *v.* Estes, 22 Iowa 246.

Kansas. — Noble *v.* Douglass, 56 Kan. 92, 42 Pac. 328.

Missouri. — Bridges *v.* Russell, 30 Mo. App. 258.

North Carolina. — Bonds *v.* Smith, 106 N. C. 553, 11 S. E. 322.

Pennsylvania. — Nichols *v.* Nichols, 133 Pa. St. 438, 19 Atl. 422.

As to Recitals Affecting Consideration see article "DEEDS." V, 12, C, Vol. IV.

17. To Rebut Presumption. — Parol evidence is admissible to rebut a presumption that a deed was an advancement (Hattersley *v.* Bissett, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am.

uncertain, or ambiguous.[18] Where, however, there is no uncertainty as to the meaning of the parties, a deed cannot be varied by parol under the pretence that such evidence tends to explain the parties' intention.[19]

(2.) Surrounding Circumstances. — Evidence of the circumstances surrounding the execution of a deed is admissible to explain the intention of the parties where this is doubtful or uncertain.[20]

(3.) To Show True Character of Transaction. — (A.) IN GENERAL. Evidence of the true character of the transaction embodied in a deed is in many cases admissible, as it would frequently occur that if the circumstances under which, and the purposes for which, the deed was given could not be shown it would enable the grantee to reap the benefits of his own fraudulent conduct.[21]

St. Rep. 532; McClintock *v.* Loisseau, 31 W. Va. 865, 8 S. E. 612, 2 L. R. A. 816); that a deed by a husband to his wife was a gift (Pool *v.* Phillips, 167 Ill. 432, 47 N. E. 758); and that joint grantees in a deed own the property in equal shares. Cage *v.* Tucker, 14 Tex. Civ. App. 316, 37 S. W. 180.

18. *Alabama.*— Hereford *v.* Hereford, 131 Ala. 573, 32 So. 620.

District of Columbia. — Gibbons *v.* Duley, 17 Wash. L. Rep. 470.

Georgia. — Leverett *v.* Bullard, 121 Ga. 534, 49 S. E. 591.

Illinois. — Mason *v.* Merrill, 129 Ill. 503, 21 N. E. 799; Drury *v.* Holden, 121 Ill. 130, 13 N. E. 547; Gardt *v.* Brown, 113 Ill. 475, 55 Am. Rep. 434.

Louisiana. — Lee *v.* Carter, 52 La. Ann. 1453, 27 So. 739.

Massachusetts. —Scaplen *v.* Blanchard, 187 Mass. 73, 72 N. E. 346.

Missouri. — Freeman *v.* Moffit, 119 Mo. 280, 25 S. W. 87.

New York. — Perrior *v.* Peck, 167 N. Y. 582, 60 N. E. 1118.

South Carolina. — Murray *v.* Northwestern R. Co., 64 S. C. 520, 42 S. E. 617.

Texas. — Mitchell *v.* Allen, 69 Tex. 70, 6 S. W. 745; Stautzenberger *v.* Stautzenberger, 17 S. W. 1046; Johnson *v.* Elmen, 24 Tex. Civ. App. 43, 59 S. W. 605; Chestnut *v.* Chism, 20 Tex. Civ. App. 23, 48 S. W. 549; Henderson *v.* Stith (Tex. Civ. App.), 43 S. W. 566.

Vermont. — Young *v.* Young, 59 Vt. 342, 10 Atl. 528.

Washington. — Clark *v.* Tacoma B. & S. Ass'n, 2 Wash. 203, 26 Pac. 253; Reed *v.* Tacoma B. & S. Ass'n, 2 Wash. 198, 26 Pac. 252, 26 Am. St. Rep. 851.

Wisconsin. — Murray Hill Land Co. *v.* Milwaukee Light, H. & P. Co., 110 Wis. 555, 86 N. W. 199; Helmholz *v.* Everingham, 24 Wis. 266.

Wyoming. — Hicks *v.* Frank, 4 Wyo. 502, 35 Pac. 475.

Writings Entered Into Contemporaneously With a Deed are admissible to supplement and explain that which evidently was not fully expressed in the deed. Brown *v.* Grove, 80 Fed. 564, 25 C. C. A. 644.

19. Terrell *v.* Huff, 108 Ga. 655, 34 S. E. 345; Com. *v.* Wellington, 146 Mass. 566, 16 N. E. 446; Abraham *v.* Oregon & C. R. Co., 37 Or. 495, 60 Pac. 899, 82 Am. St. Rep. 770, 64 L. R. A. 391.

20. *California.* — Baker *v.* Clark, 128 Cal. 181, 60 Pac. 677.

Michigan. — White *v.* Rice, 112 Mich. 403, 70 N. W. 1024.

Oregon. — Wills *v.* Leverich, 20 Or. 168, 25 Pac. 398.

Texas. — McHugh *v.* Gallagher, 1 Tex. Civ. App. 196, 20 S. W. 1115.

Vermont. — Kinney *v.* Hooker, 65 Vt. 333, 26 Atl. 690, 36 Am. St. Rep. 864.

Wisconsin. — Stahl *v.* Lynn, 81 Wis. 668, 51 N. W. 879.

21. *California.* — Black *v.* Sharkey, 104 Cal. 279, 37 Pac. 939; Corcoran *v.* Hinkel, 34 Pac. 1031.

Indiana. — Wolfe *v.* McMillan, 117 Ind. 587, 20 N. E. 509.

New York. — Barry *v.* Colville, 129 N. Y. 302, 29 N. E. 307; Johnson *v.* Donovan, 50 Hun 215, 2 N. Y. Supp. 858, 20 N. Y. St. 30.

(B.) As an Advancement. — Parol evidence is admissible to show that a deed from a parent to a child was intended as an advancement.[22]

(C.) As Security or Mortgage. — Parol evidence is generally admissible to show that a deed though absolute on its face was given as security for the payment of money,[23] or that it was in fact a mortgage,[24] and for these purposes it is competent to show that

Pennsylvania. — Ringrose *v.* Ringrose, 170 Pa. St. 593, 33 Atl. 129.

Texas. — McCartney *v.* McCartney, 93 Tex. 359, 55 S. W. 310; Smith *v.* Smith, 81 Tex. 45, 16 S. W. 637; Ullmann *v.* Jasper, 70 Tex. 446, 7 S. W. 763; Hamilton Brown Shoe Co. *v.* Mayo, 8 Tex. Civ. App. 164, 27 S. W. 781; Sinsheimer *v.* Kahn, 6 Tex. Civ. App. 143, 24 S. W. 533.

Wisconsin. — Russell *v.* Andrae, 79 Wis. 108, 48 N. W. 117.

The Object of a Deed is to convey title and not to state the contract between the parties, and parol evidence is admissible to show the real contract in pursuance of which it was given. Post *v.* Gilbert, 44 Conn. 9. See Frey *v.* Vanderhoof, 15 Wis. 397.

Application of Rule. — Parol evidence is admissible to show that a deed absolute in form was merely a partition deed between co-parceners, and therefore no conveyance at all (Dooley *v.* Baynes, 86 Va. 644, 649, 10 S. E. 974); that, though purporting to have been given as collateral, it was in fact given as a payment in full (Blazy *v.* McLean, 129 N. Y. 44, 29 N. E. 6); that it was given in payment of a judgment (Vestal *v.* Wicker, 108 N. C. 21, 12 S. E. 1037); or that it was intended to operate as a will (*In re* Slinn, L. R. 15 P. D. 156). But in Georgia it has been decided that parol evidence is not admissible to show that a deed was intended as a power of attorney. Anderson *v.* Continental Ins. Co., 112 Ga. 532, 37 S. E. 766.

A Quit-claim Deed may be shown not to be an absolute release. Purcell *v.* Burns, 39 Conn. 429.

Character of the Evidence. — Such evidence must be clear, certain and convincing, and such as to establish the facts alleged beyond any substantial doubt. Davis *v.* Hopkins, 18 Colo. 153, 32 Pac. 70; Senff *v.* Pyle, 46 Ohio St. 102, 24 N. E. 595, 15 Am. St. Rep. 562, 2 L. R. A. 753.

22. *Iowa.* — Finch *v.* Garrett, 102 Iowa 381, 71 N. W. 429.

North Carolina. — Barbee *v.* Barbee, 109 N. C. 299, 13 S. E. 792.

Pennsylvania. — Beringer *v.* Lutz, 179 Pa. 1, 37 Atl. 640.

West Virginia. — McClanahan *v.* McClanahan, 36 W. Va. 34, 14 S. E. 419.

Wisconsin. — Pomeroy *v.* Pomeroy, 93 Wis. 262, 67 N. W. 430.

23. *United States.* — Mowry *v.* Cummings, 34 Fed. 713.

Florida. — First Nat. Bank *v.* Ashmead, 23 Fla. 379, 2 So. 657.

Illinois. — German Ins. Co. *v.* Gibe, 162 Ill. 251, 44 N. E. 490; Conant *v.* Riseborough, 139 Ill. 383, 28 N. E. 789; Pearson *v.* Pearson, 131 Ill. 464, 23 N. E. 418.

Iowa. — Langer *v.* Meservey, 80 Iowa 158, 45 N. W. 732.

Missouri. — Quick *v.* Turner, 26 Mo. App. 29.

New Jersey. — Winters *v.* Earl, 52 N. J. Eq. 52, 28 Atl. 15.

New York. — Ensign *v.* Ensign, 120 N. Y. 655, 24 N. E. 942.

Pennsylvania. — Pearson *v.* Sharp, 115 Pa. 254, 9 Atl. 38.

South Carolina. — Nesbitt *v.* Cavender, 27 S. C. 1, 2 S. E. 702.

Texas. — Gray *v.* Shelby, 83 Tex. 405, 18 S. W. 809.

Utah. — Wasatch Min. Co. *v.* Jennings, 5 Utah 243, 15 Pac. 65.

West Virginia. — Gilchrist *v.* Beswick, 33 W. Va. 168, 10 S. E. 371.

Wisconsin. — Schierl *v.* Newburg, 102 Wis. 552, 78 N. W. 761.

But see Munford *v.* Green, 19 Ky. L. Rep. 1791, 44 S. W. 419; Flint *v.* Sheldon, 13 Mass. 443, 7 Am. Dec. 162.

24. *United States.* — Peugh *v.* Davis, 96 U. S. 332.

California. — Pierce *v.* Robinson, 13 Cal. 116.

the vendor remained in possession of and exercised control over the property, and that the vendee treated the conveyance as security.[25]

(D.) As a Trust. — Parol evidence is admissible to show that a deed conveying the property was intended to create a trust in the grantee,[26] as where the purchase money was furnished by a third

Delaware. — Walker *v.* Farmers Bank, 8 Houst. 258, 14 Atl. 819.

Illinois. — Trogdon *v.* Trogdon, 164 Ill. 144, 45 N. E. 575; Helbreg *v.* Schumann, 150 Ill. 12, 37 N. E. 99, 41 Am. St. Rep. 339.

Indiana. — Kelso *v.* Kelso, 16 Ind. App. 615, 44 N. E. 1013; 45 N. E. 1065; Loeb *v.* McAlister, 15 Ind. App. 643, 44 N. E. 378.

Kansas. — Barnes *v.* Crockett, 4 Kan. App. 777, 46 Pac. 997.

Kentucky. — Seiler *v.* Northern Bank, 86 Ky. 128, 5 S. W. 536; Trimble *v.* McCormick, 12 Ky. L. Rep. 857, 15 S. W. 358.

Maine. — Libby *v.* Clark, 88 Me. 32, 33 Atl. 657.

Minnesota. — Backus *v.* Burke, 63 Minn. 272, 65 N. W. 459.

Mississippi. — Klein *v.* McNamara, 54 Miss. 90.

Missouri. — Cobb *v.* Day, 106 Mo. 278, 17 S. W. 323.

Montana. — Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

North Carolina. — Watkins *v.* Williams, 123 N. C. 170, 31 S. E. 388; Shelton *v.* Shelton, 58 N. C. 292.

Oklahoma — Weiseham *v.* Hocker, 7 Okla. 250, 54 Pac. 464.

Oregon. — Swegle *v.* Belle, 20 Or. 323, 25 Pac. 633.

Pennsylvania. — Selby's Estate, 7 Pa. Dist. Rep. 171.

Tennessee. — Lewis *v.* Bayliss, 90 Tenn. 280, 16 S. W. 376.

Texas. — McLean *v.* Ellis, 79 Tex. 398, 15 S. W. 394; Lynn *v.* Sims, (Tex. Civ. App.), 43 S. W. 554; Wiggins *v.* Wiggins, 16 Tex. Civ. App. 335, 40 S. W. 643; Apollos *v.* Staniforth, 3 Tex. Civ. App. 502, 22 S. W. 1060.

West Virginia. — Shank *v.* Groff, 43 W. Va. 337, 27 S. E. 340; McNeel *v.* Auldridge, 34 W. Va. 748, 12 S. E. 851.

Compare Mitchell *v.* Fullington, 83 Ga. 301, 9 S. E. 1083, holding that a deed cannot under Georgia Code, § 3809, be shown to be a mortgage where there has been a delivery accompanied by possession.

25. Peck *v.* Manning, 99 N. C. 157, 5 S. E. 743.

26. *England.* — Rochefoucauld *v.* Boustead, (1897) 1 Ch. 196, 66 L. J. Ch. 74, 75 Law T. N. S. 502.

Alabama. — Anthe *v.* Heide, 85 Ala. 236, 4 So. 380.

California. — Brison *v.* Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Russ *v.* Mebius, 16 Cal. 350; Osborne *v.* Endicott, 6 Cal. 149, 65 Am. Dec. 498.

Delaware. — Pierson *v.* Pierson, 5 Del. Ch. 11.

Idaho. — Branstetter *v.* Mann, 6 Idaho 580, 57 Pac. 433.

Illinois. — Myers *v.* Myers, 167 Ill. 52, 47 N. E. 309.

Kansas. — Howard *v.* Howard, 52 Kan. 469, 34 Pac. 1114.

Michigan. — Ripley *v.* Seligman, 88 Mich. 177, 50 N. W. 143; Bitely *v.* Bitely, 85 Mich. 227, 48 N. W. 540; Collar *v.* Collar, 75 Mich. 414, 42 N. W. 847, 4 L. R. A. 491.

New Jersey. — Silvers *v.* Potter, 48 N. J. Eq. 539, 22 Atl. 584; McVay *v.* McVay, 43 N. J. Eq. 47, 10 Atl. 178.

New York. — Medical College Laboratory *v.* New York University, 76 App. Div. 48, 78 N. Y. Supp. 673.

North Carolina. — Hughes *v.* Pritchard, 122 N. C. 59, 29 S. E. 93.

Ohio. — Senff *v.* Pyle, 46 Ohio St. 102, 24 N. E. 595, 2 L. R. A. 753.

Oregon. — Cooper *v.* Thomason, 30 Or. 161, 45 Pac. 296; Parker *v.* Newitt, 18 Or. 274, 23 Pac. 246.

South Carolina. — Rogers *v.* Rogers, 52 S. C. 388, 29 S. E. 812.

Texas. — Smith *v.* Eckford, 18 S. W. 210; Mead *v.* Randolph, 8 Tex. 191; Barnet *v.* Houston, 18 Tex. Civ. App. 134, 44 S. W. 689; Black *v.* Caviness, 2 Tex. Civ. App. 118, 21 S. W. 635.

It Is in the Nature of a Fraud for one to whom land is conveyed

party and the title was taken in the name of the grantee in trust for the former.[27] But it is held that such evidence is not admissible to show that the grantee was to hold the property in trust for the grantor,[28] in the absence of any allegation of fraud or mistake,[29] and a trust cannot by parol evidence be engrafted upon a deed as against innocent purchasers,[30] or a subsequent mortgagee without notice.[31]

as trustee to deny the fact that the land was so conveyed and to claim it for himself. Rochefoucauld *v.* Boustead, (1897) 1 Ch. 196, 66 L. J. Ch. 74, 75 Law T. N. S. 502.

Circumstances Surrounding the Execution are admissible for this purpose. Hughes *v.* Pritchard, 122 N. C. 59, 29 S. E. 93.

The Statute of Frauds does not preclude the admission of such evidence. Rochefoucauld *v.* Boustead, (1897) 1 Ch. 196, 66 L. J. Ch. 74, 75 Law T. N. S. 502.

27. That the Purchase Money Was Paid by Another than the grantee named and that title was taken by the former, may be shown by parol evidence (McElroy *v.* Swope, 47 Fed. 380; Springer *v.* Kroeschell, 161 Ill. 358, 43 N. E. 1084; Hudson *v.* White, 17 R. I. 519, 23 Atl. 57; Heath *v.* First Nat. Bank, 19 Tex. Civ. App. 63, 46 S. W. 123; Bank of United States *v.* Carrington, 7 Leigh 566), even though the one in whose name title was taken has died (Chambers *v.* Emery, 13 Utah 374, 45 Pac. 192. *Compare* Stonehill *v.* Swartz, 129 Ind. 310, 28 N. E. 620); thus, it has been decided that after the death of the husband it may be shown that a deed to him was in trust for his wife, who provided the purchase money from the proceeds of her separate estate. Pritchard *v.* Wallace, 4 Sneed (Tenn.) 405, 70 Am. Dec. 254.

28. *Colorado.* — Annis *v.* Wilson, 15 Colo. 236, 25 Pac. 304.

Maine. — Wentworth *v.* Shibles, 89 Me. 167, 36 Atl. 108, decided under Me. Rev. St. ch. 73, § 11.

Minnesota. — Pillsbury Washburn F. M. Co. *v.* Kistler, 53 Minn. 123, 54 N. W. 1063.

Mississippi. — Horne *v.* Higgins, 76 Miss. 813, 25 So. 489, decided under Miss. Code 1892, § 4230.

Missouri. — Hillman *v.* Allen, 145 Mo. 638, 47 S. W. 509.

Pennsylvania. — Porter *v.* Mayfield, 21 Pa. St. 263.

West Virginia. — Handlan *v.* Handlan, 42 W. Va. 309, 26 S. E. 179.

But see Reeves *v.* Bass, 39 Tex. 619, holding that evidence was admissible to show that a conveyance was in trust for the grantor who was to have the use and control of the property during his life and that the deed was to operate as a testamentary devise at his death.

"There are cases wherein trusts may be proved by oral testimony; but not in violation of the rule that protects written agreements against such testimony. As a deed of conveyance is intended to define the relations between the parties to it, it is not contradicted when it is shown that the vendee purchased in trust for a third person; for such evidence only establishes a new and consistent relation. But evidence that at the time of the conveyance, the vendee agreed to hold the title in trust for the vendor, is a flat contradiction of the written instruments executed by the parties." Porter *v.* Mayfield, 21 Pa. St. 263, 264, *per* Lowrie, J.

29. Holtheide *v.* Smith, 24 Ky. L. Rep. 2535, 74 S. W. 689. See Gowdy *v.* Gordon, 122 Ind. 533, 24 N. E. 226.

30. So in the case of a deed to a wife it is said: "We know of no principle upon which such evidence can be received for the purpose of explaining or modifying such deeds, after the property has passed into the hands of innocent purchasers, and thereby engrafting upon it a trust to their detriment. Such a doctrine would go far to destroy the utility of written evidence of title to land, and the registration of conveyances for the purpose of notice." Cooke *v.* Bremond, 27 Tex. 457, 460, 86 Am. Dec. 626, *per* Moore, J.

31. McClanachan *v.* Siter, 2 Gratt. (Va.) 280.

(4.) To Identify Property. — (A.) General Rule. — Parol evidence is admissible for the purpose of applying the description in a deed to the subject-matter,[32] and to identify the property conveyed thereby,[33] for which purpose it is competent to prove the facts and circumstances surrounding its execution,[34] the acts and conduct of the parties, and the occupation of the premises by them and preceding owners, showing the practical construction of the deed.[35]

(B.) What Essential to Admission of Evidence to Identify. — (a.) *In General.* — All that is required in a deed to render such evidence admissible is reasonable certainty,[36] and if the description is not too

32. Andreu *v.* Watkins, 26 Fla. 390, 7 So. 876; Mayor, Etc. of Chauncey *v.* Brown, 99 Ga. 766, 26 S. E. 763; Robinson *v.* Jones, 2 Tex. Civ. App. 316, 22 S. W. 15; Mendota Club *v.* Anderson, 101 Wis. 479, 78 N. W. 185.

33. *Alabama.* — Dorlan *v.* Westervitch, 140 Ala. 283, 37 So. 382, 103 Am. St. Rep. 35; Pearson *v.* Adams, 129 Ala. 157, 29 So. 977; Robinson *v.* Allison, 109 Ala. 409, 19 So. 837; Black *v.* Pratt Coal & Coke Co., 85 Ala. 504, 5 So. 89.

Colorado. — Kretschmer *v.* Hard, 18 Colo. 223, 32 Pac. 418.

Georgia. — Georgia & A. R. *v.* Shiver, 121 Ga. 708, 49 S. E. 700; Gordon *v.* Trimmier, 91 Ga. 472, 18 S. E. 404; Shore *v.* Miller, 80 Ga. 93, 4 S. E. 561, 12 Am. St. Rep. 239.

Illinois. — Halliday *v.* Hess, 147 Ill. 588, 35 N. E. 380; Bradish *v.* Yocum, 130 Ill. 386, 23 N. E. 114.

Indiana. — McDonald *v.* Payne, 114 Ind. 359, 16 N. E. 795.

Iowa. — Van Husen *v.* Omaha Bridge & T. R. Co., 118 Iowa 366, 377, 92 N. W. 47.

Kentucky. — Broaddus *v.* Eubanks, 18 Ky. L. Rep. 742, 38 S. W. 134; Thacker *v.* Howell, 16 Ky. L. Rep. 134, 26 S. W. 719.

Maine. — Simpson *v.* Blaisdell, 85 Me. 199, 35 Am. St. Rep. 348, 27 Atl. 101; Moses *v.* Morse, 74 Me. 472.

Minnesota. — Eastman *v.* St. Anthony Falls Water-Power Co., 43 Minn. 60, 44 N. W. 882.

Mississippi. — Reber *v.* Dowling, 65 Miss. 259, 3 So. 654, 7 Am. St. Rep. 651.

Missouri. — Orr *v.* How, 55 Mo. 328; Schreiber *v.* Osten, 50 Mo. 513.

Nebraska. — Keplinger *v.* Woolsey, 93 N. W. 1008.

New Mexico. — Armijo *v.* New Mexico Town Co., 3 N. M. 427, 5 Pac. 709.

New York. — Petrie *v.* Hamilton College, 158 N. Y. 458, 53 N. E. 216.

North Carolina. — Hartsell *v.* Coleman, 116 N. C. 670, 21 S. E. 392; Perry *v.* Scott, 109 N. C. 374, 14 S. E. 294; Euliss *v.* McAdams, 108 N. C. 507, 13 S. E. 162; Blow *v.* Vaughan, 105 N. C. 198, 10 S. E. 891; Robbins *v.* Harris, 96 N. C. 557, 2 S. E. 70.

Oregon. — Hicklin *v.* McClear, 18 Or. 126, 22 Pac. 1057.

South Carolina. — Welborn *v.* Dixon, 70 S. C. 108, 49 S. E. 232; Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680.

Texas. — McCrory *v.* Lutz (Tex. Civ. App.), 64 S. W. 780; Linnartz *v.* McCulloch (Tex. Civ. App.), 27 S. W. 279.

Virginia. — New River Mineral Co. *v.* Painter, 100 Va. 507, 42 S. E. 300.

Washington. — Squire *v.* Greer, 2 Wash. 209, 26 Pac. 222.

West Virginia. — Snooks *v.* Wingfield, 52 W. Va. 441, 44 S. E. 277.

The Subject Upon Which a Warranty was intended to operate may be shown by parol evidence. Gill *v.* Ferrin, 71 N. H. 421, 52 Atl. 558.

34. Jay *v.* Michael, 82 Md. 1, 33 Atl. 322; Ives *v.* Kimball, 1 Mich. 308.

35. Graves *v.* Broughton, 185 Mass. 174, 69 N. E. 1083; Reynolds *v.* Boston Rubber Co., 160 Mass. 240, 35 N. E. 677; Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244. *Compare* McKenzie *v.* Houston, 130 N. C. 566, 41 S. E. 780.

36. Foley *v.* Ruley, 43 W. Va. 513, 520, 27 S. E. 268.

vague, but is capable of being made certain, parol evidence is admissible to identify the property conveyed.[37] The evidence however must be limited to an application of the description given, as an intention of the parties inconsistent therewith cannot be shown.[38] The description may be so vague as to be void and thus render evidence inadmissible to identify the property.[39]

(b.) *When Parol Evidence Not Admissible.* — Where there is no ambiguity and the language is clear and definite, parol evidence is not admissible[40] either to show that the property intended to be transferred was other than is clearly indicated by the description in the deed,[41] or to enlarge the description so as to include property not covered by its plain terms,[42] or generally to control or vary that description.[43]

"It is well settled law, that a deed shall not be held void for uncertainty, but shall be so construed wherever it is possible as to give effect to the intention of the parties and not defeat it; and that this may be done whenever the court placing itself in the situation of the grantor at the date of the transaction, with knowledge of the surrounding circumstances and of the force and import of the words used, can ascertain his meaning and intention from the language of the conveyance." Cilley *v.* Childs, 73 Me. 130, 133, *per* Barrous, J.

37. Griffin *v.* Hall, 115 Ala. 482, 22 So. 162; Black *v.* Pratt Coal & Coke Co., 85 Ala. 504, 5 So. 89; Moses *v.* Morse, 74 Me. 472; Hartsell *v.* Coleman, 116 N. C. 670, 21 S. E. 392; Robbins *v.* Harris, 96 N. C. 557, 2 S. E. 70; McGlawhorn *v.* Worthington, 98 N. C. 199, 3 S. E. 633.

"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, an identification of the land conveyed." The rule is founded on the maxim *"Id certum est, quod certum reddi potest."* Blow *v.* Vaughan, 105 N. C. 198, 10 S. E. 891.

This Rule Has Been Applied to allow evidence to identify "a certain tract of land in this state, lying about twelve miles above Fredericksburg, containing about 500 acres" (Cox *v.* Rust [Tex. Civ. App.], 29 S. W. 807), "all the real estate, water rights, and property of every description, real and personal, in the state of Nevada, belonging to the first parties of the first part, or either of them" (Brown *v.* Warren, 16 Nev. 228), and "a piece of the Abraham Moore tract of land . . . as we inherited at the death of Zachariah Peck as heirs of him." Moses *v.* Peak, 48 N. C. 520.

38. Gaston *v.* Weir, 84 Ala. 193, 4 So. 258.

39. Coker *v.* Roberts, 71 Tex. 597, 9 S. W. 665.

40. Oliver *v.* Brown, 102 Ga. 157, 29 S. E. 159; Van Husan *v.* Omaha Bridge & T. R. Co., 118 Iowa 366, 92 N. W. 47; Sloan *v.* King, 29 Tex. Civ. App. 599, 69 S. W. 541; Chew *v.* Zweib, 29 Tex. Civ. App. 311, 69 N. W. 207; Dawson *v.* McLeary (Tex. Civ. App.), 25 S. W. 705.

41. Griffin *v.* Hall, 115 Ala. 482, 22 So. 162; Duggan *v.* Uppendahl, 197 Ill. 179, 64 N. E. 289; King *v.* New York & C. G. C. Co., 204 Pa. St. 628, 54 Atl. 477; Elofrson *v.* Lindsay, 90 Wis. 203, 63 N. W. 89.

42. Clark *v.* Gregory (Tex.), 27 S. W. 56; Jackson *v.* Fawlkes (Tex.), 20 S. W. 136; Sulphur Mines Co. *v.* Thomson, 93 Va. 293, 25 S. E. 232.

43. *Canada.* — Quebec *v.* North Shore R. Co., 27 Can. Sup. Ct. 102.

United States.— McManus *v.* Chollar, 128 F. 902, 63 C. C. A. 454.

Florida. — Andrew *v.* Watkins, 26 Fla. 390, 7 So. 876.

Minnesota. — Beardsley *v.* Crane, 52 Minn. 537, 54 N. W. 740.

(C.) Description by General Terms or Known Designation. — Words of general description may be sufficient to permit the admission of parol evidence to apply the same to the property intended to be conveyed and thus to identify it.[44] A description by a name or designation generally known in the locality may be sufficient, however vague the description may appear.[45]

(D.) Boundaries, Calls and Monuments — Parol evidence is admissible to locate and identify boundaries,[46] or the calls of a

Missouri. — Harding *v.* Wright, 119 Mo. 1, 24 S. W. 211.

New York. — Armstrong *v.* Lake Champlain Granite Co., 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683; Riehlman *v.* Field, 81 App. Div. 526, 81 N. Y. S. 239.

44. Abbott *v.* Coates, 62 Neb. 247, 86 N. W. 1058; Orvis *v.* Elmira C. & N. R. Co., 17 App. Div. 187, 45 N. Y. Supp. 367, *affirmed* in 172 N. Y. 656, 65 N. E. 1120.

"Any description of lands, however general and indefinite, which is capable of being made practically certain by other evidence, is sufficient." Tucker *v.* Field, 51 Miss. 191, *per* Peyton, C. J.

Where Land "Known as the East Half" is conveyed, extrinsic evidence whereby the land described is identified, whether there be more or less than the mathematical half, does not contradict nor explain the terms in the deed, but leaves every word in the description to be understood in its plain and ordinary sense. Schlief *v.* Hart, 29 Ohio St. 150.

45. Bollinger County *v.* McDowell, 99 Mo. 632, 13 S. W. 100; Marvin *v.* Elliott, 99 Mo. 616, 12 S. W. 899; Shewalter *v.* Pirner, 55 Mo. 218; Webster *v.* Blount, 39 Mo. 500; Bates *v.* Bank of Missouri, 15 Mo. 309, 55 Am. Dec. 145.

Rule Illustrated. — In the application of this rule evidence has been held admissible to identify property described as the "Homestead Farm" (Estate of Hunsecker, 6 Pa. Dist. Rep. 202), "Rose Hill" farm (Dougherty *v.* Chestnutt, 86 Tenn. 1, 5 S. W. 444), "Wards Old Place" (Dorgan *v.* Weeks, 86 Ala. 329, 5 So. 581), "The Sellars tract" (Enliss *v.* McAdams, 108 N. C. 507, 13 S. E. 162), "Enfield property" (Packard *v.* Putnam, 57 N. H. 43), and "Douglass Gold Mine." Baucum *v.* George, 65 Ala. 250.

When a Deed of Land "Known by Name of the Mill Spot" was given, parol evidence was held admissible to show where "the mill spot" was. The court said: "The deed given in evidence by the defendant, and relied on as proof of title, specified no metes, bounds or measurements, but purported to convey land by a name or designation, 'the mill spot.' This is a proper mode of conveying land, which by reputation has acquired a proper name. But it necessarily calls for evidence *aliunde* to show where the 'mill spot' was; and the same evidence, which proves the existence of such a place, is competent to prove its limits. That any specific lot bears a particular proper name, can only be shown by reputation, that it has been so known, reputed and understood. The evidence objected to tended to show that the 'mill spot' was reputed to be bounded by a town, way, which excluded the premises. We think evidence to prove what particular piece of ground had acquired the name of the 'mill spot,' by a long established reputation, before and at the time the deed was executed, was competent to show what was intended by the name used, and that it was competent to show such reputation by parol evidence." Woods *v.* Swain, 4 Gray (Mass.) 322, 323.

46. Diggs *v.* Kurtz, 132 Mo. 250, 33 S. W. 815, 53 Am. St. Rep. 488; Hanlon *v.* Union Pac. R. Co., 40 Neb. 52, 58 N. W. 590; Bartlett *v.* La Rochelle, 68 N. H. 211, 44 Atl. 302; Fuller *v.* Weaver, 175 Pa. St. 182, 34 Atl. 634; Wead *v.* St. Johnsbury & L. C. R. Co., 64 Atl. 52, 24 Atl. 361.

"Actual occupation — ancient rep-

conveyance,[47] and monuments or natural objects given or referred to in a deed.[48] Such evidence, however, is not admissible where there is no doubt nor ambiguity as to the location of the monuments,[49] nor to control or vary boundaries, the location of which may be determined with certainty from the deed itself.[50]

(E.) To Identify Interest Conveyed. — Where a person conveys his interest in real estate without specifying the nature of the interest, parol evidence is admissible to show what interest was intended to be conveyed,[51] but not to vary the terms or legal effect of the deed.[52]

(F.) To Identify That Which is Excepted. — In the case of an exception or reservation, parol evidence is admissible to identify the subject-matter thereof where its identity is not sufficiently disclosed by the instrument itself.[53]

(G.) Reference to Other Instrument. — Where a deed refers to another instrument for the description of the property conveyed, parol evidence is admissible to connect the instrument referred to with the deed.[54]

(5.) To Identify Parties. — Parol evidence is admissible to identify

utation — the admissions of the party in possession against his interest — ancient maps and draft — marked trees — the lines of adjoining surveys — monuments erected at or soon after the date of the grant of adjoining surveys, — are all admissible for this purpose, and are constantly resorted to to fix the boundaries, though it conflicts with the courses and distances called for in the deed." Opdyke *v.* Stephens, 28 N. J. L. 83, 89.

Where Land Is Described as Bounded by a Highway, parol evidence is admissible to show that the parties had always treated the line as fenced, as the boundary, and that the line, as fenced and occupied, was never changed to accord with a certain survey. Wead *v.* St. Johnsbury & L. C. R. Co., 64 Vt. 52, 24 Atl. 361.

47. Thompson *v.* Southern Cal. M. R. Co., 82 Cal. 497, 23 Pac. 130; O'Connell *v.* Cox, 179 Mass. 250, 60 N. E. 580; Hartsell *v.* Coleman, 116 N. C. 670, 21 S. E. 392; Bonaparte *v.* Carter, 106 N. C. 534, 11 S. E. 262; Bassett *v.* Martin, 83 Tex. 339, 18 S. W. 587; Sloan *v.* King, 33 Tex. Civ. App. 537, 77 S. W. 48.

48. Hedge *v.* Sims, 29 Ind. 574; Echerd *v.* Johnson, 126 N. C. 409, 35 S. E. 1036.

49. Singer *v.* New York, 47 App. Div. 42, 62 N. Y. Supp. 347.

50. Olson *v.* Keith, 162 Mass. 485, 39 N. E. 410; Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. 154.

51. Miles *v.* Miles, 78 Miss. 904, 30 So. 2; Reece *v.* Renfro, 68 Tex. 192, 4 S. W. 545; House *v.* Johnson (Tex. Civ. App.), 36 S. W. 916. See Graham *v.* Botner, 18 Ky. L. Rep. 637, 37 S. W. 583; Coffrin *v.* Cole, 67 Vt. 226, 31 Atl. 303.

52. Cauble *v.* Worsham, 96 Tex. 86, 70 S. W. 737, wherein it is decided that a quit-claim deed, operating to convey whatever title or interest a party possesses, cannot be limited in its effect by parol evidence.

53. Moody *v.* Alabama G. S. R. Co., 124 Ala. 195, 26 So. 952; Gardner *v.* Webster, 64 N. H. 520, 15 Atl. 144.

54. Cleveland *v.* Choate, 77 Cal. 73, 18 Pac. 875; Cleveland *v.* Sims, 69 Tex. 153, 6 S. W. 634; James *v.* Koy (Tex. Civ. App.), 59 S. W. 295.

Such a Reference Does Not Exclude parol evidence to identify the property where not inconsistent with the instrument referred to. Kretchmer *v.* Hard, 18 Colo. 223, 32 Pac. 418.

a party to a deed in case of an ambiguity.[55] And where a deed is executed to one as trustee, parol evidence is admissible to show for whom the deed was taken.[56]

N. EMPLOYMENT CONTRACTS. — a. *General Rule.* — (1.) **Statement Of.** — A contract by which one is employed to do work for another cannot be varied or contradicted by parol evidence.[57]

55. *Georgia.* — Sykes *v.* McRory, 32 Ga. 348; Walker *v.* Wells, 25 Ga. 141, 71 Am. Dec. 164.

Minnesota — Wakefield *v.* Brown, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671.

New Mexico. — De Cordova *v.* Korte, 7 N. M. 678, 41 Pac. 526.

North Carolina. — Keith *v.* Scales, 124 N. C. 497, 32 S. E. 809; Simmons *v.* Allison, 118 N. C. 763, 24 S. E. 716.

South Dakota. — Salmer *v.* Lathrop, 10 S. D. 216, 72 N. W. 570.

See article "Ambiguity," III, 2, E, b, Vol. I.

56. Union Pac. R. Co. *v.* Durant, 95 U. S. 576; Johnson *v.* Calnan, 19 Colo. 168, 34 Pac. 905, 41 Am. St. Rep. 224; Charter Oak L. I. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253.

"The word 'trustee' inserted after the name of the grantee in the deed executed by plaintiffs, and also affixed by defendant to his signature to the receipt, would seem to indicate something more than a mere *descriptio personae;* as a description of the person the word thus used is too general to amount to anything; as a description it does not identify anyone. In our opinion the word 'trustee,' under the circumstances, indicates the intention of the parties that the grantee was to take the title, not in his individual capacity, but *in trust* for another, though the name of his *cestui que trust* is not disclosed by the deed." Johnson *v.* Calnan, 19 Colo. 168, 34 Pac. 905, 41 Am. St. Rep. 224, *per* Elliott, J.

57. *England.* — Grimston *v.* Cunningham, (1894) 1 Q. B. 125.

United States. — Partridge *v.* The Insurance Co., 15 Wall. 573; Chilberg *v.* Lyng, 63 C. C. A. 451, 128 Fed. 899; Whaley *v.* Graham, 122 Fed. 192; The Lakme, 93 Fed. Rep. 230; Godkin *v.* Monahan, 27 C. C. A. 410, 83 Fed. 116.

Alabama. — Drennen *v.* Satterfield, 119 Ala. 84, 24 So. 723.

California. — Wiley *v.* California Hosiery Co., 32 Pac. 522.

Colorado. — Hamill *v.* Ashley, 11 Colo. 180, 17 Pac. 502; Pollard *v.* McCloskey, 5 Colo. App. 554, 39 Pac. 432.

Connecticut. — Excelsior Needle Co. *v.* Smith, 61 Conn. 56, 23 Atl. 693.

Georgia. — Connor *v.* Lasseter, 98 Ga. 708, 25 S. E. 830.

Illinois. — Davis *v.* Fidelity Fire Ins. Co., 208 Ill. 375, 70 N. E. 359.

Iowa. — Plano Mfg. Co. *v.* Eich, 97 N. W. 1106; Mann *v.* Le Grand Ind. School Dist., 52 Iowa 130, 2 N. W. 1005.

Kentucky. — Gaither *v.* Dougherty, 18 Ky. L. Rep. 709, 38 S. W. 2; Castleman *v.* Southern Mut. L. Ins. Co., 14 Bush 197.

Massachusetts. — Worthington *v.* Plymouth County R. Co., 168 Mass. 474, 47 N. E. 403; Zerrahn *v.* Ditson, 117 Mass. 553.

Minnesota. — Tarbox *v.* Cruzen. 68 Minn. 44, 70 N. W. 860.

Missouri. — State *v.* Stinebaker, 90 Mo. App. 280; Kenefick *v.* Missouri Brass Type Foundry Co., 72 Mo. App. 381.

Nebraska. — Latenser *v.* Misner, 56 Neb. 340, 76 N. W. 897.

Nevada. — Guinan *v.* Meder, 22 Nev. 264, 38 Pac. 668.

New Hampshire. — Hodgdon *v.* Waldron, 9 N. H. 66.

New York. — McGarrigle *v.* McCosker, 178 N. Y. 637, 71 N. E. 1133; Deering *v.* Schreyer, 58 App. Div. 322, 68 N. Y. Supp. 1015; Davis *v.* New York Steam Co., 33 App. Div. 401, 54 N. Y. Supp. 78; Hutchinson *v.* Root, 2 App. Div. 584, 38 N. Y. Supp. 16.

North Carolina. — Kerr *v.* Sanders, 122 N. C. 635, 29 S. E. 943.

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

(2.) Application of Rule. — This general rule excluding parol evidence has been applied in the case of the employment of one as an actor,[58] as an agent of an insurance company,[59] an agent to procure a loan,[60] an architect,[61] attorney,[62] broker,[63] salesman,[64] seaman,[65] superintendent of a mine[66] and teacher;[67] it has been applied with respect to contracts to carry mails,[68] to cut timber,[69] and to raft logs.[70]

Pennsylvania. — Dickson *v.* Hartman Mfg. Co., 179 Pa. 343, 36 Atl. 246; Conrow *v.* Conrow, 16 Atl. 522.

Texas. — Ford *v.* Summers (Tex. Civ. App.), 26 S. W. 459.

Wisconsin. — Erbacher *v.* Seefeld, 92 Wis. 350, 66 N. W. 252; Whitworth *v.* Brown, 85 Wis. 375, 55 N. W. 422.

Where a Contract Clearly Indicates a Weekly Hiring, the only provision as to the term of employment being that the employe is to receive a certain salary per week, parol evidence is not admissible to show that it was intended that the hiring should be for a year. Eichenauer *v.* Rentz Candy Co., 43 Misc. 151, 88 N. Y. Supp. 260.

A Contract to Clear, Grub and Pile the Bush on a certain piece of land, through which a ravine runs, cannot be varied by parol evidence that it is not usual in the neighborhood to grub such ravines. Holmes *v.* Stummel, 15 Ill. 412.

Where Written Instructions are given by one person to another, with respect to the transaction of certain business of the former, and such instructions are received and acted upon by the latter, parol evidence is not admissible to control them, whether considered as a contract in writing between the parties, or as authoritative direction in writing from a principal to his agent. Richardson *v.* Churchill, 5 Cush. (Mass.) 425.

58. Grimston *v.* Cuningham, (1894) 1 Q. B. 125; Emery *v.* Parry, 17 L. T. N. S. 152.

Where a contract "to render services at any theatres" is entered into, parol evidence is not admissible to show that the word "services" means services in a particular role. Violette *v.* Rice, 173 Mass. 82, 53 N. E. 144.

59. Montgomery *v.* Aetna L. Ins. Co., 38 C. C. A. 553, 97 Fed. 913; Norwood *v.* Alamo F. Ins. Co., 13 Tex. Civ. App. 475, 35 S. W. 717.

A Contract Allowing a Certain Commission on Renewal Premiums cannot be affected by evidence showing a guaranty as to the amount of renewals. Montgomery *v.* Aetna L. Ins. Co., 38 C. C. A. 553, 97 Fed. 913.

Where One Was Employed as Clerk in an insurance office it was held that parol evidence was not admissible to vary the effect of a provision in the contract, that he would not, for one year after the termination of his employment, solicit any insurance that should be held by his employer. Borley *v.* McDonald, 69 Vt. 309, 38 Atl. 60.

60. Finck *v.* Schanbacher, 34 Misc. 547, 69 N. Y. Supp. 977.

61. Marquis *v.* Lauretson, 76 Iowa 23, 40 N. W. 73; Davis *v.* New York Steam Co., 33 App. Div. 401, 54 N. Y. Supp. 78.

62. Gaither *v.* Dougherty, 18 Ky. L. Rep. 709, 38 S. W. 2; Deering *v.* Schreyer, 58 App. Div. 322, 68 N. Y. Supp. 1015; Sanborn *v.* Plowman, 13 Tex. Civ. App. 95, 35 S. W. 193.

63. Chilberg *v.* Lyng, 63 C. C. A. 451, 128 Fed. 899; Alvord *v.* Cook, 174 Mass. 120, 54 N. E. 499; Nunn *v.* Townes (Tex. Civ. App.), 23 S. W. 1117; Erbacher *v.* Seefeld, 92 Wis. 350, 66 N. W. 252.

64. Wiley *v.* California Hosiery Co. (Cal.), 32 Pac. 522; Ross *v.* Portland Coffee & Spice Co., 30 Wash. 647, 71 Pac. 184.

65. The Lakme, 93 Fed. 230.

66. Ivery *v.* Phillips, 196 Pa. St. 1, 46 Atl. 133.

67. Connor *v.* Lasseter, 98 Ga. 708, 25 S. E. 830.

68. Pierce *v.* Walker, 23 Iowa 424.

69. Veeder *v.* Cooley, 2 Hun (N. Y.) 74.

70. Meekins *v.* Newberry, 101 N. C. 17, 7 S. E. 655.

(3.) To What Parties Rule Applies. — The general rule does not apply in an action by one not a party to the contract.[71]

(4.) Parol Agreements. — Evidence is inadmissible of a parol agreement which is inconsistent with the terms of an employment contract,[72] though it is held that such an agreement may be shown where it forms a part of the consideration,[73] and where the one seeking to enforce the instrument as it stands would be guilty of a fraud in insisting that it expressed the actual agreement of the parties.[74]

b. *Qualifications of, and Exceptions to, Rule.* — **(1.) To Invalidate.** Evidence is admissible to invalidate a contract of employment on the ground that it never had any legal existence because there was no intention that it should be operative between the parties,[75] or to show fraud[76] or illegality.[77]

(2.) Where Incomplete. — (A.) In General. — Where a contract of employment is not a complete expression of the agreement of the

71. Corbin *v.* Oriental Trading Co., 32 Wash. 668, 73 Pac. 781.

72. *United States.* — Sun Printing and Publishing Ass'n *v.* Edwards, 51 C. C. A. 279, 113 Fed. 445; Montgomery *v.* Aetna L. Ins. Co., 38 C. C. A. 553, 97 Fed. 913.

California. — McDonald *v.* Poole, 113 Cal. 437, 45 Pac. 702.

Georgia. — Boren *v.* Manhattan L. Ins. Co., 99 Ga. 238, 25 S. E. 314.

Michigan. — Carter *v.* Weber, 138 Mich. 576, 101 N. W. 818.

New York. — Stowell *v.* Greenwich Ins. Co., 163 N. Y. 298, 57 N. E. 480.

Rhode Island. — Kenney *v.* Foster & Bros. Co., 25 R. I. 474, 56 Atl. 680.

South Dakota. — Roberts *v.* Minneapolis Thresh. Mach. Co., 8 S. D. 579, 67 N. W. 607, 59 Am. St. Rep. 777.

Texas. — Bupp *v.* O'Connor, 1 Tex. Civ. App. 328, 21 S. W. 619.

Wisconsin. — Cliver *v.* Heil, 95 Wis. 364, 70 N. W. 346.

73. Walker *v.* State, 117 Ala. 42, 23 So. 149, so holding in the case of an agreement with an agent to pay the rent of his office.

74. Honesdale Glass Co. *v.* Storms, 125 Pa. 268, s. c., sub. nom. Storms *v.* Dorflinger, 17 Atl. 347; Jenkins *v.* Darling (Tex. Civ. App.), 56 S. W. 931.

75. Want of Legal Existence. It may be shown that a contract of apprenticeship was never intended to be operative between the parties and that it never in fact had a legal existence, that its sole purpose was to overcome certain legal objections of a trades organization, that it was not to be acted upon by the parties to it, and that in truth and in fact the real contract was an oral agreement by which the employe was to be paid a higher rate of wages than was provided for by the written agreement. Robinson *v.* Nessel, 86 Ill. App. 212.

76. Culp *v.* Powell, 68 Mo. App. 238.

77. Page *v.* Sheffield, 2 Curt. 377, 18 Fed. Cas. No. 10,667, holding that a contract with a master for certain voyages may be impeached by parol evidence showing that the writing is in violation of law, in that the articles do not declare the voyages for which he was shipped.

Usury. — Where it is alleged that a writing which purports to employ a person as a loan agent is in fact a mere device to evade the usury law, parol evidence is admissible to show the real transaction. New England Mtg. Sec. Co. *v.* Gay, 33 Fed. 636

Where Convicts Are Hired from an official by a contract which appears to be valid upon its face and the services contracted for are rendered, it has been decided that in an action upon the contract to recover for such services parol evidence is not admissible to show a secret agreement, in violation of

parties, parol evidence is admissible to show the part omitted, if not inconsistent with the writing.[78]

(B.) Application of Rule. — In the application of this rule it has been held that in such a case parol evidence is admissible to show a time for performance,[79] when the rendering of the services was to commence,[80] the place where they were to be rendered,[81] the duration of the employment,[82] what work is to be done and the mode of doing it,[83] what compensation is to be paid,[84] or that none was to be paid[85] and the time of payment for the services.[86]

(3.) Subsequent Agreement. — Parol evidence is admissible to show that by a subsequent oral agreement the terms of an employment contract have been modified,[87] or the contract as a whole

law, as to the work upon which the convicts might be employed. County of Walton *v.* Powell, 94 Ga. 646, 19 S. E. 989.

78. *California.* — Wolters *v.* King, 119 Cal. 172, 51 Pac. 35; Guidery *v.* Green, 95 Cal. 630, 30 Pac. 786; Toomy *v.* Dunphy, 86 Cal. 639, 25 Pac. 130.

Colorado. — Employers' Liability Assur. Co. *v.* Morris, 14 Colo. App. 354, 60 Pac. 21.

District of Columbia. — Burke *v.* Claughton (D. C. App.), 23 Wash. L. Rep. 393.

Illinois. — Van Kirk *v.* Scott, 54 Ill. App. 681.

Indiana. — Louisville N. A. & C. R. Co. *v.* Reynolds, 118 Ind. 170, 20 N. E. 711.

Iowa. — Ingram *v.* Dailey, 123 Iowa 188, 98 N. W. 627.

Kentucky. — Cook *v.* Tood, 24 Ky. L. Rep. 1909, 72 S. W. 779.

Michigan. — Locke *v.* Wilson, 135 Mich. 593, 98 N. W. 400.

Minnesota. — Staples *v.* Edwards & McC. Lumber Co., 56 Minn. 16, 57 N. W. 220; Buxton *v.* Beal, 49 Minn. 230, 51 N. W. 918.

New York. — Guttentag *v.* Whitney, 79 App. Div. 596, 80 N. Y. Supp. 435; People's Guaranty & Indemnity Co. *v.* Doernberg, 37 Misc. 801, 76 N. Y. Supp. 916; Lipski *v.* Peth, 10 N. Y. Supp. 504, 32 N. Y. St. 741; Briggs *v.* Groves, 56 Hun 643, 9 N. Y. Supp. 765, 30 N. Y. St. R. 953.

South Carolina. — Ashe *v.* Carolina & N. W. Ry. Co., 65 S. C. 134, 43 S. E. 393.

79. Ingram *v.* Dailey, 123 Iowa 188, 98 N. W. 627.

80. Meade *v.* Rutledge, 11 Tex. 44.

81. Cook *v.* Todd, 24 Ky. L. Rep. 1909, 72 S. W. 779.

82. Henry School Tp. *v.* Meredith, 32 Ind. App. 607, 70 N. E. 393; Irish *v.* Dean, 39 Wis. 562. *Compare* Eichenauer *v.* Rentz Candy Co., 43 Misc. 151, 88 N. Y. Supp. 260, and Evans *v.* Roe, 26 L. T. N. S. 70, wherein it is held that such evidence is not admissible where the contract provides for a weekly salary.

83. Guttentag *v.* Whitney, 79 App. Div. 596, 80 N. Y. Supp. 435.

84. Wickham *v.* Blight, 29 Fed. Cas. No. 17,611; Guidery *v.* Green, 95 Cal. 630, 30 Pac. 786; Employers Liability Assur. Co. *v.* Morris, 14 Colo. App. 354, 60 Pac. 21. *Compare* Williams *v.* Kansas City S. B. Ry. Co., 85 Mo. App. 103.

85. "Joannes" *v.* Mudge, 6 Allen (Mass.) 245.

86. Wolters *v.* King, 119 Cal. 172, 51 Pac. 35; Ashe *v.* Carolina & N. W. R. Co., 65 S. C. 134, 43 S. E. 393.

87. Watkins *v.* Newman, 71 Ill. App. 196; Strauss *v.* Gross, 2 Tex. Civ. App. 432, 21 S. W. 305.

A Subsequent Oral Agreement to pay an additional compensation for services not covered by the original contract may be shown (Richardson *v.* Hooper, 13 Pick. [Mass.] 446. See Page *v.* Sheffield, 2 Curt. 377, 18 Fed. Cas. No. 10,667); or to show an enlargement of the original power granted to an agent or to give an authority for another object or purpose (Hartford F. Ins. Co. *v.* Wilcox, 57 Ill. 180). And though the

abandoned.[88] So a party to such contract may show that it has been rescinded by a subsequent agreement which has been reduced to writing.[89]

c. *To Explain or Interpret.* — Parol evidence is admissible to explain or interpret the terms of an employment contract where the meaning of the parties is doubtful or uncertain.[90] This rule permits of the admission of evidence to show the meaning of, or sense in which parties have used certain words or terms,[91] but not to alter the definite and well understood meaning of a word as ordinarily used.[92]

contract provides that any subsequent change in the terms must be in writing to be binding, yet evidence is admissible of a subsequent oral agreement as to a matter in respect to which the writing is silent (Osborne & Co. *v.* Stringham, 4 S. D. 593, 57 N. W. 776).

88. Graham *v.* Houghton, 153 Mass. 384, 26 N. E. 876.

89. Guidery *v.* Green, 95 Cal. 630, 30 Pac. 786, wherein the court said: "The evidence offered did not purport to vary or contradict the terms of the written instrument set forth in the complaint, nor did it have the effect to add any new term to that agreement. Its purpose was to show that that agreement had been canceled by mutual consent, and had no longer any operative effect. Such evidence is as admissible as is oral testimony that the terms of a written agreement have been fully performed by the parties, or that the instrument evidencing such agreement has itself been canceled and destroyed by the concurrent act of both parties. In either case the object and effect of such evidence is not to change any of the terms of the contract, but to show that the contract has no longer any existence, and therefore cannot be made the basis of an action," *per* Harrison, J.

90. *United States.* — Runkle *v.* Burnham, 153 U. S. 216; Barcus *v.* Gates, 130 Fed. 364.

California. — Farng *v.* Keefer, 36 Pac. 1032.

Georgia. — Florida Cent. & P. R. Co. *v.* Usina, 111 Ga. 697, 36 S. E. 928.

Illinois. — Gould *v.* Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896; Van Kirk *v.* Scott, 54 Ill. App. 681.

Nebraska. — Latenser *v.* Misner, 56 Neb. 340, 76 N. W. 897.

New York. — Allen *v.* Armstrong, 58 App. Div. 427, 68 N. Y. Supp. 1079; Hart *v.* Thompson, 10 App. Div. 183, 41 N. Y. Supp. 909; Campbell *v.* Jemines, 3 Misc. 516, 23 N. Y. Supp. 333, 52 N. Y. St. 495.

Ohio. — Proctor *v.* Snodgrass, 5 Ohio C. C. 547.

Pennsylvania. — Douthett *v.* Ft. Pitt Gas Co., 202 Pa. St. 416, 51 Atl. 981; Stamets *v.* Deniston, 193 Pa. St. 548, 44 Atl. 575.

Texas. — Moore *v.* Waco Bldg. Ass'n, 9 Tex. Civ. App. 404, 28 S. W. 1033.

Washington. — Stringham *v.* Davis, 23 Wash. 568, 63 Pac. 230.

91. The Sense in Which Words Are Used may be explained, as in the case of contract to render "other services." Scott *v.* Schnadt, 70 Ill. App. 25. Parol evidence is admissible to explain the word "incompatibility" in a contract providing that it may be annulled for that cause (Gray *v.* Shepard, 147 N. Y. 177, 41 N. E. 500, 69 N. Y. St. 530); the words "order obtained," in a contract employing one to procure subscriptions to certain publications (Newhall *v.* Appleton, 114 N. Y. 140, 21 N. E. 105, 3 L. R. A. 859); and the meaning of the word "during" in a contract employing one during the season of certain years. Bird *v.* Beckwith, 45 App. Div. 124, 60 N. Y. Supp. 1041; Waechtershauser *v.* Smith, 10 N. Y. Supp. 535, 31 N. Y. St. 552.

92. Not to Alter Meaning of Word "Profits." — Where a contract of employment gives a share of the "profits" as compensation evidence that the word "profits" as used in the contract has another meaning, than the definite and well-understood

O. Guaranty and Suretyship Contracts. — a. *General Rule.* **(1.) Statement Of.** — The general rule excluding parol evidence contradicting or varying the terms of an agreement reduced to writing applies to contracts of guaranty and suretyship.[93] In all such contracts, the writing must be looked to to ascertain the intention of the parties, and evidence of this character is not admissible either for the purpose of restricting,[94] or enlarging or varying in any

meaning which it has as used in a mercantile sense, is not admissible. Chilberg *v.* Jones, 3 Wash. 530, 28 Pac. 1104. *Compare* Briggs *v.* Groves, 56 Hun 643, 9 N. Y. Supp. 765, 30 N. Y. St. 953.

93. *England.* — Holmes *v.* Mitchell, 7 J. Scott N. S. 361, 97 E. C. L. 361.

United States. — Gilbert *v.* Moline Plough Co., 119 U. S. 491; Rogers *v.* Moore, 29 C. C. A. 636, 85 Fed. 920, 52 U. S. App. 699.

Alabama. — Cresent Brewing Co. *v.* Handley, 90 Ala. 486, 7 So. 912; Townsend *v.* Cowles, 31 Ala. 428.

Arkansas. — West-Winfree Tobacco Co. *v.* Waller, 66 Ark. 445, 51 S. W. 320.

California. — Adams *v.* Wallace, 119 Cal. 67, 51 Pac. 14.

Connecticut. — Indiana Bicycle Co. *v.* Tuttle, 74 Conn. 489, 51 Atl. 538.

Illinois. — Schroer *v.* Wessell, 89 Ill. 113.

Iowa. — McKee *v.* Needles, 123 Iowa 195, 98 N. W. 618; Schoonover *v.* Osborn, 108 Iowa 453, 79 N. W. 263.

Kansas. — Pease Piano Co. *v.* Matthews, 5 Kan. App. 370, 48 Pac. 449.

Louisiana. — Furguson *v.* Glaze, 12 La. Ann. 667.

Maine. — Monroe *v.* Matthews, 48 Me. 555.

Missouri. — Rieger *v.* Royal Brewing Co., 106 Mo. App. 513, 80 S. W. 969.

Montana. — Gillett *v.* Clark, 6 Mont. 190, 9 Pac. 823.

Nebraska. — Crane Co. *v.* Specht 39 Neb. 123, 57 N. W. 1015, 42 Am. St. Rep. 562.

New York. — Sherman *v.* Pedrick, 35 App. Div. 15, 54 N. Y. Supp. 467; Hutchinson *v.* Root, 2 App. Div. 584, 38 N. Y. Supp. 16; Phelps *v.* Gamewell Fire Alarm Tel. Co., 72 Hun 26, 25 N. Y. Supp. 654, 55 N. Y. St. 339.

Ohio. — Deming *v.* Board of Trustees of Ohio Agr. & Mech. College, 31 Ohio St. 41; Neil *v.* Board of Trustees of Ohio Agr. & Mech. College, 31 Ohio St. 15.

Pennsylvania. — Ellmaker *v.* Franklin F. Ins. Co., 5 Pa. St. 183.

Rhode Island. — Di Iorio *v.* Di Brasio, 21 R. I. 208, 42 Atl. 1114.

Texas. — Wilkins *v.* Carter, 84 Tex. 438, 19 S. W. 997; Schneider-Davis Co. *v.* Hart, 23 Tex. Civ. App. 529, 57 S. W. 903.

Texas. — Page *v.* White Sewing-Mach. Co., 12 Tex. Civ. App. 327, 34 S. W. 988.

Vermont. — Hakes *v.* Hotchkiss, 23 Vt. 231.

Washington. — Traders' Nat. Bank *v.* Washington Water Power Co., 22 Wash. 467, 61 Pac. 152.

A Letter of Credit cannot be varied or contradicted by parol evidence as against one who has advanced money on the faith of such letter. Pollock *v.* Helm, 54 Miss. 1, 28 Am. Rep. 342.

The Contract of a Surety Upon an Injunction Bond is subject to the general rule excluding parol evidence. Williamson *v.* Hall, 1 Ohio St. 190.

94. Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101, wherein it is held that where a promise to pay for goods furnished to another is unlimited as to quality or amount, the promisor's liability is not affected by his intention that goods of a certain character only should be furnished and the fact that this intention was known to the creditor.

Where a Guaranty Is Clearly a Contiuing One parol evidence is not admissible to limit the liability of the guarantor by showing that it was not intended to be such. McShane Co. *v.* Padian, 142 N. Y. 207, 36 N. E. 880. See Indiana Bicycle Co. *v.* Tuttle, 74 Conn. 489, 51 Atl. 538.

way the liability of the guarantor as expressed therein.[95]

(2.) To What Parties Rule Applies. — The general rule applies in an action between parties and their privies but does not apply in an action between a party to the instrument and a stranger.[96]

(3.) Oral Agreements. — Evidence is not admissible of a prior or contemporaneous parol agreement that is inconsistent with the terms of the writing,[97] in the absence of fraud or mistake.[98]

b. *Qualifications of, and Exceptions to, Rule.* — **(1.) To Invalidate.** Though offered evidence may be inconsistent with the terms of a guaranty, yet where its purpose is to show fraud it is admissible.[99]

But where the guaranty was in the following terms: "I agree to be responsible personally for any goods you may let Robert Breed have, and I will see the same is paid, the same as if it was my own debt," it was held that as the instrument referred to a debt and not to debts, the language used was as applicable to a single transaction as to more than one, and that evidence of the circumstances under which the guaranty was made was admissible to show whether it was intended to be a continuing one. Hamill Co. *v.* Woods, 94 Iowa 246, 62 N. W. 735.

95. Contract Cannot Be Enlarged by Parol Evidence. — Where a contract of guaranty is confined to the purchase of a single quantity of goods at a specified price, parol evidence is not admissible for the purpose of enlarging that liability. Boston & Sandwich Glass Co. *v.* Moore, 119 Mass. 435. The court said in this case: "The rules which govern the construction of written contracts are to be applied to this; one of which is, that where there is no ambiguity in the terms, the writing itself must be alone consulted in ascertaining the intention; parol evidence to vary its contracts is excluded. In this contract the language, as applied to the subject-matter, discloses no ambiguity. There is nothing in it which fairly gives rise to the inference that it is intended to apply to more than one purchase. The liability assumed cannot be enlarged or diminished by evidence of the previous dealings, or of the dealings contemplated, between the creditor and the principal debtor; or that the defendant had previously agreed to give the plaintiff a guaranty for future advances, and the goods were sold relying on such a guaranty; or that the relations of the principal parties were well known to the surety. The question is not what would have been a fit and proper contract for the defendant to have made under all the circumstances, but what contract did he make," *per* Colt, J.

96. Brenner *v.* Luth, 28 Kan. 581.

97. *Connecticut.* — Allen *v.* Rundle, 50 Conn. 9, 47 Am. Rep. 599.

Illinois. — Jones *v.* Albee, 70 Ill. 34.

Iowa. — Domestic Sewing-Mach. Co. *v.* Webster, 47 Iowa 357.

Missouri. — State *v.* Potter, 63 Mo. 212, 21 Am. Rep. 440.

Pennsylvania. — Pritchett *v.* Wilson, 39 Pa. St. 421.

It Is Not Competent To Show an Oral Agreement that the obligee was to bear a proportionate share of a deficiency for which the guaranty was given (Squier *v.* Evans, 127 Mo. 514, 30 S. W. 143); or to show in an action on an instrument guaranteeing payment for cigars that they were to be union made and labelled (Quinn *v.* Moss, 45 Neb. 614, 63 N. W. 931); that a guaranty to a certain amount for goods purchased was by agreement limited to a certain period (Maxwell *v.* Burr, 44 Neb. 31, 62 N. W. 236); or that in the case of a guaranty of the payment of the rent in money, that it was agreed that fixtures should be received in part payment. Collamer *v.* Farrington, 15 N. Y. Supp. 452, 39 N. Y. St. 591.

98. Phelps *v.* Sargent, 73 Minn. 260, 76 N. W. 25.

99. Townsend *v.* Cowles, 31 Ala. 428, wherein it is said of such evidence: "The inconsistency of the

(2.) Where Incomplete. — Where a memorandum of a guaranty is attached to a bill of goods and it is insufficient to constitute an agreement, the entire contract may be shown by parol.[1]

c. *To Explain or Interpret.* — **(1.) In General.** — Where the meaning of the parties to a guaranty is uncertain or ambiguous, parol evidence is admissible to explain the same.[2]

(2.) The Capacity in Which a Person Acts in signing a contract of guaranty, may be shown by parol evidence.[3]

P. LEASES. — a. *General Rule.* — **(1.) Statement Of.** — Where there is no uncertainty or ambiguity in the terms of a lease, parol evidence is not admissible to show an intention inconsistent therewith,[4] as all parol negotiations and agreements of the parties

evidence with the writing, however, was no objection to its admissibility in reference to the question of fraud in procuring the execution of the guaranty by the defendant. If the evidence conduced to show fraud, it was clearly admissible and its admissibility in that point of view, did not depend on its correspondence with the written contract. If the evidence was relevant and pertinent to the question of fraud, it was competent," *per* Walker, J.

1. Richey *v.* Daemicke, 86 Mich. 647, 49 N. W. 516.

2. *Louisiana.* — Lachman *v.* Block, 47 La. Ann. 505, 17 So. 153, 28 L. R. A. 255.

Maine. — Haskell *v.* Tukesbury, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529.

Massachusetts. — Lennox *v.* Murphy, 171 Mass. 370, 50 N. E. 644.

Michigan. — Wickes *v.* Swift Electric Light Co., 70 Mich. 322, 38 N. W. 299.

New York. — Bagley-Sewall Co. *v.* Saranac R. P. & P. Co., 135 N. Y. 626, 32 N. E. 132; Nicholas *v.* McIntire, 21 N. Y. Supp. 67, 48 N. Y. St. 314.

Texas. — Lemp *v.* Armengol, 86 Tex. 690, 26 S. W. 941; Gardner *v.* Watson, 76 Tex. 25, 13 S. W. 39.

Where an "Account" is guaranteed parol evidence is admissible to show what account is referred to. Waldheim *v.* Miller, 97 Wis. 300, 72 N. W. 869.

3. Armstrong *v.* Andrews, 109 Mich. 537, 67 N. W. 567; Small *v.* Elliott, 12 S. D. 570, 82 N. W. 92, 76 Am. St. Rep. 630.

4. *Canada.* — McElvency *v.* McKilligan, 12 N. B. 322.

United States. — Harmon *v.* Harmon, 51 Fed. 113.

Alabama. — Pierce *v.* Tidwell, 81 Ala. 299, 2 So. 15.

Arkansas. — Colonial & U. S. Mortg. Co. *v.* Jeter, 71 Ark. 185, 71 S. W. 945.

Colorado. — Randolph *v.* Helps, 9 Colo. 29, 10 Pac. 245; Hardwick *v.* McClurg, 16 Colo. App. 354, 65 Pac. 405.

Connecticut. — Gulliver *v.* Fowler, 64 Conn. 556, 30 Atl. 852.

Georgia. — Carter *v.* Williamson, 106 Ga. 280, 31 S. E. 651.

Illinois. — Hartford Deposit Co. *v.* Rector, 190 Ill. 380, 60 N. E. 528, *affirming* 92 Ill. App. 175; Smith *v.* McEvoy, 98 Ill. App. 330; Fish *v.* Ryan, 88 Ill. App. 524; McMullen *v.* Moffitt, 68 Ill. App. 160; Friedman *v.* Schwabacher, 64 Ill. App. 422.

Indiana. — Reynolds *v.* Louisville N. A. & C. R. Co., 143 Ind. 579, 40 N. E. 410; Roehrs *v.* Timmons, 28 Ind. App. 578, 63 N. E. 481.

Iowa. — Kelly *v.* Chicago M. & St. P. R. Co., 93 Iowa 436, 61 N. W. 957; Lerch *v.* Sioux City Times Co., 91 Iowa 750, 60 N. W. 611.

Louisiana. — Hollingsworth *v.* Atkins, 46 La. Ann. 515, 15 So. 77.

Maine. — Stevens *v.* Haskell, 70 Me. 202.

Maryland. — Hobbs *v.* Batory, 86 Md. 68, 37 Atl. 713.

Maryland. — Williams *v.* Kent, 67 Md. 350, 10 Atl. 228.

Massachusetts. — Walker Ice Co. *v.* American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937.

Michigan. — Walsh *v.* Martin, 69 Mich. 29, 37 N. W. 40.

Minnesota. — Haycock *v.* Johnston, 81 Minn. 49, 83 N. W. 494.

Missouri. — Sandige *v.* Hill, 76 Mo. App. 540; New England L. & T. Co. *v.* Workman, 71 Mo. App. 275.

New York. — Kolasky *v.* Michels, 120 N. Y. 635, 24 N. E. 278, 30 N. Y. St. 894; Jackson *v.* Helmer, 73 App. Div. 134, 77 N. Y. Supp. 835.

New York. — Babin *v.* Ensley, 14 App. Div. 548, 43 N. Y. Supp. 849; Riley *v.* Riley, 83 Hun 398, 31 N. Y. Supp. 753, 64 N. Y. St. 423; Christopher & T. St. R. Co. *v.* Twenty-Third St. R. Co., 78 Hun 462, 29 N. Y. Supp. 233, 60 N. Y. St. 744; Equitable Life Assur. Soc. of U. S. *v.* Schum, 40 Misc. 657, 83 N. Y. Supp. 161.

North Carolina. — Taylor *v.* Hunt, 118 N. C. 168, 24 S. E. 359.

North Dakota. — Merchants' State Bank of Fargo *v.* Ruettell, 12 N. D. 519, 97 N. W. 853.

Ohio. — Howard *v.* Thomas, 12 Ohio St. 201.

Oregon. — Tallmadge *v.* Hooper, 37 Or. 503, 61 Pac. 349, 1127; Hindman *v.* Edgar, 24 Or. 581, 17 Pac. 862.

Pennsylvania. — Williams *v.* Ladew, 171 Pa. St. 369, 33 Atl. 329; Hall *v.* Phillips, 164 Pa. St. 494, 30 Atl. 353; Moore *v.* Gardiner, 161 Pa. St. 175, 28 Atl. 1018; Stull *v.* Thompson, 154 Pa. St. 43, 25 Atl. 890.

South Carolina. — Charles *v.* Byrd, 29 S. C. 544, 8 S. E. 1.

Texas. — Lynch *v.* Ortlieb, 70 Tex. 727, 8 S. W. 515; Woodward *v.* Ft. Worth & D. C. R. Co., 35 Tex. Civ. App. 14, 79 S. W. 896; Bowen *v.* Hatch (Tex. Civ. App.), 34 S. W. 330; Texas & P. Coal Co. *v.* Lawson, 10 Tex. Civ. App. 491, 31 S. W. 843.

Vermont. — Rickard *v.* Dana, 74 Vt. 74, 52 Atl. 113.

Virginia. — Richmond Ice Co. *v.* Crystal Ice Co., 103 Va. 465, 49 S. E. 650.

West Virginia. — Knowlton *v.* Campbell, 48 W. Va. 294, 37 S. E. 581.

Wisconsin. — Scholz *v.* Dankert, 69 Wis. 416, 34 N. W. 394.

Parol Evidence Is Not Admissible to affect the amount of rent designated (Williams *v.* Kent, 67 Md. 350, 10 Atl. 228); to show that a lease, giving the right to renew to the lessee, his successors or assigns, was to terminate on the death of either party (Kolasky *v.* Michels, 120 N. Y. 635, 24 N. E. 278, 30 N. Y. St. 894); to show that a lease for a year was to be only from month to month (Babin *v.* Ensley, 14 App. Div. 548, 43 N. Y. Supp. 849; Equitable Life Assur. Soc. *v.* Schum, 40 Misc. 657, 83 N. Y. Supp. 161); or to show that a lease stipulating for payment in money was to be paid partly by furnishing board. Stull *v.* Thompson, 154 Pa. St. 43, 25 Atl. 890. And where a lease recites that the premises have been examined by the lessee and that they are received by him in good repair to show that the plumbing was represented by the agent of the lessor to be in good repair and that it was not. Fish *v.* Ryan, 88 Ill. App. 524.

Where the Object of the Lease Was a Special One parol testimony cannot be received to prove that the lessee had the privilege of using the premises for other purposes. Sienters *v.* Odier, 17 La. Ann. 153.

Where the Rent Is Fixed at a Certain Sum for a Term of Years parol evidence is not admissible to show that the parties intended such sum as the yearly rental. Thus where a lease fixed the rent at $3000 "for the first three years" from October 1st, 1902, until October 1st, 1905, it was held that parol evidence was not admissible to show that it was intended that the rent should be $3000 a year. Liebeskind *v.* Moore Co., 84 N. Y. Supp. 850.

An Intention to Reserve any part of the premises not reserved by the terms of the lease cannot be shown by parol evidence. Meredith Mechanics Ass'n *v.* American Twist Drill Co., 66 N. H. 267, 20 Atl. 330. In this case the lease conveyed the yard room about the building "not otherwise occupied" and it was decided that the language used had reference to the usual and customary occupation, and evidence of a parol agreement to reserve land for the millinery shop not usually occupied

antecedent to the writing are presumed to be merged in the writing.[5]

(2.) To What Parties Rule Applies. — The general rule does not apply in an action between a party to the lease and a stranger.[6]

(3.) Parol Agreements. — (A.) GENERAL RULE. — Evidence of any prior or contemporaneous parol agreement which tends to vary or contradict the terms of a lease is, as a general rule, inadmissible,[7]

in connection with it and any conversation about a reservation for future occupation was rightfully excluded, being in conflict with the language of the lease. But see Youmans *v.* Caldwell, 4 Ohio St. 71, wherein it is decided that where land is leased, without any reservation in the lease of a growing crop thereon, parol evidence is admissible to show that such crop was, at the time of making the lease, treated and considered as personalty and not intended to be conveyed by the lease.

An Exception cannot be proved where it contradicts the terms of the lease. Thus it was held that parol evidence was not admissible to prove in the case of a lease of waterworks and buildings that there was an exception in favor of the lessor of a right which it had exercised for more than twenty years of occasionally diverting water for the purpose of cleansing the county jail and that the diversion was well known to the parties at the time of making the lease. Hovey *v.* Newton, 7 Pick. (Mass.) 29.

Parol Evidence to Impugn the Title of the Lessor is not admissible. Emerick *v.* Tavener, 9 Gratt. (Va.) 220, 58 Am. Dec. 217. *Compare* Young *v.* Heffernan, 67 Ill. App. 354, holding otherwise where fraud by the lessor is alleged.

That a Person Signed as Surety cannot be shown as against the lessor by parol evidence where his name appears in the instrument, and it is executed by him, as joint lessee with another (Hobbs *v.* Batory, 86 Md. 68, 37 Atl. 713; Howell *v.* Behler, 41 W. Va. 610, 24 S. E. 646); though it has been decided that such evidence may be admitted in a proceeding to determine the rights of the lessees as between themselves. Hobbs *v.* Batory, 86 Md. 68, 37 Atl. 713.

5. Rector *v.* Hartford Deposit Co., 190 Ill. 380, 60 N. E. 528; Ivery *v.* Phillips, 196 Pa. St. 1, 46 Atl. 133; Hunter *v.* Hathaway, 108 Wis. 620, 84 N. W. 996.

6. British & A. Mortg. Co. *v.* Cody, 135 Ala. 622, 33 So. 832. See Swint *v.* McCalmont Oil Co., 184 Pa. St. 202, 38 Atl. 1021, 63 Am. St. Rep. 791.

In a Contest for Exemption Between the Lessor and a Judgment Creditor the general rule does not apply and evidence is admissible of parol agreements concerning the property. Gates *v.* Steele, 48 Ark. 539, 4 S. W. 53.

7. *Alabama.* — Morningstar *v.* Querens, 37 So. 825.

Arizona. — Snead *v.* Tietjen, 3 Ariz. 195, 24 Pac. 324.

Connecticut. — Caulfield *v.* Hermann, 64 Conn. 325, 30 Atl. 52; Averill *v.* Sawyer, 62 Conn. 560, 27 Atl. 73.

Illinois. — Lord *v.* Haufe, 77 Ill. App. 91; Barnes *v.* Northern Trust Co., 66 Ill. App. 282.

Indiana. — Diven *v.* Johnson, 117 Ind. 512, 20 N. E. 428, 3 L. R. A. 308.

Massachusetts. — Taylor *v.* Goding, 182 Mass. 231, 65 N. E. 64.

Michigan. — Grashaw *v.* Wilson, 123 Mich. 364, 82 N. W. 73.

Minnesota. — Haycock *v.* Johnston, 81 Minn. 49, 83 N. W. 494; McLean *v.* Nicol, 43 Minn. 169, 45 N. W. 15.

Missouri. — Tracy *v.* Union Iron-Wks. Co., 104 Mo. 193, 16 S. W. 203; Sandige *v.* Hill, 76 Mo. App. 540; Gray *v.* Gaff, 8 Mo. App. 329.

Montana. — Armington *v.* Stelle, 27 Mont. 13, 69 Pac. 115, 94 Am. St. Rep. 811; York *v.* Steward, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125.

New Hampshire. — Rollins Engine Co. *v.* Eastern Forge Co., 59 Atl. 382.

though it has been held that where the agreement is an independent collateral one it may be shown.[8]

(B.) Application of Rule. — Evidence is not admissible of a parol agreement not to sublet for a certain business where the lease authorizes the lessee to sublet;[9] of an agreement to introduce gas and water into the premises;[10] to put steam heat in the building leased;[11] or of a warranty that the sanitary condition of the premises is good,[12] or that they are in a tenantable condition or in good repair;[13] nor is it competent to show a parol agreement that certain land, excepted by the terms of the lease, was to be occupied by the

New York. — Nostrand *v.* Hughes, 54 App. Div. 602, 67 N. Y. Supp. 72; Rooney *v.* Thompson, 84 N. Y. Supp. 263; Cronin *v.* Epstein, 2 N. Y. Supp. 709.

Oregon. — Ruckman *v.* Imbler Lumber Co., 42 Or. 231, 70 Pac. 811.

Pennsylvania. — Thompson *v.* Christie, 138 Pa. St. 230, 20 Atl. 934, 11 L. R. A. 236.

Texas. — Moore-Cortes Canal Co. *v.* Gyle, 36 Tex. Civ. App. 442, 82 S. W. 350; Boone *v.* Mierow, 33 Tex. Civ. App. 295, 76 S. W. 772; Greenhill *v.* Hunton (Tex. Civ. App.), 69 S. W. 440; Johnson *v.* Witte (Tex. Civ. App.), 32 S. W. 426.

Vermont. — Rickard *v.* Dana, 74 Vt. 74, 52 Atl. 113.

Wisconsin. — Braun *v.* Wisconsin Rendering Co., 92 Wis. 245, 66 N. W. 196.

An Agreement to Give Notes In Presenti for the rent of succeeding years cannot be shown by parol where the lease has been reduced to writing and there is no averment that owing to fraud, accident or mistake, the writing does not fully express the concurrent intentions of the parties. Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545.

8. Raub *v.* Barbour, 6 Mackey (D. C.) 245; Ryder *v.* Faxon, 171 Mass. 206, 50 N. E. 631, 68 Am. St. Rep. 417; Graffam *v.* Pierce, 143 Mass. 386, 9 N. E. 819.

9. Harrison *v.* Howe, 109 Mich. 476, 67 N. W. 527; Rickard *v.* Dana, 74 Vt. 74, 52 Atl. 113.

10. McLean *v.* Nicol, 43 Minn. 169, 45 N. W. 15. See Johnson *v.* Witte (Tex. Civ. App.), 32 S. W. 426.

11. Lerch *v.* Sioux City Times Co., 91 Iowa 750, 60 N. W. 611.

12. Stevens *v.* Pierce, 151 Mass. 207, 23 N. E. 1006.

13. Fish *v.* Ryan, 88 Ill. App. 524. See Lynch *v.* Ortlieb, 70 Tex. 727, 8 S. W. 515. But see De Lasalle *v.* Guilford, 70 L. J. K. B. 533, 84 L. T. N. S. 549.

Where a Factory With the Machinery and Fixtures Therein is leased, it is held that there is no implied warranty that the machinery is in good repair and that parol evidence is inadmissible to show a guaranty by the lessor that the engine and boiler were in good repair and would furnish sufficient steam power for the business. Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380. Depue, J., said: "The effort is to engraft, by parol evidence, a contract of warranty upon a contract in writing, which appears to be complete and perfect, and is silent on that subject. Oral testimony cannot be admitted for this purpose without breaking down the rule which permits parties to make their written contracts the only evidence of their undertakings, and enables them to protect themselves from the hazard of uncertain oral testimony with respect to their engagements. Where the lease contains no warranty of the condition of the premises, declarations of the lessor on that subject are not admissible to create a warranty; such proof would be adding to the written agreement by parol evidence." See Wilcox *v.* Cate, 65 Vt. 478, 26 Atl. 1105.

tenant;[14] that the rent was to be paid in advance;[15] that there should be a rebate on the rent at the end of a stated time;[16] that a less sum than was specified in the lease was to be paid as rent;[17] or that the rental agreed upon was in excess of that recited in the lease;[18] that payment of the rent was to be applied on the purchase price;[19] that if the property should be destroyed by fire, rent should cease;[20] that the building might be occupied without any payment of rent until it was torn down;[21] that the lease would be extended or renewed;[22] that the tenant might remove buildings erected by him,[23] or fixtures;[24] that the premises would only be used for a certain purpose;[25] that the lessor would make certain alterations or improvements upon the premises,[26] or that the lessor should make repairs.[27]

14. McElveney *v.* McKilligan, 12 N. B. 322.

15. Kistler *v.* McBride (N. J.), 48 Atl. 558.

16. Strong *v.* Schmidt, 13 Ohio C. C. 302, 7 Ohio Dec. 233.

17. Merchants' State Bank *v.* Ruettell, 12 N. D. 519, 97 N. W. 853. But see Sire *v.* Rumbold, 14 N. Y. Supp. 925, holding that evidence was admissible to show a parol agreement to accept a less rent than was called for by lease, where it was made as a consideration of a right on the part of the lessor to enter the premises for the purpose of adding thereto and of repairing.

18. Texas & P. Coal Co. *v.* Lawson, 10 Tex. Civ. App. 491, 31 S. W. 843.

19. Braun *v.* Wisconsin Rendering Co., 92 Wis. 245, 66 N. W. 196.

20. Stafford *v.* Staunton, 88 Ga. 298, 14 S. E. 479.

21. Kaven *v.* Chrystie, 84 N. Y. Supp. 470.

Where No Rent Was Stipulated for in the Lease it has been decided that evidence is admissible of a parol agreement that none was to be paid. Drew *v.* Buck, 12 Hun (N. Y.) 267.

22. Armington *v.* Stelle, 27 Mont. 13, 69 Pac. 115, 94 Am. St. Rep. 811; Slaughter *v.* De Vitt, 30 Tex. Civ. App. 589, 71 S. W. 616.

23. Jungerman *v.* Bovee, 19 Cal. 354.

24. Stephens *v.* Ely, 162 N. Y. 79, 56 N. E. 499.

25. Rickard *v.* Dana, 74 Vt. 74, 52 Atl. 113.

26. *Alabama.* — Morningstar *v.* Querens, 37 So. 825.

Connecticut. — Averill *v.* Sawyer, 62 Conn. 560, 27 Atl. 73.

Indiana. — Diven *v.* Johnson, 117 Ind. 512, 20 N. E. 428, 3 L. R. A. 308.

Michigan. — Grashaw *v.* Wilson, 123 Mich. 364, 82 N. W. 73.

Missouri. — Tracy *v.* Union Iron-Wks. Co., 104 Mo. 193, 16 S. W. 203.

Texas. — Moore-Cortes Canal Co. *v.* Gyle, 36 Tex. Civ. App. 442, 82 S. W. 350.

But in Lewis *v.* Seabury, 74 N. Y. 409. 30 Am. Rep. 311, it was decided that where the contract contained no provision as to furnishing fixtures, evidence was admissible of an oral agreement by the lessor to provide the same where it was founded upon an independent consideration. The court, *per* Hand, J., said: "The case is undoubtedly very near the line, but I am inclined to think that such parol agreement was a separate and independent one, touching a subject not covered by the lease, and made for an independent consideration paid by the plaintiff, not stipulated for or referred to in the lease."

27. *Alabama.* — Thompson Foundry & Mach. Wks. *v.* Glass, 136 Ala. 648, 33 So. 811.

Connecticut. — Gulliver *v.* Fowler, 64 Conn. 556, 30 Atl. 852.

Indiana. — Roehrs *v.* Timmons, 28 Ind. App. 578, 63 N. E. 481.

Michigan. — Grashaw *v.* Wilson, 123 Mich. 364, 82 N. W. 73.

New Jersey. — Hallenbeck *v.* Chapman, 58 Atl. 1096.

New York. — Hall *v.* Beston, 165 N. Y. 632, 59 N. E. 1123; Nicoll *v.* Burke, 78 N. Y. 580; Van Derhoef *v.* Hartmann, 63 App. Div. 419, 71 N.

(4.) The Existence of a Custom cannot be shown to explain nor to vary the terms of a lease which are plain and unambiguous.[28]

b. *Qualifications of, and Exceptions to, Rule.* — **(1.) To Invalidate.** Parol evidence is admissible to show that a lease never had any legal existence,[29] as that it was placed in the hands of a third person who delivered it to the lessee in violation of his instructions,[30] or that it is void for illegality,[31] or that it was procured by fraud,[32] or fraudulent representations.[33]

Y. Supp. 552; Thomas *v.* Dingleman, 45 Misc. 379, 90 N. Y. Supp. 436; Hall *v.* Beston, 16 Misc. 528, 38 N. Y. Supp. 979.

Ohio. — Howard *v.* Thomas, 12 Ohio St. 201.

Pennsylvania. — Wodock *v.* Robinson, 148 Pa. St. 503, 24 Atl. 73.

But see Vandegrift *v.* Abbott, 75 Ala. 487 (holding that where a lease only sets forth the obligation of the lessee and does not purport to contain the entire agreement it may be shown that the lessor orally agreed to make repairs); Clenighan *v.* McFarland, 16 Daly 402, 11 N. Y. Supp. 719 (holding that a collateral agreement of such a character which is a part of the consideration for taking the lease is admissible).

Where the Lessee Is to Pay for Repairs Unless "by Special Agreement" they are to be paid for by the lessor, evidence is admissible to show an oral agreement by the latter to pay for repairs. Peticolas *v.* Thomas, 9 Tex. Civ. App. 442, 29 S. W. 166.

28. Swift *v.* Occidental Min. & Petroleum Co., 141 Cal. 161, 74 Pac. 700; Watkins *v.* Greene, 22 R. I. 34, 46 Atl. 38.

29. Bedell *v.* Wilder, 65 Vt. 406, 26 Atl. 589, 36 Am. St. Rep. 871.

That a Lease Was Not Intended To Be Binding upon the parties but was merely executed as a sham may be shown by parol evidence. Oriental Investment Co. *v.* Barclay, 25 Tex. Civ. App. 543, 64 S. W. 80.

30. Pattle *v.* Hornibrook, (1897) 1 Ch. 25, 75 L. T. N. S. 475, 66 L. J. Ch. N. S. 144. See Flomerfelt *v.* Englander, 29 Misc. 655, 61 N. Y. Supp. 187.

31. Illegality. — Though the lease of a house is silent as to the purpose for which it is to be used and no illegality is apparent on the face of the instrument, parol evidence is admissible to show that it was leased for use as a bawdy house, which is against public policy and unlawful at common law and by statute. Dougherty *v.* Seymour, 16 Colo. 289, 26 Pac. 823. See Ernst *v.* Crosby, 140 N. Y. 364, 35 N. E. 603, 55 N. Y. St. 732.

32. Holley *v.* Young, 66 Me. 520; Christ *v.* Diffenbach, 1 Serg. & R. (Pa.) 464, 7 Am. Dec. 624.

33. Meyers *v.* Rosenback, 5 Misc. 337, 25 N. Y. Supp. 521, holding that parol evidence was admissible to show that the lessee was induced to sign the lease by a fraudulent representation that the premises were fit for the purpose for which he wished to use them. See Morris *v.* Shakespeare (Pa.), 12 Atl. 414.

In an Action of Forcible Detainer it is competent for the lessee to show that he was induced to execute the lease by fraudulent misrepresentations of the lessor as to a material fact affecting the subject-matter of the instrument. Thus where one who as tenant of another had subsequently leased the premises from a third person, it was held that in such an action by the latter against the lessee, parol evidence was admissible to show that the third person's attorney represented to him that the ground was the subject of litigation and that he must either execute the lease from his client or stop the progress of work upon a building which he was erecting upon the land, and that if he would execute the lease the rent to be paid would be made light until the litigation came to an end, and an agreement should be inserted securing to him the right to buy the ground or lease it if the lessor prevailed in court, and that he executed the lease in reliance upon such statements. Young *v.* Heffernan, 67 Ill. App. 354.

(2.) Where Incomplete. — Where the lease forms only a part of the entire contract between the parties and does not express their complete agreement, parol evidence is admissible to show that part of the agreement in respect to which the lease is silent.[34]

(3.) Mistake. — Parol evidence is admissible to show a mistake in a lease,[35] but to reform a lease for mistake, the evidence must be clear and convincing.[36]

(4.) Reference to Extrinsic Matters. — Where a lease provides that the lessee shall hold according to manor regulations, they are thus made a part of the contract, and it may be shown that by such

34. *United States.* — Harman *v.* Harman, 17 C. C. A. 479, 70 Fed. 894, 34 U. S. App. 316.

Colorado. — Equator Min. & S. Co. *v.* Guanella, 18 Colo. 548, 33 Pac. 613.

Georgia. — Johnston *v.* Patterson, 86 Ga. 725, 13 S. E. 17.

Kentucky. — Gray *v.* Oyler, 2 Bush (Ky.) 256.

Louisiana. — New Orleans & C. R. Co. *v.* Darms, 39 La. Ann. 766, 2 So. 230.

Michigan. — Dowling *v.* Salliotte, 83 Mich. 131, 47 N. W. 225.

New York. — Steinfield *v.* Wilcox, 26 Misc. 401, 56 N. Y. Supp. 217; Weil *v.* Kahn, 10 N. Y. Supp. 236, 31 N. Y. St. 282.

Texas. — Brincefield *v.* Allen, 25 Tex. Civ. App. 258, 60 S. W. 1010; Hammond *v.* Martin, 15 Tex. Civ. App. 570, 40 S. W. 347.

West Virginia. — Ryner *v.* South Penn. Oil Co., 54 W. Va. 530, 46 S. E. 559.

Rule Illustrated. — Parol evidence has been admitted where the lease provided that the lessor should build fences, to show what and how much fencing was contemplated (Heath *v.* West, 68 Ind. 548); to show the length of the term a lease was to run where no term was specified (Brincefield *v.* Allen, 25 Tex. Civ. App. 258, 60 S. W. 1010); and to show the time of payment of the rent where the lease is silent in this respect. Steinfield *v.* Wilcox, 26 Misc. 401, 56 N. Y. Supp. 217.

Where Labor Is To Be Performed as consideration for the lease of premises but the contract is silent as to the time when it is to be performed or the character of the work to be done, evidence is admissible to show such facts. Ingram *v.* Dailey, 123 Iowa 188, 98 N. W. 627, wherein the court said: "The contract does not fix the time as to when the labor was to be performed, nor does it specify the kind of work to be done. Parol evidence would not, therefore, tend to vary or contradict anything in the written lease. The agreement as to the kind of labor, and as to the time when it was to be performed, might very well rest in parol. The instrument is manifestly incomplete in this respect, and it is perfectly proper in such cases to show either antecedent or contemporaneous agreements resting in parol." *Per* Deemer, C. J.

Where a Lease of a Sewing Machine provides for the payment of a specified amount in a certain time, parol evidence is admissible to show that on a compliance with the terms and conditions of the lease, the title is to vest in the lessee. Singer Sewing Mach. Co. *v.* Holcomb, 40 Iowa 33.

35. Olds *v.* Conger, 1 Okla. 232, 32 Pac. 337 (*holding* that a mistake in the name of the lessor may be shown in an action of forcible detainer); Snyder *v.* May, 19 Pa. St. 235 (*holding* that it may be shown that by mistake the lease was made to call for a certain sum payable semi-annually, as rent, instead of annually); Stokes *v.* Riley, 29 Tex. Civ. App. 373, 68 S. W. 703 (*holding* that a mistake in the name of the lessee may be shown, as where the name of the lessee was stated as A. Z. Reedy, when in fact the lease was delivered to A. Z. Reeder, by whom possession was taken, and no one by the name of A. Z. Reedy was known).

36. Seitz Brewing Co. *v.* Ayres, 60 N. J. Eq. 190, 46 Atl. 535.

regulations tenants have the right to remove growing crops at any time within a reasonable period after the determination of their leases.[37]

(5.) Subsequent Agreement, Modification or Cancellation.— Evidence is admissible to show that a lease has been modified by a subsequent parol agreement between the parties thereto;[38] such evidence, however, is held to be inadmissible where the lease is under seal,[39] though in such a case it has been held competent to show that the parties subsequently agreed to an extension of the lease,[40] or that it has been surrendered.[41]

c. *To Explain or Interpret.* —**(1.) In General.** — Where the meaning of the parties to a lease is doubtful or uncertain, parol evidence is admissible to explain, or as an aid in interpreting, the same,[42] as where technical words or terms are used,[43] or where the sense in which words or terms are used is not ascertainable from the writing itself.[44] Evidence, however, is not admissible to ex-

37. Dorsey *v.* Eagle, 7 Gill & J. (Md.) 321.

38. Palmer *v.* Sanders, 49 Fed. 144; Brant *v.* Vincent, 100 Mich. 426, 59 N. W. 169; Storer *v.* Taber, 83 Me. 387, 22 Atl. 256; Yeager *v.* Cassidy, 12 Pa. Super. Ct. 232; Podlech *v.* Phelan, 13 Utah 333, 44 Pac. 838. But see Harloe *v.* Lambie, 132 Cal. 133, 64 Pac. 88, holding that under the code evidence is not admissible of any subsequent alteration or modification of a lease unless such alteration is in writing or consists of an executed oral agreement.

Evidence Is Admissible to show that the lessor agreed after the execution and delivery of the lease to accept a smaller rental than the writing calls for (Boos *v.* Dulin, 103 Iowa 331, 72 N. W. 533; Nicoll *v.* Burke, 78 N. Y. 580); or that he agreed to pay for certain repairs to be made by the lessee. Woodworth *v.* Thompson, 44 Neb. 311, 62 N. W. 450; Caulk *v.* Everly, 6 Whart. (Pa.) 303.

39. Knefel *v.* Daly, 91 Ill. App. 321.

A Lease Under Seal cannot be affected by a subsequent parol agreement, made before the termination of the period for which it is to run, to make a new lease which shall take the place of the old, the testimony offered not tending to prove any actual cancellation and surrender. Leavitt *v.* Stern, 159 Ill. 526, 42 N. E. 869.

40. Martin *v.* Topliff, 88 Ill. App. 362.

41. Mairs *v.* Sparks, 5 N. J. L. 513.

The Surrender of a Lease Under Seal may be shown by parol evidence. Alschuler *v.* Schiff, 164 Ill. 298, 45 N. E. 424. *Compare* Leavitt *v.* Stern, 159 Ill. 526, 42 N. E. 869.

Evidence of Circumstances surrounding the execution of a new lease, where it is claimed that the old one has been surrendered, is admissible. James *v.* Coe, 32 Misc. 674, 66 N. Y. Supp. 509.

42. Rhodes *v.* Purvis (Ark.), 85 S. W. 235; Carmichael *v.* Brown, 97 Ga. 486, 25 S. E. 357; Ingram *v.* Dailey, 123 Iowa 188, 98 N. W. 627; American Sav. Bank *v.* Shaver Carriage Co., 111 Iowa 137, 82 N. W. 484; Landt *v.* Schneider, 31 Mont. 15, 77 Pac. 307; Sire *v.* Rumbold, 11 N. Y. Supp. 734, 34 N. Y. St. 59, *affirmed* in 14 N. Y. Supp. 925.

43. Cambers *v.* Lowry, 21 Mont. 478, 54 Pac. 816.

44. Bartels *v.* Brain, 13 Utah 162, 44 Pac. 715 (holding that the sense in which the term "reasonable use" was used by the parties in a lease of land could be explained); Bartley *v.* Phillips, 165 Pa. St. 325, 30 Atl. 842 (holding that the meaning of the words "due diligence" could be explained).

plain the language of a lease where its meaning is clear and unambiguous.[45]

(2.) To Show True Character of Transaction. — Though a writing purports by its terms to be a lease, it has been decided that parol evidence is admissible to show that it was executed as security for the payment of a debt.[46]

(3.) To Identify. — Parol evidence is admissible to identify the subject-matter of a lease where its identity cannot be definitely ascertained from the terms of the writing itself,[47] for which purpose evidence of the practical construction put upon the lease by the parties themselves, is admissible.[48] Parol evidence is not, however, admissible, where it tends to enlarge, restrict, or otherwise vary the language of the lease in this respect.[49]

Q. LETTERS. — a. *General Rule.* — Letters which are not contractual in their nature,[50] as where they are claimed to be mere

45. Walker Ice Co. *v.* American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937; Howard *v.* Tomicich, 81 Miss. 703, 33 So. 493; Jordan *v.* Neal (Miss.), 33 So. 17; Burton *v.* Forest Oil Co., 204 Pa. 349, 54 Atl. 266; Jones *v.* Western Penn. Nat. Gas. Co., 146 Pa. St. 204, 23 Atl. 386.

46. Meyer *v.* Davenport Elevator Co., 12 S. D. 172, 80 N. W. 189.

47. *District of Columbia.* — Okie *v.* Person, 23 App. D. C. 170.

Illinois. — Bulkley *v.* Devine, 127 Ill. 406, 20 N. E. 16, 3 L. R. A. 330; Parish *v.* Vance, 110 Ill. App. 57; Paugh *v.* Paugh, 40 Ill. App. 143.

Massachusetts. — Durr *v.* Chase, 161 Mass. 40, 36 N. E. 741.

Missouri. — Elliott *v.* Abell, 39 Mo. App. 346.

Nebraska. — Schneider *v.* Patterson, 38 Neb. 680, 57 N. W. 398.

New Hampshire. — Meredith Mechanic Ass'n *v.* American Twist Drill Co., 66 N. H. 267, 20 Atl. 330.

New York. — Myers *v.* Sea Beach R. Co., 167 N. Y. 581, 60 N. E. 1117; Heyward *v.* Willmarth, 87 App. Div. 125, 84 N. Y. Supp. 75.

Pennsylvania. — Boice *v.* Zimmerman, 3 Pa. Super. Ct. 181.

Vermont. — Goodsell *v.* Rutland-Canadian R. Co., 75 Vt. 375, 56 Atl. 7.

Virginia. — Crawford *v.* Morris, 5 Gratt. 90.

Washington. — McLennan *v.* Grant, 8 Wash. 603, 36 Pac. 682.

Where the lease described the premises as "a certain factory building . . . Also the passageways from the street to the end and front of said building, and the yard-room around the same, not otherwise occupied," it was declared that parol evidence was admissible to identify the premises leased, and to determine the limits of the yard-room around the building and the portion otherwise occupied. Meredith Mechanic Ass'n *v.* American Twist Drill Co., 66 N. H. 267, 20 Atl. 330.

48. Freund *v.* Kearney, 23 Misc. 685, 52 N. Y. Supp. 149.

49. *England.* — Minton *v.* Geiger, 28 L. T. N. S. 449.

Georgia. — Carter *v.* Williamson, 106 Ga. 280, 31 S. E. 651.

Illinois. — McMullen *v.* Moffitt, 68 Ill. App. 160.

Minnesota. — Haycock *v.* Johnston, 81 Minn. 49, 83 N. W. 494, 1118.

New Jersey. — Naughton *v.* Elliott, 59 Atl. 869; Morris *v.* Kettle, 57 N. J. L. 218, 30 Atl. 879.

New York. — Kraus *v.* Smolen, 46 Misc. 463, 92 N. Y. Supp. 329.

Pennsylvania. — Duffield *v.* Hue, 129 Pa. St. 94, 18 Atl. 566.

Vermont. — Knapp *v.* Marlboro, 29 Vt. 282.

Virginia. — Emerick *v.* Tavener, 9 Gratt. 220, 58 Am. Dec. 217.

50. Bernhard *v.* Trimble, 45 Ill. App. 56; Wilson *v.* Imperial Elec. L. Co., 20 Misc. 547, 46 N. Y. Supp. 430.

A Letter Which Merely Confirms a previous transaction, sent in response to a letter asking for such confirmation, and which does not undertake to state the contract between

admissions, may be explained or contradicted by parol.[51] But contract relations are frequently entered into where they are not evidenced by a single writing but consist of a series of letters or communications. In such a case the letters which pass between the parties are, in-so-far as they are a part of the contract, subject to the general rule excluding parol evidence to vary or alter the terms of a writing.[52]

b. *Qualifications of, and Exceptions to, Rule.* — **(1.) Where Incomplete.** — If the letters do not set forth the entire contract, parol evidence is admissible to show the complete agreement of the parties.[53]

(2.) To Connect Letters. — Parol evidence is admissible to connect a letter with a former one so that the two may be read together.[54]

c. *To Explain or Interpret.* — **(1.) In General.** — The meaning of the parties to a contract evidenced by letters may, where doubtful or ambiguous, be explained by parol evidence.[55]

the parties, except as to some of the details, goes no further than the statements made therein, and parol evidence is admissible to show the entire contract. Courtney *v.* Knabe & Co. Mfg. Co., 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456.

51. Huxford *v.* Meinhart, 119 Ga. 610, 46 S. E. 852; Chicago B. & Q. R. Co. *v.* Bartlett, 20 Ill. App. 96, *affirmed* in 120 Ill. 603, 11 N. E. 867; Phelps *v.* James, 86 Iowa 398, 53 N. W. 274, 41 Am. St. Rep. 497; Smith *v.* Crego, 54 Hun 22, 7 N. Y. Supp. 86, 26 N. Y. St. 64.

52. *United States.* — Partridge *v.* The Insurance Co., 15 Wall. 573.

Illinois. — Davis *v.* Fidelity Fire Co., 208 Ill. 375, 70 N. E. 359; Sutter *v.* Rose, 169 Ill. 66, 48 N. E. 411; Flower *v.* Brumbach, 30 Ill. App. 294.

Louisiana. — Selby *v.* Friedlander, 22 La. Ann. 381.

Massachusetts. — Cook *v.* Shearman, 103 Mass. 21.

Mississippi. — Coats & Sons *v.* Bacon, 77 Miss. 320, 27 So. 621.

Missouri. — Bunce *v.* Beck, 43 Mo. 266; Harrington *v.* Brockman Com. Co., 107 Mo. App. 418, 81 S. W. 629.

North Dakota. — Northwestern Fuel Co. *v.* Bruns, 1 N. D. 137, 45 N. W. 699.

Texas. — Johnson *v.* Portwood, 89 Tex. 235, 34 S. W. 596, 787.

53. *United States.* — Woolworth *v.* McPherson, 55 Fed. 558.

Indiana. — Louisville N. A. & C. R. Co. *v.* Reynolds, 118 Ind. 170, 20 N. E. 711; Havens *v.* American F. Ins. Co., 11 Ind. App. 315, 39 N. E. 40.

Maryland. — Courtney *v.* William Knabe & Co. Mfg. Co., 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456.

Michigan. — Locke *v.* Wilson, 135 Mich. 593, 98 N. W. 400.

New York. — Lichtenstein *v.* Rabolinsky, 75 App. Div. 66, 77 N. Y. Supp. 792; Ropes *v.* Arnold, 81 Hun 476, 30 N. Y. Supp. 997, 63 N. Y. St. 190; Work *v.* Beach, 13 N. Y. Supp. 678, 37 N. Y. St. 547; Falk *v.* Wolfsohn, 7 Misc. 313, 27 N. Y. Supp. 903.

Pennsylvania. — Holt *v.* Pie, 120 Pa. 425, 14 Atl. 389.

54. McGuffie *v.* Burleigh, 78 L. T. N. S. 264 (so that they may constitute an acknowledgment to take a debt out of the statute of limitations).

55. *England.* — Oliver *v.* Hunting, L. R. 44 Ch. Div. 205.

United States. — Drovers' Nat. Bank *v.* Albany County Bank, 44 Fed. 183.

Georgia. — Slater *v.* Demorest Spoke & H. Co., 94 Ga. 687, 21 S. E. 715.

Illinois. — Gould *v.* Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896, *affirming* 108 Ill. App. 203.

Indiana. — Jaqua *v.* Witham & A. Co., 106 Ind. 545, 7 N. E. 314.

Iowa. — Elwood *v.* McDill, 105 Iowa 437, 75 N. W. 340.

Michigan. — Butler *v.* Iron Cliffs Co., 96 Mich. 70, 55 N. W. 670.

New York. — Barney *v.* Forbes,

(2.) To Identify — Parol evidence is admissible to identify the subject-matter of a letter,[56] or the one to whom it is addressed[57] or to whom it refers.[58]

R. MORTGAGES. — a. *General Rule.* — **(1.) Statement Of.** — The terms of a mortgage, so far as they purport to express agreement of the parties, cannot be varied or contradicted by parol evidence.[59]

118 N. Y. 580, 23 N. E. 890, 29 N. Y. St. 980.

Oregon. — Fisk *v.* Henarie, 13 Or. 156, 9 Pac. 322.

Vermont. — Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

56. First Nat. Bank *v.* Woodman, 93 Iowa 668, 62 N. W. 28, 57 Am. St. Rep. 287 (*holding* in the case of a letter by which the writer promised to pay a note that the note referred to could be identified by parol evidence); Johnson *v.* Fecht, 94 Mo. App. 605, 68 S. W. 615 (*holding* that the identity of the land referred to in a letter authorizing an agent to sell the "forty acres tract" may be shown by parol). See Oliver *v.* Alabama Gold L. Ins. Co., 82 Ala. 417, 2 So. 445; McIlvaine *v.* Steinson, 90 App. Div. 77, 85 N. Y. Supp. 889.

57. Haskell *v.* Tukesbury, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529.

58. Morrison *v.* State, 40 Tex. Crim. 473, 51 S. W. 358.

59. Alabama. — Maness *v.* Henry, 96 Ala. 454, 11 So. 410; Edwards *v.* Dwight, 68 Ala. 389.

California. — Barnhart *v.* Edwards, 47 Pac. 251.

Dakota. — Dean *v.* First Nat. Bank, 6 Dak. 222, 50 N. W. 831.

Florida. — Patterson *v.* Taylor, 15 Fla. 336.

Georgia. — Dyar *v.* Walton, 79 Ga. 466, 7 S. E. 220.

Illinois. — Schultz *v.* Plankinton Bank, 141 Ill., 116, 30 N. E. 346, 33 Am. St. Rep. 290.

Indiana. — Brunson *v.* Henry, 140 Ind. 455, 39 N. E. 256; Stewart *v.* Babbs, 120 Ind. 568, 22 N. E. 770; Murdock *v.* Cox, 118 Ind. 266, 20 N. E. 786.

Iowa. — Becker *v.* Dalby, 86 N. W. 314; Isett *v.* Lucas, 17 Iowa 503, 85 Am. Dec. 572.

Kentucky. — Magoffin *v.* Boyle Nat. Bank, 24 Ky. L. Rep. 585, 69 S. W. 702.

Maine. — Varney *v.* Hawes, 68 Me. 442.

Massachusetts. — Southwick *v.* Hapgood, 10 Cush. 119.

Michigan. — Williams Bros. Co. *v.* Hanmer, 132 Mich. 635, 94 N. W. 176; Dunham *v.* W. Steele Packing and P. Co., 100 Mich. 75, 58 N. W. 627.

Minnesota. — Lawton *v.* St. Paul Permanent Loan Co., 56 Minn. 353, 57 N. W. 1061.

Missouri. — Sigler *v.* Booze, 65 Mo. App. 555; Houser *v.* Andersch, 1 Mo. App. Rep. 268.

Nevada. — Gage *v.* Phillips, 21 Nev. 150, 26 Pac. 60; 37 Am. St. Rep. 494.

New Jersey. — Law *v.* Smith, 59 Atl. 327; Van Syckel *v.* Dalrymple, 32 N. J. Eq. 233.

New York. — Bowery Bank *v.* Hart, 77 App. Div. 121, 79 N. Y. Supp. 46; Snyder *v.* Ash, 30 App. Div. 183, 51 N. Y. Supp. 772.

North Carolina. — Pollock *v.* Warwich, 104 N. C. 638, 10 S. E. 699.

North Dakota. — Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576.

Ohio. — Goodman *v.* Manning, (C. P.) 5 Ohio N. P. 94.

Pennsylvania. — In re Schiehl, 179 Pa. St. 308, 36 Atl. 181.

South Carolina. — Porter *v.* Jefferies, 40 S. C. 92, 18 S. E. 229; O'Neill *v.* Bannett, 33 S. C. 243, 11 S. E. 727.

Texas. — Eckford *v.* Berry, 87 Tex. 415, 28 S. W. 937; Willer *v.* Kray, 73 Tex. 533, 11 S. W. 540; Crow *v.* Kellman (Tex. Civ. App.), 70 S. W. 564; Dunham *v.* McNatt, 15 Tex. Civ. App. 552, 39 S. W. 1016; Willis *v.* Byars, 2 Tex. Civ. App. 134, 21 S. W. 320.

Vermont. — Wing *v.* Cooper, 37 Vt. 169.

Washington. — Goon Gan *v.* Richardson, 16 Wash. 373, 47 Pac. 762.

Wisconsin. — Krouskop *v.* Krouskop, 95 Wis. 296, 70 N. W. 475.

That Another Note than the one described was intended to be secured

(2.) To What Parties the Rule Applies.— The general rule cannot be invoked against one who is not a party to a mortgage.[60]

(3.) Parol Agreements.— Parties to a mortgage are bound by the terms of the instrument and evidence of any parol agreement which tends to contradict or vary its terms is not admissible.[61]

cannot be shown. Falke *v.* Fassett, 4 Colo. App. 171, 34 Pac. 1005.

An Intention to Convey a Different Interest in land than is specified in the mortgage cannot be shown by parol. Cowley *v.* Shelby, 71 Ala. 122.

Evidence That the Mortgagee Was to Take and Retain Possession of the mortgaged property is not admissible. Berthold *v.* Fox, 13 Minn. 462, 97 Am. Dec. 243.

Evidence That Possession of Personal Property was to remain with the mortgagee has been held inadmissible. Case *v.* Winship, 4 Blackf. (Ind.) 425, 30 Am. Dec. 664. But see Webre *v.* Beltran, 47 La. Ann. 195, 16 So. 860; Pierce *v.* Stevens, 30 Me. 184.

That a Wife Joined in a mortgage simply to estop herself from claiming any interest in the premises in case she survived her husband, by whom the mortgage was also executed, cannot be shown by her in an action against her and her husband on a covenant against incumbrances. Security Bank *v.* Holmes, 68 Minn. 538, 71 N. W. 699. And in an action to foreclose it cannot be shown that her own estate was not incumbered by the mortgage but that she only executed it to release her inchoate right of dower in her husband's estate. Snyder *v.* Ash, 30 App. Div. 183, 51 N. Y. Supp. 772.

A Draft of a Mortgage made by one party to be executed by the other but not executed is not within the rule. Wise *v.* Collins, 121 Cal. 147, 53 Pac. 640.

60. De Goey *v.* Van Wyk, 97 Iowa 491, 66 N. W. 787.

In Shearer *v.* Babson, 1 Allen (Mass.) 486, it is decided that a purchaser of the mortgaged property may prove as against the mortgagee that there was an oral agreement between the mortgagor and mortgagee by which the former was authorized to sell the mortgaged property, though the mortgage prohibits a sale without the consent of the mortgagee.

61. *United States.* — Gair *v.* Tuttle, 49 Fed. 198.

California. — Harrelson *v.* Tomich, 107 Cal. 627, 40 Pac. 1032.

Indiana. — Benoit *v.* Schneider, 47 Ind. 13; Mallett *v.* Page, 8 Ind. 364.

Iowa. — Kracke *v.* Homeyer, 91 Iowa 51, 58 N. W. 1056; Isett *v.* Lucas, 17 Iowa 503, 85 Am. Dec. 572.

Maryland. — Timms *v.* Shannon, 19 Md. 296, 81 Am. Dec. 632.

Michigan. — Holmes *v.* Holmes, 129 Mich. 412, 89 N. W. 47, 95 Am. St. Rep. 444.

Missouri. — Connersville Buggy Co. *v.* Lowry, 104 Mo. App. 186, 77 S. W. 771; New England L. & T. Co. *v.* Workman, 71 Mo. App. 275.

New York. — Stevens *v.* Cooper, 1 Johns. Ch. 425, 7 Am. Dec. 499.

North Carolina. — Woodcock *v.* Bostic, 128 N. C. 243, 38 S. E. 881.

North Dakota. — First Nat. Bank *v.* Prior, 10 N. D. 146, 86 N. W. 362.

Ohio. — Goodman *v.* Mannong, 9 Ohio S. & C. P. Dec. 373.

Oregon. — Edgar *v.* Golden, 36 Or. 448, 48 Pac. 1118, 60 Pac. 2.

Texas. — Hart *v.* Eppstein, 71 Tex. 752, 10 S. W. 85.

Parol Evidence Is Not Admissible of oral agreement as to the application of a surplus (Gair *v.* Tuttle, 49 Fed. 198), or of an agreement to extend the time in which to pay the mortgage (Connersville Buggy Co. *v.* Lowry, 104 Mo. App. 186, 77 S. W. 771), or of an oral agreement to board the mortgagee free (Kracke *v.* Homeyer, 91 Iowa 51, 58 N. W. 1056), or to show that a mortgagee in possession was not to account for the rents and profits. Davis *v.* Lassiter, 20 Ala. 561. But it has been decided that in an action for conversion, evidence is admissible to show that a mortgage and note were given without consideration and that there was an oral agreement that the mortgagor might dispose of the prop-

(4.) **Conditions Affecting Instrument.** — Though parol evidence is admissible to show the non-delivery of a mortgage,[62] yet it is not admissible to show, where there has been a delivery, that it was made on conditions not expressed in the writing.[63]

b. *Qualifications of, and Exceptions to, Rule.* — **(1.) To Invalidate.** Parol evidence, the object of which is to invalidate or to defeat the operation of a mortgage, is admissible.[64] And for this purpose

erty as he pleased, as if there had been no mortgage. Perry *v.* Dow, 56 Vt. 569.

An Oral Agreement to Cancel the Mortgage on payment of a less sum than the mortgage calls for, provided the mortgagor continue to make certain purchases of the mortgagee, cannot be shown. Shea *v.* Leisy, 85 Fed. 243.

Oral Agreement as to Priority of Mortgage. — Evidence is admissible of an oral agreement between mortgagees holding under separate mortgages, as to which mortgage shall have priority where the instruments themselves contain nothing in respect thereto. Birkenhead *v.* Brown, 47 Ill. App. 216; Collier *v.* Miller, 62 Hun 99, 16 N. Y. Supp. 633.

62. Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576.

63. Dean *v.* First Nat. Bank, 6 Dak. 222, 50 N. W. 831; Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576; *In re* Schiehl, 179 Pa. St. 308, 36 Atl. 181; East Texas F. Ins. Co., *v.* Clarke, 1 Tex. Civ. App. 238, 21 S. W. 277.

As to Payment. — Parol evidence is not admissible to show that the mortgage was given on the condition that it need never be paid. *In re* Schiehl, 179 Pa. St. 308, 36 Atl. 181. So evidence is not admissible to show that a bond and mortgage were not to be paid, unless the mortgagee, and certain other persons, fulfilled a contract of the mortgagee to construct the stone work for certain houses which the mortgagor was erecting, there being no evidence of fraud, mistake, surprise or accident. Russell *v.* Kinney, 1 Sandf. Ch. (N. Y.) 34. And likewise it has been decided that evidence is not admissible of an agreement that the payment of the note, which the mortgage was given to secure, should be conditional. Edgar *v.* Golden, 36 Or. 448, 48 Pac. 1118, 60 Pac. 2, wherein the court said: "The delivery was not made conditional or dependent upon the execution of any agreement respecting the time such notes should fall due or the mortgage be foreclosed, but was absolute, and without reserve or restriction. There is much dispute, however, as to whether the plaintiff did not verbally agree to such conditions; but, whatever the agreement might have been, it was made and entered into, as related by all the witnesses, prior to or contemporaneously with the execution and delivery of the mortgage. And it is well settled that it is not competent to vary the terms of a writing by a separate parol agreement, made at the time or anterior thereto. The presumption is that the writing contains all the terms of the agreement entered into at the time, and none other can be added or considered to change or modify it in any particular. . . . The mortgage must be presumed to contain all the terms of the contract entered into at the time of its execution, and we must look to it and the notes copied therein to determine the time of the payment, and thus ascertain when the mortgage is subject to foreclosure. The parol agreement, if any, made and entered into prior to or at the time of the execution of such mortgage, cannot be relied upon or used to contradict or vary the terms of such notes and mortgage for the purpose of ascertaining the date of their payment, or the time within which such mortgage is subject to foreclosure."

64. Baker *v.* Seavey, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475; Church *v.* Case, 110 Mich. 621, 68 N. W. 424.

Want of Jurisdiction of an Official to Take the Acknowledgment may be shown by parol evidence. Edin-

evidence may be introduced of facts which show illegality,[65] fraud[66] or duress.[67]

(2.) Mistake. — It may be shown by parol evidence that owing to a mistake the mortgage does not correctly express the intention of the parties,[68] or that there is an error in the recitals of date.[69]

(3.) Where Incomplete. — Where a mortgage does not purport to express the entire agreement of the parties, parol evidence of those parts of the agreement not expressed therein, is admissible.[70]

(4.) A Subsequent Agreement modifying or altering the terms of a mortgage may be shown by parol.[71]

burgh American L. M. Co. *v.* Peoples, 102 Ala. 241, 14 So. 656.

65. Daw *v.* Niles (Cal.), 33 Pac. 1114; Aleshire *v.* Lee County Sav. Bank, 105 Ill. App. 32.

Mortgage Void as to Creditors. For the purpose of showing a mortgage void as to creditors evidence is admissible of an agreement or tacit understanding between the mortgagor and mortgagee, that the former may sell or dispose of any portion, or all, of the mortgaged property for his own use. Hangen *v.* Hachemeister, 114 N. Y. 566, 21 N. E. 1046. See Stevens *v.* Curran, 28 Mont. 366, 72 Pac. 753.

That a Wife Signed a Mortgage as Surety for her husband in violation of a statute which prohibits a wife from so binding herself may be shown. Price *v.* Cooper, 123 Ala. 392, 26 So. 238.

66. Belohradsky *v.* Kuhn, 69 Ill. 547; Cox *v.* Estate of King, 20 La. Ann. 209; State Bank *v.* Moore, 5 N. J. L. 470.

Fraud Connected With the Acknowledgment of a mortgage may be shown. Heeter *v.* Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46.

67. Heeter *v.* Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46.

68. A Mistake in Describing the Note the mortgage was given to secure, as that the amount thereof was incorrectly stated, may be shown by parol. Boren *v.* Boren, 29 Tex. Civ. App. 221, 68 S. W. 184.

A Mistake in Stating the Date of the Collateral Security may be established by parol. Jackson *v.* Bowen, 7 Cow. (N. Y.) 13.

Location of Personal Property Covered by Chattel Mortgage. Where a chattel mortgage incorrectly states the location of the property covered by it, parol evidence is admissible to show such fact, and the true location. Adamson *v.* Petersen, 35 Minn. 529, 29 N. W. 321.

Erroneous Description of Property. Parol evidence is admissible to show that by error the mortgage does not describe the property intended to be covered by the instrument. Armstrong *v.* Armstrong, 36 La. Ann. 549; Davenport *v.* Sovil, 6 Ohio St. 459. But see Locke *v.* Whiting, 10 Pick. (Mass.) 279, *holding* that a mortgage of a piece of property could not be shown by parol to cover only a moiety of the property.

A Mortgage Upon Its Face Usurious may be shown by parol to have been so drawn by mistake, and evidence is admissible that it was the intention of the parties to secure lawful interest. Griffin *v.* New Jersey Oil Co., 11 N. J. Eq. 49.

69. Pascault *v.* Cochran, 34 Fed. 358; McFall *v.* Murray, 4 Kan. App. 554, 45 Pac. 1100.

70. Savings Bank of So. Cal. *v.* Asbury, 117 Cal. 96, 48 Pac. 1081; Crowley *v.* Langdon, 127 Mich. 51, 86 N. W. 391; Akberg *v.* Kress Brew. Co., 65 Hun 182, 19 N. Y. Supp. 956, 47 N. Y. St. 373; Tonkin *v.* Baum, 114 Pa. St. 414, 7 Atl. 185.

Where a Verbal Contract, to Secure the Performance of Which a mortgage is given, is not set out in the mortgage, parol evidence is admissible to show the terms of such contract. Reynolds *v.* Hassam, 56 Vt. 449.

71. Pecos Valley Bank *v.* Evans-Snider-Buel Co., 46 C. C. A. 534, 107 Fed. 654.

Evidence of a Subsequent Agree-

(5.) **Discharge** of a chattel mortgage may be shown by evidence that the obligation, which it was given to secure, has been performed.[72]

c. *To Explain or Interpret.* — **(1.) In General.** — A mortgage is frequently couched in such language that the meaning of the parties is uncertain or ambiguous, in which case parol evidence is admissible to explain the same,[73] as where an abbreviation is used,[74] or where it is not clear what the parties meant by the use of some word.[75] For this purpose evidence is admissible of the circumstances surrounding the execution of the mortgage.[76]

(2.) True Character of Transaction. — Parol evidence is in many cases admitted to show the true character of the transaction evidenced by a mortgage, as that it was given as security for the indorsement of a note;[77] or that a mortgage given to secure the payment of a debt which was evidenced by a note, was a contract of indemnity;[78] that it was given to secure future advances;[79] or that the loan was made to the wife instead of to the husband as recited in the mortgage.[80] But it is not competent to show by parol evidence that a mortgage was intended to operate as an absolute deed.[81]

(3.) To Identify Subject-Matter. — (A.) In General. — Parol evidence is admissible for the purpose of applying the description in a mort-

ment made after the maturity of a mortgage to reduce the rate of interest and to pay it semi-annually is admissible (Sharp *v.* Wyckoff, 39 N. J. Eq. 376), as is also evidence of subsequent agreement that a mortgagor of chattels might sell the mortgaged property (Frick Co. *v.* Western Star Milling Co., 51 Kan. 370, 32 Pac. 1103), and of an agreement to extend the time for redemption. Deshazo *v.* Lewis, 5 Stew. & P. (Ala.) 91, 24 Am. Dec. 769.

72. Harrington *v.* Samples, 36 Minn. 200, 30 N. W. 671.

73. *California.* — Wise *v.* Collins, 121 Cal. 147, 53 Pac. 640.

Michigan. — Johnson *v.* Bratton, 112 Mich. 319, 70 N. W. 1021.

Missouri. — Finks *v.* Hathaway, 64 Mo. App. 186; Sparks *v.* Brown, 46 Mo. App. 529.

New York. — Eager *v.* Crawford, 76 N. Y. 97.

Utah. — Thompson *v.* Avery, 11 Utah, 214, 39 Pac. 829.

74. Jones *v.* State, 35 Tex. Crim. 565, 34 S. W. 631, holding that evidence was admissible to show that the abbreviation "uph." in a chattel mortgage meant upholstered.

75. Bowery Bank *v.* Hart, 37 Misc. 412, 75 N. Y. Supp. 781, wherein it was decided that evidence was admissible to show what the parties meant by the word "expenses" in a mortgage which provided for the payment of costs and "expenses."

76. State Bank *v.* Lighthall, 46 App. Div. 396, 61 N. Y. Supp. 794.

77. Cutler *v.* Steele, 93 Mich. 204, 53 N. W. 521.

78. Honaker *v.* Vesey, 57 Neb. 413, 77 N. W. 1100.

79. *Alabama.* — Kirby *v.* Raynes, 138 Ala. 194, 35 So. 118, 100 Am. St. Rep. 39.

Kentucky. — Louisville Bkg. Co. *v.* Leonard, 11 Ky. L. Rep. 917, 13 S. W. 521.

Missouri. — Sparks *v.* Brown, 33 Mo. App. 505.

South Carolina. — Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 538.

Texas. — Glenn *v.* Seeley, 25 Tex. Civ. App. 523, 61 S. W. 959.

Wisconsin. — Lippincott *v.* Lawrie, 119 Wis. 573, 97 N. W. 179.

80. Sprague *v.* Beamer, 45 Ill. App. 17.

81. Goon Gan *v.* Richardson, 16 Wash. 373, 47 Pac. 762.

gage to the subject-matter,[82] and thus to identify the property intended to be covered either in a mortgage of personal[83] or real property,[84] provided the description is not too vague or indefinite.[85] Such evidence, however, is inadmissible where it will contradict or vary the clear and unambiguous language of the description given in a mortgage.[86]

(B.) To Identify Debt or Obligation Secured. — Where the identity of a debt or obligation secured by a mortgage is not sufficiently certain from the terms of the instrument, parol evidence is admissible to identify the same.[87]

(4.) To Identify Persons. — The one to whom a mortgage is to be paid may be identified by parol evidence where the mortgage does not designate such person with sufficient certainty.[88]

S. Partnership Contracts. — a. *General Rule.* — **(1.) Statement Of.** — (A.) In General. — Parol evidence is not admissible to vary or alter the terms, or legal effect of a partnership agreement which has been reduced to writing.[89] The right of parties under

82. New *v.* Sailors, 114 Ind. 407, 16 N. E. 609, 5 Am. St. Rep. 632.

83. *Illinois.* — Chicago S. & St. L. R. Co. *v.* Beach, 29 Ill. App. 157.

Iowa. — Clapp *v.* Trowbridge, 74 Iowa 550, 38 N. W. 411; Ormsby *v.* Nolan, 69 Iowa 130, 28 N. W. 569.

Missouri. — Bank of Atchison Co. *v.* Shackelford, 67 Mo. App. 475.

Oregon. — Reinstein *v.* Roberts, 34 Or. 87, 55 Pac. 90, 75 Am. St. Rep. 564; Gregory *v.* North Pac. Lumb. Co., 15 Or. 447, 17 Pac. 143.

Texas. — Ft. Worth Nat. Bank *v.* Red River Nat. Bank, 84 Tex. 369, 19 S. W. 517.

84. *Alabama.* — O'Neal *v.* Seixas, 85 Ala. 80, 4 So. 745.

California. — California Title Ins. & T. Co. *v.* Pauly, 111 Cal. 122, 43 Pac. 586.

Kentucky. — Shelby *v.* Lewis, 12 Ky. L. Rep. 428, 14 S. W. 501.

Louisiana. — Kernan *v.* Baham, 45 La. Ann. 799, 13 So. 155.

North Carolina. — Stancill *v.* Spain, 133 N. C. 76, 45 S. E. 466; Wilkins *v.* Jones, 119 N. C. 95, 25 S. E. 789.

85. Augustine *v.* McDowell, 120 Iowa 401, 94 N. W. 918; Rountree *v.* Britt, 94 N. C. 104.

86. *Michigan.* — Lawrence *v.* Comstock, 124 Mich. 120, 82 N. W. 808; Thompson *v.* Smith, 96 Mich. 258, 55 N. W. 886; Whitney *v.* Hall, 82 Mich. 580, 47 N. W. 27.

Missouri. — New Hampshire Cattle Co. *v.* Bilby, 37 Mo. App. 43.

Nebraska. — Drexel *v.* Murphy, 59 Neb. 210, 80 N. W. 813.

Rhode Island. — Coombs *v.* Patterson, 19 R. I. 25, 31 Atl. 428.

South Dakota. — Felker *v.* Grant, 10 S. D. 141, 72 N. W. 81.

87. *Connecticut.* — Goddard *v.* Selden, 7 Conn. 515.

Georgia. — Kiser *v.* Carrollton Dry Goods Co., 96 Ga. 760, 22 S. E. 303.

Massachusetts. — Taft *v.* Stoddard, 141 Mass. 150, 6 N. E. 836.

New York. — Farr *v.* Nichols, 132 N. Y. 327, 30 N. E. 834, 44 N. Y. St. 555; Delaplaine *v.* Hitchcock, 6 Hill 14.

Where a Bond and Mortgage Is Given to Secure Overdrafts creating a debt against a certain person, it may be shown by parol what overdrafts created such an indebtedness. Sawyer *v.* Senn, 27 S. C. 251, 3 S. E. 298.

88. Morgan *v.* South Milwaukee Lake View Co., 97 Wis. 275, 72 N. W. 872.

89. *Alabama.* — Couch *v.* Woodruff, 63 Ala. 466.

Georgia. — Pursley *v.* Ramsey, 31 Ga. 403.

Illinois. — Evans *v.* Hanson, 42 Ill. 234.

Indiana. — Wood *v.* Deutchman, 75 Ind. 148.

such an agreement cannot be enlarged,[90] nor can it be shown that the interests of the parties are other than as stated in the writing.[91]

(B.) Dissolution Agreements. — Where partners agree to dissolve their partnership, and their agreement is reduced to writing, parol evidence is inadmissible, there being no allegation or proof of fraud, accident or mistake,[92] to contradict or vary the terms thereof,[93] as such an agreement operates as a merger of all prior and contemporaneous agreements or negotiations.[94]

(C.) To What Parties Rule Applies. — The rule excluding parol evidence which varies or contradicts the terms of a partnership agreement does not apply to controversies between strangers to the instrument.[95]

(D.) Parol Agreements. — Evidence of a parol agreement is not admissible to vary the terms or legal effect of a written partnership agreement.[96]

(E.) Conditions or Contingencies. — That partnership articles are to be binding only upon a contingency cannot be shown by parol.[97]

b. *Qualifications of, and Exceptions to, Rule.* — **(1.) Where Incomplete.** — Where a writing does not purport to be a complete expression of the agreement of the parties to a partnership con-

Michigan. — Michigan Sav. Bank *v.* Butler, 98 Mich. 381, 57 N. W. 253.

New Jersey. — Van Horn *v.* Van Horn, 49 N. J. Eq. 327, 23 Atl. 1079.

New York. — Spingarn *v.* Rosenfeld, 4 Misc. 523, 24 N. Y. Supp. 733, 54 N. Y. St. 128.

North Dakota. — Hennessy *v.* Griggs, 1 N. D. 52, 44 N. W. 1010.

Oregon. — Langell *v.* Langell, 17 Or. 220, 20 Pac. 286.

Pennsylvania. — Gearing *v.* Carroll, 151 Pa. St. 79, 24 Atl. 1045; Halberstadt *v.* Bannan, 149 Pa. St. 51, 24 Atl. 83; Cochran *v.* Perry, 8 Watts & S. 262.

90. The Terms of a Partnership Agreement Cannot Be Enlarged by parol evidence so as to give the partners an interest in property purchased by one of them and to which the others not only did not contribute but could not and were in no wise bound to. Miller *v.* Butterfield, 79 Cal. 62, 21 Pac. 543.

91. Where the Interests of the Partners Are Equal by the terms of the partnership agreement it cannot be shown by parol that they held different interests, there being no allegation of fraud or mistake. Taft *v.* Schwamb, 80 Ill. 289. See Wood *v.* Deutchman, 75 Ind. 148.

92. Yocum *v.* Cary, 1 Ind. Ter. 626, 43 S. W. 756.

93. Burress *v.* Blair, 61 Mo. 133; Nelson *v.* Spears, 16 Mont. 351, 40 Pac. 786; Lowber *v.* LeRoy, 2 Sandf. (N. Y.) 202; Curtis *v.* Kelley, 24 Tex. Civ. App. 540, 60 S. W. 265.

94. Bragg *v.* Geddes, 93 Ill. 39.

95. Marks *v.* Hardy, 25 Ky. L. Rep. 1770, 78 S. W. 864, 1105. The recital in a partnership contract of the date when it was executed is not conclusive but the true date may be shown in an action by one who dealt with the partners, prior to the date recited, under circumstances such as to induce the belief that the partnership then existed. Cain Lumb. Co. *v.* Standard Dry Kiln Co., 108 Ala. 346, 18 So. 882.

96. Hull *v.* Barth, 48 App. Div. 590, 62 N. Y. Supp. 946.

Where One Partner Buys Out the Other and assumes all the liabilities of the firm by an instrument in writing, parol evidence is not admissible to show a parol agreement to pay a personal obligation of the retiring partner, such as a board bill. Delaney *v.* Anderson, 54 Ga. 586.

97. Dix *v.* Otis, 5 Pick. (Mass.) 38.

tract, parol evidence is admissible to show what the entire contract was.[98]

(2.) Recital of Payment. — A recital in a partnership contract that each partner has paid in his share of the capital is regarded as in the nature of a receipt which may be explained, qualified, or contradicted by parol evidence.[99]

c. *To Explain or Interpret.* — **(1.) In General.** — Parol evidence is admissible to explain a partnership contract where the meaning of the parties is ambiguous or uncertain.[1]

(2.) To Identify Subject-Matter. — Where in an agreement of dissolution one partner contracts to assume and pay the existing indebtedness of the firm parol evidence is admissible to show what claims are firm debts.[2]

(3.) To Show Who Are Members of Firm. — Where a writing is signed in a firm name, parol evidence is admissible to show who are the members of such firm.[3]

(4.) To Show Real Party to Contract. — Though a contract is in the name of an individual, parol evidence is admissible to show that it is in fact a partnership contract.[4] Thus, evidence is admissible

98. Brewer *v.* McCain, 21 Colo. 382, 41 Pac. 822.

Where a Partner Is to Furnish Property for the Use of the Firm but the writing is silent as to the ownership of such property, evidence is admissible that the ownership was to remain in the one furnishing it. Walker *v.* Schindel, 58 Md. 360.

Where an Agreement of Dissolution Is Silent as to whether the partnership affairs are settled or how they have been, or are to be settled, parol evidence is properly admissible to show the time and mode of settlement which was agreed upon by the partners. Ferguson *v.* Baker, 116 N. Y. 257, 22 N. E. 400.

99. Lowe *v.* Thompson, 86 Ind. 503.

1. Jenkins *v.* Kirtley (Kan.), 79 Pac. 671; Greenwood *v.* Marvin, 111 N. Y. 423, 19 N. E. 228.

2. Cannon *v.* Moody, 78 Minn. 68, 80 N. W. 842.

Where an Agreement of Dissolution contains a provision that one of the partners assumes and agrees to pay the accounts and liabilities of the firm at a certain place, but does not specify what such accounts and liabilities are, parol evidence is admissible to show what items were included in the accounts as charges against the designated portion of the business as agreed upon between the partners prior to the dissolution. Peaks *v.* Lord, 42 Neb. 15, 60 N. W. 349.

3. **Parol Evidence to Show Who Are the Members of a Firm,** where a writing is signed by a firm name, is admissible and in nowise controverts the rule that parol evidence is inadmissible to contradict, vary or alter a written instrument. Daugherty *v.* Heckard, 189 Ill. 239, 59 N. E. 569, *affirming* 89 Ill. App. 544. See Fonda *v.* Burton, 63 Vt. 355, 22 Atl. 594.

4. Snead *v.* Barringer, 1 Stew. (Ala.) 134; Mayer *v.* Frankfeld, 85 Hun 214, 32 N. Y. Supp. 1007, 66 N. Y. St. 491. "Where a written instrument bears the name of but one person, presumably it is the undertaking of that person; but it is competent to establish by parol proof that the contract is that of the co-partnership and that the firm entered into the contract in the name and style of the individual." Daugherty *v.* Heckard, 189 Ill. 239, 59 N. E. 569, *affirming* 89 Ill. App. 544, *per* Bogg, C. J.

That a Partner in Signing Letters was acting for the firm may be established by parol evidence. Huguenot Mills *v.* Jempson & Co., 68 S. C.

to show that a note so signed and which imports individual liability was for a firm obligation,[5] or that makers of a note are partners.[6] Likewise it is admissible to show by parol that a contract in the name of one of the members of the firm was for the benefit of the firm.[7]

T. Power of Attorney. — a. *General Rule.* — The general rule excluding parol evidence to vary a written instrument applies to a power of attorney, such evidence not being admissible to alter or vary the terms or legal effect of an instrument of this character.[8]

363, 47 S. E. 687, 102 Am. St. Rep. 673.

5. Davis *v.* Turner, 56 C. C. A. 669, 120 Fed. 605; Young *v.* Stevenson, 73 Ark. 480, 84 S. W. 623; Moore *v.* Williams, 26 Tex. Civ. App. 142, 62 S. W. 977.

6. Markham *v.* Cover, 99 Mo. App. 83, 72 S. W. 474.

7. Munroe *v.* Williams, 35 S. C. 572, 15 S. E. 279.

Thus in the Case Where Title to Land Is in One Partner it may be shown by parol that he held the title for the benefit of the partnership (McKinnon *v.* McKinnon, 56 Fed. 409, 5 C. C. A. 530; York *v.* Clemens, 41 Iowa 95; Sherwood *v.* St. Paul & C. R. Co., 21 Minn. 127; Fairchild *v.* Fairchild, 64 N. Y. 471; Black's Appeal, 89 Pa. St. 201; Kempner *v.* Rosenthal, 81 Tex. 12, 16 S. W. 639; *Compare* Miller *v.* Butterfield, 79 Cal. 62, 21 Pac. 543), such evidence being admissible for the purpose of holding the grantee as trustee for the firm. Rank *v.* Grote, 110 N. Y. 12, 17 N. E. 665.

Evidence is admissible to show that the name of a grantee in a deed is a partnership name. De Cordova *v.* Korte, 7 N. M. 678, 41 Pac. 526. See Mayer *v.* Frankfeld, 85 Hun 214, 32 N. Y. Supp. 1007, 66 N. Y. St. 491.

Where a Deed Shows Title as Tenants in Common in two persons, evidence is admissible that they purchased the property with partnership funds and that it was the intention to hold the same as partnership property. *In re* Miller's Estate, 14 Pa. Co. Ct. 147, 2 Pa. Dist. R. 854.

8. Peckham *v.* Lyon, 4 McLean 45, 19 Fed. Cas., No. 10,899; Pollard *v.* McCloskey, 5 Colo. App. 554, 39 Pac. 432; Packer *v.* Roberts, 140 Ill. 9, 29 N. E. 668; Scott *v.* Amoss, 73 Md. 80, 20 Atl. 724; Griffin *v.* Walker, 36 Tex. 88; Best *v.* Sinz, 73 Wis. 243, 41 N. W. 169.

A Power to Execute a Bond for one as county treasurer cannot be varied by evidence that such power was limited to the bond required of such person if elected by popular vote and did not confer any power to execute one where he had been appointed to such position after failure to qualify within the required time after election. Redd *v.* Commonwealth, 85 Va. 648, 8 S. E. 490.

A Power of Attorney to Sell Land cannot be contradicted by parol evidence showing that such power was coupled with an interest in the land. Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820.

Evidence to Show That a Power of Attorney to Collect Money was in fact an absolute assignment of the claim to be collected is not admissible. Best *v.* Sinz, 73 Wis. 243, 41 N. W. 169.

A Power of Attorney to Confess Judgment on a bond cannot be varied by proof of a parol agreement that it was not to be entered in the state. Logan *v.* Farmers Bank, 1 Houst. (Del.) 35.

Where a Husband Gives to His Wife a power of attorney "to bargain, purchase, sell, grant, release and convey, to accept and receive all sums of money, to collect and pay, to sue and be sued, to give notes and receipts and to accept the same of, to and from all persons, and in his name to make, seal, deliver and acknowledge" etc., it has been decided that power to convey land being neither mentioned in, nor fairly to be implied from the instrument, parol evidence of facts and circum-

b. *Qualifications of, and Exceptions to, Rule.* — Where the agreement of the parties does not appear to be fully expressed in a power of attorney, parol evidence is admissible to show the same.[9]

c. *To Explain or Interpret.* — Parol evidence is admissible to explain a power of attorney where it is ambiguous,[10] and to interpret the powers conferred.[11]

U. Receipts. — a. *Where in Nature of a Contract.* — Where a writing is not only a receipt but also purports to express a contract between the parties it is, in so far as it purports to be an expression of that contract, subject to the application of the general rule excluding parol evidence, and cannot be varied, altered or contradicted by such evidence.[12]

stances from which the intention to authorize such a conveyance might be inferred is not admissible. Gee *v.* Bolton, 17 Wis. 624.

9. Ehrenberg *v.* Baker (Tex. Civ. App.), 54 S. W. 435. See Bickerdike *v.* State, 144 Cal. 681, 78 Pac. 270. And in this connection evidence is admissible to supply the date where it is left blank (Rapley *v.* Price, 9 Ark. 428); or to supply the Christian name of a party to the instrument. La Vie *v.* Tooze, 43 Or. 590, 74 Pac. 210.

10. Coldwater Nat. Bank *v.* Buggie, 117 Mich. 416, 75 N. W. 1057; Scott *v.* Amoss, 73 Md. 80, 20 Atl. 724; McNulty *v.* Urban, 1 Misc. 422, 21 N. Y. Supp. 247, 50 N. Y. St. 565; Muir *v.* Westcott, 34 Wash. 463, 75 Pac. 1107.

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

12. *United States.* — The Cayuga, 59 Fed. 483, 8 C. C. A. 188.

Alabama. — Gravlee *v.* Lamkin, 120 Ala. 210, 24 So. 756.

Delaware. — Tatman *v.* Barrett, 3 Houst. 226.

Georgia. — Simmons *v.* Martin, 52 Ga. 570.

Indiana. — Foulks *v.* Falls, 91 Ind. 315; McKernan *v.* Mayhew, 21 Ind. 291; Henry *v.* Henry, 11 Ind. 236, 71 Am. Dec. 354.

Iowa. — Stapleton *v.* King, 33 Iowa 28, 11 Am. Rep. 109.

Kansas. — Thompson *v.* Williams, 30 Kan. 114, 1 Pac. 47.

Massachusetts. — Stevens *v.* Wiley, 165 Mass. 402, 43 N. E. 177; Curtis *v.* Wakefield, 15 Pick. 437; James *v.* Bligh, 11 Allen 4; Langdon *v.* Langdon, 4 Gray 186.

Michigan. — Sloman *v.* National Exp. Co., 134 Mich. 16, 95 N. W. 999; Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665.

Minnesota. — Tarbell *v.* Farmers' Mut. Elevator Co., 44 Minn. 471, 47 N. W. 152; Wykoff *v.* Irvine, 6 Minn. 496, 80 Am. Dec. 461.

Mississippi. — Johnson *v.* Johnson, 74 Miss. 549, 21 So. 147.

Missouri. — Blakely *v.* Bennecke, 59 Mo. 193.

Nebraska. — Morse *v.* Rice, 36 Neb. 212, 54 N. W. 308.

New Hampshire. — Goodwin *v.* Goodwin, 59 N. H. 548; Scott *v.* Whittemore, 27 N. H. 309.

New York. — Meyer *v.* Lathrop, 73 N. Y. 315; Parker *v.* North German L. S. S. Co., 74 App. Div. 16, 76 N. Y. Supp. 806; La Fargo *v.* Rickert, 5 Wend. 187, 21 Am. Dec. 209; Wood *v.* Whiting, 21 Barb. 190.

North Dakota. — Prairie School Twp. *v.* Haselen, 3 N. D. 328, 55 N. W. 938.

Ohio. — Jackson *v.* Ely, 57 Ohio St. 450, 49 N. E. 792; Stone *v.* Vance, 6 Ohio 246.

Oregon. — Milos *v.* Covacevich, 40 Or. 239, 66 Pac. 914.

Pennsylvania. — Wood *v.* Donahue, 94 Pa. St. 128.

Rhode Island. — Vaughan *v.* Mason, 23 R. I. 348, 50 Atl. 390.

South Dakota. — Washabaugh *v.* Hall, 4 S. D. 168, 56 N. W. 82.

Tennessee. — Stewart *v.* Phoenix Ins. Co., 9 Lea 104.

Virginia. — Tuley *v.* Barton, 79 Va. 387.

Wisconsin. — Kammermayer *v.* Hilz, 107 Wis. 101, 82 N. W. 689.

"There is no doubt that when a

b. *Warehouse Receipts.* — (1.) **In General.** — A warehouse receipt is ordinarily in the nature of a contract which cannot be varied or contradicted by parol evidence either as between the parties,[13] or to affect the rights of innocent parties into whose hands it has come.[14] This rule operates to exclude evidence of any usage

receipt also embodies a contract the rule applicable to contracts obtains, and parol evidence is inadmissible to vary or contradict it." Fire Ins. Ass'n *v.* Wickham, 141 U. S. 564, 581, *per* Mr. Justice Brown.

A Writing Given by a Master of a Vessel to the Shipper, acknowledging the receipt of goods and stating that they were to be transported to the place of destination at customary freight, dangers of the seas excepted, cannot be varied by evidence of a parol agreement to show the terms of the shipment. Barber *v.* Brace, 3 Conn. 9, 8 Am. Dec. 149.

A Writing Acknowledging Receipt of Money "on Deposit" imports an obligation to repay the money so received and cannot be varied by parol evidence to the contrary. "All contracts have imported into them legal principles which can no more be varied by parol evidence than the strongest and clearest express stipulations. . . . Into the contract before us the law enters and makes it an agreement to repay the money received on deposit. As the contract is a written one, not subject to variation by parol evidence, the agreement to repay the money must exist in it or not exist at all, and surely no just man would assert that one who receives money on deposit, and so states in a written contract, does not undertake to repay it. If he undertakes at all he does so by his written contract, for there is and there can be no other contract, as all oral negotiations and stipulations are merged in the writing." Long *v.* Straus, 107 Ind. 94, 100, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87, *per* Elliott, J.

An Accountable Receipt for Goods Attached by which the receiptor acknowledges that the goods were attached as the property of another person and that he will return them cannot be varied by parol evidence showing property in himself. Bursley *v.* Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 433. See Remick *v.* Atkinson, 11 N. H. 256, 35 Am. Dec. 493.

Where a Receipt Is One of Several Writings, all of which constitute the contract between the parties, it is not subject to contradiction by parol evidence. Raymond *v.* Roberts, 2 Aik. (Vt.) 204, 16 Am. Dec. 698.

13. Leonard *v.* Dunton, 51 Ill. 482, 99 Am. Dec. 568; Thompson *v.* Thompson, 78 Minn. 379, 81 N. W. 204, 543; Hirsch *v.* Salem Mills Co., 40 Or. 601, 67 Pac. 949, 68 Pac. 733; Windell *v.* Readman Warehouse Co., 30 Wash. 469, 71 Pac. 56, holding that an oral contract for storage will control a warehouse receipt subsequently mailed and which was retained by the party without noticing that its provisions differed from those of the oral contract.

Payment of Storage Charges. Where a warehouse receipt provides that storage charges shall be paid at a stated time, evidence is not admissible to show a parol agreement that payment of such charges need not be made until the goods are returned. Union Storage Co. *v.* Speck, 194 Pa. St. 126, 45 Atl. 48.

Effect of Statute Making Warehouse Receipt Negotiable. — The fact that it is provided by statute that a warehouse receipt is negotiable and may be transferred by indorsement, does not render it negotiable within the meaning of the rule prohibiting the admission of parol testimony to charge one not bound upon the face of the instrument, but in that respect it is a simple contract and such evidence is admissible to show that although executed and in the name of an agent, it is in fact the contract of the principal and he is bound thereby. Anderson *v.* Portland Flouring Mills Co., 37 Or. 483, 60 Pac. 839, 82 Am. St. Rep. 771, 50 L. R. A. 235.

14. "By custom such receipts have come to be considered as rep-

or custom which is inconsistent with the terms of the writing.[15]

(2.) To Explain or Interpret. — Evidence is admissible to explain a warehouse receipt where it is ambiguous.[16] And the question whether a receipt, in the nature of a contract, was intended as a bailment or a sale may be shown by extrinsic evidence where it cannot be determined from the contract itself.[17]

c. *Where Writing a Mere Receipt.* — **(1.) In General.** — Where a writing is a receipt merely, it does not come within the rule excluding parol evidence, but in such a case it is a general rule that evidence of this character is admissible to explain, vary or contradict the writing,[18] as a mere receipt is only *prima facie* evidence of pay-

resentatives of the property, and an assignment equivalent to a delivery of the property to the assignee, and the warehouse-man is estopped as against the assignee who has purchased in good faith to deny that he had the articles mentioned in the receipt. . . . As against an assignee who has purchased, or to whom it has been assigned in good faith for advances made, the warehouse-man cannot be permitted, by parol, to show that he had not the articles mentioned in the receipt at the time it was given. The stipulation upon the face of the receipt that the articles mentioned will be delivered only upon the return of the receipt, is a *contract* upon which the assignee has a right to rely, upon the faith of which he has acted and for the breach of which he has his action against the warehouse-man. It is, therefore, as between the makers of the receipt and an assignee who has, in good faith, taken it as security for money advanced, not simply a receipt subject to be explained and contradicted by parol proof, but a *contract,* and subject to the rules applicable to other contracts." Stewart *v.* Phoenix Ins. Co., 9 Lea (Tenn.) 104, 108, *per* McFarland, J.

15. Marks *v.* Cass Co. Mill & Elev. Co., 43 Iowa 146; Wadsworth *v.* Allcott, 6 N. Y. 64.

16. Hirsch *v.* Salem Mills Co., 40 Or. 601, 67 Pac. 949, 68 Pac. 733.

17. Leiter *v.* Emmons, 20 Ind. App. 22, 50 N. E. 40. In this case the complaint was for the price of certain wheat based upon the following instrument: "Received of Lydia Emmons forty-two 35-60ths bush. wheat, in store, to be paid for, on demand, in flour at 36 lbs. per bushel, and 12 lbs. bran, subject to any loss by fire or otherwise." The court said: "If appellants had received the wheat and simply agreed to pay for it on demand in flour and bran, the transaction would clearly be a contract of sale. But the parties evidently meant something by using the words 'in store' and 'subject to any loss by fire or otherwise.' For us to say that contract was one of sale we must say that the parties meant nothing by the words 'in store,' and this we cannot do if the contract is capable of being construed with those words left in. The provisions of the contract are not necessarily contradictory, but the contract is ambiguous. . . . As it cannot be determined from the contract itself whether the parties intended a bailment or a sale of the wheat, resort may be had to extrinsic evidence to show whether the transaction was a bailment or a sale." *Per* Robinson, C.J.

18. *England.* — Straton *v.* Rastall, 2 T. R. 366.

United States. — Fire Ins. Ass'n *v.* Wickham, 141 U. S. 564; New England Mtg. Security Co. *v.* Gay, 33 Fed. 636.

Alabama. — Lynn *v.* Bean, 37 So. 515; Gravlee *v.* Lamkin, 120 Ala. 210, 24 So. 756; Reeves *v.* Skipper, 94 Ala. 407, 10 So. 309.

Arkansas. — Humphries *v.* McCraw, 5 Ark. 61; Trowbridge *v.* Sanger, 4 Ark. 179.

California. — Lacrabere *v.* Wise, 141 Cal. 554, 75 Pac. 185; Snodgrass *v.* Parks, 70 Cal. 55, 21 Pac. 429; Hawley *v.* Bader, 15 Cal. 44.

Connecticut. — Bishop *v.* Perkins, 19 Conn. 300.

Delaware. — Tatman *v.* Barrett, 3

Houst. 226; Cannon *v.* Kinney, 3 Harr. 317.

Georgia. — Pettyjohn *v.* Liebscher, 92 Ga. 149, 17 S. E. 1007; Central R. & Bkg. Co. *v.* Georgia F. & V. Exch., 91 Ga. 389, 17 S. E. 904, 55 Am. & Eng. R. Cas. 606.

Idaho. — Barghoorn *v.* Moore, 6 Idaho 531, 57 Pac. 265.

Illinois. — Starkweather *v.* Maginnis, 98 Ill. App. 143; Gage *v.* Hampton, 127 Ill. 87, 20 N. E. 12, 2 L. R. A. 512; Counselman *v.* Collins, 35 Ill. App. 68; Scheik *v.* School Trustee, 24 Ill. App. 369.

Indiana. — Henry *v.* Henry, 11 Ind. 236, 71 Am. Dec. 354; Fox *v.* Cox, 20 Ind. App. 61, 50 N. E. 92; Lemmon *v.* Reed, 14 Ind. App. 655, 43 N. E. 454.

Iowa. — Higley *v.* Burlington, C. R. & N. R. Co., 99 Iowa 503, 68 N. W. 829, 61 Am. St. Rep. 250; Wishard *v.* McNeil, 78 Iowa 40, 42 N. W. 578.

Kansas. — Cole *v.* Bower, 53 Kan. 468, 36 Pac. 1000; Thompson *v.* Williams, 30 Kan. 114, 1 Pac. 47.

Kentucky. — Trimble *v.* Oldham, 5 J. J. Marsh. 137; Dana *v.* Boyd, 2 J. J. Marsh. 587; Byrne *v.* Schwing, 6 Mon. 199.

Louisiana. — Equitable Securities Co. *v.* Talbert, 49 La. Ann. 1393, 22 So. 762; Borden *v.* Hope, 21 La. Ann. 581; Porter *v.* Brown, 21 La. Ann. 532.

Maine. — Truworthy *v.* French, 97 Me. 143, 53 Atl. 1005; Robbins Cordage Co. *v.* Brewer, 48 Me. 481; Richardson *v.* Beede, 43 Me. 161.

Maryland. — Cramer *v.* Shriner, 18 Md. 140; Shepherd *v.* Bevin, 9 Gill 32.

Massachusetts. — Brown *v.* South Boston Sav. Bank, 148 Mass. 300, 19 N. E. 382; Bancroft *v.* Parker, 13 Pick. 192; Brooks *v.* White, 2 Metc. 283, 37 Am. Dec. 95; Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150.

Michigan. — French *v.* Newberry, 124 Mich. 147, 82 N. W. 840; Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665; Bailey *v.* Cornell, 66 Mich. 107, 33 N. W. 50.

Minnesota. — Elsbarg *v.* Myrman, 41 Minn. 541, 43 N. W. 572; Burke *v.* Ray, 40 Minn. 34, 41 N. W. 240; McKinney *v.* Harvie, 38 Minn. 18, 35 N. W. 668, 8 Am. St. Rep. 640; Morris *v.* St. Paul & C. R. Co., 21 Minn. 91.

Missouri. — Carpenter *v.* Jamison, 75 Mo. 285; Vette *v.* Johnson, 43 Mo. App. 300; Fairbanks *v.* De Lissa, 36 Mo. App. 711; Griffith *v.* Creighton, 1 Mo. App. Rep. 295.

Montana. — Hennessy *v.* Kennedy Furniture Co., 30 Mont. 264, 76 Pac. 291.

Nebraska. — Morse *v.* Rice, 36 Neb. 212, 54 N. W. 308.

New Hampshire. — Goodwin *v.* Goodwin, 59 N. H. 548; Furbush *v.* Goodwin, 25 N. H. 425; Pendexter *v.* Carleton, 16 N. H. 482.

New Jersey. — Joslin *v.* Giese, 59 N. J. L. 130, 76 Atl. 680; Dorman *v.* Wilson, 39 N. J. L. 474.

New York. — Komp *v.* Raymond, 175 N. Y. 102, 67 N. E. 113; De Camp *v.* McIntire, 115 N. Y. 258, 22 N. E. 215, 26 N. Y. St. 266; Hubbard *v.* Looschen, 9 App. Div. 632, 41 N. Y. Supp. 580; Mosel *v.* William H. Frank Brew. Co., 2 App. Div. 93, 37 N. Y. Supp. 525, 83 N. Y. St. 214.

North Carolina. — Keaton *v.* Jones, 119 N. C. 43, 25 S. E. 710; Harper *v.* Dail, 92 N. C. 394; Wilson *v.* Derr, 69 N. C. 137.

North Dakota. — Prairie School Twp. *v.* Haseleu, 3 N. D. 328, 55 N. W. 938.

Ohio. — Seeman *v.* Ohio Coal Min. Co., 22 Ohio Cir. Ct. 311.

Oregon. — Rader *v.* McElvane, 21 Or. 56, 27 Pac. 97.

Pennsylvania. — Sheaffer *v.* Sensenig, 182 Pa. 634, 38 Atl. 473; Mason Fruit Jar Co. *v.* Smucker, 174 Pa. 87, 34 Atl. 553; Borlin *v.* Highberger, 104 Pa. St. 143; Russell *v.* First Presb. Church, 65 Pa. St. 9.

South Carolina. — Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680; Catoe *v.* Catoe, 32 S. C. 595, 10 S. E. 1078; Heller *v.* Charleston Phosphate Co., 28 S. C. 224, 5 S. E. 611; Bowen *v.* Humphreys, 24 S. C. 453; Moffatt *v.* Hardin, 22 S. C. 9; Heath *v.* Steele, 9 S. C. 86.

South Dakota. — D. M. Osborne & Co. *v.* Stringham, 4 S. D. 593, 57 N. W. 776.

Tennessee. — Kirkpatrick *v.* Smith, 10 Hump. 188.

Texas. — Weir Plow Co. *v.* Evans (Tex. Civ. App.), 24 S. W. 38.

Vermont. — McLane *v.* Johnson, 59 Vt. 237, 9 Atl. 837; Randall *v.* Kelsey, 46 Vt. 158; Hitt *v.* Slocum, 37 Vt. 524.

ment,[19] being regarded as simply an admission or declaration in writing.[20]

(2.) Application of Rule. — The rule that a writing which is a mere receipt may be explained, varied or contradicted by parol applies to a receipt for a note in payment of a debt,[21] a receipt given for extra services,[22] a receipt to a sheriff to make up his record in a foreclosure suit,[23] a writing reciting that a party has received a certain sum in orders,[24] a receipt in satisfaction of a judgment,[25] a receipt for alimony,[26] a receipt evidencing delivery of property,[27] a receipt to a warehouseman that the goods were received "in good condition,"[28] a receipt for loan,[29] a tax receipt,[30] a receipt acknowledging full payment of a legacy,[31] a receipt by a client to his attorneys,[32] and generally to writings which are evidence merely of the receipt of money, goods or other personal property, and which are not contractual in character.[33]

Virginia. — Tuley *v.* Barton, 79 Va. 387.

Washington. — Allen *v.* Tacoma Mill Co., 18 Wash. 216, 51 Pac. 372.

West Virginia. — Cushwa *v.* Improvement L. & B. Ass'n, 45 W. Va. 490, 32 S. E. 259; Dunlap *v.* Shanklin, 10 W. Va. 662.

Wisconsin. — Seeger *v.* Manitowoc Steam Boiler Wks., 120 Wis. 11, 97 N. W. 485; Twohy Mercantile Co. *v.* McDonald, 108 Wis. 21, 83 N. W. 1107; Woodman *v.* Clapp, 21 Wis. 350.

19. Colorado School Land L. & M. Co. *v.* Ponick, 16 Colo. App. 478, 66 Pac. 458; Bigham *v.* Coleman, 71 Ga. 176; Dunagan *v.* Dunagan, 38 Ga. 554; Anderson *v.* Root, 8 Smed. & M. (Miss.) 362; Vaughan *v.* Mason, 23 R. I. 348, 50 Atl. 390; Tuley *v.* Barton, 79 Va. 387.

20. Milos *v.* Covacevich, 40 Or. 239, 66 Pac. 914.

"Such a paper does not constitute a contract or agreement in writing between the parties, but is only the written acknowledgment of the payment of money without containing any affirmative obligation upon either party to it. In other words, it is a mere admission of a fact in writing." Vaughan *v.* Mason, 23 R. I. 348, 350, 50 Atl. 390.

21. Gravlee *v.* Lamkin, 120 Ala. 210, 24 So. 756.

22. Selma *v.* Mullen, 46 Ala. 411.

23. Hardin *v.* Dickey, 123 Cal. 513, 56 Pac. 258.

24. Pauley *v.* Weisart, 59 Ind. 241.

25. Dunn *v.* Pipes, 20 La. Ann. 276.

26. Letts *v.* Letts, 73 Mich. 138, 41 N. W. 99.

27. Hersom *v.* Henderson, 23 N. H. 498.

28. Comerford *v.* Smith, 82 App. Div. 638, 81 N. Y. Supp. 610.

29. Fareira *v.* Smith, 3 Misc. 255, 22 N. Y. Supp. 939, 52 N. Y. St. 124.

30. Brymer *v.* Taylor, 5 Tex. Civ. App. 103, 23 S. W. 635.

31. Sparhawk *v.* Buel, 9 Vt. 41.

32. Charboneau *v.* Orton, 43 Wis. 96.

33. **A Paper Acknowledging Receipt of a Promissory Note** is not a contract and parol evidence is admissible to show what the contract was under which the note passed. King *v.* Mitchell, 30 Ga. 164.

Where a Receipt for a Note to Collect described the note, but omitted to state that it was indorsed by a certain person, evidence has been held admissible to prove the indorsement. Cox *v.* Sullivan, 7 Ga. 144, 50 Am. Dec. 386.

Evidence of a Condition that the amount stated in a receipt should be indorsed on a promissory note is admissible. Perkins *v.* Hodge, 38 Iowa 284.

The Subject-Matter of a receipt may be explained by parol evidence. Kohn Bros. *v.* Zimmerman, 34 Iowa 544.

Where Money Is Deposited With

(3.) A Receipt Under Seal has been said to be conclusive and not subject to contradiction by parol evidence,[34] but this seems to be contrary to the well-settled rule that a recital in a deed, which is a mere receipt, may be varied or contradicted by parol if the operation of the deed is not thereby defeated.[35]

d. *Receipt in Full.* — The same general principles control the admissibility of parol evidence affecting receipts in full as apply to other receipts. The mere fact that the writing contains the words "in full" does not render such evidence inadmissible as the receipt is still regarded as merely an admission or declaration which is *prima facie* evidence only and which may be explained, varied or contradicted by parol evidence.[36] If, however, a receipt in full

the Cashier of a Bank who gives a mere memorandum or receipt, it may be shown by parol that the money was deposited with such cashier for the purpose of paying a certain note. Ellicott *v.* Barnes, 31 Kan. 170, 1 Pac. 767.

A Depositary who has given a receipt for money deposited with him may show in what currency or bills the deposit was made.

A Receipt for a Gross Sum Represented by Cash and Notes of third persons which does not state whether such notes are absolute payment or not, is some evidence that they were so receipted, but only slight evidence, and it may be shown that they were accepted conditionally. Shepherd *v.* Busch, 154 Pa. St. 149, 26 Atl. 363, 35 Am. St. Rep. 815.

That Articles Enumerated in a Receipt were never in fact delivered may be shown by parol evidence. Pool *v.* Chase, 46 Tex. 207.

A Receipt From a Ward to His Guardian acknowledging that the amount specified therein is in full of all demands may be contradicted by parol (Beedle *v.* State, 62 Ind. 26; Powell *v.* Powell, 52 Mich. 432, 18 N. W. 203), and this has been held true though the receipt is under seal. Felton *v.* Long, 43 N. C. 224.

A Receipt Given by an Agent of an Insurance Company, for the premium on a policy of fire insurance, may be explained or contradicted by parol evidence. Ferebee *v.* North Carolina Mut. Home Ins. Co., 68 N. C. 11. So where a receipt acknowledging payment of an insurance premium is given, parol evidence is admissible to explain the clause "This receipt being binding on said company until policy is received." Scurry *v.* Cotton States L. Ins. Co., 51 Ga. 624.

34. State *v.* Messick, 1 Houst. (Del.) 347.

35. See articles, "CONSIDERATION," Vol. III, p. 390, and "DEEDS," Vol. IV, p. 190 *et seq.*

36. *Canada.* — Montforton *v.* Bondit, 1 U. C. Q. B. 362.

United States. — Fire Ins. Ass'n. *v.* Wickham, 141 U. S. 564; Hughes *v.* United States, 25 Ct. Cl. 472.

Alabama. — Rarden *v.* Cunningham, 136 Ala. 263, 34 So. 26.

District of Columbia. — Connell *v.* Vanderwerken, 1 Mackey 242.

Georgia. — Walters *v.* Odom, 53 Ga. 286; Alexander *v.* Alexander, 46 Ga. 283.

Illinois. — Walrath *v.* Norton, 10 Ill. 437; Culver *v.* Belt, 72 Ill. App. 619.

Indiana. — Beedle *v.* State, 62 Ind. 26; Markel *v.* Spitler, 28 Ind. 488; Bettman *v.* Shadle, 22 Ind. App. 542, 53 N. E. 662.

Iowa. — Mounce *v.* Kurtz, 101 Iowa 192, 70 N. W. 119.

Kansas. — Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548; American Bridge Co. *v.* Murphy, 13 Kan. 35.

Minnesota. — Cummings *v.* Baars, 36 Minn. 350, 31 N. W. 449.

Missouri. — Carpenter *v.* Jamison, 75 Mo. 285; Bigbee *v.* Coombs, 64 Mo. 529; Ireland *v.* Spickard, 95 Mo. App. 53, 68 S. W. 748.

Nebraska. — Barnett *v.* Pratt, 37 Neb. 349, 55 N. W. 1050.

New Hampshire. — Goodwin *v.* Goodwin, 59 N. H. 548; Gleason *v.* Sawyer, 22 N. H. 85.

contains anything in the nature of an agreement or stipulation showing that a certain sum was given and accepted in settlement of a claim for unliquidated damages or as a settlement or compromise of transactions, dealings, or disputed claims between the parties, it is then regarded as contractual in nature and parol evidence will not be admitted to vary or alter its terms or legal effect.[37] But

New York. — Meislahn *v.* Irving Nat. Bank, 62 App. Div. 231, 70 N. Y. Supp. 988; Tower *v.* Blessing, 29 Misc. 276, 61 N. Y. Supp. 255; Hannon *v.* Gallagher, 19 Misc. 347, 43 N. Y. Supp. 492; Sulyewski *v.* Windholz, 9 Misc. 498, 30 N. Y. Supp. 230, 61 N. Y. St. 129.

North Carolina. — Keaton *v.* Jones, 119 N. C. 43, 25 S. E. 710; Reid *v.* Reid, 13 N. C. 247, 18 Am. Dec. 570.

Pennsylvania. — Trymby *v.* Andress, 175 Pa. St. 6, 34 Atl. 347; Gue *v.* Kline, 13 Pa. St. 60.

South Carolina. — Heller *v.* Charleston Phosphate Co., 28 S. C. 224, 5 S. E. 611.

Texas. — Rogers *v.* Tomlinson (Tex. Civ. App.), 38 S. W. 244.

Washington. — Allen *v.* Tacoma Mill Co., 18 Wash. 216, 51 Pac. 372.

West Virginia. — Dolan *v.* Freiberg, 4 W. Va. 101.

Wisconsin. — Twohy Mercantile Co. *v.* McDonald, 108 Wis. 21, 83 N. W. 107; Smith *v.* Schulenberg, 34 Wis. 41.

Compare Thompson *v.* Lemoyne, 5 Ark. 312; Williams *v.* Poppleton, 3 Or. 139; Sessions *v.* Gilbert, Brayt. (Vt.) 75.

"The Circumstances Attending the Execution of a receipt in full of all demands may be given as evidence to show that by mistake it was made to express more than intended, and that the creditor had in fact claims that were not included." Fire Ins. Ass'n *v.* Wickham, 141 U. S. 564, 580.

A Writing Which Acknowledges the Receipt by an Employe, of a certain sum of money in "full payment of his contract," may be modified, explained or contradicted by parol evidence as to an agreement in reference to an alleged balance. Komp *v.* Raymond, 175 N. Y. 102, 67 N. E. 113. But see Adriance *v.* Crews, 38 Tex. 148.

37. *United States.* — Boffinger *v.* Tuyes Bank, 120 U. S. 198.

Alabama. — Motley *v.* Motley, 45 Ala. 555.

Arkansas. — Springfield & M. R. Co. *v.* Allen, 46 Ark. 217.

Michigan. — Pratt *v.* Castle, 91 Mich. 484, 487, 52 N. W. 52.

Minnesota. — Cummings *v.* Baars, 36 Minn. 350, 31 N. W. 449.

New Jersey. — Rector, etc., of Church of Holy Communion *v.* Paterson Extension R. Co., 63 N. J. L. 470, 43 Atl. 696.

New York — Howard *v.* Norton, 65 Barb. 161; Vacheron *v.* Hildebrant, 39 Misc. 61, 78 N. Y. Supp. 771.

Ohio. — Seeman *v.* Ohio Coal Min. Co., 22 Ohio Cir. Ct. 311.

Wisconsin. — Conant *v.* Kimball, 95 Wis. 550, 70 N. W. 74.

"Where it contains anything in the nature of an agreement or stipulation, upon a compromise or settlement of disputed claims or unliquidated damages, that the one party shall receive and accept from the other a certain sum in acquittance and discharge of such claims, it is in the nature of a contract, and can not be varied or contradicted by parol, but is conclusive upon the parties, in the absence of fraud or mistake." Cummings *v.* Baars, 36 Minn. 350, 353, 31 N. W. 449.

A Receipt in Full in Settlement of a Claim for Damages cannot be varied by parol evidence. Squires *v.* Amherst, 145 Mass. 192, 13 N. E. 609; Coon *v.* Knap, 8 N. Y. 402, 59 Am. Dec. 502.

So in a case in Rhode Island it has been decided that a receipt as follows: "Received of I. B. Masons & Sons, Six and 50-100 dollars in full settlement for damages sustained by falling into ice-pit at Canal St. 'John Vaughan'" is plain and unambiguous, covers all damages arising from the cause specified and cannot be contradicted by parol. The court said: "The court permitted the plaintiff to explain this re-

even where receipts are regarded as contracts parol evidence is admissible to explain the same where they are ambiguous.[38]

e. *To Invalidate for Fraud.* — Parol evidence is admissible to show that a receipt relied upon by a party was procured by fraud.[39]

V. RELEASES. — a. *General Rule.* — **(1.) Statement Of.** — It is the general rule that a release which is complete, plain and unambiguous cannot be varied or contradicted by parol evidence.[40] The

ceipt, and to testify that when he received the money specified therein he did not understand that it was in settlement of his claim against the defendants on account of the injury received, as aforesaid, but that it was simply on account of his doctor's bill. This ruling was erroneous. The receipt is plain and unambiguous, and hence there was no occasion for any explanation to be given concerning the same. The plaintiff had fallen into an ice-pit belonging to defendants while doing work for them, and he claimed that the accident was caused by their negligence in leaving the trap-door of said ice-pit open, and hence that they were liable for the damages sustained by him. This was the only claim which he had against them, and this is the sole basis upon which his declaration is founded. The receipt in question expressly covers and includes all such damages; it is not apparent from an inspection thereof that it does not embrace the entire contract, and we think it is clear that the plaintiff is thereby barred from maintaining any action which otherwise might be founded on the accident aforesaid. . . . Where, however, an agreement is embodied in the receipt, then, in so far as the receipt contains an agreement, it cannot be varied or controlled by parol evidence, and hence is not open to explanation unless for uncertainty or ambiguity in its terms. In other words, it stands on the same footing in this regard as ordinary agreements or contracts in writing." Vaughan *v.* Mason, 23 R. I. 348, 350, 50 Atl. 390.

So a receipt, which by its terms releases from all liability for claims resulting from a collision except a specified claim, is in the nature of a contract and cannot be controlled or contradicted by parol evidence. The Cayuga, 8 C. C. A. 188, 59 Fed. 483.

Where a Vendor of Property gives to a known agent of the purchaser a receipt in full for the purchase money, and the purchaser in good faith, relying on the truth and validity of the receipt, pays the amount to the agent, the vendor is estopped from denying the truth of the receipt to the prejudice of the purchaser. Miller *v.* Sullivan, 26 Ohio St. 639.

38. McLane *v.* Johnson, 59 Vt. 237, 9 Atl. 837.

39. Tarver *v.* Rankin, 3 Ga. 210; Butler *v.* State, 81 Miss. 734, 33 So. 847; Joslyn *v.* Capron, 64 Barb. (N. Y.) 598; Oliwill *v.* Verdenhalven, 15 N. Y. Supp. 94, 39 N. Y. St. 200; Cushwa *v.* Improvement L. & B. Ass'n, 45 W. Va. 490, 32 S. E. 259.

A Receipt to a Railroad Company in Settlement of a Claim for Damages resulting from a personal injury may be shown to have been so procured. Michigan Cent. R. Co. *v.* Dunham, 30 Mich. 128.

Evidence That a Receipt Was Given for a Fraudulent Purpose in which both parties participated has been held admissible in an action between the parties. King *v.* Hutchins, 28 N. H. 561.

40. *United States.* — St. Louis & S. F. R. Co. *v.* Dearborn, 60 Fed. 880.

Colorado. — Denver & R. G. R. Co. *v.* Sullivan, 21 Colo. 302, 41 Pac. 501.

Connecticut. — Drake *v.* Starks, 45 Conn. 96.

Illinois. — Clark *v.* Mallory, 185 Ill. 227, 56 N. E. 1099; Todd *v.* Mitchell, 67 Ill. App. 84.

Indiana. — Indianapolis Union R. Co. *v.* Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; Fordice *v.* Scribner, 108 Ind. 85, 9 N. E. 122.

Kansas. — Drumm Flato Com's'n

terms thereof cannot be enlarged by parol so as to include other matters than those apparent from the instrument itself,[41] or to show an intention to exclude a matter which by the terms of the release is included.[42]

(2.) Parol Agreements. — Evidence of a prior or contemporaneous parol agreement is not admissible to contradict or vary the terms or legal effect of a release.[43]

(3.) Reference to Schedule Annexed. — Where a release refers to a schedule annexed as showing the subject-matter of the release, parol evidence is not admissible to contradict the terms of such schedule as to the matters included.[44]

b. *To Show Fraud.* — It may be shown by parol evidence that a release has never had any valid legal existence by reason of fraud in connection with its procurement or execution.[45] And in an

Co. *v.* Barnard, 66 Kan. 568, 72 Pac. 257.

Louisiana. — Morgan *v.* Morgan, 5 La. Ann. 230.

Maryland. — Neidig *v.* Whiteford, 29 Md. 178.

Massachusetts. — Radigan *v.* Johnson, 174 Mass. 68, 54 N. E. 358.

Missouri. — Williams *v.* Kansas City S. B. R. Co., 85 Mo. App. 103.

Ohio. — Cassilly *v.* Cassilly, 57 Ohio St. 582, 49 N. E. 795.

Texas. — Moore *v.* Missouri K. & T. R. Co., 30 Tex. Civ. App. 266, 69 S. W. 997.

Evidence of Declarations made at the time, tending to show that the release was executed upon conditions not appearing therein, is inadmissible. Van Bokkelen *v.* Taylor, 62 N. Y. 105.

A Release of a Cause of Action for Damages for personal injuries cannot be varied by extrinsic evidence. Leddy *v.* Barney, 139 Mass. 394, 2 N. E. 107.

Where a Release of a Mortgage recited that the mortgagor had fully paid and satisfied the debt to the mortgagees and on the same day the mortgagor executed a new mortgage to one of the mortgagees, it was decided that parol evidence was not admissible to explain or vary the terms, or legal effect of the release, and that the mortgagee lost his lien under the first mortgage, and that the second mortgage must be postponed to those prior in date. Woollen *v.* Hillen, 9 Gill (Md.) 138, 52 Am. Dec. 690.

Though a Release of One of the Obligors of a bond is held to be a release of the others, it is decided that parol evidence is admissible in equity of the intent of the parties. Massey *v.* Brown, 4 S. C. 85.

41. Rice *v.* Woods, 21 Pick. (Mass.) 30; Brady *v.* Read, 94 N. Y. 631; Howlett *v.* Howlett, 56 Barb. (N. Y.) 467.

42. Curro *v.* Altieri, 32 Misc. (N. Y.) 690, 66 N. Y. Supp. 499.

A Release of All Demands cannot be varied or contradicted by parol evidence showing that a particular debt was not intended to be released. Piersons *v.* Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467.

43. Parol Agreement. — Where a person executes a release of any right to maintain an action for injuries occasioned by the negligence of his former employer, and there is no fraud connected with the execution of the instrument, and it is full, complete and unambiguous in its terms, it has been decided that evidence is not admissible of a parol agreement, claimed to have been made in the negotiations concluded by the release, as to any future employment of the releasor. Atchison, T. & S. F. R. Co. *v.* Vanordstrand, 67 Kan. 386, 73 Pac. 113. See Myron *v.* Union R. Co., 19 R. I. 125, 32 Atl. 165. But see Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

44. West Boylston Mfg. Co. *v.* Searle, 15 Pick. (Mass.) 225.

45. Akin *v.* Drummond, 2 La. Ann. 92; Saginaw Bldg. & L. Ass'n

action to set aside a release on the ground that it was procured by fraud and deception, evidence is admissible that the plaintiff did not understand the contents of the instrument.[46]

c. *To Explain or Interpret.* — **(1.) Surrounding Circumstances.** The circumstances surrounding the execution of a release are admissible in evidence to explain the same where the meaning of the parties is not clearly apparent from the instrument itself.[47]

(2.) To Identify Subject-Matter. — Parol evidence is admissible to identify the subject-matter intended to be covered by a release.[48]

W. Royalty Contracts. — Where the rate of royalty to be paid is fixed by a contract in writing, parol evidence is not admissible to show that the parties orally agreed upon a different rate prior to the execution of the contract.[49] Parol evidence may, however, be admitted to explain the contract if ambiguous.[50]

X. Sales. — a. *General Rule.* — **(1.) Statement Of.** — Parol evidence is inadmissible to vary, alter, or contradict the terms or legal effect of a written contract of sale of real,[51] or of personal

v. Tennant, 111 Mich. 515, 69 N. W. 1118; Kirchner *v.* New Home Sew. Mach. Co., 135 N. Y. 182, 31 N. E. 1104; Ball *v.* McGeoch, 81 Wis. 160, 51 N. W. 443.

Where in an Action on a Policy of Accident Insurance the defendant alleged a full settlement and introduced in evidence proof of loss signed by the plaintiff with his mark, which provided that the payment of a certain amount weekly for a stated period should be a full discharge of all claims on account of the injury received, it was held that evidence was properly admissible to show that the plaintiff could neither read nor write the English language, that he signed such proofs not knowing that they contained such a provision, and that upon receiving the amount stated he refused to sign a receipt in full. The court said: "Here, such discharge or acquittance was not properly any part of the proofs of injury and loss, but an attempt to limit the amount of the claim and bar any further recovery. Had the question of such discharge been squarely presented to the plaintiff, it may be inferred from the testimony that he would have refused to sign it, as he did the receipt in full a day or so afterwards." Lord *v.* American Mut. Acc. Ass'n, 89 Wis. 19, 61 N. W. 293, 46 Am. St. Rep. 815, 26 L. R. A. 741.

46. Galloway *v.* San Antonio & G. R. Co. (Tex. Civ. App.), 78 S. W. 32.

47. Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377.

48. Perkins *v.* Owen, 123 Wis. 238, 101 N. W. 415, where it is decided that, where the mother of a decedent executed a release of any and all claims which she might have against the estate of her son or against his widow, parol evidence of the circumstances of the transaction was admissible to show what the word "claims" was intended to cover, and that it in fact covered any claim which she might have under a will which might be discovered, and under which she might have greater rights.

49. Standard Fireproofing Co. *v.* St. Louis Expanded Metal F. Co., 177 Mo. 559, 76 S. W. 1008.

50. Andrews *v.* Landers, 72 Fed. 666.

51. *Canada.* — Blaikie *v.* McLennan, 33 Nov. Sc. 558.

Alabama. — Williams *v.* Searcy, 94 Ala. 360, 10 So. 632; Sayre *v.* Wilson, 86 Ala. 151, 5 So. 157.

Georgia. — Wilson *v.* Hinnant, 117 Ga. 46, 43 S. E. 408; Walker *v.* Bryant, 112 Ga. 412, 37 S. E. 749.

Illinois. — Pickrel *v.* Rose, 87 Ill. 263; Lynn *v.* Lynn, 10 Ill. 602; Over *v.* Walzer, 103 Ill. App. 104; Bolton *v.* Huling, 51 Ill. App. 591.

property.[52] And such a contract cannot be affected by evidence

Indiana. — Moore *v.* Pendleton, 16 Ind. 481.

Iowa. — Hetzler *v.* Morrell, 82 Iowa 562, 48 N. W. 938.

Kentucky. — Langdon *v.* Woolfolk, 2 B. Mon. 105.

Louisiana. — Clark *v.* Hedden, 109 La. 147, 33 So. 116; Wade *v.* Percy, 24 La. Ann. 173; Arnous *v.* Davern, 18 La. 42.

Massachusetts. — Faucett *v.* Currier, 109 Mass. 79.

Missouri. — Chrisman *v.* Hodges, 75 Mo. 413; Langford *v.* Caldwell, 48 Mo. 508.

New Jersey. — Rogers *v.* Colt, 21 N. J. L. 704.

North Carolina. — Farthing *v.* Rochelle, 131 N. C. 563, 43 S. E. 1; Merchants' and Farmers' Nat. Bank *v.* McElwee, 104 N. C. 305, 10 S. E. 295.

Pennsylvania. — Vito *v.* Birkel, 209 Pa. St. 206, 58 Atl. 127; Baker *v.* Flick, 200 Pa. St. 13, 49 Atl. 349; Merriman *v.* Bush, 116 Pa. St. 276, 9 Atl. 345.

South Carolina. — Askew *v.* Poyas, 2 Desaus. 145.

Texas. — McGregor *v.* Johnston (Tex. Civ. App.), 34 S. W. 407; Heflin *v.* Campbell, 5 Tex. Civ. App. 106, 23 S. W. 595.

West Virginia. — Anderson *v.* Snyder, 21 W. Va. 632; Depue *v.* Sergent, 21 W. Va. 326.

Wisconsin. — Niland *v.* Murphy, 73 Wis. 326, 41 N. W. 335; Yenner *v.* Hammond, 36 Wis. 277.

Wyoming. — Stickney *v.* Hughes, 12 Wyo. 397, 75 Pac. 945.

That Time Was of Essence of a contract for the sale of land cannot be shown by parol evidence. Strunk *v.* Smith, 8 S. D. 407, 66 N. W. 926.

Where a Contract of Sale of Land by Metes and Bounds, upon payment of a designated sum is entered into, evidence is not admissible to show a parol agreement that the land was to be surveyed and, if it was found to exceed a certain number of acres, an additional sum should be paid. Nickelson *v.* Reves, 94 N. C. 559.

52. *Canada.* — Ulster Spinning Co. *v.* Foster, 3 Mont. L. R. Q. B. 396.

United States. — Burlee Dry Dock Co. *v.* Besse, 130 Fed. 444, 64 C. C. A. 646; Union Selling Co. *v.* Jones, 128 Fed. 672, 63 C. C. A. 224; Smith *v.* American Nat. Bank, 89 Fed. 832, 32 C. C. A. 368; Reid *v.* Diamond Plate-Glass Co., 85 Fed. 193, 29 C. C. A. 110; Wrought-Iron Range Co. *v.* Graham, 80 Fed. 474, 25 C. C. A. 570.

California. — Langley *v.* Rodriguez, 122 Cal. 580, 55 Pac. 406; 68 Am. St. Rep. 70; Bullock *v.* Consumers' Lumber Co., 31 Pac. 367.

Connecticut. — New Idea Pattern Co. *v.* Whelan, 75 Conn. 455, 53 Atl. 953.

Georgia. — Wells *v.* Gress, 118 Ga. 566, 45 S. E. 418; National Computing Scale Co. *v.* Eaves, 116 Ga. 511, 42 S. E. 783; Bass Dry Goods Co. *v.* Granite City Mfg. Co., 113 Ga. 1142, 39 S. E. 471.

Indiana. — Robinson Mach. Works *v.* Chandler, 56 Ind. 575; Buckeye Mfg. Co. *v.* Woolley Foundry & M. Wks., 26 Ind. App. 7, 58 N. E. 1069.

Kansas. — Smith *v.* Deere, 48 Kan. 416, 29 Pac. 603; Huston *v.* Peterson, 2 Kan. App. 315, 43 Pac. 101.

Louisiana. — Succession of Welsh, 111 La. 801, 35 So. 913.

Maine. — Williams *v.* Robinson, 73 Me. 186, 40 Am. Rep. 352.

Maryland. — Lawder & Sons Co. *v.* Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795; Cassard *v.* McGlaman, 88 Md. 168, 40 Atl. 711.

Massachusetts. — Dean *v.* Washburn & Moen Mfg. Co., 177 Mass. 137, 58 N. E. 162; Russell *v.* Barry, 115 Mass. 300; Coddington *v.* Goddard, 16 Gray 436.

Michigan. — Helper *v.* MacKinnon Mfg. Co., 101 N. W. 804; Hallwood Cash Register Co. *v.* Millard, 127 Mich. 316, 86 N. W. 833; Hutchison Mfg. Co. *v.* Pinch, 107 Mich. 12, 64 N. W. 729, 66 N. W. 340; Harrow Spring Co. *v.* Whipple Harrow Co., 90 Mich. 147, 51 N. W. 197, 30 Am. St. Rep. 421.

Minnesota. — Kessler *v.* Smith, 42 Minn. 494, 44 N. W. 794.

Mississippi. — Coats *v.* Bacon, 77 Miss. 320, 27 So. 621.

Missouri. — Quick *v.* Glass, 128

of any prior conversations or negotiations as all these are presumed to be merged in the writing.[58]

Mo. 320, 30 S. W. 1031; Grisham Merc. & L. Co. *v.* Rabich, 84 Mo. App. 544; Russe *v.* Hendricks, 75 Mo. App. 386.

Nebraska. — Nebraska Land & F. Co. *v.* Trauerman, 98 N. W. 37; Traver *v.* Shaefle, 33 Neb. 531, 50 N. W. 683.

New Jersey. — Rittenhouse *v.* Tomlinson, 27 N. J. Eq. 379.

New York. — Lillis *v.* Mertz, 89 App. Div. 289, 85 N. Y. Supp. 800; Fernschild *v.* Yuengling Brew. Co., 15 App. Div. 29, 44 N. Y. Supp. 106; Atwater *v.* Orford Copper Co., 85 N. Y. Supp. 426; Union Stove Wks. *v.* Arnoux, 7 Misc. 700, 28 N. Y. Supp. 23, 58 N. Y. St. 367.

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

Ohio. — Monnett *v.* Monnett, 46 Ohio 30, 17 N. E. 659.

Pennsylvania. — Hatfield *v.* Thomas Iron Co., 208 Pa. St. 478, 57 Atl. 950; Fry *v.* National Glass Co., 207 Pa. St. 505, 56 Atl. 1063.

South Carolina. — Burwell & Dunn Co. *v.* Chapman, 59 S. C. 581, 38 S. E. 222.

Tennessee. — Ross *v.* Carter, 1 Humph. 415.

Texas. — Matador L. & C. Co. *v.* White, 82 Tex. 477, 18 S. W. 603; Du Bois *v.* Rooney, 82 Tex. 173, 17 S. W. 528; Fletcher *v.* Underhill (Tex. Civ. App.), 83 S. W. 726; Harris-Hearin Fountain Co. *v.* Pressler, 35 Tex. Civ. App. 360, 80 S. W. 664; Foote *v.* Frost (Tex. Civ. App.), 39 S. W. 328.

Vermont. — Daggett *v.* Johnson, 49 Vt. 345.

Virginia. — Allen *v.* Crank, 23 S. E. 772.

Wisconsin. — Coman *v.* Wunderlich, 122 Wis. 138, 99 N. W. 612; Newell *v.* New Holstein Can. Co., 119 Wis. 635, 97 N. W. 487.

The Intention of the Parties as to the Time When Title Is to Pass must be gathered from the instrument itself, and parol evidence is not admissible of any secret understanding or agreement which varies the terms or legal effect of such a contract. Hotchkiss *v.* Higgins, 52 Conn. 205, 52 Am. Rep. 582.

A Contract for Wood To Be "Delivered When Called For" cannot be varied by parol evidence so as to change the property and possession without some further act. Illinois Cent. R. Co. *v.* Cassell, 17 Ill. 389.

A Contract of Subscription for Books providing that "no other conditions or representations than those herewith printed will be binding upon the subscriber or publisher" cannot be varied by evidence of representations made by the agent as to matters not mentioned in the executed contract. Barrie *v.* Smith, 105 Ga. 34, 31 S. E. 121.

Time of Payment. — Evidence is not admissible to show that the time of payment was in advance of that designated in the contract. Langley *v.* Rodriguez, 122 Cal. 580, 55 Pac. 406.

Application of Rule. — This rule has been applied to a contract for the sale of machinery (Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014; Leffel & Co. *v.* Piatt, 126 Mich. 443, 86 N. W. 65); of an elevator and engine (American Mfg. Co. *v.* Klarquist, 47 Minn. 344, 50 N. W. 243); of a traction engine (Staver *v.* Rogers, 3 Wash. 603, 28 Pac. 906); of a nickel-in-the-slot musical instrument (Price *v.* Marthen, 122 Mich. 655, 81 N. W. 551); of coal (Holcombe *v.* Munson, 103 N. Y. 682, 9 N. E. 443; Northwestern Fuel Co. *v.* Bruns, 1 N. D. 137, 45 N. W. 699); of corn (Ormsbee *v.* Machir, 20 Ohio St. 295); of iron ore (Hunter *v.* McHose, 100 Pa. St. 38); of logs (Gaspar *v.* Heimbach, 53 Minn. 414, 55 N. W. 559); of railroad ties (Scott *v.* Norfolk & W. R. Co., 90 Va. 241, 17 S. E. 882); of advertising cuts (Pictorial League *v.* Nelson, 69 Vt. 162, 37 Atl. 247); of cattle (Snyder *v.* Koons, 20 Ind. 389); of a business (Tichenor *v.* Newman, 166 Ill. 264, 57 N. E. 826; Fry *v.* National Glass Co., 207 Pa. St. 505, 56 Atl. 1063); of an interest in a patent (Fitz *v.* Comey, 118 Mass. 100); and of a new and useful improvement in force pumps. McClure *v.* Jeffrey, 8 Ind. 79.

53. *Canada.* — Noble *v.* Spencer, 27 U. C. Q. B. 210.

(2.) Orders for Goods. — Contracts of sale of merchandise frequently consist of a written order given by the buyer for the goods desired and an oral acceptance thereof by the seller, and in such a case the order in so far as it evidences the contract of sale cannot be contradicted or varied by parol.[54]

(3.) To What Parties Rule Applies. — The rule excluding parol evidence which tends to vary or contradict the terms of a contract of sale of land does not apply to an action brought by the broker who effected the sale against the owner to recover his commission.[55]

(4.) Sale by Sample. — Where the contract is in writing and is complete upon its face, parol evidence is not admissible to show a sale by sample where there is nothing in the writing to indicate that the sale was so made.[56]

(5.) Parol Agreements. — (A.) In General. — Evidence is, as a general rule, inadmissible to show a prior or contemporaneous parol agreement, which is inconsistent with the terms of a contract for the sale of land,[57] and this also applies to contracts for the sale of per-

United States. — Housekeeper Pub. Co. *v.* Swift, 97 Fed. 290, 38 C. C. A. 187.

Georgia. — Arnold *v.* Malsby, 120 Ga. 586, 48 S. E. 132.

Indiana. — Burke *v.* Keystone Mfg. Co., 19 Ind. App. 556, 48 N. E. 382.

New Jersey. — King *v.* Ruckman, 21 N. J. Eq. 599.

New York. — Corse *v.* Peck, 102 N. Y. 513, 7 N. E. 810; Pollen *v.* Le Roy, 30 N. Y. 549; Van Pub. Co. *v.* Westinghouse, Kerr & Co., 72 App. Div. 121, 76 N. Y. Supp. 340.

54. *Illinois.* — Miller *v.* Bensley, 20 Ill. App. 528.

Iowa. — Hutton *v.* Maines, 68 Iowa 650, 28 N. W. 9.

Louisiana. — Succession of Welsh, 111 La. 801, 35 So. 913, 64 L. R. A. 823.

Minnesota. — Kessler *v.* Smith, 42 Minn. 494, 44 N. W. 794.

Mississippi. — Coats *v.* Bacon, 77 Miss. 320, 27 So. 621.

New York. — Chase *v.* Evarts, 19 N. Y. Supp. 987, 47 N. Y. St. 425.

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

South Carolina. — Burwell & Dunn Co. *v.* Chapman, 59 S. C. 581; 38 S. E. 222.

Texas. — Gale Mfg. Co. *v.* Finkelstein (Tex. Civ. App.), 59 S. W. 571.

Vermont. — League *v.* Nelson, 69 Vt. 162, 37 Atl. 247.

Evidence That an Order for Goods Was Conditional is not admissible where it is absolute in terms. McCormick Harv. Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33.

55. Folinsbee *v.* Sawyer, 157 N. Y. 196, 51 N. E. 994.

56. Harrison *v.* McCormick, 89 Cal. 327, 26 Pac. 830; 23 Am. St. Rep. 469; Thomas *v.* Gortner, 73 Md. 474, 21 Atl. 371; Dowagiac Mfg. Co. *v.* Mahon (N. D.), 101 N. W. 903. *Compare* Grand Rapids Veneer Wks. *v.* Forsythe, 83 Hun 230, 31 N. Y. Supp. 601, 64 N. Y. St. 338, wherein it is decided that such evidence is admissible where the writing does not contain the entire agreement of the parties.

57. *California.* — Beall *v.* Fisher, 95 Cal. 568, 30 Pac. 773; Smith *v.* Taylor, 82 Cal. 533, 23 Pac. 217.

Illinois. — Schneider *v.* Sulzer, 212 Ill. 87, 72 N. E. 19; Lane *v.* Sharpe, 4 Ill. 566.

Indiana. — Stevens *v.* Flannagan, 131 Ind. 122, 30 N. E. 898; Moore *v.* Pendleton, 16 Ind. 481.

New York. — Kingsland *v.* Haines, 62 App. Div. 146, 70 N. Y. Supp. 873.

Pennsylvania. — Krueger *v.* Nicola, 205 Pa. St. 38, 54 Atl. 494; Baker *v.* Flick, 200 Pa. St. 13, 49 Atl. 349; Melcher *v.* Hill, 194 Pa. St. 440, 45 Atl. 488.

Wisconsin. — Custeau *v.* St. Louis Land Imp. Co., 88 Wis. 311, 60 N.

sonal property.[58] This rule operates to exclude evidence of such an agreement as to the time of passing title to goods or merchandise,[59] as to the time of delivery,[60] the amount to be paid,[61] the manner of shipment,[62] or, as to the payment of freight charges.[63] In some cases, however, evidence is admitted of an independent collateral agreement which was an inducement to the contract, provided it is not inconsistent with the terms thereof.[64] And it has been decided that though a contract of sale provides for payment in money evidence is admissible of a parol agreement that payment might be made in services.[65]

(B.) Not to Engage in Business. — It is a general rule that a contract of sale which is complete and unambiguous upon its face cannot be varied by evidence of a prior or contemporaneous parol agreement that the seller will not engage in the same business in that vicinity.[66] Evidence of such an agreement has, however, been

W. 425; Atlee *v.* Bartholomew, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103.

58. *United States.* — American Elec. Const. Co. *v.* Consumers' Gas Co., 47 Fed. 43.

Alabama. — Forbes *v.* Taylor, 139 Ala. 286, 35 So. 855.

Connecticut. — New Idea Pattern Co. *v.* Whelan, 75 Conn. 455, 53 Atl. 953.

Georgia. — Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28.

Illinois. — Hess Co. *v.* Dawson, 149 Ill. 138, 36 N. E. 557.

Indiana. — Conant *v.* National State Bank, 121 Ind. 323, 22 N. E. 250.

Massachusetts. — Russell *v.* Barry, 115 Mass. 300.

Michigan. — Price *v.* Marthen, 122 Mich. 655, 81 N. W. 551; Harrow Spring Co. *v.* Whipple Harrow Co., 90 Mich. 147, 51 N. W. 197, 30 Am. St. Rep. 421.

Minnesota. — Gasper *v.* Heimbach, 53 Minn. 414, 55 N. W. 559; American Mfg. Co. *v.* Klarquist, 47 Minn. 344, 50 N. E. 243.

Missouri. — Neville *v.* Hughes, 104 Mo. App. 455, 79 S. W. 735; McCormick Harv. Mach. Co. *v.* Mackey, 100 Mo. App. 400, 74 S. W. 388; Weir Furnace Co. *v.* Bodwell, 73 Mo. App. 389.

New York. — Engelhorn *v.* Reitlinger, 122 N. Y. 76, 25 N. E. 297, 33 N. Y. St. 275, 9 L. R. A. 548; Gordone *v.* Niemann, 118 N. Y. 152, 23 N. E. 454, 28 N. Y. St. 616.

Texas. — Dunovant *v.* Anderson, 24 Tex. Civ. App. 517, 59 S. W. 824; Evans-Snider-Buel Co. *v.* Stribling (Tex. Civ. App.), 45 S. W. 40; Sanborn *v.* Murphy, 5 Tex. Civ. App. 509, 25 S. W. 459.

Wisconsin. — Exhaust Ventilator Co. *v.* Chicago, M. & St. P. R. Co., 69 Wis. 454, 34 N. W. 509.

59. Finnigan *v.* Shaw, 184 Mass. 112, 68 N. E. 35; Feld *v.* Stewart, 78 Miss. 187, 28 So. 819.

60. Trauter, Davison Mfg. Co. *v.* Pittsburg Trolley P. Co., 23 Pa. Super. Ct. 46.

61. Plano Mfg. Co. *v.* Eich (Iowa), 97 N. W. 1106.

62. Elsas *v.* Gallagher, 34 Misc. 772, 68 N. Y. Supp. 839.

63. Minnesota Sandstone Co. *v.* Clark, 35 Wash. 466, 77 Pac. 803.

64. Rackemann *v.* Riverbank Imp. Co., 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427; Riemer *v.* Rice, 88 Wis. 16, 59 N. W. 450; Keefer *v.* Phoenix Ins. Co., 29 Ont. 394.

65. Agreement as to Mode of Payment. — "It is also competent to show that the parties, either at the time or subsequently, upon a new consideration, agreed how the payments provided for in the original contract might be made, either in money or money's worth, and this is not such a variance as is contemplated by the general rule." Johnson *v.* McCart, 24 Wash. 19, 24, 63 Pac. 1121.

66. Walther *v.* Stampfli, 91 Mo. App. 398; Love *v.* Hamel, 59 App.

admitted in some cases on the ground that it was an independent collateral agreement as to a matter in respect to which the writing was silent, and was a part of the consideration.[67]

(6.) Warranties. — Where a contract of sale contains an express warranty, parol evidence is not admissible to vary, enlarge, or diminish its terms or legal effect.[68] And, though, in some cases parol evidence is held admissible of a warranty where there is none in the writing,[69] yet it is a general rule that where a contract of sale is complete upon its face and no warranty is expressed in the writing, one cannot be engrafted thereon by parol evidence.[70]

Div. 360, 69 N. Y. Supp. 251; Zanturjian *v.* Boornazian, 25 R. I. 151, 55 Atl. 199; Slaughter *v.* Smither, 97 Va. 202, 33 S. E. 544; Gordon *v.* Parke & Lacy Mach. Co., 10 Wash. 18, 38 Pac. 755.

67. Durham *v.* Lathrop, 95 Ill. App. 429; Fusting *v.* Sullivan, 41 Md. 162.

68. Northey Mfg. Co. *v.* Sanders, 31 Ont. 475; Willard *v.* Ostrander, 46 Kan. 591, 26 Pac. 1017; Huston *v.* Peterson, 2 Kan. App. 315, 43 Pac. 101; Osborne & Co. *v.* Wigent, 127 Mich. 624, 86 N. W. 1022; Nichols & Co. *v.* Crandall, 77 Mich. 401, 43 N. W. 875, 6 L. R. A. 412; Case Thresh. Mach. Co. *v.* Hall, 32 Tex. Civ. App. 214, 73 S. W. 835; McQuaid *v.* Ross, 77 Wis. 470, 46 N. W. 892.

69. Chapin *v.* Dobson, 78 N. Y. 74, 34 Am. Rep. 512, holding that where a contract of sale of machines did not show on its face that it contained the whole agreement of the parties evidence was admissible of a parol agreement that they should be so made as to do the work of the buyer satisfactorily. In a later case in New York this case was cited and followed, the court, however, saying that it had been termed "a border case" but that as it had not been overruled it felt compelled to follow it. Vaughn Mach. Co. *v.* Lighthouse, 64 App. Div. 138, 71 N. Y. Supp. 799.

In Aultman *v.* Falkum, 51 Minn. 562, 53 N. W. 875, a purchaser was allowed to prove a verbal warranty as to the quality of a machine which he had bought, although in a written contract subsequently signed there was a different warranty. It appeared that he could neither read nor write, that the contract was not read or explained to him, except that it was stated by the agent of the seller to be "an order for the machine" and that his signature was therefore obtained by fraud.

Where an Order in Shape of a Letter did not purport to contain any of the contract or conditions to be performed by the seller it was decided that parol evidence of a warranty was admissible. Puget Sound Iron & Steel Wks. *v.* Clemmons, 32 Wash. 36, 72 Pac. 465.

Evidence of a Verbal Warranty Such as Would Be Implied from the contract itself has been held admissible. Tufts *v.* Verkuyl, 124 Mich. 242, 82 N. W. 891, holding that parol evidence is admissible to show that the property, in this case a soda water fountain, was orally warranted to be suitable for the purpose for which it was bought.

70. *United States.* — Seitz *v.* Brewers' Refrig. Mach. Co., 141 U. S. 510; De Witt *v.* Berry, 134 U. S. 306.

Connecticut. — Fitch *v.* Woodruff & Beach Iron Wks., 29 Conn. 82.

Georgia. — National Computing Scale Co. *v.* Eaves, 116 Ga. 511, 42 S. E. 783; Martin *v.* Moore, 63 Ga. 531.

Illinois. — Telluride Power Trans. Co. *v.* Crane Co., 208 Ill. 218, 70 N. E. 319, *affirming* 103 Ill. App. 647; Vierling *v.* Iroquois Furnace Co., 170 Ill. 189, 48 N. E. 1069; McMillan *v.* De Tamble, 93 Ill. App. 65; McCormick Harv. Mach. Co. *v.* Yoeman, 26 Ind. App. 415, 59 N. E. 1069.

Iowa. — Sandwich Mfg. Co. *v.* Trindle, 71 Iowa 600, 33 N. W. 79.

Kansas. — Diebold Safe & L. Co.

(7.) **Conditions.** — Where a contract which is clear and complete, and is upon its face absolute, has been entered into, parol evidence

v. Huston, 55 Kan. 104, 39 Pac. 1035, 28 L. R. A. 53.

Maine. — Neal *v.* Flint, 88 Me. 72, 33 Atl. 669.

Maryland. — Warren Glass Wks. Co. *v.* Keystone Coal Co., 65 Md. 547, 5 Atl. 253.

Michigan. — Dowagiac Mfg. Co. *v.* Corbit, 127 Mich. 473, 86 N. W. 954, 87 N. W. 886; Zimmerman Mfg. Co. *v.* Dolph, 104 Mich. 281, 62 N. W. 339; McCray Refrig. & C. S. Co. *v.* Woods, 99 Mich. 269, 58 N. W. 320, 41 Am. St. Rep. 599.

Minnesota. — Wheaton Roller-Mill Co. *v.* Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854; Bradford *v.* Neill, 46 Minn. 347, 49 N. W. 193; Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1.

Nebraska. — Kummer *v.* Dubuque T. & R. Mills Co., 4 Neb. (Unof.) 347, 93 N. W. 938.

New York. — Eighmie *v.* Taylor, 98 N. Y. 288; Van Ostrand *v.* Reed, 1 Wend. 424, 19 Am. Dec. 529; Hungerford Co. *v.* Rosenstein, 19 N. Y. Supp. 471, 46 N. Y. St. 195; Naylor *v.* McSwegan, 2 Misc. 255, 21 N. Y. Supp. 930, 50 N. Y. St. 339; Lamson Consol. Store Serv. Co. *v.* Hartung, 19 N. Y. Supp. 233, 46 N. Y. St. 191.

Ohio. — Hauser *v.* Curran, 5 Ohio N. P. 224.

Texas. — Traylor *v.* Evertson (Tex. Civ. App.), 26 S. W. 637.

Vermont. — Bond *v.* Clark, 35 Vt. 577.

Wisconsin. — Milwaukee Boiler Co. *v.* Duncan, 87 Wis. 120, 58 N. W. 232, 41 Am. St. Rep. 33.

"Where there is a written instrument, embodying the terms of the contract between buyer and seller, an express warranty can not be imported into the contract by parol evidence. Where the writing contains an express warranty, implied ones are excluded." Conant *v.* National State Bank, 121 Ind. 323, 22 N. E. 250.

In the frequently cited case of Thompson *v.* Libby, 34 Minn. 374, 379, 26 N. W. 1, the court says, *per* Mitchell, J.: "We are referred to a few cases which seem to hold that parol evidence of a warranty is admissible on the ground that a warranty is collateral to the contract of sale, and that the rule does not exclude parol evidence of matters collateral to the subject of the written agreement. It seems to us that this is based upon a misapprehension as to the sense in which the term "collateral" is used in the rule invoked. There are a great many matters that, in a general sense, may be considered collateral to the contract; for example, in the case of leases, covenants for repairs, improvements, payment of taxes, etc., are, in a sense, collateral to a demise of the premises. But parol evidence of these would not be admissible to add to the terms of a written lease. So, in a sense, a warranty is collateral to a contract of sale, for the title would pass without a warranty. It is also collateral in a sense that its breach is no ground for a rescission of the contract by the vendor, but that he must resort to his action on the warranty for damages. But, when made, a warranty is a part of the contract of sale. The common sense of men would say, and correctly so, that when, on a sale of personal property, a warranty is given, it is one of the terms of the sale, and not a separate and independent contract. To justify the admission of a parol promise by one of the parties to a written contract, on the ground that it is collateral, the promise must relate to a subject distinct from that to which the writing relates."

Where Machinery is sold and there is no warranty in the contract, parol evidence is not admissible to show as a defense to an action to recover the price thereof, that there was an oral representation that the machinery was suitable for the purpose for which it was bought. Whitehead *v.* Lane & Bodley Co., 72 Ala. 39.

Where a Contract to Set Up a Boiler of a specified make, size and power is entered into, parol evidence is not admissible to establish a warranty that it would furnish power enough to operate the mills of the buyer. Wheaton Roller Mill Co. *v.*

is not admissible to show that it was not to be binding except upon the happening of some event, or contingency.[71]

b. *Qualifications of, and Exceptions to, Rule.* — **(1.) To Invalidate or Defeat Operation.** — (A.) In General. — Parol evidence is admissible to show that a contract of sale has never come into operation as a valid and enforceable obligation between the parties,[72] or to invalidate the writing on the ground of fraud,[73] or to show that a

Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854. The court said in this case: "Parol evidence to prove a warranty, which was part of the prior or contemporaneous agreement, and about which the written contract was silent, was clearly inadmissible. The written contract is of the most formal and complete character, specifying with minute detail the particular make, name, size, and power of the engine and boiler and appurtenances to be furnished, and how and when they were to be set up. The plaintiff having thus contracted for machinery of a particular make, size, and power, the mere fact that it was purchased for the purpose of operating this mill, and that defendant knew this, would not be a circumstance that would of itself justify the court in construing the writing as an incomplete expression of the contract of the parties." *Per* Mitchell, J.

71. *Canada.* — Saults *v.* Eakct, 11 Man. L. Rep. 597.

Georgia. — Bass Dry Goods Co. *v.* Granite City Mfg. Co., 119 Ga. 124, 45 S. E. 980.

Iowa.—McCormick Harv. Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33.

Kansas. — Phelps-Bigelow Windmill Co. *v.* Piercy, 41 Kan. 763, 21 Pac. 793; Slatten *v.* Konrath, 1 Kan. App. 636, 42 Pac. 399.

Massachusetts. — Kinnard *v.* Cutter Tower Co., 159 Mass. 391, 34 N. E. 460; Lilienthal *v.* Suffolk Brew. Co., 154 Mass. 185, 28 N. E. 151, 26 Am. St. Rep. 234, 12 L. R. A. 821.

Missouri. — Williams *v.* Stifel, 64 Mo. App. 138.

New York. — Engelhorn *v.* Reitlinger, 122 N. Y. 76, 25 N. E. 297, 9 L. R. A. 548; Cluster Gaslight Co. *v.* Baker, 90 N. Y. Supp. 1034; Hess *v.* Liebmann, 84 N. Y. Supp. 178.

North Dakota. — Plano Mfg. Co. *v.* Root, 3 N. D. 165, 54 N. W. 921.

Vermont. — Dixon *v.* Blondin, 58 Vt. 689, 5 Atl. 514.

Affecting Delivery. — Where in a contract of sale of a new machine it was provided that one to be taken in exchange should be delivered at the time of the delivery of the new one, it was held that evidence was not admissible to show a parol agreement that the old one was not to be delivered until the new one was received and accepted. Davis & Sons *v.* Robinson, 71 Iowa 618, 33 N. W. 132.

A Contract of Sale of a Piano which provides that the seller shall take an old one in exchange and that the buyer shall in addition pay a certain sum in cash cannot be varied by evidence that the new instrument was taken on the understanding that the buyer might test it, and if satisfied might keep it and pay the amount called for by the contract, but that if unsatisfactory she might terminate the transaction and demand the return of the old instrument and the removal of the new. Daly *v.* Kimball Co., 67 Iowa 132, 24 N. W. 756.

72. McCormick Harv. Mach. Co. *v.* Morlan, 121 Iowa 451, 96 N. W. 976; Esterly *v.* Eppelsheimer, 73 Iowa 260, 34 N. W. 846; Pratt *v.* Chaffin, 136 N. C. 350, 48 S. E. 768.

73. *United States.* — Crocker *v.* Lewis, 3 Sumn. 1, 6 Fed.Cas. No. 3,399.

Illinois. — Wilson *v.* Haecker, 85 Ill. 349.

Kansas. — Bird & Mickle Map Co. *v.* Jones, 27 Kan. 177.

Louisiana. — Le Bleu *v.* Savoie, 109 La. 680, 33 So. 729; Williams *v.* Vance, 2 La. Ann. 608.

Michigan. — Kranich *v.* Sherwood, 92 Mich. 397, 52 N. W. 741; Hobbs *v.* Soris, 37 Mich. 357.

Missouri. — Stone *v.* Barrett, 34 Mo. App. 15.

contract, legal on its face, was in fact based upon an illegal consideration.[74]

(B.) False Representations. — Parol evidence is admissible to show that the execution of a contract of sale was procured by false and fraudulent representations.[75] Evidence, however, is not admissible of representations which were merely an expression of opinion.[76]

(2.) Where Incomplete. — (A.) In General. — Where the entire agreement of the parties is not embodied in a contract of sale, parol evidence is admissible to show the part of the agreement in respect to which the writing is silent,[77] provided it does not con-

Acts and Declarations of the Parties prior to or in connection with the execution of a contract of sale are admissible to show fraud. Howison *v.* Alabama C. & I. Co., 70 Fed. 683, 17 C. C. A. 339, 30 U. S. App. 473.

In Order to Render Evidence Admissible to vary the terms of a written agreement on the ground of fraud in its procurement, there must be evidence of fraud other than that which may be derived from the mere difference between the parol and written terms. Thorne *v.* Warfflein, 100 Pa. St. 519.

The Circumstances connected with the transaction may be shown where fraud is alleged. Race *v.* Weston, 86 Ill. 91.

74. Sanger *v.* Miller, 26 Tex. Civ. App. 111, 62 S. W. 425.

75. *Canada.* — Budd *v.* McLaughlin, 10 Man. L. Rep. 75.

Alabama. — Nelson *v.* Wood, 62 Ala. 175; Thompson *v.* Bell, 37 Ala. 438.

Illinois. — Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241; Telluride Power Trans. Co. *v.* Crane Co., 103 Ill. App. 647.

Iowa. — Dowagiac Mfg. Co. *v.* Gibson, 73 Iowa 525, 35 N. W. 603, 5 Am. St. Rep. 697.

Kansas. — Schoen *v.* Sunderland, 39 Kan. 758, 18 Pac. 913.

Michigan. — Peck *v.* Jenison, 99 Mich. 326, 58 N. W. 312.

Montana. — Sathre *v.* Rolfe, 31 Mont. 85, 77 Pac. 431.

Nebraska. — Bryant *v.* Thesing, 46 Neb. 244, 64 N. W. 967.

New York. — Mayer *v.* Dean, 115 N. Y. 556, 26 N. Y. St. 375, 22 N. E. 261, 5 L. R. A. 540; Pharo *v.* Beardleston, 17 N. Y. Supp. 730, 42 N. Y. St. 109.

North Carolina. — Singer Mfg. Co. *v.* Gray, 121 N. C. 168, 28 S. E. 257; Robert & Knight *v.* Houghtalling, 85 N. C. 17.

Pennsylvania. — Atherholt *v.* Hughes, 209 Pa. St. 156, 58 Atl. 269; Volkenand *v.* Drum, 154 Pa. St. 616, 26 Atl. 611.

South Dakota. — National Cash-Reg. Co. *v.* Pfister, 5 S. D. 143, 58 N. W. 270.

Texas. — Crutcher *v.* Schick, 10 Tex. Civ. App. 676, 32 S. W. 75; Halsell *v.* Musgrave, 5 Tex. Civ. App. 476, 24 S. W. 358; History *v.* Durham (Tex. Civ. App.), 23 S. W. 327.

West Virginia. — Depue *v.* Sergent, 21 W. Va. 326.

Wisconsin. — Gross *v.* Drager, 66 Wis. 150, 28 N. W. 141.

"An inducement to a written contract, such as a representation of some particular quality or incident to the thing sold, may, in some cases, be received in evidence; but a buyer cannot show such representation unless he can show that the seller by some fraud prevented him from discovering a fault which he, the vendor, knew to exist." Telluride Power T. Co. *v.* Crane Co., 103 Ill. App. 647.

76. Scroggin *v.* Wood, 87 Iowa 497, 54 N. W. 437.

77. *United States.* — Camden Iron Wks. *v.* Fox, 34 Fed. 200.

Arkansas. — Ramsey *v.* Capshaw, 71 Ark. 408, 75 S. W. 479.

Illinois. — Ebert *v.* Arends, 190 Ill. 221, 60 N. E. 211; Shrimpton *v.* Dunaway, 52 Ill. App. 448; Story *v.* Carter, 27 Ill. App. 287.

Kansas. — McGrath *v.* Crouse, 6 Kan. App. 507, 50 Pac. 969.

Kentucky. — Atwater *v.* Cardwell, 21 Ky. 1297, 54 S. W. 960.

tradict or vary the terms of the writing, but merely supplies what was omitted.[78]

(B.) Application of Rule. — Where the contract of sale is silent as to the amount to be paid, parol evidence is admissible to show the agreement of the parties in respect thereto.[79] And likewise under such circumstances parol evidence is admissible to show the date,[80] or place of delivery of goods, merchandise, or other personal property,[81] the time of passing title thereto,[82] at whose risk a ship-

Massachusetts. — Morton *v.* Clark, 181 Mass. 134, 63 N. E. 409.

Michigan. — Hutchison Mfg. Co. *v.* Pinch, 107 Mich. 12, 64 N. W. 729, 66 N. W. 340; Liggett Spring & Axle Co. *v.* Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466; Bronson *v.* Herbert, 95 Mich. 478, 55 N. W. 359; Palmer *v.* Roath, 86 Mich. 602, 49 N. W. 590.

Minnesota. — Potter *v.* Easton, 82 Minn. 247, 84 N. W. 1011; Aultman *v.* Clifford, 55 Minn. 159, 56 N. W. 593, 43 Am. St. Rep. 478; Head *v.* Miller, 45 Minn. 446, 48 N. W. 192.

Missouri. — Quick *v.* Glass, 128 Mo. 320, 30 S. W. 1031; Armsby *v.* Eckerly, 42 Mo. App. 299.

New York. — Brigg *v.* Hilton, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; Lichtenstein *v.* Rabolinsky, 75 App. Div. 66, 77 N. Y. Supp. 792; Vaughan Mach. Co. *v.* Lighthouse, 64 App. Div. 138, 71 N. Y. Supp. 799; Weeks *v.* Binns, 85 Hun 70, 32 N. Y. Supp. 644; Curtis *v.* Soltau, 12 N. Y. Supp. 285, 34 N. Y. St. 767; Smith *v.* Halligan, 1 N. Y. Supp. 820.

North Carolina. — McGee *v.* Craven, 106 N. C. 351, 11 S. E. 375; Nickelson *v.* Reves, 94 N. C. 559.

Texas. — Sherman Oil & Cotton Co. *v.* Dallas Oil & Ref. Co. (Tex. Civ. App.), 77 S. W. 961.

Wisconsin. — Cuddy *v.* Foreman, 107 Wis. 519, 83 N. W. 1103.

Where the Mode of Measurement in a contract of sale of logs is not specified, parol evidence is admissible of a contemporaneous oral agreement as to what mode should be used. Johnson *v.* Burns, 39 W. Va. 658, 20 S. E. 686.

Where there Is an Incumbrance on the Land and the agreement of sale is silent as to the character of title, parol evidence is admissible to show that at the time the contract was entered into the vendee had notice of such incumbrance. Leonard *v* Woodruff, 23 Utah 494, 65 Pac. 199.

78. Hutchison Mfg. Co. *v.* Pinch, 107 Mich. 12, 64 N. W. 729, 66 N. W. 340.

79. **Where the Amount To Be Paid** in a contract for the sale of land is not stated, parol evidence is admissible to show the amount agreed upon. Bowser *v.* Cravener, 56 Pa. St. 132.

80. **Where the Date of Delivery** of goods sold is not stated the date which the parties intended may be shown by extrinsic evidence. Armsby *v.* Eckerly, 42 Mo. App. 299; Johnston *v.* McRary, 50 N. C. 369.

81. Kieth *v.* Kerr, 17 Ind. 284; Musselman *v.* Stoner, 31 Pa. St. 265. *Compare* Marshall *v.* Gridley, 46 Ill. 247, wherein it is decided that though the writing is silent in this respect such evidence is not admissible where by statute a provision as to the place of delivery is made in such cases.

Where an Order Is Silent as to the Manner of Delivery and evidence is admitted of a custom or usage by which goods delivered to the carrier are regarded as delivered to the vendee, the presumption arising from such evidence may be rebutted by parol evidence and a different place of delivery shown. Allan *v.* Comstock, 17 Ga. 554.

82. **Time of Passing Title.** Where a bill of goods signed by the purchaser states the articles purchased, the price, and that the seller is to pay freight to a certain point, but is not exhaustive of the stipulations of the contract and does not show when title to the goods is to pass, parol evidence is admissible to show the agreement of the parties in respect thereto, and whether title passed on delivery to the carrier. De Pauw *v.* Kaiser, 77 Ga. 176, 3 S. E. 254.

ment was made,[83] or the style and material of the property contracted for.[84]

(C.) Where Required To Be in Writing. — The exception to the general rule which permits the admission of parol evidence to show the entire contract where a part is omitted, does not apply where the contract is one required by statute to be in writing.[85] Where such a contract is void by reason of defects in, or omission from, the writing, parol evidence is not admissible to supply the same and thus to validate the instrument.[86]

(3.) Mistake. — Parol evidence is admissible to show that by mistake a contract of sale does not express the intention of the parties.[87] Thus it has been decided that it may be shown that by mistake there was an omission from the contract of a reservation of grain growing upon the land at the time of sale,[88] or of wood which had been cut.[89]

(4.) Conditions Precedent. — Parol evidence is admissible to show that a contract of sale was delivered, not as a binding contract at time of delivery, but to become binding upon the performance of some condition or the happening of some contingency and that it has never become obligatory by reason of the fact that the condition has not been performed or that the contingency has not occurred.[90]

83. De Pauw *v.* Kaiser, 77 Ga. 176, 3 S. E. 254.

84. Where Neither the Style nor Material of Fixtures purchased by a written contract of sale is designated in the writings constituting the contract, parol evidence is admissible of declarations made by the purchaser to the seller, or to one acting for him, though not authorized to make such a contract for the sale of such fixtures, where the offer was made on memoranda made by such agent or employe. Dietrich *v.* Stebbins Bros., 100 Iowa 426, 69 N. W. 564.

85. Newman *v.* Bank of Watson, 70 Mo. App. 135; Thomson *v.* Poor, 10 N. Y. Supp. 597, 32 N. Y. St. 371; Westmoreland *v.* Carson, 76 Tex. 619, 13 S. W. 559.

86. Nelson *v.* Shelby Mfg. & Imp. Co., 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116; sold holding where contract for sale of land provided for one-third cash and "notes to be executed for the balance" but did not state whether the notes were to bear interest, or their time of payment, or how many were to be given. The court said in this case: "The rule that parol evidence may be introduced to supply defects and omissions in written instruments, which do not vary or contradict its terms, applies only to contracts which are valid; but parol evidence is not admissible to render valid undertakings which are void by reason of the Statute of Frauds. . . . To permit parol evidence to be introduced to supply the omission would break down the safeguards intended to be secured by the statute in all contracts for the sale of land."

87. McCurdy *v.* Breathitt, 5 T. B. Mon. (Ky.) 232, 17 Am. Dec. 65.

88. Lanchner *v.* Rex, 20 Pa. St. 464.

89. Pishkos *v.* Wortek (Tex. App.), 18 S. W. 788.

90. Manufacturers' Furnishing Co. *v.* Kremer, 7 S. D. 463, 64 N. W. 528.

Conditions Precedent. — "The making and delivering of a writing, no matter how complete a contract according to its terms, is not a binding contract if delivered upon a condition precedent to its becoming obligatory. In such case it does not become operative as a contract until the performance or happening of the condition precedent. Proving this is not an attempt to vary the terms of a writing." Cleveland Ref. Co. *v.* Dunning, 115 Mich. 238, 73 N. W. 239, *per* the court.

It has however been declared that this rule should be cautiously applied.[91]

(5.) Subsequent Agreements. — Evidence is admissible to show that by a subsequent parol agreement a contract for the sale of goods or merchandise has been modified or altered,[92] or that the parties have agreed as to some matter in respect to which the contract is silent.[93] But where by statute evidence is only admissible of an executed oral agreement, a party cannot show a modification of a contract of sale by a subsequent agreement which is executory merely.[94] And in the case of a contract for the sale of land, which under the statute must be in writing, evidence is not admissible of a subsequent modification by parol,[95] though it has been decided that a contract for the sale of land may be abandoned or rescinded by parol.[96]

(6.) Custom or Usage. — Evidence is in many cases admissible of a custom or usage which is essential to a proper interpretation of the contract and in respect to which the parties are presumed to have contracted.[97] Evidence of this character, however, is not admissible where it is apparent that the parties did not contract

That a Satisfactory Report From a Commercial Agency as to the financial standing of the purchaser was a condition precedent to a contract of sale becoming operative may be shown by parol though the contract is complete upon its face and there has been a delivery thereof. Reynolds *v.* Robinson, 110 N. Y. 654, 18 N. E. 127, 18 N. Y. St. 235.

91. Reynolds *v.* Robinson, 110 N. Y. 554, 18 N. E. 127, 18 N. Y. St. 235.

92. Town *v.* Jepson, 133 Mich. 673, 95 N. W. 742; Bryant *v.* Thesing, 46 Neb. 244, 64 N. W. 967; McCormick Harv. Mach. Co. *v.* Hiatt, 4 Neb. (Unof.) 587, 95 N. W. 627; Nightingale *v.* Eiseman, 50 Hun 189, 2 N. Y. Supp. 779, 19 N. Y. St. 169; Weeks *v.* Binns, 32 N. Y. Supp. 644, 66 N. Y. St. 26; Bannon *v.* Aultman, 80 Wis. 307, 49 N. W. 967, 27 Am. St. Rep. 37.

A Subsequent Parol Agreement as to the mode of shipment of merchandise which is the subject of the contract may be shown (Town *v.* Jepson, 133 Mich. 673, 95 N. W. 742); or as to the date of delivery. Chiles *v.* Jones, 3 B. Mon. (Ky.) 51.

93. Liggett Spring & Axle Co. *v.* Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466; Story *v.* Carter, 27 Ill. App. 287.

94. Mackenzie *v.* Hodgkin, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209.

95. Newman *v.* Bank of Watson, 70 Mo. App. 135; Thompson *v.* Poor, 10 N. Y. Supp. 597, 32 N. Y. St. 371; Cughan *v.* Larson (N. D.), 100 N. W. 1088.

96. Wadge *v.* Kittleson, 12 N. D. 452, 97 N. W. 856.

97. Merchant *v.* Howell, 53 Minn. 295, 55 N. W. 131; Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104.

Usage as to Shipment. — Where a contract for the sale of coke provided for its delivery up to the amount of fifteen tons per day, the seller not to be liable "in damages for the railroad company's failure to supply transportation" it was decided that parol evidence was admissible to show that in the purchase and sale of coke to be transported by railroad, where there is an insufficient number of cars to supply the demands of the trade, railroad companies distributed their cars among producers in proportion to the requirements of each so that the deficiency is equally borne and that producers distribute the cars assigned them ratably among their orders, so that purchasers shall equally share in the shortage, and that this is a usage of the trade so common as to be known to all dealers. McKeef-

with reference thereto and its admission would operate to vary or contradict the terms, or legal effect of the writing.[98]

c. *To Explain or Interpret.* — **(1.) In General.** — Where the meaning of the parties to a contract of sale is not clearly apparent from the instrument itself, parol evidence is admissible to explain or as an aid in interpreting the same.[99] And for this purpose evidence is admissible of a prior course of dealing between the parties in similar transactions,[1] and of the circumstances surrounding the execution of the instrument.[2] Evidence is not, however, admissible under the guise that it tends to explain such a contract where the writing is clear and unambiguous.[3]

(2.) Words, Terms, and Abbreviations. — Where a contract of sale contains words, or terms which are of doubtful import, parol evidence is admissible to show in what sense they were used by the parties.[4] And likewise such evidence is admissible to show the meaning of technical or trade terms,[5] or to explain or interpret

rey *v.* Connellsville C. & I. Co., 56 Fed. 212, 5 C. C. A. 482.

98. Keller *v.* Meyer, 74 Mo. App. 318; O'Donohue *v.* Leggett, 134 N. Y. 40, 31 N. E. 269; Goetze *v.* Dunphy, 31 N. Y. Supp. 302, 63 N. Y. St. 751; O'Donohue *v.* Leggett, 8 N. Y. Supp. 426, 29 N. Y. St. 983; Coates *v.* Early, 46 S. C. 220, 24 S. E. 305.

Contract for Merchandise "Like the Sample." — Where a contract, consisting of an order for glass "like the sample" and a letter accepting such order, was entered into, it was decided that parol evidence was not admissible to show that the word "like" had a special meaning in the glass trade, as the meaning of the word was fixed by the contract. Smith *v.* Foote, 81 Hun 128, 30 N. Y. Supp. 679, 62 N. Y. St. 633.

99. *United States.* — Camden Iron Wks. *v.* Fox, 34 Fed. 200.

Georgia. — Browne *v.* Doane, 86 Ga. 32, 12 S. E. 179, 11 L. R. A. 381; Mohr *v.* Dillon, 80 Ga. 572, 5 S. E. 770.

Indiana. — Schreiber *v.* Butler, 84 Ind. 576.

Iowa. — Coulter Mfg. Co. *v.* Ft. Dodge Grocery Co., 97 Iowa 616, 66 N. W. 875.

Michigan. — Stoddard Mfg. Co. *v.* Miller, 107 Mich. 51, 64 N. W. 948; Wickes Bros. *v.* Swift Elec. Light Co., 70 Mich. 322, 38 N. W. 299.

Missouri. — Laclede Const. Co. *v.* Moss Tie Co., 185 Mo. 25, 84 S. W. 76.

New York. — Emmett *v.* Penoyer, 151 N. Y. 564, 45 N. E. 1041.

Texas. — Fort Grain Co. *v.* Hubby, 35 Tex. Civ. App. 65, 79 S. W. 363.

Wisconsin. — Excelsior Wrapper Co. *v.* Messinger, 116 Wis. 549, 93 N. W. 459; Rhyner *v.* Carver, 84 Wis. 181, 53 N. W. 849; Magill *v.* Stoddard, 70 Wis. 75, 35 N. W. 346.

1. Spooner *v.* Cummings, 151 Mass. 313, 23 N. E. 839.

2. Hartshorn *v.* Byrne, 147 Ill. 418, 35 N. E. 622; Morrison *v.* Baechtold, 93 Md. 319, 48 Atl. 926; Newman *v.* Kay (W.Va.), 49 S.E. 926.

3. Hunt *v.* Gray, 76 Iowa 268, 41 N. W. 14; Welch *v.* Horton, 73 Iowa 250, 34 N. W. 840; Harmon *v.* Thompson, 27 Ky. Rep. 181, 84 S. W. 569.

4. McKenzie *v.* Wimberly, 86 Ala. 195, 5 So. 468; Maynard *v.* Render, 95 Ga. 652, 23 S. E. 194; Wilson *v.* Coleman, 81 Ga. 297, 6 S. E. 693; Cooper *v.* Webb (Tex. Civ. App.), 25 S. W. 151.

5. Grasmier *v.* Wolf (Iowa), 90 N. W. 813; Barnes *v.* Leidigh (Or.), 79 Pac. 51; Brenneman *v.* Bush (Tex. Civ. App.), 30 S. W. 699.

The Term "Spring Shipment" may be shown to have a technical meaning and evidence is admissible that it was used with that meaning by the parties, but not to extend the meaning beyond what the ordinary or technical meaning gives to the term. Parker *v.* Selden, 69 Conn. 544, 38 Atl. 212.

abbreviations.[6] Where, however, the meaning of a word or term is plain, it cannot be shown by parol evidence that it was used in a peculiar or different sense by the parties.[7]

(3.) To Identify Subject-Matter. — (A.) In General. — Parol evidence is admissible to identify the subject-matter of a contract of sale of personal,[8] or of real property.[9] Such evidence is not re-

6. Penn. Tobacco Co. *v.* Leman, 109 Ga. 428, 34 S. E. 679, holding that such evidence is admissible to explain the meaning of the letters "O. K."; Wilson *v.* Coleman, 81 Ga. 297, 6 S. E. 693, holding that it may be shown that the letters "C. L. R. P. oats" may be shown to mean Texas rust-proof oats. Thompson *v.* Pruden, 18 Ohio Cir. Ct. 886, holding that evidence is admissible to show that the word "sound," as used in the warranty of a horse in a contract of sale, was used in a technical sense.

7. Williams *v.* Stevens Point Lumb. Co., 72 Wis. 487, 40 N. W. 154.

Where a "Reasonable Time To Cut" timber is given the purchaser in a contract of sale, evidence is not admissible to show that a stated time was understood or agreed upon by the parties. Jenkins *v.* Lykes, 19 Fla. 148, 45 Am. Rep. 19.

8. *Alabama.* — Moore *v.* Barber Asphalt Pav. Co., 118 Ala. 563, 23 So. 798.

California. — Habenicht *v.* Lissak, 77 Cal. 139, 19 Pac. 260.

Indiana. — Clark *v.* Crawfordsville Coffin Co., 125 Ind. 277, 25 N. E. 288.

Iowa. — Jackson *v.* Mott, 76 Iowa 263, 41 N. W. 12.

Michigan. — Helper *v.* MacKinnon Mfg. Co., 101 N. W. 804.

Minnesota. — Tufts *v.* Hunter, 63 Minn. 464, 65 N. W. 922.

Pennsylvania. — Chicago Organ Co. *v.* McManigal, 8 Pa. Super. Ct. 632.

Contract of Shares of Stock. Evidence is admissible to show to what shares the contract refers. And where it appeared that there were two classes of stocks, one known as "treasury stock" and the other as "pool stock," evidence was held admissible to show that by a contemporaneous parol agreement it was agreed that the shares should be of the pool stock on which no certificates were to be issued until the expiration of five years. Williams *v.* Ashurst O. L. & D. Co., 144 Cal. 619, 78 Pac. 28.

What the Word "Appliances" includes may be shown by parol evidence. Rooney *v.* Thompson, 84 N. Y. Supp. 263.

9. *Alabama.* — Homan *v.* Stewart, 103 Ala. 644, 16 So. 35.

California. — Towle *v.* Carmelo Land and Coal Co., 99 Cal. 397, 33 Pac. 1126; Preble *v.* Abrahams, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301.

Georgia. — Ansley *v.* Green, 82 Ga. 181, 7 S. E. 921; Mohr *v.* Dillon, 80 Ga. 572, 5 S. E. 770.

Illinois. — Marske *v.* Willard, 169 Ill. 276, 48 N. E. 290.

Iowa. — Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247; Pinney *v.* Thompson, 3 Iowa 74.

Nebraska. — Ballou *v.* Sherwood, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131; Adams *v.* Thompson, 28 Neb. 53, 44 N. W. 74.

New York. — Miller *v.* Tuck, 95 App. Div. 134, 88 N. Y. Supp. 495.

North Carolina. — Edwards *v.* Deans, 125 N. C. 59, 34 S. E. 105; Carpenter *v.* Medford, 99 N. C. 495, 6 S. E. 785, 6 Am. St. Rep. 535.

Oklahoma. — Halsell *v.* Renfrow, 14 Okla. 674, 78 Pac. 118; Powers *v.* Rude, 14 Okla. 381, 79 Pac. 89.

Pennsylvania. — Crown State Co. *v.* Allen, 199 Pa. St. 239, 48 Atl. 968; Schotte *v.* Meredith, 192 Pa. St. 159, 43 Atl. 952.

Rhode Island. — Lee *v.* Stone, 21 R. I. 123, 42 Atl. 717.

South Carolina. — Kennedy *v.* Gramling, 33 S. C. 367, 11 S. E. 1081, 26 Am. St. Rep. 676.

Tennessee. — Dorris *v.* King (Tenn. Ch.), 54 S. W. 683.

West Virginia. — Norman *v.* Bennett, 32 W. Va. 614, 9 S. E. 914.

garded as contradicting the terms of the contract but has for its purpose the effectuating of the intention of the parties by applying the description therein to the subject-matter of the agreement.[10] For this purpose evidence is admissible of the situation of the parties and of the circumstances surrounding the transaction.[11]

(B.) Qualification of Rule. — To permit of the introduction of evidence to identify the subject-matter of such a contract, the description must not be too vague and indefinite,[12] for evidence will not be received which has for its purpose the supplying of a description, the parties being limited to such evidence as tends to apply the description given in the writing,[13] nor will evidence be received which tends to vary the description given in the instrument itself,[14] as where it tends to limit,[15] or to enlarge the subject-matter

Wisconsin. — Stout *v.* Weaver, 72 Wis. 148, 39 N. W. 375.

"The most specific and precise description of the property intended requires some parol proof to complete its identification. A more general description requires more. When all the circumstances of possession, ownership, situation of the parties and of their relation to each other and to the property as they were when the negotiations took place, and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement. That parol evidence is competent to furnish these means of interpreting and applying written agreements is settled by the uniform current of authorities." Mead *v.* Parker, 115 Mass. 413, 15 Am. Rep. 110.

What the Term "Appurtenances" covers in a contract of sale by land may be shown by parol evidence. Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 35 So. 539.

10. Lonergan *v.* Buford, 148 U. S. 581.

11. Dorris *v.* King (Tenn. Ch. App.), 54 S. W. 683; Rib River Lumb. Co. *v.* Ogilvie, 113 Wis. 482, 89 N. W. 483.

12. Stoinski *v.* Pulte, 77 Mich. 322, 43 N. W. 979; Farthing *v.* Rochelle, 131 N. C. 563, 43 S. E. 1; Farmer *v.* Batts, 83 N. C. 387; Halsell *v.* Renfrow, 14 Okla. 674, 78 Pac. 118.

13. Ferguson *v.* Blackwell, 8 Okla. 489, 58 Pac. 647.

14. *England.* — Plant *v.* Bourne, 66 L. J. Ch. 458, 76 L. T. N. S. 349.

California. — Ruiz *v.* Norton, 4 Cal. 355, 6 Am. Dec. 618.

Illinois. — O'Reer *v.* Strong, 13 Ill. 688; Hill *v.* Hatfield, 72 Ill. App. 534.

Indiana. — Conant *v.* National State Bank, 121 Ind. 323, 22 N. E. 250; Jacobs *v.* Finkel, 7 Blackf. 432.

Maine. — Elder *v.* Elder, 10 Me. 80, 25 Am. Dec. 205.

Maryland. — Baltimore Perm. Bldg. & L. Soc. *v.* Smith, 54 Md. 187, 39 Am. Rep. 374; Kent *v.* Carcaud, 17 Md. 291.

Massachusetts. — Fitzgerald *v.* Clark, 6 Gray 393.

Missouri. — Standard Foundry Co. *v.* Schloss, 43 Mo. App. 304.

New York. — Dady *v.* O'Rourke, 172 N. Y. 447, 65 N. E. 273; Gray *v.* Meyer, 88 App. Div. 359, 84 N. Y. Supp. 613.

Ohio. — Ormsbee *v.* Machir, 20 Ohio St. 295.

Pennsylvania. — Baugh *v.* White, 161 Pa. St. 632, 29 Atl. 267.

West Virginia. — Anderson *v.* Snyder, 21 W. Va. 632.

Wisconsin. — Ohlert *v.* Alderson, 86 Wis. 433, 57 N. W. 88.

15. Coverdill *v.* Seymour, 94 Tex. 1, 57 S. W. 37; Allen *v.* Crank (Va.), 23 S. E. 772.

An Agreement To Buy All the Material one uses from the other party to the contract, the latter agreeing to furnish all of such material the former may require can-

of the sale by including things not covered by the writing.[16]

(C.) To Identify Property Excepted or Reserved. — Where property is excepted or reserved in a contract of sale, parol evidence is admissible to identify the subject-matter of such reservation or exception.[17]

Y. Stock Certificates. — a. *General Rule.* — It is a general rule that parol evidence is not admissible to vary the terms of a stock certificate, as all negotiations and conversations are presumed to be merged in the writing.[18]

b. *Qualifications of, and Exceptions to, Rule.* — **(1.) Fraud.** For the purpose of showing fraud, evidence of statements and representations made at the time of the issuance of the certificate is admissible.[19]

(2.) Where Incomplete Expression of Contract. — Where a certificate of stock refers to other writings they may be resorted to to ascertain whether the parties intended that their whole contract should be expressed in the stock certificate.[20]

not be varied by evidence that the parties had agreed to a limitation of the amount to be furnished. Dean *v.* Washburn & Moen Mfg. Co., 177 Mass. 137, 58 N. E. 162.

16. Cook *v.* Finch, 19 Minn. 407; Caldwell *v.* Perkins, 93 Wis. 89, 67 N. W. 29.

A Contract of Exchange of Store Buildings and Stocks of Merchandise contained therein for lands cannot be varied by evidence of a prior contemporaneous agreement that store furniture was to be included in the contract to convey the buildings and stocks of goods. Caldwell *v.* Perkins, 93 Wis. 89, 67 N. W. 29.

A Contract To Sell Timber According to Orders not to exceed the capacity of the seller's mill cannot be varied by parol evidence that the buyer was to take the entire output. Pine Grove Lumb. Co. *v.* Interstate Lumb. Co., 71 Miss. 944, 15 So. 105.

A Contract of Sale of Coal in amount of about one-half or two-thirds used the previous season at a stated price cannot be varied by evidence of a prior agreement that the purchaser was to be furnished at that price with the full amount he used the previous season. Northwestern Fuel Co. *v.* Bruns, 1 N. D. 137, 45 N. W. 699.

17. Buford *v.* Lonergan, 6 Utah 301, 22 Pac. 164. In this case the party of the first part contracted to sell all of their herds of cattle excepting a certain number of steers which said party had previously contracted to sell, and it was held that this previous contract, which was in writing, was properly admissible to show what classes or ages of steers were to be reserved out of the herds.

18. Scott *v.* Baltimore & O. R. Co., 93 Md. 475, 49 Atl. 327.

19. Trinity Valley Trust Co. *v.* Stockwell (Tex. Civ. App.), 81 S. W. 793.

20. Scott *v.* Baltimore & O. R Co., 93 Md. 475, 49 Atl. 327, holding that where a certificate of stock refers to certain resolutions of the company and these refer to the plan and agreement of organization, they should be regarded as instruments in *pari materia*, and may be resorted to for the above purpose. The court here said: "Evidence of the situation of the parties, the objects and purposes for which the agreement was made, and when it is important to decide whether the certificate contains the whole agreement, all the agreements and resolutions which preceded and authorized the issue of the stock may be resorted to for the purpose, not of altering the contract, but of arriving at the real intention of the parties as expressed in the written contract."

(3.) To Show True Character of Transaction. — Parol evidence is admissible to show that a stock certificate issued to one as owner was in fact issued to him as collateral security.[21]

Z. SUBSCRIPTIONS. — a. *General Rule.* — Where a contract of subscription has been completed by the acceptance by the beneficiary of the provisions of the subscription, such contract cannot be contradicted or varied by parol evidence.[22]

(1.) Stock Subscriptions. — (A.) IN GENERAL. — A subscription for the capital stock of a corporation, where it has been reduced to writing, is subject to the application of the general rule, and parol evidence is not admissible which would vary, alter, enlarge, or restrict the terms, provisions, or legal effect of the contract as expressed therein.[23]

21. Brick *v.* Brick, 98 U. S. 514; Williams *v.* American Nat. Bank, 85 Fed. 376, 29 C. C. A. 203, 56 U. S. App. 316; Wild *v.* Western Union B. & L. Ass'n, 60 Mo. App. 200; Lone Star Leather Co. *v.* City Nat. Bank, 12 Tex. Civ. App. 128, 34 S. W. 297. But see Snyder *v.* Lindsey, 157 N. Y. 616, 52 N. E. 592.

22. *Connecticut.* — Bull *v.* Talcot, 2 Root 119, 1 Am. Dec. 62.

Iowa. — Lake Manawa R. Co. *v.* Squire, 89 Iowa 576, 57 N. W. 307; McCabe *v.* O'Connor, 69 Iowa 134, 28 N. W. 573.

Maine. — First Free-Will Baptist Parish *v.* Perham, 84 Me. 563, 24 Atl. 958; Gilman *v.* Veazer, 24 Me. 202.

Massachusetts. — Stillings *v.* Timmins, 152 Mass. 147, 25 N. E. 50.

Mississippi. — Hart *v.* Taylor, 70 Miss. 655, 12 So. 553.

Missouri. — Newland Hotel Co. *v.* Wright, 73 Mo. App. 240; James *v.* Clough, 25 Mo. App. 147.

Nebraska. — Mefford *v.* Sell (Neb.), 92 N. W. 148; Nebraska Exposition Ass'n *v.* Townley, 46 Neb. 893, 65 N. W. 1062; Gerner *v.* Church, 43 Neb. 690, 62 N. W. 51.

New Mexico. — Miller *v.* Preston, 4 N. M. 396, 17 Pac. 565.

Pennsylvania. — Davis *v.* Meade, 13 Serg. & R. 281.

Texas. — Wooters *v.* International & G. N. R. Co., 54 Tex. 294.

Vermont. — Grand Isle *v.* Kinney, 70 Vt. 381, 41 Atl. 130; Smith *v.* Burton, 59 Vt. 408, 10 Atl. 536; Stewards of M. E. Church *v.* Town, 49 Vt. 29.

Washington. — Michels *v.* Rustemeyer, 20 Wash. 597, 56 Pac. 380.

23. *United States.* — Davis *v.* Shafer, 50 Fed. 764.

Florida. — Johnson *v.* Pensacola, & G. R. Co., 9 Fla. 299.

Georgia. — Chattanooga, R. & C. R. Co. *v.* Warthen, 98 Ga. 599, 25 S. E. 988; Dinkler *v.* Baer, 92 Ga. 432, 17 S. E. 953; Bell *v.* Americus, P. & L. R. Co., 76 Ga. 754.

Indiana. — Low *v.* Studabaker, 110 Ind. 57, 10 N. E. 301; Evansville I. & C. S. L. R. Co. *v.* Shearer, 10 Ind. 244.

Iowa. — Langford *v.* Ottumwa W. P. Co., 59 Iowa 283, 13 N. W. 303; Tabor & N. R. Co. *v.* McCormick, 90 Iowa 446, 57 N. W. 949.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Truskett, 67 Kan. 26, 72 Pac. 562; Topeka Mfg. Co. *v.* Hale, 39 Kan. 23, 17 Pac. 601.

Kentucky. — Logan, etc. Tpk. R. Co. *v.* Pettit, 2 B. Mon. 428.

Maryland. — Sothoron *v.* Weems, 3 Gill. & J. 435.

New Hampshire. — Monadnock R. *v.* Felt, 52 N. H. 379.

New Jersey. — Hanrahan *v.* National Bldg. L. & P. Ass'n, 66 N. J. L. 80, 48 Atl. 517.

North Carolina. — Marshall Foundry Co. *v.* Killian, 99 N. C. 501, 6 S. E. 680, 6 Am. St. Rep. 539.

South Carolina. — Carolina, C. G. & C. R. Co. *v.* Seigler, 24 S. C. 124.

Texas. — Interstate Bldg. & L. Ass'n *v.* Hunter (Tex. Civ. App.), 51 S. W. 530; San Antonio & A. P. R. Co. *v.* Wilson, 4 Tex. Civ. App. 178, 23 S. W. 282.

(B.) Parol Agreements. — A stock subscription cannot be varied or altered by evidence of any prior or contemporaneous parol agreement,[24] as all such agreements are presumed to be merged in the writing.[25]

b. *Qualifications of, and Exceptions to, Rule.* — **(1.) Fraud and Fraudulent Representations.** — Parol evidence is admissible to show fraud or false and fraudulent representations in connection with the procuring or execution of a contract of subscription.[26] In the absence, however, of fraud, evidence is not admissible of statements or representations made prior to or contemporaneous with the execution of the contract.[27]

(2.) Want of Authority. — The want of authority of a person to

24. *Illinois.* — Dill *v.* Wabash Valley R. Co., 21 Ill. 91.

Iowa. — Gelpcke, Winslow & Co. *v.* Blake, 15 Iowa 387, 83 Am. Dec. 418.

New Hampshire. — Libby *v.* Mt. Monadnock Mineral S. & L. Co., 67 N. H. 587, 32 Atl. 772.

New Jersey. — Hanrahan *v.* National Bldg. & P. Ass'n, 66 N. J. L. 80, 48 Atl. 517.

Vermont. — Connecticut & P. R. R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

As to Payment. — Evidence is not admissible of a prior or contemporaneous parol agreement that payment of a subscription might be made in property instead of in money as provided in the written contract. Newland Hotel Co. *v.* Wright, 73 Mo. App. 240. See also Baile *v.* Calvert College Educational Soc., 47 Md. 117.

A Subscription to the Capital Stock of a Railroad cannot be varied by evidence of conversations with officers and agents of the company, showing an understanding or agreement with the person subscribing that the road was to be built on a particular route within the corporate limits of a named town: "If at the time of making his subscription he desired that the road should be built upon the old grade, he ought to have had a stipulation to that effect embodied in the writing. If he had done this and the railroad company had failed to comply with the stipulation, such failure would have constituted a good ground of defense. But having signed a contract which contained no such stipulation, and which was unambiguous, he could not show by parol evidence that the agreement was that the road should be built upon the old grade, without pleading that the agreement to that effect was omitted from the writing by fraud, accident or mistake." Chattanooga, R. & C. R. Co. *v.* Warthen, 98 Ga. 599, 618, 25 S. E. 988, *per* Simmons, C. J.

25. Wurtzburger *v.* Anniston Roll. Mills, 94 Ala. 640, 10 So. 129.

26. Turner *v.* Grobe (Tex. Civ. App.), 44 S. W. 898, *per* Collard, J.

False Representations Made by One Soliciting Subscriptions to the capital stock of a proposed corporation in reference to purchases which had been made by such corporation and other matters which were not equally within the knowledge of the subscriber are not mere statements of opinion, judgment, probability, or expectation, and evidence of such representations does not come within the rule excluding evidence which tends to vary the terms of a written instrument but it is admissible as showing that the contract was induced by fraudulent means and is voidable. Anderson *v.* Scott, 70 N. H. 350, 47 Atl. 607.

27. Scarlett *v.* Academy of Music, 46 Md. 132; Shattuck *v.* Robbins, 68 N. H. 565, 44 Atl. 694; Anderson *v.* Middle & E. T. C. R. Co., 91 Tenn. 44, 17 S. W. 803.

If Representations are conditions of the contract of subscription they should be made a part of it; and if not omitted by fraud of a party, or some accident or mistake, evidence thereof is not admissible. Jack *v.* Naber, 15 Iowa 450.

sign a subscription to corporate stock for another may be shown by parol.[28]

(3.) **Where Incomplete.** — Where a subscription contract does not purport to embody the entire agreement of the parties, the part omitted may be shown by parol evidence where consistent with that expressed in the writing.[29]

(4.) **Conditions.** — It may be shown by parol evidence that a writing has never become binding as a subscription contract by reason of the fact that there were certain conditions precedent to delivery and that such conditions have never been performed.[30]

28. Tonica & P. R. Co. *v.* Stein, 21 Ill. 96.

29. Hendrix *v.* Academy of Music, 73 Ga. 437.

30. Great Western Tel. Co. *v.* Loewenthal, 154 Ill. 261, 40 N. E. 318; Ada Dairy Ass'n *v.* Mears, 123 Mich. 470, 82 N. W. 258.

A Condition That the Instrument Should Not Be Delivered until a certain number of subscribers should be obtained may be shown by parol. Gilman *v.* Gross, 97 Wis. 224, 72 N. W. 885. The court said: "The evidence shows without dispute that it was the agreement that the subscription was not to be delivered to the corporation or to be deemed a subscription at all, until a certain number of persons had subscribed to it, and that such others did not subscribe. This establishes clearly and beyond dispute that the subscription did not become operative and binding upon the defendant. But it is said that this evidence was inadmissible and incompetent for the purpose, because its effect was to vary the terms of the writing. This position is untenable, both in reason and on authority. . . . The fact of delivery or non-delivery is ordinarily almost incapable of proof except by oral testimony. If it is wrongly delivered, contrary to the agreement of the parties, such delivery has no effect to make it become operative and binding. So, the question whether it was delivered in fact, contrary to the agreement on that behalf, is always necessarily open to question on parol testimony. This in no degree infringes upon the rule that the writing is the exclusive evidence of the terms of the contract." *Per* Newman, J.

Parol Agreement That Certain Amount of Capital Be Subscribed. In Brewers' F. Ins. Co. *v.* Burger, 10 Hun (N. Y.) 56, which was an action upon a subscription to the capital stock of an insurance company, the defendant was allowed to prove a contemporaneous agreement that the subscription should not be binding upon him unless a certain amount should be subscribed and unless a branch office of the company should be located in New York, and that at the time of his signing he protested because such provisions were not inserted in the contract and that he only signed it upon the assurance that the entire agreement should be carried out. The court said: "This is no violation of the salutary rule of law which forbids the use of parol testimony to affect a written instrument, because a part only of the agreement is reduced to writing. If the defendant had assented to the terms of the subscription paper, there might be some ground for saying he waived the agreement which was made at Schaeffer's, but, so far from his doing so, he objected to the paper because it did not contain that agreement, and only signed it when he was assured that agreement should stand and be carried out." *Per* Dykman, J. *Compare* Fairfield County Tpk. Co. *v.* Thorp, 13 Conn. 173.

A Delivery of a Subscription in Escrow to a Director of a corporation to be passed over to the corporation upon the fulfillment of certain conditions and a delivery by the director, in violation of the conditions imposed, may be shown by parol. Ottawa, Oswego & F. R. V.

The purpose of such evidence is not to vary the contract but to determine whether it was delivered or whether it had any legal existence as a contract.[31] Parol evidence is not, however, admissible to show that a person affixed his signature to a subscription contract on conditions not appearing therein where there has been a delivery of the instrument and it is absolute upon its face,[32] as,

R. Co. *v.* Hall, 1 Ill. App. 612. *Compare* Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522, holding that it is not a valid defense to allege that a subscription paper was delivered as an escrow to become effectual on certain conditions where it was delivered to one of the commissioners appointed to receive subscriptions to a railroad.

31. Ottawa, Oswego & F. R. V. R. Co. *v.* Hall, 1 Ill. App. 612.

32. *Illinois.* — Merrick *v.* Consumers Heat & Elec. Co., 111 Ill. App. 153.

Indiana. — Jones *v.* Milton & R. Tpk. Co., 7 Ind. 547.

Maine. — First Free-Will Baptist Parish *v.* Perham, 84 Me. 563, 24 Atl. 958.

Minnesota. — Masonic Temple Ass'n *v.* Channell, 43 Minn. 353, 45 N. W. 716.

Nebraska. — Nebraska Exposition Ass'n *v.* Townley, 46 Neb. 893, 65 N. W. 1062.

New Mexico. — Miller *v.* Preston, 4 N. M. 396, 17 Pac. 565.

Where the Subscription Is Unconditional no qualification can be attached to it and no mere understanding can cancel or change its effect. Topeka Mfg. *v.* Hale, 39 Kan. 23, 17 Pac. 601.

A Subscription for Construction of a Bridge cannot be varied by parol agreement that the construction should be let out to the lowest bidder. Cooper *v.* McCrimmin, 33 Tex. 383, 7 Am. Rep. 268.

An Agreement To Pay Money to a Railroad upon completion of its line to a certain point cannot be varied by parol evidence that the agreement was that the road should be extended to a further point. Low *v.* Studabaker, 110 Ind. 57, 10 N. E. 301. See McAllister *v.* Indianapolis & C. R. Co., 15 Ind. 11.

A Contract Giving a Right of Way to a railroad company, if it would run through a person's land cannot be varied by parol evidence of a condition that it must go through a certain part. Burch *v.* Augusta, G. & S. R. Co., 80 Ga. 296, 4 S. E. 850.

A Subscription to Procure the Erection of a Court-house cannot be varied by evidence that when a person put his name thereto he was informed that he would not be holden unless the new court-house should be erected where the old court-house stood. George *v.* Harris, 4 N. H. 533, 17 Am. Dec. 446. The court here said: "His promise is direct, positive, unconditional, and in writing, and parol evidence is inadmissible to contradict, or vary such a contract. He agreed to give the amount he subscribed, for the erection of a court-house on land suitable, in the opinion of certain subscribers, and to be given, for the purpose. Nothing is said of the site of the old court-house. There is another reason why the defendant ought not to be permitted to avail himself of any private understanding between him and another subscriber. He put upon the paper an unconditional promise to pay, and this may perhaps have induced others not only to subscribe, but to pay, and his attempt now to shield himself under such private understanding may be a fraud upon others who were thus induced to subscribe and pay." *Per* Richardson, C. J. But see First M. E. Church *v.* Sweny, 85 Iowa 627, 52 N. W. 546.

That a Certain Sum Should Be Subscribed cannot be shown by parol. Fairfield County Tpk. Co. *v.* Thorp, 13 Conn. 173.

A Condition That if a Loan Was Not Effected the subscriber should not be bound cannot be shown by parol. Corwith *v.* Culver, 69 Ill. 502.

That if Work Is Not Commenced Within a Certain Time the subscriber may retract his subscription cannot be shown. Cincinnati Union

in many cases, if a subscriber could avail himself of such a condition it would operate as a fraud upon subsequent signers who had affixed their signatures to the instrument on the faith of the one which is alleged to be conditional.[33]

c. *As to Parties.* — Where the legal effect of a subscription contract is to bind the parties signing it as principals, parol evidence is not admissible to show that they signed as brokers for others.[34]

III. RECORDS.

The application of the general rule to the subject of records, with its qualifications and exceptions, and the use of parol evidence to explain or interpret records is considered elsewhere in this work.[35]

& F. W. R. Co. *v.* Pearce, 28 Ind. 502.

33. "The rule forbidding the introduction of parol evidence to explain a written instrument, meets with no exception in the case of a subscription paper for stock of a corporation. . . . Such a secret condition attached to the subscription would be a fraud upon the other subscribers, and the subscription should be enforced without regard to it." Corwith *v.* Culver, 69 Ill. 502, *per* Sheldon, J.

34. American Alkali Co. *v.* Bean, 125 Fed. 823. The court said in this case: "Neither in the body of the agreement nor in the signature of the defendants is there any intimation of agency, and it is quite certain that, if they were agents, their principals were not in any manner disclosed. Consequently they became personally bound, even if in fact they were authorized to bind others and intended to act only in pursuance of that authority. Moreover, as the legal effect of this contract in writing was to make the defendants a substantial, and not merely a nominal, party to it, the capacity in which they acted is not open to question; and the offer which was made to prove that the president of the company agreed with the defendants that the subscriptions made by them were made for their constituents was especially objectionable. It amounted to nothing but a proposal to substitute for the written contract with the corporation an oral agreement with its president." *Per* Dallas, C. J. See Langford *v.* Ottumwa W. P. Co., 59 Iowa 283, 13 N. W. 303.

Where a Person Subscribes for Stock "as Trustee" it has been decided that it may be shown in an action against the alleged real parties in interest to recover on the subscription, that such person was not the real subscriber but acted as agent for the defendants at their request and for the benefit of each of them, in proportion to the individual subscription of each to the stock. Cole *v.* Satsop R. Co., 9 Mass. 487, 37 Pac. 700, 43 Am. St. Rep. 858.

35. See article "RECORDS."

PARTICULARS.— See Bill of Particulars.

PARTIES AND PERSONS INTERESTED AS WITNESSES.

By Charles A. Robbins.

CROSS-REFERENCES:

Bias;
Competency; Credibility;
Examination of Parties Before Trial;
Husband and Wife;
Impeachment of Witnesses;
Transactions With Deceased Persons.

I. COMPETENCY.

1. At Common Law. — At common law, the parties to an action and persons otherwise interested in the result thereof were generally incompetent to testify, except against interest, or to prove matters preliminary to the introduction of secondary evidence, or, in a few cases, to prove the amount of damages.[1] By the weight of authority, a party of record who had no real interest in the result of the action was a competent witness.[2] A person whose interest was equally balanced between the parties might testify for either.[3] A party might sometimes become a competent witness by the dismissal of the action as to him, or by a separate verdict or judgment against him; and the incompetency of an interested person might sometimes be removed by the transfer, release, or extinguishment of his interest or liability.[4]

2. Under Statutes. — The general disability of parties to testify in civil actions and the disability of interested persons to testify in civil or criminal actions has been removed in all jurisdictions.[5]

1. The rule having been abolished by statute in all jurisdictions, it has been deemed inadvisable to publish lists of the many cases in which it has been applied. See Cent. Dig., Vol. 50, c. 257, § 217, *et seq.*

2. See Cent. Dig., Vol. 50, c. 261, § 221.

3. See Cent. Dig., Vol. 50, c. 245, § 210.

4. See Cent. Dig., Vol. 50, c. 505, § 425, *et seq.*

5. Chase *v.* Pitman, 69 N. H. 423, 43 Atl. 617; Cooley *v.* Cooley, 58 S. C. 168, 36 S. E. 563; Gordon *v.* Funkhouser, 100 Va. 675, 42 S. E. 677; Goodwin *v.* Fox, 129 U. S. 601, 9 Sup. Ct. Rep. 367; De Beaumont *v.* Webster, 81 Fed. 535.

A Party of Record may testify as to the nature of his interest in the action. Coats *v.* Lynch, 152 Mo. 161, 53 S. W. 895. See notes 10, 11 and 62.

Stockholders or members of a corporation may testify for the corporation. Merchants & Manufacturers Bank *v.* Pizor, 24 Pa. Co. Ct. Rep. 273; Kerr *v.* Modern Woodmen of America, 117 Fed. Cas. 593, 54 C. C. A. 655; Sherret *v.* Scottish Clans, 37 Ill. App. 446. See notes 21 and 22.

The Proponents of a Will may testify generally in the absence of some special statutory prohibition. McIntyre *v.* McIntyre, 120 Ga. 67, 47 S. E. 501. The proponents of a holographic will may testify to the handwriting of the deceased. Martin *v.* McAdams, 87 Tex. 225, 27 S. W. 255.

Devisees may testify to the sanity of the testator. Williams *v.* Williams, 90 Ky. 28, 13 S. W. 250; Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253. Or to the execution of the will. *In re* Wheelock's Will (Vt.) 56 Atl. 1013.

Incompetency as Subscribing Witness. — That a person would be incompetent as a subscribing or attesting witness, does not render him incompetent to testify as an ordinary witness. Succession of Morvant, 45 La. Ann. 207, 12 So. 349; Succession of Hall, 28 La. Ann. 57; State *v.* Easterlin, 61 S. C. 71, 39 S. E. 250; Franklin *v.* Franklin, 90 Tenn. 44, 16 S. W. 557.

A Beneficiary Under a Policy of Life Insurance may testify to the marriage of the insured. Ashford *v.* Metropolitan L. Ins. Co., 80 Mo. App. 638.

An Attorney may testify for his client though his fee is contingent on the result of the action. Central Branch of U. P. R. Co. *v.* Andrews, 41 Kan. 370, 21 Pac. 276. See note 23.

An Agent or Servant may testify for his principal or master. Lion F. Ins. Co. *v.* Starr, 71 Tex. 733, 12 S. W. 45. See note 24.

In many jurisdictions, however, a party or interested witness may not testify against the representatives of deceased or incompetent persons.[6] In all jurisdictions but one, defendants in criminal actions are competent witnesses for themselves.[7] But the general competency of a defendant in a criminal action to testify for or against a co-defendant seems to be a matter of doubt in some states.[8] By the weight of authority, the competency of a husband or wife as a witness for or against the spouse is not affected by a statute removing incompetency arising from interest.[9]

II. CREDIBILITY.

1. Parties of Record. — The interest of a party to the action may properly be considered in determining his credibility as a witness.[10] The rule applies to defendants who testify in criminal prosecutions.[11] In a few cases, it has been held error to instruct

A Supervisor of Assessment may testify in support on an assessment. State *v.* Williams (Wis.), 100 N. W. 1048.

Similar Interest. — A witness is not incompetent because he is interested in a similar claim or action. Warren *v.* McGill, 103 Cal. 153, 37 Pac. 144. See note 36.

6. See article "TRANSACTIONS WITH DECEASED PERSONS."

7. In Georgia, the defendant is entitled to make a statement to the jury, but is incompetent as a witness. See §§ 1010 and 1011, Ga. Penal Code.

8. See article "COMPETENCY," Vol. III, p. 211, *et seq.*

9. See article "HUSBAND AND WIFE," Vol. VI, p. 845, *et seq.*

10. *United States.* — Curtice *v.* Crawford Co. Bank, 110 Fed. 830; White *v.* Com., 29 Fed. Cas. No. 17,544; Graham *v.* Hoskins, Olcott 224, 10 Fed. Cas. No. 5669; Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914.

Colorado. — Stewart *v.* Kindel, 15 Colo. 539, 25 Pac. 990.

Georgia. — Laramore *v.* Minish, 43 Ga. 282.

Illinois. — North Chicago St. R. Co. *v.* Anderson, 176 Ill. 635, 52 N. E. 21.

Indiana. — Dailey *v.* State, 28 Ind. 285.

Louisiana. — Marks *v.* New Orleans Cold Storage Co., 107 La. 172, 31 So. 671, 57 L. R. A. 271; Cutler *v.* Succession of Collins, 37 La. Ann. 95.

Missouri. — Lovell *v.* Davis, 52 Mo. App. 342.

New York. — Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Uransky *v.* Dry Dock, E. B. & B. R. Co., 59 Hun 626, 13 N. Y. Supp. 670; Roberts *v.* Gee, 15 Barb. 449; Burnett *v.* Harris, 50 Barb. 379.

Vermont. — McKindley *v.* Drew, 37 Atl. 285.

11. *United States.* — Reagan *v.* United States, 157 U. S. 301.

Alabama. — Smith *v.* State, 107 Ala. 139, 18 So. 306; Dryman *v.* State, 102 Ala. 130, 15 So. 433; Wilkins *v.* State, 98 Ala. 1, 13 So. 312; Lewis *v.* State, 88 Ala. 11, 6 So. 755; Norris *v.* State, 87 Ala. 85, 6 So. 371; Dick *v.* State, 87 Ala. 61, 6 So. 395.

Arkansas. — Jones *v.* State, 61 Ark. 88, 32 S. W. 81; Vaughn *v.* State, 58 Ark. 353, 24 S. W. 885; Felker *v.* State, 54 Ark. 489, 16 S. W. 663.

California. — People *v.* Hitchcock, 104 Cal. 482, 38 Pac. 198; People *v.* Curry, 103 Cal. 548, 37 Pac. 503; People *v.* Knapp, 71 Cal. 1, 11 Pac. 793; People *v.* O'Neal, 67 Cal. 378, 7 Pac. 790; People *v.* Cowgill, 93 Cal. 596, 29 Pac. 228; People *v.* Morrow, 60 Cal. 142; People *v.* Cronin, 34 Cal. 191.

Connecticut. — State *v.* Fiske, 63 Conn. 388, 28 Atl. 572.

Illinois. — Doyle *v.* People, 147 Ill. 394, 35 N. E. 372; Siebert *v.* People, 143 Ill. 571, 32 N. E. 431; Rider *v.* People, 110 Ill. 11; Dunn *v.* People,

a jury that it "should" so consider the interest of a defendant;[12] in other cases, such an instruction has been criticised, but held not to be reversible error;[13] while in many other cases, such use of the word "should," or its equivalents, has either been held proper or has escaped criticism.[14]

109 Ill. 635; Chambers *v.* People, 105 Ill. 409; Hirschman *v.* People, 101 Ill. 568; Bulliner *v.* People, 95 Ill. 394; Sullivan *v.* People, 114 Ill. 24, 28 N. E. 381; Bressler *v.* People, 117 Ill. 422, 8 N. E. 62.

Indiana. — Bird *v.* State, 107 Ind. 154, 8 N. E. 14.

Iowa. — State *v.* Sterrett, 71 Iowa 386, 32 N. W. 387; State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186.

Michigan. — People *v.* Calvin, 60 Mich. 113, 26 N. W. 851; People *v.* Herrick, 59 Mich. 563, 26 N. W. 767; People *v.* Resh, 107 Mich. 251, 65 N. W. 99.

Missouri. — State *v.* Lortz, 186 Mo. 122, 84 S. W. 906; State *v.* Bryant, 134 Mo. 246, 35 S. W. 597; State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895; State *v.* Maguire, 113 Mo. 670, 21 S. W. 212; State *v.* Renfrow, 111 Mo. 589, 20 S. W. 299; State *v.* Wells, 111 Mo. 533, 20 S. W. 232; State *v.* Turner, 110 Mo. 196, 19 S. W. 645; State *v.* Noeninger, 108 Mo. 166, 18 S. W. 990; State *v.* Ihrig, 106 Mo. 267, 17 S. W. 300; State *v.* Mounce, 106 Mo. 226, 17 S. W. 226; State *v.* Brown, 104 Mo. 635, 16 S. W. 406; State *v.* Young, 105 Mo. 634; State *v.* Harrod, 102 Mo. 590, 15 S. W. 373; State *v.* Musick, 101 Mo. 260, 14 S. W. 212; State *v.* Strattman, 100 Mo. 540, 13 S. W. 814.

Montana. — State *v.* Metcalf, 17 Mont. 417, 43 Pac. 182.

Nebraska. — Housh *v.* State, 43 Neb. 163, 61 N. W. 571; Johnson *v.* State, 34 Neb. 257, 51 N. W. 835; Clark *v.* State, 32 Neb. 246, 49 N. W. 367; Davis *v.* State, 31 Neb. 247, 47 N. W. 854; Murphy *v.* State, 15 Neb. 383, 19 N. W. 489; St. Louis *v.* State, 8 Neb. 405, 1 N. W. 371.

Nevada. — State *v.* Slingerland, 19 Nev. 135, 7 Pac. 280.

New Mexico. — Territory *v.* Romine, 2 N. M. 114; Faulkner *v.* Territory, 6 N. M. 464, 30 Pac. 905.

New York. — People *v.* Kiernan, 3 N. Y. Cr. R. 247; People *v.* Crowley, 102 N. Y. 234, 6 N. E. 384.

Oklahoma. — Territory *v.* Gatliff, 37 Pac. 809.

Oregon. — State *v.* Tarter, 26 Or. 38, 37 Pac. 53.

Pennsylvania. — Com. *v.* Orr, 138 Pa. St. 276, 20 Atl. 866.

Washington. — State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

Wyoming. — Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.

Compare Hartford *v.* State, 96 Ind. 461, 49 Am. Rep. 185. See also article "CREDIBILITY," Vol. III, p. 772.

In California it is deemed the better practice not to instruct the jury as to the credibility of a defendant; and an instruction which strongly suggests that a defendant has testified falsely is error. People *v.* Van Ewan, 111 Cal. 144, 43 Pac. 520.

Instructions which tend to discredit the testimony of a defendant have frequently been held bad. Clark *v.* State, 32 Neb. 246, 49 N. W. 367; Reagan *v.* United States, 157 U. S. 301. And see cases cited in note 46.

In Texas, the court may charge the jury to consider the interests which witnesses may have in a prosecution, but should not instruct the jury to consider the specific interest of the defendant. Muely *v.* State, 31 Tex. Crim. 155, 19 S. W. 915, *reversing* 18 S. W. 411. See also Cockerell *v.* State, 32 Tex. Crim. 585, 25 S. W. 421. But compare cases in this note, *supra.*

12. Hartford *v.* State, 96 Ind. 461; Unruh *v.* State, Ind. 4 N. E. 453.

13. State *v.* Fairlamb, 121 Mo. 137, 25 S. W. 895; State *v.* Bryant, 134 Mo. 246, 35 S. W. 597.

14. State *v.* Renfrow, 111 Mo. 589, 20 S. W. 299; State *v.* Mounce, 106 Mo. 226, 17 S. W. 226; State *v.* Brown, 104 Mo. 365, 16 S. W. 406; State *v.* Young, 105 Mo. 634, 16 S. W. 408; State *v.* Wisdom, 84 Mo. 177; Johnson *v.* State, 34 Neb. 257, 51 N. W. 835. And see cases in note 11, *supra.*

2. Other Persons Interested. — A. General Rule. — Any interest in the result of an action, which, at common law, rendered a person incompetent to testify as a witness, should now be considered in determining his credibility.[15] It is, therefore, generally proper to show the character and extent of a witness' interest in the result of the action.[16]

B. Specific Instances. — a. *Real Party in Interest.* — It is proper to show, as affecting his credibility, that a witness has entered into an agreement with the party calling him to be bound by the result of the action or to receive the benefits or share the proceeds thereof.[17] So also, it may be shown that the witness has an interest in property which is the subject of litigation, and that an assignment or conveyance thereof to the party of record is fictitious or fraudulent;[18] or that the witness is interested in the property under a trust deed,[19] or has some equitable interest therein.[20] It may be shown that a witness is a stockholder, or member of a corporation[21] or association[22] which is a party to the action, or interested in the result thereof.

b. *Representative Relation.* — It may properly be proved that a witness is an attorney,[23] or a representative, or the agent or

15. *United States.* — Dodge *v.* Hedden, 42 Fed. 446; Andrews *v.* Hyde, 3 Cliff. 516, 1 Fed. Cas. No. 377.

Alabama. — Jernigan *v.* Flowers, 94 Ala. 508, 10 So. 437.

Illinois. — Donley *v.* Dougherty, 174 Ill. 582, 51 N. E. 714, *affirming* 75 Ill. App. 39; Elgin *v.* Eaton, 2 Ill. App. 90.

Indiana. — Carver *v.* Louthain, 38 Ind. 530.

Iowa. — Harrington *v.* Hamburg, 85 Iowa 272, 52 N. W. 201; Erickson *v.* Bell, 53 Iowa 627, 6 N. W. 19, 36 Am. Rep. 246.

Michigan. — Michigan Condensed Milk Co. *v.* Wilcox, 78 Mich. 431, 44 N. W. 281; Geary *v.* People, 22 Mich. 220.

Texas. — Trinity County Lumb. Co. *v.* Denham, 88 Tex. 203, 30 S. W. 856; Jones *v.* McCoy, 3 Tex. 349.

Wisconsin. — Phoenix Ins. Co. *v.* Sholes, 20 Wis. 35.

It is quite common to instruct the jury that it "should" consider the interest of the witnesses. See the cases in this note. But *compare* Wright *v.* Com., 85 Ky. 123, 2 S. W. 904, 909.

16. Dore *v.* Babcock, 72 Conn. 408, 44 Atl. 736; Totten *v.* Burhans, 103 Mich. 6, 61 N. W. 58; Cady *v.* Bradshaw, 116 N. Y. 188, 22 N. E. 371, 5 L. R. A. 557; Strawbridge *v.* Vandenburgh, 57 Hun 589, 10 N. Y. Supp. 610; McKindley *v.* Drew, 69 Vt. 210, 37 Atl. 285.

17. Archer *v.* Helm, 70 Miss. 874, 12 So. 702; Delaware, L. & W. R. Co. *v.* Dailey, 37 N. J. L. 526.

18. Waddingham *v.* Hulett, 92 Mo. 528, 5 S. W. 27; Hoyt *v.* Lynch, 2 Sandf. (N. Y.) 328; Phoenix Ins. Co. *v.* Sholes, 20 Wis. 35.

19. Sonnentheil *v.* Christian Moerlein Brew. Co., 172 U. S. 401.

20. Jernigan *v.* Flowers, 94 Ala. 508, 10 So. 437.

21. Lowey *v.* Fidelity Print. Co., 16 Misc. 549, 38 N. Y. Supp. 711.

The testimony of a person who is the agent of a corporation and a stockholder thereof, in the nature of an admission is entitled to great weight. Durham *v.* Carbon Coal & Min. Co., 22 Kan. 232.

22. Marschall *v.* Laughran, 47 Ill. App. 29.

23. Stewart *v.* Kindel, 15 Colo. 539, 25 Pac. 990; Ross *v.* Demoss, 45 Ill. 447; Koenig *v.* Union Depot Ry. Co., 137 Mo. 698, 73 S. W. 637; Olive *v.* State, 11 Neb. 1, 7 N. W. 444; Cohn *v.* Kahn, 14 Misc. 255, 35 N. Y. Supp. 829; Michigan Carbon Works *v.* Schad, 38 Hun (N. Y.) 71; Trinity County Lum-

employe[24] of the party calling him, and that the fee of such attorney,[25] the commission of such agent,[26] or the continuation of the employment of such employe[27] is contingent on the result of the action. So also, it is proper for the jury to consider that

ber Co. *v.* Denham (Tex. Civ. App.), 29 S. W. 553, 30 S. W. 856; Granon *v.* Hartshorne, 1 Blatchf. & H. 454, 10 Fed. Cas. No. 5,689.

24. *United States.* — Tennessee Coal, Iron & R. Co. *v.* Haley, 29 C. C. A. 328, 85 Fed. 534.

Alabama. — Long *v.* Booe, 106 Ala. 570, 17 So. 716; Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; Louisville & N. R. Co. *v.* York, 128 Ala. 305, 30 So. 676; Preferred Accident Ins. Co. *v.* Gray, 123 Ala. 482, 26 So. 517; Mason *v.* Alabama Iron Co., 73 Ala. 270.

Colorado. — United Oil Co. *v.* Miller, 19 Colo. App. 46, 73 Pac. 627.

Georgia. — Central of Georgia Ry. *v.* Bagley, 121 Ga. 781, 49 S. E. 780; Brunswick & W. R. Co. *v.* Wiggins, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513.

Illinois. — Illinois Cent. R. Co. *v.* Haskins, 115 Ill. 300, 2 N. E. 654; Donley *v.* Dougherty, 174 Ill. 582, 51 N. E. 714, *affirming* 75 Ill. App. 379; Chicago, B. & Q. R. Co. *v.* Triplett, 38 Ill. 482; Central Warehouse Co. *v.* Sargeant, 40 Ill. App. 438. *Compare* Morton *v.* O'Connor, 85 Ill. App. 273; West Chicago St. R. Co. *v.* Raftery, 85 Ill. App. 319.

Louisiana. — Mathilde *v.* Levy, 24 La. Ann. 421; Bond *v.* Frost, 8 La. Ann. 297.

Nebraska. — New Omaha Thomson-Houston Elec. Light Co. *v.* Johnson, 67 Neb. 393, 93 N. W. 778.

See also Lane *v.* Harlan Co., 51 Neb. 641, 71 N. W. 302.

New York. — O'Flaherty *v.* Nassau Elec. R. Co., 34 App. Div. 74, 54 N. Y. Supp. 96, *affirmed* 59 N. E. 1128, 165 N. Y. 624; Albrecht *v.* New York Cent. & H. R. R. Co., 54 App. Div. 636, 66 N. Y. Supp. 605, *affirmed* 166 N. Y. 622; Kingsland Land Co. *v.* Newman, 1 App. Div. 1, 36 N. Y. Supp. 960; Anderson *v.* Standard Gas Light Co., 17 Misc. 625, 40 N. Y. Supp. 671; Lamb *v.* Prudential Ins. Co., 22 App. Div. 552, 48 N. Y. Supp. 123; Michigan Carbon Works *v.* Schad, 38 Hun 71; A. B. Cleveland Co. *v.* A. C. Nellis Co., 18 N. Y. Supp. 448; Wilson *v.* Wyandance Springs Imp. Co., 4 Misc. 605, 24 N. Y. Supp. 557.

Pennsylvania. — Ellis *v.* Lake Shore & M. S. R. Co., 138 Pa. St. 506, 21 Atl. 140, 21 Am. St. Rep. 914.

Vermont. — Vermont Farm Mach. Co. *v.* Batchelder, 68 Vt. 430, 35 Atl. 378.

See also article "CREDIBILITY," Vol. III, p. 773.

It has been held within the discretion of a trial court to ask a witness, who was a minor, whether his father was in the employ of the party calling him. Long *v.* Booe, 106 Ala. 570, 17 So. 716.

Evidence that the employer of one of the state's witnesses was taking an active part in the criminal prosecution is admissible. Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28.

It is proper to show on cross-examination of a witness for defendant that the witness was working under the employe who was charged with negligence. Louisville & N. R. Co. *v.* York, 128 Ala. 305, 30 So. 676.

It is error to instruct the jury that defendant's employes are not disinterested witnesses and their testimony should be subjected to as severe criticism as the testimony of the plaintiff. Uransky *v.* Dry-Dock, E. B. & B. R. Co., 59 Hun 626, 13 N. Y. Supp. 670.

25. See note 69.

26. Suit *v.* Bonnell, 33 Wis. 180.

27. *Alabama.* — Postal Tel. Cable Co. *v.* Hulsey (Ala.), 22 So. 854.

Florida. — Jacksonville, T. & R. W. R. Co. *v.* Wellman, 26 Fla. 344, 7 So. 845.

Indiana. — Chicago & E. R. Co. *v.* Thomas (Ind.), 55 N. E. 861.

Mississippi. — Illinois Cent. R. Co. *v.* Haynes, 64 Miss. 604, 1 So. 765.

Missouri. — Gessley *v.* Missouri Pac. R. Co., 32 Mo. App. 413.

New Jersey. — Haver *v.* Cent. R. Co. of New Jersey, 64 N. J. L. 312, 45 Atl. 593.

a judgment against the principal or master of such agent or employe might tend to show a liability of the latter to the former or to the other party to the action.[28]

c *Marriage Relation.* — It may be shown that a witness is the spouse of the party calling him or her,[29] or that the spouse of the witness is otherwise interested in the result of the action.[30]

d. *Other Instances.* — It is proper to prove that a decision of the action adverse to the party calling him would render the witness liable as surety or indemnitor,[31] or that the witness is a creditor of such party, the collection of whose claim would probably be affected by the result of the action,[32] or that the witness is a partner of such party,[33] or sustains other business relations with him.[34] The interest of an insolvent in the result of an action by or against the receiver of his property may be shown.[35]

It has generally been held admissible to prove that a witness has a claim or interest similar to that for which he has testified, or is a party to a similar action or controversy.[36] It may be shown that

New York. — Sipple *v.* State, 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657; Elwood *v.* Western Union Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140; Albrecht *v.* New York Cent. & H. R. Co., 54 App. Div. 636, 66 N. Y. Supp. 605, *affirmed* 166 N. Y. 622, 59 N. E. 1118; Pyne *v.* Broadway & S. A. R. Co., 19 N. Y. Supp. 217, 46 N. Y. St. Rep. 662, *affirmed* 138 N. Y. 627, 33 N. E. 1083.

28. United States *v.* Coquitlam, 57 Fed. 706; Wohlfahrt *v.* Beckert, 92 N. Y. 490, 12 Abb. N. C. 478, 44 Am. Rep. 406; Connolly *v.* Cent. Vermont R. Co., 4 App. Div. 221, 38 N. Y. Supp. 587, *affirmed* 52 N. E. 1124; Finn *v.* Peterson, 24 Misc. 737, 53 N. Y. Supp. 787; McManus *v.* Woolverton, 19 N. Y. Supp. 545.

29. North Chicago St. R. Co. *v.* Wellner, 105 Ill. App. 652; State *v.* Strattman, 100 Mo. 540, 13 S. W. 814; State *v.* Lortz, 186 Mo. 122, 84 S. W. 906; State *v.* Lingle, 128 Mo. 528, 31 S. W. 20. See article "Husband and Wife," Vol. VI, p. 845.

30. Jernigan *v.* Flowers, 94 Ala. 508, 10 So. 437; Renoux *v.* Geney, 32 Misc. 702, 65 N. Y. Supp. 508; Guernsey *v.* Froude, 13 Pa. Super. Ct. 405. See also Brenneman *v.* Rudy, 8 Pa. Dist. Rep. 68.

31. Costello *v.* State, 130 Ala. 143, 30 So. 376; Nesbit *v.* Crosby, 74 Conn. 554, 51 Atl. 550; Aurora *v.* Scott, 82 Ill. App. 616; Goodman *v.* Myers, 11 Misc. 360, 32 N. Y. Supp. 239; Braden *v.* McCleary, 183 Pa. St. 192, 38 Atl. 623.

It was held incompetent to prove that a witness was surety for plaintiff on his appeal bond, since such evidence would disclose which party prevailed below. Israel *v.* Baker, 170 Mass. 12, 48 N. E. 621.

32. Sonnentheil *v.* Christian Moerlein Brew. Co., 172 U. S. 401, *affirming* 75 Fed. 350, 21 C. C. A. 390, 41 U. S. App. 491; Shannon *v.* Tama City, 74 Iowa 22, 36 N. W. 776; McClure *v.* King, 13 La. Ann. 141; Meltzer *v.* Doll, 91 N. Y. 365. *Compare* Plyer *v.* German American Ins. Co., 121 N. Y. 689, 24 N. E. 929, *reversing* 48 Hun 618, 1 N. Y. Supp. 395.

33. Honegger *v.* Wettstein, 94 N. Y. 252; Newcombe *v.* Hyman, 16 Misc. 25, 37 N. Y. Supp. 649. See also McLaughlin *v.* Sauve, 13 La. Ann. 99.

34. Louisville & N. R. Co. *v.* Tegner, 125 Ala. 593, 28 So. 510; Aultman *v.* Nilson, 112 Iowa 634, 84 N. W. 692; Totten *v.* Burhans, 103 Mich. 6, 61 N. W. 58.

35. Honegger *v.* Wettstein, 94 N. Y. 252.

36. *United States.* — Sidenberg *v.* Robertson, 41 Fed. 763; Graham *v.* Hoskins, Olcott 224, 10 Fed. Cas. No. 5,669; Thompson *v.* The Philadelphia, 1 Pet. Adm. 210, 23 Fed. Cas. No. 13,973.

Alabama. — Bessemer Land & Imp.

a witness has an interest in so testifying as to prevent an action or criminal prosecution against himself,[37] or that an adverse finding would tend to prove him guilty of fraud.[38] So also it may be proved that an accomplice is testifying under promise or expectation of immunity or leniency,[39] or that a witness is to receive special compensation for his testimony.[40]

Evidence that a witness has laid a wager on the result of the action is admissible.[41]

C. Release of Interest and Waiver of Incompetency. — The credibility of a party as a witness is not affected by a dismissal of

Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26; Drum *v.* Harrison, 83 Ala. 384, 3 So. 715; Stahmer *v.* State, 125 Ala. 72, 27 So. 311; Alabama G. S. R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169.

Illinois. — Elgin *v.* Eaton, 2 Ill. App. 90. *Compare* Bevan *v.* Atlanta Nat. Bank, 142 Ill. 302, 31 N. E. 679, *affirming* 39 Ill. App. 577.

Louisiana. — Marks *v.* New Orleans Cold Storage Co., 107 La. 172, 31 So. 671, 57 L. R. A. 271.

Michigan. — Crippen *v.* People, 8 Mich. 117.

Mississippi. — Archer *v.* Helm, 70 Miss. 874, 12 So. 702.

Nebraska. — Blenkiron *v.* State, 40 Neb. 11, 58 N. W. 587; Olive *v.* State, 11 Neb. 1, 7 N. W. 444.

South Dakota. — Hanson *v.* Red Rock Twp., 7 S. D. 38, 63 N. W. 156.

Texas. — Wentworth *v.* Crawford, 11 Tex. 127; Chicago, R. I. & G. R. Co. *v.* Longbottom (Tex. Civ. App.), 80 S. W. 542.

See also Rix *v.* Hunt, 16 App. Div. 540, 44 N. Y. Supp. 988.

On an appeal from an assessment for taxation, it was proper to ask a witness for the appellant whether the assessment of his property had also been raised. Stahmer *v.* State, 125 Ala. 72, 27 So. 311.

37. Winston *v.* Cox, 38 Ala. 268; Sipple *v.* State, 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657; Watts *v.* State, 18 Tex. App. 381; Maxwell *v.* State, 3 Heisk. (Tenn.) 420; State *v.* Burpee, 65 Vt. 1, 25 Atl. 964, 36 Am. St. Rep. 775, 19 L. R. A. 145.

38. Becker *v.* Koch, 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515; Coyle *v.* Metropolitan L. Ins. Co., 5 Misc. 586, 25 N. Y. Supp. 90; Newman *v.* Clapp, 20 Misc. 67, 44 N. Y. Supp. 439; Andrews *v.* Hyde, 3 Cliff. 516, 1 Fed. Cas. No. 377.

39. *Arkansas.* — Gill *v.* State, 59 Ark. 422, 27 S. W. 598.

California. — People *v.* Langtree, 64 Cal. 256, 30 Pac. 813; People *v.* Dillwood (Cal.), 39 Pac. 438.

Kansas. — Craft *v.* State, 3 Kan. 450.

Michigan. — People *v.* Hare, 57 Mich. 505, 24 N. W. 843.

New York. — People *v.* Glennon, 175 N. Y. 45, 67 N. E. 125.

North Dakota. — State *v.* Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

Ohio. — Allen *v.* State, 10 Ohio St. 287.

Texas. — Hinds *v.* State, 11 Tex. App. 238.

40. *Arkansas.* — Hollingsworth *v.* State, 53 Ark. 387, 14 S. W. 41.

Illinois. — Blake *v.* Blake, 70 Ill. 618.

Iowa. — State *v.* Carroll, 85 Iowa 1, 51 N. W. 1159.

Massachusetts. — Com. *v.* Sacket, 22 Pick. 394.

Michigan. — Alford *v.* Vincent, 53 Mich. 555, 19 N. W. 182.

Minnesota. — State *v.* Tosney, 26 Minn. 262, 3 N. W. 345.

New Hampshire. — State *v.* Staples, 47 N. H. 113, 90 Am. Dec. 565.

Ohio. — Tullis *v.* State, 39 Ohio St. 200.

Vermont. — See also Hobart *v.* Young, 63 Vt. 63, 21 Atl. 612, 12 L. R. A. 693.

See article "Credibility," Vol. III, pp. 769, 771.

41. People *v.* Parker, 137 N. Y. 535, 32 N. E. 1013; Kellogg *v.* Nelson, 5 Wis. 125.

the action as to him after he has testified.[42] Though a witness has been rendered competent by the release of a disqualifying interest in the action, or his incompetency has been waived, his interest may be considered as affecting his credibility.[43]

D. Weight and Sufficiency of Evidence. — a. *Province of Court and Jury.* — It is ordinarily for the jury to say what weight shall be given to the testimony of a party or interested witness; and it has therefore been held, in many cases, that a court should not direct a verdict or nonsuit where the uncorroborated testimony of a party or interested witness is the only evidence upon a material matter.[44] In a number of recent cases, however, it has been held that where a party or interested witness has not been impeached, and his testimony is not contradicted by direct evidence or by any legitimate inference from the evidence and is not opposed to the probabilities nor in its nature surprising or suspicious, the court may direct a verdict, though there is no other evidence upon a

42. Texas & P. R. Co. *v.* Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395; Steele *v.* Payne, 2 A. K. Marsh. (Ky.) 187.

43. McLaughlin *v.* Suave, 13 La. Ann. 99; Moore *v.* Viele, 4 Wend. (N. Y.) 420; Watkins *v.* Cousall, 1 E. D. Smith (N. Y.) 65; Kinloch *v.* Palmer, 1 Mill Const. (S. C.) 216; Trinity Co. Lumb. Co. *v.* Denham (Tex. Civ. App.), 30 S. W. 856; Cornell *v.* Barnes, 26 Wis. 473. See also Klatt *v.* N. C. Foster Lumb. Co., 97 Wis. 641, 73 N. W. 563.

44. *United States.* — Sigua Iron Co. *v.* Greene, 88 Fed. 207, 31 C. C. A. 477.

Georgia. — Southern Bank *v.* Goette, 108 Ga. 796, 33 S. E. 974.

Illinois. — Bressler *v.* People, 117 Ill. 422, 8 N. E. 62.

New York. — Joy *v.* Diefendorf, 130 N. Y. 6, 28 N. E. 602, 27 Am. St. Rep. 484; Munoz *v.* Wilson, 111 N. Y. 295, 18 N. E. 855; Gildersleeve *v.* Landon, 73 N. Y. 609; Kavanagh *v.* Wilson, 70 N. Y. 177; Honegger *v.* Wettstein, 94 N. Y. 252; Wohlfahrt *v.* Beckert, 92 N. Y. 490, 12 Abb. N. C. 478, 44 Am. Rep. 406; Mercantile Bank *v.* Anderson, 27 App. Div. 94, 50 N. Y. Supp. 176; Connolly *v.* Central Vermont R. Co., 4 App. Div. 221, 38 N. Y. Supp. 587, *affirmed* 52 N. E. 1124; Kingsland Land Co. *v.* Newman, 1 App. Div. 1, 36 N. Y. Supp. 960; Miner *v.* Hilton, 15 App. Div. 55, 44 N. Y. Supp. 155; Rumsey *v.* Boutwell, 61 Hun 165, 15 N. Y. Supp. 765; Roseberry *v.* Nixon, 58 Hun 121, 11 N. Y. Supp. 523; Leavitt *v.* Dodge, 61 Hun 627, 16 N. Y. Supp. 309; Goldsmith *v.* Coverly, 75 Hun 48, 27 N. Y. Supp. 116; Crosby *v.* Delaware & H. Canal Co., 66 Hun 628, 21 N. Y. Supp. 83; Wilcox *v.* Selleck, 92 Hun 37, 36 N. Y. Supp. 633; Michigan Carbon Wks. *v.* Schad, 38 Hun 71; Stay *v.* Du Bois, 74 Hun 134, 26 N. Y. Supp. 240; Greene *v.* Miller, 74 Hun 271, 26 N. Y. Supp. 425; Fisher *v.* Rankin, 78 Hun 407, 29 N. Y. Supp. 143; Miller *v.* Boyer, 79 Hun 131, 29 N. Y. Supp. 479; Newman *v.* People, 63 Barb. 630; Hodge *v.* Buffalo, Sheld. 418, 1 Abb. N. C. 356; Lesser *v.* Wunder, 9 Daly 70; Nicholson *v.* Conner, 8 Daly 212; Stilwell *v.* Carpenter, 2 Abb. N. C. 238; Condit *v.* Sill, 18 N. Y. Supp. 97; Pool *v.* Harris, 11 N. Y. St. Rep. 673; Corn *v.* Rosenthal, 1 Misc. 168, 20 N. Y. Supp. 632; Finn *v.* Peterson, 24 Misc. 737, 53 N. Y. Supp. 787; Davey *v.* Lohrmann, 1 Misc. 317, 20 N. Y. Supp. 675; Lowey *v.* Fidelity Print. Co., 16 Misc. 549, 38 N. Y. Supp. 711.

Pennsylvania. — Prowattain *v.* Tindall, 80 Pa. St. 295; Shaffer *v.* Clark, 90 Pa. St. 95.

South Carolina. — Hornsby *v.* South Carolina R. Co., 26 S. C. 187, 1 S. E. 594.

South Dakota. — McGill *v.* Young, 16 S. D. 360, 92 N. W. 1066; Blount *v.* Medbery, 16 S. D. 562, 94 N. W. 428.

Wisconsin. — O'Brien *v.* Chicago & N. W. R. Co., 92 Wis. 340, 66 N. W. 363.

material point.[45] It has generally been held erroneous to instruct a jury that the interest of a party or witness tends to "discredit" him, or that his testimony may be "disregarded" solely because of his interest.[46]

See also cases in notes 54 and 55.

The court is not bound to submit to the jury a case founded on plaintiff's testimony which contradicts the generally recognized laws of mechanics. Nugent *v.* Kauffman Mill. Co., 131 Mo. 241, 33 S. W. 428.

45. Second National Bank *v.* Weston, 172 N. Y. 250, 64 N. E. 949; Hull *v.* Littauer, 162 N. Y. 569, 57 N. E. 102; Kelly *v.* Burroughs, 102 N. Y. 93, 6 N. E. 109; Lofner *v.* Meeker, 25 N. Y. 361; Williams *v.* Delaware, L. & W. R. Co., 66 App. Div. 336, 73 N. Y. Supp. 38; Schmidt *v.* Garfield Nat. Bank, 64 Hun 298, 19 N. Y. Supp. 252; Howe *v.* Schweinberg, 1 Misc. 481, 21 N. Y. Supp. 469. See also cases in notes 56 and 57.

The court may direct a verdict for a party whose uncontradicted testimony is corroborated by other testimony. Hull *v.* Littauer, 8 App. Div. 227, 40 N. Y. Supp. 338.

46. *United States.* — Hicks *v.* United States, 150 U. S. 442; Reagan *v.* United States, 157 U. S. 301; The Margaret B. Roper, 103 Fed. 886.

Alabama. — Allen *v.* State, 87 Ala. 107, 6 So. 370.

Illinois. — Illinois Central R. Co. *v.* Burke, 112 Ill. App. 415; North Chicago St. R. Co. *v.* Wellner, 105 Ill. App. 652; Lambert *v.* People, 34 Ill. App. 637.

Indiana. — Newport *v.* State, 140 Ind. 299, 39 N. E. 926; Veatch *v.* State, 56 Ind. 584, 26 Am. Rep. 44; Pratt *v.* State, 56 Ind. 179.

Michigan. — Marquette, H. & O. R. Co. *v.* Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453.

Mississippi. — McEwen *v.* State (Miss.), 16 So. 242; Rucker *v.* State (Miss.), 18 So. 121.

Montana. — State *v.* Metcalf, 17 Mont. 417, 43 Pac. 182.

New York. — Moran *v.* McLarty, 75 N. Y. 25; Berzevizy *v.* Delaware, L. & W. R. Co., 19 App. Div. 309, 46 N. Y. Supp. 27; Durkee *v.* President etc. Delaware & H. Canal Co., 88 Hun 471, 34 N. Y. Supp. 978; Uransky *v.* Dry Dock, E. B. & B. R. Co., 59 Hun 626, 13 N. Y. Supp. 670; Johnson *v.* Doll, 11 Misc. 345, 32 N. Y. Supp. 132; People *v.* Kiernan, 3 N. Y. Cr. R. 247; Soltan *v.* Loewenthal, 48 Hun 620, 1 N. Y. Supp. 168.

Pennsylvania. — Com. *v.* Pipes, 158 Pa. St. 25, 27 Atl. 839.

Washington. — State *v.* White, 10 Wash. 611, 39 Pac. 160.

Compare Lewis *v.* State, 88 Ala. 11, 6 So. 755; State *v.* Mecum, 95 Iowa 433, 64 N. W. 286; Padfield *v.* People, 146 Ill. 660, 35 N. E. 469; A. B. Cleveland Co. *v.* A. C. Nellis Co., 18 N. Y. Supp. 448; Ney *v.* Troy, 3 N. Y. Supp. 679 (50 Hun 604).

An instruction that the jury should consider the feeling or interest of the defendant "in connection with all the evidence in the case, in determining how far, if at all, they will believe such witness (the defendant) or consider such testimony" was held erroneous, as suggesting the probable falsity of his testimony and authorizing the jury to throw it aside as unworthy of belief because of the strong temptation to swear falsely. Woods *v.* State, 67 Miss. 575, 7 So. 495. See also Townsend *v.* State (Miss.), 12 So. 209; State *v.* Lingle, 128 Mo. 528, 31 S. W. 20; Buckley *v.* State, 62 Miss. 705.

It has been held that while the jury should take into consideration the interest of a defendant who testifies in his own behalf, it is error to instruct them that his testimony need not be treated the same as the testimony of other witnesses. Sullivan *v.* People, 114 Ill. 24, 28 N. E. 381; Lambert *v.* People, 34 Ill. App. 637.

Compare People *v.* Cowgill, 93 Cal. 596, 29 Pac. 228; People *v.* Calvin, 60 Mich. 113, 26 N. W. 851.

It has been held improper to instruct a jury that as a general rule a witness who is interested in the result of a suit will not be as honest, candid and fair in his testimony as one who is not interested. Royal Ins. Co. *v.* Crowell, 77 Ill. App. 544.

b. *Acceptance of Testimony.* — A jury is generally authorized to accept the uncorroborated testimony of a party upon a matter regarding which there is no other evidence.[47] The rule applies to the testimony of defendants in criminal actions.[48] Where the parties to an action contradict each other as witnesses, the jury may find for either one.[49] It appears to have been held, in a few

Contra Carver *v.* Louthain, 38 Ind. 530; Greer *v.* State, 53 Ind. 420; Nelson *v.* Vorce, 55 Ind. 455; Veatch *v.* State, 56 Ind. 584.

A court cannot say, as a matter of law, that the testimony of a party is to be viewed with "suspicion." Kansas Pac. R. Co. *v.* Little, 19 Kan. 267.

It is error to instruct the jury that the testimony of a defendant should be considered with "great caution." State *v.* Johnson, 16 Nev. 36; State *v.* Vasquez, 16 Nev. 42. See also State *v.* Holloway, 117 N. C. 730, 23 S. E. 168; State *v.* Collins, 118 N. C. 1203, 24 S. E. 118.

47. *Connecticut.* — Ford *v.* Haskell, 32 Conn. 489.

Michigan. — Gruett *v.* Dibble, 126 Mich. 623, 86 N. W. 120.

New York. — Felbel *v.* Kahn, 29 App. Div. 270, 51 N. Y. Supp. 435; Reid *v.* City of New York, 68 Hun 110, 22 N. Y. Supp. 623, *affirmed* 139 N. Y. 534, 34 N. E. 1102; Krause *v.* Abeles, 21 Misc. 446, 47 N. Y. Supp. 591; 20 Misc. 697, 46 N. Y. Supp. 531; Howard *v.* St. Lawrence Life Ass'n, 20 Misc. 118, 45 N. Y. Supp. 110; Waterman *v.* American Pin Co., 19 Misc. 638, 44 N. Y. Supp. 410; Doherty *v.* Metropolitan St. Ry. Co., 91 N. Y. Supp. 19; Still *v.* Nassau Elec. R. Co., 32 App. Div. 276, 52 N. Y. Supp. 975.

Pennsylvania. — Prowattain *v.* Tindall, 80 Pa. St. 295; Shaffer *v.* Clark, 90 Pa. St. 94.

Texas. — International & G. N. R. Co. *v.* Mills, 34 Tex. Civ. App. 127, 78 S. W. 11. *Compare* Missouri Pacific Ry. Co. *v.* Somers, 78 Tex. 439, 14 S. W. 779.

See also Frost *v.* Bebout, 14 La. 104.

Where the testimony of a party is contradictory, he is not entitled to recover upon his own testimony unless a recovery is justified by that part of his testimony most unfavorable to himself. Atlanta R. & Power Co. *v.* Owens, 119 Ga. 833, 47 S. E. 213; Horne *v.* Peacock, 122 Ga. 45, 49 S. E. 722; Southern R. Co. *v.* Hobbs, 121 Ga. 428, 49 S. E. 294; Ray *v.* Green, 113 Ga. 920, 39 S. E. 470; Western & A. R. Co. *v.* Evans, 96 Ga. 481, 23 S. E. 494; Farmer *v.* Davenport, 118 Ga. 289, 45 S. E. 244; Fowler *v.* Pleasant Valley Coal Co., 16 Utah 348, 52 Pac. 594.

48. Day *v.* State, 63 Ga. 667; State *v.* Sanders, 106 Mo. 188, 17 S. W. 223; State *v.* Patterson, 98 Mo. 283, 11 S. W. 728.

49. Howard *v.* Taylor, 99 Ala. 450, 13 So. 121; White *v.* Ross, 35 Fla. 377, 17 So. 640; Stampofski *v.* Steffens, 79 Ill. 303; Felbel *v.* Kahn, 29 App. Div. 270, 51 N. Y. Supp. 435; Burnett *v.* Harris, 50 Barb. (N. Y.) 379; Lawrence *v.* Maxwell, 58 Barb. (N. Y.) 511; Krause *v.* Abeles, 21 Misc. 446, 47 N. Y. Supp. 591; Anthracite Building & Loan Assn. *v.* Lyons, 2 Kulp (Pa.) 409. See also Carter *v.* Braden, 67 Ill. 241; Boyd *v.* Colt, 20 How. Pr. (N. Y.) 384; Smith *v.* Griswold, 6 Or. 440; Sanborn *v.* Babcock, 33 Wis. 400. *Compare* Campbell Printing Press and Mfg. Co. *v.* Yorkston, 11 Misc. 340, 32 N. Y. Supp. 263.

Where both parties to an action testify, and material testimony of one party as to a matter within the knowledge of both is uncontradicted by the other, such testimony will ordinarily be presumed to be true. Matthews *v.* Lanier, 33 Ark. 91; Lacy *v.* Wilson, 24 Mich. 479. *Compare* Mullally *v.* Greenwood, 127 Mo. 138, 29 S. W. 1001, 48 Am. St. Rep. 613.

It was held that the testimony of the plaintiff impeached by evidence of his contradictory statements and directly denied by the testimony of the defendant will not sustain a judgment for the former. Marinelli *v.* Ferrand, 17 Misc. 373, 40 N. Y. Supp. 151. O'Brien *v.* Chicago & N. W.

cases, that the testimony of parties or interested witnesses is not sufficient to overcome the testimony of a like number of disinterested witnesses;[50] but the general rule seems to be that a jury may accept the testimony of a party or interested witness though contradicted by other witnesses.[51]

c. *Rejection of Testimony.* — Where the testimony of a party[52]

Ry. Co., 92 Wis. 340, 66 N. W. 363. *Compare* Henry *v.* Sioux City & P. R. Co., 75 Iowa, 84, 39 N. W. 193, 9 Am. St. Rep. 457.

The testimony of one party to a contract contrary to the written terms of the contract and contradicted by the testimony of the other party is insufficient to add to the written terms. Philadelphia & D. C. R. Co. *v.* Conway, 177 Pa. St. 364, 35 Atl. 716.

50. Dailey *v.* State, 28 Ind. 285; Spang *v.* McGarry, 2 Ohio Dec. 116; Laing *v.* The G. L. Buckman, 14 Fed. Cas. No. 7988. See also Waggoner *v.* German-American Title Co. (Ky.), 56 S. W. 961; Lillibridge *v.* Barber, 55 Conn. 366, 11 Atl. 850. *Contra* Largent *v.* Beard (Tex. Cr. App.), 53 S. W. 90.

51. Hayden *v.* State, 69 Ga. 731; Brown *v.* Jefferson County, 16 Iowa 339; Laidlaw *v.* Sage, 2 App. Div. 374, 37 N. Y. Supp. 770; Adams *v.* Chicago & N. W. R. Co., 89 Wis. 645, 62 N. W. 525; Largent *v.* Beard (Tex. Civ. App.), 53 S. W. 90; O'Brien *v.* Chicago & N. W. R. Co., 92 Wis. 340, 66 N. W. 363. See also Ennor *v.* Welch, 48 Ill. 353; Dailey *v.* Dailey, 125 Mo. 96, 28 S. W. 330; Spohn *v.* Missouri Pacific R. Co., 122 Mo. 1, 26 S. W. 663.

"The manner of the so-called disinterested witness may show unmistakably that his feeling or bias is of that character which would influence and give color to his statements, and thus make him much less reliable than one whose pecuniary all was involved in the issue." Brown *v.* Jefferson Co., 16 Iowa 339.

The jury need not reject entirely the testimony of a party in his own behalf, though there is evidence tending to impeach him. Southern Bank *v.* Goette, 108 Ga. 796, 33 S. E. 974; Lauter *v.* Duckworth, 19 Ind. App. 535, 48 N. E. 864.

An instruction that "if the defendant's testimony, when compared with all the other facts and circumstances in evidence, is consistent and harmonious, it may have a controlling weight in deciding the case, but the weight it shall have is a matter left wholly to your consideration and judgment" was held erroneous, as charging the jury that his testimony could not be taken as of controlling weight unless consistent with all the facts and circumstances in evidence. Bird *v.* State, 107 Ind. 154, 8 N. E. 14.

52. *United States.* — Curtice *v.* Crawford County Bank, 110 Fed. 830.

Georgia. — Horn *v.* Peacock, 122 Ga. 45, 49 S. E. 722; Southern R. Co. *v.* Hobbs, 121 Ga. 428, 49 S. E. 294; Atlanta R. & Power Co. *v.* Owens, 119 Ga. 833, 47 S. E. 213.

Massachusetts. — Smith *v.* Butler, 176 Mass. 38, 57 N. E. 322.

New York. — Williams *v.* Delaware, L. & W. R. Co., 66 App. Div. 336, 73 N. Y. Supp. 38; Dougherty *v.* Metropolitan Life Ins. Co., 3 App. Div. 313, 38 N. Y. Supp. 258; Slater *v.* McGuire, 62 Hun 620, 16 N. Y. Supp. 682; Van Mater *v.* Burns, 76 Hun 3, 27 N. Y. Supp. 624; Chester *v.* Jumel, 53 Hun 629, 5 N. Y. Supp. 822; Merschendorf *v.* Koch, 22 Misc. 356, 49 N. Y. Supp. 285; Newcombe *v.* Hyman, 16 Misc. 25, 37 N. Y. Supp. 649; Reddin *v.* Lawlor, 13 Misc. 211, 34 N. Y. Supp. 230; De Cernea *v.* Cornell, 3 Misc. 241, 22 N. Y. Supp. 941; Olsen *v.* Ensign, 7 Misc. 682, 28 N. Y. Supp. 38; Gowing *v.* Warner, 30 Misc. 593, 62 N. Y. Supp. 797; *In re* Dimock, 11 Misc. 610, 32 N. Y. Supp. 927; Levy *v.* Yazbeck, 22 Misc. 136, 49 N. Y. Supp. 283; Stilwell *v.* Carpenter, 2 Abb. N. C. 38; Wolf *v.* Farley, 16 N. Y. Supp. 168; Davey *v.* Lohrmann, 1 Misc. 317, 20 N. Y. Supp. 675; Condit *v.* Sill, 18 N. Y. Supp. 97.

Texas. — Alamo F. Ins. Co. *v.* Heidemann Mfg. Co. (Tex. Civ. App.), 28 S. W. 910.

or interested witness[53] is contradicted or improbable, the jury may reject it. It has often been held that a jury may disbelieve the testimony of a party[54] or interested witness[55] on the ground of interest. But, in other cases, the right of a jury to reject the uncontradicted and plausible testimony of an unimpeached party[56] or

Utah. — Fowler *v.* Pleasant Valley Coal Co., 16 Utah 348, 52 Pac. 594.

53. Quock Ting *v.* United States, 140 U. S. 417, The Columbia, 27 Fed. 704; Munoz *v.* Wilson, 111 N. Y. 295, 18 N. E. 855; Sipple *v.* State, 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657; Wohlfahrt *v.* Beckert, 92 N. Y. 490, 12 Abb. N. C. 478, 44 Am. Rep. 406; McNulty *v.* Hurd, 86 N. Y. 547; Kavanagh *v.* Wilson, 70 N. Y. 177; Elwood *v.* Western Union Telegraph Co., 45 N. Y. 549, 6 Am. Rep. 140; Rollwagen *v.* Rollwagen, 3 Hun (N. Y.), 121, 5 Thomp. & C. 402.

54. *United States.* — Sigua Iron Co. *v.* Greene, 31 C. C. A. 477, 88 Fed. 207.

Illinois. — North Chicago St. R. Co. *v.* Anderson, 176 Ill. 635, 52 N. E. 21.

Missouri. — Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452.

New York. — Kearney *v.* Mayor, 92 N. Y. 617; Dean *v.* Metropolitan Elevated R. Co., 119 N. Y. 540, 23 N. E. 1054; Hamilton *v.* Oswego W. Wks., 22 App. Div. 573, 48 N. Y. Supp. 106, *affirmed* 163 N. Y. 562, 57 N. E. 1111; Mercantile Bank *v.* Anderson, 27 App. Div. 94, 50 N. Y. Supp. 176; O'Neil *v.* Third Ave. R. Co., 78 Hun 183, 28 N. Y. Supp. 917; Goldsmith *v.* Coverly, 75 Hun 48, 27 N. Y. Supp. 116; Meeteer *v.* Manhattan R. Co., 63 Hun 533, 18 N. Y. Supp. 561; Rumsey *v.* Boutwell, 61 Hun 165, 15 N. Y. Supp. 765; Bramfield *v.* Hill, 54 Hun 638, 8 N. Y. Supp. 143; Ract *v.* Duviard-Dime, 51 Hun 639, 4 N. Y. Supp. 156; De Cernea *v.* Cornell, 3 Misc. 241, 22 N. Y. Supp. 941; Posthoff *v.* Schreiber, 47 Hun 593; Finn *v.* Peterson, 24 Misc. 737, 53 N. Y. Supp. 787; Nicholson *v.* Conner, 8 Daly 212; Case *v.* Hitchins, 14 N. Y. St. Rep. 274.

South Dakota. — Blount *v.* Medbery, 16 S. D. 562, 94 N. W. 428; McGill *v.* Young, 16 S. D. 360, 92 N. W. 1066.

Texas. — Pridgen *v.* Walker, 40 Tex. 135.

See cases in note 44 *supra.*

55. *United States.* — Sonnentheil *v.* Christian Moerlein Brew. Co., 172 U. S. 401, *affirming* 75 Fed. 350, 21 C. C. A. 390, 41 U. S. App. 491.

New York. — Honegger *v.* Wettstein, 94 N. Y. 252; McNulty *v.* Hurd, 86 N. Y. 547; Albrecht *v.* New York Cent. & H. R. R. Co., 54 App. Div. 636, 66 N. Y. Supp. 605, *affirmed* 166 N. Y. 622, 59 N. E. 1118; Douai *v.* Lutjens, 21 App. 254, 47 N. Y. Supp. 659; Brush *v.* Long Island R. Co., 10 App. Div. 535, 42 N. Y. Supp. 103; Hoes *v.* Third Ave. R. Co., 5 App. Div 151, 39 N. Y. Supp. 40; Kingsland Land Co. *v.* Newman, 1 App. Div. 1, 36 N. Y. Supp. 960; Roseberry *v.* Nixon, 58 Hun 121, 11 N. Y. Supp. 523; Finn *v.* Peterson, 24 Misc. 737, 53 N. Y. Supp. 787; Newman *v.* Clapp, 20 Misc. 67, 44 N. Y. Supp. 439; Newcombe *v.* Hyman, 16 Misc. 25, 37 N. Y. Supp. 649; Coyle *v.* Metropolitan L. Ins. Co., 5 Misc. 586, 25 N. Y. Supp. 90; Wilson *v.* Wyandance Springs Improvement Co., 4 Misc. 605, 24 N. Y. Supp. 557; McManus *v.* Woolverton, 19 N. Y. Supp. 545; A. B. Cleveland Co. *v.* A. C. Nellis Co., 18 N. Y. Supp. 448; Gair *v.* Cohen, 26 Misc. 801, 56 N. Y. Supp. 180.

Texas. — Franklin Life Ins. Co. *v.* Villeneuve, 29 Tex. Civ. App. 128, 68 S. W. 203.

56. *Illinois.* — North Chicago St. R. Co. *v.* Anderson, 176 Ill. 635, 52 N. E. 21; Morton *v.* O'Connor, 85 Ill. App. 273.

Louisiana. — Marks *v.* New Orleans Cold Storage Co., 107 La. 172, 31 So. 671, 57 L. R. A. 271.

New York. — Second Nat. Bank *v.* Weston, 172 N. Y. 250, 64 N. E. 949; Hull *v.* Littauer, 162 N. Y. 569, 57 N. E. 102; Kelly *v.* Burroughs, 102 N. Y. 93, 6 N. E. 109; Honegger *v.* Wettstein, 94 N. Y. 252; Van Nostrand *v.* Hubbard, 35 App. Div. 201, 54 N. Y. Supp. 739; Denton *v.* Carroll, 4 App. Div. 532, 40 N. Y. Supp. 19; Newcombe *v.* Hyman, 16 Misc.

interested witness[57] has been denied. Probably most courts would agree that, where such testimony is corroborated by other evidence, it should not be rejected.[58]

d. *Transactions With Deceased Persons.* — The uncorroborated testimony of a party or interested witness, when competent, should be weighed with caution when offered to establish a claim against the estate or representatives of a deceased person or to prove a transaction with persons since deceased.[59]

e. *Acceptance of Part of Testimony.* — When a party testifies either for himself or at the instance of his adversary, the jury is authorized, ordinarily, to accept so much of his testimony as is against interest and to reject the remainder.[60] The jury in a criminal action may believe only such part of the defendant's testimony as is against interest.[61]

III. PROOF OF INTEREST.

1. How Proved. — The interest of a witness in the result of an action may be proved by the testimony of other witnesses or by

25, 37 N. Y. Supp. 649; Gardner *v.* Baer, 26 Misc. 181, 56 N. Y. Supp. 1096. *Compare* Roberts *v.* Gee, 15 Barb. 449.

Wisconsin. — Burnham *v.* Norton, 100 Wis. 8, 75 N. W. 304.

See also the North Star, 44 Fed. 492; Jobes *v.* Nelson (N. J. Eq.), 36 Atl. 688; and cases in note 45 *supra.*

57. *Georgia.* — Western & A. R. Co. *v.* Beason, 112 Ga. 553, 37 S. E. 863; Georgia & F. R. Co. *v.* Sanders, 111 Ga. 128, 36 S. E. 458; Georgia S. & F. R. Co. *v.* Thompson, 111 Ga. 731, 36 S. E. 945; South Carolina & G. R. Co. *v.* Powell, 108 Ga. 437, 33 S. E. 994; Morris *v.* Orient Ins. Co., 106 Ga. 472, 33 S. E. 430; Brunswick & W. R. Co. *v.* Wiggins, 113 Ga. 842, 39 S. E. 551, 61 L. R. A. 513; Georgia R. & Bkg. Co. *v.* Wall, 80 Ga. 202, 7 S. E. 639.

Illinois. — Morton *v.* O'Connor, 85 Ill. App. 273.

Louisiana. — Marks *v.* New Orleans Cold Storage Co., 107 La. 172, 31 So. 671, 57 L. R. A. 271.

New York. — Lomer *v.* Meeker, 25 N. Y. 361; Johnson *v.* Doll, 11 Misc. 345, 32 N. Y. Supp. 132.

Wisconsin. — Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

58. Denton *v.* Carroll, 4 App. Div. 532, 40 N. Y. Supp. 19.

59. Curtice *v.* Crawford County Bank, 110 Fed. 830; Harman *v.* Harman, 17 C. C. A. 479, 70 Fed. 894; The Columbia, 27 Fed. 704; Andrews *v.* Hyde, 3 Cliff. 516, 1 Fed. Cas. No. 377; Cutler *v.* Succession of Collins, 37 La. Ann. 95; Kavanagh *v.* Wilson, 70 N. Y. 177. See also Cornell *v.* Barnes, 26 Wis. 473.

60. Hardee *v.* Williams, 30 Ga. 921; Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452; Cross *v.* Cross, 108 N. Y. 628, 15 N. E. 333; Becker *v.* Koch, 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515; New York Ice Co. *v.* Cousins, 23 App. Div. 560, 48 N. Y. Supp. 799; Newman *v.* Clapp, 20 Misc. 67, 44 N. Y. Supp. 439; Schwabeland *v.* Holahan, 10 Misc. 176, 30 N. Y. Supp. 910; Roberts *v.* Gee, 15 Barb. (N. Y.) 449; Pridgen *v.* Walker, 40 Tex. 135.

A party who calls his adversary as a witness is entitled to the full benefit of facts testified to by the latter. Ferguson *v.* Daughtrey, 94 Va. 308, 26 S. E. 822.

It has been held that the uncontradicted testimony of a party called as a witness by his adversary cannot be disregarded. Hankinson *v.* Vantine, 152 N. Y. 20, 46 N. E. 292.

61. Howard *v.* State, 34 Ark. 433; State *v.* Turner, 110 Mo. 196, 19 S. W. 645; State *v.* Brown, 104 Mo. 365, 16 S. W. 406; State *v.* Brooks, 99 Mo. 137, 12 S. W. 633.

documentary evidence.[62] But the declarations of a witness, not a party, out of court are hearsay, and are not admissible to establish his interest where he has not been questioned with respect thereto.[63] When a witness, on cross-examination, denies having made declarations tending to show his interest in the action, or denies the existence of such interest, the making of such declarations[64] or the existence of such interest,[65] may be proved by other evidence. The interest of a witness is usually shown by cross-examining him with respect to it.[66] The latitude of the cross-examination rests

62. *Illinois.* — Aurora *v.* Scott, 82 Ill. App. 616.

Indiana. — Litten *v.* Wright School Twp., 127 Ind. 81, 26 N. E. 567.

Kansas. — Craft *v.* State, 3 Kan. 450.

Missouri. — Waddingham *v.* Hulett, 92 Mo. 528, 5 S. W. 27.

Pennsylvania. — Braden *v.* McCleary, 183 Pa. St. 192, 38 Atl. 623.

Texas. — Watts *v.* State, 18 Tex. App. 381; Trinity County Lumb. Co. *v.* Denham, 88 Tex. 203, 30 S. W. 856.

Vermont. — State *v.* Burpee, 65 Vt. 1, 25 Atl. 964, 36 Ann. St. Rep. 775, 19 L. R. A. 145.

63. Taylor *v.* United States, 89 Fed. 954, 32 C. C. A. 449, 61 U. S. App. 169; Brown *v.* Prude, 97 Ala. 639, 11 So. 838; Weaver *v.* Traylor, 5 Ala. 564; Erickson *v.* Bell, 53 Iowa 627, 6 N. W. 19, 36 Am. Rep. 246; Misland *v.* Boynton, 79 N. Y. 630.

64. Geary *v.* People, 22 Mich. 220; Illinois Cent. R. Co. *v.* Haynes, 64 Miss. 604, 1 So. 765; *In re* Snelling's Will, 136 N. Y. 515, 32 N. E. 1006; White *v.* Houston & T. C. R. Co. (Tex. Civ. App.), 46 S. W. 382; Pyne *v.* Broadway & Seventh Ave. R. Co., 19 N. Y. Supp. 217, 46 N. Y. St. Rep. 662, *affirmed* 138 N. Y. 627, 33 N. E. 1083. *Compare* McCallan *v.* Brooklyn City R. Co., 48 Hun 340, 1 N. Y. Supp. 289; Kramer *v.* Thomson-Houston Elec. L. Co., 95 N. C. 277; State *v.* Patterson, 24 N. C. 346, 38 Am. Dec. 699.

See article "Impeachment of Witnesses," Vol. VII.

65. Geary *v.* People, 22 Mich. 220; White *v.* Houston & T. C. R. Co. (Tex. Civ. App.), 46 S. W. 382.

66. *Alabama.* — Postal Tel. Cable Co. *v.* Hulsey, 115 Ala. 193, 22 So. 894; Alabama G. S. R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169; Drum *v.* Harrison, 83 Ala. 384, 3 So. 715; Long *v.* Booe, 106 Ala. 570, 17 So. 716; Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; Preferred Accident Ins. Co. *v.* Gray, 123 Ala. 482, 26 So. 517; Louisville & N. R. Co. *v.* York, 128 Ala. 305, 30 So. 676; Costello *v.* State, 130 Ala. 143, 30 So. 376; Stahmer *v.* State, 125 Ala. 72, 27 So. 311; Mason *v.* Alabama Iron Co., 73 Ala. 270; Bessemer Land & Improvement Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26; Winston *v.* Cox, 38 Ala. 268.

California. — Gould *v.* Stafford, 91 Cal. 146, 27 Pac. 543; People *v.* Langtree, 64 Cal. 256, 30 Pac. 813; People *v.* Dillwood (Cal.), 39 Pac. 438.

Colorado. — United Oil Co. *v.* Miller, 19 Colo. App. 46, 73 Pac. 627.

Connecticut. — Dore *v.* Babcock, 72 Conn. 408, 44 Atl. 736; Nesbit *v.* Crosby, 74 Conn. 554, 51 Atl. 550.

Florida. — Jacksonville, T. & K. W. R. Co., 26 Fla. 344, 7 So. 845.

Georgia. — Floyd *v.* Wallace, 31 Ga. 688.

Illinois. — Bevan *v.* Atlanta Nat. Bank, 142 Ill. 302, 31 N. E. 679, *affirming* 39 Ill. App. 577; Kennedy *v.* Murphy, 112 Ill. App. 607; Illinois Cent. R. Co. *v.* Burke, 112 Ill. App. 415; Marschall *v.* Laughran, 47 Ill. App. 29; Elgin *v.* Eaton, 2 Ill. App. 90.

Indiana. — Barnett *v.* Feary, 101 Ind. 95; Chicago & E. R. Co. *v.* Thomas (Ind.), 55 N. E. 861.

Iowa. — State *v.* Calkins, 73 Iowa 128, 34 N. W. 777; Harrington *v.* Hamburg, 85 Iowa 272, 52 N. W. 201; Shannon *v.* Tama City, 74 Iowa 22, 36 N. W. 776; Aultman, Miller & Co. *v.* Nilson, 112 Iowa 634, 84 N. W. 692.

Kansas. — Atchison, T. & S. F. R. Co. *v.* Blackshire, 10 Kan. 477.

largely in the discretion of the trial court.[67] It has generally been held proper to cross-examine an employe or agent as to the amount of his compensation,[68] and to cross-examine an attorney as to the amount and contingency of his fee.[69]

2. By Whom Proved. — Where a witness, on cross-examination, has testified against the party calling him, the latter is not entitled to impeach the witness by re-examining him to show his interest

Michigan. — Howard *v.* Patrick, 43 Mich. 121, 5 N. W. 84; Crippen *v.* People, 8 Mich. 117; Totten *v.* Burhans, 103 Mich. 6, 61 N. W. 58.

Mississippi. — Archer *v.* Helm, 70 Miss. 874, 12 So. 702.

Missouri. — Koenig *v.* Union Depot R. Co., 173 Mo. 698, 73 S. W. 637; Gessley *v.* Missouri Pac. R. Co., 32 Mo. App. 413.

Nebraska. — Blenkiron *v.* State, 40 Neb. 11, 58 N. W. 587; Olive *v.* State, 11 Neb. 1, 7 N. W. 444; New Omaha Thomson-Houston Elec. L. Co. *v.* Johnson, 67 Neb. 393, 93 N. W. 778.

New Jersey. — Haver *v.* Cent. R. Co. of New Jersey (N. J.), 45 Atl. 593; Delaware, L. & W. R. Co. *v.* Dailey, 37 N. J. L. 526.

New York. — People *v.* Parker, 137 N. Y. 535, 32 N. E. 1013; Hunter *v.* Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Cady *v.* Bradshaw, 116 N. Y. 188, 22 N. E. 371, 5 L. R. A. 557; Meltzer *v.* Doll, 91 N. Y. 365; People *v.* Glennon, 175 N. Y. 45, 67 N. E. 125; Vaughn *v.* Westover, 4 Thomp. & C. 316; Goodman *v.* Myers, 11 Misc. 360, 32 N. Y. Supp. 239; Hoy *v.* Lynch, 2 Sandf. 328; Strawbridge *v.* Vandenburgh 57 Hun 589, 10 N. Y. Supp. 610; Pyne *v.* Broadway & Seventh Ave. R. Co., 46 N. Y. St. Rep. 662, 19 N. Y. Supp. 217, *affirmed* 138 N. Y. 627, 33 N. E. 1083; H. E. Taylor & Co. *v.* Metropolitan St. R. Co., 84 N. Y. Supp. 282; Renoux *v.* Geney, 32 Misc. 702, 65 N. Y. Supp. 508; Sissinch *v.* Bernhardt, 29 Misc. 652, 61 N. Y. Supp. 107.

North Dakota. — State *v.* Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

Ohio. — Allen *v.* State, 10 Ohio St. 287.

South Dakota. — Holdridge *v.* Lee, 3 S. D. 134, 52 N. W. 265; Hanson *v.* Red Rock Twp., 7 S. D. 38, 63 N. W. 156.

Texas. — Wentworth *v.* Crawford, 11 Tex. 127; Hinds *v.* State, 11 Tex. App. 238.

Vermont. — Vermont Farm Mach. Co. *v.* Batchelder, 68 Vt. 430, 35 Atl. 378.

West Virginia. — Moats *v.* Rymer, 18 W. Va. 642, 41 Am. Rep. 703.

Wisconsin. — Kellogg *v.* Nelson, 5 Wis. 125; Phoenix Ins. Co. *v.* Sholes, 20 Wis. 35; Suit *v.* Bonnell, 33 Wis. 180; Klatt *v.* N. C. Foster Lumb. Co. 97 Wis. 641, 73 N. W. 563.

The interest of the witness as he understands it, though he may be mistaken, is the proper subject of inquiry. Marschall *v.* Laughran, 47 Ill. App. 29; Suit *v.* Bonnell, 33 Wis. 180.

67. Winston *v.* Cox, 38 Ala. 268; Lustig *v.* New York, L. E. & W. R. Co., 65 Hun 547, 20 N. Y. Supp. 477; King *v.* New York Cent. & H. R. R. Co., 72 N. Y. 607; H. E. Taylor & Co. *v.* Metropolitan St. R. Co., 84 N. Y. Supp. 282; Holdridge *v.* Lee, 3 S. D. 134, 52 N. W. 265; Vermont Farm Mach. Co. *v* Batchelder, 68 Vt. 430, 35 Atl. 378.

68. Kerfoot *v.* Chicago, 195 Ill. 229, 63 N. E. 101; State *v.* Shew, 8 Kan. App. 679, 57 Pac. 137; Tennessee Coal, Iron & R. Co. *v.* Haley, 85 Fed. 534, 29 C. C. A. 328. See also Vermont Farm Mach. Co. *v.* Batchelder, 68 Vt. 430, 35 Atl. 378 (allowance of such inquiry rests in discretion of court). *Contra* Mason *v.* Alabama Iron Co. 73 Ala. 270.

69. Harrington *v.* Hamburg, 85 Iowa 272, 52 N. W. 201; New Omaha Thomson-Houston Elec. L. Co. *v.* Johnson, 67 Neb. 393, 93 N. W. 778; Blenkiron *v.* State, 40 Neb. 11, 58 N. W. 587; Moats *v.* Rymer, 18 W. Va. 642. See also King *v.* York Cent. & H. R. Co., 72 N. Y. 607. *Compare* Beauchamp *v.* State, 6 Blackf. (Ind.) 299.

in the result of the action,[70] or by offering other evidence of his interest.[71] But where the cross-examination of a witness has disclosed an apparent interest, the party calling the witness may re-examine him as to such interest.[72] The party calling a witness may explain or disprove the latter's apparent interest by any competent evidence.[73]

70. Fairly *v.* Fairly, 38 Miss. 280. See also Fulton Bank *v.* Stafford, 2 Wend. (N. Y.) 483. *Compare* Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238.

71. *In re* Mellen's Estate, 56 Hun 553, 9 N. Y. Supp. 929.

72. Mitchell *v.* State, 94 Ala. 68, 10 So. 518; People *v.* Kuches, 120 Cal. 566, 52 Pac. 1002; Illinois Cent. R. Co. *v.* Haynes, 64 Miss. 604, 1 So. 765; Oxsheer *v.* State, 38 Tex. Crim. 499, 43 S. W. 335; Tomson *v.* Heidenheimer, 16 Tex. Civ. App. 114, 40 S. W. 425.

73. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; Gulf, C. & S. F. R. Co. *v.* Mitchell, 21 Tex. Civ. App. 463, 51 S. W. 662; Ward *v.* Brown, 53 W. Va. 227, 44 S. E. 488.

PARTITION.

By Clark Ross Mahan.

CROSS-REFERENCES:

Descent and Distribution;
Executors and Administrators.

I. VOLUNTARY PARTITION.

1. Presumptions and Burden of Proof. — A. In General. — A voluntary partition will not be presumed in the absence of any evidence; but when any fact is in issue the party who asserts the fact has the burden of proving it.[1]

B. Presumption From Possession in Severalty. — The presumption that there has been a partition may arise from the length of possession in severalty of a portion of the premises by one of the cotenants;[2] but it has been held that in order to justify such presumption the possession must be shown to have been exclusive,

1. Hurley *v.* O'Neill (Mont.), 79 Pac. 242.

A Voluntary Partition, Not Evidenced by Writing, must, in order to defeat a right to partition under the law, be clearly proven, and must be followed by actual possession in severalty of the several parcels, pursuant to such voluntary partition. Patterson *v.* Martin, 33 W. Va. 494, 10 S. E. 817.

Mere Severance of Possession Between Tenants in Common may be inferred from far less proof than would be required to show a sale of land to a stranger. Tomlin *v.* Hilyard, 43 Ill. 300, 92 Am. Dec. 118.

When the Evidence Shows That Part of the Lands Have Been Divided, the division being evidenced by deeds between the parties, but there is no evidence of any kind showing a division of the residue, the presumption is that no division of the residue was made. McGuire *v.* Ramsey, 9 Ark. 518. The court said: "The utter absence of proof upon this point raises a most violent presumption against the idea that any division was ever made between the parties. The circumstance that in the division of their other real estate they were careful to preserve written evidence of their respective rights is strong, if not conclusive, in connection with other pregnant circumstances that the residue of the town tract remained undivided at the period of their deaths."

2. As, for example, the possession by a devisee and those claiming under him, for more than twenty years, of a portion of lands devised to him and others as tenants in common with authority and directions for a voluntary partition. Goodman *v.* Winter, 64 Ala. 410, 38 Am. Rep. 13.

See also Allen *v.* Seawell, 70 Fed. 561, 17 C. C. A. 217, where the court said: "We think, in the absence of evidence to the contrary, the fact that cotenants 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 acts of exclusive ownership and control over the respective shares, without objection or claim on the part of other cotenants, raises a strong presumption of fact that there was an actual division by agreement, express or tacit, of the land, between the cotenants, according to the lines of exclusive occupancy, and that the defendants below were entitled to have the matter presented to the jury in this light. Between the time of trial and the date of the alleged partition there was an interval of upward of seventy years. In such a case it is obviously impossible to introduce direct evidence of a parol express agreement to partition. The proof must necessarily rest upon the circumstances, and no circumstances could be stronger than exclusive possession of the several cotenants of portions of the land."

Presumption of Partition Arises From Long Possession in Severalty and the fact that one of the distinct portions had long been known and called by the name of one of the tenants in common, there being no evidence of any claim of a tenancy in common for more than fifty years. Jackson *v.* Miller, 6 Wend. (N. Y.) 228, 21 Am. Dec. 316. See also Grady *v.* Ward, 20 Barb. (N. Y.) 543; Bogardus *v.* Trinity Church

adverse and with a denial of the right of the other tenant in common.[3]

C. Execution of Partition Deeds. — After the lapse of a great period of time after a partition, and the acquiescence of all the parties therein during that time, without question as to its validity, it will be presumed, if necessary to support the partition, that partition deeds were executed by the parties in interest.[4]

D. Inequality as Ground for Setting Aside Partition. Inequality of value as ground for setting aside a voluntary partition is not established by mere opinions of witnesses where the other evidence in the case does not establish fraud on the part of the defendant, or that the plaintiff labored under any mistake or ignorance of fact.[5]

2. Mode of Proof. — A. Written Evidence. — The rules of evidence applicable to written instruments generally are equally applicable when the purpose is to establish a voluntary partition by the production of written evidence.[6]

B. Parol Evidence. — Of course where an agreement for partition of lands may be made by parol, parol evidence may be received to establish the agreement and its execution.[7] In some

4 Sandf. Ch. (N. Y.) 633, 732; Russell *v.* Marks, 3 Metc. (Ky.) 37, wherein it was held, however, that evidence that a person had for a number of years acted as agent for one of the parties, and in that capacity had taken some control over and management of the land in controversy, but had never taken any part of it into actual possession, was not enough.

3. Lloyd *v.* Gordon, 2 H. & McH. (Md.) 254. See also Van Bibber *v.* Frazier, 17 Md. 436, where it was held that when a tenant in common enters upon the land his entry, possession and acts of ownership being lawful, no inference of adverse possession will arise; that the possession of one tenant in common under such circumstances is presumed to be the possession of the other, and to rebut this presumption an actual ouster must be proved.

4. Lavalle *v.* Strobel, 89 Ill. 370. See also White *v.* Loring, 24 Pick. (Mass.) 319; Jackson *v.* Moore, 13 Johns. (N. Y.) 513, 7 Am. Dec. 398; Hepburn *v.* Auld, 5 Cranch (U. S.) 262.

Compare Porter *v.* Perkins, 5 Mass. 233, 4 Am. Dec. 52, where it was held that the mere fact of the several possession by the tenants in common will not of itself warrant the inference that the partition was by deed.

5. Hancock *v.* Craddock, 2 B. Mon. (Ky.) 389.

6. See articles "Deeds," "Documentary Evidence" and "Private Writings."

In Wildey *v.* Bonney, 31 Miss. 644, it was held that although a judicial proceeding for the partition of lands between coparceners may be void for uncertainty in the designation of the parcels allotted to the several parties, yet if it be referred to in a parol agreement made between them to divide the land it may be introduced in evidence as a private writing, being part of the *res gestae*.

7. Lavalle *v.* Strobel, 89 Ill. 370; Wildey *v.* Bonney, 31 Miss. 644.

In Illinois it has been repeatedly held that a parol partition, if followed by possession by each tenant in common, is sufficient to protect each in his several share, and, although it does not pass the legal title, it protects the possession, and a conveyance will be decreed in equity; and where the possession under such a partition, has been of

jurisdictions, however, an agreement for the partition of lands is required by the statute of frauds to be in writing; and in such case evidence of the agreement must conform to the rule for proving other agreements so required to be in writing.[8] There are cases, however, holding that even where an agreement for partition must be in writing because of the statute of frauds, parol evidence may nevertheless be received when it tends directly to establish an executed partition, the written evidence of which cannot be produced.[9]

C. Possession in Severalty. — It is proper to receive evidence of a several occupation of distinct portions of the land by each of the tenants for a long period of time.[10]

such a length of time as to warrant the presumption that a conveyance was made, the tenant will be held to be vested with the legal title. See Manly *v.* Pettee, 38 Ill. 128; Tomlin *v.* Hilyard, 43 Ill. 300, 92 Am. Dec. 118; Nichols *v.* Padfield, 77 Ill. 253.

In Coon *v.* Cronk, 131 Ind. 44, 30 N. E. 882, the defendant claimed that there had been a parol partition of the lands sought to be partitioned in which the plaintiff had participated, that a written contract was made evidencing the terms of the partition, that deeds were subsequently executed confirming it, and that possession was taken and thereafter held under the partition thus made. Neither the written contract nor the deeds were in evidence, but evidence was admitted tending to show the execution of both, and although the evidence was far from being satisfactory the court refused to interfere with the decree denying the partition.

In Texas parol agreement for the partition of lands is valid. It is not within the statute of frauds. It is not necessary that it shall be executed by taking possession to render it valid. It is to be proved as any other contract. Glasscock *v.* Hughes, 55 Tex. 461.

In Tuffree *v.* Polhemus, 108 Cal. 670, 41 Pac. 806, the evidence showed that the cotenants entered into a verbal agreement that they would each select a section from among the lands comprising this immense tract, and that such selection, so made should be owned in severalty by the person selecting. Under this agreement Polhemus selected a section which he gave to his daughter, the plaintiff herein. She entered into possession thereof, claiming the same; had the exclusive possession for more than fifteen years; had cultivated the same, and made improvements thereon to the value of seven thousand dollars; and said cultivation and making of improvements were known to Robinson and all the cotenants. It was held that the evidence showed clearly an executed parol partition.

8. In Wood *v.* Griffin, 46 N. H. 230, it was held that evidence of a verbal partition was rightly rejected.

9. White *v.* Loring, 24 Pick. (Mass.) 319; Duncan *v.* Sylvester, 16 Me. 388; Craig *v.* Taylor, 6 B. Mon. (Ky.) 457. *Compare* Woodhull *v.* Longstreet, 18 N. J. L. 405.

In Gusman *v.* Hearsey, 26 La. Ann. 251, it was held that the partition of succession property can be considered a no more solemn act than the transfer of real property, which may be proven by propounding interrogatories, as was done in that case, and that accordingly an exception to the interrogatories on the ground that no act of partition can be proved under the law except by a written act of partition signed and executed by the parties thereto was not well taken.

10. Tomlin *v.* Hilyard, 43 Ill. 300, 92 Am. Dec. 118. And see *supra* cases cited in note 2.

In Adie *v.* Cornwell, 3 T. B. Mon. (Ky.) 276, where one executor was devisee in common with the other executors, it was held that his hold-

D. Acts and Declarations. — Where it is impossible directly to prove an agreement for partition, resort must be had to evidence of conduct and declarations.[11]

E. Reputation. — In one case, at least, evidence that a distinct portion of the lands had been known in the neighborhood as belonging to one who claimed it under a partition was received.[12]

F. Tax Duplicates. — Tax duplicates showing that distinct portions of the lands were taxed to the different tenants to whom such portions were alleged to have been set apart are competent evidence to show the division.[13]

II. JUDICIAL PARTITION.

1. Title or Estate to Support Action. — A. Presumptions and Burden of Proof. — In the absence of a statute providing otherwise, the petitioner must show a clear and undisputed title to an undivided interest or share in the lands sought to be partitioned.[14]

ing part of the property in severalty for many years was evidence that there was a partition and that all had assented.

11. As, for example, when a long time has elapsed and the parties are dead. Hamilton *v.* Phillips, 83 Ga. 293, 9 S. E. 906; Markoe *v.* Wakeman, 107 Ill. 251 (giving deed to distinct portion of the land; not paying taxes on the other portion of the land, other facts, affirmative and negative).

Where the Transaction Is of Ancient Date and the parties to it are dead, and it may be impossible from lapse of time to give evidence of the very making of the agreement, a resort is necessarily had to proof by circumstances and inferences from the acts of the parties and their conduct and acquiescence in such acts as were consistent only with the fact that a partition had been made. Whatever could reasonably throw light upon the matter or from which an inference might or might not be drawn to establish the fact ought to be received in evidence. Glasscock *v.* Hughes, 55 Tex. 461.

Declarations of a Deceased Tenant in Common that he had made a parol partition with his cotenant, and subsequently that he had received from his cotenant a deed of partition, are admissible in evidence against his heirs in support of the presumption that he gave a corresponding deed to his cotenant. White *v.* Loring, 24 Pick. (Mass.) 319.

12. Russell *v.* Marks, 3 Metc. (Ky.) 37. (Ky.) 37. Whether or not this evidence was admitted over objection does not, however, appear.

13. McSweeney *v.* McMillen, 96 Ind. 298.

In Russell *v.* Marks, 3 Metc. (Ky.) 37, as evidence that the partition had been made and acquiesced in by the parties interested it was proved that during a certain year the land claimed to have been set off was listed for taxation by the party claiming it to have been so set apart, and that taxes upon the same had subsequently to that year been paid by him and his heirs.

14. *Alabama.* — Arnett *v.* Bailey, 60 Ala. 435.

Maine. — Gilman *v.* Stetson, 16 Me. 124; Pierce *v.* Rollins, 83 Me. 172, 22 Atl. 110; Nash *v.* Simpson, 78 Me. 142.

Maryland. — Warfield *v.* Gambrill, 1 Gill & J. 503.

Mississippi. — Ingram *v.* War, 5 Smed. & M. 746; Hassam *v.* Day, 39 Miss. 392, 77 Am. Dec. 684.

Missouri. — Millington *v.* Millington, 7 Mo. 446.

New Jersey. — Hay *v.* Estell, 18 N. J. Eq. 251.

Virginia. — Stuart *v.* Coalter, 4 Rand. 74, 15 Am. Dec. 731; Straughan *v.* Wright, 4 Rand. 493.

West Virginia. — Hudson *v.* Put-

Where All the Parties to the Partition Suit Claim Through a Common Source, proof of title in the person under whom they claim is not necessary.[15]

Partition of Real Estate of an Intestate should not be decreed unless it is shown that the debts of the intestate are paid, or that the personal estate in the hands of the administrator is sufficient for that purpose, or unless due provision is made therefor in the decree.[16]

B. Mode of Proof. — For the mode of proving title to real estate, see articles "Deeds," "Ownership," and "Title."

2. Possession To Support Action. — It is not incumbent upon the complainant in partition to show that he is in actual possession of

ney, 14 W. Va. 561; Ransom *v.* High, 37 W. Va. 838, 17 S. E. 413, 38 Am. St. Rep. 67.

In Harman *v.* Kelley, 14 Ohio 502, 45 Am. Dec. 552, where the petitioner claimed the right to prosecute the suit on the ground that he owned an undivided interest in the entire premises, and in common with certain others who owned also the residue of the undivided interest, it was held that in order to support his case proof of the alleged joint ownership by the parties named was indispensable.

It is not enough to show title in severalty to a distinct portion. Russell *v.* Beasley, 72 Ala. 190.

In Hicks *v.* Chapin, 67 Ill. 236, the only evidence as to the title of the parties was the oral statements of a witness, corroborated by the master's report as to his examination of the records. It was held that the evidence was incompetent and wholly insufficient.

In Hamilton *v.* Morris, 7 Paige (N. Y.) 39, a partition suit where a decree *pro confesso* was taken against unknown owners of certain undivided shares of the premises, it was held that the master should require the complainant to produce abstracts of his title as a tenant in common in the premises, and to trace it back to the common source of title of the several tenants in common, and that the master should, so far as practicable, give an abstract of the conveyance of the several undivided shares or interests of the parties from the time the several shares were united in one common source. See also Keil *v.* West, 21 Fla. 508.

In Savery *v.* Taylor, 102 Mass. 509, it was held that partition could not be decreed merely on proof that the petitioner was a descendant of one who owned an undivided portion of the land, there being no evidence to show how many descendants there were, or that he was the only descendant. The court said that proof merely that the petitioner was in the line of descent from the ancestor through whom he claimed to derive title, even if uncontrolled, would not, so far as the law of descent and distribution in Massachusetts applied, show that he inherited the whole title of that ancestor. "In the absence of all evidence to show how many descendants there are of the same ancestor in equal degree, it cannot be judicially determined that the petitioner is entitled to the whole or to one-third of the whole descendible interest. We are aware of no presumption of law or of fact that warrants the inference that parties who are shown to have one child or three children died leaving no more. . . . It was incumbent on the petitioner to make such proof of the extent of his title as would enable the court to render a proper judgment awarding the specific share which should be set out to him. Having failed to do this the court rightly held that he had not entitled himself to have partition."

15. O'Meilia *v.* Mullarky, 124 Ill. 506, 17 N. E. 36 (where it was also admitted in the answer that such person was seized in fee of the premises); Walker *v.* Howard, 34 Tex. 478; Hannon *v.* Hannah, 9 Gratt. (Va.) 146.

16. Williams *v.* Mallory, 33 S. C. 601, 11 S. E. 1068.

the premises; it is sufficient to show constructive possession, or that he is entitled to the immediate possession thereof.[17]

3. Defenses. — A. In General. — The defendant may show the non-existence of title or estate in the petitioner;[18] as, for example, that the petitioner has conveyed to another whatever estate he may have held.[19]

17. *California.* — Martin *v.* Walker, 58 Cal. 590; Noce *v.* Daveggio, 4 Pac. 495.

Florida. — Keil *v.* West, 21 Fla. 508.

Kansas. — Scarborough *v.* Smith, 18 Kan. 399.

Maine. — Call *v.* Barker, 12 Me. 320.

Massachusetts. — Wood *v.* LeBaron, 8 Cush. 471; Marshall *v.* Crehore, 13 Metc. 462.

Missouri. — Rozier *v.* Griffith, 31 Mo. 171.

New Hampshire. — Miller *v.* Dennett, 6 N. H. 109.

Vermont. — Hawley *v.* Soper, 18 Vt. 320.

Compare Adam *v.* Ames Iron Co., 24 Conn. 230.

"As between coparceners and others claiming in privity, the entry and possession of one is always presumed to be in maintenance of the right of all; and this presumption will prevail in favor of all until some notorious act of ouster or adverse possession is brought home to the knowledge of others, or it be clearly shown that he has become the owner by purchase. A clear, positive and continued disclaimer of title, and the assertion of an adverse right, brought home to the knowledge of the other coparceners, are indispensable, although great lapse of time, with other circumstances, may warrant the presumption of a disseisin or ouster by one coparcener or other joint owner." Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804.

Where the prime object of the bill is to obtain partition of the property, and the cancellation of certain conveyances therein mentioned as clouds upon the title is only incidental and designed to make the partition more effective, proof of possession in the complainant is not necessary. Gore *v.* Dickinson, 98 Ala. 363, 11 So. 743, 39 Am. St. Rep. 67.

It is not enough for him to show a right of entry for condition broken. Whitten *v.* Whitten, 36 N. H. 326.

Under the Wisconsin Statute it is incumbent upon the petitioner to show actual or constructive possession of the premises, or a right to the same. Morse *v.* Stockman, 65 Wis. 36, 26 N. W. 176.

In New York it has been held that in a suit for partition brought before the provisions of the Code of Civil Procedure with reference to such actions went into effect it was not necessary to show that the parties or those from whom they derived title were ever in possession; that proof of ownership in fee was all that was necessary, and a constructive possession such as the law draws to the title was sufficient. Wainman *v.* Hampton, 110 N. Y. 429, 18 N. E. 234. See also Sullivan *v.* Sullivan, 66 N. Y. 37.

Under the Minnesota Statute it was held that there was nothing in the statute making proof of actual possession of the premises or a right to such possession necessary; that on the contrary the necessary implication was that such proof is not necessary. Cook *v.* Webb, 19 Minn. 167.

18. Haines *v.* Haines, 6 Md. 435.

Claim of Title to Whole of Premises. — In a suit for partition, evidence that the defendant had purchased the land from the complainant's ancestor; that in pursuance of a decree for specific performance by him a conveyance had been regularly made to him, and that the purchase money paid into court had been taken by the ancestor's legal representative as assets of the estate, is competent and sufficient to defeat complainant's right to partition. Daggy *v.* Ash, 23 Ind. 338.

19. Nichols *v.* Padfield, 77 Ill. 253.

Declarations of Ancestor. — Where the complainant in partition claims title by descent, evidence of declarations by his ancestor under which he claims, to the effect that the ancestor had no title, is admissible against the complainant.[20]

B. Outstanding Title. — The defendants in partition may set up an outstanding title and show that they are claiming under it.[21]

C. Outstanding Adverse Title. — The right to maintain a suit for partition may be defeated by showing that the interest claimed by the petitioner is also claimed by another, who is in possession, holding as owner and adversely;[22] or by showing title in the defendant by adverse possession.[23] But where the defendant claims title by adverse possession he must show the possession to have been adverse to the title set up by the complainant.[24]

D. Outstanding Incumbrances. — The right to partition in an otherwise proper case cannot be defeated by evidence showing

In Hamby Mt. Gold Mines *v.* Calhoun Land & Min. Co., 83 Ga. 311, 9 S. E. 831, it was held proper to permit the defendant to show that, subsequent to the commencement of the suit, the petitioner had sold and conveyed his interest in the property to a third person. The proceedings were, however, not vacated; the purchaser was made an additional party plaintiff.

20. McSweeney *v.* McMillen, 96 Ind. 298.

21. Walker *v.* Howard, 34 Tex. 478.

See also Burleson *v.* Burleson, 28 Tex. 383, where the court, *quoting* from Portis *v.* Hill, 14 Tex. 69, said: "If this were an action of ejectment or trespass to try title it would be sufficient to defeat the plaintiff's action to show an outstanding paramount title in a third person; but, being an equitable proceeding, it was perhaps necessary for the defendants, to enable them to defeat the plaintiff's title on the ground of a resulting trust or an equitable title out of the plaintiff, to show either that they had acquired that title or had some valid defense to urge against it; and, if the latter, the holder of the title must have been made a party before his rights would be adjudicated upon by a court of equity."

22. Moore *v.* Gordon, 44 Ark. 334, holding that the petitioner in such case must first establish his title at law; that "the proceeding for partition cannot be made a substitute for ejectment to recover an interest in law held partially by others."

23. Lavalle *v.* Strobel, 89 Ill. 370.

Evidence of an adverse possessory title to a part of the premises in question is admissible to defeat partition. Harman *v.* Kelley, 14 Ohio 502, 45 Am. Dec. 552.

24. Sanford *v.* Tucker, 54 Ind. 219.

The possession of land by one tenant in common is not adverse to his cotenant, unless an actual ouster is shown, or facts which the law deems equivalent to an ouster. Sibley *v.* Alba, 95 Ala. 191, 10 So. 831. In this case it was also held that in a suit for the partition of land between tenants in common, if the defendant claims adverse possession of the entire tract, this does not oust the jurisdiction of the court, but requires a suspension of the proceedings until the question of disputed ownership can be settled on an issue made up and submitted to a jury. Sibley *v* Alba, 95 Ala. 191, 10 So. 831.

The fact that the complainant is shown to have been out of possession for many years prior to the filing of the bill, and that the defendant has been in possession holding adversely for a period of time short of that required to ripen such a possession into perfect title, is no defense to partition. Gore *v.* Dickinson, 98 Ala.

that the estate or interest of some of the parties is burdened by incumbrances.[25]

Evidence That the Mortgagee Has Entered for Condition Broken and is in actual possession of the premises will defeat the right to partition at the instance of the mortgagor.[26]

4. Determination as to Actual Partition or Sale. — A sale of lands for distribution is not a matter of unconditional right; and if one or more of the cotenants object, a sale cannot be decreed unless it is shown that partition can be fairly and equitably made.[27] Where the petition for partition is made by adult part owners, and the evidence shows that equitable partition cannot be made without a sale, the fact that some of the parties interested are infants does not require further evidence that the sale would be to the interest

363, 11 So. 743, 39 Am. St. Rep. 67.

25. Bayhi *v.* Bayhi, 35 La. Ann. 527. See also Labauve *v.* Woolfolk, 26, La. Ann. 440; Upham *v.* Bradley, 17 Me. 423.

Attachment Lien. — Evidence showing that the interests of some of the petitioners have been attached is not admissible in bar of the right of partition. McCarty *v.* Patterson, 186 Mass. 1, 71 N. E. 112.

26. O'Brien *v.* Bailey, 163 Mass. 325, 39 N. E. 1109; Call *v.* Barker, 12 Me. 320.

27. Gill *v.* Lane, 26 Ky. 267, 80 S. W. 1176; Gernon *v.* Bestick, 15 La. Ann. 697; Segur *v.* Dorel, 11 La. 439; Thruston *v.* Minke, 32 Md. 571; Earle *v.* Turton, 26 Md. 23. See also Mewshaw *v.* Mewshaw, 2 Md. Ch. 10; Hansell *v.* Hansell, 44 La. Ann. 548, 10 So. 941, where it was held, however, that it is to be presumed (apparently on appeal) that before the order to sell the property at public auction was made the judge had sufficient evidence before him to satisfy him that the property could not be conveniently divided in kind.

The right of partition of lands, and the right to have them sold for purposes of distribution, do not rest upon the same facts, and proofs which might be sufficient in the one case will not support the other. Keaton *v.* Terry, 93 Ala. 85, 9 So. 524.

The evidence must show that the interests of the parties will be promoted by sale. Croston *v.* Male (W. Va.), 49 S. E. 136.

In Bell *v.* Smith, 24 Ky. L. Rep. 1328, 71 S. W. 433, 24 Ky. L. Rep. 2095, 72 S. W. 1107, where the property was a town lot 40x100 with a house on it, it was held that the court would presume that it could not be divided without materially impairing its value.

In Willard *v.* Willard, 145 U. S. 116, the proof showing that the property could not be divided without serious loss, it was held that the sale was rightly ordered. See also Loyd *v.* Loyd, 23 La. Ann. 231.

In Beckham *v.* Duncan (Va.), 5 S. E. 690, where the commissioners in their report stated that it was impracticable to partition for the reason that a sale of the interest of one of the minor parties was necessary to satisfy the liens upon it, it was held that in the absence of evidence to the contrary the report of the commissioner was to be accepted and the sale ordered.

In Davidson *v.* Bowden, 5 Sneed (Tenn.) 129, it was held that under the Tennessee statute in force at that time the court had no power to order a sale of real estate of minors for partition or for the general advantage of the minors unless the evidence clearly and certainly established the fact that in the one case the land was so situated that partition thereof could not be made in the mode pointed out by law, or in the other that the lands were of such description that it would be manifestly to the advantage of the heirs that they be sold; that the mere opinion of a witness unaccompanied by any facts clearly sustaining its correctness was not that "satisfactory proof" required by the statute.

of the infants;[28] but where all the owners are infants, and the application is by their guardian, further evidence is necessary.[29]

5. Allowances and Charges. — A. IMPROVEMENTS. — Where the defendants in a partition suit are sought to be charged with rents and profits, evidence of permanent and valuable improvements made upon the lands by the defendants should be received.[30] But evidence of improvements cannot be received in bar of the right to partition.[31]

Assent of Cotenant. — To entitle a tenant in common to an allowance on a partition in equity for improvements made on the premises, it does not appear to be necessary for him to show the assent of his cotenants to such improvements, nor a promise on their part to contribute their share to the expense; nor is it necessary for him to show a previous request to join in the improvements, and a refusal.[32]

B. RENTS. — Although a court of equity has jurisdiction in cases of partition, and may in the same suit enter a decree in favor of a cotenant for rent in arrears, the claim for rent must be well established.[33]

6. Report and Return of Commissioners. — A. PERFORMANCE OF DUTY BY COMMISSIONERS. — As to matters required by law to be done by the commissioners appointed for actual partition, but not required by law to be shown in their return as having been done, the presumption is that they performed their duty, and one who charges to the contrary must sustain his charge by evidence.[34]

B. FAIRNESS OF ACTUAL PARTITION. — In the absence of any evidence upon the question, the court will presume that the commissioners, in compliance with their sworn duty, acted fairly and

28. Coker *v.* Pitts, 37 Ala. 692, where the court said: "Their [the adult owners] interests are coequal with those of the infants. Their right to have the possession of their property, and to have their wishes in the premises gratified, is to be respected equally with the interests of the infants. It would be monstrous to hold that adult part-owners should be kept out of the enjoyment of their property merely because other part-owners were infants, and the interests of such infants did not require that the property should be sold."

29. Coker *v.* Pitts, 37 Ala. 692.

30. Roberts *v.* Beckwith, 79 Ill. 246; Martindale *v.* Alexander, 26 Ind. 104, 89 Am. Dec. 458. And see Sanford *v.* Tucker, 54 Ind. 219.

In Texas the statute requires the defendant in his suggestion of improvements made in good faith to state the "grounds of such claim" (Rev. Stats., art. 4813); and these grounds must be sustained by proper evidence. Freeman *v.* Preston (Tex. Civ. App.), 29 S. W. 495.

31. Martindale *v.* Alexander, 26 Ind. 104, 89 Am. Dec. 458. See also Sanford *v.* Tucker, 54 Ind. 219, where the question was raised, but not decided, although the court intimated that the rule is as stated.

32. Martindale *v.* Alexander, 26 Ind. 104, 89 Am. Dec. 458.

33. Hawkins *v.* Taber, 47 Ill. 459.

34. Thus where the law requires the surveyor and chain bearers to be sworn before surveying the land and that the survey be made in the presence of the commissioners, but does not require that the return shall show compliance therewith by the commissioners, that fact will be presumed, although the return does not so show. Bryant *v.* Stearns, 16 Ala. 302.

impartially, and made such partition as in their judgment was best for the interests of all parties concerned.[35] And to justify the court in setting aside a partition of real estate on the ground of a mistaken judgment on the part of the commissioners, the evidence must be too plain to be mistaken; if it be doubtful or contradictory the report will be sustained.[36]

Mere Opinions of Witnesses that the division is unequal is not sufficient to set aside the report.[37]

C. PAROL EVIDENCE OF PROCEEDINGS. — Parol evidence of pro-

35. Riley *v.* Gaines, 14 S. C. 454.

36. Claude *v.* Handy, 83 Md. 225, 34 Atl. 532; *In re* Thompson's Estate, 3 N. J. Eq. 637; Wilhelm *v.* Wilhelm, 4 Md. Ch. 330. See also Hall *v.* Hall, 152 Mass. 136, 25 N. E. 84; Van Buskirk *v.* Stover, 162 Ind. 448, 70 N. E. 520.

In Geer *v.* Winds, 4 Des. (S. C.) 85, the chancellor, in speaking of the partition of lands by commissioners, said that it was a species of domestic tribunal similar in some degree to arbitration, and that their acts ought to be supported unless shown clearly to be erroneous and unjust.

"The report of the commissioners is not final; it may be set aside by the court. But where the court is asked to set aside the action of the commissioners on the ground that they erred in making allotments, whereby an unequal partition has been made, it will not grant the relief asked except in clear cases—cases in which partition is based on wrong principles, or it is shown by a clear and decided preponderance of evidence that the commissioners have made a very unequal or unfair partition and allotment." Ransom *v.* High, 37 W. Va. 838, 17 S. E. 413, 38 Am. St. Rep. 67.

"So much respect is due to the report of the commissioners, selected for, and sworn to, the performance of this special duty, as to warrant the presumption that their doings have been correct, where the contrary does not appear upon the face of their return, or is shown by extrinsic proofs." Nicelar *v.* Barbrick, 18 N. C. 257.

"The court will set aside and quash the return of commissioners of partition when the partition has been made upon wrong principles or in disregard of the rights of the parties, or where there is great and evident inequality in the division. But to set aside a partition for mere inequality when there is no partiality or improper conduct of the commissioners, the proof must be clear and the inequality considerable." Hay *v.* Estell, 19 N. J. Eq. 133.

The valuation made by commissioners appointed to make partition of real estate, although not conclusive and liable to be rejected if clearly shown to be erroneous, is nevertheless entitled to great weight, and will not be disturbed unless the weight of evidence in opposition to it is decidedly preponderating. Cecil *v.* Dorsey, *cited* in Crouch *v.* Smith, 1 Md. Ch. 401.

37. Morrill *v.* Morrill, 5 N. H. 329. The court said: "As the committee is appointed by the court, and persons selected, on whose integrity and judgment the court thinks it can safely rely, and against whom neither party can raise any objection, great confidence is placed by the court in the report of the committee; and it will not be held to be any objection to a report that witnesses can be found who will testify that the division is, in their opinion, unjust or inconvenient. To induce the court to set aside the report, the inequality or inconvenience must be clearly and distinctly pointed out and shown to the court by clear and direct evidence. It is much more safe to rely upon the judgment of an impartial committee than upon the opinion of witnesses selected by the parties. Witnesses often take sides with the parties who summon them, and when that is the case, however honest and respectable they may be, very little reliance can be placed upon their testimony when called to state a mere matter of opinion."

ceedings by the commissioners in partition which do not appear on their return is competent in so far as it tends to show mistakes of law made by the commissioners which materially affect the justice of the partition.[38]

D. Fairness of Sale. — A sale of lands in partition may be set aside and a resale ordered where the preponderance of the evidence shows that the sale was made for an inadequate price,[39] or upon evidence clearly showing fraudulent and improper conduct of one of the parties as a bidder at the sale.[40]

E. Notice of Sale. — Some proof that public notice was given of the sale of lands in partition must be made other than the mere assertion of the commissioner.[41]

38. Hall *v.* Hall, 152 Mass. 136, 25 N. E. 84.

39. Loyd *v.* Loyd, 61 Iowa 243, 16 N. W. 117, where the evidence showed that at the time of the sale the lands were reasonably worth double what they sold for. See also Ramsey *v.* Humphrey, 162 Mass. 385, 38 N. E. 975.

40. Coffey *v.* Coffey, 16 Ill. 141. In this case the purchaser had, or pretended to have, a claim of title to the land adverse to the petitioners, and the evidence showed that at the sale he publicly asserted his claim; threatened any purchaser with litigation, and then bid in the premises at an under value. It was shown that others would have bid more but for the purchaser's conduct. The court said: "These facts show such fraud upon, and injury to, the rights and interests of defendant as call for correction from the court, in the exercise of a sound legal discretion of its power of disapproving and setting aside sales under its orders; and we think that discretion properly exercised in this case."

In Fisher *v.* Hersey, 78 N. Y. 387, it was held that a court of equity may in its discretion set aside a sale in partition and order a resale where fraud is charged, upon proof of facts casting such a degree of suspicion upon the fairness of the sale as to render it in its judgment expedient to do so, although the alleged fraud may not be clearly established.

41. Tibbs *v.* Allen, 29 Ill. 535, where the court said: "Some proof other than his assertion should have been required; at least a copy of the notice, with the affidavit of some credible person that he saw it posted in some public place, or, if printed in a newspaper, the usual certificate of the printer, should have been required."

PARTNERSHIP.

By E. S. Page.

I. EVIDENCE OF EXISTENCE.

1. Burden of Proof. — The burden of proof of existence of the partnership is upon the party alleging it.[1]

2. Presumptions. — A. PARTICIPATION IN PROFITS. — Evidence of participation in profits raises a presumption of the existence of a partnership.[2]

B. PRIOR EXISTENCE. — A partnership proved to have existed at one time is presumed to continue.[3]

1. *United States.* — Eichel *v.* Sawyer, 44 Fed. 845.

Alabama. — Guice *v.* Thornton, 76 Ala. 466 (upon *non est factum* being pleaded in suit upon note, the burden of proving partnership is upon the plaintiff); Rabby *v.* O'Grady, 33 Ala. 255.

Georgia. — Strauss *v.* Waldo, 25 Ga. 641.

Illinois. — Smith *v.* Knight, 71 Ill. 148, 22 Am. Rep. 94.

Iowa. — Dupuy *v.* Sheak, 57 Iowa 361, 10 N. W. 731; Davenport *v.* Brown, 93 N. W. 578.

Louisiana. — Atwater *v.* Colton, 18 La. Ann. 226; Meeker *v.* Cummings, 22 La. Ann. 317.

Massachusetts. — Howe *v.* Thayer, 17 Pick. 91.

Missouri. — Gatewood *v.* Bolton, 48 Mo. 78; Herbert *v.* Callahan, 35 Mo. App. 498.

Nebraska. — McDonald *v.* Jenkins, 44 Neb. 163, 62 N. W. 444.

New York. — Irvin *v.* Conklin, 36 Barb. 64 (burden of proof of holding out as partner is upon plaintiff); Heye *v.* Tilford, 2 App. Div. 346, 37 N. Y. Supp. 751.

Oklahoma. — Strickler *v.* Gitchel, 14 Okla. 523, 78 Pac. 94.

Pennsylvania. — Appeal of Coleman, 143 Pa. St. 352, 22 Atl. 977, 13 L. R. A. 370.

Texas. — Clifton *v.* Royse Cotton Oil Co. (Tex. Civ. App.), 87 S. W. 182; Wallis *v.* Wood, 7 S. W. 852.

Where Partners Are Plaintiffs the burden of proving the existence of the relation is upon them. Boswell *v.* Dunning, 5 Har. (Del.) 231; Dempsey *v.* Harrison, 4 Mo. 267; Campbell *v.* Hood, 6 Mo. 211; McGregor *v.* Cleveland, 5 Wend. (N. Y.) 475. But see Woodward *v.* Sutton, 1 Cranch C. C. 351, 30 Fed. Cas. No. 18,009; Robinson *v.* Magarity, 28 Ill. 423 (not required to prove unless issue is raised, because use of firm name raises no presumption of partnership).

Where defendant objects that one partner is not joined as a plaintiff, the burden is on plaintiffs to show that they alone compose the firm. Rugely *v.* Gill, 15 La. Ann. 509.

In Actions Between Partners those having the means to prove their own partnership will be held to strict proof. Arnold *v.* Conklin, 96 Ill. App. 373. See also Perkins *v.* Perkins, 3 Gratt. (Va.) 348.

2. Berry *v.* Pelneault (Mass.), 74 N. E. 917; Tamblyn *v.* Scott, 111 Mo. App. 46, 85 S. W. 918; Fourth Nat. Bank *v.* Altheimer, 91 Mo. 190, 3 S. W. 858; Philips *v.* Samuel, 76 Mo. 657. It is said that evidence of participation in profits makes a *prima facie* case of partnership. Glore *v.* Dawson, 106 Mo. App. 107, 80 S. W. 55; Roper *v.* Schaefer, 35 Mo. App. 30; Goddard-Peck Grocer Co. *v.* Berry, 58 Mo. App. 665; *In re* Francis, 2 Sawy. 286, 9 Fed. Cas. No. 5031; *In re* Ward, 2 Flip. 462, 29 Fed. Cas. No. 17,144; Lockwood *v.* Doane, 107 Ill. 235.

Formerly, participation in profits was treated as creating a partnership, but now, by the weight of authority, it is merely evidence to be considered with other facts. The leading case making profit-sharing the test is Waugh *v.* Carver, 2 H. Blackstone (Eng.) 235. The leading case upholding the other view is Cox *v.* Hickman, 2 H. L. Cas. 268.

3. Butler *v.* Henry, 48 Ark. 551, 3 S. W. 878; Mann *v.* Clapp, 1 White & W. Civ. Cas. (Tex.) § 502.

Prior Existence. — But proof of existence at one time does not raise a presumption of prior existence. Byington *v.* Woodward, 9 Iowa 360 (proof of existence of partnership

C. Joint Ownership or Liability. — No presumption of partnership arises from mere joint ownership or liability.[4]

D. Use of Firm Name. — No presumption of the existence of a partnership arises from the use of a firm name.[5]

3. Admissibility. — A. Questions Stated. — In discussing the rules as to the admissibility of evidence to prove the existence of a partnership, two cases must be carefully distinguished: (1) where the party sought to be charged is actually a member of a partnership; (2) where he has permitted himself to be held out as a partner, and third persons have contracted with the firm on the faith that he was such. The evidence that will prove the one will frequently prove the other.

B. Articles of Partnership. — Articles of partnership are clearly admissible to prove the actual existence of the relation and the membership of the firm.[6]

after the execution of a partnership instrument is not sufficient to show existence at the time of execution).

4. No presumption of partnership arises from the fact that parties are tenants in common. Neill *v.* Shamburg, 158 Pa. St. 263, 27 Atl. 992; Stannard *v.* Smith, 40 Vt. 513. Such evidence alone is not sufficient to establish a partnership. St. John *v.* Coates, 63 Hun 460, 18 N. Y. Supp. 419.

The fact that two persons have signed jointly a promissory note does not create any presumption of partnership. Knott *v.* Knott, 6 Or. 142.

Miscellaneous. — McMullen *v.* MacKenzie, 2 Greene (Iowa) 368 (fact that business was carried on together is *prima facie* evidence of partnership). Miller *v.* Hale, 96 Mo. App. 427, 70 S. W. 258 (architects jointly undertook to do work; payments were made to both; in suit between the two for an accounting it will be presumed that they are partners); King *v.* Townshend, 141 N. Y. 358, 36 N. E. 513 (conveyance to M., S. and I., described as trustees of an association, as joint tenants; in suit to remove cloud on title it was held that grantees will be presumed to be partners).

5. Robinson *v.* Magarity, 28 Ill. 423; Byington *v.* Woodward, 9 Iowa 360. No presumption arises from a mere name that a concern is a partnership, corporation or unincorporated association. Clark *v.* Jones, 87 Ala. 474, 6 So. 362. See also Munton *v.* Rutherford, 121 Mich. 418, 80 N. W. 112. See, however, Bell *v.* Massey, 14 La. Ann. 831 (promissory note payable to H. & B. indorsed by each separately; *held*, it is presumed that H. & B. are commercial partners).

Use of Words "and Co." — Where there is no statute prohibiting an individual from doing business under a firm name, the use of the words "and Co." does not raise any presumption of partnership, or that any other person is interested therein. Willey *v.* Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106; Brennan *v.* Partridge, 67 Mich. 449, 35 N. W. 85.

If there is such a presumption it is a slight one. Charman *v.* Henshaw, 15 Gray (Mass.) 293.

But the Fact that a business is carried on in the name of A. H. & Son, coupled with the fact that both gave personal attention to the business, raises a strong presumption of partnership. Haug *v.* Haug, 90 Ill. App. 604, *affirmed* 193 Ill. 645, 61 N. E. 1053. As to the effect of statutory provision, see Whitlock *v.* McKechnie, 1 Bosw. (N. Y.) 427.

Name of Party. — It has been held that where the name of a party is part of the commercial name of a partnership it is *prima facie* evidence that he was a member of the firm. Mary *v.* Lampre, 6 Rob. (La.) 314.

6. Guice *v.* Thornton, 76 Ala. 466; Willamette Casket Co. *v.* Mc-

C. Best Evidence. — In an action between partners who have entered into written articles of partnership, the articles themselves are the best evidence and should be produced, or their absence accounted for. But this rule does not apply as against third parties.[7]

Goldrick, 10 Wash. 229, 38 Pac. 1021. Likewise a written acknowledgment of the relation, signed by the defendant, is admissible. Tannenbaum *v.* Armeny, 81 Hun 581, 31 N. Y. Supp. 55.

Where a plaintiff gives evidence tending to show defendants to be partners, defendants may introduce the real agreement. Doty *v.* Gillett, 43 Mich. 203, 5 N. W. 89.

The original articles are admissible against one subsequently becoming a partner to show the character of the business and the duties and obligations of the partnership. Strecker *v.* Conn, 90 Ind. 469.

A person sued as a partner may show that his name was signed to the articles without authority. Thompson *v.* First Nat. Bank, 111 U. S. 529. An unsigned partnership contract is not admissible. Detemple *v.* Mitchell, 15 Colo. App. 127, 61 Pac. 434.

Record of Articles. — Where a public record of such article is authorized, the record may be admitted in evidence. Milligan *v.* Butcher, 23 Neb. 683, 37 N. W. 596. A certified copy of a certificate of partnership is admissible. Mortimer *v.* Warder, 93 Cal. 172, 28 Pac. 814.

To Prove Non-Existence. — Where actual existence is relied upon the defendant may produce the articles of partnership to prove that he is not a partner. Hunn *v.* McKee, 26 N. C. 475.

7. *United States.* — *In re* Warren, 29 Fed. Cas. No. 17,191.

Alabama. — Griffin *v.* Stoddard, 12 Ala. 783.

Kentucky. — Marks *v.* Hardy, 25 Ky. L. Rep. 1770, 78 S. W. 864.

Maine. — Bryer *v.* Weston, 16 Me. 261.

Massachusetts. — Trowbridge *v.* Cushman, 24 Pick. 310.

Michigan. — Bishop *v.* Austin, 66 Mich. 515, 33 N. W. 525.

Pennsylvania. — Widdifield *v.* Widdifield, 2 Bin. 245; Edwards *v.* Tracy, 62 Pa. St. 374.

South Carolina. — Pierson *v.* Steinmyer, 4 Rich. L. 309.

Vermont. — Cutler *v.* Thomas, 25 Vt. 73.

Evidence of Parties To Prove Their Own Partnership. — "When parties, who are themselves partners, seek to establish the existence of the copartnership, they should be required to bring forward the letters, and not allowed to prove it *aliunde,* without first showing a legal excuse for the non-production of the letters." Bonnaffe *v.* Fenner, 6 Smed. & M. (Miss.) 212, 45 Am. Dec. 278. But see Field *v.* Tenney, 47 N. H. 513.

When the parties themselves do not rely upon the writing as drawn the rule has no application; "nor are strangers to the instrument concluded by its terms, or estopped to show by parol evidence that the contract of the parties is different from what it purports to be on the face of the writing; and as estoppels, where they exist, must be mutual, it follows that, in a controversy with strangers to the instrument, the parties to it are not themselves estopped to explain or contradict it by parol evidence." Marks *v.* Hardy, 25 Ky. L. Rep. 1770, 78 S. W. 864, *quoting* from and *applying* Strader *v.* Lambeth, 7 B. Mon. (Ky.) 589.

But in Pursley *v.* Ramsey, 31 Ga. 403, it was held that parol evidence is not admissible to vary the terms of articles of partnership, to the prejudice of third parties. In general, see Ingraham *v.* White, 2 La. 294.

Secret Agreement. — It has been held that one dealing with a firm is not bound by a secret agreement of partnership, of which he may have had no previous knowledge, or which, even if known, may not embrace all the members of the company, or set forth correctly their several interests or liability. Reed *v.* Kremer, 111 Pa. St. 482, 5 Atl. 237, 56 Am. Rep. 295.

In an action by a non-resident alien partner the written partnership

D. Parol Evidence. — Statute of Frauds. — Subject to the limitations before mentioned, the existence of a partnership may be proved by parol evidence.[8] The statute of frauds does not apply, even where the partnership is for the purpose of dealing in land.[9]

E. Testimony of Party. — When there are no written articles of partnership a party may be allowed to testify that he is or is not a member of the firm; and such evidence is not objectionable as calling for the conclusion of the witness.[10]

F. Opinions. — Mere opinions as to existence or as to the parties constituting a partnership are not admissible.[11]

agreement need not be produced. Black *v.* Henry G. Allen Co., 56 Fed. 764.

8. *In re* Warren, 29 Fed. Cas. No. 17,191; Knott *v.* Knott, 6 Or. 142.

A statute making a record of articles of partnership *prima facie* evidence of the facts therein stated does not make the record the sole or exclusive evidence. Schneider *v.* Patterson, 38 Neb. 680, 57 N. W. 398.

9. Statute of Frauds. — An agreement for a partnership for the purpose of dealing and trading in lands is not within the statute of frauds; and therefore, even in such a case, the fact of the existence of the partnership and the extent of each partner's interest may be shown by parol. Speyer *v.* Desjardins, 144 Ill. 641, 32 N. E. 283; Van Housen *v.* Copeland, 79 Ill. App. 139; Frankenstein *v.* North, 79 Ill. App. 669; Fairchild *v.* Fairchild, 64 N. Y. 471. But see Knott *v.* Knott, 6 Or. 142.

It has been said that as between the partners themselves evidence must be written, because otherwise a party might obtain an interest in land by parol; but this does not apply to third persons. *In re* Warren, 29 Fed. Cas. No. 17,191.

10. Butte Hdw. Co. *v.* Wallace, 59 Conn. 336, 22 Atl. 330. See also Chambers *v.* Grout, 63 Iowa 342, 19 N. W. 209 (witness allowed to testify that he was not a partner).

But an opinion that a partnership existed is not admissible when no facts are given to sustain it. Williams *v.* Soutter, 7 Iowa 435. Nor when it is based upon an examination of written conveyances, for in such a case the court must determine the fact. Carlton *v.* Coffin, 27 Vt. 496.

Written Agreement. — But where a written agreement is shown, such testimony is inadmissible. It is for the court to construe the written articles and determine whether a partnership existed. Testimony of the parties that there was or was not a partnership is a mere opinion or conclusion of law. Alexander *v.* Handley, 96 Ala. 220, 11 So. 390.

11. Rabbitte *v.* Orr, 83 Ala. 185, 3 So. 420; Bragg *v.* Geddes, 93 Ill. 39 (witness stated "that he took, from what Smith said, that he and Bragg were partners"); Williams *v.* Soutter, 7 Iowa 435 (witness stated that it was his opinion that the parties were partners, but he gave no facts to sustain it); Reynolds *v.* Lawton, 62 Hun 596, 17 N. Y. Supp. 432 (question, "Did you in any way hold yourself out as a partner?" called for the conclusion of the witness).

It is error to permit a witness to state whom he regarded as his partner, and to whom he looked for protection. "If the question was designed to elicit the knowledge of the witness as to the direct, positive fact, it was evasive; or if intended to elicit the opinion of the witness as to whether the facts in his knowledge in law constituted the said defendant in execution a partner, it was still more objectionable." Atwood *v.* Meredith, 37 Miss. 635.

But a question put to a witness as to who were partners does not call for a conclusion of law. Gates *v.* Manny, 14 Minn. 21; Anderson *v.* Snow, 9 Ala. 247; McGrew *v.* Walker, 17 Ala. 824. And see Walsh *v.* Kelly, 42 Barb. (N. Y.) 98 (question "Were you a member of the firm of M. W. & Co.?" is proper).

An admission of a party that he

G. Subsequent Existence as Evidence of Prior Existence. In some jurisdictions evidence of subsequent existence is admissible as tending to prove existence at the time of the transaction;[12] in others it is held inadmissible.[13]

H. Evidence Connecting Each Member With the Firm. The existence of a partnership may be proved by connecting each member therewith, and it is not necessary that the liability of each be proved by the same species of evidence.[14]

I. Conduct and Business Dealing of Parties. — It is competent to show the conduct of the parties and their business arrangements tending to show the existence of the relation.[15] In a suit

was a partner is not a matter of opinion. Barwick *v.* Alderman (Fla.), 35 So. 13.

Where a written instrument is proved it is error to allow a witness to state that a certain party was a partner according to his construction of the contract. The construction of the instrument is for the court. Alexander *v.* Handley, 96 Ala. 220, 11 So. 390.

12. Fleshman *v.* Collier, 47 Ga. 253 (evidence of existence three months after transaction may be considered with other evidence); Farmers Bank *v.* Saling, 33 Or. 394, 54 Pac. 190 (admissible in connection with corrobating circumstances).

13. Green *v.* Caulk, 16 Md. 556 (evidence of contract entered into subsequently between partners not admissible); Ruhe *v.* Burnell, 121 Mass. 450; Butler *v.* Henry, 48 Ark. 551, 3 S. W. 878.

14. It may be proved "by the act of one, the declarations of another, and the acknowledgment or conduct (when the firm consists of three persons) of the third." Welsh *v.* Speakman, 8 Watts & S. (Pa.) 257. Continuing, the court said: "It is sometimes said that the admission of one is not evidence against the others, by which is meant that where the plaintiff fails in his proof against any one member of the alleged firm he cannot recover, however strong and overwhelming may be the evidence arising from the admissions or conduct of the other defendants who are sued; for in order to sustain his case he must connect each and every one by their own admissions or acknowledgments. But to effect this the plaintiff has a right to prove one thing at a time, to add fact to fact, from which the jury, who must judge from the whole case, may infer the existence of the partnership." See also Byington *v.* Woodward, 9 Iowa 360. See, also, in general, Drumright *v.* Philpot, 16 Ga. 424, 60 Am. Dec. 738; Conlan *v.* Mead, 172 Ill. 13, 49 N. E. 720, *affirming* 70 Ill. App. 318; Reed *v.* Kramer, 111 Pa. St. 482, 5 Atl. 237, 56 Am. Rep. 295; Haughey *v.* Strickler, 2 Watts & S. (Pa.) 411 (each partner may be connected separately).

15. *United States.* — *In re* Goold, 2 Hask. 34, 10 Fed. Cas. No. 5,604.

Alabama. — McGrew *v.* Walker, 17 Ala. 824 (evidence that parties were very intimate is admissible); McNeill *v.* Reynolds, 9 Ala. 313.

Georgia. — Perry *v.* Butt, 14 Ga. 699 (evidence of clerk that defendant was in store and sold goods for cash and on credit admissible); Tumlin *v.* Goldsmith, 40 Ga. 221 (handbills circulated containing defendant's name as partner; one was put under defendant's door).

Illinois. — Martin *v.* Ehrenfels, 24 Ill. 187 (evidence of relations between parties when they resided in Europe admissible).

Indiana. — Bingham *v.* Walk, 128 Ind. 164, 27 N. E. 483.

Iowa. — Williams *v.* Soutter, 7 Iowa 435 (agreement between parties, although alone it does not create a partnership).

Maine. — Scott *v.* Blood, 16 Me. 192; Gilbert *v.* Whidden, 20 Me. 367 (declaration of one that other was his partner admissible in his favor).

Maryland. — Beall *v.* Poole, 27 Md. 645.

Massachusetts. — Butts *v.* Tiffany,

between partners, however, such evidence is not conclusive.[16] Similar evidence is admissible on behalf of alleged partners to show that the relation did not exist.[17]

21 Pick. 95 (evidence that defendant, who was sued as a dormant partner, offered to go into partnership with others in their names, and stated that he had done business with others in their names, because he had old debts, is admissible).

New Hampshire. — Hersom *v.* Henderson, 23 N. H. 498.

New York. — Healy *v.* Clark, 120 N. Y. 642, 24 N. E. 316; Neefus *v.* Eccles, 85 N. Y. Supp. 635; Peyser *v.* Myers, 63 Hun 634, 18 N. Y. Supp. 736 (for the purpose of determining whether M. retired from the firm on a certain day, the dealings of the members of the firm with one another and with the public, their statements to one another and to the public, whether written or oral, and their books, are all competent evidence); De Cordova *v.* Powter, 48 Hun 620, 1 N. Y. Supp. 147; Gottschalk *v.* Schock, 36 App. Div. 638, 56 N. Y. Supp. 138.

Ohio. — Crowell *v.* Western Reserve Bank, 3 Ohio St. 406 (evidence of execution of mortgage deed by firm, in another transaction, admissible).

Pennsylvania. — Ryder *v.* Jacobs, 196 Pa. St. 386, 46 Atl. 667 (action between partners; entries made by defendant against plaintiff admitted in defendant's behalf, when it appeared that plaintiff examined books daily); Wood *v.* Connell, 2 Whart. 542; Welsh *v.* Speakman, 8 Watts & S. 257; Wray *v.* Spence, 145 Pa. St. 399, 22 Atl. 693 (suit to charge two as partners for sawing lumber; one defendant took logs to plaintiff; *held,* evidence that son of other defendant took some of the lumber from plaintiff is admissible); Allen *v.* Rostain, 11 Serg. & R. 362; Chidsey *v.* Porter, 21 Pa. St. 390.

South Carolina. — Hampton *v.* Ray, 52 S. C. 156, 29 S. E. 537.

Texas. — Davis *v.* Bingham (Tex. Civ. App.), 46 S. W. 840.

Vermont. — Carlton *v.* Coffin, 28 Vt. 504 (proof was made that defendant was a partner at one time; *held,* evidence is admissible showing that he subsequently took an active part in the business of the firm, and was made a party plaintiff in a suit relating to firm property).

Evidence Inadmissible. — On the other hand, headings in an abstract book of the parties are not admissible, standing alone. Green *v.* Caulk, 16 Md. 556. Nor can it be shown that prior to the time when defendant is claimed to have become a partner the other party's credit was bad. Dutton *v.* Woodman (Mass. 9 Cush.) 255, 57 Am. Dec. 46. Nor is evidence of what plaintiff received for property three years after its sale by defendant admissible to show that he was a partner in the purchase. Ruckman *v.* Bergholz, 38 N. J. L. 531.

A release by A of all demands against B, reciting a settlement "between A on the one side and B and C on the other," is not admissible to show a partnership between B and C. Farnum *v.* Farnum, 13 Gray (Mass.) 508.

Evidence of parties who had dealt with the alleged firm to the effect that they did not know of any partnership is not admissible. Gilroy *v.* Loftus, 21 Misc. 317, 47 N. Y. Supp. 138, *affirming* 20 Misc. 724, 45 N. Y. Supp. 1141.

The fact that profits had been made in other joint ventures, and that they may have been used in the later enterprise, is immaterial. Brackett *v.* Cunningham, 44 Minn. 498, 47 N. W. 157.

16. Neefus *v.* Eccles, 85 N. Y. Supp. 635 (evidence tending to show an ostensible partnership is not conclusive, but it may be considered); Willis *v.* Crawford (Or.) 64 Pac. 866, denying rehearing 63 Pac. 985 (must be evidence of intention).

17. *Indiana.* — Cook *v.* Frederick, 77 Ind. 406 (evidence that promissory note was signed by one only admissible to show that other was not a partner).

Iowa. — Chambers *v.* Grout, 63 Iowa 342, 19 N. W. 209 (defendant may testify that he was not a part-

J. Evidence of Intent. — Evidence of intent is admissible in an action where actual existence must be shown;[18] but testimony of one of the defendants that he did not intend to become a partner is not admissible where a mere holding out is sufficient to establish liability.[19]

K. Admissions. — a. *In General.* — Admissions and declarations of one partner are competent against the party making them, but cannot be received to prove the existence of the relation as against the other partners.[20]

ner, and may explain circumstances tending to show the contrary).

Maryland. — Fletcher *v.* Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355 (may show that he refused to pay for advertising; that he returned mail unopened; that he successfully resisted suit brought against him as partner).

Missouri. — Hughes *v.* Ewing, 162 Mo. 261, 62 S. W. 465 (correspondence between defendants admissible; evidence that no claim was made on defendants to pay partners' shares admissible).

Montana. — Knight *v.* Richter, 11 Mont. 74, 27 Pac. 392 (billhead which purported to state names of members, and which did not contain name of one of defendants, competent).

New York. — Tracy *v.* McManus, 58 N. Y. 257 (for the purpose of explaining acts which tend to show an actual partnership defendant may show that he did them for the purpose of aiding his relatives, who were partners in the firm).

Pennsylvania. — Given *v.* Albert, 5 Watts & S. 333 (written agreement between defendants, made before the transaction sued upon, whereby one agreed to sell goods to the other, is admissible to disprove the partnership).

For instance of evidence held inadmissible, see Kimball *v.* Longstreet, 174 Mass. 487, 55 N. E. 177 (evidence showing relations in another matter not admissible to show that parties were not partners in regard to matter in suit); Haldeman *v.* Bank of Middletown, 28 Pa. St. 440, 70 Am. Dec. 142; Schollenberger *v.* Seldonridge, 49 Pa. St. 83 (where a special partnership is claimed, evidence that defendants were not partners in other transactions is not admissible).

18. Macy *v.* Combs, 15 Ind. 469, 77 Am. Dec. 103 ("for whether the existence of certain facts shall constitute a partnership depends upon the intention of the parties interested, as between themselves").

19. This is upon the ground that it is immaterial. Griffin *v.* Carr, 21 App. Div. 51, *affirmed* 47 N. Y. Supp. 323, 165 N. Y. 621, 59 N. E. 1123.

20. It is immaterial whether the admissions have been communicated to the plaintiff or not. Barwick *v.* Alderman (Fla.), 35 So. 13.

Evidence of admissions of one partner are not competent to charge the firm, even in corroboration of other evidence. Robinson *v.* First Nat. Bank (Tex.), 82 S. W. 505, *reversing* 79 S. W. 103; Robbins *v.* Willard, 6 Pick. (Mass.) 464.

But see Conlan *v.* Mead, 172 Ill. 13, 49 N. E. 720, *affirming* 70 Ill. App. 318 ("where sufficient evidence has been given to raise a fair presumption that two or more persons are partners, then the acts and declarations of each are admissible as evidence against the others for the purpose of strengthening the *prima facie* case already established"); Bush *v.* Chas. P. Kellog Co. (Tex. Civ. App.), 34 S. W. 1056; Caraway *v.* Citizens Nat. Bank (Tex. Civ. App.), 29 S. W. 506.

Declarations of one partner are not admissible to establish the fact to the prejudice of third persons whose interests will be injuriously affected thereby, as where there is a contest between a firm and separate creditors. Clinton Lumb. Co. *v.* Mitchell, 61 Iowa 132, 16 N. W. 52.

b. *Admission by Silence.* — Evidence that a party remained silent when statements implicating him as being connected with the partnership were uttered in his presence and hearing may be adduced as an admission to charge a party as a partner.[21]

c. *Declarations Acquiesced in by Other Partner.* — Declarations made by one partner, with the knowledge of the other, and which are not denied by the latter, are admissible to prove partnership.[22]

d. *Admission by Party Dealing With Firm.* — In a suit against a maker of a note, the note itself, on its face payable to a partnership, is evidence against the maker of the existence of the partnership.[23]

e. *Admissions of All Partners.* — Partnership may be proved by the separate admissions of all the partners.[24]

f. *Declarations in Own Interest.* — Declarations made by a party to the effect that he was not a partner are not admissible in his own interest.[25] Declarations made by one alleged partner before any

21. Grier *v.* Deputy, 1 Marv. (Del.) 19, 40 Atl. 716; Scott *v.* Blood, 16 Me. 192. See also Tapp *v.* Dibrell, 134 N. C. 546, 47 S. E. 51; Newberger *v.* Heintze, 3 Tex. Civ. App. 259, 22 S. W. 867 (evidence of witness that he had been introduced to S. as one of the partners of H. & Co. admissible, although witness could not state time, place or circumstance of introduction)

22. Barcroft *v.* Haworth, 29 Iowa 462; Giles *v.* Vandiver, 91 Ga. 192, 17 S. E. 115.

23. Blodgett *v.* Jackson, 40 N. H. 21. See article "ADMISSIONS."

24. *Illinois.* — Gordon *v.* Bankard, 37 Ill. 147.

Iowa. — Barcroft *v.* Haworth, 29 Iowa 462.

Maine. — Bryer *v.* Weston, 16 Me. 261.

Massachusetts. — Currier *v.* Silloway, 1 Allen 19; Smith *v.* Collins, 115 Mass. 388.

Michigan. — Sager *v.* Tupper, 38 Mich. 258; Armstrong *v.* Potter, 103 Mich. 409, 61 N. W. 657 (admissions of both may be received; fact that one introduced other as his partner is admissible).

Pennsylvania. — Welsh *v.* Speakman, 8 Watts & S. 257; Taylor *v.* Henderson, 17 Serg. & R. 453; Drennen *v.* House, 41 Pa. St. 30.

See also Huyssen *v.* Lawson, 90 Mo App 82 ("The declarations of Lawson, the contracting party, to the effect that Wilson was his partner were primarily inadmissible, but were rendered admissible by the subsequent proof that when Lawson's declarations were repeated to him [Wilson] he admitted they were true").

But such admissions cannot be received where there is a contest between firm creditors and separate creditors. Clinton Lumb. Co. *v.* Mitchell, 61 Iowa 132, 16 N. W. 52.

Evidence that defendants permitted a default in another action in which they were sued as partners may be received as an admission. Fogg *v.* Greene, 16 Me. 282; Ellis *v.* Jameson, 17 Me. 235; Cragin *v.* Carleton, 21 Me. 492; Millard *v.* Adams, 1 Misc. 431, 2 N. Y. Supp. 424.

A letter purporting to be signed by both defendants is admissible. Zachary *v.* Phillips, 101 N. C. 571, 8 S. E. 359.

25. *Alabama.* — Alexander *v.* Handley, 96 Ala. 220, 11 So. 390.

Arkansas. — Rector *v.* Robbins, 86 S. W. 667 (declaration made after execution of instrument).

Iowa. — Danforth *v.* Carter, 4 Iowa 230.

New York. — Gilroy *v.* Loftus, 21 Misc. 317, 47 N. Y. Supp. 138, *affirming* 20 Misc. 724, 45 N. Y. Supp. 141.

Massachusetts. — Ruhe *v.* Burnell, 121 Mass. 450 (declarations of one defendant to other not admissible against plaintiff).

Wisconsin. — Carlyle *v.* Plumer, 11 Wis. 96.

controversy has arisen, to the effect that another is not his partner, have been received in favor of the latter;[26] but the better opinion is that such declarations are not admissible.[27]

L. Entries in Books. — Entries in the account books of a firm are not admissible to prove the existence of the relation,[28] unless

See also Flournoy *v.* Williams, 68 Ga. 707; Southern White Lead Co. *v.* Haas, 73 Iowa 399, 33 N. W. 657, 35 N. W. 494.

Such declarations are not admissible even when made to an agent of the party seeking to hold him as a partner. Pirie *v.* Gillitt, 2 N. D. 255, 50 N. W. 710.

In an action by the survivor against a third party, statements of a deceased partner are not admissible in favor of the survivor to prove a partnership. Brown *v.* Mailler, 12 N. Y. 118. Statements which are part of the *res gestae* may be admitted. England *v.* Burt, 4 Humph. (Tenn.) 399.

Where letters between the alleged partners are introduced as tending to show the existence of the relation, other letters which have passed between the two showing to what the former referred are admissible. Morgan *v.* Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. Rep. 282.

26. "If these declarations are not admissible the case of a clerk may be a dangerous one. You can prove acts enough upon him every day to make him a partner, and unless he has a written contract of employment he is helpless; and is not even that contract itself a declaration of the partners, or some of them?" Danforth *v.* Carter, 4 Iowa 230. See also Starke *v.* Kenan, 11 Ala. 818.

27. Young *v.* Smith, 25 Mo. 341. ("Such testimony would enable a crafty set of men to carry on an extensive operation as partners to the world, but when preparation was about to be made necessary to a failure, then one might withdraw with all the funds and stock, and honest, confiding creditors be met with the assertion 'that they never were partners'"). Clarke *v.* Huffaker, 26 Mo. 264; Van Kleeck *v.* McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182; Carlyle *v.* Plumer, 11 Wis. 96.

Letters written by one partner in the partnership name are not admissible to show that the defendant was not a partner. Champlin *v.* Tilly, 3 Day (Conn.) 303, 1 Brunner Col. Cas. 71, 5 Fed. Cas. No. 2586.

28. Robins *v.* Warde, 111 Mass. 244; Abbott *v.* Pearson, 130 Mass. 191; Rosenbaum *v.* Howard, 69 Minn. 41, 71 N. W. 823; Brackett *v.* Cunningham, 44 Minn. 498, 47 N. W. 157 (page from ledger, containing account with third person, not admissible). But see Richter *v.* Selin, 8 Serg. & R. (Pa.) 425 (ledger admitted to prove partnership).

Nor are account books admissible to show that there was no partnership. Gilroy *v.* Loftus, 21 Misc. 317, 47 N. Y. Supp. 138, *affirming* 20 Misc. 724, 45 N. Y. Supp. 1141. But such entries are admissible to prove existence as against the party making them. Lewis *v.* Post, 1 Ala. 65.

In Richardson *v.* Aldrich, 6 Phila. (Pa.) 534, entries in the firm books were admitted on behalf of one defendant to show that he was a creditor, not a partner.

As Corroborative Evidence. — In Bryce *v.* Joynt, 63 Cal. 375, 49 Am. Rep. 94, McKee, J., said: "In and of themselves the books were not admissible for the purpose of proving partnership. Until there was evidence of the fact, at the times of the entries on the books, the entries are to be regarded as *res inter alios*, mere declarations of a third person, not made under oath, which are not binding and are inadmissible to prove the fact. Partnership, like agency, must be proved by evidence *aliunde*. But when there is such evidence sufficient in the judgment of the court to lay the foundation for the admission of corroborative evidence, then the books and the entries therein may be admitted as the acts and declarations of parties between whom such a relation exists."

See also Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 817 (entries in

accompanied by other evidence fairly tending to show that all the parties sought to be charged had knowledge of such entries, and expressly or impliedly assented to them.[29]

M. General Reputation. — Evidence of general reputation is inadmissible to prove the existence of a partnership.[30] It is admis-

account books, made after the alleged date of dissolution, were admissible with other evidence to prove the continued existence of the firm); Frick *v.* Barbour, 64 Pa. St. 120; Hale *v.* Brennan, 23 Cal. 511.

Where a partnership is sworn to by a clerk of one of the partners, the books may be given in evidence to fortify or discredit his testimony, although he had not made the entries. Moyes *v.* Brumaux, 3 Yeates (Pa.) 30.

Entries in Third Party's Books. Entries in books of a plaintiff are not admissible to prove a partnership between defendants. Severance *v.* Lombardo, 17 Cal. 57.

Books Containing Nothing on the Subject. — Likewise, books of account are not admissible to disprove the existence of a partnership by showing that they contain nothing on the subject. Willamette Casket Co. *v.* McGoldrick, 10 Wash. 229, 38 Pac. 1021.

29. Rosenbaum *v.* Howard, 69 Minn. 41, 71 N. W. 823; Champlin *v.* Tilley, 3 Day (Conn.) 303, 1 Brunner Col. Cas. 71, 5 Fed. Cas. No. 2586 (books containing entries by both partners admissible); McNeill *v.* Reynolds, 9 Ala. 313 (same *dictum*); Ryder *v.* Jacobs, 196 Pa. St. 386, 46 Atl. 667.

Entries in handwriting of one partner, and purporting to have been made in the presence of the other, are admissible to prove existence. Howard *v.* Patrick, 38 Mich. 795.

30. *United States.* — Wilson *v.* Colman, 1 Cranch C. C. 408, 30 Fed. Cas. No. 17,798.

Alabama. — Marble *v.* Lypes, 82 Ala. 322, 2 So. 701; Tanner & Delaney Engine Co. *v.* Hall, 86 Ala. 305, 5 So. 584; First Nat. Bank *v.* Leland, 122 Ala. 289, 25 So. 195; Carter *v.* Douglas, 2 Ala. 499.

Arkansas. — Stiewel *v.* Borman, 63 Ark. 56, 37 S. W. 404.

California. — Sinclair *v.* Wood, 3 Cal. 98.

Connecticut. — Butte Hdw. Co. *v.* Wallace, 59 Conn. 336, 22 Atl. 330.

Delaware. — Grier *v.* Deputy, 1 Marv. 19, 40 Atl. 716, *reversing* Deputy *v.* Harris, 1 Marv. 100, 40 Atl. 714. (The lower court held that general reputation is admissible, and that it can be rebutted only by general reputation, not by specific acts.)

Idaho. — Gaffney *v.* Hoyt, 2 Idaho 184, 10 Pac. 34.

Illinois. — Joseph *v.* Fisher, 4 Ill. 137; Bowen *v.* Rutherford, 60 Ill. 41, 14 Am. Rep. 25.

Indiana. — Earl *v.* Hurd, 5 Blackf. 248; Macy *v.* Combs, 15 Ind. 469, 77 Am. Dec. 103

Iowa. — Southwick *v.* McGovern, 28 Iowa 533; Brown *v.* Rains, 53 Iowa 81, 4 N. W. 867.

Kentucky. — Marks *v.* Hardy, 25 Ky. L. Rep. 1770, 1909, 78 S. W. 864, 1105.

Massachusetts. — Goddard *v.* Pratt, 16 Pick. 412.

Michigan. — Sager *v.* Tupper, 38 Mich. 258.

Mississippi. — Atwood *v.* Meredith, 37 Miss. 635.

New Hampshire. — Grafton Bank *v.* Moore, 13 N. H. 99, 38 Am. Dec. 478; Hersom *v.* Henderson, 23 N. H. 498.

New Jersey. — Taylor *v.* Webster, 39 N. J. L. 102.

New York. — Smith *v.* Griffith, 3 Hill 333, 38 Am. Dec. 639; McGuire *v.* O'Hallaran, Hill & D. Supp. 85.

Ohio. — Inglebright *v.* Hammond, 19 Ohio 337, 53 Am. Dec. 430.

Oregon. — Farmers Bank *v.* Saling, 33 Or. 394, 54 Pac. 190.

Texas. — Buzard *v.* Jolly, 6 S. W. 422; Wallis *v.* Wood, 7 S. W. 852; Emberson *v.* McKenna, 16 S. W. 419; White *v.* Whaley, 1 White & W. Civ. Cas. §101; Cleveland *v.* Duggan, 2 Wills. Civ. Cas. §82; Frank *v.* J. S. Brown Hdw. Co., 10 Tex. Civ. App. 430, 31 S. W. 64.

Vermont. — Hicks *v.* Cram, 17 Vt.

sible, however, when accompanied by evidence that the report was known to and acquiesced in by the party sought to be charged.[31]

N. City Directories. — A paragraph from a city directory is not admissible to charge a defendant as a partner, unless it is shown that he knew of it.[32]

O. Mercantile Agency Reports. — Evidence that the party sought to be charged was represented to be a partner in reports of a mercantile agency is not admissible to prove a partnership, unless brought home to the party sought to be charged.[33]

449; Carlton *v.* Coffin, 27 Vt. 496.

Reasons. — Such evidence is hearsay. "To receive such evidence would be a departure from principle and a precedent dangerous in practice. A person of doubtful credit might cause a report to be circulated that another was in partnership with him, for the very purpose of maintaining his credit. His creditors also might aid in circulating the report, for the purpose of furnishing evidence to enable them to collect their debts." Brown *v.* Crandall, 11 Conn. 92.

Reputation Arising From Defendant's Act. — It has been held that evidence of common reputation is admissible if shown to arise from the acts of the party sought to be charged. Gilpin *v.* Temple, 4 Har. (Del.) 190.

In Suits by Partners. — It follows that partners themselves cannot establish their own partnership by common reputation, so as to entitle them to sue. Lockridge *v.* Wilson, 7 Mo. 560. See also Adams *v.* Morrison, 113 N. Y. 152, 20 N. E. 829.

On Behalf of Third Parties. — In Parshall *v.* Fisher, 43 Mich. 529, 5 N. W. 1049, evidence of general repute was admitted on behalf of third parties to show that a certain person was not a partner. But see *contra,* Scott *v.* Blood, 16 Me. 192.

In the following cases it was said that evidence of reputation alone is not sufficient, but the question of its admissibility was not decided. Tunlin *v.* Goldsmith, 40 Ga. 221; Holman *v.* Herscher (Tex.), 16 S. W. 984. In Turner *v.* McIlhaney, 8 Cal. 575, it is said that evidence of common report is admissible, "first, in corroboration; and second, to show knowledge on the part of the plaintiff." The statement is a mere *dictum.*

31. Gilpin *v.* Temple, 4 Har. (Del.) 190; Gaffney *v.* Hoyt, 2 Idaho 184, 10 Pac. 34; Marks *v.* Hardy, 25 Ky. L. Rep. 1770, 1909, 78 S. W. 864, 1105; Frank *v.* J. S. Brown Hdw. Co., 10 Tex. Civ. App. 430, 31 S. W. 64.

"If the fact had been proved that the saw-mill business was openly carried on in Chipley, Fla., in the name of Hall & Mobley as partners, perhaps the common notoriety of this fact might also be proved to charge the defendant with probable knowledge of it, in order to show that by culpable silence or express agreement the defendant had permitted himself to be held out to the public as a partner; provided it were further proved that the debt sued for was contracted on the faith of this fact, and related to the alleged partnership business." Tanner & Delaney Engine Co. *v.* Hall, 86 Ala. 305, 5 So. 584.

It has been said that if the party sought to be charged resides in the neighborhood he may be presumed to know of the reputation. Gay *v.* Fretwell, 9 Wis. 186. But when he resides elsewhere knowledge must be brought home to him. Campbell *v.* Hastings, 29 Ark. 512.

32. First Nat. Bank *v.* Loggie, 14 Wash. 699, 45 Pac. 644. But such an entry has been admitted in connection with other testimony. Entwisle *v.* Mulligan (Pa.), 12 Atl. 766.

33. *Arkansas.* — Campbell *v.* Hastings, 29 Ark. 512.

Colorado. — Mullins *v.* Gilligan, 12 Colo. App. 13, 54 Pac. 1106.

Kentucky. — Marks *v.* Hardy, 25 Ky. L. Rep. 1770, 1909, 78 S. W. 864, 1105.

P. From Whom Evidence May Come. — Evidence of the actual existence of a partnership need not come from a member of the firm. It may be given by any witness who knows the facts.[34]

Q. Party Incompetent To Testify Against Decedent. — Under a statute declaring parties incompetent to testify against executors and administrators of deceased persons concerning a personal transaction with a decedent, a party cannot be a witness in his own behalf to establish his partnership with the deceased.[35]

R. Evidence To Prove One a Dormant Partner. — The existence of a dormant partnership cannot be proved by hearsay evidence;[36] but it has been held that evidence of general reputation may be received to show that a person alleged to be a partner is in fact a dormant partner.[37]

S. Evidence To Prove Holding Out. — a. *Knowledge of Con-*

New York. — Sheehan *v.* Fleetham, 66 Hun 628, 21 N. Y. Supp. 128.

Ohio. — Cook *v.* State Co., 36 Ohio St. 135, 38 Am. Rep. 568.

Texas. — Frank *v.* J. S. Brown Hdw. Co., 10 Tex. Civ. App. 430, 31 S. W. 64.

When it is shown that such reports were made with defendant's consent they are admissible. Carey *v.* Marshall, 67 N. J. L. 236, 51 Atl. 698, (admissible as to sales made thereafter; inadmissible as to sales made before).

34. Gilbert *v.* Whidden, 20 Me. 367 (may be proved by persons who have done business with them as partners); *In re* Dusenbury, 94 N. Y. Supp. 107 (person who has done business with firm may testify as to who are members); Hodges *v.* Tarrant, 31 S. C. 608, 9 S. E. 1038.

In Farmers Bank *v.* Saling (Or.), 54 Pac. 190, it was held that a witness might testify that he knew defendants were partners because he had dealt with them, and their stationery and billheads so indicated. See also Woods *v.* Quarles, 10 Mo. 170 (evidence of third parties admitted).

When a witness has stated what he has seen or heard, tending to establish a partnership, it is competent to prove negatively that he had no knowledge or information to the contrary. Conklin *v.* Barton, 43 Barb. (N. Y.) 435.

Evidence of Partner. — A partner may testify as to whom the other partners were. First Nat. Bank *v.* Conway, 67 Wis. 210, 30 N. W. 215; Rosenbaum *v.* Howard, 69 Minn. 41, 71 N. W. 823.

35. Adams *v.* Morrison, 113 N. Y. 152, 20 N. E. 829. See also Ford *v.* Kennedy, 64 Ga. 537.

36. Such evidence may be received, however, to prove whether the plaintiff had been informed of the existence of the relation. Lingenfelser *v.* Simon, 49 Ind. 82.

The evidence was not sufficient to hold the defendant as a dormant partner in Douglas *v.* Frame, Lalor Supp. (N. Y.) 45.

37. Metcalf *v.* Officer, 2 Fed. 640, 1 McCrary 325. ("The definition of a dormant partner sanctioned such proof. He is one whose name and transactions are unknown to the world, at least to such extent that he cannot be regarded an ostensible partner. It is a question of fact for the jury to determine, although the style of the partnership indicated to the world that more than one might be members of the copartnership; and the same class of testimony which would justify a jury in deciding whether a plaintiff knew a defendant was a partner is competent and admissible to determine whether a partner is dormant.")

Declarations of One Partner. — The declarations of one partner are not admissible to establish the relation as against another. Whitney *v.* Ferris, 10 Johns (N. Y.) 66.

As to sufficiency of evidence, see Rowland *v.* Estes, 190 Pa. St. 111, 42 Atl. 528.

duct Must Be Shown. — Evidence of conduct, declarations and the like of the party sought to be changed is not admissible unless it is shown that they were known to the plaintiff and were relied upon by him in the transaction;[38] and, even if admitted, they are not sufficient without such additional showing.[39]

b. *Evidence of Reliance.* — Reliance may be shown by evidence of declarations of one partner to the plaintiff at the time of the transaction,[40] or by evidence of the conduct of one party.[41]

c. *Conduct.* — Evidence of acts, admissions and representations known to plaintiff which would tend to make him believe the party sought to be charged to be a partner is admissible.[42] The defendant may introduce evidence of his conduct in rebuttal when it tends to disprove the representations.[43]

38. *Alabama.* — Alexander *v.* Handley, 96 Ala. 220, 11 So. 390.

Iowa. — Davenport Woolen Mills Co. *v.* Neinstedt, 81 Iowa 226, 46 N. W. 1085.

Massachusetts. — Fitch *v.* Harrington, 13 Gray 468, 74 Am. Dec. 641.

Missouri. — Rimel *v.* Hayes, 83 Mo. 200.

Pennsylvania. — Denithorne *v.* Hook, 112 Pa. St. 240, 3 Atl. 777 (agreement between defendants and third parties not admissible to show holding out, unless it is shown that plaintiff knew of it).

39. Benedict *v.* Davis, 2 McLean 347, 3 Fed. Cas. No. 1293; Thornton *v.* McDonald (Ga.), 33 S. E. 680 (admissions not sufficient when it is not shown that plaintiff acted upon them); Cassidy *v.* Hall, 97 N. Y. 159.

40. Southwick *v.* McGovern, 28 Iowa 533 (admitted to show that goods were sold on the credit of the firm); Brown *v.* Grant, 39 Minn. 404, 40 N. W. 268; Rogers *v.* Murray, 110 N. Y. 658, 18 N. E. 261; Greenwood *v.* Sias, 21 Hun (N. Y.) 391; Hicks *v.* Cram, 17 Vt. 449.

41. Fletcher *v.* Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355 (letters, circulars, etc., admitted, although circulated without knowledge of party sought to be charged).

The plaintiff may be asked if he supposed defendants were partners, in order to show that he believed such to be the fact. De Cordova *v.* Powter, 48 Hun 620, 1 N. Y. Supp. 147.

42. *Alabama.* — Cain Lumb. Co. *v.* Standard Dry Kiln Co., 108 Ala. 346, 18 So. 882 (C had been partner in another transaction; did not repudiate when informed that he was believed to be a partner; made claim that contract was conditional).

Colorado. — Stevens *v.* Walton, 17 Colo. App. 440, 68 Pac. 834 (newspaper article stated that defendant was a partner; he had knowledge of it, but did not deny it; article admissible).

Kansas. — Rizer *v.* James, 26 Kan. 221 (advertisement in newspaper stated that defendant was a partner; sufficiently brought home to defendant by showing that he was a regular subscriber to paper).

Michigan. — Parshall *v.* Fisher, 43 Mich. 529, 5 N. W. 1049.

Minnesota. — Rosenbaum *v.* Howard, 69 Minn. 41, 71 N. W. 823.

Evidence that the defendants allowed a default to be taken in another action wherein they were sued as partners is competent to show a holding out. Ellis *v.* Jameson, 17 Me. 235; Fogg *v.* Greene, 16 Me. 282; Cragin *v.* Carleton, 21 Me. 492.

A letter from an attorney for defendant to plaintiff, written before the debt was incurred, in respect to giving security for the prospective debt, is irrelevant. Phillips *v.* Trowbridge Furn. Co., 92 Ga. 596, 20 S. E. 4. And such evidence is not admissible. Potter *v.* Greene, 9 Gray (Mass.) 309, 69 Am. Dec. 290.

43. Fletcher *v.* Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355 (may prove that he refused to pay for advertising; that he returned

d. *General Reputation.* — Evidence of general reputation in the community is admissible to show that plaintiff believed the defendant to be a partner, and gave credit with that understanding.[44]

e. *Evidence of no Actual Existence.* — Evidence tending to show that there was no partnership in fact is immaterial to a holding out and should be excluded.[45]

4. Sufficiency of Evidence. — A. Participation in Profits. Evidence of participation in profits is sufficient proof of partnership when not rebutted.[46]

B. In Actions Between Partners. — a. *Generally.* — In suits between partners it must be shown that there was an intent to enter into the partnership relation.[47] Stricter proof is required than in actions in which third persons are plaintiffs.[48]

mail unopened; that he successfully resisted suit brought against him as partner).

44. Southwick *v.* McGovern, 28 Iowa 533 (statements from individuals; report from mercantile agency); Benjamin *v.* Covert, 47 Wis. 375, 2 N. W. 625.

Likewise, evidence that the party sought to be charged was not generally reputed to be a member of the firm is admissible to show that plaintiff did not rely upon his membership. Bernard *v.* Torrance, 5 Gill & J. (Md.) 383.

Evidence of the party's dealings with others in the community is admissible in order to show, not only that he has held himself out as a partner, but that the fact has been one of such general notoriety in the community that the plaintiff may be presumed to have given the credit on the strength of it. Wood *v.* Pennell, 51 Me. 52.

45. Griffin *v.* Carr, 21 App. Div. 51, 47 N. Y. Supp. 323, *affirmed* 165 N. Y. 621, 59 N. E. 1123 (evidence of intention of parties immaterial; Reed *v.* Kremer, 111 Pa. St. 482, 5 Atl. 237, 56 Am. Rep. 295 (where defendant has held himself out as a partner, articles of agreement are not admissible to prove non-existence); Rainsford *v.* Massengale, 5 Wyo. 1, 35 Pac. 774 (defendant signed check in firm name; evidence that firm reimbursed him is immaterial).

Likewise, evidence tending to show that a party was induced to enter into the partnership relation by fraud is not admissible. Van Kleeck *v.* McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182. But where the plaintiff relies upon both actual existence and a holding out he cannot object to evidence showing no actual existence. Hughes *v.* Moles, 3 Lack. Jur. 382.

46. Gibson *v.* Smith, 31 Neb. 354, 47 N. W. 1052. It is sufficient in the absence of other evidence. Meehan *v.* Valentine, 29 Fed. 276.

When the *prima facie* case made by a showing of participation of profits is not rebutted it is sufficient to warrant a finding of partnership. Fourth Nat. Bank *v.* Altheimer, 91 Mo. 190, 3 S. W. 858; *In re* Francis, 2 Sawy. 286, 9 Fed. Cas. No. 5031.

Such *prima facie* case may be rebutted by showing that profits were not received as such, but simply by way of compensation for services. (Roper *v.* Schaefer, 35 Mo. App. 30); or in part payment of a loan. Scholtz *v.* Freud, 128 Mich. 72, 87 N. W. 130.

47. Sabel *v.* Savannah Rail & Equipment Co., 135 Ala. 380, 33 So. 663; Boon *v.* Turner, 96 Mo. App. 635, 70 S. W. 916.

It must appear that there was an agreement, express or implied, for joint ownership of partnership funds, and for a participation in the profits and losses of the business, either ratably or in some other proportion. Heard *v.* Wilder, 81 Iowa 421, 46 N. W. 1075; Chase *v.* Barrett, 4 Paige (N. Y.) 148.

48. *Alabama.* — Chisholm *v.* Cowles, 42 Ala. 179.

b. *Universal Partnership With Decedent.* — To establish a universal partnership in a suit by a survivor against the representatives of a deceased partner, the evidence should be clear and full, and not subject to doubt.[49]

C. In Actions by Partners. — The evidence must establish the existence of an actual partnership between the parties.[50]

Delaware. — Davis *v.* White, 1 Houst. 228; Robinson *v.* Green, 5 Har. 115.

Florida. — Dubos *v.* Hoover, 25 Fla. 720, 6 So. 788.

Illinois. — Loucks *v.* Paden, 63 Ill. App. 545; Haug *v.* Haug, 193 Ill. 645, 61 N. E. 1053 *affirming* 90 Ill. App. 604.

Iowa. — Irwin *v.* Cooper, 111 Iowa, 728, 82 N. W. 757; Scribner *v.* Starbuck, 52 Iowa 714, 2 N. W. 1014.

Maryland. — Whiting *v.* Leakin, 66 Md. 255, 7 Atl. 688.

Massachusetts. — McMurtrie *v.* Guiler, 183 Mass. 451, 67 N. E. 358.

Michigan. — Groth *v.* Payment, 79 Mich. 290, 44 N. W. 611.

Missouri. — Bush *v.* Bush, 89 Mo. 360, 14 S. W. 560; Creath *v.* Distilling Co., 70 Mo. App. 296 (conflicting oral evidence; additional evidence of petition filed by defendant in court in another matter in which he alleged that plaintiff was his partner, sufficient).

New Jersey. — Jones *v.* Beekman (N. J. Eq.), 47 Atl. 71.

New York. — Smith *v.* Wood, 36 N. Y. St. 847, 12 N. Y. Supp. 724; Kearney *v.* Morris, 63 Hun 635, 18 N. Y. Supp. 346 (in connection with conflicting statements, written "extracts from the books of the firm, coupled with the presumptions against the defendants which the destruction of the firm's books creates," sufficient); Van Da Linda *v.* Stevens, 9 App. Div. 179, 41 N. Y. Supp. 126 (plaintiff's husband, who had been a partner, sold interest to her; plaintiff testified that defendant recognized her as partner, but defendant denied it; books showed division of profits); Evans *v.* Warner, 20 App. Div. 230, 47 N. Y. Supp. 16; Solomons *v.* Ruppert, 34 App. Div. 230, 54 N. W. Supp. 729; Burkhardt *v.* Walsh; 49 App. Div. 634, 64 N. Y. Supp. 779 (plaintiff testified to oral partnership in building houses on speculation; defendant claimed plaintiff was a mere employe; additional evidence that plaintiff bought one of the lots, managed all the building, and collected the rents, sufficient); Leeds *v.* Ward, 38 Misc. 674, 78 N. Y. Supp. 239; Haynes *v.* Foley, 82 App. Div. 629, 81 N. Y. Supp. 446; *In re* Muller, 96 App. Div. 619, 88 N. Y. Supp. 673.

Oregon. — Gius *v.* Coffinberry, 39 Or. 414, 65 Pac. 358.

South Carolina. — Wagner *v.* Sanders, 62 S. C. 73, 39 S. E. 950.

West Virginia. — Hinkson *v.* Ervin, 40 W. Va. 111, 20 S. E. 849.

Proof of Holding Out. — But it is held that evidence that parties have acted as partners is *prima facie* evidence of the relation, even in proceedings between themselves. Forbes *v.* Davison, 11 Vt. 660.

49. Gray *v.* Palmer, 9 Cal. 616.

50. Maret *v.* Wood, 3 Cranch C. C. 2, 16 Fed. Cas. No. 9,067.

Gilbert *v.* Whidden, 20 Me. 367; Reed *v.* Brewer (Tex. Civ. App.), 36 S. W. 99. See Gray *v.* Gibson, 6 Mich. 300, where Christiancy, J., said: "The plaintiffs had sued jointly for the wheat; they were, therefore, bound to show a joint right to, or interest in the wheat as between themselves. They sued as *partners,* and claimed the joint right or interest in no other way. It was necessary, therefore, to prove a partnership which would constitute such joint right or interest. . . . [It was contended that the court should apply] the same rule in all respects to the proof of partnership of plaintiffs, as would be applicable if they had been sued as partners. We do not understand this to be the law, especially in a case like the present. Had the plaintiffs held themselves out to defendant as partners, and had he contracted with them as such in respect to his wheat, they might, per-

D. In Actions Against Partners. — Parties will be held to be partners as to creditors upon slighter proof than is necessary to establish the relation between themselves.[51]

haps, have maintained an action as partners against him for anything growing out of the contract, without showing that they were strictly partners as between themselves. *Bond v. Pittard 3 M. & W. (Eng.) 358.* Or if the suit had been upon a written contract made expressly with all the plaintiffs as partners, or upon negotiable paper, indorsed in blank, etc., no partnership, perhaps, need be proved. . . . At least, there is nothing to take the case out of the general rule that the right of action by partners depends upon the contract of partnership as existing between themselves."

51. *United States.* — *In re* Grant, 106 Fed. 496; *In re* Beckwith, 130 Fed. 475 (same).

Alabama. — Henderson *v.* Perryman, 114 Ala. 647, 22 So. 24; Leinkauff *v.* Frenkle, 80 Ala. 136.

California. — Krasky *v.* Wollpert, 134 Cal. 338, 66 Pac. 309.

Delaware. — Davis *v.* White, 1 Houst. 228.

Colorado. — McDonald *v.* Clough, 10 Colo. 59, 14 Pac. 121.

Georgia. — Chaffee *v.* Rentfroe, 32 Ga. 477; Scranton *v.* Rentfrow, 29 Ga. 341.

Illinois. — Creighton *v.* Garcia, 41 Ill. App. 429; Reynolds *v.* Radke, 112 Ill. App. 575; Janes *v.* Bergevin, 83 Ill. App. 607; Kelleher *v.* Tisdale, 23 Ill. 354.

Indiana. — Henshaw *v.* Root, 60 Ind. 220; Bisel *v.* Hobbs, 6 Blackf. 479.

Iowa. — Gensburg *v.* Field, 104 Iowa 599, 74 N. W. 3; Jenkins *v.* Barrows, 73 Iowa 438, 35 N. W. 510; McMullan *v.* MacKenzie, 2 Greene 368; Cleghorn *v.* Johnson, 11 Iowa 292; Davenport Woolen Mills Co. *v.* Neinstedt, 81 Iowa 226, 46 N. W. 1085; Wallace *v.* Berger, 14 Iowa 183.

Kentucky. — Rhodes *v.* Lowry, 25 Ky. L. Rep. 1708, 1822, 78 S. W. 459, 883.

Louisiana. — Schmidt *v.* Ittman, 46 La. Ann. 888, 15 So. 310.

Maine. — Holmes *v.* Porter, 39 Me. 157.

Massachusetts. — Case *v.* Baldwin, 136 Mass. 90; Griffiths *v.* Copeland, 183 Mass. 548, 67 N. E. 652.

Michigan. — Webb *v.* Johnson, 95 Mich. 325, 54 N. W. 947; Dawson *v.* Iron Range & H. B. R. Co., 97 Mich. 33, 56 N. W. 106; Peninsular Sav. Bank *v.* Currie, 123 Mich. 666, 82 N. W. 511 (evidence sufficient to go to jury); Wright *v.* Weimeister, 87 Mich. 594, 49 N. W. 870.

Minnesota. — Rosenbaum *v.* Howard, 69 Minn. 41, 71 N. W. 823.

Missouri. — Bissell *v.* Warde, 128 Mo. 439, 31 S. W. 928; Meyers *v.* Boyd, 44 Mo. App. 378.

Nebraska. — Atwood *v.* Peregoy, 22 Neb. 238, 34 N. W. 378; Atwood *v.* Kennard, 22 Neb. 246, 34 N. W. 381; McDonald *v.* Jenkins, 44 Neb. 163, 62 N. W. 444.

New Hampshire. — State *v.* Wiggin, 20 N. H. 449.

New Jersey. — Sayre *v.* Coyne (N. J. Eq.), 33 Atl. 300; Wyckoff *v.* Luse, 67 N. J. L. 218, 54 Atl. 100.

New York. — Rogers *v.* Murray, 110 N. Y. 658, 18 N. E. 261; Clark *v.* Clergue, 49 Hun 609, 1 N. Y. Supp. 892; Pilwisky *v.* Cattaberry, 9 N. Y. Supp. 636; Elliott *v.* Vallaro, 16 App. Div. 630, 44 N. Y. Supp. 1072; Schroth *v.* Gedney, 30 Misc. 808, 61 N. Y. Supp. 923; Hallenbeck *v.* Smith, 51 App. Div. 344, 64 N. Y. Supp. 957; Swift *v.* McNamara, 25 Misc. 789, 54 N. Y. Supp. 569; Whitney *v.* Sterling, 14 Johns. 215; Pell *v.* Baur, 41 N. Y. St. 99, 16 N. Y. Supp. 258.

North Carolina. — Clements *v.* Mitchell, 59 N. C. 171; Dobson *v.* Chambers, 78 N. C. 334.

Oregon. — North Pac. Lumb. Co. *v.* Spore, 44 Or. 462, 75 Pac. 890.

Pennsylvania. — Guyer *v.* Port, 155 Pa. St. 322, 26 Atl. 545; Drennen *v.* House, 41 Pa. St. 30.

South Carolina. — Winslow *v.* Cheffelle, Harp. Eq. 25.

Texas. — Brannin *v.* Wear-Boogher Dry Goods Co., (Tex. Civ. App.), 30 S. W. 572.

Vermont. — Mathews *v.* Felch, 25 Vt. 536.

To Prove Wife a Partner of Her Husband. — Stronger proof is required to charge a wife as a partner of her husband than is required in other cases.[52]

E. Where Defendant Sets up Partnership of Plaintiff. Where defendant sets up in defense that the plaintiff and another are partners, for the purpose of showing a defect of parties he must prove the actual existence of the relation.[53]

F. To Prove a Holding Out. — The evidence to prove a holding out is insufficient unless knowledge of the representations is brought home to the plaintiff.[54]

II. EVIDENCE OF LIABILITY.

1. Burden of Proof. — A. In General. — The burden of proving joint liability is upon the plaintiff.[55]

West Virginia. — Hinkson *v.* Ervin, 40 W. Va. 111, 20 S. E. 849.

Wisconsin. — Schoeffler *v.* Schwarting, 17 Wis. 320; Moore *v.* Dickson, 121 Wis. 591, 99 N. W. 322; Voshmik *v.* Urquhart, 91 Wis. 513, 65 N. W. 60.

The fact that one partner sells partnership property in his own name, "together with the inference that the proceeds were transmitted to him in his own name, does not necessarily rebut the idea of a partnership, because if a partnership exists, the fact that one partner by contract with his copartner is to have the control of the product for sale will not prevent it being such." Field *v.* Eilers, 103 Ill. App. 374, *per* Bigelow, P. J.

"The defendants below, by presenting a note in evidence which they had paid to plaintiffs, executed in the same way as the note sued on, and reading in evidence a receipt for money given to them in the name of their firm, have admitted that they were partners in trade." McFarland *v.* Lewis, 3 Ill. 344.

52. John Bird Co. *v.* Hurley, 87 Me. 579, 33 Atl. 161. In this case the court said: "The law cherishes the marriage relation. It recognizes the deep interest the wife should and does take in the business carried on by the head of the family. It regards and commends this interest as arising naturally from marital affection rather than from any partnership in the business. This wifely interest is essential to the completeness of the marriage relation. Its quick and ample manifestation should not be restrained by any fear of danger therefrom to the wife or her separate estate."

53. It is not enough to show that the plaintiffs have held themselves out as partners. Proof sufficient to charge parties as partners is not sufficient when set up to prevent a recovery. Bishop *v.* Hall, 9 Gray (Mass.) 430. In Adler *v.* Cloud, 42 S. C. 272, 20 S. E. 393, the evidence presented was held insufficient to show that plaintiff had a partner.

54. Evidence Sufficient. — *United States.* — Blair *v.* Harrison, 57 Fed. 257, 6 C. C. A. 326, *affirming* Claflin *v.* Bennett, 51 Fed. 693.

Georgia. — Thornton *v.* McDonald, 108 Ga. 3, 33 S. E. 680.

Illinois. — Hefner *v.* Palmer, 67 Ill. 161.

Iowa. — Iowa Leather & S. Co. *v.* Hathaway, 78 N. W. 193.

Maine. — Wood *v.* Pennell, 51 Me. 52; Palmer *v.* Pinkham, 37 Me. 252.

Maryland. — Lighthiser *v.* Allison, 59 Atl. 182 (not sufficient).

Michigan. — Wright *v.* Weimeister, 87 Mich. 594, 49 N. W. 870 (sufficient).

Missouri. — Kelm *v.* Rathbun, 36 Mo. App. 199 (sufficient); Huyssen *v.* Lawson, 90 Mo. App. 82 (same).

New York. — Rives *v.* Michaels, 16 Misc. 57, 37 N. Y. Supp. 644.

55. M. W. Powell Co. *v.* Finn, 198 Ill. 567, 64 N. E. 1036, *affirming*

B. Negotiable Instruments. — In cases of non-trading partnerships the burden of proof of authority to bind the firm by a negotiable instrument is upon the plaintiff;[56] in cases of trading partnerships it is upon the defendants to show want of authority,[57]

101 Ill. App. 512; De St. Aubin *v.* Laskin, 74 Ill. App. 455.

In a suit against a firm of attorneys for money collected during the continuance of the relation the burden is on the defendant denying liability to show that the employment was before the existence of the firm. Parrish *v.* Maupin (Ky.), 42 S. W. 1141.

The burden of proof is upon the creditor to show what money was advanced or indebtedness incurred on the faith of the partnership. Johnson *v.* Rankin (Tenn. Ch. App.), 59 S. W. 638.

Where there are three different names under which business is transacted the presumption is that there are separate firms. The burden of showing that they are identical is upon the plaintiff. Frisbie *v.* McFarlane, 196 Pa. St. 110, 46 Atl. 359.

Where, however, letters acknowledging liability on behalf of the firm are introduced, the burden is upon the defendant to show fraud. Robinson *v.* Quarles, 1 La. Ann. 460.

Where a transaction is beyond the scope of the partnership, and so beyond the power of an individual partner, the burden of proving ratification is upon the plaintiff. Sibley *v.* American Exchange Nat. Bank, 97 Ga. 126, 25 S. E. 470. See also Miller *v.* Hines, 15 Ga. 197.

56. Schellenbeck *v.* Studebaker, 13 Ind. App. 437, 41 N. E. 845, 55 Am. St. Rep. 240; Schele *v.* Wagner, 163 Ind. 20, 71 N. E. 127; Smith *v.* Sloan, 37 Wis. 285, 19 Am. Rep. 757 (non-trading partnership). See also cases cited in section on presumptions arising under such facts, all of which, either expressly or impliedly, lay down the same rule.

57. *California.* — Pierce *v.* Jackson, 21 Cal. 636.

Georgia. — Miller *v.* Hines, 15 Ga. 197.

Iowa. — Sheldon *v.* Bigelow, 118 Iowa 586, 92 N. W. 701.

Kentucky. — Hamilton *v.* Summers, 12 B. Mon. 11, 54 Am. Dec. 509.

Michigan. — Carrier *v.* Cameron, 31 Mich. 373, 18 Am. Rep. 192; Littell *v.* Fitch, 11 Mich. 525.

Mississippi. — Faler *v.* Jordan, 44 Miss. 283.

Nebraska. — Schwanck *v.* Davis, 25 Neb. 196, 41 N. W. 141.

New York. — Paul *v.* Van Da Linda, 58 Hun 611, 12 N. Y. Supp. 638; Richardson *v.* Erckens, 53 App. Div. 127, 65 N. Y. Supp. 872, *affirmed* 62 N. E. 1100.

Texas. — Powell *v.* Messer, 18 Tex. 401.

See also cases cited in section on presumptions arising under such facts, all of which, either expressly or impliedly, lay down the same rule.

"The fact that the note was given in the name of the firm is of itself presumptive evidence that it was given for a valuable consideration furnished to the copartnership, and the *onus probandi* lies upon the party seeking to avoid the note to show that it was given for things not relating to or affecting the partnership." McMullan *v.* MacKenzie, 2 Greene (Iowa) 368.

A few cases lay down the rule broadly that the burden is upon the plaintiff in all cases. "This burden is sustained by the presumption of law when the partnership is a commercial one, but, when it appears that the partnership is of the non-trading class, then it devolves upon him to go further, and show such additional facts as are necessary to establish the right, either directly, by proof of express authority, or inferentially, by proof of usage, custom or necessity therefor." Schellenbeck *v.* Studebaker, 13 Ind. App. 437, 41 N. E. 845, 55 Am. St. Rep. 240.

When a note is made after dissolution the plaintiff has the burden of proving authority. Harwell *v.* Phillips & Buttrof Mfg. Co., 123 Ala. 460, 26 So. 501.

and knowledge of all the facts in the case by the plaintiff.[58]

2. Presumption of Authority To Bind Firm. — A. Acts Within Scope of Partnership Business. — It is presumed that an act of one partner within the scope of the partnership business is done with authority, and is a partnership transaction.[59]

B. Acts Beyond Scope of Partnership Business. — On the other hand, it is presumed that acts of one partner beyond the scope of the partnership business are without authority.[60]

C. By Negotiable Instruments. — a. *Trading Partnerships.* When a negotiable instrument is made by a member of a trading partnership, a presumption of authority to bind the firm arises.[61]

58. Platt *v.* Koehler, 91 Iowa 592, 60 N. W. 178; Buettner *v.* Steinbrecher, 91 Iowa 588, 60 N. W. 177; Hamilton *v.* Summers, 12 B. Mon. (Ky.) 11, 54 Am. Dec. 509.

59. Edwards *v.* Pitzer, 12 Iowa 607; Dick *v.* Maxwell, 6 Mart. (N. S.) (La.) 396; Johnston *v.* Trask, 116 N. Y. 136, 22 N. E. 377, 15 Am. St. Rep. 394, 5 L. R. A. 630; Mifflin *v.* Smith, 17 Serg. & R. (Pa.) 165.

A power of attorney was given to a firm in 1871. In 1872 the firm name was signed by V., who was then a member of the firm. *Held,* these facts are sufficient to warrant the presumption that V. was a member of the firm when the power of attorney was given, and that he therefore had power to execute it. Frost *v.* Erath Cattle Co., 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831.

60. Assignments for Creditors. It is presumed that an assignment for creditors, made by one partner alone, is without authority. Mayer *v.* Bernstein, 69 Miss. 17, 12 So. 257. The presumption was overcome in Sheldon *v.* Smith, 28 Barb. (N.Y.) 593.

Miscellaneous Matters Beyond Scope. — Hobson *v.* Porter, 2 Colo. 28; Miller *v.* Hines, 15 Ga. 197; Johnson *v.* McClary, 131 Ind. 105, 30 N. E. 888 (transfer of firm's assets for separate debt); Koch *v.* Endriss, 97 Mich. 444, 56 N. W. 847 (lease of house for member and family; lessor has burden of showing authority); Waller *v.* Keyes, 6 Vt. 257; Hubbard *v.* Moore, 67 Vt. 532, 32 Atl. 465 (conveyance of firm property for individual debt).

Non-Trading Partnerships. — "In non-commercial partnerships, one who seeks to hold the firm bound upon a contract made by a single member must be able to show either express authority, or that such is the custom and usage of that particular branch of business in which the firm is engaged, or such facts as will warrant the conclusion that the partner had been invested by his copartners with the requisite authority, the distinction being that in commercial partnerships the extent of a partner's power to bind the firm is a question of law, while the power of a partner in a non-commercial firm to bind his copartners is a question of fact." Judge *v.* Braswell, 13 Bush (Ky.) 67, 26 Am. Rep. 185. See also Jamison *v.* Cullom, 110 La. 781, 34 So. 775; Cavanaugh *v.* Salisbury, 22 Utah 465, 63 Pac. 39 (partnership in stage business; no authority to engage in mining); Gutheil *v.* Gilmer, 23 Utah 84, 63 Pac. 817 (same).

61. *United States.* — Le Roy *v.* Johnson, 2 Pet. 186.

Georgia. — Miller *v.* Hines, 15 Ga. 197.

Indiana. — Schellenbeck *v.* Studebaker, 13 Ind. App. 437, 41 N. E. 845, 55 Am. St. Rep. 240.

Iowa. — Platt *v.* Koehler, 91 Iowa 592, 60 N. W. 178; Sherwood *v.* Snow, 46 Iowa 481; Buettner *v.* Steinbrecher, 91 Iowa 588, 60 N. W. 177; McMullan *v.* McKenzie, 2 Greene 368.

Kansas. — Adams *v.* Ruggles, 17 Kan. 237; Lindh *v.* Crowley, 29 Kan. 756.

Kentucky. — Hamilton *v.* Summers, 12 B. Mon. 11, 54 Am. Dec. 509; Magill *v.* Merrie, 5 B. Mon.

b. *Non-Trading Partnerships.* — But there is no presumption that a member of a non-trading partnership had authority to execute a negotiable instrument for the firm.[62]

c. *Instruments Given for Private Debt.* — A third party taking from a partner the signature of his firm for a private debt cannot hold the firm without proof of authority, adoption, or ratification.[63]

168; Rochester *v.* Trotter, 1 A K. Marsh. 54.

Maryland. — Manning *v.* Hays, 6 Md. 5.

Michigan. — Carrier *v.* Cameron, 31 Mich. 373, 18 Am. Rep. 192; Littell *v.* Fitch, 11 Mich. 525.

Minnesota. — Van Dyke *v.* Seelye, 49 Minn. 557, 52 N. W. 215.

Mississippi. — Faler *v.* Jordan, 44 Miss. 283; Sylverstein *v.* Atkinson, 45 Miss. 81.

Missouri. — Feurt *v.* Brown, 23 Mo. App. 332.

Nebraska. — Schwanck *v.* Davis, 25 Neb. 196, 41 N. W. 141.

New York. — Paul *v.* Van Da Linda, 58 Hun 611, 12 N. Y. Supp. 638; Doty *v.* Bates, 11 Johns. 544; Vallett *v.* Parker, 6 Wend. 615.

Ohio. — Purviance *v.* Sutherland, 2 Ohio St. 478.

Pennsylvania. — Hogg *v.* Orgill, 34 Pa. St. 344.

Texas. — Powell *v.* Messer, 18 Tex. 401.

The presumption that the paper is what it purports to be cannot be overthrown upon a mere matter of form in inserting the name of one of the members of the partnership as payee. Haldeman *v.* Bank of Middletown, 28 Pa. St. 440, 70 Am. Dec. 142.

A note executed by one partner in the name of the firm is *prima facie* evidence that it was given for partnership purposes. Ensminger *v.* Marvin, 5 Blackf. (Ind.) 210; Holmes *v.* Porter, 39 Me. 157.

62. *Connecticut.* — Pease *v.* Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53.

Indiana. — Schellenbeck *v.* Studebaker, 13 Ind. App. 437, 41 N. E. 845, 55 Am. St. Rep. 240; Schele *v.* Wagner, 163 Ind. 20, 71 N. E. 127.

Kentucky. — Judge *v.* Braswell, 13 Bush 67, 26 Am. Rep. 185.

Mississippi. — Prince *v.* Crawford, 50 Miss. 344.

Missouri. — Deardorf *v.* Thacher, 78 Mo. 128, 47 Am. Rep. 95.

New Hampshire. — National Etc. Bank *v.* Noyes, 62 N. H. 35.

Vermont. — Waller *v.* Keyes, 6 Vt. 257.

Wisconsin. — Smith *v.* Sloan, 37 Wis. 285, 19 Am. Rep. 757.

"Where the act done by the individual partner is not within the scope and usage of similar partnerships, nor according to the course of business of the particular partnership, nor a necessary incident to a successful prosecution of the business engaged in, to bind the several partners there must be proof of their previous express consent, or, being fairly advised of the facts, subsequent adoption and satisfaction." Gray *v.* Ward, 18 Ill. 32.

In Carrier *v.* Cameron, 31 Mich. 373, 18 Am. Rep. 192, it is held that it is not necessary for a plaintiff to show either express authority or that the nature of the partnership warrants an implication of authority. See also Miller *v.* Hines, 15 Ga. 197 (partnership for practice of law).

63. *Alabama.* — Rolston *v.* Click, 1 Stew. 526; Pierce *v.* Pass, 1 Port. 232.

Georgia. — Miller *v.* Hines, 15 Ga. 197 (where paper given out of the partnership business by one member, presumption of want of authority arises).

Illinois. — Davis *v.* Blackwell, 5 Ill. App. 32 (guaranty of individual note); Harts *v.* Byrne, 31 Ill. App. 260.

Louisiana. — Mechanics & Traders Ins. Co. *v.* Richardson, 33 La. Ann. 1308, 39 Am. Rep. 290; Mutual Nat. Bank *v.* Richardson, 33 La. Ann. 1312.

Minnesota. — Bank of Commerce *v.* Selden, 3 Minn. 155.

New York. — Joyce *v.* Williams, 14 Wend. 141; Kemeys *v.* Richards, 11 Barb. 312.

d. *Instruments in Name of Individual Partner.* — Where instruments are drawn in the name of an individual partner the presumption is that the intention was to bind the individual, and not the firm.[64]

D. By Contract of Guaranty. — It is presumed that an individual partner had no authority to make a contract of guaranty or to issue accommodation paper for the firm.[65]

3. Admissibility. — A. Parol Evidence. — Parol evidence is admissible to show that a liability, apparently separate, is in fact a partnership liability.[66]

Ohio. — Penfield *v.* Mason, 17 Ohio Cir. Ct. 160.

West Virginia. — Tompkins *v.* Woodyard, 5 W. Va. 216.

The burden is on the plaintiff to show consent by the other partners. Farwell *v.* St. Paul Trust Co., 45 Minn. 495, 48 N. W. 326, 22 Am. St. Rep. 742; Van Dyke *v.* Seelye, 49 Minn. 557, 52 N. W. 215; Levi *v.* Latham, 15 Neb. 509, 19 N. W. 460, 48 Am. Rep. 361; Williams *v.* Walbridge, 3 Wend. (N. Y.) 415; Mercien *v.* Andrus, 10 Wend. (N. Y.) 461 (mere fact that other partner was present and heard the arrangement not sufficient); Gernon *v.* Hoyt, 90 N. Y. 631. Such authority was sufficiently shown in Warren *v.* Martin, 24 Neb. 273, 38 N. W. 849.

In Allen *v.* Cary, 33 La. Ann. 1455, it is said to be "the duty of every one who deals with a member of a commercial partnership who apparently transcends his mandates and powers, to require evidence of his authority to bind his copartners, and this at his risk and peril."

A partnership note *prima facie* binds the firm. Jones *v.* Rives, 3 Ala. 11; Knapp *v.* McBride, 7 Ala. 19.

64. Patriotic Bank *v.* Coote, 3 Cranch C. C. 169, 18 Fed. Cas. No. 10,807.

Manufacturers & Mechanics Bank *v.* Winship, 5 Pick. (Mass.) 11. See also Davis *v.* Blackwell, 5 Ill. App. 32 (individual note; guaranty by firm).

The presumption is overcome in Bach *v.* Cornen, 5 La. Ann. 109. "A firm may be constituted doing business in the name and style of one of its members, and the copartnership will be bound by the signature of such name, when relating to the business of the firm. But in such case the presumption would be that the signature of the individual was binding on him alone." Mercantile Bank *v.* Cox, 38 Me. 500. To the same effect see Oliphant *v.* Mathews, 16 Barb. (N. Y.) 608.

65. *Connecticut.* — New York F. Ins. Co. *v.* Bennett, 5 Conn. 574, 13 Am. Dec. 109.

Maine. — Darling *v.* March, 22 Me. 184.

Massachusetts. — Sweetser *v.* French, 2 Cush. 309, 48 Am. Dec. 666.

Minnesota. — Osborne *v.* Stone, 30 Minn. 25, 13 N. W. 922; Van Dyke *v.* Seelye, 49 Minn. 557, 52 N. W. 215.

Mississippi. — Andrews *v.* Planters Bank, 7 Smed. & M. 192, 45 Am. Dec. 300; Langan *v.* Hewett, 13 Smed. & M. 122.

New York. — Foot *v.* Sabin, 19 Johns. 154, 10 Am. Dec. 208; Schermerhorn *v.* Schermerhorn, 1 Wend. 119; Boyd *v.* Plumb, 7 Wend. 309; Butler *v.* Stocking, 8 N. Y. 408.

North Dakota. — Clarke *v.* Wallace, 1 N. D. 404, 48 N. W. 339, 26 Am. St. Rep. 636.

Contra, First Nat. Bank *v.* Carpenter, 34 Iowa 433.

Where a promissory note is indorsed in blank by one member of a firm, and is offered for discount by the maker, a presumption against the assent of the other partners arises. But the burden of proof which the law puts upon the plaintiff under such circumstances is not limited to direct and positive proof. Assent may be shown by the circumstances of the case. Mechanics Bank *v.* Barnes, 86 Mich. 632, 49 N. W. 475; Fore *v.* Hitson, 70 Tex. 517, 8 S. W. 292.

66. Brown *v.* Lawrence, 5 Conn.

B. Circumstances and Relations of Partners. — Upon the question whether a liability is a separate or a partnership debt, evidence as to the manner in which the partners lived, and as to their domestic and business relations while conducting the partnership affairs, is competent.[67]

C. Conduct of Partners. — Character of Business. — Evidence of the conduct of the partners and of the nature, extent, and character of the business is admissible when it tends to show a partnership liability.[68]

D. Money Borrowed by Partner. — In the absence of express proof of a separate contract, the application to partnership uses of money borrowed by one partner is evidence to show that the debt is joint.[69]

E. Firm Books of Account. — a. *In General.* — Firm books of account are admissible against the members of a partnership to show that the transaction was a partnership affair.[70]

b. *Presumption of Knowledge of Contents.* — A member of a partnership is presumed to know the contents of the firm books.[71]

397 (parol evidence admitted to show that notes were delivered to partner for collection as a partnership matter; receipt given was as an individual); Huguenot Mills *v.* Jempson, 68 S. C. 363, 47 S. E. 687; McDonald *v.* Eggleston, 26 Vt. 154, 60 Am. Dec. 303 (parol evidence admissible to prove instrument to be the deed of the firm; evidence of parol ratification).

That a promissory note to which a partnership name was signed, executed by one of the alleged partners, not in the presence of the other, contains a waiver of homestead, presents no legal objection to its admission in evidence. Giles *v.* Vandiver, 91 Ga. 192, 17 S. E. 115.

67. Haben *v.* Harshaw, 49 Wis. 379, 5 N. W. 872.

68. *California.* — Sanborn *v.* Cunningham, 33 Pac. 894.

Illinois. — Hallack *v.* March, 25 Ill. 33 (evidence that partner was present and made no objection to the terms of the submission of the partnership affairs to arbitration is admissible to show assent thereto).

Iowa. — Baxter *v.* Rollins, 99 Iowa 226, 68 N. W. 721.

Michigan. — Stecker *v.* Smith, 46 Mich. 14, 8 N. W. 583; Carney *v.* Hotchkiss, 48 Mich. 276, 12 N. W. 182; Towle *v.* Dunham, 84 Mich. 268, 47 N. W. 683, Coller *v.* Porter, 88 Mich. 549, 50 N. W. 658; Botsford *v.* Kleinhaus, 29 Mich. 332.

Mississippi. — Lea *v.* Guice, 13 Smed. & M. 656; Boyd *v.* Ricketts, 60 Miss. 62.

New York. — Richardson *v.* Hinck, 48 App. Div. 531, 62 N. Y. Supp. 1073.

Pennsylvania. — Little *v.* Clarke, 36 Pa. St. 114.

Rhode Island. — Anthony *v.* Wheatons, 7 R. I. 490.

Vermont. — Burton *v.* Ferris, Brayt. 78; Waller *v.* Keyes, 6 Vt. 257 (previous consent to purchase may be proved by evidence of subsequent conduct); Harris *v.* Holmes, 30 Vt. 352.

Where partnership articles provided that a firm should assume the "mercantile debts" of the then "jobbing business" of one of the partners, verbal evidence was admitted of contemporaneous acts and declarations of the parties, and of the opening entries in their firm books, to prove the sense in which those terms were used. Ellis *v.* Harrison, 104 Mo. 270, 16 S. W. 198.

69. *In re* Davis Estate, 5 Whart. (Pa.) 530, 34 Am. Dec. 574.

70. McDermott *v.* Hacker, 109 Iowa 239, 80 N. W. 338. See also Smith *v.* Hood, 4 Ill. App. 360.

71. The fact that one member was permitted to use the books in

F. In Suits by Partners. — Contract by One Member. Collusion. — In a suit by partners they may show that a contract made by one member was a firm obligation, providing they can also show that the defendant so understood.[72] Evidence as to collusion of one partner in an effort to defraud the firm is also admissible.[73]

III. EVIDENCE AS TO OWNERSHIP OF PROPERTY.

1. Question of Intent. — The ownership of partnership property is to be determined by evidence of the intent of the parties.[74] The right of a partner is frequently derived from a resulting or constructive trust.[75]

2. Burden of Proof. — A. Title in One Partner. — Where the legal title is in one partner, who mortgages it, the burden of proving that the property was in fact a portion of the partnership assets, and that the mortgagee had notice of the facts, is upon the other partner.[76]

B. Property in Possession of One Partner. — Whenever partnership property is traced into the hands and possession of an individual partner the burden is upon him to show why it should not be treated as partnership assets.[77]

3. Presumptions. — A. Ownership Presumed To Be in Holder of Legal Title. — The ownership of land is presumed to be in the party in whose name the conveyance is taken.[78]

his individual business does not change the rule. Burchell *v.* Voght, 35 App. Div. 190, 55 N. Y. Supp. 80, *affirmed* 164 N. Y. 602, 58 N. E. 1085.

The presumption is stated, but not so broadly, in McDermott *v.* Hacker, 109 Iowa 239, 80 N. W. 338.

72. Kitchen *v.* Dallas Brick Co. (Tex. Civ. App.), 29 S. W. 402.

Where suit is brought by partners in their individual names they may introduce in evidence a receipt made out to the firm in the firm name. Kuhl *v.* Long, 102 Ala. 563, 15 So. 267.

73. Where a defendant, in a suit by a partnership, sets up a settlement with one of the partners, the plaintiff may introduce evidence tending to show that such settlement was collusive, and made with intent to defraud the other partners. Loftus *v.* Ivy, 14 Tex. Civ. App. 410, 37 S. W. 766.

In a suit to test the validity of an assignment for creditors, evidence that the absconding partner stated that he authorized it is admissible. Blum *v.* Bratton, 2 Tex. Civ. App. 226, 21 S. W. 65.

74. "Whether lands held in the name of one partner or of both are to be deemed copartnership property is generally a question of intent, to be gathered from the manner in which the members of the firm have dealt with it. While the fact that funds of the copartnership have been used in paying for the lands, when originally purchased or subsequently, is not conclusive of this intent, yet it is persuasive evidence and when, as in this case, it is accompanied by the entry of the transaction on the firm books, as a copartnership transaction under circumstances which import a daily declaration that it was so regarded, is convincing." Lindsay *v.* Race, 103 Mich. 28, 61 N. W. 271.

75. See article "Trusts and Trustees."

76. Hogle *v.* Lowe, 12 Nev. 285.

77. Hardin *v.* Jamison, 60 Minn. 348, 62 N. W. 394.

78. Greenwood *v.* Marvin, 11 N. Y. St. 235; Chamberlin *v.* Chamber-

B. Improvements. — Improvements of a permanent character put upon the property of an individual partner are *prima facie* individual property.[79]

C. Use for Partnership Purposes. — In general, evidence that property standing in the name of one partner is used for partnership purposes raises a presumption that it is partnership property.[80]

D. Presumption as to Interest of Partners. — It is presumed that partners' interests in firm property are equal.[81]

4. Parol Evidence as to Ownership of Land — Parol evidence is admissible to show that land standing in the name of one partner is partnership property.[82] Some cases hold to the contrary, how-

lin, 12 Jones & S. (N. Y.) 116 (leasehold presumed to belong to individual partner, although the business is carried on by the firm on the premises).

Where a conveyance is to several individuals in proportions stated, and it is agreed between them that their liabilities therefor shall be in proportion to their interests, it is presumed that the property is separate property. Lindsay *v.* Race, 103 Mich. 28, 61 N. W. 271.

79. Goepper *v.* Kinsinger, 39 Ohio St. 429.

80. Where land is used by a partnership for partnership purposes it may be presumed that it was bought with partnership funds and is partnership property. Hammond *v.* Hopkins, 143 U. S. 224. But see Goepper *v.* Kinsinger, 39 Ohio St. 429, where it is said that the mere fact that property was in the occupation of the firm will not, "as between the partners themselves, or between the partners and creditors, convert the individual real property of one partner into joint property of the partnership. There must be something which amounts to a representation that it is joint property, or conduct justifying the creditor to treat it as such."

81. Leonard *v.* Worsham, 18 Tex. Civ. App. 410, 45 S. W. 336.

"Where there is no evidence except the mere fact that the partnership exists, a rule that the partners hold unequal shares in any distinct proportion would necessarily be arbitrary; but we know that each has some interest, and justice would seem to demand that their interests should be presumed to be equal." Johnston *v.* Ballard, 83 Tex. 486, 18 S. W. 686.

It is presumed that profits are to be divided equally. Turnipseed *v.* Goodwin, 9 Ala. 372.

82. *Iowa.* — York *v.* Clemens, 41 Iowa 95.

Kansas. — Scruggs *v.* Russell, 1 Kan. 478, McCahon 39.

Kentucky. — Lucas *v.* Cooper, 15 Ky. 642, 23 S. W. 959.

Michigan. — Williams *v.* Shelden, 61 Mich. 311, 28 N. W. 115.

Minnesota. — Sherwood *v.* St. Paul & C. R. Co., 21 Minn. 127 (it may be shown that the name of the individual grantee is the name of the firm).

New Mexico. — De Cordova *v.* Korte, 7 N. M. 678, 41 Pac. 526.

New York. — Fairchild *v.* Fairchild, 64 N. Y. 471; Thompson *v.* Egbert, 1 Hun 484, 3 Thomp. & C. 474; Leary *v.* Boggs, 1 N. Y. St. 571.

Ohio. — Teare *v.* Cain, 7 Ohio Cir. Ct. 375 (title taken in names of all partners).

Pennsylvania. — Black's Appeal, 89 Pa. St. 201.

Texas. — Kempner *v.* Rosenthal, 81 Tex. 12, 16 S. W. 639.

The rules are well stated in Bird *v.* Morrison, 12 Wis. 138, as follows: "1. Where real estate is bought with partnership funds for partnership purposes there is a resulting trust in favor of the partnership, though the title be taken in the name of one. [Of course such facts may be shown by parol evidence.]

"2. Where the title is held by all the partners jointly, so as to be entirely consistent with the character of partnership property, the fact of partnership may be shown by parol, and that the property was held for partnership purposes, and from these facts the law will imply its partner-

ever,[83] and still others make a distinction between cases arising between partners themselves and those where third persons are involved.[84]

5. Parol Evidence as to Personal Property. — Parol evidence is also admissible to show ownership of personal property apparently belonging to one partner.[85]

6. Neither Positive Agreement Nor Use. — It is not indispensable that the evidence show a positive agreement that the land should be partnership property, nor need it show that the land has been actually used for partnership purposes.[86]

ship character, and such trusts as result therefrom.

"3. A partnership in any branch of trade or business may be shown by parol as an existing fact, and then whatever real estate is held for the purpose of such business is regarded as an incident thereto, and that the law will imply a trust in favor of the partnership where the legal title is not in all."

Evidence that the property was assessed to the firm and that it paid the taxes thereon is admissible. Hubbard *v.* Moore, 67 Vt. 532, 32 Atl. 465; Booher *v.* Perrill, 140 Ind. 529, 40 N. E. 36.

83. Otis *v.* Sill, 8 Barb. (N. Y.) 102. See also Hale *v.* Henrie, 2 Watts (Pa.) 143, 27 Am. Dec. 289, where the court said: "Such a trust or ownership of property is inconsistent with the title on record, which is vested in them as tenants in common. To permit a person, apparently owning property as an individual, to aver a different right in himself as partner, by which his relations to creditors and others are to be affected, would defeat the statute of frauds and perjuries, by which no interest in real estates (except a lease for a short period) can vest or be transferred without deed or writing. It would be even worse than to pass real estate without writing, since a deed would thus express one thing and mean another; and our recording acts, instead of being guides to truth, would be no better than snares."

To the same effect, see Appeal of Lefevre, 69 Pa. St. 122; Appeal of Ridgway, 15 Pa. St. 177, 53 Am. Dec. 586 ("when partners intend to bring real estate into partnership their intention must be manifested by deed or writing placed on record, that purchasers and creditors may not be deceived").

84. Later cases in Pennsylvania make a distinction between cases arising between the partners themselves and those where third persons are involved. It is held that a resulting trust in favor of one partner may be shown by parol when the rights of others are not involved; but when the rights of creditors or purchasers are involved, such evidence is not admissible to defeat such rights. Appeal of Ebbert, 70 Pa. St. 79. See also Appeal of Second Nat. Bank, 83 Pa. St. 203; Appeal of Holt, 98 Pa. St. 257; Williams *v.* Sheldon, 61 Mich. 311, 28 N. W. 115.

85. The fact that a bank deposit stands in the individual name of one of the partners of a firm shows at most that he has legal title thereto, and is not conclusive evidence that the firm has no interest therein. Extraneous evidence is admissible to show that the equitable title and substantial ownership of the funds are in the firm, and that moneys going to swell the deposit in fact go to the benefit of the firm. Gansevoort Bank *v.* Carragan, 69 N. J. L. 404, 55 Atl. 741.

When a note is given to one partner it may be shown to have been given for a partnership transaction, and to be the property of the firm. Hall *v.* Tufts, 18 Pick. (Mass.) 455.

86. "When the land is conveyed to the several partners it is not indispensable that it should be actually used for partnership purposes, nor that a positive agreement should be proved making it partnership property. If it has been paid for with partnership effects it is then a ques-

7. Ownership as Against Creditors. — The same evidence which will prove property to belong to a firm as between the members will suffice as to creditors.[87]

IV. EVIDENCE AS TO COMMENCEMENT AND DURATION.

The commencement and duration of a partnership may be proved in the same manner as existence;[88] and when existence has once been shown it is presumed to continue,[89] but where there has been an apparent dissolution the burden of proof is upon the one alleging the continuance.[90]

tion of intention whether the conveyance is to have its legal effect, and the parties are to be treated as tenants in common, or whether the land is to be treated as partnership property. The manner in which the accounts are kept, whether the purchase money was severally charged to the members of the firm, or whether the accounts treat it the same as other firm property, as to purchase money, income, expenses, etc., are controlling circumstances in determining such intention, and from these circumstances an agreement may be inferred." The rule is the same when the deed is made in the individual name of one of the partners. Fairchild *v.* Fairchild, 64 N. Y. 471.

87. "The same evidence, however, which would make it partnership property for the purpose of paying debts and adjusting the equities between the copartners would establish it for the purpose of final division. It would be incongruous to say that evidence which would be sufficient to establish that it was partnership property for the former purposes would fail for the latter purpose, and I can find no authority for such a distinction. Such a rule, while compelling one member of a firm holding the legal title as trustee for the partnership to account and disgorge to the extent of making the accounts equal between the members of the firm, when that was accomplished would enable him to rob his associates by pocketing the remainder." Fairchild *v.* Fairchild, 64 N. Y. 471.

88. Teas *v.* Woodruff (N. J.), 10 Atl. 392; Burnley *v.* Rice, 18 Tex. 481 (partner allowed reputation of existence to continue, and failed to produce articles of partnership at the trial).

Parol Evidence. — The continuance of a partnership may be shown by parol, although it has expired according to the terms of the written articles. Harzburg *v.* Southern R. Co., 65 S. C. 539, 44 S. E. 75.

89. **Presumption of Continuance.** Where a copartnership is shown to exist it is presumed to continue until notice is published or brought to the attention of those dealing with it. First Nat. Bank *v.* Grignon (Idaho), 65 Pac. 365.

90. An apparent termination of the partnership relations of the parties would be treated as an actual dissolution as between themselves, unless it be made to appear by a preponderance of the evidence that the parties continued to be partners secretly. In other words, the burden of proof is upon the party alleging the continuance of the relation. Wright *v.* Cudahy, 168 Ill. 86, 48 N. E. 39, *affirming* 64 Ill. App. 453.

When actual existence is relied upon, evidence to show a dissolution prior to the transaction is admissible. Nichols *v.* White, 41 Hun (N. Y.) 152.

Rice *v.* Maddox, 16 Daly 156, 9 N. Y. Supp. 524; Fick *v.* Mulholland, 48 Wis. 413, 4 N. W. 346.

A partnership for mining will be presumed to be intended to last at least one mining season. Where such a partnership engages men to work for a year, to be paid by a share in the profits, it is implied that the partnership is to last at least a year. Potter *v.* Moses, 1 R. I. 430.

V. DISSOLUTION.

1. How Shown. — Dissolution may be shown by parol evidence of an agreement between the parties, and by evidence of the surrounding circumstances.[91]

2. Authority for Subsequent Acts. — In order to bind one of the late partners for an act of another after dissolution, in excess of implied authority, the evidence must show authorization.[92]

3. Power To Dispose of Property. — After the dissolution neither of the late partners has a right to dispose of the interest of the other save for the payment of the firm's liabilities.[93]

4. Notice of Dissolution. — A. As to Prior Dealers. — a. *Actual Notice Necessary.* — As to prior dealers, the evidence must show an actual notice of dissolution; but this may be proved by circumstantial evidence.[94]

91. Truesdell *v.* Baker, 2 Rich. L. (Va.) 351 (may be proved by parol when written articles provide for dissolution by mutual consent).

A writing transferring the interest of one member to another, although not expressing the agreement to dissolve, is competent in corroboration of a parol agreement of dissolution. Emerson *v.* Parsons, 46 N. Y. 560, *affirming* 2 Sweeny (N. Y.) 447.

Evidence of the discontinuance of the old firm and the formation of a new one, who succeed in business at the same store, is admissible as tending to show dissolution. Southwick *v.* Allen, 11 Vt. 75. See also Waller *v.* Davis, 59 Iowa 103, 12 N. W. 798.

But evidence that the store has been transferred is not in itself sufficient. Brown *v.* Clark, 14 Pa. St. 469.

The mere stopping of a newspaper notice stating a party's connection with the firm raises no presumption of dissolution. Uhl *v.* Harvey, 78 Ind. 26.

Joint declarations orally made to the public are admissible to prove dissolution. Cregler *v.* Durham, 9 Ind. 375.

In an action against an assignee in bankruptcy of a partnership, who sets up dissolution of a prior firm, plaintiff may show that there has been a mere change of name, and that the same parties managed the business both before and after the change. Mellinger *v.* Parsons, 51 Iowa 58, 49 N. W. 861.

92. Where a negotiable instrument is given or indorsed by a member of a firm after dissolution and notice, the burden of proving authority is upon the plaintiff. Woodson *v.* Wood, 84 Va. 478, 5 S. E. 277.

93. Where the dispute is between one partner and a purchaser from another after dissolution, it is competent to show that the partnership debts were paid prior to the sale; for after such payment neither party has a right to dispose of the interests of the other. Hogendobler *v.* Lyon, 12 Kan. 276.

94. It may be shown by direct or circumstantial evidence. Laird *v.* Ivens, 45 Tex. 621.

Mailing Notice. — Where a notice of dissolution is mailed to a party, addressed to his street and number, a strong presumption of notice arises; but to give rise to this presumption it must appear that the street and number were given in the address. Hunt *v.* Colorado Mill. & Elev. Co., 1 Colo. App. 120, 27 Pac. 873.

Letter Heads. — Where Carr & Coffin did business under the firm name of Carr, Brown & Co., and Carr withdrew and Coffin continued the business under the same firm name, and Coffin sent to one Swift, with whom they had had previous dealings, a letter with the printed heading "Edward Coffin," under the firm name of Carr, Brown & Co., the letter was admissible to show notice of the dissolution to Swift. Swift

b. *Publication.* — Mere publication of a notice in a newspaper is not sufficient to affect prior dealers with notice, unless it is shown, under the circumstances, to amount to actual notice.[95]

B. Public Rumor. — Evidence of public rumor and notoriety is not admissible to show actual notice.[96]

C. As to Subsequent Dealers. — a. *Public and Notorious Statement Sufficient.* — As to subsequent dealers, evidence of a public and notorious disavowal of continued existence is sufficient.[97]

b. *Publication.* — Publication in a newspaper is sufficient notice to such parties.[98]

c. *Public Rumor.* — Evidence of public rumor in the community is admissible as a circumstance proper to be considered with other evidence.[99]

VI. KINDS OF EVIDENCE ADMISSIBLE.

1. Best Evidence of Terms of Partnership Agreement. — Where the terms of a partnership agreement are in issue the written articles are the best evidence and should be produced.[1]

v. Carr, 145 Mass. 552, 15 N. E. 146.

Commercial Agency Reports. Evidence that the fact of dissolution was published in a commercial agency report received by plaintiffs is admissible. Homberger *v.* Alexander, 11 Utah 363, 40 Pac. 260.

Facts Showing Knowledge. — Evidence that one of the plaintiffs had written the name of one of the defendants as a late partner "is sufficient proof of notice to him." Cahoon *v.* Hobart, 38 Vt. 244.

Reports of one of plaintiff's employes referring to one member only are admissible. Robinson *v.* Worden, 33 Mich. 316.

95. *United States.* — Shurlds *v.* Tilson, 2 McLean 458, 22 Fed. Cas. No. 12,827.

Maryland. — Boyd *v.* McCann, 10 Md. 118 (evidence of publication is admissible, although not conclusive).

Massachusetts. — Smith *v.* Jackman, 138 Mass. 143 (evidence admitted).

New York. — Lansing *v.* Gaine, 2 Johns. 300.

Pennsylvania. — Little *v.* Clarke, 36 Pa. St. 114.

Publication in a paper taken by the plaintiffs is a fact from which actual notice may be inferred. And where it is shown that one paper in which the notice was published was taken by plaintiffs it is not error to admit other papers in evidence, by way of establishing the publicity of the notice and raising the presumption of actual knowledge on the part of the plaintiffs. Treadwell *v.* Wells, 4 Cal. 260. See also Roberts *v.* Spencer, 123 Mass. 397.

Publication of fact of formation of a new partnership does not furnish evidence of notice of dissolution of the old firm. Southwick *v.* Allen, 11 Vt. 75.

96. Central Nat. Bank *v.* Frye, 148 Mass. 498, 20 N. E. 325; Southwick *v.* Allen, 11 Vt. 75.

97. Lovejoy *v.* Spafford, 93 U. S. 430.

98. Shurlds *v.* Folsom, 2 McLean 458, 22 Fed. Cas. No. 12,827; Mowatt *v.* Howland, 3 Day (Conn.) 353; Lansing *v.* Gaine, 2 Johns. (N. Y.) 300.

News Item. — Publication of the fact of dissolution in a news item in a newspaper is a fact to be considered. Askew *v.* Silman, 95 Ga. 678, 22 S. E. 573.

99. Lovejoy *v.* Spafford, 93 U. S. 430; Askew *v.* Silman, 95 Ga. 678, 22 S. E. 573; Central Nat. Bank *v.* Frye, 148 Mass. 498, 20 N. E. 325.

1. Trump *v.* Baltzell, 3 Md. 295; Price *v.* Hunt, 59 Mo. 258; Field *v.* Tenney, 47 N. H. 513; Hastings *v.* Hopkinson, 28 Vt. 108.

2. Written Articles Cannot Be Varied by Parol. — As between the partners and those claiming under them, parol evidence is not admissible to alter or vary the terms of written articles or other instruments[2] of partnership, although it is admissible to explain them.[3] And it has been held that a recital in partnership articles that a certain amount of money has been paid is not conclusive, but may be contradicted by parol evidence.[4]

3. Partnership Books. — A. ADMISSIBLE TO CHARGE THE PARTNERSHIP. — Partnership books are admissible to charge a partnership in a suit against it.[5]

B. ADMISSIBLE TO CHARGE INDIVIDUAL PARTNER. — They are

Collateral Issue. — But this rule does not obtain when the suit is between a partner and a stranger, and the terms of the partnership are not the question at issue, but come up collaterally. Brem *v.* Allison, 68 N. C. 412.

Secondary Evidence. — Where the articles of partnership are lost, parol evidence of their contents is admissible. Perry *v.* Randolph, 6 Smed. & M. (Miss.) 335.

2. *Alabama.* — Couch *v.* Woodruff, 63 Ala. 466.

California. — Miller *v.* Butterfield, 79 Cal. 62, 21 Pac. 543.

Georgia. — Pursley *v.* Ramsey, 31 Ga. 403; Delaney *v.* Anderson, 54 Ga. 586.

Illinois. — Burgess *v.* Badger, 124 Ill. 288, 14 N. E. 850; Evans *v.* Hanson, 42 Ill. 234; Taft *v.* Schwamb, 80 Ill. 289; Bragg *v.* Geddes, 93 Ill. 39.

Indiana. — Wood *v.* Deutchman, 75 Ind. 148.

Louisiana. — Lynch *v.* Burr, 7 Rob. 96.

Missouri. — Burress *v.* Blair, 61 Mo. 133.

New Jersey. — Van Horn *v.* Van Horn, 49 N. J. Eq. 327, 23 Atl. 1079, *reversing* 20 Atl. 826.

New York. — Walsh *v.* Brown, 51 Hun 644, 4 N. Y. Supp. 79; Spingarn *v.* Rosenfeld, 4 Misc. 523, 24 N. Y. Supp. 733; Jarvis *v.* Palmer, 11 Paige 650; Crater *v.* Bininger, 45 N. Y. 545, *affirming* 54 Barb. 155; Lowber *v.* LeRoy, 2 Sandf. 202.

Pennsylvania. — Gearing *v.* Carroll, 151 Pa. St. 79, 24 Atl. 1045; Brett *v.* Challis, 5 Clark 360.

South Carolina. — Reab *v.* Pool, 30 S. C. 140, 8 S. E. 703.

Admissible To Show a Mistake. Barnes *v.* O'Reilly, 73 Hun 169, 25 N. Y. Supp. 906.

Parol evidence is admissible to show an assumption of prior debts, although the articles of partnership are silent in regard thereto. Parol evidence is admissible to prove collateral and independent facts about which the writing is silent. Keough *v.* McNitt, 6 Minn. 513.

Limitation. — The rule applies only to controversies arising between the parties to the instrument, their representatives, and those claiming under them, and has no application to a controversy to which a stranger is a party. Smith *v.* Moynihan, 44 Cal. 53.

3. Brewer *v.* McCain, 21 Colo. 382, 41 Pac. 822; Peaks *v.* Lord, 42 Neb. 15, 60 N. W. 349.

It is also admissible to prove a fact upon which the written articles are silent. Ball *v.* Benjamin, 73 Ill. 39.

4. Lowe *v.* Thompson, 86 Ind. 503.

5. Perry *v.* Butt, 14 Ga. 699; Tucker *v.* Peaslee, 36 N. H. 167; Walden *v.* Sherburne, 15 Johns. (N. Y.) 409 (entries made by one admissible against both).

Shackelford *v.* Shackelford, 32 Gratt. (Va.) 481.

In a suit against an assignee of a firm to recover property which he alleged to have been transferred by way of an unlawful preference, the firm books, verified by the oath of one partner, are admissible on behalf of the defendant to show insolvency and knowledge thereof. Holbrook *v.* Jackson, 7 Cush. (Mass.) 136.

also admissible to charge an individual partner who has had access to them.[6]

C. Admissibility on Behalf of Partnership. — How Proved. The admissibility of books on behalf of a partnership depends upon the ordinary rules relating to books of account.[7] In general they must be proved by the oath of the party who made the entries;[8] but if he is dead, or has left the state, they may be proved by the oath of one of the partners.[9]

D. Admissibility in Actions Between Partners. — In action between partners, partnership books are admissible to charge a partner who has had access to and opportunity to examine them.[10]

6. Eden *v.* Lingenfelter, 39 Ind. 19; First Nat. Bank *v.* Huber, 75 Hun 80, 26 N. Y. Supp. 961.

7. See article "Books of Account."

In a suit against a partnership, in which other creditors intervene, the firm books are not admissible in favor of the interveners and against the plaintiff, and while the books may be admitted if a conspiracy between the plaintiff and the defendant is shown, they are not admissible until at least a *prima facie* case of conspiracy is made out. Martin Brown Co. *v.* Perrill, 77 Tex. 199, 13 S. W. 975.

8. Brannin *v.* Foree, 12 B. Mon. (Ky.) 506.

In an action by the partnership, the books, verified by the partner who made most of the entries, are admissible to prove the account where a course of dealing is shown. Webb *v.* Michener, 32 Minn. 48, 19 N. W. 82.

In an action by a partnership one partner should not be allowed to testify as to entries made in the books by the other partner, unless he had knowledge that the sales were actually made, or unless he could show in some other way that he knew the entries spoke the truth. Horton *v.* Miller, 84 Ala. 537, 4 So. 370.

9. It has been held that where one of the copartners, who made the entries, is out of the state, the other copartner may swear to his handwriting in the books. Foster *v.* Sinkler, 1 Bay (S. C.) 40.

But the party should be held to strict proof that the one who made the entries was out of the state before secondary evidence should be admitted. Walker *v.* Parkham, 3 McCord (S. C.) 295.

Where the partner who made the entries is dead, the books may be proved by the oath of the other partner. White *v.* Murphy, 3 Rich. L. (S. C.) 369.

Where the firm is a defendant the books may be received in its favor although the partner who made the entries has absconded. New Haven & N. Co. *v.* Goodwin, 42 Conn. 230.

10. Foster *v.* Fifield, 29 Me. 136; Topliff *v.* Jackson, 12 Gray (Mass.) 565; Tucker *v.* Peaslee, 36 N. H. 167.

An entry made in the books at the time of the transaction in question is *prima facie* evidence in favor of the partner who personally transacted the matter, especially when all the partners have had access to the books. Armistead *v.* Spring, 1 Rob. (La.) 567.

And it has been held that items from a book are not admissible when it does not appear that they are the firm books, nor that plaintiff had access to them, nor that they were fairly kept. Adams *v.* Funk, 53 Ill. 219.

An entry made in the interest of the other members after dissolution is not admissible to charge a partner who had no knowledge thereof. Bank of British North America *v.* Delafield, 80 Hun 564, 30 N. Y. Supp. 600.

But it has been held that in an action between partners the firm books are not admissible against the defendant when the entries are not in his handwriting. Sutton *v.* Mandeville, 1 Cranch C. C. 2, 23 Fed. Cas. No. 13,648. *Compare* Jordan *v* White, 4 Mart. (N. S.) (La.) 335

E. In Actions for Accounting. — a. *In General.* — Upon a partnership accounting the firm books are admissible against those who have kept them and against those who have had access to and opportunity to examine them.[11]

b. *Presumption as to Opportunity To Inspect.* — While it is presumed that all the partners have had access to the books and opportunity to inspect them, the presumption is rebuttable, and the contrary may be shown.[12]

c. *When no Opportunity To Inspect.* — The books are not admissible against a partner who has had no opportunity to inspect them.[13]

(clerk who made entries was dead; books admitted).

11. *Alabama.* — Routen *v.* Bostwick, 59 Ala. 360; Desha *v.* Smith, 20 Ala. 747; Powers *v.* Dickie, 49 Ala. 81.

Arkansas. — Haller *v.* Willamowicz, 23 Ark. 566.

Illinois. — Gregg *v.* Hord, 129 Ill. 613, 22 N. E. 528; O'Brien *v.* Hanley, 86 Ill. 278 (books kept by a clerk; both partners had access).

Kentucky. — Kirwan *v.* Henry, 13 Ky. L. Rep. 199, 16 S. W. 828; Simms *v.* Kirtley, 1 T. B. Mon. 79.

Nebraska. — Morris *v.* Haas, 74 N. W. 828.

New Jersey. — Dunnell *v.* Henderson, 23 N. J. Eq. 174.

New York. — Donovan *v.* Clark, 138 N. Y. 631, 33 N. E. 1066; Heartt *v.* Corning, 3 Paige 566; Caldwell *v.* Leiber, 7 Paige 483; Cheever *v.* Lamar, 19 Hun 130.

Oregon. — Boire *v.* McGinn, 8 Or. 466.

South Carolina. — Richardson *v.* Wyatt, 2 Desaus. 471; Cameron *v.* Watson, 10 Rich. Eq. 64.

See also Roberts *v.* Eldred, 73 Cal. 394, 15 Pac. 16; Carpenter *v.* Camp, 39 La. Ann. 1024, 3 So. 269; Stoughton *v.* Lynch, 2 Johns. Ch. (N. Y.) 209.

Rationale. — "The admissibility of the books of a copartnership, on questions arising between the partners themselves, is founded on the right of each partner to have access to the books and to inspect them, and the presumption that he has in fact inspected them. His acquiescence amounts to an implied acknowledgment or a tacit assent to the correctness of the books. This is analogous to the well-settled rule that if a creditor presents to a debtor his account as a statement of his demand, and the debtor examines it or retains it for examination, and makes no objection within a reasonable time, it is an admission of the debt." Cameron *v.* Watson, 10 Rich. Eq. (S. C.) 92; Taylor *v.* Herring, 10 Bosw. (N. Y.) 447.

"This rule grows out of the relation between the parties who are agents for each other in the partnership transactions. Such books are subject to the inspection of all the copartners and to their instant correction if wrong." Wheatley *v.* Wheeler, 34 Md. 62.

12. "Whether they had such knowledge is matter of fact upon the whole evidence in the case. The ordinary presumption is, in cases of partnership, that all the partners have access to the partnership books, and might know the contents thereof. But this is a mere presumption from the ordinary course of business, and may be rebutted by any circumstances which either positively or presumptively rebut any inference of such access; such, for instance, as distance of place, or the course of business of the particular partnership, and, indeed, any other circumstances raising a presumption of non-access." United States Bank *v.* Binney, 5 Mason 176, 28 Fed. Cas. No. 16,791; Taylor *v.* Herring, 10 Bosw. (N. Y.) 447.

13. Wheatley *v.* Wheeler, 34 Md. 62; Saunders *v.* Duval, 19 Tex. 467. See also Cameron *v.* Watson, 10 Rich. Eq. (S. C.) 64.

The evidence was sufficient to overthrow the presumption of examina-

d. *Books Presumed To Be Correct.* — It is presumed that the partnership books are correct;[14] but this presumption may be overcome by clear evidence to the contrary.[15]

e. *Books Kept by One Partner.* — Where the business of the partnership has been almost exclusively conducted by one member of the firm, and the books have been kept by him, the other is entitled to introduce evidence of the incorrectness of the entries contained therein, and also to show that others, not entered, should be made.[16]

f. *Right To Impeach.* — The right to contradict books kept by the other party is not affected by the fact that they were introduced by the party seeking to impeach them.[17]

g. *Presumption Against Party Who Has Kept Books Incorrectly.* **(1.) Generally.** — Every presumption is indulged against a party who has wilfully kept incorrect accounts;[18] but this rule does not

tion, in Taylor *v.* Herring, 10 Bosw. (N. Y.) 447.

Account books are at least *prima facie* evidence of the affairs of the firm, although one partner has kept them from the others for a time. Mooe *v.* Story, 8 Dana (Ky.) 226.

14. "The partnership books of account are presumed to contain a true history of the business, and a true record of the transaction between the partners. In absence of proof to the contrary reliance is properly placed on such books." Stuart *v.* McKichan, 74 Ill. 122; Gregg *v.* Hord, 129 Ill. 613, 22 N. E. 528.

See also, to the effect that the entries are presumed to be correct, Routen *v.* Bostwick, 59 Ala. 360; Desha *v.* Smith, 20 Ala. 747; Heartt *v.* Corning, 3 Paige (N. Y.) 566; Hicks *v.* Chadwell, 1 Tenn. Ch. 251.

15. The partner who has kept the books may show that certain items are erroneous (Kirwan *v.* Henry, 13 Ky. L. Rep. 199, 16 S. W. 828); especially where the books were in reality kept by subordinates. Jamer *v.* Jacobs, 71 Hun 176, 24 N. Y. Supp. 1126, *affirmed* 147 N. Y. 710, 42 N. E. 723. And the rule holds when both parties have kept the books, or have had access thereto. Barrett *v.* Kling, 40 N. Y. St. 823, 16 N. Y. Supp. 92; Heartt *v.* Corning, 3 Paige (N. Y.) 566.

16. Carpenter *v.* Camp, 39 La. Ann. 1024, 3 So. 269; Donovan *v.* Clark, 138 N. Y. 631, 33 N. E. 1066; Horne *v.* Greer (Tenn. Ch. App.), 43 S. W. 774.

"When an error is committed, either on the debit or credit side, the entry, if improper, can be corrected, or, if an omission to make entries is shown, the error should be corrected, and the error may be established by other books connected with the partnership." Bannon *v.* Hawkins, 18 Ky. L. Rep. 150, 35 S. W. 636.

But where the parties have kept books of their daily affairs they should be shown to be clearly erroneous before a party should be permitted to recover beyond the same for a matter which ought to have been entered regularly every day. Parker *v.* Jonte, 15 La. Ann. 290. See also Van Ness *v.* Van Ness, 32 N. J. Eq. 669.

A partner should not be allowed to contradict them after the lapse of a great number of years. Richardson *v.* Wyatt, 2 Desaus. (S. C.) 471.

Although the books have been inaccurately kept they are admissible against any partner who has had access to them. Topliff *v.* Jackson, 12 Gray (Mass.) 565.

17. Donovan *v.* Clark, 138 N. Y. 631, 33 N. E. 1066. But see Wendling *v.* Jennisch, 85 Iowa 392, 52 N. W. 341.

18. Pierce *v.* Scott, 37 Ark. 308; Evans *v.* Montgomery, 50 Iowa 325; Leftwitch *v.* Leftwitch, 6 La. Ann. 346; Bevans *v.* Sullivan, 4 Gill. (Ind.) 383; Dimond *v.* Henderson, 47 Wis. 172, 2 N. W. 73.

But some evidence is necessary. Askew *v.* Odenheimer, Baldw. 380, 2

apply as against a party who has ignorantly confused the accounts.[19]

(2.) Effect of Neglect. — Where the partner whose business it is to keep the books neglects to keep them up, and many items are omitted, the books will not be admitted upon his behalf.[20]

h. *Loss of Books.* — Where partnership books are lost, and there is no other evidence from which an account can be stated, the court will not decree an accounting.[21]

i. *Reports of Experts.* — In Tennessee the books must be examined by experts, and their deductions are then admitted in evidence.[22]

j. *Entries After Dissolution.* — Entries made by a partner in the firm books after dissolution are not admissible in his behalf.[23]

k. *Inspection of Books.* — When one partner withholds the part-

Fed. Cas. No. 587. He cannot complain if other evidence is used to charge him. Petty *v.* Haas, 122 Iowa 257, 98 N. W. 104.

Where the books show that a certain sum has been received, and it does not appear therefrom how it has been expended, the partner who received the money will be held for the deficiency. Johnson *v.* Garrett, 23 Minn. 565.

19. This rule in all its rigor is for wrongdoers. It does not apply to those who have failed in their capacity to perform their undertakings. Knapp *v.* Edwards, 15 N. W. 140, 57 Wis. 191.

Thus, where the books are kept by the son of an ignorant partner no presumption is to be indulged against him because of carelessness, especially whether the other partner supervised the keeping of the books. Archer *v.* Barry, 23 Ky. Law Rep. 12, 62 S. W. 485.

Where the adverse party knows of the lack of method he cannot complain. Mitchell *v.* Mitchell, 92 Mich. 618, 52 N. W. 1024.

20. Greer *v.* Greer, 15 Ky. L. Rep. 472, 23 S. W. 866. In such a case the party who has kept the books cannot complain if he is held to their entries. Kirwan *v.* Henry, 13 Ky. L. Rep. 199, 16 S. W. 828.

21. The court will never undertake to adjust the rights of parties without satisfactory means of ascertaining what those rights are. Davidson *v.* Wilson, 3 Del. Ch. 307. But see Evans *v.* Montgomery, 50 Iowa 325, where the court said: "While the failure to keep accounts renders an accurate adjustment between the parties difficult, if not impossible, it will not do to say that no adjustment can be made because it is difficult, nor that no settlement will be had because it may not be absolutely correct. Ordinarily, in the settlement of complicated accounts, it is practicable only to approximate correctness. The law never refuses redress because absolute certainty cannot be obtained."

22. In Tennessee it is held to be the duty of the parties to have the books "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. Without the light thus afforded the books themselves would rather tend to mislead than to enlighten, and the record would be uselessly incumbered to no purpose." Myers *v.* Bennett, 3 Lea (Tenn.) 184. See also Hicks *v.* Chadwell, 1 Tenn. Ch. 251; Budeke *v.* Ratterman, 2 Tenn. Ch. 459.

23. "A partner who undertakes to wind up the affairs of a firm, stands in the position of an executor or administrator, and for that reason books kept by him of his collections and disbursements are not evidence for him, and he must show the amount of disbursements by the production of vouchers properly authenticated." Clements *v.* Mitchell, 62 N. C. 3. See also Cameron *v.* Watson, 10 Rich. Eq. (S. C.) 64 (books

nership books from the other the court may order the party so holding to deposit the books in court, or to allow an inspection and a copy to be taken.[24]

VII. EVIDENCE IN PARTICULAR ACTIONS.

1. Actions at Law Between Partners. — A. In General. — It is to be noted that in general, actions at law can be maintained only after a settlement of accounts, or where there are independent transactions; and of course the evidence must establish these facts.[25]

B. Money Had and Received. — A statement of account in the handwriting of a partner is admissible against him although not signed.[26]

C. Action for Contribution. — In an action for contribution the judgment roll is admissible.[27]

D. Compensation for Services. — A partner seeking to hold the other for compensation for services performed has the burden of proof. The presumption is against compensation.[28]

2. Actions for Dissolution and Accounting. — A. Burden of Proof. — a. *In General.* — The burden of proof in a suit for

admissible if there has been opportunity to inspect); Boyd *v.* Foot, 5 Bosw. (N. Y.) 110.

24. Kelly *v.* Eckford, 5 Paige (N. Y.) 548; Congdon *v.* Aylsworth, 16 R. I. 281, 18 Atl. 247; Johnston *v.* Ballard, 83 Tex. 486, 18 S. W. 686; Calloway *v.* Tate, 1 Hen. & M. (Va.) 9.

When Inspection Denied. — Where the defendant denies the partnership, and there is no evidence tending to show that the books will aid in establishing the fact, it is proper to deny an inspection. Knoch *v.* Funke, 27 Jones & S. 240, 14 N. Y. Supp. 477

Reasons. — The right rests upon the ground of the joint ownership of each partner. Stebbins *v.* Harmon, 17 Hun (N. Y.) 445.

25. Wright *v.* Cobleigh, 21 N. H. 339; Purvines *v.* Champion, 67 Ill. 459. In an action of assumpsit, evidence of acknowledgments of indebtedness is not admissible unless it is shown that the account sued on was one separate from the partnership account, or a general balance of the partnership accounts. Murdock *v.* Martin, 12 Smed. & M. (Miss.) 660.

Evidence relating to the state of the partnership business is not admissible in a suit at law. Wilt *v.* Bird, 7 Blackf. (Ind.) 258.

26. Yohe *v.* Barnet, 3 Watts & S. (Pa.) 81; Jessup *v.* Cook, 6 N. J. L. 434 (account in the handwriting of the defendant is admissible against him under a count for money had and received).

In such an action, evidence that the debt was paid by plaintiff six years after a general assignment for creditors gives rise to the presumption that the partnership had been dissolved. Brown *v.* Agnew, 6 Watts & S. (Pa.) 235.

27. Sears *v.* Starbird, 78 Cal. 225, 20 Pac. 547. In an action at law for contribution, plaintiff may introduce the record of the judgment, and may show infringement of the patent for which judgment was obtained. Smith *v.* Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311.

Evidence of the submission of a question to arbitration or of an attempted settlement is admissible. Beidler *v.* Shallenberger, 42 Iowa 203.

28. Boardman *v.* Close, 44 Iowa 428; Butcher *v.* Auld, 3 Kan. 217. Evidence of mere general understanding that the parties were to do what was right is not sufficient. Nevills *v.* Moore Min. Co., 135 Cal. 561, 67 Pac. 1054.

the settlement of partnership accounts is, in general, on the complainant.[29]

b. *Disputed Items.* — The burden of proving a disputed item is upon the party setting it up.[30]

c. *Payment.* — On an accounting between partners the burden of proving payment is upon the party setting it up.[31]

d. *Prior Dissolution or Settlement.* — On the issue of a prior dissolution, set up by defendant, the burden is upon him to prove his allegations by a preponderance of evidence.[32]

e. *Error or Fraud in Settlement.* — A party complaining of an error or fraud in the settlement of a partnership account should make it appear by proof.[33]

f. *Trust Relation.* — When quasi-trust relations exist, the burden of proof rests upon that party to whose care and fidelity the affairs of the concern were intrusted to make a fair and clear showing as a basis of settlement.[34]

g. *Presumption.* — When there is a settlement of account, and one partner retires, it is presumed that a debt owing by such partner

29. *Florida.* — Nims *v.* Nims, 23 Fla. 69, 1 So. 527.

Iowa. — McCabe *v.* Franks, 44 Iowa 208 (the party seeking to establish the claim has the burden of proof).

Kentucky. — Mooe *v.* Story, 8 Dana 226; Wilson *v.* Potter, 19 Ky. L. Rep. 988, 42 S. W. 836.

Louisiana. — Camblat *v.* Tupery, 2 La. Ann. 10.

Missouri. — Burgess *v.* Ransom, 72 Mo. App. 207.

Oregon. — Ashley *v.* Williams, 17 Or. 441, 21 Pac. 556.

Pennsylvania. — Stibich *v.* Golnner, 8 Pa. Dist. 227.

Tennessee. — Maupin *v.* Daniel, 3 Tenn. Ch. 223.

West Virginia. — Hinkson *v.* Ervin, 40 W. Va. 111, 20 S. E. 849.

30. Brainerd *v.* Wilson, 51 Iowa 707, 1 N. W. 706. See also Bradley *v.* Webb, 53 Me. 462.

Debts Contracted in Individual Name. — A partner claiming an allowance for debts contracted in his own name must show that the proceeds were applied to the benefit of the firm. Rodes *v.* Rodes, 6 B. Mon. (Ky.) 400.

31. Silverthorn *v.* Brands, 42 N. J. Eq. 703, 11 Atl. 328; Van Horn *v.* Van Horn (N. J.), 20 Atl. 826.

32. Marabitti *v.* Bagolan, 21 Or. 299, 28 Pac. 10; Gossett *v.* Weatherly, 58 N. C. 46.

The Same Is True as to prior settlement. Harris *v.* Harris, 132 Ala. 208, 31 So. 355.

33. Bry *v.* Cook, 15 La. Ann. 493.

Fraud. — In an action by the executor of a deceased partner, alleging fraud, the burden of proving the fraud is upon the plaintiff. Farrington *v.* Harrison, 44 N. J. Eq. 232, 15 Atl. 8.

34. Long *v.* Kee, 44 La. Ann. 309, 10 So. 854. See also Laffan *v.* Naglee, 9 Cal. 662, 70 Am. Dec. 678.

Partner agreed that all property held by the managing partner should be held to belong equally to both. In a suit against the executor of the managing partner for an accounting it was held that it should be presumed that any property in his hands at the time of the agreement was partnership property; but that the burden was on the plaintiff to prove that property subsequently in his hands was partnership property. McCullough *v.* Barr, 145 Pa. St. 459, 22 Atl. 962.

Where complainants show that defendant received money in real estate transactions, for the commissions on which he should account, the burden

to the firm was charged to him as an item in the accounting.[35]

3. Actions After Change of Membership. — In actions against a new firm upon an indebtedness of a former firm which it has succeeded, the burden is upon the plaintiff to prove an agreement of assumption of liability.[36] In actions against a member of the old firm, the defendant must show a discharge from liability and an agreement of the creditor to substitute the new firm as debtor.[37]

is on the defendant to show that he received no commission. Kilbourn *v.* Latta, 7 Mack. (D. C.) 80.

35. Clark *v.* Carr, 45 Ill. App. 469.

Debts Paid After Death of Partner. — Where it is shown that debts have been paid after the death of a partner it will be presumed that the survivor has paid them. Mayson *v.* Beazley, 5 Cushm. (Miss.) 106.

Shares of Partners. — Where there is no express agreement as to the shares of the respective partners it is presumed that they are to share equally. In view of this, "it cannot be held that they had agreed to an unequal division of the earnings merely because they went on doing business for many years without having any accounting with one another in reference to the business." Van Name *v.* Van Name, 38 App. Div. 451, 56 N. Y. Supp. 659.

Individual Property on Partnership Farm. — When a partner places his own stock on a partnership farm "the presumption would be that when he placed it there it was to and did become partnership property, for the value of which the firm would be liable to account to him, but the profit would inure to the firm, and if loss occurred it would have to be borne by the firm." Laswell *v.* Robbins, 39 Ill. 209.

36. Waters *v.* Maddox, 7 La. Ann. 644; Bank of Scott City *v.* Sandusky, 51 Mo. App. 398.

Assumption of Liability. — In an action against the new firm upon a liability of the old firm assumed by the former, evidence of the agreement between the members of the two firms is admissible. Morris *v.* Marqueze 74 Ga. 86 (agreement admissible although not signed by the retiring partner).

The fact that a new party becomes a member of a firm creates no presumption of an agreement to assume the liabilities of the old firm. "The fact, however, may be established by indirect as well as by direct evidence, and may, in the absence of an express agreement, be inferred from facts and circumstances which justly raise an implication of its existence." Peyser *v.* Myers, 135 N. Y. 599, 32 N. E. 699, *affirming* 63 Hun 634, 18 N. Y. Supp. 736.

A newspaper containing a statement signed by the members of the new firm, to the effect that they had assumed the debts of the old firm, is admissible. Wright *v.* Carman, 47 N. Y. St. 125, 19 N. Y. Supp. 696.

Where the new firm continues the business of the old, slight evidence of assumption of debts is sufficient. Shaw *v.* McGregory, 105 Mass. 96.

A note given by the new firm is *prima facie* for an obligation of the new firm. Chaffin *v.* Chaffin, 22 N. C. 255; Abpt *v.* Miller, 50 N. C. 32.

Where a promissory note is given in renewal of a note of a partnership of which some of the members of the firm which made the new note were not members the burden is on the plaintiff to prove the assent of the new members. Tyree *v.* Lyon, 67 Ala. 1.

37. Fogarty *v.* Cullen, 17 Jones & S. (N. Y.) 397.

The evidence must show an agreement to discharge the older partnership and to substitute the new one as the debtor. Evidence of demand of payment from the succeeding firm, or even the receipt of interest or part payment, is not sufficient to show a release of the retiring partner. Hall *v.* Jones, 56 Ala. 493.

PART PAYMENT.—See Limitation of Actions; Payment.

PART PERFORMANCE.—See Specific Performance; Statute of Frauds.

PARTY WALLS.—See Adjoining Landowners.

PASS BOOKS.—See Books of Account.

PASSENGERS.—See Carriers.

PASSION.—See Homicide.

PATENT AMBIGUITY.—See Ambiguity.

PATENTS.

By Clark Ross Mahan.

I. PROCEEDINGS TO OBTAIN LETTERS PATENT.

1. Prosecution of the Application. — A. Judicial Notice. — The patent office officials are bound to take notice of the decisions of the United States courts, and may base their actions upon the finding of facts contained therein.[1] And as evidence that the prosecution of the application under examination is not made in good faith, with the purpose and expectation of advancing the prosecution, judicial notice is taken by the commissioner of the procedure in various other applications filed by the same applicant and the same attorney.[2]

B. Presumptions and Burden of Proof. — a. *In General.* The oath of the applicant for a patent is *prima facie* evidence of invention, and where the complete application complies with the requirements of the law and there appears to be no contest, and the patent office in its examination does not discover any evidence that the invention, as stated in its combination, falls within any of the conditions mentioned in the patent law as a sufficient ground to justify a rejection, it has no power to require additional evidence as to practical results.[3]

b. *Issue Raised by Rejection.* — But where an issue of fact as to the patentability of an invention claimed is raised by a rejection upon the part of the patent office, it is incumbent upon the applicant to produce evidence showing patentability in accordance with the Rules of Practice.[4]

1. *Ex parte* Tournier, 108 O. G. 798. See also Drawbaugh *v.* Seymour, 9 App. D. C. 219, 77 O. G. 313.

2. *Ex parte* Bassett, 98 O. G. 2174.

3. *In re* Seely, 1 McA. Pat. Cas. 248, 21 Fed. Cas. No. 12,632. The court in this case, after reviewing the action of the commissioner in calling for such additional evidence, and referring to the rule that when the alleged invention served some useful and important purpose, the degree of utility, whether larger or smaller, is not a subject for consideration in determining whether the invention will support a patent, said: "Nor is this rule of evidence at all unreasonable. The proceeding before the Commissioner is an initiatory proceeding, and, from the nature of the subject, not unlike the practice in incipient stages of many other allowed cases."

4. *In re* Jackson, 1 McA. Pat. Cas. 485, 13 Fed. Cas. No. 7,126.

Where a Clear Case of "on Sale" Is Established, the burden is on the inventor to prove that the sale was for the purpose of having proper tests made, and it was, at least to that extent, a restricted sale. *In re* Mills, 25 App. D. C. 377, 117 O. G. 904.

When It Has Been Pointed Out That the Device Will Not Operate because based on a mode of operation contravening well-established principles of science and mechanics, the burden is shifted on the applicant to show that it will operate. *Ex parte* Payne, 108 O. G. 1049.

The Patent Office can not arbitrarily impose upon an applicant the burden of proving that the device is operative without stating reasons why it is regarded as inoperative. *Ex parte* Gibon, 99 O. G. 227. The commissioner said: "The assertion of inoperativeness is not a welcome objection, and should be made only when supported by a statement of the reasons therefor, and not dogmatically. The applicant obviously cannot know what argument to make in his efforts to convince the examiner until he knows what position the Examiner takes."

c. *Public Use.* — The protestants against the grant of a patent must prove the facts set up by them as constituting the public use.[5]

d. *Revival of Abandoned Application.* — To warrant the revival of an abandoned application it must be shown that the entire period of delay was unavoidable.[6]

C. Mode of Proof. — a. *In General.* — Where an application is rejected on any of the grounds enumerated therein, a rule of the patent office permits affidavits or depositions supporting or traversing the references or objections to be received; but prohibits the reception of affidavits in other cases without special permission of the commissioner.[7]

5. When this evidence is before the office, it will then judge whether the subject-matter was in public use at the time alleged, and whether the evidence is sufficient to justify the refusal of a patent. *In re* National Phonograph Co., 89 O. G. 1669.

6. *Ex parte* Warren, 96 O. G. 2410; *Ex parte* Murray, 56 O. G. 1060; *Ex parte* Edison, 56 O. G. 1061; *Ex parte* Clarke, 61 O. G. 286.

The showing to warrant the revival of an abandoned application must include a sufficient excuse for the delay after the expiration of the year allowed by law, as well as for that before. *Ex parte* Naef, 115 O. G., 1583.

7. Pat. Off. Rules 76.

Where Claims Are Rejected for Non-Invention, affidavits offered in response to such objection concerning the merits and efficiency of that for which patent is sought are proper and will be admitted. *Ex parte* Robinson, 115 O. G. 1584.

Where an interference has been dissolved on motion on the ground that a party's device is inoperative, it is held that in the *ex parte* treatment of the application thereafter, the examiner may receive affidavits upon the question of operativeness, since he is not bound by the ruling in the interference. Rule 76 specifically provides for filing affidavits in regard to the operativeness of the invention claimed, and it is clear that the applicant has the right to present proper affidavits on this question and to have the examiner's independent judgment on the question of operativeness; nor will the proceedings in the interference deprive him of that right. *Ex parte* Mark, 117 O. G. 2636. See also *Ex parte* Homan, 117 O. G. 2088.

Affidavits Going To Show the Practical Success of the applicant's device, where the truth thereof is substantially conceded, are entitled to material weight in view of the fact that the grant of a patent confers no absolute right of property, and in view of the customary rule of resolving ordinary doubts in favor of applicants. *In re* Thompson, 120 O. G. 2756.

Affidavits comparing applicant's device with other devices not referred to by the examiner, or otherwise made pertinent to the issue, will not be admitted in the case. *Ex parte* Robinson, 115 O. G. 1584.

In an affidavit under Rule 75, the total omission of a statement of facts as to the time and circumstances of the conception of the invention and its development to completion prior to the filing date of the reference is fatal. Drawbaugh *v.* Seymour, 9 App. D. C. 219, 77 O. G. 313.

Where affidavits are offered as evidence that the rejection of the claims by the primary examiner was erroneous, they should ordinarily be submitted to the primary examiner before the prosecution of the case before him has been closed by final rejection or appeal. When presented after final rejection or appeal, affidavits or any other new evidence should be accompanied by a verified showing of reasons for the delay similar to the showing required in the case of tardy amendments touching the merits of an application. Thus it is not a sufficient showing under this practice merely that the

Where the Claims in an Application Have Not Been Rejected, affidavits touching upon the question of patentability are not in order.[8]

Affidavits Which Contain Mere General Expressions of Opinion in respect to the patentability of the claims are entitled to no weight.[9]

Distinction Between Rules 75 and 76. — An affidavit required by Rule 75 does not necessarily mean the same affidavit as that required by Rule 76. The latter rule is a general one, and the affidavits therein referred to include not only the special affidavit provided for by Rule 75, but all other affidavits "supporting or traversing references or objections."[10]

b. *Priority of Invention.* — Where an original or reissue application is rejected on reference to an expired or unexpired domestic patent which substantially shows or describes, but does not claim, the rejected invention, or on reference to a foreign patent or to a printed publication, an affidavit of the applicant may be received stating facts showing a completion of the invention in this country before the filing of the application on which the domestic patent issued, or before the date of the foreign patent, or before the date of the printed publication, and that he does not believe that the invention has been in public use or on sale in this country, nor patented nor described in a printed publication in this or any foreign country for two years prior to his application, and that he has never abandoned the application.[11] Although this rule does in

applicant was not in a position to make the experiments referred to in the affidavits until after the appeal was taken. *Ex parte* Peirce, 121 O. G. 1347.

Foreign Patent. — An affidavit which seeks to overcome a foreign patent cited as a reference must make a showing of facts as required by Rule 75, that the invention was completed in this country before the date of the foreign patent. *Ex parte* Grosselin, 76 O. G. 1573.

8. *Ex parte* Robinson, 115 O. G 1584.

9. *In re* Garrett, 122 O. G. 1,047. An affidavit, under Rule 75, should contain not merely the deponent's conclusion that he had invented prior to the time of the reference sought to be overcome, but should state the facts supporting that conclusion. Schmertz *v.* Appert, 77 O. G. 1784.

10. *Ex parte* Grosselin, 76 O. G. 1573.

11. Pat. Off. Rules of Prac., No. 75, providing that the effect of such an affidavit is to preclude the patent or publication cited from barring a grant of a patent to the applicant unless the date of the application or printed publication is more than two years prior to the date on which the application was filed in this country.

An Affidavit Under Rule 75 To Overcome a Prior Printed Publication of a foreign patent disclosing the invention, or a domestic patent disclosing but not claiming the invention, must show invention in this country before the date of the reference; acts performed abroad are not pertinent. *Ex parte* Grosselin, 97 O. G. 2977. In this case the application had been rejected upon a prior German patent disclosing the invention, and attempt to overcome it as a reference by affidavits tending to show that he had made the invention in France before its date, but it was held that the affidavits were incompetent for that purpose, since they did not show that a knowledge of the invention was introduced into this country.

The Essential Thing To Be Shown Under Rule 75 is priority of invention, and this may be done

terms provide for corroborative affidavits, yet if the examiner believes that an applicant's affidavit is fraudulent, and so charges, the applicant should be given leave to file such affidavits.[12]

c. *Utility.* — Upon the hearing of an application for a patent, the testimony of practical men as to the utility of the invention claimed is entitled to consideration.[13]

d. *Public Use.* — Where an applicant is ordered to show cause why public use proceedings should not be instituted against him, and no showing is made save an argument that the depositions and affidavit filed do not make out a *prima facie* case of public use, testimony will be taken in regard to the question of public use.[14]

by any satisfactory evidence of the fact. *Ex parte* Foster, 105 O. G. 261, where it was held that if the affidavit of the inventor cannot be procured, the affidavits of the assignees and other parties may be received as competent evidence. The commissioner said: "It is to be noted that the rule does not say that the patent cannot be overcome as a reference in some other way. In determining the meaning of the rule the purpose and end aimed at should be kept in mind. The purpose is clearly to permit the applicant to show that he made the invention prior to the patentee. The rule says that the inventor's affidavit will be sufficient; but it does not say that the fact may not be established in some other way. . . . The essential fact is priority of invention and the office may accept any satisfactory evidence of that fact. Where it has no testimony or record evidence of the fact it must of necessity accept *ex parte* affidavits. Where the testimony of the inventor cannot be obtained, priority may in some cases be proved without his testimony, and this is clearly true of the *ex parte* showing of priority where testimony cannot be taken."

An affidavit tending to show that an invention shown, but not claimed, in a foreign patent derived from the applicant, and that it is in fact nothing more than a printed publication of the applicant's invention, and not the invention of another, is competent evidence, and should be received and considered by the primary examiner. *Ex parte* Grosselin, 84 O. G. 1284.

Where the examiners-in-chief have overruled all grounds of rejection given by the examiner save one, and rely upon a single reference which the applicant wishes to overcome by an affidavit under Rule 75, the case will be reopened to permit the filing of the affidavit. *Ex parte* Parrish, 115 O. G. 1327.

After a Claim Has Been Finally Rejected on Several References, an antedating affidavit under Rule 75, tending to overcome one of the references, cannot be admitted. *Ex parte* Berg, 120 O. G., 903.

12. *Ex parte* Johnson, 89 O. G. 1341.

13. Hayden *v.* James, 11 Fed. Cas. No. 6,260.

14. *Ex parte* Aston, 122 O. G. 730.

Where public use is shown by testimony regularly taken, its effect cannot be overcome by *ex parte* affidavits, but only by evidence taken in the regular way. *Ex parte* Tournier, 108 O. G. 798.

The applicant is clearly entitled to be heard as a witness on his own behalf in public-use proceedings, the only question being as to the weight to be given his testimony; but, as in other Patent Office proceedings, his testimony is not sufficient to establish his case unless it is corroborated. *In re* Mills, 25 App. D. C. 377, 117 O. G. 904.

Where it is ordered that testimony be taken in regard to the question of public use, the protestant should promptly notify the office of the names of the witnesses and the time when and place where they will be produced for examination. And also a deposit should be made to cover the expense incident to the

2. Hearing on Interference. — A. Judicial Notice. — a. *In General.* — The ordinary rules of evidence which are applied in the United States courts are applied in interference cases,[15] including the rules relating to dispensing with evidence of facts of public notoriety.[16]

b. *Records of Office.* — While it is proper in some cases to take cognizance of the records of the patent office which have not been placed in evidence, in order that justice may be done,[17] it is not thought, in such case, that they should ordinarily be examined for the sole purpose of discrediting a witness.[18]

c. *Foreign Patents.* — Under the provisions of the United States Revised Statutes, § 893, the officials of the patent office must take judicial notice of foreign patents where copies have been furnished by the foreign governments and they are among the records in that office.[19]

B. Presumptions and Burden of Proof. — a. *In General.* — In original proceedings in cases of interference the several parties will be presumed to have made the invention in the chronological order in which they filed their complete applications[20] for patents,

taking of testimony. *Ex parte* Aston, 122 O. G. 730.

15. Berry *v.* Stockwell, 9 O. G. 404.

16. Anson *v.* Woodbury, 12 O. G. 1. The commissioner said: "It has been determined by the Supreme Court of the United States that in patent matters courts may take judicial notice of matters of public notoriety, and this whether mentioned in the pleadings or not. If the courts will thus notice such matters in determining the validity of a patent, I can see no good reason why the Office should not pursue the same course with respect to the novelty of an invention when granting a patent."

The process of taking judicial notice does not necessarily imply that the judge at the moment actually knows and feels certain of the truth of the matter submitted; it merely relieves the party from offering evidence because the matter is one which the judge either knows or can easily ascertain. Ball *v.* Flora, 121 O. G. 2668. In this case the question of priority involved the state of the weather upon a certain date, and the court said that it would have been competent to produce official weather records of the place in question and that the court would take judicial notice of the weather if such record were properly brought to his attention.

17. Cain *v.* Park, 14 App. D. C. 42, 86 O. G. 797.

Where no profert is made of an application filed by one of the parties to an interference, and no copy of the same is produced in evidence, no consideration can be given to that application, as it is not a record open to the public and is in no form before the court for consideration. Robinson *v.* Seelinger, 25 App. D. C. 237, 116 O. G. 1725.

The case of Cain *v.* Park, 14 App. D. C. 42, 86 O. G. 797, where an application was in evidence, and notice taken of certain office records regarding that application, is to be distinguished from a case where no profert is made of an application and no copy is produced.

18. In Bowditch *v.* Todd, 112 O. G. 1477, it was said that if they were placed in evidence the opposing party would have an opportunity to explain them, and that it was manifestly unfair to consider them without opportunity for such explanations as might be made.

19. Robin *v.* Muller, 108 O. G. 292.

20. **The Words "Their Complete Applications,"** used in this rule, are not limited to the applications involved in the interference. They

clearly illustrating and describing the inventions; and the burden of proof rests upon the party who shall seek to establish a different state of facts.[21] The decision of the commissioner of patents in placing the burden of proof in an interference case is not the act of an administrative officer and purely ministerial in its character,

refer to any complete applications in which the invention is disclosed by means of which judgment of priority would necessarily be rendered in favor of the party so disclosing, providing no testimony at all (see Rule 114) or no more testimony were taken. Meyer *v.* Sarfert, 96 O. G. 1037. In this case Meyer had been granted a patent which fully disclosed the invention in issue so that priority of invention would be awarded to him had no testimony been taken, and after the grant thereof, filed application for patents on the disclosed inventions, the claim and the issue having been held to be patentable in said applications, and said applications were placed in interference with previously granted patents to Sarfert, which were granted subsequently to the grant of the patent to Meyer. It was held that Meyer being the first to disclose the invention as shown by the records of the Patent Office, the burden of proof was on Sarfert.

21. Pat. Off. Rules of Prac. No. 116 And see Bader *v.* Vajen, 14 App. D. C. 241, 87 O. G. 1235; Hunter *v.* Stikeman, 13 App. D. C. 214, 85 O. G. 610.

In Murphy *v.* Meissner, 112 O. G. 249, where both parties had been working for the same company and each claimed to have disclosed the invention to the other, but it was admitted by the president of the company, who was the financial backer of one of the parties, that the other was hired for the purpose of making such inventions, it was held that the presumption should be indulged that the invention was made by the person hired for that purpose.

In Dittgen *v.* Parmenter, 99 O. G. 2966, where on a motion to shift the burden of proof it was argued that a party was not entitled to the benefit of the date of an earlier application because the claim was not made therein, and because there was included a disclaimer of it, it was held that this relates to his right to make the claim, and not to the disclosure in the earlier case, which is the only thing considered under Rule 116.

It is not sufficient for the junior party to present testimony which merely raises a presumption that the facts desired to be proved actually existed; it is incumbent upon him to satisfactorily establish those facts. Ball *v.* Flora, 117 O. G. 2362.

The mere appearance of two parties with the same invention, identical in many novel and definite details, raises some suspicion of derivation of one from the other, and where one of the parties is proved to have been in possession of the invention prior to any date of possession proved by the other party, and it is shown that opportunity for derivation by the later party from the earlier party occurred prior to such proved date of possession by the later party, the suspicion of derivation in absence of satisfactory evidence to the contrary becomes conviction. Beall *v.* Shuman, 120 O. G. 655.

Where the date and contents of a foreign application are proved, the burden is on the party against whom it is used to show that it was not published or open to public inspection on the date which it bears. Robin *v.* Muller, 113 O. G. 2506.

Where the question involved is originality of invention, and the evidence is silent as to who suggested the specific details, the presumption is that the inventor of the broad idea also suggested the details. Larkin *v.* Richardson, 122 O. G. 2390.

The record evidence as to the date to which a party is entitled relates to proof of priority of invention, and should be passed upon by the examiner of interferences rather than the primary examiner. Raulet *v.* Adams, 114 O. G. 1827.

but it is the act of a judicial officer, and from that decision no appeal can be taken to the secretary of the interior.[22]

Application Not Complete. — Although one applicant may have filed his application before the other party to the interference in point of time, yet if his application as filed is not complete, as, for example, where the necessary drawing does not accompany the application, he will in such case be considered the junior party and will accordingly have the burden of proof.[23]

Failure To Adopt Claim Suggested. — Where a claim is suggested to an applicant and every opportunity afforded him to place his application in condition for interference, his neglect to do so raises the presumption that he is not the inventor of the subject-matter of the interference.[24]

A Motion To Shift the Burden of Proof in accordance with this rule should be made before, and decided by, the examiner of interferences.[25] In the absence of a motion to shift the burden of proof, or in case such a motion is denied, the party may introduce his alleged earlier applications in evidence as part of his proofs.[26]

b. *Applicant Against Applicant.* — In case of an interference between applicants, the first to apply for a patent in point of time

22. In Poole *v.* Avery, 87 O. G. 357, the secretary said: "The law provides, as has been seen, that the Commissioner of Patents, under the direction of the Secretary of the Interior, shall superintend or perform all duties respecting the granting and issuing of patents directed by law, and that he may, subject to the approval of the Secretary of the Interior, from time to time establish regulations not inconsistent with law for the conduct of proceedings in the Patent Office. The rules hereinbefore quoted were severally established by the Commissioner of Patents with the approval of the Secretary of the Interior for the conduct of proceedings in the Patent Office, and the duty devolved upon the Commissioner to determine which of these rules was applicable to this interference and upon whom the burden of proof should be placed thereunder. The discharge of this duty was a necessary step in the progress of this proceeding and was inseparably connected with an orderly ascertainment of and decision upon the rights of the parties. It was the exercise of a judicial discretion and authority, the same as would be the admission or rejection of evidence or the making of any other interlocutory ruling, and for that reason cannot be reviewed by the Secretary of the Interior."

23. Palmer *v.* Bailey, 83 O. G. 1207.

24. *Ex parte* Calm, 87 O. G. 1397. See also Calm *v.* Dolley *v.* Finzelberg, 84 O. G. 1869.

25. Raulet *v.* Adams, 114 O. G. 1827, where the commissioner, in speaking of the practice under this rule, said: "The question involved in what is termed the 'burden of proof' relates primarily to the question of priority of invention. It involves the question as to the record dates to which the parties are entitled upon the question of priority of invention. This is essentially a matter of evidence, since it is a question whether the application refered to constitutes legal evidence of invention of the subject-matter in controversy at its date. This is a matter which should be determined by the Examiner of Interferences, whose duty it is to pass upon questions of evidence."

The burden of proof in an interference may be shifted without dissolving or redeclaring the interference. Dinkel *v.* D'Olier, 113 O. G. 2507.

26. Raulet *v.* Adams, 114 O. G.

is the senior party and has *prima facie* the priority of right, and the burden of proof is upon any junior applicant to show priority of invention by a fair preponderance of the evidence.[27]

c. *Applicant Against Patentee.* — (1.) **Generally.** — Where an applicant for letters patent is placed in interference with a previously regularly granted patent, the burden is upon him to show beyond a reasonable doubt that he is the first and original inventor of the matter in controversy;[28] or, as it has otherwise been stated, the

1827; Osborne *v.* Armstrong, 114 O. G. 2091.

27. Funk *v.* Matteson *v.* Haines, 20 App. D. C. 285, 100 O. G. 1764, *affirming* 100 O. G. 1563; Watson *v.* Thomas, 106 O. G. 1776; Wilkin *v.* Cleveland, 118 O. G. 2533; Cherney *v.* Clauss, 115 O. G. 2137.

Where it appears by the patent office records that one party to the interference is the first inventor of the matter in issue, the burden of establishing a different state of facts should be placed upon his opponent. Sheppard *v.* Webb, 96 O. G. 1647.

In Lloyd *v.* Antisdel, 17 App. D. C. 490, 95 O. G. 1645, where Antisdel's application was on file and involved in an interference in which Lloyd testified as a witness, and Lloyd thereafter at the instance of the other party to the interference filed an application in his own name, it was held that the burden of proof was strongly upon Lloyd.

In interference between two rival applicants, the requirement that reduction to practice by the junior party before the senior should be established beyond a reasonable doubt is undoubtedly onerous. Wurts *v.* Harrington, 10 App. D. C. 149, 79 O. G. 337.

28. Dashiell *v.* Tasker, 21 App. D. C. 64, 103 O. G. 2174; Gedge *v.* Cromwell, 19 App. D. C. 192, 98 O. G. 1486; Sendelbach *v.* Gillette, 22 App. D. C. 168, 109 O. G. 276; Hull *v.* Hallberg, 110 O. G. 1428; Cheeney *v.* Clauso, 25 App. D. C. 15, 116 O. G. 597; Bauer *v.* Crone, 118 O. G. 1071; French *v.* Halcomb, 115 O. G. 506; Williams *v.* Ogle, 14 App. D. C. 145, 87 O. G. 1958; Pratt *v.* Thomson, 72 O. G. 1347; LaFlare *v.* Chase, 72 O. G. 741.

"Public policy and the settled practice of the office alike forbid the issue of a second patent for the same invention in any but a clear case — clear beyond a reasonable doubt;" but the fact that one party has unjustly obtained a patent is not final, for the rule as applied to this case is that "he is the first inventor who first forms a complete mental conception of the improvement in question, as proved not merely by improvements, but by full and certain disclosure to another, and who, under all the circumstances of the case, proceeds with reasonable diligence to the consideration of a full-sized machine, embodying the improvement in working form, and that this is so although another with a later conception first fully reduces the invention to practice." Huson *v.* Yates, 72 O. G. 1201.

"This rule in respect of the conclusive weight of evidence necessary to overcome the priority of invention evidenced by a regular and formal patent, has been long established and our observation of its operation in general has had no tendency to incline us toward laxity in its application." Sharer *v.* McHenry, 19 App. D. C. 158, 98 O. G. 585.

An applicant in interference with a patent granted before the filing of the application has the burden of proving his case beyond a reasonable doubt, and this burden is not discharged by testimony which raises a doubt as to which of the two parties made the invention or whether a third person may not have contributed to the essential idea which led to the invention. French *v.* Halcomb, 120 O. G. 1824.

The Burden of Proof Is Heavily Cast Upon an Applicant who is placed in interference with a patentee when the application was not filed until after the date of the grant of the patent. Gallagher *v.* Hastings, 21 App. D. C. 88, 103 O. G.

applicant must produce such evidence of priority as would defeat the patent in the courts.[29] And the burden of proof should not be placed upon the patentee in an interference between him and an applicant, even though his preliminary statement alleges a date of conception subsequent to the applicant's original filing date.[30]

(2.) Applications Co-Pending When Patent Granted. — Where an applicant is placed in interference with a patent, which, however, was inadvertently issued after the filing of the other application, the patentee can claim no benefit from the inadvertent issue; in so far as the burden of proof is concerned, the parties stand in the same relation as if both were applicants, their rights being determined by a preponderance of the evidence.[31]

d. *Joint Application.* — A joint application is no proof that one of the parties is a sole inventor, and cannot be used as a basis for a

1165. In this case, where the applicant claimed to have conceived the invention and to have disclosed it to the patentee and there was but one reduction to practice, that of the patentee, and the testimony of the applicant was clear and unshaken by cross-examination, it was held sufficient to overcome the burden of proof imposed upon the applicant and compel his adversary to account for his claim of the invention.

Probably one who makes an invention and keeps it within his knowledge and fails to lay claim to it until a rival has entered the field is not barred by any statute from making his claim, and if he proves his case, he, and not his rival, will be entitled to a patent; but such conditions make it imperative upon him that he should prove his case beyond all reasonable doubt, and the patent office and the courts are justified in presuming in such cases that what is claimed to be reduction to practice is no more than mere experiment until the contrary is clearly shown. Warner *v.* Smith, 13 App. D. C. 111, 84 O. G. 311.

In Russell *v.* Asencio, 109 O. G. 1605, where Asencio's assignee was the one who furnished the money for Russell's experiments and paid for Russell's application for patent, but refused to pay the final fee and let the application become forfeited, and then induced Asencio to file an application for and secure a patent upon the same invention while Russell's case was forfeited, it was held that the burden of proof was upon Asencio to show that he was the first inventor.

29. Gill *v.* Scott, 23 O. G. 2511; Withington *v.* Locke, 11 O. G. 417; Stoddard *v.* Perry, 6 O. G. 33.

30. Lutz *v.* Lewis, 110 O. G. 2014; Russell *v.* Asencio, 109 O. G. 1605.

31. Andrews *v.* Nilson, 118 O. G. 1363.

Although the senior party to an interference is a patentee, yet if the application of the junior party was pending when the patent issued, no benefit accrues to the senior party from his possession of the patent, in respect to the burden of proof imposed on the junior party. Paul *v.* Hess, 24 App. D. C. 462, 115 O. G. 251.

Where a patent is inadvertently granted on an application pending contemporaneously with the application of another party, the patentee gains no advantage in an interference proceeding, and the patentee, being the last to file, is the junior party in the proceeding, and has the burden of proof. Furman *v.* Dean, 24 App. D. C. 277, 114 O. G. 1552. See also Hunt *v.* McCaslin, 10 App. D. C. 527, 79 O. G. 861; Wurtz *v.* Harrington, 10 App. D. C. 149, 79 O. G. 337.

Renewal of Forfeited Application. Where during the time that an application is forfeited another party files an application for the same invention which goes to patent, the burden of proof in an interference between the patent and a renewal of the first application is upon the applicant, notwithstanding the earlier

judgment in his favor in an interference, and hence cannot affect the burden of proof.[32]

e. *Re-issue Applicant.* — A re-issue applicant is entitled to the date of his original application as his date of filing in determining the question of the burden of proof.[33]

f. *Divisional Application.* — A divisional application entitles the applicant to the benefit of the date of the original application from which it was divided,[34] and this is true although the first application contains no claims to the matter in the second, since the two constitute parts of one continuous proceeding.[35] But this rule does not apply where it appears that the subject-matter of the issue was not disclosed in the original application as filed.[36]

date of his first application. Lutz *v.* Lewis, 110 O. G. 2014.

32. Haskell *v.* Miner *v.* Ball, 109 O. G. 2170.

Joint Applicants. — Where two parties file an application as joint inventors, and upon discovery that it was a mistake one of them files an application as sole inventor and is placed in interference with a third person, the sole applicant can derive no benefit from the earlier joint application in determining the burden of proof in the interference. Arnold *v.* Vaughen, 109 O. G. 805.

33. "A reissue application is merely an amendment to the patent or application on which the patent was granted, and it is well settled that in determining the question as to the burden of proof, the date of the application, not the date of an amendment thereto, is to be considered." Walsh *v.* Hallbauer, 88 O. G. 2409.

34. Where an interference is declared between an application and a patent granted before the filing of the application, and the applicant introduces in evidence a prior application filed before the grant of the patent and which discloses the subject-matter of the later application involved in interference, it is incumbent upon the applicant to establish his case by a preponderance of the evidence and not by evidence beyond a reasonable doubt. Spaulding *v.* Norden, 112 O. G. 2091.

Where an application goes to patent upon claim which is not a proper division of another application in interference, the patentee derives no benefit from the fact of issue of the patent on the divisional application; coming into the office subsequently to the filing of his opponent's claims by claim of prior invention, he should bear the burden such claim naturally imposes as between contending applicants in the production of proof as applied to both interferences. Porter *v.* Louden, 7 App. D. C. 64, 73 O. G. 1551.

35. In Lowry *v.* Spoon, 110 O. G. 858, where Lowry's patent was granted while Spoon's application was pending disclosing but not claiming the invention, and Spoon subsequently filed a divisional application claiming the invention and is placed in interference, the burden of proof was held to be on Lowry since he was the last to file.

36. Brill *v.* Hunter, 96 O. G. 641.

In Krakau *v.* Harding, 105 O. G. 1531, where Krakau, on a motion to shift the burden of proof, contended that his application was a division of a patent granted to him, and it appeared that the construction claimed was not clearly shown in the patent, and there was no description of it, it was held that he was not entitled to the date of the application upon which the patent issued.

Earlier Application. — Where the burden of proof is heavy upon the applicant, as being the junior in the office and being also required to overcome the effect of the patent in the hands of his opponent, an earlier application filed by the applicant cannot lighten the proof where such application does not disclose the issue. Norden *v.* Spaulding, 24 App. D. C. 286, 114 O. G. 1828.

g. Conception and Reduction to Practice. — **(1.) Generally.** Where the senior party to an interference relies upon his record date, the burden is upon the junior party to show reduction to practice preceding that date, or else earlier conception followed with due diligence[37] by reduction to practice, either actual or constructive.[38] But where the evidence shows that the senior party

37. Jenner *v.* Dickinson *v.* Thibodeau, 116 O. G. 1181; Paul *v.* Hess, 24 App. D. C. 462, 115 O. G. 251; Paul *v.* Johnson, 23 App. D. C. 188, 109 O. G. 807.

In Watson *v.* Thomas, 106 O. G. 1776, it was held that where the burden of proof is upon the junior applicant, who was the first to conceive, it was as necessary for him to show affirmatively that he was diligent, as it was for him to show affirmatively conception and reduction to practice.

Where the junior party, although the first to conceive, was the last to reduce to practice, the burden is upon him to show that immediately before the senior party entered the field and upon that date he was exercising due diligence in perfecting his invention and attempting to reduce it to actual practice. Seeberger *v.* Dodge, 24 App. D. C. 476, 114 O. G. 2382.

The party first to conceive but last to reduce to practice must show diligence in perfecting the invention mechanically; and it is not sufficient to show that efforts were made to exploit commercially the business in which the invention might be used. *Ibid.*

Diligence. — While of course the applicant has the burden of proving diligence in reducing his conception to practice, no hard and fast rule as to the evidence necessary to establish diligence applicable to all cases alike can be stated. Whether ordinary diligence or its opposite has been shown, or the delay shown is to be regarded as excusable or inexcusable, must necessarily depend upon the special circumstances surrounding the actions of the party in the particular case wherein the application of the rule may be sought. Christensen *v.* Ellis, 17 App. D. C. 498, 94 O. G. 2561. See also Turnbull *v.* Curtis, 120 O. G. 2442; Clement *v.* Richards *v.* Meissner, 113 O. G. 1143.

Diligence on the part of the assignee is not established beyond a reasonable doubt by evidence showing that the delay in filing the application was due to the business convenience of the assignee, and it appears that during the delay he had filed many applications for other inventions. Rolfe *v.* Hoffman, 118 O. G. 833.

Delay in Reduction to Practice. A delay of two years and eight months after alleged reduction to practice of the invention raises a strong presumption that what was done amounted to a mere abandoned experiment; but this presumption is not conclusive; it may be overcome by satisfactory evidence that the machine was in fact successfully operated. Smith *v.* Brooks, 112 O. G. 953, 24 App. D. C. 75.

38. Paul *v.* Hess, 24 App. D. C. 462, 115 O. G. 251. See also Hunter *v.* Stikeman, 13 App. D. C. 214, 85 O. G. 610.

A Complete Conception as defined in an issue of priority of invention is matter of fact and must be clearly established by proof. The conception of the invention consists in the complete performance of the mental part of the invented act. All that remains to be accomplished in order to perfect the act belongs to the determination of construction and not invention. Hence the proof necessary to establish an available conception within the purview of the patent law must be of that character which shows formation in the mind of the inventor, of a definite and permanent idea of the completed and operative invention as it is thereafter to be applied in practice. Ritter *v.* Krakan, 111 O. G. 1935, *citing* and *quoting* from Mergenthaler *v.* Scudder, 11 App. D. C. 264, 81 O. G. 1417.

The Mere Conception Without Actual Reduction to Practice within a reasonable time does not avail a junior party making claim. Funk *v.* Matteson *v.* Haines, 20 App. D. C.

is not the original inventor, the question of the diligence of the junior party is immaterial.[39]

Where Complete Reduction to Practice Amounts to Two Years' Public Use, the fact of such reduction must be established by evidence of the same degree as that required in evidence setting up the bar of public use.[40]

(2.) Presumption of Operativeness. — In the case of a simple invention, the presumption that an application describes an operative machine is in favor of the applicant, and this presumption can be overcome only by evidence clearly showing that the alleged defects are present in practice.[41] But where the invention belongs to that class which requires either actual use or thorough tests to demonstrate its practicability, it cannot be said that reduction to practice is established until one or the other thing is proved.[42] And where the evidence shows that the device was tested and voluntarily laid aside for a long time, the evidence must, in order to overcome the

285, 100 O. G. 1764, *affirming* 100 O. G. 1563.

Evidence of Reduction to Practice Must Embrace All of the Elements of the issue, leaving nothing to inference merely, since no element can be said to be subordinate and immaterial. Blackford *v.* Wilder, 21 App. D. C. 1, 104 O. G. 578. See also Robinson *v.* Seelinger, 116 O. G. 1735.

In Flather *v.* Weber, 21 App. D. C. 179, 104 O. G. 312, *s. c.* 103 O. G. 223, where it was admitted by both parties that the invention was reduced to practice in the presence of both of them, and the only dispute between them was as to which one was entitled to the benefit of this reduction, it was held that the fact that the invention was reduced to practice might be taken as established.

The Proof Tending To Establish a Reduction to Practice Must Be Considered as a Whole and the attendant circumstances of the case must be borne in mind; and where the action of the inventor with respect to the exhibit prior to the necessity for its use in the interference proceedings, his failure to construct other machines or promptly file an application, and the fact that the application when filed discloses different features from those in the exhibit, or tend to show that the device was not a reduction to practice, but merely an experimental device, an award of priority of invention against him is proper. Ocumpaugh *v.* Norton, 24 App. D. C. 296, 115 O. G. 1850.

39. Henry *v.* Doble, 122 O. G. 1398.

40. Wurts *v.* Harrington, 79 O. G. 335.

41. Bowditch *v.* Todd, 112 O. G. 1477, *holding* that mere theoretical defects which do not make it certainly apparent that the device is inoperative are not sufficient to overcome the presumption of operativeness.

42. Gallagher *v.* Hien, 24 App. D. C. 296, 115 O. G. 1330; Seeberger *v.* Russel, 117 O. G. 2086; Bauer *v.* Crone, 118 O. G. 1071.

In order to establish a reduction to practice, the proof showing that the device was capable of successful performance of the work for which it was built must admit of no reasonable doubt. Lemp *v.* Mudge, 112 O. G. 727.

Where the invention was of such character as to need the test of demonstrating its practicability, evidence to the effect that it was operated to some extent, but whether the operation was successful or not is left entirely to conjecture, does not establish the fact of reduction to practice beyond a reasonable doubt. Rolfe *v.* Hoffman, 118 O. G. 833.

Although experiments, claimed to be such an operation of the invention as to show reduction to practice,

presumption thus raised that the test was unsuccessful, be clear and convincing.[43]

Process and Product. — Where the testimony in an interference proceeding establishes the fact of conception and reduction to practice of a process, the same testimony also establishes the fact of conception and reduction to practice of the article of manufacture which results from that process.[44]

h. *Disclosure.* — Whether or not the alleged inventor derived his knowledge of the invention through a disclosure thereof to him by another is a question of fact, and will not, in the absence of all evidence, be presumed; it must be established by the party asserting it.[45]

were much more than mere laboratory tests, yet they cannot be accepted as a proof of reduction to practice where it does not appear that the invention was practically carried on therein, or that possibility of practical operation was satisfactorily demonstrated. Pohle *v.* McKnight, 119 O. G. 2519.

MacDonald *v.* Edison, 21 App. D. C. 527, 105 O. G. 1263, where it was a conceded fact that the original machine on which MacDonald's claim of priority was founded was constructed prior to the filing of Edison's application which resulted in a patent, Edison having taken no testimony; and it was held that inasmuch as the invention was not a simple one, MacDonald, in order to succeed, had the burden of proving that his machine as constructed was actually capable of successfully performing the work for which it was intended.

43. The presumption that a test of a device was unsuccessful is not rebutted by proof that the party was dependent upon his father, and that it was necessary to devote his attention to other inventions which would secure to him better financial returns, where it appears that other applications were filed and no effort was made to secure the adoption and use practically of the invention in issue. Bliss *v.* McElroy, 122 O. G. 2687.

Where devices embodying the invention are made and after trials discredited and thrown in the scrap heap, and no similar devices are ever used thereafter, and only upon reading a patent which has been granted to another person does the inventor recall the fact that he thought he had the same device some years before, claims of this character must be proved by testimony of the clearest and most satisfactory character before they can be accepted. Lemp *v.* Mudge, 24 App. D. C. 282, 114 O. G. 763.

44. Kyle *v.* Corner, 113 O. G. 2216.

45. Where a party is not only the junior party, but admittedly employed by the senior party to construct a machine embodying an invention made by him, the burden is upon the junior party to prove that the improvements embodied by him in the machine were his own invention and not the ideas suggested by the senior party. Corry *v.* McDermott, 117 O. G. 279.

Where the junior party proves that he made patterns embodying certain counts of the issue before any date proved by the senior party, and the senior party asserts that they were made by disclosures from him, which is denied, the burden is upon the senior party to prove the disclosure. Cherney *v.* Clauss, 25 App. D. C. 15, 116 O. G. 597.

Where it appears that both parties were working for the same employer and each party claims to have disclosed the invention to the other, but it is admitted by the employer, who is the financial backer of one of the parties, that the other contestant was hired for the purpose of making such inventions, the presumption is that the invention was made by the person hired for that purpose. Murphy *v.* Meissner, 112 O. G. 249.

Where an employer instructs an

i. *Relationship of Employer and Employe.* — To establish the relation of employer and employe which will entitle the employer to claim the benefit of improvements made by the employe, it must be shown that the employment relates to the subject-matter of the invention, involving an agreement to perfect a preconceived design of the employer relating to that invention. The mere fact of employment does not of itself entitle the employer to claim all inventions made by the employe.[46]

j. *Effect of Failure of Inventor To Testify.* — A failure of an inventor to appear and testify in his own behalf warrants an unfavorable presumption.[47]

k. *Effect of Failure To Call Witness or Produce Evidence.* The failure of a party to call a witness who, it is alleged, could testify to material matters, raises the inference that his testimony, if produced, would have been unfavorable.[48]

C. Production of Evidence. — a. *Time for Taking Testimony.* (1.) **Generally.** — Times will be assigned by the patent office in which the junior applicant to an interference shall complete his testimony in chief, and in which the other party shall complete the testimony on his side, and a further time in which the junior applicant may take rebutting testimony; but he shall take no other testimony. If there be more than two parties to the interference,

employe to stamp the article "Patent applied for," which he does without protest, it is then, if at all, that the employe would naturally expect to assert his claim of invention, and his failure to do so raises a strong presumption that the employer was the original inventor and that any claim by the employe subsequently made is a mere afterthought. Larkin *v.* Richardson, 122 O. G. 2390.

Where the junior party, who is an applicant, admits that the senior party, who is a patentee, furnished him with all materials, made suggestions and exercised rigid oversight over all his work with the sole exception of the single specific invention of the issue, the patent having issued before the junior party filed his application, which was only done after knowledge had come to him of the patent, the presumption is that the patentee also disclosed the invention of the issue to the applicant. French *v.* Halcomb, 115 O. G. 506.

As between two parties each claiming disclosure of the invention to the other, where one of such parties has a practical knowledge of the art and the other has not, there is a strong presumption in favor of the one having such practical knowledge. Alexander *v.* Blackman, 121 O. G. 1979.

46. Schroeder *v.* Wageley, 118 O. G. 268.

47. Silverman *v.* Hendrickson, 99 O. G. 445, *holding*, however, that where he has assigned his invention and is not friendly with the assignee, this presumption is entitled to but little weight.

48. Blackman *v.* Alexander, 121 O. G. 1979; *s. c.* 113 O. G. 1703.

In Flora *v.* Powrie, 23 App. D. C. 195, 106 O. G. 2288, where it was alleged in the preliminary statement that the invention was disclosed to a certain person, it was held that failure to call that person as a witness when he could have been called, raised a presumption that his testimony, had it been given, would not have tended to support the allegation in the preliminary statement.

Where the question in the interference proceeding involves originality of invention as between an employer and an employe, the unexplained failure of the employer to testify as a witness in his own behalf warrants inferences in favor of the employe's claim to independent in-

the time for taking testimony will be so arranged that each shall have an opportunity to prove his case against prior applicants and to rebut their evidence, and also to meet the evidence of junior applicants.[49]

Where a Preliminary Statement Is Amended After Decision on priority to conform to the evidence, new times for taking testimony should be set so as to give the opposing party an opportunity to cross-examine the witnesses.[50]

Taking Testimony During Suspension of Proceedings. — It is proper to permit the taking of testimony in this country pending an appeal upon the question of taking testimony abroad, particularly where delay might render it difficult to secure the testimony.[51]

(2.) Extension of Time for Taking Testimony. — It is further provided, however, that if a party is unable to take testimony within the time limited, he may upon proper motion and showing secure further time.[52] And where a party fails to accompany his motion

ventorship. Peckham *v.* Price, 118 O. G. 1934.

Although a party claims to have disclosed his invention to his solicitor, among other persons, and the solicitor is not called as a witness, the failure so to call him is immaterial, and no ground for an unfavorable inference where it appears that the party was not certain of disclosure to the solicitor at the early date upon which disclosure was made to another witness who did testify. Turnbull *v.* Curtis, 120 O. G. 2442.

49. Pat. Off. Rules of Prac. No. 118.

In O'Hara *v.* Hawes, 3 App. Com'r Pat. 247, 18 Fed. Cas. No. 10,466, it was held that the rules of practice promulgated by the commissioner concerning the taking of testimony in contested cases are binding upon the parties and upon the commissioner equally, and that depositions taken after the date fixed for the closing thereof cannot be received in evidence over proper objection. While the rules of practice referred to in this case were promulgated under the act of 1839, the principle is equally applicable under the rules of practice now in force.

Where an applicant files an application for the express purpose of obtaining an interference with a patent, not only is the burden upon him to prove his case beyond a reasonable doubt, but it is incumbent upon him to present all his testimony during the time originally given to him for this purpose. This is not only necessary to promote proper procedure in interference cases, but is just to the patentee that a person who contests his grant by instituting interference proceedings shall exercise diligence in gathering and presenting all his testimony in the time originally given to him, that the question of priority of interference shall be settled by the proper tribunal at the earliest possible moment. French *v.* Halcomb, 110 O. G. 1727.

In Donning *v.* Stackpole, 107 O. G. 268, it was held that where a party, after his time for taking testimony has expired, moves to be permitted to use as a part of his evidence, testimony taken in another interference, his motion will be denied.

The times fixed for taking testimony do not begin to run after suspension of proceedings for consideration of motions to dissolve until the cases are returned to the examiner of interferences and formal resumption of proceedings is noted. Hewitt *v.* Steinmetz, 122 O. G. 1396.

Where the party last to file his application takes no testimony, judgment of priority of invention cannot be in his favor. Trufant *v.* Prindle *v.* Brown, 111 O. G. 1035.

50. Richardson *v.* Humphrey, 88 O. G. 2241.

51. Herreshoff *v.* Knietsch, 111 O. G. 1624.

52. Pat. Off. Rules of Prac. Nos. 121, 154, par. 4. And see O'Reilly *v.* Smith, 1 McA. Pat. Cas. 218, 18 Fed. Cas. No. 10,566.

to extend the time for taking testimony with a verified showing as provided by the rules of practice, the motion is properly denied.[53]

Where the Attorneys Agree To Continue the Taking of Testimony on a certain date after the time originally set had expired, the

In Dunbar *v.* Schellenger, 113 O. G. 2213, the commissioner said: "This office desires to have before it all material evidence which will assist it in determining the question of priority of invention; but it must be apparent to counsel that in all proceedings of this kind it is necessary to have certain rules governing the presentation of evidence, and that an enforcement of this rule is as necessary as their existence." In that case the record showed that extensions of time for taking testimony had been given repeatedly, and that when the last extension was granted the examiner of interferences gave warning that no further extension would be allowed; and it was held incumbent upon the parties to use every effort to complete the testimony within the time set and to examine such witnesses as could be obtained at the earliest possible date.

In Wightman *v.* Rothenstein, 98 O. G. 2172, it is held that where it appears that a party to an interference has been prevented by poverty from taking his testimony within the time set, but is now able and desirous to do so, and where a refusal to permit time to take his testimony will work a hardship greater to him than will be caused to the other party by the delay, opportunity should be given him to take his testimony.

In the Case of Delay in Taking Testimony Until the Last Day of the time allowed without any good reason for the delay, a motion for an extension of time will be denied. Brill *v.* Uebelacker, 99 O. G. 2966.

Where a party has been notified that no further extensions of time for taking testimony will be granted except for good cause, the motion thereafter filed by him to extend the time to permit him to apply to the court to compel a witness to testify will not be granted where it appears that he did not file the motion promptly nor apply to the court promptly. Donning *v.* Anderson, 111 O. G. 582.

53. Reppeto *v.* Stephens, 105 O. G. 1779. See also Reynolds *v.* Bean, 101 O. G. 2821.

In Davis *v.* Cody, 101 O. G. 1369, it was held that an affidavit by an attorney in support of a motion to extend time for taking testimony setting forth the fact that his client was absent from his place of residence and could not be communicated with because his whereabouts were unknown, was not sufficient.

In Spindler *v.* Nathan, 109 O. G. 2171, where a motion to extend the time for taking testimony for the third time was supported only by the affidavit of the attorney to sickness and absence of some of the witnesses and absence of the inventor part of the time, and so far as appears the testimony of the inventor and other witnesses might have been taken, it was held that the motion was properly denied. In this case it was also held that the desire to have present at one time all of the witnesses, some of whom were sick and residing at widely separated places, so as to avoid trouble and expense, will not justify repeated extensions of time for taking testimony and failure to take the testimony of those witnesses who were available.

An affidavit by an attorney in support of a motion to extend the time for taking testimony which sets forth merely that he is informed that a certain witness is absent from his place of residence and at such a distance that he cannot be communicated with by mail in less than fifteen days, and that a letter and telegram addressed to him have brought no reply, is not sufficient. Cirkel *v.* Killing, 85 O. G. 1224.

Unless and until an order suspending proceedings is made, a party, although he has moved for an extension of time in which to take his testimony, is not for that reason relieved of the necessity of taking his testimony within the time set. He

examiner of interferences may properly extend the time to include that date.[54]

Discretion of Examiner of Interferences. — The action of the examiner of interferences in granting a motion to extend times for taking testimony is final, and no limit of appeal should be set. The setting of times for taking testimony is peculiarly within the discretion of the examiner of interferences.[55]

(3.) Re-taking Testimony After Suppression. — Where irregularities requiring the suppression of depositions arise through inadvertence, and not through any desire to delay the proceedings or to take an unfair and overreaching advantage of the opposing party, it is proper, upon a clear and satisfactory showing of this fact, to permit the party to retake his testimony so that he may have an opportunity properly to present his case.[56]

(4.) Re-opening Interference to Take Further Testimony. — (A.) GENERALLY. — In order to justify the granting of a motion to reopen an

may, of course, rely on his motion being granted and thus fail to take testimony, but he does so at his own risk, since he has no right to an extension of time if his motion is denied. Leonard *v.* Chase, 84 O. G. 1727.

54. An agreement between the attorneys conducting the examination of witnesses continuing the time of taking depositions to a certain day is binding, although no written power of attorney is filed in the office. The applicant cannot repudiate any ordinary agreement by him on the ground that it was in excess of authority. Fairbanks *v.* Karr, 113, O. G. 1148. In this case the commissioner said that when counsel for one party appears and conducts the examination of witnesses on his behalf, the opposing counsel have the right to assume that he has the usual powers of an attorney in conducting the case, and that in the absence of express notice from the principal at the time as to his limited powers, the office will not entertain any question as to his authority to make any ordinary agreement and bind his client.

Where the notary taking the testimony makes a note on the record of an agreement of counsel to continue the taking of testimony to a certain day, the office will take notice of the agreement without requiring a stipulation signed by both parties. *Ibid.*

55. It is he who has sole control of the setting of times for taking testimony when interference is declared, and there is no reason why he should not have as complete control over the granting of motions to extend those times, and accordingly on granting a motion to extend times for taking testimony his decision is not appealable. Christensen *v.* McKenzie, 117 O. G. 277; Goodfellow *v.* Jolly, 115 O. G. 1064.

The fact that a substitute attorney, because of his unfamiliarity with the case, closed his proofs without the introduction of evidence necessary to the success of his cause, whereupon the examiner of interferences reopened the case for further evidence and set new times for taking testimony, does not make the case of such peculiar difficulty that it should constitute an exception to the general rule that no appeal will lie from the decision of the examiner of interferences in respect to extensions of time for taking testimony. Dalton *v.* Hopkins *v.* Newman, 121 O. G. 2666.

56. Jones *v.* Starr, 111 O. G. 2221; Goodfellow *v.* Jolly, 111 O. G. 1940.

The Court of Appeals will not ordinarily review the commissioner's action affirming or reversing the decision of the examiner of interference on motions to retake testimony suppressed for irregularity. This is within the sound discretion of the commissioner. Jones *v.* Starr, 117 O. G. 1495.

interference after a decision on the question of priority, to take further testimony, it is necessary for the moving party to show *inter alia* good cause why the testimony sought to be taken was not taken within the time originally set for the taking of testimony.[57] The showing must make it clear and certain that reopening is essential to the ends of justice.[58]

57. Donning *v.* Stackpole, 107 O. G. 268. See also Robinson *v.* Townsend, 101 O. G. 1611; Fordyce *v.* Taisey, 102 O. G. 821.

An interference will not be reopened after decision for the purpose of permitting the party to file his printed testimony upon an *ex parte* request of one of the parties, but only on motion served upon the opposing party and supported by a showing of good cause. Thus, in one case where it was alleged that the attorney of the party was ill, the commissioner held that the party should have secured the services of another attorney, that while the illness of the attorney was unfortunate, it was not sufficient excuse to warrant disturbing those rights showing final decision in the case. Smith *v.* Locklin, 116 O. G. 2009.

Where the showing consists of an affidavit that the reason the evidence was not introduced was that the moving party failed to recollect it, the showing will be held insufficient as a ground for reopening, since it is intangible and solely within the knowledge of the party who desires to introduce it and is incapable of being rebutted. French *v.* Halcomb, 110 O. G. 1727.

Where it appears that an inventor knew of the whereabouts of a certain exhibit before he took testimony, but did not attempt to produce that exhibit at the time because he did not deem it expedient to expend the money necessary to obtain it, but chose to proceed with the taking of testimony, supposing that he was in the possession of sufficient evidence to establish his case, the case should not be reopened to permit the introduction of the exhibit as it does not constitute newly discovered evidence. Greuter *v.* Mathieu, 111 O. G. 582.

An interference will not be reopened after decision, awarding judgment on the record, merely because the moving party under the advice of different attorneys has changed his mind as to his ability to prove his case if permitted to take testimony. Hull *v.* McGill, 117 O. G. 597.

Where One Party Takes No Testimony, to permit the other party to take more testimony works no injury to his opponent except in so far as delay may be injurious, and hence the strict rule requiring a showing of utmost diligence as applied to reopening decided cases to take further testimony does not apply. Watson *v.* Thomas, 98 O. G. 2361.

58. To reopen a decided case for the introduction of newly discovered evidence, it must clearly appear that the evidence would change or modify the decision. Ball *v.* Flora, 117 O. G. 2088; French *v.* Halcomb, 110 O. G. 1727. See also Estes *v.* Gause, 88 O. G. 1336.

Even if it be true as alleged that one of the parties to an interference has testified in another proceeding that the invention was disclosed to him by a third person, that fact does not change the award of priority so long as he was in possession of the invention before his opponent, and although it might lead to the rejection of his claims, if final judgment be in his favor, it furnishes no ground for reopening the interference to receive further testimony. Dunbar *v.* Schellenger, 121 O. G. 2663.

It is a well-settled rule that cases will not be reopened merely because a party has through mistake or ignorance failed to present his best evidence. The opposing party may have relied upon what he considered the failure to overcome his *prima facie* case, and if the proceedings were now reopened it might be necessary for him to take testimony which otherwise would have been unnecessary. There must be an end

(B.) Time for Moving. — A motion to reopen for the purpose of introducing evidence must be made promptly upon the alleged discovery of the evidence.[59]

The Commissioner of Patents Has Jurisdiction Pending an Appeal to the court of appeals to hear and determine a motion to reopen a case for the purpose of taking additional testimony.[60]

somewhere to interference proceedings. Autenrieth *v.* Sorensen, 120 O. G. 1164.

Where a contestant in interference has been put upon notice at the time of the hearing before the examiner of interferences that there was a weak point in his evidence, and notwithstanding which he waited until an appeal had been taken to the examiners-in-chief and thence to the commissioner before making any effort to supply the deficiency in his testimony, it is then too late to have the case reopened for the purpose of introducing evidence known and accessible to him at the time his testimony was taken. Webb *v.* Blickensderfer, 64 O. G. 857.

After decision of priority has been rendered the case will not be reopened and a party permitted to file his testimony where it appears that the testimony which has been taken relates in no way to the question of priority of invention, but solely and entirely to the right of the opposing party to make the claims of the issue. *Ex parte* Willits, 115 O. G. 1064.

Where the testimony in an interference refers to a certain exhibit which is not introduced in evidence, although its whereabouts is known, and the interference is reopened for the purpose of taking further testimony properly to connect such exhibit with the original testimony, the interference will not be reopened a second time because of the insufficiency of the testimony last taken. Autenrieth *v.* Sorensen, 120 O. G. 1164.

Times for taking testimony are not fixed as a matter of course where the allegation in a preliminary statement fails to antedate the filing date of an opponent; but if in answer to the usual order issued in such a case, a party makes out a *prima facie* case of inoperativeness in his opponent's device, which does not extend to his own, and proposes to take testimony in support of his position, permission to do so should be granted, provided a *prima facie* showing is made. Browne *v.* Stroud, 122 O. G. 2688. See also Lowry *v.* Spoon, 122 O. G. 2687.

Where it appears that an inventor was diligently in search of a witness during the time that he took testimony, but was unable at that time to procure the attendance of the witness, a motion should have been brought to extend the time for taking testimony, accompanied by a showing of facts to warrant the extension; and the interference will not be reopened for the purpose of taking the testimony of this witness where it appears that the inventor, instead of taking that course deliberately chose to proceed to take testimony with the hope that the testimony would be found sufficient to establish his case, especially where it appears that the testimony to be given by the new witness is merely cumulative. Greuter *v.* Mathieu, 111 O. G. 582.

59. French *v.* Halcomb, 110 O. G. 1727.

60. Where pending an appeal to the court of appeals a motion is made to reopen and take further testimony, and it appears that the motion is brought in good faith and not for the purpose of delay, and upon consideration of the same the facts are such as to warrant that the motion should be heard and determined on its merits, jurisdiction will be conferred upon the examiner of interferences for that purpose. Clement *v.* Richards *v.* Meissner, 111 O. G. 1626.

Upon a motion to restore jurisdiction to the examiner of interferences of an interference, pending on an appeal before the examiners-in-chief on the question of priority, for the consideration of a motion to reopen the case to receive newly discovered evidence, the only apparent questions for

(C.) Discretion of Examiner of Interferences. — The question of reopening an interference for the purpose of introducing testimony is a matter discretionary with the examiner of interferences, and in the absence of a showing of abuse of that discretion, a denial of a motion for that purpose will not be disturbed on interlocutory appeal.[61]

b. *Taking Testimony in Foreign Countries.* — The patent office rules of practice expressly provide for the taking of testimony in foreign countries.[62] But the testimony proposed to be taken must be material.[63]

Distinction Between Priority and Originality of Invention. — Testimony cannot be taken abroad to prove conception, explanation to others, or reduction to practice which took place abroad, but testimony may be taken abroad as to disclosure by one party to the interference to his opponent.[64]

consideration are whether the motion to reopen is in proper form and whether, so far as can be seen without going into the merits of the motion, it is made in good faith. Newell *v.* Clifford *v.* Rose, 122 O. G. 730.

61. Dunbar *v.* Schellenger, 121 O. G. 2663.

Where the junior party moves for leave to take testimony to show that the device of the senior party is inoperative, the question whether the testimony may be taken is to be determined in the first instance by the examiner of interferences. Lowry *v.* Spoon, 122 O. G. 2687; Clement *v.* Richards *v.* Meissner, 111 O. G. 1626.

62. Pat. Off. Rules of Prac. No. 158.

Where letters rogatory are issued to take testimony abroad, the testimony must be taken on written interrogatories filed, unless the parties stipulate to take it orally. Herreshoff *v.* Knietsch, 111 O. G. 1039.

Where it appears that the testimony of witnesses residing in Germany is material and necessary in an interference proceeding, and it cannot be taken in the regular way by commission because of a prohibitory rule of the German government, the commissioner of patents will issue letters rogatory in order to obtain through the German court testimony which cannot be obtained in any other way. Potter *v.* Ochs, 97 O. G. 1835.

63. Muller *v.* Lauber, 106 O. G. 2016.

In Butterworth *v.* Boral *v.* Ecob, 97 O. G. 1596, where a party had asked leave to take testimony abroad and his opponents by stipulation admitted all facts which he desired to prove with the exception of the date of his foreign application, it was held that the date of the application being immaterial there was no necessity to take the testimony abroad.

64. Shiels *v.* Lawrence, 81 O. G. 2085; Parkin & Wright *v.* Jenness, 63 O. G. 759.

In Stiff *v.* Galbraith, 108 O. G. 290, it was held that where a motion is made to take testimony abroad for the purpose of showing that the opposing party to the interference is not an original inventor, and it appears from the showing that the testimony will tend to show that fact, the motion should be granted.

Where the senior party moves for judgment on the record and his record date is prior to the date of introduction of the invention into this country set up in the preliminary statement of his opponent, judgment will not be delayed solely in order that the junior party may take testimony concerning a foreign application which cannot affect the result. Brown *v.* Lindmark, 109 O. G. 1071. In this case it is also held that where the junior party's preliminary statement goes back of the senior party's record date only by reference to foreign applications and the junior party's domestic application was filed prior to the act of March 3, 1903,

c. *Method of Producing Evidence.* — (1.) **Oral Testimony.** (A.) GENERALLY. — The rules of practice of the patent office, so far as testimony is concerned, provide that in interference it is to be produced in the form of depositions taken and duly filed in the patent office as required.[65] And evidence not taken and filed in compliance with the rules will not be considered on the hearing.[66]

judgment will not be delayed solely in order that the junior party may take testimony concerning the foreign applications.

65. Pat. Off. Rules of Prac. No. 154.

Formalities. — The Rules of Practice require the pages of each deposition to be numbered, and the name of each witness to be plainly and conspicuously written at the top of each page. The testimony must be written upon legal cap or foolscap paper with a wide margin on the left hand side of the page, and with the writing on one side only of the sheet. Rule 155. But the fact that the names of the witnesses are not written at the top of the pages of the deposition is a mere technical objection, and is not sufficient ground for suppressing depositions which are unobjectionable in other respects. Rolfe *v.* Taylor, 111 O. G. 1938. In this case it was also held that the fact that there is no margin at the left hand side of the sheet upon which the depositions are written is a mere technical objection, and not sufficient ground for suppressing depositions which are not objectionable in other respects.

Where the notary's certificate does not state the date upon which the package was sealed, the name of the person who transcribed the stenographer's notes, or that they were written out in the presence of the notary, or that depositions were read over by the witnesses, or that the notary read them over to the witnesses before they were signed, the depositions will be suppressed in the absence of a stipulation waiving these informalities. *Ibid.*

Exhibits. — The rules specifically require that exhibits shall be forwarded directly to the patent office by the officer before whom the testimony was taken, and where exhibits have not been forwarded that portion of the testimony relating to the exhibits will be suppressed in the absence of a stipulation waiving this requirement. *Ibid.*

Depositions Should Not Be Stricken Out Because of a Short Delay by the notary in filing them, where the delay was not caused by the party or his attorney, and it does not appear to have injured his opponent. Royce *v.* Kempshall, 117 O. G. 2090.

A Delay of Twenty-four Hours in Forwarding Testimony to the office is not unreasonable where the testimony is taken down by a stenographer and afterward to be transcribed; although it would seem that if the testimony had been written down and completed at the end of the examination of the witnesses such a delay would be regarded as unreasonable. Rolfe *v.* Taylor, 111 O. G. 1938.

Testimony will not be suppressed where, although the notary delays filing it, a reasonable explanation for the delay is given, and there is no allegation that the testimony was out of the possession of the notary, nor that the delay wrought a substantial injury to the opposing party. Moss *v.* Blaisdell, 113 O. G. 2505.

Presence of Party or Attorney. The objection that the notary's certificate failed to state whether a party or his attorney was present when the deposition was taken is purely technical, and is no ground for striking out the deposition where both parties agree that neither the party nor his attorney was present. Royce *v.* Kempshall, 117 O. G. 2090.

66. Pat. Off. Rules of Prac., No. 159. This rule further expressly provides that it is not to be construed as modifying established rules of evidence which will be applied strictly in all practice before the patent office.

Strict Compliance Necessary. The rules in regard to the taking of testimony in interference proceedings must be strictly complied with

(B.) Notice of Taking Depositions. — Before depositions are to be taken by either party, due and sufficient notice must be given to the opposing party or parties, as provided in the rules of practice.[67]

unless informalities are waived by agreement of counsel. Blackman *v.* Alexander, 98 O. G. 1281. As the commissioner said in a recent case: "This office desires to have before it all material evidence which will assist it in determining the question of priority of invention, but it must be apparent that in all proceedings of this kind it is necessary to have certain rules governing the presentation of evidence, and that an enforcement of these rules is as necessary as their existence. Unless parties understand that they will be expected and required to conform to those rules the door will be open whereby a party may subject his opponent to indefinite and vexatious delays. Laxity in the application of the rule against unnecessary delay may help one of the parties in a particular case, but it will render all applicants uncertain as to their rights, and may result in injury to many." Dunbar *v.* Schellenger, 113 O. G. 2213.

Waiver. — The provisions in the statutes and rules in regard to taking depositions may be waived by the opposing party, since they are intended for his benefit. Badger *v.* Morgan, 117 O. G. 598.

In Badger *v.* Morgan, 117 O. G. 598, where it was agreed that testimony for one party should be taken in the absence of opposing counsel, and it was stipulated that certain named objections were reserved, it was held that all other objections were waived.

Ex Parte Affidavits as to Public Use cannot furnish ground for dissolving an interference or for rejecting claims of an application. The bar of public use must be established by testimony taken in accordance with the rules of evidence. Shrum *v.* Baumgarten, 104 O. G. 577; Davis *v.* Swift, 96 O. G. 2409.

Ex Parte Affidavits Are Not Equivalent to Testimony, and the office is not bound to give effect thereto in determining questions of patentability even though they are received. It is doubtful if such affidavits serve any useful purpose in contested cases; it is certain that their consideration is regarded by the office as burdensome when they are filed in great volume. The office, however, has been very careful to refrain from holding that affidavits should not be accepted when of a proper character and when filed under proper conditions. Where affidavits are filed by any of the parties which are not in answer to the affidavits filed by their opponents, they must ordinarily, under the established practice in the office, be served upon the opponents at least five days before the date of hearing. Affidavits in rebuttal may then be filed by the opponents, but they should ordinarily be served before the day of the hearing. Therefore affidavits are not looked upon with favor by the office, and certainly they should not in any case be offered except when accompanied by a satisfactory showing, excusing the delay or justifying an attempted resort to surrebuttal evidence. The conclusion of the primary examiner upon the character of an affidavit, as a basis for its admission or exclusion, will not be disturbed except in cases of clear error; and extensive and voluminous affidavits will not be examined upon appeal to the commissioner to determine whether proper or improper, unless the matters urged upon the appeal have been fully urged before the primary examiner, and the supposed errors in his decision are clearly pointed out on the appeal. Browne *v.* Stroud, 122 O. G. 2688.

67. See Rules of Prac., Rule 154. And see Mergenthaler *v.* Scudder, 11 App. D. C. 264, 81 O. G. 1417.

Timely Notice Is Necessary. Hoag *v.* Abbott, 15 O. G. 471.

Where a notice is served at 10 a.m. that testimony is to be taken at 2 p.m. on the last day upon which testimony must be taken, and all parties live in the same city and were present, the record shows that the testimony was very brief, nothing ap-

And such notice cannot be used unless the adverse party has waived his right to notice.[68]

(C.) Taking Testimony. — The testimony must be taken in answer to interrogatories, the questions and answers being committed to writing in their regular order by the officer, or, in his presence, by some person not interested in the case, either as party or as attorney.[69]

(D.) Testimony Taken Down in Shorthand. — The rules of practice permit the testimony to be taken stenographically with the written consent of the parties, and the deposition may be written out by other persons in the presence of the officer. When it is taken stenographically, a longhand or typewritten copy must be read to or by the witness as soon as it can be made, and signed by him as required.[70]

(E.) Compelling Attendance of Witness. — A federal statute requires the clerks of the various courts of the United States to issue

pearing in the record that there was not sufficient time remaining to finish the cross-examination, the testimony will not be stricken out, notwithstanding an objection on the record of insufficient notice and refusal to permit cross-examination. Roberts *v.* Webster, 115 O. G. 2135.

In serving notice for the taking of testimony at a place distant from Washington City, ample time should be given counsel to communicate with his client and to arrange his business affairs before he is compelled to start on his journey. . . . A motion served on Saturday to take testimony does not become effective until Monday at the same hour. Counsel cannot be compelled to travel on Sunday whether any objection to Sunday traveling is raised or not. Goodfellow v. Jolly, 111 O. G. 1940.

68. Perry *v.* Cornell, 1 McA. Pat. Cas. 66, 19 Fed. Cas. No. 11,001. In this case it was also held that giving notice to produce the depositions before a commissioner for inspection and examination by counsel, and refusal of an offer of the other party to have the witnesses before the commissioner for cross-examination did not constitute such waiver. See Potter *v.* Ochs, 95 O. G. 1049.

Waiver. — Failure to give notice that depositions were to be taken, as required by the patent office rules, is no ground for rejecting the depositions where the adverse party was present at the examination and cross-examined the witnesses. Gibbs *v.* Ellithorp, 1 McA. Pat. Cas. 702, 10 Fed. Cas. No. 5,383, holding further that when the adverse party had so appeared he was bound to take notice of an adjournment, and if he was not present at the adjourned examination it was his own fault.

69. Pat. Off. Rules Prac. No. 156.

Where no objection to the notary was made during the taking of the depositions, any objections as to his competency are to be considered as waived and cannot be considered later. . . . The fact that the notary who took the depositions was an employe of the attorney at whose instance they were taken and had delayed forwarding the depositions to the Patent Office, will not warrant striking out the depositions on the ground that the depositions were in possession of the attorney during the delay. Royce *v.* Kempshall, 117 O. G. 2090.

Where long after depositions were taken and filed in the office, motion was made to strike them out because the notary acted without authority, but it appears that no objection was made or reserved at the time they were taken, *held* that the motion will be denied. Badger *v.* Morgan, 117 O. G. 598.

70. Pat. Off. Rules of Prac. 156, 157.

While rule 156 requires that there be a written consent of both parties before testimony may be taken stenographically, the reason for the rule does not apply where one of the

subpoenaes to secure the attendance of witnesses whose testimony is desired in contested cases in the patent office.[71]

(F.) Printing Testimony. — The printing of testimony is required by the rules of practice of the patent office, and can be dispensed with only upon the showing made as required therein.[72]

(G.) Compelling Witness To Answer Questions. — The patent office has no power to compel a witness to answer questions.[73]

(H.) Leading Questions. — Testimony adduced by leading questions cannot be excluded from consideration unless objection to it

parties did not attend the examination. In such case it is immaterial how the testimony shall be taken down provided the rules in other respects are complied with. Rolfe *v.* Taylor, 111 O. G. 1938.

71. U. S. Rev. Stat. § 4906. To secure such subpœna an affidavit showing the pendency of the interference proceeding in the patent office, the witness' name and residence and the materiality of his testimony, should be filed in the office of the clerk of the United States Circuit Court upon the application for such subpœna.

72. Pat. Off. Rules of Prac. 162. The rule requiring printed copies of the testimony to be furnished to the office and the opposing parties is valid and of binding authority. Plummer *v.* Penniston, 67 O. G. 928.

Whether or not judgment on the record should be entered against a party because of his failure to print his testimony is a matter to be decided by the examiner of interferences, and his judgment in relation thereto will not be controlled by an order by the commissioner made in advance. Mark *v.* Greenawalt, 118 O. G. 1068.

Where no motion to dispense with the printing of the testimony in an interference proceeding has been made and no excuse for failure to print is offered by the junior party, judgment awarding priority is properly entered in favor of the senior party. Levering Coffee Co. *v.* Union Pacific Tea Co., 121 O. G. 1077.

A corporation will not be relieved of the necessity of printing its testimony in an interference proceeding on a showing that it has no ready money for that purpose, where it appears that the corporation is not in reality poor and there is no showing that the parties interested in the company, and who would be the real beneficiaries from any decision in its favor in the interference, are unable to furnish the money for the purpose of printing testimony. Rule 162, permitting the filing of typewritten copies of the record, in place of printed copies, was made in the interest of those inventors who are, in fact, so poor that it is impossible for them to bear the expense of printing their testimony. The rule is not to be extended, in view of the great burden which would be placed upon the office and upon the opposing party in considering typewritten testimony in place of printed testimony. An additional consideration and one of much force, referred to by the office, is that it would be necessary to print the testimony if an appeal should be taken to the court of appeals of the District of Columbia, and if it should happen that the opposing party was the one compelled to take that appeal, it would be necessary for him to bear the expense of printing the other party's testimony. Dow *v.* Des Jardins, 119 O. G. 1923.

73. The office may at final hearing strike out or refuse to consider the testimony of a witness who refuses to produce material evidence; but if a party is not satisfied with this remedy, he must apply to the Federal court for the proper order compelling the witness to produce the desired evidence. Lindstrom *v.* Lipschutz, 120 O. G. 904. See also *s. c.* 121 O. G. 1977. *Compare* Bird *v.* Halsy, 87 Fed. 671.

The commissioner of patents has no judicial power over the production and conduct of witnesses in an interference proceeding; this whole matter is left in the hands of the Federal courts of the district in which

has been properly interposed. The leading character of the questions may be good ground for scanning the testimony with critical care, but it is no ground for discrediting it.[74]

(I.) Proceedings to Perpetuate Testimony. — By analogy to the practice of courts of equity, the patent office has authority to, and, in proper cases, will permit the taking of testimony to perpetuate it for use in proceedings pending before the office.[75]

(J.) Suppression of Depositions. — A motion to suppress testimony should be brought before and determined by the examiner of interferences in the first instance.[76]

(K.) Time for Objecting to Depositions. — The rule is that if a deposition is in any respect open to objection for irregularities the objec-

the testimony is being taken. And where a party fails to avail himself of his right to apply to the proper court for the control of a refractory witness, the commissioner will not interfere except in an unusual case, but will, in passing upon the question of priority, give to the testimony of such witness only such weight as is justified by the circumstances. Kelly *v.* Park, 81 O. G. 1931. See also, Wright *v.* Dogett, 44 O. G. 943; Osgood *v.* Badger *v.* Bennett, 44 O. G. 1065.

Where at the hearing of a motion to compel a witness to answer certain questions or to suppress his deposition, the interference was suspended for ten days to permit the parties to come to some agreement, and a paper was thereafter filed in the case, in accordance with the agreement of counsel, to show that no agreement could be reached, such paper will not be stricken out upon the allegation that it is a supplemental brief filed in violation of the rules. Lindstrom *v.* Lipschutz, 120 O. G. 904.

The Fact That the Witness Is a Volunteer Witness does not relieve him from the jurisdiction of the Federal court, and the remedy from his refusal to answer proper questions is by application to the Federal court of the district in which the testimony is being taken. Kelly *v.* Park, 81 O. G. 1931, holding, however, that an application for leave to apply to the court comes too late where it has been made after the taking of testimony has closed, the printed record filed, and the day set for final hearing has passed.

74. Smith *v.* Brooks, 24 App. D. C. 25, 112 O. G. 953. See also articles "Examination of Witnesses," Vol. V; "Leading Questions," Vol. VIII.

75. Thus, where there have been long delays in an interference without reaching the point of having taken testimony, one of the parties will be permitted to take his testimony to be used when the case comes to trial, upon a showing that unless he is permitted to take his testimony there is likelihood that it will be lost irretrievably, even though he is the senior party and in the regular order of events he would not be required to take his testimony until after the junior party had taken his. Lowry *v.* Spoon, 117 O. G. 903.

76. Lindstrom *v.* Lipschutz, 120 O. G. 904.

A motion to suppress testimony will not be considered until final hearing, where it appears that in order to pass upon the question properly a complete consideration of the entire record is necessary. Andrews *v.* Nilson, 111 O. G. 1038. See also Knight *v.* Morgan, 82 O. G. 187.

Where the examiner of interferences rules that the consideration of a motion to suppress testimony as incompetent should be postponed until final hearing, because it would require consideration of the greater part of the record, an appeal from his ruling raises only the question whether the examiner was right in postponing the consideration of the question and will not be reviewed and reversed except in a clear case of abuse of discretion. Royce *v.* Kempshall, 119 O. G. 338.

Questions and answers in the

tion must be taken before the cause goes to hearing before the examiner of interferences on the question of priority.[77]

(2.) Preliminary Statements. — The preliminary statement required by the rules of practice to be filed in an interference proceeding can in no case be used as evidence in behalf of the party making it, since these statements are simply the pleadings in the case.[78]

(3.) Caveat as Evidence. — Where a party to an interference relies upon a caveat to establish the date of his invention, the caveat itself or a certified copy thereof must be filed in evidence, upon due notice to the opposite party.[79]

(4.) Official Records, Printed Publications, Etc. — Upon notice given to the opposite party before the closing of the testimony, any official record and any special matter contained in a printed publication, if competent evidence and pertinent to the issue, may be used at the hearing.[80]

written record of testimony in an interference proceeding when stricken out should be canceled by red lines, and proper marginal notes should be made just as when matter is canceled in the specification of an application for patent; the matter so struck out should be omitted from their places in the body of the testimony and a notice inserted that it has been stricken out, giving the date of decision in which the order to strike out was made. If the party against whom the order is directed desires to do so, he may print the excluded testimony, properly designated, as an appendix to his record, or separately. By pursuing this course the main body of the records is not confused or incumbered with matter not in the case; yet this matter is conveniently accessible in the event of subsequent question as to the propriety of its exclusion. Marconi *v.* Shoemaker *v.* Fessenden, 121 O. G. 2664.

77. "It is undoubtedly the proper practice that for technical defects objection must be taken to depositions before the cause goes to hearing. This is only the dictate of justice, because then the party, on whose behalf the deposition is introduced, may have an opportunity to remedy the supposed defect." Meyer *v.* Rothe, 13 App. D. C. 97, 84 O. G. 649.

Time for Objections. — Objections as to informalities in depositions should be made at the time they are taken unless the right of objection is reserved by stipulation. Badger *v.* Morgan, 117 O. G. 598.

78. Pat. Off. Rules of Prac. No. 117. And see Lauder *v.* Crowell, 16 O. G. 405.

79. Pat. Off. Rules of Prac. No. 154, par. 5.

A Caveat Filed by One of the Parties to an Interference, in so far as it extends to the description of the invention and the machinery which was then constructed, amounts to a declaration of his invention and forms part of the *res gestae* and may be received in evidence. Jones *v.* Wetherill, 1 McA. Pat. Cas. 409, 13 Fed. Cas. No. 7,508.

In Colhoun *v.* Hodgson, 5 App. D. C. 21, 70 O. G. 276, where a caveat disclosed substantially the invention in interference, it was held that the expression in the caveat of a desire to mature the same did not show that the invention could not have been reduced to practice at its date.

80. Pat. Off. Rules of Prac. No. 154, par. 6.

In Hall *v.* Weber, 108 O. G. 1054, where one of the applicants admitted that the proceeding was closely related to another interference in which he was involved, and introduced in evidence the decision in that other interference, and stated that he had no objection to the introduction of the entire record, it was held that the opposing party might refer to the entire record without printing it as part of his proofs.

(5.) **Testimony Taken in Another Interference.** — By leave of the commissioner first obtained, testimony taken in an interference proceeding may be used in another or subsequent interference proceeding so far as relevant and material, subject, however, to the right of any contesting party to recall witnesses whose depositions have been taken, and to take other testimony in rebuttal of the depositions.[81]

81. Pat. Off. Rules of Prac. No. 157.

Validity of Rule. — Rule 157, which permits the use in one interference of depositions taken in another, is not contrary to the fundamental principles upon which the ordinary rules of evidence is based, and is not invalid because contrary to law, and indeed express authority for the rule seems to be found in section 4905 of the Revised Statutes, providing that the commissioner of patents may establish rules for taking depositions required in cases pending in the patent office; the question in each case, under the very wording of the rule itself, is whether the showing made justifies the use of the deposition, and is one calling for the exercise of discretion; but there is no valid ground for doubting the authority of the office to admit the deposition. Kenny *v.* O'Connell *v.* Baird *v.* Schmidt, 117 O. G. 1163.

Discretion of Office. — Rule 157, permitting the use of testimony taken in a prior interference, does not mean merely that such testimony may be used where all the parties consent; the rule is clearly intended to mean that the office may exercise its discretion in permitting the use of such testimony, even where the parties do not consent. So far as concerns the party against whom the testimony is sought to be used, and his right to object to its use, the only limitation seems to be that he must have had the opportunity to recall the witnesses for further examination and to take other testimony in rebuttal thereof. The testimony itself must of course be relevant and material, or at least that portion of it sought to be used. And where the party objecting to its use has been given the opportunity to recall witnesses for cross-examination and the right to take rebuttal testimony, he is in no position to successfully object to the use of the testimony. Kenny *v.* O'Connell *v.* Baird *v.* Schmidt, 117 O. G. 1163.

Effect of Rule. — Rule 157, permitting a party upon motion to use in one interference testimony taken in another, relates merely to the form in which the testimony is presented, and does not modify the other rules as to presenting testimony. Donning *v.* Stackpole, 107 O. G. 268.

Upon a Rehearing or a New Trial of an Interference, depositions taken and used on the former may be received and used against a party brought in subsequent to the first hearing. Carter *v.* Carter, 1 McA. Pat. Cas. 388, 5 Fed. Cas. No. 2475. In this case the assignees of the patentee under the patent cited had been parties to the first hearing. Subsequently and before the rehearing their assignor was brought in as a party. The applicant sought to use the depositions of the assignees taken and used on the former hearing for the purpose of showing variances and discrepancies between them and the depositions of the witnesses used on the rehearing. The court, in holding that the applicant should have been permitted to use the depositions, said: "If this trial could have been confined to the original parties only, according to well-settled principles of law, I suppose no doubt could have been entertained that the appellants would have been permitted to use the old depositions for the purposes they wished to use them for on this occasion. What difference, then, does the coming in of the new parties make in the principle? The general rule certainly is, that where the parties are not the same, either identical or in privity, the evidence is not admissible, because there is no mutuality, and the new parties would not have had an opportunity

(6.) Taking Exhibits From Patent Office. — It is the uniform practice of the Patent Office to refuse to permit exhibits, filed as a part of the record of proceedings in that office, to be taken out of its possession except upon the consent of both parties.[82]

(7.) Foreign Application. — Application for patent filed in a foreign country affords no evidence of priority of invention in an interference proceeding in the United States patent office, in the absence of legislation giving it that effect.[83]

(8.) Foreign Patent. — A foreign patent cannot be regarded as in evidence and entitled to consideration on the question of priority of invention where no copy of the patent itself is produced, but merely an alleged official copy of the specification and drawings annexed to the patent is introduced.[84]

of cross-examination. But from the nature of this peculiar proceeding, where new parties, applicants for the same invention, may be allowed to come in and have a proceeding adapted to the new condition of things, the rule of evidence which will be applicable resembles more a proceeding in chancery than otherwise. He will be received only on the terms of being subject to the testimony which either of the parties have previously taken in the case."

A motion to permit the use of testimony taken in other interferences between the same parties will not be denied merely because the present interference relates to a process, whereas the other interference related to an apparatus. Struble *v.* Young, 119 O. G. 338.

In considering a motion by a party after his time for taking testimony has expired, that he be permitted to use in one interference testimony taken in another, it must be decided not only whether the testimony itself is admissible, but whether the party has any right at that time to introduce any evidence whether in the form requested or any other form. Stone *v.* Hutin, 84 O. G. 1731.

A motion to permit the use of testimony taken in other interferences between the same parties will not be denied merely because the testimony contained unnecessary matter. Struble *v.* Young, 119 O. G. 338.

Different Parties. — Testimony taken in one interference should not be admitted in a subsequent interference between different parties against the protest of one of the parties to the later interference, even though the testimony sought to be introduced is pertinent to the later issue and the protesting party was also a party to the earlier interference. Secor *v.* Knapp, 63 O. G. 612.

Testimony taken in one interference cannot be used in a subsequent interference where such use is opposed by a party to the later interference who was no party to the earlier interference at the time the testimony was taken and thereafter, especially where it does not appear that the witnesses who testified in the earlier interference cannot be procured to testify in the later one. Hunter *v.* Sprague, 63 O. G. 611.

While a deposition given by a witness in another interference may be used for the purpose of discrediting the deponent, the deposition of other witnesses in the other interference cannot be received as proper evidence to establish the facts stated in it. Talbot *v.* Monell, 99 O. G. 2965.

82. Where they consent, the exhibits may be sent out as requested; but in the absence of such consent, they can be sent only in charge of some employe of the patent office, and, in the latter event, the party making the request must make the deposit to cover the expenses of the employe. Seiler *v.* Goldberg, 116 O. G. 595.

83. Rousseau *v.* Brown, 21 App. D. C. 73, 104 O. G. 1120.

84. Rousseau *v.* Brown, 21 App. D. C. 73, 104 O. G. 1120.

Where a certified copy of a French patent is produced, although the certificate is on a separate sheet from

(9.) **Improper Rebuttal.** — Testimony which should be introduced in the examination in chief, but which is taken during the time set for the taking of rebuttal and is not in rebuttal of any testimony taken by the other party, may be stricken out.[85]

(10.) **Surrebuttal Evidence.** — Where a party to an interference is surprised by evidence or by a line of defense which he has had no reason to anticipate, or opportunity to prepare against, he should have the privilege of answer or explanation, whatever may be the stage of the proceedings, and even though he has had the opportunity of cross-examination.[86]

(11.) **Cross-Examination of Witness.** — The cross-examination of a

the specification and is not attached, the certificate may nevertheless be taken to show the grant and its date, and the copy of the patent in the scientific library of the patent office may be received to prove the contents of the patent. Robin *v.* Muller, 108 O. G. 292.

85. Basch *v.* Hammond, 113 O. G. 551; Huber *v.* Aiken, 88 O. G. 1525; Empire Cycle Co. *v.* Monarch Cycle Mfg. Co. *v.* Meacham Arms Co., 82 O. G. 1689.

On the hearing before the examiner of interferences the question at issue is priority of invention, and rebuttal testimony taken on the part of junior party, which relates solely to the question of patentability, is not proper rebuttal testimony and is properly stricken out by the examiner of interferences. Parker *v.* Lewis, 120 O. G. 323.

The insufficiency of an opponent's application to sustain judgment against a party to an interference proceeding is clearly a part of that party's *prima facie* case, and evidence directed to that question when offered as a part of the party's case in rebuttal should be stricken out upon proper objection and motion made. Marconi *v.* Shoemaker *v.* Fessenden, 121 O. G. 2664.

Where the junior party in his testimony in chief shows that he disclosed the invention at a certain time, rebuttal testimony by him for the purpose of showing by the same witnesses that he disclosed the invention two years earlier is not admissible; such testimony would tend to discredit the disclosure shown in his testimony in chief if the latter were not supported by some record testimony. Furman *v.* Dean, 24 App. D. C. 277, 114 O. G. 1552.

86. In Scribner *v.* Childs *v.* Balsley, 63 O. G. 1961, the commissioner said: "The theory upon which the practice governing the introduction of rebuttal testimony proceeds is that a party having been surprised by evidence or a line of defense which he has had no reason to anticipate or opportunity to prepare against, he should have the privilege of answer or explanation. It would be an arbitrary ruling that limited the benefits of this custom to a single party or stopped operation at a particular stage of the case, and it would be a manifest injustice at whatever stage of the proceeding to bar from seeking to overthrow evidence suddenly introduced against him by an opponent and of a kind and character that make it absolutely certain he has had no previous opportunity to counteract; nor is it any answer to say that the aggrieved party had an opportunity to, or actually did, cross-examine the rebutting witnesses. The result of the cross-examination of a witness is no sure criterion in determining the truth or falsity of his testimony, for, while it may in some cases lead to satisfactory results, it could as frequently lead to the confusion of an honest witness as to the detection of a lying one."

Surrebuttal Evidence. — Surrebuttal evidence should be accepted from a party only where new matter is introduced in his opponent's case which is in the nature of a surprise to the party seeking to introduce surrebuttal evidence. Marconi *v.* Shoemaker *v.* Fessenden, 121 O. G. 2664.

witness must be limited by the scope of the direct examination of that witness, and cannot be based upon the entire record.[87]

(12.) Taking Testimony Through Interpreter. — While there may be cases where it would be proper that the officer taking the deposition should be specially sworn as an interpreter, yet a deposition should not be rejected merely because it does not appear affirmatively that the officer has been sworn to report correctly the answers of a witness given in a foreign language with which the officer himself is familiar.[88]

D. Scope of Inquiry. — a. *In General.* — An interference proceeding raises the question of priority of invention as between the parties thereto, and the testimony must be confined to that inquiry.[89] And where it appears that the testimony taken by one

87. **Where an Adverse Party Is Called as a Witness** and refuses to testify concerning certain matters, he cannot be cross-examined by his own counsel about those matters about which he has refused to testify. Marconi *v.* Shoemaker *v.* Fessenden, 121 O. G. 2664.

Striking Out an Improper Cross-Examination does not deprive the cross-examining party of any right. *Ibid.*

88. Meyer *v.* Rothe, 13 App. D. C. 97, 84 O. G. 649. The court said: "Inasmuch as there is no further qualification required of the officer who acts than the commission by and under which he has received his appointment to his office no special oath or other obligation to perform the duty faithfully is prescribed by the statute or by the rules of the Patent Office. It has resulted as matter of convenience that testimony for use in the Patent Office has very generally, if not invariably, been taken by and before notaries public, and the commissions issued to these officers by the proper authorities of their respective States are sufficient warrant to them, without other preliminary qualification by special oath or otherwise, to take and return the depositions required for the determination of causes in the Patent Office.

The execution of the statute and of the rule in the case where witnesses are presented who are not conversant with the English language and cannot testify in it presents, of course, a difficulty, but not greater than is encountered in the courts of law. Testimony with us is necessarily required to be in the English language, and the testimony of a witness unacquainted with our language or unable to testify in it must be translated into the English language before it can become testimony competent to be used for the adjudication of our legal controversies. This is accomplished in our courts of common law by the aid of interpreters, who are themselves sworn as witnesses for the purpose, and the rule is not dissimilar in equity or other tribunals in which testimony is required to be adduced by way of deposition; but where the officer who takes the deposition is himself conversant not only with the English language, in which he takes it, but likewise with the language of the witness an interpreter is unnecessary. Indeed, it is very plain that there is in that case a greater guaranty of accuracy than when a third person is interposed as interpreter, for the officer then knows himself what the witness says and is not required to take it at second hand from a person who gives his understanding of it. This we understand to be admitted, at least not to be denied, by the appellants; but the argument is that when the officer acts in the dual capacity of a commissioner to take the testimony and of an interpreter to translate the interrogatories to the witness and to translate his answers into the English of the deposition he should be sworn specially in this latter capacity. Neither upon reason nor upon authority do we regard the argument as well founded."

89. Steinmetz *v.* Hewitt, 107 O. G.

of the parties relates solely to public use, it will be suppressed.[90]

b. *Invention by Third Person.* — A junior claimant of an invention cannot overcome the prior date of his adversary by proof that some third person was in fact the inventor,[91] even where that third person was once a party to the interference.[92]

c. *Disclosure of Invention.* — Where the question is whether or not the application discloses the invention, testimony as to what the inventor did, and what he intended to include in the application is inadmissible.[93]

d. *Date of Invention.* — The sworn preliminary statements required in an interference proceeding constitute the pleadings of the parties, and the practice is strictly adhered to of not permitting the parties in presenting evidence of the dates of their inventions to go back of those given therein.[94] But where a party presents

1972; Brill *v.* Uebelacker, 99 O. G. 2966.

In Trufant *v.* Prindle, 101 O. G. 1608, the commissioner said: "The question whether some independent bar exists against one party other than prior possession by the other parties is not up for consideration, and to permit testimony to be taken upon that question would be to transform the interference into a proceeding to investigate the *ex parte* rights of the parties who happen to be involved in it. This is not permissible and is not warranted by the rules. Interferences are sufficiently burdensome to the parties when confined to their legitimate purpose and this office will not sanction or permit their extension to include other questions not bearing upon the matter in issue." The precise point ruled in this case was that testimony that one of the parties was not an original inventor but received a disclosure of it from some third person not connected with the interference relates to his *ex parte* rights and not to the question of priority of invention as between the parties to the interference.

90. Stroud *v.* Miller, 101 O. G. 2075.

91. Evidence that some third person other than parties to the interference was in fact the inventor of the patent is not pertinent to an interference proceeding. Garrels *v.* Freeman, 21 App. D. C. 207, 103 O. G. 1683, *affirming* 102 O. G. 1777; Loster *v.* Antisdel, 88 O. G. 1527.

The question whether some other person than the parties to an interference proceeding was the inventor of the issue is not pertinent. It can only become pertinent when the third person files an application for patent on the invention of the issue, and is made a party to the interference. Bauer *v.* Crone, 118 O. G. 1071.

92. Prindle *v.* Brown, 24 App. D. C. 114, 112 O. G. 957. The commissioner said that the reason for this is that the question whether the senior applicant may be entitled to priority of invention as against all persons is not the issue in an interference case between two claimants of the invention, but is whether the junior applicant has sustained the burden of establishing his own priority of invention over that of his opponent.

93. Dow *v.* Converse, 106 O. G. 2291. The commissioner said that the question at issue must obviously be determined from the application itself; that the opinions of experts as to what the application would mean to those skilled in the art might be pertinent and might throw some light upon the question to be decided, but that testimony of the character introduced was certainly improper.

94. Hammond *v.* Basch, 24 App. D. C. 469, 115 O. G. 804. See also Cross *v.* Phillips, 14 App. D. C. 228, 87 O. G. 1399; Bader *v.* Vajen, 14 App. D. C. 241, 87 O. G. 1235; Huber *v.* Aiken, 88 O. G. 1525.

Where the junior party is limited by his preliminary statement to dates subsequent to the opposing party's record date, there seems to be no good reason according to the rules of the office for examining the testimony of such junior party attempting to prove

evidence of completion of the invention prior to the date to which he is restricted by his preliminary statement, the evidence so introduced is entitled to some consideration upon the question of diligence, as tending to show that he had some reason to be satisfied with the practicability of his device.[95] It has been held, however, that where the evidence on behalf of the party to an interference shows that the invention was made at a date later than that alleged in the preliminary statement, the evidence is not to be disregarded because of the variance from the statement.[96]

e. *Character of Parties.* — Testimony concerning the general character of the parties to an interference is not competent.[97]

E. Competency of Evidence. — a. *In General. — Rule of Evidence of District of Columbia.* — The rules of evidence in force and as applied in the courts of the District of Columbia govern in the production of evidence in interference proceedings, so far as they concern its admissibility.[98]

b. *Documentary Evidence.* — Where an application is involved in interference in which a part only of the invention is included in the issue, the applicant may file certified copies of the part or parts of the specification, claims and drawings which cover the interfering matter, and such copies may be used in the proceeding in place of the original application.[99]

dates earlier than those set up in his preliminary statement where permission to amend this statement has been asked and refused. In such case, testimony to establish such earlier dates cannot be considered on the question of priority, even with the consent of counsel, unless expressly approved by the commissioner of patents or his representative. Cases of course may often arise where the interest of the parties and the public will be best subserved by permitting dates earlier than those set forth in the preliminary statement to be proved. It should, however, be done under the supervision of and with the approval of the office. Fowler *v.* Boyce, 122 O. G. 1726.

Where a party has been refused permission to put back his dates as set out in his preliminary statement after seeing his adversary's dates, any attempt to prove the earlier dates is contrary to the rules of the patent office and to the general rules applicable to pleading in courts of law. Where the party, in order to prevail, depends upon earlier dates than those set out in his preliminary statement, and permission to amend the statement setting out the earlier dates has been refused, testimony relating to the earlier dates must be disregarded. Fowler *v.* McBerty, 121 O. G. 1015.

95. Hammond *v.* Basch, 24 App. D. C. 469, 115 O. G. 804.

96. Herman *v.* Fullman, 23 App. D. C. 259, 109 O. G. 1888. But variance between the dates set forth in the preliminary statement and those shown by the testimony is to be considered in weighing the evidence. See cases cited.

97. Jenkins *v.* Burke, 77 O. G. 973.

98. Koen *v.* Quint, 23 O. G. 1329; Marsh *v.* Rein, 43 O. G. 1453; Patee *v.* Cook, 107 O. G. 835.

99. Pat. Off. Rules No. 105.

While a prior mechanical application is not a constructive reduction to practice of a design, a copy of the application may be introduced in evidence to show prior conception. McArthur *v.* Gilbert, 110 O. G. 2509.

Where a party files an application for patent disclosing an invention but permits it to become abandoned and thereafter files a second application which is placed in interference, the first application is proof

Letters and Records or Memoranda of Experiments by a person experimenting under the direction of the inventor describing the methods, processes and results of his experiments are not admissible for the purpose of confirming his testimony as a witness, although they may be used for the purpose of refreshing his memory.[1]

c. *Declarations and Conversations.* — On an issue as to priority and originality of invention, conversations and declarations of one of the parties are admissible when part of the *res gestae*,[2] or when constituting an admission against interest.[3] Evidence that a party at a certain time stated that he had reduced the invention in controversy to practice, while admissible as tending to show the fact of conception, is not competent to prove the independent fact of reduction of that conception to practice.[4]

d. *Demonstrative Evidence.* — Upon the question of reduction to

only of conception of the invention and not of a constructive reduction to practice. Trufant *v.* Prindle *v.* Brown, 111 O. G. 1035.

1. Jones *v.* Wetherill, 1 McA. Pat. Cas. 409, 13 Fed. Cas. No. 7,508.

2. As when made at the time of exhibiting and explaining the invention claimed. Gibbs *v.* Johnson, 3 App. Com'r Pat. 255, 10 Fed. Cas. No. 5,384. This case involved the priority of the invention of a sewing machine, and it was urged that the mechanical production of the stitch brought to perfection by each of the parties as exhibited in the patent could not be established either by hearsay, opinion, or presumption, but only by the testimony of those who saw it so produced by the alleged mechanical agent, and by proof on mechanical principles of the ability of the machine to produce the stitch; but the court overruling the contention said: "In questions of priority of invention such as this, where the precise time is to be ascertained, the invention itself being an intellectual operation, and the nature of the case differing very much from ordinary cases, the declarations and conversations of the party himself, where forming a part of the *res gestae*, are admissible." See also Dietz *v.* Wade, 3 App. Com'r Pat. 142, 7 Fed. Cas. No. 3,903.

Declarations and Conversations. On an issue as to priority and originality of invention, conversations and declarations of one of the parties stating that he had made an invention and describing its details and explaining its operation were properly to be deemed an assertion of his right at that time as an inventor, but only to the extent of the facts and details which he then made known. Garratt *v.* Davidson, 3 App. Com'r Pat. 21, 10 Fed. Cas. No. 5,247.

3. In Furman *v.* Dean, 24 App. D. C. 277, 114 O. G. 1552, it was held that a declaration by one of the parties to an interference, made to parties in interest, that his invention was different from the invention of the other party, does not necessarily raise an estoppel but is merely matter of testimony, the effect of which could be explained by other testimony, since there might well be differences of detail between the two claims, although they might be the same in substance.

4. Petrie *v.* De Schweinitz, 99 O. G. 1387, holding that such statements are clearly self-serving declarations.

Statement in a memorandum of a note-book produced by one of the parties to an interference, and alleged to disclose the invention in issue, is not sufficient to prove conception, where it appears that the entry was seen by no one and there is no corroborative evidence except the statement of another witness that the party produced such a book during a certain month. French *v.* Halcomb, 120 O. G. 1824.

practice, an exhibit or model properly authenticated may be received and considered.[5]

Conception. — Conception cannot be proved merely by a sketch which fails to disclose a feature called for by the issue, the witnesses not referring to that feature.[6]

e. *Examination of Exhibits With Microscope.* — Where exhibits are introduced in evidence and it is not pretended that everything on those exhibits is discernible to the naked eye, an examination of them by the aid of a microscope is permissible.[7]

f. *Opinion Evidence.* — Testimony which intrudes the opinion of the witness upon a question which it is the duty of the tribunal hearing the case to decide from the facts uninfluenced by any conclusions thereon by others is not admissible.[8]

Affidavits Which Consist Merely of Opinions of various persons as to the scope and meaning of the issue, and as to the question of interference in fact between the claims involved in the interference, should not be received.[9]

g. *Testimony of Inventors.* — The uncorroborated[10] testimony of the inventor, while apparently in all cases regarded as competent,

5. The question whether a certain exhibit was a reduction to practice depends upon its condition at the time it is claimed to have been reduced to practice, and not at the time it was introduced in evidence, and this can be shown by competent testimony. Blackford *v.* Wilder, 21 App. D. C. 1, 104 O. G. 580.

In Paul *v.* Hess, 113 O. G. 847, it was held that evidence that an exhibited machine was in its present condition and embodied the invention claimed for it was very weak, the evidence consisting only of the testimony of the alleged inventor to that effect, and of two witnesses, one of whom was proved utterly incompetent upon cross-examination, and the other, who seems to have only incidentally seen the machine during construction, merely stating that he could not see any change in it.

There is no doubt that the construction of a full-sized device capable of use to a sufficient extent to demonstrate the practical utility of the invention may often be regarded as a reduction to practice, notwithstanding it may have been called a model as well as intended by the inventor to be used as a model for the construction of a like device of better and different materials when there has been some test or application to use. But such a model so called must be different from the ordinary model, which, while it may show the invention, is incapable of operation to effect its purpose. And the cases must be few indeed in which the construction and disclosure of a device intended as an illustrative model merely, without some test of its capacity to perform the service intended, can be accepted not only as evidence of conception but of reduction to practice also. Hammond *v.* Basch, 24 App. D. C. 469, 115 O. G. 804.

6. Harris *v.* Stern, 105 O. G. 259.

7. Flora *v.* Powrie, 23 App. D. C. 195, 109 O. G. 2443. The court said that to hold otherwise would preclude a judge with defective eyesight the right to use his spectacles. See *s. c.* 106 O. G. 2288.

8. Marconi *v.* Shoemaker *v.* Fessenden, 121 O. G. 2664. See also Peckham *v.* Price, 118 O. G. 1934.

9. Summers *v.* Hart, 98 O. G. 2585.

10. Where a party depends for corroboration of his assertion of conception and disclosure of the invention upon the testimony of his assignee, whose character for veracity and reliability is not impeached and the circumstances afford no reason for not believing the statements of the assignee, the corroboration is not rendered insufficient by the

yet is in no case sufficient to establish conception or reduction to practice.[11] While the testimony of a party to an interference is competent, yet the force and effect of his testimony may be fully overcome by circumstances surrounding the transaction and his conduct in relation thereto.[12]

fact that the witness is such party's assignee. Turnbull *v.* Curtis, 120 O. G. 2442.

Although there are apparent inconsistencies in the testimony of the inventor, yet where his testimony is explained by the testimony of other witnesses, the conclusion is justified that the inventor was merely mistaken in giving his testimony and that he has not knowingly and willingly perjured himself. Scott *v.* Laas, 118 O. G. 1367.

11. Blackman *v.* Alexander, 113 O. G. 1703; Harris *v.* Stern, 105 O. G. 259; Petrie *v.* De Schweinitz, 99 O. G. 1387; French *v.* Halcomb, 120 O. G. 1824; Robinson *v.* Copeland, 1120 O. G. 501.

The uncorroborated testimony of a party as to conception, the making of drawings and an actual construction of the invention before his rival's invention is not sufficient to satisfy the burden of proof imposed upon him by the condition of his opponent's possession of a regularly issued patent when his application was made, however plausible his testimony may be. Sharer *v.* McHenry, 19 App. D. C. 158, 98 O. G. 585.

The uncorroborated testimony of a party that he operated the machine and satisfied himself of its practical mechanism is not sufficient to establish reduction to practice. Paul *v.* Hess, 113 O. G. 847. In this case it was further held that the testimony of a party that a machine was submitted to the officers of the company by which he was employed was not evidence of successful operation and did not afford corroboration of his own testimony that the machine had been successfully operated.

Where a device embodying the invention in issue is shown to have been constructed, and the question is whether or not such device operated successfully and satisfactorily, the testimony of the inventor and of two witnesses, who showed that they were thoroughly familiar with the construction, that the device operated successfully, and that they used it a number of times, is sufficient to warrant the conclusion that such device was an actual reduction to practice, and it is unnecessary that the facts on which they base their conclusion appear in the record. Seeberger *v.* Russel, 121 O. G. 2328.

12. Voight *v.* Hope, 114 O. G. 762. In this case one of the parties claimed to have conceived an invention twelve years before his opponent entered the field, but did not reduce the invention to practice until several months after his opponent, and the testimony showed that during the twelve years he did nothing but make experimental devices and models, all of which were thrown in the scrap; it was held that his action in throwing these alleged devices in the scrap heap was a good indication of their character, and since it was obvious that no great amount of labor would have been required to reduce the invention to practice by constructing a full-sized device, his delay was to be explained only by the fact that he was making no real effort to reduce the invention to practice.

Weight of Testimony. — The weight of the testimony of the parties and its inherent probability must be considered in the light of all the circumstances of the case, and although a conflict may exist a rational conclusion must be drawn from what appears to be the real transaction as disclosed by the surrounding circumstances — such circumstances as lend support to the credibility of one of the parties as opposed to that of another. Flather *v.* Weber, 21 App. D. C. 179, 104, O. G. 312.

Circumstances Surrounding the Transaction. — Where the contesting parties to an interference are not independent inventors working out the same conception separately and unknown to each other, but each claims the conception and reduction

to practice of a construction that was set on foot by one to meet a novel condition and was manufactured by the other, and the only witnesses are the contesting parties themselves, each of whom testifies in his own behalf, and their testimony results in conflict of statement, it is natural and proper to look to the unquestioned facts and circumstances surrounding the transaction and shedding light upon it to ascertain whether they and the proper inferences therefrom corroborate or contradict one or the other party. Gallagher *v.* Hastings, 21 App. D. C. 88, 103 O. G. 1165.

Where an applicant relies upon an earlier application and its filing date is such that if he had made the invention at that time it could have been described and claimed in the application, but was not; the omission to include the invention of the issue in the application discredits his testimony that he had made the invention at such an early date. Norden *v.* Spaulding, 24 App. D. C. 286, 114 O. G. 1828.

In Lemp *v.* Mudge, 112 O. G. 727, where the testimony as to the successful operation of the device was taken some four years after the time when the device was used, it was held that the actions of the inventor at the time the device was used were much more significant and outweighed mere oral testimony as to results.

In Barrett *v.* Harker, 112 O. G. 729, where the two inventors were in the employ of the same company and one admitted that he knew that the other had conceived of an invention and had made a disclosure thereof by means of drawings and a model, and also admitted that in view of that knowledge he said nothing at that time to anyone connected with the company about his alleged prior conception of the same generic invention, it being shown by the record that it was his duty to speak, it was held that the fact that he remained silent raised a strong presumption that he did not at that time have a conception of the invention.

In Barrett *v.* Harker, 112 O. G. 729, where an inventor did not protest when he knew that another was preparing the drawings and a model disclosing the invention when the facts showed that he was bound by all conscience and equity to disclose the invention to his employer, and that he did not immediately file an application for a patent; it was held that his actions were not in accordance with the laws of ordinary human conduct and raised a presumption that he was not the first inventor.

In Slaughter *v.* Halle, 102 O. G. 469, it was held that where the circumstances were such that it would have been most natural for the applicant to have disclosed the invention to a company engaged in making such devices, and he failed to do so until stimulated to activity by a knowledge of what his opponent was doing, the presumption that he did not have the invention was stronger than the testimony of witnesses.

In Tyler *v.* St. Amand, 17 App. D. C. 464, 94 O. G. 1969, where the applicant claimed to have produced the design in controversy and to have appreciated its value and utility, but according to his own showing had laid it aside and had done nothing in the matter for some three years, although his company was engaged in manufacturing such articles, and he knew, during a part of the time at least, that a rival company was putting substantially the same article on the market, it was held that his conduct raised a strong presumption that he was not in possession of the invention and made it incumbent upon him to show the fact by evidence so clear and convincing as to leave no reasonable doubt in the matter.

Where an experienced operator is given ample time to test a tool, and uses it under service conditions, and then recommends that a similar tool be bought for use on work for which he is personally responsible, his conduct will be regarded as stronger evidence of his opinion of the operativeness of the tool at that time than his testimony given after he had used a later improved device, that the first one was not a safe tool, and therefore not a successful one. Double *v.* Mills, 112 O. G. 1747.

Upon the Question of Originality of Invention, the surrounding circumstances and the conduct of the

The Unsupported Testimony of Joint Inventors is not sufficient to establish invention by them. The testimony of one joint inventor is not corroborative of the testimony of the other.[13]

h. *Testimony of Wife of Inventor.* — It was at one time held that the wife of a party to an interference was not a competent witness on behalf of her husband.[14] But the commissioner has since held that in view of the statute in force in the District of Columbia making husband and wife competent witnesses for each other, she may now testify on behalf of her husband.[15] The Court of Appeals of the District, however, has not passed directly on this question, although in one case it was raised but not decided.[16]

3. Hearing on Appeal. — A. Burden of Proof. — Upon an appeal from the decision of the commissioner upon the question of either priority of invention,[17] or rejecting a claim for want of

parties at the time are considered as evidence of a more conclusive character than specific claims made by them long afterward, and in weighing the specific testimony, recourse should be had to the relation the parties to each other and the principal facts proved or admitted in the development of the interference. Larkin *v.* Richardson, 122 O. G. 2390.

13. Lowrie *v.* Taylor, 118 O. G. 1681; Podlesak *v.* McInnerney, 120 O. G. 2127; *s. c.* 118 O. G. 835.

In Garrels *v.* Freeman, 21 App. D.C. 207, 103 O. G. 1683, *affirming* 102 O. G. 1777, it was held that the fact that two witnesses had testified to an act of invention instead of one, does not change the rule that the uncorroborated testimony of the inventor is insufficient to establish an alleged date of conception or reduction to practice where the two witnesses in question are the two applicants who jointly lay claim to the one conception.

14. Marsh *v.* Rein, 43 O. G. 1453.

15. Patee *v.* Cook, 107 O. G. 835.

16. Harter *v.* Barrett, 24 App. D. C. 300, 114 O. G. 975. In this case it was held that the testimony of a wife as to disclosure of an invention must be rigidly scrutinized and is not likely to be admitted as sufficient without some corroboration of its truth in view of the difficulty often amounting to impossibility of contradicting it, or even of subjecting it to proper cross-examination. And where her testimony on this question is given from her unaided memory, and is wholly uncorroborated by other evidence, although the testimony itself is specific and explicit, yet it will be held insufficient to establish her husband's claim of conception and disclosure of the invention.

17. Schellaberger *v.* Schnabel, 10 App. D. C. 145, 79 O. G. 339; Appleton *v.* Chambers, 3 App. Com'r Pat. 384, 1 Fed. Cas. No. 497*a*; Garratt *v.* Davidson, 3 App. Com'r, Pat. 21, 10 Fed. Cas. No. 5,247.

Where an applicant is in interference with a patentee and the unanimous decisions of the patent office tribunals are against him, on appeal he has the double burden of proving his case beyond a reasonable doubt. Talbot *v.* Monell, 23 App. D. C. 108, 109 O. G. 280. The court said: "He assumes to bear the burden successfully by seeking to show that the tribunals of the Patent Office in the first place construed the issues too broadly, and in the second construed them too narrowly—an argument which certainly savors to some extent of inconsistency."

To the heavy burden imposed by the established rule of law upon appellant who seeks to overcome the right of an adversary founded on a patent issued before the filing of his own application is superadded the necessity of making out a very clear case of error by reason of the concurrence of all the tribunals of the patent office in deciding against the sufficiency of his evidence to prove reduction to practice. MacDonald *v.* Edison, 21 App. D. C. 527, 105 O. G. 1263.

patentability,[18] the burden of proof is upon the appellant.

B. Consideration of Evidence on Appeal. — On appeal from the decision of the commissioner refusing to grant a patent the court cannot send the case back to the patent office to prove by competent experts the patentability of the alleged invention, nor can it receive or hear such proof on the appeal; it is limited to the papers and evidence which were before the commissioner.[19]

II. THE VALIDITY OF LETTERS PATENT.

1. Original Patents. — A. Originality and Priority of Invention. — a. *Presumptions and Burden of Proof.* — (1.) Generally.

18. *In re* Jackson, 1 McA. Pat. Cas. 485, 13 Fed. Cas. No. 7,126.

The rule is settled that unanimity of decision in the patent office refusing to issue patent or in rejecting claims imposes upon appellant the burden of showing very clearly that error was committed in the final decision of the commissioner, in order to warrant a reversal. *In re* Adams, 114 O. G. 2093.

19. *Ex parte* Sanders, 3 App. Com'r Pat. 438, 21 Fed. Cas. No. 12,292.

It is a well-settled rule that no evidence should be considered on appeal where it was not presented for consideration to the tribunal from whose decision the appeal is taken. McHarg *v.* Schmidt, 105 O. G. 263, where the practice of attempting to make a showing before the commissioner on an appeal from the examiner of interferences of additional facts not before the examiner was condemned.

Affidavits. — Upon an appeal from the refusal of the commissioner to grant a patent, affidavits which were not taken by the authority of the commissioner and acted upon by him in forming his decision cannot be noticed. *In re* Jackson, 1 McA. Pat. Cas. 485, 13 Fed. Cas. No. 7,126.

The court will not on appeal consider affidavits filed either in the court or the patent office relating to changes that may have occurred in drawings, models, experimental machines and like exhibits after they are introduced in evidence. To guard against accidental changes in exhibits resulting from frequent handling, it would be prudent for the party offering them to have them particularly described in respect of appearance, construction, and operation at the time that he offers them in evidence. Greenwood *v.* Dover, 23 App. D. C. 251, 109 O. G. 2172.

Experiments in Court. — It has been held that on an appeal from the decision of the commissioner where the evidence as to the practicability of the alleged invention is conflicting, experiments made in court showing the operation of the invention may be considered by the court in arriving at its conclusion. Bell *v.* Hill, 1 McA. Pat. Cas. 351, 3 Fed. Cas. No. 1,252.

Correspondence Between Commissioner and Applicant. — Upon an appeal from the refusal of the commissioner to grant a patent, it is proper for the court to consider the most material parts of correspondence had between the commissioner and the applicant, wherein facts are stated and have been acted upon and not denied. *In re* Boughton, 1 McA. Pat. Cas. 278, 3 Fed. Cas. No. 1,696, holding further that it was proper for the court to give the applicant the benefit of the rule, that where a part of the statement is used, the whole of the contemporaneous statement should be received, the part operating for him as well as that which makes against him; that "such, it is believed, will be the proper rules of evidence on the occasion."

Where the testimony of the party had been suppressed for gross irregularities in taking it, and no attempt made within the proper time to get the decision suppressing the testimony set aside, or to take other testimony, the court is not justified in considering the suppressed testimony. Jones *v.* Starr, 117 O. G. 1495.

The general rule is that the grant of letters patent raises the presumption that the patentee is the original and first inventor of the machine, art, manufacture or composition of matter described and claimed therein.[20]

(2.) Junior and Senior Patents Covering Same Invention. — In the case of two patents covering substantially the same invention, the presumption is that the senior patentee was the first inventor, and if the junior patentee attempts to carry the date of his invention back prior to that of the senior patentee the burden is upon him to establish this by a clear preponderance of the evidence.[21]

(3.) Rebuttal of Presumption. — The presumption of priority arising from the letters patent is, however, not regarded as conclusive upon this question of fact thus determined by the patent office so as to preclude inquiry in relation thereto in a subsequent proceeding.[22]

(4.) Burden and Degree of Countervailing Proof. — But where priority of invention is relied upon either as a defense to defeat a claim of infringement,[23] or as a ground for relief in equity under

20. Morgan *v.* Daniels, 153 U. S. 120 (*reversing* 42 Fed. 451); Blanchard *v.* Putnam, 8 Wall. (U. S.) 420; Cantrell *v.* Wallick, 117 U. S. 679; Smith *v.* Goodyear Dental Vulcanite Co., 93 U. S. 486; Standard Cart. Co. *v.* Peters Cart. Co., 77 Fed. 630, 23 C. C. A. 367, *affirming* 69 Fed. 408; William Schwarzwaelder & Co. *v.* Detroit, 77 Fed. 886; Richardson *v.* Campbell, 72 Fed. 525; Ecaubert *v.* Appleton, 67 Fed. 917, 15 C. C. A. 73; Rogers *v.* Beecher, 3 Fed. 639.

That the patentee in the patent in suit was the original and first inventor of the invention claimed is established *prima facie* by the introduction of the letters patent. Blanchard *v.* Putnam, 8 Wall. (U. S.) 420.

In the Case of a Design Patent, as in the case of other patents, the production of a patent is *prima facie* evidence that the patentee was the original inventor of the design; and this presumption becomes conclusive in the absence of countervailing proof. Miller *v.* Smith, 5 Fed. 359.

Presumption From Oath of Applicant. — The presumption arising from the oath of the applicant that he believes himself to be the first inventor of the thing for which patent is applied continues until the contrary is established. Elizabeth *v.* Pavement Co., 97 U. S. 126.

21. Ashton Valve Co. *v.* Coale Muffler & Safety Valve Co., 50 Fed. 100; American Roll Paper Co. *v.* Knopp, 44 Fed. 609; Pelton *v.* Waters, 1 Ban. & A. 599, 7 O. G. 425, 19 Fed. Cas. No. 10,913.

22. Morgan *v.* Daniels, 153 U. S. 120 (*reversing* Daniels *v.* Morgan, 42 Fed. 451); Ecaubert *v.* Appleton, 67 Fed. 917, 15 C. C. A. 73. And see cases in succeeding notes. *Compare* National Mach. Co. *v.* Wheeler & Wilson Mfg. Co., 72 Fed. 185.

23. Cantrell *v.* Wallick, 117 U. S. 689; Coffin *v.* Ogden, 18 Wall. (U. S.) 120; Smith *v.* Goodyear Dental Vulcanite Co., 93 U. S. 486; Standard Cart. Co. *v.* Peters Cart. Co., 77 Fed. 630, 23 C. C. A. 367, *affirming* 69 Fed. 408; Richardson *v.* Campbell, 72 Fed. 525; Spill *v.* Celluloid Mfg. Co. 2 Fed. 707; Thomas-Houston Elec. Co. *v.* Winchester Ave. R. Co., 71 Fed. 192. See also Brooks *v.* Sacks, 81 Fed. 403, 26 C. C. A. 456; Stonemetz Printers Mach. Co. *v.* Brown Fold. Mach. Co., 57 Fed. 601, *affirmed* 58 Fed. 571, 7 C. C. A. 374; Rogers *v.* Beecher, 3 Fed. 639; Duffy *v.* Reynolds, 24 Fed. 855.

Where a defendant in an infringement suit asserts that he was in fact the first inventor of the invention claimed, the burden is upon him to establish that fact. Albany Steam Trap Co. *v.* Felthousen, 20 Fed. 633.

In Patterson *v.* Duff, 20 Fed. 641, where it was alleged that a third

the patent statutes after the refusal of an application,[24] the burden of establishing the priority of the invention alleged is upon the party asserting that fact; and not only has he the burden of proof in this respect, but it is held that every reasonable doubt should be resolved against him.

b. *Mode of Proof.* — (1.) **Generally.** — Many of the general rules of evidence are applied where the issue involves the question of priority of invention; the fact that the litigation grows out of, and is based upon, a patent being apparently immaterial.[25] Thus the use of the file wrapper of the patent and its contents, including certain depositions taken on behalf of the alleged prior inventor in interference proceedings in the patent office, to contradict the testimony of the alleged prior inventor and his witnesses who had

person first conceived the idea of the invention, that he described it to one of the complainants and that they thus derived the idea from him, it was held that the burden of proving this allegation was upon the defendant, and that since the defense was not clearly and satisfactorily sustained the doubt was to be resolved in favor of the complainant.

Claim of Joint Invention. — Evidence in Equipoise. — Where defendant in an infringement suit claims that the complainant was not the sole original and prior inventor, but that another was a joint inventor with him, and the only testimony in support thereof is the testimony of such alleged joint inventor, which is denied *in toto* by the complainant, the testimony being thus in equipoise, the presumption arising from the patent will prevail. William Schwarzwaelder & Co. *v.* Detroit, 77 Fed. 886.

24. Morgan *v.* Daniels, 153 U. S. 120 (*reversing* Daniels *v.* Morgan, 42 Fed. 451); Ecaubert *v.* Appleton, 67 Fed. 917, 15 C. C. A. 73.

In Christie *v.* Seybold, 55 Fed. 69, 5 C. C. A. 33, the court said: "The man who first reduces an invention to practice is *prima facie* the first and true inventor, but that the man who first conceives, and, in a mental sense, first invents, a machine, art, or composition of matter, may date his patentable invention back to the time of its conception, if he connects the conception with its reduction to practice by reasonable diligence on his part, so that they are substantially one continuous act. The burden is on the second reducer to practice to show the prior conception, and to establish the connection between that conception and his reduction to practice by proof of due diligence." See also Standard Cart. Co. *v.* Peters Cart. Co., 77 Fed. 630, 23 C. C. A. 367, *affirming* 69 Fed. 408.

25. **Opinion of Commissioner of Patents in Interference Proceedings.** — In a suit under the federal statute to cancel an interfering patent, the opinion of the commissioner of patents rendered in an interference proceeding between the same parties, respecting the same invention, is irrelevant. Ecaubert *v.* Appleton, 67 Fed. 917, 15 C. C. A. 73, where the court said: "The record of the judgment or decree in the interference proceeding would have been admissible, but the opinion of the commissioner was not a decree, and was not the finding of facts which a court is frequently called upon to make. It was the argument and recital of the considerations which led the commissioner to his conclusions, and a statement of the effect of the testimony upon his mind, and was not a part of the judgment record."

Testimony Taken in Interference Proceedings. — In a suit under the federal statute to determine the question of priority of invention between interfering patents, testimony taken in interference proceedings before the patent office between the same parties respecting the same invention is irrelevant. Ecaubert *v.* Appleton, 67 Fed. 917, 15 C. C. A. 73. The court said: "This suit is an independent

fixed the date of the invention as earlier than that shown by the depositions, does not make the depositions evidence generally.[26]

Prior State of Art. — In a suit under the federal statute to cancel an interfering patent, oral evidence of the prior state of the art should not be excluded merely because this is stated with sufficient clearness in the specifications of each patent.[27]

(2.) Testimony of Co-Patentees. — When it is claimed that a patent issued to two persons is void because one of them alone was the inventor, that fact may be established by the testimony of the patentees themselves.[28]

(3.) Testimony of Third Persons. — Where it is claimed that the patentee of the patent in suit was not in fact the original and first inventor of the invention claimed, it is proper to permit witnesses acquainted with the history of, and having knowledge of the facts in relation to, the invention to state such facts.[29] But negation of originality and priority of invention shown by such testimony may be overcome by merely impeaching the credit of the witnesses.[30]

Unsupported Recollections of Witnesses. — But the unsupported recollections of witnesses as to facts and dates many years prior to giving testimony, and facts, moreover, of a kindred character to other facts occurring at or near the same time, with which they may be confused, are not sufficient to establish priority of invention.[31] So also where the various collateral events to which the witnesses refer have no natural connection with the main fact of which they speak.[32]

Testimony of a Former Employe of the Patentee that he, and not the patentee, was the prior inventor, should not be believed as against the oath of the patentee, especially when other evidence on behalf of the patentee is not accessible.[33]

(4.) Admissions. — Either oral or written admissions by the applicant are competent against him.[34]

one, although between the same parties as in the patent-office proceeding. The testimony of the various witnesses was not offered because they were dead or unavoidably absent, but the whole volume containing the testimony of the witnesses who had been also examined in this suit was presented, as if it was admissible in bulk."

26. Richardson *v.* Campbell, 72 Fed. 525. And see article "Impeachment of Witnesses," Vol. VII, p. 245.

27. Ecaubert *v.* Appleton, 67 Fed. 917, 15 C. C. A. 73. The court said that it was necessary for the judge to know the point from which each inventor started, and thus to know in what the invention consisted, and that the fact of a sufficient statement having been made in the specification was no legal objection to an oral reproduction of the history.

28. Welsbach L. Co. *v.* Cosmopolitan Incandescent Light Co., 104 Fed. 83.

29. Standard Cart. Co. *v.* Peters Cart. Co., 77 Fed. 630, 23 C. C. A. 367, *affirming* 69 Fed. 408; Agawam Co. *v.* Jordan, 7 Wall. (U. S.) 583.

30. Agawam Woolen Co. *v.* Jordan, 7 Wall. (U. S.) 583.

31. Brooks *v.* Sacks, 81 Fed. 403, 26 C. C. A. 456.

32. Richardson *v.* Campbell, 72 Fed. 525.

33. Thomson-Houston Elec Co. *v.* Winchester Ave. R. Co., 71 Fed. 192.

34. In order, however, to defeat

(5.) Acts and Declarations. — All that the complainant did and said at or about the time of the alleged conception by him is competent to show how far he had then developed his idea, and what he then claimed to be his invention.[35]

B. PATENTABILITY. — a. *Judicial Notice.* — **(1.) Invention.** (A.) GENERALLY. — For the purpose of aiding in the determination of the question whether a patent is invalid for want of invention, the court may take judicial notice of matters of common knowledge relating to the state of the art.[36] Nor is the court, in determining

the patent issued to him, they must be sufficiently cogent to make it clear that other independent evidence supporting the action of the patent office cannot be true; it is not enough that they merely cast discredit upon him as a witness for himself. Standard Cart. Co. *v.* Peters Cart. Co., 77 Fed. 630, 23 C. C. A. 367, *affirming* 69 Fed. 408.

35. Standard Cart. Co. *v.* Peters Cart. Co., 77 Fed. 630, 23 C. C. A. 367, *affirming* 69 Fed. 408, where the court said: "Whatever he said as to the nature of his invention, mode of operation, etc., is competent upon the question as to the sufficiency of his prior conception to enable him to carry back his later construction or later application to the time of his first conception."

Evidence of statements by a patentee that he has made an invention, and describing its details and explaining its operations, are properly deemed an assertion of his right at that time as an inventor to the extent of the facts and details which he then makes known, although not of their existence at a prior time. Such declarations, coupled with the description of the nature and objects of the invention, are to be deemed a part of the *res gestae* and legitimate evidence that the invention was then known and claimed by him, and thus its origin may be fixed at least as early as that period. Philadelphia & T. R. Co. *v.* Stimpson, 14 Pet. (U. S.) 448.

Conversations and declarations of an inventor coupled with a description of the nature and objects of the invention are to be deemed a part of the *res gestae*, and legitimate evidence that the invention was then known to and claimed by him, and such verbal descriptions without drawing or model must be considered admissible for the purpose of proving priority of invention. Stephens *v.* Salisbury, 1 McA. Pat. Cas. 379, 22 Fed. Cas. No. 13,369.

Drawings and Oral Explanations. In a suit brought under the federal statute to determine the question of originality and priority of an invention, the burden resting upon the complainant to show prior conception and to commit that conception and his reduction to practice, may be met by the exhibition of drawings, and by oral explanations of the conception antedating the first reduction to practice by the defendant. Standard Cart. Co. *v.* Peters Cart. Co., 77 Fed. 630, 23 C. C. A. 367, *affirming* 69 Fed. 408; McCormick Harv. Mach. Co. *v.* Minneapolis Harv. Wks., 42 Fed. 152, where a question of priority was settled upon proof of oral explanations of certain improvements touching harvesting machines in the presence of an old machine; the inventor orally explaining the scope of his proposed improvement and its proposed application, in terms sufficiently clear to enable a good mechanic, familiar with such machines, to construct the device from the description given.

36. Brown *v.* Piper, 91 U. S. 37; King *v.* Gallun, 109 U. S. 99; Slawson *v.* Grand St. R. Co., 107 U. S. 649; Terhune *v.* Phillips, 99 U. S. 592; Phillips *v.* Detroit, 111 U. S. 604; Heaton Penin. Button Fast. Co. *v.* Schlochtmeyer, 69 Fed. 592, *affirmed*, 72 Fed. 520, 18 C. C. A. 674; Wall *v.* Leck, 61 Fed. 291; Electric Vehicle Co. *v.* Winton Motor C. Co., 104 Fed. 814.

Where the Claimed Invention Consists of the Combination of Old Elements well known, or if not known

the question of invention, necessarily limited to the consideration of prior devices belonging only to the particular class of which the device in question is one.[37]

(B.) Records of Another Case Involving Similar Mechanism. — For the purpose of ascertaining the state of the art the court may take judicial notice of its own records in another case previously decided and involving similar mechanisms appertaining to the same art.[38]

(C.) Distinction Between Common and Special Knowledge. — But the court must keep strictly within the field of common knowledge; careful distinction must be made between the judge's own special knowledge and that which he considers to be the common knowledge of others in the field or sphere where the device or machine is used.[39]

(2.) Novelty. — Where the patentability of an alleged invention involves the element of novelty *vel non,* the court may take judicial notice of matters of common knowledge relating to the state of the art to which the invention appertains.[40]

in the combination described, well known in analogous combinations, the court may take judicial notice thereof and decide for itself whether there be any invention in using them in the exact combination claimed. Richards *v.* Chase Elev. Co., 158 U. S. 299, 159 U. S. 477. See also Dalby *v.* Lynes, 64 Fed. 376.

37. Kelly *v.* Clow, 89 Fed. 297.

38. Cushman Paper Box Mach. Co. *v.* Goddard, 95 Fed. 664.

39. Heaton Penin Button Fast. Co. *v.* Schlochtmeyer, 69 Fed. 592; Eclipse Mfg. Co. *v.* Adkins, 36 Fed. 554, where the court said: "When the judge before whom rights are claimed by virtue of a patent can say from his own observation and experience that the patented device is in principle and mode of operation only an old and well known device in common use, he may act upon such knowledge. The case must, however, be so plain as to leave no room for doubt; otherwise injustice may be done, and the right granted by the patent defeated, without a hearing upon the proof." See also Bradford v. Belknap Motor Co., 105 Fed. 63.

40. Phillips *v.* Detroit, 111 U. S. 604; Root *v.* Sontag, 47 Fed. 309; Brown *v.* Piper, 91 U. S. 37; Terhune *v.* Phillips, 99 U. S. 592; Ho Ah Kow *v.* Nunen, 5 Sawy. 552, 12 Fed. Cas. No. 6,546; Buckingham *v.* Iron Co., 51 Fed. 236; Black Diamond Coal Min. Co. *v.* Excelsior Coal Co., 156 U. S. 611.

Novelty. — In Office Specialty Mfg. Co. *v.* Fenton Metallic Mfg. Co., 174 U. S. 492, which involved the validity of a patent covering improvements in a storage case and shelves for books, one of the claims consisting of the combination of a supporting frame, a series of horizontal rollers, the front roller in two separated sections, the "intermediate part of the frame being carried back to permit the admission of the hand between" the roller sections, it was held that the employment of semicircular hand holes or recesses in book cases for more readily grasping the books is a familiar device in upright partitions for holding books; that the court may properly take judicial notice of their use long prior to the patent in suit.

Design Patent. — In New York Belt. & Pack. Co. *v.* New Jersey Car Spring & Rubber Co., 30 Fed. 785, Judge Wallace held a patent for a design for rubber mats invalid upon demurrer to the bill, taking judicial notice of the fact that the design was old as applied to other fabrics, and holding that its application to rubber mats did not involve invention. On appeal the supreme court (137 U. S. 445), Justice Bradley pronouncing the opinion, sustained the decree so far as the first claim was concerned, "for the reason stated in the opinion," which he quoted, including the portion where the judge below took judicial

(3.) Anticipation. — (A.) Prior Knowledge or Use. — The court will take judicial notice that a claimed invention was known and in general use long before the issuing of the patent.[41]

(B.) Prior Patents. — To what extent the court may take judicial notice of the state of the art for the purpose of determining whether a patent is invalid for anticipation by prior patents depends, apparently, upon whether or not there has been such a mass of patents, covering so long a period of time, that they may be taken to have become part of the common knowledge which the court shares; and hence such judicial notice cannot extend to a single patent, relating to a particular fact in a limited art.[42] It has been held, however, that prior patents can be considered, when not specially pleaded, but only for the purpose of showing the state the art has reached, to aid in construing and limiting the claims of the patent in suit, without affecting their validity.[43]

b. *Presumptions and Burden of Proof.* — **(1.) Presumptions Arising From Issuance of Patent.** — (A.) Generally. — The general rule seems to be well settled that the action of the patent office in granting letters patent raises the presumption of the validity of the patent in respect to the question of patentability of the invention in so far as questions of fact concerning invention, novelty, utility, etc., are concerned.[44]

(B.) Conclusiveness. — (a.) *Generally.* — This presumption is not

notice of the fact that the design was old as applied to other fabrics; but Justice Bradley thought that, as to the other more limited claims, proof should have been heard.

In Roberts *v.* Bennett, 136 Fed. 193, where the validity of a design patent covering a metal basket was in question, the court said: "Irrespective of the fact that prior metal baskets of the same general shape shown were introduced at the trial, the court may take judicial notice of the conventional bushel basket, which the design patent is evidently intended to simulate in general shape, inwardly curved bottom, and handles. Black Diamond Coal Mining Co. *v.* Excelsior Coal Co., 156 U. S. 611, 616, 15 Sup. Ct. 482, 39 L. Ed. 553, and cases cited. In these circumstances it is unnecessary to discuss plaintiff's contention that the questions of novelty and patentability are not open for review in this court. Where the patent is void upon its face, or is shown to have been anticipated by prior patents, or when the presumption of novelty arising from the grant is overcome by proof of the prior art, and, as in this case, by facts of which the court may take judicial notice, it is the duty of the court to instruct the jury to that effect."

Compare New York Belt. & Pack. Co. *v.* New Jersey Car Spring Co., 137 U. S. 445, where the court said: "Whether or not the design is new is a question of fact, which, whatever our impressions may be, we do not think it proper to determine by taking judicial notice of the various designs which may have come under our observation. It is a question which may and should be raised by answer and settled by proper proof."

41. Terhune *v.* Phillips, 99 U. S. 592; Brown *v.* Piper, 91 U. S. 37; Piper *v.* Moore, 91 U. S. 44.

42. Parsons *v.* Seelye, 100 Fed. 452. See also New York Belt. & P. Co. *v.* New Jersey Spring & R. Co., 137 U. S. 445; American Fibre-Chamois Co. *v.* Buckskin-Fibre Co., 72 Fed. 508, 18 C. C. A. 662.

43. Grier *v.* Wilt, 120 U. S. 412.

44. Electric Smelt. & Alum. Co. *v.* Carborundum Co., 102 Fed. 618. And see the cases cited in notes to the succeeding sections.

conclusive,[45] and evidence of non-patentability may be offered to rebut it in support of defenses other than those expressly permitted by statute in infringement suits.[46]

The Issuance of Letters Patent to Different Persons covering similar devices is not conclusive evidence of absence of identity between the inventions.[47]

(b.) *Date of Signature of Officers.* — It may be shown, upon a collateral proceeding, that the letters were not signed by one or more of the proper officials at the date they purport to have been signed.[48]

(c.) *Estoppel To Deny Validity of Patent.* — Where it is claimed that the defendant in an infringement suit is estopped to deny the validity of the patent in suit, the facts relied upon to work an estoppel must be clearly established and not be permitted to rest on inference.[49]

(2.) Invention. — (A.) GENERALLY. — The issuance of letters patent is *prima facie* evidence of the fact of invention.[50] But this pre-

45. Mahn *v.* Harwood, 112 U. S. 354; Reckendorfer *v.* Faber, 92 U. S. 347; Cantrell *v.* Wallick, 117 U. S. 689; Planing Mach. Co. *v.* Keith, 101 U. S. 479; Brown *v.* Piper, 91 U. S. 37; Dunbar *v.* Myers, 94 U. S. 187; Atlantic Wks. *v.* Brady, 107 U. S. 192.

The presumption of validity arising from the issuance of the letters patent cannot usurp the province of the court to determine the question of patentability; the court should give due consideration to the action of the patent officer, but should not permit that action to control its deliberate judgment when it is manifest that the invention claimed is not patentable. J. L. Warren Co. *v.* Rosenblatt, 80 Fed. 540, 25 C. C. A. 625.

Regarded as Rule of Evidence. The presumption arising from the patent is probably a mere rule of evidence which casts the burden of proof upon the alleged infringer. J. J. Warren Co. *v.* Rosenblatt, 80 Fed. 540, 25 C. C. A. 625, *s. c.* 168 U. S. 710.

46. "The statutory defences are not the only defences which may be made against a patent. Where it is evident that the Commissioner, under a misconception of the law, has exceeded his authority in granting or re-issuing a patent, there is no sound principle to prevent a party sued for its infringment from availing himself of the illegality, independently of any statutory permission so to do." Mahn *v.* Harwood, 112 U. S. 354.

Defects Not Apparent in Face of Patent. — The broad rule has been laid down that evidence tending to show defects, not apparent on the face of the letters, cannot be received upon a collateral proceeding, except where specially provided by statute; although this rule has been declared as applicable only to those cases where the patent has been in fact executed and the authority of the officers to issue the same was complete. Marsh *v.* Nichols, Shepard & Co., 128 U. S. 605.

47. Bowers *v.* Pacific Coast Dredg. & Reclam. Co., 99 Fed. 745.

48. Marsh *v.* Nichols, Shepard & Co., 128 U. S. 605 (signature of the acting secretary of the interior).

49. Burrell *v.* Elgin Creamery Co., 96 Fed. 234.

50. Reckendorfer *v.* Faber, 92 U. S. 347; Earle *v.* Wanamaker, 87 Fed. 740; J. J. Warren Co. *v.* Rosenblatt, 80 Fed. 540, 25 C. C. A. 625; Corser *v.* Brattleboro Overall Co., 93 Fed. 807; Kraatz *v.* Tieman, 79 Fed. 322; Lettelier *v.* Mann, 91 Fed. 909; Ironclad Mfg. Co. *v.* Dairymen's Mfg. Co., 138 Fed. 123.

Application Repeatedly Rejected. It is held, however, that the fact of the issuance of the letters patent is entitled to little, if any, weight where it appears that the application had been repeatedly rejected on the ground that it exhibited nothing new, and that the patent was finally obtained, apparently, through mere persistence of the applicant and his at-

sumption is not in any manner conclusive of that question.[51]

(B.) Degree of Countervailing Proof. — Evidence to overcome the presumption of invention arising from the issuance of the patent must be conclusive on the question.[52]

(3.) Novelty. — (A.) Generally. — The general rule is that the issuance of letters patent to an inventor is *prima facie* evidence of novelty.[53] But it is not conclusive evidence of that fact.[54]

Failure To Claim Separately Several Elements. — In the case of a patented combination, failure to claim any one of the elements separately raises a presumption that no one of them is novel.[55]

(B.) Degree of Proof. — One who asserts want of novelty not only has the burden of proving that fact,[56] but he must establish it beyond a reasonable doubt, the general rule being that every reasonable doubt should be resolved against the party asserting want of novelty.[57]

torneys, no reason having been assigned for the subsequent change of judgment. Earle *v.* Wanamaker, 87 Fed. 740.

51. Reckendorfer *v.* Faber, 92 U. S. 347.

52. Wilkins Shoe Button F. Co. *v.* Webb, 89 Fed. 982; Regina Co. *v.* New Century Music Box Co., 138 Fed. 903.

"The presumption of the want of the inventive faculty in the application of a dowel to any particular art cannot be overcome by mere proof of novelty, or by the presumption arising from the issue of a patent, or by proofs of the indecisive character which we have here, to the effect that it met a want which had long existed, but which persons skilled in the art had not been able to overcome, or by all combined." Perry *v.* Revere Rubber Co., 86 Fed. 633.

Reliable and Certain Proof is necessary to overcome the *prima facies* arising from the patent. Osborne *v.* Glazier, 31 Fed. 402.

In Patterson *v.* Duff, 20 Fed. 641, where the defense was that the device or combination claimed in the patent did not involve invention, it was held that in view of the fact that no such device was in existence or use before, although there was a wide necessity for its employment and of its obvious utility, the presumption of patentability authorized by the grant of the patent was not overcome.

53. Lehnbeuter *v.* Holthaus, 105 U. S. 94; Kinnear & Gager Co. *v.* Capital Sheet-Metal Co., 81 Fed. 491; Kraatz *v.* Tieman, 79 Fed. 322; Western Elec. Co. *v.* Millheim Elec. Tel. Co., 88 Fed. 505; Lettelier *v.* Mann, 91 Fed. 909; Bowers *v.* Pacific Coast Dredg. & Reclam. Co., 99 Fed. 745; J. J. Warren Co. *v.* Rosenblatt, 80 Fed. 540, 25 C. C. A. 625; Atwood-Morrison Co. *v.* Sipp Elec. & Mach. Co., 136 Fed. 859; Blanchard *v.* Putnam, 8 Wall. (U. S.) 420; Parker *v.* Stiles, 5 McLean 44, 1 Fish. Pat. Rep. 399, 18 Fed. Cas. No. 10,749.

Issue, Reissue and Extension. In Jordan *v.* Dobson, 2 Abb. (U. S.) 398, 4 Fish. Pat. Cas. 232, 7 Phila. 533, 13 Fed. Cas. No. 7,519, it was held that there was a strong presumption against the want of novelty, and in favor of the validity of a patent arising from its issue, its reissue, its extension, and the reissue of the extended letters; the evidence also showing that suits had been brought upon it both at law and in equity in which the patent had been sustained.

54. Cantrell *v.* Wallick, 117 U. S. 689.

55. Campbell *v.* H. T. Conde Imp. Co., 74 Fed. 745.

56. Cantrell *v.* Wallick, 117 U. S. 689; Mowry *v.* Whitney, 14 Wall. (U. S.) 620.

57. Kinnear & Gager Co. *v.* Capital Sheet-Metal Co., 81 Fed. 491; German-American Filter Co. *v.* Loew Filt. Co., 103 Fed. 303; Atwood-Morrison Co. *v.* Sipp Elec. & Mach Co., 136 Fed. 859; Topliff *v.* Topliff, 145 U. S. 156; The Barbed Wire Patent, 143 U. S. 275; Cantrell *v.* Wallick, 117 U. S. 689.

(4.) **Utility.** — The issuance of the letters patent is *prima facie* evidence of the fact of utility.[58] And one who assails the validity of the patent for want of utility has the burden of proof to establish that fact beyond a reasonable doubt.[59]

(5.) **Anticipation.** — (A.) PRIOR KNOWLEDGE OR USE. — (a.) *Generally.* The issuance of letters patent is *prima facie* evidence that the thing patented had not been anticipated by prior knowledge or use; and one who attacks the validity of the patent upon the ground that it has been so anticipated has the burden of proof.[60]

In American Bell Tel. Co. *v.* People's Tel. Co., 22 Fed. 309, where it was alleged by the defendant that one Drawbaugh was the prior inventor of Bell's telephone, Judge Wheeler said: "The complainant starts with the benefit of the presumption of law that Bell, the patentee, was the inventor. . . Whoever alleges the contrary must assume the burden of proof. Evidence of doubtful probative force will not overthrow the presumption of novelty and originality arising from the grant of letters patent for an invention. It has been frequently held that the defense of want of novelty or originality must be made out by proof so clear and satisfactory as to remove all reasonable doubt." This case was subsequently affirmed by the Supreme Court of the United States in People's Tel. Co. *v.* American Bell Tel. Co., 126 U. S. 2.

58. Lehnbeuter *v.* Holthaus, 105 U. S. 94; Vance *v.* Campbell, 1 Fish. Pat. Cas. 483, 28 Fed. Cas. No. 16,837; Patent Button Co. *v.* Scovill Mfg. Co., 92 Fed. 151; Universal Winding Co. *v.* Willimantic Linen Co., 82 Fed. 228; Potter *v.* Holland, 4 Blatchf. 238, 1 Fish. Pat. Cas. 382, 19 Fed. Cas. No. 11,330; Kirk *v.* DuBois, 33 Fed. 252; Parker *v.* Stiles, 5 McLean 44, 1 Fish. Pat. Rep. 399, 18 Fed. Cas. No. 10,749; Thomas *v.* Shoe Mach. Mfg. Co., 3 Ban. & A. 557, 16 O. G. 541, 23 Fed. Cas. No. 13,911.

"Every invention under our patent laws must be useful as well as original and new. The patent implies that the invention is of some utility, but this may be rebutted by evidence that it is frivolous and of no practical value." Wayne *v.* Holmes, 1 Bond 27, 2 Fish. Pat. Cas. 20, 29 Fed. Cas. No. 17,303.

59. Gandy *v.* Main Belting Co., 143 U. S. 587; Western Elec. Co. *v.* La Rue, 139 U. S. 601.

Where it is sought to impeach a contract as without consideration on the ground that the consideration was the grant of a right to sell a patented article, and that the article is useless, it must be shown that it is useless in the sense that will avoid the patent. Wilson *v.* Hentges, 26 Minn. 288. In this case the patent covered a weighing scale, the utility of which was attacked, and the only evidence was that of a witness who had seen three of the scales, and who, upon being asked to describe the character of the scales, whether he "could weigh anything with them," answered, "you could weigh with them, but you could not correct with a Fairbanks scale," and on being further asked if they would weigh correctly answered that they would not. There was nothing to show how far they varied from absolute correctness, or whether the defect lay in the principle of the invention, or in faulty construction, or arrangement, or condition of the particular scales that the witness saw; and it was held that the evidence was insufficient to show the invention so devoid of utility as to avoid the patent.

60. Badische Anilin & Soda Fabrik *v.* Kalle, 94 Fed. 163; United Shirt & C. Co. *v.* Beattie, 138 Fed. 136; Cohansey Glass Mfg. Co. *v.* Wharton, 28 Fed. 189; Taylor *v.* Wood, 12 Blatchf. 110, 1 Ban. & A. 270, 8 O. G. 90, 23 Fed. Cas. No. 13,808; Wayne *v.* Holmes, 1 Bond 27, 2 Fish. Pat. Cas. 20, 29 Fed. Cas. No. 17,303.

Patentee Presumed To Have Knowlege. — So far as concerns the question of anticipation, it is immaterial whether the patentee of the patent in suit in fact knew, or did not

Date of Anticipatory Matter. — Anticipation of the invention, when relied upon to defeat a patent, must be established as of a date anterior to the patentee's invention or discovery; not merely prior to the application for, or the date of, the patent.[61]

(b.) *Degree of Proof Required.* — Anticipation predicated upon prior knowledge or use must be proved beyond a reasonable doubt.[62]

(B.) PRIOR PATENTS. — The burden of proof to show that the patent in suit had been anticipated by prior patents is upon the defendant who alleges such anticipation, and the proof in support of the prior patents must be clear and convincing, and place the question beyond

know, of the alleged anticipatory matter, at the time he claims to have invented the machine covered by his patent; the court, in passing upon his machine, is bound to presume that he had such knowledge. Lettelier *v.* Mann, 91 Fed. 909.

Falsity of Oath Taken by Patentee. — Where it is charged that the patentee falsely and fraudulently stated that he did not know or believe that the device or machine therein shown was ever used or known prior to his invention thereof, the burden of proof is upon the party so charging the fraud to overcome the *prima facies* of the patent and to prove the falsity of the oath taken. And to do this he must show the actual existence of the invention sought to be patented, and that the applicant knew of it. Roberts *v.* Pittsburgh Wire Co., 69 Fed. 624, *affirmed*, 71 Fed. 706, 18 C. C. A. 302.

61. Von Schmidt *v.* Bowers, 89 Fed. 121, 25 C. C. A. 323, *affirming* 63 Fed. 572, *citing* St. Paul Plow Wks. *v.* Starling, 140 U. S. 184, 198; Clark Thread Co. *v.* Willimantic Linen Co., 140 U. S. 481; Loom Co. *v.* Higgins, 105 U. S. 580; Kneeland *v.* Sheriff, 2 Fed. 901; Woodman *v.* Stimpson, 3 Fish. Pat. Cas. 98, 30 Fed. Cas. No. 17,979; Treadwell *v.* Bladen, 4 Wash. C. C. 703, 1 Robb. Pat. Cas. 531, 24 Fed. Cas. No. 14,154; Judson *v.* Cope, 1 Bond 327, 1 Fish. Pat. Cas. 615, 14 Fed. Cas. No. 7,565.

62. Deering *v.* Winona Harv. Wks., 155 U. S. 286; Badische Anilin & Soda Fabrik *v.* Kalle, 94 Fed. 163; Campbell Printing-Press & Mfg. Co. *v.* Duplex Printing-Press Co., 86 Fed. 315; United Shirt & C. Co. *v.* Beattie, 138 Fed. 136; Washburn & Moen Mfg. Co. *v.* Haish, 4 Fed. 900; The Barbed Wire Patent, 143 U. S. 275; Traut & H. Mfg. Co. *v.* Waterbury Buckle Co., 64 Fed. 492; Williams Patent Crusher & P. Co. *v.* St. Louis Pulverizer Co., 104 Fed. 795. See also Lehnbeuter *v.* Holthaus, 105 U. S. 94; Tannage Patent Co. *v.* Donallan, 93 Fed. 811; Bradley *v.* Eccles, 138 Fed. 911; Lalance & Groojean Mfg. Co. *v.* Habermann Mfg. Co., 53 Fed. 375.

Where anticipation is relied upon to defeat a patent, if the question of identity of method and result is doubtful, the doubt must be resolved in favor of the successful patentee who has in a practical way materially advanced the art. Simonds Rolling Mach. Co. *v.* Hathorn Mfg. Co., 93 Fed. 958, 36 C. C. A. 24.

The Evidence Must Show Something More Than Mere Probabilities. Western Elec. Co. *v.* Millheim Elec. Tel. Co., 88 Fed. 505.

A Mere Preponderence of Evidence is not enough. McEwan Bros. *v.* McEwan, 91 Fed. 787; United Shirt & C. Co. *v.* Beattie, 138 Fed. 136.

Degree of Proof as Affected by Probabilities. — Although the rule is well settled that evidence of prior use must always be closely scrutinized, and accepted with caution, the measure of proof required to establish the alleged anticipatory matter must necessarily vary with its degree of probability; and where by the complainant's own evidence, and on the conceded facts, it would seem to be an almost irresistible inference, even without any more direct proof that the invention claimed had in fact been used prior to its alleged discovery, the measure of proof required will not be so great. Haworth *v.* Stark, 88 Fed. 512.

a reasonable doubt,[63] especially where the patent in suit has been held to be valid in a prior decision.[64]

(C.) Prior Description in Printed Publication. — To support a claim of prior publication in a foreign country, the evidence must show such publication before the invention claimed was made, or more than two years prior to the application for patent thereon.[65]

(D.) Burden on Patentee To Carry Back Invention. — When the validity of a patent is assailed upon the ground of anticipation by reason of the existence of prior patents covering the same invention, and the party so assailing the patent in suit has given evidence tending to establish such anticipation, it then devolves upon the other party to show that the invention in fact antedated the prior patents set up.[66] And this he must do by evidence which shall strongly outweigh that of his adversary, if not beyond a reasonable doubt.[67]

(6.) Prior Public Use or Sale. — (A.) Generally. — As in the case of other questions of fact involved in the commissioner's decision in awarding letters patent, the patent is *prima facie* evidence that the invention claimed was not in public use or on sale in this country for more than two years prior to the application;[68] but it is not conclusive evidence of that fact.[69]

63. Where it is claimed that a device covered by a prior patent operated in the same manner as the device covered by the patent in suit, that fact must be established beyond a reasonable doubt. Nelson *v.* Farmer Type-Founding Co., 91 Fed. 418.

The evidence to establish anticipation must clearly show the invention, subsequently patented, in such manner as to enable any person skilled in the art or science to which it relates to make or construct and practically use the invention for the purposes contemplated by the subsequent patent. McNeely *v* Williams, 96 Fed. 978, 37 C. C. A. 641.

64. Bowers *v.* San Francisco Bridge Co., 91 Fed. 381; Carnegie Steel Co. *v.* Cambria Iron Co., 89 Fed. 721.

65. U. S. Rev. Stat., § 4886, as amended March 3, 1897.

For the rule under the act of 1836, see Judson *v.* Cope, 1 Bond 327, 1 Fish. Pat. Cas. 615, 14 Fed. Cas. No. 7,565.

66. Clark Thread Co. *v.* Willimantic Linen Co., 140 U. S. 481; Lein *v.* Myers, 97 Fed. 607.

"When the patentee proposes to show that his invention is of a date prior to the time when he filed his original application, he takes upon himself the burden of proof, and to maintain that theory as against another patent improvement of the same construction and mode of operation, he must prove, not only that he made his invention at the period claimed, but that he reduced the same to practice as an operative machine." Jones *v.* Sewall, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 O. G. 630, 13 Fed. Cas. No. 7,495.

67. Brooks *v.* Sacks, 81 Fed. 403, 26 C. C. A. 456. See also Michigan Cent. R. Co. *v.* Consolidated Car H. Co., 67 Fed. 121, 14 C. C. A. 232.

68. Manning *v.* Cape Ann Isinglass & Glue Co., 108 U. S. 462; Mast Foos & Co. *v.* Dempster Mill Mfg. Co., 82 Fed. 327, 27 C. C. A. 191, *reversing* 71 Fed. 701; Hanifen *v.* E. H. Godshalk, 84 Fed. 649, 28 C. C. A. 507, *reversing* 78 Fed. 811.

69. Manning *v.* Cape Ann Isinglass & Glue Co., 108 U. S. 462.

"Nothing short of proof that the invention was on sale or in public use, with the consent and allowance of the inventor, for a period exceeding two years, will support such a defense, as the party charged with infringing the rights of an inventor must bring himself fairly within the

Experimental Use. — Where prior use is claimed by the patentee or assignee to have been solely for the purpose of experiment, the burden is upon him to establish that fact.[70]

(B.) Degree of Proof Required. — And one who seeks to defeat the patent on the ground of prior public use or sale must establish the facts constituting such use or sale beyond a reasonable doubt.[71]

(7.) Abandonment. — (A.) Generally. — The letters patent are *prima facie* evidence that there was no abandonment by the inventor;[72] but they are not conclusive evidence of that fact.[73] It is open to every

words of the act of Congress, which justify the acts charged as an infringement." Jones *v.* Sewall, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 O. G. 630, 13 Fed. Cas. No. 7,495.

70. Swain *v.* Holyoke Mach. Co., 102 Fed. 910.

Where It Is Once Shown That the Use Was Experimental, then, upon the question of its reasonableness in point of duration, every presumption should be made in favor of the inventor. Innis *v.* Oil City Boiler Wks., 22 Fed. 780.

The Character and Degree of Evidence Necessary to Prevent a Prior Use from invalidating a patent has been thus stated: "In considering the evidence as to the alleged prior use for more than two years of an invention, which, if established, will have the effect of invalidating the patent, and where the defense is met only by the allegation that the use was not a public use in the sense of the statute, because it was for the purpose of perfecting an incomplete invention by tests and experiments, the proof on the part of the patentee, the period covered by the use having been clearly established, should be full, unequivocal, and convincing." Smith & Griggs Mfg. Co. *v.* Sprague, 123 U. S. 249, *quoted* with approval in Lettelier *v.* Mann, 91 Fed. 917, in which case it was held that the evidence was far from satisfying the burden thus imposed upon the patentee.

71. Mast Foos & Co. *v.* Dempster Mill Mfg. Co., 82 Fed. 327, 27 C. C. A. 191, *reversing* 71 Fed. 701; German-American Filter Co. *v.* Loew Filt. Co., 103 Fed. 303; Revere Rubber Co. *v.* Consolidated Hoof Pad Co., 138 Fed. 899; Dreyfus *v.* Schneider, 25 Fed. 481; Converse *v.* Matthews, 58 Fed. 246.

The Evidence of Prior Use Must Not Be Vague and Indefinite; it must be of that high character which convinces the court beyond a reasonable doubt. Everest *v.* Buffalo Lubricating Oil Co., 20 Fed. 848; Dodge *v.* Post, 76 Fed. 807; Young *v.* Wolfe, 120 Fed. 956; Atwood-Morrison Co. *v.* Sipp Elec. & Mach. Co., 136 Fed. 859.

"The invention or discovery relied upon as a defence, must have been complete, and capable of producing the result sought to be accomplished; and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him. If the thing were embryotic or inchoate; if it rested in speculation or experiment; if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed; while in the other case there was only progress, however near that progress may have approximated to the end in view. The law requires, not conjecture, but certainty. If the question relate to a machine, the conception must have been clothed in substantial forms which demonstrate at once its practical efficacy and utility. Reed *v.* Cutter, 1 Story 590. The prior knowledge and use by a single person is sufficient. The number is immaterial." Coffin *v.* Ogden, 18 Wall. (U. S.) 120.

72. Johnsen *v.* Fassman, 1 Woods 138, 5 Fish. Pat. Cas. 471, Fed. Cas. No. 7,365; Mast Foos & Co. *v.* Dempster Mill Mfg. Co., 82 Fed. 327, 27 C. C. A. 191, *reversing* 71 Fed. 701.

73. Planing-Mach. Co. *v.* Keith, 101 U. S. 479, where the court said:

person charged with the infringement of a patent to show in his defense that the patentee had abandoned his invention before he obtained his patent;[74] but the burden of proving the abandonment is upon the defendant.[75]

(B.) Mere Forbearance To Apply for Patent. — Mere forbearance to apply for a patent until one has perfected his invention, and tested it by actual practice, affords no just ground to presume its abandonment.[76]

(C.) Use or Sale Within Two Years. — Nor will the use or sale within two years before the application is filed afford such ground, unless such use or sale is accompanied by other acts, or by declarations which clearly evidence an intention to dedicate the improvement to the public.[77]

(D.) Describing and Claiming Only Part of Invention. — Where an inventor, although entitled to a broader claim than that to which he limits himself, in fact describes and claims only part of his invention, he is presumed to have abandoned the residue to the public.[78] But if, at the date of the issue of the patent, the patentee has another application pending which describes and claims what he describes but does not claim, in the patent issued, the presumption of dedication to the public use does not arise.[79]

c. *Mode of Proof.* — (1.) Invention. — (A.) Generally. — Whether the inventive faculty has been exercised is mostly a question of

"In fact, the Commissioner may not be called upon to pass upon that question. No evidence respecting it may be before him, except mere lapse of time, and he has not, generally, the means of ascertaining what the action of an applicant for a patent has been, outside of the Patent Office."

74. Planing-Mach. Co. *v.* Keith, 101 U. S. 479.

75. "An abandonment may undoubtedly be proved within two years prior to the filing of the application, but it ought not to be presumed, and it should be established by convincing evidence of the intention of the owner of the invention to dedicate it to the public. An abandonment is a dedication, and, like any other dedication, it should be clearly proved. It rests upon the intention of the inventor. If he expressly declares, or by his acts clearly shows, his intention to dedicate his invention to the public, a finding of abandonment would be warranted. But such a dedication should not be lightly presumed, because it surrenders a vested right of property as much as the dedication of land for a public park or a public road." Mast, Foos & Co. *v.* Dempster Mill Mfg. Co., 82 Fed. 327.

The burden of showing that a prior use set up by defendant was forgotten and abandoned before the invention was made by the patentee, is upon the complainant. Dalby *v.* Lynes, 64 Fed. 376.

76. Jones *v.* Sewall, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 O. G. 630, 13 Fed. Cas. No. 7,495.

77. Mast, Foos & Co. *v.* Dempster Mill Mfg. Co., 82 Fed. 327.

78. Deering *v.* Winona Harv. Wks., 155 U. S. 286, *citing* McClain *v.* Ortmayer, 141 U. S. 419.

79. Suffolk Co. *v.* Hayden, 3 Wall. (U. S.) 315; Independent Elec. Co. *v.* Jeffrey Mfg. Co., 76 Fed. 981, *reversed* on other points 83 Fed. 191, 27 C. C. A. 512; Singer *v.* Braunsdorf, 7 Blatchf. 521, 22 Fed. Cas. No. 12,897.

Generic and Specific Patents. In Thompson-Houston Elec. Co. *v.* Winchester Ave. Ry. Co., 71 Fed. 192, it was held that the mere fact that the patentee in good faith sought to protect an improved form of his generic invention by a specific

fact to be deduced from the evidence, and is always to be considered in reference to the condition of the art and the results accomplished.[80]

The Fact That the Inventor Was the First To Produce the Invention in this country is a fact of great weight in determining the question of invention.[81]

New Combination of Known Elements Attaining New Result. — It is laid down as a general rule, that the fact that a new combination and arrangement of known elements produces a new and beneficial result never before attained is evidence of invention;[82] although it has been declared that the fact that nearly all, if not all, the

invention while the application for the generic invention was delayed by interference in the patent office, does not warrant the presumption that he thereby surrendered to public use the original underlying invention. See also Holmes Elec. Protective Co. *v.* Metropolitan Burglar Alarm Co., 33 Fed. 254.

80. *In re* Pennock, 1 MacA. (D. C.) 531; Myers *v.* Sternheim, 97 Fed. 625, 38 C. C. A. 345.

The mere fact that others were so long wandering by the wrong path is no evidence that it requires invention to accomplish what has been done, by taking the direct path pursued by these patentees. Butler *v.* Steckel, 27 Fed. 219.

The fact that various skillful mechanics, at or about the same time, acting independently of each other, suggested the same improvement for a defective machine, furnishes persuasive evidence that the improvement did not involve invention, but mechanical skill merely. Haslem *v.* Pittsburg Plate Glass Co., 68 Fed. 470.

The fact that another person made a device prior to the application for the patent in suit, to accomplish the same result, but which differed from and was greatly inferior to the device in question is not conclusive evidence that a mechanic did not and could not learn from the prior art the mode of construction disclosed by the patent. Johnson Co. *v.* Pennsylvania Steel Co., 67 Fed. 940.

Foreign Publication. — A foreign publication is competent as evidence to show the state of the art and as a foundation for the inquiry whether the thing patented involved the element of invention. French *v.* Carter, 137 U. S. 239.

Prior Patents. — For the purpose of showing the prior state of the art, prior patents may be received in evidence. Myers *v.* Sternheim, 97 Fed. 625, 38 C. C. A. 345.

Opinion Evidence as to Differences Between Patents. — Where want of invention is set up as ground for invalidating a patent, and prior patents have been introduced for the purpose of showing the state of the art, it is proper to permit witnesses to point out the differences between such prior patents and the patent in suit. Myers *v.* Sternheim, 97 Fed. 625, 38 C. C. A. 345, where the court said: "The conclusion in respect to the matter is to be drawn by the jury, or where a jury is waived, by the court; but this fact does not preclude the showing by witnesses of differences that may exist in the various designs. Such detailed differences, where shown, are not, of course, conclusive upon the jury, which, on the contrary, is to say from the whole evidence, under the rule stated, whether or not there was an infringement of the plaintiff's patent."

In Stevens *v.* Felt, 23 Fed. Cas. No. 13,307, it was held that the testimony of eminent chemists and of books of reputation in the science and arts were competent evidence that a coloring fluid was not known in the arts prior to the patent obtained by the plaintiff.

81. Badische Anilin & Soda Fabrik *v.* Kalle, 94 Fed. 163.

82. Krementz *v.* The S. Cottle Co., 118 U. S. 556, *reversing* 30 Fed. 323; The Barbed Wire Patent, 143 U. S. 275; Loom Co. *v.* Higgins, 105 U. S. 580.

When the Combination Is Con-

elements of the combination involved in the invention claimed were so common in the practical arts that their use anywhere must be regarded as analogous to previous uses, raises a presumption against invention, although not conclusive.[83]

(B.) Utility and Extent of Use.— Evidence that the thing patented has gone into general use, and has displaced other things which had been previously employed for analogous uses, is always regarded as admissible upon the question of invention.[84]

Conclusiveness.— How far conclusive of the fact of invention evidence of utility and extent of use is to be regarded, is not, in all cases, possible to state. By some of the courts it has been held broadly to have a controlling, if not conclusive, effect.[85] But other

fessedly New, and the benefit great, the presumption is strongly in favor of invention. *In re* Pennock, 1 MacA. (D. C.) 531.

New Combination of Old Elements. In determining whether a new combination of old elements constitutes invention, the facts proper to be considered, and indeed the most important and controlling, are the intrinsic novelty and utility of the concrete invention. Kelly *v.* Clow, 89 Fed. 297.

"The fact that a new combination or device may be simple and obvious to the ordinary understanding, when once produced in concrete form, is not necessarily proof that invention was not involved. This is almost a commonplace in the jurisprudence of patent law. It is also true that admitted benefits resulting from the combination or device, and widely extended adoption, are facts relevant to the novelty and usefulness of the alleged invention." Buchanan *v.* Perkins Elec. Switch Mfg. Co., 135 Fed. 90.

A new combination of old parts, for attaining an object, may sometimes, and perhaps often, be so obvious "as to merit no title to invention;" and, in ordinary cases, while novelty and utility are evidence of inventive skill, there should be other evidence to show that it existed. This is often found in the machine, which itself shows that it came from a creative mind, or the necessary evidence may sometimes be found, in the history of the invention. Enterprise Mfg. Co. *v.* Sargent, 28 Fed. 185.

83. Heap *v.* Tremont & Suffolk Mills, 82 Fed. 449, *reversing* 75 Fed. 406.

84. Keystone Mfg. Co. *v.* Adams, 151 U. S. 139, *reversing* 41 Fed. 595; Smith *v.* Goodyear Dental Vulcanite Co., 93 U. S. 486; Streator Cathedral Glass Co. *v.* Wire-Glass Co., 97 Fed. 950, 38 C. C. A. 573; Michigan Stove Co. *v.* Fuller-Warren Co., 81 Fed. 376.

"In the absence of any other test the courts have seemed to assume that the fact of the acceptance of a new device or combination by the public, and putting it into extensive use, was evidence that it was the product of invention; or, as one of the counsel for plaintiff expressed it, 'utility is suggestive of originality.'" Washburn & Moen Mfg. Co. *v.* Haish, 4 Fed. 900.

Extensive Recognition by the Public, large sales, and the fact that manufacturers have generally taken license under the patent, are potential facts, largely influencing the judgment of the court. Robbins *v.* Dueber Watch-Case Mfg. Co., 71 Fed. 186.

85. "In determining the question of invention, the fact that the article produced supersedes all other appliances, or that a useful and commercially successful result has been attained, or that the value of the thing patented has been recognized by the public in extensive use, has a controlling, if not a conclusive effect; and it should have, upon obvious principles of justice to one who sees that which he suggests constantly appropriated and used by others." Wilkins Shoe-Button F. Co. *v.* Webb, 89 Fed. 982.

In Western Elec. Mfg. Co. *v.* Chicago Elec. Mfg. Co., 14 Fed. 691, it was held that the fact of the general

courts have held that evidence of utility and extent of use can only be considered and allowed to determine the patentability where the exercise of the inventive faculty is in doubt,[86] or in cases where, in addition to the evidence of utility and extent of use, there is evidence enabling the court to determine whether extensive use is due to the intrinsic nature of the patented article, or extraneous causes.[87]

(2.) Novelty. — (A.) GENERALLY. — When the letters patent are good

adoption of the invention and that simultaneously a number of inventors had given their attention to the subject-matter covered by the invention was evidence that it required something more than mere mechanical skill to accomplish the result attained by the patent in suit.

86. The Barbed Wire Patent, 143 U. S. 275, *reversing* 33 Fed. 261; Dalby *v.* Lynes, 64 Fed. 376; Rubber Tire Wheel Co. *v.* Columbia Pneumatic W. W. Co., 91 Fed. 978; Streator Cathedral G. Co. *v.* Wire-Glass Co., 97 Fed. 950, 38 C. C. A. 573; National H. Brake B. Co. *v.* Interchangeable Brake B. Co., 99 Fed. 758; Falk Mfg. Co. *v.* Missouri R. Co., 103 Fed. 295; Brownson *v.* Dodson-Fisher-Brockmann Co., 71 Fed. 517; Diamond Match Co. *v.* Schenck, 71 Fed. 521.

In Krementz *v.* The S. Cottle Co., 148 U. S. 556, the court, *quoting* from Consolidated Brake Shoe Co. *v.* Detroit Steel & S. Co., 47 Fed. 894, said: "When the other facts in the case leave the question of invention in doubt, the fact that the device has gone into general use and has displaced other devices which had been previously employed for analogous cases, is sufficient to turn the scale in favor of the existence of invention." See also Topliff *v.* Topliff, 145 U. S. 156.

In Wilson Pack. Co. *v.* Chicago Pack. & Prov. Co., 9 Fed. 547, the court said: "It may be admitted that, in all doubtful cases involving the validity of a patent, the fact that a mode described in the patent has gone into extensive use has and often will induce courts to decide in favor of the patent. But, while this is so, courts ought not, merely because of such use, to sustain a patent. The rights of the public are to be protected as well as those of individuals, and a monopoly should not be allowed unless the right to it is clearly shown."

87. Stahl *v.* Williams, 64 Fed. 121; Dalby *v.* Lynes, 64 Fed. 376; Watson *v.* Stevens, 51 Fed. 757, 2 C. C. A. 500; Ypsilanti Dress Stay Mfg. Co. *v.* Van Valkenburg, 72 Fed. 277.

The success and extent of the sales of the articles depends "so much on the efforts and enterprise of those interested in and managing the business, that the measure of success and extent of sales is not always a reliable test." Earle *v.* Wanamaker, 87 Fed. 740.

In Duer *v.* Corbin Cabinet Lock Co., 149 U. S. 216, *affirming* 37 Fed. 338, where, although the device was shown to have gained an immediate popularity and to have met with large and increasing sales, the court said: "Were the question of patentability one of doubt, this might suffice to turn the scale in favor of the patentee. But then there are so many other considerations than that of novelty entering into a question of this kind that the popularity of the article becomes an unsafe criterion."

The fact that a device has gone into general use, and displaced other devices, while in some cases high evidence of invention, is not conclusive of patentability, and is not sufficient to support a patent, where the changes made from the prior art are mere changes of mechanical construction, or of form, size, or materials. Klein *v.* Seattle, 77 Fed. 200, 23 C. C. A. 114.

In Curtis *v.* Atlas Co., 136 Fed. 222, where the validity of a patent covering a detachable rubber footrest for a bicycle pedal was involved, the court said: "It is somewhat remarkable that with all the ingenuity and skill, inventive as well as mechanical, which has been brought to bear upon the manufacture of bi-

on inspection, the question of patentable novelty then becomes one of fact.[88]

(B.) Utility and Extent of Use. — Evidence of utility and extent of use is always regarded as admissible and entitled to some weight on the question of patentable novelty.[89] But when there

cycles, so simple and convenient an appliance as the detachable rubber foot-rest devised by the complainant should not have been thought of before. The fact that it had not, and that it has gone into such extended use as was shown, not only proves that it has met a popular and hitherto unfilled demand, but is also persuasive that its discovery involved the exercise of real invention, and not simply the handy skill of the ordinary mechanic, as one might at first be inclined to believe. The invention displayed may not be of a high order, but it was, at least, sufficient to appreciate the need, and the means for meeting it acceptably, where others had failed, a circumstance which always has weight."

In Crown Cork & Seal Co. *v.* Standard Stopper Co., 136 Fed. 841, *reversing* 136 Fed. 199, where the validity of a patent covering a metallic sealing cap for bottles was involved, it was urged that the great commercial success which had attended the introduction of the patented cap was persuasive that it supplied a long-felt want which previous inventors had not been able to meet, and was therefore evidence of patentable novelty; but the court, while recognizing the legitimacy of such an argument, held that in that case it had not its usual force, first, because the caps put upon the market seemed to have been made according to an earlier patent differing from the cap covered by the patent in question, and secondly, because the success was largely attributable to the machine used for fastening the caps on the bottles, and which enabled it to be done with great rapidity and efficiency.

88. Kinnear & Gager Co. *v.* Capital Sheet-Metal Co., 81 Fed. 491.

State of the Art. — When the patentability of a claimed invention is assailed for want of novelty, the state of the art when the application for the patent was made may be shown and taken into consideration. Busell Trimmer Co. *v.* Stevens, 137 U. S. 423; Alvin Mfg. Co. v. Scharling, 100 Fed. 87.

Prior Accidental Production of Same Thing. — It is not enough that the evidence, to prove want of novelty, shows a prior accidental production of the same thing, when the operator does not recognize the means by which the accidental result is accomplished, and no knowledge of it, or of the method of its employment, is derived from it by any one. Wickilman *v.* A. B. Dick Co., 88 Feb. 264, 31 C. C. A. 530.

Aggregation of Old Elements. The fact that the same aggregation of elements or devices has never been assembled in a new location, while proper to be considered, is not controlling, and frequently is of little value in determining the question of patentable novelty. "Their assemblage may be nothing but another instance of a double use, and, when they require special adaptation to the new arrangement and occasion, it still remains to inquire whether this has required invention." Dunbar *v.* Eastern Elev. Co., 81 Fed. 201, 26 C. C. A. 330, *reversing* 75 Fed. 567.

Combination of Old Elements. A patent cannot be defeated by showing merely that each of its elements, separately considered, was old. It must be shown that the combination was old. Gormully & J. Mfg. Co. *v.* Stanley Cycle Mfg. Co., 90 Fed. 279.

Prior Construction for Different Purpose. — The presumption of novelty is not negatived or overcome by showing prior construction of a similar article for a wholly different and foreign use, not suggestive of the particular use to which the invention claimed is being applied. Kinnear & Gager Co. *v.* Capital Sheet-Metal Co., 81 Fed. 491. See also Topliff *v.* Topliff, 145 U. S. 156; Potts *v.* Creager, 155 U. S. 597; Griswold *v.* Wagner, 68 Fed. 494, 15 C. C. A. 525.

89. Allen *v.* Grimes, 89 Fed. 869.

is in fact no invention, in point of law, in a patented article, the extent of the use is immaterial.[90]

Conclusiveness. — Evidence of utility and extent of use is not conclusive of the fact of novelty,[91] although in a doubtful case it has weight and may turn the scale in favor of the invention claimed.[92]

In Judson *v.* Cope, 1 Bond 327, 1 Fish. Pat. Cas. 615, 14 Fed. Cas. No. 7,565, the court said: "I do not suppose it would be competent for one claiming under a patent to rest the novelty of the invention solely upon the fact that it may be superior; but it does seem to me as the case now stands before this jury, it will be a matter that will tend to lead them to a just conclusion upon the question of novelty, if the plaintiff can show upon testimony, that the workings of this invention is different, and decidedly superior in its results. . . . There may be cases in which the mind of the jury will be much aided by evidence of the practical workings of the invention; and if the superiority is marked and decided, it is possible it might determine the question." See also Judson *v.* Moore, 1 Bond 285, 1 Fish. Pat. Cas. 544, 14 Fed. Cas. No. 7,569; Many *v.* Sizer, 1 Fish. Pat. Cas. 17; 16 Fed. Cas. No. 9,056.

What Constitutes Public Use. Public use, so far as shown, which relates to an indiscriminate use, rather than use by manufacturers and other persons engaged in the art or science to which the invention claimed relates, is not the public use which the courts regard as of especial value. Nutter *v.* Brown, 98 Fed. 892, 39 C. C. A. 332.

90. Adams *v.* Bellaire Stamping Co., 141 U. S. 539, *affirming* 28 Fed. 360; Electric Boot & Shoe Fin. Co. *v.* Little (C. C. A.), 138 Fed. 732, *affirming* 75 Fed. 276; Thomson-Houston Elec. Co. *v.* Winchester Ave. R. Co., 71 Fed. 192, where the court said: "The doctrine that utility, in the absence of patentable novelty, is immaterial, is especially applicable where the sole foundation for the claim of utility lies in the mere mechanical adaptability of a well-known device to a novel invention protected by a valid patent."

91. Lettelier *v.* Mann, 91 Fed. 909. That an article has gone into extensive use is an unsafe criterion by which to judge its novelty. Other causes may have co-operated in creating a large sale. "The commercial success of a patented article is only one element to be considered where patentability is otherwise in doubt." Lane *v.* Welds, 99 Fed. 286, 39 C. C. A. 528.

Evidence that the sales of the article were phenomenally large, and that it was received with great favor by the users, although competent, is not conclusive evidence of novelty or invention, especially where it appears that the article, as manufactured, differs in some respects from the article described in the specifications and covered by the claims. Christy *v.* Hygeia Pneumatic B. S. Co., 93 Fed. 965, 36 C. C. A. 31.

"Its extensive use is due rather to the meritorious character of the Church invention than to the fact that it has supplied a long-felt want in the field of watchmaking. Extensive use is only an element to be considered in a case where patentability and invention are doubtful. Where, as here, the extended use can be attributed to something other than the mere novelty of the device, it loses its evidential force." Dueber Watch-Case Mfg. Co. *v.* Robbins, 75 Fed. 17.

92. McClain *v.* Ortmayer, 141 U. S. 419; Olin *v.* Timken, 155 U. S. 141; Thomas Roberts Stevenson Co. *v.* McFassell, 90 Fed. 707, 33 C. C. A. 249; Allington & C. Mfg. Co. *v.* Globe Co., 89 Fed. 865; McEwan Bros. *v.* McEwan, 91 Fed. 787; Irwin *v.* Hasselman, 97 Fed. 964, 38 C. C. A. 587; Consolidated Elec. Mfg. Co. *v.* Holtzer, 67 Fed. 907, 15 C. C. A. 63; E. Ingraham Co. *v.* E. N. Welch Mfg. Co., 87 Fed. 1000; Heckin *v.* Baker, 138 Fed. 63, *reversing* 127 Fed. 828; William Schwarzwaelder & Co. *v.* Detroit, 77 Fed. 886.

In Grant *v.* Walter, 148 U. S. 547, 13 Sup. Ct. 690, the supreme court, speaking by Mr. Justice Jackson, said: "The most that can be said

(C.) Admissions. — Patentable novelty may be established by admissions of the alleged infringer.[93]

(D.) Oral Evidence. — (a.) *Generally.* — When the patent is assailed for want of novelty it is proper to permit a witness, who made or used the article or process long prior to the patent in suit, to testify to that fact.[94]

Uncorroborated Testimony. — But oral testimony to establish want of novelty must be very strong and very reasonable when it is uncorroborated by any evidence consisting of documents or things; it must be of such character as to negative novelty beyond reasonable doubt.[95]

of this Grant patent is that it is a discovery of a new use for an old device, which does not involve patentability. . . The advantages claimed for it, and which it no doubt possesses to a considerable degree, cannot be held to change this result; it being well settled that utility cannot control the language of the statute, which limits the benefit of the patent laws to things which are new as well as useful. The fact that the patented article has gone into general use is evidence of its utility, but not conclusive of that, and still less of its patentable novelty." See also Christy *v.* Hygeia Pneumatic B. S. Co., 93 Fed. 965, 36 C. C. A. 31.

93. As for example, his purchase and sale of the device under the patent until dissatisfaction and dispute arose concerning the price. Rose *v.* Hirsh, 77 Fed. 469, 23 C. C. A. 246, *reversing* 71 Fed. 881. The court said: "The admission is not, of course, an estoppel; but in view of the defendant's presumed familiarity with the art, such an expression of judgment is evidence, and worthy probably of as much weight as that now expressed by their experts."

Compare Osgood Dredge Co. *v.* Metropolitan Dredging Co., 75 Fed. 670, 21 C. C. A. 491, *affirming* 69 Fed. 620. In this case it was urged, as establishing the novelty of the dredger in suit, advertisements and other public declarations of the respondent maintaining the patentability of dredgers of the general character of the one in suit. The court said: "In that class of litigation in which results can affect no interests except those of the parties to it, the court may well give weight to declarations of that nature; but with reference to a patent for an invention, which is of public concern, such declarations are of little consequence, and neither the inventor nor the alleged infringer. . . . Much more would it refuse to be controlled by evidence of the kind which the complainant thus brings to our attention."

"The fact that for a time the defendant was a licensee of the Colby patent cannot, of course, estop the defendant from disputing its validity in a suit for infringements charged to have taken place after the license was withdrawn. Such a fact, in a doubtful case, might have considerable evidential force as an admission of the validity of the patent by the licensee. Here, however, we do not have a case involving doubt. More than this, the license embraced in the Fitch and the Fisher & Lucas patents, and the admission contained in the act of accepting the license thereby loses much of its weight." Dueber Watch-Case Mfg. Co. *v.* Robbins, 75 Fed. 17.

94. See Klein *v.* Russell, 19 Wall. (U. S.) 433, holding further that it is proper to permit the witness in such case to be asked on cross-examination if the patentee had not forbidden him to continue the making or use.

95. The Barbed Wire Patent, 143 U. S. 275; Deering *v.* Winona Harv. Wks., 155 U. S. 286; Bowman *v.* De Grauw, 60 Fed. 907.

Uncorroborated Testimony of a Single Witness will not negative the fact of novelty beyond a reasonable doubt. Singer Mfg. Co. *v.* Schenck, 68 Fed. 191.

Direct Testimony of Want of Novelty Is Not Overcome by impeaching a principal witness the truth of whose testimony is shown by other evidence which bad character will not vitiate.[96]

(b.) *Expert Testimony.* — Upon the question of novelty, the testimony of witnesses skilled in the art or science to which the invention pertains is very generally received.[97]

(3.) Utility. — (A.) GENERALLY. — INTENDED ILLEGAL USE. — It has been held proper, upon an issue that the claimed invention lacks utility, to show that its intended and primary use is for gambling purposes;[98] and this rule applies not only in the case of a machine, but it is also held proper to show, in the case of a design patent, that the design is intended to be used on a gambling device.[99]

Failure To Put Invention to Use. — Failure to put an invention to use is a circumstance proper to be considered as against the practical utility of the machine, although it may not be conclusive upon that question.[1]

(B.) EXTENT OF USE. — The fact that the thing or process has been largely adopted and is in general use is evidence of utility.[2] But it is not always conclusive evidence of that fact, even in a doubtful case.[3]

96. Olin *v.* Timken, 155 U. S. 141; *s. c.*, 37 Fed. 205.

97. National Chemical & Fertilizer Co. *v.* Swift & Co., 104 Fed. 87.

Decision by Foreign Patent Office. Where a patent to a foreign inventor is attacked for want of invention, a decision by the patent office of his country sustaining the article or process as a patentable invention, while not controlling upon a court in this country, is valuable as the opinions of trained experts in the country of the inventor, and where the art is best understood. Badische Anilin & Soda Fabrik *v.* Kalle, 94 Fed. 163, where the court said: "The opinions of such men, learned, able and disinterested, officially expressed after thorough examination, are persuasive, to say the least."

In Judson *v.* Cope, 1 Bond 327, 1 Fish. Pat. Cas. 615, 14 Fed. Cas. 7,565, it was held that testimony as to what might have been done with prior devices was mere speculation, and not admissible.

98. National Automatic Device Co. *v.* Lloyd, 40 Fed. 89.

99. Reliance Nov. Co. *v.* Dworzek, 89 Fed. 902.

1. Bowers *v.* San Francisco Bridge Co., 91 Fed. 381.

2. Gandy *v.* Main Belt. Co., 143 U. S. 587. See also Magowan *v.* New York Belt. & Pack. Co., 141 U. S. 332; Hoyt *v.* Horne, 145 U. S. 302; Simpson *v.* Mad River R. Co., 6 McLean 603, 22 Fed. Cas. No. 12,885.

3. McClain *v.* Ortmayer, 141 U. S. 419

In a doubtful case the fact that the patented article has gone into general use and superseded other devices may be sufficient to turn the scale in favor of the patent. Thomas Roberts Stevenson Co. *v.* McFassell, 90 Fed. 707, 33 C. C. A. 249.

Extensive Use Is Strong Proof of Utility. — National H. Brake B. Co. *v.* Interchangeable Brake B. Co., 99 Fed. 758.

The Reason for the Inconclusive Character of Evidence of Extensive Use as proof of utility is that the extensive use may not be due wholly to the usefulness of the article; other considerations may have entered into and been to a large extent the means of bringing about the extensive use; such as advertising. Lane *v.* Welds, 99 Fed. 286, 39 C. C. A. 528.

In Consolidated Car Heat. Co. *v.* American Elec. H. Corp., 82 Fed. 993, it was undisputed that the device in suit had gone into immediate general use and had practically supplanted

(C.) Use by Alleged Infringer, Etc. — The fact that the thing or process has been and is used by the alleged infringer is sufficient to establish the fact of utility, at least as against him.[4]

(D.) Hearsay. — Utility cannot be established by mere hearsay evidence.[5]

(4.) **Anticipation.** — (A.) Prior Knowledge or Use. — (a) *Generally.* Upon the question whether or not the invention claimed in the patent in suit was anticipated by prior knowledge or use, it is competent to receive any competent evidence, whether direct or indirect, tending to establish such prior knowledge or use.[6]

(b.) *Model of Anticipating Machine.* — A model of the machine alleged as anticipating that covered by the patent in suit may be introduced in evidence when authenticated by the proper preliminary showing as a correct representation of the machine in question.[7]

(c.) *Oral Evidence.* — Anticipation may be established by positive

all others; but it was urged that this fact was due largely, if not entirely, to artful advertising, indeed, so artful as to be to some extent fraudulent. It was held, however, that this suggestion would have great force with reference to an article sold to the public at large; but that it was of little value in that case, because the device was used only by mechanicians of skill in their art.

4. DuBois *v.* Kirk, 158 U. S. 58; Gandy *v.* Main Belt. Co., 143 U. S. 587; Lehnbenter *v.* Holthaus, 105 U. S. 94; Western Elec. Co. *v.* LaRue, 139 U. S. 601; Consolidated Car Heat. Co. *v.* American Elec. H. Corp., 82 Fed. 993; Lambert-Snyder Vibrator Co. *v.* Marvel Vibrator Co., 138 Fed. 82; Niles Tool Wks. *v.* Betts Mach. Co., 27 Fed. 301; Hancock Inspirator Co. *v.* Jenks, 21 Fed. 911; Atwood-Morrison Co. *v.* Sipp Elec. & Mach. Co., 136 Fed. 859.

5. **The Report of a State Fair Committee** touching the utility of a patented invention being *ex parte* not under oath and by men whose testimony might be taken on the question is hearsay and not admissible in evidence on that point. Gatling *v.* Newell, 9 Ind. 572.

6. Dalby *v.* Lynes. 64 Fed. 376

Evidence tending to show knowledge or use of the article or process prior to the patent in suit is not admissible on behalf of the alleged infringer where he was himself the patentee named in the patent in suit, the plaintiff claiming by assignment. Alvin Mfg. Co. *v.* Scharling, 100 Fed. 87.

Object of Use of Prior Process. In determining whether or not a process anticipated the invention claimed, it is proper to inquire and ascertain clearly what object was in view in such case. Carnegie Steel Co. *v.* Cambria Iron Co., 89 Fed. 721.

7. Williams Patent Crusher & P. Co. *v.* St. Louis Pulverizer Co., 104 Fed. 795. See also Swift *v.* Whisen, 2 Bond 115, 3 Fish. Pat. Cas. 343, 23 Fed. Cas. No. 13,709, where the court held that such a model was not only competent evidence, but characterized it as the most reliable kind of evidence for the purpose indicated; that "it is a witness that cannot lie; the jury may rely on it, and it will be for the jury, if they find it necessary, to institute a comparison from the models of these two machines and then decide whether they are identical."

When It Was Made After the Lapse of Many Years from recollection solely, and the fact that it was not an original model, was not disclosed when it was offered in evidence, but was intentionally concealed until brought out on cross-examination, it cannot be accepted as sufficient evidence to establish anticipation. Kansas City Hay Press Co. *v.* Devol, 81 Fed. 726, 26 C. C. A. 573, *reversing* 72 Fed. 717; rehearing denied 84 Fed. 463, 28 C. C. A. 464.

and uncontradicted testimony of several witnesses to the prior use of the machine or device relied on,[8] especially when corroborated by documentary evidence identifying the time, and by the actual presence of the machine or device in court,[9] or, when corroborated, by the testimony of other credible witnesses.[10] But testimony tending to show prior use is, when unsupported by proceedings to obtain a patent, or by patents or exhibits, open to grave suspicion.[11] And oral testimony, when merely from memory, and concerning

8. Parlin *v.* Moline Plow Co., 89 Fed. 329, 32 C. C. A. 221, *reversing* 84 Fed. 349, holding also, that the fact that the maker of the original machine had not applied for a patent thereon did not overcome the proof thus made, especially as a reasonable excuse was given for his not applying for the patent. The court said, however, that if the evidence on the question of anticipation had been conflicting or doubtful, then the circumstance that no application for patent on the prior machine had been made might have been allowed to turn the scale.

9. Campbell Prtg.-Press & Mfg. Co. *v.* Duplex Prtg.-Press Co., 86 Fed. 315; Coffin *v.* Ogden, 18 Wall. (U. S.) 120.

10. Diamond Drill & Mach. Co. *v.* Kelley Bros. & Spielman, 138 Fed. 833.

11. Hart & Hegeman Mfg. Co. *v.* Anchor Elec. Co., 92 Fed. 657. See also Parlin *v.* Moline Plow Co., 89 Fed. 329, 32 C. C. A. 221, *reversing* 84 Fed. 349.

In Deering *v.* Winona Harv. Wks., 155 U. S. 286, the court said: "Granting the witnesses to be of the highest character, and never so conscientious in their desire to tell only the truth, the possibility of their being mistaken as to the exact device used, which, though bearing a general resemblance to the one patented, may differ from it in the very particular which makes it patentable, are such as to render oral testimony peculiarly untrustworthy; particularly so if the testimony be taken after the lapse of years from the time the alleged anticipating device was used. If there be added to this a personal bias, or an incentive to color the testimony in the interest of the party calling the witness, to say nothing of downright perjury, its value is, of course, still more seriously impaired." See also Barbed Wire Patent, 143 U. S. 275; Cantrell *v.* Wallick, 117 U. S. 689; Marconi Wireless Tel. Co. *v.* De Forest Wireless Tel. Co., 138 Fed. 657.

In the Barbed Wire Patent, 143 U. S. 275, the court said: "In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory and beyond a reasonable doubt. Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information. The very fact, which courts as well as the public have not failed to recognize, that almost every important patent, from the cotton gin of Whitney to the one under consideration, has been attacked by the testimony of witnesses who imagined they had made similar discoveries long before the patentee had claimed to have invented his device, has tended to throw a certain amount of discredit upon all that class of evidence, and to demand that it be subjected to the closest scrutiny. Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defense of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer."

Indefinite and Contradictory Testimony given after the lapse of many years as to the date at which a device similar to the one embraced by the patent in suit was produced, and

events and matters of routine occurring many years before, and which were not at the time considered of any special importance, is not sufficient.[12]

(B.) Prior Description in Printed Publication. — Since the statute expressly requires that an invention to be patentable must not have been described in any printed publication in this or any foreign country before the invention or discovery thereof,[13] printed publications, whether domestic or foreign,[14] in which it is claimed is contained the description of the invention covered by the patent in suit are always regarded as admissible in evidence in support of the claim of anticipation.[15] But the introduction of such a publication will not supersede the patented invention unless the description is so full, clear and exact as to enable any person skilled in the art or science to which it appertains, to make, construct or practice the invention as he would be enabled to do if the information were derived from a prior patent.[16]

based entirely upon memory, is not sufficient to establish anticipation. Untermeyer *v.* Freund, 58 Fed. 205.

Testimony of a Patentee in Derogation of His Own Patent is open to suspicion. Duer *v.* Corbin Cabinet Lock Co., 149 U. S. 216.

"The novelty of a device often depends upon a careful and discriminating examination of small and apparently inconsequential differences in construction between it and the prior art; and to permit witnesses to institute comparisons in their own minds, and state the result of such comparisons in general terms, to the effect that the unseen and unproduced machine operates in the same way as the machine of the patent, that the admitted difference in the structure between a circular and rectangular cylinder about the shaft is of no importance, and that the unproduced machine accomplishes the same results as the machine of the patent, would, if tolerated as satisfactory evidence, open the door to mistake, fraud, and deception." Williams Patent Crusher & P. Co. *v.* St. Louis Pulverizer Co., 104 Fed. 795.

12. Kraatz *v.* Tieman, 79 Fed. 322.

13. U. S. Rev. Stat. § 4886; Comp. Stat. See also U. S. Rev. Stat. § 4886, as amended March 3, 1897.

14. Under §§ 4886, 4920, 4923 of the U. S. Rev. Stats., the only evidence that can be used in proof of a foreign invention is that coming through the channel of a patent or printed publication. Ireson *v.* Pierce, 39 Fed. 795. See also Hurlbut *v.* Schillinger, 130 U. S. 456.

15. Downton *v.* Yaeger Milling Co., 108 U. S. 466; Clark Thread Co. *v.* Willimantic Linen Co., 140 U. S. 481.

A Pamphlet Purporting To Be a Part of a Trade Magazine printed for general circulation, bound with other numbers for the same years, and having references to the advertisements of the magazine, giving terms therefor, and characterized as a publication by the witnesses, may be received in evidence on the question of anticipation. Britton *v.* White Mfg. Co., 61 Fed. 93.

A Drawing Not Accompanied by Any Printed Description, but contained in a pamphlet which appears to be a mere trade circular, and unaccompanied by any evidence that it was ever published or intended for general use, or accessible to the public, is not such a printed publication within the rule as will entitle it to admission as evidence for the purpose of showing anticipation. Britton *v.* White Mfg. Co., 61 Fed. 93.

16. Seymour *v.* Osborne, 11 Wall. (U. S.) 516; Cohn *v.* U. S. Corset Co., 93 U. S. 366; Downton *v.* Yaeger Mill. Co., 108 U. S. 466 (where the prior description was held sufficient); Badische Anilin & Soda Fabrik *v.* Kalle, 94 Fed. 163; Western Elec. Co. *v.* Millheim Elec. Tel. Co., 88 Fed. 505.

(C.) Prior Patents. — (a.) *Generally.* — Where a patent is assailed upon the ground that the invention claimed was anticipated by a prior patent, it is proper to receive in evidence the prior patent set up,[17] and if the invention patented thereby is afterward put in actual use, the date of the patent is evidence of the date of the invention, even though it is not set up as a defense in an answer to a suit for infringement.[18] And where it is claimed that the patent in suit has been anticipated by a prior patent, it is error to refuse to permit such patent, confessedly prior in date and invention to that in suit, to be introduced and read to the jury, when the action is at law.[19] Where anticipation is sought to be established by proof of prior invention, proof of reduction to practice and the

If the Alleged Anticipating Matter Leaves the Description Incomplete, requiring extrinsic evidence to make it complete, it fails as an anticipation. Badische Anilin & Soda Fabrik *v.* Kalle, 94 Fed. 163, where the court said: "If prior patents and publications can be reconstructed by extrinsic evidence to fit the exigencies of the case, the inquiry will no longer be confined to what the publication communicates to the public, but it will be transferred to an endeavor to ascertain what its author intended to communicate. The question is, what does the prior publication say? Not what it might have said or what it should have said. The court has simply to consider what the publication in question has contributed to the art. If it fails to show the invention which it is said to anticipate, the contention that its author knew enough to write an anticipation and intended to do so is grotesquely irrelevant." This case was affirmed on this point in 104 Fed. 802.

17. Loan Co. *v.* Higgins, 105 U. S. 580; Hurlbut *v.* Schillinger, 130 U. S. 456.

In Clark Thread Co. *v.* Willimantic Linen Co., 140 U. S. 481, where the patentability of an invention was assailed upon the ground of anticipation by reason of prior patents, it was held that proof of such prior patent was properly and sufficiently made by the introduction of the patent attached to the deposition of an examiner used by him in his examination, marked as an exhibit by him and made part of the record. See also Hoskin *v.* Fisher, 125 U. S. 217.

In St. Paul Plow Works *v.* Starling, 140 U. S. 184, where the validity of a patent was assailed on the ground of anticipation, after the defendant had introduced the alleged anticipating patents and examined expert witnesses in regard thereto, the plaintiff rebutted that evidence by other expert witnesses; it was held that it was within the discretion of the trial judge to refuse to permit the defendant to introduce further evidence in support of his claim of anticipation.

18. Atlantic Works *v.* Brady, 107 U. S. 192.

19. In Tucker *v.* Spalding, 13 Wall. 453, 455, where an action at law was brought to recover damages for the infringement of a patent for the use of movable teeth in saws, and where the defendant offered in evidence, as covering the subject-matter of the plaintiff's patent, a patent prior in date and invention to that of plaintiff, the action of the court below in rejecting this offer of evidence, because, in its judgment, the patent offered did not anticipate the one in suit, was held to be erroneous by this court, and Mr. Justice Miller, speaking for the court, used this language: "Whatever may be our personal opinions of the fitness of the jury as a tribunal to determine the diversity or identity in principle of two mechanical instruments, it cannot be questioned that when the plaintiff, in the exercise of the option which the law gives him, brings his suit in the law in preference to the equity side of the court, that question must be submitted to the jury, if there is so much resemblance as raises the question at all. And though the principles by

use of the invention claimed to be prior must be made by direct evidence of the construction and use of the article; but nothing from the patent office can be admitted in evidence of earlier dates than the patents.[20]

(b.) *Paper Patents.* — A prior patent, even though it may be a mere paper patent, may be introduced in evidence to show anticipation, provided, of course, it sufficiently discloses the principle of the alleged invention.[21]

(c.) *Use in Foreign Country.* — But anticipation cannot be established by prior use in a foreign country.[22]

(d.) *Test of Sufficiency.* — A prior patent produced in evidence for the purpose of establishing anticipation will not have that effect, unless its descriptions or drawings contain or explain a substantial representation of the patented invention in such full, clear and exact terms as to enable any person skilled in the art or science to which it appertains, to practice the invention without the necessity of making experiments.[23]

which the question must be decided may be very largely propositions of law, it still remains the essential nature of the jury trial that while the court may on this mixed question of law and fact, lay down to the jury the law which should govern them, so as to guide them to truth, and guard them against error, and may, if they disregard instructions, set aside their verdict, the ultimate response to the question must come from the jury." See also Coupe *v.* Royer, 155 U. S. 565.

20. Howes *v.* McNeal, 4 Fed. 151, where it was held that the file wrapper, contents, and drawings of the alleged prior inventions were not admissible for the purpose of showing reduction to practice and use of the inventions. The court said: "All such evidence would be hearsay and secondary. A patent is allowed, by statute, to speak as a public grant; but the preliminary papers are merely the declarations of third persons not parties to this suit, or connected with them in interest or title. The evidence is not competent."

In the Case of a Process Patent, a sample of the product made in conformity with the prior patent is admissible upon the question of anticipation, and has, it seems, been regarded as very weighty, if not indeed conclusive, when it presents every quality described in the patent in suit, and the exhibits made thereunder, differing only in immaterial respects. National Chemical & Fertilizer Co. *v.* Swift & Co., 104 Fed. 87.

21. Universal Winding Co. *v.* Willimantic Linen Co., 82 Fed. 228; National Chemical & Fert. Co. *v.* Swift & Co., 104 Fed. 87. See also Dashiell *v.* Grosvenor, 162 U. S. 425.

22. Gandy *v.* Main Belting Co., 143 U. S. 587; Clark Thread Co. *v.* Willimantic Linen Co., 140 U. S. 481; Cohn *v.* United States Corset Co., 93 U. S. 366.

23. Hanifen *v.* E. H. Godshalk, 84 Fed. 649, 28 C. C. A. 507, *reversing* 78 Fed. 811 (foreign patent); Thomson-Houston Elec. Co. *v.* Winchester Ave. R. Co., 71 Fed. 192 (domestic patent). See also Metallic Extraction Co. *v.* Brown, 104 Fed. 345.

"Evidence to sustain the second defense is sufficient if the patent introduced for the purpose, whether foreign or domestic, was duly issued or the complete description of the invention was published in some printed publication prior to the patented invention in suit; and the patent offered in evidence or the printed publication will be held to be prior, if it is of prior date to the patent in suit, unless the patent in suit is accompanied by the application for the same, or unless the complainant introduces parol proof to show that his invention was actually made prior to the date of the patent, or prior

(e.) *Unsuccessful Operation of Anticipating Machine or Device.* — In a doubtful case, the failure in whole or in part of a previously patented machine or device relied upon in anticipation, or that it was not put to use, may be shown.[24] But success or failure of the invention described in the prior patent is not controlling when the relevancy of the patent goes, not to the question of anticipation, but to illustrate the generic type of machine, and the general process and path of development which the inventor disclaimed to follow.[25]

(f.) *Identity of Invention.*— In determining the question of identity of invention between the patent in suit and the alleged anticipating patent, the court may receive, and in a difficult case ought to receive, evidence concerning the construction and actual operation of each machine.[26]

Expert Testimony.— Where the patent in suit is attempted to be invalidated by a prior patent, it is proper to take the testimony of experts as to the nature of the various mechanisms or manufactures described in the different patents produced, and as to the identity or diversity between them;[27] and to submit all the evidence to the jury under proper instructions as to the rules by which they are to consider such evidence.[28] But such testimony is far from being

to the time the application was filed." Bates *v.* Coe, 98 U. S. 31.

The sufficiency of the description in the prior patent must be tested by the knowledge of persons skilled in the art as it existed at the date of the prior passage. Bowers *v.* San Francisco Bridge Co., 91 Fed. 381, *citing* Wilcox *v.* Bookwalter, 31 Fed. 224.

24. Rubber Tire Wheel Co. *v.* Columbia Pneumatic W. Wheel Co., 91 Fed. 978, citing Gandy *v.* Main Belt. Co., 143 U. S. 587.

Invention Claimed in Prior Patent Not Put to Use. — In determining the question of anticipation it is a pertinent and reasonable inquiry, if it be true that the disclosure of an earlier patent was substantially that of the invention claimed in the patent in suit, why, during a period of many years, was it not practically applied to the same use? And when a great branch of industry recognized the need of just such a device or process, where that need was a subject of discussion at gatherings interested in practical questions of the art, the inquiry becomes more pertinent. "That no one practiced the alleged anticipation, and that no one saw, or even suggested, such possibilities in it until after the later discovery was announced, are cogent facts which warrant the most convincing assurance to a court that such knowledge was conveyed in a neglected and dormant patent." Carnegie Steel Co. *v.* Cambria Iron Co., 89 Fed. 721.

Testimony that the invention described and claimed in the prior patent "was not practical" without explaining the circumstances is merely the conclusion of the witness. National Chemical & Fertilizer Co. *v.* Swift & Co., 104 Fed. 87.

Defects Which Are Merely in Minor Details of Construction will not defeat the efficiency of the patent as an anticipation, provided it sufficiently discloses the principle of the alleged invention. Patent Button Co. *v.* Scovill Mfg. Co., 92 Fed. 151.

25. U. S. Glass Co. *v.* Atlas Glass Co., 88 Fed. 493.

26. Thomson-Houston Elec. Co. *v.* Western Elec. Co., 72 Fed. 530, 19 C. C. A. 1.

27. Ferguson *v.* Ed. Roos Mfg. Co., 71 Fed. 416, 18 C. C. A. 162.

28. Bischoff *v.* Wethered, 9 Wall. (U. S.) 812, where the court said: "A case may sometimes be so clear that the court may feel no need of an expert to explain the terms of

regarded as conclusive or as at all binding upon the court.[29]

(D.) Carrying Back Date of Invention in Suit. — (a.) *Generally.* Where the validity of the patent is assailed on the ground of anticipation, and the party asserting invalidity has introduced in evidence earlier patents on which the claim of anticipation is based, it is

art or the descriptions contained in the respective patents, and may, therefore, feel authorized to leave the question of identity to the jury, under such general instructions as the nature of the documents seems to require. And in such plain cases the court would probably feel authorized to set aside a verdict unsatisfactory to itself, as against the weight of evidence. But in all such cases the question would still be treated as a question of fact for the jury, and not as a question of law for the court. And under this rule of practice, counsel would not have the right to require the court, as matter of law, to pronounce upon the identity or diversity of the several inventions described in the patents produced. Such, we think, has been the prevailing rule in this country, and we see no sufficient reason for changing it. The control which the courts can always exercise over unsatisfactory verdicts will enable them to prevent any wrong or injustice arising from the action of juries; whereas, if the courts themselves were compellable to decide on these often recondite and difficult questions, without the aid of scientific persons familiar with the subjects of the inventions in question, they might be led into irremediable errors, which would produce great injustice to suitors. We are disposed to think that the practice adopted by our courts is, on the whole, the safest and most conducive to justice." See also Tucker *v.* Spalding, 13 Wall. (U. S.) 453, where this doctrine was reaffirmed.

29. National Co. *v.* Belcher, 71 Fed. 876, 879, where the court, speaking by Judge Butler, in refusing to give controlling effect to the testimony of a competent mechanic, who stated that, by following the directions of an earlier patent, he had made a device identical with the one in controversy, said: "If a valuable patent might be overthrown in this manner by the testimony of an expert, without careful inquiry into, and virtual demonstration of, its correctness, the rights of patentees would rest upon the testimony of such witnesses rather than the judgment of the court." See also Hanifen *v.* E. H. Godshalk, 84 Fed. 649, 28 C. C. A. 507, *reversing* 78 Fed. 811.

In National Co. *v.* Belcher, 71 Fed. 876, 18 C. C. A. 375, *reversing* 68 Fed. 665, it was held that the testimony of one trained in the art that by following the directions in the prior patent he had made a device or machine identical with that described and claimed in the patent in suit should not be lightly accepted, the court said: "Of course if the witness is accurate the respondent's contention is sustained. This evidence is somewhat startling; and should not be accepted lightly. If a valuable patent might be overthrown in this manner by the testimony of an expert, without careful inquiry into and virtual demonstration of its correctness, the rights of patentees would rest upon the testimony of such witnesses rather than the judgment of the court. Of course, as before remarked, if Noble is entirely accurate there is no escape from his conclusion. We cannot, however, accept his statements, notwithstanding their positiveness. We do not mean to cast doubt on his honesty; but it seems manifest from the face of Lampe's patent that it does not describe such a device as that produced; that the witness has not adhered to its terms, either in letter or spirit, but has introduced the suggestions of his own mind. He is a trained mechanic and an intelligent expert, familiar with the art involved. It is difficult, at least, to believe that he was not aware of Reynolds' device, notwithstanding what he says on the subject. It cannot well be supposed that he was

proper to permit the patentee to show that prior to the date of any of the other patents he had reduced the invention covered by his claim to practice in a working form.[30]

(b.) *Drawings, Sketches, Etc.* — The patentee may show the fact of invention by drawings, sketches, models or any other competent evidence.[31]

(c.) *Testimony of Patentee.* — When the question is as to whether a patent is anticipated by reason of the existence of prior patents covering the invention claimed, the testimony of the patentee as to the date of his invention, while unquestionably competent, should be received with caution,[32] and construed strictly as against the party claiming under the letters patent.[33]

(E.) Carrying Back Date of Anticipating Invention. — Neither in an action at law nor a suit in equity is it permissible for the defendant to prove that the invention described in a prior patent, or the invention described in the printed publication, was made prior to the date of such patent or printed publication. The prior patent as a patent, or the printed publication as a publication, is the anticipatory matter, not what may be shown extrinsically.[34]

(5.) Prior Public Use or Sale. — (A.) Generally. — Evidence showing that a single article like that covered by the patent in suit had been made and used by others prior to the date of the invention claimed is sufficient to establish prior use.[35]

not abreast with the progress of this art; and being so it was quite natural that in duplicating Lampe's device he should unite the parts so as to make them co-operate and work as he knew they could be made to do". *Compare* Marconi Wireless Tel. Co. *v.* DeForest Wireless Tel. Co., 138 Fed. 657, where it was held that even evidence to prove that an apparatus or device produced in accordance with the disclosures of the prior patent was successfully operated has been held insufficient for that purpose where it rested upon the testimony of a single witness, except in the case of one test which was, in fact, a failure, and it further appeared that the apparatus differed essentially from that described in the prior patent.

30. St. Paul Plow Wks. *v.* Starling, 140 U. S. 184. See also Elizabeth *v.* Pavement Co., 97 U. S. 126; Loom Co. *v.* Higgins, 105 U. S. 580.

Even in the Case of an Invention Conceived in a Foreign Country, the patent for which was obtained in this country after the introduction of the article into commercial use in this country, but before any foreign patent was issued, and before the description of the invention in any printed publication, the patentee may show the date of his invention as of that in the foreign country, in order to meet the defense of prior knowledge or use. Hanifen *v.* Price, 96 Fed. 435.

31. Von Schmidt *v.* Bowers, 80 Fed. 121, 25 C. C. A. 323, *affirming* 63 Fed. 572.

32. Brooks *v.* Sacks, 81 Fed. 403, 26 C. C. A. 456.

33. Clark Thread Co. *v.* Willimantic Linen Co., 140 U. S. 481.

34. **The Reason** is that the patent or publication can only have the effect as evidence that is given to the same by the act of congress. Unlike that, the presumption in respect to the invention described in the patent in suit, if it is accompanied by the application for the same, is that it was made at the time the application was filed; and the complainant or plaintiff may, if he can, introduce proof to show that it was made at a much earlier date. Bates *v.* Coe, 98 U. S. 31.

35. Flomerfelt *v.* Newitter, 88 Fed. 696, *holding* also that the fact

(B.) Oral Evidence. — Where unsupported oral testimony as to prior public use or sale is relied upon, it must establish such use or sale beyond a reasonable doubt.[36]

(6.) **Abandonment.** — (A.) Generally. — Abandonment or relinquishment may be shown by direct or by circumstantial evidence. It may be shown by express declarations of an intention to abandon or by conduct inconsistent with any other conclusion, such as omission or delay to do what the law requires to be done in order to obtain letters patent.[37]

(B.) Proof of Diligence. — When delay in applying for a patent is relied upon as an abandonment, no hard and fast rule applicable to all cases can be laid down in respect of the evidence necessary to be given by the patentee to establish diligence.[38]

that the article never went into general use did not overcome the effect of the evidence.

36. Mast Foos & Co. *v.* Dempster Mill & Mfg. Co., 82 Fed. 327, 27 C. C. A. 191, *reversing* 74 Fed. 701 (*holding* that the oral testimony of a single witness, unsupported by that of any other witness and unaccompanied by any exhibits or patents, was not sufficient); Kraatz *v.* Tieman, 79 Fed. 322.

See also American Roll Paper Co. *v.* Weston, 59 Fed. 147, where the court recognized the just criticisms made upon oral testimony to establish prior use, but stated that it was impossible to resist the mass of testimony in that case, coming as it did from witnesses who were unimpeached and possibly with one exception wholly disinterested.

Testimony Based Wholly on Recollection. — Testimony as to the date when an alleged anticipating article came into the possession of the witness, based on recollection, unsupported by any other proof, and not fixed in his mind by any other occurrence which can itself be located in time, is not sufficient to prove prior use. Flomerfelt *v.* Newitter, 88 Fed. 696.

See also Atwood-Morrison Co. *v.* Sipp Elec. & Mach. Co., 136 Fed. 859, where the witnesses for the defendant, who testified upon the question of user, relied upon their memory to give details of what they said had been made and sold from twelve to fifteen years before the time when they testified, and the court said: "Under such circumstances, the memory, even when untrammeled by self-interest, is liable to betray and mislead."

37. Such as Failure to Apply for a Patent. — Consolidated Fruit Jar Co. *v.* Wright, 94 U. S. 92; Craver *v.* Weyhrich, 31 Fed. 607.

Failure To Prosecute or Renew His Application After Its Rejection or Withdrawal. — United States Rifle & Cart. Co. *v.* Whitney Arms Co., 118 U. S. 22; Planing Machine Co. *v.* Keith, 101 U. S. 479.

A Dedication to the Public cannot be proved by evidence which shows merely experimental practice by the inventor or his employes, whether in public or in private. Jones *v.* Sewall, 3 Cliff. 563, 6 Fish. Pat. Cas. 343, 3 O. G. 630, 13 Fed. Cas. No. 7,495, where the court said: "Such an inference is never favored, nor will it, in general, be sufficient to prove such a defense, unless it appears that the use, exercise or practice of the invention was somewhat extensive, and for the purpose of gain, evincing an intent on the part of the inventor to secure the exclusive benefits of his invention without applying for the protection of letters patent."

38. The Character of the Invention, the pecuniary circumstances of the inventor, his health, and his occupation upon kindred or subordinate inventions, are all matters proper to be shown and taken into consideration. Nor is it necessary that he show uninterrupted effort or concentration of his entire energies upon the single enterprise. In short,

(C.) Testimony of Applicant. — Upon the question of abandonment, the applicant may testify that owing to lack of funds he was unable further to prosecute his application after its rejection by the patent office.[39]

C. Cancellation of Letters Patent. — Presumptions and Burden of Proof. — In a suit in equity by the United States to cancel a patent for fraud, the burden is upon the complainant to establish the fraud by testimony which is clear, unequivocal and convincing; a bare preponderance of evidence which leaves the issue in doubt is not sufficient.[40]

Error of Judgment as to Extent of Power. — Proof of the existence of an error on the part of the patent office officials as to the extent of their power is not sufficient to justify a decree of cancellation of letters patent in a suit in equity by the United States.[41]

2. Reissued Patents. — A. Presumptions and Burden of Proof. a. *In General.* — Reissued letters patent are *prima facie* evidence of their validity in respect of all matters of fact involved in the granting of their reissue.[42]

his evidence need show only a diligence reasonable when considered in the light of all the circumstances surrounding the delay. Von Schmidt *v.* Bowers, 80 Fed. 121, 25 C. C. A. 323, *affirming* 63 Fed. 572.

39. Shepherd *v.* Deitsch, 138 Fed. 83.

40. Thus where the fraud charged consists of long delay in the prosecution of an application the government must affirmatively and clearly show that the delay was caused in some way by the conduct of the applicant. United States *v.* American Bell Tel. Co., 167 U. S. 224. In this case the first ground for relief was "that the delay of the application in the (patent) office for thirteen years was, under the circumstances alleged in the bill, unlawful and fraudulent." The court said: "What are the evidences of wrong in this matter of delay? It may have been caused either by the negligent or wrongful action of the officers of the department, and without any connivance, assistance or concurrence on the part of the applicant, or it may have been brought about by the applicant, either through its corruption of the public officers, or through other misconduct on its part. If the fault is wholly that of the department, the applicant ought not to suffer therefor. While, on the other hand, if its conduct has been wrongful, it may and ought to suffer. There is no presumption against the applicant. If a tribunal charged with official action delays such action, whatever of presumption surrounds the delay attaches to the tribunal, and no evidence of wrong being given, the presumption would be that the delay was at the instance of the tribunal and not caused by the applicant. The government, therefore, in order to make out its case, must affirmatively show that the delay has been caused in some way by the conduct of the applicant, and before its patent can be set aside the government must, in accordance with the rules laid down in respect to land patents, establish that fact clearly. It may not rest on mere inferences, mere suggestions, but must prove the wrong in such a manner as to satisfy the judgment, before it can destroy that which its own agents have created."

41. United States *v.* American Bell Tel. Co., 167 U. S. 224.

42. Clark *v.* Wooster, 119 U. S. 322.

Matters Omitted From Original by Mistake. — Where the specifications of a reissue patent contain matters not contained in the original, the presumption is that before the reissue was granted there was before the patent office satisfactory evidence that the omission in the original was caused through inadvertence or mis-

b. *Claims in Re-issue Broader Than Original.* — Where it is asserted that the claims in the reissued patent are broader than those of the original, and that the reissue was not applied for until a long time had elapsed after the grant of the original, the granting of the reissued patent is *prima facie* evidence of validity.[43]

c. *Identity of Invention.* — The issuance of a reissued patent is *prima facie* evidence of identity of invention between the original and reissued patent.[44]

d. *Delay.* — Where a reissue expands the claims of the original patent, and it appears that there was a delay of two years or more in applying for it, the delay invalidates the reissue unless accounted for and shown to be reasonable.[45]

B. Mode of Proof. — a. *In General.* — Some of the earlier cases held that for the purpose of invalidating a reissued or extended patent it was proper to show that the commissioner had been induced to grant it by fraudulent representations.[46] But it afterward came to be regarded as the better opinion that the decision of the commissioner, in granting the application for such patent, was to be regarded as conclusive evidence as to all matters of fact

take, but this is not a presumption of law, but merely one of fact, and may be rebutted. Franklin *v.* Illinois Mould. Co., 138 Fed. 58, *affirming* 128 Fed. 48.

Jurisdiction of Commissioner, Thus, where the attack upon the validity of the patent goes to the jurisdiction of the commissioner to grant the reissue, the letters are *prima facie* evidence of such jurisdiction. The fact that the commissioner assumed jurisdiction by treating the original letters as a proper subject for reissue is *prima facie* evidence, at least, that he had jurisdiction. Brooks *v.* Bicknell, 3 McLean 250, 4 Fed. Cas. No. 1,944.

Material Interpolations in a Reissue show that the commissioner exceeded his jurisdiction, and where that is done it clearly becomes the duty of the court to declare the patent void. Thomas *v.* Shoe Mach. Mfg. Co., 3 Ban. & A. 557, 16 O. G. 541, 23 Fed. Cas. No. 13,911.

43. The presumption is that the commissioner knew the law, and, knowing it, would not grant a broader reissue after a long lapse of time after the original. Clark *v.* Wooster, 119 U. S. 322.

44. Smith *v.* Goodyear Dental Vulcanite Co., 93 U. S. 486; Klein *v.* Russell, 19 Wall. (U. S.) 433; Allen *v.* Blunt, 2 Woodb. & M. 121, 2 Robb. Pat. Cas. 530, 1 Fed. Cas. No. 217; Stevens *v.* Pritchard, 2 Ban. & A. 390, 4 Cliff. 417, 23 Fed. Cas. No. 13,407.

The decision of the commissioner of patents is at least *prima facie* evidence that the reissue patent is for the same invention as the original in all cases where no doubts are raised in the mind of the court by an examination of the instruments themselves, and no fraud is proved. Poppenhusen *v.* Falke, 4 Blatchf. 493, 2 Fish. Pat. Cas. 181, 19 Fed. Cas. No. 11,279.

Identity of Invention Between Original and Reissued Patent. Persons seeking redress for the infringement of a reissued patent are not obliged to introduce the surrendered patent; and if the old patent is not given in evidence by the alleged infringer, the defense that the inventions covered by the two patents are not identical is not open to him. Bates *v.* Coe, 98 U. S. 31.

45. Hoskin *v.* Fisher, 125 U. S. 217.

46. Battin *v.* Taggert, 17 How. (U. S.) 74; Miller & Peters Mfg. Co. *v.* Du Brul, 2 Ban. & A. 618, 12 O. G. 51, 17 Fed. Cas. No. 9,597.

involved in the hearing of an application to reissue or extend, and in granting it.[47]

b. *Identity of Invention.* — The question of identity of the invention in the reissue patent with that in the original is to be determined from the face of the patents by mere comparison.[48]

A Surrendered Patent, although inoperative as a cause of action, may be admitted as evidence to support or disprove an issue that the reissued patent was not for the same invention as the original.[49]

III. CONSTRUCTION OF THE LETTERS PATENT.

1. In General. — Where the claims of a patent are of themselves self-sufficient and explanatory, and, read in their common, ordinary

47. Seymour *v.* Osborne, 11 Wall. (U. S.) 516; Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788; Mahn *v.* Harwood, 112 U. S. 354.

"Where the commissioner accepts a surrender of an original patent and grants a new patent, his decision in the premises, *in a suit for infringement,* is final and decisive, and is not re-examinable in such a suit in the circuit court unless it is apparent upon the face of the patent that he has exceeded his authority, that there is such a repugnancy between the old and the new patent that it must be held as matter of legal construction that the new patent is not for the same invention as that embraced and secured in the original." Thomas *v.* Shoe Mach. Mfg. Co., 3 Ban. & A. 557, 16 O. G. 541, 23 Fed. Cas. No. 13,911.

In Peoria Target Co. *v.* Cleveland Target Co., 58 Fed. 227, the court said: "With respect to the proof of inadvertence, accident, or mistake, the action of the commissioner is conclusive, if there is any evidence before him tending to show such accident, inadvertence, and mistake as will, in law, warrant a reissue. With respect to whether the original patent is inoperative and defective, the court has always reserved the right to review the action of the commissioner. If it shall appear from an examination of the new and old patents that the old patent was not defective or inoperative, but was for a complete invention, and that the reissue was taken out to secure another and different invention lurking in the mechanical arrangement of parts, the supreme court has always held the reissue void. Parker & Whipple Co. *v.* Yale Clock Co., 123 U. S. 87, 8 Sup. Ct. Rep. 38. Again, if an examination of the patent-office record discloses that there was no evidence before the commissioner of accident, inadvertence, or mistake, such as to warrant him in reissuing the patent, or that there was record evidence, of a conclusive character, showing that there could have been no accident, inadvertence, or mistake, the supreme court has not hesitated to hold a reissue void."

Grounds for Reissue. — If by reason of inadvertence or mistake in the drawings or specification the patent is rendered in part inoperative, and the patentee promptly applies for a reissue, and no substantial rights are affected, or fraudulent intent charged, the decision of the commissioner as to the facts giving him jurisdiction to reissue is conclusive. Beach *v.* Hobbs, 92 Fed. 146, 34 C. C. A. 248.

48. Miller *v.* Brass Co., 104 U. S. 350.

If it appears from the face of the patents that extrinsic evidence is not needed to explain terms of art or science, or to apply the description to the subject-matter, so that the court is able from mere comparisons to determine what are the inventions described in each, and to affirm from such comparison that they are or are not the same, then the question of identity is one of pure construction, and not of evidence. Heald *v.* Rice, 104 U. S. 737.

49. The Corn Planter Patent, 23 Wall. (U. S.) 181.

meaning, are explicit and clear, a resort to extrinsic evidence as to the meaning of the claims is not proper.[50] An inquiry as to what was in the mind of the patentee at the time of the invention is irrelevant and should not be permitted.[51]

Utility and Success. — Evidence that the patented machine or device was the first successful one, and that it had great commercial success, has no pertinency to a case involving merely the construction of the patent.[52]

Admissions by Patentee. — Definitions and admissions made by an applicant in order to avoid the state of the art as adduced by the patent office are binding upon him upon the subsequent construction of the patent.[53]

2. Ambiguities. — A. In General. — Evidence may be introduced to explain ambiguities in letters patent.[54]

B. Specifications, Drawings, Etc. — The claims of the patent

In Knapp *v.* Shaw, 15 Fed. 115, it was held that the original patent was properly read in evidence for the purpose of showing that the reissue was for a different invention in fact from the original.

50. Computing Scale Co. *v.* Keystone Store-Service Co., 88 Fed. 788; United States Glass Co. *v.* Atlas Glass Co., 88 Fed. 493; Jones *v.* Davis, 138 Fed. 62.

Upon the construction of a patent it is proper to refuse to permit a witness to give his opinion as to whether or not the invention was for a process or for a machine. Corning *v.* Burden, 15 How. (U. S.) 252.

51. Edison Elec. L. Co. *v.* E. G. Bernard Co., 88 Fed. 267, where the court said: "Such an inquiry seems irrelevant. The patent law cannot be administered along such lines as these. Patents are formal grants controlled by carefully drawn statutes and strict rules, and must be construed as other similar documents are construed. The court is not permitted to inquire what the patentee might have done or was capable of doing. The question is, what did he do?"

52. De Loriea *v.* Whitney, 63 Fed. 611.

53. New York Asbestos Mfg. Co. *v.* Ambler Asbestos A. C. C. Co., 103 Fed. 316. See also Sargent *v.* Hill Safe & Lock Co., 114 U. S. 63; Greene *v.* Buckley, 135 Fed. 520.

In construing the claims of a patent which the patentee has modified in obedience to the requirements of the patent office, the admissions and declarations of the patentee in the patent office, and amendments made by him which relate to the essence of the alleged invention, and are directed to the question of invalidity, when understandingly and deliberately assented to, are regarded as binding upon him. Donchian *v.* Kingston, 138 Fed. 890, where the court said: "It would be unjust to the public, and to all the parties involved in the construction of the patent, if a patentee were allowed to 'understandingly and deliberately' limit the scope of his patent while he is obtaining it, and were afterwards allowed to escape from his limitation when the patent is construed. He ought not to be heard to demand one rule of interpretation in the patent office and another in the courts." See also Greene *v.* Buckley, 135 Fed. 520.

54. In an action to recover royalties under a contract granting to the defendants the right to manufacture and sell devices "containing the patented improvement," evidence showing the prior state of the art is admissible, not to invalidate the patent itself, but to explain the latent ambiguity in the phrase "containing the patented improvement," and as bearing upon the situation of the parties and their object in making the contract. Andrews *v.* Landers, 72 Fed. 666.

must be reasonably construed;[55] and in cases of doubt or ambiguity it is held proper in all cases for the court to receive in evidence and consider the descriptive portions of the specifications to aid in solving the doubt, or in ascertaining the true intent and meaning of the language employed in the claims.[56] And the drawings and claims of the patent may be received in evidence to aid in ascertaining its true construction.[57]

C. Proceedings in Patent Office. — In a proper case it is permissible for the court, for the purpose of assisting it in the construction of the claims, to receive in evidence and consider the proceedings in the patent office showing certain views entertained and expressed by the examiners as to the construction of the claims in issue.[58]

A Surrendered Patent may be introduced in evidence and considered by the court to aid in construing a reissued patent, if the latter is ambiguous. The Corn Planter Patent, 23 Wall. (U. S.) 181.

55. The Corn Planter Patent, 23 Wall. (U. S.) 181.

"If a claim, uncertain when considered apart from the description, can by reference to the latter be rendered so clear as to satisfy the requirement of the statute, that the inventor 'shall particularly point out and distinctly claim' his invention, by parity of reasoning a doubtful point in the description, when considered apart from the claims, can by reference to the latter, when in themselves unambiguous, be rendered so clear as to satisfy the other requirement of the statute that the inventor shall fully and clearly set forth his invention in the description. That under such circumstances a description uncertain or indefinite when considered alone, but not inconsistent with the claims, may be rendered certain and sufficient to meet the requirements of the statute by reading the whole specification together has frequently been recognized and is, we think, a sound rule of law." Electric Smelt. & Alum. Co. *v.* Carborundum Co., 102 Fed. 618.

In Mossberg *v.* Nutter, 135 Fed. 95, the court said: "In approaching a patent, we are to look primarily at the thing which the inventor conceived and described in his patent, and the claims are to be interpreted with this particular thing ever before our eyes. In confining our attention too exclusively to a critical examination of the claims, we are apt to look at them as separate and independent entities, and to lose sight of the important consideration that the real invention is to be found in the specification and drawings, and that the language of the claims is to be construed in the light of what is there shown and described."

In the construction of a patent, the whole instrument, embracing the specification and drawings, is to be taken together; and if, from this, the exact nature and extent of the claim, made by the inventor, can be perceived, the court is bound to adopt that interpretation and give it full force and effect. Parker *v.* Stiles, 5 McLean 44, 1 Fish. Pat. Rep. 399, 18 Fed. Cas. No. 10,749.

Vagueness or uncertainty in the description of the invention may be removed by reference to the drawings, which may be examined to determine this question. Swift *v.* Whisen, 2 Bond 115, 3 Fish. Pat. Cas. 343, 23 Fed. Cas. No. 13,700.

56. Bates *v.* Coe, 98 U. S. 31.

57. Ross-Moyer Mfg. Co. *v.* Randall, 104 Fed. 355; Bates *v.* Coe, 98 U. S. 31; Brooks v. Fiske, 15 How. (U. S.) 212. See also Marconi Wireless Tel. Co. *v.* De Forest Wireless Tel. Co., 138 Fed. 657.

58. Perry *v.* Revere Rubber Co., 86 Fed. 633, holding, however, that the proceedings were not of a character to operate as an estoppel and could not be accepted as of any effect, but that the true construction was to be determined from the face of the patent. See also American

3. Meaning of Terms. — While the construction or interpretation of a patent is within the province of the court, yet it, as has been declared, cannot be expected that the court will always possess the requisite knowledge for that purpose; it often becomes necessary that it should receive and consider such evidence as will enable it to understand the terms used in the patent, and the devices and operations described or alluded to therein.[59] Thus where the patent, either original or reissued, contains technical terms or terms of art, the court may take the testimony of persons skilled in the science or art to which the invention pertains, for the purpose of aiding the court in coming to a correct conclusion;[60] and indeed cases frequently arise where the language of the specifications and claims in both patents is so interspersed with technical terms or terms of art that the testimony of expert witnesses is indispensable to a correct understanding of its meaning.[61] Of course in such cases both parties would have a right to examine the witnesses.[62] But such testimony is not conclusive.[63]

Sewage Disposal Co. *v.* Pawtucket, 138 Fed. 811, *affirming* 132 Fed. 35; Donchian *v.* Kingston, 138 Fed. 890; Crawford *v.* Heysinger, 123 U. S. 589, where the file wrapper and contents in the matter of the reissue were part of the evidence in the case and considered as throwing light upon what should be the proper construction of certain claims.

59. Loom Co. *v.* Higgins, 105 U. S. 580; American Sewage Disposal Co. *v.* Pawtucket, 138 Fed. 811, *affirming* 132 Fed. 35.

60. Bischoff *v.* Wethered, 9 Wall. (U. S.) 812, where the court said: "It may be objected to this view that it is the province of the court, and not the jury, to construe the meaning of documentary evidence This is true. But the specifications of patents for inventions are documents of a peculiar kind. They profess to describe mechanisms and complicated machinery, chemical compositions and other manufactured products which have their existence *in pais*, outside of the documents themselves; and which are commonly described by terms of the art or mystery to which they respectively belong; and these descriptions and terms of art often require peculiar knowledge and education to understand them aright; and slight verbal variations, scarcely noticeable to a common reader, would be detected by an expert in the art, as indicating an important variation in the invention. Indeed, the whole subject-matter of a patent is an embodied conception outside of the patent itself, which, to the mind of those expert in the art, stands out in clear and distinct relief, whilst it is often unperceived, or but dimly perceived by the uninitiated. This outward embodiment of the terms contained in the patent is the thing invented, and is to be properly sought, like the explanation of all latent ambiguities arising from the description of external things, by evidence *in pais*." See also Winans *v.* New York & E. R. Co., 21 How. (U. S.) 88.

Description of Invention. Whether or not the description of the invention and of its process of manufacture and use is stated with such clearness and precision as required by the patent laws that a person of reasonable intelligence and skill in that branch of art or science could carry the invention into practice is a question upon which it is proper to receive the judgment of persons having practical knowledge in such matters. Wayne *v.* Holmes, 1 Bond 27, 2 Fish. Pat. Cas. 20, 29 Fed. Cas. No. 17,303.

61. Seymour *v.* Osborne, 11 Wall. (U. S.) 516.

62. Seymour *v.* Osborne, 11 Wall. (U. S.) 516.

63. Panzl *v.* Battle Island Paper Co., 138 Fed. 48.

IV. INFRINGEMENT.

1. Title or Right to Letters Patent. — A. Plaintiff Claiming as Patentee. — a. *Presumptions and Burden of Proof.* — The legal title to the patent alleged to have been infringed must be shown to be in the plaintiff.[64]

Reissue Patents. — And where the letters patent claimed to be infringed consist of a reissued patent, the plaintiff or complainant, as the case may be, should produce the reissued patent.[65]

b. *Mode of Proof.* — The grant of the patent may be established by the production in evidence of the letters patent sued upon, or of a written or printed copy thereof, authenticated by the seal of the patent office, and certified by the commissioner or the acting commissioner of the patent office.[66]

B. Plaintiff Claiming Under Patentee. — a. *Presumptions and Burden of Proof.* — Where the plaintiff does not claim as patentee, it is incumbent upon him to establish his legal title to the right for the infringement of which he seeks to recover.[67]

b. *Mode of Proof.* — Inasmuch as a patent is a creature of the federal law, and may be transferred only in the mode authorized by that law, the proof of the assignment or transfer must show an assignment in conformity therewith.[68]

2. The Fact of Infringement. — A. Presumptions and Burden

64. Bates *v.* Coe, 98 U. S. 31; Seymour *v.* Osborne, 11 Wall. (U. S.) 516.

It is sufficient, on the question of the plaintiff's title, to show that he owned the patent at the commencement of the suit and at the time of trial. Gormully & J. Mfg. Co. *v.* Stanley Cycle Mfg. Co., 90 Fed. 279.

Where it appears that the plaintiff in an infringement suit is the original patentee, he is presumed to be still the owner of it in the absence of proof of any assignment. Fischer *v.* Neil, 6 Fed. 89.

Where it appears that the patentee, who has brought the suit for infringement, had previously made an assignment of an interest in the patent to become effective upon the performance by his assignee of certain conditions, it is incumbent upon him, in order to establish his title, to show that his assignee had not performed those conditions. De Beaumont *v.* Williams, 71 Fed. 812.

65. Blanchard *v.* Putnam, 8 Wall. (U. S.) 420.

A Reissue of Patent to the Assignee raises a presumption of title in the assignee. Washburn & Moen Mfg. Co. *v.* Haish, 4 Fed. 900.

66. U. S. Rev. Stat. § 892.

67. Rude *v.* Westcott, 130 U. S. 152. See also Seymour *v.* Osborne, 11 Wall. (U. S.) 516.

Title Claimed by Assignment or Grant. — Where the plaintiff or complainant claims title to the letters patent in suit by assignment or grant, it is incumbent upon him to prove his title by the production of the proper assignment or grant. Blanchard *v.* Putnam, 8 Wall. (U. S.) 420.

68. Gayler *v.* Wilder, 10 How. (U. S.) 477; Jewett *v.* Atwood Suspender Co., 100 Fed. 647; Gordon *v.* Anthony, 16 Blatchf. 234, 10 Fed. Cas. No. 5,605.

Certified Copies of the Patent Office Record of instruments purporting to be assignments are not *prima facie* proof of the execution and genuineness of the instruments. New York *v.* American Cable R. Co., 60 Fed. 1016, 9 C. C. A. 336, *disapproving* Dederick *v.* Whitman Agr. Co., 26 Fed. 763, and National Folding B.

OF PROOF. — a. *In General.* — The burden is upon the plaintiff to establish the infringement, when that is in issue, by a preponderance of the evidence.[69]

b. *Process of Manufacture.* — And where infringement of a process of manufacture is claimed, it must be shown by satisfactory proof that the defendant uses the process of the patent; it is not enough to show similarity or even identity of appearance in the product.[70]

c. *Joint Infringement.* — And where joint infringement of several defendants is charged, it must be shown;[71] it is not enough to show the making and using by one, and the using by the other, without any proof of co-operation between them.[72]

d. *Identity of Invention Claimed in Alleged Infringing Patent With Invention in Patent in Suit.* — Where it appears that the defendant is operating under a patent duly issued to him or to his assignor subsequent to the issuance of the patent in suit, and the question of infringement depends upon whether or not the inventions claimed in the alleged infringing patent and in the patent in suit are identical, the presumption arising from the issuance of the patent to the defendant or his assignor is against the identity

& P. Co. *v.* American Paper P. & B. Co., 55 Fed. 488.

69. Seymour *v.* Osborne, 11 Wall. (U. S.) 516; Alvin Mfg. Co. *v.* Scharling, 100 Fed. 87; Blanchard *v.* Putnam, 8 Wall. (U. S.) 420; Bates *v.* Coe, 98 U. S. 31; Brill *v.* St. Louis Car Co., 80 Fed. 909; Kinzell *v.* Luttrell Brick Co., 67 Fed. 926; Michigan Stove Co. *v.* Fuller-Warren Co., 81 Fed. 376; Goodyear Shoe Mach. Co. *v.* Spaulding, 101 Fed. 990; Parker *v.* Stiles, 5 McLean 44, 1 Fish. Pat. Rep. 399, 18 Fed. Cas. No. 10,749; Powell *v.* Leicester Mills Co., 103 Fed. 476.

In Royer *v.* Chicago Mfg. Co., 20 Fed. 853, the court said: "It is incumbent on the plaintiff to prove clearly and satisfactorily that there has been an infringement. It is an affirmative fact which it is incumbent on the plaintiff to prove."

To establish the fact of infringement it is incumbent upon the plaintiff to show that the defendant has used his invention, either in the precise form in which it is constructed under the patent, or in a form and on principles substantially the same. Parker *v.* Stiles, 5 McLean 44, 1 Fish. Pat. Rep. 399, 18 Fed. Cas. No. 10,749.

In the case of suit filed before the issuance of the patent and while the application therefor was pending in the patent office, the fact that the defendant was then constructing a machine which infringed the patent does not warrant the presumption that the defendant would continue infringement after the grant of letters patent; on the contrary, the presumption should be indulged that he would conform to the law rather than violate it. Brill *v.* St. Louis Car Co., 80 Fed. 909.

70. Schwartz *v.* Housman, 88 Fed. 519.

In Societe Etc. *v.* Lueders, 135 Fed. 102, it was held that infringement was not shown except by proof of a product produced by the precise process; that merely showing the ingredients was not enough, since they might have been brought together by a process not embraced in the patent.

71. Western Elec. Co. *v.* North Elec. Co., 135 Fed. 79.

72. Consolidated Car Heat. Co. *v.* American Elec. H. Corp., 82 Fed. 993.

and in favor of diversity.[73] But this presumption is not conclusive.[74]

e. *Degree of Proof Necessary.* — The infringement must be shown by a fair preponderance of the evidence;[75] mere possibility or even probability is not enough.[76]

In Equity, the complainant must, in general, establish the fact of the infringement by the testimony of more than one witness, or by that of one witness and corroborative circumstances.[77]

73. St. Louis Car Coupler Co. *v.* National Mall. Castings Co., 87 Fed. 885, 31 C. C. A. 265, *affirming* 81 Fed. 706; Curtain Supply Co. *v.* North Jersey St. R. Co., 138 Fed. 734; Loew Supply Co. *v.* Fred Miller Brew. Co., 138 Fed. 886; Mills *v.* Russell Mfg. Co., 136 Fed. 874; Ney *v.* Ney Mfg. Co., 69 Fed. 405, 16 C. C. A. 293; Kohler *v.* George Worthington Co., 77 Fed. 844; Holliday *v.* Pickhardt, 12 Fed. 147; Corning *v.* Burden, 15 How. (U. S.) 252; Boyd *v.* Janesville Hay Tool Co., 158 U. S. 260; Ries *v.* Barth Mfg. Co., 136 Fed. 850.

Norton *v.* Jensen, 90 Fed. 415, where the court said: "The presumption is that [the defendant] invented something new, or he would not have secured this second patent. Where two patents apparently describe and claim the same art or article, the question of identity is open for examination, with the presumption in favor of their diversity." *Compare* Hardwick *v.* Masland, 71 Fed. 887.

The presumption from the granting of a later patent relating to the same subject-matter, is, that there is a substantial difference between the inventions, and this presumption is fortified by the success of the machines under the later patent, and the fact that the machines under the earlier one did not meet the requirements of the trade, so that the patent has remained moribund for nearly three-fourths of its term. Campbell Printing-Press & Mfg. Co. *v.* Duplex Printing-Press Co., 86 Fed. 315.

The grant is presumed to have been made after a full examination by official examiners, with the prior state of the art fully in view, especially as the same is shown by previously granted patents. There can be no reason why the presumption of validity and non-interference with any prior patent should not obtain as strongly in defendant's favor as it does in favor of the patent in suit. In considering the weight of the testimony, as to all points bearing on the question of infringement, this presumption must be kept in view. Powell *v.* Leicester Mills Co., 103 Fed. 476.

Second Letters Patent Issued to Defendant Subsequent to Assignment to Plaintiff. — In an infringement suit wherein it appears that the defendant is making and using the article under a patent issued to him subsequently to his assignment to the plaintiff of a prior patent covering an article of the same class, it will be presumed that the second letters patent issued to the defendant did not describe and claim that which would be an infringement of the first letters patent issued to him, and hence that the article where manufactured in accordance with the terms of the second letters does not infringe upon the invention covered by the prior patent. Griffith *v.* Shaw, 89 Fed. 313.

74. Ries *v.* Barth Mfg. Co., 136 Fed. 850.

75. Béné *v.* Jeantet, 129 U. S. 683 (equity).

76. Sterling Co. *v.* Pierpont Boiler Co., 72 Fed. 780, *s. c.* 77 Fed. 1007, 22 C. C. A. 680.

Infringement Is a Tort Which Must Be Proved; it cannot rest wholly on conjecture. It is not enough to show merely that a person occupied an office jointly with one who is proved to be an infringer. "One may occupy the same room, or indeed the same bed, with an infringer, and yet not be guilty of infringement. Infringement is not contagious." King *v.* Anderson, 90 Fed. 500.

77. Alvin Mfg. Co. *v.* Scharling, 100 Fed. 87.

B. Mode of Proof. — a. *In General.* — Where the invention or inventions are embraced in a machine, the question of infringement is often best determined by a comparison of the machine made by the alleged infringer with the mechanism described in the patent or patents in suit.[78] Infringement has been sometimes sufficiently established by admissions of witnesses produced by the alleged infringer.[79]

Compelling Defendant's Employes to Testify. — Where it appears that the defendant's business is conducted in private for the purpose of securing to himself his peculiar machinery and methods of manufacture, his employes, who were under contract not to divulge the secrets of his business, will not be compelled to answer questions calling for information which will show wherein the defendant's machine differs from the complainant's, in the absence of any showing that the secrets of the defendant's business were used merely as a cloak to cover an invention of the plaintiff's rights.[80]

b. *Prior Paper Patent.* — A prior patent, although a mere paper patent, may be relevant to show that the alleged infringing device is not an infringement, but is merely another improvement upon the prior patent, or an application thereof to a new purpose.[81]

c. *Use of Devices.* — In determining the fact of infringement, the question of similarity between the device covered in the patent in suit and the alleged infringing device cannot be tested satisfactorily by an inquiry into the uses to which, in practice, the devices are put.[82]

d. *Method of Production.* — In considering the question of infringement of a design patent, the method of production is immaterial.[83]

78. Seymour *v.* Osborne, 11 Wall. (U. S.) 516.

Where defendant denies infringement and avers that the alleged infringing article was made under a later patent than that sued on, the court may, unaided by experts, in a plain case, determine the question of infringement by inspection and comparison of the two patents. Hardwick *v.* Masland, 71 Fed. 887.

Minor Differences. — Upon a proceeding either at law or in equity involving the question of infringement *vel non* by the defendant's machine with the plaintiff's patent, minor differences in the character and operation of the two machines, although they may not be relied on as of themselves relieving the defendant from the charge of infringement, are, nevertheless, the subject of legitimate consideration by the jury as part of the evidence upon which they must pass in determining the question of infringement. Coupe *v.* Royer, 155 U. S. 565.

79. Panzl *v.* Battle Island & P. Co., 138 Fed. 48, *affirming* in part 132 Fed. 607.

Admissions by Defendant's President as showing infringement. See Hemolin Co. *v.* Harway Dyewood & Extract Mfg. Co., 131 Fed. 483, *affirmed*, 138 Fed. 54.

80. Dobson *v.* Graham, 49 Fed. 17. The employes in this case were permitted to answer interrogatories directed toward a comparison of the defendant's machinery with the plaintiff's except where the answer would tend to describe wherein the former differed from the latter, and thus to describe the peculiarity of the defendant's machinery.

81. Universal Winding Co. *v.* Willimantic Linen Co., 82 Fed. 228.

82. Heap *v.* Greene, 91 Fed. 792.

83. Braddock Glass Co. *v.* Macbeth, 64 Fed. 118, 12 C. C. A. 70.

e. *Prior Adjudication.* — When it is claimed that the patent in suit, which is alleged to have been infringed, was, in a former suit between the same parties, decreed to be an infringement of a patent under which the defendant claims to be operating, the evidence in support thereof must show that the two suits involved the identical claims of the two patents and the parts of the device or machinery relied upon.[84]

f. *Expert Testimony.* — Expert testimony is admitted upon the fact of infringement.[85] Thus, it has been held proper to permit a witness skilled in mechanics, and understanding the meaning of the term "mechanical equivalent," to express his opinion of the relation of one machine to the other.[86] But if the court does not deem such testimony necessary it may be excluded.[87]

The Subject for Consideration Is Not the Process of Creation, but the effect produced upon the eye by the things created. If there be such resemblance between them as to deceive a purchaser, inducing him or her to purchase the one supposing it to be the other, the one which is patented is infringed by the later one. Byram *v.* Friedberger, 87 Fed. 559.

84. Union Steam-Pump Co. *v.* Battle Creek Steam-Pump Co., 104 Fed. 337.

85. Campbell Printing-Press & Mfg. Co. *v.* Duplex Printing-Press Co., 86 Fed. 315. See also Ironclad Mfg. Co. *v.* Dairymen's Mfg. Co., 138 Fed. 123, where the court characterized the taking of such testimony in court as a very satisfactory manner of taking testimony in patent cases.

In A. B. Dick Co. *v.* Belke & Wagner Co., 86 Fed. 149, where the defendants were charged with infringing letters patent granted to the complainant's assignor for improvement in inks, the analysis of the defendants' ink by the complainant's experts showed the presence of various constituents entering into the plaintiff's combination; and it was held that although this testimony might have been much less conclusive if the defendants had denied under oath the use of such constituents, their failure to meet the complainant's analysis by denial left no doubt that the analysis was substantially correct.

In Overweight C. Elevator Co. *v.* Imported Order of R. M. H. Ass'n. 94 Fed. 155, 36 C. C. A. 125, which involved the question as to how far conclusive expert testimony as to the fact of infringement was, the court said: "The court certainly has the unquestioned right to draw its own conclusions from an exhibition and inspection of the respective machines, or models thereof, as well as from the opinions of expert witnesses. It is not bound to accept such testimony as conclusive. The Conqueror, 166 U. S. 111, 131, 17 Sup. Ct. 510. It considers the facts upon which the opinions of the witnesses are based, and determines from all the evidence in the case whether the conclusions given by the witnesses are sound and substantial. The value of expert testimony generally depends upon the facts stated as a reason for their opinions and conclusions. Green *v.* Terwilliger, 56 Fed. 384, 394; 1 Tayl. Ev. sec. 58. More weight is given to the testimony of a witness based upon facts within his own knowledge and experience than to the testimony of a witness which is 'largely the assertion of a theory.' Béné *v.* Jeantet, 129 U. S. 683, 688, 9 Sup. Ct. 428."

86. National Cash Reg. Co. *v.* Leland, 94 Fed. 502, where it was held error to refuse to permit the witness to testify that a certain part of the defendant's machine was the equivalent of, or "exactly the nature of" a certain part of the plaintiff's machine. The court said: "A direct statement of equivalence from a competent expert might well have been helpful to an unskilled juryman unable to comprehend fully a statement of differences of detail."

87. Sugar Apparatus Mfg. Co. *v.* Yaryan Mfg. Co., 43 Fed. 140.

Design Patents. — The testimony of expert designers has not found favor with the courts on the question of infringement of designs.[88]

3. Marking Specimens "Patented." — If the plaintiff's patented articles are not duly marked, the statute expressly puts upon him the burden of proving notice to the infringers before he can charge them in damages;[89] and this burden is imposed upon the patentee whether he seeks recovery in an action at law or at equity.[90] But proof of marking specimens is not required in the case of a process patent.[91]

4. Preliminary Injunction. — A. Presumptions and Burden of Proof. — Upon an application for a preliminary injunction in an infringement suit, the general rule is that whether the patent covers mechanisms and mechanical devices or designs,[92] the complainant must show clearly not only the fact of infringement,[93] but also that the validity of the patent is supported by public acquiescence or prior adjudication;[94] and even though the validity has been estab-

88. Britton *v.* White Mfg. Co., 61 Fed. 93, where the court said: "It is not based upon experience in dealings with the ordinary purchaser, giving only such attention as persons ordinarily give. It is based upon a theory emphasized and liable to be biased by the trained observation of the specialist. Inasmuch as the test of sameness is determined by the eye of the ordinary observer I do not regard such testimony, from such expert designers, as of much importance."

89. Coupe *v.* Royer, 155 U. S. 565; McComb *v.* Brodie, 1 Woods (U. S.) 153; 15 Fed. Cas. No. 8,708. See also Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788.

90. Dunlap *v.* Schofield, 152 U. S. 244, where the court said: "One of these two things, marking the articles, or notice to the infringers, is made by the statute a prerequisite to the patentee's right to recover damages against them. Each is an affirmative fact, and is something to be done by him. Whether his patented articles have been duly marked or not is a matter peculiarly within his own knowledge; and if they are not duly marked, the statute expressly puts upon him the burden of proving the notice to the infringers, before he can charge them in damages. By the elementary principles of pleading, therefore, the duty of alleging, and the burden of proving, either of these facts is upon the plaintiff."

"Another defense is that the complainant's articles were not marked 'Patented,' as provided by section 4900, Rev. St., and that no notice was given to the defendants. Whatever doubt there may be, under the proofs, as to marking the complainant's articles 'Patented,' I think the actual written notice is sufficiently proved; but, at the most, the want of notice or marking would only affect the question of damages, but not the right to an injunction." Horn *v.* Bergner, 68 Fed. 428.

91. United States Mitis Co. *v.* Midvale Steel Co., 135 Fed. 103; United States Mitis Co. *v.* Carnegie Steel Co., 89 Fed. 206.

92. Smith *v.* Meriden Britannia Co., 92 Fed. 1003.

93. Brill *v.* St. Louis Car Co., 80 Fed. 909; Blakey *v.* National Mfg. Co., 95 Fed. 136, 37 C. C. A. 27; Societe, etc., *v.* Allen, 84 Fed. 812.

A preliminary injunction will not be granted where the affidavits of eminent scientists are at complete variance on the question of infringement of complainant's patent. Brush Elec. Co. *v.* Electric Storage Battery Co., 64 Fed. 775.

94. Wilson *v.* Store Service Co., 88 Fed. 286, 31 C. C. A. 533; Hatch Storage Battery Co. *v.* Electric Storage Battery Co., 100 Fed. 975; Blakey *v.* National Mfg. Co., 95 Fed. 136, 37 C. C. A. 27; American Sulphite P. Co. *v.* Burgess Sulphite F. Co., 103 Fed. 975; Dickerson *v.* Machine Co., 35 Fed. 143; Preck Stow & Wilcox Co. *v.* Fray, 88 Fed. 784; Robinson *v.*

lished by prior adjudication the proof of infringement must be clear unless prior adjudication also involved the issue of infringement.[95]

B. Degree of Proof Necessary. — Where the evidence produced upon the hearing of a preliminary injunction is conflicting, and the question is left in serious doubt, the writ should be denied.[96] But it is not necessary that the evidence offered by the defendant in opposition to the complainant's *prima facie* case shall "convince the mind."[97]

5. Compensation for Infringement. — A. Presumption and Burden of Proof. — a. *In Actions at Law.* — In an action at law to recover damages for the infringement of a patent, actual, not speculative damages, must be shown,[98] and by clear and definite and cer-

S. & B. Lederer & Co., 138 Fed. 140, where there was proof of public acquiescence for fourteen years. See also Palmer Pneumatic Tire Co. *v.* Newton Rubber Wks., 73 Fed. 218, in which Judge Goff states the law thus: "It must be conceded that the mere patent itself is an unsatisfactory foundation on which to base a preliminary injunction. The rule is now well established that the patent alone does not create a sufficiently strong presumption as to its own validity as to justify a court in granting a preliminary injunction. It must be established either by prior adjudication, or a strong presumption of its validity must exist because of continuous public acquiescence, or it must have successfully withstood an action by interference in the patent office."

In Foster *v.* Crossin, 23 Fed. 400, there is a discriminating opinion by Judge Carpenter, in which he was considering the question whether a preliminary injunction should ever be granted where there is no prior adjudication in favor of the patent, and no satisfactory proof of acquiescence by the public, and he held that an injunction might be issued even in such a case. He said: "Undoubtedly, the production of the patent alone can in no case raise the presumption in favor of the patentee sufficient to justify the order of a preliminary injunction; and it is perhaps, usually true that the most satisfactory basis for finding such a presumption will be in a judicial decision or in long uninterrupted use. But I am not prepared to say that the presumption can arise in no other way. It is true that a rule will be found laid down in many cases in terms which taken by themselves are broad enough to support the contention of the respondents; but it is also true that in many, if not most, of these cases, the rule is stated more broadly than is necessary to the decision." See also Societe, etc., *v.* Allen, 84 Fed. 812.

95. Hatch Storage Battery Co. *v.* Electric Storage Battery Co., 100 Fed. 975. See also Duff Mfg. Co. *v.* Norton, 92 Fed. 921, where the court in a prior decision fully considered the question of infringement, and gave the patent so broad a construction as clearly to include the device complained of in the subsequent case. Whippany Mfg. Co. *v.* United Indurated Fibre Co., 87 Fed. 215, 30 C. C. A. 615, *reversing* 83 Fed. 485.

96. National Folding-Box & P. Co. *v.* Brown & Bailey Co., 98 Fed. 437; Smith *v.* Meriden Britannia Co., 92 Fed. 1003.

97. The Criterion is that it shall "cast a reasonable doubt" upon complainant's right to the remedy sought. Welsbach Light Co. *v.* Cosmopolitan Incandescent Gaslight Co., 100 Fed. 648.

98. Rude *v.* Westcott, 130 U. S. 152; Dobson *v.* Hartford Carpet Co., 114 U. S. 439.

Plaintiff Must Show His Damage by Evidence. — "They must not be left to conjecture by the jury. They must be proved and not guessed at." Philp *v.* Nock, 17 Wall. (U. S.) 460. See also New York *v.* Ransom, 23 How. (U. S.) 487.

"The burden of proof is upon the

tain proof; otherwise nominal damages only can be awarded.[99]

In the Case of a Wanton Infringement, however, every doubt, especially as to the sufficiency of the evidence of damages, is to be resolved against the infringer.[1]

b. *In Suits in Equity.* — **(1.) Generally.** — So, too, where profits are sought to be recovered for the infringement of a patent by a suit in equity, the complainant has the burden of proving the amount of profits the defendant has made by the use of his invention.[2] The profits which the complainant seeks to recover must

plaintiff to show the amount of damages that he has suffered, and to furnish the jury reasonably satisfactory evidence to enable them to reach a conclusion on that subject; and, if the plaintiff has furnished you that proof, it is your duty to award him substantial damages. If there has been an infringement, he is entitled to nominal damages anyway; but if the evidence shows that the patent is of real value, then he is entitled to substantial damages, according to the proof." National Car-Brake Shoe Co. *v.* Terre Haute Car & Mfg. Co., 19 Fed. 514.

99. Hohorst *v.* Hamburg-American Packet Co., 91 Fed. 655, 34 C. C. A. 39, *affirming* 84 Fed. 354; Seattle *v.* McNamara, 81 Fed. 863, 26 C. C. A. 652; Boston *v.* Allen, 91 Fed. 248, 33 C. C. A. 485; Lee *v.* Pillsbury, 49 Fed. 747.

1. In Rose *v.* Hirsh, 94 Fed. 177, 36 C. C. A. 132, a case of wanton infringement, the evidence showing that the respondent had made and used a certain number of the articles claimed as infringing the complainant's patent, it was held that a finding was justified, and especially so in the absence of all counter-proof by the respondent, that the complainant was by the respondent's wrongful impairment of his sales damaged to the extent of the difference between the cost price, as shown by the complainant's evidence and corroborated by certain evidence of the respondent, and the selling price established between the parties previous to the infringement.

2. Tilghman *v.* Proctor, 125 U. S. 136; Coupe *v.* Royer, 155 U. S. 565; Dobson *v.* Hartford Carpet Co., 114 U. S. 439; Blake *v.* Robertson, 94 U. S. 728. In this case no license fee charged by the complainant was shown, although it appeared that he made a certain profit on the machines sold by him, which, however, embraced inventions covered by patents other than that for the infringment of which suit was brought; and it was held that in the absence of proof to show how much of that profit was due to such other patents, and how much a manufacturer's profit, he was entitled to nominal damages merely.

In Andrews *v.* Creegan, 7 Fed. 477, the defendant denied any profits, and insisted that none were proved to lay the foundation of an accounting. None were proved beyond the presumption arising from the fact of the putting the well down so that it could be used. This was held to raise a presumption that there were, or might have been, some profits, and the allegation that the transaction was not profitable would not meet the presumption so as to defeat an accounting.

In proving profits it is necessary to show a saving by the use of the infringing device over the cost of operating any other device which the defendant was free to use, where the infringement consists solely of the act of using the device. Hohorst *v.* Hamburg-American Packet Co., 91 Fed. 655, 34 C. C. A. 39, *affirming* 84 Fed. 354.

Profits Accruing Subsequent to Commencement of Suit. — Where profits accruing subsequent to the commencement of the suit are sought to be recovered, it is incumbent upon the complainant to show the fact not only of infringement made previous to the suit, but that it continued after the suit was begun. Marsh *v.* Nichols, 128 U. S. 605.

be shown to have been actually received by the defendant. It is not enough to show possible gains.[3]

(2.) Infringing Device Portion Only of Defendant's Machine. — Where the infringed device was a portion only of the defendant's machine, which embraced inventions covered by patents other than that claimed to have been infringed, the complainant is entitled to nominal damages only, where he does not show how much of the profits were due to such other patents, and how much was a manufacturer's profit.[4] And this rule applies where the invention claimed is a process.[5]

(3.) Device Mere Improvement. — Where the patented device claimed to have been infringed, and for the infringement of which the profits made accruing to the infringer therefrom are sought to be recovered, is a mere improvement upon something known before and open to use by the defendant, it is incumbent upon the complainant to distinguish or separate the profits arising from the improvement from those arising from the use of what was open to use by the defendant.[6] Where the complainant has, however, shown that certain saving resulted from the use of the improvement, but the defendant claims that part of the saving resulted from the use of another device, he has the burden of proving what part of the saving was due to the other device.[7]

B. Scope and Mode of Inquiry. — a. *Distinction Between Actions at Law and Suits in Equity.* — There is a difference between

3. Coupe *v.* Royer, 155 U. S. 565; Tilghman *v.* Proctor, 125 U. S. 136.

4. Keystone Mfg. Co. *v.* Adams, 151 U. S. 139, *reversing* 41 Fed. 595.

5. Mowry *v.* Whitney, 14 Wall. (U. S.) 620.

6. McCreary *v.* Pennsylvania Canal Co., 141 U. S. 459; Kirby *v.* Armstrong, 5 Fed. 801; Bostock *v.* Goodrich, 25 Fed. 819; Star Salt Caster Co. *v.* Crossman, 4 Ban. & A. 566, 22 Fed. Cas. No. 13,320. See also Dobson *v.* Hartford Carpet Co., 114 U. S. 439.

When a patent is for an improvement and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefits derived from it may be distinctly seen and appreciated. The rule on this head is aptly stated by Mr. Justice Blatchford in the court below: "The patentee," he says, "must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine as a marketable article, is properly and legally attributable to the patented feature." Garretson *v.* Clark, 111 U. S. 120.

On an accounting for damages or profits for infringement of a claim of a patent covering an improvement on an existing device, it is incumbent on complainant to show how much of the profit made by defendant on the entire article was due to the patented improvement, or, in case of damages, how much of complainant's loss was due to such improvement. Baker *v.* Crane Co., 138 Fed. 60.

7. Campbell *v.* New York, 81 Fed. 182.

actions at law and suits in equity for the infringement of letters patent in respect to proving compensation therefor. At law the evidence in respect of the damages to which the plaintiff is entitled should show the pecuniary loss he has suffered from infringement without regard to the question whether the defendant has gained or lost by his unlawful acts.[8] In equity, however, the evidence should show such gains and profits as have been made by the infringer from the unlawful use of the invention;[9] and since the act of July, 1870, in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the defendant, the complainant is entitled to show the damages he has sustained in addition to the profits received by the defendant.[10]

b. *Actual Damages.* — (1.) **Royalties.** — Upon the question of damages for infringement of a patent, evidence of an established royalty paid under licenses to make, use and vend the patented article may be received;[11] but in order to be accepted as the measure

8. Tilghman *v.* Proctor, 125 U. S. 136; Burdell *v.* Denig, 92 U. S. 716; Philp *v.* Nock, 17 Wall. (U. S.) 460; New York *v.* Ransom, 23 How. (U. S.) 487.

In Coupe *v.* Royer, 155 U. S. 565, *reversing* Royer *v.* Coupe, 29 Fed. 371, the court said: "At law the plaintiff is entitled to recover as damages compensation for the pecuniary loss he has suffered from the infringement, without regard to the question whether the defendant has gained or lost by his unlawful acts. . . . It is evident, therefore, that the learned judge applied the wrong standard in instructing the jury that they should find what the defendants might be shown to have gained from the use of the patented invention. . . . Upon this state of facts the evidence disclosing the existence of no license fee, no impairment of the plaintiff's market,—in short, no damages of any kind,—we think the court should have instructed the jury, if they found for the plaintiff at all, to find nominal damages only." There was no evidence tending to show what would have been a reasonable royalty for the use of the plaintiff's device, the evidence upon that branch of the case being confined to proof of the advantage which the defendant would gain through the use of the invention, and the profits he would derive therefrom; and the court did not expressly hold that in an action at law the plaintiff might not prove as the measure of his damages the sum that would be a reasonable royalty for his invention. See also Seattle *v.* McNamara, 81 Fed. 863, 26 C. C. A. 652.

9. Keystone Mfg. Co. *v.* Adams, 151 U. S. 130, *reversing* 41 Fed. 595; Sessions *v.* Romadka, 145 U. S. 29; Tilghman *v.* Proctor, 125 U. S. 136; Littlefield *v.* Perry, 21 Wall. (U. S.) 205; Dean *v.* Mason, 20 How. 198.

10. Coupe *v.* Royer, 155 U. S. 565; Birdsall *v.* Coolidge, 93 U. S. 64; Willimantic Thread Co. *v.* Clark Thread Co., 27 Fed. 865.

Although the statute permits the assessment of damages in addition to profits, there is, however, a noticeable reluctance in the courts to add damages when the profits are a substantial sum, and very clear proof is required before the addition will be made. Star Salt Caster Co. *v.* Crossman, 4 Ban. & A. 566, 22 Fed. Cas. No. 13,320.

11. Tilghman *v.* Proctor, 125 U. S. 136; Burdell *v.* Denig, 92 U. S. 716; Philp *v.* Nock, 17 Wall. (U. S.) 460; Wooster *v.* Simonson, 20 Fed. 316.

In the case of infringing articles made and sold, an established royalty is the proper measure of damages. Star Salt Caster Co. *v.* Crossman, 4 Ban. & A. 566, 22 Fed. Cas. No. 13,320.

"It is competent for a patentee, in order to enable the jury to measure his damages, to prove contract prices at which licenses had been granted

they must be shown to have been paid or secured before the infringement complained of, and by such a number of persons as to indicate a general acquiescence in their reasonableness, and that they were uniform.[12]

A License for the Use of a Patented Invention Is Not Required To Be in Writing, nor is the amount of the fee required to be shown by writing; the whole may be shown by parol as against an infringer who is not a party to the contract.[13]

(2.) Evidence Other Than Royalties. — Where there is no established license fee in the case, in order to arrive at a fair measure of damages, or even an approximation of it, general evidence must necessarily be resorted to;[14] and it is accordingly held proper to receive

under the patent while it was in force, but it is not competent for him to prove the prices paid for infringements; that is to say, payments made in settlement of infringements already perpetrated. In order to be competent evidence of value, the prices agreed upon must have been fixed with regard to future use, when, there being no liability between the parties, they are presumed, on both sides, to have acted voluntarily, and therefore to have made up their minds deliberately as to what was a fair price. Such arrangements, licenses thus granted, fees thus fixed, are competent evidence to consider in determining what the actual value of an invention is, and what the recovery ought to be for its use. But settlements for past transactions, where the parties are liable to suit if they do not pay, I instruct you, are not admissible as evidence for the plaintiff upon the subject of value." National Car-Brake Shoe Co. *v.* Terre Haute Car & Mfg. Co., 19 Fed. 514.

"Evidence of an established royalty will undoubtedly furnish the true measure of damages in an action at law, where the unlawful acts consist in making and selling the patented improvement, or in the extensive and protracted use of the same, without palliation or excuse; but where the use is a limited one and for a brief period, as in the case before the court, it is error to apply that rule arbitrarily and without any qualification." Birdsall *v.* Coolidge, 93 U. S. 64.

12. Rude *v.* Westcott, 130 U. S. 152.

Where compensation for infringement is sought on the basis of an established license fee which gave to the licensee the right to use all the claims of the patent, and it appears that the defendant in fact only used a portion of them, it is incumbent upon the complainant to establish the value of the claims infringed as distinguished from those not used by the defendant. Willimantic Thread Co. *v.* Clark Thread Co., 27 Fed. 865.

13. Wooster *v.* Simonson, 20 Fed. 316. The court said: "The amount of the license fee was exactly what the defendants would have to pay for a lawful use of the same extent, and exactly what the orator lost by their use without making the payment. The amount of the license fee for such use of the patented invention as the defendants had, was a question of fact to be proved by any competent evidence. Such licenses are not required to be in writing, neither is the amount of the fee required to be shown by writing. The whole may be shown by parol. The written contracts of license between the orator and others might be evidence between the orator and the defendants; but this suit is not brought upon those licenses; the defendants are not parties to them, and they are not conclusive upon either the defendants or the orator, as they would be upon the parties to them in suits between those parties upon them."

14. Hunt Bros. Fruit-Pkg. Co. *v.* Cassiday, 64 Fed. 585; Houston E. & W. T. R. Co. *v.* Stern, 74 Fed. 636, 20 C. C. A. 568 (evidence of sales to other parties).

"Where there is no license fee, no fixed price for royalty, and nothing

evidence of the utility and advantage of the invention and benefits to persons who have used it.[15]

Evidence of Amounts Received by the Plaintiff in Settlement of Claims against other infringers is not admissible on the question of damages.[16]

Evidence of Amounts Paid by the Defendant as royalties to the owner of another patent under which the alleged infringed article was manufactured is not competent on the question of damages, especially where the averments failed to shut out the possibility that that patent covered more than the patent in issue.[17]

(3.) Opinion Evidence. — A mere opinion as to the amount of that damage cannot be received or considered.[18]

c. *Profits.* —**(1.) Generally.** — Complainants may give evidence tending to show the profits realized by defendants from use of the patented devices, but great difficulty has always been found in applying the rule that the profits of the defendant afford a standard whereby to estimate the amount which the plaintiff is entitled to recover.[19]

disclosed which would show that the patentee puts upon the market a machine, for the use of which he charges so much, it is a very difficult matter to determine what the amount of damages may be in a certain case; but, like all questions presented to a jury for their determination, the plaintiff is bound and required to give some *data*, and must furnish the jury with evidence, so that they may be enabled to come to a proximate amount of the damage which the patentee has sustained by the infringement. In other words, general evidence may be resorted to for the purpose of furnishing *data* for the jury to come to a conclusion. They are to take into consideration and look at the value and utility and advantages of the patentee's machine over other makes of seed separators, and ascertain that value from all the evidence as to its character, operation and effect; and you will take into consideration the value, if any, of that which the defendants have used belonging to the plaintiff to aid you in forming a judgment of the actual damage plaintiff has sustained." Lee *v.* Pillsbury, 49 Fed. 747.

15. Suffolk Co. *v.* Hayden, 3 Wall. (U. S.) 315, where the court said: "What evidence could be more appropriate and pertinent than that of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringer, a jury will be in possession of material and controlling facts that may enable them, in the exercise of a sound judgment, to ascertain the damages, or, in other words, the loss to the patentee or owner, by the piracy, instead of the purchase of the use of the invention." See also Doten *v.* Boston, 138 Fed. 406.

Extent of Use. — Ordinarily in determining the amount of damages to be awarded for the infringement of a patent, the extent of use is a very vital element, and evidence bearing directly on that question should be received, especially as against the sole objection of its being irrelevant. Boston *v.* Allen, 91 Fed. 248, 33 C. C. A. 485.

16. Ewart Mfg. Co. *v.* Baldwin Cyc. Chain Co., 91 Fed. 262.

17. Ewart Mfg. Co. *v.* Baldwin Cyc. Chain Co., 91 Fed. 262.

18. Lee *v.* Pillsbury, 49 Fed. 747.

19. "Such a measure of damages is of comparatively easy application where the entire machine used or sold is the result of the plaintiff's invention; but when the patented invention is but one feature in a machine embracing other devices that contribute to the profits made by the defendant, serious difficulties arise." Keystone Mfg. Co. *v.* Adams, 151 U. S. 139, *reversing* 41 Fed. 595.

Evidence of Payments for Past Infringements for the purpose of ascertaining the amount which should be paid by the defendant is not admissible.[20]

Use of Patented Invention by Complainant. — When the patentee seeks recovery in equity for profits only, evidence showing that he used the patented invention is immaterial.[21]

(2.) Profits Realized by Others. — In a suit in equity to recover profits realized from the infringements of a patent, evidence of profits realized by third persons from the manufacture, sale or use of a device similar to the one covered by the patent in suit is not admissible.[22]

(3.) Losses Incurred by Infringer. — Where the only inquiry is the profit made by the defendant, losses incurred by him through his wrongful invasion of the patent in suit cannot be shown nor deducted from the compensation which the patentee is entitled to receive.[23]

20. Westcott *v.* Rude, 19 Fed. 830. The court said: "I know of no case in which it has been decided that such evidence is competent, and, upon principle, am not able to see how it can be; on the contrary, it seems to me clear that it ought not to be received. Proof of license fees charged and paid before use for the right to use an invention, is admissible upon the same theory that proof of sales in open market of any marketable commodity is competent; because it shows, or tends to show, a market price. But settlements for past use of an invention cannot be brought within the rule, because inconsistent with the principle on which the rule rests. The infringer, or one who is accused of infringement, is, from the necessity of the situation, under compulsion to make compensation as demanded, or to take the risk of a suit; and how much his action, in a particular case of settlement, may have been influenced by this or other special consideration, it is impossible for the master or the court to determine, and therefore the inquiry should not be entered upon. The only way to escape the inquiry is to exclude the evidence. To admit it is contrary to the maxim, *Inter alios acta*, etc. It involves an attempt to resolve one doubt or difficulty by another. *Litem lite solvit.*"

21. Crosby Steam Gage & Valve Co. *v.* Consolidated Safety Valve Co., 141 U. S. 441. The court said: "If there had been an award of damages, and the loss of trade by the plaintiff, in consequence of the competition by the defendant had been an element entering into those damages, it would have been a material fact to be shown by the plaintiff that it was putting on the market goods embodying the Richardson invention; but, as the plaintiff recovers only the profits made by the defendant in using in its business the Richardson invention, it is immaterial whether or not the plaintiff itself employed that invention. The profits made by the defendant cannot be increased or diminished by any act on the part of the plaintiff; and the amount of them is not affected by the question whether during the same time the plaintiff did or did not use the patented invention."

22. Keystone Mfg. Co. *v.* Adams, 151 U. S. 139, *reversing* 41 Fed. 595, where the court said: "Nothing is more common than for one manufacturing concern to make profits, where another, with equal advantages, operates at a loss."

In Wayne *v.* Holmes, 1 Bond 27, 2 Fish. Pat. Cas. 20, 29 Fed. Cas. No. 17,303, plaintiff offered to prove the aggregate of profit made by all manufacturers of the device in violation of his exclusive right, insisting that the defendant was liable for a *pro rata* share of its entire profit, but the court excluded this evidence from the jury as not furnishing a proper rule of damages.

23. Crosby Steam Gage & Valve

(4.) **License Canceled.** — A license fee under a license which had been executed between the complainant and the defendant, but which had been canceled after the defendant began manufacturing the article, does not control on the question of damages, but the proper inquiry in such case is the actual profits accruing to the defendant from the use of the article.[24]

(5.) **Opinion Evidence as to Savings.** — Undoubtedly there are cases in which, for the purpose of aiding in the determination of profits or savings arising from the manufacture and sale or use of the infringing article, it is proper to take the opinions of competent witnesses, not alone as experts giving opinions upon supposed facts,[25] but as observers as well, stating facts from their own knowledge, with estimates and opinions thereon.[26] But as in the case of other opinion evidence of non-experts, the witness must state the facts upon which his estimate or opinion is founded.[27]

6. Defenses. — A. In General. — Where the plaintiff or complainant in an infringement suit has made his *prima facie* case by establishing the matters essential thereto, as previously shown, it then devolves upon the defendant to rebut this *prima facie* case by proving either non-infringement, or one or more of the valid defenses open to him in such cases.[28]

Co. *v.* Consolidated Safety Valve Co., 141 U. S. 441.

24. Wales *v.* Waterbury Mfg. Co., 87 Fed. 920.

25. Herring *v.* Gage, 15 Blatchf. (U. S.) 124, 12 Fed. Cas. No. 6,422.

26. Campbell *v.* New York, 81 Fed. 182. This was a suit for the infringement of an improvement upon fire engines, and it was held proper to take the opinions of the master chiefs of fire departments of the defendant city, of the foreman and others employed in those departments as to the utility of the patented device, the uses made of it, and the results produced with their estimates as to the saving in the number of men employed as the result of its use.

27. Coupe *v.* Royer, 155 U. S. 565; Munson *v.* New York, 16 Fed. 560; Sargent *v.* Yale L. Mfg. Co., 17 Blatchf. 249, 21 Fed. Cas. No. 12,367.

28. Blanchard *v.* Putnam, 8 Wall. (U. S.) 420.

A statement here of all of the defenses available in an infringement suit and the rules of evidence in relation thereto would involve but little more than repetition of what has been previously discussed in this article, since most of the defenses available in such cases involve the element of patentability, or the question whether the patentee was in fact the original and prior inventor; and such defenses as do not involve these elements are found elsewhere discussed in the article. There are some few defenses, however, not so involved in other discussions and these are treated herein.

In Smith *v.* Uhrich, 94 Fed. 865, it was held that the defendant in an infringement suit should complete his evidence with respect to the state of the art before the taking of complainants' testimony in rebuttal; that he has no right to introduce additional testimony and exhibits thereafter taken, even for the sole purpose of narrowing the claims, after the evidence of the complainants had all been taken, and their expert had been fully examined with reference to the prior art as it had then been made to appear.

In Duff Mfg. Co. *v.* Norton, 96 Fed. 986, wherein the defendant urged on the court the usual presumption arising from the fact that his device also was covered by a patent, the court said: "The application of such a presumption is al-

B. Distinction Between Validity and Scope of Letters Patent. — While equity will not permit the assignor of letters patent to show, as against his assignee, that the letters were invalid for want of patentability,[29] yet he is not estopped to show that the article made and used by him is not an infringement when considered in the light of the scope and extent of the first patent.[30] There are well considered cases, however, to the contrary.[31]

C. Surreptitiously Obtaining Patent on Invention by Another. — Among the defenses allowed by statute to meet the presumption of invention from the issuance of letters patent is, that the supposed inventor "had surreptitiously or unjustly obtained the patent for that which was in fact invented by another who was using reasonable diligence in adapting and perfecting the same." This defense is regarded as an affirmative defense, the burden of proving which is upon the defendant, and he must establish it beyond a reasonable doubt.[32]

D. License. — If the defendant asserts license, the burden of proving it is upon him.[33]

E. Limitation as to Time of Infringement. — The restriction imposed by the act of March 3, 1897, amending § 4921 of the Revised Statutes, limiting the right of a patentee to the recovery of profits or damages to infringements committed within six years before suit, is a matter of defense, the burden of proving which is upon the defendant in an infringement suit.[34]

ways dangerous, as it cannot always be known whether the patent office contemplated that the later patent covered a substantial divergence or only an improvement on the earlier one."

In New Departure Bell Co. *v.* Corbin, 88 Fed. 901, the court said: "As was said by Mr. Justice Shiras, in Haughey *v.* Lee, 151 U. S. 285, 14 Sup. Ct. 332, 'the defense of want of patentable invention in a patent operates not merely to exonerate the defendant, but to relieve the public from an asserted monopoly.' In such cases the public interest demands that the true facts shall be shown as against the original patent, which has been secured by the patentee from the patent office upon representations that it covers a valuable invention."

29. Griffith *v.* Shaw, 89 Fed. 313.

30. **A Distinction** is made between the validity of the patent in this respect and the scope thereof. Griffith *v.* Shaw, 89 Fed. 313; Noonan *v.* Chester Park Athletic Club Co., 99 Fed. 90, 39 C. C. A. 426; Smith *v.* Ridgely, 103 Fed. 875; Hurwood Mfg. Co. *v.* Wood, 138 Fed. 835.

31. Siemens Halske Elec. Co. *v.* Duncan Elec. Mfg. Co., 142 Fed. 157.

32. Corser *v.* Brattleboro Overall Co., 93 Fed. 807, where it was held that proof of a mere oral and casual suggestion by another to the patentee in respect to an improvement subsequently covered by the patent was mere information, the receiving and acting upon which was not surreptitious or unjust.

33. Fischer *v.* Hayes, 6 Fed. 76.

The Permitted Use of One or More of the Devices in Issue at one locality does not raise any presumption, either of law or of fact, in favor of a license to use other of the devices at another locality some years later. Boston *v.* Allen, 91 Fed. 248, 33 C. C. A. 485.

34. Peters *v.* Hanger, 134 Fed. 585, *reversing* on rehearing 127 Fed. 820, 62 C. C. A. 498. The court said: "It is also to be remembered

that if the infringements, or any of them, were committed more than six years prior to the action, it is the defendant who best knows the fact in this respect, and can most easily prove them. Consequently any doubt as to the propriety of excluding the plaintiff from proving the time of the infringements could properly be solved under the rule imposing the burden of proof upon the party that has the best means of knowing the facts." *Citing* 2 Encyc. of Ev., 800, 804.

PATENTS FOR LANDS.—See Public Lands.

PATERNITY.—See Bastardy; Parent and Child.

PATRIMONY.—See Descent and Distribution.

PAUPERS.

CROSS-REFERENCE:

Domicile.

I. PAUPERISM.

1. Burden of Proof. — The question whether a person was a pauper at a particular time within the meaning of the statute, is a question of fact,[1] the burden of proof thereof being upon the party asserting it.[2] But where it appears that a town has, by its failure to answer the proper pauper notice, estopped itself from contesting

1. Holland *v.* Belgium, 66 Wis. 557, 29 N. W. 558.

2. Winneshiek County *v.* Allamakee County, 62 Iowa 558, 17 N. W. 753; Ripley *v.* Hebron, 60 Me. 379; Norridgewock *v.* Madison, 70 Me. 174; Franklin *v.* Fuller, 105 Mass. 336.

In an action against a town to recover for disbursements on behalf of the pauper, it is incumbent upon the plaintiff to show that at the time the relief was furnished the person in question was in fact a pauper. Waltham *v.* Brookline, 119 Mass. 479.

In Order to Justify the Issuance of an Order of Removal, it is not sufficient merely to prove that the town had rendered assistance to the alleged pauper by way of support, but there must be proof of such destitution and want on the part of such person as to render such assistance necessary. Hardwick *v.* Pawlet, 36 Vt. 320.

In Hunnewell *v.* Hobart, 40 Me. 28, an action of trespass *quare clausum* and for carrying away sundry articles of personal property, wherein the breaking and entering charged were not denied, but the defendants justified on the ground of their having removed the plaintiff and his family as paupers from another town to the town of which the defendants were acting as agents, and which was the place of the pauper's legal settlement, it was held incumbent upon the defendants to show that at the time of the plaintiff's removal he was a pauper and as such liable to removal.

the question of settlement, it is immaterial whether the alleged pauper was or was not such in fact.[3]

2. Mode of Proof. — Where the issue is whether or not a person alleged to be a pauper is in fact a pauper, either party may, for the purpose of establishing the issue, resort to such circumstances as tend to prove it.[4]

II. NEED OF RELIEF FURNISHED.

In an action to recover for pauper supplies furnished, the fact that they were furnished as alleged must be shown.[5] But it is not necessary for the plaintiffs to go further and show that there had been a formal adjudication as to the necessity therefor.[6]

3. Freeport *v.* Edgecumbe, 1 Mass. 459.

4. As for example, the fact of his applying for aid, his acts and conduct at the time of so applying, his incapacity to labor because of disease, etc. New Portland *v.* Kingfield, 55 Me. 172.

In Lyme *v.* East-Haddam, 14 Conn. 394, an action for the support of a man and his family, claimed to be paupers, the evidence showed that the man was in good health and capable of earning four shillings a day, but that he was wholly destitute of property, had been turned out of his former dwelling place, and had no other place to go to, and that the woman whom he lived with as his wife, though she was not legally such, and his children by her, were sick and under necessitous circumstances. It was held that these facts conduced to show that the man was a pauper.

The Fact That a Person Has Been Receiving Aid from the state or from any town or individual is competent for the purpose of showing that he is a pauper. It shows his "condition of poverty and need of relief." Franklin *v.* Fuller, 105 Mass. 336.

Ability to Support Self. — In an action against a town for the support of a person alleged to be a pauper, it is competent for the defendant to prove the ability of the alleged pauper to maintain himself. Freeport *v.* Edgecumbe, 1 Mass. 459.

Recovering Judgment for Wages. The fact that after the pauper was furnished with supplies by the plaintiffs she recovered a judgment for wages due her at the time from the person with whom she was then living, is not admissible in evidence to show that she was not in distress and need of relief when the supplies were furnished. Appleton *v.* Belfast, 67 Me. 579.

Aid Rendered Several Years Previously. — In Plymouth *v.* Reading, 50 Vt. 709, it was held that evidence that the plaintiff had rendered aid to the pauper in 1870 had no tendency to prove that he was likely to become chargeable in 1877, and was hence inadmissible. The court said: "The fact is too remote. So much time had elapsed that no such inference can fairly be drawn. She might have been destitute then and wealthy now; or, wealthy then and a pauper now. There is a material change in the pecuniary condition (for better or worse) of almost every person within a period of seven years. Such changes are too common to make the condition of a person at the one period proof of such person's condition at the other. The evidence offered, we think, was inadmissible and should have been excluded."

5. Ripley *v.* Hebron, 60 Me. 379.

6. See Linneus *v.* Sidney, 70 Me. 114.

In Danville State Hospital *v.* Bellefonte Borough, 163 Pa. St. 175, 29 Atl. 901, an action by the plaintiff against a poor district to recover for moneys expended in the maintenance of insane paupers, it was held that the plaintiff was not bound to show affirmatively that an order of relief or approval had been obtained as a condition to recover, since the presumption is that in sending the pau-

III. NOTICE.

The poor laws generally require, as a condition to the right to recover for pauper relief furnished, that the claimant town shall first give notice to the town wherein the pauper's alleged settlement may be, of the condition of the pauper, stating his name, etc.; and of course in such case the fact of notice as required must be established.[7]

Fact of Mailing Notice. — Although the statute providing for the support of paupers may make the putting of a letter into the mail sufficient evidence that notice was given, yet the fact of putting the letter into the mail is to be proved, or disproved, by any competent evidence.[8]

IV. SETTLEMENT OF PAUPERS.

1. Presumptions and Burden of Proof. — A. ACQUIREMENT OF SETTLEMENT. — a. *In General.* — The settlement of a pauper is a fact to be established by evidence by the party asserting that the settlement is in a certain place.[9] But the rule that a domicile once

pers to the plaintiff town the defendant overseers acted rightly.

In Albany *v.* McNamara, 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212, it was held that the question as to the propriety of granting requested pauper relief is confided to the discretion of the officers of the poor in the particular jurisdiction, and if they grant it the presumption is that they made such investigations as they deemed necessary, and determined the question as to the right of the party to relief, and their determination cannot be reviewed.

7. Ripley *v.* Hebron, 60 Me. 379. **The Connecticut Statute** (Gen. Stat., p. 199, sec. 5), provided, with regard to the right of one town to recover of another for the support of a pauper of the latter by the former, that the selectmen of the claimant town shall give notice to those of the other of the condition of the pauper, "stating his name." And a notice describing the paupers as "Austin Seymour (colored) and wife, and four children, aged from ten years down to an infant," has been held sufficient not only for the parents but for the children. There is nothing technical in the statute. It means that definite information as to the pauper shall be given, and that is all that is intended by its language. Windham *v.* Lebanon, 51 Conn. 319.

8. Litchfield *v.* Farmington, 7 Conn. 100, where it was held that after a witness for the plaintiff had testified to having deposited a letter in the mail on a certain date directed to the selectmen of the defendant town informing them of the condition of the pauper, the defendant should have been permitted to introduce the testimony of its selectmen that they had received no such letter.

9. Middlebury *v.* Bethany, 32 Conn. 71; Winneshiek County *v.* Allamakee County, 62 Iowa 558, 17 N. W. 753; Norridgewock *v.* Madison, 70 Me. 174; Waltham *v.* Brookline, 119 Mass. 479; Canaan *v.* Hanover, 47 N. H. 215.

There are no equities among towns in the support of paupers, but the liability is imposed by statute and is a matter of strict right; and the party averring a settlement must show everything necessary to the acquisition thereof. Burke *v.* Westmore, 55 Vt. 213.

In New Bedford *v.* Taunton, 9 Allen. (Mass.) 207, the court said: "The legislature has exercised its discretion in the establishment of a system of positive rules, and courts of law must assume that this discretion has been wisely exercised, and must enforce the system by giving to the statutes a fair interpretation. They will take it for granted that

acquired is presumed to continue until a subsequent change is shown applies to the question of settlement in pauper cases.[10] Where it is shown or admitted that the pauper originally had a settlement in the defendant town, but it claims that he had acquired another settlement, it has the burden of proving that fact.[11] But it is not incumbent upon the defendant to prove that he had a settlement in any particular town.[12]

In the Case of a Derivative Settlement it is not necessary for the plaintiff to show any exact time, or any particular mode, in which the ancestor's settlement was gained.[13]

whenever the burden of supporting any particular pauper is thrown by statute and by legal evidence upon any particular town or city, it is right and equitable that it should be so." This is the view taken of these statutes by the court in Berlin *v.* Bolton, 10 Metc. (Mass.) 115, where it was said that the obligations of towns to support paupers resulted from provisions of positive law, and that towns must be brought strictly within them, and that analogy, equitable construction and approximation are all insufficient. See also Shrewsbury *v.* Salem, 19 Pick. (Mass.) 389; Middleborough *v.* Plimpton, 19 Pick. (Mass.) 489; Robbins *v.* Townsend, 20 Pick. (Mass.) 345.

In Wilmington *v.* Burlington, 4 Pick. (Mass.) 174, an action for the support of a pauper who had derived his settlement from that of his father or of his mother, brought against the town where the mother had her settlement, it was held that the burden of proof was not on the defendant to show that the father had a settlement in some other town, but on the plaintiffs to show that he had not a settlement within the commonwealth.

Where it appears that the pauper once had a legal settlement in the plaintiff town, the burden is upon the plaintiff town to show that he had acquired a new settlement in the defendant town. Deer Isle *v.* Winterport, 87 Me. 37, 32 Atl. 718; Newfane *v.* Dummerston, 34 Vt. 184; Boylston *v.* Groton, 4 Gray (Mass.) 282.

10. Chicopee *v.* Whately, 6 Allen (Mass.) 508. In this case the pauper had originally had a settlement in the defendant town but had removed to the plaintiff town, and the jury were held to have been properly charged that if they were satisfied that he had acquired a domicile in the plaintiff town, such domicile must be presumed to continue unless a subsequent change was proved.

11. Starks *v.* New Portland, 47 Me. 183; Bowdoinham *v.* Phippsburg, 63 Me. 497; Boylston *v.* Groton, 4 Gray (Mass.) 282; Oakham *v.* Sutton, 13 Met. (Mass.) 192; Boston *v.* Weymouth, 4 Cush. (Mass.) 538; Worcester *v.* Wilbraham, 13 Gray (Mass.) 586; Hallowell *v.* Augusta, 52 Me. 216.

12. Abington *v.* Duxbury, 105 Mass. 287. The court said that the defendant in such case is not confined like the plaintiff to a single proposition. "They may set up, and support by testimony, any number of propositions, to establish alternatively a settlement in either of several towns, or in either of several modes of acquisition. If the evidence is insufficient or doubtful upon the proposition which, under the statute, would control, the defense may still prevail upon any other proposition establishing a settlement in an alternative mode."

13. "The real issue was, that a settlement was gained at some time; the precise time and mode of its acquisition were only incidental to the main inquiry. It was competent for the plaintiffs to present their case in various aspects and different alternatives, so that, if they failed in maintaining their case upon one theory, they might have recourse to another." Hingham *v.* South Scituate, 7 Gray (Mass.) 229.

b. *Place of Birth.* — The place of a child's birth is presumptively the place of its settlement,[14] but this presumption is not conclusive.[15] Neither the fact that the pauper was first known at the age of four years residing with his parents, nor that his first recollection was of being in a certain place, furnishes any legal presumption that he was born there.[16]

c. *Residence.* — **(1.) The Fact of Residence.** — Where settlement of a pauper is claimed to have been gained by the requisite residence, the party asserting that fact must establish it.[17]

14. Sterling *v.* Plainfield, 4 Conn. 114; Windham *v.* Lebanon, 51 Conn. 319.

The place where a child is born is *prima facie* the settlement of legitimate children. It is only so, however, until the settlement to which the child is entitled by parentage is discovered. But this does not apply to illegitimate children. The settlement of such children is presumptively where they are born until they gain a settlement for themselves. Delavergne *v.* Noxon, 14 Johns. (N. Y.) 334.

15. Bern *v.* Knox, 6 Cow. (N. Y.) 433.

In Shrewsbury *v.* Holmdel, 42 N. J. L. 373, where the court said: "Such *prima facie* proof is overcome by showing that the settlement of the father was in a different place at the time of the birth, for such settlement of the father instantly communicated itself to the child, and became its settlement. The proof of the father's settlement, which will overcome the *prima facie* proof of the settlement of the child, springing from the fact of birth, may be made through proof of apprenticeship served, the ownership of real estate, immigration, service under indenture, settlement derived from parents, or by proof of *his place of birth,* which latter, if not overcome by other proof, will as effectually establish the fact as proof of either of the other modes of acquiring a settlement." It was insisted in this case, however, that as against *prima facie* proof afforded by the fact of birth, nothing less than a settlement acquired by the father, can prevail. But the court said: "However ingenious the argument based upon this position may be, I know of no such qualification of the general rule above stated. It is a question merely whether the father had a settlement which attached to the son, without regard to how such settlement originated, or to the manner of its proof, provided it be established by competent evidence. If the father were the pauper in this case, upon the proof adduced, there can be no doubt that he would be declared settled where he was born, upon the mere proof of such birth; that proof being in the case established the question as to him, and that being settled, it becomes of no consequence where the son was born. It is only when the settlement of the father or mother cannot be ascertained that the place of birth of the child becomes an important inquiry."

This presumption may be met and overcome by proof that the mother had a settlement elsewhere. Bern *v.* Knox, 6 Cow. (N. Y.) 433.

16. Union *v.* Plainfield, 39 Conn. 563.

17. Ripley *v.* Hebron, 60 Me. 379.

In Corinth *v.* Lincoln, 34 Me. 310, the defendant did not deny the settlement of the pauper in the defendant town derived from her father who resided there when the town was incorporated, but the ground taken in defense was that the pauper moved into the plaintiff town after she became of age, and lived there for the space of five years. It was held that this defense must be sustained by proof. See also Etna *v.* Brewer, 78 Me. 377, 5 Atl. 884.

In New Bedford *v.* Middleborough, 16 Gray (Mass.) 295, an action against a town, a part of which had been made a new town by a statute providing "that the said towns shall hereafter be respectively liable for the support of all persons relieved as

Habitation of Wife. — Evidence of the habitation of a wife and family is *prima facie* evidence of the residence of the husband,[18] but is not conclusive.[19]

(2.) Continuity of Residence. — Where it is shown that a person was residing at a certain place at a certain time, the presumption ordinarily is that such residence was a continuing one.[20] But where a break in the actual residence is shown, the party asserting settlement by residence must show such a state of facts as will prove a legal residence notwithstanding the break.[21] In the case of an unexplained absence, however, followed by return, the intention of returning has been presumed, especially where there are *indicia* of such intention.[22]

d. *Payment of Taxes.* — The burden of proof as to the fact of payment of taxes is upon the party alleging that a settlement was acquired in that manner.[23]

paupers, whose settlement was gained by or derived from a residence within their respective limits," to recover for the support of a pauper who had a settlement in the old town, it was held that the plaintiff had the burden of proof to show that such settlement was acquired by a residence within the territory which remained, after the division, a part of the town sued.

Where Mere Residence Without Registration Is Ineffectual to give a settlement, it is incumbent upon a party claiming a settlement to have been acquired in that mode to show affirmatively the fact of registration as well as of residence. Newfane *v.* Dummerston, 34 Vt. 184.

18. Brewer *v.* Linnæus, 36 Me. 428; Topsham *v.* Lewiston, 74 Me. 236, 43 Am. Rep. 584; Hardwick *v.* Raynham, 14 Mass. 363.

19. *England.* — West Ham Union *v.* Cardiff Union, (1895) 1 Q. B. 766.

Maine. — Bangor *v.* Frankfort, 85 Me. 126, 26 Atl. 1088; Woodstock *v.* Canton, 91 Me. 62, 39 Atl. 281; Greene *v.* Windham, 13 Me. 225; Burlington *v.* Swanville, 64 Me. 78.

Massachusetts. — Cambridge *v.* Charleston, 13 Mass. 501; Fitchburg *v.* Winchendon, 4 Cush. 190.

New York. — Syracuse *v.* Onondaga County, 25 Misc. 371, 55 N. Y. Supp. 634.

20. For what period of time such presumption would last must depend upon all the circumstances of the particular case. Greenfield *v.* Camden, 74 Me. 56.

21. When a pauper having no family leaves a town where he has resided, leaving no house or place therein to which he has any right to return, and having no effects save the clothes he wears, the law does not presume that he intends a temporary absence, and has a continuing purpose to retain a home in such town, and return to it at some future period. Nor does the law presume that he has no such intention. But it leaves it to the jury to determine upon all the evidential circumstances and probabilities in the case, what his intention in fact was. It is not necessary that there should be any distinct declaration of intention proved, but it may be latent in the mind of the pauper. Ripley *v.* Hebron, 60 Me. 379.

If a person goes from the place of his home to another place for the purpose of laboring in the other place, there is not a presumption of law that he intends to return to the former place when his laboring has ended. There may be some presumption of fact to that effect, an argumentative presumption, stronger or weaker, according as it may be, in the belief of the jury, supported by circumstances. Belmont *v.* Vinalhaven, 82 Me. 524, 20 Atl. 89.

22. Such as Leaving Behind Personal Effects. — Brewer *v.* Linnæus, 36 Me. 428.

23. Attleborough *v.* Middleborough, 10 Pick. (Mass.) 378; Dana *v.*

c. *Marriage.* — Where marriage is set up in order to establish settlement, proof of due solemnization of a marriage at the time alleged, with subsequent cohabitation, is sufficient; it is not necessary that further evidence be given to establish affirmatively that the parties were capable of contracting a legal marriage at the time.[24]

Proof of a Woman's Marriage is not sufficient to create a presumption of a change of her settlement; it must also be shown that the husband had a settlement.[25]

Petersham, 107 Mass. 598; Haverhill *v.* Orange, 47 N. H. 273; Boston *v.* Weymouth, 4 Cush. (Mass.) 538.

Where the payment of all taxes duly assessed is an essential element of a pauper settlement, the party alleging such settlement has the burden of proof, and must show either that taxes were not assessed, or that taxes assessed were paid. Lisbon *v.* Lyman, 49 N. H. 553, holding further that the burden of proof in this respect is not changed by the fact that the subject-matter is peculiarly within the knowledge of the other party, or by the inconvenience of furnishing evidence.

Where a pauper has presumptively acquired a settlement in a town by an acknowledged residence therein of the requisite time, unless he has neglected or refused during that time to pay any taxes assessed upon him after legal demand, the burden is upon the town, in order to avoid the effect of such residence, to prove that the pauper is a tax debtor. Middletown *v.* Berlin, 18 Conn. 189.

On the question between two towns whether a pauper has acquired a settlement in one of them by a residence therein for ten years, and the payment of all taxes for any five years within that period, the fact that a highway tax assessed on him one year was not included in his tax bill of the ensuing year raises a presumption that it was paid, although this presumption may be rebutted by evidence to the contrary. Attleborough *v.* Middleborough, 10 Pick. (Mass.) 378.

24. Harrison *v.* Lincoln, 48 Me. 205. The court said: "The law will assume in the absence of all other evidence and facts that the marriage regularly solemnized is valid, because it is not to be assumed that either of the parties have been guilty of bigamy, which is a crime; and because it would require proof extending over the whole adult lives of the parties and their acts to negative the possibility of a former marriage." See generally the article "MARRIAGE," Vol. VIII.

Where the settlement of a pauper is claimed to be derived from his father, evidence of the father's marriage is essential, but where an actual descent is proved, slight evidence such as the reputed marriage of the parties, even from the pauper himself, is sufficient evidence to establish that fact. Landaff *v.* Atkinson, 8 N. H. 532.

In an action by one town against another for the support of a pauper who was the illegitimate son of a married woman, the plaintiff town having proved her settlement to have been originally in the defendant town the burden is on the defendant town to show that the husband had a settlement in some other town in the commonwealth, and so that her settlement was changed by her marriage; it is not incumbent on the plaintiffs to prove that the husband either had his settlement in the defendant town or had no settlement in the commonwealth. Randolph *v.* Easton, 23 Pick. (Mass.) 242, distinguishing Wilmington *v.* Burlington, 4 Pick. (Mass.) 174.

25. Windham *v.* Lebanon, 51 Conn. 319.

Proof that an insane or poor person has resided more than one year in a county is *prima facie* sufficient to establish his settlement in that county; but if it is shown that such person is a married woman, it may be necessary to prove further that her husband has had his residence in that county, or else that she has been de-

f. *Military Settlement.* — Sometimes by statute, notably in Massachusetts, a military settlement may be acquired; and where such a settlement is sought to be established not only must enlistment and mustering in be shown, but it must also be shown that the pauper became disabled from disease contracted while engaged in service.[26]

B. Preventing Acquirement of Settlement. — a. *Furnishing Pauper Supplies.* — Where it is claimed that acquirement of settlement was prevented because of pauper supplies having been furnished, the party so claiming has the burden of proof.[27] And it

serted by him. Scott County *v.* Polk County, 61 Iowa 616, 14 N. W. 206, 16 N. W. 726.

In West Greenwich *v.* Warwick, 4 R. I. 136, a controversy between two towns concerning the settlement of a female pauper born in one of them but married to a man proved to have once had a settlement in Massachusetts, it was held unnecessary for the town in which the pauper was born to prove that the husband was settled in another town in Rhode Island, since by the law of Massachusetts the husband retained his original settlement there until he had gained another settlement in Massachusetts.

26. South Scituate *v.* Scituate, 155 Mass. 428, 29 N. E. 639. In this case it appeared that the soldier at his enlistment was passed by the examining surgeon but shortly thereafter was found to be suffering from epilepsy and was discharged. His testimony and that of various other witnesses who had known him before his enlistment showed beyond a question that the disease existed before his enlistment, and it was held that the case was properly withdrawn from the jury and a verdict ordered for the defendant.

In Newburyport *v.* Waltham, 150 Mass. 311, 23 N. E. 46, it was held that the evidence from the certificate of the examining surgeon, made at the time of the enlistment of the soldier in question as a part of the quota of Waltham, and from the surgeon's certificate upon which he was discharged from the service of the United States at a subsequent period, was sufficient to establish the fact that the soldier became disabled while serving as a part of that quota, and hence had acquired military settlement in that town. See also Waltham *v.* Newburyport, 150 Mass. 569, 23 N. E. 379.

27. A town sued for supplies furnished to a pauper, claiming that the residence of the pauper, relied upon as giving him a settlement therein, did not have that effect because of pauper supplies furnished during the time, has the burden of proof to establish the fact of distress and need and that the supplies were furnished as alleged. Corinna *v.* Hartland, 70 Me. 355.

In Maine by statute supplies furnished to a soldier, in order to operate as pauper supplies and to prevent his gaining a new pauper settlement, must have been furnished to relieve distress not occasioned "in consequence of an injury sustained in the service." In Augusta *v.* Mercer, 80 Me. 122, 13 Atl. 401, it was admitted that the soldier had a legal settlement in defendant town prior to June 5, 1877, and that since that date he had resided in plaintiff city; so that, unless he received supplies as a pauper from the plaintiff city during his residence there, so as to interrupt any five consecutive years of it, he had gained a legal settlement there. The evidence authorized the jury to find that supplies furnished by the plaintiff city in May and June, 1880, were not to relieve distress "in consequence of an injury sustained in the service," and therefore operated to interrupt any five consecutive years' residence of the soldier in plaintiff city prior to the supplies sued for, furnished in March and April, 1885. It was held that the burden to show the contrary was upon the defendant town.

In Belmont *v.* Morrill, 73 Me. 231, where the defendant town denied settlement of the pauper in it, and as-

is not enough for this purpose, to show merely that supplies have been furnished by the town; it must also appear to the satisfaction of the jury that the person supplied, or his family, was in need of immediate relief, was so destitute of the necessaries of life that without aid from some quarter they would probably have suffered from the lack thereof.[28] Where it is claimed that the relief so furnished was furnished collusively for the purpose of preventing a settlement being gained, the party so claiming has the burden of proof.[29]

b. *Warning Out.* — The burden of proving the warning out of an inhabitant of a town under a settlement statute is on the party

serted that during the five year period pauper supplies had been furnished, the court said: "The ruling of the court that upon this last issue, whether, supposing the father's residence in Belmont, in 1836, had been long enough to give him a legal settlement there, it had been interrupted by receiving pauper supplies, or not, the burden of proof was on the defendants, seems to be in accordance with the opinion of the court in Corinna *v.* Hartland, 70 Maine, 355. We understand it to mean no more than this: that when the plaintiffs undertook to prove a pauper settlement acquired by the father in the sixth statutory mode, proof of residence in the ordinary way, without unusual circumstances showing want or destitution, without apparent sign of the need or of the furnishing of supplies, raised a certain presumption of fact that none were furnished, which was as far as the plaintiffs need go towards proving a negative, till the defendants overcame this presumption by evidence. To require the plaintiffs to prove an absolute negative might be impracticable. If the residence for the five years is proved, and there are no circumstances which indicate that relief was needed or given, it is sufficient, till the adverse party, alleging that supplies were furnished, offers some evidence of the fact."

28. Veazie *v.* Chester, 53 Me. 29. The court said: "When the rights and obligations of another town may be affected by the act, the law requires that a case of necessity and need should be established before the supplies are furnished, and those rights or obligations changed. They must be furnished because the immediate wants of the family required them to prevent suffering, and not because the town could thus prevent the acquisition of a settlement by the pauper. Relief furnished and accepted when the family or person was not in fact in need of them would not affect the settlement."

29. In New Portland *v.* Kingfield, 55 Me. 172, an action by one town against another to recover for supplies furnished to an alleged pauper, the defendants had introduced testimony tending to prove that the supplies furnished by the plaintiffs, May 1, 1861, were collusively furnished. It was held that the presiding judge properly instructed the jury that, as the plaintiff's testimony showed that the alleged paupers had had their home in the plaintiff town since May, 1856, the burden of proof was on the plaintiffs to show that, before the lapse of five years from that time they had become destitute, and in need of relief, and had received necessary supplies as paupers; otherwise their settlement would be in the plaintiff town; that if the plaintiffs had satisfied the jury of these facts, and that such supplies were furnished and received, the presumption was, in the absence of evidence to the contrary, that the transaction was in good faith; and that, if the defendants claimed that there was bad faith on the part of the overseers of the plaintiffs, and that the supplies were furnished collusively and by the contrivance of the overseers to prevent their gaining a settlement in the plaintiff town, the burden of proof was upon the defendants to show it.

claiming the benefit of such proceeding.[30] And where the statute requires a warning out process served upon a pauper, to be recorded within a certain time from the time the pauper commenced his residence, the burden is upon the party relying upon such process to prevent a settlement, to show that it was so recorded.[31]

2. Mode of Proof. — A. Acquirement of Settlement. — a. *Presumptive or Disputable Evidence.* — **(1.) Generally.** — While generally in settlement cases the same rules of evidence that govern elsewhere must be adhered to,[32] it should be borne in mind that the question whether a person has acquired a settlement in a certain place, except perhaps in those cases where it is not open to investigation by reason of some matter of estoppel,[33] is not an independent fact capable of being directly established, but is an ultimate fact to be determined by proof of the matters whose existence the law makes necessary to the acquirement of a settlement, such as place of birth, marriage, residence, etc.

Receiving State Aid. — On the issue of whether a pauper had or had not a settlement in a particular town, evidence that the pauper was at the time receiving aid as such from the state is not competent.[34]

30. If the Warning Out Is Not Shown by the party objecting to the settlement, it is presumed not to exist. Fayton *v.* Richmond, 25 Vt. 446.

The Time of Residence of a Pauper within a town previous to his being warned out must be clearly shown either by the warning or return; otherwise the warning is void. Jaffrey *v.* Mount Vernon, 8 N. H. 436.

31. Pawlet *v.* Sandgate, 17 Vt. 619, *holding* further that the court would not presume that the warning was so recorded from the fact that a copy was produced on the trial certified by the town clerk to be "a true copy of record," and which has upon it a copy of a certificate, made upon the original, at the time it was returned to the clerk's office, signed by the then clerk and certifying that the warning was "received into record," and bearing date at a time within the specified period; that this was not such a record as the law contemplated.

Return. — Where a warning to an individual to leave town, issued in accordance with a statute, was duly served and subsequently found in the clerk's office in a regular file purporting to contain papers returned within the period required by the statute, this is *prima facie* evidence of a seasonable return. Milford *v.* Wilton, 8 N. H. 420.

32. West Buffaloe Twp. *v.* Walker Twp., 7 Watts (Pa.) 171.

Deed of Indenture. — Where it is claimed that a pauper had acquired a right of settlement by an inhabitancy or service under a deed of indenture, the indenture itself is the best evidence of its contents and ought to be produced, or its nonproduction accounted for before secondary evidence should be received. West Buffaloe Twp. *v.* Walker Twp., 7 Watts (Pa.) 171.

Leasing Property. — For the purpose of showing that a settlement claimed to have been acquired by a leasing calling for payment of the rental in services, it is competent to show that the contract was not complied with, and hence a settlement was not thereby gained. Laporte Borough *v.* Hillsgrove Twp., 95 Pa. St. 269.

33. See *infra*, IV. 2. A, b.

34. Franklin *v.* Fuller, 105 Mass. 336, where the court said: "The utmost effect which can be given to the fact that a pauper receives aid from the state is that the town and state authorities have decided that he has no settlement in the commonwealth

(2.) **Place of Birth.** — The place of a person's birth is not a question of pedigree, and when material in a settlement case, cannot be proved by hearsay evidence.[35]

(3.) **Through Marriage.** — A town, in which a married woman is alleged to have her settlement, may show that her husband has a settlement in the state elsewhere than with them, derived from his mother, without first proving that he had derived no settlement from his father.[36]

(4.) **Residence.** — (A.) GENERALLY. — Whether or not a person is or was a resident of a certain place upon a particular day, or during a given period of time, thereby acquiring a settlement in such place, is a fact which may be shown by circumstantial or presumptive evidence.[37] Thus evidence showing that he voted at the place in

known to them. Now the act of furnishing aid, and the decision of the authorities which precedes it, are as to this defendant strictly *res inter alios*, and under a well established rule of law not admissible in evidence against him. The same principle would be applicable as if the same plaintiffs had offered evidence that the pauper had received aid from a neighboring town, claiming that the inference was that she had a settlement in such town. The obvious answer of the defendant would be that it was a transaction between third persons to which he was not a party, and is not admissible in evidence against him. For the same reason, even a judgment of court, in a suit to which the defendant was not a party, which determined that the settlement of the pauper was in another town, so that she had no settlement in the commonwealth, would not be admissible against him."

35. Evidence of the Declarations of a Deceased Person is admissible in settlement cases, to show when, but not where, such person was born. Greenfield *v.* Camden, 74 Me. 56. See also Wilmington *v.* Burlington, 4 Pick. (Mass.) 174, where the court said: "The reason of the distinction probably is that where a person is treated as a child for many years, there is rather a course of conduct than a simple declaration showing the relationship; whereas the question of birthplace presents a distinct fact. This reason, however, is not altogether satisfactory. But the rule of evidence appears to be established, and it has been sanctioned by this court in a case in which the declaration of an alien as to the place of his birth was rejected. It is better to uphold the rules of evidence than to admit testimony of a doubtful character."

Declarations of Father. — Upon an issue as to where a pauper was born, evidence of declarations by the pauper's father, although since deceased, as to the place of his birth, is not admissible. Union *v.* Plainfield, 39 Conn. 563. The court said: "This is not a question of pedigree. There is no doubt about his parentage. It is a simple question of locality—where was the pauper born? The place of one's birth cannot be proved by hearsay."

Entry in Family Bible. — Upon the issue as to where a pauper was born, an entry in a family bible belonging to and kept by his father, stating the place of his birth, is not competent. Union *v.* Plainfield, 39 Conn. 563.

36. Abington *v.* Duxbury, 105 Mass. 287.

37. The fact that a pauper's ancestor lived and had his home upon the territory of a town upon the day of its incorporation, thereby acquiring his settlement in such town, may be shown by circumstantial and presumptive evidence. Greenfield *v.* Camden, 74 Me. 56.

In Reading *v.* Weathersfield, 30 Vt. 504, it was held that if a town exercised actual and exclusive jurisdiction over land the resident thereon will gain a settlement in that town, although the land is not within its charter limits, and that evidence that

question is admissible.[38] But the fact that a person resided in a certain place at a given time is no evidence that he resided there many years previously.[39]

The Fact That Old Inhabitants Had Never Known the pauper is competent to show that he never had a settlement in that town.[40]

Animus Manendi. — The question whether or not a pauper has acquired a settlement by residence, is, at least so far as he is concerned, to be determined by his intention at the time of his becoming an inhabitant of the place in question, that is, by the *animus manendi;* and this may be established by any competent evidence, direct or indirect.[41]

the town has for more than seven years levied and collected taxes of a resident upon such land, caused his children to be returned as belonging to one of its school districts and allowed him to vote at town meetings, is competent to show that such jurisdiction has been exercised as will give him a settlement in the town.

In proving the settlement of a pauper, evidence that the person from whom it is derived was in possession of real estate until he died, and that those who claimed his title have since been in the undisturbed occupancy of it, is competent to show his ownership. Thornton *v.* Campton, 17 N. H. 338.

38. East Livermore *v.* Farmington, 74 Me. 154.

39. In Hingham *v.* South Scituate, 7 Gray (Mass.) 229, it was held that evidence showing that the person from whom the pauper derived his settlement had lived in the defendant town in 1742 was no evidence of his having lived there in 1695. The court said: "The law presumes that a fact, continuous in its nature and character, like domicile possession or seisin, when once established by proof, continues; and, in the absence of evidence to the contrary, legally infers therefrom its subsequent existence. But we know of no rule of law which permits us to reason in an inverse order, and to draw from proof of the existence of present facts any inference or presumption that the same facts existed many years previously."

Storing Personal Effects. — Evidence as to the place where an unmarried person without a permanent home has his personal effects stored may be received. Berlin *v.* Worcester, 50 Vt. 23; Kirby *v.* Waterford, 14 Vt. 414; Newbury *v.* Topsham, 7 Vt. 407.

40. Thomas *v.* Ross, 8 Wend. (N. Y.) 672.

41. Ripley *v.* Hebron, 60 Me. 379; Wayne *v.* Greene, 21 Me. 357.

In Ripley *v.* Hebron, 60 Me. 379, where the question was whether the pauper had had his home for five consecutive years between 1860 and 1867 in the plaintiff town, the question turned mainly on the facts connected with an undisputed absence of about three weeks in 1863, in another town, where the pauper went and remained, and of another absence of a few days later, in the same year, it was held competent for the plaintiff town to show that the pauper came to the witness's house in the plaintiff town and asked to be permitted to stay awhile, which the witness declined to allow, giving his reasons therefor; and that it was also held proper to permit the same witness to testify that while the pauper was at his house another person proposed to the pauper that the latter should come and live with him on certain conditions, which the pauper did. The court said: "This is but evidence of a contract made between two parties—distinct and definite. It is not hearsay, nor mere naked declaration. It is certainly unobjectionable to prove under what agreement of hire or employment, or terms as to time or as to board, a pauper goes into a town, where the very question is as to the nature of his residence there, and whether temporary or not." It was further held to be unobjectionable to permit the witness to state whether at the time the pauper left his house there

Animus Revertendi. — So, too, whether or not there existed an intention of returning at the time of the absence, may be gathered from the circumstances surrounding the act.[42]

(B.) Recitals in Deeds, Wills, Etc. — The designation of the present place of residence of the maker thereof in a solemn instrument, such as a deed or will, is competent evidence of the fact recited.[43] And this rule has been held to apply to a writ.[44]

(C.) Acts and Declarations of the Pauper. — (a.) *Generally.* — The verbal declarations of the pauper himself, even though he be dead, are not admissible to establish the independent fact of residence.[45]

was any understanding between them, and any authority given to the pauper to return to his house.

42. Deer Isle *v.* Winterport, 87 Me. 37, 32 Atl. 718; Wayne *v.* Green, 21 Me. 357.

43. Ward *v.* Oxford, 8 Pick. (Mass.) 476, where the court said: "We consider this species of evidence as different from the mere verbal declaration of a pauper as to his residence, which has been ruled not to be evidence. The designation of his residence in a solemn instrument, such as a deed or a will, is in the nature of a fact rather than a declaration, being made when there was no controversy, and when no possible interest could exist to give a false designation. But this evidence, which is merely presumptive, being admitted, it was proper to let the other party into proof of facts and circumstances, which would have a tendency to rebut the presumption arising from it." See also Bridgewater *v.* West Bridgewater, 7 Pick. (Mass.) 191.

The recital in an ancient deed that the grantor was of a certain place, is competent evidence of his residence in such place at the date of the deed. It is an act done *ante litem motam,* a part of the *res gestae,* the actors in which are dead. Greenfield v. Camden, 74 Me. 56.

44. In Oldtown *v.* Shapliegh, 33 Me. 278, in order to prove in what town was the residence of a pauper on a particular day, twenty-two years before the trial, a writ drawn and dated on that day, in which he was the plaintiff and his residence was named, was allowed to be read in evidence, although it was never served, and although the attorney who drew it had no knowledge of the residence, except as stated to him by the pauper when it was drawn. The court said: "The writ being made at the request of and for the pauper, while he was present with the attorney, everything therein is supposed to have been by his direction or his subsequent approval; and the writ is a document of as great solemnity as would be a deed made at the time, or a notice to citizens to attend school district meetings. It was made in the ordinary course of business of the attorney, and the facts introduced from the testimony of the attorney and the docket, in which he had entered the memorandum of the suit, without objection, certainly raises a strong presumption that the writ itself would contain a statement of the residence of the one who caused it to be made, and that such statement would be true. The satisfaction to the mind, to be expected from an inspection of the writ, under such a chain of facts might be very full and clear; much more so than the recollection simply of the pauper himself. It is a species of evidence, upon the point of residence of the pauper, which would not probably mislead, and exhibits a fact which could not be shown in any other mode with any degree of certainty. The reasons for its introduction are certainly as strong as those given for the admission of minutes and entries made by deceased persons in the cases cited, and may be regarded as somewhat analogous. The writ as evidence, in connection with other facts in the case, falls within the principle applicable to wills, deeds and other solemn instruments, and we think it was equally admissible on the question of domicile."

45. West Buffalo Twp. *v.* Walker Twp., 7 Watts (Pa.) 171. See also King *v.* Ferry Frystone, 2 East

(b.) *Animus Manendi.* — But as heretofore stated, the question whether a settlement has been acquired by residence is, as to the pauper, one of intention on his part at the time of commencing his inhabitancy, and on this point evidence of acts and declarations by him when part of the *res gestae* may be received,[46] even though he

(Eng.) 54; King *v.* Abergvilly, 2 East (Eng.) 63.

"**The Pauper, in Questions of Settlement, Is Not Regarded as a Party to the Contest;** hence his admissions or declarations are not admissible more than that of any other person. He, however, may be examined as a witness in the same manner as other persons, and in this way only can his narrative be made evidence. In short, the same rules of evidence must be adhered to in settlement cases that govern in others." West Buffaloe Twp. *v.* Walker Twp., 7 Watts (Pa.) 171.

46. New Milford *v.* Sherman, 21 Conn. 101; Cornville *v.* Brighton, 39 Me. 333; Wayne *v.* Greene, 21 Me. 357; Gorham *v.* Canton, 5 Me. 266, 17 Am. Dec. 231.

Upon the question as to the settlement of a pauper, his declarations are admissible in evidence to illustrate any acts done by him tending to establish the issue. Thus, when about going from the town where he was at work to the town where his former settlement was, his declarations of his purpose in making the journey are admissible. Cornville *v.* Brighton, 39 Me. 333. In this case the original home of the pauper was in Brighton and the question at issue was whether he had abandoned that home. He was found at different times when out of that town returning thither. It was urged that it was uncertain for what purpose he was returning, that it might be on temporary business of his own, or on the business of his employer, and hence the fact of his going to Brighton whilst he was residing in Cornville did not necessarily show that he was going to Brighton as his home. But the court said: "This is very true. But the act is entirely consistent with such intention and is evidence pertinent to prove that fact, and the only object of admitting the declarations is to illustrate the intention with which the act was done. If it thus appeared that the act had reference to his place of permanent residence, his home, it became material to the issue and was legitimate evidence for the plaintiffs; if not, then the whole transaction became immaterial or resulted in favor of the defendants. The act itself being pertinent and proper to be proved, the force and effect to be given to it would depend upon the intent with which it was performed. As one legitimate mode of ascertaining that intention, resort is had to the declarations of the party made at the time and in explanation thereof."

In Belmont *v.* Vinalhaven, 82 Me. 524, 20 Atl. 89, one of the issues was, whether the pauper who went from Belmont to Vinalhaven in 1860, gained a settlement in the latter town by residing there five years, continuously, between 1860 and 1866. Between 1866 and 1880 his residence was not of a fixed character, living as he did at different periods in different places. It was held that evidence of declarations made by him between 1880 and 1884, as he was going from or back to Belmont, to the effect that he was going from, or to, his home there, was not admissible as tending to show his home was in Belmont at so remote a period as that prior to 1866; but that evidence of such declarations made during the five-year period, or soon thereafter, the conditions of his residence having remained unchanged, was admissible. It was further held, however, that the pauper's declarations made after 1880 with acts done in pursuance thereof, tending to show a disposition on his part to gain a settlement in Vinalhaven, and avoid one in Belmont, implying thereby that his settlement prior thereto had not been in Vinalhaven, were admissible to show his bias and prejudice when testifying as a witness to his intention, between 1860 and 1866, of

is alive at the time of the trial.[47] But declarations not part of the *res gestae,* are not admissible.[48]

(c.) *Animus Revertendi.* — Again, where the pauper has apparently

making his permanent home in Vinalhaven; it being admitted that no new settlement was ever acquired by him after 1866. The court said: "It must be considered that this kind of evidence may have great weight in pauper cases. In close cases, dependent very much upon what may have been the intent of the pauper as to residence, his own testimony, often biased by his wishes and whims at the time he testifies, is apt to have a very controlling effect, unless overcome by other evidence. It is difficult to counteract the pauper's influence as a witness. To do so, a good many acts and expressions of his, when a part of the *res gestae,* have to be woven together, making a web illustrating the pauper's intention, instead of taking his testimony for it. And such evidence should be received with reasonable liberality."

47. In Baring *v.* Calais, 11 Me. 463, although the pauper was present in court during the trial he was not called as a witness, and the defendant offered to give in evidence certain declarations made by him at different times and on different occasions, within a period of five years. The court said: "In *one view* of the subject, his declarations are not so good as his testimony; the declarations were made by him when he was not *on oath,* and so were not the best evidence in the power of the party to produce. They are not like the declarations of the assignee of a bond in an action upon the bond, or of a deputy sheriff for whose misfeasance or neglect an action is brought against the sheriff; for in both those cases the person's declarations are against his interest; and neither of them can be admitted as a witness. If the declarations of the pauper in the case under consideration are legally admissible, it must be on some other principle; that is, because they are to be regarded *as facts* and parts of the *res gestae.* If they are so to be regarded, then the person who testifies that he heard the declarations made by the pauper, is as good a witness to prove them so made, as the pauper."

48. As when made after his actual habitation in the place has ended. Dorr *v.* Seneca, 74 Ill. 101; Belmont *v.* Vinalhaven, 82 Me. 524; Derby *v.* Salem, 30 Vt. 722.

In Corinth *v.* Lincoln, 34 Me. 310, the pauper had in 1829 derived from her father a settlement in the defendant town. In 1839 being then of age, she went from Fayette, where she had been residing, to the home of her father, who then lived in the plaintiff town, and there made his house her stopping place. After thus going to the plaintiff town she labored for wages at different places in that and in neighboring towns, occasionally returning to her father's home, where she sometimes left such articles of personal property as she did not have occasion to carry with her. The defendants offered evidence of declarations by the pauper made when going from her places of labor to her father's residence to prove that she considered her home to be at his house. In holding that this evidence was properly rejected the court said: "They were not a part of the *res gestae;* were not acts in the least indicative of a design at that time to change her residence from one town to another, or as going into the town of Corinth as the place of her home. Such declarations could have no greater effect, than those made, when she might be passing to and from church or public meetings, or in going from one part to the other of the house or appendages, where she was at the time boarding. The act itself not being one expressive in the least, of an intention of living in one town rather than another, but only indicating to what place in the town she might be going, either as her permanent place of abode or otherwise, for that particular time, the declarations accompanying such acts could not on any principle be held admissible."

interrupted the continuity of his residence by an absence or change of residence, the question whether the absence or change is permanent is one of intention on his part, which may be gathered from evidence of declarations by him accompanying the act in question,[49] although such evidence is not conclusive.[50] But declarations made after his return, as to his intention at the time of the removal, are not admissible.[51] And his declarations while about his ordinary business, as to his future intentions or expectations, can not be received in evidence.[52]

49. Richmond *v.* Thomaston, 38 Me. 232; Burnham *v.* Pittsfield, 68 Me. 580; North Yarmouth *v.* West Gardiner, 58 Me. 207, 4 Am. Rep. 279; Carnoe *v.* Freetown, 9 Gray (Mass.) 357; Mead *v.* Boxborough, 11 Cush. (Mass.) 362.

Upon the question of settlement, declarations of a pauper accompanying the act of his going from one town to another indicating his purpose to reside there permanently are admissible. Corinth *v.* Lincoln, 34 Me. 310.

In Etna *v.* Brewer, 78 Me. 377, 5 Atl. 884, the court said: "The issue was whether the pauper's home had ceased to exist in the plaintiff town. The question being one in part of intention, how could that intention be shown better than by his declarations communicated at the time? Such declarations are a part of the *res gestae*. They accompany an act, the nature, object or motive of which is a proper subject of inquiry. They are verbal acts, and as such are legal evidence of his intention."

In New Milford *v.* Sherman, 21 Conn. 101, the plaintiff to prove settlement of the pauper in the defendant town, offered, in connection with other evidence, declarations of the pauper, made while leaving the residence of one in the plaintiff town for whom he had been working and while traveling towards the defendant town, that he was "going home to" the defendant town; it was held that the declarations were admissible as showing his mind and conduct in relation to his domicile.

In Thomaston *v.* St. George, 17 Me. 117, it was held proper to charge the jury that in determining whether a pauper has gained a settlement by a residence of five years in another town they are to gather the intentions of the pauper as to a change of domicile from his declarations, which, however, are not conclusive evidence on that point, and from his acts all taken in connection with each other.

In Deer Isle *v.* Winterport, 87 Me. 37, 32 Atl. 718. The court said: "In seeking to determine whether a person has left town for a simple visit, or for a change of home, is not his prior disposition of his house, furniture and household goods of some evidential value? We think there can be no doubt of the relevancy and materiality of the one act to explain the other. But, if the prior act was properly in evidence (as it clearly was) it was open to either party to introduce evidence to explain the character, purpose or intent of that act. If the furniture was soon afterward moved to Deer Isle, that would indicate one purpose of its original packing. If, instead, it was afterward set up in another house in Winterport, that would indicate another purpose. So, if at the time, the pauper said he was breaking up housekeeping and storing his furniture to be sent to a new home in Deer Isle, that would be explanatory of the purpose. If, on the other hand, he said he was storing the furniture until he could find another house in Winterport, that would also be explanatory of the purpose."

50. Wayne *v.* Green, 21 Me. 357; Thomaston *v.* St. George, 17 Me. 117.

51. Salem *v.* Lynn, 13 Met. (Mass.) 544.

52. Richmond *v.* Thomaston, 38 Me. 232. In this case the paupers were married but had no habitation of their own. The husband was a common mariner and the wife lived out in families as a servant. In the fall of 1846 the husband shipped as a seaman on a voyage to New Orleans

(D.) Acts and Declarations of Public Officers. — (a.) *Generally.* The acts of officers of the town wherein settlement is claimed, recognizing and treating the person in question as an inhabitant thereof, may be shown;[53] such as placing his name on the list of voters,[54] warning him to attend meetings[55] and other acts of like nature.

The Mere Acts and Opinions of one of the selectmen of a town are not competent evidence on the question of settlement, without proof of his authority to act for the town.[56]

and his wife remained in Thomaston. About the time of his departure and during the early part of the voyage the pauper had made declarations as to his future hopes and intentions as to business and residence on his return from the voyage, but it was held that evidence of those declarations was properly excluded.

Declarations by a pauper whilst temporarily in a town away from the place of his residence indicating an intention to remove to and reside in still another town not having been carried into execution are not admissible in evidence. Such declarations are wholly disconnected with any act and are not any part of the *res gestae*. Bangor *v.* Brewer, 47 Me. 97.

53. A description, in a town record, of land laid out in 1696, as "adjoining to the fence of C.'s home pasture," is admissible, against a town subsequently created out of part of that town, to prove that C. then dwelt in that part of the town in which the land was situated. Hingham *v.* South Scituate, 7 Gray (Mass.) 229.

In Fort Ann *v.* Kingsbury, 14 Johns. (N. Y.) 365, where the justices and overseers of the poor of the defendant town had seized the property of the pauper in question under the statute in force at that time on the ground of his having run away leaving his wife and children a charge upon the town, it was held that this constituted an admission of his having a legal settlement in that town.

In a pauper suit, the ancient books of records belonging to a town which is a party to the litigation, reciting facts bearing upon the residence of the pauper's ancestor in such town, although the books are not kept with technical accuracy, are competent evidence of the facts recited; they are a part of the *res gestae*, and partake of the character of declarations made by the town. Greenfield *v.* Camden, 74 Me. 56.

54. In Belmont *v.* Vinalhaven, 82 Me. 524, 20 Atl. 89, it was held that the voting lists of a town, on which the name of a voter is checked with a cross, are *prima facie* evidence in a case against the town for the support of such voter as a pauper, that the pauper voted at the elections at which such lists were used.

55. In West Boylston *v.* Sterling, 17 Pick. (Mass.) 126, an action by one town against another to recover expenses incurred in the support of a pauper, it was held that a notification addressed to the pauper by an inhabitant of a third town, warning him to attend a district school meeting therein, was competent for the purpose of proving that the pauper resided at that time in such third town, it being testified by such inhabitant that he had delivered the notification to the pauper.

56. Thornton *v.* Campton, 17 N. H. 338. In this case the evidence was that one of the selectmen of the defendant town, in company with one of the selectmen from a third town which was then claimed to be the place of settlement, examined into the question of settlement, and that the defendant town never after that called upon such third town for assistance; but there was no proof that the acts of these individuals were official, or that they had any authority to determine the question of settlement. The court said: "The tendency of the evidence was to show that those two persons formed an opinion that Campton was liable. Evidence that any other parties met and formed such an opinion, or an opposite one, would be equally to the purpose."

The Certificate of the Town Clerk that the pauper had been enrolled during the time in question, as a voter in that town, is not competent.[57]

(b.) *Paying For and Furnishing Relief, Removing the Pauper, Etc.* Other acts, evidence of which is often sought to be adduced for the purpose of showing settlement, are the removal of the pauper by and to the town wherein the settlement is alleged to be, and supporting him or paying another town the expense of such support. Although there are cases to the contrary,[58] the weight of authority is to the effect that such acts partake of the nature of admissions, and evidence thereof is admissible[59] but is not conclusive

57. New Milford *v.* Sherman, 21 Conn. 101, so holding (1) because it was not the proper evidence of a matter of record, a certified copy of which should have been produced, and (2) because the record itself would not have been proper evidence of the particular fact of settlement, nor of residence even; these must be proved by appropriate evidence under oath.

58. In South Scituate *v.* Stoughton, 145 Mass. 535, 14 N. E. 744, it was held that the acts of the overseers of the poor of the defendant town in removing the pauper to their town and supporting her, and in paying to another town the expenses of her support, were not competent as admissions by the defendant. "The overseers in these respects acted as public officers, and not as agents of the town. Their acts, whether in removing the pauper, or in providing for her support in their town, or in ordering payment for her relief furnished by North Bridgewater, bound their town by authority of law, and not by authority of the town, and cannot be taken as admissions by the town or its agents." *Compare* Ward *v.* Oxford, 8 Pick. (Mass.) 476.

New Bedford *v.* Taunton, 9 Allen (Mass.) 207. The court said: "Officers thus elected for the purpose of discharging public duties prescribed by statute, and not dictated or controlled by the inhabitants of the town, constitute a part of the internal government of the commonwealth. This consideration applies to the binding out of the children of paupers. The inhabitants can neither direct nor forbid nor intermeddle with it. They are not parties to the indenture, or to any of its recitals. But the overseers act independently of them, and as public officers, discharging a public duty prescribed and regulated exclusively by statute provisions. When one has power to do an act not only without authority from the town, but against the will of the inhabitants, he cannot be regarded as their agent, nor can they be regarded as his principals in such act. The recital cannot then be regarded as the admission of the inhabitants, made by their agents, nor the indenture as the act of the inhabitants; and it cannot within any legal rules be received as their admission."

The admission of an overseer of the poor, in giving directions for a pauper's relief to the person having charge of paupers, that the pauper has a settlement in the town, is not competent evidence against the town in an action against it for supplies furnished. Dartmouth *v.* Lakeville, 7 Allen (Mass.) 284, 9 Allen 211 n.

In Waltham *v.* Newburyport, 150 Mass. 569, 23 N. E. 379, it was held that the fact that the defendant town had paid to the pauper state aid, for which it was subsequently reimbursed by the state upon the application of the town officers, could not be treated as an admission by the defendant town of its responsibility for the pauper, by which it would be bound, in a controversy with the plaintiff as to the settlement of the pauper.

59. Barre *v.* Morristown, 4 Vt. 574; Weld *v.* Farmington, 68 Me. 301.

The acts of selectmen in paying bills incurred by other towns for the support of a pauper may be shown in evidence as tending to prove any

evidence of the legal settlement of the paupers in the town.[60]

fact necessary to establish the settlement of such pauper in that town. Thornton *v.* Campton, 18 N. H. 20. The court said: "There is always a presumption that public officers, in the exercise of the functions appropriate to the characters in which they assume to act, have not proceeded wholly without authority. . . . It is also to be presumed that the acts which they have performed have been authorized by the existence of a state of things either imperatively requiring, or at least legally calling for and justifying the supposed act."

In Hampstead *v.* Plaistow, 49 N. H. 84, it was held that the allowance and payment, by the county commissioners, of a claim against the county for the support of a pauper partook of the nature of a judgment that such person was a county pauper, and was evidence of such facts as must necessarily have been found as the basis for such judgment, and was *prima facie* evidence that such pauper had a legal settlement in the state.

Payment by a town for pauper supplies is evidence by way of admission on its part that the pauper had then acquired a settlement there by residence as alleged. Belmont *v.* Morrill, 73 Me. 231.

The fact that the son of an alleged pauper, having no settlement except by derivation from his father, was supported by the town sought to be charged, is competent evidence against the town, being in the nature of an admission. Pittsfield *v.* Barnstead, 40 N. H. 477.

In Hopkinton *v.* Springfield, 12 N. H. 328, the question was whether the pauper had a derivative settlement from her father in the defendant town, and it was held that the plaintiff was properly permitted to introduce evidence that some years previously the defendant had paid to the plaintiff town money expended for the relief of a brother of the pauper, as tending to show an admission that the settlement of the father was in the defendant town as alleged. The court said: "If the town of Springfield, in the course of the progress of that cause, had, by any vote or resolution, admitted the settlement of Hall to be in that town, there is no doubt that such admission might be given in evidence against them, in any subsequent case in which the question should arise; and the act of an agent, within the scope of the authority committed to him, may be given in evidence against the principal, the presumption being that it was done by his direction, or with his assent." See also Canaan *v.* Hanover, 47 N. H. 215.

In Marlborough *v.* Sisson, 23 Conn. 401, an action on the case by the town of M., for illegally transporting a pauper into said town, the defendants offered in evidence certain bills in the handwriting of one of the selectmen of said town, that were found deposited among important papers and files of said town, and purported on their face to be for small supplies of food and fuel, sold at various times, by said selectmen to the town. It was held that such bills were admissible, as conducing to prove, not only that they were received by the town, but also, from the character and quantities of the supplies, that they were furnished, from time to time, by the town, for the support of some of its paupers; and as the name of the person, for whom the articles were furnished, was not mentioned in the bills, that they were also admissible for the purpose of rebutting evidence offered by the plaintiff, by which he claimed to have proved that, during the time to which such bills related, the town was in the practice of entering the names of all paupers for whom it furnished support, in its books or papers.

In a case between towns, upon an issue whether a pauper had a settlement in a third town by a residence there on March 21, 1821, testimony is not admissible to show that the latter town furnished supplies to the pauper after that time. Appleton *v.* Belfast, 67 Me. 579.

60. In Barre *v.* Morristown, 4 Vt. 574, where the overseers of the plaintiff town under a supposition that certain paupers residing in the

(E.) Formal Vote. — A town may admit by its formal vote that a person had a settlement therein.[61]

defendant town had a legal settlement in the plaintiff town, supported the paupers for a time in the defendant town, but afterwards carried them to the plaintiff town and supported them there for a long time, it was held that these proceedings, although legal evidence, were not conclusive that the paupers were legally settled in the plaintiff town.

Furnishing supplies and support for a pauper does not estop the town from showing that that pauper has in fact a settlement in another town. New Vineyard *v.* Harpswell, 33 Me. 193. "It is not within the official authority or duty of overseers of the poor, to create or change the settlement of paupers, and neither their acts, nor their admissions to that extent, can bind or estop towns." See also Marlborough *v.* Sisson, 23 Conn. 44; New Milford *v.* Sherman, 21 Conn. 101.

A record of town orders, given by a town for the support of a pauper on the ground that he had a settlement therein, though admissible in evidence on the question of his settlement, is not conclusive as an estoppel, but is for the jury to weigh. Weld *v.* Farmington, 68 Me. 301.

The removal of a pauper and his family to a town by its overseers of the poor from a town which had supported him as a pauper, the payment for that support and for a like support furnished by still another town and the occasional relief given to him as a pauper during a number of years subsequently, do not preclude the town from showing that the pauper's settlement was elsewhere, or that he never had one within the state, although they are conclusive unless the town shows that it acted in ignorance and under mistake. New Bedford *v.* Middleborough, 16 Gray (Mass.) 295.

In Edgartown *v.* Tisbury, 10 Cush. (Mass.) 408, it was held that a voluntary payment by a town of a demand for the support of a pauper, after suit brought, did not constitute such an admission as would estop the town from showing the true settlement of the pauper's mother, in another suit brought by the same plaintiffs to recover for her support.

Repeated Payments for pauper supplies furnished by one town to another after notice and without denial of liability are not conclusive of the fact of settlement in the paying town; but they are important evidence, the weight of which with the other circumstances of the case, is for the jury to determine. "The more numerous the payments, the greater the probability that the pauper has his settlement in the town so paying." Norridgewock *v.* Madison, 70 Me. 174.

61. West Bridgewater *v.* Wareham, 138 Mass. 305. In this case the records of the defendant town showed that at a meeting held under a warrant "to see what the town will do with the town poor," it was "voted the children of James Fryes be sold to the lowest bidder," and that whatever it should cost to get them kept until they were twenty-one should be paid in one year; that "the rest of the town's poor that are not provided for be left to the care of the selectmen to dispose of." The record also showed the votes of previous years "to hire out James Fryes and take his wages for to support his family," "to vendue the poor," followed by the record of the bidding off of James Fryes's children, and to pay various bills for the support of him and them. It was urged that as the statute provided that settlements should be gained in certain ways, and not otherwise, and also in view of the limited power of towns, proof of admissions of the conclusion of law that a pauper had a settlement cannot take the place of proof of the facts that warrant that conclusion. But the court held otherwise, saying: "The admission is not conclusive, and, if it does not induce the inference of the facts prescribed by statute as necessary to constitute a settlement or a marriage, it goes for nothing. Finally, we see no more reason to doubt the power of towns to make admissions in town

(F.) Testimony of the Pauper. — Animus Manendi. — The pauper is a competent witness to testify to his intention in taking up his habitation.[62]

Animus Revertendi. — So, too, he is a competent witness to testify as to whether, when leaving the town, he intended to return.[63]

(G.) Reputation. — Evidence tending to show the pauper's reputed place of residence is not admissible.[64]

(5.) Assessment and Payment of Taxes. — The assessment of taxes is necessarily a matter of record, which should itself be produced.[65]

meeting prejudicial to their own interests, in a case where they have power to act on the general subject-matter, than to doubt their power of doing the same thing through their counsel in court; especially on a question which they have statutory power to settle, as the defendant could have done in this case, by town vote admitting the pauper as an inhabitant."

In East Greenwich *v.* Warwick, 4 R. I. 138, it was held that an order of a town council to the clerk of the council, to grant a certificate to a person to another town in Rhode Island, was an acknowledgment by the town making the order that such person was at the time settled in that town.

62. Searsmont *v.* Lincolnville, 83 Me. 75; Baring *v.* Calais, 11 Me. 463; Albion *v.* Maple Lake, 71 Minn. 503, 74 N. W. 282.

63. Cushing *v.* Friendship, 89 Me. 525, 36 Atl. 1001; Solon *v.* Embden, 71 Me. 418.

64. Albion *v.* Maple Lake, 71 Minn. 503, 74 N. W. 282. The court said: "Hearsay evidence or testimony as to his reputed place of residence was inadmissible. People living at his alleged place of residence might properly testify as to acts of the party within their own knowledge which might constitute elements tending to establish residence; but what people said to each other tending to establish residence would be hearsay, and, as such, should be excluded when offered for the specific purpose of creating a liability against a municipal corporation, under the poor laws of the state."

65. In Marlborough *v.* Sisson, 23 Conn. 44, where the question was whether the pauper had acquired a settlement in Vermont, it appeared that under the statute of that state any person residing therein acquired a settlement by payment of taxes assessed against him for the space of two years; but it was held that to prove that a settlement was so acquired it must be shown that a tax was legally laid and assessed; that this was necessarily matter of record, which should be produced, and that secondary evidence was not admissible until the proper foundation had been first laid for dispensing with the higher and better evidence.

In Hamden *v.* Bethany, 43 Conn. 212, a statute declared that the absence from the records of a town of a certain certificate and tax list required to be made by the collector of any tax and by the selectmen respectively, showing taxes abated, should be accepted by all courts as conclusive proof that certain assessed taxes had been paid; and in that case, where it was alleged that the pauper in question had his settlement in the defendant town, it was shown that the collector of taxes for Bethany had made no certificate as required by law, in reference to the pauper; nor had the selectmen made the required list; nor had they caused any certificate or list applicable to him to be recorded. It was held that the defendant town could not show by the collector that he had legally demanded of the pauper the amount of taxes assessed against him for each of the years in question, and that the pauper had neglected and refused to pay them. The court said: "For reasons satisfactory to itself the legislature has by express enactment varied the common law mode of proving one particular fact. The statute declares that the absence from the records of the town of a certain certificate and list to be made by the

b. *Conclusive Evidence* — (1.) **Generally.** — Under the settlement statutes, it is held that where notice is given of the furnishing of pauper supplies or for the removal of the pauper as required by statute, but neither the removal of the pauper when so requested is made nor any answer given, the town so notified cannot show in an action brought for expenses incurred or supplies furnished, that the pauper has not a settlement in it.[66]

(2.) Order of Removal. — An order of removal of a pauper, not appealed from, is conclusive evidence against the town to which he is removed, of the settlement of the pauper.[67] And an order for the removal of a pauper followed by notice and an ineffectual attempt to appeal after the time allowed for that purpose has elapsed, is conclusive evidence of his legal settlement in a subsequent pro-

collector of any tax and by the selectmen, respectively, shall be accepted by all courts as conclusive proof that certain assessed taxes have been paid."

In Lebanon *v.* Plainfield, 40 N. H. 291, the question was whether or not the pauper had been taxed for his poll in 1797 in the defendant town, and a book of imperfect records of that town was admitted containing town papers arranged without order as to dates and showing various lists of taxes from 1774 to 1799, and amongst them was a list without any date by which it appeared that the pauper was taxed for his poll; and it was held that there was no error in admitting the evidence although its bearing might be remote.

66. Ellsworth *v.* Houlton, 48 Me. 416.

Compare Turner *v.* Brunswick, 5 Me. 31.

67. *New Jersey.* — Elizabeth *v.* Westfield, 7 N. J. L. 439; South Brunswick *v.* Cranbury, 53 N. J. L. 126, 20 Atl. 1084. See also Little Falls *v.* Bernards, 44 N. J. L. 621.

Pennsylvania. — Renovo Overseer *v.* Half-Moon Overseers, 78 Pa. St. 301; Directors of Schuylkill *v.* Overseers of Montour, 44 Pa. St. 484; Bradford Twp. *v.* Keating Twp., 27 Pa. St. 275; Sugar Loaf Twp. *v.* Schuylkill County, 44 Pa. St. 481.

Rhode Island. — Tiverton *v.* Fall River, 7 R. I. 132.

Vermont. — Barre *v.* Morristown, 4 Vt. 574; Fairfield *v.* St. Albans, Brayt. 176; Braintree *v.* Westford, 17 Vt. 141; Rupert *v.* Sandgate, 10 Vt. 278; Poultney *v.* Sandgate, 35 Vt. 146; Charleston *v.* Lunenburgh, 23 Vt. 525; Pittsford *v.* Chittenden, 58 Vt. 49, 3 Atl. 323.

In Chester *v.* Wheelock, 28 Vt. 554, it was held that an order of removal of a man named and a particular woman as his wife, and ordering her to be removed with him, if not appealed from, was conclusive evidence as against the town to which they were ordered to be removed, of the existence of the relationship of husband and wife between them.

The establishment of the settlement of an illegitimate child by order of removal unappealed from establishes and necessarily determines the settlement of the child's mother in a subsequent proceeding. Pittsford *v.* Chittenden, 58 Vt. 49, 3 Atl. 323.

"**The Principle Upon Which These Cases Rest** is that a matter once examined and necessarily decided by a competent tribunal shall not be reagitated and in effect shown to have been decided erroneously upon new evidence which might have been, but was not, produced upon the former hearing. Some attempts have been made to impeach the conclusiveness of the effect of a former order of removal, unappealed from, but thus far without success." Pittsford *v.* Chittenden, 58 Vt. 49, 3 Atl. 323.

In Starksboro *v.* Huntington, 50 Vt. 599, it was held that where a copy of the order of removal disclosed no adjudication that the alleged pauper was or was likely to become chargeable to the town procuring the order, it was held that it was void on its face and disclosed no judgment imposing any liability on

ceeding involving that question.[68] So also is an order affirmed on appeal.[69]

To make an order of removal conclusive evidence in this respect, it must be shown to have been executed, that is, it must be shown that the pauper was actually removed unless prevented by sickness or death, or that the order was perfected by giving legal notice thereof.[70] Such an order is not only conclusive between the towns which are parties thereto, but upon all other towns, upon the question of settlement.[71] An order of removal from which an appeal has been taken but abandoned because the town applying for the order has consented to take back the pauper, is not conclusive.[72]

B. Preventing Acquirement of Settlement. — Where the

the town to which the removal was ordered, and that that town was not bound to appeal to avoid liability for the pauper's support.

68. Westmoreland County *v.* Conemaugh Twp., 34 Pa. St. 231.

69. Barre *v.* Morristown, 4 Vt. 574.

70. Barre *v.* Morristown, 4 Vt. 574. See also Hartland *v.* Williamstown, 1 Aik. (Vt.) 241.

In Pawlet *v.* Sandgate, 19 Vt. 621, it was held that in an action of assumpsit for the recovery of expenses of sickness and removal of a pauper, parol testimony is admissible to prove that the pauper was sick at the time the order of removal was made and continued so, and hence could not have been removed, without endangering life, until the actual removal.

71. Barre *v.* Morristown, 4 Vt. 574. See also Dorset *v.* Manchester, 3 Vt. 370. *Compare* Harmony Twp. *v.* County of Forest, 91 Pa. St. 404, in which *ex parte* proceedings had been had under the statute in force at that time and an order made for the removal and support of an insane pauper and his settlement adjudicated, but no legal notice had been given to the town where his settlement was decided to be of the order and the adjudication. The county subsequently sued the township to recover the amount expended for the pauper's support, and it was held that the statute was not to be so construed as to preclude the township from defending on the ground that the pauper did not reside therein, but that it was also competent and relevant for the county to show that he had a legal settlement in the township.

In New Jersey, it is held that on *ex parte* proceedings a pass warrant is not conclusive evidence of the place of the legal settlement as against a township which had no privilege of examining the witnesses, producing evidence, nor the power to obtain the privilege by appeal. Upper Freehold *v.* Hillsborough, 13 N. J. L. 289. In this case the warrant or order contained merely the opinion of a justice as to the place of legal settlement, founded on an examination of the person himself alone, and in the absence of all parties interested. The court said: "To allow an opinion, resting on such superficial investigation, and made in a proceeding altogether *ex parte,* to be conclusive as to the place of legal settlement, or to be at all binding in that respect on a township, which had not the privilege of calling a witness, nor the power to obtain it by appeal to the sessions, would be unauthorized by any clause in the act, and as repugnant to its provisions as to all sound principles of justice."

72. People *v.* Cayuga, 2 Cow. (N. Y.) 530.

In Vernon *v.* Smithville, 17 Johns. (N. Y.) 89, where an order of removal of a pauper from one town to another had been issued, and from which the latter town had appealed, it appeared that the former town took back the pauper and the appeal was never prosecuted; and it was held that the order was not evidence that the pauper's settlement was in the latter town.

issue is whether supplies were furnished to a pauper in good faith, or for the purpose of preventing his gaining a settlement, it is competent for the officer who furnished the supplies to testify that in so doing he acted in good faith and in the discharge of what he believed to be his official duty.[73] But declarations of the officer when not part of the *res gestae* cannot be received upon this question.[74]

V. PENALTY FOR BRINGING PAUPER INTO TOWN.

To subject a person to the penalty for bringing a pauper into a place where he has no settlement, without legal authority, it must be shown that he acted *mala fide*.[75]

Justification for Act. — Where the defendant in such an action justifies his act upon the ground that as an officer he performed the act under an order from the overseers of the poor of another town directing him to remove the pauper to the plaintiff town, it is not necessary for him to show that the overseers had complied with the statutory requirements relating to the issuance of such orders.[76]

73. Corinna *v.* Exeter, 13 Me. 321. *Compare* Foxcroft *v.* Corinth, 61 Me. 559, where it was held that where supplies are furnished by the overseers of the poor to, and are received by, a pauper who is then actually in need of immediate relief, the intention of the overseers thereby to prevent a settlement by such pauper in their town is immaterial to qualify the legal effect of their action.

74. Corinna *v.* Exeter, 13 Me. 321.

75. Thomas *v.* Ross, 8 Wend. (N. Y.) 672. See also Franklin *v.* Fuller, 105 Mass. 336.

Sturbridge *v.* Winslow, 21 Pick. (Mass.) 83.

76. Sturbridge *v.* Winslow, 21 Pick. (Mass.) 83. The court said: "The overseers have authority, after having complied with the requisitions of the statute and given due notice, which has not been regarded, to cause the pauper to be removed by a written order directed to any person therein designated, who is thereupon authorized to execute the same. Now when the question is, as to the criminal intention of the party acting under such order, the court are of opinion that such party may have presumed, and had a right to presume, that the officers had done all the acts which would justify them in making such an order. And whether this would have been a justification to the defendant, from all consequences of obeying the order or not, it goes to repel and rebut the allegation that this removal was made for the unlawful purpose mentioned in the statute. It is a very different question where one claims, in virtue of an authority, to establish a right or control over the property or person of another, and where it is used defensively and relied on as an honest excuse."

PAWNBROKERS.—See Pledges.

PAYMENT.

By E. S. Page.

CROSS-REFERENCES:

Admissions;
Bills and Notes;
Insurance;
Mortgages;
Parol Evidence.

I. BURDEN OF PROOF.

1. In General. — In general, the burden of proving payment is upon the party setting it up or claiming it.[1]

1. *United States.* — Archer *v.* Morehouse, 30 Fed. Cas. No. 18,225; Simonton *v.* Winter, 5 Pet. 141; Holmes *v.* Dodge, Abb. Adm. 60, 12 Fed. Cas. No. 6637.

Alabama. — Sampson *v.* Fox, 109 Ala. 662, 19 So. 896, 55 Am. St. Rep. 950; McWilliams *v.* Phillips, 71 Ala. 80; Levystein *v.* Whitman, 59 Ala. 345; Harwood *v.* Pearson, 60 Ala. 410; Wolffe *v.* Nall, 62 Ala. 24; McCurdy *v.* Middleton, 82 Ala. 131, 2 So. 721; Snodgrass *v.* Caldwell, 90 Ala. 319, 7 So. 834; Pearce *v.* Walker, 103 Ala. 250, 15 So. 568; Turrentine *v.* Grigsby, 118 Ala. 380, 23 So. 666.

Arkansas. — Blass *v.* Lawhorn, 64 Ark. 466, 42 S. W. 1068 (a suit on an account for merchandise); Hays *v.* Dickey, 67 Ark. 169, 53 S. W. 887; Decker *v.* Laws, 85 S. W. 425.

California. — Caulfield *v.* Sanders, 17 Cal. 569; Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; Stuart *v.* Lord, 138 Cal. 672, 72 Pac. 142.

Colorado. — Mohr *v.* Barnes, 4 Colo. 350; Lovelock *v.* Gregg, 14 Colo. 53, 23 Pac. 86; Thomas *v.* Carey, 26 Colo. 485, 58 Pac. 1093.

Florida. — Lakeside Press & Photo Engraving Co. *v.* Campbell, 39 Fla. 523, 22 So. 878.

Georgia. — Lanier *v.* Huguley, 91 Ga. 791, 18 S. E. 39.

Illinois. — Johnson *v.* Breaton, 1 Ill. App. 293; Hanke *v.* Cobiskey, 57 Ill. App. 267; Schanzenbach *v.* Brough, 58 Ill. App. 526; Harley *v.* Harley, 67 Ill. App. 138; Boon *v.* Bliss, 98 Ill. App. 341; Ross *v.* Skinner, 107 Ill. App. 579; Robison *v.* Bailey, 113 Ill. App. 123.

Indiana. — Clifford *v.* Smith, 4 Ind. 377.

Iowa. — Walker *v.* Russell, 73 Iowa 340, 35 N. W. 443.

Kansas. — Lathrop *v.* Davenport, 20 Kan. 285; Guttermann *v.* Schroeder, 40 Kan. 507, 20 Pac. 230; First Nat. Bank *v.* Hellyer, 53 Kan. 695, 37 Pac. 130, 42 Am. St. Rep. 316; Anthony *v.* Mott, 10 Kan. App. 105, 61 Pac. 509.

Kentucky. — Powell *v.* Swan, 5 Dana 1; Harris *v.* Merz Architectural Iron Wks., 82 Ky. 200; Silver *v.* Hedges, 3 Dana 439; White *v.* White, 19 Ky. L. Rep. 1590, 44 S. W. 83; Ermert *v.* Dietz, 22 Ky. L. Rep. 540, 58 S. W. 442.

Louisiana. — Diggs *v.* Parish, 18 La. 6; Irwin *v.* Gernon, 18 La. Ann. 228.

Maine. — Witherell *v.* Swan, 32 Me. 247; Crooker *v.* Crooker, 49 Me. 416.

Michigan. — Adams *v.* Field, 25 Mich. 16; Atwood *v.* Cornwall, 25 Mich. 142 (*dictum*); Baldwin *v.* Clock, 68 Mich. 201, 35 N. W. 904; Hulbert *v.* Hammond, 41 Mich. 343, 1 N. W. 1040; Appeal of Smith, 52 Mich. 415, 18 N. W. 195; Doolittle *v.* Gavagan, 74 Mich. 11, 41 N. W. 846; Liesemer *v.* Burg, 106 Mich. 124, 63 N. W. 999.

Missouri. — Yarnell *v.* Anderson, 14 Mo. 619; Griffith *v.* Creighton, 61 Mo. App. 1, 1 Mo. App. Rep. 295; Oil Well Supply Co. *v.* Wolfe, 28 S. W. 167, *affirmed* Oil Well Supply Co. *v.* Wolfe, 127 Mo. 616, 30 S. W. 145; Ferguson *v.* Dalton, 158 Mo. 323, 59 S. W. 88; Brown *v.* Morgan, 56 Mo. App. 382.

Nebraska. — Curtis *v.* Perry, 33 Neb. 519, 50 N. W. 426; Mullaly *v.* Dingman, 62 Neb. 702, 87 N. W. 543; Davis *v.* Hall, 97 N. W. 1023.

New Hampshire. — Kendall *v.* Brownson, 47 N. H. 186; Buzzell *v.* Snell, 25 N. H. 474; Smith *v.* Lewiston Steam Mill, 66 N. H. 613, 34 Atl. 153.

New Jersey. — Morgan *v.* Morgan, 48 N. J. Eq. 399, 22 Atl. 545; Fein *v.* Meier, 58 Atl. 114.

New York. — Hussey *v.* Culver, 53 Hun 637, 6 N. Y. Supp. 466; Dean *v.* Pitts, 10 Johns. 35; Everett *v.* Lockwood, 8 Hun 356; Barnes *v.* Courtright, 37 Misc. 60, 74 N. Y. Supp. 203; Rosenstock *v.* Dessar, 85 App. Div. 501, 83 N. Y. Supp. 334.

North Carolina. — Harmon *v.* Taylor, 98 N. C. 341, 4 S. E. 510.

North Dakota. — Satterlund *v.* Beal, 12 N. D. 122, 95 N. W. 518.

Pennsylvania. — Gebhart *v.* Francis,

2. Under Plaintiff's Allegation of Payment. — And this rule applies against a plaintiff who sets up a payment in his complaint.[2]

3. Under Allegation of Non-Payment. — Although rules of pleading frequently require a party to allege non-payment, the burden is still upon his adversary to show payment.[3]

4. Under General Denial. — A party claiming payment has the burden of proof, although his plea is in the form of a denial of an allegation of non-payment.[4] In some jurisdictions it is held that where it is necessary to allege demand and non-payment, proof must be given of such allegations where the general denial is pleaded.[5]

5. Payment to Third Party. — When the defendant sets up that he has paid to an agent or other third party, he has the burden of showing that the third party had authority to receive payment.[6]

6. Notes or Collaterals as Absolute Payment. — A. NOTE OF

32 Pa. St. 78; North Pennsylvania R. Co. *v.* Adams, 54 Pa. St. 94, 93 Am. Dec. 677; Mitchell *v.* Mitchell, 6 Atl. 682.

South Carolina. — Adger *v.* Pringle, 11 S. C. 527.

South Dakota. — Union School Furn. Co. *v.* Mason, 3 S. D. 147, 52 N. W. 671.

Tennessee. — Mason *v.* Spurlock, 4 Baxt. 554; Ford *v.* Lawrence (Tenn. Ch. App.), 51 S. W. 1023.

Texas. — Hutchins *v.* Hamilton, 34 Tex. 290; Grant *v.* Roberts (Tex. Civ. App.), 38 S. W. 650; Tinsley *v.* McIlhenny, 30 Tex. Civ. App. 352, 70 S. W. 793; Cherry *v.* Butler (Tex. App.), 17 S. W. 1090.

Vermont. — Smith *v.* Woodworth, 43 Vt. 39; Terryberry *v.* Woods, 69 Vt. 94, 37 Atl. 246; Austin *v.* Downer, 25 Vt. 558.

Wisconsin. — Meyer *v.* Hafemeister, 119 Wis. 539, 97 N. W. 165, 100 Am. St. Rep. 900.

How Sustained. — The burden may be overcome by a mere preponderance of the evidence. Rice *v.* Georgia Nat. Bank, 64 Ga. 173.

2. German *v.* Boslough, 28 Neb. 33, 44 N. W. 72; Shrader *v.* United States Glass Co., 179 Pa. St. 623, 36 Atl. 330; Grissel *v.* Bank of Woonsocket, 12 S. D. 93, 80 N. W. 161.

3. Wolffe *v.* Nall, 62 Atl. 24; Guttermann *v.* Schroeder, 40 Kan. 507, 20 Pac. 230.

4. See cases cited in foregoing notes.

"The question is not one of pleading, but of evidence; not what must be alleged, but where the burden of proof lies. The general rule is that a party is not called upon to prove his negative averments, although they may be necessary to his pleading." Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127.

5. Wimpy *v.* Gaskill, 76 Ga. 41.

The rule was stated and the distinction drawn in Cochran *v.* Reich, 91 Hun 440, 2 N. Y. Ann. Cas. 313, 36 N. Y. Supp. 233, 25 Civ. Proc. 147, where the court said: "To summarize, then, the logical rule of pleading should require, where a general denial is interposed, proof by the plaintiff of every allegation essential to his cause of action. Therefore, where it is necessary to allege demand and non-payment, proof must be given of such allegations. In actions, however, where allegations such as demand and non-payment are not essential to the plaintiff's cause of action, then payment is an affirmative defense, and, to be proved, must be specially pleaded, a general denial not being sufficient to admit of such proof. The distinction between the two lies in the fact that, in the former, plaintiff has to allege and prove non-payment as a part of his cause of action, while, in the latter, the defendant confesses the cause of action, but seeks to avoid it by pleading and proving payment, which is new matter."

6. Holmes *v.* Dodge, Abb. Adm. 60, 12 Fed. Cas. No. 6637; Woodruff *v.* Thurlby, 39 Iowa 344; Ketelman *v.* Chicago Brush Co., 65 Neb. 429,

Debtor. — In most jurisdictions a party claiming that a promissory note of the debtor was accepted in absolute payment of an antecedent debt, has the burden of proving the fact.[7]

B. Note or Check of Third Party. — Likewise, the burden of proving that a note or check of a third person was received in absolute payment of an antecedent debt is upon the debtor.[8]

C. Present Debts. — But in some jurisdictions the burden is upon the creditor when it is claimed that a bill or note of a third person was given in absolute payment of a debt presently incurred.[9]

D. Where Higher Security Is Given. — Where higher security is given, as where the debtor gives a new note waiving

91 N. W. 282; Gilbert *v.* Garber, 62 Neb. 464, 87 N. W. 179; McCornick *v.* Sadler, 11 Utah 444, 40 Pac. 711 (payment to mechanics' lien claimant).

7. *Indiana.* — Godfrey *v.* Crisler, 121 Ind. 203, 22 N. E. 999.

Kansas. — Bradley *v.* Harwi, 43 Kan. 314, 23 Pac. 566; Webb *v.* National Bank of the Republic, 67 Kan. 62, 72 Pac. 520.

Maryland. — Haines *v.* Pearce, 41 Md. 221; Sebastian May Co. *v.* Codd, 77 Md. 293, 26 Atl. 316.

Minnesota. — Devlin *v.* Chamblin, 6 Minn. 468.

New Hampshire. — Kenniston *v.* Avery, 16 N. H. 117; Randlet *v.* Herren, 20 N. H. 102.

New York. — Crane *v.* McDonald, 45 Barb. 354; Noel *v.* Murray, 13 N. Y. 167, *affirming* 1 Duer 385; Gibson *v.* Toby, 53 Barb. 191.

Pennsylvania. — Collins *v.* Busch, 191 Pa. St. 549, 43 Atl. 378; League *v.* Waring, 85 Pa. St. 244 (draft of a third person); *In re* Davis' Estate, 5 Whart. 530, 34 Am. Dec. 574; Holmes *v.* Briggs, 131 Pa. St. 233, 18 Atl. 928, 17 Am. St. Rep. 804.

Rhode Island. — Nightingale *v.* Chafee, 11 R. I. 609, 23 Am. Rep. 531.

South Dakota. — Baker *v.* Baker, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776.

West Virginia. — Feamster *v.* Withrow, 12 W. Va. 611.

Wisconsin. — Willow River Lumb. Co. *v.* Luger Furn. Co., 102 Wis. 636, 78 N. W. 762.

Taking Note Not Per Se Payment. The taking of a debtor's negotiable note, at or after the creation of the debt, is not a payment or extinguishment of the debt itself, unless there is an agreement so to receive it; in the absence of any such agreement, if the note is not paid at maturity, the creditor may sue on the original cause of action; and if he produces the note at the trial, and offers to give it up to the defendant, and the evidence shows that it was taken "for the purpose of closing the account on the books," it is not error to instruct the jury that "the taking of the note does not raise the presumption of payment." Mooring *v.* Mobile Marine Dock & Mut. Ins. Co., 27 Ala. 254.

8. Collins *v.* Busch, 191 Pa. St. 549, 43 Atl. 378; Holmes *v.* Briggs, 131 Pa. St. 233, 18 Atl. 928, 17 Am. St. Rep. 804; Haines *v.* Pearce, 41 Md. 221; Randlet *v.* Herren, 20 N. H. 102; Crane *v.* McDonald, 45 Barb. (N. Y.) 354; Noel *v.* Murray, 13 N. Y. 167, *affirming* 1 Duer 385; Gibson *v.* Toby, 53 Barb. (N. Y.) 191; Willow River Lumb. Co. *v.* Luger Furn. Co., 102 Wis. 636, 78 N. W. 762.

The burden of showing that a check was received in absolute payment is upon the debtor. Cox *v.* Hayes, 18 Ind. App. 220, 47 N. E. 844.

In Indiana the debtor has the burden of showing that a non-negotiable security was accepted as absolute payment. Rhodes *v.* Webb-Jameson Co., 19 Ind. App. 195, 49 N. E. 283.

9. In New York the burden is on the debtor when the note or bill of a third person is given for an antecedent debt, and upon the creditor when given for a present debt. Hall *v.* Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802. The same is law in Wisconsin. Challoner *v.* Boyington, 83 Wis. 399, 53 N. W. 694.

exemptions, the burden is upon the creditor to show that it was not received in absolute payment.[10]

E. COLLATERALS. — A party alleging an agreement to accept collaterals as payment has the burden of proof.[11]

7. To Explain or Contradict Receipt. — A party attempting to explain or contradict a receipt has the burden of proof.[12]

8. Application of Payment. — When the debtor claims to have directed an application the burden of proving the direction is upon him.[13] The creditor has the burden of proving authority for a certain application.[14] A third party claiming that a certain application has been made has the burden of proof.[15]

9. Medium of Payment. — A party claiming a debt to be payable in other than the circulating medium has the burden of proving the fact.[16]

II. PRESUMPTIONS.

1. Transfer of Money. — Payment of indebtedness will be presumed from evidence of the transfer of money from the debtor to the creditor.[17]

10. Lee *v.* Green, 83 Ala. 491, 3 So. 785.

11. Brown *v.* Hiatt, 1 Dill. 372, 4 Fed. Cas. No. 2,011.

A party claiming that the creditor has realized from the collaterals sufficient to discharge the debt has the burden of proof. Barnes *v.* Bradley, 56 Ark. 105, 19 S. W. 319.

12. *Arkansas.* — Decker *v.* Laws, 85 S. W. 425.

Illinois. — Winchester *v.* Grosvenor, 44 Ill. 425; Nielsen *v.* United States Rolling Stock Co., 37 Ill. App. 283; Fitzgerald *v.* Coleman, 114 Ill. App. 25 (can be overcome only by clear and unmistakable evidence).

Indiana. — Moore *v.* Korty, 11 Ind. 341.

Iowa. — Levi *v.* Karrick, 13 Iowa 344.

Louisiana. — Gray *v.* Lonsdale, 10 La. Ann. 749.

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

But the burden is on the defendant to show that the plaintiff executed the receipts. Mitchell *v.* Mitchell (Pa.), 6 Atl. 682.

13. Levystein *v.* Whitman, 59 Ala. 345; Pearce *v.* Walker, 103 Ala. 250, 15 So. 568. See also Harrison *v.* Dayries, 23 La. Ann. 216; Marshall *v.* Nagel, 1 Bail. (S. C.) 266.

14. A mortgagee has the burden of showing that the mortgagor authorized the application of the proceeds of the mortgaged property to an unsecured debt. Boyd *v.* Jones, 96 Ala. 305, 11 So. 405, 38 Am. St. Rep. 100.

Where payments have been made to the mortgagee, he has the burden of proving that they were not to be applied on the mortgage debt. Tharp *v.* Feltz, 6 B. Mon. (Ky.) 6.

Where the debtor shows a payment, the burden is on the creditor to show that there was another debt. Mann *v.* Major, 6 Rob. (La.) 475; Hill *v.* Pettit, 23 Ky. L. Rep. 2001, 66 S. W. 188.

As between the debtor and the creditor, the burden of showing how the payment has been applied is on the creditor. Goldsmid *v.* Lewis Co. Bank, 7 Barb. (N. Y.) 427.

15. Turner *v.* Hill (N. J. Ch.), 39 Atl. 137.

16. A defendant who claimed a debt was payable in Confederate currency had the burden of proving that fact. Neely *v.* McFadden, 2 Rich. (S. C.) 169; Halfacre *v.* Whaley, 4 Rich. (S. C.) 173.

17. "If A owes B a debt and pays him money, the law presumes, in the absence of anything shown to the contrary, that it was the intention to apply it to the payment of the debt." Hansen *v.* Kirtley, 11 Iowa 565. See also Dougherty *v.* Deeney, 45 Iowa 443.

2. Expenditure for Creditor. — Payment may be presumed from the fact that the debtor has expended money for the creditor;[18] but this applies only when the relation between the parties is of a business character.[19]

3. Possession of Evidence of Indebtedness. — A. GENERALLY. Possession by the debtor of the evidence of his indebtedness raises a presumption of payment;[20] and possession by another raises a presumption of non-payment.[21] Possession by a third party who has assumed the indebtedness is presumptive evidence of payment by him.[22]

B. LIMITATIONS. — The presumption does not apply as to a note

Recognizing his indebtedness to his children, a father directed a sum of money largely in excess thereof to be by his commission merchant transferred to their account without designating the purpose for so doing. *Held*, that the first presumption of law is that a payment of said indebtedness was intended and thereby accomplished. Succession of Hymel, 48 La. Ann. 737, 19 So. 742.

18. Where one whose duty it is to pay off a charge neglects to do so, and the party whose rights are injured pays it, it will be presumed that the latter had authority, and that he thereby paid his debt to the former. Corwell *v.* Simpson, 52 N. C. 285.

19. When the relation is that of father and son, or man and mistress, other presumptions arise. Swain *v.* Ettling, 32 Pa. St. 486.

20. *Alabama* — Potts *v.* Coleman, 86 Ala. 94, 5 So. 780; Lipscomb *v.* DeLemos, 68 Ala. 592.

Delaware. — Star Loan Ass'n *v.* Moore, 4 Pen. 308, 55 Atl. 946.

Illinois. — Tedens *v.* Schumers, 112 Ill. 263 (possession of due-bill by maker is *prima facie* evidence of payment); Walker *v.* Douglas, 70 Ill. 445; Teeter *v.* Poe, 48 Ill. App. 158.

Iowa. — Burrows *v.* Cook, 17 Iowa 436.

Kentucky. — Callahan *v.* Bank of Kentucky, 82 Ky. 231.

Louisiana. — Benson *v.* Shipp, 5 Mart. (N. S.) 154; Brown *v.* Sadler, 16 La. Ann. 206; Joublanc *v.* Delacroix, 5 Mart. (O. S.) 477 (possession of check).

Maryland. — Carroll *v.* Bowie, 7 Gill 34.

Michigan. — Ormsby *v.* Barr, 21 Mich. 474.

Missouri. — McFall *v.* Dempsey, 43 Mo. App. 369.

Nebraska. — Peavey *v.* Hovey, 16 Neb. 416, 20 N. W. 272.

New York. — Levy *v.* Merrill, 52 How. Pr. 360.

North Carolina. — Allen *v.* Allen, 114 N. C. 121, 19 S. E. 269.

Pennsylvania. — Bracken *v.* Miller, 4 Watts & S. 102; Porter *v.* Nelson, 121 Pa. St. 628, 15 Atl. 852.

Texas. — Hays *v.* Samuels, 55 Tex. 560.

The force of presumption depends upon the circumstances of the particular case. Therefore it is error to instruct the jury that possession of the note raises a strong presumption of payment. Smith *v.* Gardner, 36 Neb. 741, 55 N. W. 245.

The presumption may be rebutted by evidence showing that the note was delivered up by mistake. Smith *v.* Smith, 15 N. H. 55. See also, as to rebuttal of the presumption, Allen *v.* Sawyer, 88 Ill. 414; Anderson *v.* Culver, 127 N. Y. 377, 28 N. E. 32, *affirming* 53 Hun 633, 6 N. Y. Supp. 181; Fitzmahony *v.* Caulfield, 87 Hun 66, 33 N. Y. Supp. 876.

21. Shippen *v.* Whittier, 117 Ill. 282, 7 N. E. 642; Davis *v.* Gaines, 28 Ark. 440; Melink *v.* Coman, 111 Ill. App. 583; Jones *v.* Fennimore, 1 Greene (Iowa) 134; Johnson *v.* Gooch, 116 N. C. 64, 21 S. E. 39. See also Haywood *v.* Lewis, 65 Ga. 221; Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258.

Presumptions From Possession of Evidences of Indebtedness. — A mortgagee's possession of a bond and mortgage raises the presumption that the debt is not paid. Fitzmahony *v.* Caulfield, 25 App. Div. 119, 49 N. Y. Supp. 196.

22. Carr *v.* Beck, 51 Pa. St. 269.

indorsed to the payor for accommodation;[23] nor when the payee becomes the administrator of the payor;[24] nor when the maker is a member of the payee's family and might easily have obtained the note without payment.[25]

4. Delivery of Note by Creditor to Debtor. — A. GENERALLY. The fact that the plaintiff, after his account is due, gives the defendant notes and due-bills, thereby acknowledging himself his debtor, raises a presumption of payment.[26]

B. LIMITATION. — But this principle has no application when one liability is joint and the other individual.[27]

5. Settlement of Later Indebtedness. — Evidence of the settlement of a debt raises a presumption of the settlement of a prior indebtedness.[28]

6. Satisfaction of Mortgage. — Payment is presumed from the satisfaction of a mortgage securing it,[29] but the satisfaction must be by the party entitled to make it.[30]

7. Payment by Agent to Principal. — When it is shown that an agent has received money for his principal it will be presumed that the agent has paid it over to the principal.[31]

23. Callahan *v.* Bank of Kentucky, 82 Ky. 231.

24. Tharp *v.* Feltz, 6 B. Mon. (Ky.) 6; Arnold *v.* Arnold, 124 Ala. 550, 27 So. 465, 82 Am. St. Rep. 199.

25. Grimes *v.* Hilliary, 150 Ill. 141, 36 N. E. 977 *affirming* 51 Ill. App. 641. Erhart *v.* Dietrich, 118 Mo. 418, 24 S. W. 188 (son made note to father, who was old and infirm; son took father to his home and cared for him; *held,* possession by son does not raise presumption of payment); Rogers *v.* McGuire, 90 Hun 455, 37 N. Y. Supp. 76 (son's possession raises no presumption against father's representative).

26. McIntyre *v.* Meldrim, 63 Ga. 58; Wilkins *v.* Ferguson, 47 Ind. 136; Duguid *v.* Ogilvie, 1 Abb. Pr. (N. Y.) 145.

It is presumed that services rendered by the maker of a note for the payee, before its execution, have been paid for. Barnes *v.* Green, 10 Ky. L. Rep. 422, 12 S. W. 277.

27. Mechanics Bank *v.* Wright, 53 Mo. 153.

28. Settlement of Later Indebtedness. — A settlement for services for a particular month is *prima facie* evidence of payment for all labor or services previously rendered. Shuman *v.* Clater, 3 Head (Tenn.) 445.

A receipt for later rent is *prima facie* evidence of payment of prior rent. Brewer *v.* Knapp, 1 Pick. (Mass.) 332; Ottens *v.* Fred Krug Brew. Co., 58 Neb. 331, 78 N. W. 622; Decker *v.* Livingston, 15 Johns. (N. Y.) 479; Patterson *v.* O'Hara, 2 E. D. Smith (N. Y.) 58; Rowe *v.* Collier, 25 Tex. Sup. 252.

But it has been said that this is a mere presumption or inference of fact. Ham *v.* Barret, 28 Mo. 388.

29. Seiple *v.* Seiple, 133 Pa. St. 460, 19 Atl. 406; Fleming *v.* Parry, 24 Pa. St. 47.

30. Satisfaction of mortgage by party who is entitled to income only is evidence of payment of interest, but not of payment of principal. Giddings *v.* Seward, 16 N. Y. 365.

31. "Where one sends his agent or clerk to the bank with a check to draw money, or to a debtor to collect a debt, it is unusual for such agent or clerk to take a receipt from his employer when he pays him the money thus received or collected. In the absence of any evidence of nonpayment, or of complaint on the part of the principal in regard to it, it is fair to presume the agent has performed his duty." Knapp *v.* Griffin, 140 Pa. St. 604, 21 Atl. 449.

Where a son-in-law acts as agent for his father-in-law, and in his presence, and by his direction, receives money for him, it must be presumed that it passed into the possession of

8. Co-Existence of Duty To Pay and Right To Collect. — When the dual obligation to pay and the duty and authority to demand and receive payment of a debt co-exist in the same person, in Alabama it is held the law presumes the debt to be paid.[32]

9. Failure To Produce Note. — A failure by a plaintiff to produce or account for a note sued upon raises a presumption of payment.[33]

10. Receipts. — A. In General. — A receipt in writing is presumptive evidence of payment.[34]

the latter. Eavenson's Appeal, 84 Pa. St. 172.

Where it was held that in an action against an agent of a third party for money had and received there is no presumption that the money was paid to his principal and not to him, except when from the nature of the business, or the usual course in transacting it, payment would be expected to be made to the principal. But see Hathaway *v.* Burr, 21 Me. 567, 38 Am. Dec. 278.

32. Miller *v.* Irby, 63 Ala. 477.

But there must be concurrence and co-existence of the legal obligation to pay and of the authority and duty to demand and receive payment. Sampson *v.* Fox, 109 Ala. 662, 19 So. 896, 55 Am. St. Rep. 950. The principle "has been of most frequent application when a debtor to a testator, or to an intestate, takes probate of the will and qualifies as executor, or obtains a grant of administration."

Where a debt and credit — a right to demand and an obligation to pay — co-exist, even for a moment, in the same person, the debt is extinquished by the presumption of payment. Ragland *v.* Calhoun, 36 Ala. 606.

When Presumption Does Not Arise. — The doctrine of the presumption of payment in cases where a note is found in possession of the maker free from circumstances calculated to excite suspicion has no application when the debtor is the administrator of his creditor's estate. Arnold *v.* Arnold, 124 Ala. 550, 27 So. 465, 82 Am. St. Rep. 199.

33. Bassett *v.* Hathaway, 9 Mich. 28; Ward *v.* Munson, 105 Mich. 647, 63 N. W. 498 (presumption is conclusive). At least, payment may be inferred from such failure. Butler *v.* Washington, 28 S. C. 607, 5 S. E. 601.

Where a note has interest coupons attached, the absence of one such coupon, unaccounted for, raises a *prima facie* presumption of its payment. Merrick *v.* Hulbert, 17 Ill. App. 90.

Where Loss of Note Is Shown. It is not necessary for a creditor to prove that a debt evidenced by a lost paper is not paid; the *onus probandi* rests upon him who alleges it. Bell *v.* Young, 1 Grant Cas. (Pa.) 175.

34. "A receipt *prima facie* imports exactly what it contains, neither more nor less. If it specifies that it is 'in full,' *prima facie* it is so; and if it states that it is 'on account,' *prima facie* more remains due, but with the right to either party to show in either case that it is erroneous. So, also, where it simply acknowledges receipt of so much money, it imports *prima facie* that that amount was paid by the one party and received by the other, and it imports nothing more than this." Bercier *v.* McInnis, 57 Miss. 279. See also Bougher *v.* Kimball, 30 Mo. 193 (raises no presumption of payment for services other than those mentioned in the receipt).

Receipt in Full. — A receipt in full raises a presumption of payment of all unsettled demands up to its date. Newton *v.* Field, 98 Ky. 186, 32 S. W. 623; Alvord *v.* Baker, 9 Wend. (N. Y.) 323; Dobbins *v.* Perry, 1 Rich. L. (S. C.) 32.

Receipt for Later Indebtedness. A receipt for later indebtedness is presumptive evidence of payment of prior indebtedness. Brewer *v.* Knapp, 1 Pick. (Mass.) 332; Ottens *v.* Fred Krug Brew. Co., 58 Neb. 331, 78 N. W. 622; Decker *v.* Livingston, 15 Johns. (N. Y.) 479.

Kind of Money Paid. — A receipt for so much money paid raises no presumption as to the kind of money

B. Recital of Payment in Deed. — A recital of payment in a deed is evidence of payment.[35]

C. Indorsement on Note. — An indorsement of payment upon the back of a promissory note raises a strong presumption of such payment.[36]

11. Transfer of Property. — While the transfer of property from the debtor to the creditor may sometimes raise a presumption of payment,[37] the transfer of a chose in action does not raise a presumption of satisfaction.[38]

12. Accepting Note for Indebtedness. — A. Of Debtor. — Ordinarily, the taking of a note for an antecedent debt will not be presumed to have been in payment or discharge of the original indebtedness, and the burden of proof is upon him who asserts that it was so taken;[39] but in some jurisdictions it gives rise to a rebuttable presumption of the extinguishment of an antecedent debt.[40]

paid. Melvin *v.* Stevens, 84 N. C. 78.

35. Bonner *v.* Metcalf, 58 Ga. 236.

36. Greenough *v.* Taylor, 17 Ill. 602 (presumption created although indorsement is in pencil).

37. A receipt for produce delivered raises the presumption that it was delivered in payment of an antecedent debt. Abrams *v.* Taylor, 21 Ill. 102. But see *contra,* Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496 ("where goods are delivered by a debtor to his creditor who has an account against him, it will not be presumed that they were delivered in payment").

A conveyance of land by a father to a child to whom he is in debt raises a presumption of satisfaction of the indebtedness. Kelly *v.* Kelly, 6 Rand. (Va.) 176, 18 Am. Dec. 710.

An order for the transfer of property is presumed to be in conditional payment only. McWilliams *v.* Phillips, 71 Ala. 80.

38. Preston *v.* Jones, 3 Ill. App. 632; Leas *v.* James, 10 Serg. & R. (Pa.) 307.

Where a negotiable instrument is received it is presumed to be in payment. Fowler *v.* Ludwig, 34 Me. 455.

Delay in Presenting Check. Where the holder delays in presenting a check and thus works injury to the debtor the debt is paid, at least to the amount of the injury. Carroll *v.* Sweet, 128 N. Y. 19, 27 N. E. 763, 13 L. R. A. 43 *reversing* 57 N. Y. Super. Ct. 100, 5 N. Y. Supp. 572.

39. United States *v.* Hegeman, 204 Pa. St. 438, 54 Atl. 344 (raises no presumption of payment); Baker *v.* Baker, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776; Copeland *v.* Clark, 2 Ala. 388.

The giving of a new note raises no presumption of payment of a former note. Merchants Nat. Bank *v.* Good, 21 W. Va. 455; Powell *v.* Blow, 34 Mo. 485. This is really a proposition of substantive law. (For the numerous cases sustaining the proposition the reader must be referred to treatises on negotiable instruments).

Checks. — The debtor's own check raises no presumption of payment. Baird *v.* Spence, 8 Misc. 535, 28 N. Y. Supp. 774, *affirmed* 10 Misc. 772, 31 N. Y. Supp. 1125; Springfield *v.* Green, 7 Baxt. (Tenn.) 301.

40. *United States.* — Palmer *v.* Elliot, 1 Cliff. 63, 18 Fed. Cas. No. 10,690; Baker *v.* Draper, 1 Cliff. 420, 2 Fed. Cas. No. 766; Hudson *v.* Bradley, 2 Cliff. 130, 12 Fed. Cas. No. 6,833.

Indiana. — Mason *v.* Douglas, 6 Ind. App. 558, 33 N. E. 1009; Keck *v.* State, 12 Ind. App. 119, 39 N. E. 899. But see Travelers Ins. Co. *v.* Chappelow, 83 Ind. 429.

Iowa. — Grimmell *v.* Warner, 21 Iowa 11 (raises a presumption that all prior indebtedness has been settled).

Maine. — Varner *v.* Nobleborough,

B. Obligation of Third Party. — When a creditor receives from his debtor the note or bill of a third party for an antecedent debt, the presumption is that he takes it by way of security or conditional payment.[41] In some jurisdictions, however, a presumption of payment arises even in such a case.[42] In others a presumption of absolute payment arises when it is taken for a present debt.[43]

C. Secured and Unsecured Notes. — It is presumed that an unsecured note was not given in satisfaction of a secured indebtedness.[44] On the other hand, the giving of a note with a waiver of exemptions raises a presumption of absolute payment.[45]

D. Negotiation of Instrument. — The actual negotiation of an instrument is presumptive evidence of intent to accept it as payment.[46]

2 Me. 121, 11 Am. Dec. 48; Shumway *v.* Reed, 34 Me. 560, 56 Am. Dec. 679; Descadillas *v.* Harris, 8 Me. 298; Ward *v.* Bourne, 56 Me. 161; Fowler *v.* Ludwig, 34 Me. 455; Titcomb *v.* McAllister, 81 Me. 399, 17 Atl. 315; Bryant *v.* Grady, 98 Me. 389, 57 Atl. 92. *Compare* Kidder *v.* Knox, 48 Me. 551.

Massachusetts. — Reed *v.* Upton, 10 Pick. 522, 20 Am. Dec. 545; Wood *v.* Bodwell, 12 Pick. 268; Maneely *v.* McGee, 6 Mass. 142, 4 Am. Dec. 105; Butts *v.* Dean, 2 Metc. 76, 35 Am. Dec. 389; Melledge *v.* Boston Iron Co., 5 Cush. 158, 51 Am. Dec. 59; Appleton *v.* Parker, 15 Gray 173; Parham Sew. Mach. Co. *v.* Brock, 113 Mass. 194; Green *v.* Russell, 132 Mass. 536; Paddock & Fowler Co. *v.* Simmons, 186 Mass. 152, 71 N. E. 298.

Minnesota. — McArdle *v.* McArdle, 12 Minn. 98 (*dictum*); but see *contra,* to the effect that the acceptance is presumed to be in conditional payment, Washington Slate Co. *v.* Burdick, 60 Minn. 270, 62 N. W. 285.

New York. — Eighme *v.* Strong, 49 Hun 16, 15 Civ. Proc. 119, 1 N. Y. Supp. 502.

South Carolina. — Morse *v.* Ellerbe, 4 Rich. L. 600 (presumed that all precedent indebtedness included in the note).

Vermont. — Hadley *v.* Bordo, 62 Vt. 285, 19 Atl. 476; Wemet *v.* Missisquoi Lime Co., 46 Vt. 458.

41. *Arkansas.* — Malpas *v.* Lowenstine, 46 Ark. 552.

Minnesota. — Devlin *v.* Chamblin, 6 Minn. 468.

New Hampshire. — Whitney *v.* Goin, 20 N. H. 354.

New York. — Torry *v.* Hadley, 27 Barb. 192; Darnall *v.* Morehouse, 36 How. Pr. 511; Smith *v.* Applegate, 1 Daly 91.

Pennsylvania. — Hunter *v.* Moul, 98 Pa. St. 13, 42 Am. Rep. 610; League *v.* Waring, 85 Pa. St. 244.

In New York it is said that presumption of payment arises when the bill or note is given at the time of the transaction. Noel *v.* Murray, 13 N. Y. 167, *affirming* 1 Duer (N. Y.) 385; Manning *v.* Lyon, 70 Hun 345, 24 N. Y. Supp. 265 (chattel mortgage and note given at time).

Where the creditors do not surrender the evidence of indebtedness it is presumed that the obligation is taken as collateral security; when they do, it is presumed that it is taken in payment. Crumbaugh *v.* Kugler, 3 Ohio St. 544.

Checks. — The rule is the same in regard to checks. McIntyre *v.* Kennedy, 29 Pa. St. 448. But see Beatty *v.* Lehigh Val. R. Co., 134 Pa. St. 294, 19 Atl. 745.

42. Parkhurst *v.* Jackson, 36 Me. 404; Ely *v.* James, 123 Mass. 36; Challoner *v.* Boyington, 83 Wis. 399, 53 N. W. 694.

43. Hall *v.* Stevens, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802; Noel *v.* Murray, 13 N. Y. 167; Blum *v.* Sadofsky, 86 N. Y. Supp. 22; Challoner *v.* Boyington, 83 Wis. 399, 53 N. W. 694. See also Partee *v.* Bedford, 51 Miss. 84.

44. Savings & Loan Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922.

45. Lee *v.* Green, 83 Ala. 491, 3 So. 785.

46. Sweet *v.* James, 2 R. I. 270.

E. Presumptions Rebuttable. — All the presumptions arising from the giving of a bill, note or check are rebuttable.[47]

13. From Lapse of Time. — **A. In General.** — An unexplained delay of a creditor to enforce his claim for twenty years or more gives rise to a presumption of payment.[48] This is separate and

47. *United States.* — Hudson *v.* Bradley, 2 Cliff. 130, 12 Fed. Cas. No. 6833; Palmer *v.* Elliott, 1 Cliff. 63, 18 Fed. Cas. No. 10,690.

Alabama. — Gookin *v.* Richardson, 11 Ala. 889, 46 Am. Dec. 232.

Arkansas. — Camp *v.* Gullett, 7 Ark. 524.

Indiana. — Keck *v.* State, 12 Ind. App. 119, 39 N. E. 899.

Kentucky. — Powell *v.* Swan, 5 Dana 1.

Maine. — Varner *v.* Nobleborough, 2 Me. 121, 11 Am. Dec. 48; Parkhurst *v.* Jackson, 36 Me. 404; Fowler *v.* Ludwig, 34 Me. 455; Titcomb *v.* McAllister, 81 Me. 399, 17 Atl. 315.

Massachusetts. — Maneely *v.* McGee, 6 Mass. 142, 4 Am. Dec. 105; Butts *v.* Dean, 2 Metc. 76, 35 Am. Dec. 389; Melledge *v.* Boston Iron Co., 5 Cush. 158, 51 Am. Dec. 59; Appleton *v.* Parker, 15 Gray 173; Parham Sew. Mach. Co. *v.* Brock, 113 Mass. 194; Green *v.* Russell, 132 Mass. 536; Reed *v.* Upton, 10 Pick. 522, 20 Am. Dec. 545; Wood *v.* Bodwell, 12 Pick. 268.

Nebraska. — Hapgood Plow Co. *v.* Martin, 16 Neb. 27, 19 N. W. 512.

New York. — Torry *v.* Hadley, 27 Barb. 192.

Rhode Island. — Sweet *v.* James, 2 R. I. 270.

Vermont. — Wemet *v.* Missisquoi Lime Co., 46 Vt. 458.

"The fact that the result of giving effect to the presumption will be to deprive a party, in a given case, of security which he has for the payment of his debt will go a long way toward rebutting the presumption." Paddock & Fowler Co. *v.* Simmons, 186 Mass. 152, 71 N. E. 298.

48. *United States.* — Goldhawk *v.* Duane, 2 Wash. C. C. 323, 10 Fed. Cas. No. 5,511; Philippi *v.* Philippe, 115 U. S. 151; Patterson *v.* Phillips, 1 Hemp. St. 69, 18 Fed. Cas. No. 10,829*a*; Dunlop *v.* Ball, 2 Cranch 180; Miller *v.* Evans, 2 Cranch C. C. 72, 17 Fed. Cas. No. 9,569; Didlake *v.* Robb, 1 Woods 680, 7 Fed. Cas. No. 3,899; Gaines *v.* Miller, 111 U. S. 395; Idler *v.* Borgmeyer, 65 Fed. 910, 13 C. C. A. 198.

Alabama. — Solomon *v.* Solomon, 83 Ala. 394, 3 So. 679; Semple *v.* Glenn, 91 Ala. 245, 9 So. 265, 24 Am. St. Rep. 894.

California. — Gage *v.* Downey, 79 Cal. 140, 21 Pac. 527.

Connecticut. — Boardman *v.* De Forest, 5 Conn. 1.

Delaware. — De Ford *v.* Green, 1 Marv. 316, 40 Atl. 1120.

Florida. — Buckmaster *v.* Kelley, 15 Fla. 180.

Illinois. — McCormick *v.* Evans, 33 Ill. 327.

Indiana. — Garnier *v.* Renner, 51 Ind. 372; O'Brien *v.* Holland, 3 Blackf. 490.

Kansas. — Courtney *v.* Staudenmeyer, 56 Kan. 392, 43 Pac. 758, 54 Am. St. Rep. 592.

Louisiana. — Wooten *v.* Harrison, 9 La. Ann. 234; Wells *v.* Compton, 3 La. 164; Peytavin *v.* Maurin, 2 La. 480; Kuhn *v.* Bercher, 114 La. 602, 38 So. 468.

Massachusetts. — Inches *v.* Leonard, 12 Mass. 379.

Mississippi. — Stark *v.* Gildart, 5 How. 606.

Missouri. — Smith *v.* Benton, 15 Mo. 371; Carr *v.* Dings, 54 Mo. 95.

New Hampshire. — Clark *v.* Clement, 33 N. H. 563; Roberts *v.* Dover, 72 N. H. 147, 55 Atl. 895.

New Jersey. — Betts *v.* Van Dyke, 40 N. J. Eq. 149; Ward *v.* Greinds (N. J. Eq.), 10 Atl. 374; Magee *v.* Bradley, 54 N. J. Eq. 326, 35 Atl. 103; Peacock *v.* Black, 4 N. J. Eq. 61; *Id.*, 5 N. J. Eq. 535.

New York. — Owen *v.* Calhoun, 55 Hun 608, 8 N. Y. Supp. 447; Bailey *v.* Jackson, 16 Johns. 210, 8 Am. Dec. 309; Morey *v.* Farmers Loan & Tr. Co., 14 N. Y. 302; Lyon *v.* Adde, 63 Barb. 89; Grant *v.* Duane, 9 Johns. 591; Livingston *v.* Livingston, 4 Johns. Ch. 294; Bean *v.* Tonnele, 94 N. Y. 381, 46 Am. Rep. 153; Lyon *v.* Chase, 51 Barb. 13; Rosenstock *v.*

entirely distinct from any question of the statute of limitations.[49]

B. To What the Presumption Extends. — a. *In General.* In general the presumption extends to every debt, no matter how solemn the instrument which creates or evidences it.[50]

Dessar, 33 Misc. 419, 67 N. Y. Supp. 657; Berger *v.* Waldbaum, 46 Misc. 4, 93 N. Y. Supp. 352; Sheldon *v.* Heaton, 22 App. Div. 308, 47 N. Y. Supp. 1124.

North Carolina. — Wilkerson *v.* Dunn, 52 N. C. 125; Walker *v.* Wright, 47 N. C. 155; Kerlee *v.* Corpening, 97 N. C. 330, 2 S. E. 664; Bird *v.* Graham, 36 N. C. 196.

Pennsylvania. — McQuesney *v.* Hiester, 33 Pa. St. 435; Hart *v.* Bucher, 182 Pa. St. 604, 38 Atl. 472, *In re* Devereux's Estate, 184 Pa. St. 429, 39 Atl. 225; Appeal of Bentley's Ex'rs., 99 Pa. St. 500; Ankeny *v.* Penrose, 18 Pa. St. 190; Morrison *v.* Funk, 23 Pa. St. 421; Brock *v.* Savage, 31 Pa. St. 410; Appeal of Hayes, 113 Pa. St. 380, 6 Atl. 144; *In re* Smith's Estate, 152 Pa. St. 102, 25 Atl. 315; Gregory *v.* Com., 121 Pa. St. 611, 6 Am. St. Rep. 804; McLean *v.* Findley, 2 Pen. & W. 97; King *v.* Coulter, 2 Grant Cas. 77; Appeal of O'Kerson, 2 Grant Cas. 303.

South Carolina. — Barnwell *v.* Barnwell, 2 Hill Eq. 228; Williams *v.* Sims, 1 Rich. Eq. 53; McQueen *v.* Fletcher, 4 Rich. Eq. 152; Smith *v.* Steen, 38 S. C. 361, 16 S. E. 1003; Haskell *v.* Keen, 2 Nott & McC. 160; Levy *v.* Hampton, 1 McCord 145; Kinard *v.* Baird, 20 S. C. 377.

Tennessee. — Thompson *v.* Thompson, 39 Tenn. 405.

Texas. — State *v.* Sais, 60 Tex. 87; Foot *v.* Silliman, 77 Tex. 268, 13 S. W. 1032; Owen *v.* New York & T. Land Co., 11 Tex. Civ. App. 284, 32 S. W. 189.

Vermont. — Evarts *v.* Nason, 11 Vt. 122; Graves *v.* Weeks, 19 Vt. 178; Tudor *v.* Taylor, 26 Vt. 444; Martin *v.* Bowker, 19 Vt. 526.

Virginia. — Scott *v.* Isaacs, 85 Va. 712, 8 S. E. 678; King *v.* King, 90 Va. 177, 17 S. E. 894; White *v.* Offield, 90 Va. 336, 18 S. E. 436.

West Virginia. — Sadler *v.* Kennedy, 11 W. Va. 187; Calwell *v.* Prindle, 19 W. Va. 604; Criss *v.* Criss, 28 W. Va. 388; Burbridge *v.* Sadler, 46 W. Va. 39, 32 S. E. 1028; Seymour *v.* Alkire, 47 W. Va. 302, 34 S. E. 953.

Wisconsin. — Sanderson *v.* Olmstead, 1 Chand. 190, 2 Pin. 224.

49. Carr *v.* Dings, 54 Mo. 95.

Distinguished From Statute of Limitations. — "There is a recognized distinction between the statute of limitations and the presumption of payment from lapse of time, the condition of the parties, their relations toward each other, etc. In the former case the bar is absolute; in the latter it is a rule of evidence, not of pleading, and simply raises a presumption of payment. It is founded upon the idea that, in the ordinary course of human affairs, it is not usual for men to allow real and well-founded claims to lie dormant an unreasonable length of time:" Clendenning *v.* Thompson, 91 Va. 518, 22 S. E. 233. See also Courtney *v.* Staudenmeyer, 56 Kan. 392, 43 Pac. 758, 54 Am. St. Rep. 592; Bird *v.* Graham, 36 N. C. 196.

Delay in Suing on a Legal Claim. Mere fact of delay to sue a strictly legal claim where the statute of limitations has not run against it gives rise to no presumption of payment. Newcombe *v.* Fox, 1 App. Div. 389, 37 N. Y. Supp. 294.

50. *Connecticut.* — Daggett *v.* Tallman, 8 Conn. 168.

Iowa. — Manning *v.* Meredith, 69 Iowa 430, 29 N. W. 336.

Kentucky. — Shields *v.* Pringle, 2 Bibb 387.

Missouri. — Smith *v.* Benton, 15 Mo. 371,

New Hampshire. — Clark *v.* Clement, 33 N. H. 563.

North Carolina. — Spruill *v.* Davenport, 27 N. C. 663.

Pennsylvania. — Appeal of Hayes, 113 Pa. St. 380, 6 Atl. 144.

A presumption in favor of one joint obligor may be taken advantage of by all. Persall *v.* Houston, 48 N. C. 346.

Ground Rent. — A ground rent reserved by deed is not subject to a

b. *Judgments. — Bonds.* — This rule extends to judgment debts. A judgment upon which no execution has been issued or attempt made to enforce the same for twenty years is presumed to have been paid.[51] Likewise it applies to bonds.[52]

c. *Mortgages.* — It applies as well to debts secured by mortgage,

legal presumption of extinguishment from mere lapse of time; but arrears of a ground rent, as well as a judgment, or mortgage, or any other form of indebtedness, are subject to the presumption of payment. Trustees of St. Mary's Church *v.* Miles, 1 Whart. (Pa.) 229; McQuesney *v.* Hiester, 33 Pa. St. 435.

While payment of rent may be presumed, the fact that the right has been released or conveyed cannot be. Lyon *v.* Odell, 65 N. Y. 28.

Trusts. — Lapse of time may raise a presumption as to settlement under a constructive trust, but in Delaware not under an actual trust. Cartwell *v.* Perkins, 2 Del. Ch. 102.

To the effect that presumption of payment cannot arise from mere delay where the trust relates to land, see Williams *v.* Williams, 82 Wis. 393, 52 N. W. 429.

The presumption may arise in favor of an attorney or collection agent. Roberts *v.* Armstrong, 1 Bush (Ky.) 263, 89 Am. Dec. 624.

51. *United States.* — Gaines *v.* Miller, 111 U. S. 395.

Alabama. — Rhodes *v.* Turner, 21 Ala. 210.

Delaware. — Farmers Bank *v.* Leonard, 4 Har. 536; Burton *v.* Cannon, 5 Har. 13; Robinson *v.* Tunnell, 2 Houst. 387; Morrow *v.* Robinson, 4 Del. Ch. 521.

Georgia. — Burt *v.* Casey, 10 Ga. 178; Tennessee *v.* Virgin, 36 Ga. 388.

Indiana. — Bright *v.* Sexton, 18 Ind. 186.

Maine. — Noble *v.* Merrill, 48 Me. 140.

Missouri. — Clemens *v.* Wilkinson, 10 Mo. 97.

New York. — Miller *v.* Smith, 16 Wend. 425; Henderson *v.* Henderson, 3 Denio 314; *In re* Kendrick, 107 N. Y. 104, 13 N. E. 762.

North Carolina. — Herman *v.* Watts, 107 N. C. 646, 12 S. E. 437 (by statute, presumption arises in ten years).

Oregon. — Beekman *v.* Hamlin, 19 Or. 383, 24 Pac. 195, 20 Am. St. Rep. 827, 10 L. R. A. 454.

Pennsylvania. — Cope *v.* Humphreys, 14 Serg. & R. 15.

South Carolina. — Pratt *v.* McLure, 10 Rich. Eq. 301; Kinard *v.* Baird, 20 S. C. 377; Cohen *v.* Thompson, 2 Mill Const. 145.

Vermont. — Tudor *v.* Taylor, 26 Vt. 444.

52. *United States.* — Higginson *v.* Mein, 4 Cranch 415.

Delaware. — Durham *v.* Greenly, 2 Har. 124; State *v.* Lobb, 3 Har. 421; Fleming *v.* Emory, 5 Har. 46.

Indiana. — O'Brien *v.* Coulter, 2 Blackf. 421.

Maryland. — Boyd *v.* Harris, 2 Md. Ch. 210.

New Hampshire. — Bartlett *v.* Bartlett, 9 N. H. 398.

New York. — Clark *v.* Hopkins, 7 Johns. 556; Bander *v.* Snyder, 5 Barb. 63.

North Carolina. — Haws *v.* Craigie, 49 N. C. 394; Hall *v.* Gibbs, 87 N. C. 4 (arises in ten years); Rogers *v.* Clements, 98 N. C. 180, 3 S. E. 512.

Pennsylvania. — Reed *v.* Reed, 46 Pa. St. 239; Hughes *v.* Hughes, 54 Pa. St. 240.

South Carolina. — Agnew *v.* Renwick, 27 S. C. 562, 4 S. E. 223; Brewton *v.* Cannon, 1 Bay 482; Frazer *v.* Perdrieau, 1 Bail. 172; Willingham *v.* Chick, 14 S. C. 93; Palmer *v.* Dubois, 1 Mills Const. 178.

Tennessee. — Blackburn *v.* Squib, 7 Tenn. 60; Thompson *v.* Thompson, 2 Head 405.

Vermont. — Rogers *v.* Judd, 5 Vt. 236, 26 Am. Dec. 301.

Virginia. — Perkins *v.* Hawkins, 9 Gratt. 649; Booker *v.* Booker, 29 Gratt. 605, 26 Am. Rep. 401; Norvell *v.* Little, 79 Va. 141.

West Virginia. — Colwell *v.* Prindle, 11 W. Va. 397.

Does not apply where special proceedings to enforce the judgment

the presumption arising after lapse of the period of limitations provided by statute in which the mortgagor has been in possession and no steps have been taken to collect.[53]

(1.) Limitations. — Possession or Foreclosure Proceedings. — The presumption does not arise if the land has been in the possession of the mortgagee for,[54] or if foreclosure proceedings have been commenced within[55] twenty years.

(2.) Statute of Limitations. — If the statute of limitations has not barred the debt, the presumption will not arise.[56]

d. *In Favor of Executors and Administrators.* — The presumption may arise in favor of an executor or administrator as against a creditor of the estate or a legatee.[57]

are taken before expiration of time. Palen *v.* Bushnell, 51 Hun 423, 4 N. Y. Supp. 63.

53. *Alabama.* — Goodwyn *v.* Baldwin, 59 Ala. 127.

Illinois. — Locke *v.* Caldwell, 91 Ill. 417.

Maine. — Sweetser *v.* Lowell, 33 Me. 446; Blethen *v.* Dwinal, 35 Me. 556; Jarvis *v.* Albro, 67 Me. 310; Mathews *v.* Light, 40 Me. 394.

Maryland. — Boyd *v.* Harris, 2 Md. Ch. 210; Brown *v.* Hardcastle, 63 Md. 484.

Massachusetts. — Kellogg *v.* Dickinson, 147 Mass. 432, 18 N. E. 223, 1 L. R. A. 346; Inches *v.* Leonard, 12 Mass. 379.

Michigan. — Michigan Ins. Co. *v.* Brown, 11 Mich. 265.

Missouri. — Wilson *v.* Albert, 89 Mo. 537, 1 S. W. 209.

New Jersey. — Magee *v.* Bradley, 54 N. J. Eq. 326, 35 Atl. 103; Evans *v.* Huffman, 5 N. J. Eq. 354; Barned *v.* Barned, 21 N. J. Eq. 245.

New York. — Collins *v.* Torrey, 7 Johns. 278, 5 Am. Dec. 273; Jackson *v.* Pratt, 10 Johns. 381; Jackson *v.* Wood, 12 Johns. 242, 7 Am. Dec. 315; Giles *v.* Baremore, 5 Johns. Ch. 545; Dunham *v.* Minard, 4 Paige 441; Jackson *v.* Pierce, 10 Johns. 414; Newcomb *v.* St. Peter's Church, 2 Sandf. Ch. 636; Belmont *v.* O'Brien, 12 N. Y. 394; Barnard *v.* Onderdonk, 98 N. Y. 158; McMurray *v.* McMurray, 63 Hun 183, 17 N. Y. Supp. 657.

North Carolina. — Roberts *v.* Welch, 43 N. C. 287; Powell *v.* Brinkley, 44 N. C. 154; Ray *v.* Pearce, 84 N. C. 485; Pemberton *v.* Simmons, 100 N. C. 316, 6 S. E. 122.

Pennsylvania. — Smith *v.* Nevin, 31 Pa. St. 238.

Vermont. — Whitney *v.* French, 25 Vt. 663; Atkinson *v.* Patterson, 46 Vt. 750.

Virginia. — Jones *v.* Comer, 5 Leigh 350.

54. Crooker *v.* Jewell, 31 Me. 306.

55. Kibbe *v.* Thompson, 5 Biss. 226; 14 Fed. Cas. No. 7754; Baldwin *v.* Cullen, 51 Mich. 33, 16 N. W. 191.

56. Locke *v.* Caldwell, 91 Ill. 417.

Acknowledgment or Payment. An acknowledgment of the debt or payment of interest thereon will prevent the presumption from arising. Howard *v.* Hildreth, 18 N. H. 105; New York L. Ins. & T. Co. *v.* Covert, 3 Abb. Dec. 350, 6 Abb. Prac. (N. S.) 154.

Presumption in Favor of Third Party. — Where no presumption has arisen in favor of the mortgagor none will arise in favor of his grantee. Wright *v.* Eaves, 10 Rich. Eq. (S. C.) 582.

57. There is no presumption of payment of the debts of an estate where they are large and numerous, and there is considerable property left to be disposed of. McHardy *v.* McHardy, 7 Fla. 301.

But there may be a presumption of the payment of debts from long delay. Miller *v.* Cramer, 48 S. C. 282, 26 S. E. 657. See also Gaines *v.* Miller, 111 U. S. 395; White *v.* Offield, 90 Va. 336, 18 S. E. 436.

And the presumption may be raised against a legatee. Smith *v.* Calloway, 7 Blackf. (Ind.) 86; Bird *v.* Graham, 36 N. C. 196; Durdon *v.* Gaskill, 2 Yeates (Pa.) 268; Barn-

e. *As Against the Government.* — In analogy to the rule as to the statute of limitations, no presumption of payment from lapse of time can be raised against the government.[58]

C. Period Short of Statute of Limitations. — Generally, a mere lapse of time for a period short of that of the statute of limitations is not sufficient to raise the presumption.[59] At common law, and in many of the states, a period of less than twenty years is not sufficient.[60]

well *v.* Barnwell, 2 Hill Eq. (S. C.) 228.

And in general see Bass *v.* Bass, 88 Ala. 408, 7 So. 243; Coleman *v.* Lane, 26 Ga. 515; Hooper *v.* Howell, 52 Ga. 315; Langworthy *v.* Baker, 23 Ill. 430; Shearin *v.* Eaton, 37 N. C. 282; Foulk *v.* Brown, 2 Watts (Pa.) 209.

58. United States *v.* Williams, 4 McLean 567, 28 Fed. Cas. No. 16,720; *Id.*, 5 McLean 133, 28 Fed. Cas. No. 16,721.

59. Appeal of Smith, 52 Mich. 415, 18 N. W. 195.

Georgia. — Thomas *v.* Hunnicutt, 54 Ga. 337; Milledge *v.* Gardner, 33 Ga. 397.

Illinois. — Aultman *v.* Connor, 25 Ill. App. 654.

New Jersey. — Snediker *v.* Everingham, 27 N. J. L. 143.

South Carolina. — Smithpeter *v.* Ison, 4 Rich. L. 203, 53 Am. Dec. 732.

Vermont. — Grafton Bank *v.* Doe, 19 Vt. 463, 47 Am. Dec. 697.

Virginia. — Cheatham *v.* Aistrop, 97 Va. 457, 34 S. E. 57 (lapse of time, coupled with fact that no proceedings were taken until after debtor's death, not sufficient).

"Where the form of action prevents the defendant from availing himself of the statute by way of plea, he should have the benefit of its principle, by being permitted to use the lapse of time (which would be a complete defense under the statute) as evidence of payment." Jackson *v.* Sackett, 7 Wend. (N. Y.) 94. To the same effect see Martin *v.* Bowker, 19 Vt. 526 (fifteen years, statute applied to equitable proceeding).

By virtue of statute the presumption may accrue in ten years in North Carolina. Spruill *v.* Davenport, 27 N. C. 663.

60. *Alabama.* — Phillips *v.* Adams, 78 Ala. 225.

Iowa. — Forsyth *v.* Ripley, 2 Greene 181; Hendricks *v.* Wallis, 7 Iowa 224.

Kentucky. — Stockton *v.* Johnson, 6 B. Mon. 408.

Maine. — Cony *v.* Barrows, 46 Me. 497.

Missouri. — West *v.* Brison, 99 Mo. 684, 13 S. W. 95.

New Hampshire. — Gould *v.* White, 26 N. H. 178.

New Jersey. — Boon *v.* Pierpont, 28 N. J. Eq. 7.

New York. — Clark *v.* Bogardus, 2 Edw. Ch. 387; Lyon *v.* Adde, 63 Barb. 89; Boyd *v.* Boyd, 9 Misc. 161, 29 N. Y. Supp. 7; Daby *v.* Ericsson, 45 N. Y. 786; Camp *v.* Hallanan, 42 Hun 628; Jackson *v.* De Lancey, 11 Johns. 365; Ingraham *v.* Baldwin, 9 N. Y. 45.

Pennsylvania. — Rogers *v.* Burns, 27 Pa. St. 525; Appeal of Briggs, 93 Pa. St. 485; Morrison *v.* Collins, 127 Pa. St. 28, 17 Atl. 753, 14 Am. St. Rep. 827; Moore *v.* Smith, 81 Pa. St. 182; Murphy *v.* Philadelphia Trust Co., 103 Pa. St. 379; McCarty *v.* Gordon, 4 Whart. 321.

South Carolina. — Foster *v.* Hunter, 4 Rich. Eq. 16; Wherry *v.* McCammon, 12 Rich. Eq. 337, 91 Am. Dec. 240; Wightman *v.* Butler, 2 Spears 357.

Vermont. — Mattocks *v.* Bellamy, 8 Vt. 463; Sparhawk *v.* Buell, 9 Vt. 41.

Virginia. — Erskine *v.* North, 14 Gratt. 60; James *v.* Life, 92 Va. 702, 24 S. E. 275.

West Virginia. — Sadler *v.* Kennedy, 11 W. Va. 187; Calwell *v.* Prindle, 19 W. Va. 604; Criss *v.* Criss, 28 W. Va. 388.

A lapse of three years is not sufficient. Dodds *v.* Dodds, 57 Ind. 293. Nor a lapse of five years. Nash *v.* Gibson, 16 Iowa 305. Nor a lapse of fifteen years. Lenox *v.* Greene, 4 N. C. 261; Chiles *v.* Monroe, 61 Ky. 4

D. Rebuttal. — a. *In General.* — The presumptions are rebuttable,[61] and may be overthrown by any evidence showing it to be

Metc. (Ky.) 72. Nor a lapse of eighteen years and a half. Bottz *v.* Bullman, 1 Yeates (Pa.) 584.

In the following cases lapse of time for less than twenty years was held sufficient to raise the presumption: Miller *v.* Evans, 2 Cranch C. C. 72, 17 Fed. Cas. No. 9,569 (nineteen years and ten months); Didlake *v.* Robb, 1 Woods 680, 7 Fed. Cas. No. 3899 ("after a debt has remained due and payable for sixteen years the law holds such lapse of time as *prima facie* evidence of payment; . . . and after the lapse of twenty years the presumption of payment becomes conclusive"); Sailor *v.* Hertzog, 4 Whart. (Pa.) 259; Barnwell *v.* Barnwell, 2 Hill Eq. (S. C.) 228 (nineteen years).

Sixteen years were held sufficient to create the presumption in Didlake *v.* Robb, 1 Woods 680, 7 Fed. Cas. No. 3,899; Atkinson *v.* Dance, 9 Yerg. (Tenn.) 424, 30 Am. Dec. 422; Anderson *v.* Settle, 5 Sneed (Tenn.) 202; Kilpatrick *v.* Brashear, 10 Heisk. (Tenn.) 372; Thompson *v.* Thompson, 2 Head (Tenn.) 405; McDaniel *v.* Goodall, 2 Cold. (Tenn.) 391; Yarnell *v.* Moore, 3 Cold. (Tenn.) 173.

Difference From Statute of Limitations. — A distinction must be noted between cases arising under the statute of limitations and those in which there is a mere presumption. In the former case the party, to avoid its effect, must bring himself within some of its savings; in the latter he may show any circumstances which outweigh the presumption. Abbott *v.* Godfroy, 1 Mich. 178.

61. *United States.* — Denniston *v.* McKeen, 2 McLean 253, 7 Fed. Cas. No. 3,803; Higginson *v.* Mein, 4 Cranch 415.

Connecticut. — Fanton *v.* Middlebrook, 50 Conn. 44.

Delaware. — Vaughan *v.* Marshall, 1 Houst. 604.

Georgia. — Burt *v.* Casey, 10 Ga. 178.

Indiana. — Swatts *v.* Bowen, 141 Ind. 322, 40 N. E. 1057; Bright *v.* Sexton, 18 Ind. 186; Reddington *v.* Julian, 2 Ind. 224.

Kentucky. — Helm *v.* Jones, 3 Dana 86; Waters *v.* Waters, 1 Metc. 519.

Maine. — McLellan *v.* Crofton, 6 Me. 307; Knight *v.* McKinney, 84 Me. 107, 24 Atl. 744; Noble *v.* Merrill, 48 Me. 140; Brewer *v.* Thomes, 28 Me. 81; Knight *v.* Macomber, 55 Me. 132; Jackson *v.* Nason, 38 Me. 85; Joy *v.* Adams, 26 Me. 330; Sweetser *v.* Lowell, 33 Me. 446; Jarvis *v.* Albro, 67 Me. 310; Philbrook *v.* Clark, 77 Me. 176; Shumway *v.* Reed, 34 Me. 560, 56 Am. Dec. 679.

Maryland. — Brown *v.* Hardcastle, 63 Md. 484.

Massachusetts. — Knapp *v.* Knapp, 134 Mass. 353; Delano *v.* Smith, 142 Mass. 490, 8 N. E. 644; Denny *v.* Eddy, 22 Pick. 533; Cheever *v.* Perley, 11 Allen 584; Anthony *v.* Anthony, 161 Mass. 343, 37 N. E. 386.

Michigan. — Abbott *v.* Godfroy, 1 Mich. 178.

New Hampshire. — Clark *v.* Clement, 33 N. H. 563; Grantham *v.* Canaan, 38 N. H. 268; Barker *v.* Jones, 62 N. H. 497, 13 Am. St. Rep. 586.

New Jersey. — Magee *v.* Bradley, 54 N. J. Eq. 326, 35 Atl. 103; Johnson *v.* Tuttle, 9 N. J. Eq. 365; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748; Rockhill *v.* Rockhill, 14 Atl. 760.

New York. — Morris *v.* Wadsworth, 17 Wend. 103; Hall *v.* Roberts, 63 Hun 473, 18 N. Y. Supp. 480; Arden *v.* Arden, 1 Johns. Ch. 313; Waddell *v.* Elmendorf, 10 N. Y. 170, *affirming* 12 Barb. 585; Jackson *v.* De Lancey, 11 Johns. 365; Jackson *v.* Slater, 5 Wend. 295.

North Carolina. — Quince *v.* Ross, 3 N. C. 377; Gee *v.* Cumming, 3 N. C. 398; McKinder *v.* Littlejohn, 23 N. C. 66; Buie *v.* Buie, 24 N. C. 87; Grant *v.* Burgwyn, 84 N. C. 560; Rogers *v.* Clements, 98 N. C. 180, 3 S. E. 512; Currie *v.* Clark, 101 N. C. 329, 7 S. E. 805; Alston *v.* Hawkins, 105 N. C. 3, 11 S. E. 164, 18 Am. St. Rep. 874; *In re* Walker, 107 N. C. 340, 12 S. E. 136; Long *v.* Clegg, 94 N. C. 763; Cartwright *v.* Kerman, 105 N. C. 1, 10 S. E. 870.

Oregon. — Beekman *v.* Hamlin, 20 Or. 352, 25 Pac. 672; *Id.*, 23 Or. 313, 31 Pac. 707.

more probable than otherwise that the debt has not been paid.[62]

b. *Sufficient When Coupled With Other Circumstances.* — But a shorter period, coupled with other circumstances tending to show payment, may be sufficient to warrant a jury in making an inference of payment.[63] There is no precise rule as to the quality

Pennsylvania. — Morrison *v.* Funk, 23 Pa. St. 421; Ankeny *v.* Penrose, 18 Pa. St. 190; Gregory *v.* Com., 121 Pa. St. 611, 12 Atl. 452, 6 Am. St. Rep. 804; *In re* Smith's Estate, 177 Pa. St. 437, 35 Atl. 680; Durdon *v.* Gaskill, 2 Yeates 268; Trustees of St. Mary's Church *v.* Miles, 1 Whart. 229; Reed *v.* Reed, 46 Pa. St. 239.

South Carolina. — Tucker *v.* Hunt, 6 Rich. Eq. 183; Levy *v.* Hampton, 1 McCord 145; Kinard *v.* Baird, 20 S. C. 377; North *v.* Drayton, 1 Harp. Eq. 34; Boyce *v.* Lake, 17 S. C. 481, 43 Am. Rep. 618.

Tennessee. — Anderson *v.* Settle, 5 Sneed 202; Stanley *v.* McKinzer, 7 Lea 454.

Texas. — Shotwell *v.* McCardell, 19 Tex. Civ. App. 174, 47 S. W. 39.

Vermont. — Spear *v.* Newell, 13 Vt. 288; Evarts *v.* Nason, 11 Vt. 122.

Virginia. — Eustace *v.* Gaskins, 1 Wash. 188; Jameson *v.* Rixey, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726; Tinsley *v.* Anderson, 3 Call. 329; Bowie *v.* Poor School Soc., 75 Va. 300.

West Virginia. — Hale *v.* Pack, 10 W. Va. 145; McCleary *v.* Grantham, 29 W. Va. 301, 11 S. E. 949.

Wisconsin. — Delaney *v.* Brunette, 62 Wis. 615, 23 N. W. 22.

As to the effect of the statute in Arkansas see Woodruff *v.* Sanders, 15 Ark. 143; Rector *v.* Morehouse, 17 Ark. 131.

62. *United States.* — Burnham *v.* Hewey, 1 Hask, 372, 4 Fed. Cas. No. 2175.

Delaware. — De Ford *v.* Green, 1 Marv. 316, 40 Atl. 1120.

New Hampshire. — Grantham *v.* Canaan, 38 N. H. 268.

New York. — Morris *v.* Wadsworth, 17 Wend. 103.

North Carolina. — Quince *v.* Ross, 3 N. C. 377; Gee *v.* Cumming, 3 N. C. 398; McKinder *v.* Littlejohn, 23 N. C. 66 (may be repelled by evidence that debtor did not have means nor opportunity to pay); Buie *v.* Buie, 24 N. C. 87 (want of person against whom to bring suit).

Pennsylvania. — Ankeny *v.* Penrose, 18 Pa. St. 190; *In re* Smith's Estate, 177 Pa. St. 437, 35 Atl. 680; Gregory *v.* Com., 121 Pa. St. 611, 15 Atl. 452, 6 Am. St. Rep. 804; Levers *v.* Van Buskirk, 7 Watts. & S. 70; *Id.*, 4 Pa. St. 309 (evidence of a former recovery in ejectment); O'Hara *v.* Corr, 210 Pa. St. 341, 59 Atl. 1099 (may be rebutted by any evidence affirmatively showing non-payment).

Tennessee. — Anderson *v.* Settle, 5 Sneed 202 (may be rebutted by any satisfactory explanation of the delay); Stanley *v.* McKinzer, 7 Lea 454.

Virginia. — Eustace *v.* Gaskins, 1 Wash. 188 ("may be opposed by circumstances, accounting for the forbearance").

West Virginia. — McCleary *v.* Grantham, 29 W. Va. 301, 11 S. E. 949.

Wisconsin. — Delaney *v.* Brunette, 62 Wis. 615, 23 N. W. 22 (may be overcome by positive evidence of non-payment).

63. *United States.* — Jones *v.* Wilkey, 78 Fed. 532; Goldhawk *v.* Duane, 2 Wash. C. C. 323, 10 Fed. Cas. No. 5511; Denniston *v.* McKeen, 2 McLean, 253, 7 Fed. Cas. No. 3803.

Alabama. — Phillips *v.* Adams, 78 Ala. 225.

Connecticut. — Perkins *v.* Kent, 1 Root 312 (lapse of seventeen years, coupled with evidence of statements of creditor).

Delaware. — Fleming *v.* Emory, 5 Har. 46.

Florida. — Buckmaster *v.* Kelley, 15 Fla. 180.

Georgia. — Milledge *v.* Gardner, 33 Ga. 397 (lapse of time coupled with evidence of the continued solvency of the defendant, and the continued insolvency of the plaintiff, sufficient; Janes *v.* Patterson, 62 Ga. 527 (lapse of time coupled with recital of payment in deed).

Indiana. — Garnier *v.* Renner, 51

or quantity of other evidence necessary. Each case must depend upon its own circumstances.[64]

E. When Time Begins To Run. — The time begins to run from the time when proceedings might have been instituted,[65] and the computation is largely governed by the analogy of the statute of limitations.[66] Of course, lapse of time before a debt is due cannot be considered;[67] and time in which the debtor has resisted payment should be disregarded.[68]

F. Rebutting Evidence. — a. *Lapse of Time.* — Evidence that a suit was commenced within twenty years,[69] or that there had been

Ind. 372; Long *v.* Straus, 124 Ind. 84, 24 N. E. 664.

Iowa. — Hendricks *v.* Wallis, 7 Iowa 224.

Kentucky. — Moore *v.* Pogue, 1 Duv. 327.

Louisiana. — Denaule *v.* Nunez, 6 La. 27; Davenport *v.* Labauve, 5 La. Ann. 140.

Maine. — Thayer *v.* Mowry, 36 Me. 287.

Missouri. — West *v.* Brison, 99 Mo. 684, 13 S. W. 95; Baker *v.* Stonebraker, 36 Mo. 338.

New Jersey. — Snediker *v.* Everingham, 27 N. J. L. 143; Eckel *v.* Eckel, 49 N. J. Eq. 587, 27 Atl. 433.

New Hampshire. — Gould *v.* White, 26 N. H. 178 (lapse of time coupled with evidence of unexplained possession of mortgaged land).

New York. — Clark *v.* Bogardus, 2 Edw. Ch. 387; Jackson *v.* Sackett, 7 Wend. 94; Lyon *v.* Adde, 63 Barb. 89; Boyd *v.* Boyd, 9 Misc. 161, 29 N. Y. Supp. 7; Bander *v.* Snyder, 5 Barb. 63.

Pennsylvania. — Diamond *v.* Tobias, 12 Pa. St. 312; Appeal of Briggs, 93 Pa. St. 485; Moore *v.* Smith, 81 Pa. St. 182.

South Carolina. — Williams *v.* Sims, 1 Rich. Eq. 53; Blake *v.* Quash, 3 McCord, 340; Bradley *v.* Jennings, 15 Rich. L. 34; Levy *v.* Hampton, 1 McCord, 145; Barnwell *v.* Waring, Rich. Eq. Cas. 283; Foster *v.* Hunter, 4 Rich. Eq. 16; Sessions *v.* Stevenson, 11 Rich. Eq. 282; Winstanley *v.* Savage, 2 McCord. Eq. 435.

Tennessee. — Huskey *v.* Maples, 2 Cold. 25, 88 Am. Dec. 588; Blackburn *v.* Squib, 7 Tenn. 60.

Virginia. — Ross *v.* Darby, 4 Munf. 428; Tunstall *v.* Withers, 86 Va. 892, 11 S. E. 565.

West Virginia. — Sadler *v.* Kennedy, 11 W. Va. 187; Calwell *v.* Prindle, 19 W. Va. 604; Criss *v.* Criss, 28 W. Va. 388.

In some cases this is said to be an inference of fact rather than a presumption of law. Snediker *v.* Everingham, 27 N. J. L. 143; Thompson *v.* Thompson, 2 Head (Tenn.) 405.

64. Buckmaster *v.* Kelley, 15 Fla. 180.

"The single circumstance that the defendant was able to pay would not be a fact from which this presumption would arise in less than twenty years. For, if the defendant is able to pay, the plaintiff may be able and willing to wait." Morrison *v.* Collins, 127 Pa. St. 28, 17 Atl. 753, 14 Am. St. Rep. 827.

65. Philippi *v.* Philippe, 115 U. S. 151. See also Spuill *v.* Davenport, 27 N. C. 663.

In cases of judgments the time begins to run from the date of the judgment. Succession of Tilghman, 7 Rob. (La.) 387. And not from the time when the last execution lost its active energy. Dillard *v.* Brian, 5 Rich. L. (S. C.) 501.

As to the effect of stay laws see Black *v.* Burton, 47 Ga. 362; Akin *v.* Freeman, 49 Ga. 51; Solomon *v.* Hinton, 50 Ga. 163, *holding* that the time does not run during the period of the law. But see Kinsler *v.* Holmes, 2 Rich. (S. C.) 483.

66. Penrose *v.* King, 1 Yeates (Pa.) 344; Mason *v.* Spurlock, 4 Baxt. (Tenn.) 554.

67. Dwight *v.* Eastman, 62 Vt. 398, 20 Atl. 594. See also *In re* Oakley, 2 Edw. Ch. (N. Y.) 478; Sullivan *v.* Fosdick, 10 Hun (N. Y.) 173.

68. Spear *v.* Newell, 13 Vt. 288.

69. Commencement of Suit. — Evidence that suit was commenced with-

a demand of payment within that time,[70] will rebut the presumption; and as to judgments, the presumption will be rebutted by showing a revival or a return of execution within that period.[71]

b. *Relationship Between the Parties.* — The presumption may be rebutted by evidence of close relationship between the parties.[72]

c. *Legal Disabilities.* — **(1.) Infancy or Coverture.** — Infancy,[73] or coverture[74] of the creditor will extend the time for the accrual of the presumption.

(2.) Alien Enemies. — No presumption can arise during a state of war where the plaintiff is an alien enemy.[75]

(3.) Stay Laws. — The suspension of the statute of limitations by stay laws does not affect the presumption.[76]

d. *Part Payment.* — **(1.) In General.** — The presumption may be rebutted by showing a payment on account during the period.[77]

in twenty years will rebut the presumption. McCormick *v.* Eliot, 43 Fed. 469; Levers *v.* Van Buskirk, 7 Watts & S. (Pa.) 70. Obtaining a judgment will have the same effect. Shaw *v.* Barksdale, 25 S. C. 204.

70. Demand of Payment. — Demand of payment within twenty years will rebut the presumption. Waters *v.* Waters, 1 Metc. (Ky.) 519; Stout *v.* Levan, 3 Pa. St. 235. But see Sellers *v.* Holman, 20 Pa. St. 321.

71. Revival of Judgment or Return of Execution. — As to judgments, the presumption is rebutted by showing a revival or a return of execution within the period. Brearly *v.* Peay, 23 Ark. 172; Henderson *v.* Cairns, 14 Barb. (N. Y.) 15; James *v.* Jarrett, 17 Pa. St. 370; Black *v.* Carpenter, 3 Baxt. (Tenn.) 350. But see Tobin *v.* Myers, 18 S. C. 324.

72. Knight *v.* McKinney, 84 Me. 107, 24 Atl. 744; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748; Vaughn *v.* Tate (Tenn. Ch. App.), 36 S. W. 748; Stanley *v.* McKinzer, 7 Lea (Tenn.) 454. But see Magee *v.* Bradley, 54 N. J. Eq. 326, 35 Atl. 103 (not rebutted by evidence that mortgagor and mortgagee were brother and sister).

In Hart *v.* Bucher, 186 Pa. St. 384, 40 Atl. 511, the facts that the mortgagee lived with the mortgagor and kept control of the mortgage were held insufficient to overcome the presumption.

Where the party who owes the money is also the executor of the creditor's estate no presumption can arise from mere lapse of time. Newman *v.* Clyburn, 41 S. C. 534, 19 S. E. 913.

73. Infancy. — "If the plaintiff had been himself an infant when the cause of action accrued, then by analogy to the statute of limitations, even in real actions, the presumption of payment would arise in five years after he should attain full age, provided there were twenty years from the time of the accruing of the cause of action." Bartlett *v.* Bartlett, 9 N. H. 398.

In Wilkerson *v.* Dunn, 52 N. C. 125, it was held that the time does not begin to run until the infant becomes of age. But *contra*, see Johnson *v.* England, 20 N. C. 70.

74. Lynde *v.* Denison, 3 Conn. 387.

75. Dunlop *v.* Ball, 2 Cranch (U. S.) 180.

It does not necessarily follow that the same length of time after removal of the disability is necessary.

76. Shubrick *v.* Adams, 20 S. C. 49; Philippi *v.* Philippe, 115 U. S. 151. But see Penrose *v.* King, 1 Yeates (Pa.) 344.

77. *Arkansas.* — Duke *v.* State, 56 Ark. 485, 20 S. W. 600.

Connecticut. — Boardman *v.* De Forest, 5 Conn. 1.

Delaware. — Burton *v.* Cannon, 5 Har. 13; Vaughan *v.* Marshall, 1 Houst. 604.

Iowa. — Walker *v.* Russell, 73 Iowa 340, 35 N. W. 443.

New Jersey. — Betts *v.* Van Dyke, 40 N. J. Eq. 149.

North Carolina. — McKeethan *v.* Atkinson, 46 N. C. 421; Hughes *v.*

(2.) Must Affirmatively Appear. — Credits indorsed on a bond within the period must affirmatively appear to have been made at the purported time, and the burden is upon the plaintiff to show it.[78]

(3.) Payment by Co-Obligor. — Part payments by one co-obligor will overthrow the presumption as to the others.[79]

e. *Acknowledgment of Debt.* — **(1.) In General.** — An admission or acknowledgment of the debt within twenty years will rebut the presumption of payment,[80] although unaccompanied by a promise to pay.[81] And the admission may be either oral or written.[82]

Blackwell, 59 N. C. 73 (payment of interest).

Pennsylvania. — Unangst *v.* Kraemer, 8 Watts & S. 391; Kitchen *v.* Deardoff, 2 Pa. St. 481 (payment of interest or part of the principal sufficient); *In re* Darlington's Appropriation, 13 Pa. St. 430; Jenkins *v.* Anderson, 11 Atl. 558.

South Carolina. — Pyles *v.* Bell, 20 S. C. 365; Kinard *v.* Baird, 20 S. C. 377; Dickson *v.* Gourdin, 29 S. C. 343, 7 S. E. 510, 1 L. R. A. 628.

78. Credits indorsed on a bond in the handwriting of the obligee are not evidence of actual payment, sufficient to rebut the presumption, until they are affirmatively shown to have been made within twenty years and at a time when it was against the interest of the obligee to make them. Hart *v.* Bucher, 182 Pa. St. 604, 38 Atl. 472; *Id.*, 186 Pa. St. 384, 40 Atl. 511. See also Cremer's Estate, 5 Watts & S. (Pa.) 331. But the indorsement is admissible and may be considered. Dabney *v.* Dabney, 2 Rob. (Va.) 622, 40 Am. Dec. 761.

Burden of Proof. — The plaintiff has the burden of proving a payment within the time. Appeal of Wingett, 122 Pa. St. 486, 15 Atl. 863.

79. Campbell *v.* Brown, 86 N. C. 376, 41 Am. Rep. 464; Lowe *v.* Sowell, 48 N. C. 67; Denny *v.* Eddy, 22 Pick. (Mass.) 533. See also Nixon *v.* Bynum, 1 Bail. (S. C.) 148.

Payment by Assignee in Bankruptcy. — Part payment within the period by an assignee in bankruptcy of one of the debtors will rebut the presumption. Hamlin *v.* Hamlin, 56 N. C. 191; Belo *v.* Spach, 85 N. C. 122.

80. *Alabama.* — Girard *v.* Futterer, 84 Ala. 323, 4 So. 292.

Delaware. — Farmers Bank *v.* Leonard, 4 Har. 536; Robinson *v.* Milby, 2 Houst. 387, 396; Cloud *v.* Temple, 5 Houst. 587, 594; De Ford *v.* Green, 1 Marv. 316, 40 Atl. 1120; Burton *v.* Cannon, 5 Har. 13.

New Hampshire. — Clark *v.* Clement, 33 N. H. 563.

New Jersey. — Murphy *v.* Coates, 33 N. J. Eq. 424; Stimis *v.* Stimis, 54 N. J. Eq. 17, 33 Atl. 468.

New York. — Carll *v.* Hart, 15 Barb. 565.

North Carolina. — Morris *v.* Osborne, 104 N. C. 609, 10 S. E. 476; Cartwright *v.* Kerman, 105 N. C. 1, 10 S. E. 870.

Ohio. — Bissell *v.* Jaudon, 16 Ohio St. 498.

Pennsylvania. — Kitchen *v.* Deardoff, 2 Pa. St. 481; Appeal of Breneman, 121 Pa. St. 641, 15 Atl. 650; Morrison *v.* Funk, 23 Pa. St. 421; Smith *v.* Shoenberger, 176 Pa. St. 95, 34 Atl. 954; Reed *v.* Reed, 46 Pa. St. 239.

South Carolina. — Roberts *v.* Smith, 21 S. C. 455.

81. Appeal of Breneman, 121 Pa. St. 641, 15 Atl. 650. *Compare* Stover *v.* Duren, 3 Strob. L. (S. C.) 448, 51 Am. Dec. 634. The delay may be excused by an admission made within twenty years, although it is accompanied by a refusal to pay. Gregory *v.* Com., 121 Pa. St. 611, 15 Atl. 452, 6 Am. St. Rep. 804. It has been held that such an admission must be made within the period. Colvin *v.* Phillips, 25 S. C. 228.

82. Appeal of Runner, 121 Pa. St. 649, 15 Atl. 647.

Acknowledgment of Part. — A written acknowledgment of part of a debt rebuts the presumption as to the whole. Kitchen *v.* Deardoff, 2 Pa. St. 481.

(2.) Time of Acknowledgment. — Acknowledgments made before[83] or after[84] expiration of the twenty years are sufficient, but not one made more than twenty years before suit.[85]

(3.) Acknowledgment to Third Person. — It has been held that an acknowledgment to a third person is not sufficient.[86]

(4.) Admission of Co-Obligor. — An admission of a co-obligor, made in the absence of the other, will not rebut the presumption as to the latter.[87]

f. *Death of Creditor.* — The presumption may be rebutted by evidence that the creditor has died and that no administration has been taken out on his estate.[88]

g. *Absence of Defendant From State.* — Absence of the defendant from the state for the greater part of the time will repel the presumption of payment.[89]

h. *Absence of Creditor From State.* — Absence of the creditor from the state for the greater part of the period will rebut the presumption.[90]

83. See cases cited in preceding notes.

84. Eby *v.* Eby, 5 Pa. St. 435. But see McQueen *v.* Fletcher, 4 Rich. Eq. (S. C.) 152.

85. Simms *v.* Kearse, 42 S. C. 43, 20 S. E. 19.

86. Appeal of Bentley's Exrs., 99 Pa. St. 500. But see Gregory *v.* Com., 121 Pa. St. 611, 12 Atl. 452, 6 Am. St. Rep. 804.

87. Rogers *v.* Clements, 98 N. C. 180, 3 S. E. 512. See also Haskell *v.* Keen, 2 Nott. & McC. (S. C.) 160.

The fact that an administrator sets up that there is a prior claim is not an acknowledgment. *In re* Kendrick, 107 N. Y. 104, 13 N. E. 672. Nor is the fact that a mortgagor who has given an absolute deed records his defeasance. Short *v.* Caldwell, 155 Mass. 57, 28 N. E. 1124.

88. Abbott *v.* Godfroy, 1 Mich. 178; Sheldon *v.* Heaton, 88 Hun 535, 34 N. Y. Supp. 856 (no administrator appointed until twenty-one years after death). See also Burwell *v.* Anderson, 3 Leigh (Va.) 348.

But the fact that for a small part of the time there was no administrator does not repel the presumption. Cox *v.* Brower, 114 N. C. 422, 19 S. E. 365.

And it has been held that the failure to administer is no excuse when there are parties who have the right to demand payment and who could obtain administration. Idler *v.* Borgmeyer, 65 Fed. 910, 13 C. C. A. 198.

89. *Connecticut.* — Daggett *v.* Tallman, 8 Conn. 168; Boardman *v.* DeForest, 5 Conn. 1.

Delaware. — De Ford *v.* Green, 1 Marv. 316, 40 Atl. 1120.

Iowa. — Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356.

Kentucky. — Herndon *v.* Bartlett, 7 T. B. Mon. 449.

Mississippi. — Mann *v.* Manning, 12 Smed. & M. 615.

Vermont. — Dunning *v.* Chamberlin, 6 Vt. 127.

To the effect that mere absence will not rebut the presumption see Alston *v.* Hawkins, 105 N. C. 3, 11 S. E. 164, 18 Am. St. Rep. 874; Cox *v.* Brower, 114 N. C. 422, 19 S. E. 365.

In Wisconsin it is held that the defendant need not reside twenty years within the state to be entitled to the presumption. Sanderson *v.* Olmsted, 1 Chand. (Wis.) 190, 2 Pin. 224.

It is generally held immaterial that he has been in an adjoining state. Daggett *v.* Tallman, 8 Conn. 168; Mann *v.* Manning, 12 Smed. & M. (Miss.) 615. But in Pennsylvania it is held that the absence must be in a foreign country. Kline *v.* Kline, 20 Pa. St. 503. Or that he has land within the state. Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356. But absence of one joint debtor will not repel the presumption. Boardman *v.* DeForest, 5 Conn. 1.

90. Helm *v.* Jones, 3 Dana (Ky.) 86.

i. *Insolvency of Debtor.* — The fact that the debtor has been insolvent for the greater part of the time will rebut the presumption.[91]

14. Remittance by Mail. — A remittance by mail creates no presumption of payment, unless authorized by the creditor or shown to be the usual course of business.[92]

15. Presumptions as to Application of Payments. — A. In General. — Application is a matter of intention. When there are no directions by the debtor it is generally presumed that the application is to be made in the way which at the time was most to his advantage.[93] Where it could not be promoted by any particular application it will be presumed that the payment is to be applied in the way which will be to the best interest of the creditor.[94]

Non-residence of mortgagees prevents the rise of a presumption of payment. Kibbe *v.* Thompson, 5 Biss. 226, 14 Fed. Cas. No. 7754.

91. *Delaware.* — Farmers Bank *v.* Leonard, 4 Har. 536; De Ford *v.* Green, 1 Marv. 316, 40 Atl. 1120; Robinson *v.* Tunnell, 2 Houst. 387.

New York. — Waddell *v.* Elmendorf, 10 N. Y. 170, *affirming* 12 Barb. 585; Boyd *v.* Boyd, 9 Misc. 161, 29 N. Y. Supp. 7.

Oregon. — Beekman *v.* Hamlin, 23 Or. 313, 31 Pac. 707.

North Carolina. — Woodbury *v.* Taylor, 48 N. C. 504. See also McKinder *v.* Littlejohn, 26 N. C. 198; Grant *v.* Burgwyn, 84 N. C. 560.

Pennsylvania. — *In re* Devereux's Estate, 184 Pa. St. 429, 39 Atl. 225.

But in Kline *v.* Kline, 20 Pa. St. 503, both insolvency and non-residence were held insufficient to rebut the presumption. See also Daggett *v.* Tallman, 8 Conn. 168; Taylor *v.* Megargee, 2 Pa. St. 225 (not unless it creates an abiding inability to pay); Rogers *v.* Judd, 5 Vt. 236, 26 Am. Dec. 301.

Insolvency of one of two joint debtors is not sufficient to overcome the presumption. Boardman *v.* De Forest, 5 Conn. 1.

92. Crane *v.* Pratt, 12 Grey (Mass.) 348; Boyd *v.* Reed, 6 Heisk. (Tenn.) 631.

Where an administrator of a solvent estate, in pursuance of an agreement to pay a certain sum in discharge of a debt, sent the money by mail, and the creditor, who had previously been vigilant in the prosecution of his claim, made no further demand to the time of his death eighteen months after, it was held that the circumstances were sufficient to justify the probability of the receipt of the money by post, and the presumption of payment. Waydell *v.* Velie, 1 Bradf. Sur. (N. Y.) 277.

93. Harker *v.* Conrad, 12 Serg. & R. (Pa.) 301; Pope *v.* Transparent Ice Co., 91 Va. 79, 20 S. E. 940.

He who pays money has the right to direct the application if there are several duties to which it may be applied; but if he neglects to do it the receiver may make his election. Kissam *v.* Burrall, Kirby (Conn.) 326.

It will be presumed that a payment made after a note was marked paid was intended to be applied upon another indebtedness. Chapman *v.* Smoot, 66 Md. 8, 5 Atl. 462.

94. Harker *v.* Conrad, 12 Serg. & R. (Pa.) 301; Pope *v.* Transparent Ice Co., 91 Va. 79, 20 S. E. 940; Chapman *v.* Com., 25 Grant. (Va.) 721; Robinson *v.* Allison, 36 Ala. 525.

Between Secured and Unsecured Claims. — Where one debt is secured and the other is not it will be presumed that a payment has been applied on the unsecured debt. Hare *v.* Stegall, 60 Ill. 380. See also Coles *v.* Withers, 33 Gratt. (Va.) 186.

Where both are secured it is presumed that the amount has been applied upon the weaker security. Ayers *v.* Staley (N. J.), 18 Atl. 1046.

Between Interest-Bearing and Non-Interest-Bearing Claims. — It is presumed that an undesignated payment was intended to be applied to

B. Application to Oldest Items. — It is presumed that payments are intended to be applied to the oldest items of indebtedness.[95]

C. Between Disputed and Undisputed Claims. — Where a creditor claims on two separate demands, one of which is disputed by the debtor, a payment made will be presumed to be intended to apply on the undisputed claim.[96]

D. When no Other Debt Shown. — Payment is presumed to be in satisfaction of an admitted debt when no other liability is shown to have existed.[97]

E. Debt Not Due. — It will not be presumed that a payment was intended to be applied on a debt not due.[98]

16. Time of Payment. — Payment being shown, it is presumed to have been made on the day the debt was due.[99] Where the creditor has died it is presumed to have been made before his death.[1]

17. Medium of Payment. — Debts are presumed to be payable in the current circulating legal tender.[2]

an interest-bearing demand, rather than to one not bearing interest. Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258.

Between Individual and Joint Obligations. — A payment by an individual is presumed to be applicable to an individual rather than to a joint indebtedness. Wells *v.* Ayers, 84 Va. 341, 5 S. E. 21. See also Brunson *v.* McLendon, 98 Ala. 568, 13 So. 523.

95. *England.* — Pennell *v.* Deffell, 4 De G., McN. & G. 372.

Connecticut. — Dulles *v.* De Forest, 19 Conn. 190.

Maine. — Thurlow *v.* Gilmore, 40 Me. 378.

Massachusetts. — Crompton *v.* Pratt, 105 Mass. 255.

New Hampshire. — Bancroft *v.* Holton, 59 N. H. 141.

New York. — Hurd *v.* Wing, 93 App. Div. 62, 86 N. Y. Supp. 907.

Pennsylvania. — Maloney *v.* Bartlett, 172 Pa. St. 284, 33 Atl. 553. See also Chapman *v.* Com., 25 Gratt. (Va.) 721.

96. Perot *v.* Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258.

97. Harvey *v.* Quick, 9 Ind. 258. See also Tharp *v.* Feltz, 6 B. Mon. (Ky.) 6; Masser *v.* Bowen, 29 Pa. St. 128, 72 Am. Dec. 619.

Where it is shown that money has been paid and possession of a lot has been taken and kept, it will be presumed that the payment was applied on the purchase price. Frick *v.* Trustees of Schools, 99 Ill. 167.

98. Pargoud *v.* Amberson, 10 La. 352; Hall *v.* Clement, 41 N. H. 166.

99. Johnson *v.* Carpenter, 7 Minn. 176.

It is presumed that the consideration for an order was paid on the day it was drawn. Smith *v.* Poor, 37 Me. 462.

When it is shown that a payment has been made within a certain period, but the exact day cannot be shown, it will be presumed that the payment was made on the last day of the period. Byers *v.* Fowler, 14 Ark. 86.

1. Lipscomb *v.* DeLemos, 68 Ala. 592.

2. *United States.* — Stewart *v.* Salamon, 94 U. S. 434 (note made in Georgia in 1863 presumed to be payable in Confederate currency).

Louisiana. — Harvey *v.* Walden, 23 La. Ann. 162 (debt held to be payable in Confederate currency).

North Carolina. — Robeson *v.* Brown, 63 N. C. 554; Alexander *v.* Atlantic, T. & O. R. Co., 67 N. C. 198; Palmer *v.* Love, 82 N. C. 478; Brickell *v.* Bell, 84 N. C. 82; Smith *v.* Smith, 101 N. C. 461, 8 S. E. 133.

In the foregoing cases debts were presumed to be payable in Confederate currency.

An act declaring that contracts shall be presumed to be payable in Confederate currency does not apply

18. Presumptions Rebuttable. — A presumption of payment is rebuttable.[3]

19. Effect of Presumption. — A presumption of payment operates only in favor of the party entitled to the benefit of the presumption.[4]

III. MODE OF PROOF.

1. In General. — Any circumstance which tends to make the proposition of payment more or less probable is relevant and admissible.[5]

2. Documentary Evidence. — A. Documents From Which Payment May Be Inferred. — Any document from which a reasonable inference of payment may be deduced is admissible.[6]

B. Judicial Records. — Any judicial record having a bearing upon the question of payment is admissible.[7]

to a note "payable in the current funds of the country when due." McKesson *v.* Jones, 66 N. C. 258.

A payment made in a Confederate state during the civil war is presumed to have been paid in Confederate currency. Abernathy *v.* Phifer, 84 N. C. 711.

In Virginia it was held in some cases that there was no presumption of law as to the medium of payment (Effinger *v.* Kenney, 24 Gratt. (Va.) 116; Dyerle *v.* Stair, 28 Gratt. (Va.) 800); although in a later case it was held that an obligation is presumed to be payable in sound money. Hansbrough *v.* Utz, 75 Va. 959.

A receipt for money paid raises no presumption as to the kind of money paid. Melvin *v.* Stevens, 84 N. C. 78.

The medium of payment is to be determined by an interpretation of the contract of the parties. Maryland *v.* Baltimore & O. R. Co., 22 Wall. (U. S.) 105; Bonner *v.* Nelson, 57 Ga. 433.

3. McIntyre *v.* Meldrim, 63 Ga. 58; Humpeler *v.* Hickman, 13 Ill. App. 537 (presumption of non-payment overcome); Dougherty *v.* Deeney, 45 Iowa 443; Buie *v.* Buie, 24 N. C. 87; Brill *v.* Hoile, 53 Wis. 537, 11 N. W. 42.

"And even where twenty years have elapsed, the presumption of payment is not absolute. Such a lapse of time after a right of action accrues, amounts only to a circumstance on which to found the presumption of payment, and is not in itself a legal bar to the action." Forsyth *v.* Ripley, 2 Greene (Iowa) 181.

4. A presumption of payment is not like an actual payment, which satisfies the debt as to all debtors; it operates as a payment only in favor of the party entitled to the benefit of the presumption. New York L. Ins. Co. *v.* Covert, 29 Barb. (N. Y.) 435.

5. Supreme Tribe of Ben Hur *v.* Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262.

6. An administrator's deed which recites that it was made under order of court is admissible, although there is no recital of payment Harwood *v.* Harper, 54 Ala. 659. Receipts indorsed on a duplicate copy of the contract are admissible. Hillyard *v.* Crabtree, 11 Tex. 264, 62 Am. Dec. 475.

In Bates *v.* Hazen, 63 N. H. 618, it was claimed that the creditor agreed to take the note of a third person in payment, provided the maker agreed to pay it. *Held,* a letter from the maker agreeing to pay is admissible.

Unexecuted Draft of Agreement. An unexecuted draft of an agreement to take property in payment is not admissible. Green *v.* Davis, 44 N. H. 71.

7. *Alabama.* — Griel *v.* Solomon, 82 Ala. 85, 2 So. 322, 60 Am. Rep. 733; Wharton *v.* Thomason, 78 Ala. 45 (account filed by an executor is admissible against him).

Georgia. — Harrison *v.* Henderson, 12 Ga. 19.

C. RECEIPTS. — a. *Of Party to Action.* — Receipts of a party to the action are admissible as evidence of payment as against him;[8] but they are only *prima facie* evidence subject to explanation and rebuttal.[9]

b. *Receipts in Full.* — A receipt in full is *prima facie* evidence of a full settlement of indebtedness, but it may be contradicted.[10]

Pennsylvania. — Levers *v.* Van Buskirk, 4 Pa. St. 309.

Vermont. — Bradley *v.* Briggs, 22 Vt. 95.

West Virginia. — Pasley *v.* Bromley, 32 W. Va. 21, 9 S. E. 40.

In several of these cases judicial records were admitted to rebut the presumption arising from lapse of time.

The inventory of an estate is admissible to show that a claim was not regarded as an existing demand. Cox *v.* Ledward, 124 Pa. St. 435, 16 Atl. 826.

8. Burton *v.* Merrick, 21 Ark. 357; Northrop *v.* Knott, 114 Cal. 612, 46 Pac. 599 (admissible although it does not state purpose); Mervin *v.* Potter, 1 Root (Conn.) 201; Scott *v.* Scott, 36 Ga. 484; Wells *v.* Patterson, 7 How. (Miss.) 32.

A receipt for purchase money is admissible, although the fact of payment is recited in the deed. Farrow *v.* Nashville, C. & St. L. R. Co., 109 Ala. 448, 20 So. 303.

But a receipt which shows on its face that it relates to another matter is not admissible. Swan *v.* Scott, 11 Serg. & R. (Pa.) 155 (receipt given prior to award of arbitrators is not admissible after award).

The plaintiff's receipt for money paid by a third person, without other explanation, is not evidence of payment by defendant. Murphy *v.* Richardson, 33 Pa. St. 235.

9. *Colorado.* — Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

Delaware. — Nicholson *v.* Frazier, 4 Har. 206 (if plaintiff claims mistake he must show in what it consists).

Illinois. — Winchester *v.* Grosvenor, 44 Ill. 425.

Indiana. — Bettman *v.* Shadle, 22 Ind. App. 542, 53 N. E. 662.

Minnesota. — Cappis *v.* Wiedemann, 86 Minn. 156, 90 N. W. 368.

Nebraska. — National L. Ins. Co. *v.* Goble, 51 Neb. 5, 70 N. W. 503.

New Jersey. — Kenny *v.* Kane, 50 N. J. L. 562, 14 Atl. 597.

New York. — Hannon *v.* Gallagher, 19 Misc. 347, 43 N. Y. Supp. 492.

As to the admissibility of parol evidence to vary, explain or contradict a receipt, see article "PAROL EVIDENCE."

A receipt reciting that a note was received "in payment on account" is not conclusive. H. F. Cady Lumb. Co. *v.* Greater American Exposition Co. (Neb.) 93 N. W. 961.

Thompson *v.* Faussat, Pet. C. C. 182, 23 Fed. Cas. No. 13,954; Wooten *v.* Nall, 18 Ga. 609; Coon *v.* Brown, 13 Ind. 150; Brewer *v.* Knapp, 1 Pick. (Mass.) 332; Fiske *v.* Gerhard, 2 McCord (S. C.) 11; Gibson *v.* Peebles, 2 McCord (S. C.) 418.

Receipted Account. — A receipted account between the parties to an amount larger than one installment raises no presumption of payment of the second installment. Clark *v.* Wells, 5 Gray (Mass.) 69.

Lost Receipts. — Evidence that the debtor paid the account and was given a receipt, which he had lost, and the contents of which he stated, is sufficient. Terry *v.* Husbands, 53 S. C. 69, 30 S. E. 826.

10. *Arkansas.* — Burton *v.* Merrick, 21 Ark. 357.

Delaware. — State *v.* Robinson, 2 Har. 5; Derrickson *v.* Norris, 2 Har. 392 (strong evidence, but not conclusive).

Illinois. — Marston *v.* Wilcox, 2 Ill. 270; Lyons *v.* Williams, 15 Ill. App. 27 (it is evidence of a strong and convincing character).

Michigan. — Pratt *v.* Castle, 91 Mich. 484, 52 N. W. 52 (conclusive unless contradicted).

New Hampshire. — Gleason *v.* Sawyer, 22 N. H. 85 (receipt for small sum in full is *prima facie* evidence of payment of a larger sum).

New York. — Danziger *v.* Hoyt,

It may be shown to have been executed by mistake,[11] or to be erroneous.[12] But a receipt in full is evidence only of such demands as it purports to include.[13]

c. *Of Third Party.* — A receipt of a third party is not ordinarily admissible on behalf of a party to the action;[14] but it may be admitted when the evidence connects the parties.[15] And it may also

120 N. Y. 190, 24 N. E. 294, *affirming* 46 Hun 270.

North Carolina. — Reid *v.* Reid, 13 N. C. 247, 18 Am. Dec. 570 (*prima facie* evidence of payment of all demands, and not merely of sum named); Grant *v.* Hughes, 96 N. C. 177, 2 S. E. 339.

Pennsylvania. — Megargel *v.* Megargel, 105 Pa. St. 475.

South Carolina. — Trimmer *v.* Thompson, 10 Rich. 164.

It Is Not Conclusive. — Grinnell *v.* Spink, 128 Mass. 25; Hogg *v.* Brown, 2 Brev. (S. C.) 223, and see cases just cited.

Contradiction or Explanation of Receipt. — A receipt "in full to date" is not *prima facie* evidence of prior payments when the defendant's secretary testifies that nothing was ever owed for prior services. Newport Ice & Cold Storage Co. *v.* Lunyou, 69 Ark. 287, 62 S. W. 1047.

11. Appeal of Huntington, 73 Conn. 582, 48 Atl. 766; Dodd *v.* Mayson, 39 Ga. 605.

12. Illinois Cent. R. Co. *v.* Manion, 23 Ky. L. Rep. 2267, 67 S. W. 40. See also St. Louis, Ft. S. & W. R. Co. *v.* Davis, 35 Kan. 464, 11 Pac. 421.

For the early rule as to the effect of receipts under seal, which were said to be conclusive, see State *v.* Gott, 44 Md. 341.

13. A receipt in full for attending defendant's wife and baby is not evidence as to payment for services rendered for defendant personally. Corbus *v.* Leonhardt, 114 Fed. 10, 51 C. C. A. 636.

A receipt in full is evidence of payment of personal demands only. It is not evidence of settlement of a much larger amount due to the creditor as trustee. Bartholomew *v.* Bartholomew, 24 Ill. 199. It is not evidence of payment of claims for future support. Austin *v.* Austin, 9 Vt. 420.

A receipt "in full of the above account" is not a receipt in full of all demands. O'Hehir *v.* Middletown-Goshen Trac. Co., 91 Hun 639, 36 N. Y. Supp. 140.

14. *Kentucky.* — Davis *v.* Shreve, 3 Litt. 260, 14 Am. Dec. 66; Davidson *v.* Berthoud, 1 A. K. Marsh. 353.

Minnesota. — Ferris *v.* Boxell, 34 Minn. 262, 25 N. W. 592.

Nebraska. — Ellison *v.* Albright, 41 Neb. 93, 59 N. W. 703, 29 L. R. A. 737.

New York. — Warner *v.* Price, 3 Wend. 397; Goldman *v.* Brandt, 25 N. Y. St. 864, 5 N. Y. Supp. 420.

Ohio. — Ranney *v.* Hardy, 43 Ohio St. 157, 1 N. E. 523.

Pennsylvania. — Cutbush *v.* Gilbert, 4 Serg. & R. 551 ("it is evidence against himself, but against another his oath is better"); English *v.* Hannah, 4 Watts 424, 28 Am. Dec. 729; Lloyd *v.* Lynch, 28 Pa. St. 419, 70 Am. Dec. 137.

The reason given is that they are mere hearsay. But see Locke *v.* Porter Gold & Sil. Min. Co., 41 Cal. 305; Georgia R. & Bkg. Co. *v.* Macon, 86 Ga. 585, 13 S. E. 21 (receipt of state official admitted); Cassell *v.* Cooke, 8 Serg. & R. (Pa.) 268, 11 Am. Dec. 610 (payment of legacies charged on land may be shown by receipts of legatees).

A receipt from a sheriff for money paid to him at a sale is not admissible to prove that the judgment has been satisfied. Wasson *v.* Hodshire, 108 Ind. 26, 8 N. E. 621.

A receipt from an indorsee to an indorser is admissible to prove payment as against the maker of a promissory note. Garnsey *v.* Allen, 27 Me. 366.

Receipts are admissible in proof of payments made by a guardian in the settlement of his account. Shearman *v.* Akins, 4 Pick. (Mass.) 283.

15. Sewanee Min. Co. *v.* Best, 3 Head (Tenn.) 701; Perkins *v.* Hawkins, 9 Gratt. (Va.) 649.

be admitted in corroboration of positive testimony of payment.[16]

d. *Requisites of Receipts.* — In order to make a receipt admissible its execution must be shown,[17] and it should be or have at some time been in the possession of the debtor or some one acting for him.[18]

e. *As Evidence of Prior Payments.* — A receipt is conclusive as to prior payments, unless contradicted;[19] but it is not evidence of subsequent payments.[20]

D. Indorsements Upon Notes. — An indorsement of payment on a note is admissible on behalf of the debtor although not signed;[21] but it is not admissible on behalf of the holder.[22]

E. Canceled Bills, Notes and Checks. — A paid bank check, payable to the order of the creditor, and indorsed by him, is admissible in evidence;[23] but a check which is made payable to bearer

16. Cain *v.* Mead, 66 Minn. 195, 68 N. W. 840.

17. Wright *v.* Wright, 64 Ala. 88; Cope *v.* Deaton, 19 Ky. L. Rep. 1197, 43 S. W. 190. See, however, Snodgrass *v.* Nelson, 48 Ill. App. 121 (signature may be presumed).

18. **Must Be in Possession of Debtor.** — A receipt, to be evidence of the payment of money, ought to be in the possession of the party who paid the money. A receipt in the possession of the opposite party certainly proves nothing more than his willingness to receive the money and give a receipt therefor. Nelson *v.* Boland, 37 Mo. 432.

19. Johnstone *v.* Mulcahy, 132 Cal. 606, 64 Pac. 1077. See also Brewer *v.* Knapp, 1 Pick. (Mass.) 332.

20. A receipt for a "first installment" is not evidence of any other payment. White *v.* Hardin, 5 Dana (Ky.) 141.

21. Brown *v.* Gooden, 16 Ind. 444.

An indorsement of payment on the back of a lease is admissible. Sowles *v.* Butler, 71 Vt. 271, 44 Atl. 355.

An indorsement of payment on a note is sufficient unless overcome by strong and clear evidence. Thomassen *v.* Van Wyngaarden, 65 Iowa 687, 22 N. W. 927. See also Graves *v.* Moore, 7 T. B. Mon. (Ky.) 341, 18 Am. Dec. 181; Benson *v.* Mathews, 7 La. 356 (entitled to credit although crossed out).

The debtor may show that an indorsement has been erased. Graves *v.* Moore, 7 T. B. Mon. (Ky.) 341, 18 Am. Dec. 181.

22. Wilson *v.* Pope, 37 Barb. (N. Y.) 321; Coleman *v.* Howell (N. J. Ch.), 16 Atl. 202; Young *v.* Alford, 118 N. C. 215, 23 S. E. 973; Gupton *v.* Hawkins, 126 N. C. 81, 35 S. E. 229. "The indorsements on the note, on the evidence of the plaintiffs, were utterly worthless to prove either that the alleged payments were made, or by whom made, or when made; and without this they should not have been permitted to be made to the jury." To permit the fact of payment to be established by the credit entered on the note, the court said, "would be, manifestly, allowing the party relying on it to make evidence for himself." Knight *v.* Clements, 45 Ala. 89, 101, 6 Am. Rep. 693.

23. Baumgardner *v.* Henry, 131 Mich. 240, 91 N. W. 169 (admitted although not indorsed); Jesse *v.* Davis, 34 Mo. App. 351; Fernean *v.* Whitford, 39 Mo. App. 311 (admitted although mutilated); Boyd *v.* Daily, 85 App. Div. 581, 83 N. Y. Supp. 539, (raises presumption of payment), *affirmed* Boyd *v.* New York Security & Trust Co., 176 N. Y. 556, 68 N. E. 1114; Masser *v.* Bowen, 29 Pa. St. 128, 72 Am. Dec. 619; Murphy *v.* Brick, 33 Pa. St. 235 (admissible although drawn by debtor's wife). See also Stevens *v.* Gainesville Nat. Bank, 62 Tex. 499. But see Ottens *v.* Fred Krug Brew. Co., 58 Neb. 331, 78 N. W. 622.

Of course plaintiff may show that the payments were made on other transactions. Druss *v.* Rosen, 84 N. Y. Supp. 174. Such evidence alone is not sufficient to prove payment.

is not.[24] A note in the possession of the maker is admissible if it appears that it has been in the possession of the payee.[25]

F. Note Given by Debtor. — A note given by defendant at the time of payment is admissible to show that full payment was not made.[26]

G. Account Books. — Account books of the debtor are not admissible in his behalf to show payment;[27] nor are books of the creditor admissible to show non-payment by absence of entries of payment therein.[28] But books of the creditor are admissible on behalf of the debtor to show payment;[29] and books of the debtor are admissible on behalf of the creditor.[30]

Simmons *v.* Thornton, 111 Ga. 239, 36 S. E. 685. A canceled check is not evidence of any particular application, however. Ottens *v.* Fred Krug Brew. Co., 58 Neb. 331, 78 N. W. 622.

Individual Check Given for Firm Debt. — When the defendant testifies that a debt has been paid with firm money his individual check is not admissible. Arbuckle *v.* Chadwick, 146 Pa. St. 393, 23 Atl. 346.

24. Burch *v.* Spaulding, 2 Cranch C. C. 422, 4 Fed. Cas. No. 2140; Lowe *v.* McClery, 3 Cranch C. C. 254, 15 Fed. Cas. No. 8566.

25. Notes of the debtor on which payment is indorsed by the creditor are admissible. Snyder *v.* Wertz, 5 Whart. (Pa.) 163. Notes found in the possession of the debtor, payable to the creditor, are not admissible unless shown to have been in the possession of the creditor. Lamb *v.* Ward, 114 N. C. 255, 19 S. E. 230. See also Connelly *v.* McKean, 64 Pa. 113. Even though the signature has been torn off. Chinberg *v.* Gale Sulky Harrow Mfg. Co., 38 Kan. 228, 16 Pac. 462.

Notes of a firm in the possession of a party who was settling its affairs are some evidence, but not conclusive, that he paid them out of his own funds. Scott *v.* Scott, 36 Ga. 484.

26. Grovenstein *v.* Brewer, 76 Ga. 763.

27. Woodes *v.* Dennett, 12 N. H. 510.

Account Books. — An account on the books of the debtor, showing an equal amount due him, is not admissible. Clark *v.* Wells, 5 Gray (Mass.) 69. An entry by the debtor in his own favor is inadmissible. Schwartz *v.* Allen, 7 N. Y. Supp. 5.

But an entry made nineteen years before by a deceased debtor is admissible to support the presumption from lapse of time. Rodman *v.* Hoops, 1 Dall. (U. S.) 85.

Entries in a debtor's books showing payment are not admissible, even after his decease. New York L. Ins. Co. *v.* Johnson, 24 Ky. L. Rep. 1867, 72 S. W. 762. See also *In re* Burk & McFetridge's Assigned Estate, 205 Pa. St. 332, 54 Atl. 998; Galbraith *v.* Starks, 25 Ky. L. Rep. 2090, 79 S. W. 1191.

28. Account Books. — Plaintiff's account books, containing no entry of payment, are not admissible to show non-payment. Schwarze *v.* Roessler, 40 Ill. App. 474; Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84. *Contra,* Harbison *v.* Hall, 124 N. C. 626, 32 S. E. 964 (admissible in connection with positive evidence of non-payment).

29. In an action by an indorser against a maker for money paid a bank, the books of the bank are admissible. Parker *v.* Sanborn, 7 Gray (Mass.) 191. But see Boyd *v.* Wilson, 2 Cranch C. C. 525, 3 Fed. Cas. No. 1751.

Plaintiff's books are admissible on behalf of defendant to show that plaintiff was really indebted to defendant. McCain *v.* Peart, 145 Pa. St. 516, 22 Atl. 981.

30. After the loss of a vendee's account books, evidence that they were still open is admissible as tending to show non-payment. Sharp *v.* Hicks, 94 Ga. 624, 21 S. E. 208.

Evidence that the debtor's account books contained no entry as to payment is admissible. Peck *v.* Pierce, 63 Conn. 310, 28 Atl. 524.

3. Parol Evidence. — A. In General. — Parol evidence is admissible to prove payment[31] or non-payment[32] of a debt, or even of a judgment[33] or mortgage debt.[34]

B. To Contradict Receipt or Written Acknowledgment of Payment. — Parol evidence is admissible to contradict a receipt or written acknowledgment of payment;[35] but it is not admissible to prove the contents of a receipt.[36] Such evidence is competent to prove time, place and medium of payment.[37]

31. In the following cases parol evidence was held admissible to show payment, either in accordance with the terms of an instrument, or in a manner orally agreed upon by the parties.

Alabama. — Johnson *v.* Cunningham, 1 Ala. 249.

Arkansas. — Splawn *v.* Martin, 17 Ark. 146.

California. — Clarke *v.* Scott, 45 Cal. 86.

Georgia. — Fisher *v.* George S. Jones Co., 93 Ga. 717, 21 S. E. 152 (parol evidence of payment by notes, etc., is admissible without production of the notes); Denham *v.* Walker, 93 Ga. 497, 21 S. E. 102.

Idaho. — Vincent *v.* Larson, 1 Idaho 241.

Illinois. — Taliaferro *v.* Ives, 51 Ill. 247 (books of account admissible).

Indiana. — Ketcham *v.* Hill, 42 Ind. 64.

Louisiana. — Dull *v.* Gordon, 24 La. Ann. 478; Macarty *v.* Gasquet, 11 Rob. 270; Derouin *v.* Segura, 5 La. Ann. 550.

Maryland. — Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392.

Massachusetts. — Holden *v.* Parker, 110 Mass. 324.

Mississippi. — Stadeker *v.* Jones, 52 Miss. 729.

Missouri. — The Charlotte *v.* Hammond, 9 Mo. 58, 43 Am. Dec. 536; Riley *v.* Pettis Co., 96 Mo. 318, 9 S. W. 906.

New Jersey. — Berry *v.* Berry, 17 N. J. L. 441 (although receipt has been given); Rogers *v.* Rogers, 5 N. J. Eq. 32.

New York. — Waters *v.* Travis, 9 Johns. 450; Smith *v.* Schanck, 18 Barb. 344.

South Carolina. — Hagood *v.* Swords, 2 Bail. 305; Bradley *v.* Long, 2 Strob. 160.

32. Hall *v.* King, 2 Colo. 711 (to show non-payment of interest); Butman *v.* Howell, 144 Mass. 66, 10 N. E. 504; Beckwith *v.* Burlingame, 16 Misc. 217, 39 N. Y. Supp. 191; Hendricks *v.* Leopold (Tex. App.), 18 S. W. 638.

33. *Georgia.* — Tarver *v.* Rankin, 3 Ga. 210.

Indiana. — Morrison *v.* King, 4 Blackf. 125.

Iowa. — Hollenbeck *v.* Stanberry, 38 Iowa 325.

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

Louisiana. — Spencer *v.* Sloo, 8 La. 290; Vidichi *v.* Cousin, 6 La. Ann. 489.

Maine. — Thayer *v.* Mowry, 36 Me. 287.

Pennsylvania. — Johnson *v.* Ramsey, 16 Serg. & R. 115; Fowler *v.* Smith, 153 Pa. St. 639, 25 Atl. 744.

Tennessee. — Gates *v.* Brinkley, 4 Lea 710.

34. Howard *v.* Gresham, 27 Ga. 347; Thornton *v.* Wood, 42 Me. 282; Estes *v.* Fry, 94 Mo. 266, 6 S. W. 660.

35. See article "Parol Evidence."

36. Romayne *v.* Duane, 3 Wash. C. C. 246, 20 Fed. Cas. No. 12,028.

37. Evidence of an express agreement as to the medium of payment is admissible. Sowers *v.* Earnhart, 64 N. C. 96. See also Melvin *v.* Stevens, 84 N. C. 78. That an obligation was payable in Confederate money may be shown by circumstances. Heilbroner *v.* Douglass, 45 Tex. 402. Evidence that the creditor used Confederate currency after it was paid to him is admissible to show that he received it in payment. Jones *v.* Thomas, 5 Cold. (Tenn.) 465.

Evidence showing that bills in which payment was made were counterfeit is admissible. Kottwitz *v.*

4. Res Gestae. — Evidence of what happened and what was said at the time the payment was made is admissible as a part of the *res gestae*.[38]

5. Admissions and Declarations. — Evidence of admissions by the creditor is admissible to prove payment;[39] and evidence of admissions by the debtor is admissible to prove non-payment.[40] Self-

Bagby, 16 Tex. 656. See articles "Bills and Notes" and "Parol Evidence."

Where a draft is payable in no special kind of currency, parol evidence is not admissible to show that it was the intention and agreement that it should be payable in gold coin. Langenberger *v.* Kroeger, 48 Cal. 147, 17 Am. Rep. 418.

38. *Illinois.* — Thorp *v.* Goewey, 85 Ill. 611.

Maryland. — Williamson *v.* Morton, 2 Md. Ch. 94.

Missouri. — Webster *v.* Canmann, 40 Mo. 156 (evidence of what was said when claim was presented).

North Carolina. — Harper *v.* Dail, 92 N. C. 394.

Tennessee. — Planters Bank *v.* Massey, 2 Heisk. 360.

But mere declarations made under other circumstances are not admissible unless under the rules relating to admissions. See McPherson *v.* Foust, 81 Ala. 295, 8 So. 193.

Circumstances of Acceptance of Bill or Note. — Evidence of the agreement or circumstances under which a bill, note or check was accepted is admissible to show whether it was accepted as absolute or conditional payment.

Indiana. — Thorn *v.* Wilson, 27 Ind. 370 (written agreement admitted to show that note was not taken in absolute payment).

Iowa. — Kruse *v.* Seiffert & Weise Lumb. Co., 79 N. W. 118 (may testify as to intent).

Maryland. — Sebastian May Co. *v.* Codd, 77 Md. 293, 26 Atl. 316 (evidence that defendant knew that maker of note was insolvent is admissible).

Massachusetts. — Ely *v.* James, 123 Mass. 36 (evidence admitted to show that note was not taken in absolute payment); Folsom *v.* Ballou Bkg. Co., 160 Mass. 561, 36 N. E. 469 (evidence that plaintiff sent a registered letter to defendant refusing to accept check is admissible).

Michigan. — Hotchin *v.* Secor, 8 Mich. 494 (evidence of subsequent acts and circumstances admissible); Hutchinson *v.* Hutchinson, 102 Mich. 635, 61 N. W. 60.

Rhode Island. — Macomber *v.* Macomber, 31 Atl. 753 (evidence of the surrounding circumstances admissible).

South Dakota. — Grissel *v.* Bank of Woonsocket, 12 S. D. 93, 80 N. W. 161 (evidence of understanding of the parties admissible).

39. Pearce *v.* Nix, 34 Ala. 183; Robinson *v.* Dugan (Cal.), 35 Pac. 902; Applegate *v.* Baxley, 93 Ind. 147; Scammon *v.* Scammon, 33 N. H. 52 (admissible on behalf of third persons); Chadwick *v.* Fonner, 6 Hun (N. Y.) 543; Titus *v.* Johnson, 50 Tex. 224. *Compare* Fisher *v.* Moore, 12 Rob. (La.) 95.

Declarations by an officer of a corporation, not authorized to bind the company, are not admissible. Stewart *v.* Huntingdon Bank, 11 Serg. & R. (Pa.) 267, 14 Am. Dec. 628.

It follows that declarations of a former officer who is not a party to the suit are not admissible. Sterling *v.* Marietta & S. Trad. Co., 11 Serg. & R. (Pa.) 179.

In Ballance *v.* Frisby, 3 Ill. 63, it was held that one debtor might prove payment as against his co-debtor by evidence of written or oral admissions of the creditor.

40. *Alabama.* — Wharton *v.* Thomason, 78 Ala. 45 (implied admission may be received).

Connecticut. — Peck *v.* Pierce, 63 Conn. 310, 28 Atl. 524; Dwight *v.* Brown, 9 Conn. 83.

Maine. — McCobb *v.* Healy, 17 Me. 158 (evidence of an admission after the circumstances relied upon to show payment).

Massachusetts. — Tozier *v.* Crafts, 123 Mass. 480; Batchelder *v.* Rand, 117 Mass. 176.

serving declarations, however, are not admissible on behalf of the party making them.[41]

6. Payment in Property. — Evidence that goods were shipped to the creditor and were received in payment is admissible.[42]

7. Corroborative Evidence. — A. In General. — Evidence of facts corroborating direct evidence of payment may be admitted although the facts themselves do not prove payment.[43]

New Hampshire. — Burnham *v.* Ayer, 35 N. H. 351 (recognition of mortgage in subsequent instrument).

North Dakota. — Benjamin *v.* Northwestern Elev. Co., 6 N. D. 254, 69 N. W. 296.

Texas. — Dwyer *v.* Rippetoe, 72 Tex. 520, 10 S. W. 668.

41. *United States.* — Saenger *v.* Nightingale, 48 Fed. 708.

Alabama. — Trammell *v.* Hudmon, 78 Ala. 222.

Colorado. — Davis *v.* Johnson, 4 Colo. App. 545, 36 Pac. 887.

Connecticut. — Pinney *v.* Jones, 64 Conn. 545, 30 Atl. 762, 42 Am. St. Rep. 209.

Florida. — Pensacola & A. R. Co. *v.* Atkinson, 20 Fla. 450.

Illinois. — Cumins *v.* Leighton, 9 Ill. App. 186.

Iowa. — McCormick Harv. Mach. Co. *v.* Jacobson, 73 Iowa 546, 35 N. W. 627.

Kentucky. — Wheatly *v.* Phelps, 3 Dana 302.

Maryland. — Shipley *v.* Fox, 69 Md. 572, 16 Atl. 275 (declarations of mortgagor that debt had been paid not admissible).

New York. — Schwartz *v.* Allen, 7 N. Y. Supp. 5; Newcombe *v.* Fox, 1 App. Div. 389, 37 N. Y. Supp. 294; Conkling *v.* Weatherwax, 90 App. Div. 585, 86 N. Y. Supp. 139.

Tennessee. — Bradley *v.* Freed (Tenn. Ch. App.), 51 S. W. 124.

Texas. — Kennedy *v.* Yoe (Tex. Civ. App.), 39 S. W. 946 (evidence that maker of note had stated that he had paid it, inadmissible).

Such statements are not admissible even in corroboration. Bradley *v.* Freed (Tenn. Ch. App.), 51 S. W. 124. See also Brooklyn L. Ins. Co. *v.* Bledsoe, 52 Ala. 538.

The failure to object to such evidence gives it no weight. Wheatly *v.* Phelps, 3 Dana (Ky.) 302.

Declarations of Debtor. — Declarations of a debtor to the effect that he was on his way to make payment are not admissible. Rosencrance *v.* Johnson, 191 Pa. St. 520, 43 Atl. 360.

Hearsay. — Declarations which are mere hearsay are not admissible upon an issue of payment.

Alabama. — Trammell *v.* Hudmon, 78 Ala. 222.

Arkansas. — Gould *v.* Tatum, 21 Ark. 329 (declaration by agent to receive payment). Sangster *v.* Dalton, 12 S. W. 202.

Colorado. — Davis *v.* Johnson, 4 Colo. App. 545, 36 Pac. 887.

Georgia. — Foster *v.* Thrasher, 45 Ga. 517.

Illinois. — Morse *v.* Thorsell, 78 Ill. 600.

Kentucky. — Letcher *v.* Yantis, 3 Dana 160 (declarations of creditor not admissible on behalf of a plaintiff suing for contribution).

Michigan. — Baumgardner *v.* Henry, 131 Mich. 240, 91 N. W. 169.

New York. — Woodgate *v.* Fleet, 44 N. Y. 1, 11 Abb. Pr. (N. S.) 41 (declarations of sheriff).

Pennsylvania. — Boltz *v.* Bullman, 1 Yeates 584; Vincent *v.* Huff, 8 Serg. & R. 381.

Texas. — Downtain *v.* Connellee, 2 Tex. Civ. App. 95, 21 S. W. 56.

42. *Florida.* — Edgerton *v.* West, 43 Fla. 133, 30 So. 797 (payment in chattels).

Indiana. — Henry *v.* Scott, 3 Ind. 412.

Iowa. — Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356; Royce *v.* Barrager, 116 Iowa 671, 88 N. W. 940.

Property Delivered. — Stirna *v.* Beebe, 11 App. Div. 206, 42 N. Y. Supp. 614.

Evidence of Value of Property Delivered. — Evidence of the value of property so delivered is admissible. Ludwig *v.* Blackshere, 102 Iowa 366, 71 N. W. 356; Commercial Bank *v.* Chisholm, 6 Smed. & M. (Miss.) 457; Phillips *v.* Commercial Bank, 1 Smed. & M. (Miss.) 636.

43. Brown *v.* Welch, 38 Vt. 241.

B. Services by Debtor. — Evidence that the alleged debtor has performed services for the creditor since the accrual of the indebtedness in payment thereof is admissible.[44]

C. Financial Condition of Creditor. — Evidence that the creditor had money about the time of the alleged payment to him is not admissible;[45] but evidence that he was in indigent circumstances and made no effort to collect is admissible as tending to show payment.[46]

D. Financial Condition of Debtor. — a. *In General.* — Evidence that the debtor had the means of payment is admissible as bearing upon the question of payment.[47] Likewise, evidence of

Failure To File Claim Against Insolvent. — Evidence that the creditor filed no claim against the insolvent estate of the debtor is admissible against her as a circumstance to be weighed with other testimony in determining whether any part of the purchase money remained unpaid. Kelly *v.* Hancock, 75 Ala. 229.

Failure To Include Claim in Tax Inventory. — Evidence that the plaintiff did not include the claim in his tax inventory is admissible as a circumstance to show payment. Morse *v.* Bruce, 70 Vt. 378, 40 Atl. 1034. But see Young *v.* Doherty, 183 Pa. St. 179, 38 Atl. 587.

44. Blackburn *v.* Squib, 7 Tenn. 60 (admissible in connection with lapse of time). The creditor may overcome such proof by showing that such services were paid for. Owens *v.* Owens, 21 Ky. L. Rep. 679, 52 S. W. 943.

45. Trude *v.* Meyer, 82 Ill. 535.

46. **Poverty of Creditor.** — "The indigent circumstances of a creditor who holds a bond, and had the opportunity to collect it from his debtor, but makes no demand of payment either of the principal or interest, for a period of twenty years, afford strong presumptive evidence of payment or satisfaction." Farmers Bank *v.* Leonard, 4 Har. (Del.) 536. To the same effect see Bean *v.* Tonnele, 94 N. Y. 381, 46 Am. Rep. 153; *In re* Keenan's Estate, 73 Hun 177, 25 N. Y. Supp. 877 (admissible in connection with evidence of delay of almost twenty years of solvency of debtor); Marshall *v.* Marshall, 12 B. Mon. (Ky.) 459 (evidence that creditor, who had long been in straitened circumstances, did not mention the claim, which the debtor was able to pay, admissible). Daniel *v.* Whitfield, 44 N. C. 294; Strong *v.* Slicer, 35 Vt. 40.

Where the defendant claims that one note sued upon was paid by another also sued upon, evidence that the creditor did not have enough money to loan for both notes is admissible. Vogt *v.* Butter, 105 Mo. 479, 16 S. W. 512.

47. *Illinois.* — Orr *v.* Jason, 1 Ill. App. 439.

Indiana. — Hedge *v.* Talbott, 8 Ind. App. 597, 36 N. E. 437.

New York. — Dishno *v.* Reynolds, 17 Hun 137 ("such evidence is not very cogent, but it is a fact which, in the judgment of jurors, may aid them in arriving at the probable truth"); *In re* Keenan's Estate, 73 Hun 177, 25 N. Y. Supp. 877 (admissible in connection with evidence of delay and of embarrassing circumstances of creditor).

Pennsylvania. — Van Loon *v.* Smith, 103 Pa. St. 238 (admissible as tending to support presumption from lapse of time); Walls *v.* Walls, 170 Pa. St. 48, 32 Atl. 649.

Tennessee. — Planters Bank *v.* Massey, 2 Heisk. 360.

Vermont. — Strong *v.* Slicer, 35 Vt. 40.

Contra. — Rogers *v.* Burns, 27 Pa. St. 525; Hilton *v.* Scarborough, 5 Gray (Mass.) 422 (not admissible to raise presumption of payment); Veazie *v.* Hosmer, 11 Gray (Mass.) 396; Atwood *v.* Scott, 99 Mass. 177, 96 Am. Dec. 728.

the poverty or insolvency of the debtor is admissible as tending to rebut payment.[48]

b. *Evidence That He Had the Specific Money.* — Evidence showing that the debtor had the money with which he claimed payment was made is admissible.[49]

E. Habits of Promptness. — It is generally held that evidence that the debtor was in the habit of paying his bills promptly is not admissible;[50] nor is evidence that the creditor was a strict collector admissible.[51]

F. Evidence That Creditor Had Been Mistaken About Other Payments. — Evidence that the creditor had been mistaken about other payments,[52] or had made false claims in other cases,[53] is not admissible.

8. Payment by Third Person. — Evidence that an obligation has been paid by some third person is inadmissible unless it is also shown that it was paid for the obligor and accepted by the creditor.[54]

48. Rutherford *v.* McIvor, 21 Ala. 750; Farmers Bank *v.* Leonard, 4 Har. (Del.) 536; Bean *v.* Tonnele, 94 N. Y. 381, 46 Am. Rep. 153; McKinder *v.* Littlejohn, 23 N. C. 66 (admissible to overcome presumption from lapse of time); Wood *v.* Deen, 23 N. C. 230; Beckley *v.* Jarvis, 55 Vt. 348.

But see Xenia Bank *v.* Stewart, 114 U. S. 224, where the court said: "The insolvency and pecuniary embarrassment of a person may be shown as evidence that he has not paid all his debts, but they do not tend to show that he has not paid a particular debt."

49. Morgan *v.* Weir, 119 Ind. 178, 21 N. E. 656 (evidence of a party that he paid money to the defendant on the day defendant claimed to have paid plaintiff is admissible when defendant claims that he paid part of that money to the plaintiff).

Evidence That He Had Access to Money. — Evidence that the debtor had access to money, with permission to use it, is admissible as tending to make the fact of payment more probable. Supreme Tribe of Ben Hur *v.* Hall, 24 Ind. App. 316, 56 N. E. 780, 79 Am. St. Rep. 262.

Evidence that the defendant never received the money with which he claimed to have paid the debt is admissible. Frindel *v.* Schaikewitz, 1 App. Div. 214, 37 N. Y. Supp. 172.

Competent But Weak. — Evidence that plaintiff borrowed the money to loan defendant, and paid the debt shortly after defendant claimed to have paid, is competent or corroborative evidence however weak it might be. Koltze *v.* Messenbrink, 74 Iowa 242, 37 N. W. 179.

Evidence that the payer of a note borrowed money for the purpose of paying it about the time it became due is irrelevant. Reed *v.* Pierson, 3 N. J. L. 681.

50. *Indian Territory.* — Fletcher *v.* Dulaney, 1 Ind. Ter. 674, 43 S. W. 955.

Iowa. — Martin *v.* Shannon, 92 Iowa 374, 60 N. W. 645.

Massachusetts. — Abercrombie *v.* Sheldon, 8 Allen 532.

Pennsylvania. — Rosencrance *v.* Johnson, 191 Pa. St. 520, 43 Atl. 360.

Vermont. — Strong *v.* Slicer, 35 Vt. 40.

Contra. — Orr *v.* Jason, 1 Ill. App. 439; Thorp *v.* Goewey, 85 Ill. 611.

51. Young *v.* Doherty, 183 Pa. St. 179, 38 Atl. 587.

Evidence that the plaintiff was a close and strict collector has been admitted. Leiper *v.* Erwin, 5 Yerg. (Tenn.) 97.

52. Shockley *v.* Van Eaton, 81 Iowa 417, 46 N. W. 1097; Bradley *v.* Freed (Tenn. Ch. App.), 51 S. W. 124.

53. Young *v.* Doherty, 183 Pa. St. 179, 38 Atl. 587.

54. Whittier *v.* Eager, 1 Allen (Mass.) 499; Gray *v.* Herman, 75 Wis. 453, 44 N. W. 248, 6 L. R. A. 691.

9. Evidence of Non-Payment. — A. Conduct of Debtor. — Evidence of any conduct on the part of the debtor inconsistent with payment is admissible.[55]

B. Evidence Explaining Creditor's Conduct. — The creditor may introduce evidence explaining conduct which would otherwise give rise to an inference of payment.[56]

IV. APPLICATION OF PAYMENTS.

The application may be proved by evidence of express declarations or by circumstances.[57]

Evidence that a third party directed the payees of a note to pay themselves out of the proceeds from the sale of goods he had sent to them is inadmissible, unless it is shown that the request was complied with. King *v.* Bush, 36 Ill. 142.

55. Wheeler *v.* Thomas, 67 Conn. 577, 35 Atl. 499; Garnier *v.* Renner, 51 Ind. 372; Allen *v.* Woods, 24 Pa. 76 (payment was to be made in bricks; evidence that the bricks were delivered to third parties, against whom defendant recovered judgment for the price, is admissible as showing that they had not been received by plaintiff).

Where defendant claims that money deposited by him was deposited in payment of a note held by a bank, evidence that he withdrew the money is admissible to show that he placed the money there for his own use. Low *v.* Warden, 77 Cal. 94, 19 Pac. 235. Steiner *v.* Jeffries, 118 Ala. 573, 24 So. 37 (evidence of statement prepared by bookkeeper of defendant showing liability admissible); Turrentine *v.* Grigsby, 118 Ala. 380, 23 So. 666 (debtor wrote a new note which he subsequently refused to sign; *held* admissible).

56. Johnson *v.* White, 8 Leigh (Va.) 214; Robertson *v.* Garshwiler, 81 Ind. 463; De Vay *v.* Dunlap, 7 Ind. App. 690, 35 N. E. 195 (evidence of reason for delay in bringing suit admissible when the circumstances are such that an inference might be drawn from the delay).

57. *Illinois.* — Bailey *v.* Wynkoop, 10 Ill. 449; Snell *v.* Cottingham, 72 Ill. 124.

Indiana. — Howland *v.* Rench, 7 Blackf. 236.

Maine. — Curtis *v.* Nash, 88 Me. 476, 34 Atl. 273.

Oregon. — Brown *v.* Cahalin, 3 Or. 45 (evidence of the state of accounts is admissible).

Texas. — Bray *v.* Crain, 59 Tex. 649.

Washington. — Frazer *v.* Miller, 7 Wash. 521, 35 Pac. 427.

Intent. — Evidence of a naked intent of the debtor as to the mode of application, not communicated to the creditor, is not admissible. Brice *v.* Hamilton, 12 S. C. 32.

Directions. — But evidence of directions communicated by the debtor to the creditor is admissible. Thorn *v.* Moore, 21 Iowa 285; Wittkowsky *v.* Reid, 82 N. C. 116.

Where there is a conflict of testimony as to direction, the creditor cannot show the indorsements he made. Craig *v.* Miller, 103 Ill. 605. But see Smith *v.* Camp, 84 Ga. 117, 10 S. E. 539 (where conflict of testimony as to actual application, account containing credit is admissible); Van Rensselaer *v.* Roberts, 5 Denio (N. Y.) 470 (account books of creditor admissible in his favor to show how he has applied payments).

Questions of the sufficiency of evidence as to particular applications were considered in the following cases:

Alabama. — Kent *v.* Marks, 101 Ala. 350, 14 So. 472; Pearce *v.* Walker, 103 Ala. 250, 15 So. 568.

Georgia. — Green *v.* Ford, 79 Ga. 130, 3 S. E. 624; Cox *v.* Wall, 84 Ga. 456, 11 S. E. 137.

Iowa. — Sankey *v.* Cook, 78 Iowa 419, 43 N. W. 280.

Maine. — Hunt *v.* Brewer, 68 Me. 262.

V. SUFFICIENCY.

1. In General. — A plea of payment may be sustained without the production of any direct evidence of the fact of payment, or any evidence whatever of the time, place or mode of payment.[58]

2. Admissions. — Unexplained admissions are sufficient to prove payment or non-payment as against the party making them,[59] and admissions of either party may be received against him to prove application of payments.[60]

3. Receipts. — A. In General. — A receipt, proved to have been executed by the creditor, is *prima facie* evidence of payment of the money it recites as paid; and in general it is sufficient unless overthrown by clear evidence.[61]

Massachusetts. — Swett *v.* Boyce, 134 Mass. 381.

Michigan. — Lewis *v.* Noble, 93 Mich. 345, 53 N. W. 396.

New Hampshire. — Price *v.* Dearborn, 34 N. H. 481; Lauten *v.* Rowan, 59 N. H. 215.

New Jersey. — Woodruff *v.* McIntyre, 14 Atl. 572.

New York. — Grant *v.* Keator, 117 N. Y. 369, 22 N. E. 1055; Eberlin *v.* Palmer, 57 Hun 592, 10 N. Y. Supp. 660.

North Dakota. — First Nat. Bank *v.* Roberts, 2 N. D. 195, 49 N. W. 722.

Texas. — Hinkle *v.* Higgins, 83 Tex. 615, 19 S. W. 147.

Wisconsin. — Otto *v.* Klauber, 23 Wis. 471.

58. Presumptive evidence of the fact of payment will be sufficient unless the presumption is rebutted. McIntyre *v.* Meldrim, 63 Ga. 58.

59. Amos *v.* Flournoy, 80 Ga. 771, 6 S. E. 696 (debtor wrote to creditor, "Mrs. E. may not have the pay, but I have;" *held*, sufficient to show non-payment); Koontz *v.* Koontz, 79 Md. 357, 32 Atl. 1054 (positive evidence that deceased creditor had said that debt was paid is sufficient); Oldham *v.* Henderson, 4 Mo. 295 (evidence that creditor admitted receiving money, but that he said it was a loan, is not sufficient to show payment); Hall *v.* Thompson, 70 Hun 599, 24 N. Y. Supp. 86; State Bank *v.* Wilson, 12 N. C. 484 (admission of creditor or his agent sufficient); Brubaker *v.* Taylor, 76 Pa. St. 83.

The evidence of admissions may be overthrown by explanatory or contradicting evidence. Wiltsie *v.* Wiltsie, 49 Hun 606, 1 N. Y. Supp. 559.

60. Statements of debtor as to the mode of application are admissible. Snell *v.* Cottingham, 72 Ill. 124.

A recital in a mortgage executed by defendant as to the amount due on certain notes is admissible against defendant. Taylor *v.* Cockrell, 80 Ala. 236.

Evidence that defendant promised to pay a balance soon is admissible to show consent to application. Darling *v.* Temple, 22 Tex. Civ. App. 478, 55 S. W. 40.

Admissions of Creditor. — A letter written by the holder of a note stating the manner of application of payments is admissible. Sweeney *v.* Pratt, 70 Conn. 274, 39 Atl. 182, 66 Am. St. Rep. 161.

An indorsement upon a note in the handwriting of the deceased creditor is admissible to show application, and to toll the statute of limitations. Hopper *v.* Hopper, 61 S. C. 124, 39 S. E. 366.

61. *United States.* — Vint *v.* King, 28 Fed. Cas. No. 16,950.

Arkansas. — Burton *v.* Merrick, 21 Ark. 357.

California. — Jenne *v.* Burger, 120 Cal. 444, 52 Pac. 706 (receipt reading "received payment by note" is conclusive unless rebutted by clear and convincing evidence).

Florida. — Broward *v.* Doggett, 2 Fla. 49 (receipt is presumptive evidence of payment).

Georgia. — Mallard *v.* Moody, 105 Ga. 400, 31 S. E. 45.

B. Receipts for Notes. — A receipt reciting payment by note is, in some jurisdictions, *prima facie* evidence of payment, and is sufficient if uncontradicted.[62]

Illinois. — Ballance *v.* Frisbie, 3 Ill. 63 (*prima facie* evidence); Winchester *v.* Grosvenor, 44 Ill. 425 ("written receipt is evidence of the highest and most satisfactory character"); Rork *v.* Minor, 109 Ill. App. 12; Fitzgerald *v.* Coleman, 114 Ill. App. 25.

Indiana. — Chandler *v.* Schoonover, 14 Ind. 324 (*prima facie* evidence).

Iowa. — Levi *v.* Karrick, 13 Iowa 344 (conclusive until rebutted).

Kansas. — Solomon R. Co. *v.* Jones, 34 Kan. 443, 8 Pac. 730.

Kentucky. — Whittemore *v.* Stout, 3 Dana 427 (receipts will prove what they state, if not controverted).

Louisiana. — Platt *v.* Maples, 19 La. Ann. 459 (receipt is *prima facie* evidence, but is not conclusive); Borden *v.* Hope, 21 La. Ann. 581 (receipt will stand when evidence impeaching is contradictory).

Maine. — Rollins *v.* Dyer, 16 Me. 475 (receipt is *prima facie* evidence, but is not conclusive).

Maryland. — Brooke *v.* Quynn, 13 Md. 379 (receipt is conclusive until rebutted).

Massachusetts. — Hudson *v.* Baker, 185 Mass. 122, 70 N. E. 419.

Mississippi. — Butler *v.* State, 81 Miss. 734, 33 So. 847.

Missouri. — Massey *v.* Smith, 64 Mo. 347 (may be overthrown).

Montana. — Ramsdell *v.* Clark, 20 Mont. 103, 49 Pac. 591.

New Jersey. — Kenny *v.* Kane, 50 N. J. L. 562, 14 Atl. 597 (not conclusive).

New York. — McTurck *v.* Foussadier, 51 App. Div. 218, 64 N. Y. Supp. 962, (receipt dated on day of alleged payment sufficient); Lambert *v.* Seely, 17 How. Pr. 432 (conclusive unless contradicted); *In re* Waite, 43 App. Div. 296, 60 N. Y. Supp. 488.

Pennsylvania. — Rothrock *v.* Rothrock, 195 Pa. St. 529, 46 Atl. 90 (receipt sufficient when no other money transaction between the parties is shown); Crawford *v.* Forest Oil Co., 189 Pa. St. 415, 49 Atl. 39 (receipt controls when evidence conflicting); *In re* Rhoads' Estate, 189 Pa. St. 460, 42 Atl. 116; Harris *v.* Hay, 111 Pa. St. 562, 4 Atl. 715 (should be set aside only for weighty reasons).

South Carolina. — Clarke *v.* Deveaux, 1 Rich. 172 (not conclusive).

Tennessee. — Breeder *v.* Parchman (Tenn. Ch. App.), 54 S. W. 677 (issue as to genuineness of receipt; *held,* genuine and sufficient); Alsup *v.* Thompson (Tenn. Ch. App.), 52 S. W. 324 (typewritten receipt, signed in typewriting, is sufficient in connection with other circumstances).

West Virginia. — Anderson *v.* Davis, 55 W. Va. 429, 47 S. E. 157.

Sufficient To Prove Only Matters Stated Therein. — Where a receipt is given "for land bought by me," and no selection of credits on a prior note will make the sum stated in the receipt, the receipt is not sufficient evidence to prove that it covered the credits or part of them. Witt *v.* Moberley (Ky.), 42 S. W. 338.

Where a receipt states that it is to be applied on a note it is incumbent upon the debtor to show what note was intended. Bowsher *v.* Porter, 52 Ill. App. 59.

62. Moore *v.* Newbury, 6 McLean 472, Newb. Adm. 49, 17 Fed. Cas. No. 9772; Drew *v.* Hull of a New Ship, 7 Fed. Cas. No. 4078; Palmer *v.* Priest, 1 Spr. 512, 18 Fed. Cas. No. 10,694; Real Estate Bank *v.* Rawdon, 5 Ark. 558; *Ex parte* Williams, 17 S. C. 396.

Contra. — A receipt for a note "in payment of the above account" is not evidence of acceptance in absolute payment. Glenn *v.* Smith, 2 Gill & J. (Md.) 493, 20 Am. Dec. 452. See also Berry *v.* Griffin, 10 Md. 27, 69 Am. Dec. 123. But see Phelan *v.* Crosby, 2 Gill (Md.) 462.

In Putnam *v.* Lewis, 8 Johns. (N. Y.) 389, a receipt was given as for money. It was held that the evidence was not sufficient to show an absolute payment. See also Doebling *v.* Loos, 45 Mo. 150; Swain *v.* Frazier, 35 N. J. Eq. 326; Tobey *v.* Barber, 5 Johns. (N. Y.) 68, 4 Am. Dec.

C. Recitals in Deeds and Other Instruments. — An acknowledgment or recital of payment in a deed or other instrument is *prima facie* evidence, but is not conclusive.[63]

4. Acceptance of Bill or Note. — According to the general rule, the evidence must show an agreement, express or implied, to accept a bill or note as payment, or an actual application at the time.[64] In some jurisdictions, however, a showing of delivery of such an instrument is *prima facie* evidence, and is sufficient unless rebutted.[65]

326; Combination Steel & Iron Co. *v.* St. Paul City R. Co., 47 Minn. 207, 49 N. W. 744.

It may be explained by showing a different intention. Moore *v.* Newbury, 6 McLean 472, Newb. Adm. 49, 17 Fed. Cas. No. 9772.

63. *Alabama.* — Agnew *v.* McGill, 96 Ala. 496, 11 So. 537.

Illinois. — Koch *v.* Roth, 150 Ill. 212, 37 N. E. 317 (deed).

Maine. — Patch *v.* King, 29 Me. 448 (acknowledgment of payment on margin of record of mortgage).

Missouri. — Bridges *v.* Russell, 30 Mo. App. 258.

New York. — Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62.

Pennsylvania. — Watson *v.* Blaine, 12 Serg. & R. 131, 14 Am. Dec. 669 (agreement for conveyance of land).

Wisconsin. — Crowe *v.* Colbeth, 63 Wis. 643, 24 N. W. 478.

A recital in an administrator's deed of payment to his intestate is not evidence against the heirs, as it is no more than a declaration of his belief. Williams *v.* Peal, 20 N. C. 471.

64. Petefish *v.* Watkins, 124 Ill. 384, 16 N. E. 248; Fulton Grain & Mill. Co. *v.* Anglim, 34 App. Div. 164, 54 N. Y. Supp. 632; Ellison *v.* Hosie, 147 Pa. St. 336, 23 Atl. 455 (evidence sufficient to be submitted to the jury); Pinson *v.* Puckett, 35 S. C. 178, 14 S. E. 393 (it is proper to submit the question to the jury).

Evidence Insufficient. — In the following cases the evidence was insufficient to show that the bill or note was taken in absolute payment:

California. — Savings & Loan Soc. *v.* Burnett, 106 Cal. 514, 39 Pac. 922.

Connecticut. — Freeman *v.* Benedict, 37 Conn. 559 (note).

Illinois. — Crabtree *v.* Rowand, 33 Ill. 421 (giving of note not of itself sufficient).

Kansas. — Mullins *v.* Brown, 32 Kan. 312, 4 Pac. 305 (check not *prima facie* evidence of payment).

Maryland. — Haines *v.* Pearce, 41 Md. 221.

Michigan. — Sheldon Axle Co. *v.* Scofield, 85 Mich. 177, 48 N. W. 511.

New York. — Cameron *v.* Leonard, 11 App. Div. 631, 42 N. Y. Supp. 73, (not sufficient to show that draft was accepted in payment); Baird *v.* Spence, 8 Misc. 535, 28 N. Y. Supp. 774, *affirming* 10 Misc. 772, 31 N. Y. Supp. 1125; Beal *v.* American Diamond Rock Boring Co., 16 Misc. 540, 38 N. Y. Supp. 743; Van Eps *v.* Dillaye, 6 Barb. 244.

Evidence Sufficient. — In the following cases the evidence was held sufficient to show an intent to receive a bill or note in absolute payment. Case Mfg. Co. *v.* Soxman, 138 U. S. 431 (notes); Whitley *v.* Dunham Lumb. Co., 89 Ala. 493, 7 So. 810 (credited on mortgage and on creditor's books; statement rendered later showed amount as paid); Greer *v.* Laws, 56 Ark. 37, 18 S. W. 1038 (where language of instrument purports a full payment it is *prima facie* evidence); Roberts *v.* Fisher, 53 Barb. (N. Y.) 69. And see Robinson *v.* Hurlburt, 34 Vt. 115, applying the New York rule.

65. *United States.* — Wallace *v.* Agry, 4 Mason 336, 29 Fed. Cas. No. 17,096; Palmer *v.* Elliot, 1 Cliff. 63, 18 Fed. Cas. No. 10,690.

Maine. — Bunker *v.* Barron, 79 Me. 62, 8 Atl. 253, 1 Am. St. Rep. 282; Strang *v.* Hirst, 61 Me. 9.

Massachusetts. — Quimby *v.* Durgin, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514 (it is immaterial whether note was made by debtor or by a third person); Butts *v.* Dean, 2 Metc. 76; Appleton *v.* Parker, 15 Gray 173; Amos *v.* Bennett, 125 Mass. 120; Brigham *v.* Lally, 130 Mass. 485 (not conclusive evidence).

5. Evidence of Payment Sufficient To Show Discharge When Only One Debt Shown. — In the absence of a showing of other indebtedness, evidence of payment of money is sufficient to show a discharge of a note sued upon.[66]

6. Evidence of One Witness Sufficient. — Evidence of one witness is sufficient to prove payment even in Louisiana, where a contract for the payment of more than five hundred dollars must be proved by stronger evidence.[67]

7. Testimony of Parties. — The testimony of parties to the suit may be sufficient to show payment.[68]

Vermont. — Collamer *v.* Langdon, 29 Vt. 32.

The *prima facie* case was overcome in the following cases: Graves *v.* Shulman, 59 Ala. 406 (*held*, that it may be overcome); Davis *v.* Parsons, 157 Mass. 584, 32 N. E. 1117 (note was given before amount due was ascertained, and to accommodate the creditor).

66. Griswold *v.* Lambert, 89 Me. 534, 36 Atl. 1046.

67. O'Brien *v.* Flynn, 8 La. Ann. 307; Jones *v.* Fleming, 15 La. Ann. 522; De St. Romes *v.* New Orleans, 18 La. Ann. 210.

68. In the following cases the sufficiency of the testimony of parties was considered:

Colorado. — Kutcher *v.* Love, 19 Colo. 542, 36 Pac. 152.

Illinois. — Hawkins *v.* Harding, 37 Ill. App. 564 (where testimony of plaintiff and of defendant is conflicting, possession of note will control).

Iowa. — Mulhall *v.* Berg, 95 Iowa 60, 63 N. W. 573 (evidence not sufficient to show payment).

Minnesota. — Goenen *v.* Schroeder, 18 Minn. 66 (evidence sufficient to show payment).

Missouri. — Collins *v.* Stocking, 98 Mo. 290, 11 S. W. 750 (positive statement of beneficiary under trust deed, supported by testimony of debtor, sufficient to overcome presumption of payment).

New Jersey. — Magee *v.* Bradley, 54 N. J. Eq. 326, 35 Atl. 103 (presumption of payment from lapse of time overcome by positive testimony of party that legacy was not paid).

New York. — Newcombe *v.* Hyman, 16 Misc. 25, 37 N. Y. Supp. 649 (in action by an administrator, testimony of defendant is not conclusive, although uncontradicted).

Texas. — Henderson *v.* Landa, 79 Tex. 39, 14 S. W. 891 (defendant's testimony as to payment too uncertain).

PEACE OFFICERS.—See Officers; Sheriffs and Constables.

PEDIGREE.

By A. P. Rittenhouse.

CROSS-REFERENCES:

Age;
Declarations; Divorce;
Hearsay;
Incest;
Marriage;
Paupers;
Rape.

I. DEFINITION.

Pedigree is the lineage, descent, and relationship, through families, of persons and animals. The term embraces not only descent and relationship, but the facts of birth and death when they are to be shown as matters of pedigree and not as independent facts, and in the case of persons, marriage as well, and the times when all such events happened, and the facts necessarily resulting therefrom.[1]

II. NATURE OF PROOF GENERALLY.

1. Hearsay Admissible To Prove Pedigree. — To the rule which excludes hearsay evidence, proof of pedigree is an exception, and is so recognized by the courts largely upon the ground of necessity.[2]

2. Living Witnesses. — Where the facts as to pedigree are recent, and can be proved by living witnesses, family reputation as to the same matter cannot be admitted.[3]

1. Kelly *v.* McGuire, 15 Ark. 555, 604; Washington *v.* Bank for Savings, 171 N. Y. 166, 173, 63 N. E. 831, 89 Am. St. Rep. 800; Young *v.* Shulenberg, 165 N. Y. 385, 388, 59 N. E. 135, 80 Am. St. Rep. 730; Citizens' Rapid-Transit Co. *v.* Dew, 100 Tenn. 317, 324, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 518.

2. Vowles *v.* Young, 13 Ves. (Eng.) 140; Berkeley Peerage, 4 Camp. (Eng.) 401, 414; Ellicott *v.* Pearl, 10 Pet. (U. S.) 412; Flora *v.* Anderson, 75 Fed. 217, 234; Fulkerson *v.* Holmes, 117 U. S. 389, 397; Greenwood *v.* Spiller, 3 Ill. 502; Mann *v.* Cavanaugh, 110 Ky. 776, 62 S. W. 854; Washington *v.* Bank for Savings, 171 N. Y. 166, 173, 63 N. E. 831, 89 Am. St. Rep. 800.

In Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323, the court said: "It is a well recognized exception to this rule (rule excluding hearsay evidence) that, in matters of pedigree the declarations of deceased members of the family are admitted. . . . This exception to the general rule had its origin in the necessity of the case."

Pedigree is the history of family descent which is transmitted from one generation to another by both oral and written declarations, and unless proved by hearsay evidence, it cannot in most instances be proved at all, hence declarations of deceased members of a family made *ante litem motam,* are received to prove family relationship, including marriages, births, and deaths, and the facts necessarily resulting from those events. Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730. Reputation, hearsay, and family records are admissible in evidence from necessity, but the proof of these, by other than legal evidence, is not required by necessity. They must be proved as other facts are proved. Peterson *v.* Ankrom, 25 W. Va. 56, 61.

3. White *v.* Strother, 11 Ala. 720; Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 780, 12 S. E. 18; Harland *v.* Eastman, 107 Ill. 535; Covert *v.* Hertzog, 4 Pa. St. 145; Campbell *v.* Wilson, 23 Tex. 252, 76 Am. Dec. 67; *In re* Hurlburt, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794.

But see Craufurd *v.* Blackburn, 17 Md. 49, 54, 77 Am. Dec. 323. The issue was whether the mother of the appellant was married to his father. The mother being then alive testified to the fact of such marriage. The father being dead his declarations to the effect that he was not married to the mother, were held properly admitted. The court said: "It is objected, that although such declarations to prove pedigree are ordinarily admissible, yet they ought to have been excluded in this case, because the necessity did not exist, there being a party to the alleged marriage,

3. Birth and Death. — The place of birth and death of a person may generally be proved by declarations like other facts of pedigree;[4] but, it has been held to the contrary.[5]

4. Statute Regulations. — The method of proving pedigree is sometimes provided for by statute.[6]

III. ORAL DECLARATIONS.

1. General Rule. — Before declarations of persons can be admitted to prove pedigree, it is essential that three facts be established by legal evidence, viz: First, that the declarant is dead, or his testimony unobtainable;[7] Second, that the declarant was related to the family to which the declarations refer, by blood or marriage; Third, that the declarations were made *ante litem motam,* that is to say,

living and competent to testify, and because it was inadmissible upon the principle, that the best evidence of which the nature of the thing is capable, must be given. This objection arises from a misapprehension of the rule. Such declarations are not held to be admissible or inadmissible according to the necessity of the particular case; but they are admitted as primary evidence on such subjects by the established rule of law, which, though said to have had its origin in necessity, is universal in its application."

4. Doe *v.* Griffin, 15 East (Eng.) 293; Rishton *v.* Nesbet, 2 Mo. & R. (Eng.) 554; Wise *v.* Wynn, 59 Miss. 588, 591, 42 Am. Rep. 381; Jackson *v.* Boneham, 15 Johns. (N. Y.) 226; Hammond *v.* Noble, 57 Vt. 193, 203.

5. Rex *v.* Erith, 8 East (Eng.) 539; Brooks *v.* Clay, 3 A. K. Marsh. (Ky.) 545; Tyler *v.* Flanders, 57 N. H. 618, 624; Independence *v.* Pompton, 9 N. J. L. 209; Carter *v.* Montgomery, 2 Tenn. Ch. 216.

In Wilmington *v.* Burlington, 4 Pick. (Mass.) 174, the defendant sought to prove that one, John Taylor, was born in Reading or Medford and not in Burlington. For this purpose the trial court admitted the deposition of a witness who testified that "when she was about ten years old, which was more than seventy years ago, her father and mother brought home to their house in Reading a male infant, which her mother told her they brought from Medford." "Being interrogated, 'who brought the child,' she said, in the same deposition, 'I do not remember being present when he was first brought into the house.'" *Held,* error. The court said: "By the English authorities, hearsay evidence is admissible to prove pedigree, but not the place of a child's birth. The reason of the distinction probably is, that where a person is treated as a child for many years, there is rather a course of conduct than a simple declaration showing the relationship; whereas the question of birthplace presents a distinct fact. This reason, however, is not altogether satisfactory. But the rule of evidence appears to be established, and it has been sanctioned by this court in a case in which the declaration of an alien as to the place of his birth was rejected. It is better to uphold the rules of evidence than to admit testimony of a doubtful character."

6. C. C. P. Cal. 1903, §§ 1852, 1870; C. C. P. Ga. 1895, § 5177; C. C. P. Mont. 1895, §§ 3128, 3146; C. C. P. Or. 1892, §§ 688, 706; Wis. Stat. 1901, C. 28.

7. Where the declaration of a member of the family is offered, the fact that it is impossible to procure his testimony on account of his death, absence, insanity, or the like, will render such declarations admissible. Vowles *v.* Young, 13 Ves. (Eng.) 140; Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730; Eisenlord *v.* Clum, 126 N. Y. 552, 563, 27 N. E. 1024, 12 L. R. A. 836; Thompson *v.* Woolf, 8 Or. 455.

before the controversy about the pedigree in question arose.[8]

2. Means of Knowledge and Motive. — It must appear that the declarant had either personal knowledge of the matters to which his declarations refer, or knowledge acquired from repute in the family;[9] and it must also appear that he had no motive either to

8. *England.* — Vowles *v.* Young, 13 Ves. 140; Berkeley Peerage, 4 Camp. 401, 409; Shrewsbury Peerage, 7 H. L. 20.

United States. — Blackburn *v.* Crawfords, 3 Wall. 175, 188; Strickland *v.* Poole, 1 Dall. 14; Elliott *v.* Peirsoe, 11 Wheat. 328, 337.

Alabama. — Elder *v.* State, 123 Ala. 35, 26 So. 213; Rowland *v.* Ladiga, 21 Ala. 9, 32.

California. — *In re* Heaton, 135 Cal. 385, 67 Pac. 321; *In re* James, 124 Cal. 653, 660, 57 Pac. 578, 1008; People *v.* Mayne, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256.

Illinois. — Chilvers *v.* Race, 196 Ill. 71, 63 N. E. 701; Greenwood *v.* Spiller, 3 Ill. 502; Cuddy *v.* Brown, 78 Ill. 415.

Indiana. — De Haven *v.* De Haven, 77 Ind. 236.

Kansas. — Smith *v.* Brown, 8 Kan. 409, 417.

Kentucky. — Travelers' Ins. Co. *v.* Henderson Cotton Mills, 27 Ky. L. Rep. 653, 85 S. W. 1090; Birney *v.* Hann, 3 A. K. Marsh. 322, 13 Am. Dec. 167; Mann *v.* Cavanaugh, 110 Ky. 776, 23 Ky. L. Rep. 238, 62 S. W. 854.

Maryland. — Walkup *v.* Pratt, 5 Harr. & J. 51; Copes *v.* Pearce, 7 Gill 189, 200; Pancoast *v.* Addison, 1 Harr. & J. 212; Barnum *v.* Barnum, 42 Md. 251, 304.

Maine. — Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615.

Massachusetts. — Haddock *v.* Boston & Maine R., 3 Allen 298, 81 Am. Dec. 656; Butrick *v.* Tilton, 155 Mass. 461, 29 N. E. 1088.

Michigan. — Lamoreaux *v.* Attorney-General, 89 Mich. 146, 50 N. W. 812; Van Sickle *v.* Gibson, 40 Mich. 170.

Minnesota. — Dawson *v.* Mayall, 45 Minn. 408, 48 N. W. 12.

New Hampshire. — Waldron *v.* Tuttle, 4 N. H. 371, 378; Mooers *v.* Bunker, 29 N. H. 420; Emerson *v.* White, 29 N. H. 482; South Hampton *v.* Fowler, 54 N. H. 197.

New Jersey. — Westfield *v.* Warren, 8 N. J. L. 249.

New York. — Jackson *v.* Browner, 18 Johns. 37.

North Carolina. — Hodges *v.* Hodges, 106 N. C. 374, 11 S. E. 364; Moffit *v.* Witherspoon, 32 N. C. 185, 192; Morgan *v.* Purnell, 11 N. C. 95; Kaywood *v.* Barnett, 20 N. C. 91.

Texas. — Cook *v.* Carroll Land & Cattle Co., 39 S. W. 1006; Wren *v.* Howland (Tex. Civ. App.), 75 S. W. 894; Louder *v.* Schluter, 78 Tex. 103, 14 S. W. 205, 207; Nunn *v.* Mayes, 9 Tex. Civ. App. 366, 30 S. W. 479; De Leon *v.* McMurray, 5 Tex. Civ. App. 280, 23 S. W. 1038; Brown *v.* Lazarus, 5 Tex. Civ. App. 81, 25 S. W. 71; Sheppard *v.* Avery, 28 Tex. Civ. App. 479, 69 S. W. 82.

In Northrop *v.* Hale, 76 Me. 306, 310, 49 Am. Rep. 615, the court said: "It has, therefore, become a universally recognized exception to the general rule excluding hearsay, based on various sound considerations, that as to certain facts of family history, usually denominated pedigree, comprising *inter alia,* birth, death and marriage, together with their respective dates, and, in a qualified sense, legitimacy and illegitimacy, declarations are admissible; (1) When it appears by evidence dehors the declarations that the declarant was lawfully related by blood or marriage to the person or family, whose history the facts concern; (2) That the declarant was dead when the declarations were tendered; and (3) That they were made *ante litem motam.*"

9. Monkton *v.* Attorney-General, 2 Russ. & M. (Eng.) 147, 350; Vowles *v.* Young, 13 Ves. (Eng.) 140; Doe *v.* Randall, 2 Mo. & R. (Eng.) 25; Jewell *v.* Jewell, 1 How. (U. S.) 219; Van Sickle *v.* Gibson, 40 Mich. 170; Rothwell *v.* Jamison, 147 Mo. 601, 49 S. W. 503; Grand Lodge A. O. U. W. *v.* Bartes (Neb.), 96 N. W. 186.

exceed or to fall short of the truth in making the declarations.[10]

3. Declarant Out of Jurisdiction. — While the general rule is that a declarant must be proved to be dead in order to render his declarations admissible in evidence, it has been held, that if it appears that he is incompetent as a witness, or beyond the jurisdiction of the court, it will be sufficient to admit his declarations if otherwise competent.[11]

4. Declaration of Husband or Wife. — The declarations of a husband in regard to his wife's family, or of a wife in regard to her husband's family, are admitted in evidence upon substantially the same principles as those of a relation by blood.[12]

5. Declarant's Relationship to Family. — In order to render declarations as to pedigree admissible in evidence, the relationship of the declarant to the family to which the declarations refer must be proved by evidence other than the declarations themselves.[13] Slight proof of such relationship is sufficient, especially where there is great lapse of time between the making of the declarations, and the offering of them in evidence;[14] where, however, it is sought to reach the estate of the declarant himself, and not to establish a right through him, his declarations with reference to his family and kindred are admissible, though the relationship is not shown by other evidence.[15]

10. Whitelocke *v.* Baker, 13 Ves. Jr. (Eng.) 511; Rex *v.* Eriswell, 3 Durnf. & E. (Eng.) 707; Berkeley Peerage, 4 Camp. (Eng.) 401-420; Butler *v.* Mountgarret, 7 H. L. C. (Eng.) 633; Monkton *v.* Attorney-General, 2 Russ. & M. (Eng.) 147, 350; People *v.* Fulton F. Ins. Co., 25 Wend. (N. Y.) 220; Moffit *v.* Witherspoon, 32 N. C. 185.

11. Vowles *v.* Young, 13 Ves. (Eng.) 140; Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730; Thompson *v.* Woolf, 8 Or. 455.

12. Shrewsbury Peerage, 7 H. L. (Eng.) 1; Sitler *v.* Gehr, 105 Pa. St. 577, 593, 51 Am. Rep. 207; Gehr *v.* Fisher, 143 Pa. St. 311, 22 Atl. 859.

13. *In re* Heaton, 135 Cal. 385, 67 Pac. 321; Chapman *v.* Chapman, 2 Conn. 347, 7 Am. Dec. 277; Malone *v.* Adams, 113 Ga. 791, 39 S. E. 507, 84 Am. St. Rep. 259; Greene *v.* Almand, 111 Ga. 735, 36 S. E. 957; Sitler *v.* Gehr, 105 Pa. St. 577, 592, 51 Am. Rep. 207; *In re* Robb's Estate, 37 S. C. 19, 33.

Blackburn *v.* Crawfords, 3 Wall. (U. S.) 175, 187. In this case nephews and nieces of one Dr. Crawford claimed his estate as his heirs, and the main question was whether or not their father and mother, Mr. Thomas Crawford, brother of Dr. Crawford, and Elizabeth Taylor were married. Declarations of one Sarah Evans who was a sister of Elizabeth Taylor, and deceased, were introduced in evidence in behalf of the nephews and nieces. The court held these declarations incompetent and improperly admitted, declaring that it was proper to prove the relationship by giving in evidence the declarations of any deceased member of the Crawford family, but not the declarations of a person belonging to another family, such person claiming to be connected with that family, only by the intermarriage of a member of each family, and that a declaration from such a source, of the marriage which constituted the affinity of the declarant, was not such evidence *aliunde*, as the law requires.

14. Fulkerson *v.* Holmes, 117 U. S. 389, 397; Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730; *In re* Robb's Estate, 37 S. C. 19, 33, 16 S. E. 241.

15. The case of Wise *v.* Wynn, 59

6. Degree of Relationship. — It is sufficient if the declarant be shown to have been a member of some branch of the family in question, and the degree of relationship need not be proved with absolute precision.[16]

7. Declarant Not Related. — Declarations of deceased persons as to the pedigree of a person with whom they were closely connected

Miss. 588, 42 Am. Rep. 381, was a suit to recover the estate of Charles Wise, deceased, by alleged heirs who claimed as children of the deceased's brother Thomas Wise. The question was whether or not plaintiffs' ancestor was a brother of the deceased. The plaintiffs proved that they were children of Thomas Wise, deceased, formerly a resident of a place known as "Hell's Corner," in Virginia, where the corners of three counties come together; that nearly fifty years before, their father had a younger brother named Charles, who having seduced a young lady of respectable family, fled the country to escape the vengeance of her relatives, and announced at the time that he expected to go to Texas or Mississippi, and that he should take care that no one in Virginia should ever discover the place of his future home. From that time until shortly before the bringing of the suit, nothing was heard in Virginia of the subsequent career of Charles Wise. The plaintiffs then proposed to prove by two witnesses living in the county where the deceased lived and died, that the deceased Charles Wise told them that he came from a place in Virginia, known as "Hell's Corner," where the corners of three counties come together, that he had there a brother named Thomas, and that he had left there because of some trouble about a woman. This proffered testimony was excluded by the court, except the isolated statement of the deceased, that he had a brother named Thomas. The witnesses not even being allowed to state that the deceased had said that his brother Thomas lived in Virginia, or that he himself came from that state. The court held this proffered evidence to be admissible, and improperly excluded, and declared, that where a plaintiff was seeking to reach the estate of the declarant by evidence of what he had said with reference to his family and kindred, it was wholly different from a case where it was sought to establish a right derived through the declarant, by his own declarations, where the rule is, that the declarant's relationship must be made to appear by evidence dehors his declarations, and the court further said after citing authorities: "Independently of these or of any authorities, we think *ex necessitate rei*, and as a matter of common sense, that declarations such as were offered here and under the circumstances here existing, should always be received in evidence."

The case of Young *v.* State, 36 Or. 417, 59 Pac. 812, 60 Pac. 711, 47 L. R. A. 548, was an action to recover property of one Fenstermacher, which had been declared escheated to the state. The declarations of the deceased as to his family history, and his own movements and wanderings tending to show that he was Jonas Fenstermacher, whom the plaintiffs claimed as their ancestor, were admitted in behalf of the plaintiff, and were held competent.

16. Vowles *v.* Young, 13 Ves. (Eng.) 140; Shrewsbury Peerage, 7 H. L. (Eng.) 1; Flora *v.* Anderson, 75 Fed. 217, 234.

While a declarant must be connected with the family to whom the person whose pedigree is in question, claims to belong, that is, with some branch of it, yet when that connection is proved, the relationship between different members of the family, may be shown by his declarations. For instance, in a pedigree case where the object is to connect A with C, after proving that B, a deceased person, was related to A, it is competent to show the relationship between A and C, by the declarations of B, and it is not necessary to show by evidence other than such declarations, that B is also related to C. Sitler *v.* Gehr, 105 Pa. St. 577, 596, 51 Am. Rep. 207; Gehr *v.* Fisher, 143 Pa. St. 311, 22 Atl. 859.

in life, though not related by blood or marriage, have been held competent evidence.[17]

8. Legitimate Relationship. — Hearsay evidence consisting of the declarations of deceased persons, as to pedigree, is limited to legitimate relationship. Illegitimacy as a substantive fact cannot be so established;[18] but where the question is marriage *vel non*, the declarations of parents if deceased, that they were, or were not married, are admissible if made *ante litem motam*.[19]

9. Non-existence of Relatives. — The declarations of a deceased person may be admitted in evidence to show that he had no heirs or relatives, as well as to show relationship between himself and others.[20]

17. In a suit for partition, the paternity of the plaintiff, William D. Alston, was in question. He claimed to be the natural son of William Alston. Evidence was introduced that prior to his birth, his mother Octavia Daniels, and William Alston, both unmarried, lived in the same town and were acquainted; that a few months after the birth of William D. Alston, William Alston made an arrangement with Mr. and Mrs. De France to raise the child, and he resided with them till they died. The evidence showed that William Alston visited the De France home when the child was there, spoke to him as his son, was addressed by him as a son, that the reputed father took especial interest in the child when he was sick; referred to him as his son in conversations with people; and deeded to him 120 acres of land for the consideration of one dollar. The declarations of the De Frances (then deceased) that the child was the son of William Alston were held competent evidence. The court said: "With reference to the declarations of Mr. and Mrs. De France they do not come strictly within the rule requiring such declarations to be by a relative by blood or marriage, but it was their family in which plaintiff was brought up, and we hold that their declarations are admissible by reason of such relationship." Alston *v.* Alston, 114 Iowa 29, 86 N. W. 55.

18. Goodright *v.* Moss, 2 Cowp. (Eng.) 591; Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615; Craufurd *v.* Blackburn, 17 Md. 49, 77 Am. Dec. 323. Where relationship is acknowledged as a matter of fact, and its lawfulness only is disputed hearsay evidence from members of the family may be introduced to show that such relationship was lawful, or was not lawful. But, hearsay cannot be introduced to establish an unlawful relationship *per se*, where a lawful relationship is not claimed. Where legitimacy is made a ground of claim, declarations of members of the family may be admitted to dispute such claim. Flora *v.* Anderson, 75 Fed. 217, 234.

19. *In re* Heaton, 135 Cal. 385, 67 Pac. 321; Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442, 461; Watson *v.* Richardson, 110 Iowa 673, 690, 80 N. W. 407; Alston *v.* Alston, 114 Iowa 29, 35, 86 N. W. 55; Barnum *v.* Barnum, 42 Md. 251, 304; Jackson *v.* Jackson, 80 Md. 176, 187, 30 Atl. 752.

20. The case of Washington *v.* Bank for Savings, 171 N. Y. 166, 63 N. E. 831, 89 Am. St. Rep. 800, was a suit by the administrator of a deceased person's estate to recover money deposited by her in bank in the names of alleged children, who were claimed by the administrator to be fictitious persons. On the trial the declarations of the deceased that she never had any children were admitted in evidence in behalf of the plaintiff. *Held*, properly admitted. The court said: "It is quite true, as suggested by the learned counsel for the defendant that hearsay evidence as to pedigree is generally admitted to establish the descent or relationship of a real living person with some deceased ancestor. In this case it was admitted for the purpose of establishing

10. Declarations Must Be Ante Litem Motam, and Not Self-serving. — In order to render declarations as to pedigree admissible in evidence, it must appear that they were made before the controversy arose concerning such pedigree. Declarations otherwise reliable, but made after a suit is brought or a claim started, upon the question to which they relate become inadmissible on account of the supposed bias under which they are uttered.[21] Likewise, self-serv-

the fact that the names placed upon the books of the bank as beneficiaries were not real but fictitious, and that in truth the deceased had no children and, therefore that the money deposited passed to the personal representatives upon her death. It was admitted to prove the nonexistence of any children, heirs or next of kin of the deceased. The declarations of the deceased which were admitted related to her family history. They were in substance, that she had no children or relatives, and if such declarations related to pedigree they were just as admissible to prove a negative as an affirmative. The declarations in such cases are not strictly confined to births, marriages and deaths, but extend to any inquiry necessarily involving these events, or which tend to show that either, some or all of them took place or did not."

21. *United States.* — Stein *v.* Bowman, 13 Pet. 209, 220.

Connecticut. — Chapman *v.* Chapman, 2 Conn. 347, 7 Am. Dec. 277.

Indiana. — Collins *v.* Grantham, 12 Ind. 440; De Haven *v.* De Haven, 77 Ind. 236.

Maine. — Northrop *v.* Hale, 76 Me. 306, 49 Am. Rep. 615.

New York. — People *v.* Fulton F. Ins. Co., 25 Wend. 205; Caujolle *v.* Ferrie, 26 Barb. 177, 187.

North Carolina. — Morgan *v.* Purnell, 11 N. C. 95.

Texas. — Schott *v.* Pellerin (Tex. Civ. App.), 43 S. W. 944; Nehring *v.* McMurrian, 94 Tex. 45, 57 S. W. 943.

Washington. — Boudereau *v.* Montgomery, 4 Wash. C. C. 186, 190.

The case of Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. 380, was a suit for partition of the estate of Samuel Bohn deceased, by Charles D. Bohn, the complainant, and appellee here. The contention was whether or not the complainant was the child and heir at law of Samuel Bohn deceased, and Lucinda Bohn, his wife. The evidence showed that Charles D. Bohn was brought up in the family of Samuel Bohn and Lucinda Bohn, as their lawful offspring, they living together as husband and wife; that he was treated and recognized as their child, by them and others; that when the child appeared the father was about sixty-three years old, and the mother forty-nine; that they had previously adopted a daughter, and had proposed to adopt a son, and had taken an infant from a foundling asylum, but after retaining it a short time returned it; that shortly thereafter, the child, Charles D., appeared, and certain neighbors who were not taken into the confidence of the family expressed doubts as to the paternity of the child, and started rumors in relation to it. The appellant urged that such doubts and rumors amounted to a controversy arising before the declarations and acts of the father in relation to the paternity of the child, and therefore, evidence of such declarations and acts could not be received. The court declared this position unsound, and said: "The general rule is that declarations made after a controversy originates are excluded. By the term 'controversy,' as thus used, are not meant mere idle rumors, or doubts of curious scandal-mongers whose discussions of the family matters of their neighbors is made without reverence for sanctity, morality, privacy or religion. . . . Such suspicions, doubts and rumors do not rise to the dignity of a controversy that would exclude declarations made thereafter by the father."

"Declarations are not admissible if made *post litem motam*, and to be so, it is not necessary that a litiga-

ing declarations are, under all circumstances, inadmissible.[22]

IV. WRITTEN DECLARATIONS.

Statements in writing relating to pedigree made or recognized by members of a family, who are dead, are admissible in evidence upon the principle that they are natural effusions of parties who must know the truth.[23] Inscriptions on tombstones, and on family portraits, and charts, and engravings in rings are competent evidence of pedigree;[24] so also are entries in family Bibles, or other family records; recitals and descriptions in deeds, wills, and bills in chancery; public registers of births, marriages, and deaths required to be kept; old pedigrees and genealogical tables.[25]

tion should absolutely have been commenced, but it is sufficient if the matter was in controversy so that litigation might reasonably be apprehended." Berkeley Peerage, 4 Camp. (Eng.) 409.

22. Byers *v.* Wallace, 87 Tex. 503, 509, 28 S. W. 1056, 29 S. W. 760.

23. Shrewsbury Peerage, 7 H. L. (Eng.) 1; Whitelocke *v.* Baker, 13 Ves. Jr. (Eng.) 511; People *v.* Fulton F. Ins. Co., 25 Wend. (N. Y.) 205, 220.

24. *England.* — Shrewsbury Peerage, 7 H. L. 1; Vowles *v.* Young, 9 Ves. 172; Camoys Peerage, 6 Cl. & F. 789, 895.

Arkansas. — Kelly *v.* McGuire, 15 Ark. 555, 604.

California. — Pearson *v.* Pearson, 46 Cal. 610, 629, 637.

Missouri. — Beckham *v.* Nacke, 56 Mo. 546; Eastman *v.* Martin, 19 N. H. 152; Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730; Jackson *v.* Cooley, 8 Johns. (N. Y.) 128; Douglass *v.* Sanderson, 1 Yeates (Pa.) 15, *affirmed* in 2 Dall. (U. S.) 116; Scharff *v.* Keener, 64 Pa. St. 376; Murray *v.* Supreme Hive L. of M. of W., 112 Tenn. 664, 80 S. W. 827, 831.

25. *United States.* — Stokes *v.* Dawes, 4 Mason 268; Deery *v.* Cray, 5 Wall. 795, 805; Fulkerson *v.* Holmes, 117 U. S. 389, 399; Morris *v.* Vanderen, 1 Dall. 64.

Colorado. — Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442, 460.

Kentucky. — Travelers' Ins. Co. *v.* Henderson Cotton Mills, 27 Ky. L. Rep. 653, 85 S. W. 1090.

New York. — Jackson *v.* King, 5 Cow. 237, 15 Am. Dec. 468; Jackson *v.* Russell, 4 Wend. 543, 548; Young *v.* Shulenberg, 165 N. Y. 385, 59 N. E. 135, 80 Am. St. Rep. 730.

North Carolina. — Wood *v.* Sawyer, 61 N. C. 251, 259.

Pennsylvania. — Bowser *v.* Cravener, 56 Pa. St. 132; Scharff *v.* Keener, 64 Pa. St. 376, 378; Paxton *v.* Price, 1 Yeates 500.

Texas. — Chamblee *v.* Tarbox, 27 Tex. 139, 145, 84 Am. Dec. 614.

Wisconsin. — Watts *v.* Owens, 62 Wis. 512, 22 N. W. 720.

Contra. — Fort *v.* Clarke, 1 Russ. (Eng.) 601; Slaney *v.* Wade, 1 Myl. & C. (Eng.) 338; Stockley *v.* Cissna, 119 Fed. 812, 824; Dixon *v.* Monroe, 112 Ga. 158, 37 S. E. 180; Murphy *v.* Loyd, 3 Whart. (Pa.) 538, 549; Watkins *v.* Smith, 91 Tex. 589, 45 S. W. 560; Potter *v.* Washburn, 13 Vt. 558, 564, 37 Am. Dec. 615.

The entry of a deceased parent or other relative made in a Bible, family missal, or any other book or document, or paper, stating the fact, and date of the birth, marriage, or death of a child or relative, is regarded as the declaration of such parent or relative in a matter of pedigree; correspondence of deceased members of the family, recitals in family deeds, descriptions in wills and other solemn acts are original evidence. Kelly *v.* McGuire, 15 Ark. 555, 604.

"On questions of marriage, births, deaths, etc., entries in a family Bible or Testament, are admissible, even without proof that they have been made by a relative, provided the book is produced from the proper custody." Jones *v.* Jones, 45 Md. 144, 160.

V. GENERAL REPUTATION IN FAMILY.

1. Generally. — Pedigree may be established by proof of general reputation in a family, consisting of such declarations as have come down from one generation to another from deceased members, even though it cannot be determined which of the deceased relatives made such declarations, or was personally cognizant of the facts therein stated, where it appears that such declarations were made as family history, and *ante litem motam,* by a deceased person connected by blood or marriage with the person whose pedigree is to be established.[26]

Entry of baptism of a child in a church register, is not evidence of the time of the child's birth, but only of the fact of baptism, and of the date when the rite was administered. Blackburn *v.* Crawfords, 3 Wall. (U. S.) 175, 190.

Entries on the minutes of a Masonic lodge, more than thirty years old, were held admissible to prove pedigree, as after such a lapse of time they were presumed to have been correctly made. Howard *v.* Russell, 75 Tex. 171, 177, 12 S. W. 525.

26. *England.* — Higham *v.* Ridgway, 10 East 109; Whitelocke *v.* Baker, 13 Ves. Jr. 511.

Illinois. — Ringhouse *v.* Keever, 49 Ill. 470.

Kentucky. — Birney *v.* Hann, 3 A. K. Marsh. 322, 13 Am. Dec. 167.

Minnesota. — Backdahl *v.* Grand Lodge A. O. U. W., 46 Minn. 61, 48 N. W. 454.

New Hampshire. — Eastman *v.* Martin, 19 N. H. 152.

New York. — Clark *v.* Owens, 18 N. Y. 434, 442.

North Carolina. — Morgan *v.* Purnell, 11 N. C. 95.

Tennessee. — Morris *v.* Swaney, 7 Heisk. 591; Swink *v.* French, 11 Lea 78, 47 Am. Rep. 277.

Vermont. — Hammond & Burt *v.* Noble, 57 Vt. 193, 203; *In re* Hurlburt's Estate, 68 Vt. 366, 377, 35 Atl. 77, 35 L. R. A. 794.

West Virginia. — Peterson *v.* Ankrom, 25 W. Va. 56, 61.

"Family history is nothing but the declaration of different members of a family repeated by so many persons and for such a time as to become common repute in the family. . . . It is certainly no objection to declarations when admissible that they are the statements of what the declarant knows, rather than what he heard." Byers *v.* Wallace, 87 Tex. 503, 510, 28 S. W. 1056, 29 S. W. 760.

In the case of Stein *v.* Bowman, 13 Pet. (U. S.) 209, the court said: "From necessity, in cases of pedigree, hearsay is admissible. But this rule is limited to members of the family, who may be supposed to have known the relationships which existed in its different branches. The declarations of these individuals, they being dead, may be given in evidence to prove pedigree; and so is reputation, which is the hearsay of those who may be supposed to have known the fact, handed down from one to another, evidence. As evidence of this description must vary by the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject. 'It is not every statement or tradition in the family that can be admitted in evidence.' The tradition must be from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken."

Facts involved in a question of pedigree may be established by proof of general reputation in the family, but a witness cannot testify as to what members of the family still living have said upon the subject. Harland *v.* Eastman, 107 Ill. 535.

In the case of Smith *v.* Kenney (Tex. Civ. App.), 54 S. W. 801, a witness, Martin Kenney, showed

2. Living Members of Family. — A living member of a family is incompetent to testify to matters of pedigree, if it be shown that he has no knowledge in fact on the question involved, from not having heard it discussed, or because his opportunities for obtaining knowledge on the question have been insufficient.[27]

3. General Reputation. — Evidence of what neighbors or acquaintances thought or said upon the subject of the paternity, or relationship of a person whose pedigree is in question, is not admissible;[28] nor can relationship be proved by general reputation in the community;[29] though it was held to the contrary, in an early Tennessee case.[30]

himself to have been a cousin of a certain James Kenney, their fathers being brothers. The court held that this fact of relationship qualified the witness to testify from common repute in the family, as to who its members were, their relationship to each other, and to facts of birth, death, etc., and said that the rule that it must first be shown outside of the declarations, that declarant is related, and that the person whose declaration is offered, is dead, has no application where the witness is the declarant.

The case of Dupoyster *v.* Gagani, 84 Ky. 403, 1 S. W. 652, was a suit in ejectment by the appellee who claimed title as devisee of Baker Woodruff. On the trial, the appellee undertook to prove her identity as the Mrs. Henderson named in the will of Baker Woodruff, now Mrs. Gagani, by N. T. Moss who testified that he had known George D. Badger and his wife, and Mary A. Gagani for about fifteen years, and that from the family history, derived from these parties, he knew that Mrs. Henderson named in the will of Baker Woodruff was the Mrs. Gagani, the appellee. The court held this evidence clearly incompetent, and said: "It is only in the instance that the declarant is dead, and was related to the person in question by blood or marriage, that his declaration as to the relationship, and the degree of it, of such person can be proved by third persons; and any person, whether related or not, if otherwise competent as a witness, who heard such declarations, may prove them. If, however, such relationship is attempted to be proved by the general repute in the family, and not by the declarations of its deceased members, then the proof must be confined to the surviving members of it. If the declarant is not dead, then it is not competent to prove his declarations, because he can himself testify to the fact, which is the best testimony."

27. A person's age or pedigree may be testified to by a member of the family to which he belongs, but, on cross-examination, it may be shown that although a member of the family, the witness is not qualified, either because he has no knowledge in fact on the question involved, from not having heard it discussed, or that his opportunities for obtaining knowledge on the question have been insufficient to make him a competent witness. Grand Lodge A. O. U. W. *v.* Bartes (Neb.), 96 N. W. 186.

28. Flora *v.* Anderson, 75 Fed. 217, 234; Chapman *v.* Chapman, 2 Conn. 347, 7 Am. Dec. 277; De Haven *v.* De Haven, 77 Ind. 236; *In re* Hurlburt, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794.

The testimony of a witness, as to the birth of a child, who never saw the child, and testifies from what she heard people say, is not competent evidence upon a question of pedigree. Branch *v.* Texas Lumb. Mfg. Co., 56 Fed. 707, 713.

29. Lamar *v.* Allen, 108 Ga. 158, 33 S. E. 958.

30. In an action of ejectment by plaintiffs' lessors who claimed as heirs of David Flowers, it was proved that they were the children and lawful issue of James Flowers. A witness, not shown to be related to the family, testified that he was acquainted with David Flowers, Thomas Flowers, and James Flowers, and lived in the same town with

VI. PEDIGREE OF ANIMALS.

The pedigree of animals may be established by entries in registers of pedigrees, kept up for the information of the public,[31] or by general reputation.[32]

them, and as far as he had knowledge, they were reputed and concluded to be brothers, and as far as he had knowledge David and Thomas Flowers died leaving no lawful issue, and he also understood that James Flowers was dead. This was held to be competent evidence. Flowers *v.* Haralison, 6 Yerg. (Tenn.) 494. See also Citizens' Rapid-Transit Co. *v.* Dew, 100 Tenn. 317, 325, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 518.

31. Kuhns *v.* Chicago, M. & St. P. R. Co., 65 Iowa 528, 22 N. W. 661; Louisville & N. R. Co. *v.* Frazee, 24 Ky. L. Rep. 1273, 71 S. W. 437; Richmond & D. R. Co. *v.* Chandler (Miss.) 13 So. 267; Jones *v.* Memphis & A. C. P. Co. (Miss.) 31 So. 201.

Upon the question as to the value of a horse killed in a collision, witnesses were permitted to testify as to the pedigree of the horse as shown by the American stud books, it appearing from the testimony that these books are records carefully compiled by experts under the supervision of the breeders of thoroughbred horses, so kept for many years, and that they are universally accepted as conclusive evidence by persons dealing in such animals. Louisville & N. R. Co. *v.* Kice, 109 Ky. 786, 792, 60 S. W. 705, and see compiled Laws of Mich. Gen. § 10,202.

Books containing registers of pedigrees of horses, cattle or dogs, kept up for the information of the public, are received as satisfactory evidence in the same manner, and upon the same principles as entries in family records of births, deaths, and marriages are received with regard to the human family. Citizens' Rapid-Transit Co. *v.* Dew, 100 Tenn. 317, 324, 325, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 518.

32. The case of Ohio and Mississippi R. Co. *v.* Stribling, 38 Ill. App. 17, was a suit by the appellee for damages, for injuring a mare. On the trial a witness testified that he gave the names of the horses referred to as the reputed sires of the mare, and of her foal, and said they were famous. This statement was objected to, and was claimed to have been improperly admitted. The court held it proper, and said: "We hold that such reputation is not competent evidence of the fact as reputed, still it is of itself an element of market value, and as such was admissible."

The question of pedigree and ancestry is a matter of common or general reputation whether the question concerns horses, cattle, dogs, or men, and the pedigree of all these, and of sheep, swine, chickens, and turkeys, may be proved by general reputation. Citizens' Rapid-Transit Co. *v.* Dew, 100 Tenn. 317, 325, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 518.

PENALTIES.

By Omar O'Horrow.

CROSS-REFERENCES:

Carriers;
Damages;
Privileges.

I. SCOPE.

The term "penalty" as used in this article means the punishment inflicted by a statute by way of forfeiture of goods or money for a violation of its provisions. The action under a penal statute for the recovery of a penalty is a civil proceeding, and is distinguished from a prosecution for the violation of a criminal statute.[1]

II. RULES OF EVIDENCE APPLICABLE TO CIVIL ACTIONS APPLY.

1. In General. — While an action to recover a penalty partakes of the nature of both a criminal prosecution and a civil suit, as a

1. Railway Co. *v.* State, 56 Ark. 166, 19 S. W. 572; Railway Co. *v.* State, 59 Ark. 165, 26 S. W. 824; Common Council *v.* Fairchild, 1 Ind. 315; Swift *v.* State, 3 Ind. App. 285, 29 N. E. 488; People *v.* Hoffman, 3

general rule those rules of evidence applicable to the particular civil action obtain, and not those governing a criminal prosecution.[2]

2. Depositions. — It has been held that the clause in the sixth amendment to the constitution of the United States which entitles a party in a criminal prosecution to be confronted with the witnesses against him does not apply to the civil action for a penalty, and that depositions may be introduced in evidence.[3]

3. Defendant as Witness. — The rule as to the testimony of the defendant, however, follows that of criminal prosecutions rather than that of civil actions. It is well settled that he cannot be compelled to give testimony which would subject him to the penalty or which would make him liable under a criminal prosecution.[4] Nor can he be compelled to produce books or papers which would tend to the same result.[5]

III. FACTS NECESSARY AND COMPETENT TO BE PROVED.

1. In General. — It is incumbent on the plaintiff to prove every step in the chain of facts upon which his recovery rests. What these facts are depend entirely upon the statute under which the action is brought.[6]

Mich. 249; State *v.* Muir, 164 Mo. 610, 65 S. W. 285; Atcheson *v.* Everitt, 1 Cowp. (Eng.) 382.

2. Munson *v.* Atwood, 30 Conn. 102; Hall *v.* Brown, 30 Conn. 551; Lewiston *v.* Proctor, 27 Ill. 413; Roberge *v.* Burnham, 124 Mass. 277; Hitchcock *v.* Munger, 15 N. H. 97.

In a suit for a violation of a city ordinance prohibiting hawkers and peddlers from selling goods without a license, the court, in stating its reasons for not requiring the defendant to be proved guilty beyond a reasonable doubt, as in criminal cases, said: "This is not a criminal action, either in form or in substance. It is not found in the criminal code, but is given by the revenue law, and is for the protection of the revenue. It is not an offense at the common law, nor is it indictable under the statute. In form it is an action of debt, and not a criminal prosecution. . . . The violation of the statute for which the action is given is not even a misdemeanor. No fine is inflicted, but simply a penalty is imposed. It is true, the right of action does not arise out of contract, and the penalty may be in the nature of a punishment, but that may be the case in many civil actions, as in trespass or slander. Punishments are not alone confined to crimes in the technical sense of the term." Webster *v.* People, 14 Ill. 365.

3. United States *v.* Zucker, 161 U. S. 475; Indiana Millers Mut. F. Ins. Co. *v.* People, 65 Ill. App. 355; McGuire *v.* Xenia, 54 Ill. 299; State *v.* Barrels of Liquor, 47 N. H. 369.

4. Equitable L. Assur. Soc. *v.* Com., 113 Ky. 126, 67 S. W. 388, 23 Ky. L. Rep. 2359, 67 S. W. 588.

5. People *v.* Western Mfrs. Mut. Ins. Co., 40 Ill. App. 428.

6. Askew *v.* Ebberts, 22 Cal. 263; Bull *v.* Quincy, 9 Ill. App. 127; Ewbanks *v.* Ashley, 36 Ill. 177; Barber Asphalt Pav. Co. *v.* Peck, 186 Mo. 506, 85 S. W. 387.

In an action under the Connecticut statute imposing a penalty for the felonious taking of goods of another, it was held that before a recovery could be had, it was incumbent on the plaintiff to prove the defendant guilty, not merely of a trespass, but also of a felonious taking. Hall *v.* Brown, 30 Conn. 551.

Where the evidence in a suit against a railroad company for failure to sound its signals did not establish the fact that the offense was com-

2. Judgment in Criminal Action. — A judgment in a criminal prosecution for the same offense is not admissible in a civil action for the penalty.[7]

3. Presumptions. — Courts will not indulge in inferences or a presumption to sustain the recovery of a penalty, but every step must be proven, and no intendments are allowed in favor of the person for whose benefit the suit is brought.[8]

4. Knowledge and Intent. — The intention of the party committing the offense, or even the knowledge that he is violating the statute, is not an essential ingredient in its commission, and evidence of such facts is irrelevant and immaterial.[9]

IV. WEIGHT AND SUFFICIENCY. — REASONABLE DOUBT.

While the courts of the various states differ as to the amount of evidence necessary to sustain the recovery of a penalty, the weight of authority seems to be that the rule is the same as in other civil actions, and that a preponderance of evidence only is necessary.[10] Some of the courts, however, insist that a mere preponderance will not suffice, but that the preponderance must be clear and satisfactory.[11] Still others have held that the rule is the same as in crim-

mitted on the exact day alleged in the complaint, but that it occurred some time in the spring of the same year, the variance was held to be fatal. Railway Co. *v.* State, 59 Ark. 165.

Other Violations of the Statute. Evidence of other violations of the statute than the one alleged in the indictment are inadmissible. State *v.* Meadows, 106 Mo. App. 604, 81 S. W. 463.

7. People *v.* Snyder, 90 App. Div. 422, 86 N. Y. Supp. 415; People *v.* Rohrs, 49 Hun 150, 1 N. Y. Supp. 672; Stone *v.* United States, 167 U. S. 178.

8. Conly *v.* Clay, 90 Hun 20, 35 N. Y. Supp. 521; People *v.* Dunston, 84 N. Y. Supp. 257.

Thus where the statute authorized a suit for the obstruction of a public highway by an elector, the fact that the party suing was an elector must be shown and cannot be presumed. Waddle *v.* Duncan, 63 Ill. 223.

9. New York *v.* Hewitt, 91 App. Div. 445, 86 N. Y. Supp. 832; People *v.* Laesser, 79 App. Div. 384, 79 N. Y. Supp. 470.

The action for a penalty is a civil one, pure and simple, and the defendant's intent is not a necessary feature of the plaintiff's case. People *v.* Snyder, 90 App. Div. 422, 86 N. Y. Supp. 415. *Contra,* Palmer *v.* People, 109 Ill. App. 269; Bulpit *v.* Matthews, 145 Ill. 345, 34 N. E. 525.

Sale of Liquor to Minor. — Under the Massachusetts statute, giving a right of action to the parent or guardian against any person selling intoxicating liquors to a minor, it is not necessary to prove that the defendant knew the person to whom he sold the liquor was a minor. Roberge *v.* Burnham, 124 Mass. 277.

10. Louisville & N. R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163; Munson *v.* Atwood, 30 Conn. 102; Campbell *v.* Burns, 94 Me. 127, 46 Atl. 812; State *v.* Lubee, 93 Me. 418, 45 Atl. 520; Roberge *v.* Burnham, 124 Mass. 277; Hitchcock *v.* Munger, 15 N. H. 97; People *v.* Briggs, 47 Hun (N. Y.) 268, *affirmed* 114 N. Y. 56, 20 N. E. 820; Brockenbrough *v.* Spindle, 17 Grat. (Va.) 21.

11. Gunkel *v.* Bachs, 103 Ill. App. 494; Lewiston *v.* Proctor, 27 Ill. 413; Ewbanks *v.* Ashley, 36 Ill. 177; Ruth *v.* Abingdon, 80 Ill. 418; Abingdon *v.* Meadows, 28 Ill. App. 442; Indiana Millers Mut. F. Ins. Co. *v.* People, 65 Ill. App. 355.

In the case of Toledo, P. & W. R. Co. *v.* Foster, 43 Ill. 480, an action against a railroad company to

inal cases, and that the violation of the statute must be proved beyond a reasonable doubt.[12]

V. BURDEN OF PROOF.

The burden of proof, as in both civil and criminal proceedings, is on the party bringing the action;[13] but if the defendant seeks the benefit of any exception under the statute, then the burden is upon him to bring his case clearly within the exception.[14]

recover a penalty for failure to sound the whistle or ring the bell, the court says that while the same degree of proof is not required as in criminal cases where life or liberty is in jeopardy, yet there must be reasonable and well-founded belief in the guilt of the defendant. A slight preponderance will not suffice. Before a jury should render a verdict taking away a man's property under the form of a fine, they should be satisfied the law has been violated, and if the evidence fails to produce upon their minds the degree of conviction upon which they would be willing to act in important affairs of their own, it is not sufficient, even though there be a very slight preponderance.

12. Louisville & N. R. Co. *v.* Com., 112 Ky. 635, 66 S. W. 505, 23 Ky. L. Rep. 1900, 66 S. W. 505; Glenwood *v.* Roberts, 59 Mo. App. 167; State *v.* Meadows, 106 Mo. App. 604, 81 S. W. 463; Brooks *v.* Clayes, 10 Vt. 37; Chaffee *v.* United States, 18 Wall. (U. S.) 516.

13. Railway Co. *v.* State, 59 Ark. 165, 26 S. W. 824; Conly *v.* Clay, 90 Hun 20, 35 N. Y. Supp. 521; Gulf, C. & S. F. R. Co. *v.* Ft. Grain Co. (Tex. Civ. App.), 72 S. W. 419; The Pope Catlin, 31 Fed. 408; Chaffee *v.* United States, 18 Wall. (U. S.) 516.

14. People *v.* Briggs, 47 Hun (N Y.) 266, *affirmed* 114 N. Y. 56, 20 N. E. 820.

PENETRATION.—See Rape; Sodomy.

PERCOLATING WATERS.—See Waters and Water Courses.

PERFECTING INVENTION.—See Patents.

PERFECTING TITLE.—See Vendor and Purchaser.

PERJURY.

I. ELEMENTS OF THE OFFENSE.

1. The Oath. — In a prosecution for perjury, it is incumbent upon the prosecution to show that the defendant was sworn in the proceeding in which the alleged perjury was committed.[1] The prosecution must also show that the oath or affirmation was material, or had some effect in law.[2] It is sufficient *prima facie* to show that the person by whom the oath was administered was an acting magistrate.[3] And proof that an oath was administered in the presence of the court by any officer authorized so to do is sufficient to sustain an allegation that the person was sworn by the court or in court.[4]

1. Hitesman *v.* State, 48 Ind. 473; Sloan *v.* State, 71 Miss. 459, 14 So. 262.

It Being Affirmatively Shown That an Oath Was Administered, the presumption arises that it was rightly done. "The maxim *omnia presumuntur rite esse acta* applies in no case with greater effect than to official acts of this nature, the minute and particular details of which, while important, are not likely to attract such attention as to insure their being accurately remembered." State *v.* Mace, 86 N. C. 668.

In Greene *v.* People, 182 Ill. 278, 55 N. E. 341, the defendant, previous to testifying before the master, was sworn by him as a witness. It was held that this, in the absence of proof to the contrary, sufficiently established that a binding oath was administered to him.

The Production of an Affidavit Regular in Form, with proof that the accused signed it, and that the officer before whom it purports to be sworn to, signed the jurat and affixed his seal is sufficient evidence on the trial on such an indictment that the accused actually swore to the affidavit. State *v.* Madigan, 57 Minn. 425, 59 N. W. 490. The fact of the oath may be proved by the testimony of the officer. Thompson *v.* State, 120 Ga. 132, 47 S. E. 566.

2. Silver *v.* State, 17 Ohio 365.

3. *Illinois.* — Greene *v.* People, 182 Ill. 278, 55 N. E. 341.

Indiana. — Masterson *v.* State, 144 Ind. 240, 43 N. E. 138.

Kentucky. — Dowdy *v.* Com., 13 Ky. L. Rep. 350, 17 S. W. 187.

Massachusetts. — Com. *v.* Warden 11 Metc. 406.

Michigan. — Keator *v.* People, 32 Mich. 484.

New Hampshire. — State *v.* Hascall, 6 N. H. 352.

New York. — Lambert *v.* People, 76 N. Y. 220, 32 Am. Rep. 293; People *v.* Albertson, 8 How. Pr. 363.

North Carolina. — State *v.* Ledford, 28 N. C. 5; State *v.* Gregory, 6 N. C. 69.

Presumption From Acting May Be Rebutted by proof to the contrary. In Morrell *v.* People, 32 Ill. 499, an indictment was found for perjury before the clerk of the circuit court. One of the grounds of error alleged was that there was no proof that the person who administered the oath was clerk as alleged. It was held that it was requisite that it should be proved that the person before whom the oath was taken was authorized by law to administer it; that proof that the person who administered it habitually acted in the capacity of a particular officer is perhaps only *prima facie* evidence of the fact, but until rebutted it was sufficient without producing his appointment or commission.

In State *v.* Williams, 61 Kan. 739, 60 Pac. 1050, it being shown that the police judge who administered the oath upon which perjury was assigned, was appointed by officers having authority to appoint, and that he had qualified and had entered upon the discharge of his duties, it was held that testimony that he had changed his residence to a place outside of the city was properly excluded.

4. State *v.* Caywood, 96 Iowa 367, 65 N. W. 385; Keator *v.* People, 32 Mich. 484; Campbell *v.* People, 8

2. The Proceeding, Testimony, Etc. — A. Burden of Proof. a. *In General.* — The judicial proceeding in which the perjury is alleged to have been committed must be proved before one can be convicted of perjury.[5]

Testimony. — It was formerly held that the prosecution must prove all of the defendant's testimony.[6] But the rule now is that it is sufficient to prove only that particular part of the defendant's testimony upon which the perjury is assigned.[7] But the prosecution must prove the substance of the whole of the matters set out upon which perjury is assigned.[8] It is not necessary, however, to prove the exact words used by the defendant; it is sufficient to prove substantially what he said.[9]

Testimony of Two Witnesses Not Necessary. — The law does not require two witnesses to establish the giving of testimony upon which perjury is assigned.[10]

Different Assignments. — Where there are several assignments of perjury and there is proof sufficient to sustain any good assignment, a general verdict will be sustained.[11]

b. *Materiality of Testimony.* — The materiality of the matter in regard to which it is charged that the defendant swore falsely must

Wend. (N. Y.) 636; Cutler *v.* Territory, 8 Okla. 101, 56 Pac. 861; State *v.* Spencer, 6 Or. 152; Jefferson *v.* State (Tex. Crim.), 29 S. W. 1090.

Regularity of Appointment. — The appointment of one before whom the testimony is given cannot be questioned on the trial for perjury of one who it is alleged testified falsely. Markey *v.* State (Fla.), 37 So. 53.

5. Heflin *v.* State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147; King *v.* State, 32 Tex. Crim. 463, 24 S. W. 514.

6. Rex *v.* Jones, 1 Peake's Cases 37; Rex *v.* Dowlin, 1 Peake's Cases 170.

7. Rex *v.* Rowley, R. & M. (Eng.) 299; United States *v.* Erskine, 4 Cranch C. C. 299, 25 Fed. Cas. No. 15,057; Hutcherson *v.* State, 33 Tex. Crim. 67, 24 S. W. 908; Beach *v.* State, 32 Tex. Crim. 240, 22 S. W. 976; Dodge *v.* State, 24 N. J. L. 455.

8. Gandy *v.* State, 23 Neb. 436, 36 N. W. 817; State *v.* Frisby, 90 Mo. 530, 2 S. W. 833; State *v.* Mace, 76 Me. 64; State *v.* Mumford, 12 N. C. 519, 17 Am. Dec. 573; Gabrielsky *v.* State, 13 Tex. App. 428; Brown *v.* State, 40 Tex. Crim. 48, 48 S. W. 169.

9. Rex *v.* Munton, 3 C. & P. (Eng.) 498; Taylor *v.* State, 48 Ala. 157; Meierholtz *v.* Territory, 14 Okla. 359, 78 Pac. 90; Hutcherson *v.* State, 33 Tex. Crim. 67, 24 S. W. 908.

10. United States *v.* Hall, 44 Fed. 864, 10 L. R. A. 324; Williams *v.* State, 68 Ala. 551; State *v.* Wood, 17 Iowa 18; State *v.* Jean, 42 La. Ann. 946, 8 So. 480; Com. *v.* Pollard, 12 Metc. (Mass.) 225; People *v.* Hayes, 70 Hun (N. Y.) 111, 24 N. Y. Supp. 194, *affirmed* 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 72, 23 L. R. A. 830; Butler *v.* State (Tex. Crim.), 38 S. W. 46.

Contra. — In State *v.* Howard, 4 McC. (S. C.) 95, it was held that two witnesses are required, as well to prove the facts sworn to, as the falsity of the oath. *Compare* State *v.* Hayward, 1 Nott & McC. (S. C.) 546.

11. Reg. *v.* Virrier, 12 A. & E. 317; Marvin *v.* State, 53 Ark. 395, 14 S. W. 87; Com. *v.* Johns, 6 Gray (Mass.) 274; State *v.* Hascall, 6 N. H. 352; State *v.* Blaisdell, 59 N. H. 328; Williams *v.* Com., 91 Pa. St. 493; Beach *v.* State, 32 Tex. Crim. 240, 22 S. W. 976; Hutcherson *v.* State, 33 Tex. Crim. 67, 24 S. W. 908.

be shown; it cannot be presumed.[12] Nor is it necessary to show that the evidence given was material to the main issue; it is sufficient if it be material to a necessary collateral issue.[13] The evidence must show that the matters testified to were material to the issue at the time such testimony was given.[14]

Question of Law. — The materiality of the testimony on which perjury is assigned is a question of law for the court.[15] But it

12. People *v.* Ah Sing, 95 Cal. 657, 30 Pac. 797; People *v.* Lem You, 97 Cal. 224, 32 Pac. 11; People *v.* Ostrander, 110 Mich. 60, 67 N. W. 1079; Nelson *v.* State, 32 Ark. 192; State *v.* Aikens, 32 Iowa 403; State *v.* Kennerly, 10 Rich. L. (S. C.) 152; Wood *v.* People, 59 N. Y. 117. *Compare* State *v.* Byrd, 28 S. C. 18, 4 S. E. 793, 13 Am. St. Rep. 660.

Proof That Certain Testimony Was Admitted on the trial of the case in which the perjury is alleged to have been committed, is not sufficient to warrant a court and jury in inferring that such testimony was material to the issue. Rich *v.* United States, 1 Okla. 354, 33 Pac. 804; Com. *v.* Pollard, 12 Metc. (Mass.) 225; Com. *v.* Parker, 2 Cush. (Mass.) 212

In Nelson *v.* State, 32 Ark. 192, the accused was indicted for perjury alleged to have been committed on his examination as a witness before a jury of inquest over the body of one Pippen, on which examination he testified that on Wednesday afternoon, August 9, 1876, one, Harris, was at his house, and ate supper there, and was there until bedtime, and went to bed there, and as to the materiality of this evidence the court said: "It was not proven that Henry Harris was arrested for or suspected of any criminal connection with the death of Pippen, or that his guilt or innocence was in any manner the subject of inquiry before the coroner's inquest. It was proven that appellant swore at the inquest that Henry Harris was at his house on the evening of the 9th of August, 1876, ate supper, and remained there during the night, and there was evidence conducing to prove that this statement was false, but there was no evidence to prove that the whereabouts of Henry Harris, during that particular evening and night, was material to any matter that was the proper subject of inquiry by the coroner or his jury. The materiality of the testimony on which perjury is assigned, must be established by evidence, and cannot be left to presumption or inference."

13. *England.* — Rex *v.* Griepe, 1 Ld. Raym. 256.

Florida. — Robinson *v.* State, 18 Fla. 898.

Indiana. — State *v.* Hopper, 133 Ind. 460, 32 N. E. 878.

Massachusetts. — Com. *v.* Pollard, 12 Metc. 225; Com. *v.* Grant, 116 Mass. 17.

Missouri. — State *v.* Savally, 9 Mo. 834; State *v.* Wakefield, 73 Mo. 549.

New Hampshire. — State *v.* Norris, 9 N. H. 96.

New Jersey. — State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

New York. — Wood *v.* People, 59 N. Y. 117.

North Carolina. — Studdard *v.* Linville, 10 N. C. 474.

South Carolina. — State *v.* Hathaway, 2 Nott & McC. 118, 10 Am. Dec. 580.

Texas. — Lawrence *v.* State, 2 Tex. App. 479; Rahm *v.* State, 30 Tex. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911.

14. People *v.* Lem You, 97 Cal. 224, 32 Pac. 11; Bullock *v.* Koon, 4 Wend. (N. Y.) 531.

15. *England.* — Reg. *v.* Southwood, 1 F. & F. 356; Reg. *v.* Courtney, 7 Cox C. C. 111.

United States. — United States *v.* Singleton, 54 Fed. 488.

Arkansas. — Nelson *v.* State, 32 Ark. 192.

Illinois. — Young *v.* People, 134 Ill. 37, 24 N. E. 1070.

Iowa. — State *v.* Swafford, 98 Iowa 362, 67 N. W. 284.

Kentucky. — Renan *v.* Com., 2 Ky. L. Rep. 66.

may become a mixed question of law and fact in which case the court should submit it to the jury with proper instructions.[16]

B. Mode of Proof. — a. *In General.* — The testimony may be proved by parol when not required by law to be reduced to writing;[17] and even when required to be so reduced to writing, it may be so proved if for any reason there is a failure to reduce it to writing.[18] It is not permissible to allow witnesses to testify to what other than defendant testified in the cause in which he is alleged to have committed perjury.[19] The materiality of the testimony cannot be established by the opinions of witnesses.[20] Jurors in the original proceeding may testify as to evidence given by the accused.[21]

Mississippi. — Cothran *v.* State, 39 Miss. 541.

Missouri. — State *v.* Fannon, 158 Mo. 149, 59 S. W. 75.

New Jersey. — Gordon *v.* State, 48 N. J. L. 611, 7 Atl. 476.

New York. — Power *v.* Price, 16 Wend. 449.

Oklahoma. — Stanley *v.* United States, 1 Okla. 336, 33 Pac. 1025; Peters *v.* United States, 2 Okla. 138, 37 Pac. 1081.

Pennsylvania. — Steinman *v.* McWilliams, 6 Pa. St. 170.

Texas. — Washington *v.* State, 23 Tex. App. 336, 5 S. W. 119; Davidson *v.* State, 22 Tex. App. 372, 3 S. W. 662.

16. Reg. *v.* Goddard, 2 F. & F. (Eng.) 361; Reg. *v.* Worley, 3 Cox C. C. (Eng.) 535; Young *v.* People, 134 Ill. 37, 24 N. E. 1070; Washington *v.* State, 23 Tex. App. 336, 5 S. W. 119; Lawrence *v.* State, 2 Tex. App. 479; McAvoy *v.* State, 39 Tex. Crim. 684, 47 S. W. 1000.

17. State *v.* Gibbs, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749. See also People *v.* Curtis, 50 Cal. 95; Hutcherson *v.* State, 33 Tex. Crim. 67, 24 S. W. 908.

In Barnett *v.* State, 89 Ala. 165, 7 So. 414, the alleged false testimony having been given before the grand jury, pending their investigation of a criminal charge preferred by the defendant against another person, for having procured his signature by mark to a bill of sale by false pretenses as to the character of the instrument; it was held that the county solicitor, who swore and examined him, might testify as to what occurred before the grand jury, without producing the paper, or accounting for its absence, and without showing that it was produced before the grand jury.

18. Stanley *v.* State (Tex.), 74 S. W. 318.

The act of Congress of March 3, 1903 (32 Stat. 1222, Ch. 1012, U. S. Comp. St. Supp. 1903, p. 191), which provides that all courts shall, before issuing the final order or certificate of naturalization, "cause to be entered of record the affidavit of the applicant and of all his witnesses, so far as applicable, reciting and affirming the truth of every material fact requisite for naturalization," does not absolutely require the testimony to be in the form of an affidavit and make the written affidavit the best evidence; on the contrary, oral evidence is admissible without accounting for a non-production of the record evidence. Schmidt *v.* United States, 133 Fed. 257, 66 C. C. A. 389.

19. Freeman *v.* State, 43 Tex. Crim. 580, 67 S. W. 499.

20. Washington *v.* State, 23 Tex. App. 336, 5 S. W. 119; Foster *v.* State, 32 Tex. Crim. 39, 22 S. W. 21.

21. People *v.* Ostrander, 110 Mich. 60, 67 N. W. 1079. *Compare* Com. *v.* Scodwen, 92 Ky. 120, 17 S. W. 205, where it is held that upon the trial of one for false swearing alleged to have been committed before a grand jury, a grand juror cannot testify to what the accused swore before the grand jury; that false swearing and perjury are distinct offenses and that section 113 of the Ky. Crim. Code, which makes a grand juror a competent witness in

b. *Record of Original Proceeding.* — The record and judgment in the proceedings containing the evidence of the alleged false swearing are admissible as a matter of inducement to show that the suit was brought, the regularity of the proceedings, and the jurisdiction of the court.[22] But it is not evidence to be considered indiscriminately by the jury as proof of perjury, and it is the duty of the court to limit and restrict its use.[23]

a prosecution for perjury as to the defendant's testimony before the grand jury, does not apply to a prosecution for false swearing.

22. *United States.* — United States *v.* Erskine, 4 Cranch C. C. 299, 25 Fed. Cas. No. 15,057; United States *v.* Burkhardt. 31 Fed. 141.

California. — People *v.* Rodley, 131 Cal. 240, 63 Pac. 351.

Georgia. — Heflin *v.* State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147.

Louisiana. — State *v.* Brown, 111 La. 170, 35 So. 501.

Michigan. — People *v.* Macard, 109 Mich. 623, 67 N. W. 968.

New York. — Eighmy *v.* People, 79 N. Y. 546.

Texas. — Gabrielsky *v.* State, 13 Tex. App. 428; Higgenbotham *v.* State, 24 Tex. App. 505, 6 S. W. 201; Franklin *v.* State, 38 Tex. Crim. 346, 43 S. W. 85; Ross *v.* State, 40 Tex. Crim. 349, 50 S. W. 336; Jefferson *v.* State (Tex. Crim.), 29 S. W. 1090. See also Osburn *v.* State, 7 Ohio 212.

Original Pleadings in the case in which it is alleged perjury was committed are admissible in evidence when the final judgment has not been made up. Smith *v.* State, 103 Ala. 57, 15 So. 866. See also Williams *v.* State, 68 Ala. 551 (so holding of the original indictment in the cause in which the alleged perjury was committed). State *v.* Horine (Kan.), 78 Pac. 411; Boynton *v.* State, 77 Ala. 29; Chrisman *v.* State, 18 Neb. 107, 24 N. W. 434.

Whole Record. — The whole record should be given in evidence, at least all such parts of it as shed light on the case made for adjudication. Rule *v.* State, (Miss.), 22 So. 872.

Record of Another Case. — The record of a case other than that in which the alleged perjury was committed is irrelevant and not admissible. Gibson *v.* State (Tex. App.), 15 S. W. 118; Jefferson *v.* State (Tex. Crim.), 29 S. W. 1090. See also Hill *v.* State, 22 Tex. App. 579, 3 S. W. 764.

Falsity of Record. — The clerk of the court in which the perjury is alleged to have been committed cannot testify that the record is false. United States *v.* Walsh, 22 Fed. 644.

Record Best Evidence. — An indictment alleged perjury to have been committed by the accused in his application for naturalization, the record of the court before whom the application was made by him, signed and sworn to, is the best evidence that can be produced. United States *v.* Walsh, 22 Fed. 644. See also Brown *v.* State, 40 Tex. Crim. 48, 48 S. W. 169.

In State *v.* Faulk, 30 La. Ann. 831, a prosecution for perjury for having sworn in a civil action to having witnessed the sale of witness' property, it was held that the defendant had the right to introduce in evidence the judgment of the court in the civil action, decreeing that the sale had been made, and stating the reasons for the judgment by the court.

23. State *v.* Brown, 111 La. 170, 35 So. 501; Davidson *v.* State, 22 Tex. App. 372, 3 S. W. 662; Washington *v.* State, 23 Tex. App. 336, 5 S. W. 119; Maines *v.* State, 23 Tex. App. 568, 5 S. W. 123; Littlefield *v.* State, 24 Tex. App. 167, 5 S. W. 650; Ross *v.* State, 40 Tex. Crim. 349, 50 S. W. 336. See also Franklin *v.* State, 38 Tex. Crim. 346, 43 S. W. 85, recognizing this rule but holding failure so to limit not to be error in that case.

In Maines *v.* State, 23 Tex. App. 568, 5 S. W. 123, a trial for perjury alleged to have been committed by the accused as a witness upon the trial of one W. who was on trial for the theft of a steer, the en-

c. *Stenographer Reading His Notes.* — The stenographer who took notes of the testimony at the trial in which the perjury is alleged to have been committed, may, after testifying to their correctness, read his notes.[24]

3. Falsity of the Oath. — A. Burden of Proof. — a. *In General.* — It is further incumbent upon the prosecution to establish the falsity of the oath.[25] And the prosecution, by proving the falsity of the oath, *prima facie,* makes a case of corrupt swearing as to what was false.[26]

b. *Number of Witnesses and Corroboration.* — **(1.) Ancient Rule.** According to earlier cases no conviction of perjury could be had unless the falsity of the evidence given under oath was proved by the direct evidence of two credible witnesses, the evidence of two witnesses being required to overcome the legal presumption of innocence.[27]

(2.) Modern Rule. — But this rule has long since been modified.[28]

tire record of the proceedings on the trial of W. for the theft was read in evidence; and it was held that while such testimony was admissible in perjury case as inducement, it is the duty of the court to restrict it and a failure to do so is error.

24. People *v.* Lem You, 97 Cal. 224, 32 Pac. 11; Hereford *v.* People, 197 Ill. 222, 64 N. E. 310. "The old application of the rule requiring the best evidence, which treated the recollection of a person who was present and heard the testimony of a witness as the best medium for reproducing such testimony, should be modified to meet the changed conditions caused by the progress and advancement made in science, art, skill, and mechanism; and the notes or longhand manuscript of a skilled and impartial stenographer should be treated as more accurate and reliable than to trust to the imperfections of human recollection." Cutler *v.* Territory, 8 Okla. 101, 56 Pac. 861.

The Evidence of the Defendant taken at the trial in which the perjury is alleged to have been committed may be read by the reporter who took the same to show the materiality of the defendant's testimony. State *v.* Camley, 67 Vt. 322, 31 Atl. 840.

In Milstead *v.* Com., 21 Ky. L. Rep. 358, 51 S. W. 451, it was held that testimony that the stenographer, in making notes of the testimony on which perjury was assigned, sometimes made mistakes was not competent.

25. Green *v.* State, 41 Ala. 419; People *v.* German, 110 Mich. 244, 68 N. W. 150; Franklin *v.* State, 38 Tex. Crim. 346, 43 S. W. 85; Brown *v.* State, 57 Miss. 424; Thomas *v.* State, 71 Ga. 252.

26. The burden is then on the accused to show that it was occasioned by surprise, inadvertency, or that it did not proceed from a corrupt motive. State *v.* Norris, 9 N. H. 96, State *v.* Chamberlin, 30 Vt. 559.

27. Champneys Case, 2 Lew. C. C. (Eng.) 259; Reg. *v.* Yates, 1 C. & M. (Eng.) 132.

28. History of Rule. — "At first two witnesses were required to convict in a case of perjury; both swearing directly adversely from the defendant's oath. Contemporaneously with this requisition, the larger number of witnesses on one side or the other prevailed. Then, a single witness corroborated by other witnesses, swearing to circumstances bearing directly upon the imputed *corpus delicti* of a defendant, was deemed sufficient. Next, as in the case of Rex *v.* Knill, 5 B. and A. 929, note, with a long interval between it and the preceding, a witness who gave proof only of the contradictory oaths of the defendant on two occasions, one being an examination before the House of Lords, and the other an examination before the House of Commons, was

Under the modern rule the accused can be convicted on the testimony of one witness, which however in all cases must be corroborated.[29]

(3.) One Witness Not Sufficient. — The evidence of one witness alone, not corroborated by any other evidence, is insufficient to warrant a conviction.[30] This rule is founded on substantial justice

held to be sufficient. Though this principle had been acted on as early as 1764, by Justice Yates, as may be seen in the note to the case of King *v.* Harris, 5 B. and A. 937, and was acquiesced in by Lord Mansfield, and Justices Wilmot and Aston. We are aware that in a note to Rex. *v.* Mayhew, 6 Carrington & Payne, 315, a doubt is implied concerning the case decided by Justice Yates; but it has the stamp of authenticity, from its having been referred to in a case happening ten years afterwards, before Justice Chambre, as will appear by the note in 6 B. and A. 937. Afterwards, a single witness, with the defendant's bill of costs (not sworn to) in lieu of a second witness, delivered by the defendant to the prosecutor, was held sufficient to contradict his oath; and in that case, Lord Denman says, 'a letter written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness,' 6 Carr. & Payne, 315. . . . We thus see that this rule in its proper application, has been expanded beyond its literal terms, as cases have occurred in which proofs have been offered equivalent to the end intended to be accomplished by the rule." United States *v.* Wood, 14 Pet. (U. S.) 430.

29. *United States.* — United States *v.* Wood, 14 Pet. 430.

Arizona. — Terry *v.* Williams, 54 Pac. 232.

California. — People *v.* Davis, 61 Cal. 536.

Kentucky. — Williams *v.* Com., 24 Ky. L., 465, 68 S. W. 871.

Mississippi. — Whittle *v.* State, 79 Miss. 327, 30 So. 722.

Minnesota. — State *v.* Renswick, 85 Minn. 19, 88 N. W. 22.

Missouri. — State *v.* Heed, 57 Mo. 252.

Nebraska. — Gandy *v.* State, 23 Neb. 436, 36 N. W. 817.

New Jersey. — State *v.* Dayton, 23 N. J. L., 49, 53 Am. Dec. 270.

New Mexico. — Territory *v.* Williams, 9 N. M. 400, 54 Pac. 232.

New York. — People *v.* Stone, 32 Hun. 41.

North Carolina. — State *v.* Hawkins, 115 N. C. 712, 20 S. E. 623; State v. Gates, 107 N. C. 832, 12 S. E. 319.

Ohio. — Crusen *v.* State, 10 Ohio St. 258.

Pennsylvania. — Williams *v.* Com., 91 Pa. St. 493.

South Carolina. — State *v.* Hayward, 1 Nott & McC. 546.

Texas. — State *v.* Buie, 43 Tex. 532; State *v.* Gabrielsky, 13 Tex. App. 428; Gartman *v.* State, 16 Tex. App. 215; Hernandez *v.* State, 18 Tex. App. 134, 51 Am. Rep. 295; Anderson *v.* State, 24 Tex. App. 705, 7 S. W. 40; Plummer *v.* State, 35 Tex. Crim. 202, 33 S. W. 228; Franklin *v.* State, 38 Tex. Crim. 346, 43 S. W. 85; Maines *v.* State, 26 Tex. App. 14, 9 S. W. 51; Smith *v.* State, 22 Tex. App. 196, 2 S. W. 542; Waters *v.* State, 30 Tex. App. 284, 17 S. W. 411; Kemp *v.* State, 28 Tex. App. 519, 13 S. W. 869; Beach *v.* State, 32 Tex. Crim. 240, 22 S. W. 976; Washington *v.* State, 22 Tex. App. 26, 3 S. W. 228; Kitchen *v.* State, 29 Tex. App. 45, 14 S. W. 392; Grandison *v.* State, 29 Tex. App. 186, 15 S. W. 174; Rogers *v.* State, 35 Tex. Crim. 221, 32 S. W. 1044; Whitaker *v.* State, 37 Tex. Crim. 479, 36 S. W. 253; Carter *v.* State (Tex. Crim.) 43 S. W. 996; Butler *v.* State (Tex.) 38 S. W. 46.

Virginia. — Schwartz *v.* Com., 27 Gratt. 1025, 21 Am. Rep. 365.

30. *England.* — Reg. *v.* Braithwaite, 8 Cox C. C. 254; Champneys Case, 2 Lew. C. C. 258; Reg. *v.* Yates, 41 E. C. L. 77; Reg. *v.* Muscot, 10 Mod. 192.

United States. — United States *v.* Coons, 1 Bond 1, 25 Fed. Cas. No. 14,860.

and fairness, otherwise it would be merely oath against oath.[31]

(4.) Corroboration. — Definition. — What is meant by corroboration is evidence *aliunde*, evidence which tends to show the perjury independent of the defendant's declarations.[32]

Documentary Evidence. — A living witness may be dispensed with altogether in a prosecution for perjury, as in a case where the false swearing is proved by documentary or written testimony springing

Alabama. — Peterson *v.* State, 74 Ala. 34.

California. — People *v.* Davis, 61 Cal. 536.

Indiana. — Galloway *v.* State, 29 Ind. 442.

Iowa. — State *v.* Raymond, 20 Iowa 582.

Massachusetts. — Com. *v.* Pollard, 12 Metc. 225.

New Mexico. — Territory *v.* Williams, 9 N. M. 400, 54 Pac. 232.

Missouri. — State *v.* Heed, 57 Mo. 252.

New York. — People *v.* Stone, 32 Hun 41.

Pennsylvania. — Williams *v.* Com., 91 Pa. St. 493.

Texas. — Anderson *v.* State, 24 Tex. App. 705, 7 S. W. 40; Wilkerson *v.* State, (Tex. Crim.) 55 S, W. 49.

In State *v.* Hayward, 1 Nott & McC. (S. C.) 546, it was held that two witnesses are not necessary to disprove the fact sworn to by the defendant; but where there is one witness some other evidence must be introduced in addition to his testimony.

An omission to instruct the jury that a conviction of perjury cannot be had on the testimony of a single witness is reversible error. State *v.* Rutledge, 37 Wash. 523, 79 Pac. 1123; Wilson *v.* State, 27 Tex. App. 47, 10 S. W. 749, 11 Am. St. Rep. 180.

A "Credible Witness" means one who, being competent to give evidence, is worthy of belief. Smith *v.* The State, 22 Tex. App. 196, 2 S. W. 542; Wilson *v.* State, 27 Tex. App. 47, 10 S. W. 749, 11 Am. St. Rep. 180.

31. United States *v.* Hall, 44 Fed. 864, 10 L. R. A. 324; Rex. *v.* Yates, 1 C. & M. 132.

32. *United States.* — United States *v.* Hall, 44 Fed. 864, 10 L. R. A. 324.

Alabama. — Peterson *v.* State, 74 Ala. 34.

California. — People *v.* Maxwell, 118 Cal. 50, 50 Pac. 18; People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; People *v.* Wells, 103 Cal. 631, 37 Pac. 529; People *v.* Porter, 104 Cal. 415, 38 Pac. 88.

Florida. — McClerkin *v.* State, 20 Fla. 879.

Iowa. — State *v.* Waddle, 100 Iowa 57, 69 N. W. 279.

Kentucky. — Wadlington *v.* Com. 22 Ky. L. Rep. 1108, 59 S. W. 851; Wells *v.* Com., 6 S. W. 150.

Louisiana. — State *v.* Jean, 42 La. Ann. 946, 8 So. 480.

Massachusetts. — Com. *v.* Parker, 2 Cush. 212.

Mississippi. — Brown *v.* State, 57 Miss. 424; Vance *v.* State, 62 Miss. 137; Hemphill *v.* State, 71 Miss. 877, 16 So. 261; Whittle *v.* State, 79 Miss. 327, 30 So. 722.

Missouri. — State *v.* Miller, 44 Mo. App. 159; State *v.* Heed, 57 Mo. 252; State *v.* Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; State *v.* Blize, 111 Mo. 464, 20 S. W. 210; State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; State *v.* Hunter, 181 Mo. 316, 80 S. W. 955.

Montana. — State *v.* Gibbs, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749.

Oregon. — State *v.* Buckley, 18 Or. 228, 22 Pac. 838.

Texas. — Gabrielsky *v.* State, 13 Tex. App. 428.

Virginia. — Schwartz *v.* Com., 27 Gratt. 1025, 21 Am. Rep. 365.

Truth of Declarations. — The declarations of the defendant, in cases of perjury, contrary to what has been charged to be false in the indictment, are not presumed to be true. Otherwise the burden of proving the defendant's guilt might be removed from the State and the defendant

directly from the defendant with circumstances showing his corrupt intent.[33]

(5.) Elements of Corroboration. — (A.) NEED NOT BE EQUAL TO ANOTHER WITNESS. — The corroboration need not be equivalent or tantamount to another witness or such as would require the jury to convict in a case in which a single witness is sufficient.[34] But it must be clear and positive, substantiating material testimony ad-

would be required to prove his innocence. State *v.* Williams, 30 Mo. 364; State *v.* Hunter, 181 Mo. 316, 80 S. W. 955. See Article "CORROBORATION."

33. *United States.*— United States *v.* Hall, 44 Fed. 864, 10 L. R. A. 324; United States *v.* Mayer, Deady 127, 26 Fed. Cas. No. 15,753.

Dakota. — Territory *v.* Jones, 6 Dak. 85, 50 N. W. 528.

Georgia. — Adams *v.* State, 93 Ga. 166, 18 S. E. 553.

Kentucky. — Com. *v.* Davis, 92 Ky. 460, 18 S. W. 10.

Massachusetts. — Com. *v.* Butland, 119 Mass. 317; Com. *v.* Parker, 2 Cush. 212.

New York. — People *v.* Burden, 9 Barb. 467; Bowden *v.* People, 12 Hun 85.

Oregon. — State *v.* Kalyton, 29 Or. 375, 45 Pac. 756.

In United States *v.* Wood, 14 Pet. (U. S.) 430, the court said: "In what cases, then, will the rule not apply? Or in what cases may a living witness to the *corpus delicti* of a defendant be dispensed with, and documentary or written testimony be relied upon to convict? We answer, to all such where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent. In cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath; the oath only being proved to have been taken. In cases where a party is charged with taking an oath, contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating to the fact sworn to; or by other written testimony existing and being found in the possession of a defendant, and which has been treated by him as containing the evidence of the fact recited in it."

34. *England.* — Reg. *v.* Muscot, 10 Mod. 192.

United States. — United States *v.* Hall, 44 Fed. 864, 10 L. R. A. 324.

Indiana. — Galloway *v.* State, 29 Ind. 442.

Kentucky. — Barton *v.* Com., 17 Ky. L. Rep. 580, 32 S. W. 396; Williams *v.* Com., 24 Ky. L. Rep. 465, 68 S. W. 871; Com. *v.* Davis, 92 Ky. 460, 18 S. W. 10.

Louisiana. — State *v.* Jean, 42 La. Ann. 946, 8 So. 480.

Massachusetts. — Com. *v.* Park, 2 Cush. 212.

Missouri. — State *v.* Miller, 44 Mo. App. 159; State *v.* Heed, 57 Mo. 252.

New York. — People *v.* Stone, 32 Hun 41.

North Carolina. — State *v.* Peters, 107 N. C. 876, 12 S. E. 74.

Washington. — State *v.* Rutledge, 37 Wash. 523, 79 Pac. 1123.

Contra. — Reg. *v.* Parker, 41 E. C. L. 346; Gandy *v.* State, 23 Neb. 436; Silver *v.* State, 17 Ohio 365.

In State *v.* Rutledge, 37 Wash. 523, 79 Pac. 1123, it was held proper to refuse to instruct that no conviction could be had for perjury unless the falsity of the evidence was proved by two witnesses, or by one witness and corroborating circumstances of equal weight and credibility as testimony of another witness, since the rule is that the corrobating circumstances established by independent evidence need not equal in weight the testimony of a second witness, but need only be of such character as to turn the scale and overcome the evidence of the defendant and the legal presumption of his innocence.

duced by the state in support of the charge against the accused and not evidence to an immaterial matter.[35]

(B.) Need Not Be a Direct Contradiction. — It is not necessary that it should amount to a direct contradiction of the statement made by the accused, upon which the perjury is assigned.[36] Nor be so strong, that standing alone it would justify a conviction.[37]

(C.) May Be by Facts and Circumstances. — The required corroboration may be furnished by facts and circumstances as well as by direct positive testimony, but it must be by independent circumstances, tending to show the same results and not merely that the account is possible.[38]

35. People *v.* Rodley, 131 Cal. 240, 63 Pac. 351; State *v.* Buie, 43 Tex. 532.

There must be corroboration of a witness in some particular, either by the testimony of another witness, or other witnesses or by other evidence of a documentary or circumstantial character, which possesses sufficient corroborative effect. It is not true, however, that two witnesses are essentially requisite to disprove the particular fact sworn to; for if any material circumstance, such as the defendant's own letters and declarations, be proved clearly by other witnesses in confirmation of the witness who gives the direct testimony to show the perjury, such material circumstance may turn the scale and warrant a conviction. United States *v.* Hall, 44 Fed. 864, 10 L. R. A. 324.

In order to authorize a conviction of perjury, it is necessary, in addition to the testimony of one witness to the falsity of the statement alleged as the perjury, that strong corroborating circumstances, of such a character as clearly to turn the scale, and overcome the oath of the party charged, and the legal presumption of his innocence, should be established by independent evidence; and, in Com. *v.* Parker, 2 Cush. (Mass.) 212, where the charge was that the defendant had testified that no agreement for the payment by him of more than the lawful rate of interest had ever been made between him and a person to whom he was indebted, it was held that existence of such an agreement, corroborated by the letters of the defendant to him, containing a direct promise to pay more than legal interest on a demand then held by such creditor, if the payment could be delayed, and apologizing for a delay which had already taken place in the payment of another demand, and promising to pay a bonus for the delay, was competent and sufficient evidence of the falsity of the statement alleged as the perjury.

36. Reg. *v.* Towey, 8 Cox C. C. (Eng.) 328.

Proof that the defendant has made statements verbally or in writing, under oath or not under oath, conflicting with the statement made under oath upon which the indictment is founded is competent evidence on an indictment for perjury and such evidence in connection with the testimony of other witnesses has been sufficient to warrant a conviction. Dodge *v.* State, 24 N. J. L. 455; State *v.* Molier, 12 N. C. 263; Rex. *v.* Mayhew, 6 C. & P. (Eng.) 315.

37. United States *v.* Hall, 44 Fed. 864, 10 L. R. A. 324; State *v.* Miller, 44 Mo. App. 159; State *v.* Heed, 57 Mo. 252; State *v.* Hill, 91 Mo. 423, 4 S. W. 121; State *v.* Blize, 111 Mo. 464, 20 S. W. 210.

38. *England.* — Rex *v.* Mayhew, 6 C. & P. 315; Reg. *v.* Baldry, 2 B. & H. Lead. Cas. 494.

United States. — United States *v.* Coons, 1 Bond 1, 25 Fed. Cas. No. 14,860; United States *v.* Hall, 44 Fed. 864, 10 L. R. A. 324.

California. — People *v.* Rodley, 131 Cal. 240, 63 Pac. 351.

Iowa. — State *v.* Raymond, 20 Iowa 582; State *v.* Clough, 111 Iowa 714, 83 N. W. 727.

Kentucky. — Williams *v.* Com., 24 Ky. L. Rep. 465, 68 S. W. 871.

(6.) Different Assignments. — If an indictment contains several assignments of perjury, in order to convict on any one, there must be two witnesses, or one witness and corroborating circumstances.[39] Proof of one assignment is not corroborated by proof of another.[40]

(7.) Amount of Proof Required. — Evidence confirmatory of one witness, in some slight particulars, is not sufficient to warrant a conviction.[41]

(8.) Contradictory Statements. — It is not sufficient to prove merely that the defendant, at different times, testified to, or made, two statements irreconcilable with each other. There must be testimony aside from his own contradictory statements as to the falsity of the matters upon which the alleged perjury is assigned.[42] But the

Massachusetts. — Com. *v.* Parker, 2 Cush. 212.

Missouri. — State *v.* Miller, 44 Mo. App. 159; State *v.* Heed, 57 Mo. 252; State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116.

New Mexico. — Territory *v.* Remuzon, 3 N. M. 648, 9 Pac. 598.

New York. — People *v.* Doody, 172 N. Y. 165, 64 N. E. 807.

Ohio. — State *v.* Courtright, 66 Ohio St. 35, 63 N. E. 590.

Texas. — Hernandez *v.* State, 18 Tex. App. 134, 51 Am. Rep. 295; Anderson *v.* State, 24 Tex. App. 705, 7 S. W. 40; Maines *v.* State, 26 Tex. App. 14, 9 S. W. 51; Parker *v.* State, 25 Tex. App. 743, 9 S. W. 42; Beach *v.* State, 32 Tex. Crim. 240, 22 S. W. 976; Rogers *v.* State, 35 Tex. Crim. 221, 32 S. W. 1044; Plummer *v.* State, 35 Tex. Crim. 202, 33 S. W. 228; McCoy *v.* State (Tex. Crim.), 73 S. W. 1057; Maroney *v.* State, 45 Tex. Crim. 524, 78 S. W. 696.

Washington. — State *v.* Rutledge, 37 Wash. 523, 79 Pac. 1123.

West Virginia. — State *v.* Miller, 24 W. Va. 802.

In McCoy *v.* State (Tex. Crim.), 73 S. W. 1057, a charge to the jury that "The facts and circumstances proved, if any, should not only be consistent with the falsity of said alleged false statement, but inconsistent with any other reasonable hypothesis or conclusion than that of its falsity," etc., was held to contain the essential requirements of circumstantial evidence.

39. Reg. *v.* Roberts, 2 C. & K. (Eng.) 607; Com. *v.* Davis, 92 Ky. 460, 18 S. W. 10; Barton *v.* Conn., 17 Ky. L. Rep. 580, 32 S. W. 396; Williams *v.* Com., 91 Pa. St. 493.

40. Lea *v.* State, 64 Miss. 278, 1 So. 235.

41. *England.* — Rex *v.* Yates, 1 C. & M. 132; Reg. *v.* Baldry, 2 B. & H. Lead. Cas. 494.

Iowa. — State *v.* Raymond, 20 Iowa 582.

Indiana. — Galloway *v.* State, 29 Ind. 442.

Missouri. — State *v.* Miller, 44 Mo. App. 159.

New Mexico. — Territory *v.* Remuzon, 3 N. M. 648, 9 Pac. 598.

Texas. — Hernandez *v.* State, 18 Tex. App. 134, 51 Am. Rep. 295; State *v.* Buie, 43 Tex. 532.

Virginia. — Schwartz *v.* Com., 27 Gratt. 1025, 21 Am. Rep. 365.

In Com. *v.* Davis, 92 Ky. 460, 18 S. W. 10, it was proved that the accused had testified that he had not, upon a certain day, been at the house of one M. nor of one W. nor had he at either of the houses tried or offered to sell clothes wringers, or other goods. One R. testified that the accused was at the house of M. on the day named, and W. testified that he was at her house on the day in question. The court held that the testimony of one corroborated the other, in showing the falsity of the testimony of the accused.

42. *England.* — Champneys Case, 2 Lew. C. C. 258.

Alabama. — Peterson *v.* State, 74 Ala. 34.

Florida. — Freeman *v.* State, 19 Fla. 552.

Missouri. — State *v.* Blize, 111 Mo. 464, 20 S. W. 210.

oath of one witness and the declarations of the defendant inconsistent with the oath in which the perjury is assigned are sufficient.[43]

B. Mode of Proof. — a. *In General.* — For the purpose of proving the falsity of the oath or testimony upon which the alleged perjury is assigned, any competent evidence, whether direct or indirect, may be received.[44]

b. *Res Gestae.* — The whole *res gestae* of the transaction, including declarations of third persons, made at the time may be introduced in evidence against the accused to show that his testimony

New Jersey. — Dodge *v.* State, 24 N. J. L. 455.

New York. — Woodbeck *v.* Keller, 6 Cow. 118.

Oregon. — State *v.* Buckley, 18 Or. 228, 22 Pac. 838.

Texas. — Brooks *v.* State, 29 Tex. App. 582, 16 S. W. 542; Waters *v.* State, 30 Tex. App. 284, 17 S. W. 411.

Virginia. — Schwartz *v.* Com., 27 Gratt. 1025, 21 Am. Rep. 365; Rhodes *v.* Com., 78 Va. 692.

In Peterson *v.* State, 74 Ala. 34, the court said: "There can be no conviction of the crime of perjury, on the unaided testimony of a single witness. This would be oath against oath. There must be two witnesses, or one with strong corroboration. 1 Greenl. Ev. § 257; Clark's Manual, § 1248. This corroboration, to be sufficient, must be of the very act — the *corpus delicti* — the giving of material testimony which is willfully and corruptly false. And when, as in this case, it is alleged the accused has made two sworn statements which are in irreconcilable conflict, if there is no strong corroboration of one of the versions, how can it be affirmed the other is false? Previous contradictory statements, made with or without oath, may be very important evidence, in connection with other circumstances, against the accused; but, no matter by how many witnesses the different and conflicting statements may be proved, this is not corroborative proof of the *corpus delicti.*"

The Defendant's Own Evidence Upon Oath is not sufficient of itself to disprove the evidence on which the perjury is assigned. State *v.* Williams, 30 Mo. 364; State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; Schwartz *v.* Com., 27 Gratt. (Va.) 1025, 21 Am. Rep. 365.

Formerly It Was Held that perjury could be established by proof of the contradictory oath. Rex *v.* Knill, 7 E. C. L. 306n. This was overruled in England by the cases of Reg. *v.* Wheatland, 8 C. & P. 238, and Reg. *v.* Hughes, 1 C. & K. 519. When a prisoner has made contradictory statements under oath and in the second he has acknowledged the intentional falsity of the first, that acknowledgment is sufficient to establish the perjury of the first without further evidence. People *v.* Burden, 9 Barb. (N. Y.) 467.

43. Dodge *v.* State, 24 N. J. L. 455; Vance *v.* State, 62 Miss. 137; State *v.* Molier, 12 N. C. 263.

The direct oath of one witness and proof of declarations of the prisoner inconsistent with the oath on which perjury is assigned, is sufficient. Hereford *v.* People, 197 Ill. 222, 64 N. E. 310.

44. *United States.* — United States *v.* Mayer, Deady 127, 26 Fed. Cas. No. 15,753.

Iowa. — State *v.* Seaton, 8 Iowa 138; State *v.* Voght, 27 Iowa 117.

Indiana. — State *v.* Hunt, 137 Ind. 537, 37 N. E. 409.

Massachusetts. — Com. *v.* Butland, 119 Mass. 317.

Missouri. — State *v.* Blize, 111 Mo. 464, 20 S. W. 210.

Texas. — Anderson *v.* State, 24 Tex. App. 705, 7 S. W. 40; Cordway *v.* State, 25 Tex. App. 405, 8 S. W. 670; Beach *v.* State, 32 Tex. Crim. 240, 22 S. W. 976; Hutchinson *v.* State, 33 Tex. Crim. 67, 24 S. W. 908.

In Floyd *v.* State, 30 Ala. 511, on an indictment charging the defendant with perjury in having falsely sworn in a civil action against him for tui-

as to some particulars was false.[45] But the declarations of third persons, when no part of the *res gestae,* cannot be received.[46]

tion "that he did not send his son to school last year, and did not know that his son went to school," it was held proper to ask the witness who had heard the defendant so testify, to state if there were any circumstances within his knowledge which would show falsity of the defendant's statement.

Other Crimes. — If the evidence tends to prove the falsity of the testimony charged in the indictment, it is not incompetent because it also tends to prove the commission by the accused of another crime. State *v.* Madigan, 57 Minn. 425, 59 N. W. 490. See also Maynard *v.* People, 135 Ill. 416, 25 N. E. 740.

45. State *v.* Williams, 30 Mo. 364; State *v.* Day, 100 Mo. 242, 12 S. W. 365; Heflin *v.* State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147; Eighmy *v.* People, 79 N. Y. 546; Tuttle *v.* People, 36 N. Y. 431; Littlefield *v.* State, 24 Tex. App. 167, 5 S. W. 650; Cordway *v.* State, 25 Tex. App. 405, 8 S. W. 670.

In a prosecution for perjury alleged to have been committed by the accused in that he swore that he did not on a certain occasion commit an assault on his wife, it was competent for the state to show as part of the *res gestae* of the assault that the defendant was cursing and abusing his wife. Townley *v.* State (Tex. Crim.) 81 S. W. 309.

Conduct of Defendant. — Evidence of the defendant's conduct, actions and language are admissible. Foster *v.* State, 32 Tex. Crim. 39, 22 S. W. 21; Galloway *v.* State, 29 Ind. 442; McDonough *v.* State (Tex. Crim.) 84 S. W. 594.

In Martin *v.* State, 33 Tex. App. 317, 26 S. W. 400, Martin was indicted for perjury in falsely swearing that one Smith and one Fitzgerald placed a satchel in a straw stack at a certain place, named in the indictment, and covered said satchel with straw. The trial court permitted a witness Smith to testify to a conversation between Smith and others, and this was objected to because the defendant was not present at the conversation and because it was hearsay. The witness Smith stated the circumstances of the loss of the satchel, his search for it, and how he traced it to Browning and Brown, and recovered most of the money from them, but was unable to find the satchel. Browning and Brown stated to him that they left the satchel in the road after taking out the money. This was objected to because not made in the presence of the defendant. The court said: "The rule invoked has no application here. Appellant is not charged with a theft of property, but with perjury concerning it. To prove the theft is admissible, and certainly there could be no reason for excluding the confessions of the parties charged with the theft."

46. Brown *v.* State, 57 Miss. 424; Lambert *v.* People, 76 N. Y. 220, 32 Am. Rep. 293, *reversing* 147 Hun 512; Maines *v.* State, 23 Tex. App. 568, 5 S. W. 123; Reavis *v.* State, 6 Wyo. 240, 44 Pac. 62.

Declarations made after an assault and not in the presence of one accused of perjury, alleged to have been committed on the trial of the assault, are irrelevant and hearsay as against the accused. Such testimony is not part of the *res gestae,* and does not tend to disprove the facts testified to by witnesses. Reavis *v.* State, 6 Wyo. 240, 44 Pac. 62. *Contra* Martin *v.* State, 33 Tex. App. 317, 26 S. W. 400.

In Maines *v.* State, 23 Tex. App. 568, 5 S. W. 123, it was held error for the trial court to permit certain witnesses to testify to conversations between themselves and another concerning the guilt of the defendant in a larceny case, wherein the perjury was alleged to have been committed, in which conversation neither of the defendants in the larceny and perjury cases was present. The court said: "Such testimony was clearly hearsay, and the conversations and agreements were *res inter alios acta,* and in no manner binding either upon Wyers (the defendant in the larceny case) or this defendant."

Declarations of Defendant when contemporaneous and connected with the principal facts, constitute part of the *res gestae* or serve to illustrate such principal facts, and may be received in his behalf to disprove the alleged falsity of the matters assigned.[47] But not when not part of the *res gestae*.[48]

4. Guilty Knowledge, Intent, Etc. — Guilty knowledge, intent, or corrupt motive are not often susceptible of proof by direct evidence; and any evidence which tends to show the corrupt motives which induced the accused to commit perjury;[49] or which substantiates the charge made in the indictment as to the guilty knowledge,[50] may be received.

II. DEFENDANT AS WITNESS.

The defendant while on the stand as a witness in his own behalf

47. Spencer *v.* Com. 15 Ky. L. Rep. 182, 22 S. W. 559; State *v.* Ricketts, 74 N. C. 187; State *v.* Curtis, 34 N. C. 270.

48. State *v.* Hunt, 137 Ind. 537, 37 N. E. 409.

In Meyers *v.* United States, 5 Okla. 173, 48 Pac. 186, a prosecution for perjury in falsely swearing to a contest affidavit before the U. S. Land Office, it was held proper for the court to refuse to permit the defendant to prove by witnesses his own statements relative to his purposes and dwelling upon the land, the only purpose of those statements being to contradict the testimony of witnesses who had testified for the prosecution that the defendant had stated to them that he was on the land as an employe of the third person.

49. *England.* — Rex *v.* Munton, 14 E. C. L. 411 (expressions of malice toward person against whom alleged perjury was committed); Reg. *v.* Boynes, 47 E. C. L. 65.

Georgia. — Heflin *v.* State, 88 Ga. 151, 14 S. E. 112, 30 Am. St. Rep. 147.

Iowa. — State *v.* Clough, 111 Iowa 714, 83 N. W. 727.

Michigan. — People *v.* Macard, 109 Mich. 623, 67 N. W. 968 (offering witnesses money to prevent them from testifying).

New Hampshire. — State *v.* Hascall, 6 N. H. 352.

Texas. — Kitchen *v.* State, 26 Tex. App. 165, 9 S. W. 461.

Perjury Not Assigned. — While a perjury not assigned in the indictment cannot be considered on the question of the guilt of the defendant upon such other perjury, yet, if the evidence thereof was legitimately brought out in the development of the whole case and related to the same oath and subject-matter of the perjury charged, it may be considered in determining the question of corrupt intent in swearing to the false matter upon which the perjury is assigned. State *v.* Raymond, 20 Iowa 582.

In State *v.* Curtis, 34 N. C. 270, an indictment for perjury in swearing that one of several assailants in an affray struck the defendant, whereas, in fact, another of the assailants struck the blow, it was held competent for the defendant, in order to disprove a corrupt motive, to show that immediately on his recovering consciousness, he had given the same account of the transaction he did in his testimony on the trial of the case, in which the perjury was alleged to have been committed.

50. United States *v.* Gardiner, 2 Hayn & H. 89, 25 Fed. Cas. No. 15,186a; Floyd *v.* State, 30 Ala. 511.

In Adams *v.* State, 93 Ga. 166, 18 S. E. 553, it was held on a trial for perjury, that a witness for the state, after reciting what the accused testified, when the alleged perjury was committed, could say that it was false, at the same time state facts which conclusively show that it was false.

is subject to the same rules as any other witness, and may be asked any question touching his credibility,[51] as well as testifying in his own behalf.

III. CHARACTER.

When the defendant testifies in his own behalf evidence of his general moral character is admissible for the purpose of impeaching his credibility.[52]

IV. ACQUITTAL.

A judgment of acquittal rendered in the case in which the alleged perjury was committed is not admissible on a trial for perjury to show the guilt or innocence of the defendant.[53]

V. SUBORNATION OF PERJURY.

Subornation of perjury may be proved by the testimony of one

51. State *v.* Brown, 111 La. 170, 35 So. 501.

In Cordway *v.* State, 25 Tex. App. 405, 8 S. W. 670, when the evidence in behalf of the state tended to show that the accused had testified under the motive of pecuniary interest created by bribery, it was held that he had the right to reply to such evidence by proving that before there was an opportunity for offering him a bribe, and within an hour after the occurrence touching which he testified, he related the facts and the circumstances substantially in accordance with his account of them as subsequently given by him on oath, as a witness, his testimony as then given, being the perjury assigned.

The defendant may prove the actual fact in dispute notwithstanding any admissions or confessions he may have made to the contrary. Markey *v.* State (Fla.) 37 So. 53.

52. Lockard *v.* Com. 87 Ky. 201, 8 S. W. 266; Barton *v.* Com., 17 Ky. L. Rep. 580, 32 S. W. 171; State *v.* Day, 100 Mo. 242, 12 S. W. 365.

53. State *v.* Caywood, 96 Iowa 367, 65 N. W. 385; State *v.* Williams, 60 Kan. 837, 58 Pac. 476; Kitchen *v.* State, 26 Tex. App. 165, 9 S. W. 461; Davidson *v.* State, 27 Tex. App. 262, 11 S. W. 371; Hutcherson *v.* State, 33 Tex. Crim. 67, 24 S. W. 908. In this case the appellant was arrested on a charge of an aggravated assault and battery by striking another with his fist. Upon the trial he took the stand in his own favor and swore that he did not strike her. Although acquitted of that charge, he was indicted for perjury, and it was held that the judgment of acquittal was not admissible to show the guilt or innocence of the defendant of the charge of perjury.

Contra. — United States *v.* Butler, 38 Fed. 498, where the defendant who had been acquitted upon an indictment for selling liquors without payment of the special tax required by law, was subsequently put upon trial for perjury, in swearing upon his preliminary examination before a commission that he did not so sell, it was held that his acquittal for selling liquors was a conclusive adjudication in his favor upon the subsequent trial for perjury, and that the government could not show that his oath was false.

In Cooper *v.* Com., 21 Ky. L. Rep. 546, 51 S. W. 789, the defendant had been tried and acquitted of the crime of adultery. Thereupon he was indicted for falsely swearing that he did not have sexual intercourse. It was held that the defendant had already been tried and acquitted of having had sexual intercourse, and the judgment in that case *res ad-*

witness.[54] But if it is sought to establish by the person suborned the fact that perjury was committed by him, his testimony must be corroborated to such fact.[55]

judicata against the commonwealth, and he cannot again be put on trial when the truth or falsity of the charge in the indictment is the gist of the question under investigation.

54. *In re* Frances, 1 C. H. R. (Eng.) 121; State *v.* Waddle, 100 Iowa 59, 67 N. W. 279; Com. *v.* Douglass, 5 Metc. (Mass.) 241. *Contra,* People *v.* Evans, 40 N. Y. 1.

55. State *v.* Renswick, 85 Minn. 19, 88 N. W. 22.

PERMISSIVE OCCUPANCY.—See Adverse Possession; Landlord and Tenant.

PERPETUATION OF TESTIMONY.—See Depositions.

PERSONAL INJURIES.—See Injuries to Person; Physical Examination.

PERSONAL PROPERTY.—See Ownership.

PERSONAL SERVICE.—See Service.

PETIT LARCENY.—See Larceny.

PHOTOGRAPHS.

By A. P. Rittenhouse.

I. JUDICIAL NOTICE.

Courts take judicial notice that photography is the art of producing and preserving representations of persons, places, and things, by the action of light upon a prepared surface.[1]

1. Luke *v.* Calhoun Co., 52 Ala. 115; Barns *v.* Ingalls, 39 Ala. 193; Wurmser *v.* Frederick, 62 Mo. App. 634. In Udderzook *v.* Com., 76 Pa. St. 340, the court declared: "Photography has become a customary and common mode of taking and preserving views, as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science, that the images on the plate made by the rays of light through the ca-

II. ADMISSIBILITY.

As a general rule photographs are admissible in evidence when they are shown to have been accurately taken,[2] and to be correct representations of the subject in controversy,[3] and are of such a nature as to throw light upon it.[4]

III. PRELIMINARY QUESTIONS.

When a photograph is offered in evidence it devolves upon the trial court, as preliminary to its admission, to determine from other evidence whether or not the photograph has been accurately taken

mera are dependent upon the same general laws which produce the images of outward forms upon the retina, through the lenses of the eye. The process has become one in general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses."

In State *v.* Matheson (Iowa), 103 N. W. 137, an action for assault with intent to murder, an X-ray photograph showing the position of the bullet in the body of the person upon whom the assault was committed, was held admissible, the court saying: "The court takes judicial notice of the fact that by the ordinary photographic process, a representation may be secured sufficiently truthful and reliable to be considered as evidence with reference to objects which are in a condition to be thus photographed, without regard to whether they have been actually observed by any witness or not."

2. United States *v.* Pagliano, 53 Fed. 1001; State *v.* Cook, 75 Conn. 267, 53 Atl. 589; Chicago & A. R. Co. *v.* Myers, 86 Ill. App. 401.

Degrees of Accuracy. — In Cunningham *v.* Fair Haven & W. R. Co., 72 Conn. 244, 43 Atl. 1047, the court said: "The proof of accuracy varies with the nature of the evidence the photograph is offered to supply. When it it offered as a general representation of physical objects, as to which testimony is adduced, for the mere convenience of witnesses in explaining their statements, very slight proof of accuracy may be sufficient; but when it is offered as representing handwriting which is to be subjected to minute detailed examination, or any object where slight differences of height, breadth or length are of vital importance, much more convincing proof should be required."

3. Iroquois Furnace Co. *v.* McCrea, 91 Ill. App. 337; State *v.* Miller, 45 Or. 325, 74 Pac. 658; Ruloff *v.* People, 45 N. Y. 213; Cowley *v.* People, 83 N. Y. 464, 38 Am. Rep. 464.

Photographs are not admissible in evidence unless authenticated by other evidence that they are correct resemblances or truthful representations. Chicago M. & St. P. R. Co. *v.* Kendall, 49 Ill. App. 398; People's Pass. R. Co. of Baltimore *v.* Green, 56 Md. 84; Leidlein *v.* Meyer, 95 Mich. 586, 55 N. W. 367; Goldsboro *v.* Central R. Co., 60 N. J. L. 49, 37 Atl. 433; Hupfer *v.* National Distilling Co., 114 Wis. 279, 90 N. W. 191.

In Blair *v.* Pelham, 118 Mass. 420, the court said: "A plan or picture, whether made by the hand of man or by photography, is admissible in evidence if verified by proof that it is a true representation of the subject, to assist the jury in understanding the case."

4. Photographs which do not throw light upon any controverted point are not material and should be excluded. *In re* Jessup, 81 Cal. 408, 22 Pac. 742, 6 L. R. A. 594; Schneider *v.* North Chicago St. R. Co., 80 Ill. App. 306; Perkins *v.* Buaas (Tex. Civ. App.), 32 S. W. 240; People *v.* Webster, 139 N. Y. 73, 34 N. E. 730.

and correctly represents the subject in controversy, and the court's determination of these matters is not open to exception.[5]

IV. PHOTOGRAPHS OF PERSONS.

1. Generally. — Photographs properly verified are admissible to

5. *Connecticut.* — Cunningham *v.* Fair Haven & W. R. Co., 72 Conn. 244, 43 Atl. 1047.
Florida. — Ortiz *v.* State, 30 Fla. 256, 11 So. 611.
Illinois. — Chicago & E. I. R. Co. *v.* Lawrence, 96 Ill. App. 635; Cleveland C. C. & St. L. R. Co. *v.* Monaghan, 140 Ill. 474, 30 N. E. 869.
Indiana. — Huntington Light & Fuel Co. *v.* Beaver (Ind. App.), 73 N. E. 1002.
Iowa. — Locke *v.* S. C. & P. R. Co., 46 Iowa 109.
Maine. — Jameson *v.* Weld, 93 Me. 345, 45 Atl. 299.
Massachusetts. — Hollenbeck *v.* Rowley, 8 Allen 473; Randall *v.* Chase, 133 Mass. 210; Com. *v.* Morgan, 159 Mass. 375, 34 N. E. 458; Harris *v.* Quincy, 171 Mass. 472, 50 N. E. 1042; Cary *v.* Hubbardston, 51 N. E. 521; Dolan *v.* Mutual Reserve Fund L. Ass'n, 173 Mass. 197, 53 N. E. 398; De Forge *v.* New York, N. H. & H. R. Co., 178 Mass. 59, 59 N. E. 669.
New Hampshire. — Pritchard *v.* Austin, 69 N. H. 367, 46 Atl. 188.
New Jersey. — Goldsboro *v.* Central R. Co., 60 N. J. L. 49, 37 Atl. 433.
New York. — Ruloff *v.* People, 45 N. Y. 213.

Photographs, to be admissible in evidence, must be verified by preliminary proof that they are true representations of the places and objects concerning which inquiry is being made, and whether they are sufficiently verified or not is a preliminary question of fact, to be determined by the judge presiding at the trial, and his decision is not subject to exception. Blair *v.* Pelham, 118 Mass. 420; Martin *v.* Moore, 99 Md. 41, 57 Atl. 671.

Taken by Amateur, and at Variance With Other Evidence. — In Chicago *v.* Vesey, 105 Ill. App. 191, an action for damages for personal injuries received by reason of a defective sidewalk, a photograph of the place of the accident, two years after the happening of the injury, taken by a daughter of the plaintiff, who was an amateur photographer, was admitted by the trial court over the objection of the defendant. In passing on the exception the appellate court declared the photograph to be contrary to the testimony of all the witnesses who described the place of the accident, and said: "Although the question as to whether an offered photograph has been shown to be so correct a representation as that it should be admitted is addressed to the discretion of a trial court, nevertheless, while the admission of this photograph does not constitute reversible error, we feel that, taken as it was by an amateur more than two years after the accident, and at variance with testimony given by each party, it is such that it ought not, under the circumstances, to have been admitted."

Rarely Reviewed. — In Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672, the court said: "Photographs of a stretch of road with fences and houses can never represent such objects in exactly their true proportions and relations to each other. Whether they show these proportions and relations sufficiently to be of value as evidence is a preliminary question to be decided by the court, and as to which its decision can rarely be reviewed." See also Verran *v.* Baird, 150 Mass. 141, 22 N. E. 630.

Discretion of Court Not Unlimited. When it is shown that photographs fairly represent the object or objects under investigation they are admissible in evidence, and, in determining whether they have been sufficiently verified, the discretion of the trial judge is not unlimited, and may not be exercised arbitrarily. Carlson *v.* Benton, 66 Neb. 486, 92 N. W. 600.

establish the identity of persons;[6] but when offered for the purpose of contradicting a witness they must first be shown to give him an opportunity to say whether or not they represent the person of whom he spoke.[7] Photographs have also been held admissible as tending to prove the paternity of children,[8] the character and

6. Identity. — Travelers Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18. In United States *v.* A Lot of Jewelry, 59 Fed. 684, it became important for the government to show that a man named Vollkringer came to New York under the name of Flamant. In order to prove this a witness who knew Vollkringer was shown a photograph of a man, and he testified that Vollkringer's appearance corresponded with the picture. Another witness who had known the man called Flamant, being shown the same photograph, testified that Flamant's appearance corresponded with the photograph. It did not appear when the photograph had been taken, or whether or not it was a likeness of Vollkringer. The court held the photograph admissible and pertinent to the inquiry then in hand, but not conclusive.

In Luke *v.* Calhoun Co., 52 Ala. 115, an action brought by a widow for the murder of her husband, plaintiff offered in evidence a photograph which had been sent to her by her husband, with the indorsement thereon in his handwriting, "Taken Jacksonville, Ala., March 19, 1870." It was shown by the photographer whose work it was that it was the likeness of a man bearing the name of Luke, and was taken at Jacksonville, Alabama, about March 20, 1870. A deputy sheriff who saw the body after the murder testified that the photograph was a good likeness of the murdered man, who bore the name of Luke. Other witnesses testified that he bore the name of Luke. The photograph was held competent to establish the identity of the plaintiff's husband with the murdered man.

7. In an action for personal injury, the photograph of the injured person was offered in evidence to contradict the defendant's witnesses, who had described him in their testimony. *Held,* properly excluded as independent evidence, the court saying, "that before it was offered the counsel should have showed it to the witnesses and given them the opportunity to say whether or not the photograph was that of the person they saw injured." Stiasny *v.* Metropolitan St. R. Co., 58 App. Div. 172, 68 N. Y. Supp. 694.

8. Paternity of Children. — *In re* Jessup, 81 Cal. 408, 22 Pac. 742, 6 L. R. A. 594, was a proceeding by an illegitimate child to establish heirship to an estate. There was introduced in evidence a photograph showing the deceased and the petitioner in the same picture. It was made shortly before the trial by bringing two negatives in juxtaposition, and from them making a third. The negative of the petitioner was made from life at the time; the negative of the deceased was made several years before. The purpose of introducing this photograph was to show the resemblance of the two persons as a fact tending to prove paternity. The court said: "We are not prepared to say that pictures by the improved processes of photography may not be admissible for such a purpose, but they would be entitled to much less weight as evidence than profert of the persons themselves."

In an action to set aside a will, one of the principal questions was whether the testator was the father of the defendant in error. A photograph of the testator was admitted in evidence for the purpose of comparison with the features of defendant in court. Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337.

In Bastardy Proceedings. — The defendant offered in evidence a photograph of a party since deceased, in order that the jury might judge whether the child resembled said party or defendant. The exclusion of the photograph was held not error. Farrell *v.* Weitz, 160 Mass. 288, 35 N. E. 783.

disposition of persons,[9] and even the race to which persons belong.[10] But they are not admissible to show the appearance of good health,[11] or of old age or infirmity.[12]

2. Photographs of Personal Injuries. — Photographs properly verified as correct representations are generally admissible to show the nature and extent of personal physical injuries.[13] It is not

9. To Show Character and Disposition. — In the probate of a will the question in issue was the soundness of the testator's mind. Photographs of the testator and his wife, proved to correctly represent their appearance up to near the last days of their lives, were held properly admitted in evidence as tending to show the character, vigor, temperament and disposition of these people as touching undue influence. Pritchard *v.* Austin, 69 N. H. 367, 46 Atl. 188.

10. Racial Appearance. — In Van Houten *v.* Morse, 162 Mass. 414, 38 N. E. 705, an action for damages for breach of promise of marriage, the defense was that the plaintiff had negro blood in her veins, and had concealed the fact. Photographs of the plaintiff's parents and sister, and of the latter's children, which she testified were correct likenesses, and had been shown by her to the defendant, were held competent evidence.

11. Rock Island *v.* Drost, 71 Ill. App. 613; Brown *v.* Metropolitan L. Ins. Co., 65 Mich. 306, 32 N. W. 610.

12. Gilbert *v.* West End R. Co., 160 Mass. 403, 36 N. E. 60.

13. If photographs show the condition or appearance of injuries as they actually are, they are not rendered incompetent by the fact that such condition or appearance is calculated to awaken sympathy in the minds of the jury. Toledo Trac. Co. *v.* Cameron, 137 Fed. 48; Miller *v.* Minturn (Ark.), 83 S. W. 918; People's Gas Light & Coke Co. *v.* Amphlett, 93 Ill. App. 194; Reddin *v.* Gates, 52 Iowa 210, 2 N. W. 1079; Jameson *v.* Weld, 93 Me. 345, 45 Atl. 299; Cooper *v.* St. Paul City R. Co., 54 Minn. 379, 56 N. W. 42; Geneva *v.* Burnett, 65 Neb. 464, 91 N. W. 275; Carlson *v.* Benton, 66 Neb. 486, 92 N. W. 600; Alberti *v.* New York, L. E. & W. R. Co., 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765.

Davis *v.* Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591, an action for damages for the death of a child by negligence, a photograph of the child taken just before it was injured, and another taken afterward, but before the child died, were held competent evidence. The court said: "Photographs frequently convey information to the jury, and the court, with an accuracy not permissible to spoken words, if their admission is properly guarded by inquiry as to the time and manner when taken. . . . They have become well-recognized means of evidence."

Chicago & Joliet Elec. Co. *v.* Spence, 213 Ill. 220, 72 N. E. 796, was an action for damages for personal injury. A sciagraph, or X-ray photograph, of a portion of the chest and body of the appellee was introduced in evidence. It was made by one who testified that he was an X-ray expert, and was regularly engaged in taking such photographs for physicians; that he took the negative from which the photograph was developed, and that he developed the photograph, and that it was an accurate and correct representation. Its purpose was to show that the appellee's heart had been displaced; that the walls of that organ had become thick, and that an abnormally heavy tissue had formed on the walls of his heart. *Held,* that the testimony of the X-ray expert who made the sciagraph was sufficient to justify the court in ruling that the picture should be admitted in evidence.

Contra.— In a personal injury case three photographs showing the plaintiff's injured foot in various poses were admitted in evidence. *Held,* that they were wholly unnecessary to a full description and explanation of plaintiff's condition so far as it affected the question of damages, and since the distortion of the foot was most serious the photographs were of such a character as to arouse sympathy, or indignation, or divert

necessary to notify the adverse party that photographs will be taken and introduced at the trial.[14] If photographs throw no light upon matters in issue they may be rejected.[15]

3. X-Ray Photographs. — Photographs taken by the X-ray process are admissible upon the same principles, under similar circumstances, and with like effect, as ordinary photographs.[16]

the minds of the jury to improper or irrelevant considerations, and for that reason they were improperly admitted. Selleck *v.* Janesville, 104 Wis. 570, 80 N. W. 944.

In Cirello *v.* Metropolitan Exp. Co., 88 N. Y. Supp. 932, it was held that photographs of the plaintiff's injuries were improperly admitted in evidence because the injuries were capable of verbal description, and since there was no justifiable reason for introducing the photographs, it must have been done to excite the sympathies of the jury. See also People's Gas Light & Coke Co. *v.* Amphlett, 93 Ill. App. 194.

14. Mauch *v.* Hartford, 112 Wis. 40, 487 N. W. 816.

15. In Baxter *v.* Chicago & N. W. R. Co., 104 Wis. 307, 80 N. W. 644, the plaintiff sued for personal injury. He was in court at the trial, and expert witnesses described his injured leg. Verified photographs showing his injured leg as compared with his uninjured leg were admitted in evidence. *Held,* error, but not prejudicial.

In Fraser *v.* California St. Cable R. Co., 146 Cal. 714, 81 Pac. 29, the jury returned a verdict for the defendant, based on the ground of contributory negligence. *Held,* that the alleged error of the trial court in excluding an X-ray photograph of plaintiff's injuries was harmless, as the photograph could throw no light on anything but the extent of the injury suffered, and this was immaterial in view of the verdict.

16. Miller *v.* Minturn (Ark.), 83 S. W. 918; Chicago & J. Elec. R. Co. *v.* Spence, 213 Ill. 220, 72 N. E. 796; Jameson *v.* Weld, 93 Me. 345, 354, 45 Atl. 299; Geneva *v.* Burnett, 65 Neb. 464, 91 N. W. 275; Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816; Miller *v.* Dumon, 24 Wash. 648, 64 Pac. 804.

In State *v.* Matheson (Iowa), 103 N. W. 137, an assault to murder, a witness who testified that he was an electrical engineer, and familiar with the use of the X-ray machine, produced an X-ray photograph which he testified was made by subjecting the middle portion of the body of the injured man to the proper process for taking a photograph of the interior thereof by means of the X-ray machine, which photograph showed the vertebrae of the spinal column in the lumbar region, and appeared to show a dark object in the shape of a bullet, close to one of the vertebrae. The photograph was held properly admitted, the court saying: "The process of X-ray photography is now as well established as a recognized method of securing a reliable representation of the bones of the human body, although they are hidden from direct view by the surrounding flesh, and of metallic or other solid substances which may be imbedded in the flesh, as was photography as a means of securing a representation of things which might be directly observed by the unaided eye, at the time when photography was first given judicial sanction as a means of disclosing facts of observation; and for that purpose X-ray photographs, or sciagraphs, or radiographs, as they are variously called, have been held admissible upon the same basis as photographs. . . . We have no difficulty, therefore, in holding that the radiograph admitted in evidence in this case, after proof that it was taken by a competent person, was admissible to show that there was in the body of Baker some hard substance in the shape of a bullet near the spinal column."

De Forge *v.* New York, N. H. & H. R. Co., 178 Mass. 59, 59 N. E. 669, was an action for personal injury. X-ray pictures of the injured foot were offered in behalf of the defendant, and rejected. The evi-

Where X-ray photographs are admitted in evidence the testimony of expert witnesses explanatory of the process of taking such pictures, and of the difference between them and ordinary photographs, is admissible.[17]

V. PHOTOGRAPHS OF PLACES.

1. Generally. — Where the nature or condition of a place becomes a matter of controversy in a civil action, photographs of the place shown to be true representations of it at the time in ques-

dence showed that these X-ray pictures were taken by a physician of high standing, who had taken about one hundred X-ray pictures, and had seen most of them developed. *Held*, the pictures were sufficiently verified by this evidence, and should have been admitted. The court said: "While a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, yet it should be admitted if properly taken."

In Carlson *v.* Benton, 66 Neb. 486, 92 N. W. 600, an action for malpractice, three expert surgeons testified that an X-ray photograph of the injured leg, taken after treatment by defendants, was a true representation of the position, location and condition of the bones of the injured leg. *Held* sufficient to render the photograph admissible, without going into the question of the competency of the person who took the photograph, or the condition of the apparatus by means of which it was taken. The court said: "Such matters would be far less satisfactory evidence to the ordinary mind that the photograph was an accurate representation of what it was claimed to represent, than would the testimony of witnesses who were competent to compare it with the original, and who had thus compared it."

In Bruce *v.* Beall, 99 Tenn. 303, 41 S. W. 445, the court, after declaring that X-ray photographs, properly verified, were admissible, said: "It is not to be understood, however, that every photograph offered as taken by the cathode or X-ray process would be admissible. Its competency to be first determined by the trial judge, depends upon the science, skill, experience and intelligence of the party taking the picture, and testifying with regard to it, and, lacking these important qualifications, it should not be admitted, and even then it is not conclusive upon the triers of fact, but is to be weighed like other competent evidence."

17. In a personal injury case the plaintiff introduced in evidence an X-ray photograph of both feet, printed from a glass plate. The feet were marked in the picture "left" and "right" respectively, in lead pencil. A witness testified that the foot marked "left" in the picture represented the injured foot, and that the bone of it was enlarged as the result of a fracture, which fracture was not visible to the naked eye. The defendant offered to show that the X-ray placed the right foot upon the right side, and the left foot upon the left side of the plate, and that in printing sensitized paper the objects would be reversed. He also offered in evidence the glass plate from which plaintiff's picture was taken, and other pictures printed from the same plate, all of which were excluded. This was held error, the court saying: "It was clearly competent for the defendant to introduce evidence to show that the plaintiff's pictures showing an enlargement of one of the feet, and from which a witness for the plaintiff discovered a fracture, did not represent the left foot, but the right, and for this purpose to show the difference between an ordinary photograph and one taken by an X-ray." De Forge *v.* New York, N. H. & H. R. Co., 178 Mass. 59, 59 N. E. 669.

tion are generally admissible in evidence.[18] Photographs may be proved to be correct representations by witnesses other than the person who took them.[19]

18. *United States.* — Scott *v.* New Orleans, 75 Fed. 373.

Alabama. — Louisville & N. R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371.

Connecticut. — Harris *v.* Ansonia 73 Conn. 359, 47 Atl. 672; Dyson *v.* New York & N. E. R. Co., 57 Conn. 9, 17 Atl. 137.

Illinois. — La Salle *v.* Evans, 111 Ill. App. 69; Wabash R. Co. *v.* Prast, 101 Ill. App. 167; Lake Erie & W. R. Co. *v.* Wilson, 189 Ill. 89, 59 N. E. 573; Rockford *v.* Russell, 9 Ill. App. 229; Wabash R. Co. *v.* Jenkins, 84 Ill. App. 511; Williams *v.* Carterville, 97 Ill. App. 160.

Indiana. — Huntington *v.* Lusch (Ind. App.), 70 N. E. 402.

Iowa. — Bach *v.* Iowa Cent. R. Co., 112 Iowa 241, 83 N. W. 959; Barker *v.* Perry, 67 Iowa 146, 25 N. W. 100; Locke *v.* S. C. & P. R. Co., 46 Iowa 109.

Maryland. — Dorsey *v.* Habersack, 84 Md. 117, 35 Atl. 96.

Massachusetts. — Randall *v.* Chase, 133 Mass. 210; Beals *v.* Brookline, 174 Mass. 1, 54 N. E. 339; Turner *v.* Boston & M. R. R., 158 Mass. 261, 33 N. E. 520.

Michigan. — Sterling *v.* Detroit, 134 Mich. 22, 95 N. W. 986; Bedell *v.* Berkey, 76 Mich. 435, 43 N. W. 308.

Missouri. — Smart *v.* Kansas City, 91 Mo. App. 586; Robinson *v.* St. Joseph, 97 Mo. App. 503, 71 S. W. 465; Baustian *v.* Young, 152 Mo. 317, 53 S. W. 921, 75 Am. St. Rep. 462.

New York. — Leeds *v.* New York Tel. Co., 79 App. Div. 121, 80 N. Y. Supp. 114; Archer *v.* New York, N. H. & H. R. Co., 106 N. Y. 589, 13 N. E. 318; Glazier *v.* Hebron, 62 Hun 137, 16 N. Y. Supp. 503; Warner *v.* Randolph, 18 App. Div. 458, 45 N. Y. Supp. 1112.

Wisconsin. — Church *v.* Milwaukee, 31 Wis. 512.

In an action for personal injuries received in a railroad collision, photographs of the wreck and its surroundings were held admissible upon proof of their correctness. The court said: "The admission of such photographs is always allowed when proven to be correct, for the purpose of enabling witnesses to explain their testimony as to the facts, or to assist the jury in arriving at a better understanding of the testimony." Denver & R. G. R. Co. *v.* Roller, 100 Fed. 738.

In Kansas City M. & B. R. Co. *v.* Smith, 90 Ala. 25, 8 So. 43, an action for personal injuries received in a railroad wreck, photographs of the scene of the accident taken two hours after the accident occurred were held admissible. The court said: "A plan, picture or other representation produced by the art of photography, illustrating the scene of a transaction and the relative location of objects, if verified as a true and accurate representation, is admissible in evidence in order to enable the jury to understand and apply the proved facts to the particular case."

In Galway *v.* Metropolitan Elev. R. Co., 58 Hun 610, 13 N. Y. Supp. 47, which was an action brought to restrain the operation of defendants' railway in front of plaintiff's premises, a photograph of a building on the corner opposite plaintiff's building was held admissible as tending to show the effect of defendants' structure on plaintiff's property.

19. New York, S. & W. R. Co. *v.* Moore, 105 Fed. 725; McGar *v.* Bristol, 71 Conn. 652, 42 Atl. 1000; Roosevelt Hospital *v.* New York Elev. R. Co., 66 Hun 633, 21 N. Y. Supp. 205; Nies *v.* Broadhead, 75 Hun 255, 27 N. Y. Supp. 52.

In Huntington Light & Fuel Co. *v.* Beaver (Ind. App.), 73 N. E. 1002, preliminary proof of the accuracy of photographs was made by a witness who testified that she saw the building "right away" after the explosion, and that the photographs introduced in evidence were photos of the building after the explosion. *Held*, competent and properly admitted. The court said: "It was

2. Time of Taking Immaterial. — Where photographs are shown to be correct representations of a place or locality where the transaction under investigation took place as it appeared at the time of the transaction, they are admissible in evidence without regard to the time when they were taken.[20]

3. Change of Conditions. — Where a substantial change in the condition or appearance of a place occurs between the time of the transaction under investigation and the time when photographs of such place were taken they are not admissible in evidence.[21]

not material that the witness did not see the photographs taken, but whether the witness who saw the building immediately after the explosion could say that the appearance of the building at that time was correctly represented by the photographs."

20. Barker *v.* Perry, 67 Iowa 146, 25 N. W. 100; Baustian *v.* Young, 152 Mo. 317, 53 S. W. 921, 75 Am. St. Rep. 462; Leeds *v.* New York Tel. Co., 79 App. Div. 121, 80 N. Y. Supp. 114.

In a personal injury case, photographs taken some three weeks after the accident were proved to be correct representations of the place where it occurred, except that there was snow on the ground when the photographs were taken. Fitzgerald *v.* Heldstrom, 98 Ill. App. 109.

In a case of personal injury caused by a defective sidewalk, photographs proved to exhibit the exact condition of the sidewalk and driveway where the injury was received, at the time it was received, except that there was no snow or ice on the ground, were held properly admitted in evidence. Considine *v.* Dubuque (Iowa), 102 N. W. 102.

Miller *v.* New York, 104 App. Div. 33, 93 N. Y. Supp. 227, was an action for personal injury caused by a hole in the street. The injury was received in April, 1902. A photograph of the hole in the street where plaintiff was injured taken in October, 1902, and proved to correctly represent the hole in the condition in which it was at the time of the accident, except that it was deeper then than when the picture was taken, was held admissible.

Photographs Taken Before the Transaction. — Tracy *v.* Baltimore & O. R. Co., 98 Fed. 633, was a libel in admiralty, for injury to a tug caused by the defective condition of a jetty. A photograph of the jetty taken three months before the injury occurred was held competent to show its condition at the time of the injury.

In condemnation proceedings for a railroad right of way a photograph of the premises, taken before the construction of the road, was held admissible. Omaha S. R. Co. *v.* Beeson, 36 Neb. 361, 54 N. W. 557.

21. Chicago & A. R. Co. *v.* Corson, 101 Ill. App. 115; Wabash R. Co. *v.* Farrell, 79 Ill. App. 508; Hampton *v.* Norfolk & W. R. Co., 120 N. C. 534, 27 S. E. 96, 35 L. R. A. 808.

In Maynard *v.* Oregon R. & Nav. Co. (Or.), 78 Pac. 983, an action for personal injury suffered in a railroad collision, photographs of the scene of the wreck taken the morning after the collision, after the wrecker had been clearing the track, and the conditions were somewhat changed from those which obtained when the collision took place, were introduced in evidence for the purpose of showing the great force of the collision. The court held that while the photographs were not taken at the exact time, the conditions had not so materially changed as to render them incompetent.

In an action for personal injuries received at a railroad crossing the plaintiff put in evidence a photograph of the crossing which showed that the defendant had erected gates since the accident. *Held*, the plaintiff did not lose his right to show the premises to the jury because the defendant had changed the situation. Stott *v.* New York, L. E. & W. R. Co., 66 Hun 633, 21 N. Y. Supp. 353.

4. Of Assumed Situations. — Photographs are not admissible in evidence merely to illustrate a hypothetical situation, or to explain the theories of a party as to the matter in controversy.[22]

VI. PHOTOGRAPHS OF WRITINGS.

1. Of Documents. — Photographs properly verified are admissible to prove the contents of documents charged to have been forged where the same have become illegible.[23] And, in the comparison of documents whose genuineness is questioned with those of undoubted genuineness, photographic copies of the same are admissible in evidence.[24] But it has been held that photographs of documents are not admissible if the original can be produced.[25]

2. Of Signatures. — Where the genuineness of signatures is called

22. In a personal injury case the defendant offered photographs, not only to show the condition of the place of the accident at the time it happened, but showing men in various assumed positions, and things in various assumed situations, merely serving to illustrate certain theories of the defendant as to how the accident happened. *Held*, not competent for the purpose. Babb *v.* Oxford Paper Co., 99 Me. 298, 59 Atl. 290.

Stewart *v.* St. Paul City R. Co., 78 Minn. 110, 80 N. W. 855, was an action for personal injury caused by the stopping of a car in such a manner that a passenger in alighting stepped into a hole in the street. About eight months after the accident the defendant took the same car to the *locus in quo*, and placed a crowbar vertically in the ground near it, to show the location of the hole into which plaintiff had stepped and photographed this and offered the photograph in evidence, with offers to prove that the situation was the same as at the time of the accident. *Held*, not error in the court below to refuse to admit the photograph.

23. In Duffin *v.* People, 107 Ill. 113, 47 Am. Rep. 431, the defendant was charged with forgery. The prosecution offered in evidence the promissory note alleged to have been forged, and a photographic copy thereof. The evidence showed that the officers of the bank who held the note observed that the ink in which the note was written was fading rapidly, and had the note photographed, and the photographic copy was offered in evidence simply to prove the words of the original, and not any peculiarity of handwriting, it appearing that since the photograph was taken the original had faded so that it had become practically illegible. *Held*, clearly competent.

24. Lucco *v.* United States, 23 How. (U. S.) 515. In the matter of Fosler's Will, 34 Mich. 21, the genuineness of the will was questioned, and at the probate thereof photographic copies of it were offered in evidence, and rejected. Upon appeal, the court held that photographic copies of the will might, without error, have been given to the jury with sufficient precautions to insure their identity and correctness, but that the rejection of them by the court below was not error.

25. Maclean *v.* Scripps, 52 Mich. 214, 17 N. W. 815. In Howard *v.* Illinois Trust & Sav. Bank, 189 Ill. 568, 59 N. E. 1106, an action of ejectment, the sole issue was the genuineness of a deed. A photograph of the deed, and of the same size, was held to be but a duplicate of the deed, and merely secondary evidence, which was not admissible without proof of the loss of the original; but a photograph enlarged beyond the size of the deed was held admissible.

In Geer *v.* Lumber & Min. Co., 134 Mo. 85, 95, 34 S. W. 1099, an action of ejectment, in order to defeat defendants' title the plaintiff undertook to prove that deeds purporting to have been made by a patentee of the

in question, and they are compared with signatures admitted or proved to be genuine, enlarged photographs of the compared signatures are admissible in evidence.[26] But it has been held improper for an expert to point out to the jury the difference between the photographic copies of the genuine and the disputed signatures.[27]

VII. PHOTOGRAPHS IN CRIMINAL CASES.

1. To Estabish Identity of Persons. — Photographs are admissible in evidence to establish the identity of persons charged with the commission of crime.[28] They are also admissible in trials for

land were forgeries. To establish a standard for comparing the handwriting of the grantor in the deeds, who was the patentee of the land, the plaintiff offered in evidence a photo-lithographic copy of the affidavit of actual settlement and cultivation, filed by the patentee with the register of the land office, the original being then on file in the department of the interior at Washington city. To this copy was attached a certificate of the commissioner of the general land office that the copy was the same size as the original, and a true and literal exemplification of the original, on file in his office. The court held the photo-lithographic copy so certified to be incompetent for the purpose, and said: "Without determining whether such a copy, the original of which would be admissible as a standard, and could not be produced, could be substituted, we are satisfied it could not be done unless preliminary proof was first made that the copy was exact and accurate in all respects. There was no such proof as preliminary to the introduction of this copy. The officer merely certifies that the copy is of the same size and 'is a true and literal exemplification of the original.' This certificate might have been made to a written copy as well as to this one."

26. United States *v.* Ortiz, 176 U. S. 422. In Marcy *v.* Barnes, 16 Gray (Mass.) 161, 77 Am. Dec. 405, an action on a promissory note, the genuineness of the maker's signature was in issue. Magnified photographic copies of defendant's genuine signature, and of the disputed signature, proved to be accurate in all respects excepting only as to size and color, were held to be admissible in evidence. See article "HANDWRITING."

27. Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538. Tome *v.* Parkersburg R. Co., 39 Md. 36, 91, 17 Am. Rep. 540, an action involving the genuineness of certificates of capital stock of a corporation, it was alleged that the signatures of the president of the corporation were forged. Photographic copies of certain genuine signatures were taken by a photographer who was an expert in handwriting, some being of the same size as the original, and others enlarged. These copies were admitted, together with testimony of the photographer, who was permitted to explain the difference between the genuine and those alleged to be forged, and to give his opinion, derived from a comparison of said copies with the originals, as to the genuineness of the signatures attached to the certificates in question. This evidence was held to be improperly admitted, because signatures cannot be proved by a direct comparison of hands—the collation of two papers in juxtaposition for the purpose of ascertaining by inspection if they were written by the same person. The court declared that the evidence was of that character which was held inadmissible by the common law as declared by the English jurists and the courts of Maryland, and announced its adherence to the common law rule. See article "HANDWRITING."

28. Com. *v.* Campbell, 155 Mass. 537, 30 N. E. 72; Com. *v.* Morgan, 159 Mass. 375, 34 N. E. 458; People *v.* Carey, 125 Mich. 535, 84 N. W. 1087; State *v.* Fulkerson, 97 Mo. App. 599, 71 S. W. 704; People *v.* Smith, 121 N. Y. 578, 24 N. E. 852; Russell *v.* State (Ala.) 38 So. 291.

murder for purpose of showing the identity of the persons killed.[29]

2. Photographs of Wounds. — Ordinary and X-ray photographs properly verified are admissible in evidence to show the nature and extent of wounds inflicted upon a person.[30] But if such photographs are not instructive, and the actual conditions can be established by the testimony of witnesses, they are not competent evidence.[31]

3. Of the Scene of Crime. — Photographs of the scene of a crime, if proved to correctly represent the place as it was at the time of the commission of the crime, are admissible in evidence.[32] And

In State *v.* Hasty, 121 Iowa 507, 96 N. W. 1115, the defendant was charged with adultery. A photograph of defendant's paramour, taken several years before the trial, was held admissible as tending to identify her as the female with whom the defendant lived.

29. Wilson *v.* United States, 162 U. S. 613; Malachi *v.* State, 89 Ala. 134, 8 So. 104; Beavers *v.* State, 58 Ind. 530; State *v.* Windahl, 95 Iowa 470, 64 N. W. 420; State *v.* Holden, 42 Minn. 350, 44 N. W. 123; Marion *v.* State, 20 Neb. 233, 29 N. W. 911; 57 Am. Rep. 825.

People *v.* Durrant, 116 Cal. 179, 48 Pac. 75, was a prosecution for murder. A sister of the deceased testified that she was living with her at the time of her disappearance. She was shown a photograph of the deceased, taken about three years before, and was asked whether or not the photograph was a fair representation of her sister as she was just before she disappeared. Over objection and exception she was permitted to answer. *Held*, competent, the court saying: "It is a general rule without contradiction that where a photograph is shown to be a faithful representation of what it purports to reproduce it is admissible as an appropriate aid to the jury in applying the evidence, and this is equally true whether the photograph be of persons, things or places."

In Udderzook *v.* Com., 76 Pa. St. 340, a trial for murder, the identity of the deceased was in question. A photograph of the person charged to have been killed was proved to be like a mutilated body found. It was held to be admissible as tending to establish the identity of the deceased.

30. State *v.* Powell (Del.) 61 Atl. 966; Franklin *v.* State, 69 Ga. 36, 47 Am. Rep. 748; State *v.* Matheson (Iowa), 103 N. W. 137; State *v.* Roberts (Nev.), 82 Pac. 100; People *v.* Fish, 125 N. Y. 136, 26 N. E. 319; Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

31. State *v.* Miller, 43 Or. 325, 74 Pac. 658.

32. Mow *v.* People, 31 Colo. 351, 72 Pac. 1069; Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097; State *v.* Hersom, 90 Me. 273, 38 Atl. 160; Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551; Com. *v.* Robertson, 162 Mass. 90, 38 N. E. 25.

Scene of Crime With Prearranged Figures. — In Shaw *v.* State, 83 Ga. 92, 9 S. E. 768, a trial for murder, a photograph of the place where the deceased was killed was admitted in evidence. Before the trial persons were placed on the scene of the homicide in the positions said to have been occupied by the defendant and his accomplices, and the photograph was then taken. It was claimed that the court erred in admitting this photograph on the ground that it was calculated to inflame the jury. *Held*, not error.

State *v.* O'Reilly, 126 Mo. 597, 29 S. W. 577, a trial for murder, a photograph of the interior of the saloon in which the homicide occurred was introduced in evidence, on which were grouped three prearranged figures to indicate the positions of the defendant, the deceased and the father of the deceased. The photograph was taken shortly after the killing, and more than three years before the trial, and was shown to be a true representation of the saloon at the time of the difficulty. It was held properly admitted in evidence for the

they are competent evidence if they show the condition of the place as it appeared by reason of the commission of the crime.[33]

purpose of illustrating the position of persons and places, and to better enable the witnesses to properly locate them. To same effect see People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54.

Contra. — In Fore *v.* State, 75 Miss. 727, 23 So. 710, a trial for murder, a series of photographs were introduced over the defendants' objection. It appeared that a witness for the state went to the scene of the homicide and placed a buggy with a man in it in the attitude which he said the deceased was when shot; he then put a man where he said the defendant was, and had the buggy and the two men and a wagon photographed. *Held,* improperly admitted, the court saying: "The photographs and all the evidence touching them should have been excluded. They were not simply reproductions of the scene of the homicide. They were photographic representations of *tableaux vivants* carefully arranged by the chief witness for the state, whereby his version of the tragical occurrence should be brought vividly before the mind's eye of the jury as the view of the actual occurrence, and not as the mere statement of the facts of that occurrence as detailed by this witness."

33. In Com. *v.* Fielding, 184 Mass. 484, 69 N. E. 216, the defendant was charged with burning insured property. Photographs representing the building that was burned were held admissible after having been verified.

In People *v.* Buddensieck, 103 N. Y. 487, 9 N. E. 44, the defendant was charged with manslaughter by reason of his negligent construction of a building which fell and killed a person. Photographs of the ruins of the fallen building, shown to be correct when taken, were held to be competent evidence, it being shown that there was no change in the condition of the building between the time it fell and the taking of the photographs.

In Paulson *v.* State, 118 Wis. 89, 94 N. W. 771, a trial for murder, it appeared that the body of the deceased was found in the ruins of a burned house. Photographs of the ruins and surrounding premises proved to be correct were held competent evidence.

PHYSICAL EXAMINATION.

By George E. Cryer.

CROSS-REFERENCES:

Demonstrative Evidence; Divorce;
Expert and Opinion Evidence;
Homicide;
Injuries to Person;
Marriage;
Negligence.

I. VOLUNTARY EXHIBITION OR EXAMINATION.

1. By Parties. — A. Civil Actions. — In Actions for Personal Injuries the court may in the exercise of its discretion permit the plaintiff to exhibit his injuries for the examination and inspection of the jury.[1] Thus it has been held proper to permit the exhibition

1. Mulhado *v.* Brooklyn City R. Co., 30 N. Y. 370; Louisville, N. A. & C. R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Indiana Car Co. *v.* Parker, 100 Ind. 181. See Ottawa *v.* Gilliland, 63 Kan. 165, 65 Pac. 252, 88 Am. St. Rep. 232; Union Pac. R. Co. *v.* Botsford, 141 U. S. 250.

Removal of Salve From Wound. There is no error in permitting the plaintiff to exhibit to the jury his injured leg, nor in refusing to compel him to remove the salve from the wound, both matters resting in the sound discretion of the trial court. Swift & Co. *v.* O'Neill, 88 Ill. App. 162, *affirmed* in 187 Ill. 337, 58 N. E. 416.

and examination of injured hands,[2] feet,[3] limbs,[4] eyes,[5] and other portions of the body,[6] and the uninjured limb may be exhibited with the injured one for purposes of comparison;[7] so also it is proper to allow the bones taken from the injured limb to be offered

2. Indiana Car Co. *v.* Parker, 100 Ind. 181; Barker *v.* Town of Perry, 67 Iowa 146, 25 N. W. 100.

3. Injured Foot. — Texas Midland R. Co. *v.* Brown (Tex. Civ. App.), 58 S. W. 44; Cunningham *v.* Union Pacific R. Co., 4 Utah 206, 7 Pac. 795. Where the plaintiff claimed injury to his foot, it was held no error to permit him to exhibit it to the jury after evidence to the effect that it had been permanently injured in the manner alleged in the petition and that its condition at the time of the trial was wholly due to such injury. City of Crete *v.* Hendricks (Neb.), 90 N. W. 215.

4. West Chicago St. R. Co. *v.* Grenell, 90 Ill. App. 30.

Injured Arm. — Jordan *v.* Bowen, 14 Jones & S. (N. Y. Super.) 355; Newport News & M. V. R. Co. *v.* Carroll, 17 Ky. L. Rep. 374, 31 S. W. 132; Swift & Co. *v.* Rutkowski, 82 Ill. App. 108. See also Prichard *v.* Moore, 75 Ill. App. 553.

Injured Leg. — City of Lanark *v.* Dougherty, 45 Ill. App. 266; Hiller *v.* Village of Sharon Springs, 28 Hun (N. Y.) 344.

Where the testimony tends to show that plaintiff's leg, which was broken by the accident, is shrivelled and withered because of the injury, he may exhibit it to the jury. Langworthy *v.* Twp. of Green, 95 Mich. 93, 54 N. W. 697; *citing* Whart. Crim. Ev., § 312; Best Ev., § 197; 1 Tayl. Ev., § 554; Abb. Tr. Ev. 599; 25 Cent. Law J. 3; 15 Cent. Law J. 2; and distinguishing Carstens *v.* Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. Rep. 606, in which the refusal to allow the defendant, who set up malpractice as a defense to the action for physician's services, to exhibit her injured limb, was held proper, the ground of distinction being that the fact to be demonstrated in the present case did not depend upon opinion evidence nor require scientific knowledge to pass upon, as it did in the case distinguished.

Ankle. — Edwards *v.* Common Council, 96 Mich. 625, 55 N. W. 1003.

5. In an action for injuries to the plaintiff's eye it was held no error to permit an examination of the plaintiff in the presence of the jury to see if pus continued to exude from the wound. McNaier *v.* Manhattan R. Co., 51 Hun 644, 4 N. Y. Supp. 310.

6. Where it appeared that several of the plaintiff's ribs were broken and that he was permanently injured, and the defendant contended that the injuries were not as serious as claimed, it was held no error for the trial court to permit the plaintiff to exhibit the injured portion of his body to the jury. "Such physical exhibition was necessary to a demonstration of the deformity testified to by the physician, and tended to make the description of the injury more intelligible to the jury." Perry *v.* Metropolitan St. R. Co., 68 App. Div. 351, 74 N. Y. Supp. 1, distinguishing Rost *v.* Brooklyn Heights R. Co., 10 App. Div. 477, 41 N. Y. Supp. 1069, on the ground that there the nature and extent of the injury was not questioned and the exhibition was merely calculated to arouse the passion and prejudice of the jury.

Exhibition of Body of Injured Child held proper. Lacs *v.* Everard's Breweries, 61 App. Div. 431, 70 N. Y. Supp. 672; Citizens' St. R. Co. *v.* Willoeby, 134 Ind. 563, 33 N. E. 627.

7. Exhibition of injured leg in connection with uninjured one held not improper. City of Topeka *v.* Bradshaw, 5 Kan. App. 879, 48 Pac. 751.

Measurement and Comparison of Limbs. — In Missouri, K. & T. R. Co. *v.* Moody, 35 Tex. Civ. App. 46, 79 S. W. 856, it was held no error to permit the plaintiff to exhibit both his injured and uninjured arm and to allow his counsel to measure them with a string showing the difference

in evidence.[8] Such an exhibition may be made in connection with the testimony of an expert for the purposes of illustration and explanation.[9]

B. Criminal Case. — In the trial of criminal assaults the court may permit the injured person to exhibit his wounds to the jury.[10]

2. Third Persons as Witnesses. — Where the nature and extent of injuries of third persons are directly in issue the court may permit them to exhibit their injuries to the jury,[11] unless the exhibition would be indecent.[12] But it is not error to refuse to allow

in size. "We are unable to see any impropriety in the exhibition of injuries of this character to the jury, in order that they may see for themselves the extent of the injuries sustained."

8. The bones of the plaintiff's injured leg which had been amputated were held properly admitted for the inspection of experts. Williams *v.* Nally, 20 Ky. L. Rep. 244, 45 S. W. 874.

In Newport News & M. V. R. Co. *v.* Carroll, 17 Ky. L. Rep. 374, 31 S. W. 132, it was held no error to permit the plaintiff to exhibit his injured arm from which the bones had been taken, nor to allow the bones themselves to be exhibited to the jury.

9. Freeman *v.* Hutchinson, 15 Ind. App. 639, 43 N. E. 16. Plaintiff may properly exhibit his injured arm before the jury to the surgeon who is testifying as to its condition. Mulhado *v.* Brooklyn City R. Co., 30 N. Y. 370; Winner *v.* Lathrop, 67 Hun 511, 22 N. Y. Supp. 516.

10. Barker *v.* Town of Perry, 67 Iowa 146, 25 N. W. 100, 1 Hale's P. C. 636.

11. In an action to recover damages on account of alleged sales of intoxicating liquors to plaintiff's husband, where the alleged damage was the freezing of the latter's hands and feet while intoxicated, it was held no error to permit the husband, who testified as a witness in plaintiff's favor, to exhibit his maimed hands and feet to the jury, over the objection of defendant. "Plaintiff was suing for injury to her means of support, and the extent of that injury depended upon the extent to which the husband's ability to labor and earn money had been impaired. There was no way in which the exact nature and extent of his disability could be made so clear to the apprehension of the jurors as by placing him before them, and letting them personally see and examine him. It will be conceded that, in ordinary actions for damages by the person who has sustained a bodily injury, this kind of evidence is admitted, as tending to show the extent of the resulting pain and suffering; and, of course, plaintiff in this case could not be allowed to recover for the pain and suffering of her husband. But this is not the only, nor, indeed, the principal, ground for allowing such testimony. The most common justification for its admission is the one which we have already suggested; that is, it shows the 'extent of the disability' which is alleged to have been occasioned by the defendants' neglect or wrongful act. . . . Nor is the evidence objectionable because it may tend to excite the sympathies of the jury. . . . While the husband's hands and feet were all maimed, neither member had suffered entire amputation; and it was more important that the jury should be able to see for themselves whether the disability thus occasioned was entire or partial, and, if partial, the extent to which he was thereby incapacitated for manual labor. This could be seen far better than the most expert witnesses could describe it. It is inevitable, perhaps, that evidence of this nature should have a tendency to excite human sympathies, but these collateral and incidental effects do not render improper evidence which is otherwise admissible." Faivre *v.* Mandercheid, 117 Iowa 724, 90 N. W. 76.

12. Garvik *v.* Burlington, C. R. & N. R. Co., 124 Iowa 691, 100 N.

a third person to exhibit a similar injury for the purpose of determining what the probable effect of plaintiff's injury will be.[13]

3. Extent of Exhibition and Examination. — The injured member may not only be exhibited but the plaintiff may be permitted to make a physical demonstration of the extent to which its functions have been impaired.[14] And the jury may be allowed to carry their examination to the point of using their hands to determine the extent or result of the injury.[15] The plaintiff may be placed in such a position as to give the jury the best view of his injuries.[16]

4. Limitations on Exhibition or Examination. — A. GENERALLY. The right to make such an exhibition or examination is not abso-

W. 498, in which the action of the court in permitting the jury to retire for a private examination of the private parts of a witness to determine his capacity for sexual intercourse was held error for several reasons, among them its indecency.

13. In an action against a benefit society to recover benefits for permanent disability, it is not error to refuse to permit a witness for the defendant to exhibit an injury of the same character as plaintiff's from which it is claimed the witness has recovered, where the defendant has been permitted to question the witness fully. Such an exhibition would have raised a collateral issue. Grand Lodge B. of R. T. *v.* Randolph, 186 Ill. 89, 57 N. E. 882.

14. See articles "DEMONSTRATIVE EVIDENCE" and "EXPERIMENTS."

In Citizens' St. R. Co. *v.* Willoeby, 134 Ind. 563, 33 N. E. 627, an action by a minor for personal injuries, it was held no error to permit a physician testifying for the plaintiff to exhibit the latter's injuries and to place him in different attitudes for the purpose of explaining the nature of the injuries. Plaintiff may be permitted to exhibit his injured legs to the jury and to have a physician demonstrate the absence of feeling in them by sticking pins in them. Missouri, K. & T. R. Co. *v.* Lynch (Tex. Civ. App.), 90 S. W. 511; Osborne *v.* City of Detroit, 32 Fed. 36. See article "EXPERIMENTS." The plaintiff in an action for personal injuries may be permitted to walk as best he could before the jury to show the extent of his injuries. Birmingham Light & Power Co. *v.* Rutledge (Ala.), 39 So. 338.

The plaintiff claiming injuries to his knee may exhibit and use it in the presence of the jury, and the fact that he may by false movements impose upon the jury goes to the weight but not to the competency of the evidence. "It produced a higher order of evidence than is usually attainable, in that it added physical illustration and demonstration to oral statement, and impressed the court and jury through the sense of sight as well as through that of hearing. It may be true that a designing witness can exaggerate the true condition of an injured limb by false and constrained movements, and yet that cannot render the performance of physical acts inadmissible as evidence any more than the equally obvious fact that he may give undue and false coloring to his oral statements, renders him incompetent to testify by word of mouth. That objection might be urged against all human testimony, but it goes only to the question of weight or credibility, and does not reach that of competency or admissibility." Arkansas River Packet Co. *v.* Hobbs, 105 Tenn. 29, 58 S. W. 278.

15. Examination by Jury. — In an action for damages for an assault and battery, it was held no error to permit the jury by means of their fingers to examine the scars upon the plaintiff's head caused by the assault in question. Jackson *v.* Wells, 13 Tex. Civ. App. 275, 35 S. W. 528.

16. The plaintiff, a boy of twelve, may be placed upon a table so that the jury may better observe his in-

lute but rests in the sound discretion of the trial court.[17] The mere fact that the nature and extent of the injuries is not seriously controverted, or that there is other sufficient evidence does not alone deprive the plaintiff of the right to exhibit his injuries;[18] nor does the fact that it might arouse the sympathy or prejudice of the jury.[19] But both of these facts are important considerations in the exercise of the court's discretion.[20] Preliminary evidence that no material change in the condition of the injury has occurred

jured leg. Jefferson Ice Co. *v.* Zwicokoski, 78 Ill. App. 646.

17. May *v.* Northern Pac. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111; Lanark *v.* Dougherty, 153 Ill. 163, 38 N. E. 892; Springer *v.* City of Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609.

18. See Orscheln *v.* Scott, 90 Mo. App. 352.

Exhibition of Rupture. — Permitting plaintiff in an action for personal injuries to exhibit to the jury a rupture alleged to have been caused by the accident was held not to be a clear abuse of discretion, although the existence, nature and extent of the rupture were not controverted by the defendant who so stated to the court at the time. "It is questionable whether the exhibition was proper under the circumstances, and whether its only effect would not be to excite feeling rather than to aid in settling any disputed question; but we do not feel prepared to say that such was the case, or that there was a clear abuse of the discretion confided to the trial court." Chicago & Alton R. Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680, *affirming* 70 Ill. App. 550.

Where the injury complained of was the loss of the plaintiff's foot, it was held no error to permit him to exhibit his injured limb to the jury, although the defendant did not deny the loss of the foot and the defendant claimed that the exhibition was therefore unnecessary. "Such action, however, regardless of the issues is permitted in nearly all jurisdictions and this court has looked with approval on this practice." Chicago, B. & Q. R. Co. *v.* Krayenbuhl (Neb.), 98 N. W. 44.

19. See Chicago & Alton R. Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680, *affirming* 70 Ill. App. 550; Faivre *v.* Mandercheid, 117 Iowa 724, 90 N. W. 76.

Shoulder From Which Arm Has Been Amputated. — In Carrico *v.* West Virginia Cent. & P. R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50, an action for personal injuries, it was held no error to permit the plaintiff to unclothe and exhibit to the jury the shoulder from which his arm had been severed by amputation. Being relevant and competent to prove the nature of the injury it could not be excluded because there may have been danger of inspiring sympathy in the jury and increasing the damages.

Empty Eye-Socket. — Although in an action for assault and battery the exhibition to the jury of the plaintiff's eye-socket may tend to excite sympathy and pity yet it is the best evidence in regard to the extent and character of the injury, and permitting the plaintiff to exhibit it to the jury is not error even though it was admitted that the defendant had cut and destroyed the eye. Orscheln *v.* Scott, 90 Mo. App. 352.

20. See Jefferson Ice Co. *v.* Zwicokoski, 78 Ill. App. 646.

"It is the undoubted rule that the exhibition of an injury or an injured member of the body to the jury is proper where it is the subject of examination, when such exhibition is necessary to enable the jury to understand the circumstances surrounding the injury, or to obtain a more comprehensive and intelligent conception of the conditions which existed when the injury was received, or of the character of the injury itself. But where such exhibition is not essential or necessary to enable the jury to better understand the conditions, or where the jury may be led to illegitimate considerations on account of it, then it may become improper," as

has been held necessary under some circumstances,[21] especially when the condition at some previous time is in issue.[22]

B. Female Plaintiff. — The fact that the plaintiff is a woman and that the exhibition may for this reason unduly stimulate the sympathy and prejudice of the jury is no valid objection to permitting it.[23]

C. Indecency. — The exhibition may be of such an indecent nature that its allowance would be error.[24]

D. Physical Capacity. — An exhibition of the person to the jury may be proper under some circumstances, to show the physical capacity or incapacity of the person in question,[25] but where this fact could not be reliably determined from a mere inspection by a non-expert, the exhibition would be likely to mislead the jury and it seems is not permissible.[26]

where the exhibition would merely tend to unduly prejudice the jury. Rost *v.* Brooklyn Heights R. Co., 10 App. Div. 477, 41 N. Y. Supp. 1069. Where the extent of the plaintiff's injuries is not controverted and both he and his physician have testified in that regard there is no abuse of discretion in refusing to permit such an exhibition. Ewald *v.* Michigan Cent. R. Co., 107 Ill. App. 294.

21. In French *v.* Wilkinson, 93 Mich. 322, 53 N. W. 530, an action for injuries to plaintiff's leg from a dog bite, it was held error to permit the plaintiff to exhibit his leg to the jury at the trial more than three years after the injury and nine months after the expiration of the period of disability alleged, without introducing any testimony to show that no change for the worse had occurred.

22. Garvik *v.* Burlington, C. R. & N. R. Co., 124 Iowa 691, 100 N. W. 498.

23. See Edwards *v.* Common Council, 96 Mich. 625, 55 N. W. 1003; Louisville, N. A. & C. R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

Where the injury complained of was the crushing of the plaintiff's leg between the ankle and knee, it was held no error to permit her to exhibit the injured limb to the jury, although such an exhibition was objected to as likely to unduly excite the sympathies of the jury, especially as the plaintiff was a woman, young, handsome and attractive. The court says: "She was entitled, in sustaining her claim, to resort to the same proofs that she might have resorted to if she had been aged, ugly, and repulsive." Omaha St. R. Co. *v.* Emminger, 57 Neb. 240, 77 N. W. 675.

24. See Carstens *v.* Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. Rep. 606.

Indecent Exhibition Not Allowable. — In Brown *v.* Swineford, 44 Wis. 282, 28 Am. Rep. 582, a civil action for assault and battery, the action of the trial court in permitting the plaintiff to exhibit his organs of generation to the jury was severely censured as calculated to disgrace the administration of justice and bring it into ridicule and contempt. No such indecency is ever necessary or should be tolerated in court. "If the condition of any private part of the body of any party male or female is material on any trial it should be privately examined by experts, out of court, and expert testimony be given of it." See also Garvik *v.* Burlington, C. R. & N. R. Co., 124 Iowa 691, 100 N. W. 498, in which a similar exhibition to the jury in private, was held error.

25. See *supra*, I, 3.

26. Where the physical capacity of a third person, one of defendant's servants, to rape the plaintiff, was in issue, it was held error to permit the jury to retire and examine such person's penis, for the reason among others, that this fact could not be determined by a non-expert from a mere examination. Garvik *v.* Burlington, C. R. & N. R. Co., 124 Iowa 691, 100 N. W. 498.

E. Court's Refusal to Permit of Its Own Motion. — While of course the court of its own motion may refuse to permit an examination in open court which would be indecent or otherwise improperly interfere with the trial, it has been held error to refuse to permit an examination to which no legal objection was made and which was perfectly proper under the circumstances of the case.[27]

II. POWER TO ORDER PHYSICAL EXAMINATION OR EXHIBITION.

1. Writ de Ventre Inspiciendo. — The *writ de ventre inspiciendo* was granted in certain cases at common law for the purpose of determining the question of pregnancy,[28] but it is said that the practice has never prevailed in the United States and is repugnant to common right.[29]

2. In Actions for Divorce or Nullity of Marriage. — A. Generally. — In an action for divorce or to nullify a marriage on the ground of impotence the court has power to order the defendant to submit to a physical examination by experts for the purpose of qualifying them to testify as to the alleged incapacity.[30] This power is based upon absolute necessity and may be exercised not-

27. In Hall *v.* Manson, 99 Iowa 698, 68 N. W. 922, 34 L. R. A. 207, an action for damages for injuries to the plaintiff's foot and leg in which the testimony of opposing physicians was in direct conflict as to the size of the injured leg as compared with the uninjured one. The refusal of the court to permit the measurement of the leg in the presence of the jury was held error. The plaintiff, a woman, while apparently unwilling to permit the exposure made no legal objection, but the court of its own motion refused to permit the exhibition.

28. 1 Bl. Com. 456; Briggs *v.* Morgan, 2 Hagg. Con. 324, *s. c.* 3 Phill. 325; *In re* Blakemore, 14 L. J. Ch. (N. S.) 336; Union Pac. R. Co. *v.* Botsford, 141 U. S. 250.

29. McQuigan *v.* Delaware, L. & W. R. Co., 129 N. Y. 50, 29 N. E. 235, 26 Am. St. Rep. 507, 14 L. R. A. 466; Roberts *v.* Ogdensburgh & L. C. R. Co., 29 Hun. (N. Y.) 154; Neuman *v.* Third Ave. R. Co., 18 Jones & S. (N. Y. Super.) 412. See also May *v.* Northern Pac. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111.

30. Briggs *v.* Morgan, 3 Phill. 325; Brown *v.* Brown, 1 Hag. Ec. 523; Neuman *v.* Third Ave. R. Co., 18 Jones & S. (N. Y. Super.) 412; Newell *v.* Newell, 9 Paige's Ch. (N. Y.) 25; Devenbagh *v.* Devenbagh, 5 Paige's Ch. (N. Y.) 554. 28 Am. Dec. 443, Anonymous, 35 Ala. 226. See May *v.* Northern Pac. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111.

Although the statute makes no provision for such an examination the court has power in an action to nullify a marriage on the ground of impotence to compel a physical examination of the defendant. This was the settled practice of the ecclesiastical courts of England. LeBarron *v.* LeBarron, 35 Vt. 365; *citing* Norton *v.* Seton, 1 Eng. Eccl. Rep. 384; Briggs *v.* Morgan, 1 Eng. Eccl. Rep. 408, and quoting from the latter case: "It has been said that the means resorted to for proof on these occasions, are offensive to natural modesty; but nature has provided no other means, and we must be under the necessity of saying that all relief shall be denied, or of applying the means within our power. The court must not sacrifice justice to notions of delicacy of its own."

withstanding it offends the modesty or delicacy of the examined party, but its exercise should not extend beyond the necessity.[31] So also when necessary the court may order the plaintiff to likewise submit to such an examination for the purpose of determining where the fault lies.[32]

B. On Court's Own Motion. — It seems that the court might of its own motion order an examination of both parties.[33]

C. Time for Application. — The application for the order must be timely and if not the court may in its discretion deny it.[34]

D. Nature and Extent of Examination. — The court may order such a surgical or other examination as may be necessary to determine the facts.[35] In selecting the surgeons and attendants the court or master should have due regard to the wishes and feelings of the party examined and no other person should be present without the latter's consent.[36]

E. Method of Enforcement. — The cases dealing with the power to make the order assume that the court could compel obedience but do not specify the method of enforcement.[37] But it has been held that if the complainant refuse to comply his bill may be dismissed,[38] and in case of a non-resident defendant whose

31. "The power, however, resting in necessity ends where the necessity ends, and it has been held that where the party has been examined by physicians, no further inspection will be ordered." Neuman *v.* Third Ave. R. Co., 18 Jones & S. (N. Y. Super.) 412; *citing* Brown *v.* Brown, 1 Hag. Ec. 523.

In a suit brought against a female, the court will not compel her to submit to a further examination, if it appears that she has been already sufficiently examined by competent surgeons, whose testimony can be obtained by the complainant, to show that her physical incapacity is incurable. Devenbagh *v.* Devenbagh, 5 Paige's Ch. (N. Y.) 554, 28 Am. Dec. 443. But in a suit by a husband to annul a marriage on the ground of the physical incapacity of the defendant, if the answer admits the present incapacity, but denies that it existed at the time of the marriage, and the nature of the incapacity is such as to render a surgical examination of the defendant necessary, in connection with a personal examination on oath as to the commencement and progress of the disease which has created the incapacity, the court will direct the defendant to submit to such examination, although she has been previously examined *ex parte* and without oath by her own medical attendants. Newell *v.* Newell, 9 Paige's Ch. Rep. 25.

32. On a bill for divorce by the wife on the ground of physical incapacity by reason of the abnormal proportions of the parts of the husband, an examination of plaintiff by physicians or matrons skilled in such matters to be appointed by the court, was held proper and necessary. Anonymous, 89 Ala. 291, 7 So. 100, 18 Am. St. Rep. 116, 7 L. R. A. 429.

33. Anonymous, 89 Ala. 291, 7 So. 100, 18 Am. St. Rep. 116, 7 L. R. A. 429.

34. Where the application was not made until after publication of the testimony, it was held no error to deny the request as it was discretionary with the court to receive evidence after publication. Anonymous, 35 Ala. 226.

35. Devenbagh *v.* Devenbagh, 5 Paige's Ch. (N. Y.) 554, 28 Am. Dec. 443; Newell *v.* Newell, 9 Paige's Ch. (N. Y.) 25.

36. Devenbagh *v.* Devenbagh, 5 Paige's Ch. (N. Y.) 554, 28 Am. Dec. 443.

37. See cases *supra* and also *infra*.

38. Anonymous, 89 Ala. 291, 7 So.

deposition has been taken his testimony might be suppressed.[39]

3. In Actions for Personal Injuries. — A. GENERALLY. — The courts are in conflict upon the question whether a physical examination of the plaintiff in an action for personal injuries can be ordered without his consent or acquiescence. The numerical weight of authority seems to be in favor of the exercise of the power,[40]

100, 18 Am. St. Rep. 116, 7 L. R. A. 425.

39. Anonymous, 35 Ala. 226.

40. *Alabama.* — Alabama G. S. R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442.

Arkansas. — Sibley *v.* Smith, 46 Ark. 275, 55 Am. Rep. 584.

Indiana. — City of South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 212, 54 L. R. A. 396; Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462.

Iowa. — Schroeder *v.* Chicago, R. I. & P. R. Co., 47 Iowa 375.

Kansas. — Ottawa *v.* Gilliland, 63 Kan. 165, 65 Pac. 252, 88 Am. St. Rep. 232.

Kentucky. — Louisville R. Co. *v.* Hartlege, 25 Ky. L. Rep. 152, 74 S. W. 742.

Michigan. — Graves *v.* Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641 (plaintiff's hand and arm).

Minnesota. — Wittenberg *v.* Onsgard, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141.

Missouri. — Shepard *v.* Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 390 (modifying Loyd *v.* Hannibal & St. J. R. Co., 53 Mo. 599); Sidekum *v.* Wabash, St. L. & P. R. Co., 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549.

North Dakota. — Brown *v.* Chicago, M. & St. P. R. Co., 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564.

Ohio. — Miami & Montgomery Tpk. Co. *v.* Baily, 37 Ohio St. 104.

Washington. — Lane *v.* Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153.

Wisconsin. — White *v.* Milwaukee City R. Co., 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154.

"In a civil action for physical injuries, where the plaintiff tenders an issue as to his physical condition, and appeals to the courts of justice for redress, it is within the power of the trial court, in the exercise of a sound discretion, in proper cases, upon an application reasonably made, under proper safeguards designed to preserve the rights of both parties, to order such an inspection." Wanek *v.* Winona, 78 Minn. 98, 80 N. W. 851, 79 Am. St. Rep. 354, 46 L. R. A. 448.

Examination of Eyes. — Where the plaintiff claimed temporary and permanent injury to his eyes, it was held that the court erroneously refused to compel plaintiff to submit to a physical examination by defendant's physician for the purpose of qualifying the latter to give expert evidence. Such examination is compellable in the discretion of the court. Atchison, T. & S. F. R. Co. *v.* Thul, 29 Kan. 466, 44 Am. Rep. 659.

In Georgia. — The case of Richmond & D. R. Co. *v.* Childress, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808, holding that the court has power to order an examination, apparently is based upon a statute providing that "every court has power to control in furtherance of justice the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." Hence it has been said that this case is not authority for the exercise of the power of compelling an examination under the common law (Austin & N. W. R. Co. *v.* Cluck, 97 Tex. 172, 77 S. W. 403, 104 Am. St. Rep. 863, 64 L. R. A. 494); but the court approves the authorities in other states, recognizing the power.

In Indiana the power was at first denied. Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 4 L. R. A. 90; Terre Haute & I. R. Co. *v.* Brinker, 128 Ind. 542, 26 N. E. 178; Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E.

although some of the courts whose opinions are generally regarded as most weighty are opposed to it.[41] In some cases where the question has arisen the court has expressly refused to pass upon it, preferring to base its decision upon the particular facts of the case.[42]

860. But these cases were overruled in City of South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 212, 54 L. R. A. 396.

41. *United States.* — Union Pac. R. Co. *v.* Botsford, 141 U. S. 250; Illinois Cent. R. Co. *v.* Griffin, 80 Fed. 278 (holding that such an examination cannot be compelled either before or during the trial).

Delaware. — Mills *v.* Wilmington City R. Co., 1 Marv. 269, 40 Atl. 1114.

Illinois. — Pittsburgh, C. C. & St. L. R. Co. *v.* Story, 104 Ill. App. 132; Peoria, D. & E. R. Co. *v.* Rice, 144 Ill. 227, 33 N. E. 951; Joliet St. R. Co. *v.* Call, 143 Ill. 177, 32 N. E. 389, *affirming* 42 Ill. App. 41. See Chicago, B. & Q. R. Co. *v.* Reith, 65 Ill. App. 461.

Massachusetts. — Stack *v.* New York, N. H. & H. R. Co., 177 Mass. 155, 58 N. E. 686, 83 Am. St. Rep. 269, 52 L. R. A. 328.

Montana. — May *v.* Northern Pac. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111.

New York. — McQuigan *v.* Delaware, L. & W. R. Co., 129 N. Y. 50, 29 N. E. 235, 26 Am. St. Rep. 507, 14 L. R. A. 466; Neuman *v.* Third Ave. R. Co., 18 Jones & S. (N. Y. Super.) 412; Cole *v.* Fall Brook Coal Co., 159 N. Y. 59, 53 N. E. 670, *affirming* 87 Hun 584, 34 N. Y. Supp. 572; McSwyny *v.* Broadway & S. A. R. Co., 54 Hun 637, 7 N. Y. Supp. 456; Roberts *v.* Ogdensburgh & L. C. R. Co., 29 Hun 154 (disapproving Walsh *v.* Sayre, 52 How. Pr. 334, and Shaw *v.* Van Rensselaer, 60 How. Pr. 143).

Oklahoma. — Kingfisher *v.* Altizer, 13 Okla. 121, 74 Pac. 107 (the court while recognizing that by the weight of authority the court has the power to compel a physical examination when the necessities of the case demand it, nevertheless regards the decision of the supreme court of the United States as binding upon it).

Texas. — Austin & N. W. R. Co. *v.* Cluck, 97 Tex. 172, 77 S. W. 403, 104 Am. St. Rep. 863, 64 L. R. A. 494; St. Louis & S. W. R. Co. *v.* Lindsey (Tex. Civ. App), 81 S. W. 87; International & G. N. R. Co. *v.* Butcher (Tex. Civ. App.), 81 S. W. 819; Galveston, H. & S. A. R. Co. *v.* Sherwood (Tex. Civ. App.), 67 S. W. 776; Gulf, C. & S. F. R. Co. *v.* Pendery, 14 Tex. Civ. App. 60, 36 S. W. 793; Gulf, C. & S. F. R. Co. *v.* Brown (Tex. Civ. App.), 75 S. W. 807.

Examination in Court. — The refusal of the trial court to compel the plaintiff in a personal injury action to submit to an examination of his injured eyes by a physician in the presence of the jury, is not error. The court has no power to make or enforce such an order. Parker *v.* Enslow, 102 Ill. 272, 40 Am. Rep. 588.

Plaintiff Willing. — Counsel Unwilling. — Where the plaintiff upon being questioned expressed his willingness to submit to an examination if his counsel were willing, and the latter refused to permit it, it was held no error to refuse to grant the order. Ft. Worth & R. G. R. Co. *v.* White (Tex. Civ. App.), 51 S. W. 855.

For a Full Discussion of the cases and the reasons urged for and against the exercise of the power to compel submission to a physical examination, see the opinion of Halloway, J., in May *v.* Northern Pac. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111.

42. In Easler *v.* Southern R. Co., 60 S. C. 117, 38 S. E. 258, the refusal of the trial court to order a physical examination of the plaintiff was held no error on the ground that there was no statutory provision empowering the court to order a physical examination in such case, and on the further ground that even conceding the power the application therefor had not been made in accordance with the statutes govern-

B. Reasons Urged For and Against Exercise of Power. a. *Common Law Precedents.* — There is no common law precedent for the exercise of this power in personal injury actions,[43] though an attempt has been made to explain this fact as due to the recent rapid increase in the number of actions of this kind and the submission to an examination without question.[44] Some courts have found a precedent in the writ *de ventre inspiciendo* and the examination which is sometimes ordered in divorce suits.[45]

b. *Inherent Power.* — The courts upholding the exercise of the power to order a physical examination can logically base it upon only one fundamental ground, the inherent power of the court in the furtherance of justice, and this is the stand taken by most of

ing an examination before trial, but was made independently and not in pursuance of such provisions. "These views render unnecessary the consideration of the question whether the court would have the power, in absence of statutory provisions, to order the physical examination of a party to the action in behalf of the adverse party before the trial of the case." In City of Chadron *v.* Glover, 43 Neb. 732, 62 N. W. 62, the court in discussing the power to order the plaintiff to submit to a physical examination by a commission of experts appointed for that purpose, says: "It has been twice intimated that it is within the power of the court to make such an order (Sioux City & P. R. Co. *v.* Finlayson, 16 Neb. 578; Ellsworth *v.* City of Fairbury, 41 Neb. 881). In each case, however, the court disclaimed the intention of deciding the question. It was not necessary in either of those cases and it is not necessary here."

43. Union Pac. R. Co. *v.* Botsford, 141 U. S. 250; McQuigan *v.* Delaware, L. & W. R. Co., 129 N. Y. 50, 29 N. E. 235, 26 Am. St. Rep. 507, 14 L. R. A. 466; May *v.* Northern Pac. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111; Austin & N. W. R. Co. *v.* Cluck, 97 Tex. 172, 77 S. W. 403, 104 Am. St. Rep. 863, 64 L. R. A. 494; Stack *v.* New York, N. H. & H. R. Co., 177 Mass. 155, 58 N. E. 686, 83 Am. St. Rep. 269, 52 L. R. A. 328.

44. Union Pac. R. Co. *v.* Botsford, 141 U. S. 250, dissenting opinion of Brewer, J.; City of South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 212, 54 L. R. A. 396. But for an answer to this, see Austin & N. W. R. Co. *v.* Cluck, 97 Tex. 172, 77 S. W. 403, 104 Am. St. Rep. 863, 64 L. R. A. 494.

45. Schroeder *v.* Chicago, R. I. & P. R. Co., 47 Iowa 375. In Lane *v.* Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153, it is contended that the authority of courts to compel a physical examination in divorce cases is a precedent for the exercise of such a power in personal injury actions; that the public has as much interest in the attainment of justice between individuals as it has in upholding or dissolving the marriage state. "The admission that the court has power to make the order whenever it is deemed requisite to ascertain the fact of incapacity in a divorce action seems to us an argument in favor of the existence of the power to make such an order in the present case. It exists by implication, and may be exercised in either case, whenever the demands of justice require it."

Contra. — The writ *de ventre inspiciendo* does not prevail in this country. "The practice in England is *sui generis*, and has never been adopted here. It may have originated in the peculiar favor shown to heirs by the law of England, but whatever its origin, it seems repugnant to common right, and the fact that in this instance only have the courts of England exercised the power to compel the examination of the person in a civil proceeding, tends to show that the power is not there regarded as general, but special and peculiar, and

them.[46] On the other hand, the courts denying the power while recognizing that it might be desirable in some instances, contend that it would be too liable to abuse and that however desirable such a power may be, its creation is not within the judicial province but is a matter for the legislature.[47] The argument that the power is based upon the necessity of securing the best and most reliable evidence in the furtherance of justice, is met by the contention

limited to the particular case. The doctrine of the cases in chancery . . . that in an action to procure a decree of nullity of marriage on the ground of impotence or sexual incapacity, the chancellor may compel the defendant to submit to a surgical examination, is a graft from the civil and common law, and, as has been said, 'rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction.'" McQuigan *v.* Delaware, L. & W. R. Co., 129 N. Y. 50, 29 N. E. 235, 26 Am. St. Rep. 507, 14 L. R. A. 466. See also May *v.* Northern Pac. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111.

46. Brown *v.* Chicago, M. & St. P. R. Co., 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564; Schroeder *v.* Chicago, R. I. & P. R. Co., 47 Iowa 375; Lane *v.* Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153.

"The fundamental principle . . . is an ancient doctrine of the common law, limited, it is true, to a few classes of cases, among them mayhem and divorce cases, wherein impotency was charged; but as the sources of evidence have been extended to parties and in many other ways, its application has been expanded to meet new conditions. The doctrine rests upon the principle that justice is the object of judicial investigation, and that courts charged with its administration, as a necessary means of attaining that end, have inherent power to require the production of the most infallible evidence. That its application to personal injury cases is a modern practice does not disprove its common law origin. As was well said by Justice Brewer in his dissenting opinion in Union, etc., Co. *v.* Botsford, 141 U. S. 250, 258, 11 Sup. Ct. 1000, 35 L. Ed. 734: 'The silence of common law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages, in early days, was, compared with later times, limited; and very few of those difficult questions as to the nature and extent of the injuries, which now form an important part of such litigation, were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute. Certainly the power of the courts and of the common law courts to compel a personal examination was, in many cases, often exercised and unchallenged. Indeed, wherever the interests of justice seemed to require such an examination, it was ordered.' . . . Courts are instituted by the state to administer impartial justice to contending parties. In such contests it is the duty of the court to bestow upon the litigants equal and exact justice. This cannot be done without the court first obtaining the exact and full truth concerning the matters in controversy. Hence from this duty of the court to dispense exact justice is essentially implied all power necessary to its performance, which includes the power to make subservient to its order all persons and things that will afford the most reliable evidence." City of South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 212, 54 L. R. A. 396.

47. May *v.* Northern Pac. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111; Austin & N. W. R. Co. *v.* Cluck, 97 Tex. 172, 77 S. W. 403, 104 Am. St. Rep. 863, 64 L. R. A. 494.

"We cannot say that the exercise

that in so doing courts are confined to the machinery provided by the common and statute law.[48]

c. *Inviolability of Person.* — (1.) **Generally.** — Some courts have refused to order an examination on the ground that it would violate

of the power claimed might not in some cases promote justice and prevent fraud. On the other hand, unless carefully guarded, it would be subject to grave objections. But we have to deal only with the question of the power of the courts, in the absence of any legislation. It is very clear that the power is not a part of the recognized and customary jurisdiction of courts of law or equity. The doctrine that courts have an inherent jurisdiction to mould the proceedings to meet new conditions and exigencies, is true but in a limited sense. They cannot, under cover of procedure or to accomplish justice in a particular case, invade recognized rights of person or property. No court, we suppose, can abrogate an established rule of evidence, as for example, the rule that hearsay evidence is inadmissible, or the rule of the common law that parties shall not be witnesses, or that interest disqualifies. They may apply existing rules to new circumstances. Nor is it, we conceive, within the power of the court to create remedies unknown to the common law, or institute a procedure not according to the course of the common law. It is most important that courts should proceed under the sanction of an orderly and regulated jurisdiction, and that as little as possible should be left to the discretion of a judge. The exercise by the court of the power now invoked, as has been shown, is not sanctioned by any usage in the courts of England or of this state. Its existence is not indispensable to the due administration of justice. Its exercise depending on the discretion of the judge, would be subject to great abuse. We think the assumption by the court of this jurisdiction, in the absence of statute authority, would be an arbitrary extension of its powers. It is a just inference that an alleged power which has lain dormant during the whole period of English jurisprudence, and never attempted to be exercised in America until a very recent period, never in fact had any existence." McQuigan *v.* Delaware, L. & W. R. Co., 129 N. Y. 50, 29 N. E. 235, 26 Am. St. Rep. 507, 14 L. R. A. 466, *affirming* 60 Hun 576, 15 N. Y. Supp. 973. "We put our decision not upon the impolicy of admitting such a power, but upon the ground that it would be too great a step of judicial legislation to be justified by the necessities of the case." Stack *v.* New York, N. H. & H. R. Co., 177 Mass. 155, 58 N. E. 686, 83 Am. St. Rep. 269, 52 L. R. A. 328.

48. In Austin & N. W. R. Co. *v.* Cluck, 97 Tex. 172, 77 S. W. 403, 104 Am. St. Rep. 863, 64 L. R. A. 494, the statement in South Bend *v.* Turner, that the duty to administer justice implies "all power necessary to its performance, which includes the power, to make subservient to its order all persons and things that will afford the most reliable evidence," and therefore gives the court authority to compel submission to a physical examination is criticized. "If this proposition be well founded, then, indeed, the power of a court over the persons of parties who apply to it for adjustment of their rights is unlimited. This statement of judicial power is too broad to be accepted as correct, but that line of decisions can not be sustained by less comprehensive authority. . . .The claim that the duty rests upon each court to administer exact justice between parties is not supported by any authority, nor is it consistent with the general law of this state, nor with the common law upon these questions. It is the province of a court to try issues formed by the pleadings of parties according to the rules of procedure, to furnish all process authorized by law to secure evidence, and to administer justice according to the evidence adduced on the trial. The common law and our statutes provide all of the means which courts are authorized to use in the administration of justice between

the person of the plaintiff, a right which he may waive however.[49]

(2.) Implied Consent by Tendering an Issue as to Physical Condition. It has been said that by tendering an issue as to his physical condition the plaintiff impliedly consents in advance to make any disclosures necessary to the administration of justice.[50]

d. *Power of Enforcement.* — Another objection urged against the assumption of such power by the courts is their inability to enforce the order.[51]

parties, and no court has authority to originate and introduce a new process to enable parties to secure evidence in support of their cases. A court with power 'to make subservient to its order all persons and things that will afford the most reliable evidence' would be an anomaly in constitutional republican government. It is better for the common good, that courts should be restrained within prescribed limits, than that judges be invested with unlimited and irresponsible power over the person and property of the citizen."

49. Union Pac. R. Co. *v.* Botsford, 141 U. S. 250.

"The right to the inviolability of one's person is merely a privilege which plaintiff may waive, as a defendant may the constitutional guaranty that in a criminal case he cannot be compelled to be a witness against himself. The defendant cannot be compelled to be a witness against himself, in such a case, but he may become such if he chooses; . . . And as a defendant may give evidence against himself, but cannot be compelled to do so unless he waives the privilege, so the plaintiff may exhibit portions of the clothed parts of his body to the jury, if the court permits, but cannot be compelled to do so. The constitutional guaranty is not more solemn and binding in one instance than in the other. And, for the much stronger reason, plaintiff cannot be compelled to make such exhibition of himself to third parties, strangers to the case, in order that they may procure material for testimony." May *v.* Northern Pac. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111. But see Lane *v.* Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153.

50. Wanek *v.* Winona, 78 Minn. 98, 80 N. W. 851, 79 Am. St. Rep. 354, 46 L. R. A. 448. See also Richmond & D. R. Co. *v.* Childress, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808; Schroeder *v.* Chicago, R. I. & P. R. Co., 47 Iowa 375.

"Testimony which is open to one party ought logically to be open to his opponent, if it can be obtained with due regard to decency, and in the orderly conduct of the trial." Graves *v.* Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641. See also Ottawa *v.* Gilliland, 63 Kan. 165, 65 Pac. 252, 88 Am. St. Rep. 232.

51. "The assertion of the power by certain courts is no more extraordinary than the remedy proposed for violation of the order. To say that a court can make an order but cannot enforce it, is remarkable, to say the least. To say that a court may refuse to permit a witness to testify, or dismiss his action if he refuse to comply with the order, is a doctrine which we cannot approve. Except in particular instances where the authority is directly conferred (and the present case does not present one of them), our courts have no authority to refuse to permit the plaintiff to testify or to dismiss his action. For a trial court of this state to make an order of this character and prescribe dismissal of the action as a penalty for noncompliance, would amount to a clear usurpation of authority in each instance. The order would be made without authority, and, in case of disobedience, the penalty inflicted without sanction of the law." May *v.* Northern Pac. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111.

No Power to Take Case From Jury. Austin & N. W. R. Co. *v.* Cluck, 97 Tex. 172, 77 S. W. 403, 104 Am. St. Rep. 863, 64 L. R. A. 494. But see

C. WAIVER. — a. *Voluntary Exhibition.* — Where the plaintiff in a personal injury action has exhibited an injured member to the jury in corroboration of his testimony it has been said that it becomes evidence in the case and the defendant is entitled to a further examination of it by a physician;[52] and it has been so held in a state where the power to order an examination in the first instance is denied.[53] But it has been denied that such conduct is a

infra this article "ENFORCEMENT OF ORDER."

52. Haynes *v.* Trenton, 123 Mo. 326, 27 S. W. 622, in which the plaintiff during his examination as a witness had exhibited his injured leg. It appeared that on a former trial experts had been permitted to examine the leg and testify as to its condition. There was evidence tending to show that the injuries were greater than they appeared to have been on the former trial. The defendant, as part of the examination of the plaintiff, asked that physicians who had previously examined the leg might be permitted to make a further examination, but the court refused this request, which was held reversible error. "The leg, when shown to the jury, became evidence in the case which may have carried with it great weight, particularly in the matter of the damage sustained. This evidence thus put into the case was open to attack by the opposite party in any manner which may have tended to reduce its probative force. When, for example, a piece of machinery or material, the character or quality of which is in issue, is exhibited to the jury, it is always competent for the opposite party to have experts examine it and give the jury their opinion, of the quality of the material and the sufficiency of the machinery. When admitted in evidence, and its damaging effect has been accomplished, it can not be withdrawn until the party affected by it has had opportunity to apply every test for the purpose of overcoming its force and effect. No reason can be urged why a different rule should be applied when an injured limb is the subject of inquiry. Defendant had the undoubted right in this case, at any time after the injuries had been shown to the jury, to have physicians examine the injured leg and testify, as experts, to its character and probable permanency. The question was not as to the right of defendant to have an examination of the injuries made, but as to the right to test the effect and reduce the weight of evidence introduced by plaintiff."

Where one of the plaintiff's witnesses, a physician, testified for the plaintiff that he could not tell by an examination of the plaintiff's hand whether it was permanently injured or not and that he would have to rely upon the statement of the plaintiff, and the plaintiff submitted her hand to his examination while he was testifying, it was held error for the court to refuse to compel the plaintiff to submit her hand to examination by two of the defendant's physicians, who testified that they could tell by an examination of the hand without reference to what the patient said, whether it was permanently injured as claimed. "To permit the plaintiff to testify that the member was injured and that the injury was permanent, and to deny other competent witnesses, who are especially skilled in treating such injuries, an opportunity to examine the hand, and to demonstrate, if they could, that it was not in fact injured at all, was an abuse of discretion." Louisville & N. R. Co. *v.* Simpson, 111 Ky. 754, 64 S. W. 733.

53. Where Plaintiff Has Voluntarily Exhibited His Person. Where plaintiff has exhibited his arm to the jury in his own behalf in a malpractice case, the defendant has a right to an order compelling the plaintiff to submit it to a further personal or professional inspection at the instance of the defendant "Such an examination, seems to me, to stand upon a different principle from that of a compulsory examination by the adverse party, before or

waiver,[54] and it has been said that the right to an examination is not coextensive with the power of cross-examination.[55]

b. *Submission to Examination Ordered by Court.* — The submission of the plaintiff to an exhibition by physicians appointed by the court is not a waiver of his rights and the court cannot therefore compel him to submit to a second examination.[56] But the power to compel submission to such an examination will not be considered where the plaintiff has acquiesced in an order therefor.[57]

c. *Offering the Testimony of Physicians Who Have Made a Private Examination* of the plaintiff at his own instance is not a waiver by him of his right to refuse to submit to an examination at the instance of the defendant.[58]

D. Considerations Governing Exercise of Power. — a. *Discretionary With Trial Court.* — **(1.) Generally.** — The defendant has no absolute right to an order for an examination but it is in all cases a matter resting in the sound discretion of the trial court,[59]

at the trial, when the injured party has not made profert of the injured part. It seems to me that it would be unfair, and might result in gross injustice to the party against whom such evidence was used. In such a case it would be in the power of the party, by muscular distortion of the injured part, especially an arm or hand, to impose upon the jury and court, as well as the adverse party, and produce upon the mind of the jury a false impression as to the extent of the injury. The member having been put in evidence as a part of the direct examination, it is for the purposes of the trial, made the property of the court and opposite party for the purpose of a cross-examination. It is difficult to conceive of a species of evidence that is offered by one party, in support of his case, which may not, in the presence of the same tribunal, be examined and criticized by the party against whom it is offered. We think, therefore, that the inspection and examination of this limb should have been ordered and permitted by the court; and, in case of refusal to submit to such inspection by the plaintiff, her evidence, so far as that exhibit and explanation of the same by the plaintiff was concerned, should have been stricken out on defendant's motion." Winner *v.* Lathrop, 67 Hun 511, 22 N. Y. Supp. 516. See *infra,* II, 7, note 31.

54. Mills *v.* Wilmington C. R. Co., 1 Marv. 269, 40 Atl. 1114.

55. Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462.

56. Although the plaintiff has submitted to an examination by physicians appointed by the court, the court has no power to compel him to submit to a further examination by the same physicians. International & G. N. R. Co. *v.* Gready, 36 Tex. Civ. App. 536, 82 S. W. 1061.

57. Where the plaintiff has acquiesced in an order of the court for a compulsory physical examination by selecting one of the physicians and submitting to the examination without objection, and permitting the introduction of the testimony of the examining physicians without questioning the authority of the court to make the order, the power of the court will not be considered. Ellsworth *v.* City of Fairbury, 41 Neb. 881, 60 N. W. 336.

58. Waiver of Privacy. — Offering Testimony of Physicians who have previously examined the injured person is not a waiver by him of the privacy of his person, nor does it affect the right of the court to order such an examination. Cole *v.* Fall Brook Coal Co., 159 N. Y. 59, 53 N. E. 670.

59. Macon R. & L. Co. *v.* Vining, 120 Ga. 511, 48 S. E. 232; South-

the exercise of which is to be governed by numerous considerations of necessity, possible injury to the person or feelings of the party to be examined, nature and timeliness of the application, delay of the trial, and others hereinafter discussed.[60]

ern Kansas R. Co. *v.* Michaels, 57 Kan. 474, 46 Pac. 938; Louisville & N. R. Co. *v.* Hartlege, 25 Ky. L. Rep. 152, 74 S. W. 742; Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462; Shepard *v.* Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 390; Ottawa *v.* Gilliland, 63 Kan. 165, 65 Pac. 252, 88 Am. St. Rep. 232; Alabama G. S. R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442; Graves *v.* Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641. But see Sibley *v.* Smith, 46 Ark. 275, 55 Am. Rep. 584.

Where an examination was asked for during the trial and it appeared that the injuries had occurred some eighteen months previous and that the plaintiff was plainly a helpless cripple and had suffered extreme and excruciating pain, it was held no error to refuse to compel it since the defendant has no absolute right to demand such an order, but the granting of it rests in the discretion of the court when justice requires it and the facts cannot be brought to light in any other way. Belle of Nelson Distilling Co. *v.* Riggs, 104 Ky. 1, 45 S. W. 99.

60. Louisville & N. R. Co. *v.* Hartlege, 25 Ky. L. Rep. 152, 74 S. W. 742; Graves *v.* Battle Creek, 95 Mich. 266, 54 N. W. 757, 55 Am. St. Rep. 561, 19 L. R. A. 641.

"The cases affirming the existence of the power establish the following propositions: (1) That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; (2) that a defendant has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the trial court; (3) that the exercise of such discretion is reviewable on appeal, and correctible in cases of abuse; (4) that the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts which can only be disclosed, or fully elucidated, by such an examination, and such an examination may be made without danger to the plaintiff's life or health, or the infliction of serious pain; (5) that the refusal of the motion, when the circumstances appearing in the record present a reasonably clear case for the examination under the rules stated is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; (6) that such an order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding. The discretion lodged in the trial court, as fairly deducible from the decisions, is a sound discretion based solely upon legal considerations. When serious and permanent injuries are claimed by the plaintiff, and he, or she, has submitted to examination by a chosen physician, or surgeon, who appears as a witness in plaintiff's behalf, and the nature, extent, and effect of the injury is to be deduced from objective conditions, and so fully from no other source, no degree of sentiment will justify a denial of the motion. When it becomes a question of probable violence to the refined and delicate feelings of the plaintiff on the one hand, and probable injustice to the defendant on the other, the law will not hesitate,—the court in making such orders, with respect to time, place, and persons, in every case, having such due regard for the feelings of the plaintiff and proprieties of the case as the ends of justice will permit." City of South Bend *v.* Turner, 156 Ind. 418, 428, 60 N. E. 271, 83 Am. St. Rep. 212, 54 L. R. A. 396. To the same effect Alabama G. S. R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442.

The Refusal will not be presumed to have been based upon the want of power.[61]

Review on Appeal. — The exercise of this discretion may be reviewed on appeal but will not be interfered with unless it appears that the facts could not be obtained in any other way, that the case was a proper one in every respect for an examination, and that the defendant was substantially prejudiced by the denial of the request.[62]

(2.) Necessity. — (A.) GENERALLY. — Such an examination should only be ordered when necessary to determine the very cause of

61. The refusal of the trial court to order a physical examination of the plaintiff "will not be *presumed* to have been based on the ground of a want of power in the court to make the order, but, in the absence of any showing to the contrary, on the ground that, under the circumstances, the order ought not to have been granted." Miami & Montgomery Tpk. Co. *v.* Baily, 37 Ohio St. 104.

62. Louisville & N. R. Co. *v.* McLain, 23 Ky. L. Rep. 1878, 66 S. W. 391; Belt Elec. Line Co. *v.* Allen, 102 Ky. 551, 19 Ky. L. Rep. 1656, 44 S. W. 89, 80 Am. St. Rep. 374. See also Sidekum *v.* Wabash, St. L. & P. Co., 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549; Shepard *v.* Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 390.

"Each case must rest on its own foundation, and the defendant who complains, upon appeal, that the trial court abused its discretion, in refusing to make the order, must be able to present a case where it is plain that the request should have been granted." Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462. "It is apparent from the adjudged cases, that the statement of the rule as to the revision of the trial court's action on a motion of this sort, to the effect that such action will not be interfered with unless it involves a manifest abuse of discretion, is inapt and misleading. What is really meant — the rule fairly deducible from the opinion — is, that if a proper case for granting the motion is clearly made, and is refused, the appellate court, having before it all the facts involved in the determination of the matter in the lower court, will reverse the judgment thus infected with error." Alabama G. S. R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442.

Where the plaintiff claimed injury to her internal organs and the defendant was without evidence as to her condition and without means of procuring it except in so far as the plaintiff made disclosure, the refusal of the court to order an examination was held an abuse of discretion. Brown *v.* Chicago, M. & St. P. R. Co., 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564.

In Louisville R. Co. *v.* Hartlege, 25 Ky. L. Rep. 152, 74 S. W. 742, the court says that from a review of the preceding cases in that state the weight of authority favors the right of the defendant to demand a physical examination of the plaintiff. "The decisions, however, recognize that the defendant has no absolute right to have an order made to that end, but that a motion therefor is directed to the sound discretion of the court, and that its exercise will be reviewed on appeal, and corrected in case of abuse; that such an examination may be ordered when the facts can only be brought to light or fully elucidated in that way, and when it can be made without danger to the plaintiff's life or health, or without the infliction of severe pain or offending decency."

Subsequent Opportunity Cures Error in Refusal. — Even though the court has improperly refused to order an examination it would seem that a subsequent opportunity for such an examination even during the trial cures any error in the refusal. Gulf, C. & S. F. Co. *v.* Norfleet, 78 Tex. 321, 14 S. W. 703.

action or defense pleaded in the case and when justice to the other party demands that it be made.[63]

(B.) When Merely Cumulative. — Such an order is properly refused when the evidence secured thereby would be merely cumulative.[64]

(C.) When Plaintiff Is Willing. — An order for an examination should not be made if the plaintiff is willing to submit to one without such an order.[65]

(3.) Danger to Health and Infliction of Pain. — (A.) Generally. — If the examination would endanger the health of the person examined, or inflict upon him serious pain, it should not be ordered.[66]

63. Vierling *v.* Binder, 113 Iowa 337, 85 N. W. 621. See Graves *v.* Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641, and *infra*, II, 6.

"As it trenches closely upon an invasion of the private rights of the person, it should be exercised with great caution and only where it is necessary to effect the ends of justice." Southern Kansas R. Co. *v.* Michaels, 57 Kan. 474, 46 Pac. 938. See also Atchison, T. & S. F. R. Co. *v.* Thul, 29 Kan. 466, 44 Am. Rep. 659.

Conceding that the court has the power to compel an examination, it is not error to refuse one where the undisputed evidence shows that the plaintiff received no external injuries of any kind and there is nothing to indicate that she is malingering, or that an examination of her person would throw any light whatever upon the character or extent of her injuries. Gulf, C. & S. F. R. Co. *v.* Gibbs, 33 Tex. Civ. App. 214, 76 S. W. 71.

64. Atchison, T. & S. F. R. Co. *v.* Thul, 29 Kan. 466, 44 Am. Rep. 659; Loyd *v.* Hannibal & St. J. R. Co., 53 Mo. 509; Smith *v.* Spokane, 16 Wash. 403, 47 Pac. 888; Graves *v.* Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641.

Where it appears that the examination would not materially add to the information already disclosed by the testimony, it is not error for the court to refuse to compel it. Owens *v.* Kansas City, St. J. & C. B. R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39.

65. In no case should such an order be made when the party is willing to be examined by competent and disinterested men without an order of the court. Gulf, C. & S. F. R. Co. *v.* Norfleet, 78 Tex. 321, 14 S. W. 703.

66. See Belt Elec. Line Co. *v.* Allen, 102 Ky. 551, 19 Ky. L. Rep. 1656, 44 S. W. 89, 80 Am. St. Rep. 374; Louisville R. Co. *v.* Hartlege, 25 Ky. L. Rep. 152, 74 S. W. 742; Alabama G. S. R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442; Schroeder *v.* Chicago, R. I. & P. R. Co., 47 Iowa 375.

In Hess *v.* Lake Shore & Michigan R. Co., 7 Pa. Co. Ct. Rep. 565, the court although remarking that the examination should be conducted in such a manner as to avoid the infliction of pain, the subjection to indignity or the endangering of health or life, and that no anæsthetic, opiates or drugs should be administered, proceeds to order an examination "by electric tests by means of a battery of such moderate power as is approved by medical authority in like cases, and as will not inflict pain or endanger the health or life of plaintiff."

Where the injury alleged was to the plaintiff's bladder and she had permitted a physical examination by defendant's physicians, except that under advice of her physician she had refused to permit the insertion of a catheter into her bladder because it might endanger her health, and it appeared that such might be the result, the refusal to order such an examination was held not an abuse of discretion. "On the contrary, it would have been an abuse of discretion to force the plaintiff to submit to such an experiment with instruments, under the circumstances stated." O'Brien *v.* City of LaCrosse, 99 Wis.

(B.) Use of Drugs. — (a.) *Generally.* — The mere fact that the examination involves the use of drugs upon the person of the party examined does not render it improper or prevent the court from requiring it to be submitted to. The test in such cases is whether the plaintiff will be subjected to serious discomfort or the risk of deleterious consequences.[67] But there are *dicta* to the effect that the use of drugs should not be countenanced.[68]

(b.) *Use of Anaesthetics.* — Where a physical examination would necessitate the administering of anaesthetics to the plaintiff it would be an abuse of discretion to order a physical examination.[69]

421, 75 N. W. 81, 40 L. R. A. 831.

67. Atchison, T. & S. F. R. Co. *v.* Palmore, 68 Kan. 545, 75 Pac. 509, 64 L. R. A. 90. In this case plaintiff claimed permanent injury to his eyesight, and offered the testimony of experts in support of such claim. Defendant made a request for an expert physical examination of plaintiff's eyes in the usual and ordinary manner. The latter consented to an examination provided no drugs were put into his eyes for purposes of dilation, and the court refused to compel him to submit to an examination in which drugs were to be used. This ruling was held error. The court disapproves of statement in Atchison, T. & S. F. R. Co. *v.* Thul, 29 Kan. 466, 44 Am. Rep. 659, that the use of drugs should not be countenanced, on the ground that "drugs are of infinite shades of potency," and the cases of Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616; Hess *v.* Lake Shore & M. S. R. Co., 7 Pa. Co. Ct. Rep. 565, in which similar statements are made, and cites in support of its action Alabama, G. & S. R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442, and Brown *v.* Chicago, M. & St. P. R. Co., 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564, in which the examinations authorized necessarily contemplated either an internal digital exploration or the use of the speculum. The court says: "The question, therefore, is not if drugs shall be used, but if an examination shall be made without serious inconvenience and without deleterious effect. Any enforced examination is vexatious and embarrassing, and very frequently must involve some slight degree of that discomfort which is denominated pain, but an examination may, nevertheless, be made with due consideration of both the sensibilities of the plaintiff and the demands of justice. . . . So far as the intrinsic character of the agency employed is concerned, the law should not distinguish between dilations accomplished by mechanical and by medicinal means. . . . The conclusion to be drawn from these decisions therefore is, that due precautions for the comfort and safety of the subject are the matters for primary consideration. With these provided for, the method and means employed should be left to the discretion of the expert making the examination. From all this the conclusion must follow that the district court should have required an expert examination of the plaintiff's eyes to be made, subject to the limitation that it should not produce serious discomfort or any deleterious consequence; and in order to insure the execution of its order according to the strict letter of its terms, the court should have approved, if it did not actually select, the experts appointed to make the examination."

68. Schroeder *v.* Chicago, R. I. & P. R. Co., 47 Iowa 375; and see cases cited in preceding note.

69. Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616. In this case plaintiff consented to an examination in open court provided no anæsthetics, drugs or harsh methods were used, but defendant insisted on an examination out of court, and that its physicians use such means as they deemed necessary to make a complete examination. It was apparent from their testimony that they deemed it necessary to administer anæsthetics. It was held that it would have been an abuse of discretion to make the

(C.) X-Ray Examination. — It would seem that owing to the possibility of injurious consequences resulting therefrom a court should not order an X-ray examination, at least it has been held no error to refuse to do so.[70]

(4.) Delicacy. — Where an examination would of necessity violate the privacy of the person and offend the sense of delicacy, it will not be ordered unless the necessities of the case demand it.[71] But

order asked for, under such circumstances. See also Schroeder *v.* Chicago, R. I. & P. R. Co., 47 Iowa 375.

70. It is no abuse of discretion to refuse to compel a party to submit to a second examination by the X-ray process when he had been accidentally burned during the first examination, which lasted two hours and had also permitted two of the defendant's medical witnesses to examine him. Boelter *v.* Ross Lumb. Co., 103 Wis. 324, 79 N. W. 243.

In Wittenberg *v.* Onsgard, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141, it was held no error to refuse to order the plaintiff in an action for malpractice to permit an X-ray photograph to be taken of his neck, which was the injured member, for two reasons: first, that the request was not seasonably made, and second, that it did not sufficiently appear that the person by whom the defendant desired the photograph to be taken had the necessary skill or experience to properly and safely apply the rays without injury to the plaintiff. "If the fact that the exposure of the person to these rays is harmless becomes as well established in science as is the accuracy of photographs taken by them, there is as much reason why, in a proper case, under proper safeguards, and at the reasonable request of the defendant, the plaintiff should be required, in a case like the present, to submit his neck to those rays for the purpose of photographing it, as there is for requiring a party to submit his person to a physical examination, as in Wanek *v.* City of Winona, *supra*, page 98. Whether science is as yet sufficiently advanced on the subject to so hold may admit of doubt, and a person cannot be required to submit his person to any process which is liable to injure him. It is impracticable to stop the trial in order to ascertain by evidence whether the exposure of a part of the human body to these rays is liable to result in injury. Moreover, if any such practice should obtain, there would be no uniform rule on the subject, as each case would depend on the evidence introduced, and the conclusion which the particular judge would draw from it. Hence a party ought not to be required to submit his person to the X-rays until it is so well established as a fact in science that the process is harmless, that the courts will take judicial notice of it. It may admit of doubt whether that time has yet arrived."

71. Smith *v.* Spokane, 16 Wash. 403, 47 Pac. 888; Graves *v.* Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641; Sidekum *v.* Wabash, St. L. & P. R. Co., 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549.

Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462, (in which the refusal of a request to order an examination was held no error "for the reason, if for no other, that it required the appellee, a woman, to make a quasi-public exposure of her person,—" her injured leg). See Sidekum *v.* Wabash, St. L. & P. R. Co., 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549.

Where the plaintiff claimed injuries to one of the spinal processes of the lumbar vertebræ and consequent nervous debility, and the evidence as to the nature and extent of her injuries was conflicting, the refusal to compel a physical examination was held no abuse of discretion. Norton *v.* St. Louis & H. R. Co., 40 Mo. App. 642.

In Louisville Ry. Co. *v.* Hartlege, 25 Ky. L. Rep. 152, 74 S. W. 742, the appellate court refused to reverse the action of the trial court in refusing to order a female plaintiff to submit to a physical examina-

this consideration will not prevent the making of the order where a refusal would result in injustice to the other party.[72]

tion which would necessitate the exploring of the vagina, breaking the hymen which was intact, and would expose her to pain and possible injury as well as offend her sense of delicacy. It appeared that the extent of plaintiff's injuries was substantially disclosed by her clinical history and symptoms.

In Shepard *v.* Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 390, it was held no abuse of discretion to refuse to compel a female plaintiff who claimed injury to the terminal bone of her spine to submit to a personal examination, "not by one skilled surgeon, but by at least three. It is with reluctance, and only from absolute necessity, that a lady of refinement ever submits to such a personal examination, even by her chosen physician, as defendant asked that this plaintiff should submit to." The plaintiff had submitted to one examination and offered to submit to another by an eminent and reputable surgeon.

Necessity Must Be Pressing. — In an action by a female plaintiff where reputable physicians had been called by her and testified as to her injuries, as well as numerous other lady witnesses who testified fully and without restraint as to the plaintiff's condition before and after her injury, it was held no error to refuse to compel her to submit her body to a personal examination by medical experts, on the ground that a proceeding so repugnant to her sense of delicacy should not be ordered unless the reasons therefor were very cogent and pressing. Hill *v.* City of Sedalia, 64 Mo. App. 494.

72. Where the plaintiff's physicians had testified fully as to the nature of her injuries, the defendant asked for an order requiring the plaintiff to submit to an examination by physicians appointed by the court. The examination was of such a nature as to be most objectionable to a woman of refinement. The denial of the request was held error. "The fact that she was of a nervous temperament, or in a nervous condition, involved no tenable objection, especially in view of the opium habit which she had contracted, and which could, without hurt to her, have been utilized to allay nervousness. Her delicacy and refinement of feeling, though, of course, entitling her to the most considerate and tender treatment consistent with the rights of others, cannot be permitted to stand between the defendant and a legitimate defense against her claim of a large sum of money. When it becomes a question of possible violence to the refined and delicate feelings of the plaintiff on the one hand, and possible injustice to the defendant, on the other, the law cannot hesitate; justice must be done." Alabama G. S. R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442.

Where plaintiff claimed permanent injury to her uterus and bladder, and also a fracture of her hipbone, and it appeared that her physician had testified at the trial as to the results of his examination of the plaintiff, it was held error for the court to refuse to order an examination of the plaintiff, before the trial, by physicians selected by the defendant. "It was no answer to defendant's request for an examination that it would offend the modest and womanly instincts of the plaintiff to require her to submit to an examination of experts. She told a jury of twelve men of her pains; how and when they affected her. She submitted to a digital examination of her injured parts by two physicians of her own selection. It would have been no greater indignity to be examined by other doctors; but 'when it becomes a question of possible violence to the refined and delicate feelings of a plaintiff, on one side, and possible injustice to the defendant, on the other, the law cannot hesitate. It was essential to the ends of justice that plaintiff should submit to this examination.'" Brown *v.* Chicago, M. & St. P. R. Co., 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564. The court may order an examination of a female plaintiff's leg.

(5.) Previous Examinations by Agreement. — It is no abuse of discretion to refuse to compel an examination where it appears that the plaintiff has already voluntarily submitted to one or more examinations by the defendant's experts,[73] unless they were made under such circumstances as not to furnish adequate information of the nature and extent of the injuries.[74]

b. *Application for Order.* — **(1.) Time of Application.** — (A.) GENERALLY. — The application for such an order must be timely. It is a general rule that where the examination will interfere with the progress of the trial it will not be error to refuse to make the order,[75] especially where there is no sufficient showing to excuse

White *v.* Milwaukee City R. Co., 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154.

73. Chicago & E. R. Co. *v.* Holland, 122 Ill. 461, 13 N. E. 145; Southern Bell Tel. Co. *v.* Lynch, 95 Ga. 529, 20 S. E. 500 (several previous examinations by physicians, one of whom was sworn as a witness for the defendant). But see Haynes *v.* Trenton, 123 Mo. 326, 27 S. W. 622.

Where the plaintiff had been examined fully by two of the defendant's surgeons at the time of the accident or shortly thereafter and later by three other physicians, the testimony of all of whom at the trial was practically unanimous as to the nature and extent of the injury, the refusal of the court to order an examination before trial was held no error, the trouble being one concerning which a further examination would probably have revealed nothing more than was shown by the evidence. Louisville & N. R. Co. *v.* McLain, 23 Ky. L. Rep. 1878, 66 S. W. 391.

In Belt Elec. Line Co. *v.* Allen, 102 Ky. 551, 19 Ky. L. Rep. 1656, 44 S. W. 89, 80 Am. St. Rep. 374, which was an action for injuries to plaintiff's ankle, the defendant, during the trial, asked that the plaintiff be compelled to submit to an examination, which was refused. But during the cross-examination of one of plaintiff's experts, the court, with the consent of all parties, permitted the plaintiff to retire and be examined by this expert whose testimony was entirely in accord with that of defendant's experts who had examined the plaintiff shortly after the injury. It was held that the refusal to compel an examination in this case was no error.

Where the plaintiff had been examined by physicians at the instance of the defendant some time prior to the trial and after an amendment of the complaint, the court on application of the defendant designated two physicians to again examine the plaintiff, one of whom attended and testified for the plaintiff, and the other was too busy to appear, and the court called a third physician and offered to allow him to examine the plaintiff in the presence of the jury but not otherwise; it was held to be no abuse of discretion to refuse to permit a further examination. Helbig *v.* Grays Harbor Elec. Co., 37 Wash. 130, 79 Pac. 612.

74. In an action against a city for injuries caused by a defective sidewalk, it appeared that after the accident the plaintiff had requested the city to send a physician to examine and treat the plaintiff, with which request the defendant complied. The physician during the course of his treatment examined the plaintiff two or three times, but such examinations occurred before the plaintiff gave any notice of his intention to bring an action and over six months before the action was brought. It was held that the refusal to order an examination under such circumstances was an abuse of discretion because the previous examinations had been made before the defendant knew what claims the plaintiff would make as to his injuries. Wanek *v.* Winona, 78 Minn. 98, 80 N. W. 851, 79 Am. St. Rep. 354, 46 L. R. A. 448.

75. Myrberg *v.* Baltimore & S.

the delay in making the application.[76] Thus it is held no error to refuse to make the order where the application is not made until after the close of the evidence,[77] or until after the defendant has commenced the introduction of his evidence;[78] and it has been held no abuse of discretion to refuse to make the order, where there was an unexplained delay in making the application until after the close of plaintiff's evidence in chief,[79] or until after the trial of the case had begun,[80] or where the application was not made until the day before case was called for trial.[81]

(B.) Renewal of Request. — Where the court in denying the motion leaves the matter open for further developments in the case the motion must be renewed later.[82]

(2.) Showing Required. — To warrant the court in making the order for an examination, the moving party should support his

Min. & Reduc. Co., 25 Wash. 364, 65 Pac. 539; Savannah, F. & W. R. Co. *v.* Wainwright, 99 Ga. 255, 25 S. E. 622; Southern Kansas R. Co. *v.* Michaels, 57 Kan. 474, 46 Pac. 938; Wittenberg *v.* Onsgard, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141. See Belle of Nelson Distilling Co. *v.* Riggs, 20 Ky. L. Rep. 499, 45 S. W. 99.

76. Macon R. & L. Co. *v.* Vining, 120 Ga. 511, 48 S. E. 232.

77. Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287.

78. Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90; Myrberg *v.* Baltimore & S. Min. & Reduc. Co., 25 Wash. 364, 65 Pac. 539.

It would be unjust to the plaintiff to require him to submit to a physical examination after his case in chief was closed because he could not reply to such evidence "except by a successful appeal to the discretion of the court. For additional evidence on the subject by the plaintiff would be evidence in chief and not rebutting evidence." Miami & Montgomery Tpk. Co. *v.* Baily, 37 Ohio St. 104.

79. Southern Kansas R. Co. *v.* Michaels, 57 Kan. 474, 46 Pac. 938; Archer *v.* Sixth Ave. R. Co., 20 Jones & S. (N. Y. Super.) 378; Fullerton *v.* Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516; Sioux City & Pac. R. Co. *v.* Finlayson, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724. *Contra.* Sibley *v.* Smith, 46 Ark. 275, 55 Am. Rep. 584.

80. Southern Kan. R. Co. *v.* Michaels, 57 Kan. 474, 46 Pac. 938; Stuart *v.* Havens, 17 Neb. 211, 22 N. W. 419; Paul *v.* Omaha & St. L. R. Co., 82 Mo. App. 500. But see Schroeder *v.* Chicago, R. I. & P. R. Co., 47 Iowa 375; Hall *v.* Manson, 99 Iowa 698; 68 N. W. 922, 34 L. R. A. 207.

"If such an application is proper under any circumstances, it must be made before trial." City of Chadron *v.* Glover, 43 Neb. 732, 62 N. W. 62. See also Smith *v.* Spokane, 16 Wash. 403, 47 Pac. 888.

81. Kinney *v.* Springfield, 35 Mo. App. 97.

82. Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462 (where the application was made during the examination of one of defendant's expert witnesses, the court in denying the motion said, "at this present time I will not grant the request"). It is not an abuse of discretion to refuse to compel a female plaintiff to submit to a physical examination by "physicians, to be named by defendant, not exceeding four in number" where the court in denying the motion stated that if during the progress of the trial it appeared necessary to determine the nature and extent of the injuries he would direct an examination, and no renewal of the motion was made. Sidekum *v.* Wabash, St. L. & P. R. Co., 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549, in which it appeared that the examination would have shocked the plaintiff's feelings of delicacy.

motion by affidavits showing the necessity for the examination,[83] the nature of the evidence expected to be developed and the fact that the party sought to be examined has refused or is unwilling voluntarily to submit to an examination.[84] In the absence of such preliminary showing he will not be in a position to claim error by reason of the refusal of the court to order the examination.[85] In some states this matter of the preliminary showing is provided for by statute and such statutes must be strictly complied with.[86]

c. *Scope of Order.* — The order need not be as broad as the request[87] and should not extend beyond the necessities of the case.[88]

d. *Expense.* — It is intimated in some cases that the party for whose benefit the examination is ordered should bear the expense incident to it.[89]

e. *Appointment of Experts.* — It has been held error to refuse to order an examination by experts named by the defendant.[90] It is generally said that the experts should be agreed upon by the parties or chosen by the court.[91]

83. Galveston, H. & S. A. R. Co. *v.* Sherwood (Tex. Civ. App.) 67 S. W. 776; Terre Haute & I. R. Co. *v.* Brunker, 128 Ind. 542, 26 N. E. 178.

84. Richmond & D. R. Co. *v.* Childress, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808; International & G. N. R. Co. *v.* Underwood, 64 Tex. 463.

85. Terre Haute & I. R. Co. *v.* Brunker, 128 Ind. 542, 26 N. E. 178. See also Joliet St. R. Co. *v.* Call, 143 Ill. 177, 32 N. E. 389, *affirming* 42 Ill. App. 41; St. Louis Bridge Co. *v.* Miller, 138 Ill. 465, 28 N. E. 1091.

86. See *infra,* "STATUTES."

87. Extent of Order. — "Of course the court is not bound to refuse or to grant the motion to the full extent of the prayer. Its order may be moulded to suit the circumstances of the case." Owens *v.* Kansas City, St. J. & C. B. R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39.

88. Atchison, T. & S. F. R. Co. *v.* Thul, 29 Kan. 466, 44 Am. Rep. 659.

89. Richmond & D. R. Co. *v.* Childress, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808; Lane *v.* Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153.

90. Atchison, T. & S. F. R. Co. *v.* Thul, 29 Kan. 466, 44 Am. Rep. 659.

91. Stuart *v.* Havens, 17 Neb. 211, 22 N. W. 419; Missouri Pac. R. Co. *v.* Johnson, 72 Tex. 95, 10 S. W. 325. See also Atchison, T. & S. F. R. Co. *v.* Palmore, 68 Kan. 545, 75 Pac. 509, 64 L. R. A. 90.

It is not error to refuse an application for an examination by physicians named by the defendant. Stuart *v.* Havens, 17 Neb. 211, 22 N. W. 419; Smith *v.* Spokane, 16 Wash. 403, 47 Pac. 888. Even if the court has power to compel an examination it should be conducted by a surgeon agreed upon by the parties or one selected by the court, and not one who has already testified in the case adversely to the plaintiff. Houston & T. C. R. Co. *v.* Berling, 14 Tex. Civ. App. 544, 37 S. W. 1083.

Discretion of Court in Appointment of Examining Physicians. "The selection of such experts is a matter entirely within the discretion of the trial judge. Neither party has any right, by suggestion, motion, or otherwise, to control his discretion in any degree. The court, in making the order for a physical examination, and in designating the experts to execute it, is conserving the interests of neither the defendant nor the plaintiff, but the ends of justice; and when a competent and impartial commission is named, it is a matter of no consequence whatever that the parties, or either of them, preferred and demanded the appointment of other persons." Alabama G. S. R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65.

E. Enforcement of Order. — a. *Punishment for Contempt.* It has been said that a refusal to obey an order to submit to a physical examination can be punished as a contempt,[92] but this does not seem to be generally regarded as the appropriate remedy.[93]

b. *Dismissal of Action.* — The dismissal of the plaintiff's action or the granting of a non-suit is quite frequently said to be the appropriate penalty for a refusal to submit to the examination ordered.[94]

c. *Suppression or Exclusion of Evidence.* — Another suggested remedy or penalty for the refusal to obey the order is the suppression or exclusion of the plaintiff's evidence relating to his injury.[95]

d. *Striking Out Allegations of Complaint.* — It has been said that the court might strike from the plaintiff's complaint those allegations relating to permanent injury upon his refusal to submit to the examination.[96]

F. Conduct of Examination. — a. *Generally.* — The examination should be made under the control and direction of the court[97]

92. Sibley *v.* Smith, 46 Ark. 275, 55 Am. Rep. 584; Schroeder *v.* Chicago, R. I. & P. R. Co., 47 Iowa 375.

93. See Wanek *v.* Winona, 78 Minn. 98, 80 N. W. 851, 79 Am. St. Rep. 354, 46 L. R. A. 448, cases in following notes.

See also Lane *v.* Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153, *quoting* the dissenting opinion of Brewer and Brown, JJ., in Union Pac. R. Co. *v.* Botsford, 141 U. S. 250.

94. Wanek *v.* Winona, 78 Minn. 98, 80 N. W. 851, 79 Am. St. Rep. 354, 46 L. R. A. 448; Brown *v.* Chicago, M. & St. P. R. Co., 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564; Miami & Montgomery Tpk. Co. *v.* Baily, 37 Ohio St. 104; Shepard *v.* Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 390. See Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462.

Stays the Suit. — An order for a physical examination "when granted, will operate to stay the suit until its provisions are complied with." Lane *v.* Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153.

95. On the refusal of the plaintiff to comply with an order requiring him to submit to a physical examination, if the order is properly made the court may dismiss the action or refuse to allow the plaintiff to give evidence to establish the injury. "The dismissal is authorized by section 5314, Revised Statutes. Authority to exclude the evidence arises out of the inherent power of the court over the subject under investigation." Miami & Montgomery Tpk. Co. *v.* Baily, 37 Ohio St. 104. "Certainly, if the court can make the order, it will have no difficulty in enforcing it. Not that it can compel the party to submit to a personal examination, but it may dismiss a plaintiff's suit for a persistent refusal to do so; or, in case of either defendant or plaintiff, treat it as a suppression of testimony, and so present the matter to the jury as to make the refusal equivalent to proof of the fact, which the party asking such personal examination would make it probable, by affidavit or otherwise, the examination would disclose." Shepard *v.* Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 390. If plaintiff after having exhibited her injured arm refuses to permit a further examination in the presence of the jury, at the instance of the defendant, her evidence so far as that exhibition and the explanation of the same are concerned should be stricken out on defendant's motion. Winner *v.* Lathrop, 67 Hun. 511, 22 N. Y. Supp. 516.

96. Schroeder *v.* Chicago, R. I. & P. R. Co., 47 Iowa 375.

97. "When such an examination is

which may exercise its discretion as to the manner in which the examination shall be conducted, with due regard to the convenience and desires of the person examined.[98]

b. *Where Made.* — (1.) **Generally.** — It seems to be discretionary with the trial court where such an examination shall be made, whether in its presence during the trial or in private.[99]

(2.) Private Examination by Jury. — It would seem to be improper to permit the jury to retire and make a private examination even though a public exhibition would be indecent.[1] Such a private examination of the defendant in a criminal case by the jury has, however, been permitted.[2]

G. EVIDENCE OF REFUSAL. — Ordinarily even in those jurisdictions in which the power to compel submission to an examination is denied, evidence of the refusal to submit to one is competent as tending to discredit the party's claim.[3] But it seems that where the application for such an examination is properly denied, evidence of the refusal to submit is not proper.[4] And where there is no

necessary, . . . it should be conducted under the control and direction of the court." Southern Kansas R. Co. *v.* Michaels, 57 Kan. 474, 46 Pac. 938. See also Alabama G. S. R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442.

98. "It is to be presumed that, in exercising this power, the trial court will always see that only proper physicians or surgeons — and, where possible, wholly disinterested ones,— are appointed to conduct the examination, and the expense of such examination should be borne by the party requesting it. Care should be exercised to avoid all unnecessary inconvenience and annoyance to the plaintiff, and, when desired, it should be made in the presence of the counsel and friends of the party to be examined, and the trial court must be free to exercise that sound discretion which the nature of the case and the ends of justice may require." Lane *v.* Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153.

99. Railway Co. *v.* Dobbins, 60 Ark. 481, 486, 30 S. W. 887, 31 S. W. 147, in which it was held no error to order a plaintiff residing in Texas to submit to an examination at his home instead of requiring him to appear before the jury.

1. See Garvik *v.* Burlington, C. R. & N. R. Co., 124 Iowa 691, 100 N. W. 498. See generally the article "VIEW BY JURY."

2. Retirement of Jury to Examine Injury Privately. — In 1 Hale's P. C. 636, is recited an instance of the retirement of the jury for the purpose of inspecting the defendant charged with rape to substantiate his claim that he was and had been for seven years past so severely ruptured as to be incapable of carnal intercourse. The evidence against him was apparently conclusive. To vindicate himself he offered to show the rupture in open court, "which for the indecency of it I declined, but appointed the jury to withdraw into some room to inspect this unusual evidence; and they accordingly did so, and came back and gave an account of it to the court, . . . whereupon he was acquitted."

3. Austin & N. W. R. Co. *v.* Cluck, 97 Tex. 172, 77 S. W. 403, 104 Am. St. Rep. 863, 64 L. R. A. 494; International & G. N. R. Co. *v.* Butcher (Tex. Civ. App.) 81 S. W. 819; Kinney *v.* Springfield, 35 Mo. App. 97; Stack *v.* New York, N. H. & H. R. Co., 177 Mass. 155, 58 N. E. 686, 83 Am. St. Rep. 269, 52 L. R. A. 328; Union Pac. R. Co. *v.* Botsford, 141 U. S. 250; Peoria, D. & E. R. Co. *v.* Rice, 144 Ill. 227, 33 N. E. 951. But see Chicago, B. & Q. R. Co. *v.* Reith, 65 Ill. App. 461.

4. Louisville & N. R. Co. *v.* McLain, 23 Ky. L. Rep. 1878, 66 S. W. 391.

Evidence of Refusal Not Admissible When Order Properly Refused.

power to compel submission to an examination, evidence that it would not be harmful is not material.[5]

H. Furnishing Urine for Analysis. — The power to compel a plaintiff to furnish a specimen of his urine for analysis by experts seems to be coextensive with the power to compel submission to a physical examination, being respectively affirmed[6] and denied[7] in those jurisdictions affirming and denying the power to compel the latter. The refusal to furnish a sample of urine for such purpose may be shown even in those states denying the power.[8]

Where the court in its discretion has properly refused to order an examination because the application therefor was not timely the defendant is not entitled to show that the plaintiff had declined to submit to such an examination. "If the court had made the order, and the plaintiff had then refused, and the court notwithstanding such refusal, had permitted plaintiff to further prosecute his suit, then we think that the fact of plaintiff's refusal would have been competent and very potent evidence against him." Kinney *v.* Springfield, 35 Mo. App. 97.

Where the court has properly refused to compel submission to a physical examination after the plaintiff's case is closed, it is not error to refuse to instruct the jury that the plaintiff's refusal "at any time after the close of the testimony on his behalf" to submit to such an examination affords a presumption against his claim as to the character and extent of his injury. Miami & Montgomery Tpk. Co. *v.* Baily, 37 Ohio St. 104.

Where the court had properly refused to compel the plaintiff to submit to a physical examination, it was held no error to sustain an objection to a question put to the plaintiff and his wife, for whose injuries he was suing, as to whether they would "object at this time to an examination" of the wife by physicians appointed by the court, the question being too much in the nature of a banter or an attempt to impose upon the witness. Gulf, C. & S. F. R. Co. *v.* Pendery, 14 Tex. Civ. App. 60, 36 S. W. 793.

Contra. — In Missouri, K. & T. R. Co. *v.* Mitchell (Tex. Civ. App.), 90 S. W. 716, plaintiff was asked whether he was willing to submit to a physical examination by physicians appointed by the court or agreed upon by counsel. An objection to the question on the grounds that the plaintiff had already been twice examined at the instance of the defendant, that it was a matter entirely in the hands of his counsel, that it was immaterial, and that no motion had been filed asking that plaintiff be compelled to submit to another examination, was sustained. This ruling was held error on the ground that the plaintiff's refusal to submit to an examination whether before or during trial could always be shown, and that he could present any excuse he might have therefor. But see Stack *v.* New York, N. H. & H. R. Co., 177 Mass. 155, 58 N. E. 686, 83 Am. St. Rep. 269, 52 L. R. A. 328.

5. Chicago & E. I. R. Co. *v.* Stewart, 104 Ill. App. 37, *affirmed* in 203 Ill. 223, 67 N. E. 830.

6. Cleveland, C. C. & St. L. R. Co. *v.* Huddleston (Ind.), 46 N. E. 678.

7. Austin & N. W. R. Co. *v.* Cluck, 97 Tex. 172, 77 S. W. 403, 104 Am. St. Rep. 863, 64 L. R. A. 494.

8. Where the plaintiff in a personal injury action claimed to have Bright's disease as a result of the injury and a physician testified in his behalf to finding albumen in plaintiff's urine, the latter's refusal to furnish a sample of his urine for examination by defendants' experts was held proper evidence for the consideration of the jury and its exclusion by the trial court error. Freeport *v.* Isbell, 93 Ill. 381. *Contra.* — In Austin & N. W. R. Co. *v.* Cluck, 97 Tex. 172, 77 S. W. 403, 104 Am. St. Rep. 863, 64 L. R. A. 494, a question by defendant propounded to plaintiff, as to whether he was willing to furnish a specimen of his urine for analysis by physicians appointed by the court, was held properly excluded as the

I. Power to Compel Performance of a Physical Act Before Jury. — It has been held that the court may in a proper case require a party to perform a physical act before the jury that will illustrate or demonstrate the extent and character of his injuries.[9]

J. Statutes. — a. *Generally.* — Statutes have been passed in a few states authorizing the court to compel the plaintiff in an action for personal injuries to submit to a physical examination by experts appointed by the court, for the purpose of qualifying such experts to testify at the trial as to the nature and extent of the injuries. Such a statute is constitutional.[10]

b. *New York Statute.* — **(1.) Generally.** — The New York statute is merely an amendment to already existing provisions relating to the examination of parties before trial.[11] It authorizes no independent proceeding but only a physical examination as part of an examination of the plaintiff before trial.[12] By its terms it applies only to the plaintiff in an action for personal injuries.[13] The examination must be by a physician of the plaintiff's own sex.[14]

(2.) After Voluntary Submission to Examination by Defendant's Experts. After the plaintiff has voluntarily submitted to an examination by the defendant's experts, he cannot be compelled to submit to another examination by physicians appointed by the court since

same objection applied to this as to physical examination, it could not be enforced.

9. Hatfield *v.* St. Paul & D. R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14, in which it was held no error to refuse to compel the plaintiff suing for personal injuries to walk across the court room, as the only fact which could possibly have been determined thereby was whether the plaintiff was lame or limped in walking and there was already ample and uncontradicted evidence of this fact.

10. Lyon *v.* Manhattan R. Co., 142 N. Y. 298, 37 N. E. 113, 31 Abb. N. C. 356, 25 L. R. A. 402.

Such a statute is not an infringement of the constitutional right of a party in a civil suit to be confronted by the witnesses; nor does it violate any of the express or implied restraints upon the legislative power found in the federal or state constitutions. McGovern *v.* Hope, 63 N. J. L. 76, 42 Atl. 830.

11. N. Y. Code Civ. Proc. § 873; Cole *v.* Fall Brook Coal Co., 159 N. Y. 59, 53 N. E. 670.

The court has no power to order an examination before the court at a special term. Bowe *v.* Brunnbauer, 13 Misc. 631, 34 N. Y. Supp. 919, 25 Civ. Proc. Rep. 56.

12. Lyon *v.* Manhattan R. Co., 142 N. Y. 298, 37 N. E. 113, 31 Abb. N. C. 356, 25 L. R. A. 402.

13. In a Mandamus Proceeding to Determine the Relator's Right to the Office of chief of police, where the issue tendered by the answer involves the relator's physical capacity to perform the duties because of lameness and other physical disabilities, the court has no authority statutory or otherwise to compel the relator to submit to a physical examination, the statute on this subject applying by its terms only to actions for personal injuries and being only proper in connection with an oral examination. People *v.* Roosa, 43 App. Div. 611, 60 N. Y. Supp. 244.

14. Physician of Own Sex. — An order for a female plaintiff's physical examination before a referee by a physician not her own sex, will not be vacated where it appears that no request was made to the trial court for a modification of the order in this respect, although the code provides that such an examination be made by a physician of the plaintiff's own sex. The plaintiff will be given leave to ask for a modification of the order to this extent. Lawrence *v.* Samuels, 16 Misc. 501, 38 N. Y. Supp. 976.

the defendant, by agreeing to the examination made, has waived his statutory right.[15]

(3.) The Application and Showing. — The application for an examination cannot be made at the trial.[16] It must be supported by an affidavit showing that the examination is material and necessary to a defense to the action.[17]

15. Although the New York Statute authorizes a physical examination of the plaintiff in an action for personal injuries, by a physician appointed by the court, yet where the plaintiff on the first trial has voluntarily submitted to an examination by a physician selected by the defendant, on a third trial the defendant is not entitled to another examination by a physician appointed by the court, where the testimony of the first physician is not shown to be unavailable. Whitaker *v.* Staten Island Midland R. Co., 76 App. Div. 351, 78 N. Y. Supp. 410, in which an order granting an examination under such circumstances was reversed on appeal. The court says: "The provisions of the Code of Civil Procedure in reference to examinations before trial were intended as an extension of the privileges of defendants in actions for personal injuries, but the rule is well settled that a party may waive a rule of law, or a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public morals are involved, and, having once done so, he cannot subsequently invoke its protection. Mayor, etc., of City of New York *v.* Manhattan R. Co., 143 N. Y. 126, 37 N. E. 494, and authorities there cited. We are of opinion that the defendant, having once waived the right to an examination by a physician appointed under the order of the court, may not now seek to take advantage of the provisions of section 873. The general purpose of the enactment was to change a rule of the common law (Lyon *v.* Railway Co., 142 N. Y. 298, 302, 37 N. E. 113, 25 L. R. A. 402), and it ought not to be extended beyond the clearly expressed intention of the legislature, which, while not expressly limiting the examination to a single occasion, makes no provision for more than one examination, and this is before trial. There can be no chance for a surprise; the record of two trials abundantly shows the extent of the injuries and the scope of the evidence, while the defendant's physician, who made the original physical examination, is in a position to testify to all of the matters which were revealed by that examination. . . . The defendant has had all of the advantages of the provisions of section 873 of the Code of Civil Procedure; it has, by accepting a physical examination under the stipulation of the plaintiff, waived any right to have another physician appointed by the court for the same purpose."

16. Cole *v.* Fall Brook Coal Co., 87 Hun 584, 34 N. Y. Supp. 572.

17. Green *v.* Middlesex R. Co., 10 Misc. 473, 32 N. Y. Supp. 177.

Where the affidavit shows that the defendant is ignorant of the nature and extent of plaintiff's injuries, that the plaintiff has refused to submit to a physical examination by a physician, and that defendant after diligent investigation is unable to obtain definite information as to the nature and extent of the injuries, it sufficiently appears that such examination is material and necessary to a defense to the action. Campbell *v.* Joseph H. Bauland Co., 41 App. Div. 474, 58 N. Y. Supp. 984.

An affidavit made to secure an order for a physical examination of the plaintiff, which states that the defendant is ignorant of the nature and extent of the plaintiff's injuries is not objectionable for not stating that defendant intends to make use of the examination on the trial. Moses *v.* Newburgh Elec. Ry. Co., 91 Hun 278, 36 N. Y. Supp. 149. It is sufficient if this be made to appear by fair inference from any other facts. Green *v.* Middlesex R. Co., 10 Misc. 473, 32 N. Y. Supp. 177, 24 Civ. Proc. Rep. 272, 1 N. Y. Ann. Cas. 167.

(4.) The Order must operate on the plaintiff himself and not on his attorney,[18] and it must direct the time of the service of a copy thereof.[19] Five days must intervene between the order and the examination in the absence of special circumstances.[20]

c. *The New Jersey Statute* is broader than the New York statute in that it is not made a mere auxiliary to the proceeding for examination of parties before trial.[21] The court has some discretion as to the mode of conducting the examination.[22]

d. *In the Federal Courts.* — A state statute giving the trial court power to order a physical examination of the plaintiff in personal injury actions if not inconsistent with any law of congress[23] is a rule of decision binding upon the federal courts sitting within that state.[24]

4. In Slander or Libel Case. — An application by the defendant in a libel or slander suit for a compulsory examination of the plaintiff to sustain a plea of the truth is properly refused, since a person making such a charge must be prepared to substantiate it without invading the privacy of the plaintiff's person.[25]

5. In Malpractice Case. — In actions against physicians or surgeons for malpractice or negligent treatment of injuries, it is proper to permit the plaintiff to exhibit the injured member,[26] and it would seem that in such cases he might be compelled to do so at the request of the defendant in those jurisdictions where the

18. Bowe *v.* Brunnbauer, 13 Misc. 631, 34 N. Y. Supp. 919, 25 Civ. Proc. Rep. 56.

19. Bowe *v.* Brunnbauer, 13 Misc. 631, 34 N. Y. Supp. 919, 25 Civ. Proc. Rep. 56.

20. At least five days must intervene between the order and the examination unless there are special circumstances which are shown in the affidavit and recited in the order. The latter requirements are essential and must be followed. Bowe *v.* Brunnbauer, 13 Misc. 631, 34 N. Y. Supp. 919, 25 Civ. Proc. Rep. 56.

21. McGovern *v.* Hope, 63 N. J. L. 76, 42 Atl. 830.

22. The court has some discretion as to the mode in which the authority conferred by the statute shall be exexercised. "In executing the powers conferred upon the court under this statute the proceedings will be so controlled in the designation of physicians and surgeons, and with respect to the mode in which the examination shall be conducted, as to give both parties an equal opportunity of having qualified witnesses present at the examination, and will also require, as far as practicable, the examination to be conducted in such a manner as not to subject the plaintiff to any unnecessary annoyance or exposure of her person." McGovern *v.* Hope, 63 N. J. L. 76, 43 Atl. 830.

23. In Camden & S. R. Co. *v.* Stetson, 177 U. S. 172, the court says that the form of the New York statute "would probably be regarded as conflicting with the law of Congress in relation to the examination of a party as a witness before trial, and hence might not be enforced in courts of the United States sitting within the state of New York."

24. Camden & S. R. Co. *v.* Stetson, 177 U. S. 172, holding that a surgical examination was properly ordered under the New Jersey statute, and distinguishing Union Pac. R. Co. *v.* Botsford, 141 U. S. 250.

25. Kern *v.* Bridwell, 119 Ind. 226, 21 N. E. 664, 12 Am. St. Rep. 409.

26. Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90. See also the article "Physicians and Surgeons."

In Freeman *v.* Hutchinson, 15 Ind. App. 639, 43 N. E. 16, a physician as a witness for plaintiff was permitted to examine the injured thumb in the

power to compel such an exhibition is recognized.[27] It has been held proper however to refuse to permit a voluntary exhibition for the purpose of determining the merits or demerits of the treatment.[28]

6. Action for Breach of Promise of Marriage. — In an action for breach of promise of marriage, where the defense urged is the unfit physical condition of the plaintiff, the defendant's application for an order compelling the plaintiff to submit to a physical examination has been held properly refused because the question in issue is the latter's condition at the time the promise was made and not at the time of trial.[29]

7. In Criminal Case. — Since in a criminal case it would be a violation of the defendant's privilege to compel him to exhibit his injuries or submit to a physical examination it would not be proper to ask him to make such an exhibition during the trial.[30] But it has been held that by becoming a witness in his own behalf and exhibiting his person he waives his privilege in this respect.[31]

presence of the jury and to exhibit and describe its condition. "Not only may a witness use the injured member in giving his testimony, but it is proper for the jury to examine and inspect it. Such evidence is of the highest rank."

27. Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462; Wittenberg *v.* Onsgard, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141; malpractice cases in which the request for a compulsory examination was refused but not upon the ground that it could not be ordered under proper circumstances.

28. In an action for professional services rendered by a physician where the defense of malpractice was set up it was held proper to refuse to allow the defendant to exhibit her injured limb to the jury. "The injury occurred several years before, and there was testimony concerning the correctness of the treatment, which necessarily involved medical questions which no jury could be supposed to fully comprehend. It is not competent to allow juries to determine for themselves whether a physician's course has been proper or improper in the treatment of a fractured limb, and the court very properly refused to permit them to inspect it for that purpose. No inspection after an injury is healed, apart from some knowledge of the character of the injury and the method of treatment, could enable even a medical expert to decide upon the merits or demerits of the attending surgeon. A jury's guessing from such an inspection would be of no value whatever, and any needless exposure would have been, as the court below properly held, improper, if not indecent." Carstens *v.* Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. Rep. 606.

29. Vierling *v.* Binder, 113 Iowa 337, 85 N. W. 621. An action for breach of promise of marriage. Defendant pleaded the diseased condition of plaintiff as tending to show *that he never agreed* to marry plaintiff, and asked for an order requiring the plaintiff to submit to a physical examination by physicians appointed by the court for the purpose of determining whether her physical condition was such as to present an obstacle to marriage. It was held that the motion was properly denied, since the only question at issue involving plaintiff's physical condition *related to the time* when defendant's promise was alleged to have been made, and not to her condition at the time of trial as involving her fitness to marry.

30. See article "PRIVILEGE."

31. Where the defendant in a murder case claimed that the deceased had shot him in the left leg and in corroboration of his testimony while on the stand exhibited this leg to the jury, he was asked on cross-examination if he had not exhibited the same scar to certain persons before the killing to which he replied that the scar then exhibited was on

8. Examination of Third Persons. — A. GENERALLY. — Even though a court may have the power to compel a party to submit to a physical examination it has no such power over the person of a mere witness,[32] though the contrary has been held.[33]

B. CRIMINAL SLANDER. — Thus in a prosecution for criminal slander for falsely charging unchastity the prosecutrix cannot be compelled to submit to a physical examination to determine the truth or falsity of the charge.[34] The refusal to submit to such an examination raises no presumption against the prosecutrix' chastity.[35]

C. RAPE. — So in prosecutions for rape it would seem that the

his right leg. The state requested the defendant to submit the wounds on both right and left leg to an examination by a physician but the court on objection refused to compel it, stating, however, that he would permit the prosecution in the presence of the jury to ask defendant to exhibit his leg and if he refused to do so his refusal would be permitted to go to the jury in connection with his other testimony, and thereupon the defendant under protest allowed an inspection and examination by physicians who were permitted over objection to testify in regard to the same. The action of the court was held proper on the ground that the defendant by voluntarily becoming a witness was bound to submit to cross-examination and having exhibited his leg the prosecution was entitled to request an examination of the other leg. Thomas *v.* State, 33 Tex. Crim. 607, 28 S. W. 534.

Where the defendant in a criminal case voluntarily exhibited a scar on his head to sustain his defense there was no error in requiring him to allow it afterwards to be examined by a physician for the state for the purpose of determining the age of the scar. Gordon *v.* State, 68 Ga. 814. But see article "PRIVILEGE."

32. See cases following.

33. Compulsory Examination of Prosecuting Witness. — In an action for assault with a deadly weapon the prosecuting witness was examined for the state and testified that the defendant had shot him in the arm. The defendant on cross-examination asked that the witness' arm be exhibited to the jury, but an objection by the state was sustained. This ruling was held error. "No question was raised by the witness, court or counsel as to the delicacy of the proposed exhibition of the witness' arm. . . . The arm could have been laid bare, and the wound or scar, if any there was thereon, shown to the jury, without offense to the modesty or delicacy of feeling of the witness, of the court or the persons present in the court room. . . . It has often been ruled that a plaintiff, suing for personal injuries will be required to exhibit the injured parts to the jury, if it appears necessary to the ends of justice, and does not involve an indecent exposure of the person. . . . For greater reason, it would seem, should a witness in a criminal cause be required, in such a case, to furnish evidence of that kind." King *v.* State, 100 Ala. 85, 14 So. 878; *citing* Williams *v.* State, 98 Ala. 52, 13 So. 333.

34. McArthur *v.* State, 59 Ark. 431, 27 S. W. 628.

Criminal Slander. — Examination of Prosecutrix. — On a prosecution for criminal slander in which the defendant offered to prove as a justification that he had carnal intercourse with the prosecutrix, it was held that the court had no authority to order an examination of the private parts of the prosecutrix to determine this question. "Of course, if prosecutrix had been willing to submit to the examination, and such examination would tend to solve a disputed issue in the case, it would be entirely competent for the court to make the order." Bowers *v.* State, 45 Tex. Crim. 185, 75 S. W. 299. See Whitehead *v.* State, 39 Tex. Crim. 89, 45 S. W. 10.

35. McArthur *v.* State, 59 Ark. 431, 27 S. W. 628.

prosecutrix cannot be compelled to undergo an examination in support of the defendant's denial of the act; at least, such an order would not be proper except in cases of extreme necessity.[36]

36. "We do not doubt the correctness of the court's ruling in refusing to compel the infant to submit to an examination of her person by medical experts, on motion of the defendant made at the trial. Such a practice has never prevailed in this State, and if adopted as matter of right in all cases of prosecution for rape, the temptation to its abuse would be so great that it might be perverted into an engine of oppression to deter many modest and virtuous females from testfying in open court against the perpetration of one of the most barbarous and detestable of all crimes. We have repeatedly held that a conviction for rape may be sustained on the uncorroborated testimony of a prosecutrix, which excludes the idea of any necessity for corroboration by an examination of her person, either by medical experts or others. In Barnett *v.* State, 83 Ala. 40, we accordingly held there was no error in the trial court's refusal to advise the jury not to convict, unless the testimony was corroborated by an examination of her person by medical or other experts, and that her refusal to submit to such examination would subject her evidence to discredit. However forcible,' we observed, 'such a suggestion may be, under some circumstances, as an argument to a jury, the law does not require it.' . . . In this case, the witness is no party to any civil suit, but has been summoned at the instance of the State, to testify in a criminal prosecution against an alleged violator of the law. It may be well doubted, in cases of rape, and cognate offenses, whether the court has the power to make an order compelling the inspection of the private person of a prosecutrix, in the event of her refusal to submit to such examination. If such right exists at all, we should hold it to be a matter of judicial discretion with the trial court, to be exercised only in cases of extreme necessity, and not a subject of review on appeal to this court. There being other corroboration of the local marks of violence in this case, made soon after the injuries, no such necessity is made to appear." McGuff *v.* State, 88 Ala. 147, 7 So. 35, 16 Am. St. Rep. 25.

PHYSICIANS AND SURGEONS.

CROSS-REFERENCES:

Abortion;
Expert and Opinion Evidence;
Homicide;
Injuries to Person;
Physical Examination; Privilege; Privileged Communications;
Witnesses.

I. THE RIGHT TO PRACTICE MEDICINE.

1. The Practicing. — A. Presumptions and Burden of Proof. Upon a prosecution for practicing medicine or surgery without the requisite authority the burden is upon the prosecution to establish the fact that the defendant practiced.[1]

B. Mode of Proof. — a. *In General.* — The fact of having practiced medicine or surgery may be, and in fact ordinarily is, established by circumstantial evidence,[2] such as holding oneself out as a physician and surgeon,[3] administering medicine to and treating people for disease for a reward,[4] etc.

1. State *v.* Carey, 4 Wash. 424, 30 Pac. 729; State *v.* Dunham, 31 Wash. 636, 72 Pac. 459; Howe *v.* State (Tex. Crim.), 78 S. W. 1064.

Proof of One Act in Violation of the Statute may be sufficient, the evidence being sufficient in other respects — as that the defendant had held himself out in the community as a physician and surgeon. Antle *v.* State, 6 Tex. App. 202.

Itinerant Vendors. — In People *v.* Lehr, 196 Ill. 361, 63 N. E. 725, where the defendant was charged with having sold, offered to sell or advertised for sale a medical device, the statute under which he was being prosecuted provided "that any itinerant vendor of any appliance of any kind intended for the treatment of disease or injury, who shall, by writing or printing, or any method, profess to the public to cure or treat disease or deformity by any drug, nostrum or application, shall pay a license," etc. It was held that, admitting that the oxygenor was an appliance within the meaning of the statute, the evidence did not show that the defendant was an itinerant vendor of the same.

2. In Mayer *v.* State, 64 N. J. L. 323, 45 Atl. 624, where the statute on which the indictment was based declared, among other things, that the use by a person of the title "Dr.," "Doctor," etc., or the exposure of a sign, circular, advertisement or any other device or information, indicating thereby the occupation of the person, shall be considered *prima facie* evidence, it was held that a card which the defendant gave to the prosecuting witness, on which his name appears as "Dr." A. M., and a bottle of medicine given at the same time, were admissible as a declaration of the defendant that he was practicing medicine, or holding himself out as doing so at that time.

3. People *v.* Phippin, 70 Mich. 6, 37 N. W. 888; Benham *v.* State, 116 Ind. 112, 18 N. E. 454.

4. In Richardson *v.* State, 47 Ark. 562, 2 S. W. 187, a prosecution for practicing medicine or surgery as a profession without being first duly registered as required by law, it was held that evidence that the plaintiff administered medicine to and treated a certain person for a certain disease and received money for his services tended to establish the fact of his having practiced.

In Benham *v.* State, 116 Ind. 112, 18 N. E. 454, on the question whether or not the defendant had practiced medicine within the meaning of the statute, the evidence showed that the defendant, in his treatment of patients having the "opium habit," held himself out to the world as a physician; that he issued circulars, signed "Dr. M. C. Benham," in which he claimed that his "treatment" would effect a "complete cure" of the "opium habit." He also issued a number of letters from former patients, addressed to him as "Doctor," testifying to the efficacy and success of his "treatment." It was held that the evidence fairly tended to show that he was practicing medicine.

Other Acts. — In Whitlock *v.* Com., 89 Va. 337, 15 S. E. 893, a witness for the prosecution was permitted to testify that the defendant had visited his family and practiced upon certain members thereof. The court said: "There was no error in this action of the court; for although the offense may have been complete when the

b. *Opinion Evidence.* — The question what is practicing medicine is not ordinarily one for expert testimony.[5]

2. The Right To Practice. — A. Presumptions and Burden of Proof. — a. *As Defense to Prosecution for Unlawfully Practicing.* In the case of a criminal prosecution, or an action to recover a penalty, for practicing medicine without having the requisite certificate or authority, the license or due qualification under the statute is not presumed; if the defendant attempts to justify on the ground that he had such right, it rests with him to prove it.[6]

wife of the witness was prescribed for, yet it was not improper to receive evidence as to the defendant's visits to the family of the witness, and his practicing upon them, all of which was admissible in support of the general charge in the indictment that the defendant had practiced medicine without a license; the evidence being confined to a period within a year of the indictment, and the place being within the jurisdiction of the court." *Compare* United States *v.* Williams, 5 Cranch C. C. 62, 28 Fed. Cas. No. 16,713, where the prosecution offered evidence of a specific instance of practice and receiving payment not stated in the indictment, and of which no notice had been given, and contended that as all the instances of practice before the finding of the indictment constituted but one offense they had a right to give in evidence any specific instance upon the general count without notice; but the court rejected the evidence.

Previous Conviction for Same Offense. — In Howe *v.* State (Tex. Crim.), 78 S. W. 1064, it was held improper to permit proof that the defendant, who was being prosecuted for pursuing the occupation of a traveling medical specialist without having paid the requisite license tax, had been previously convicted of the same offense.

5. In People *v.* Lehr, 196 Ill. 361, 63 N. E. 725, defendant was charged with selling, offering to sell and advertising for sale a medical device. The defendant did not profess to treat patients with this device further than to recommend its use, and perhaps, in some instances, instruct persons how to use it. A witness was asked to state whether or not, in his opinion, a person prescribing a medical device, claiming that it will cure rheumatism, etc., would be regarded as practicing medicine, as he understood the term. The court, in holding the rejection of the question proper, said: "The statute defines the practicing of medicine, and it was for the jury, and not for a witness, even though he might be called an expert, to say whether certain conduct amounted to the practice of medicine. In other words, this question seeks to have the witness decide the very ultimate question which the jury had been sworn to try."

6. Williams *v.* People, 20 Ill. App. 92; Apothecaries Co. *v.* Bentley, R. & M. 159, 21 E. C. L. 404; Benham *v.* State, 116 Ind. 112, 18 N. E. 454; People *v.* Fulda, 52 Hun 65, 4 N. Y. Supp. 945.

On a prosecution for practicing medicine without the requisite license or authority, the burden is on the defendant to show either that he has obtained the requisite license or that he is within the purview of one of the exceptive clauses of the law. Sheldon *v.* Clark, 1 Johns. (N. Y.) 513. See also Bower *v.* Smith, 8 Ga. 74.

In Richardson *v.* State, 47 Ark. 562, 2 S. W. 187, a prosecution for practicing medicine or surgery as a profession without being first duly registered as required by statute, it was held that if the defendant held a certificate of registration it devolved upon him to show it, this being a fact peculiarly within his own knowledge.

In People *v.* Nyce, 34 Hun (N. Y.) 298, a prosecution for practicing medicine without the requisite authority, the defendant admitted the fact that he had practiced medicine at the time and place charged in the indictment; whereupon the district

b. *As Basis for Recovery for Professional Services.* — As to whether or not one seeking to recover the value of professional services rendered as a physician or surgeon must establish his right to practice, as part of his case, there is conflict in the decisions. Some of the courts hold that he must.[7] Other courts, however,

attorney rested the case. The defendant then moved for his discharge, on the ground that mere proof that he practiced medicine was insufficient to convict him of so practicing without a license. In holding a denial of this motion to be correct, the court said: "To practice medicine without a license or diploma, issued or granted to the practitioner, as the law requires, is declared a misdemeanor and is punishable as such. It being then proved or admitted that the defendant practiced medicine it was incumbent on him, in order to avoid the penalty imposed for the alleged unlawful act, to show that he did so under the protection of a license or diploma. The burden of proof was on him to show his justification."

In Raynor *v.* State, 62 Wis. 289, 22 N. W. 430, where the statute under which the defendant was being prosecuted for prefixing the title "Doctor" to his name, and assuming the title of physician and surgeon without having the requisite diploma, and without being a member of a medical society, imposed upon the defendant the burden of establishing his right to use the title of "Doctor" it was held valid; and it was further held that the admission of incompetent evidence given by the prosecution in an attempt to prove that the defendant had no such right was, if error at all, immaterial.

7. Adams *v.* Stewart, 4 Har. (Del.) 144; Styles *v.* Tyler, 64 Conn. 432, 30 Atl. 165; Dow *v.* Haley, 30 N. J. L. 354, where the court said: "Physicians do not occupy positions of attorneys, sheriffs and other public officers, and are not enumerated among those whose character is shown by proof that they have notoriously acted as such."

In Bower *v.* Smith, 8 Ga. 74, the statute required a license to practice medicine except in the case of physicians practicing at the time the statute was enacted; and it was held that in an action by a physician to recover for medical services rendered he must either show a license or that he fell within the exceptive clause of the statute.

Contracts for Medical Services.— In Alabama a statute provides that every contract or agreement, express or implied, the consideration of which is the services of a physician or surgeon, is void unless the physician or surgeon has obtained authority to practice according to law; but proof of such authority must not be required unless two days' notice to make the same is given before the trial of any suit brought to recover the value of such services. (Code, § 3265). And if such notice is given it then devolves upon the plaintiff, whenever it is established that the contract sued upon is for medical services, to show that he is outside of the prohibition. Mays *v.* Williams, 27 Ala. 267.

An Indiana Statute provides that no cause of action shall lie for professional medical services rendered unless the person has been previously licensed to practice; and in Cooper *v.* Griffin, 13 Ind. App. 212, 40 N. E. 710, it was held incumbent upon the plaintiff in an action for such services to show that he was duly licensed to practice medicine.

Veterinary Surgery. — Where there is no statutory provision respecting one's right to practice veterinary surgery, a party suing for the value of services rendered as such has the burden of proving his qualification. Conkey *v.* Carpenter, 106 Mich. 1, 63 N. W. 990. The court said: "His education and experience were peculiarly within his own knowledge. It was incumbent upon him to prove them, and not upon the defendant to disprove them. Physicians who are graduates of medical colleges, or are admitted to practice under the laws of the state, will be presumed competent, and malpractice will then be the only ques-

hold that a physician and surgeon who seeks to recover the value of his professional services is, in the absence of evidence to the contrary, presumed to have authority or right to practice; that the lack of such authority or right is matter of defense, the burden of proving which is upon the defendant.[8]

c. *As Between Third Persons.* — Where the question of the license or qualification of a physician and surgeon arises collaterally in a civil action between third persons, the license or due

tion to determine in the individual case. . . . Practically, the burden of proof upon this point was assumed by the plaintiff upon the trial, for his attorney, at the beginning, asked him about his experience in the business of a veterinary surgeon, and he testified that he had been engaged in it for sixteen years. I think it is the common practice, when a professional man sues for services as such, to prove his qualification. This is done by showing his admission to practice under the statute, his graduation from some reputable college or school, or his study and experience, if his right to practice is not regulated by statute."

Slight Evidence Sufficient. — As against one who calls a physician, slight evidence of his right to practice may suffice. Chicago & A. R. Co. *v.* Smith, 21 Ill. App. 202. The only point involved in this case was as to the legal right of the plaintiff to practice medicine. He testified without objection that he had practiced some fourteen years, and that he had a certificate, as required by law. It was shown that his name appeared on the register of physicians in the county clerk's office. And it was held that this was enough as against the defendant, who had called him and thereby recognized his right to practice his profession.

8. *Illinois.* — Jo Daviess Co. *v.* Staples, 108 Ill. App. 539; Good *v.* Lasher, 99 Ill. App. 653.

Iowa. — Lacy *v.* Kossuth Co., 106 Iowa 16, 75 N. W. 689; Robinson *v.* Campbell, 47 Iowa 625.

Louisiana. — Dickerson *v.* Gordy, 5 Rob. 489.

Minnesota. — Lyford *v.* Martin, 79 Minn. 243, 82 N. W. 479.

Nebraska. — Cather *v.* Damerell, 99 N. W. 35.

South Carolina. — Crane *v.* McLaw, 12 Rich. L. 129.

In Thompson *v.* Sayre, 1 Denio (N. Y.) 175, an action to recover for the value of medical services, the plaintiffs proved that the defendants retained them and received their services as such physicians; and it was held on the authority of McPherson *v.* Cheadell, 24 Wend. (N. Y.) 15, that a license to practice was to be presumed until the contrary was shown.

In Prevosty *v.* Nichols, 11 Mart. (O. S.) (La.) 21, an action to recover the value of medical services rendered, it was objected by the defendant that the plaintiff had not produced a license authorizing him to practice medicine, but the court said: "Where a defendant, in the course of the transaction on which the action is founded, has acted with the plaintiff as possessing a certain character, and acknowledged the title by virtue of which he sues, this is *prima facie* evidence that he is entitled to sue; and if he is not, the burthen of proof is then thrown on the defendant.— Phillip's Evidence, 171, (edit. 1820). In the present case it is clearly established that the plaintiff was employed as a physician, and frequently admitted to be such by defendant, and his agents; we therefore think the objection taken to the plaintiff's right to maintain this action has not been sustained." See also Dickerson *v* Gordy, 5 Rob. (La.) 489, a similar action, where it was held that since the defendant had employed the plaintiff as a physician the burden of proving that he was not legally authorized to practice as such rested on the defendant.

qualification of the physician and surgeon under the statute will be presumed.[9]

B. Mode of Proof. — The right to practice medicine or surgery seems to be almost, if not entirely, one given by statute, and the proof of that right consists of the production of the evidence specified in the statute.[10] On the trial of an information against one

9. Chicago *v.* Wood, 24 Ill. App. 40, *disapproving* Chicago *v.* Honey, 10 Ill. App. 535. See also North Chicago St. R. Co. *v.* Cotton, 140 Ill. 486, 29 N. E. 899, where the court, in referring to these cases, said: "Without fully committing ourselves to either of these views, it will be sufficient for this case to say that this being a case between third parties, and the question of the physician's qualifications arising only collaterally, the evidence in the present record is sufficient, *prima facie* at least, to establish the proper qualifications of the physician. He testifies that his profession is that of physician and surgeon; that he has practiced his said profession in Chicago for twenty-one and one-half years, and that he is a professor of the theory and practice of medicine in the Woman's Medical College at Chicago. It being shown that he is a physician and surgeon by profession, and that he has practiced his profession in this state for the length of time stated, the law, as it has stood ever since July 1, 1874, having required him to have a license in order to lawfully engage in said practice, it will be presumed, when the question arises in a collateral proceeding, that he has obeyed the law, and obtained the required license. If he were himself suing to recover for his professional services, he would doubtless be required to show affirmatively his compliance with the law, but between third persons the fact that he is and for a long time has been practicing as a physician and surgeon is sufficient to show *prima facie*, that he is lawfully authorized so to do."

10. In White *v.* Mastin, 38 Ala. 147, it was held that the plaintiff's license to practice medicine was competent evidence of such right without proof of its execution, by virtue of the Code, § 975. The present Code (§ 3265) provides that the certificate issued to a physician, the record thereof being certified by the judge of probate, is evidence of the authority of the person therein named to practice medicine, and if the original be lost, a certified copy of the record is sufficient evidence.

The Iowa Statute provides that the qualifications prescribed, when ascertained, shall be evidenced by a certificate of the board, and that the certificate shall be recorded in the county where the holder resides; and the record must show the facts upon which the certificate was granted. The certificate or record is the proper evidence of qualification. State *v.* Mosher, 78 Iowa 321, 43 N. W. 202.

Diploma From Chartered School. Where the statute regulating the practice of medicine requires, among other things, a license or diploma from some chartered school, a diploma purporting to have been issued by a medical college, or secondary evidence thereof, is not admissible on the question of the right to practice under the statute without proof that the college was chartered. People *v.* Nyer, 34 Hun (N. Y.) 298.

The Issuance of a Diploma to the defendant and his admission to membership in a medical society, as provided by the statute regulating the right to practice, are *prima facie* evidence, in a prosecution for having unlawfully practiced medicine, that he was entitled to the diploma and to be admitted to such membership. Raynor *v.* State, 62 Wis. 289, 22 N. W. 430; Wendel *v.* State, 62 Wis. 300, 22 N. W. 435.

In Rider *v.* Ashland Co., 87 Wis. 160, 58 N. W. 236, an action to recover for medical services rendered, it was held that evidence that the plaintiff was a practicing physician and a graduate of an incorporated school of medicine was sufficient; that

for practicing medicine without the requisite certificate or license as required, evidence showing that he was entitled to a certificate under the law, or that the board had unlawfully refused it, is immaterial.[11]

II. COMPENSATION FOR PROFESSIONAL SERVICES.

1. The Contract of Employment and Its Performance. — A. PRESUMPTIONS AND BURDEN OF PROOF. — In an action by a physician and surgeon to recover for professional services rendered, the plaintiff must establish the contract of employment, and that he rendered the services in question.[12]

Implied Contract. — And it is incumbent upon the plaintiff, when not relying upon an express contract, to prove facts from which the law will imply a contract.[13]

it was not necessary for him to show further that he had received a diploma; that "the fact that a man is a graduate of a school carries with it a presumption that he has received a diploma."

A Diploma Purporting To Be Issued by a Regularly Chartered Medical School in Another State does not prove itself; it is necessary to authenticate by proof of the corporate seal. Barton *v.* Wilson, 9 Rich. L. (S. C.) 273. The statute in this case provided that all persons practicing medicine or surgery, and who shall have graduated and received a diploma from any regularly organized medical college within the United States, shall be entitled to charge, sue for and collect for their services in the same manner as the graduates of the South Carolina medical college. The plaintiff produced what purported to be a diploma from a chartered medical school in Pennsylvania, but did not produce evidence of the genuineness of the impression of the seal thereon.

11. State *v.* Mosher, 78 Iowa 321, 43 N. W. 202.

12. Styles *v.* Tyler, 64 Conn. 432, 30 Atl. 165. See also Robinson *v.* Campbell, 47 Iowa 625.

In Curry *v.* Shelby, 90 Ala. 277, 7 So. 922, where the services were rendered to a third person upon request of defendant, the liability was held to be established by proof that the services were rendered at the instance and request of the defendant, and that when the plaintiff proposed to discontinue his visits, defendant requested him to continue them, and that when plaintiff presented his bill defendant did not deny his liability, but disputed its amount.

By Statute in Indiana the county officials are required to employ a physician to attend the poor of the county, but if for any reason they do not do so the township trustees may employ such medical or surgical services as paupers within their respective jurisdiction may require; and in Warren Co. *v.* Osburn, 4 Ind. App. 590, 31 N. E. 541, an action against the defendant county to recover for medical services rendered in treating paupers, wherein it appeared that the plaintiff's employment was by a township trustee, but that the county had contracted with a physician to treat the paupers of that township, it was held that it was to be presumed that adequate provision had been made, and that the burden of showing an exigency authorizing the employment of medical assistance by the trustee in such township was with the plaintiff. *Compare* Orange Co. *v.* Ritter, 90 Ind. 362, where, however, it did not appear that any such regular contract of employment had been made by the county officials, and it was held that if such fact existed it was not a fact to be proved by the plaintiffs, but was one to be established as matter of defense.

13. Curry *v.* Shelby, 90 Ala. 277, 7 So. 922. See also Crane *v.* Baudoine, 65 Barb. (N. Y.) 260 (where it was held that the facts shown established an implied employment of

B. Mode of Proof. — The employment of a physician or surgeon is a matter of contract, and any competent evidence, whether direct or indirect, should be received in proof[14] or disproof of the

the plaintiff by the defendant in the usual way of employing physicians; and that although the request of the defendant that the plaintiff should attend his daughter was not proved by any express terms, yet it was plainly collected from the circumstances, and suppled by intendment of law); Madden *v.* Blain, 66 Ga. 49 (*holding* that the fact that a son-in-law is present at the bedside of his wife's mother, rendering such services as he can, and has knowledge of the physicians who attend her, but says nothing, is not sufficient to show an implied promise to pay the physicians' bill).

"The general rule, no doubt, is that, where a person requests the performance of a service, and the request is complied with and the service performed, the law raises an implied promise to pay the reasonable value of the services. But this implication does not obtain where one person requests a physician to perform services for another, unless the relation of the person making the request to the patient is such as raises a legal obligation on his part to call in a physician and pay for the services. Where a husband calls in a physician to attend upon his wife, or where a father calls in a physician to attend upon his minor child, the law implies a promise on his part to pay the reasonable value of the services, because there is a legal obligation on his part, in either case, to furnish necessaries for the patient's benefit. But no such implication arises where one calls in a physician to attend upon a stranger, or upon one to whom he is under no legal obligation to furnish necessaries." Meisenbach *v.* Southern Cooperage Co., 45 Mo. App. 232.

14. In an action to recover for medical services rendered to a third person, it is permissible for the plaintiff to show that, although he did not begin his services at the instance and request of the defendant, he continued them at his request. White *v.* Mastin, 38 Ala. 147, *holding* that for this purpose he may show that, when he spoke of discontinuing his visits, a telegraphic dispatch and a letter from defendant, requesting that all necessary attention be bestowed on the patient at his expense, were shown to him by the person who had received them, and who then requested him to continue his attendance; and holding further that defendant's dispatch being addressed to the infirmary at which the patient was confined, but authorizing the employment of persons not connected with the infirmary to perform necessary services for the patient, the fact that the defendant has paid the account contracted with the infirmary, which did not embrace the plaintiff's account, is irrelevant and inadmissible.

Payment of Other Bills. — In Becker *v.* Gibson, 70 Ind. 239, an action to recover for medical treatment of the defendant's parents at the alleged request and express promise by the defendant to pay therefor, it was held that evidence that other persons had furnished to his parents other necessaries for which he had paid in no manner tended to establish the express promise alleged, and was properly excluded. The court said: "At common law a son is under no legal obligation to support his parents, and we are not aware of the existence of any statute of this state changing that rule. A son may be charged for necessaries furnished to his parents at his request, but such request must be proven. It cannot be inferred from his natural duty to provide for his parents, or from any merely collateral fact."

In Indiana, where by statute the county officials are required to make contracts with physicians to attend the poor generally in their county, it is held that the board of commissioners act in an administrative capacity, and not as a court, and that while doubtless their minutes should show in some way the making of such a contract, yet if they do not the contract is not thereby invalidated, and in such case its terms and conditions may be shown by parol evidence. Orange Co. *v.* Ritter, 90

contract,[15] provided, of course, it is not otherwise objectionable.[16]

Transactions With Deceased Persons. — A physician suing for professional services rendered to the defendant's testator is not a competent witness to testify as to whether he treated the testator professionally during his lifetime.[17]

2. Necessity of Frequent Visits. — A physician is regarded as the best and proper judge of the necessity of frequent visits, and in the absence of proof to the contrary it will be presumed that all professional visits made were deemed necessary and were properly made.[18]

3. The Value of the Services. — A. PRESUMPTIONS AND BURDEN OF PROOF. — In an action by a physician and surgeon to recover the value of professional services rendered, it is of course incumbent upon the plaintiff to establish the value of the services alleged.[19]

Ind. 362. See also article "OFFICERS."

15. Where the plaintiff in an action for medical services rendered does not rely upon an express contract to pay, it would seem proper to permit the defendant to show facts the effect of which would tend to disprove the existence of any agreement. Curry *v.* Shelby, 90 Ala. 277, 7 So. 922, an action to recover for services rendered to a third person where the plaintiff relied upon an implied agreement, and the court so declared.

16. Reputation of Physician. Evidence that a physician suing for professional services rendered is not of good repute is not competent as tending to show that the contract was not made. Prietto *v.* Lewis, 11 Mo. App. 601.

17. Ross *v.* Ross, 6 Hun (N. Y.) 182. The court said: "But it is very clear that the inquiry made related to a personal transaction between the witness and the deceased testator, upon which he was not competent to give evidence, according to the section of the code just referred to. If the evidence could have been taken, the direct tendency of it would have been to prove that he performed service about his father's person, from which the law might imply a promise on the part of the latter to pay, while, if he were living, his own evidence might disprove both of such facts. The policy of section 399 is to prevent the estates of deceased persons from being rendered liable by evidence of that description, proceeding from the surviving party to such a transaction. Where that has been had personally with the deceased, the liability of the estate on account of it, if established at all, must be shown by the evidence of persons who are not parties asserting and endeavoring to sustain the claim made. The rule is a very salutary and proper one, and it has been rigidly adhered to in the administration of the laws, and, under it, the question was very properly overruled." See fully on this question the article "TRANSACTIONS WITH DECEASED PERSONS."

18. Todd *v.* Myres, 40 Cal. 355, an action to recover for sixty-six visits, it appearing, however, that the plaintiff was specially requested to make only about a dozen, although the defendant knew that the plaintiff was visiting his family and made no objection. The court said: "It would be a dangerous doctrine for the sick to require a physician to be able to prove the necessity of each visit, before he can recover for his services. This is necessarily a matter of judgment, and one concerning which no one save the attending physician can decide. It depends not only upon the condition of the plaintiff, but, in some degree, upon the course of treatment adopted." See also Ebner *v.* Mackey, 186 Ill. 297, 57 N. E. 834, 78 Am. St. Rep. 280, 51 L. R. A. 298.

19. Styles *v.* Tyler, 64 Conn. 432, 30 Atl. 165. See also Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597.

The Reasonableness of the Amount Charged for the services rendered

The value, however, to be proved in such case is the ordinary and reasonable price for services of that nature; it is not necessary to prove the value of the services to the defendant.[20]

B. Mode of Proof. — a. *In General.* — Where the amount of compensation to be paid to a physician and surgeon for his services has been fixed by an express agreement, such agreement would seem to control as to the amount of recovery to which he is entitled.[21]

b. *Charges to Other Patient.* — A physician cannot establish the reasonableness of his charges by showing what he has charged another person in a similar case.[22]

c. *Pecuniary Condition of Patient.* — The pecuniary ability of a patient cannot be shown by a physician suing to recover for services rendered for the purpose of affecting the reasonableness of his charges.[23]

d. *Professional Income.* — The value of services rendered by a physician and surgeon cannot be measured by his professional income for any series of years.[24]

e. *Professional Standing.* — A physician and surgeon suing for the value of professional services may show that his standing in the

must be proved. Sidener *v.* Fetter, 19 Ind. 310.

20. Styles *v.* Tyler, 64 Conn. 432, 30 Atl. 165, where the court said: "He is not bound to prove the value of the services to the defendant; they may save the defendant's life or they may effect no cure, or a cure may follow without aid from the services. In the first case the value of the services to the defendant can hardly be measured; in the others they are of no value. The value to be proved by the plaintiff is the ordinary and reasonable price for services of that nature; the contract of employment, unless special conditions are made, does not include an insurance of actual benefit to the patient; in this respect the employment of a physician differs essentially from the employment of a builder or of any person whose employment involves an insurance that the services shall answer the purposes for which they are rendered."

21. Doyle *v.* Edwards, 15 S. D. 648, 91 N. W. 322; Burgoon *v.* Johnson, 194 Pa. St. 61, 45 Atl. 65.

22. Collins *v.* Fowler, 4 Atl. 647, the court said: "The object was doubtless to show that the charge made in this case was what was usual and customary for physicians to charge for services in like cases. But this could not be established by proving what the plaintiff had charged another person as the question would still return, whether that charge was reasonable, and according to the usage and practice of physicians in the neighborhood."

23. Robinson *v.* Campbell, 47 Iowa 625. See also Morrisett *v.* Wood, 123 Ala. 384, 26 So. 307, 82 Am. St. Rep. 127. *Contra,* Succession of Haley, 50 La. Ann. 840, 24 So. 285.

24. Marion Co. *v.* Chambers, 75 Ind. 409, where the court said: "If a surgeon properly performs a surgical operation he is entitled to recover the reasonable value of his services, neither more nor less, whether his professional income be $10 or $10,000 a year. . . . If the physician or surgeon possesses the requisite skill and knowledge and exercises such knowledge and skill properly he is entitled to be paid the reasonable value of services rendered by him, irrespective of the question of his yearly professional income."

The value of a physician's services cannot well be measured by his usual receipts in daily business to such an extent as to exclude opinions of competent men as to their worth. Thomas *v.* Caulkett, 57

profession is high.[25] But evidence pertaining to the plaintiff's professional character is not admissible for the defendant upon an issue of the value of the former's professional services.[26]

f. *Opinion Evidence.* — On an issue as to the value of the professional services of a physician and surgeon, other physicians and surgeons may give their opinion in relation thereto,[27] even though they state that they base their opinion entirely upon what they think the services worth and have no knowledge of what other physicians charge for such services.[28] But the witness must be qualified to give such an opinion.[29]

Conclusiveness. — The opinion of competent experts as to the value of medical services, while not binding upon the court,[30] cannot

Mich. 392, 24 N. W. 154, 58 Am. Rep. 369.

25. Lange *v.* Kearney, 51 Hun 640, 4 N. Y. Supp. 14, *affirmed* 127 N. Y. 676, 28 N. E. 255; Heintz *v.* Cooper (Cal.), 47 Pac. 360. But see Baker *v.* Wentworth, 155 Mass. 338, 29 N. E. 589, where the question whether or not evidence of the standing of a physician was competent on the question whether his charge was reasonable was raised, but not decided, but the language of the court implied that they regarded such evidence as not admissible.

26. Jeffries *v.* Harris, 10 N. C. 105. The court said: "The defendant is equally liable on his assumpsit whether the plaintiff's character was good or bad; for if he chose to employ him as a physician it is not competent for him afterward to say that he is not a good one and therefore he will not pay him."

27. MacEvitt *v.* Maass, 64 App. Div. 382, 72 N. Y. Supp. 158; Ward *v.* Ohio River & C. R. Co., 53 S. C. 10, 30 S. E. 594. See also Chicago *v.* Wood, 24 Ill. App. 40; Kwiecinski *v.* Newman (Mich.), 100 N. W. 391.

Physician Devoting Entire Time to Patient. — In the case of a physician giving up his other practice and devoting himself exclusively to one patient, the services rendered cannot properly be compensated by the usual charges, and hence the witness, in estimating what would be a reasonable compensation, may take into consideration the nature of the contract and the fact that by such arrangement the physician would probably lose largely in his other practice. Maddin *v.* Head, 1 Lea (Tenn.) 664, *holding*, however, that what loss the physician had actually sustained in his practice by reason of the contract and services in question could not form a part of his actual recovery.

28. Marion Co. *v.* Chambers, 75 Ind. 409. The court said: "The testimony was competent, for the witnesses were shown to be experts, and to possess such knowledge, skill and acquaintance with the subject under investigation as entitled them to express their opinions to the jury. They may have had some knowledge of the value of such services, without knowing anything at all about what others were charging for like services. The question for the court was, not what was the weight or value of such opinions, but were they relevant, and were they of any material weight? What weight shall be given such opinions is one thing, and whether they shall be expressed at all or not is quite another. It is clear from the statements of the witnesses, that they were skilled in their profession, and that they did have sufficient acquaintance with the nature and value of services rendered in *post mortem* examinations to entitle their opinions to go in evidence."

29. It is improper to permit one who is not a physician to give his opinion of the value of medical services; nor does the fact that the witness had previously heard a competent witness express his opinion of such value make the witness competent. Mock *v.* Kelly, 3 Ala. 387.

30. *In re* Smith, 18 Misc. 139, 41 N. Y. Supp. 1093.

be disregarded by the jury and a value fixed by them upon their own judgment.[31]

g. *Matters of Defense.* — (1.) **Generally.** — It is competent for the defendant, where the plaintiff declares on a *quantum meruit*, to prove the real value of the plaintiff's services, or that they were of no value; and for this purpose he may show the customary charges by physicians for like services in the same locality or neighborhood.[32] But evidence as to the price at which the defendant could have procured other physicians to perform the services in question is not admissible.[33]

(2.) Efficacy and Ingredients of Medicines Used. — In an action to recover for medical services rendered, it is competent for the defendant to prove that the medicines used by the plaintiff were worthless, and possessed no efficacy in producing the results for which they were used; and in order to do this he may show the ingredients and nature of the medicines.[34] Nor is the plaintiff, when testifying as a witness for himself, privileged from disclosing these facts when asked to do so on cross-examination by the defendant.[35]

31. Ladd *v.* Witte, 116 Wis. 35, 92 N. W. 365.

See also Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597, where the court said: "There can be no presumption of law concerning the value of a surgeon's services, and there is no presumption that a jury can ascertain it without testimony of some kind, from persons knowing something about such value. . . . We do not say that the value of a physician's services at a given time and place may not be known to other persons than physicians, if they have been in a position to learn the customary or proper rates. But there is no legal presumption and no reasonable probability that all jurymen have this knowledge. And there can be no safety to any one if juries are to use their own misguided views on such matters."

32. Jonas *v.* King, 81 Ala. 285, 1 So. 591.

In Jeffries *v.* Harris, 10 N. C. 105, an action to recover for services rendered as a physician, the defendant was permitted to show that the plaintiff had not been regularly educated as a physician.

33. Marion Co. *v.* Chambers, 75 Ind. 409. The court said that the question in issue was, not what others would have done the work for, but what was the reasonable value of the services of the plaintiff? That it was no more competent for the defendant to introduce such evidence than it would have been for the plaintiff to prove that any other physician and surgeon would have charged twice as much as the sum claimed by him; . . . that it was proper for the defendant to call competent witnesses to give their opinions of the value of the services, but not to prove particular bargains or offers."

34. Jonas *v.* King, 81 Ala. 285, 1 So. 591.

35. Jonas *v.* King, 81 Ala. 285, 1 So. 591. In this case "the defendant asked the plaintiff what was the medicine he used as an injection in treating defendant; plaintiff objected to this question on the ground that the medicine so used by him was his own preparation and discovery. The court sustained the objection and defendant excepted. The defendant then stated that he expected to prove by other witnesses that the medicine was worthless and would not have benefited him, if he could ascertain what the medicine was, and again asked the question. The court again sustained the plaintiff's objection, made on the same grounds, and defendant excepted." The court said: "The plaintiff had no property in the secret of his remedy such as the

(3.) Misconduct and Mistreatment. — In an action by a physician to recover for professional services rendered, evidence showing misconduct and mistreatment by the plaintiff in rendering the services in question, whereby the defendant passed from one disease into another equally or more dangerous, is admissible.[36]

(4.) Rendering Bill. — The fact that a physician suing for the value of professional services rendered a bill for an amount less than is sued for is a competent circumstance upon the question of the value of the services.[37]

law would privilege him from disclosing. The fear that such disclosure might give others the benefit of his skill would not excuse him in refusing to testify as to the nature of the medicine. His only mode of protection was by procuring a patent for the discovery. When he became a witness it was for the purpose of testifying to all material and relevant facts within his knowledge not privileged by law from disclosure. The circuit court erred in excluding the question having reference to this inquiry."

36. Piper *v.* Menifee, 12 B. Mon. (Ky.) 465, 54 Am. Dec. 547. In this case it was proved on the part of the defendant that on the first visit of the plaintiff he was sent for to call upon a patient suffering from smallpox, and the defendant told him that he could not attend the defendant if he attended the smallpox patients, when, without admitting or denying that he visited the smallpox patients, he said if he did visit them he would change his clothes and there would be no danger. The defendant, while convalescent, was taken with smallpox, as were also members of his family. The defendant sought to show that while rendering the services sued for the plaintiff was also attending smallpox patients, and to prove other facts conducing to show that the plaintiff, by his visits to the defendant, had brought with him and communicated to the defendant the smallpox infection, and that there were no other means by which it could have been communicated to him, but the evidence was excluded. In holding that the evidence should have been received, the court said: "We are of opinion that the facts offered to be proved in this case, being a part of the very transaction and contract on which the recovery is claimed, and tending to prove maltreatment on the part of the plaintiff in his attendance on the first disease, whereby his services in that disease were rendered less valuable, and whereby another disease was produced, for his services, in which he has no just claim to compensation except in reduction of damages claimed against himself, are admissible and material, not by way of set-off, but as affecting the cause of action itself, and as a ground of diminishing or defeating his recovery, so far as his demand is founded upon services rendered either in attending on the defendant and his son in the smallpox, or in attending on the defendant in his prior disease, in violation of his promise not to attend smallpox patients while attending the defendant. Indeed, there is some ground for saying that his right to charge the defendant for attendance on the first disease was made expressly dependent upon his not visiting smallpox patients."

37. In Heath *v.* Kyles, 17 N. Y. St. 469, 1 N. Y. Supp. 770, the court said: "It has long been a rule of law that the rendering of a bill for a fixed amount charged as services is an admission, upon the part of the person rendering the bill, that the amount thereof is the sum owing, and *prima facie,* as against him, that the services are of the value as therein stated, and that his right to recover is limited to that sum. *Williams* v. *Glenny,* 16 N. Y. 389. The language of this authority is: 'The plaintiff's own estimate of the value of his services was high evidence against himself.' There, as here, the party claiming to recover was confronted with his bill, ren-

(5.) Amount of Previous Charges. — As tending to show an implied contract or understanding in relation to the amount which should be charged for the services sued for, the patient should be permitted to show that for previous services the physician had charged a less amount, there being no evidence of any new agreement.[38]

III. MALPRACTICE.

1. Employment of Physician or Surgeon. — In a malpractice action it is incumbent upon the plaintiff to show that he employed the defendant to perform the services which the latter undertook.[39]

2. Facts Constituting Malpractice. — A. PRESUMPTIONS AND BURDEN OF PROOF. — a. *In General.* — The general rule is that in an action against a physician and surgeon to recover damages for alleged malpractice, consisting of negligence or want of professional skill or both, the affirmative of the issue is with the plaintiff, and he has the burden of proving the facts charged as constituting the malpractice.[40] And it is error in such an action to impose upon

dered for a less amount than the sum sought to be enforced. The bill is by no means conclusive upon the plaintiff. He still has the right to show that his services were worth in fact more, and that either by mistake or otherwise the bill was rendered for a less amount."

38. Sidener *v.* Fetter, 19 Ind. 310.

39. Peck *v.* Martin, 17 Ind. 115.

40. *Illinois.* — Sims *v.* Parker, 41 Ill. App. 284; Hoener *v.* Koch, 84 Ill. 408.

Kansas. — Pettigrew *v.* Lewis, 46 Kan. 78, 26 Pac. 458.

Maryland. — State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587.

New Hampshire. — Leighton *v.* Sargent, 27 N. H. 460, 59 Am. Dec. 388; Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323.

New York. — Billinger *v.* Craigue, 31 Barb. 534.

Ohio. — Craig *v.* Chambers, 17 Ohio St. 253.

In an action against a physician and surgeon to recover damages for malpractice, the professional skill of the defendant is, if not in express terms, at least by implication, put in issue, and the burden of proof is upon the plaintiff to show the defendant's want of such skill. Holtzman *v.* Hoy, 118 Ill. 534, 3 N. E. 832, 59 Am. Rep. 390.

Malpractice Resulting in Death. In an action to recover for the death of a patient, alleged to be due to malpractice, the burden of proof is upon the plaintiff. Chase *v.* Nelson, 39 Ill. App. 53.

In Ballou *v.* Prescott, 64 Me. 305, a malpractice action where the defendant was charged with negligence in abandoning the plaintiff while in need of medical care, the defendant admitted the fact of non-attendance, but attempted to justify, not only on the ground that no further attention was necessary, but also on the ground of notice that he should not attend further unless sent for, and that the contract was thus rescinded and discharged. It was held that as to the first ground the burden would continue upon the plaintiff, for there would be no delinquency unless the defendant had failed to exercise the requisite judgment or had carelessly neglected his duty; but that as to the latter ground the defendant set up a new fact in avoidance, and it was incumbent upon him to establish that fact.

In Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696, an action for malpractice for unskillfully or negligently treating a fractured arm, it was held that it was not necessary for the plaintiff to show gross culpability on the part of the defendants; it was sufficient that there was

the defendant the burden of proving to the satisfaction of the jury that he possessed and used the knowledge, skill and ability that were reasonably necessary to properly treat the plaintiff.[41] So, too, in an action to recover for the value of medical services wherein the defendant alleges that the plaintiff did not possess or did not exercise reasonable skill, the burden of proof is on the defendant.[42] It must be shown that the treatment was improper or negligent; not merely that the defendant was mistaken or that his treatment resulted injuriously to the plaintiff.[43] But it is not necessary to

evidence of any failure on their part to exercise proper care, or of any neglect in the discharge of the duty they had assumed toward the plaintiff.

In an action against a physician and surgeon alleged unskillfulness and negligence in the treatment of a special case of sickness or infirmity which he is employed to attend, a liability can not be established against him in consequence of his failure to learn the peculiar condition of the patient in another respect, unless the evidence clearly shows that he does not possess such a reasonable degree of learning and skill as is requisite for the practice of his profession, or that he did not exercise his best judgment, and ordinary care and diligence, to discover whether such condition existed or not. And where, in such a case, it appeared that there was good reason for believing that such condition did not exist, and that the physician applied all the tests known to medical science which could be employed, under the circumstances of the case, to ascertain such fact, and was unable to detect it, it was held that a cause of action against him on account of such failure was not made out, and that a nonsuit, if properly applied for, should have been granted. Langford *v.* Jones, 18 Or. 307, 22 Pac. 1064.

A Mere Preponderance of Evidence Is Sufficient to prove malpractice; it is not necessary to prove the charge by evidence sufficient to produce a clear conviction in the minds of the jury. Hoener *v.* Koch, 84 Ill. 408.

41. Vanhooser *v.* Berghoff, 90 Mo. 487, 3 S. W. 72.

42. Robinson *v.* Campbell, 47 Iowa 625.

In an action to recover the value of medical services rendered, wherein the defendant, by way of counterclaim, alleges that ordinary skill and care were not used by the plaintiff, the burden of proof is upon the defendant to make good his defense; it is not incumbent upon the plaintiff to show that he did treat the case with ordinary skill and care. Styles *v.* Tyler, 64 Conn. 432, 30 Atl. 165. The court said: "The disproof of the actual acts and omissions necessary to show that ordinary skill has not in fact been exercised in a particular case is not a part of the physician's case in chief; unless such acts and omissions are established by a preponderance of evidence the physician's right of action remains proved. Such acts and omissions are set up by the defendant, not as disproving the allegations of the complaint, but as establishing an independent series of acts that are a bar to the right of action. The defendant thus becomes an actor and *quo ad* the facts he has undertaken to establish the burden of proof is on him."

43. Sims *v.* Parker, 41 Ill. App. 284, an action to recover damages for an injury alleged to have been caused to the defendant by a truss improperly applied and adjusted for the cure of hernia, when in fact he had no hernia. The court said: "Proof that he was mistaken as to the existence of a rupture, or that the abscess was caused by the pressure of the truss, was not enough to entitle plaintiff to a verdict. Proof of a bad result or of a mishap is of itself no evidence of negligence or lack of skill. The defendant is qualified to practice medicine and surgery, and the evidence of the experts in his profession shows him

show a want of proper knowledge and skill by evidence independent of, and unconnected with, the treatment of the case.[44]

The Reason Assigned for imposing this burden upon the plaintiff in a malpractice case is that in the absence of evidence the law will not presume a party guilty of a breach of duty, nor of negligence nor fraud.[45]

competent and skillful. Before a recovery could be had against him it must be shown that his treatment was improper or negligent, not merely that he was mistaken, or that his treatment resulted injuriously to plaintiff. A physician or surgeon, or one who holds himself out as such, is only bound to exercise ordinary skill and care in the treatment of a given case, and in order to hold him liable it must be shown that he failed to exercise such skill or care. McNevins *v.* Lowe, 40 Ill. 209. The jury cannot draw the conclusion of unskillfulness from proof of what the result of the treatment was, but that the treatment was improper must be shown by evidence."

In Pettigrew *v.* Lewis, 46 Kan. 78, 26 Pac. 458, an action to recover damages for an alleged unskillful and negligent operation on the plaintiff's eye which resulted in injury and disease, it was held incumbent upon the plaintiff to prove that the injury and disease were produced by the operation, and that the defendants did not exercise ordinary skill and care in performing the operation; that proving merely that the plaintiff's eyes had become weak and sore after the operation was performed was insufficient to establish liability.

To charge a physician or surgeon with damages, on the ground of unskillful or negligent treatment of his patient's case, it is never enough to show that he has not treated his patient in that mode nor used those measures which in the opinion of others, even medical men, the case required; because such evidence tends to prove errors of judgment, for which the defendant is not responsible, as much as the want of reasonable care and skill, for which he may be responsible. Alone, it is not evidence of the latter, and therefore the party must go further, and prove by other evidence that the defendant assumed the character and undertook to act as a physician, without the education, knowledge, and skill which entitled him to act in that capacity; that is, he must show that he had not reasonable and ordinary skill; or he is bound to prove in the same way that, having such knowledge and skill, he neglected to apply them with such care and diligence as in his judgment, properly exercised, the case must have appeared to require; in other words, that he neglected the proper treatment from inattention and carelessness. The evidence in support of these two views must naturally be of a very different character. Leighton *v.* Sargent, 27 N. H. 460, 59 Am. Dec. 388.

44. "It is quite clear that the treatment of the particular case might show such gross ignorance of the business of the surgeon, as to put it beyond all doubt that he had not the amount of skill usually possessed by the profession, or even, in fact, that he had no knowledge of his profession at all. It might appear that the course pursued was wholly unknown to the profession, and that it resulted, as it necessarily must, in detriment to the patient. Nothing further, certainly, would need to be shown to render one answerable for an injury done, who should offer his services as a skillful surgeon." Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323.

45. Billinger *v.* Craigue, 31 Barb. (N. Y.) 534.

In State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587, the court said: "It was the duty of the professional men to exercise ordinary care and skill, and this being a duty imposed by law, it will be presumed that the operation was carefully and skillfully performed, in the absence of proof to the contrary. As all persons are presumed to have duly performed any

b. *Want of Consent to Operation.* — Where the plaintiff in an action for malpractice in a surgical operation alleges that there was no consent to the performance of the operation the burden is upon him to show that fact.[46]

c. *Freedom From Contributory Negligence.* — As in other negligence cases, there is conflict in the decisions as to whether contributory negligence on the part of the patient is a matter of defense in a malpractice case; or whether it is incumbent upon the patient to show freedom therefrom.[47]

B. Mode of Proof. — a. *Existence or Want of Skill.* — **(1.) Generally.** — Where a physician or surgeon sued for malpractice is charged with a want of skill, any competent evidence tending to establish the want of skill charged should be received.[48] And

duty imposed on them, negligence cannot be presumed, but must be affirmatively proved. Best on Presump., 68; Jacksonville Street R. Co. *v.* Chappell, 21 Fla. 175. This principle is especially applicable in suits against physicians and surgeons for injuries sustained by reason of alleged unskillful and careless treatment. The burden of proof is on the plaintiff to show a want of proper knowledge and skill."

46. State *v.* Housekeeper, 70 Md. 162, 16 Atl. 382, 14 Am. St. Rep. 340, 2 L. R. A. 587. This was an action to recover for the death of a wife caused by the alleged unskillful or wrongful performance of a surgical operation upon her by the defendants, and the plaintiff claimed that he had not consented to the operation; but the court held that he had the burden of proving such non-consent; that "the party who allows a surgical operation to be performed is presumed to have employed the surgeon for that particular purpose."

Where a husband, with the assent of the wife, places her in the care of a physician for medical and surgical treatment for a dangerous disease, he impliedly requests him to do all such acts and adopt such course of treatment and operations as in his judgment would be most likely to effect her ultimate cure and recovery, and the wife's assent will be presumed from the circumstances; and if the husband subsequently claims that an operation was unnecessary or improper under the circumstances, or that it was unskillfully or carelessly performed, the burden of proving his case is upon him. McClallen *v.* Adams, 19 Pick. (Mass.) 333, 31 Am. Dec. 140.

47. In Gramm *v.* Boener, 56 Ind. 497, it was held proper for the court to charge the jury as follows: "The allegations, that the injuries complained of were occasioned by the want of professional skill and care of the defendant, are not sustained, if it is proved that the negligence of the plaintiff contributed immediately and directly to produce such injuries. But proof of the commission by defendant of the injuries, or any of such injuries, of which the plaintiff complains, very generally carries with it *prima facie* proof of negligence and unskillfulness, and it is for the defendant to show that the injuries were the result of inevitable accident, or that they were occasioned by the negligence of the plaintiff himself."

A patient suing a physician for malpractice must not only show the malpractice charged, but also, if an issue thereon is made, that no negligence of his own caused the injury. Baird *v.* Morford, 29 Iowa 531.

In Whitesell *v.* Hill (Iowa), 66 N. W. 894, it was held that although the plaintiff did not allege that he was free from contributory negligence, yet since the defendant averred that the plaintiff was guilty of contributory negligence the court properly told the jury that the burden was upon the plaintiff to show his freedom from negligence contributing to the injury. See article "Negligence," Vol. VIII.

48. Where a physician is sued for

where there is evidence tending to show ignorance or unskillfulness, any evidence calculated to repel the inference of such ignorance and unskillfulness, and to show that he was a man of suitable education and requirements for the safe practice of his profession, is competent on his behalf.[49]

Skill at Time Subsequent. — Evidence in a malpractice case showing the skill of the defendant two years after the treatment com-

malpractice in attending a woman in childbirth, evidence of declarations by him that she was afflicted with a disease which was the cause of the difficulty in her case is competent for the purpose of showing his ignorance and unskillfulness it being shown that she was not in fact afflicted with that disease. Grannis *v.* Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143. The court said: "This was proper evidence for the consideration of the jury, if introduced for the purpose of showing that the defendant was ignorant of the true state of the patient's case. And if the defendant himself, who might be supposed to make the best of his case, has alleged the existence of such a disease as the only cause of his ill success, the plaintiff, by disproving this charge, might furnish good ground for the jury to infer that the want of success was attributable solely to the ignorance or misconduct of the defendant. For this purpose alone the evidence was admitted, as the court charged the jury that it was not to be considered as enhancing the damages. In this view the evidence was proper."

Where a physician sued for malpractice has introduced evidence of his general character to raise a presumption in favor of his skill and knowledge in his profession, it is competent to show in rebuttal that he is not a regularly educated physician and surgeon. Grannis *v.* Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143.

49. In Leighton *v.* Sargent, 27 N. H. 460, 59 Am. Dec. 388, the defendant, in reply to evidence offered by plaintiff tending to show unskillful and improper treatment by the defendant offered to show that he had received a good medical and surgical education, that he was a regularly educated and skilled physician and surgeon, that he had attended a course of instruction in surgery, and that he had otherwise received good scientific tuition in surgery, and it was held that this evidence should have been received.

In Vanhooser *v.* Berghoff, 90 Mo. 487, 3 S. W. 72, where the petition charged the plaintiff both with a want of skill and with negligence in the treatment, and the plaintiff had been permitted to show the skill and reputation of another surgeon, it was held that the defendant should have been allowed to show his own skill and reputation in his profession. The court said: "The possession or want of skill by defendant was thus made a material isue, and plaintiff was not limited, either in his pleadings or by the instructions in the cause, to the issue of negligence. The possession of the required skill by defendant, if he did not apply or use it in the case, would, it is true, be no protection, but it would make the liability depend upon the question of negligence merely, and, where both issues are thus tendered and submitted together, we are not disposed to hold that it is immaterial whether the defendant is, or is not, a skillful surgeon. . . . The experts whose testimony was offered in this behalf were, we may remark, personally acquainted with defendant, and some of them, at least, had been associated with him in practice in similar cases, and it was, we think, and so hold, competent to prove by such witnesses thus qualified to testify, whether defendant was or was not a skillful surgeon. The admission of similar evidence as to the skill and reputation of Dr. Gough manifestly would strengthen his diagnosis of the case and give value to the opinions of the experts based thereon, and this, we think, rendered it all the more proper and necessary that the jury should have the same proof as to the skill

plained of has no tendency to show that he was so skilled at the date of the act complained of.[50]

Physician Principally Engaged in Other Occupation. — In a malpractice action, on the question of the knowledge and skill of the defendant it is competent to show that he was at and prior to the time devoting himself principally to some other avocation.[51]

(2.) Reputation. — In an action for malpractice, the fact that the defendant's skill, or rather the want of it, is put in issue does not make it proper either to establish or to disprove that skill by showing his general reputation.[52]

of defendant in considering his diagnosis and treatment of the case."

50. Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323, where the court said: "Skill possessed two years subsequently to the time of the act complained of does not presuppose a like degree of skill at its date."

51. In Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90, the plaintiff was permitted to show that the plaintiff was extensively engaged in farming at and prior to the time of the injury, and that he devoted a considerable share of his time to the management of several farms. The defendant contended that this evidence tended to prove that he was wealthy and was therefore incompetent as tending to incline the jury to give enhanced damages. The court said: "The evidence was not admitted for the purpose of showing the relative pecuniary condition of the parties. It would have been clearly incompetent for any such purpose. It was, however, entirely competent, as tending to show that one who undertook to perform professional services requiring peculiar skill and knowledge, as well as constant study and close application, was devoting himself principally to some other avocation."

In Mayo *v.* Wright, 63 Mich. 32, 29 N. W. 832, an action for malpractice, it was held proper to permit the defendant on cross-examination to be asked as to his having been engaged in farming pursuits during the time he had been practicing as a physician and surgeon.

52. Holtzman *v.* Hoy, 118 Ill. 534, 8 N. E. 832, 59 Am. Rep. 390. In this case the court said: "While his skill, or the want of it, was put in issue, his reputation in that respect was not put in issue, and, therefore, evidence to establish it was properly excluded. Suppose it appeared, from the evidence, the treatment of the plaintiff's leg was proper, and in every respect according to the most approved surgery, and evidence of the character offered had been admitted, would it have availed the plaintiff anything if it further appeared, from the evidence, that the defendant was generally reputed to be an unskillful and unsafe surgeon? Surely not. The hypothesis here suggested, as we conceive, is but a presentation from a different standpoint of the principle contended for, but in a way that more forcibly illustrates its unsoundness. There are many reasons, outside of those mentioned, why evidence of this character is not admissible. First, its bearing upon the issue is too remote, and in many, if not most, of cases, it would tend to mislead the jury rather than enlighten them. The veriest quack in the country, by his peculiar methods, not infrequently becomes very famous, for the time being, in his locality—so much so that every person in the neighborhood might safely testify to his good reputation. It is true, that one's reputation thus acquired is generally of short duration. His patrons, sooner or later, must pay the penalty of their credulity, by becoming the victims of his ignorance, and, with that, his good name vanishes. Yet, according to the principle contended for, the quack, in such case, when called to account for his professional ignorance, might successfully entrench himself behind his previous good

Reputation of College. — On an issue in a malpractice case as to the degree of skill possessed by the defendant as compared with that of other surgeons, the general reputation of the medical col-

reputation. Again, one may, in many respects, be a good practitioner, and deservedly stand well in the neighborhood in which he lives, and yet, at the same time, be grossly ignorant about some matter in the line of his profession, which would render him liable, if, by reason thereof his patient should be improperly treated, and thereby subjected to loss or injury. In such case, it is manifest, evidence of the defendant's good reputation would be no answer to an action brought for the injury sustained, and its admission would be clearly calculated to mislead the jury."

In Stevenson *v.* Gelsthorpe, 10 Mont. 563, 27 Pac. 404, the court said: "Defendant's reputation as a physician was not in issue. It was his specific acts in the treatment of a certain case, and the fact as to whether his acts were unskillful and negligent in this treatment was the matter in issue. A doctor's reputation for skill and ability will not exonerate him where gross negligence and want of the application of skill is alleged and proved. Nor can the fact that a doctor is reputed to be negligent or unskillful be allowed as proof to establish negligence or unskillful treatment in a particular case, because he may have treated that case with unusual skill and care. The introduction of that evidence was not only improper from a legal view, but it was of a character which may have unjustly prejudiced defendant's case, before the jury, upon a point where defendant had made no preparation to defend."

"When it is proved that the surgeon has omitted altogether the established mode of treatment, and adopted one that has proved to be injurious, evidence of skill, or of reputation for skill, is wholly immaterial, except to show (what the law presumes) that the defendant possesses the ordinary degree of skill of persons engaged in the same profession. In such a case it is of no consequence how much skill he may have; he has demonstrated a want of it in the treatment of the particular case. In such cases I think the proposition of the judge is right. The failure to use skill, if the surgeon has it, may be negligence; but when the treatment adopted is not in accordance with established practice, but is positively injurious, the case is not one of negligence, but of want of skill." Carpenter *v.* Blake, 60 Barb. (N. Y.) 488.

In Degnan *v.* Ransom, 83 Hun 267, 31 N. Y. Supp. 966, the allegations and proofs on the part of the plaintiff, so far as the skill of the defendant was concerned, were confined to the question of the degree of skill employed in the actual treatment of the plaintiff's case, and it was held error to permit the defendant to introduce evidence to the effect that he was generally reputed and considered to possess a high degree of skill in his profession. The court in this case, in distinguishing Carpenter *v.* Blake, 60 Barb. 490, 50 N. Y. 696, said: "There is only a brief memorandum of the decision of the case in the court of appeals (*supra*), and from that memorandum it appears that the objection to the charge above mentioned, was sustained by only a majority of one in that court. The authority of that decision is therefore not to be extended beyond the limits fixed by the particular case, and that was a case where, as appears from the report in 60 Barb. *supra*, the complaint alleged that the defendant 'represented himself to be . . . a scientific, skillful and competent physician and surgeon,' and that the plaintiff, 'by the ignorant, unskillful, careless and negligent treatment by the defendant, was greatly damaged,' etc. This allegation seems to have been regarded as putting in issue the general skill and intelligence of the defendant, and to have justified the introduction of evidence of his general character in that respect. But by that particular allegation the case of Carpenter *v.* Blake is distinguished from the case at bar. Here is no such allegation. Here ignorance is not charged, and

lege at which the defendant had attended lectures is not admissible.[53]

(3.) Opinion Evidence. — Where the issue in a malpractice action pertains to the degree of skill possessed by the defendant, it is not proper to take the opinion of another physician on that question; another physician might, as a witness, testify to the facts on which it would be proper to base a conclusion on the question one way or the other, but the drawing of the conclusion itself is for the jury.[54]

unskillfulness only in the treatment of the particular case. It is a little difficult to see, on principle, how the general character of the surgeon can ever be material to the inquiry whether he has been guilty of malpractice in a particular case, because it is certain that, though he be the merest pretender to surgical skill—the veriest quack—yet if, by chance, he treats the particular case correctly, he is not guilty of malpractice; and, equally, though he be a master in his profession, yet if, through neglect to apply his skill in the particular case, he treats it improperly, the patient may have his action."

In Williams *v.* Poppleton, 3 Or. 139, a malpractice case, the defendant was denied permission to show what was his reputation for skill in his profession.

53. Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323, where the court said: "Whatever that reputation might be, the individual student might possess more or less skill than others. The proficiency that one makes in the pursuit of science must depend mainly upon personal exertion and talent, and cannot be measured with legal accuracy by the reputation of the institution at which his studies may be pursued."

54. The Opinion of a Physician With Whom the Witness Studied His Profession as to whether or not he possessed more than the ordinary skill of the members of his profession, judging from his acquaintance with them, is not admissible. Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323. The court said: "In the case before us, the jury, we conceive, might well be supposed to be able to determine whether the defendant possessed 'the ordinary skill of the members of the profession,' from the facts being stated upon which the witness might found his own opinion. If the witness knew the extent of the knowledge and skill of the members of the profession generally, he might state the facts constituting the evidence of that knowledge and skill among them generally, and also in relation to the particular individual in a case like this; and we think that when they should be stated, the jury might form a correct judgment as to the comparative skill of the profession generally, and of the individual. A competent and skillful surgeon would, doubtless, well know and could easily state what constitutes skill in another. And he could describe the extent of the possession of the qualifications constituting it among the profession and also so far as it relates to the individual. From such a statement the jury could readily form a judgment, and make the requisite comparison."

In Boydston *v.* Giltner, 3 Or. 118, a malpractice case, a physician was not permitted to give his opinion in regard to the skill of the defendant as a surgeon, but he was permitted to testify as to how the defendant had performed a surgical operation at which the witness had been present.

In Williams *v.* Poppleton, 3 Or. 139, a malpractice case, a witness for the defendant was asked: "What do you know of your own knowledge of his [the defendant's] skill?" The court admitted the question, but informed the witness that he was not to state, in reply, matters of opinion. The witness testified that he had been associated with defendant in difficult surgical cases; and he was asked by the defendant to state any facts within his knowledge going to show whether or not defendant was a skillful surgeon. The same objection was made and overruled; and the witness described several surgical cases in which he

b. *Exercise of Skill.* — (1.) Circumstantial Evidence. — Generally. Where a physician or surgeon is sued for malpractice, the question, so far as concerns the admissibility of evidence generally, is of course not so much as to the existence *vel non* of the requisite professional skill, but rather whether there was the proper exercise of such skill,[55] even although the basis of the charge of malpractice is the want of such skill.[56] Accordingly, all the facts and circumstances of the treatment, and the acts and conduct of the defendant, are proper matters of evidence in such an action.[57] And

had seen the defendant operate, and testified that the defendant performed each of the operations skillfully.

55. In Mertz *v.* Detweiler, 8 Watts & S. (Pa.) 376, the court, in speaking of the inadmissibility of evidence of the defendant's general skill in a malpractice case, said: "It was not that, but his treatment of the particular case, with which the jury had to do. If the latter was notoriously bad, of what account would be his abstract science, or treatment of other cases? It may be said that his general qualifications might serve to shed light on the propriety of his practice in this particular instance; but it is light which would be less likely to lead to a sound conclusion than to lead astray. The jury, assisted by the opinions of medical witnesses, would be better able to judge of the treatment from the treatment itself than from the more remote consideration of the defendant's professional reputation, which was consequently not the best evidence of which the case was susceptible."

In Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696, an action for malpractice in negligently and unskillfully treating what was claimed to be known as "Colles' fracture," one of the defendants had testified to his qualifications, his studies and his practice, and had stated that he had had a number of cases of such fractures, and was then asked: "And with what results?" It was held that the question was properly rejected; that "An answer would not have tended to enlighten the jury as to his treatment of the present case. The question they were called to pass upon concerned the performance of the defendants' duty in caring for the plaintiff, and that was to be decided upon a consideration of the evidence of what they did, or did not do."

Where the issue is whether or not a physician was incompetent and negligent in his treatment of the patient, evidence that he had obtained his certificate from the board without an examination as to his qualifications, but that his certificate was issued upon the presentation of diplomas from medical schools which were irregularly obtained, is immaterial and irrelevant. Bute *v.* Potts, 76 Cal. 304, 18 Pac. 329. The court said: "The case was presented upon the theory that the party sued had been guilty of negligence, and lacked skill as a physician and surgeon. The fact that he had or had not certificates and diplomas as a physician and surgeon is no proof either that he had skill as such or lacked it. A certificate or diploma could be no proof that he acted with skill in attending a given patient, or that he did not so act. His services as to skill or the contrary must be determined by his acts and conduct in attending the patient. It is the manner in which the services are performed that is the test of their character."

56. In Holtzman *v.* Hoy, 118 Ill. 534, 8 N. E. 832, 59 Am. Rep. 390, the court said that the proper and only mode of showing that the defendant in a malpractice action did not possess the requisite professional skill is by proving that he did not exercise it in the treatment of the plaintiff.

57. Upon an issue as to whether or not a physician and surgeon was negligent and unskillful in his treatment of a fractured limb, evidence as to attacks of sickness suffered by

this rule applies not only as to evidence to support the charge of the patient and as to the treatment therefor by the defendant is admissible. Kendall *v.* Brown, 86 Ill. 387. The court said: "The bilious attacks were supposed by the witnesses to have been caused in whole or in part by the shock to the system resulting from the fracture, and the confinement necessarily following; but from whatever cause, the question was, whether treating the bilious attacks in the way they were treated was the proper treatment in order to effect a speedy and permanent restoration of the fractured limb. There was evidence that appellant gave appellee a preparation composed in part of calomel, and his excuse for so doing was the bilious condition of appellee; and there was other evidence that this was improper treatment, because the tendency of calomel is to destroy the plastic lymph, through the agency of which the first union of the fractured parts is effected. So it is manifest the evidence was pertinent under the charge in the declaration of negligent and unskillful treatment; and, being pertinent, it was just as proper for the consideration of the jury as any other evidence in the case."

It is proper in an action for malpractice to show the treatment received by the plaintiff after the defendant gave up the case. Bower *v.* Self, 68 Kan. 825, 75 Pac. 1021.

In an action for an injury resulting from a surgeon's unskillfulness in treating a dislocation as a fracture, it was shown that if his diagnosis was correct a grating sound would have been heard on manipulation of the limb. And it was held that evidence could be given of remarks made by bystanders at the time of the examination tending to show that they heard such a sound. Hitchcock *v.* Burgett, 38 Mich. 501.

In Williams *v.* Poppleton, 3 Or. 139, the defendant as a witness was asked to state what was said or advised by himself and a consulting physician in the course of the consultation in regard to the proper mode of treating the plaintiff's case. The plaintiff objected to the question as irrelevant and incompetent. The court said that if the plaintiff claimed that the treatment on that occasion was improper, the consultation might be treated as of the *res gestae*, and what was advised might be given in evidence; but that as the plaintiff disclaimed objection to the treatment on that occasion the evidence was not admissible.

In Piles *v.* Hughes, 10 Iowa 579, an action to recover damages alleged to have been sustained on account of the unskilled and negligent manner in which the defendant, as a surgeon, treated a fractured leg of the plaintiff, whereby the same was shortened, it was held that the declarations of the defendant, made in the presence of the plaintiff, when the limb was measured at the time the plaintiff was discharged from treatment, were admissible in evidence as a part of the *res gestae*, and as verbal declarations made in the presence of and acquiesced in by the plaintiff.

In Moody *v.* Sabin, 9 Cush. (Mass.) 505, an action against a surgeon for negligently treating a fractured thigh bone, the defendant, in support of his allegation that he had placed the fractured limb upon a double inclined plane, at an angle of forty-five degrees, or thereabouts, introduced a witness who testified to statements made in the presence of the plaintiff by the defendant to the witness, at the time when the defendant brought the machine to the plaintiff's house, about the principle upon which the machine operated, and how it might be made a double inclined plane of any angle by means of a screw. The evidence was admitted, and, on exceptions, the court held that, both as *res gestae* and as a statement made in the presence of the party, they could not say that it was erroneously admitted.

In Cochran *v.* Miller, 13 Iowa 128, an action for the alleged negligent treatment of the plaintiff's arm, "It seems that defendant claimed that other medicines were applied than those prescribed by him. The father of plaintiff was asked: 'Whether or not he would most likely have known of the application of any other medicines than those applied by the de-

malpractice, but also to evidence to negative such charge.[58] While evidence that the defendant in such an action is ordinarily proficient and skillful as a physician and surgeon is admissible, it is not conclusive of the fact that he exercised it in a particular case.[59]

Acts and Declarations of Deceased Partner. — Evidence of acts and declarations made by a physician and surgeon while engaged in a surgical operation, and while treating the patient afterward for the injury sustained, may be received on behalf of the plaintiff in an action against such physician's surviving partner for malpractice.[60]

Evidence That the Defendant Had Never Received Any Compensation from nor made any charge against the plaintiff for the services rendered is not admissible on behalf of the plaintiff,[61] but it has been held that the reception of such evidence when introduced by the defendant, if error at all, was harmless.[62]

Intoxication of Physician. — In a malpractice action, evidence of the defendant's condition as to his being intoxicated and as to his appearance at the time of his treatment of the plaintiff is admissible as part of the *res gestae*.[63]

Skill of Assistant. — In an action against a surgeon for malpractice it is proper to permit the defendant to show that the surgeon who assisted him in the surgical act was a skillful physician and surgeon.[64]

fendant, if they had been applied to the arm. It is objected that this interrogatory called for the *opinion* of the witness on a matter of fact, and was therefore objectionable," but the court in overruling this contention said: "The plaintiff was living in her father's house. He had abundant means of knowing the treatment she received. His answer to this question would be no more objectionable, upon the ground of containing an *opinion* instead of a *fact*, than if he stated that defendant had prescribed and given medicine for the disease. The inquiry is a very common one, and one that may be fairly and legitimately made under the precise circumstances as here disclosed. Were other medicines applied? Plaintiff says not, and to maintain, so to speak, this negative, she makes this inquiry of one who had ample means of knowing."

58. Baker *v.* Wentworth, 155 Mass. 338, 29 N. E. 589.

Mertz *v.* Detweiler, 8 Watts. & S. (Pa.) 376.

59. West *v.* Martin, 31 Mo. 375; Graham *v.* Gautier, 21 Tex. 111, where the court said: "It may be well to remark in reference to another part of the charge that the fact that a man is a physician of ordinary skill being proved does not raise a legal inference as is supposed by the charge that the particular services in any one case were skillfully rendered by him. It is a natural presumption, not legal. It is evidence of that fact, and practically it may be the only attainable evidence of it. But there is no rule of law giving it artificial weight as a legal presumption or making it *prima facie* evidence."

60. Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90.

61. Baird *v.* Gillett, 47 N. Y. 186, where the evidence was admitted by the court as a circumstance in the nature of an admission tending to prove that the defendant was guilty of malpractice as charged, but on appeal it was held that the court below erred in admitting the evidence.

62. Jones *v.* Angell, 95 Ind. 376.

63. Merrill *v.* Pepperdine, 9 Ind. App. 416, 36 N. E. 921.

64. Jones *v.* Angell, 95 Ind. 376.

The Fact That a Broken Limb Is Shorter after the patient has recovered is not *prima facie* evidence of a want of ordinary skill or care by the surgeon in his treatment thereof, although it is a fact proper to be considered.[65]

(2.) Declarations and Exclamations Indicative of Pain and Suffering. Under the rule permitting proof of declarations and exclamations indicative of present pain and suffering in a personal injury action, it is proper, in a malpractice case, to receive such evidence for the purpose of showing pain and suffering by the patient during and as a result of the treatment in question.[66] Of course, as in

Compare Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323, *holding* that the fact that a skillful surgeon assisted the defendant in his treatment of the plaintiff has no tendency to prove either the skill or diligence of the defendant, especially when it appears that they disagreed as to the mode of treatment pursued by the defendant.

65. Piles *v.* Hughes, 10 Iowa 579. In this case the court had refused to charge the jury that such fact, "unaccounted for and unexplained, makes out a *prima facie* case of want of ordinary skill or care in the treatment of the case," but modified the instruction by striking out all after the words "unaccounted for," and inserting "is proper to be considered by the jury." The court said: "If the court had instructed the jury as asked by the plaintiff, it would have substantially directed the jury that in every case of fracture of this character, if the limb when well is shorter thereby, it is *prima facie* evidence of want of skill in the surgeon who attended the same. We should not regard this as a correct rule of law, and applicable to all characters of cases. It depends to a great extent upon the age and health of the person, and the character and extent of the injury, and the care and attention the patient takes of himself, whether such fractures are cured without lameness, even when the surgeon bestows the greatest skill and his greatest care."

The fact that the injured limb was slow in healing and imperfectly healed at last is not necessarily any evidence that the treatment was improper. Wood *v.* Barker, 49 Mich. 295, 13 N. W. 597.

66. In Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696, an action for malpractice in negligently and unskillfully reducing a fracture, a witness had testified to the plaintiff's sufferings, and was asked: "Did he continue these complaints?" to which he answered: "Just the same; this burning, terrible pain." The court held that the evidence was unobjectionable, for they were complaints which had been communicated to the attending physician with a view to having him relieve the tight bandaging.

In Mayo *v.* Wright, 63 Mich. 32, 29 N. W. 832, an action for malpractice in setting the plaintiff's leg, it was held proper to permit witnesses on behalf of the plaintiff to testify to complaints made by him as to his leg hurting and paining him a good deal, but it was not proper to permit the witnesses to give in evidence statements by the plaintiff to the effect that he thought the bandages on his leg were too tight. The court said as to the latter class of evidence that "plaintiff was not an expert, and this testimony should have been excluded for that reason, and for the further reason that if he had been an expert the testimony was hearsay."

In Spaulding *v.* Bliss, 83 Mich. 311, 47 N. W. 210, an action for malpractice in reducing a fractured thigh bone, it was held proper to permit the plaintiff to describe her symptoms, but not give her conclusions as to the cause thereof. The court said: "We think she was permitted to testify as fully as the law allows to her symptoms and feelings. It was not her province to state conclusions. She could tell where her pains were,

other personal injury cases, the trial court must be permitted to exercise its discretion very largely in determining whether the declarations were made under such circumstances as to permit the inference that they were genuine expressions, and the jury must be left to determine whether or not such inference shall be drawn.[67]

(3.) Admissions by Patient. — A physician and surgeon sued for malpractice should be permitted to introduce in evidence statements by the patient tending to show that there is no basis in fact for the charge of malpractice.[68]

(4.) Exhibiting Person to Jury. — In an action against a physician and surgeon for malpractice it is proper to permit the plaintiff to exhibit the injured member to the jury, that they may determine for themselves the nature of the injury received.[69]

but she was not an expert and could not therefore testify what was the cause of such pains. When she testified that she never suffered any pain of any amount in the fracture, but it was all in the knee, she was permitted to give her symptoms and her feelings as to where the pain was located and from whence she felt it proceed. It was not competent for her to say whether or not it was connected with, or caused by the fracture."

In Hyatt *v.* Adams, 16 Mich. 180, an action to recover damages sustained by the plaintiff from the alleged malpractice and gross negligence of the defendant while operating upon the defendant's wife, by reason of which she died, it was held that evidence of exclamations of pain and suffering uttered by the deceased during and after the operation, although some of them were in the absence of the defendant, were to be considered as original evidence of suffering, and admissible as bearing on the alleged malpractice, although not for the purpose of aggravating the damages.

67. In Hewitt *v.* Eisenbart, 36 Neb. 794, 55 N. W. 252, an action to recover damages for the alleged negligent and unskillful setting, dressing and treating of a broken leg, a witness called to show the extent of the plaintiff's injuries testified that he employed the plaintiff to work for him and directed him to do certain work, that the plaintiff failed to make proper progress with the work, and on asking him the reason the plaintiff explained that his inability to do the work was due to the then condition of his leg. It was held that there was no error in permitting this evidence.

68. In O'Hara *v.* Wells, 14 Neb. 403, 15 N. W. 722, an action for damages for the negligent and unskillful reduction and treatment of a fractured arm, a witness was permitted to testify to statements by the plaintiff respecting his arm just after the splints were removed. His testimony was that the plaintiff showed his arm and said "he felt satisfied and that it was all right." It was contended that the plaintiff was no expert, and that he knew nothing at that time as to whether his arm was all right or not, but the court said: "We think the admission entirely competent evidence and of considerable value in view of the plaintiff's testimony respecting the condition and use of his arm, especially of the wrist and elbow joints, and of the injury caused by his fall in endeavoring to jump over a saw-horse some time afterward."

69. Fowler *v.* Sergeant, 1 Grant's Cas. (Pa.) 355; Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90, (resetting a dislocated shoulder). The court said: "The jury were, after seeing the condition it [the shoulder] was in, better able to apply the evidence of the witnesses."

In Freeman *v.* Hutchinson, 15 Ind. App. 639, 43 N. E. 16, an action to recover damages resulting from the alleged negligent treatment of a wounded thumb, it was held proper to permit a physician and a witness for the plaintiff to examine the injured

(5.) Opinion Evidence. — (A.) TESTIMONY OF DEFENDANT. — A physician and surgeon sued for malpractice may be permitted to testify that in his treatment of the plaintiff he used the best ability and skill he possessed.[70]

(B.) NON-EXPERT WITNESSES. — As in other cases, the testimony of non-experts should be confined to matters proper to be testified to by that class of witnesses.[71]

(C.) MEDICAL EXPERTS. — (a.) *Generally.* — The questions usually involved in a malpractice action, such as whether the treatment in question was proper, whether a surgical operation was performed skillfully or not, whether subsequent disease was due to the alleged negligent treatment, and the like, are questions of science, and opinion evidence in relation thereto must from the very nature of the case come from physicians and surgeons.[72] But a medical witness cannot be asked to state his opinion whether from all the

thumb in the presence of the jury and to exhibit and describe its condition. *Compare* Carstens *v.* Hanselman, 61 Mich. 426, 28 N. W. 159, 1 Am. St. Rep. 606, where the trial court had refused to permit the defendant to exhibit the injured limb to the jury. The injury occurred several years before, and there was testimony concerning the correctness of the treatment which necessarily involved medical questions which no jury could be supposed to comprehend fully, and it was held that the action of the court in refusing the inspection by the jury was proper because "it is not competent to allow juries to determine for themselves whether a physician's course has been proper or improper in the treatment of a fractured limb. No inspection after an injury is healed, apart from some knowledge of the character of the injury and the method of treatment, could enable even a medical expert to decide upon the merits or demerits of the attending surgeon. The jury's guessing from such an inspection would be of no value whatever, and any needless exposure would have been, as the court below properly held, improper if not indecent."

70. Doyle *v.* New York Eye & Ear Infirmary, 80 N. Y. 631.

Where the real controversy in a malpractice suit relates to the manner in which the physician had treated the patient, there being no question as to his general knowledge and skill, it is proper to permit the physician to state whether in his treatment he exercised the best judgment and skill of which he was capable. Fisher *v.* Niccols, 2 Ill. App. 484.

71. See Graves *v.* Santway, 52 Hun 613, 6 N. Y. Supp. 892.

Appearance of Injured Parts. Although a non-expert witness is not competent to give his opinion as to the existence of a dislocation of a limb, he may describe its appearance, as he saw it, to the jury. O'Hara *v.* Wells, 14 Neb. 403, 15 N. W. 722.

Ability to Labor. — In an action against a physician for malpractice, a witness testified that he was "well acquainted with the physical ability of the plaintiff to perform manual labor, both before and since the breaking of his arm; that the said plaintiff, before the injury, was a strong, able-bodied man; that since he has been hurt the plaintiff has been unable to perform no more than one-half a man's work; that witness had worked with plaintiff both before the arm was broken and since; that witness and plaintiff were both farmers, and lived near together." I was held that this testimony was competent. Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

72. Spaulding *v.* Bliss, 83 Mich. 311, 47 N. W. 210; Twombly *v.* Leach, 11 Cush. (Mass.) 397; Pettigrew *v.* Lewis, 46 Kan. 78, 26 Pac. 458; Hoener *v.* Koch, 84 Ill. 408; Challis *v.* Lake, 71 N. H. 90, 50 Atl. 260. See also Tefft *v.* Wilcox, 6

Kan. 46, where the court said: "As to what constitutes ordinary skill, and ordinary care and diligence, on the part of a physician and surgeon, it is a question of law; in this view, at least: that it is to be stated by the court as defined by the books. It will be seen, however, at a glance, that in order to enable a jury to apply the rule so stated to particular circumstances, something further is necessary to be done. Such jury must be informed as to the facts or criterion upon and by which the standard of ordinary skill and ordinary care and diligence rests and is regulated in these professions. And to supply such need evidence may properly be introduced as showing such facts. This evidence must, from the very nature of the case, come from experts, as other witnesses are not competent to give it, nor are juries supposed to be conversant with what is peculiar to the science and practice of the professions of medicine and surgery to that degree which will enable them to dispense with all explanations. Such explanations, therefore, become necessary. In this view, the whole question under consideration seems to be one of mixed law and fact, and is so to be regarded."

Rule Stated. — "The question of negligence and carelessness on the part of the surgeon in the treatment he gave the plaintiff's leg, while it is one which the jury must necessarily determine upon the whole evidence in the case, is still a question which must be determined mainly upon expert evidence. Certainly the claimed misconduct of the surgeon is not so flagrant that a man entirely ignorant of surgery can form an intelligent judgment as to the propriety or impropriety of the treatment given by the defendant, unaided by evidence of men skilled in surgery and having superior knowledge as to what treatment should have been given to the broken leg under all the circumstances. The defendant was therefore entitled to show, if he could, by witnesses having superior knowledge and skill in surgery, that the treatment he gave the plaintiff's leg was such as a surgeon of ordinary knowledge and skill in his profession would and ought to have given." Quinn *v.* Higgins, 63 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305.

In Mayo *v.* Wright, 63 Mich. 32, 29 N. W. 832, the court, in ruling upon expert testimony as to the correctness of the treatment, held that it was not necessary to ask the expert's opinion upon any particular part of the treatment, but that he might be asked whether, taking the whole treatment together in the manner in which it was applied, it was proper or improper; that if improper the plaintiff was bound to show wherein, and unless the witness specified of his own accord the plaintiff's counsel would be obliged to interrogate him further in order to show wherein the treatment was careless, unskillful or negligent.

In Getchell *v.* Hill, 21 Minn. 464, where the issue was whether the treatment of a broken arm was proper, it was held proper to permit a surgeon who had heard the testimony to be asked, "Having heard the testimony in this case, and assuming it to be true, what, in your opinion as a surgeon, was the necessity of this arm remaining in the position described by the plaintiff for the first twelve or thirteen days of the treatment?"

In Mertz *v.* Detweiler, 8 Watts. & S. (Pa.) 376, it was held that the nature and properties of the powders employed by the defendant in his treatment of the plaintiff were subjects of medical inquiry, and proper for medical witnesses as experts.

In Wright *v.* Hardy, 22 Wis. 348, an action for malpractice in having wrongfully, negligently and unskillfully amputated a limb, it was held proper to permit a medical witness on behalf of the plaintiff to testify that "the point of amputation was too high, and that the danger of death was somewhat increased by the selection of that point." The court said: "It is a matter, if not of common, certainly of professional experience, that in many cases of amputation the care and skill of the surgeon is involved as much in the selection of the point of amputation as in the manner of its performance after the point has been selected. This appears to have been such a case, and the selection of the point

facts in evidence there was malpractice.[73] Nor can a third person as a witness detail an opinion given by another physician as to the plaintiff's incurable condition after treatment by the defendant; the physician should himself be introduced as a witness if his opinion is desired.[74]

(b.) *Scope of Inquiry as Affected by Schools of Medicine.* — Upon the question as to whether the correctness of the treatment in question is to be tested by the doctrines of the school to which the defendant belongs the cases seem to be at variance; on the one hand there are cases so expressly holding.[75] There are cases, however,

may with propriety be said to have been part of the performance itself. When, therefore, it is charged that the amputation was carelessly or unskillfully performed, any want of proper care or skill in the selection of the place seems necessarily to be included."

73. Hoener *v.* Koch, 84 Ill. 408.

In Wright *v.* Hardy, 22 Wis. 348, a malpractice case for having negligently and unskillfully performed an amputation, after having shown by a medical expert that he had heard the testimony of plaintiff's witness, he was asked by the defendant: "Suppose his statement relative to the amputation and its subsequent treatment to be truthful, was or was not the amputation well performed? Was the subsequent treatment of the patient proper or improper? And, in your opinion, was or was not the death of the patient the result of any neglect or want of skill in the surgeon?" To these questions objection was taken on the part of the plaintiff, and the objection sustained by the court; but the counsel for the defendant was allowed to and did question the adept upon a hypothetical case stated to him by the counsel, formed on the counsel's understanding of the testimony of the witness, and such questions were answered.

74. Sims *v.* Moore, 61 Iowa 128, 16 N. W. 58.

75. Force *v.* Gregory, 63 Conn. 167, 27 Atl. 1116, 38 Am. St. Rep. 371, 22 L. R. A. 343, was a suit for damages for malpractice in treating plaintiff for ophthalmia. The defendant was a homeopathic physician and treated the plaintiff according to the system of that school. There was no question as to the diagnosis of the case. It was simply as to the treatment. The defendant asked the court to instruct the jury "that treatment by a physician of one particular school is to be tested by the general doctrines of his school, and not by those of other schools." *Held,* the instruction should have been given.

Bowman *v.* Woods, 1 Greene (Iowa) 441, was a suit for damages for malpractice in a case of *accouchement,* in that the defendant failed to remove the placenta or relieve the bladder for thirty-six hours after parturition. The plaintiff showed by the testimony of allopathic physicians that such treatment was improper, and liable to result in puerperal fever. The defendant then offered to prove that he was a botanical physician, and that according to the botanic system of practice and medicine it is considered improper to remove the placenta, and that it should be permitted to remain until expelled by the efforts of nature. The trial court excluded the testimony so offered. The supreme court held that no particular system of medicine is established or favored by the laws of Iowa, "and, as no system is upheld, none is prohibited;" that "the regular, the botanic, the homeopathic, the hydropathic, and other modes of treating diseases are alike unprohibited;" and that "a person professing to follow one system of medical treatment cannot be expected by his employer to practice any other. . . . Therefore, if in this case the defendant below could show that he was employed as a botanic physician, and that he performed the *accouchement* with ordinary skill and care in accordance with the system he pro-

wherein medical witnesses belonging to other schools were permitted to testify on this question.[76] So, too, on the question as to the correctness of the diagnosis medical men of other schools have been permitted to give their opinions.[77]

fessed to follow, we should regard it as a legal defense."

Martin *v.* Courtney, 75 Minn. 255, 77 N. W. 813, was a suit for malpractice against an allopathic physician and surgeon in the amputation and subsequent treatment of the plaintiff's husband's toes, which had been crushed by accident. A second amputation was found necessary and the sole point was whether it should have been of an additional quarter of an inch of the foot or of the whole foot at the ankle. Another allopathic physician testified that the defendant had acted properly. But the plaintiff called a homeopathic physician, and asked his opinion as to whether the treatment was proper. Upon objection being made to this, the witness testified that there is a decided difference between the rules and principles of the two schools as respects "the practice of medicine," but not as respects surgery; that there was no difference between the two schools as to the treatment of sepsis connected with surgery, but there was a difference where the sepsis has produced a diseased condition, for then it became a question of disease, and not of surgery, and the treatment of the two schools would be entirely different. The defendant offered to prove that the two schools are hostile to each other in their rules of treatment of sepsis, even in cases connected with surgery. The trial court excluded the evidence offered by the defendant, and permitted the homeopathic physician to testify. The supreme court held this to be error, and that a physician must be judged by the rules and principles of medicine of the school to which he belongs, and not by those of any other school, and accordingly reversed a judgment in favor of the plaintiff.

Granger *v.* Still, 187 Mo. 197, 85 S. W. 1114, 70 L. R. A. 49, where it was held that an allopathic physician is not competent to give his opinion as to the correctness of the treatment given by the defendant as an osteopath in that case, the disease being hip disease, and it not appearing that both schools employed the same treatment for that disease.

76. Thus in an action against a clairvoyant for malpractice, allopathic physicians are competent to give an opinion of the diagnosis and the treatment. Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719. This case was substantially followed by the case of Longan *v.* Weltmer, 180 Mo. 322, 79 S. W. 655, 103 Am. St. Rep. 573, 64 L. R. A. 969. This last case was an action against a magnetic healer, the result of his treatment being that the ligaments connecting the back bone and hip bone were ruptured and torn, and the back and spine and pelvic organs were permanently injured. The court, in speaking of the competency of physicians of other schools to testify as to the correctness of the diagnosis and treatment, said: "While it is true that the physicians who testified on the part of the plaintiff did not claim or pretend to know anything about the practice of magnetic healing, they were nevertheless competent from education and experience to testify whether the treatment which the plaintiff underwent was proper in any case, and especially in her condition. Simply because a person claims or pretends to possess certain powers of healing peculiar to himself is no reason why other persons who do not claim such powers, but who have knowledge acquired from education and practice, are not competent to judge whether the treatment administered was negligently or carelessly done."

77. Nelson *v.* Harrington, 72 Wis. 591, 40 N. W. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719, was a suit for malpractice. The defendant was a clairvoyant, and claimed to diagnose and treat diseases by going into a trance, and while in that state to receive information as to the charac-

(c.) *Weight and Conclusiveness.* — Although it has been recognized as possible that there may be cases where the mode of treatment having been shown, the practical common sense of the jury will enable them to determine that the injury or failure of cure was owing to unskillful or negligent treatment,[78] it has also been held that the jury should not be permitted to find malpractice without testimony from persons who are qualified to give opinions on the methods of treatment.[79] But it is not necessary that all the expert witnesses called should consider the treatment pursued by defendant as improper, nor will the fact that all such witnesses agree that a portion of the treatment is proper under some circumstances, in itself defeat a recovery.[80] In an action for surgical malpractice, in determining the relative value of the evidence of medical experts the jury are to consider their professional knowledge and experience, freedom from bias, and the reasons they are able to give for their conclusions.[81]

3. Damages. — A. Burden of Proof. — a. *In General.* — As in other actions to recover damages for a personal injury, the plaintiff must show an injury resulting from the malpractice; otherwise he will be entitled to nominal damages only.[82] And to entitle him

ter and proper mode of treating the disease. The court held that allopathic physicians were competent, in such case, to give an opinion as to the correctness of the diagnosis and treatment. The decision also holds that to constitute a school of medicine it must have rules and principles of practice for the guidance of all its members as respects principles, diagnosis and remedies, which each member is supposed to observe.

In Granger *v.* Still, 187 Mo. 197, 85 S. W. 1114, 70 L. R. A. 49, an action for malpractice for negligent and unskillful osteopathic treatment, it was held that a physician of the old school was competent to testify to the correctness of the diagnosis of the disease by the defendant, it appearing that the diagnosis of the disease in question was the same in the allopathic school and in the osteopathic school.

78. See Getchell *v.* Hill, 21 Minn. 464, recognizing that this might be true, but holding that that case was not such a case.

79. In Spaulding *v.* Bliss, 83 Mich. 311, 47 N. W. 210, the court had charged the jury as follows: "You are necessarily bound, independent of every other consideration, to adopt the testimony of the physicians and surgeons, when you come to determine whether, on the facts in this case, these defendants have treated the case in a proper form, and by the use of proper appliances." In holding this charge to be correct, the court said: "The court said, in connection with it, that— 'no other witness in this case, aside from the surgeons — the physicians — who have testified in the case, have undertaken to tell you what is proper practice, or what, under the present methods of surgery, would be proper practice, in this given case.' It was for the others to give the facts as to the treatment and acts of the defendants, and it was for physicians and surgeons to say whether or not the same were proper."

80. Hewitt *v.* Eisenbart, 36 Neb. 794, 55 N. W. 252.

81. Bennison *v.* Walbank, 38 Minn. 313, 37 N. W. 447.

82. The implied liability of a surgeon, retained to treat a case professionally, extends no further, in the absence of a special agreement, than that he will indemnify his patient against any injurious consequences resulting from his want of the proper degree of skill, care or diligence in the execution of his em-

to recover for the permanent injury which it is proven he has sustained, it is necessary to prove that this permanent injury would not have been present had not the defendant been guilty of negligence or want of skill in his treatment.[83] To entitle the plaintiff to recover present damages for apprehended future consequences, the evidence must show such a degree of probability of their occurring as to amount to a reasonable certainty that they will result from the original injury.[84]

b. *Expenses.* — Where the plaintiff in a malpractice action alleges as part of his damages certain expenses resulting from the alleged malpractice, it is incumbent upon him to establish those expenses,[85] and that the expense so incurred was reasonably necessary.[86]

B. Evidence To Establish Damages. — Upon the question of damages in a malpractice action it is proper to receive competent evidence showing pecuniary loss, both direct and indirect, if referable to and resulting from the treatment complained of; also of suffering produced in consequence of the acts in question; loss of time and actual expenses in consequence thereof; the character of the resulting injury as to its permanency and the situation and condition of the patient.[87]

ployment. And in an action against the surgeon for malpractice, the plaintiff, if he shows no injury resulting from negligence or want of due skill in the defendant, will not be entitled to recover nominal damages. Craig *v.* Chambers, 17 Ohio St. 253. The court said: "It is true that every injury imports at least nominal damage. But an injury is not presumed, and must be proved. It is also true that where an injury is shown *prima facie* to be referable to the want of the proper degree of skill or care, if due skill and care would have been ineffectual, the defendant must show it."

83. Smith *v.* Dumond, 53 Hun 637, 6 N. Y. Supp. 242.

84. Smith *v.* Dumond, 53 Hun 637, 6 N. Y. Supp. 242.

85. Hyatt *v.* Adams, 16 Mich. 180.

86. Hewitt *v.* Eisenbart, 36 Neb. 794, 55 N. W. 252.

87. Tefft *v.* Wilcox, 6 Kan. 46.

Chamberlain *v.* Porter, 9 Minn. 244, was an action for injury from improper treatment of a broken limb by a surgeon. There was testimony that the limb had been treated by other surgeons, and also of negligence on the part of plaintiff. As to the damages, the court charged: "The jury must take into consideration all the pain and suffering that the plaintiff has sustained and been subjected to, which has resulted from the injury, over and above what he would have necessarily suffered and sustained had the limb been treated with ordinary surgical skill; also such further damages as the plaintiff may sustain by reason of his future disability to use said limb; and that in estimating the damages they are to take into consideration the present and future condition of the plaintiff compared with what it would have been if the limb had been treated with ordinary skill." The charge was held correct.

In proving the actual damages resulting from negligence and unskillful treatment of a patient by a physician, it is proper to show all the facts occurring and growing out of the injury, even up to the time of the verdict itself. Coady *v.* Reins, 1 Mont. 424.

Evidence as to the Physical Condition of a plaintiff in a malpractice case just before the trial and two or more years after undergoing the treatment complained of is competent where such condition is shown to be the result of the injury in question

C. Mitigation of Damages. — Contributory Negligence. Evidence of contributory negligence on the part of the patient may be received in a malpractice action, not to defeat the right to recover for the malpractice, but merely in mitigation of the damages sustained.[88]

Injury Unavoidable. — In an action for malpractice, the defendant may show that the injury was unavoidable, even if the act charged was negligent.[89]

and is of a permanent nature. Hewitt *v.* Eisenbart, 36 Neb. 794, 55 N. W. 252.

88. Sanderson *v.* Holland, 39 Mo. App. 233. See also Wilmot *v.* Howard, 39 Vt. 447, 94 Am. Dec. 338.

Evidence of a failure on the part of the plaintiff in a malpractice case to obey the defendant's instructions, thereby contributing to an aggravation of the injury, is admissible only in mitigation of damages. DuBois *v.* Decker, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. Rep. 529, 14 L. R. A. 429.

The information which a physician and surgeon may give to a patient concerning the nature of his malady is a circumstance proper to be considered by the jury in determining the question whether the patient, in disobeying the instructions of his physician, was guilty of contributory negligence or not. Geiselman *v.* Scott, 25 Ohio St. 86. This case also holds that if a patient neglects to obey the reasonable instructions of the physician and thereby contributes to the injuries complained of, he cannot recover for the injury.

In an action for injury from a surgeon's negligence it is proper for the defense to show that it resulted from plaintiff's imprudence in throwing off his splints and going on crutches, but that fact cannot be shown by the statements of one who had no personal knowledge of it. Hitchcock *v.* Burgett, 38 Mich. 501.

89. A physician sued for malpractice resulting in the death of his patient may show in his defense that even if the act charged as the cause of the death was a negligent one, still the nature of the patient's disease was of such a character that he would have died soon at all events. Chase *v.* Nelson, 39 Ill. App. 53, where the court said that although such showing might not constitute a complete bar to the action it was still important in mitigation of damages.

Injury Notwithstanding Diligence. In an action for malpractice in optical surgery resulting in permanent loss of sight it is competent to show that operations in such cases, even though skillfully conducted, do not generally result in restoring the sight. Peck *v.* Hutchinson, 88 Iowa 320, 55 N. W. 511.

PICKETING.—See Conspiracy

PLACER MINES.—See Mines and Minerals.

PLATS.—See Diagrams; Maps.

PLEADINGS.—See Admissions; Answers; Records.

PLEDGES.

By A. P. Rittenhouse.

CROSS-REFERENCES:

Bailments;
Fraudulent Conveyances;
Mortgages.

I. BURDEN OF PROOF.

1. Essential Elements. — Contract and Delivery. — To establish a pledge, the evidence must show that there was a contract, made in good faith by the parties, whereby certain personal property was to be held as security for a debt, and that the property was actually or constructively delivered to the pledgee, or to a third person for his benefit.[1]

2. Negligence and Loss. — The burden of proving negligence or other misconduct on the part of the pledgee, and consequent loss, is generally upon the pledgor.[2] But where the pledgee of notes

1. Dunn *v.* Train, 125 Fed. 221; Casey *v.* Cavaroc, 96 U. S. 467, 486; Huntington *v.* Sherman, 60 Conn. 463, 22 Atl. 769; Textor *v.* Orr, 86 Md. 392, 397, 38 Atl. 939; Chitwood *v.* Lanyon Zinc Co., 93 Mo. App. 225; First Nat. Bank *v.* Caperton, 74 Miss. 857, 22 So. 60, 60 Am. St. Rep. 540; Sharmer *v.* McIntosh, 43 Neb. 509, 516, 61 N. W. 727.

It must appear that the agreement to pledge an article was executed. Proof of an agreement not executed, but to be carried out in the future, is not sufficient to establish a pledge. Harrison *v.* Clark, 74 Conn. 18, 22, 49 Atl. 186.

Written Agreement Unnecessary. Mitchell *v.* McLeod (Iowa), 104 N. W. 349, was an action to recover two windmills levied upon and sold as the property of one Somme. Plaintiff claimed the property as pledgee of said Somme. The evidence showed that Somme had a contract whereby he could purchase windmills and other property for resale in Ida county, Iowa. Somme induced the plaintiff to furnish the money for such purchase, and agreed that the windmills should be taken possession of and held by the plaintiff until he (Somme) should repay the amount of the advancement so made. The mills were shipped in Somme's name, but were delivered to the plaintiff upon arrival in Ida county, and he had possession thereof when they were levied upon by the defendant sheriff. *Held*, that the evidence showed that plaintiff was a pledgee in possession, and that there was no necessity for a written instrument evidencing the contract.

Parol Evidence is not admissible to prove a pledge where it is required by law to be made in writing. De Blois Syndic *v.* Reiss, 32 La. Ann. 586.

In Meguiar *v.* Thomas, 19 Ky. L. Rep. 1003, 42 S. W. 846, the evidence showed that Thomas had kept and trained a number of horses for one J. W. White, and had a bill of account against him therefor; that White had delivered the possession of these horses to Thomas, and expressly pledged them for the payment of the bill; that Thomas had surrendered to White all the horses except one mare. Thomas testified that he asked White to pay his bill, and that White responded that he had no money, but that he (Thomas) had the mare in his possession, and that he could hold her until every dollar due him was paid. The court said: "Now does this language, if true, constitute a valid pledge? About this, we think, there can be no doubt. The delivery of personal property by a debtor to a creditor upon an oral agreement that the creditor shall hold the property until the payment of the debt is a pledge."

2. *Arkansas.* — Barnes *v.* Bradley, 56 Ark. 105, 19 S. W. 319.

Georgia. — Fisher *v.* Jones, 108 Ga. 490, 494, 34 S. E. 172.

Idaho. — Murphy *v.* Bartsch, 2 Idaho 603, 23 Pac. 82.

Indiana. — Kiser *v.* Ruddick, 8 Blackf. 382; Reeves *v.* Plough, 41 Ind. 204.

Mississippi. — Steger *v.* Bush, Smed. & M. Ch. 172.

Missouri. — Fourth Nat. Bank *v.* Blackwelder, 81 Mo. App. 428.

New Hampshire. — Goodall *v.* Richardson, 14 N. H. 567.

or other collateral paper permits them to become barred by the statute of limitations the burden is upon him to show that his apparent negligence has not injured the debtor.[3] Where it appears that collaterals in the hands of the pledgee have become uncollectible on account of the insolvency of the makers thereof the burden is on the pledgee to show that he used ordinary diligence to collect the same.[4]

New York. — Vose *v.* Yulee, 4 Hun 628.

Wisconsin. — Plant's Mfg. Co. *v.* Falvey, 20 Wis. 211.

In Mauck *v.* Atlanta Trust & Bkg. Co., 113 Ga. 242, 38 S. E. 845, the court said: "In order for a pledgee of collateral security to be held liable for a failure to collect the same, it must appear not only that such failure was due to negligence, but that it resulted in damage to the pledgor. *Fisher* v. *Jones Co., supra.* Inasmuch as the law will not, in such a case, presume either damage to the pledgor or that the pledgee has been guilty of negligence, and it is incumbent on the pledgor to establish both by substantive proof." That case was a suit on a promissory note. The defendant proved that valuable accounts were deposited with the plaintiff as collateral security, and that the accounts were not collected. The court held this insufficient to prove negligence of the plaintiff as pledgee, saying: "Certainly this is not sufficient to show that the plaintiff negligently failed to collect them, or to put it on proof as to its diligence. It does not prove that the accounts could have been collected. The mere failure to collect proves nothing. It does not show that the plaintiff did not make *bona fide* efforts to collect the accounts. The persons alleged to owe the accounts might have had a good defense to the same. It may be that the persons liable on these accounts became insolvent after they were assigned to the plaintiff; and if so, mere delay to collect does not show negligent delay."

3. In Farm Inv. Co. *v.* Wyoming College & Normal School, 10 Wyo. 240, 68 Pac. 561, 567, it appeared that promissory notes were delivered by the defendant to the plaintiff as collateral security, which were good and worth their face value when so delivered, and that plaintiff permitted the notes to become barred by the statute of limitations. *Held,* to cast the burden of proof on the pledgee, the court saying: "Where by inaction of the pledgee action has become barred by the statute of limitations, the want of diligence is said to be so unquestionable that the presumption of negligence can scarcely be rebutted, although it is always open to the pledgee to show that no injury was suffered by the pledgor from the apparent want of diligence. . . . and it is incumbent on the plaintiff to show that its failure to prevent the bar of the statute had not resulted to the injury of the defendant. If suit upon them would have been unavailing the plaintiff should have offered proof tending to establish that fact."

4. Where a creditor receives as collateral security the notes of third persons, knowing them to be of doubtful solvency, and fails to collect such notes, he must prove either that he has exercised reasonable diligence in attempting to collect them, or some excuse for his failure to do so. Slevin *v.* Morrow, 4 Ind. 425.

A pledgee held a fire insurance policy as collateral security. The insurance company remained solvent for one month after the insurance money became due on the policy, and then became insolvent. During this time the pledgee made no effort to collect the insurance money. *Held,* to establish negligence *prima facie,* and that the burden of proof was on the pledgee to show absence of negligence and diligence. Charter Oak L. Ins. Co. *v.* Smith, 43 Wis. 329.

It is always open to the pledgee to show that no injury was suffered by the pledgor from the apparent want of diligence. Farm Inv. Co. *v.* Wy-

II. PRESUMPTIONS.

1. Delivery by Debtor to Creditor. — Where a debtor delivers shares of stock in a corporation, or other property, to his creditor, the law presumes it is intended as collateral security.[5]

2. Presumption as to Consideration. — Where it is shown that a pledge of property has been made, the law presumes that it was made upon sufficient consideration.[6]

3. Presumption as to Value. — Where bonds or negotiable instruments, held as collateral security, are improperly disposed of by the pledgee, the law presumes them to be worth the amount represented on their face.[7]

4. Presumption of Conversion. — Where the pledgee cannot produce the pledged property when the debt is due, the law presumes a conversion of it.[8] But loss is not presumed from the mere fact

oming College & Normal School, 10 Wyo. 240, 68 Pac. 561, 567.

In Murphy *v.* Bartsch, 2 Idaho 603, 23 Pac. 82, the appellant on October 18, 1886, delivered his promissory note for $500 to respondent, payable the next day, and as collateral security for its payment he transferred a demand he held against one Shaw, payable on the first day of November, 1886. At the latter date Shaw was solvent, but by the following April he became insolvent. In August, 1887, action was commenced to recover on the note, and appellant interposed the defense that the respondent had neglected to collect the claim against Shaw, which, by the latter's insolvency, became wholly lost to the appellant. *Held,* that the respondent could not be presumed without proof to have committed such neglect as resulted in appellant's damage, and the appellant must prove actual negligence on the part of the respondent, and that such negligence resulted in damage or loss to him.

5. Brown *v.* Olmsted, 50 Cal. 162; Morgan *v.* Dod, 3 Colo. 551; Wilhelm *v.* Schmidt, 84 Ill. 183; Caldwell *v.* Fifield, 24 N. J. L. 150; Harris *v.* Lombard, 60 Miss. 29; Perit *v.* Pittfield, 5 Rawle (Pa.) 166; Leas *v.* James, 10 Serg. & R. (Pa.) 307; Bayard *v.* Shunk, 1 Watts & S. (Pa.) 92, 37 Am. Dec. 441, 442; Stone *v.* Miller, 16 Pa. St. 450.

In Borland *v.* Nevada Bank, 99 Cal. 89, 33 Pac. 737, the court said: "When a debtor deposits property with his creditor, in the absence of any showing as to the purpose with which the deposit is made or received it is presumed that it was intended as a collateral security for the debt. Unless there is some evidence tending to show an intention on the part of the debtor to give, and also on the part of the creditor to receive, the property in satisfaction of the debt, either in whole or in part, the law presumes that it is given only as collateral security. Especially does this presumption arise if the property given is itself a chose in action or a security of a different nature from the debt, whose value is neither intrinsic nor apparent, and is not agreed upon by the parties."

6. Robinson *v.* Boyd, 60 Ohio St. 57, 64, 53 N. E. 494; Atlas Bank *v.* Doyle, 9 R. I. 76, 11 Am. Rep. 219.

7. Vose *v.* The Florida R. Co., 50 N. Y. 369, 377.

Where notes are delivered as collateral security, and are shown to be then worth their face value, the law presumes the continuance of such value, in the absence of contrary evidence. Farm Inv. Co. *v.* Wyoming College & Normal School, 10 Wyo. 240, 68 Pac. 561.

8. Stuart *v.* Bigler, 98 Pa. St. 80, was a suit by the assignees of a bankrupt on a promissory note. It appeared in evidence that bonds had been pledged with the assignor as collateral security, and that the bonds were not in the possession of the as-

that collateral securities remain uncollected by the pledgee.[9]

5. Delay in Redemption. — No presumption against the right to redeem pledged property arises from the mere fact of delay in making the claim for redemption where such delay does not extend beyond the time fixed by the statute of limitations for the recovery of the debt secured.[10]

III. PROOF OF DELIVERY.

1. General Rule. — A pledge cannot be established by evidence which merely shows an intent to pledge; it must also appear that the property intended to be pledged was delivered either actually or constructively to the pledgee, or to some person for his benefit.[11]

signor at the time of his failure. *Held,* that this fact created a presumption that the bonds had been converted, but that this might be explained or rebutted by proof of what he did with them; that the burden of showing this was on the assignees.

9. Reeves *v.* Plough, 41 Ind. 204.

10. Whelan *v.* Kinsley, 26 Ohio St. 131, 140.

11. *United States.* — Hook *v.* Ayers, 80 Fed. 978; Seymour *v.* Hendee, 54 Fed. 563; Christian *v.* Atlantic & N. C. R. Co., 133 U. S. 233, 241; Casey *v.* Cavaroc, 96 U. S. 490.

California. — George *v.* Matonni, 56 Pac. 53; McFall *v.* Buckeye Grangers Warehouse Ass'n, 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47; George *v.* Pierce, 123 Cal. 172, 55 Pac. 775.

Connecticut. — Huntington *v.* Sherman, 60 Conn. 463, 22 Atl. 769.

Illinois. — Atkinson *v.* Foster, 134 Ill. 472, 25 N. E. 528; Union Trust Co. *v.* Trumbull, 137 Ill. 146, 27 N. E. 24.

Indiana. — Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302, 40 L. R. A. 109.

Kansas. — Matthewson *v.* Caldwell, 59 Kan. 126, 52 Pac. 104.

Louisiana. — Blanc *v.* Germania Nat. Bank, 114 La. Ann. 739, 38 So. 537.

Maine. — Collins *v.* Buck, 63 Me. 459.

Massachusetts. — Harding *v.* Eldridge, 186 Mass. 39, 42, 71 N. E. 115; Moors *v.* Reading, 167 Mass. 322, 45 N. E. 760, 57 Am. St. Rep. 460; Robertson *v.* Robertson, 186 Mass. 308, 71 N. E. 571.

Michigan. — Merchants' Bank *v.* Hibbard, 48 Mich. 118, 11 N. W. 834, 42 Am. Rep. 465.

New Hampshire. — Pinkerton *v.* Manchester & L. R. R., 42 N. H. 424.

North Carolina. — McCoy *v.* Lassiter, 95 N. C. 88.

Oklahoma. — Jackson *v.* Kincaid, 4 Okla. 554, 46 Pac. 587.

Oregon. — Marquam *v.* Sengfelder, 24 Or. 2, 32 Pac. 676.

Tennessee. — Johnson *v.* Smith, 11 Humph. 396.

Washington. — Heilbron *v.* Guarantee Loan & Trust Co., 13 Wash. 645, 43 Pac. 932.

Wisconsin. — Geilfuss *v.* Corrigan, 95 Wis. 651, 70 N. W. 306, 60 Am. St. Rep. 143, 37 L. R. A. 166.

Wyoming. — Toms *v.* Whitmore, 6 Wyo. 220, 44 Pac. 56.

When property is capable of personal possession the evidence must show an actual delivery and a continued change of possession in order to establish the fact of a pledge. "The requirement of possession in the pledgee is an inexorable rule of law adopted to prevent fraud and deception. . . . There must not only be an actual delivery, as distinguished from a mere pretense, but the change of possession must be continuing — not formal, but substantial." Mahoney *v.* Hale, 66 Minn. 463, 69 N. W. 334.

In Dunn *v.* Train, 125 Fed. 221, a quantity of paper was put in pledge to secure the payment of money advanced and to be advanced in the manner following: An employe of the pledgor was made the agent of the pledgee, and was put in custody of the paper, which remained in the

2. Constructive Delivery. — Where, by reason of the nature of the property pledged, actual physical delivery is impossible or difficult, constructive delivery may be shown by proof of the delivery of a recognized symbol of title, such as bills of lading, warehouse receipts and the like.[12]

basement of the pledgor's mill, subject to the orders of the pledgee; and from time to time other quantities of paper were added in pledge under the same arrangement, some of it being receipted for by the agent of the pledgee, and some not. *Held,* that there is no rule of law that a delivery or change of possession shall be established by a receipt. Also that the fact of the custodian of the property being in the employ of the pledgor did not render the pledge invalid. Also that delivery of the pledged property may be shown by proof that the property has been deposited in some suitable place, for the pledgee to take away when he chooses, and the delivery may be either actual or constructive. Also that where the property pledged is not removed from the premises of the pledgor, the fact of actual delivery and actual control and dominion by the pledgee or its agent should be clearly and unmistakably proved.

In American Pig Iron Storage Warrant Co. *v.* German, 126 Ala. 194, 239, 28 So. 603, 85 Am. St. Rep. 21, an iron furnace company borrowed money from one Verchot and agreed to secure the repayment of the same by pledging seven hundred tons of iron. It was proved that under the agreement of pledge between the furnace company, acting by its president, and Verchot, a particular spot of ground belonging to the company, and located apart from its own iron yards, was tendered by the president and accepted by Verchot for his use, and that a quantity of iron was placed thereon, piled in hundred-ton lots, and marked with paint with Verchot's initials. It did not appear that any power was reserved or allowed to the furnace company, or its officers or employes, either to repledge, sell, or use, or have charge of the iron, after it was so placed. The court held that a delivery was sufficiently established, saying: "It was not essential for the delivery to be made at the time of the contract, and the pledge took effect upon subsequent delivery made in performance of the contract; considering the character of the property involved, its delivery must be taken as vesting complete possession in Verchot, thereby validating the pledge."

In Kentucky Furnace Co. *v.* City Nat. Bank, 25 Ky. L. Rep. 28, 75 S. W. 848, the evidence showed that the company leased to J. P. Holt a part of its ground, and then placed upon the ground so leased its pig iron, and Holt issued to it warehouse receipts therefor, and the company then pledged the warehouse receipts to the appellee for money loaned; that the pig iron was stacked on the ground and marked by Holt with chalk, "C. N. B.," after the pledge of the receipts, to show that it belonged to the City National Bank; that the bank officers saw Holt, who told them the receipts were all right, and they also examined the iron. Upon this evidence the court said: "The evidence clearly shows that the appellee was given a lien on the 113 tons of pig iron in controversy, and that it was set apart and identified beyond question. Holt had charge of it, as agent of the bank. It was placed in his possession for this purpose, and the evidence is undisputed that he informed the bank that he held the iron for it, and the bank instructed him to keep it safely. This was a valid pledge, and the circuit court properly enforced it."

12. Citizens Bkg. Co. *v.* Peacock, 103 Ga. 171, 29 S. E. 752; Richardson *v.* Nathan, 167 Pa. St. 513, 31 Atl. 740.

In Mott *v.* Newark German Hospital, 55 N. J. Eq. 722, 37 Atl. 757, 760, the court said: "Possession cannot always be shown by an actual physical holding of the pledge. Many articles may be pledged which are not susceptible of such visible holding, and the parties may pledge such articles by acts indicating delivery

3. Possession of Warehouseman. — To render the delivery of a warehouse receipt effective as constructive delivery of the property, it must appear that the property was in possession of the warehouseman when the receipt was issued.[13]

4. Possession in Third Party. — Where property is not in the possession of the pledgor, but in possession of a third party, de-

which are apt and proper to the nature of the thing intended to be pledged, or in compliance with accepted usage, or with the requirements of law. If the subject of the pledge be of an incorporeal character, as a debt secured by mortgage, possession may be given either by actual delivery of the *indicia* of the debt, etc., or written transfer to the hands or power of the pledgee, so as to be made available to him for the satisfaction of the debt."

In Whitney *v.* Tibbitts, 17 Wis. 359, the question was whether on a pledge of wheat stored in a warehouse a delivery by the pledgor of the warehouse receipt without indorsement, the warehouse receipt stating that the wheat "is deliverable on return of this receipt," constituted a sufficient delivery of the property to sustain the pledge as against attaching creditors of the pledgor. The plaintiff offered evidence to show that by a general custom in Milwaukee, grain in store, was transferred by a delivery of such receipts without indorsement. The offer was rejected. In declaring this error the court said: "The existence of such a custom serves to throw light upon the intention of the parties in delivering the receipt. It shows that the possession of the receipt gave to the pledgee actual control and dominion over the property, which control would be acknowledged by the warehouseman who issued it. It showed that the receipt, even without indorsement, constituted in fact the usual evidence of title, the delivery of which is, by all the books, a good delivery of property."

In Sholes *v.* Asphalt Co., 183 Pa. St. 528, 38 Atl. 1029, the evidence showed that the asphalt company had in good faith given collateral notes containing declarations pledging asphalt blocks and tiles, which were then stored in the company's yard; that neither at that time nor at any time thereafter was anything done by either of the parties to carry the pledges into effect; that the pledgor did not deliver the goods, nor did the pledgees remove them, or take possession of them, actually or constructively. It was not shown what number of blocks and tiles were on hand in the yard, nor that the blocks and tiles claimed to be pledged were marked in any way, or that anything was done to distinguish them from the unpledged assets of the company, or that would have enabled the pledgees, in case they desired to enforce their pledge, to enter on the grounds of the company and designate what particular part of the product there stored was covered by the lien. *Held*, that the facts did not sustain the pledge.

13. In Commercial Bank *v.* Flowers, 116 Ga. 219, 42 S. E. 474, it appeared that a wharfinger's receipt for property therein described was delivered as collateral security to a promissory note, and that the property described in the receipt was not in the possession of the wharfinger or of the party who undertook to pledge it. *Held*, that no delivery was proved. The court said: "A warehouseman's or wharfinger's receipt for particular property may be used in commercial transactions as the representative of and a substitute for property which has been deposited with him, and the delivery of the property described in such receipt may be effected by the delivery of the receipt, but the delivery of a so-called receipt, issued by a warehouseman or wharfinger, which represents nothing in his possession, is not a symbolic delivery of anything. Before there can be a substitute there must be an original."

Delivery of Pawn Ticket. — Proof that a pawn ticket was delivered to be held as security for the payment of rent establishes the fact of pledg-

livery may be shown by proving that an order for delivery, or notice of the pledging, was given to the party in possession.[14]

5. Pledgee in Possession. — If it be shown that when the property was pledged it was then in possession of the pledgee, although for another purpose, it will render the pledge effectual without proof of further delivery.[15]

6. Choses in Action. — Where promissory notes, bonds, certificates of stock in a corporation or other choses in action are alleged to have been put in pledge, it must appear that the same were transferred and delivered to the pledgee.[16]

ing the goods described in the ticket. Lehmeyer *v.* Provident Loan Soc., 31 Misc. 719, 65 N. Y. Supp. 313.

14. Porter *v.* Shotwell, 105 Mo. App. 177, 181, 79 S. W. 728.

In Hunt *v.* Bode, 66 Ohio St. 255, 270, 64 N. E. 126, certain warehouse receipts were pledged to a bank to secure payment of a claim held by it against the pledgor. Afterward the pledgor, by a written agreement, pledged the same receipts to another person to secure a debt, and notified the bank that held the receipts of the fact. *Held,* to constitute a pledge to the second party without actual delivery.

15. Parsons *v.* Overmire, 22 Ill. 58; Meguiar *v.* Thomas, 19 Ky. L. Rep. 1003, 42 S. W. 846.

In Farson *v.* Gilbert, 114 Ill. App. 17, the main question in issue was whether one Thayer had made a valid pledge of certain electro plates of an atlas, to Donohue and Henneberry, who published the atlas for him. The testimony was, that while the plates were in possession of Donohue and Henneberry for the purpose of printing the atlas, they pressed Thayer for the amount due them for printing, and that Thayer said to them that they had the plates for security; that they need not be in a hurry to get their money, as they had plenty of security or property in their possession; that they had his sheets and plates. *Held,* to establish a pledge; the court saying: "We think the declaration of Thayer constituted a valid pledge of the plates, because they showed an agreement on the part of the owner that Donohue and Henneberry, his creditors, should hold the plates until the amount due from him to them for printing should be paid."

16. Christian *v.* Atlantic & N. C. R. Co., 133 U. S. 233, 242; Higgins *v.* Manson, 126 Cal. 467, 58 Pac. 907, 77 Am. St. Rep. 192; Hall *v.* Cayot, 141 Cal. 13, 74 Pac. 299; Rice *v.* Gilbert, 173 Ill. 348, 50 N. E. 1087.

In Ormsby *v.* De Borra (Cal.), 52 Pac. 499, it was shown that the defendant had pledged two promissory notes to a bank, to secure a debt, and desiring to pledge the same notes to secure a debt to the plaintiff, he directed the bank in writing to hold the said notes and apply them to the payment of the plaintiff's debt, after the bank's claim was satisfied. The court held that the notes having already been indorsed by the defendant, it was not necessary that they be reindorsed, and having already been delivered to the bank as a pledge it was not necessary that they be actually delivered to the plaintiff, the indorsement on the notes, and the order to the bank to hold them for the payment of plaintiff's note, constituting in effect an indorsement and delivery to him as a pledge.

Copy of Note. — In Corn Exchange Bank *v.* Schuttleworth, 99 Iowa 536, 68 N. W. 827, the court said that to establish the fact that a promissory note was pledged, it must appear that the same was actually delivered to the pledgee to be held as collateral security. To constitute such delivery, the note must have been offered to the pledgee to be held as such security, and accepted by him. It is not necessary, however, to show that the pledgee accepted and received the original note. If the original note was lost or destroyed, a copy thereof might be substituted

IV. PAROL EVIDENCE.

1. To Explain Written Transfers. — Written transfers of personal property which appear absolute on their face, such as bills of sale and of parcels, assignments of shares of stock in corporations, assignments of insurance policies, indorsements of promissory notes, transfers of bonds, and the like, may generally be shown by parol evidence to be merely pledges, and not absolute transfers.[17]

2. Contradiction of Written Contract. — Where personal property is delivered under a written contract which states the terms of the transaction and the purpose of the delivery, parol evidence is not competent to contradict or vary the same.[18]

in its place, provided such copy was delivered and accepted as collateral in place of the original. The burden is on the pledgee to show that it received and accepted such copy to be held as collateral.

A building contractor made an agreement with a bank whereby it was to furnish him advancements of money as working capital in building a church, not to exceed $3000, between installments of payments made to him by the church, and he agreed that whenever such an installment was paid by the church the advancements made by the bank to that date should be paid therefrom. *Held*, that this transaction amounted to a pledge of the installments due under the contract. Scribner *v.* Taggart, 123 Iowa 321, 98 N. W. 798.

17. *Alabama.* — Overstreet *v.* Nunn, 36 Ala. 649.

Colorado. — Morgan *v.* Dod, 3 Colo. 551.

Georgia. — Ober *v.* Drane, 106 Ga. 406, 32 S. E. 371.

Indiana. — Hazzard *v.* Duke, 64 Ind. 220.

Kentucky. — Bright *v.* Wagle, 3 Dana 252.

Massachusetts. — Whitaker *v.* Sumner, 20 Pick. 399; Hazard *v.* Loring, 10 Cush. 267; Walker *v.* Staples, 5 Allen 34; Newton *v.* Fay, 10 Allen 505; Reeve *v.* Dennett, 137 Mass. 315.

Minnesota. — Jones *v.* Rahilly, 16 Minn. 320.

Missouri. — O'Neill *v.* Capelle, 62 Mo. 202; Wood *v.* Matthews, 73 Mo. 477; Newell *v.* Keeler, 13 Mo. App. 189.

New York. — Moses *v.* Murgatroyd, 1 Johns. Ch. 119, 7 Am. Dec. 478; Skenandoa Cotton Co. *v.* Lefferts, 36 N. Y. St. 63, 13 N. Y. Supp. 33, and 142 N. Y. 683, 37 N. E. 825; Shaw *v.* Wellman, 36 N. Y. St. 1002, 13 N. Y. Supp. 527; Vickers *v.* Battershall, 65 N. Y. St. 470, 32 N. Y. Supp. 314.

Pennsylvania. — Leas *v.* James, 10 Serg. & R. 307.

Texas. — Clarke *v.* Adam, 30 Tex. Civ. App. 66, 69 S. W. 1016.

A transfer of stock, absolute on its face, may be shown by parol evidence to be really a pledge of the stock as security for a debt, but when such evidence alone is relied on it ought to be clear and convincing. Travers *v.* Leopold, 124 Ill. 431, 16 N. E. 902.

Oral evidence is admissible to show that a written assignment of shares of stock in a corporation, however absolute in form, is merely a pledge; and the consideration and purpose of the transaction may be shown in the same way. Riley *v.* Hampshire Co. Nat. Bank, 164 Mass. 482, 486, 41 N. E. 679.

Where it is claimed that insurance policies, to which a party appears to have the absolute title by contract with another person, are held merely as a pledge, the burden of proof is upon the party making such claim. Lance *v.* Bonnell, 58 N. J. Eq. 259, 43 Atl. 288, 291.

18. Whitney *v.* Lowell, 33 Me. 318; Nelson *v.* Robson, 17 Minn. 284.

In Johnson *v.* Zweigart, 24 Ky. L. Rep. 1323, 71 S. W. 445, there was introduced in evidence a written instrument signed by the appellee, which showed that he had received from the appellant certain promissory notes as collateral security for

3. Local Customs. — In actions involving the question of negligence, or conversion, on the part of the pledgee, evidence of local customs or usage among brokers as to the care or disposal of pledged property is inadmissible;[19] but where parties contract with special reference to such customs, evidence thereof may be admitted.[20]

V. MISCELLANEOUS.

1. Defense Against Conversion. — Where a pledgee is charged with wrongfully surrendering collateral notes to the maker at less than their face value, he may show that the notes were merely

money loaned. The appellee introduced oral evidence to prove that said notes were sold to him outright. *Held* error, the court saying: "The question presented by this appeal is, whether the appellee could by his testimony vary or dispute the writing above copied, and signed by him, without an allegation of fraud or mistake in its execution, and whether it was proper for the court to submit to the jury the question of the binding effect of the writing. Appellee was allowed over objections to testify as to an oral sale, and the court submitted to the jury to decide whether such an oral sale was made. The court is of opinion that this question was improperly submitted to the jury."

In Fay *v.* Gray, 124 Mass. 500, it appeared that a certificate of stock was assigned and delivered as security for a loan, and a receipt was given by the pledgee stating that such certificate was received as collateral security, and containing an agreement that the pledgee might sell the stock on one day's notice. *Held,* that it was not competent for the pledgee to prove by parol that when he took the certificate, and signed the receipt, a different arrangement from that stated in the receipt was made, whereby the pledgee was given authority to use the stock.

In Radigan *v.* Johnson, 174 Mass. 68, 54 N. E. 358, the owner of horses pledged them to a liveryman, by a written agreement relinquishing all claim to them until the charges for board and care of them should be paid in full. *Held,* that evidence showing that by a parol agreement made at the same time the owner was to continue to use the horses the same as before was not competent.

19. Evidence tending to show a custom or usage among brokers to hypothecate, or otherwise use securities pledged as collateral security, is not competent in a suit against the pledgee for conversion. Lawrence *v.* Maxwell, 53 N. Y. 19.

Evidence of a local custom among brokers to sell commercial paper, pledged as security for a loan, at private sale, and for the best price that can be obtained, after demand of payment, and notice that such sale will be made in case of default, was held inadmissible. Wheeler *v.* Newbould, 16 N. Y. 392.

In a suit to recover the value of stock pledged, evidence of a general usage among stock brokers which was known to plaintiff's agent who made the pledge, at the time it was made, to sell and hypothecate pledged stock at pleasure, and simply return an equal quantity of the same kind of stock upon payment of the debt secured by the pledge, which custom appeared wholly inconsistent with the contract between the parties, was held incompetent, and properly rejected. Dykers *v.* Allen, 7 Hill (N. Y.) 497, 42 Am. Dec. 87.

20. Baker *v.* Drake, 66 N. Y. 518, 23 Am. Rep. 80, was an action for conversion of pledged stocks by an alleged sale, without notice to the pledgor. It appeared that plaintiff employed defendants to purchase stocks for him upon margin, he agreeing that all transactions in stocks should be in every way subject to the usages of defendants' office. Defendants offered to prove

accommodation paper, given for no value, but he cannot show that the pledgor was indebted to the maker.[21]

2. Good Faith. — Where a pledgee buys the pledged property at his own sale he must prove that the sale was fairly made, and that he acted in good faith toward the pledgor to defeat an action to set aside the sale.[22]

3. Expenditures. — A pledgee may show that he expended money to preserve the value of the pledged property.[23]

4. Defense to Action on Collateral Note. — In a suit by the pledgee on a note pledged to him before maturity as collateral security for indebtedness then existing, and also for advances to be thereafter made to him, evidence tending to show that the maker of the note had a good defense as against the payee is admissible, and the burden of proof is upon the maker to show the amount of advances made by the pledgee if they were less than the amount of the note.[24]

5. Tender to Purchaser. — In an action by a pledgor against a *bona fide* purchaser of goods from the pledgee, the pledgor must prove that he tendered the amount due on the pledge.[25]

that it was the custom of their office to sell on account of failure to furnish sufficient margin at the stock exchange, without giving notice to the customer of the time and place of sale. This evidence was rejected. *Held*, error.

21. Union Trust Co. *v.* Rigdon, 93 Ill. 458, 470.

22. Perkins *v.* Applegate, 27 Ky. L. Rep. 522, 85 S. W. 723.

23. Reynolds *v.* Cridge, 131 Pa. St. 189, was a suit for the conversion of railroad bonds purchased by the plaintiffs, subject to a pledge of them to defendant as collateral security. The defendant offered to prove that a flood having washed away the tracks, roadbed and appurtenances of the road, the same was worth considerably less than the amount of the bonds and mortgage on it, and that the defendant, for the preservation of the securities, expended a large sum of money in restoring the different portions of the road so damaged; this for the purpose of recouping against plaintiff's claim, to be followed by evidence that what value the bonds had was due to this expenditure of money. The court rejected the offer. *Held* error, on the ground that plaintiff's bonds must have been enhanced by the defendant's advancements.

24. Gammon *v.* Huse, 9 Ill. App. 557, 565.

25. Talty *v.* Freedman's Sav. & Trust Co., 93 U. S. 321.

POKER.—See Gaming.

POISONS and POISONING.—See Expert and Opinion Evidence; Homicide.

POLYGAMY.—See Bigamy.

POSITIVE AND NEGATIVE EVIDENCE.

I. WHAT IS NEGATIVE TESTIMONY.

1. Definitions. — Evidence is positive when a witness states that an event did or did not occur, or that a certain matter is or is not so. It is negative when he in effect says that so far as he knows the event did not occur, or that he did not see or hear a certain thing.[1]

1. See Frizell *v.* Cole, 42 Ill. 362. "The preference the law gives positive over negative is when one swears positively that a thing happened and another swears that he was present and did not see it or hear it (as the

2. Positive Evidence of a Negative. — Direct testimony that an event did not occur, or that a matter is not so is positive, and not negative.[2] Where the opportunities for knowledge of two witnesses were the same, and the attention of both was equally engaged, the testimony of the one stating that the event did not occur is, considerations of credibility being laid aside, equal to that of the one stating that it did occur.[3] In such cases it is for the jury to determine the weight of the evidence without instructions from the court as to which is the better evidence.[4]

3. Negative Testimony Must Tend to Contradict. — A. In General. — Negative testimony, within the meaning of the term as

case may be), it being quite possible that it may have happened although the other may not have seen or heard it." Atlanta & W. P. R. *v.* Johnson, 66 Ga. 259.

2. *Georgia.* — Atlanta & W. P. R. *v.* Johnson, 66 Ga. 259; Georgia Pac. R. Co. *v.* Bowers, 86 Ga. 22, 12 S. E. 182.

Illinois. — Grabill *v.* Ren, 110 Ill. App. 587; Chicago Consol. Traction Co. *v.* Gervens, 113 Ill. App. 275.

Kansas. — Kansas City, Ft. S. & G. R. Co. *v.* Lane, 33 Kan. 702, 7 Pac. 587.

Maine. — Downing *v.* Freeman, 13 Me. 90.

Michigan. — Lonis *v.* Lake Shore & M. S. R. Co., 111 Mich. 458, 69 N. W. 642.

Missouri. — McCormick *v.* Kansas City, Ft. S. & M. R. Co., 50 Mo. App. 109.

North Carolina. — Reeves *v.* Poindexter, 53 N. C. 308; Glenn *v.* Farmers Bank, 70 N. C. 191; Smith *v.* McIlwaine, 70 N. C. 287.

Tennessee. — Delk *v.* State, 3 Head 79.

Wisconsin. — Sobey *v.* Thomas, 39 Wis. 317; Shekey *v.* Eldredge, 71 Wis. 538, 37 N. W. 820; Joannes *v.* Millerd, 90 Wis. 68, 62 N. W. 916.

The distinction is well brought out in Frizell *v.* Cole, 42 Ill. 362, where the court said: "Where a witness swears that a particular act occurred at a specified time and place, or that particular language was spoken by a person to whom he refers, this is affirmative evidence. But, if another witness were at the same place at the same time, and were to swear that he did not observe the act, or hear the language of which the other speaks, this would be called negative evidence. But, suppose the latter witness were to state that his attention was fully excited to what occurred, and what was said, and that the act of which the other spoke did not occur, or that the language was not used by the person to whom it was attributed, this would be as fully affirmative evidence as the other."

The distinction was not noticed in Crew *v.* St. Louis, K. & N. W. R. Co., 20 Fed. 87. In that case, after laying down the general rule that positive testimony is entitled to more weight than negative, the court said: "The positive testimony of witnesses that a man was intoxicated at a particular time is better than the testimony of those who say that he was not intoxicated." It was also overlooked in Matthews *v.* Poythress, 4 Ga. 287, and in Hepburn *v.* Citizens Bank, 2 La. Ann. 1007, 46 Am. Dec. 564.

3. Frizell *v.* Cole, 42 Ill. 362; Coughlin *v.* People, 18 Ill. 266, 68 Am. Dec. 541 (testimony that a blow was not struck is equal to that stating the contrary); Denham *v.* Holeman, 26 Ga. 182, 71 Am. Dec. 198; Georgia Pac. R. Co. *v.* Freeman, 83 Ga. 583, 10 S. E. 277.

4. It is the province of the jury to determine as to what evidence they will give the greater weight, and their privilege in that regard should not be interfered with. Chicago & A. R. Co. *v.* Robinson, 106 Ill. 142. Where parties enjoy equal opportunities of determining the existence or non-existence of a fact, they are entitled to equal weight. Johnston *v.* Ashley, 7 Ark. 470.

The jury is justified in giving

it is used here, must, in order to have any weight as evidence, tend to contradict positive testimony of the other party.[5]

B. Failure to Remember. — Testimony of a witness that he does not remember whether a certain event took place or not, does not contradict in any degree positive testimony that it did occur.[6] Accordingly, it is entitled to little or no weight.

C. Witness Must Have Given Attention to the Matter. Negative testimony does not contradict unless it appears that the witness was in such a position and was giving such attention to the matter that he might reasonably be expected to notice it.[7]

4. Common Repute. — Where the question at issue is one of common repute, testimony of a witness that he had never heard of the repute is not negative.[8]

greater weight to the evidence of the negative. Chicago, B. & Q. R. Co. *v.* Cauffman, 38 Ill. 424.

5. See cases cited in following notes.

Thus testimony of witnesses that they had never heard of a certain individual does not tend in any way to contradict positive evidence that he existed. Martin *v.* Anderson, 21 Ga. 301.

"It must appear that they were looking, watching and listening for it, that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative. A mere 'I did not hear' is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact." Culhane *v.* New York Cent. & H. R. R. Co., 60 N. Y. 133; Tolman *v.* Syracuse, B. & N. Y. R. Co., 27 Hun (N. Y.) 325; McKeever *v.* New York Cent. & H. R. R. Co., 88 N. Y. 667.

6. Horn *v.* Baltimore & O. R. Co., 54 Fed. 301, 4 C. C. A. 346, 6 U. S. App. 381; Railsback *v.* Patton, 34 Neb. 490, 52 N. W. 277; Idaho Mercantile Co. *v.* Kalanquin, 8 Idaho 101, 66 Pac. 933; Hinkle *v.* Higgins, 83 Tex. 615, 19 S. W. 147; Harrison *v.* Yerby (Ala.), 14 So. 321.

7. Chicago & N. W. R. Co. *v.* Andrews, 130 Fed. 65, 64 C. C. A. 399; Atlanta & W. P. R. Co. *v.* Johnson, 66 Ga. 259. See also Davis *v.* New York, N. H. & H. R. Co., 159 Mass. 532, 34 N. E. 1070; Cathcart *v.* Hannibal & St. J. R. Co., 19 Mo. App. 113; Culhane *v.* New York Cent. & H. R. R. Co., 60 N. Y. 133; Tolman *v.* Syracuse, B. & N. Y. R. R. Co., 27 Hun (N. Y.) 325; Hoffmann *v.* Fitchburgh R. Co., 67 Hun 581, 22 N. Y. Supp. 463.

"Common experience teaches us that the testimony of a person that he did not hear a familiar sound, like the ringing of a bell, when he admits that he was not listening or thinking of the matter, is entitled to very little, if any, weight." Chicago, R. I. & P. R. Co. *v.* Givens, 18 Ill. App. 404.

8. Banta *v.* Clay, 2 A. K. Marsh. (Ky.) 409; Haws *v.* Marshall, 2 A. K. Marsh. (Ky.) 413; Wilson *v.* M'Ghee, 1 Bibb (Ky.) 34. See also Wooley *v.* Bruce, 2 Bibb (Ky.) 105.

Reasons. — "Notoriety is based on hearsay, and everyone, acting on the same theatre where this reputation is alleged to exist, who is ignorant of the matter, excites a strong belief that this reputation was circumscribed, and not general." Banta *v.* Clay, 2 A. K. Marsh. (Ky.) 409.

"If three out of four who are referred to as knowing the fact, whose objects were exploring lands, hunting springs, and making improvements, and these were the topics of a conversation and full and free communication thereon, depose that they have no knowledge of it, can it be said that the fact did exist? If they had no knowledge of it, it was not generally known. Nor can this kind of testimony be properly called 'negative.'" Liggett *v.* Marshall, 15 Fed. Cas. No. 8,342. See article "Character," Vol. III, p. 43.

5. Opinions. — Where opinions are based upon the same facts, an opinion that a certain condition was not present is not open to the objection of being negative.[9]

II. WEIGHT TO BE GIVEN TO POSITIVE AND NEGATIVE TESTIMONY.

1. Positive Testimony Generally Entitled to Greater Weight.

A. In General. — Where witnesses are equally credible, positive testimony is entitled to greater weight than negative.[10]

B. Evidence of Ringing of Bell or Sounding of Whistle. Positive evidence as to the fact that a bell was rung, or a whistle was sounded, or of any other fact not improbable in itself, is entitled to more weight than negative evidence in relation to such facts.[11]

9. Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329. See also Elkins *v.* Kenyon, 34 Wis. 93 (evidence of farmers who had tried a certain instrument as to whether it was of any use).

10. *United States.* — Abbe *v.* Rood, 6 McLean 106, 1 Fed. Cas. No. 6; Crew *v.* St. Louis, K. & N. W. R. Co., 20 Fed. 87; Colt *v.* Rood, 6 McLean 106, 6 Fed. Cas. No. 3,031; The Alabama, 114 Fed. 214.

Alabama. — Stoddard *v.* Kelly, 50 Ala. 452 (dictum).

Connecticut. — Johnson *v.* Scribner, 6 Conn. 185.

Delaware. — Carswell *v.* Wilmington, 2 Marv. 360, 43 Atl. 169.

Georgia. — Atlantic & W. P. R. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 776.

Illinois. — Chicago & A. R. Co. *v.* Gretzner, 46 Ill. 74; Chicago, B. & Q. R. Co. *v.* Dickson, 88 Ill. 431; Frizell *v.* Cole, 42 Ill. 362.

Indiana. — Allen *v.* Bond, 112 Ind. 523, 14 N. E. 492.

Louisiana. — Story *v.* Hope Ins. Co., 37 La. Ann. 254; Socola *v.* Chess-Carley Co., 39 La. Ann. 344, 1 So. 824; Stachle *v.* Leopold, 107 La. 399, 31 So. 882.

Maryland. — Sarlouis *v.* Firemen's Ins. Co., 45 Md. 241; Ramsburg *v.* Campbell, 55 Md. 227.

New York. — Sanger *v.* Vail, 13 How. Pr. 500.

North Carolina. — Henderson *v.* Crouse, 52 N. C. 623; Reeves *v.* Poindexter, 53 N. C. 308; Cawfield *v.* Asheville St. R. Co., 111 N. C. 597, 16 S. E. 703.

Pennsylvania. — Frantz *v.* Lenhart, 56 Pa. St. 365.

Tennessee. — Delk *v.* State, 3 Head 79.

Texas. — State *v.* Moore, 7 Tex. 257.

Vermont. — Farmers' & Mechanics' Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

Wisconsin. — Berg *v.* Chicago, M. & St. P. R. R. Co., 50 Wis. 419, 7 N. W. 347; Draper *v.* Baker, 61 Wis. 450, 21 N. W 527, 50 Am. Rep. 143.

Testimony of a witness that to the best of his knowledge and recollection he did not unite certain persons in marriage is negative, and entitled to less weight than positive testimony. Allen *v.* Bond, 112 Ind. 523, 14 N. E. 492.

Reasons. — The reason frequently given is that both statements may be true; for although the event may have occurred, or the words may have been spoken, one witness may not have seen or heard. Abbe *v.* Rood, 6 McLean 106, 1 Fed. Cas. No. 6; Reeves *v.* Poindexter, 53 N. C. 308; Frantz *v.* Lenhart, 56 Pa. St. 365.

"Generally a witness who testifies to an affirmative is entitled to credit in preference to one who swears to a negative, because the latter may have forgotten what actually occurred, while it is impossible to remember what never had an existence. Allen *v.* Bond, 112 Ind. 523, 14 N. E. 492.

11. *United States.* — Horn *v.* Baltimore & O. R. Co., 54 Fed. 301, 4 C. C. A. 346, 6 U. S. App. 381.

C. Evidence of Habits of Life. — Where the question at issue is as to the habits of life of a certain person, testimony of parties that they had frequently seen him in a certain condition is entitled to more weight than testimony of others that they had never seen him so.[12]

D. One Positive Witness Against Several Negative. — It is frequently stated broadly that the testimony of one positive witness is entitled to more weight than that of several negative witnesses.[13] This, however, is not always strictly true. The jury has a right to consider whether the fact testified to by the positive witness is, in view of the negative testimony, reasonable and probable.[14]

2. Where Negative Evidence Sufficient. — A. Jury May Weigh the Evidence. — Although as a general rule positive testimony will outweigh that which is negative in its character, nevertheless, to the jury belongs the duty of determining for themselves what weight, considering all the circumstances, they would attach to the testimony of the various witnesses on the point in question.[15] The

Delaware. — Parvis *v.* Philadelphia, W. & B. R. Co., 8 Houst. 436, 17 Atl. 702.

Illinois. — Chicago & A. R. Co. *v.* Gretzner, 46 Ill. 74; Chicago & R. I. R. Co. *v.* Still, 19 Ill. 499, 71 Am. Dec. 236; Haecker v. Chicago & A. R. Co., 91 Ill. App. 570; Chicago & E. I. R. Co. *v.* Eganolf, 112 Ill. App. 323.

Kansas. — Kansas City, Ft. S. & G. R. Co. *v.* Lane, 33 Kan. 702, 7 Pac. 587; Missouri Pac. R. Co. *v.* Pierce, 39 Kan. 391, 18 Pac. 305.

Maryland. — Northern Cent. R. Co. *v.* State, 100 Md. 404, 60 Atl. 19.

Michigan. — Crane *v.* Michigan Cent. R. Co., 107 Mich. 511, 65 N. W. 527.

New York. — Van Patten *v.* Schenectady St. R. Co., 80 Hun 494, 30 N. Y. Supp. 501.

Pennsylvania. — Urias *v.* Pennsylvania R. Co., 152 Pa. St. 326, 25 Atl. 566.

Wisconsin. — Sutton *v.* Chicago, St. P., M. & O. R. Co., 98 Wis. 157, 73 N. W. 993.

See also Chicago & A. R. Co. *v.* Robinson, 106 Ill. 142, where an instruction that "a jury may be justified in giving greater weight to the testimony of witnesses who state negatively that the whistle was not sounded or the bell rung, than to that of witnesses stating affirmatively that such was done" was held erroneous.

This is subject to the limitation that where the negative witness had an equal opportunity to observe, and his attention was directed to the matter, no such superiority attaches to the affirmative evidence.

12. Habits of Sobriety. — Testimony of witnesses that they had frequently seen a party intoxicated is entitled to more weight than testimony of others that they had never seen him in that condition. Brockway *v.* Mutual Ben. L. Ins. Co., 9 Fed. 249.

13. Patterson *v.* Gaines, 6 How. (U. S.) 550, 588; Urias *v.* Pennsylvania R. Co., 152 Pa. St. 326, 25 Atl. 566; State *v.* Moore, 7 Tex. 257; Hinton *v.* Cream City R. Co., 65 Wis. 323, 27 N. W. 147.

14. "If a person, being in a room with others, should testify that a clock in the same room, and in good order, the hands of which pointed to 'twelve,' actually struck 'forty,' and the others, having a chance equally as favorable to see and hear the striking, should testify that they did not hear it, the testimony of the latter should outweigh that of the single person, for the fact to which he testified was neither reasonable nor probable." Greenville *v.* Henry, 78 Ill. 150.

15. Le Cointe *v.* United States, 7 App. D. C. 16; State *v.* Gee, 85 Mo. 647; Ehrmann *v.* Nassau Elec. R.

jury should take into consideration the comparative credibility and means of knowledge of the witness.[16]

B. Negative Testimony Not Attributable to Inattention. Where negative testimony can not be reconciled with positive testimony by attributing it to inattention, error or defect of memory, it may be of equal weight with positive testimony.[17]

C. Where Witness Had as Favorable Opportunity for Observing as Others. — Negative testimony of a party who was in a position to observe and whose attention was directed specially to the occurrence is entitled to as much weight as positive testimony of a witness who had no better opportunities.[18] Where a witness states that he did not see nor hear a certain thing, his mere statement that it could not have taken place without his having seen or

Co., 23 App. Div. 21, 48 N. Y. Supp. 379. See also Rockwood *v.* Poundstone, 38 Ill. 199.

Negative evidence is admissible and should not be disregarded. Chicago & N. W. R. Co. *v.* Andrews, 130 Fed. 65, 64 C. C. A. 399; Northern Cent. R. Co. *v.* State, 100 Md. 404, 60 Atl. 19.

"Although negative testimony is ordinarily of less weight than positive, yet it is not to be disregarded, but the jury have a right to consider it; and where a witness testifies that he was in a position to see the whole transaction, and as to certain things testified to by another witness, states positively that they did not occur, and as to other things, that he did not see them, there is such a contradiction as would justify the jury in discrediting or disregarding the evidence of one or the other of the witnesses." Bradley *v.* Mutual Ben. L. Ins. Co., 45 N. Y. 422, 6 Am. Rep. 115, *reversing* 3 Lans. (N. Y.) 341.

16. In weighing such testimony the comparative credibility and means of knowledge of the witnesses should be considered. "If the witness who gave the negative testimony was where he would have heard the bell, had it been rung, or the whistle, had it been blown, his evidence would have been entitled to as much weight as that of a more credible witness (who gave positive testimony, but) who, by reason of distance, location on the moving train, or other cause, would be less likely to hear or notice the sounds in question." Pence *v.* Chicago, R. I. & P. R. Co., 79 Iowa 389, 44 N. W. 686. See also Atlanta Consol. St. R. Co. *v.* Bigham, 105 Ga. 498, 30 S. E. 934.

17. Cornell *v.* Hyatt, 1 Mac Arthur Pat. Cas. 423, 6 Fed. Cas. No. 3,237; State *v.* Chevallier, 36 La. Ann. 81; State *v.* Kansas City, Ft. S. & M. R. Co., 70 Mo. App. 634 (witnesses testified that they were giving careful attention).

"When men fully acquainted with the usual qualities of objects for which they search, and with the ground where the search is made, do not find the improvements they are looking for, their testimony is not subject to the suspicion that attaches to negative testimony concerning facts to which the attention may not have been directed, or which may escape notice in the multitude of distracting incidents." Schaer *v.* Gliston, 24 Ark. 137.

18. Haun *v.* Rio Grande W. R. Co., 22 Utah 346, 62 Pac. 908; Stanley *v.* Cedar Rapids & M. C. R. Co., 119 Iowa 526, 93 N. W. 489; Selensky *v.* Chicago G. W. R. Co., 120 Iowa 113, 94 N. W. 272.

Testimony of a witness that he was looking at an engine, and although his attention was not called directly to the matter, he would have noticed if a whistle had been blown or bell sounded, and that he did not hear either, is positive. Lonis *v.* Lake Shore & M. S. R. Co., 111 Mich. 458, 69 N. W. 642.

heard it will not entitle his testimony to the same weight as positive testimony.[19]

D. Where Great Certainty Required of Opponent. — Where it is necessary to prove a fact with great certainty, negative evidence although not sufficient to balance positive may be sufficient to throw such a doubt upon the matter as to cause a failure of proof.[20]

3. Where Both Parties Testify Only to Recollection. — The rules as to positive and negative testimony do not apply when both parties testify as to memory of the transaction or conversation.[21]

19. Killian *v.* Georgia R. & B. Co., 97 Ga. 727, 25 S. E. 384. "To entitle the testimony of a witness that he did not see or hear a certain thing occur at a particular time and place, to the same weight upon the question of whether it did occur or not, as that of an equally credible witness that he saw or heard the occurrence in question, it must appear that the opportunities of the former were at least equal to those of the latter, and that his attention was specially directed to the matter; and whether this was so or not is to be determined, not merely from his own opinion or statement that the occurrence could not have taken place without his seeing or hearing it, but from all the evidence bearing on the subject." Killian *v.* Georgia R. & B. Co., 97 Ga. 727, 25 S. E. 384.

20. As in the case of an nuncupative will. "The testimony of Hughes, it is true, is negative; and is therefore not entitled to the same weight with that of Dr. Henry. But nevertheless its legitimate effect, is to detract from its certainty. And hence, if it were conceded that the facts deposed to by Dr. Henry, if true, are sufficient to prove that the words were spoken by the deceased, under the belief and with the intent of making his will, we are not authorized, from the whole evidence in the cause, to hold that the material and essential fact, the *animus testandi,* is clearly and sufficiently proved." Lucas *v.* Goff, 33 Miss. 629.

21. In Marshall Dental Mfg. Co. *v.* Harkenson, 84 Iowa 117, 50 N. W. 559, the defendant stated that he paid a certain sum of money at a certain time, as near as he could remember. The plaintiff could not remember such a payment. It was held that the positive statement was entitled to no greater weight than the negative.

POSSESSION. — See Adverse Possession; Boundaries; Fraudulent Conveyances; Mortgages; Ownership; Presumption; Title.

POSSESSORY TITLE. — See Adverse Possession; Ejectment; Quieting Title.

POST-OFFICE. — See Offenses Against Postal Laws.

PREDICATE.—See Impeachment of Witnesses.

PREEMPTION.—See Adverse Possession; Public Lands.

PREFERENCES.—See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances; Insolvency.

PRELIMINARY EXAMINATION.—See Examination Before Committing Magistrate.

PRESCRIPTION.—See Adverse Possession; Highways; Municipal Corporations.

PRESUMPTIONS.

By Edward W. Tuttle.

I. SCOPE AND METHOD OF TREATMENT.

This article contains no detailed discussion of specific presumptions except such as could not be logically or conveniently treated elsewhere. Owing to the great confusion existing upon the subject, and the consequent mass of conflicting and unrelated propositions and cases any strictly logical analysis of them is impossible.[1]

II. NATURE, DEFINITION AND CLASSES.

1. Relation to Law of Evidence. — Presumptions are ordinarily treated as a part of the law of evidence; logically considered, however, they do not belong to this subject, though often closely connected with it, but rather are rules of legal reasoning,[2] similar

1. Prof. Thayer's Preliminary Treatise on Evidence, chapter on Presumptions, contains the only clear analysis of the nature and development of presumptions and their place in the law, and the writer of this article, as well as the legal profession generally, are under great obligations to him for his work in this field.

Composite Nature of the Subject. "The numberless propositions figuring in our cases under the name of presumptions, are quite too heterogeneous and non-comparable in kind, and quite too loosely conceived of and expressed, to be used or reasoned about without much circumspection. Many of them are grossly ambiguous, true in one sense and false in any other; some are not really presumptions at all, but only wearing the name; some express merely a natural probability, and others, for the sake of having a definite line, establish a mere rule of legal policy; very many of them, like the rule about children born in wedlock, lay down a *prima facie* rule of the substantive law, and others, a rule of general reasoning, and of procedure, founded on convenience or probability or good sense; like the wide-reaching principle which 'presumes a usual and ordinary state of things rather than a peculiar and exceptional condition, . . . legality rather than crime, and virtue and morality rather than the opposite qualities; which demands a construction of evidence as well as of written language, *ut res magis valeat quam pereat.*' (Per Denio, J., in Caujolle *v.* Ferrié, 23 N. Y. 90, 138.) Some are maxims, others mere inferences of reason, others rules of pleading, others are variously applied; as the presumption of innocence figures now as a great doctrine of criminal procedure, and now as an ordinary principle in legal reasoning, or a mere inference from common experience, or a rule of the law of evidence." Thayer Prelim. Treat. Ev., p. 351.

2. "What is the relation of presumptions to what we call the 'law of evidence.' They are ordinarily regarded as belonging peculiarly to that part of the law. This appears to be an error; they belong rather to a much larger topic, already briefly considered, that of legal reasoning, in its application to particular subjects. . . . Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience, or probability of any kind; or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted; by assuming its existence. . . . Presumptions are not in themselves either argument or evidence, although for the time being they accomplish the result of both. . . . Presumption, assumption, taking for granted, are simply so many names for an act or process which aids and shortens inquiry and argument.

in this respect to judicial notice.[3] And many of the so-called presumptions have no connection whatever with evidence, being mere rules of substantive law or rules of administration and maxims of legal reasoning stated in the form of presumptions.[4]

2. Supplying Allegations of Complaint. — In determining the sufficiency of a complaint on demurrer, presumptions have in some cases been held to supply the place of an averment of an essential fact.[5]

These terms relate to the whole field of argument, whenever and by whomsoever conducted; and also to the whole field of the law, in so far as it has been shaped or is being shaped by processes of reasoning." Thayer Prelim. Treat. Ev., p. 314.

"Presumptions of law are, in reality, rules of law and part of the law itself; and the court may draw the inference whenever the requisite facts are developed, whether in pleading or otherwise." Justice *v.* Lang, 52 N. Y. 323.

3. See article "Judicial Notice," Vol. VII, p. 879.

4. **Substantive Law Stated in Form of Presumptions.** — "We must take notice of a thing which easily escapes attention; namely, that much of the substantive law is expressed presumptively, in the form of *prima facie* rules. This evidential form of statement leads often to the opinion that the substance of the proposition is evidential; and then to the further notion, that inasmuch as it is evidential it belongs to the law of evidence. That is an error." Thayer Prelim. Treat. Ev., p. 315. See also *id.* p. 351.

Maxims of Legal Reasoning. Many presumptions are merely statements of certain maxims of legal reasoning. "There are many of these, which pass current under the name of presumptions — maxims, ground rules, constantly to be remembered and applied in legal discussion; such as those familiar precepts that *omnia praesumuntur rite esse acta, probatis extremis praesumuntur media,* and the like. Of this nature also is the assumption of the existence of the usual qualities of human beings, such as sanity, and their regular and proper conduct, their honesty and conformity to duty. Often these maxims and ground principles get expressed in this form of a presumption perversely and inaccurately, as when the rule that ignorance of the law excuses no one, is put in the form that every one is presumed to know the law; and when the doctrine that every one is chargeable with the natural consequences of his conduct, is expressed in the form that every one is presumed to intend these consequences; and when the rule that he who holds the affirmative must make out his case, is put in the form of *praesumitur pro negante.* The form of these statements is often a mere matter of convenience or habit; it means little. In whatever form they are made or ought to be made, their character is the same, that of general maxims in legal reasoning, having no peculiar relation to the law of evidence." Thayer Prelim. Treat. Ev., p. 335. See also *id.* p. 352.

5. Albertson *v.* Wells, 95 Ind. 370.

The presumption in favor of the jurisdiction of a court of general jurisdiction renders unnecessary an allegation showing jurisdiction of the subject-matter of an action brought in such a court. Kinnaman *v.* Kinnaman, 71 Ind. 417; Butcher *v.* Bank of Brownsville, 2 Kan. 70, 83 Am. Dec. 446. See also Phelps *v.* Duffy, 11 Nev. 80; Wheeler *v.* Raymond, 8 Cow. (N. Y.) 311.

In an action by an administrator for the wrongful death of his intestate, a demurrer to the complaint on the ground that there is no averment that actual damage was sustained from the death of the intestate is properly overruled where the complaint avers that the decedent left surviving him a widow and infant son still living. The legal presumption is that the widow and in-

3. True Nature of Presumption. — The term presumption in so far as it is a technical legal term signifies merely a rule of law, whether based upon logic, convenience or policy, rendering further evidence, argument, or allegation by one of the parties unnecessary, either absolutely or conditionally.[6]

4. Basis of Presumptions. — A. GENERALLY. — Legal presumptions are said to be based upon the common experience of men and courts and the logical inferences drawn therefrom.[7] Many presumptions, however, are the product not of logic but of policy or convenience independent of any question of the truth of the

fant child were both entitled to the services of the deceased and that such services were valuable to both, and such presumptions are sufficient to sustain a complaint against a demurrer which confesses the truth of the averment. Chicago & E. R. Co. *v.* Thomas (Ind.), 55 N. E. 861.

In an action by a supervisor of a town against the board of supervisors and the county treasurer to compel them to comply with the requirements of a law relating to the investment of certain taxes, the presumption is that the public officers had duly assessed, collected and paid over all the taxes as required by law, and that upon a demurrer to the complaint this presumption had the same force as the fact. Hand *v.* Supervisors of Columbia Co., 31 Hun (N. Y.) 531.

6. Succession of Tilghman, 7 Rob. (La.) 387; Lisbon *v.* Lyman, 49 N. H. 553, 563. See State *v.* Jones, 64 Iowa 349, 362, 17 N. W. 911, 20 N. W. 470.

"Presumptions of law are like the statutes of limitations. They are artificial rules which have a legal effect independent of any belief, and stand in the place of proof until the contrary be shown." Smith *v.* Asbell, 2 Strobh. L. (S. C.) 141.

Presumptions of law are rules of law, whether disputable or the contrary. If the disputable presumption is not contradicted or removed by evidence it is a rule of law to be applied as inflexibly as a presumption that is indisputable or conclusive; in other words, a presumption of law that is disputable when not changed by evidence becomes to the court a rule indisputable for the case and the court is bound to apply it. Kidder *v.* Stevens, 60 Cal. 414.

"The presumptions or implications which, in criminal cases, the law deduces from the establishment of particular facts, have no other force than to dispense with further proof of the thing presumed, unless something in the testimony either theretofore or thereafter offered, suggests a doubt of the existence of the presumed fact. But the moment that doubt is engendered in reference to it, if it be as to a fact necessary to conviction, the state must establish the fact independently of the presumption." Cunningham *v.* State, 56 Miss. 269, 31 Am. Rep. 360.

7. Chesley *v.* Brown, 11 Me. 143; McCagg *v.* Heacock, 34 Ill. 476, 85 Am. Dec. 327. See Thayer Prelim. Treat. Ev., p. 351.

"Legal presumptions are founded upon the experience and observation of distinguished jurists, as to what is usually found to be the fact resulting from any given circumstances, and the result being thus ascertained, whenever such circumstances occur, they are *prima facie* evidence of the fact presumed." Betts *v.* Jackson, 6 Wend. (N. Y.) 173, 182.

"In its origin, every prescription is one of fact, and not of law. It may, in course of time, become a presumption of law, and even an indisputable one. Its truth may be so universally accepted as to elevate it to the position of a maxim of jurisprudence. Its convenience, as a rule of decision, may be so generally recognized as to place it in the rank of legal fictions. But so long as it retains its original character as a presumption of fact, it has simply the

fact presumed,[8] or are based upon a combination of both logic and policy.[9]

B. PRESUMPTION ON PRESUMPTION. — One presumption cannot be based upon another presumption or inference, but must be founded upon facts in evidence.[10]

force of an argument." Ward *v.* Metropolitan L. Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80.

8. "Presumptions of law are usually founded upon reasons of public policy, and social convenience and safety, which are warranted by the legal experience of courts in administering justice." United States *v.* Searcey, 26 Fed. 435.

The Presumption of Knowledge of the Law is founded on policy and necessity, being contrary to the fact. Brent *v.* State, 43 Ala. 297; Reg. *v.* Mayor of Tewksbury, L. R. 3 Q. B. 629; Martindale *v.* Falkner, 2 C. B. 719.

Injury to Goods by Connecting Carrier. — The presumption that injury to goods shipped through connecting carriers was done by the carrier in whose hands it is found injured, is an artificial presumption based on convenience and necessity. See Laughlin *v.* Chicago & N. W. R. Co., 28 Wis. 204, 9 Am. Rep. 493. See also Moore *v.* New York, N. H. & H. R. R. Co., 173 Mass. 335, 53 N. E. 816, 73 Am. St. Rep. 298.

The Presumption of Negligence from the fact of injury. See articles "NEGLIGENCE" and "RAILROADS."

"Presumptions do not always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed, . . . from a principle, of quieting the possession." Hillary *v.* Waller, 12 Ves. (Eng.) 239, 252.

"Not only convenience but necessity calls for a definite rule to produce certainty of result in the determination of facts which must be passed upon without proof; and such can be obtained only from the doctrine of presumptions, which, however arbitrary, is indispensable, and, when founded in the ordinary course of events, productive of results which usually accord with the truth." Burr *v.* Sim, 4 Whart. (Pa.) 150, 33 Am. Dec. 50.

Many Statutory Presumptions are founded not so much upon natural probability as upon grounds of policy, convenience, or necessity; as for example, the presumptions in prosecutions for gaming (see article "GAMING", Vol. VI) and unlawful sales of intoxicating liquor (see article "INTOXICATING LIQUORS"); the presumption against one colliding vessel which fails to stand by and assist the injured vessel (see article "ADMIRALTY"); the presumption in favor of tax and other official sales (see article "TITLE"); the presumption of negligence from the fact of injury (see articles "NEGLIGENCE" and "RAILROADS").

9. Certain presumptions, while partly based upon logic and beginning merely as inferences, have crystallized into the form of rules of law expressed as presumptions, through the action of the judges in their effort either to limit the functions of the jury (see Lisbon *v.* Lyman, 49 N. H. 553, 563), or to make the law conform to the economic and social necessities of a changing society (see Thayer Prelim. Treat. Ev. pp. 316-331). Among these are the presumptions relating to the death of absent persons, to adverse possession, to payment, and numerous others.

10. *England.* — Rex *v.* Burdett, 4 B. & Ald. 314, 6 E. C. L. 431; Whelton *v.* Hardisty, 8 E. & B. 332.

United States. — United States *v.* Ross, 92 U. S. 281; Manning *v.* Insurance Co., 100 U. S. 693. See United States *v.* Carr, 132 U. S. 644.

Arkansas. — Danley *v.* Rector, 10 Ark. 211, 227, 50 Am. Dec. 242; Pennington *v.* Yell, 11 Ark. 212, 236, 52 Am. Dec. 262.

Connecticut. — Ward *v.* Metropolitan L. Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80.

District of Columbia. — Davis *v.* United States, 18 App. D. C. 468.

Georgia. — See Terry *v.* Rodahan, 79 Ga. 278, 291, 5 S. E. 38, 11 Am. St. Rep. 420.

Illinois. — Globe Acc. Ins. Co. *v.*

5. Definitions and Classifications. — A. GENERALLY. — Presumptions have been variously defined[11] and classified, but owing to the

Gerisch, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486.

Indian Territory. — Missouri, K. & T. R. Co. *v.* Wilder, 3 Ind. Ter. 85, 53 S. W. 490.

Iowa. — Thayer *v.* Smoky Hollow Coal Co., 121 Iowa 121, 96 N. W. 718; Ellis *v.* Ellis, 58 Iowa 720, 13 N. W. 65.

Kansas. — Atchison, T. & S. F. R. Co. *v.* McFarland, 2 Kan. App. 662, 43 Pac. 788; Chicago, R. I. & P. R. Co. *v.* Rhoades, 64 Kan. 553, 68 Pac. 58.

Missouri. — Bigelow *v.* Metropolitan St. R. So., 48 Mo. App. 367; Moore *v.* Renick, 95 Mo. App. 202, 68 S. W. 936.

New Hampshire. — Cole *v.* Boardman, 63 N. H. 580, 4 Atl. 572.

New York. — O'Gara *v.* Eisenlohr, 38 N. Y. 296.

Pennsylvania. — Douglass *v.* Mitchell, 35 Pa. St. 440; Philadelphia City Pass. R. Co. *v.* Henrice, 92 Pa. St. 431, 37 Am. Rep. 699; McAleer *v.* McMurray, 58 Pa. St. 126.

Texas. — Missouri Pac. R. Co. *v.* Porter, 73 Tex. 304, 11 S. W. 324.

Vermont. — Richmond *v.* Aiken, 25 Vt. 324; Doolittle *v.* Holton, 26 Vt. 588.

"A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption." United States *v.* Ross, 92 U. S. 281, *quoted* in Manning *v.* Insurance Co., 100 U. S. 693.

From a presumption that a deceased person was in the exercise of due care when killed by a railroad train, it cannot further be presumed that the defendant was guilty of negligence, since it is not allowable to build one presumption on another. Yarnell *v.* Kansas City, Ft. S. & M. R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599.

Several Conclusions from Same State of Facts. — The presumption which the jury is to make is not a circumstance in proof and is not of itself a legitimate foundation for a second presumption. A presumption cannot be founded upon a presumption, but nevertheless several conclusions or presumptions of fact may arise from the same state of circumstances. Morris *v.* Indianapolis & St. L. R. R. Co., 10 Ill. App. 389.

11. "A presumption is an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known." Insurance Co. *v.* Weide, 11 Wall. (U. S.) 438; Hilton *v.* Bender, 69 N. Y. 75; Chesley *v.* Brown, 11 Me. 143 (*quoting* from Starkie on Ev., Vol. I, p. 23); Patterson *v.* McCausland, 3 Bland (Md.) 69, 71.

"A presumption has been defined to be a rule of law that courts and judges shall draw a particular inference from particular facts, or from particular evidence, unless and until the truth of the inference is disproved." Ulrich *v.* Ulrich, 136 N. Y. 120, 32 N. E. 606, 18 L. R. A. 37; *citing* Steph. Dig. L. Ev., ch. 1, art. 1.

"A presumption is a probable inference, which our common sense draws from circumstances usually occurring in such cases. The slightest presumption is of the nature of probability; and there are almost infinite shades from the lightest probability to the highest moral certainty." State *v.* Tibbetts, 35 Me. 81.

"'A presumption is a deduction which the law expressly directs to be made from particular facts.'" (Code Civ. Proc., §1059). Fisher *v.* McInerny, 137 Cal. 28, 69 Pac. 622, 907, 92 Am. St. Rep. 68.

Presumptions are consequences which the law or the judge draws from a known fact to a fact unknown. Presumptions not established by law are left to the judgment and discretion of the judge. Cronan *v.* New Orleans, 16 La. Ann. 374; *citing* Civ. Code.

Presumptions are called the intendments of law. They are in pursuance of the allowed principles, or permissions of the established law, but can-

various and inconsistent uses of the term, any comprehensive definition covering all of these uses is impossible.[12] Presumptions have been classified as presumptions of law and presumptions of fact,[13] natural and artificial presumptions,[14] rebuttable and conclusive,[15] weak and strong or violent presumptions.[16]

B. Distinction Between Presumptions of Law and of Fact. a. *Generally.* — The distinction usually drawn between these two classes of presumptions is that a presumption of law is an arbitrary rule of law that when a certain fact or facts appear a certain other fact is for the purposes of the case deemed to be established either conclusively or until contrary evidence is introduced;[17] while a

not be permitted when they are in hostility to them. Vinyard *v.* Passalaigue, 2 Strobh. L. (S. C.) 536.

12. See *supra*, II, 3.

13. See *infra*, II, 5, B.

14. "Presumptions are of two classes, natural and legal or artificial. The natural presumption is when a fact is proved, wherefrom by reason of the connection founded on experience, the existence of another fact is directly inferred. The legal or artificial presumption is, where the existence of the one fact is not direct evidence of the existence of the other, but the one fact existing and being proved the law raises an artificial presumption of the existence of the other." Guilick *v.* Loder, 13 N. J. L. 68, 23 Am. Dec. 711. See also Burr *v.* Sim, 4 Whart. (Pa.) 150, 33 Am. Dec. 50; Snevely *v.* Jones, 9 Watts (Pa.) 433; Huntress *v.* Boston & M. R. Co., 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600.

Artificial presumptions based on considerations of policy are mere rules of law having nothing to do with the natural inference from the facts upon which they are based. See Hanson *v.* Lessee of Eustace, 2 How. (U. S.) 653, 709.

15. Chamblee *v.* McKenzie, 31 Ark. 155. See *infra*, II, 5, C.

Disputable presumptions are inferences which the law requires to be drawn from given facts, and which are conclusive until disproved by evidence to the contrary. Joyner *v.* South Carolina R. Co., 26 S. C. 49, 1 S. E. 52. See also Brandt *v.* Morning Journal Ass'n, 81 App. Div. 183, 80 N. Y. Supp. 1002.

16. "We understand by a *violent presumption* one which is very strong and forcible, although not one which is necessarily conclusive." Shealy *v.* Edwards, 75 Ala. 411, 419.

A violent presumption in the law of evidence is the presumption arising where the connection between the fact to be inferred and that which is proven is found by experience and observation to be invariable in all instances. It is equal to full proof. Davis *v.* Curry, 2 Bibb (Ky.) 238, 239.

17. *United States.* — United States *v.* Searcey, 26 Fed. 435; United States *v.* Sykes, 58 Fed. 1000.

California. — Levins *v.* Rovegno, 71 Cal. 273, 12 Pac. 161; Kidder *v.* Stevens, 60 Cal. 414; *In re* Bauer's Estate, 79 Cal. 304, 21 Pac. 759.

Colorado. — Doane *v.* Glenn, 1 Colo. 495.

Connecticut. — Ward *v.* Metropolitan L. Ins. Co., 66 Conn. 227, 33 Atl. 902.

Illinois. — See McCagg *v.* Heacock, 34 Ill. 476, 85 Am. Dec. 327.

North Carolina. — Johnson *v.* Chambers, 32 N. C. 287, 292; State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

"A legal presumption is the conclusion of the law itself of the existence of one fact from others in proof, and is binding on the jury *prima facie* until disproved, or conclusively, just as the law adopts the one or the other as the effect of proof." Tanner *v.* Hughes, 53 Pa. St. 289.

"A legal presumption is a rule of law — a reasonable principle, or an arbitrary dogma — declared by the court." Lisbon *v.* Lyman, 49 N. H. 553, 563.

It is Obligatory Upon a Jury to find in favor of a party who is supported by a presumption of law, in

presumption of fact is merely a logical inference or conclusion which the trier of the facts is at liberty to draw or refuse to draw.[18] Some courts, however, seem not to recognize any distinction between presumptions of law and presumptions of fact.[19] Others create an intermediate or mixed class, presumptions of law and fact.[20]

the absence of opposing evidence. Fitzgerald *v.* Barker, 85 Mo. 13.

"Where a presumption of law is disregarded by a jury, a new trial will be granted *ex debito justitiae;* but where the presumption disregarded is only one of fact, however strong or obvious, the granting a new trial is at the discretion of the court." Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 502.

Distinction Stated. — Where the law presumes that a person found dead, killed by alleged negligence of another, has exercised due care himself, it is error to refuse an instruction to this effect and substitute instead an instruction that an inference arises from the instinct of self-preservation that the person killed has exercised due care himself. "The presumption has a technical force of weight and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption, but in the case of a mere inference there is no technical force attached to it. The jury, in the case of an inference, are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and the evidence, and in the other case the jury draw it. An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury." Cogdell *v.* Wilmington & W. R. Co., 132 N. C. 852, 44 S. E. 618.

18. State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625; Ward *v.* Metropolitan L. Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80.

See United States *v.* Searcey, 26 Fed. 435; Ballam *v.* State, 17 Ala. 451; Sutphen *v.* Cushman, 35 Ill. 186.

A presumption of fact is an inference of the existence of a certain fact arising from its necessary and usual connection with other facts which are known. Roberts *v.* People, 9 Colo. 458, 13 Pac. 630.

Presumptions of fact are at best but mere arguments and depend on their own natural force in generating conviction in the mind, and should not be aided by suggestions or intimations from the court as to what they do or do not prove. Lawhorn *v.* Carter, 11 Bush (Ky.) 7.

Where a presumption is one of fact merely, the court is not warranted in declaring it to the jury as a presumption authoritatively raised by *law*, but should direct them that from the evidence it is their province to determine whether they will raise the presumption or not. Erhart *v.* Dietrich, 118 Mo. 418, 24 S. W. 188; Ham *v.* Barret, 28 Mo. 388.

Presumptions of fact are in truth but mere arguments. True *v.* Sanborn, 27 N. H. 383; Smith *v.* Hannibal & St. J. R. Co., 37 Mo. 287, 1 Greenleaf Ev. § 44.

Presumptions of fact are merely the major premises of those inferences which juries are at liberty to draw, in the light of their experience as men of the world, from the facts directly proved. Leighton *v.* Morrill, 159 Mass. 271, 278, 34 N. E. 256.

19. It is immaterial whether the court calls the presumption arising from the possession of stolen goods a presumption of law or a presumption of fact. "It is a presumption recognized by the law, and may, therefore, be termed a presumption of law. The term presumption of fact implies that from certain facts the law will raise a presumption. Either of these terms, presumption of law or presumption of fact, may be used to express the same thought, for they are identical in meaning." State *v.* Kelly, 57 Iowa 644, 11 N. W. 635.

20. State *v.* Tibbetts, 35 Me. 81;

b. *Distinction Between Presumption and Inference.* — The so-called presumption of fact, however, is not strictly and correctly speaking a presumption, being a mere permissible inference having no legal significance.[21] But courts frequently use the term presumption when they mean inference,[22] and as a consequence confusion has resulted.[23]

C. Conclusive Presumptions. — Conclusive presumptions are not really presumptions at all, whatever they may have been before becoming conclusive. They are merely rules of law declaring a particular fact to be true under particular circumstances and forbidding any inquiry into its truth or falsity. A presumption *ex vi termini* is rebuttable, but the courts almost universally classify presumptions as disputable and conclusive.[24]

Smith *v.* Asbell, 2 Strobh. L. (S. C.) 141.

21. See Smith *v.* Asbell, 2 Strobh. L. (S. C.) 141; State *v.* Tibbetts, 35 Me. 181; and *supra*, II, 5, B, a.

A Presumption of Fact Is a Logical Inference of the existence of one fact drawn from the existence of some other fact or facts.

United States. — United States *v.* Sykes, 58 Fed. 1000; Home Ins. Co. *v.* Weide, 11 Wall. 438.

California. — Liverpool, L. & G. Ins. Co. *v.* Southern Pac. Co., 125 Cal. 434, 58 Pac. 55; Levins *v.* Rovegno, 71 Cal. 273, 12 Pac. 161.

Colorado. — Roberts *v.* People, 9 Colo. 458, 13 Pac. 630; Kent *v.* People, 8 Colo. 563, 9 Pac. 852.

Illinois. — Podolski *v.* Stone, 186 Ill. 540, 58 N. E. 340.

Indiana. — Pittsburgh, C. & St. L. R. Co. *v.* Bennett, 9 Ind. App. 92, 35 N. E. 1033.

Missouri. — Lane *v.* Missouri Pac. R. Co., 132 Mo. 4, 33 S. W. 645, 1128; Bluedorn *v.* Missouri Pac. R. Co. (Mo.), 24 S. W. 57.

Nebraska. — Smith *v.* Gardner, 36 Neb. 741, 55 N. W. 245.

New Mexico. — United States *v.* Griego, 72 Pac. 20.

New York. — Hilton *v.* Bender, 69 N. Y. 75; Jackson *v.* Warford, 7 Wend. 62.

Pennsylvania. — Com. *v.* Frew, 3 Pa. Co. Ct. 496.

Utah. — McIntyre *v.* Ajax Min. Co., 20 Utah 323, 60 Pac. 552.

22. See Bell *v.* Town of Clarion, 113 Iowa 126, 84 N. W. 962.

23. See articles "Homicide," "Malice," and "Larceny."

The so-called presumption of guilt arising from flight, from the destruction, suppression or fabrication of evidence, from the possession of stolen goods, or other fruits of crime, and of intent or malice from certain circumstances, are illustrations of the confusion arising from the misuse of the term presumption.

English Cases Dangerous Precedents. — "Among the various ways in which the province of the jury has been encroached upon, in England, the use of legal presumptions as substitutes for evidence, is one of the most conspicuous. In this country, where the right of the jury, and the right of parties to a full trial of facts by jury, are more carefully observed, the English collection of legal presumptions, is not to be adopted upon the mere strength of precedent. In each instance a critical examination is to be made to ascertain whether that which is asserted as a legal presumption is anything more than a conclusion of fact at which the court may think the jury ought to arrive." Lisbon *v.* Lyman, 49 N. H. 553, 563.

24. The so-called conclusive presumptions of knowledge of the law (see article "Knowledge," Vol. VIII); of malice in some cases (see articles "Homicide," Vol. VI, p. 583 *et seq*; "Libel and Slander," Vol. VIII, p. 196); of intent under some circumstances (see article "Intent," Vol. VII; and other similar presumptions) are merely declarations of the law that actual knowledge, malice, or intent is immaterial under those circumstances.

6. Probative Force and Effect of Presumptions. — A. GENERALLY. There is some confusion in the cases upon the question whether a presumption is evidence and has probative force. Since the function of a presumption logically considered is merely to impose the burden of going forward with the evidence upon the party against whom it operates, when contrary evidence is adduced the presumption disappears,[25] although the facts upon which it rested

25. See Diefenthaler *v.* Hall, 96 Ill. App. 639; Largen *v.* State, 76 Tex. 323, 13 S. W. 161; Conway *v.* Supreme Council Cath. K. of Am., 137 Cal. 384, 70 Pac. 223; Erhart *v.* Dietrich, 118 Mo. 418, 24 S. W. 188; Galpin *v.* Page, 85 U. S. 350, 365; Jones *v.* Bond, 40 Fed. 281; Cunningham *v.* State, 56 Miss. 269, 31 Am. Rep. 360.

"Presumptions are raised to supply the place of actual proofs; when the proofs are present there is neither foundation nor room for the presumption." Keller *v.* Over, 136 Pa. St. 1, 20 Atl. 25; Grier *v.* Pennsylvania Coal Co., 128 Pa. St. 79, 18 Atl. 480.

A presumption remains available to the party in whose favor it arises until overcome by opposing evidence or broken in upon by a countervailing presumption. Adams *v.* Slate, 87 Ind. 573; Louisville, N. A. & C. R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. St. Rep. 120; Bates *v.* Pricket, 5 Ind. 22, 61 Am. Dec. 73.

The presumption that the plaintiff in a personal injury action was exercising due care at the time he was injured obtains only in the absence of evidence to the contrary; and when there is evidence of contributory negligence the jury should not be instructed as to the existence of this presumption. Myers *v.* City of Kansas, 108 Mo. 480, 18 S. W. 914; Moberly *v.* Kansas City, St. J. & C. B. R. Co., 98 Mo. 183, 11 S. W. 569; Winter *v.* Supreme Lodge K. of P., 96 Mo. App. 1, 69 S. W. 662. So also the presumption that a traveler killed at a railroad crossing was exercising due care does not apply when the circumstances are detailed by eye-witnesses. In such case the evidence alone should be considered. Reed *v.* Queen Anne's R. Co., 4 Pen. (Del.), 413, 57 Atl. 529. See also articles "NEGLIGENCE," "RAILROADS."

"In the face of evidence permitting an inference contrary to a disputable presumption, it is not correct to throw the presumption into the scale, as it is said, in giving the law to the triers of fact." Winter *v.* Supreme Lodge K. of P., 96 Mo. App. 1, 69 S. W. 662.

When there is clear and incontestable proof of a fact, no presumptions can be indulged except such as arise from the proof. Chicago, B. & Q. R. R. Co. *v.* Van Patten, 74 Ill. 91.

Submission to Jury. — "The better opinion seems to be, that no disputable presumption of law is to be regarded as testimony which must necessarily be submitted to a jury, but its office is merely to determine upon which party the *onus probandi* is laid." Spaulding *v.* Chicago & N. W. Ry. Co., 33 Wis. 582, in which the presumption of the improper construction or management of a locomotive arising from proof that it set a fire was held to be overcome as a matter of law by uncontradicted evidence showing its proper construction and management. It was contended that this presumption had the force and effect of testimony, and the question therefore whether contrary evidence was sufficient to overcome it was one for the jury and not for the court. It was held, however, that presumptions of law are different in this respect from presumptions of fact. Their weight and effect and the amount and character of the proof necessary to overcome them being questions for the court. To the same effect, see also Louisville & N. R. Co *v.* Marbury Lumb. Co., 125 Ala. 237, 28 So. 438, 50 L. R. A. 620; Volkman *v.* Chicago, St. P., M. & O. R. Co., 5 Dak. 60, 37 N. W. 731; Huber *v.* Chicago, M. & St. P. R. Co., 6 Dak. 392, 43 N. W. 819; Southern R. Co. *v.* Pace, 114 Ga. 712, 40 S. E.

still remain as evidence in the case. A presumption is therefor not evidence,[26] nor is a so-called presumption of fact or mere

723; Kentucky Cent. R. Co. *v.* Talbot, 78 Ky. 621; Menominee River Co. *v.* M. & N. R. Co., 91 Wis. 447, 65 N. W. 176. But apparently *contrary*, see Atchison, T. & S. F. R. Co. *v.* Geiser, 68 Kan. 281, 75 Pac. 68; Lake Erie & W. R. Co. *v.* Holderman, 56 Ill. App. 144; Callaway *v.* Sturgeon, 58 Ill. App. 159; Greenfield *v.* Chicago & N. W. R. Co., 83 Iowa 270, 49 N. W. 95; Hoffman *v.* Chicago, M. & St. P. R. Co., 43 Minn. 334, 45 N. W. 608; Brown *v.* Missouri Pac. R. Co., 13 Mo. App. 462.

Identity of Name. — No Presumption When Contrary Circumstances Appear. — Stevenson *v.* Murray, 87 Ala. 442, 6 So. 301.

The Presumption Arising From the Mailing of a Letter only prevails where there is no evidence to the contrary. "The mailing of the letter in this instance created no *legal* presumption, but was proper testimony to be considered by the jury, together with the other evidence, in determining when it was received." Sullivan *v.* Kuykendall, 82 Ky. 483, 56 Am. Rep. 901. The presumption disappears when confronted with evidence. American Cent. Ins. Co. *v.* Heath, 29 Tex. Civ. App. 445, 69 S. W. 235.

The General Presumption That Public Officers Have Faithfully Executed the Duties with which they are charged "is a mere arbitrary rule of law. It possesses no inherent probative force, and when met by opposing evidence is entirely destroyed." Blaco *v.* State, 58 Neb. 557, 78 N. W. 1056. See also Sternberger *v.* McSween, 14 S. C. 35.

Presumption of Acceptance of Beneficial Deed only arises in the absence of evidence. "The presumption obtains only where the facts are unknown. Where those and the attendant circumstances are shown, the question must be determined from them; there is no room for presumption." Knox *v.* Clark, 15 Colo. App. 356, 62 Pac. 334.

Presumption of Malice From Use of Deadly Weapon does not arise when all the circumstances of the act appear. Godwin *v.* State, 73 Miss. 873, 19 So. 712. See also Hornsby *v.* State, 94 Ala. 55, 10 So. 522; Jordan *v.* State, 79 Ala. 9.

Effect of Introduction of Evidence on Presumption of Good Character. See article "CHARACTER," Vol. III, p. 35, note 1.

Double Use of Presumption. — "A legal presumption is a rule of law — a reasonable principle, or an arbitrary dogma — declared by the court. There may be a difficulty in weighing such a rule of law as evidence of a fact, or in weighing law on one side, against fact on the other. And if the weight of a rule of law as evidence of a fact, or as counterbalancing the evidence of a fact, can be comprehended, there are objections to such a use of it. . . . A legal presumption is not evidence. In civil cases, it is the finding of a fact or the decision of a point, when there is no testimony, and no inference of fact from the absence of testimony, on the subject, or when the evidence is balanced. And often the fact is also found, or the decision made, by the rule of law which imposes the burden of proof on the party having the affirmative. When this is the case, the assignment of the burden of proof to one party, and the benefit of the legal presumption to the other, is a double and unjust use of one and the same thing." Lisbon *v.* Lyman, 49 N. H. 553, 563.

Presumption of Negligence. Weight and effect as evidence — See article "NEGLIGENCE," Vol. VIII, p. 900.

26. Lisbon *v.* Lyman, 49 N. H. 553, 563; State *v.* Jones, 64 Iowa 349, 17 N. W. 911, 20 N. W. 470; Wooten *v.* State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819. See also State *v.* Hudspeth, 159 Mo. 178, 209, 60 S. W. 136.

A legal presumption is not evidence. It establishes a point when there is no testimony and no inference of fact from the absence of testimony, and also when all the testimony is so balanced that the point is not decided by the testimony. State *v.* Pike, 49 N. H. 399, 443, 6 Am. Rep. 533.

inference of fact; it is merely the result of evidence.[27] In some cases, however, it has been held that a legal presumption is evidence and has probative force as such,[28] even though its arbitrary legal character may have been destroyed by contrary evidence.[29] These cases have been most frequently concerned with the presumption of innocence and instructions as to its force and effect.[30] And

27. **"A Presumption Which the Jury Is to Make** is not a circumstance in proof." United States *v.* Ross, 92 U. S. 281; Manning *v.* Insurance Co., 100 U. S. 693; Morris *v.* Indianapolis & St. L. R. R. Co., 10 Ill. App. 389; Moore *v.* Renick, 95 Mo. App. 202, 68 S. W. 936. *Contra.* — The fair inferences from evidence founded upon the natural course of business and from human experience are as much evidence as the principal facts from which the deductions flow. Austin *v.* Bingham, 31 Vt. 577.

28. See Jones *v.* Union R. Co., 18 App. Div. 267, 46 N. Y. Supp. 321. Hockstedler *v.* Dubuque & S. C. R. Co., 88 Iowa 236, 55 N. W. 74; Croddy *v.* Chicago, R. I. & P. Ry. Co., 91 Iowa 598, 60 N. W. 214.

On a prosecution for seduction the defendant must not only produce such evidence as would raise a reasonable doubt of the previous chaste character of the prosecuting witness, but such as would overcome the legal presumption of chastity by a fair preponderance. State *v.* Wells, 48 Iowa 671.

The presumption of a carrier's negligence arising from the fact that injury occurred to the plaintiff while being carried as a passenger is itself a fact which the jury must consider in determining its verdict. "A presumption which the law raises from admitted or established facts is itself evidence sufficient to sustain a verdict in accordance therewith, and cannot be disregarded by the jury, or by the court in any instruction which it may give with reference thereto." Bush *v.* Barnett, 96 Cal. 202, 31 Pac. 2.

29. "It has been said, that presumptions of law derive their force from *jurisprudence* and not from *logic*, and that such presumptions are arbitrary in their application. This is true of irrebuttable presumptions, and, primarily, of such as are rebuttable. It is true of the latter until the presumption has been overcome by proofs, and the burden shifted; but when this has been done, then the conflicting evidence on the question of fact is to be weighed and the verdict rendered, in civil cases, in favor of the party whose proofs have most weight, and in this latter process the presumption of law loses all that it had of mere arbitrary power, and must necessarily be regarded only from the standpoint of logic and reason, and valued and given effect only as it has evidential character. Primarily, the rebuttable legal presumption affects only the burden of proof, but if that burden is shifted back upon the party from whom it first lifted it, then the presumption is of value only as it has probative force, except it be that on the entire case the evidence is equally balanced, in which event the arbitrary power of the presumption of law would settle the issue in favor of the proponent of the presumption. Regarded in its evidential aspect, a given presumption of law may have either more or less of probative value, dependent upon the character of the presumption itself and upon the circumstances of the particular case in which the issue may arise. Some legal presumptions are more probable and inherently stronger than others. So, also, differing circumstances may give differing degrees of probability to one and the same legal presumption." Graves *v.* Colwell, 90 Ill. 612.

30. *United States.* — Coffin *v.* United States, 156 U. S. 432 (but see *s. c.* on a second appeal, 162 U. S. 664); United States *v.* Kenney, 90 Fed. 257; State *v.* Gosnell, 74 Fed. 734 (following Coffin *v.* United States, 156 U. S. 432). See also Lilienthal's Tobacco *v.* United States, 97 U. S. 237, 267.

Alabama. — Bryant *v.* State, 116 Ala. 445, 23 So. 40; Newsom *v.* State, 107 Ala. 133, 18 So. 206; Harris *v.*

some courts while not regarding a presumption as evidence nevertheless hold that it has a certain amount of probative force and is to be considered along with the evidence,[31] and that it is not over-

State, 123 Ala. 69, 26 So. 515; Amos *v.* State, 123 Ala. 50, 26 So. 524.

Arkansas. — Lavender *v.* Hudgens, 32 Ark. 763, 772 (*dictum*).

Missouri. — State *v.* Shelley, 166 Mo. 616, 66 S. W. 430 (*dictum*). But see State *v.* Hudspeth, 159 Mo. 178, 209, 60 S. W. 136, in which the refusal to instruct the jury that the presumption of innocence is evidence in defendant's behalf was held no error. Calling this presumption evidence adds no significance to its force or effect.

Nebraska. — Long *v.* State, 23 Neb. 33, 36 N. W. 310 (following Garrison *v.* People, 6 Neb. 274).

New Mexico. — Territory *v.* Baca (N. M.), 71 Pac. 460 (following Coffin *v.* United States, 156 U. S. 432).

Rule Based on Greenleaf. — Most of these cases derive the rule laid down from a statement to the same effect in Greenleaf Ev., Vol. I, § 34.

Apparent Modification of Rule. — An instruction to the jury that "The law raises no presumption against the defendant; on the contrary, the presumption of law is in favor of his innocence. This presumption of innocence continues through the trial until every material allegation in the information is established by the evidence to the exclusion of all reasonable doubt," was held equivalent to a requested and refused instruction to the effect that the presumption of innocence is a matter of evidence in favor of the defendant, to the benefit of which he is entitled during the deliberations of the jury. Bartley *v.* State, 53 Neb. 310, 73 N. W. 744; 55 Neb. 294, 75 N. W. 832. To the same effect Agnew *v.* United States, 165 U. S. 36, 51, distinguishing Coffin *v.* United States, 156 U. S. 432, 460, on the ground that "in that case the charge of the court was not thought to have given due effect to the presumption of innocence, which there was no failure in this case to state, and the giving of the instruction asked would have tended to obscure what had already been made plain." See also Houston *v.* State, 24 Fla. 356, 5 So. 48; Wooten *v.* State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819.

In Civil Action. — The presumption of innocence stands as evidence in favor of a party charged with conduct involving moral turpitude, in a civil action. "It is only where the testimony when considered in connection with the presumption of law arising in the case, preponderates in favor of the charge that its truth should be found. Jones *v.* Greaves, 26 Ohio St. 2, 20 Am. Rep. 752. *Contra.* — A presumption of innocence as probative evidence is not applicable in civil cases nor in revenue seizures. Lilienthal's Tobacco *v.* United States, 97 U. S. 237, 267.

31. On a contest of the probate of a will, the presumption of sanity "is of probative force in favor of the proponents of the will." Barber's Appeal, 63 Conn. 393, 403, 406, 27 Atl. 973, 22 L. R. A. 90.

"The presumption of sanity is not in itself evidence, but it may serve the purpose and supply the place of evidence in setting up something which must be overcome by proof to the contrary." Hence in determining testamentary capacity the court may properly instruct the jury that the presumption of sanity must be considered along with the evidence offered by the proponents and cast into the scales in determining on what side the evidence preponderates. "The important thing for the jury to understand in the case at bar was that the proponents had something to rely on besides the positive evidence which they had introduced to show testamentary capacity; that this was to be considered together with that evidence; and that it consisted in a presumption recognized in law as based on the general facts of life, which had probative force enough to turn the scale, if otherwise, taking into account all that either party had put in evidence, the balance should seem to them to stand equal." Sturdevant's Appeal, 71 Conn. 392, 42 Atl. 70.

come by any competent evidence to the contrary, however slight.[32]

B. Relation of Presumptions to Burden of Proof. — Courts frequently say that a legal presumption shifts the burden of proof or imposes the burden of proof upon the party against whom it operates.[33] But unless the presumption happens to be merely the converse statement of the burden of proof, as it frequently is,[34] the presumption merely shifts or governs the burden of going forward with the evidence.[35]

The defendant is presumed to be innocent until his guilt is established beyond a reasonable doubt, and "this presumption of innocence, though not strictly evidence in favor of the accused, yet has, to the extent it goes, the effect of evidence — sufficiently so to turn the scale in a doubtful case in his favor, and produce his acquittal." Hampton *v.* State, 1 Tex. App. 652.

32. In Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652, it was held that the trial court properly refused to instruct the jury that the presumption of chastity is "only a bare presumption, and cannot be considered in rebuttal to any competent evidence" to the contrary, and that such presumption does not continue after the production of any competent evidence to the contrary. This ruling was held proper because the presumption has probative force, and because a rebuttable presumption of law is not overcome by any competent evidence however slight without reference to its credibility. The court cites Graves *v.* Colwell, 90 Ill. 612.

33. State *v.* Jones, 64 Iowa 349, 17 N. W. 911, 20 N. W. 470; Graves *v.* Colwell, 90 Ill. 612.

See articles "Burden of Proof," Vol. II, p. 810 *et seq.*; "Negligence," Vol. VIII, p. 900, n. 16.

34. See State *v.* Pike, 49 N. H. 399, 443, 6 Am. Rep. 533; Lisbon *v.* Lyman, 49 N. H. 553, 563, (quoted *ante* in note under II, 6, A) for a criticism of this double use of the burden of proof by creating from it a legal presumption.

In every case where the burden of proof rests upon either party it is because the presumptions either of law or of fact are against such party. Diefenthaler *v.* Hall, 96 Ill. App. 639.

35. See following cases:

England. — *In re* Banbury Peerage, 1 Sim. & S. 153, 1 Eng. Ch. 153, 24 Rev. Rep. 159; Pickup *v.* Thames & Mersey M. Ins. Co., 3 Q. B. D. 594, 47 L. J. Q. B. 749; Hingeston *v.* Kelly, 18 L. J. Ex. 360; Sutton *v.* Sadler, 3 C. B. N. S. 87.

United States. — McKnight *v.* United States, 113 Fed. 451; Davis *v.* United States, 160 U. S. 469, 485, 487.

Connecticut. — State *v.* Hoyt, 47 Conn. 518, 36 Am. Rep. 89; State *v.* Lee, 69 Conn. 186, 37 Atl. 75; Pease *v.* Cole, 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53.

Illinois. — Dacey *v.* People, 116 Ill. 555, 6 N. E. 165; Jackson Paper Mfg. Co. *v.* Commercial Nat. Bank, 99 Ill. App. 108.

Maine. — Jones *v.* Granite St. F. Ins. Co., 90 Me. 40, 37 Atl. 326; Tarbox *v.* Eastern Steamboat Co., 50 Me. 339.

Massachusetts. — Baxter *v.* Abbott, 7 Gray 71; Holmes *v.* Hunt, 122 Mass. 505, 514, 23 Am. Rep. 381.

Michigan. — People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

Missouri. — Marshall Livery Co. *v.* McKelvy, 55 Mo. App. 240.

New Hampshire. — State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242; Blodgett *v.* Cummings, 60 N. H. 115.

New York. — Brotherton *v.* People, 75 N. Y. 159; Heinemann *v.* Heard, 62 N. Y. 448.

Texas. — Gulf, C. & S. F. R. Co. *v.* Johnson, 28 Tex. Civ. App. 395, 67 S. W. 182; Highland *v.* Houston, E. & W. T. R. Co. (Tex. Civ. App.), 65 S. W. 649; Galveston, H. & S. A. R. Co. *v.* Chittim, 31 Tex. Civ App. 40, 71 S. W. 294; Clark *v.* Hills, 67 Tex. 141, 2 S. W. 356. See also Thayer Prelim. Treat. Ev., p. 382, *et seq.*

The presumption of negligence

C. Evidence in Addition to and in Support of a Legal Presumption. — Although there would appear to be no necessity for additional evidence as to a fact which is legally presumed,[36] nevertheless evidence is usually admissible under such circumstances.[37] In certain classes of cases, however, on particular issues, evidence in addition to a presumption is not admissible on behalf of the party in whose favor it operates.[38]

D. Amount or Weight of Evidence Necessary to Overcome Presumption. — Owing to the confusion and misunderstanding as to the real nature and function of a true presumption, courts quite frequently, if not generally, speak of a certain amount or weight of evidence being required to overcome a particular presumption, as a preponderance of evidence, or evidence beyond a reasonable doubt, and other expressions indicating varying degrees

arising from proof that the fire by which the damage was caused was set by sparks from the defendant railway company's locomotive does not shift the burden of proving negligence which on the whole case rests upon the plaintiff, although it requires the defendant to show the proper equipment and management of the engine. Mexican Cent. R. Co. *v.* Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103; Babcock *v.* Chicago & N. W. R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909. See more fully, article "Railroads."

36. Hume *v.* Kusche, 42 Misc. 414, 87 N. Y. Supp. 109.

Evidence as to Matters Judicially Noticed. — See article "Judicial Notice," Vol. VII, p. 1034.

37. Good Character. — The presumption of the defendant's good character in a criminal case does not render inadmissible evidence to show the same fact. See articles "Character," Vol. II, p. 6; "Homicide," Vol. VI, p. 656.

Evidence in Addition to Presumption of Falsity of Charge of Libel or Slander. — See article "Libel and Slander," Vol. VIII, p. 197.

In Support of the Presumption of Continuance. — See Howland *v.* Davis, 40 Mich. 545; Coghill *v.* Boring, 15 Cal. 213, 219, and *infra* this article, "Presumption of Continuance — Evidence Based Thereon."

Knowledge of Law. — In an action for damages for injuries inflicted upon the plaintiff by defendant's trains at a railway crossing, evidence of the plaintiff's acquaintance with the provisions of an ordinance limiting the speed of trains and requiring the ringing of a bell at such crossings is not inadmissible merely because the plaintiff would be presumed to know what the ordinance required. "That presumption does not render incompetent evidence that confirms it as a fact." But in a dissenting opinion Ladd, J., says: "As a matter of public policy, the fact of such knowledge and notice is conclusively presumed, and requires no confirmation. If evidence is admissible tending to establish plaintiff's knowledge of the provisions of an ordinance, as bearing on the charge of contributory negligence, then it may also be received as tending to show want of such knowledge; and, if such an investigation is permissible in determining the issue as to plaintiff's negligence, then equally must it be passing on the issue as to the negligence of the engineer controlling the defendant's train. And all this for what purpose? Strengthening or weakening a fact that is conclusively presumed. Such inquiries could serve no useful purpose, and ought not to receive the sanction of this court." Moore *v.* Chicago, St. P. & K. C. Ry. Co., 102 Iowa 595, 71 N. W. 569.

38. The Presumption of the Plaintiff's Good Character in an Action of Libel or Slander renders evidence in support thereof inadmissible. See article "Libel and Slander," Vol. VIII, p. 274.

of proof. Logically speaking, however, a presumption in so far as it is merely a rule of law only obtains in the absence of any credible evidence to the contrary or where the evidence is equally balanced.[39] The degree of proof which may be required in a particular class of cases is not determined by a presumption but by some other independent rule operating along with it.[40]

7. Conflicting Presumptions. — A. GENERALLY. — Looking upon a presumption merely as a rule of law requiring the court or jury to find in a particular way when certain facts are shown, there can logically be no such thing as a conflict of presumptions.[41] But as

39. State *v.* Jones, 64 Iowa 349, 17 N. W. 911, 20 N. W. 470. See State *v.* Pike, 49 N. H. 399, 443; Lisbon *v.* Lyman, 49 N. H. 553, 563, 6 Am. Rep. 533. See *supra*, II, 6, A.

A rebuttable presumption is not overcome by any competent evidence, however slight, without reference to its credibility. Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652.

Where the plaintiff in an action for killing his stock by the operation of the defendant's train relies solely upon the statutory presumption of negligence arising from proof of the killing, the jury may find for the plaintiff on such presumption, although the defendant's engineer testifies that the killing was unavoidable, if his testimony is improbable or inconsistent. Railway Co. *v.* Chambliss, 54 Ark. 214, 15 S. W. 469.

40. See *infra*, III, 9, D, a, (4.) for the distinction between the presumption of innocence and the rule requiring guilt to be established beyond a reasonable doubt.

The sole function and effect of a presumption is to impute to certain facts or groups of facts a certain significance or operation, and to throw upon the party against whom they operate the duty of meeting this imputation. "There are, indeed, various rules of presumption which appear to do more than this, — to fix the amount of proof to be adduced, as well as the duty of adducing it. But in these cases also, the presumption, merely as such, goes no further than to call for proof of that which it negatives, *i. e.*, for something which renders it probable. It does not specify how much; whether proof beyond a reasonable doubt or by a preponderance of all the evidence, or by any other measure of proof. From the nature of the case, in negativing a given supposition and calling for argument or evidence in support of it, there is meant such an amount of evidence or reason as may render the view contended for rationally probable. But beyond that, a presumption seems to say nothing. When, therefore, we read that the contrary of any particular presumption must be proved beyond a reasonable doubt, as is sometimes said, *e. g.*, of the 'presumption of innocence' and the presumption of legitimacy, it is to be recognized that we have something superadded to the rule of presumption, namely, another rule as to the amount of evidence which is needed to overcome the presumption; or, in other words, to start the case of the party who is silenced by it." Thayer Prelim. Treat. Ev., p. 336.

41. What really happens in a case of so-called conflicting presumptions is that the legal conclusion or presumption which ordinarily attaches to certain facts is prevented from attaching either by facts or by a rule of law inconsistent therewith. It is a logical and legal impossibility for two rules of law to affix inconsistent conclusions to the same state of facts at the same time.

"There cannot be two presumptions in a criminal case." Hence where the court has in effect instructed that the accused is presumed to be innocent until his guilt is established beyond any reasonable doubt, it is not error to refuse to instruct that "where there are two presumptions, one in favor of innocence and the other in favor of a criminal course, the one in favor of innocence must prevail." People *v.* Douglass, 100 Cal. 1, 34 Pac. 490.

the subject is usually treated by the courts presumptions sometimes conflict, and in such cases either neutralize each other or the stronger presumption overcomes the weaker. The relative strength of presumptions when they conflict is a subject on which the courts are not in harmony, and for a detailed treatment of the question the particular titles involving the presumptions in question must be consulted.

B. Where the Presumptions Are of Equal Strength, they are said to neutralize each other.[42]

C. Special Presumptions. — It has been held that special presumptions overcome general presumptions, such as innocence.[43]

D. The Presumption of Innocence is held to prevail over many other conflicting presumptions,[44] such as the continuance of life,[45] chastity,[46] legality of marriage,[47] regularity of election pro-

42. See Yarnell *v.* Kansas City, Ft. S. & M. R. Co., 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; Gibson *v.* Martin, 7 Humph. (Tenn.) 127.

Where the presumptions in favor of the legality of two acts are equal and inconsistent with each other they neutralize each other. Thus, where two successive marriages are charged in a prosecution for bigamy the presumption in favor of the legality of each is equal and an actual first marriage must be proved. Lowery *v.* People, 172 Ill. 466, 50 N. E. 165, 64 Am. St. Rep. 50. See Weinberg *v.* State, 25 Wis. 370; Squire *v.* State, 46 Ind. 459. But see article "Bigamy", Vol. II, p. 418, note 11.

There can be no presumption that a public officer has performed his duty where it would result in showing that another public officer had failed in his duty. Weimer *v.* Bunbury, 30 Mich. 201, 216; Supervisors *v.* Rees, 34 Mich. 481, 489.

The presumption that everything that an officer did appears in his return is balanced by the presumption that he performed his duty as required by law. Foster *v.* Berry, 14 R. I. 601.

43. "The rule is, in case of conflicting legal presumptions, the special and favored must prevail, or take precedence over the general. And the practical operation of this rule we see constantly exemplified in trials for murder. In these trials for even capital offenses, we shall constantly find the legal presumption of malice, arising from the use of a deadly weapon, and we shall see this presumption taking precedence over the general presumption of innocence, in the absence of any other evidence showing circumstances of justification or excuse for the homicide." Hemingway *v.* State, 68 Miss. 371, 417, 8 So. 317, a prosecution of the treasurer for embezzlement, in which it was held that the presumption of innocence did not overcome the presumption in favor of the correctness of the defendant's books showing him in default.

44. In cases of conflicting presumptions that which assumes innocence of a criminal offense will be adopted. Sharp *v.* Johnston, 22 Ark. 79.

In all cases of conflicting presumptions on the subject of legitimacy that in favor of innocence shall prevail. Senser *v.* Bower, 1 Penn. & W. (Pa.) 450. See article "Legitimacy."

45. Kelly *v.* Drew, 12 Allen (Mass.) 107, 90 Am. Dec. 138; Carroll *v.* Carroll, 20 Tex. 732; Lockhart *v.* White, 18 Tex. 102. See Yates *v.* Houston, 3 Tex. 433, 449; Rex *v.* Twyning, 2 B. & Ald. 387, and articles "Bigamy" and "Marriage."

The facts proved, however, out of which the presumption of continued life arises, may overcome the presumption of innocence. Hyde Park *v.* Canton, 130 Mass. 505.

46. Although in a prosecution for seduction the previous chastity of the prosecutrix is presumed, this presumption is overcome by the presumption of the defendant's innocence. Walton *v.* State, 71 Ark. 398, 75 S. W. 1. But see more fully *infra*, III, 9, D, c, and articles "Chastity" and "Seduction."

47. There can be no presumption

ceedings,[48] continuance of marriage,[49] payment;[50] but there are some presumptions sufficient to overcome it,[51] such as the presumption of sanity,[52] knowledge of the law,[53] and malice.[54]

E. Other Presumptions. — It has been held that the presump-

that the celebration of a marriage was legal in a prosecution for bigamy where it would result in overcoming the presumption of the defendant's innocence. The burden is on the prosecution in such case to prove a strictly legal marriage. Weinberg *v.* State, 25 Wis. 370. See also Lowery *v.* People, 172 Ill. 466, 50 N. E. 165, 64 Am. St. Rep. 50; Squire *v.* State, 46 Ind. 459. But see article "Bigamy," Vol. II, p. 418, n. 11.

48. State *v.* Shelley, 166 Mo. 616, 66 S. W. 430.

49. Klein *v.* Laudman, 29 Mo. 259.

50. Potter *v.* Titcomb, 7 Me. 302. In cases of conflicting presumptions the presumption of innocence is stronger than the presumption of payment, as where an insolvent merchant after assigning all of his property except his exemptions to secure a note to his sister-in-law for a sum largely exceeding his exemptions was shown to have subsequently had the note in his possession after its maturity, and it does not appear that after the assignment he had acquired means to pay the note, the presumption is not that he had fraudulently withheld assets enough to pay the note, but that his possession of it was consistent with good faith in the execution of the assignment. Excelsior Mfg. Co. *v.* Owens, 58 Ark. 556, 25 S. W. 868.

51. In a prosecution for making obscene publications the defendant contended that the presumption of innocence was stronger than the presumption arising from proof of the regular course of business of the government employes in the postal department, and that he was entitled to an instruction to this effect. The refusal to give such an instruction was held no error. The court says: "The position of the defendant in this connection is that the presumption of the defendant's innocence in a criminal case is stronger than any presumption, except the presumption of the defendant's sanity, and the presumption of knowledge of the law, and that he was entitled to a direct charge that the presumption of the defendant's innocence was stronger than the presumption that the messengers who deposited these papers in their proper boxes, took them from the mails. If it were broadly true that the presumption of innocence overrides every other presumption, except those of sanity and knowledge of the law, it would be impossible to convict in any case upon circumstantial evidence, since the gist of such evidence is that certain facts may be inferred or presumed from proof of other facts. . . . It is true that it is stated in some of the authorities that where there are conflicting presumptions, the presumption of innocence will prevail against the presumption of the continuance of life, the presumption of the continuance of things generally, the presumption of marriage and the presumption of chastity. But this is said with reference to a class of presumptions which prevail independently of proof to rebut the presumption of innocence, or what may be termed abstract presumptions. Thus, in prosecutions for seduction, or for enticing an unmarried female to a house of ill-fame, it is necessary to aver and prove affirmatively the chastity of the female, notwithstanding the general presumption in favor of her chastity, since this general presumption is overridden by the presumption of the innocence of the defendant. . . . This rule, however, is confined to cases where proof of the facts raising the presumption has no tendency to establish the guilt of the defendant, and has no application where such proof constitutes a link in the chain of evidence against him." Dunlop *v.* United States, 165 U. S. 486.

52. Cunningham *v.* State, 56 Miss. 269, 31 Am. Rep. 360.

53. See article "Knowledge," Vol. VIII.

54. Hemingway *v.* State, 68 Miss 371, 8 So. 317.

tion of validity of marriage prevails over the presumption of continuance of life,[55] and continuance of insanity.[56]

III. PARTICULAR CLASSES OF PRESUMPTIONS.

1. Physical and Mental Condition and Capacity. — A. GENERALLY. — In the absence of circumstances showing the contrary a person is presumed to be in the possession of the normal faculties of mind and body.[57] Men of mature age are presumed to be capable of sexual intercourse.[58] The capacity of infants, physical and mental, is elsewhere treated.[59]

B. SANITY. — The presumptions as to sanity are fully discussed elsewhere in this work.[60]

C. CAPACITY FOR PROCREATION. — While in England it has frequently been held that the fact that a woman has reached an age at which women are ordinarily incapable of child-bearing, in connection with other circumstances, justifies an inference that she is incapable of procreation,[61] nevertheless, it has been held in the United States that such incapacity will never be presumed where the devolution of property is thereby affected;[62] and this latter

55. Johnson *v.* Johnson, 114 Ill. 611, 3 N. E. 232, 5 Am. Rep. 883. See article "MARRIAGE."

56. Where a man who has been adjudged of unsound mind afterwards marries a woman with whom he lives for more than thirty years in the relation of husband and wife, the presumption of continued insanity will not prevail as against the presumption in favor of the legality of the marriage. Castor *v.* Davis, 120 Ind. 231, 22 N. E. 110.

57. A strong and healthy man although of comparatively advanced years is, in the absence of evidence to the contrary, presumptively in the full possession and enjoyment of his faculties, including the senses of sight and hearing. Green *v.* Southern Pac. Co., 122 Cal. 563, 55 Pac. 577.

58. Gardner *v.* State, 81 Ga. 144, 7 S. E. 144. And see *infra*, "CAPACITY FOR PROCREATION."

59. See articles "INFANTS" and "RAPE."

60. See article "INSANITY."

61. *In re* Widdow's Trusts, L. R. 11 Eq. 408; *In re* Taylor, 43 L. T. N. S. 795; Davidson *v.* Kimpton, L. R. 18 Ch. Div. 213, 45 L. T. N. S. 132; Haynes *v.* Haynes, 35 L. J. Ch. 303; *In re* Allason, 36 L. T. R. N. S. 653; Edwards *v.* Tuck, 23 Beav. 268; Liddon *v.* Ellison, 19 Beav. 565; Brandon *v.* Woodthorpe, 10 Beav. 463; Dodd *v.* Wake, 5 De G. & Sm. 226; Brown *v.* Pringle, 4 Hare 124, 14 L. J. Ch. 121. But see Conduit *v.* Soane, 24 L. T. N. S. 656; Croxton *v.* May, 9 Ch. Div. 388; Jee *v.* Audley, 1 Cox Ch. 324, 1 Rev. Rep. 46, 29 Eng. Reprint 1186.

In *In re* Millner's Estate, L. R. 14 Eq. 245, a woman aged forty-nine years and nine months who had been married twenty-six years without issue to a husband still living was presumed to be incapable of child-bearing.

62. *In re* Apgar, 37 N. J. Eq. 501; Hill *v.* Spencer, 196 Ill. 65, 63 N. E. 614.

In the devolution of estates the law presumes that the possibility of bearing children exists even when a woman has passed the age to which the ability to do so usually continues. In fact this presumption exists no matter what age the woman has reached. List *v.* Rodney, 83 Pa. St. 483.

Conclusive Presumption. — In matters relating to the character and devolution of estates there is a conclusive presumption that a woman never reaches an age when she is incapable of having issue. Flora *v.* Anderson, 67 Fed. 182.

qualification seems to have been made in some English cases.[63] Men are presumed capable of procreation notwithstanding advanced age.[64]

2. Status. — A. GENERALLY. — Parties to suits are presumed to be adults until the contrary appears.[65] There is no presumption that a particular person is married or unmarried[66] in the absence of circumstances from which marriage may be inferred.[67]

B. LEGITIMACY. — The presumptions as to legitimacy are elsewhere discussed in this work.[68]

C. CITIZENSHIP. — The presumptions as to citizenship are elsewhere treated.[69]

3. Love of Life and Avoidance of Danger. — Owing to the well-known natural instinct of self-preservation it is presumed in the absence of contrary evidence that personal injuries were not self-inflicted;[70] hence, there is a presumption against suicide,[71] and it is held in many courts that there is also a presumption that an injured person was in the exercise of due care at the time of his injury.[72]

4. Regularity and Regular Course of Business. — A. GENERALLY. Numerous presumptions are based upon the fact that a certain course of conduct is usually followed in the doing of certain acts.[73]

63. See *In re* White, (1901) 1 Ch. 570, 70 L. J. Ch. 300, 84 L. T. N. S. 199; *In re* Hocking, (1901) 2 Ch. Div. 567, 67 L. J. Ch. 662, 79 L. T. N. S. 164.

64. Lomax *v.* Holmeden, 2 Str. 940; Lushington *v.* Boldero, 15 Beav. 1. See also Trevor *v.* Trevor, 2 Myl. & K. 675, 1102. And see Gardner *v.* State, 81 Ga. 144, 7 S. E. 144.

65. Rowe *v.* Arnold, 39 Ind. 24. See article "INFANCY."

66. There is no presumption that a woman is married even though she may long have been of marriageable age. Erskine *v.* Davis, 25 Ill. 228. See Johnson *v.* Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748.

For the Presumption as to Continuance of marriage or a single state, see *infra*, this article III, 8, II, b.

67. Where the defendant is described in an information as a single woman or not described as married, if she pleads not guilty and fails to plead in abatement, the presumption is that she is single, but this is not a conclusive presumption since she may prove the contrary. United States *v.* De Quilfeldt, 5 Fed. 276. See also Seiler v. People, 77 N. Y. 411.

68. See article "LEGITIMACY."

69. See article "CITIZENS AND ALIENS," Vol. III, p. 156.

70. Where it has been sufficiently established by circumstantial evidence that a person has suffered injury by reason of falling from a dangerous height, it will be presumed in the absence of evidence to the contrary that the fall was accidental. Western Travelers' Acc. Ass'n *v.* Holbrook, 65 Neb. 469, 91 N. W. 276, 94 N. W. 816, an action against a mutual insurance company.

71. See article "INSURANCE," Vol VII, p. 552 *et seq.*

72. See article "NEGLIGENCE," Vol. VIII, p. 859, n. 15 and p. 897.

73. Where bank messengers, notaries and such official persons do certain acts in the regular course of their business thousands of times each year, this warrants a very satisfactory inference that a particular act of that class was done. Shove *v.* Wiley, 18 Pick. (Mass.) 558.

In an action against a corporation for a refusal to transfer stock on its books to one who is in possession of a certificate of the stock with the usual assignment and power of attorney thereon executed in blank by the original stockholder, it is pre-

But these presumptions are of such an uncertain and unrelated character that any attempt to collect or classify them all would be useless and without the scope of this article.[74]

B. Sequence of Acts. — Where the legality of a transaction depends upon the time when or order in which certain acts constituting the transaction occurred, such acts will, in the absence of contrary evidence, be presumed to have occurred at the time or in the order customarily followed and necessary to make them legally effective.[75]

C. Custom. — Where a custom of doing a particular thing under certain circumstances has been shown, it has been held that in a

sumed that the certificate was delivered to the person in possession of it in the ordinary course of business on the same principle that a deed found in the hands of the grantee having on its face the evidence of its regular execution is presumed to have been delivered by the grantor. Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616.

It is presumed that abstracts of title shown to be in the handwriting of the abstracter were made on the day of their date and in the regular course of business. Chicago & A. R. Co. *v.* Keegan, 152 Ill. 413, 39 N. E. 33. See article "Abstracts of Title," Vol. I, p. 69, n. 12.

74. See the appropriate articles where the particular presumptions pertaining thereto are discussed, as for instance "Private Writings," and "Deeds."

75. Acts are presumed to have been done in the order which would render the conduct of the actor legal and not fraudulent. Thus where a person has given orders to two persons, A. and B., on his debtor C., the one to A. for a specified sum less than the whole debt, and the one to B. for the whole balance due from C., the presumption is that the order in favor of A. was given first. James River and Kanawha Co. *v.* Littlejohn, 18 Gratt. (Va.) 53.

Where the witness whose evidence established the contents of a will also stated that the last time he read it before it was executed it contained several blanks and it appeared after the testator's death that these blanks had been filled up in his handwriting, it was held that although it was possible from the evidence that the blanks were filled either before or after execution, yet the presumption of law would be in favor of the right time to make the instrument good, namely, that the blanks were filled before the will was signed and attested. Graham *v.* O'Fallon, 4 Mo. 601.

The law presumes that the usual and ordinary course of business has been pursued in business transactions; hence, where a purchaser of land on the same day that he receives his deed executes a deed of trust for the benefit of his grantor, it will be presumed that he executed the trust deed after the deed to him had been delivered. Ivy *v.* Yancey, 129 Mo. 501, 31 S. W. 937.

The law presumes that the signature of a guarantor upon a note was placed upon it at the time it was executed. Duncanson *v.* Kirby, 90 Ill. App. 15.

Where a deed of trust made to secure the payment of certain notes was executed prior to the execution of a deed to defendant, in which is assumed the payment of the notes, it will be presumed that the ordinary course of business was pursued, and that the notes had been executed and delivered when defendant assumed their payment. Fitzgerald *v.* Barker, 85 Mo. 13.

Where there is doubt whether or not a subscribing witness to an instrument signed it before the donor, in the absence of proof to the contrary the presumption is that the donor signed first in accordance with the general presumption of regularity. Hughes *v.* Debnam, 53 N. C. 127.

particular instance the presumption is that the custom was followed.[76]

D. Presumption of Receipt of Letters and Telegrams and Other Documents. — a. *From Mailing.* — (1.) **Generally.** — A letter properly stamped, directed to the addressee's post-office address, and deposited in the regular receptacle for mail is legally presumed to have been received by the addressee in the usual course of the mails,[77] and in such case a presumption is recognized by statute in

76. Where in a suit after the loss by fire of a quantity of rice deposited in a mill, it was proved that the general custom of the mill was to give a receipt to the owner of the rice delivered expressing the quantity and terms of deposit, it was held, in the absence of proof that the custom was departed from in this particular instance, that there was a presumption that such a receipt was delivered to the plaintiff. Ashe *v.* Derosset, 53 N. C. 240. See article "Customs and Usages," Vol. III, p. 951, *et seq.*

77. *United States* — Kimberly *v.* Arms, 129 U. S. 512, 529.

Arkansas. — Planters' Mut. Ins. Co. *v.* Green, 72 Ark. 305, 80 S. W. 151.

Colorado. — Breed *v.* First Nat. Bank, 6 Colo. 235.

Indiana. — Home Ins. Co. *v.* Marple, 1 Ind. App. 411, 27 N. E. 633.

Massachusetts. — Huntley *v.* Whittier, 105 Mass. 391, 7 Am. Rep. 536 (*distinguishing* Crane *v.* Pratt, 12 Gray 348; Greenfield Bank *v.* Crafts, 4 Allen 447; Groton *v.* Lancaster, 16 Mass. 110); Marston *v.* Bigelow, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; Briggs *v.* Hervey, 130 Mass. 186.

Minnesota. — Melby *v.* Osborne, 33 Minn. 492, 24 N. W. 253.

Missouri. — Ripley Nat. Bank *v.* Latimer, 64 Mo. App. 321.

Nebraska. — National Masonic Acc. Ass'n *v.* Burr, 57 Neb. 437, 77 N. W. 1098.

New Hampshire. — Sabre *v.* Smith, 62 N. H. 663.

New York. — Hastings *v.* Brooklyn L. Ins. Co., 53 Hun 631, 6 N. Y. Supp. 374; Hastings *v.* Brooklyn L. Ins. Co., 63 Hun 624, 17 N. Y. Supp. 333.

Pennsylvania. — Jensen *v.* McCorkell, 154 Pa. St. 323, 26 Atl. 366, 35 Am. St. Rep. 843; Whitmore *v.* Dwelling House Ins. Co., 148 Pa. St. 405, 23 Atl. 1131, 33 Am. St. Rep. 838.

Wisconsin. — McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375; Small *v.* Prentice, 102 Wis. 256, 78 N. W. 415.

This presumption is sufficient to require a proper preliminary showing before secondary evidence of the contents of the letter is admissible. Watson *v.* Richardson, 110 Iowa 673, 80 N. W. 407.

Basis of Presumption. — The case of Henderson *v.* Carbondale Coal & Coke Co., 140 U. S. 25, 37, while holding contrary to the general rule that this is not a presumption of law, correctly states its basis as follows: "This presumption, which is not a presumption of law, but one of fact, is based on the proposition that the post-office is a public agency charged with the duty of transmitting letters; and on the assumption that what ordinarily results from the transmission of a letter through the post-office probably resulted in the given case. It is a probability resting on the custom of business and the presumption that the officers of the postal system discharged their duty." See also Rosenthal *v.* Walker, 111 U. S. 185; Tanner *v.* Hughes, 53 Pa. St. 289.

The Mailing of a Letter Countermanding an Order for goods raises a presumption that it was duly received by the addressee and places upon the latter the burden of showing the contrary. Merchants' Exchange Co. *v.* Sanders (Ark.), 84 S. W. 786 (*citing* Burlington Ins. Co. *v.* Threlkeld, 60 Ark. 539, 31 S. W. 265; Click *v.* Sample, 73 Ark. 194, 83 S. W. 932).

When an Account Stated Is Sent in the usual and customary way by mail, it is presumed to have been

some states.[78] This presumption arises without regard to the contents of the letter, notwithstanding they are such that they would tend to subject the party sending it to a penalty or forfeiture if the letter were received.[79] In some cases, however, it is held that no presumption of law arises from such facts, but merely a so-called presumption of fact or inference.[80] And it is sometimes difficult to determine what some cases mean to hold owing to the confusing use of the terms "presumed," "presumption of fact" and "*prima facie* evidence."[81]

(2.) Notices. — (A.) GENERALLY. — In accordance with the rule previously stated as to the receipt of letters the presumption is that

duly received. Dick *v.* Zimmerman, 105 Ill. App. 615; *citing* Darby *v.* Widow, 28 La. Ann. 605.

Sending a Check in a Letter, postage prepaid, addressed to a party at his place of business, raises a presumption that he received it. Sutton *v.* Corning, 59 App. Div. 589, 69 N. Y. Supp. 670.

Withdrawal of Offer. — Where it appeared that a notice of the withdrawal of an offer had been mailed with a return card in time to reach the other party in due course of mail, previous to the date of the acceptance of the offer, it was held that in the absence of rebutting evidence the presumption that the notice had been received in due time was conclusive. "In this case the presumption of the receipt of the letter is strengthened by the fact that it was never returned to the defendant, either in obedience to the direction of the return card on the envelope, or through the dead letter office." Sherwin *v.* National Cash Reg. Co., 5 Colo. App. 162, 38 Pac. 392.

Change of Address. — "So, if a party has changed his place of business, and has informed the post-office authorities of it, there is a presumption or inference that the letter has been delivered at the new address." Marston *v.* Bigelow, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43.

78. St. Vincent's Inst. *v.* Davis, 129 Cal. 20, 61 Pac. 477; Grade *v.* Mariposa County, 132 Cal. 75, 64 Pac. 117 (C. C. P. §1963, subd. 24); Williams *v.* Culver, 39 Or. 337, 64 Pac. 763 (Hill's Ann. Laws, § 776, subd. 24).

79. Rosenthal *v.* Walker, 111 U. S. 185.

80. *United States.* — Henderson *v.* Carbondale Coal & Coke Co., 140 U. S. 25, 37; United States *v.* Babcock, 3 Dill. 571, 24 Fed. Cas. No. 14,485; Uhlman *v.* Arnholdt & Schaefer Brew. Co., 53 Fed. 485.

Connecticut. — See President, etc., of Hartford Bank *v.* Hart, 3 Day 491, 3 Am. Dec. 274.

Massachusetts. — Greenfield Bank *v.* Crafts, 4 Allen 447.

Pennsylvania. — First Nat. Bank *v.* McManigle, 69 Pa. St. 156, 8 Am. Rep. 236; Tanner *v.* Hughes, 53 Pa. St. 289.

Rhode Island. — Russell *v.* Buckley, 4 R. I. 525, 70 Am. Dec. 167.

Although a letter containing an execution is deposited in the post-office, properly addressed to the officer at his place of residence, this raises no presumption that it was received. Woodman *v.* Jones, 8 N. H. 344; *citing* Groton *v.* Lancaster, 16 Mass. 110.

Where One Town Calls Upon Another Town for the Removal of a Pauper, the fact that the notice required by statute was mailed raises no presumption that it was received. The ordinary presumption in such case would not arise, because it is not the duty or business of municipal officers in country towns to watch the arrival of mails. Groton *v.* Lancaster, 16 Mass. 110. But see Augusta *v.* Vienna, 21 Me. 298.

81. See Huntley *v.* Whittier, 105 Mass. 391, 7 Am. Rep. 536; Crane *v.* Pratt, 12 Gray (Mass.) 348; Sullivan *v.* Kuykendall, 82 Ky. 483, 56 Am. Rep. 901; Susquehanna Mut. F. Ins. Co. *v.* Tunkhannock Toy Co., 97 Pa. St. 424, 34 Am. Rep. 816; Rosenthal *v.* Walker, 111 U. S. 185.

notices enclosed in such letters were duly received.[82] And the rule is the same where notice is expressly or impliedly required by law,[83] as in the case of the dissolution of a partnership.[84]

(B.) Notice of Non-Payment and Protest of Negotiable Paper. — The receipt of a notice of non-payment and protest of negotiable paper properly directed and mailed to an indorser is said to be conclusively presumed, but this seems to be rather a rule of substantive law making the fact of mailing sufficient evidence of receipt, because the question is rather one of the diligence of the holder than notice to the indorser.[85]

82. *Illinois.* — Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582, 595, 54 N. E. 987.

Kentucky. — Railway Officials' & Employes' Ass'n. *v.* Beddow, 112 Ky. 184, 65 S. W. 362.

Minnesota. — Benedict *v.* Grand Lodge A. O. U. W., 48 Minn. 471, 51 N. W. 371.

New York. — McCoy *v.* Mayor, etc. of New York, 46 Hun 268; Roth Clothing Co. *v.* Maine S. S. Co., 44 Misc. 237, 88 N. Y. Supp. 987.

North Carolina. — Bragaw *v.* Supreme Lodge, 124 N. C. 154, 32 S. E. 544.

Tennessee. — Boorum & Peas Co. *v.* Armstrong (Tenn. Ch.), 37 S. W. 1095. See also Gaar, Scott & Co. *v.* Stark (Tenn. Ch.), 36 S. W. 149.

Vermont. — Walworth *v.* Seaver, 30 Vt. 728, 73 Am. Dec. 332.

Notice of a Special Directors' Meeting mailed by the secretary, postpaid and properly addressed to each of the directors, is presumed to have been received by them in the absence of evidence to the contrary. Stockton C. H. & A. Wks. *v.* Hauser, 109 Cal. 1, 41 Pac. 809. See Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187.

A Notice of the Death of an Insured mailed to the insurance company, duly addressed and stamped, is evidence that it was received by such company. McFarland *v.* United States Mut. Acc. Ass'n, 124 Mo. 204, 27 S. W. 436.

A Notice of an Assessment by an Insurance Company mailed, properly addressed and stamped is presumed to have been received by the addressee, and this is a presumption of law, although it may be rebutted. Sherrod *v.* Farmers' Mut. F. Ins. Ass'n, 139 N. C. 167, 51 S. E. 910.

Notice to an Insurer of Loss to Insured. — Where a policy of fire insurance contains a provision that persons sustaining loss shall forthwith give notice of such loss to the secretary of the company, the sending of such preliminary notice of loss by mail properly addressed is *prima facie* evidence of the service of such notice. Susquehanna Mut. F. Ins. Co. *v.* Tunkhannock Toy Co., 97 Pa. St. 424, 39 Am. Rep. 816. The court, however, apparently recognizes the rule laid down in Kenney *v.* Altvater, 77 Pa. St. 34, and Bank *v.* McManigle, 69 Pa. St. 156, 8 Am. Rep. 236, that there is no presumption of law that a letter mailed to one at the place he usually receives his letters was received by him.

83. Consolidated Coal Co. *v.* Block & Hartman Smelt. Co., 53 Ill. App. 565.

84. Proof of the mailing of notices of the dissolution of a partnership and of the retirement of certain members thereof, properly addressed to persons having had prior dealings with the firm, is *prima facie* evidence that the notices have been received by the parties to whom they were addressed. Meyer *v.* Krohn, 114 Ill. 574, 2 N. E. 495; Young *v.* Clapp, 147 Ill. 176, 100, 32 N. E. 187, 35 N. E. 372; Eckerly *v.* Alcorn, 62 Miss. 228; Van Doren *v.* Libman, 11 N. Y. Supp. 760, 33 N. Y. St. 1030.

85. Home Ins. Co. *v.* Marple, 1 Ind. App. 411, 27 N. E. 633; Smyth *v.* Hawthorn, 3 Rawle (Pa.) 355; Dunlap *v.* Thompson, 5 Yerg. (Tenn.) 67. See Munn *v.* Baldwin, 6 Mass. 316; Jensen *v.* McCorkell, 154 Pa. St. 323, 26 Atl. 360, 35 Am. St. Rep. 843.

"It is a mistake to suppose that in

(3.) Prerequisite Facts.— Before the presumption of delivery or receipt of a letter arises it must appear that it was properly stamped,[86] directed to the regular address of the addressee,[87] and mailed.[88] All of these facts must be shown,[89] but a statement that a letter was mailed has been held to sufficiently show the prepayment of postage, the latter fact being included in the former.[90]

(4.) Time.— There can be no presumption as to the time when a letter was received without evidence as to the place where it was mailed and the usual course of the mails,[91] but when these appear

case of letters, put in the mail to give notice of demand of commercial paper and non-payment, the law considers it sufficient on the presumption that the letter is always received. But it is on the fact, that writing and doing so are using due diligence to give notice. If such a presumption of the receipt of letters put in the post-office, is to be made in all cases, it is a presumption, contradicted daily by the immense dead letter collections never received by correspondents." Allen *v.* Blunt, 2 Woodb. & M. (U. S.) 121.

86. Bless *v.* Jenkins, 129 Mo. 647, 31 S. W. 938; Welsh *v.* Chicago Guaranty F. L. Soc., 81 Mo. App. 30; Ward *v.* Hasbrouck, 44 App. Div. 32, 60 N. Y. Supp. 391.

87. Henderson *v.* Carbondale Coal & Coke Co., 140 U. S. 25, 37; Equitable L. Assur. Soc. *v.* Frommhold, 75 Ill. App. 43; Mayor, etc. of New York *v.* Finn, 26 Jones & S. 360, 11 N. Y. Supp. 580, 33 N. Y. St. 764; Boorum & Peas Co. *v.* Armstrong (Tenn. Ch.), 37 S. W. 1095.

No presumption arises that an insured received a notice of the maturity of a premium sent by mail where it was not addressed to the city in which he was at the time residing. Goodwin *v.* Provident Sav. L. Assur. Ass'n, 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473.

88. Best *v.* German Ins. Co., 68 Mo. App. 598.

89. National Bldg. Ass'n. *v.* Quin, 120 Ga. 358, 47 S. E. 962; Equitable L. Assur. Soc. *v.* Frommhold, 75 Ill. App. 43.

In an action on a fire insurance policy where the plaintiff's proof of notice of loss was merely that he "wrote to the company at Freeport, Ill.," on a certain date, it was held that this did not amount to a *prima facie* showing of notice. The plaintiff should have shown that the letter was properly addressed, stamped, and deposited in the mail. Best *v.* German Ins. Co., 68 Mo. App. 598.

But where there is testimony that certain letters were written and sent, in the absence of any proof to the contrary, or any inquiry as to the mode of sending, the court must assume that they were mailed in the usual manner. Oregon S. S. Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

90. An allegation that a letter was duly mailed carries with it the presumption that it was duly stamped, inasmuch as the latter is a requirement of law and a prerequisite to mailing. The court must presume that the law was complied with. Phenix Ins. Co. *v.* Schultz, 80 Fed. 337, 25 C. C. A. 453.

Where the certificate of a notary public showed that he deposited in the post-office a notice of presentation and non-payment properly addressed, but is silent as to the prepayment of postage, it will be presumed that the postage was prepaid, the presumption being "that a notary public sending such a notice by mail, conformed to the established regulations of the Post Office Department." Brooks *v.* Day, 11 Iowa 46.

The report by an officer that he duly served a notice by mail is equivalent to a statement that the postage was prepaid. "The rule is so plain and is so universally known that we may regard it as a statement of fact that postage was prepaid, where the person asserting the service of a notice by mail says that it was duly served." People *v.* Crane, 125 N. Y. 535, 26 N. E. 736.

91. There is no ground for the presumption that a letter reached its

the presumption is that the letter was delivered in the usual course of the mails.[92]

(5.) Force of Presumption. — This presumption is not conclusive.[93] But as to what effect contrary evidence has upon it, the courts are not entirely in accord. It has been said that the presumption disappears when confronted with facts,[94] and hence, that it is rebutted by positive and direct evidence to the contrary.[95] The positive denial by the addressee that he received the letter has been held sufficient to overcome the presumption.[96] But the mere impression of the addressee that he has not received such a letter is not sufficient.[97]

The General Rule, however, seems to be that the presumption is not overcome as a matter of law by the positive testimony of the addressee, or other evidence to the contrary, but the question then becomes one of fact for the jury.[98] The true rule would seem to

destination by mail within two weeks after it was mailed, in the absence of any proof as to the place where it was mailed or of the usual course of the mails. Boon *v.* State Ins. Co., 37 Minn. 426, 34 N. W. 902.

92. See *supra,* III, 4, D, a, (1.).

When Receipt Shown. — Presumption That It Was in Due Course of Mail. — Where it was proved that a notification stating the facts in relation to a pauper as required by the act for the settlement and relief of the poor, and properly directed to the overseers of the town where his settlement was alleged to be, was put into the post-office on a certain day and arrived at the post-office in the town to which it was directed and was actually received by the overseers, but the precise day did not appear, it was held that in the absence of all other evidence the presumption of law was that the notice was received in due course of mail, since it will not be presumed that the postmaster or mail carriers violate the law and neglect their duty. Augusta *v.* Vienna, 21 Me. 298.

93. National Masonic Acc. Ass'n *v.* Burr, 57 Neb. 437, 77 N. W. 1098; Huntley *v.* Whittier, 105 Mass. 391, 7 Am. Rep. 530; Jensen *v.* McCorkell, 154 Pa. St. 323, 26 Atl. 366, 35 Am. St. Rep. 843; Planters' Mut. Ins. Co. *v.* Green, 72 Ark. 305, 80 S. W. 151; Grade *v.* Mariposa County, 132 Cal. 75, 64 Pac. 117; Eckerly *v.* Alcorn, 62 Miss. 228.

94. "There was evidence to the effect that it was not received and that destroyed any presumption as to its having been received. Presumptions disappeared when confronted with facts." American Cent. Ins. Co. *v.* Heath, 29 Tex. Civ. App. 445, 69 S. W. 235.

95. American Cent. Ins. Co. *v.* Heath, 29 Tex. Civ. App. 445, 69 S. W. 235.

The Presumption Will Have But Little Weight Against Positive Testimony to the effect that it was never received. Ault *v.* Interstate Sav. & L. Ass'n, 15 Wash. 627, 47 Pac. 13.

96. Grade *v.* Mariposa County, 132 Cal. 75, 64 Pac. 117; Allen *v.* Blunt, 2 Woodb. & M. (U. S.) 121.

But see Roth Clothing Co. *v.* Maine S. S. Co., 44 Misc. 237, 88 N. Y. Supp. 987.

97. See McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375; Pioneer Sav. Etc. Co. *v.* Thompson, 115 Ala. 552, 22 So. 511; Austin *v.* Holland, 69 N. Y. 571; 25 Am. Rep. 240; Breed *v.* First Nat. Bank, 6 Colo. 235.

The presumption of the receipt of a notice of a meeting of the directors of a corporation deposited in the post-office, properly stamped and addressed to one of the directors, is not overcome by his mere failure to recall its receipt or his impression that he did not receive it. Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187.

98. Steiner *v.* Ellis (Ala.), 7 So. 803; Moran *v.* Abbott, 26 App. Div.

be that upon the introduction of contrary evidence the legal presumption of receipt disappears, but the facts upon which it was founded remain in the case as evidence and the inference arising therefrom may or may not be overcome by the contrary evidence.[99]

b. *Letters and Papers Delivered in Regular Course of Business.* Where it is shown that letters or papers are customarily deposited in a particular place or with a particular person for delivery, and that when so left they are delivered in the regular course of business, it is presumed that a particular letter or paper so deposited with proper directions was duly received by the person to whom it was sent.[1]

570, 50 N. Y. Supp. 337; McCoy *v.* Mayor, Etc., of New York, 46 Hun (N. Y.) 268; *In re* Wiltse, 5 Misc. 105, 25 N. Y. Supp. 733; National Masonic Acc. Ass'n *v.* Burr, 57 Neb. 437, 77 N. W. 1098; Walworth *v.* Seaver, 30 Vt. 728, 73 Am. Dec. 332.

The mere fact that the letter was not found amongst the addressee's papers after his decease does not rebut the presumption. Sabre *v.* Smith, 62 N. H. 663.

Although depositing a letter in a post-office, properly addressed and stamped, is *prima facie* proof that it was received by the person to whom it was addressed in due course of mail; yet where its receipt is disputed and denied it is error to instruct the jury that its receipt might be inferred from so mailing it. "In all cases where actual notice is required, evidence of the mailing of a letter containing such notice, properly addressed and stamped, is proof *prima facie* of the receipt of the notice; and where its receipt is not denied the court may instruct the jury to so find. But the inference is one of fact, and where the receipt of the notice is disputed the question should be submitted to the jury to be determined from all the evidence, both positive and circumstantial, whether the notice was in fact received or not. Under the latter hypothesis the court should not instruct the jury what inferences might be drawn from any of the facts in evidence." Home Ins. Co. *v.* Marple, 1 Ind. App. 411, 27 N. E. 633.

99. See *supra*, II, 3, and Sullivan *v.* Kuykendall, 82 Ky. 483, 56 Am. Rep. 901; American Cent. Ins. Co. *v.* Heath, 29 Tex. Civ. App. 445, 69 S. W. 235.

1. Where a question is made whether a certain paper, or other document, has reached the hand of the person for whom it is intended, proof of a usage to deliver such papers at the house, or of the duty of a certain messenger to deliver such papers, creates the presumption that the paper in question was actually so delivered. Business could hardly be carried on without indulging in the presumption that employes, who have certain duties to perform and are known generally to perform such duties, will actually perform them in connection with a particular case. Thus, if it be shown that a letter, properly stamped, has been mailed, there is a presumption that it reached the person addressed; or, if letters properly directed to a gentleman be left with his servant, it is reasonable to presume that they reached his hands. Dunlop *v.* United States, 165 U. S. 486.

Letters Deposited at Hotel Bar. Where it was the usage of a hotel to deposit all letters left at the bar in an urn kept for that purpose whence they were sent almost every fifteen minutes throughout the day to the rooms of the different guests to whom they were directed, it will be presumed that a letter addressed to one of the guests and left at the bar was received by him. The presumption in such case being even stronger than a letter deposited in the post-office. Dana *v.* Kemble, 19 Pick. (Mass.) 112.

Contra. — The presumption that a letter properly addressed and prepared for transmission through the post-office and placed by a merchant in the usual course of his business in the receptacle in which

c. *Telegram.* — Where a telegraphic message properly addressed is deposited in the telegraph office with the operator and all charges for its transmission prepaid, in the absence of evidence to the contrary the presumption is that it reached its destination and was delivered in accordance with the obligation imposed by law upon telegraph companies.[2]

E. Presumption of Mailing From Post-Mark. — The fact that an envelope bears a regular post-mark raises a presumption that it passed through the mail.[3]

F. Response to Telephone Call. — The response to a telephone call is presumed to come from the person called, or his agent.[4]

5. Identity. — The presumptions as to identity are fully discussed elsewhere.[5]

letters were customarily placed, and from which they were usually carried to the post-office, was received by the addressee, is not a presumption of law, but a mere inference of fact. Lawrence Bank *v.* Raney, 77 Md. 321, 26 Atl. 119.

2. Oregon S. S. Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438. The court says: "As a rule, to which an exception is very rare, all letters and all telegrams with equal certainty reach their destination, and, the reasonable intendments with reference to each being identical, the same legal presumption may well be entertained as to both." See also Com. *v.* Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712; Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220; Breed *v.* First Nat. Bank, 6 Colo. 235; White *v.* Flemming, 20 Nov. Sc. 335; State *v.* Gritzner, 134 Mo. 512, 36 S. W. 39.

"Such presumption results naturally, if not necessarily, from the relation of telegraph companies to the public, which, in this state at least, is held to be that of public carriers of intelligence with rights and duties analogous to those of carriers of goods and passengers." Perry *v.* German-American Bank, 53 Neb. 89, 73 N. W. 538, 68 Am. St. Rep. 593.

3. The post-office stamp or post-mark upon a letter is *prima facie* evidence that it was mailed, even though there is testimony that other postmasters have on occasions, in aid of justice, furnished numerous empty envelopes bearing stamps of their post-offices which have never been through the mail; such evidence does not show a deviation from the regular course of business sufficient to overcome the presumption. United States *v.* Noelke, 1 Fed. 426.

A postmark upon the envelope of a letter affords presumptive proof that it has been deposited in the mail. United States *v.* Williams, 3 Fed. 484.

4. When one is connected by telephone wire with a place of business of one with whom he desires to converse and is answered by someone assuming to be such person, it will be presumed that he is such person, although this presumption is not conclusive. "It is a rule of everyday application in and out of court, that a person (even though non-official) performs a duty which is imposed upon him. Lennox *v.* Harrison, 88 Mo. 496. . . . State *ex rel v.* Bank, 120 Mo. 161. So when plaintiff's agent asked the central station of the telephone company to connect him with the defendant's agent at the depot, and he answered that he would and had done so, we must presume that he performed such duty." Guest *v.* Hannibal & St. J. R. Co., 77 Mo. App. 258.

Where the consignee of freight telephones to the railroad office where consignees generally get information, the presumption is that the answer received over the telephone was given by an agent of the company. Rock Island & Peoria Ry. Co. *v.* Potter, 36 Ill. App. 590.

5. See article "Identity," Vol. VI.

6. Lapse of Time and Other Circumstances. — The lapse of time alone or in connection with other circumstances is sometimes made the basis of presumptions of regularity,[6] notice to parties to judicial proceedings,[7] legality,[8] title,[9] and numerous other presumptions[10]

6. After the lapse of many years and the destruction of the records, where the validity of a guardian's sale is questioned collaterally, it will be presumed that the clerk of the court filed the guardian's petition as it was his duty to do; so it will be presumed that the clerk recorded the guardian's report of sale on its approval. Spring *v.* Kane, 86 Ill. 580.

After the lapse of sixty years the proceedings of a judge of probate who had jurisdiction, are presumed to have been regular. Giddings *v.* Smith, 15 Vt. 344.

It appearing from entries on the docket and minutes of the superior court that an attachment case had been twice continued, that a verdict and judgment against the defendant had been entered therein, and that a motion by him for a new trial had been made and overruled, and a *fi. fa.* in favor of plaintiff against the defendant issued and levied, it will be presumed, after the lapse of a long period of time, that a declaration was duly filed and that a proper verdict and judgment were rendered thereon, although the original papers are not to be found in the clerk's office, and no record of the case appears in the record of writs. Wiggins *v.* Gillette, 93 Ga. 20, 19 S. E. 86, 44 Am. St. Rep. 123.

7. See Belcher's Adm'r *v.* Belcher, 21 Ky. L. Rep. 1460, 55 S. W. 693.

Where the regularity of the final settlement of an estate is not shown by the record, the court will presume in favor of its correctness after the lapse of twenty years that the necessary notices were given and that the parties in interest were present. Barnett's Ex'r *v.* Tarrence, 23 Ala. 463.

Where all the parties to an action were summoned to answer the original petition, but the record fails to show whether some of them were summoned to answer an amended petition, it will be presumed after the lapse of thirty-five or forty years that all the parties were served with proper process. Best *v.* Vanhook, 11 Ky. L. Rep. 753, 13 S. W. 119.

After the lapse of thirty years it will be presumed that a court of general jurisdiction had all the necessary parties before it to enable it to settle and adjust their rights as creditors and devisees, the record showing nothing to the contrary. Jones *v.* Edwards, 78 Ky. 6.

8. After the lapse of more than twenty years a sheriff's sale will be presumed valid. Brosnaham *v.* Turner, 16 La. 433; Drouet *v.* Rice, 2 Rob. (La.) 374.

9. See article "TITLE" for a discussion of when a conveyance will be presumed from the lapse of time and other circumstances; and also, the article "DEEDS," Vol. IV, p. 219 *et seq.*

After a long lapse of time (thirty-five years in the present case) every reasonable presumption should be indulged to uphold a tax deed, and especially where the original proprietors or their privies have asserted no title, although numerous subsequent conveyances have been made. Sheafer *v.* Mitchell, 109 Tenn. 181, 71 S. W. 86.

In support of a sale of land which has been acquiesced in by the parties concerned for fifteen or twenty years, and based on a judgment, it will be presumed in the absence of anything to the contrary that a verdict which should have existed as the foundation for the judgment did in fact exist where the court minutes of the proceeding have been lost or destroyed. "Rather than rip up a judgment and a sale under it, both of them so old, any presumption should be indulged which it is legally possible to invoke." American Mtg. Co. *v.* Hill, 92 Ga. 297, 18 S. E. 425.

10. The Extinguishment of a Trust may be presumed from a long lapse of time where the original parties are all dead and the evidence of the matter largely destroyed. This is in analogy with the rule

particularly treated under the subjects to which they relate. Where, however, the proper evidence is of a kind required to be preserved it must be accounted for,[11] unless it appears that the records were loosely and carelessly kept.[12]

7. Acceptance of Benefits. — It is presumed that persons will

which presumes the payment of a debt from the lapse of time where the circumstances require it. Prevost *v.* Gratz, 6 Wheat. (U. S.) 481. See article "TRUSTS."

Payment. — See article "PAYMENT."

Death. — See article "DEATH AND SURVIVORSHIP."

Judicial Action. — See Jones *v.* Edwards, 78 Ky. 6; Best *v.* Vanhook, 11 Ky. L. Rep. 753, 13 S. W. 119, and *infra*, III, 10.

Presumptions as to Settlement of Estate From Lapse of Time. — See articles "DESCENT AND DISTRIBUTION," Vol. IV, p. 581, note 28; "EXECUTORS AND ADMINISTRATORS" Vol. V, p. 451; and Kosminsky *v.* Estes, 27 Tex. Civ. App. 69, 65 S. W. 1108.

11. Hilton *v.* Bender, 69 N. Y. 75; Hathaway *v.* Clark, 5 Pick. (Mass.) 490.

Where from the lapse of time and other circumstances it appears that it is not in the power of a party to produce the evidence usually required to prove certain facts, such facts may often be legally presumed from other facts and circumstances, the existence of which cannot fairly be accounted for without such presumption; but this presumption does not legally arise where there is nothing in the case from which to infer that the regular evidence is not in existence or not accessible to the party entrusted to establish the facts in question. "Legal presumptions generally apply to facts of a transitory character, the proper evidence of which is not usually preserved with care, but not to records or public documents, in the custody of officers charged with their preservation and safe keeping, unless proved to have been lost or destroyed." Brunswick *v.* McKean, 4 Me. 508.

"Justice and the repose of society have induced the adoption of many legal presumptions; and among these is that which after a long lapse of time, cures *irregularities* in judicial proceedings, and assumes that everything that was done was '*solemnly and rightly done*,' and that, also, which even presumes, in some rare cases, that an *unfound record* once existed. But time can never authorize the presumption that an *existing record*, apparently complete and perfect, is not substantially what it always was, and especially that anything which it expresses or imports is false. The legal maxim '*omnia praesumuntur rite et solemniter esse acta donec probitur en contrarium*,' applies not to such a case." Shaefer *v.* Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164.

12. Records Loosely Kept. Strong presumptions are allowed in favor of records irregularly kept after a great lapse of time. It is presumed under such circumstances that courts did what the law required them to do and that omissions were the result of carelessness or ignorance on the part of the clerks. McFate's Appeal, 105 Pa. St. 323; *citing* Shaw *v.* Boyd, 12 Pa. St. 215.

Presumption of Regularity of Probate Proceedings From Lapse of Time and Loose Manner of Keeping Records. — See article "DESCENT AND DISTRIBUTION," Vol. IV, p. 584; and Delk *v.* Punchard, 64 Tex. 360.

Where the ancient records of the probate courts fail to show that everything was done that the law requires in making sales of property of the estates of deceased persons and minors, but the sale is proved and there is no evidence to impeach its fairness, the presumption is that the officers of the court and the representative of the estate did their duty, and this presumption owing to the uncertain manner in which the records have been made and kept controls the presumption that the records show all the proceedings thereof. Baker *v.* Coe, 20 Tex. 430. See also Graham *v.* Hawkins, 1 Posey Unrep. Cas. (Tex.) 514.

accept benefits attempted to be conferred gratuitously upon them.[13]

8. Presumption of Continuance. — A. Generally. — The general statement is sometimes made that a fact, relation, or state of things once shown to exist is presumed to continue until the contrary appears.[14] Such a proposition, however, is not true without regard

13. For particular applications of this presumption, see articles "Corporations," Vol. III, p. 600; "Deeds," Vol. IV, p. 177, *et seq;* "Assignments For Benefit of Creditors," Vol. II, p. 32; "Gifts," Vol. VI, p. 210; and "Wills."

14. *Alabama.* — McKenzie *v.* Stevens, 19 Ala. 691.

Illinois. — St. Louis, A. & T. H. R. Co. *v.* Eggman, 161 Ill. 155, 43 N. E. 620.

Indiana. — Stumph *v.* Miller, 142 Ind. 442, 41 N. E. 812.

Massachusetts. — See Kershaw *v.* Wright, 115 Mass. 631.

New Hampshire. — Scammon *v.* Scammon, 28 N. H. 419; Ela *v.* Ela, 70 N. H. 163, 47 Atl. 414.

Nevada. — Table, Mt. G. & S. Min. Co. *v.* Waller's Defeat Silv. Min. Co., 4 Nev. 218, 97 Am. Dec. 526.

New York. — Ne-Ha-Sa-Ne Park Ass'n *v.* Lloyd, 25 Misc. 207, 55 N. Y. Supp. 108.

Pennsylvania. — Oller *v.* Bonebrake, 65 Pa. St. 338.

Tennessee. — Watkins *v.* Specht, 7 Coldw. 585.

Vermont. — Rixford *v.* Miller, 49 Vt. 319.

An execution which upon being issued by the clerk passed in due course from him to the sheriff will be presumed to have remained in the sheriff's hands during the continuance of his office, unless shown to have been returned or delivered to the plaintiff, or to some other person within that period. "The doctrine that a state of things once existing is presumed to continue until a change or some adequate cause of change appears, or until the presumption of change arises out of the nature of the subject, is an element of universal law. Without such a principle we could count upon the stability of nothing, and to assure ourselves of a set of conditions at one period of time would afford no ground for inferring the same conditions at another period. This presumption of *continuance* is a well recognized principle of evidence." Anderson *v.* Blythe, 54 Ga. 507.

Where the testimony was undisputed that a gas pipe was put up by a skillful gasfitter, and was properly supported when first erected, the presumption is that it so continued until cause arose sufficient to destroy such supports; the general rule being that things once proved to have existed in a particular state are presumed to have continued in that state until the contrary is shown, and the mere fact that no supports were found after a violent explosion does not rebut the presumption. Metzger *v.* Schultz, 16 Ind. App. 454, 43 N. E. 886, 45 N. E. 619, 59 Am. St. Rep. 323.

Condition of Goods Shipped by Connecting Carrier. — Upon the proof of the existence of a certain state of facts at a certain time in respect to the condition of goods, the jury may presume that the same continued up to the time when the evidence shows a different state of facts to have existed. Thus where goods in a box were shipped by three successive carriers and when delivered to the consignee the box was found to have been opened and certain goods abstracted therefrom, the jury may presume in the absence of evidence to the contrary that the box remained unopened until it came into the possession of the last carrier. This is a purely artificial presumption based upon policy and necessity; otherwise the consignee might be unable to enforce his remedy. Laughlin *v.* Chicago & N. W. R. Co., 28 Wis. 204. See also article "Carriers."

Reputability of College. — A dental college shown to be "reputable" in April, 1900, is presumed to be of this character in May, 1901. "Reputability of an institution of learning . . . rests on conditions that do not ordinarily change in a day or a week or a month. . . . It is

to the fact involved; it is only those facts or states which are continuous in their nature that are legally presumed to continue.[15]

one of those conditions which, when once established, is presumed to continue, not indefinitely, but so that lapse of time only weakens the force of the presumption as evidence." State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

Decree in Chancery. — Where there is no evidence that a decree in chancery was ever annulled, reversed or set aside, the presumption is that it is still in force. Murphy *v.* Orr, 32 Ill. 489.

Condition of Cattle Guard. — See Haskings *v.* St. Louis, K. C. & N. R. Co., 58 Mo. 302.

Rules for Operation of Street Cars. See Paquin *v.* St. Louis & S. R. Co., 90 Mo. App. 118.

"A State of Peace and the Continuance of Treaties must be presumed by all courts of justice till the contrary be shown." People *v.* McLeod, 1 Hill (N. Y.) 377, 407.

Existence of Corporation. — Where a corporation has been shown to be legally created, it is presumed to exist until the contrary is shown. People *v.* President of Manhattan Co., 9 Wend. (N. Y.) 351, 378.

Highway. — Where it has been established that a highway has been legally laid out, its continuance as such is to be presumed until the contrary appears. Beckwith *v.* Whalen, 65 N. Y. 322. See also Cohoes *v.* Delaware & H. Canal Co., 134 N. Y. 397, 31 N. E. 887; Horey *v.* Haverstraw, 124 N. Y. 273, 26 N. E. 532.

A Note once proved to exist is presumed to exist still unless payment be shown or other circumstances from which a stronger counter presumption arises. Bell *v.* Young, 1 Grant's Cas. (Pa.) 175.

Incompetency of Chancellor. — A chancellor shown to be incompetent to try a particular case is presumed to remain incompetent to try the same case where there is nothing in the record showing a removal or waiver of his incompetency, and no change of interest in parties from which it might be inferred. "The rule of law presuming that a fact once shown to exist continues to exist until the contrary is shown, applies." Bolling *v.* Anderson, 4 Baxt. (Tenn.) 550.

Presumption as Continuance of Cause for Taking Deposition. — See article "DEPOSITIONS," Vol. IV, p. 520.

15. A fact, relation, or state of things continuous in its nature once admitted or proved, is presumed to continue until the contrary appears. Murdock *v.* State, 68 Ala. 567; Garner *v.* Green, 8 Ala. 90; Walrod *v.* Ball, 9 Barb. (N. Y.) 271.

Where the fact in issue was whether the employment of a salesman at $250 per month continued for several years, an instruction that "when a fact is once shown to exist, the law presumes it to continue until the contrary is shown" was held error on the ground that there is no such presumption, regardless of the nature of the fact. The true rule, and the one established by Code Civil Procedure, § 1963, subd. 32 is, that the presumption is that "a thing once proved to exist continues *as long as is usual with things of that nature*." The continuance of the employment at such a rate might be inferred by the jury, but it is error for the court to say as a matter of law that it continued unless the contrary was proved. Scott *v.* Wood, 81 Cal. 398, 22 Pac. 871.

The existence of a thing permanent in its character once established is presumed to continue thereafter until the contrary is shown, but the use of land as a pasture is not of such a character. Martyn *v.* Curtis, 67 Vt. 263, 31 Atl. 296.

A presumption of the continuance of a given state of things only exists in reference to such matters as are of a continuous nature; that is, such a state of things as would be likely to continue unless interrupted by other causes outside of the relations themselves. "The fact that a person is seen on the street today does not warrant the presumption

B. Length of Time Continuance Is Presumed. — No general rule can be laid down as to the length of time this presumption continues.[16] Being founded upon the logical inference it would obviously cease with the inference, but at what point it would cease to have the force of a legal presumption depends upon the nature of the fact involved.[17]

C. Evidence Based Thereon. — Owing to this presumption, evidence of the previous existence of a relation or state of facts may be admissible;[18] and this is true, even though the inference arising in such cases may not be of sufficient strength to warrant a legal presumption of continuance.[19]

that he will remain there forever, or even five minutes; but if a person is shown to be in the employment of a person today, he will be presumed to remain in that person's employment until the contrary is shown.'" Greenfield *v.* Camden, 74 Me. 56; *quoting* from Best on Ev., Woods' Ed. Vol. II, § 405, note.

Editorship of Paper. — See Macleod *v.* Wakley, 3 Car. & P. 311, 14 E. C. L. 322.

Possession of Money. — There is no such thing as a continuing presumption of the possession of a circulating medium. McCabe *v.* Com. (Pa. St.), 8 Atl. 45.

16. The presumption of continuity "is grounded on common knowledge that conditions of things, and character of persons, change gradually as a general rule, when they change at all. The exceptions only go to the weight of the presumption of continuity and class it with rebuttable presumptions, but it remains probative to some degree, in some cases, for a great length of time. No general rule can be stated as to when this force will become so weak by time as to render it too remote to be considered at all, or to be given weight sufficient to *prima facie* establish the fact to which it points." State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587.

17. Donahue *v.* Coleman, 49 Conn. 464. See *infra,* the particular applications of this presumption.

Facts shown to exist are presumed to continue so long as facts of that nature usually continue. See Scott *v.* Wood, 81 Cal. 398, 22 Pac. 871; Toledo & W. R. Co. *v.* Smith, 25 Ind. 288; Martin *v.* Fishing Ins. Co., 20 Pick. (Mass.) 389, 32 Am. Dec. 220; Duffield *v.* Robeson, 2 Harr. (Del.) 375; Bethel *v.* Linn, 63 Mich. 464, 474, 30 N. W. 84; Haskings *v.* St. Louis, K. C. & N. R. Co., 58 Mo. 302; Gernau *v.* Oceanic Steam Nav. Co., 141 N. Y. 588, 36 N. E. 739.

Where it is shown that two persons were respectively clerk and deputy clerk of a court at a certain date, there is no presumption that they held such offices ten years previous to that date. Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302.

18. In an action for the death of an infant caused by the falling upon him of a heavy skid belonging to the defendant and alleged to have been in a dangerous position, evidence as to the position of the skid on the day before the accident was held improperly excluded where it appeared that the defendant had not been using the skid for several days previous, the presumption being that it continued on the day of the accident in the same position as it was in the day before. Gernau *v.* Oceanic Steam Nav. Co., 66 Hun 633, 21 N. Y. Supp. 371, 70 Hun 598, 23 N. Y. Supp. 1143, judgment *affirmed* 141 N. Y. 588, 36 N. E. 739.

19. See articles "Intent," "Mental and Physical States," etc.

In an action against a railway company for killing plaintiff's stock, evidence as to the condition of a cattle guard some months previous to the accident is admissible, because in the absence of any showing to the contrary it is sufficient "to raise some presumption that the cattle guard was insufficient at the time of the accident." (But this presumption seems to be merely matter for the consideration of the jury.) Hasking *v.* St. Louis, K. C. & N. R. Co., 58 Mo. 302.

D. Laws. — a. *Generally.* — The law of a foreign state shown to exist at a particular date is presumed to continue the same in the absence of evidence that it has been subsequently changed.[20]

b. *A Municipal Ordinance* shown to have been in force on a particular date is presumed to continue in force in the absence of evidence showing its repeal.[21]

E. Possession. — Possession of property once shown is presumed to continue,[22] but the length of time it continues seems to depend

20. *Alabama.* — Bush *v.* Garner, 73 Ala. 162.

Georgia. — Seaboard Air-Line R. *v.* Phillips, 117 Ga. 98, 43 S. E. 494.

Illinois. — Miami Powder Co. *v.* Hotchkiss, 17 Ill. App. 622.

Indiana. — Cochran *v.* Ward, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229, (in which a statute of Illinois shown to have been in force in 1874 was presumed to be still in force in 1888).

Kentucky. — King *v.* Mims, 7 Dana 267.

Louisiana. — Graham *v.* Williams, 21 La. Ann. 594; *Ex parte* Lafonta, 2 Rob. 495.

Michigan. — People *v.* Calder, 30 Mich. 85.

Minnesota. — See State *v.* Armstrong, 4 Minn. 335.

North Carolina. — State *v.* Cheek, 35 N. C. 114; State *v.* Patterson, 24 N. C. 346, 356.

Where a general rule of equity appears to prevail in a foreign state at a particular time, it will be presumed to continue in force until the contrary is shown. Babcock *v.* Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728.

Where a volume of the laws of a foreign state published by its authority is offered in evidence, the presumption is that the law therein shown has continued unchanged. *In re* Huss, 126 N. Y. 537, 27 N. E. 784, 12 L. R. A. 620, *reversing* 55 Hun 611, 8 N. Y. Supp. 750, and *distinguishing* Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538. To the same effect Raynham *v.* Canton, 3 Pick. (Mass.) 293; State *v.* Abbey, 29 Vt. 60, 67 Am. Dec. 754.

A court takes judicial notice of the laws existing in a foreign country or state which once formed part of the same state or country in which it sits at the time of the separation, and the presumption in the absence of contrary evidence is that such laws have remained unchanged. Stokes *v.* Macken, 62 Barb. (N. Y.) 145.

21. St. Louis, A. & T. H. R. Co. *v.* Eggman, 161 Ill. 155, 43 N. E. 620; Cleveland, C. C. & St. L. R. Co. *v.* Bender, 69 Ill. App. 262.

22. *United States.* — Lazarus *v.* Phelps, 156 U. S. 202.

Alabama. — Clements *v.* Hays, 76 Ala. 280.

Connecticut. — Gray *v.* Finch, 23 Conn. 495.

Illinois. — Choisser *v.* People, 140 Ill. 21, 29 N. E. 546.

Kentucky. — Forman *v.* Ambler, 2 Dana 109.

Massachusetts. — Brown *v.* King, 5 Mete. 173.

Missouri. — Janssen *v.* Stone, 60 Mo. App. 402.

New Jersey. — Den *v.* Kelty, 16 N. J. L. 517.

New York. — Wilkins *v.* Earle, 44 N. Y. 172, 192, 4 Am. Rep. 655; Saunders *v.* Springsteen, 4 Wend. 429.

Washington. — Balch *v.* Smith, 4 Wash. 497; 30 Pac. 648.

Wisconsin. — Smith *v.* Hardy, 36 Wis. 417.

Where money is shown to have been in the hands of the county treasurer, in the absence of evidence of its ever having been paid out the presumption is that it is still in his hands. Spaulding *v.* Arnold, 125 N. Y. 194, 26 N. E. 295.

Where in an action to recover certain slaves it is proved that defendant got possession of them illegally and fraudulently and was the last person seen in possession of them, they will be presumed to be still in his possession and the burden is upon him to show the contrary. Drummond *v.* Commissioners of C. & P. H. R. Co., 7 Rob. (La.) 234.

But there is no presumption that the possessor kept a particular chattel or thing in the same place: thus the

upon the nature of the property,[23] and the character of the possession.[24]

A Right to Possession is likewise presumed to continue.[25]

The Legal Character of the Possession shown is presumed to remain the same in the absence of evidence to the contrary.[26]

F. Ownership and Seizin. — Where either ownership[27] or

fact that a holographic script was seen among the valuable papers and effects of the decedent eight months before his death is no evidence that it was found there at or after his death. Adams *v.* Clark, 53 N. C. 56.

Question for Jury. — When money is shown to have come into the hands of a guardian at a particular time and there is no evidence that any disposition whatever has been made of it, it is a question for the jury to say whether or not it continued in her possession until a particular time thereafter. Williams *v.* Harrison, 19 Ala. 277.

23. Possession of Real Estate shown to exist at one time is presumed to continue until it was regularly transferred to someone else by the party so possessed. Hale *v.* Wiggins, 33 Conn. 101.

In an Action of Ejectment against a trespasser where it is shown that he was in possession in March, it will be presumed that his possession continued up to the time of the suit in May. Chilson *v.* Buttolph, 12 Vt. 231.

Where Possession of Personal Property involved in a suit is shown to have been in the defendant in 1873, there is no presumption that it continued in his possession until 1888. Allen *v.* Brown, 83 Ga. 161, 9 S. E. 674, *distinguishing* Robson *v.* Rawlings, 79 Ga. 354, 7 S. E. 212; Mercier *v.* Mercier, 43 Ga. 323.

24. Goods which are bought and sold by the possessor are not presumed to remain in his possession for four months and a half. Bethel *v.* Linn, 63 Mich. 464, 30 N. W. 84.

25. Smith *v.* Smith, 11 N. H. 459.

26. The legal presumption is that a possession beginning with the assent of the landlord continues in subordination to his title until a change of tenure is shown by the evidence. Leport *v.* Todd, 32 N. J. L. 124.

Where Possession Has Been Shown To Be Lawful, it is presumed to continue lawful in the absence of contrary evidence. Thus, where it is shown that at the time of the commencement of the action the defendant as administratrix had the right of possession to a band of sheep, it was held that her possession having been lawful while her authority as administratrix continued the presumption was that it continued lawful after her marriage. Buckley *v.* Buckley, 16 Nev. 180.

Unlawful Possession. — The burden of proof rests on the owner of land to show that a person who first entered upon the land as a trespasser afterwards became a tenant; the presumption is that he continued to hold the land in the same character as he at first held it. Dixon *v.* Ahern, 19 Nev. 422, 14 Pac. 598.

27. Chillingworth *v.* Eastern Tinware Co., 66 Conn. 306, 33 Atl. 1009; United States *v.* Mathoit, 1 Sawy. 142, 26 Fed. Cas. No. 15,740; Magee *v.* Scott, 9 Cush. (Mass.) 148, 55 Am. Dec. 49; Zwisler *v.* Storts, 30 Mo. App. 163; Balch *v.* Smith, 4 Wash. 497, 30 Pac. 648. Lind *v.* Lind, 53 Minn. 48, 54 N. W. 934. See also Rhone *v.* Gale, 12 Minn. 54, and article "Ownership."

Where it is shown that a patent has been granted to a party he is presumed to continue to be the owner of it, in the absence of any allegation or proof of an assignment by him. Fischer *v.* Neil, 6 Fed. 89.

Where a person is shown to be the purchaser at a sale on execution, the presumption is that he has not conveyed, in the absence of evidence to the contrary. Meacham *v.* Sunderland, 10 Ill. App. 123.

The title to land ceded to the United States by a treaty is presumed to remain in the government until the contrary is shown. United States *v.* De Coursey, 1 Pinn. (Wis.) 508.

Where the ownership of property

seizin[28] is once proved to be in a certain person it is presumed to continue in him until a change is shown. The character of the estate shown is presumed to remain the same.[29]

Title shown to be in a particular person previous to a conveyance or the levy of an execution is presumed to have continued in him until the execution of the deed,[30] or the levy of the execution.[31]

G. VALUE. — In spite of the fluctuating character of value it is presumed to remain constant for at least brief periods.[32]

is shown to be in a certain person prior to his death, the legal presumption is in the absence of evidence to the contrary that the property continued to be his up to the time of his death. Hanson *v.* Chiatovich, 13 Nev. 395.

Ownership of Stock. — Where a witness is shown to have been a stockholder in an incorporated company three years previous to the trial, it will be presumed that he continued to be a stockholder at the time of the trial. Montgomery & Wetumpka Plank-Road Co. *v.* Webb, 27 Ala. 618.

Where the ownership of corporate stock has been shown to have been in a person for seven years until his death and then in the name of his estate until a certain date, in the absence of contrary evidence the ownership is presumed to continue the same. Collins *v.* Denny Clay Co. (Wash.) 82 Pac. 1012.

If a Joint Ownership be shown to have once existed its continuance may be presumed, unless it be proved that it has ceased. Jones *v.* Sims, 6 Port. (Ala.) 138, 165.

Beneficial Interest. — Where it is shown that a person took title to certain shares of stock in trust for another, the presumption in the absence of other evidence is that the latter's beneficial interest in the property continued unchanged. *In re* Fisher's Estate (Iowa) 102 N. W. 797.

28. Balch *v.* Smith, 4 Wash. 497, 30 Pac. 648; Watkins *v.* Specht, 7 Coldw. (Tenn.) 585; St. Louis *v.* Arnot, 94 Mo. 275, 7 S. W. 15.

The court will not presume any fact that works a forfeiture of an estate; such facts must be matter of strict proof, and a seizin and possession once having been proved in the grantees under a deed, such seizin is presumed to continue until a disseizin is proved. State *v.* Atkinson, 24 Vt. 448.

29. Kidder *v.* Stevens, 60 Cal. 414.

30. Where title has been shown in a grantor at a particular time previous to his execution of a deed, it will be presumed to have continued in him until the execution of such deed in the absence of evidence to the contrary. Hohenshell *v.* South Riverside L. & W. Co., 128 Cal. 627, 61 Pac. 371.

31. Title to property in a certain person once proved or admitted is presumed to continue until the contrary is shown. Thus, on the trial of a claim of a third party to property levied upon by an execution, it is error for the court to dismiss the levy on the ground that the plaintiff in *fi. fa.* had not made out a *prima facie* case after the claimant admitted title in the defendant in *fi. fa.*, though the admission related to a period antedating the judgment. Coleman & Burden Co. *v.* Rice, 105 Ga. 163, 31 S. E. 424.

32. Howland *v.* Davis, 40 Mich. 545; Merrill Chemical Co. *v.* Nickells, 66 Mo. App. 678; Jennings *v.* Sparkman, 48 Mo. App. 246.

Value. — Where the market price of grain is shown on a day named, in the absence of evidence to the contrary it will be presumed to continue to the next day in spite of the fact that sometimes there are great fluctuations from day to day. "In the absence of evidence we think that the ordinary rule that a state of affairs once shown to exist is presumed to continue, may be applied for at least the term of one day, even to the Chicago grain market." Nash *v.* Classon, 55 Ill. App. 356.

Where the withdrawal value of

H. Status and Relations. — a. *Generally* speaking a particular status or relation once shown is presumed to continue, at least, as long as it would naturally in the ordinary course of events.[33]

b. *Marriage.* — Coverture is a status which is presumed to continue until the contrary appears,[34] though it may be overcome by other presumptions.[35] But there is no presumption that a man or woman was unmarried at a particular time merely because at some previous time this was his status.[36]

building and loan association stock on a particular day is shown, in the absence of further evidence, it will be presumed to continue the same a week later. Bexar Bldg. & L. Ass'n *v.* Seebe (Tex. Civ. App.), 40 S. W. 875.

33. Eames *v.* Eames, 41 N. H. 177; McKenzie *v.* Stevens, 19 Ala. 691 (applying this rule to the relation of agency).

On a prosecution for shooting, wounding and disabling a certain person where it is shown that he was shot in the thigh and so far disabled as to be unable to walk at the time, "the existence of the disabling having once been proved, its continuance is presumed, till proof be given to the contrary. . . . From the fact of a wound having once been given, its nature raises a very strong presumption of its continuance, and that the party did not recover from its effects immediately; and as there is no particular time when the presumption ceases, it still continues." Baker *v.* State, 4 Ark. 56.

Infancy. — See Irvine *v.* Irvine, 5 Minn. 61; and article "Infants," Vol. VII, p. 263, n. 4.

Character of Relation. — Illicit Relation. — A relation once shown to be unlawful is presumed to continue of this character. Carotti *v.* State, 42 Miss. 334; Cartwright *v.* McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105; Cargile *v.* Wood, 63 Mo. 501. See article "Marriage," Vol. VIII.

Partnership. — Until the contrary is shown the presumption is that a partnership once shown to exist, continues. Anslyn *v.* Franke, 11 Mo. App. 598; Garner *v.* Green, 8 Ala. 96. See also Butler *v.* Henry, 48 Ark. 551, 3 S. W. 878; Pursley *v.* Ramsey, 31 Ga. 403; Princeton & K. Tpk. Co. *v.* Gulick, 16 N. J. L. 161; Cooper *v.* Dedrick, 22 Barb. (N. Y.) 516; Marks *v.* Sigler, 3 Ohio St. 358.

Where certain persons are shown to have been partners in business two or three years previous and there is no evidence of any change or dissolution of partnership, the presumption is that they are still partners. Cooper *v.* Dedrick, 22 Barb. (N. Y.) 516.

34. Erskine *v.* Davis, 25 Ill. 228; Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975; Goodwin *v.* Goodwin, 113 Iowa 319, 85 N. W. 31. See the article "Marriage," Vol. VIII, p. 459 *et seq.*

35. See articles "Adultery;" "Bigamy;" "Death and Survivorship;" "Legitimacy;" "Marriage."

36. Johnson *v.* Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748, a partition proceeding in which the only evidence as to a missing heir was that of his sister, who testified that more than twenty years before the trial, when he was about eighteen years of age, he left home, and nothing had been heard of him since, and that so far as witness knew he was unmarried. This was held insufficient to raise a presumption that such heir continued unmarried until his death. "At best it can only be said that there is no presumption at all on the subject; although ordinarily a condition, whether it be one of insolvency, insanity of a chronic nature . . . or what not, once shown to exist, is presumed to continue until shown to have changed. But here was a young man last heard of at a time when he naturally would be unmarried, but approaching that period of life at which the greater number of men do marry, if at all, and no better reason is apparent for presuming a man unmarried until his death, merely because that was his condition in his early adolescence, than for the presumption that he spent his life in sin because, accord-

c. *Childless.* — There is no legal presumption that an unmarried person continues childless for a considerable number of years,[37] or that a married person died childless.[38]

d. *Life, Death, and Survivorship.* — The presumptions as to life, death, and survivorship are fully discussed elsewhere.[39]

e. *Condition of Mind.* — Whether a condition or state of mind once proved to exist is presumed to continue depends upon whether it is continuous in its nature.[40] Thus, insanity of a permanent character is presumed to continue until the contrary appears,[41] while temporary insanity or derangement of mind is not presumed to continue at all.[42]

ing to the creeds of some religious denominations, he was born under the cloud of original sin. Fish, J., . . . in Bennett *v.* State, 103 Ga. loc. cit. 67, 68, said: 'There is no presumption of law or of fact that a man or woman is single, nor any presumption to the contrary. There is no presumption that a man is not a member of the church, or of the masonic or any other order, simply because he was not a member in early life. Nor can it be inferred that a man is uneducated from the fact that such was his original condition. Yet there is as much reason for a presumption in such cases as there is for presuming that a man is unmarried because that must necessarily have been his first state. It may be that at a fixed age a majority of persons are single, and that at a more advanced age a majority are married, but it would be very uncertain and unreliable to presume that a particular individual of either age was single or that he was married. Moreover, why should a man in a civilized community, who is competent to marry, be presumed not to have entered into a contract of marriage, when no presumption arises that he has not entered into any other kind of a contract?'" See also Vought *v.* Williams, 120 N. Y. 253, 24 N. E. 195, 17 Am. St. Rep. 634, 8 L. R. A. 591. But see Lackland *v.* Nevins, 3 Mo. App. 335; Gaunt *v.* State, 50 N. J. L. 490, 14 Atl. 600.

37. Although a person when last heard of was unmarried and has been absent long enough to raise a legal presumption of his death, there is no presumption that he died childless where property rights depend upon this fact. Still *v.* Hutto, 48 S. C. 415, 26 S. E. 713. But see article "DESCENT AND DISTRIBUTION," Vol. IV, p. 578, n. 10 and cases cited. See also the following cases: Stinchfield *v.* Emerson, 52 Me. 465, 83 Am. Dec. 524; Hammond *v.* Inloes, 4 Md. 138; *Re* Webb, 5 I. R. Eq. 235.

38. See Hays *v.* Tribble, 3 B. Mon. (Ky.) 106; Sprigg *v.* Moale, 28 Md. 497; Campbell *v.* Reed, 24 Pa. St. 498.

39. See article "DEATH AND SURVIVORSHIP."

40. It is presumed that a parent who has made large advancements to his children continued to intend on his death intestate that the children should all be brought into account so that they should share equally in his estate. Oller *v.* Bonebrake, 65 Pa. St. 338.

Feeble-Mindedness. — Where it appeared that a party was feeble-minded in the spring of a certain year, it was held that it would be presumed in the absence of evidence to the contrary that this condition continued until August of the same year. Stumph *v.* Miller, 142 Ind. 442, 41 N. E. 812.

Temporary Hallucination. — There is no presumption of law as to the continuance of a temporary hallucination or delusion resulting from disease. Staples *v.* Wellington, 58 Me. 453.

Presumptions as to Continuance of Malice. — See article "HOMICIDE," Vol. VI, p. 591.

41. See fully article "INSANITY," Vol. VII, p. 462.

42. See fully article "INSANITY," Vol. VII, p. 463.

f. *Solvency or Insolvency.* — Solvency[43] or insolvency[44] once shown is presumed to continue for a reasonable time thereafter.

g. *Contract.* — Contract relations having been proved are presumed to have continued until shown to have been terminated.[45]

I. Office. — Where it has been shown that a particular individual was holding an office or place, it is presumed that he continued to hold the same during the prescribed term or until he was legally discharged.[46] This rule applies to officers of a corporation.[47] But there is no presumption of continuance beyond the regular term,[48] nor does the presumption operate retrospectively.[49]

J. Residence and Domicil. — Domicil in a particular place or state, having been established, is presumed to continue unchanged

43. See Walrod *v.* Ball, 9 Barb. (N. Y.) 271.

Accounts having once been shown to be good and collectable are presumed to have continued so by virtue of the principle that a thing once proved to exist is presumed to continue as long as is usual with things of that nature. Thornton-Thomas Mercantile Co. *v.* Bretherton, 32 Mont. 80, 80 Pac. 10; *citing* Code Civ. Proc. § 3266, cl. 32.

44. Mullen *v.* Pryor, 12 Mo. 307. See article "Insolvency," Vol. VII, p. 482.

The presumption that bankruptcy shown to exist at a certain date continued for five months thereafter is a very slight one, although in the absence of evidence to the contrary it would be controlling. The general presumption of continuance is merely one of fact and its effect depends on the nature of the matter or condition in question relative to its permanency and uniformity. For this reason such a presumption must in some cases be confined to a limited range of time. Donahue *v.* Coleman, 49 Conn. 464.

Where the solvency or insolvency of a debtor is the point in issue, if it is shown that he had no property in November of a particular year it will be presumed that this condition continued until December of the following year. Adams *v.* Slate, 87 Ind. 573. See also article "Insolvency."

45. Love *v.* Edmonston, 27 N. C. 354. See also Spencer *v.* McDonald, 22 Ark. 466; Burlington Ins. Co. *v.* Threlkeld, 60 Ark. 539, 31 S. W. 265; Eames *v.* Eames, 41 N. H. 177; Hensel *v.* Maas, 94 Mich. 563, 54 N. W. 381; McCullough *v.* Phœnix Ins. Co., 113 Mo. 606, 21 S. W. 207; The Tribune, 3 Sumn. 144, 24 Fed. Cas. No. 14,171.

Indebtedness. — When a fact is proved which is in its nature continuous, the general rule is that it is presumed to exist until the contrary is shown; hence a debt being proved by showing an admission, the fact that it had not become payable at the time its existence was admitted does not take the case out of the general rule. Farr *v.* Payne, 40 Vt. 615. See also Carder *v.* Primm, 52 Mo. App. 102; State *v.* McAlpin, 26 N. C. 140.

46. *England.* — Rex *v.* Budd, 5 Esp. 230; Steward *v.* Dunn, 1 D. & L. 642, 8 Jur. 218, 13 L. J. Ex. 324, 12 M. & W. 655.

Arkansas. — Kaufman *v.* Stone, 25 Ark. 336; Norris *v.* State, 22 Ark. 524.

Maine. — Sawyer *v.* Knowles, 33 Me. 208.

Michigan. — Kinyon *v.* Duchene, 21 Mich. 498.

Missouri. — Sisk *v.* American Cent. F. Ins. Co., 95 Mo. App. 695, 69 S. W. 687.

New Hampshire — Lucier *v.* Pierce, 60 N. H. 13.

47. Sisk *v.* American Cent. F. Ins. Co., 95 Mo. App. 695, 69 S. W. 687; Mason *v.* Belfast Hotel Co., 89 Me. 381, 36 Atl. 622.

48. Urmston *v.* State, 73 Ind. 175.

49. Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302. See *infra*, III, 8.

till the contrary appears.[50] The same rule applies to residence[51] except that there is perhaps a limit to the length of time it is presumed to continue.[52]

K. Occupation and Employment. — Occupation once shown is presumed to continue the same for a reasonable time at least,[53] but a particular employment cannot be presumed to continue for several years.[54]

L. Habits and Customs. — Habits[55] and customs[56] shown to have existed are presumed to have continued.

50. Chicopee *v.* Whately, 6 Allen (Mass.) 508. See fully articles "Domicil" and "Paupers."

51. Residence or non-residence is a fact in its nature continuous, and when once proved to exist will be presumed to continue until the contrary is made to appear. Daniels *v.* Hamilton, 52 Ala. 105. Residence of a party in another state at a given time having been proved, the presumption unless rebutted is that it continues. Nixon *v.* Palmer, 10 Barb. (N. Y.) 175. It being proved that a person was seventeen years ago a resident of another state, the law presumes that residence still to continue until the presumption is overthrown by other testimony. Prather *v.* Palmer, 4 Ark. 456. Proof that a person was a non-resident at the time he made a contract or when the cause of action thereon accrued raises a presumption of continued absence from the state, in the absence of evidence to the contrary. State Bank *v.* Seawell, 18 Ala. 616; Rixford *v.* Miller, 49 Vt. 319.

Continued Residence of Deponent outside the jurisdiction in which his deposition has been used. See article "Depositions," Vol. IV, p. 520.

52. Where it is shown that a person was residing at a certain place at a certain time, the presumption is that he continued to reside there. "The presumption is one of fact, or perhaps a mixed presumption, that is, a presumption of fact recognized by the law. And for how long any man's residence should be presumed to continue unchanged must depend upon the circumstances and the judgment of the tribunal which is to draw a deduction from the circumstances. The less the opportunity to obtain evidence of actual continuance of residence, the stronger may the presumption be." Greenfield *v.* Camden, 74 Me. 56.

53. Occupation as Gambler. Where it appeared that a petitioner for letters of administration was a professional gambler twenty months before filing his petition, it was held that in the absence of further evidence it would be presumed that his employment continued the same. McMahon *v.* Harrison, 6 N. Y. 443.

54. Scott *v.* Wood, 81 Cal. 398, 22 Pac. 871.

55. Leonard *v.* Mixon, 96 Ga. 239, 23 S. E. 80, 51 Am. St. Rep. 134. See also McMahon *v.* Harrison, 6 N. Y. 443; Eureka Ins. Co. *v.* Robinson, 56 Pa. St. 256, 94 Am. Dec. 65; Coxe *v.* Deringer, 82 Pa. St. 236; Pittsburg etc. F. Co. *v.* Ruby, 38 Ind. 294, 10 Am. Rep. 111; Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15; Vaughan *v.* Raleigh & G. R. Co., 63 N. C. 11.

Gross and Confirmed Habits of Intoxication are presumed to continue in the absence of evidence to the contrary, and on a libel for divorce on this ground, such habits on the part of the libellee having been proved to exist when he was last heard from, it is error for the court in the absence of any evidence as to the continuance of such habits up to the filing of the libel to dismiss the libel on the ground that there could be no presumption of the continuance of the habits sufficient to warrant a decree of divorce. McCraw *v.* McCraw, 171 Mass. 146, 50 N. E. 526.

56. Custom. — A custom proved to have existed from time immemorial until 1689 must be taken to exist still in 1840 if there be no further evidence proving or disproving its existence. Scales *v.* Key, 11 A. & E. 819, 39 E. C. L. 240.

M. Reputation. — A reputation once shown is presumed to have continued the same for at least a considerable length of time.[57]

N. Intermediate Continuance. — A fact or relation shown to exist at different dates may be of such a nature that its continuance during the intervening period may be legally presumed; as, for instance, the possession of real estate,[58] or chattels[59] by a particular person, or the existence of a partnership.[60]

O. Continuance in Future. — There is no presumption that a fact or state of things shown to exist will continue to exist in the future.[61] But of course many facts are of such a nature that their continuance unchanged may be inferred or assumed.[62]

P. Retrospective Operation of Presumption. — Although the subsequent continuance of a fact continuous in its nature is presumed, this presumption does not operate retrospectively, that is, there is no legal presumption that a fact or state of things shown to exist at a particular time was in existence prior thereto.[63] Not-

57. State *v.* Chittenden, 112 Wis. 569, 88 N. W. 587; Scammon *v.* Scammon, 28 N. H. 419; Wood *v.* Matthews, 73 Mo. 477.

The presumption in favor of the continuance of an established status obtains with regard to a witness's reputation for truth, notwithstanding the lapse of three years. Lum *v.* State, 11 Tex. App. 483, 502. This presumption is applicable, within reasonable limits, to the character of a witness proved to have once sustained a bad reputation for truth and veracity; hence the character of a witness may be impeached by persons in whose neighborhood he had lived until four years prior to the trial, though he had then removed to another place where he had since resided, and the witnesses do not know the character which he bore at the latter place. Sleeper *v.* Middlesworth, 4 Denio (N. Y.) 431.

58. See article "Adverse Possession," Vol. I, p. 669, cases in note 56.

Possession Between Given Dates. In ejectment where defendant was shown to be in possession of the premises both shortly before and shortly after the commencement of the action, the law will presume that the same state of facts existed during the intermediate period, unless the contrary is shown. Eaton *v.* Woydt, 26 Wis. 383.

59. Where upon the trial of an issue of fraud *vel non* in obtaining a discharge in bankruptcy it is shown that five years before the filing of his petition the bankrupt was the owner of a certain slave which was not rendered in his schedule, and that four years after his discharge the same slave was in his possession, the law raises the presumption that he was the owner of the slave during the interim, and devolves upon him the necessity of showing by competent proof that such was not the fact. The possession or ownership, however, of the slave several years previous to the application for the discharge in bankruptcy raises no presumption of ownership at the time of the application. Powell *v.* Knox, 16 Ala. 364.

60. Garner *v.* Green, 8 Ala. 96.

61. Covert *v.* Gray, 34 How. Pr. (N. Y.) 450. See also Strong *v* Strong, 1 Abb. Pr. (N. S.) 233.

62. Evidence of present existence and condition is constantly used as a basis of inference as to what the future will be.

63. *Canada.* — Cullen *v.* Voss, 15 N. B. 464.

Arkansas. — Butler *v.* Henry, 48 Ark. 551, 3 S. W. 878.

Iowa. — State *v.* Dexter, 115 Iowa 678, 87 N. W. 417.

Kentucky. — Hyatt *v.* James, 2 Bush 463, 92 Am. Dec. 505.

Massachusetts. — Hingham *v.* South Scituate, 7 Gray 229.

Michigan. — Blank *v.* Livonia Twp., 79 Mich. 1, 44 N. W. 157.

New Jersey. — Dixon *v.* Dixon, 24 N. J. Eq. 133.

North Carolina. — Jarvis *v.* Van-

withstanding this rule, however, there is often a very strong inference as to a previous state of facts arising from proof of their subsequent state or condition, and this is the basis for the admission of evidence of subsequent condition, conduct, and statements.[64]

9. Conformity With Law and Duty. — A. GENERALLY. — The general maxim that all things are presumed to have been rightly done is applied in many ways in the form of variously expressed presumptions,[65] all in effect amounting to the same thing, that mis-

derford, 116 N. C. 147, 21 S. E. 302.

Texas. — Henderson *v.* Lindley, 75 Tex. 185, 12 S. W. 979.

Vermont. — Martyn *v.* Curtis, 67 Vt. 263, 31 Atl. 296.

Wisconsin. — Body *v.* Jewsen, 33 Wis. 402.

Statutes of a foreign state passed in 1852 raise no presumption as to the law of that state in 1845. "The production of the statutes of another state may raise the presumption that the law has continued to be the same as at the date of their passage, until an amendment or appeal is shown, but it cannot run retrospectively." State *v.* Armstrong, 4 Minn. 335. There is no presumption that a person shown to be qualified to act as justice at a particular date was qualified to act in such capacity at a period anterior to that date. Barelli *v.* Lytle, 4 La. Ann. 557. Where a woman is shown to be married at a particular time there is no presumption that she was married previous to that time, the presumption of coverture not being retrospective. Erskine *v.* Davis, 25 Ill. 228.

Insolvency at a particular date raises no presumption of insolvency five years previous thereto. Windhaus *v.* Bootz, 92 Cal. 617, 28 Pac. 557. But see McCormick *v.* Joseph, 77 Ala. 236; Emmerich *v.* Hefferan, 58 N. Y. Super. 217, 9 N. Y. Supp. 801.

For a Statute apparently making a presumption operate retrospectively, see Dohan *v.* Wilson, 14 La. Ann. 353. See also Dugas *v.* Estiletts, 5 La. Ann. 559; Gaulden *v.* Lawrence, 33 Ga. 159.

64. See McCormick *v.* Joseph, 77 Ala. 236, and article "INTENT." But see Murdock *v.* State, 68 Ala. 567.

In Sandiford *v.* Hempstead, 97 App. Div. 163, 90 N. Y. Supp. 76, where one of the questions in issue was the condition of the beach and inlets at a certain point on the coast, it is said in the opinion of the referee, which was approved, that "It is a fair presumption that the constant changing and shifting in the various inlets which the proof shows now goes on was going on in 1725."

65. See the following cases:

England. — King *v.* Hawkins, 10 East 211; Williams *v.* East India Co., 3 East 192; Middleton *v.* Barned, 4 Ex. 241, 18 L. J. Ex. 433.

United States. — Moses *v.* United States, 166 U. S. 571; Bank of United States *v.* Dandridge, 12 Wheat. 64.

Arkansas. — Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262.

California. — Case *v.* Case, 17 Cal. 598; Fisher *v.* McInerney, 137 Cal. 28, 69 Pac. 622, 907, 92 Am. St. Rep. 68.

Colorado. — Knight *v.* Lawrence, 19 Colo. 425, 36 Pac. 242.

Connecticut. — Skiff *v.* Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102.

Illinois. — J. Walter Thompson Co. *v.* Whitehead, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51; Hinchman *v.* Whetstone, 23 Ill. 108; Diefenthaler *v.* Hall, 96 Ill. App. 639; Russell *v.* Baptist Theo. Union, 73 Ill. 337.

Indiana. — Louisville, N. A. & C. R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; Palmer *v.* Logansport & R. C. G. R. Co., 108 Ind. 137, 8 N. E. 905.

Iowa. — Campbell *v.* Polk Co., 3 Iowa 467; *In re* Edwards, 58 Iowa 431, 10 N. W. 793.

Kentucky. — Kenton Co. Ct. *v.* Bank Lick Tpk. Co., 10 Bush 529.

Louisiana. — Greenwood *v.* Lowe, 7 La. Ann. 197; Selby *v.* Bass, 19 La. 499.

Maine. — Baxter *v.* Ellis, 57 Me.

conduct and illegality of any kind will not ordinarily be presumed but must be proved. It is presumed that men have acted honestly and in good faith and in conformity with the law and their duty

178; Sweetser *v.* Boston & M. R. Co., 66 Me. 583; McClinch *v.* Sturgis, 72 Me. 288; Hall *v.* Otis, 77 Me. 122.

Maryland. — Brewer *v.* Bowersox, 92 Md. 567, 48 Atl. 1060; Calvert *v.* Carter, 18 Md. 73.

Michigan. — Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430; Thayer *v.* McGee, 20 Mich. 195; *In re* King's Estate, 94 Mich. 411, 54 N. W. 178.

Minnesota. — Deering & Co. *v.* Peterson, 75 Minn. 118, 77 N. W. 568.

Mississippi. — Wilkie *v.* Collins, 48 48 Miss. 496.

Missouri. — State *v.* Hannibal etc. R. Co., 113 Mo. 297, 21 S. W. 14; Glover *v.* American Cas. etc. Ins. Co., 130 Mo. 173, 32 S. W. 302; Osborn *v.* Weldon, 146 Mo. 185, 47 S. W. 936; Bluedorn *v.* Missouri Pac. R. Co., 108 Mo. 439, 18 S. W. 1103; 32 Am. St. Rep. 615; Sheffield *v.* Balmer, 52 Mo. 474, 14 Am. Rep. 430.

Nebraska. — Richards *v.* Kountze, 4 Neb. 200.

New Hampshire. — Taylor *v.* Jones, 42 N. H. 26.

New Jersey. — Gillette *v.* Ballard, 25 N. J. Eq. 491; State *v.* Van Winkle, 25 N. J. L. 73.

New York. — Hartwell *v.* Root, 19 Johns. 345, 10 Am. Dec. 232; Spaulding *v.* Arnold, 125 N. Y. 194, 26 N. E. 295; Matter of Frazer, 92 N. Y. 239; Green *v.* Benham, 57 App. Div. 9, 68 N. Y. Supp. 248; People *v.* Minck, 21 N. Y. 539.

Ohio. — Titus *v.* Lewis, 33 Ohio St. 304.

Oregon. — McEwen *v.* Portland, 1 Or. 300.

Pennsylvania. — Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 52 Am. Rep. 468; Stewart's Estate, 149 Pa. St. 111, 24 Atl. 174.

South Carolina. — Habersham *v.* Hopkins, 4 Strob. L. 238, 53 Am. Dec. 676.

Tennessee. — Sheafer *v.* Mitchell, 109 Tenn. 181, 71 S. W. 86; Singer Mfg. Co. *v.* Jenkins (Tenn. Ch.), 59 S. W. 660.

Vermont. — Childs *v.* Merrill, 66 Vt. 302, 29 Atl. 532.

Washington. — Hays *v.* Hill, 23 Wash. 730, 63 Pac. 576.

Wisconsin. — Muster *v.* Chicago, M. & St. P. R. Co., 61 Wis. 325, 21 N. W. 223, 50 Am. Rep. 141; Farmers' & Millers' Bank *v.* Detroit & M. R. Co., 17 Wis. 372.

A breach of the law cannot be presumed, but on the contrary the presumption is that every person has conformed to the law until the contrary appears by evidence. Horan *v.* Weiler, 41 Pa. St. 470. Hence where a contract stipulates for ten per cent. interest on money advanced it will be presumed that the indebtedness was on the account of money loaned, in which case only the statute allowed such a high rate of interest. Sutphen *v.* Cushman, 35 Ill. 186.

It will not be presumed that the reading of the Bible in a public school has taken the form of sectarian instruction contrary to law. State *v.* Scheve, 65 Neb. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927.

In an action to recover the value of property of the plaintiff stolen while he was dining at the defendant's restaurant in which it was proved that liquors were sold, the court will take judicial notice that liquors could not be legally sold there unless under a license and that such licenses could be issued only to persons keeping an inn, and will presume in the absence of evidence to the contrary that defendants are innkeepers and liable as such for the property of guests, since it could not be presumed that they were deliberately violating the law. Korn *v.* Schedler, 11 Daly (N. Y.) 234.

Where nothing appears to the contrary the presumption is in favor of the legality of contracts and the legal action of contracting parties. Scottish Commercial Ins. Co. *v.* Plummer, 70 Me. 540. (But this seems to be merely another way of stating that the burden of proof is

and obligations. This presumption, however, is a very general and indefinite one and is likely to be misapplied.[66]

on the party asserting the illegality.)

Where a corporation may acquire lawfully a certain kind of property, the presumption of law in an action brought by the corporation as owner thereof is that it was so acquired where the manner of its acquisition does not appear from the complaint. Farmers' & Millers' Bank *v.* Detroit & M. R. Co., 17 Wis. 372, 383. So a proper legitimate purpose will be presumed on the part of a corporation accepting a conveyance of land, in the absence of any evidence to the contrary. Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656.

In a suit on a contract brought by a foreign corporation not authorized to do business in the state where the suit is brought, if it does not appear where the contract was executed, it will be presumed that it was executed in another state and that the corporation has not violated the laws of the domestic state. Friend *v.* Smith Gin Co., 59 Ark. 86, 26 S. W. 374; *citing* Railway Co. *v.* Fire Ass'n, 55 Ark. 163, 18 S. W. 43.

The presumption is, until the contrary is shown, that a building and loan association complied with its by-laws requiring competitive bidding for its stock. Farmers' Sav. & Bldg. & L. Ass'n *v.* Ferguson, 69 Ark. 352, 63 S. W. 797.

A corporation is presumed to have followed the method of acquiring land by eminent domain prescribed in its charter. White *v.* Barlow, 72 Ga. 887.

Legal notice of a corporation meeting is presumed to have been given to the stockholders. New Orleans, J. & G. N. R. Co. *v.* Lea, 12 La. Ann. 388.

There is always a presumption in favor of honesty and fair dealing, and this is a general legal presumption. Hence a passenger killed while riding on a railway train, who had been riding on it for several hours and in whose pockets was found a conductor's check, is presumed to have been on the train rightfully, notwithstanding the fact that he had on his person a non-transferrable pass issued to another person. Louisville, N. A. & C. R. Co. *v.* Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. St. Rep. 120. See also Pennsylvania R. Co. *v.* Books, 57 Pa. St. 339, 98 Am. Dec. 229, and article, "CARRIERS," III, p. 904, n. 26.

Where the plaintiff reads to the jury as evidence a statement in the handwriting of the defendant without accounting for his possession of it, in the absence of proof to the contrary the legal presumption is that he obtained it fairly in the course of business. Hazen *v.* Henry, 6 Ark. 86.

The law presumes that all acts are done in good faith until there is evidence to the contrary, and color of title is presumed to have been thus acquired until it is shown to have been acquired otherwise. McCagg *v.* Heacock, 34 Ill. 476, 85 Am. Dec. 327.

An attorney is entitled to the benefit of the rule that everyone shall be presumed to have discharged his legal and moral obligations until the contrary is made to appear. Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262.

In an action against a railway company by an employe for injuries caused by the throwing of a mail bag from a train, the evidence showed that the bag was thrown either from the mail car, express car or baggage car, on a train by a person within the car. The bag could not lawfully have been in any other than the mail car and no person other than a postal clerk or agent could lawfully enter such car or throw the bag therefrom. It was held that in the absence of evidence to the contrary it would be presumed that the bag was thrown from the mail car by a postal clerk or agent. Muster *v.* Chicago, M. & St. P. R. Co., 61 Wis. 325, 21 N. W. 223, 50 Am. Rep. 141.

66. "The founding of one presumption on another, such as the law presumes that every man does his duty, and therefore the law presumes this man did so and so, is not

Where Possession might be either legal, or illegal, it will be presumed to be legal.[67]

B. AGENTS AND TRUSTEES are presumed to have acted honestly.[68] This rule is applied to the conduct of executors and administrators.[69] But it has been held that there is no legal presumption that the duties of a private agency have been faithfully performed.[70]

C. FUTURE MISCONDUCT. — It cannot be presumed that a person will violate the law, or his legal obligations.[71]

a safe mode of stating presumptions to a jury, where there is any chance of misapplying the wider presumption to some other part of the case. The presumption that every man does his duty is liable to great abuse. On it alone the jury might by a blunder always find for the defendant." Terry *v.* Rodahan, 79 Ga. 278, 291, 5 S. E. 38, 11 Am. St. Rep. 420. And see Ward *v.* Metropolitan L. Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80.

67. If a bond is in the custody of a person acting in a legal and an illegal capacity, his act as custodian of the bond will be referred to his legal character. McLean *v.* State, 8 Heisk. (Tenn.) 22.

Where one makes a deed of trust conveying certain slaves and holds possession of them after the execution thereof, it will be presumed in the absence of evidence to the contrary that he holds in that capacity in which by law he should hold. Wade *v.* Green, 3 Humph. (Tenn.) 547, 557.

Every Possession Is Presumed To Be Lawful. — Bradshaw *v.* Ashley, 14 App. D. C. 485, 506, approved on appeal 180 U. S. 49, where the court holds that proof of undisturbed and quiet possession raises a presumption of title in favor of the plaintiff in ejectment.

68. The presumption of law is that an agent has done his duty until the contrary appears. Misconduct and negligence will not in the absence of proof be presumed. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316. See also Whisten *v.* Brengal, 35 N. Y. 813; Harding *v.* Field, 35 N. Y. 399; Hall *v.* Otis, 77 Me. 122.

A servant is presumed to have acted in good faith and turned over moneys which it was his duty to collect for his master. Turner *v.* Kouwenhoven, 100 N. Y. 115, 2 N. E. 637. But see Carder *v.* Primm, 47 Mo. App. 301, 52 Mo. App. 102.

Reconveyance by Trustee. Where land has been conveyed to a trustee and the conditions upon which the trust was to be executed have become impossible, it is presumed that a reconveyance has been made, but this presumption is disputable and is overcome by evidence to the contrary. Lincoln *v.* French, 105 U. S. 614.

69. Administrators. — Price *v.* Springfield Real-Estate Ass'n, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595. See also Potter *v.* Titcomb, 7 Me. 302.

Administrators and trustees are presumed to have performed their duties and not to have committed breaches of trust. So also the presumption is that the acts of an executor were legal and all done in good faith. McCreery *v.* First Nat. Bank, 55 W. Va. 663, 47 S. E. 890.

Where an administrator continues to act as such after his final discharge, the presumption is that the order of discharge had been revoked or set aside. Bayne *v.* Garrett, 17 Tex. 330; *citing* Townsend *v.* Munger, 9 Tex. 300; Poor *v.* Boyce, 12 Tex. 440.

70. Ward *v.* Metropolitan L. Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80.

71. Gallagher *v.* Flury, 99 Md. 181, 57 Atl. 672. See also District Attorney *v.* Lynn & B. R. Co., 16 Gray (Mass.) 242.

In a suit by an abutting owner to enjoin the construction of a railroad it will not be presumed that the railroad company will violate its contract with the municipal board of public works, and an allegation in

D. Presumption of Innocence. — a. *In Criminal Cases.* **(1.) Generally.** — The defendant in a criminal case is on the trial thereof presumed to be innocent of the crime charged until his guilt is established beyond a reasonable doubt,[72] and he is entitled to an instruction to this effect.[73] This presumption, however, extends only to the main, vital fact in issue and as to certain collateral facts, such as his sanity and his intention. Other presumptions unfavorable to him may arise,[74] but these incidental presumptions

the complaint that it intends to do so cannot prevail against the presumption of good faith and fair dealing. Mordhurst *v.* Ft. Wayne & S. W. Traction Co., 163 Ind. 268, 71 N. E. 642, 106 Am. St. Rep. 222, 66 L. R. A. 105.

If a contract can be performed without any violation of law "then it is only a natural and legal presumption that it will be so performed, or at least there is no legal presumption that it will not be so performed." Sheffield *v.* Balmer, 52 Mo. 474, 14 Am. Rep. 430.

72. *United States.* — Agnew *v.* United States, 165 U. S. 36; United States *v.* Gooding, 12 Wheat. 460.

Alabama. — Ogletree *v.* State, 28 Ala. 693; Rogers *v.* State, 117 Ala. 192, 23 So. 82; Newsom *v.* State, 107 Ala. 133, 18 So. 206.

Arkansas. — McArthur *v.* State, 59 Ark. 431, 27 S. W. 628; State *v.* Prescott, 31 Ark. 39.

California. — People *v.* O'Brien, 106 Cal. 104, 39 Pac. 325; People *v.* Arlington, 131 Cal. 231, 63 Pac. 347.

Connecticut. — State *v.* Smith, 65 Conn. 283, 31 Atl. 206.

Florida. — Long *v.* State, 42 Fla. 509, 28 So. 775.

Georgia. — Campbell *v.* State, 100 Ga. 267, 28 S. E. 71; Dorsey *v.* State, 110 Ga. 331, 35 S. E. 651.

Illinois. — Schintz *v.* People, 178 Ill. 320, 52 N. E. 903.

Indiana. — Line *v.* State, 51 Ind. 172; Aszman *v.* State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33.

Iowa. — Tweedy *v.* State, 5 Iowa 433.

Kansas. — Horne *v.* State, 1 Kan. 42, 81 Am. Dec. 499.

Kentucky. — Graham *v.* Com., 16 B. Mon. 587.

Maine. — State *v.* Tibbetts, 35 Me. 81.

Massachusetts. — Com. *v.* Dana, 2 Metc. 329; Com. *v.* Webster, 5 Cush. 295, 320, 52 Am. Dec. 711.

Michigan. — People *v.* Garbutt, 17 Mich. 9, 97 Am. Dec. 162; People *v.* De Fore, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863.

Mississippi. — Hemingway *v.* State, 68 Miss. 371, 8 So. 317.

Missouri. — State *v.* Gonce, 79 Mo. 600; State *v.* Hugate, 27 Mo. 535.

Montana. — Territory *v.* Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

Nebraska. — State *v.* Scheve, 65 Neb. 853, 93 N. W. 169, 59 L. R. A. 927.

New Jersey. — State *v.* Wilson, 1 N. J. L. 502; Gardner *v.* State, 55 N. J. L. 17, 26 Atl. 30.

New York. — People *v.* Pallister, 138 N. Y. 601, 33 N. E. 741; People *v.* Baker, 96 N. Y. 340.

Ohio. — State *v.* Turner, Wright 21; State *v.* Thompson, Wright 617; Fuller *v.* State, 12 Ohio St. 433.

Tennessee. — Draper *v.* State, 4 Baxt. 246.

Texas. — Stapp *v.* State, 1 Tex. App. 734; Blocker *v.* State, 9 Tex. App. 279; Williams *v.* State, 35 Tex. Crim. 606, 34 S. W. 943.

Washington. — State *v.* Krug, 12 Wash. 288, 41 Pac. 126.

Wisconsin. — Fossdahl *v.* State, 89 Wis. 482, 62 N. W. 185.

A Defendant However Degraded or Abandoned is nevertheless presumed to be innocent until his guilt is proved beyond a reasonable doubt. United States *v.* Montgomery, 3 Sawy. 544, 26 Fed. Cas. No. 15,800.

73. Line *v.* State, 51 Ind. 172; Long *v.* State, 46 Ind. 582; Long *v.* State, 42 Fla. 509, 28 So. 775; Mace *v.* State, 6 Tex. App. 470. See also Blocker *v.* State, 9 Tex. App. 279; Pierce *v.* State (Tex. Crim.), 22 S. W. 587.

74. The proposition that nothing is to be presumed or taken by implication against the defendant does

do not interfere with, and overcome the general presumption of innocence.[75] The fact that the crime is statutory and no criminal intent necessary does not affect the general presumption.[76] The presumption of the innocence of a defendant charged with crime arises only on the trial and for the purposes thereof; in other proceedings after indictment the defendant is presumed to be guilty.[77]

(2.) As Affected by Relation of Parties. — No stronger or additional presumption of innocence arises from the fact that the defendant and the person injured were husband and wife, or parent and child,[78] though it has been held to the contrary.[79]

not correctly state the law. While the presumption upon the main vital fact in issue, the guilt or innocence of the defendant, whether he did the very act charged against him, is always in favor of innocence; it cannot be said that nothing is to be presumed or taken by implication against him as to collateral facts affecting the main question of guilt or innocence. The presumption of law is often against the accused. As for instance he is presumed to be sane, to have intended the natural consequences of his acts, from the perpetration of a fraudulent act to have had a fraudulent intent, etc. Thalheim *v.* State, 38 Fla. 169, 20 So. 938.

75. A statute making the finding of any implements commonly used in games of chance, usually played in gambling houses or by gamblers, *prima facie* evidence that the house or place where the same are found is kept for the purpose of gambling does not have the effect to deprive a person charged with keeping and maintaining a room for the purpose of gambling of the benefit and protection of the presumption of innocence which remains with every man on trial for crime as long as there is reasonable doubt of his guilt. Houston *v.* State, 24 Fla. 356, 5

76. The presumption of innocence in a criminal case exists whether the crime charged be a statutory one or a common law offense, and even in the case of a statutory misdemeanor where intent is not an element of the offense charged. People *v.* Potter, 89 Mich. 353, 50 N. W. 994.

77. *Ex parte* Ryan, 44 Cal. 555. See also People *v.* Dixon, 3 Abb. Pr. (N. Y.) 395; State *v.* Sheriff. 40 La. Ann. 3, 3 So. 350; *In re* White, 9 Ark. 222.

An indictment for a capital offense of itself furnishes a presumption of guilt for all purposes except the trial before a petit jury. People *v.* Tinder, 19 Cal. 539, 81 Am. Dec. 77; State *v.* Mills, 13 N. C. 420; Hight *v.* United States, 1 Morris (Iowa) 407, 510. Nor can affidavits or oral testimony as to the guilt or innocence of the accused be received to repel the presumption of guilt arising from the indictment in capital cases except under special and extraordinary circumstances. People *v.* Tinder, 19 Cal. 539, 81 Am. Dec. 77.

On *certiorari* to review the refusal of bail to one indicted for murder, it will be presumed in the absence of evidence to the contrary that "the proof of guilt is evident or the presumption great," the constitution providing "'that all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.'" State *v.* Madison County Court, 136 Mo. 323, 37 S. W. 1126.

78. Hawes *v.* State, 88 Ala. 37, 7 So. 302.

"There is no more reason why a married man accused of the murder of his wife, should have this two-ply presumption thrown around him, than a single man charged with the murder of his sister or his brother, father or mother. Whence I conclude, that an old-fashioned one-ply presumption of innocence is amply sufficient for all practical purposes of the administration of the criminal law." State *v.* Soper, 148 Mo. 217, 49 S. W. 1007, *overruling* State *v.* Leabo, 84 Mo. 168, 54 Am. Rep. 91, and State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

79. On a prosecution of a hus-

(3.) Duration of Presumption. — The presumption of innocence continues throughout the trial or until the guilt of the accused has been established beyond any reasonable doubt.[80] It does not cease with the submission of the case to the jury but must be considered by them in their deliberations until they are satisfied of the defendant's guilt beyond reasonable doubt.[81] The establishment of

band for murdering his wife there is an additional presumption that he did not murder her arising from the nature of the relation. "This presumption is in addition to, and to be distinguished from, the legal presumption of innocence that exists in every case in favor of a party charged with the commission of crime; and in cases where both presumptions exist, the public prosecutor must overcome the force of both, and establish the contrary fact, before the accused can be found guilty." State *v.* Green, 35 Conn. 203. See also State *v.* Watkins, 9 Conn. 47, 21 Am. Dec. 712; State *v.* Hossack, 116 Iowa 194, 89 N. W. 1077; People *v.* Hendrickson, 8 How. Pr. (N. Y.) 404; People *v.* Greenfield, 23 Hun 454, *affirmed* in 85 N. Y. 75, 39 Am. Rep. 636.

80. *United States.* — Allen *v.* United States, 164 U. S. 492.

Alabama. — Bryant *v.* State, 116 Ala. 445, 23 So. 40.

Florida. — Reeves *v.* State, 29 Fla. 527, 10 So. 901.

Kansas — Horne *v.* State, 1 Kan. 42, 81 Am. Dec. 499.

Massachusetts. — Com. *v.* Clancy, 187 Mass. 191, 72 N. E. 842.

Michigan. — People *v.* McWhorter, 93 Mich. 641, 53 N. W. 780; People *v.* Potter, 89 Mich. 353, 50 N. W. 994.

Nebraska. — Edwards *v.* State, 95 N. W. 1038; Van Syoc *v.* State, 96 N. W. 266.

The presumption of innocence does not cease when evidence has been introduced. McVey *v.* State, 55 Neb. 777, 76 N. W. 438.

81. People *v.* O'Brien, 106 Cal. 104, 39 Pac. 325; People *v.* Arlington, 131 Cal. 231, 63 Pac. 347.

The presumption of innocence in a criminal case accompanies the defendant throughout the trial and must be considered by the jury during their examination of the evidence until they are satisfied beyond a reasonable doubt of the defendant's guilt. People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390; People *v.* McNamara, 94 Cal. 509, 29 Pac. 953.

The presumption of innocence attends the accused from the beginning to the end of the trial. Emery *v.* State, 101 Wis. 627, 660, 78 N. W. 145; Farley *v.* State, 127 Ind. 419, 26 N. E. 898. But in Waters *v.* State, 117 Ala. 108, 22 So. 490, it is held that the presumption of innocence does not necessarily attend the defendant throughout the whole trial, but only until it is overturned by evidence which convinces the jury of guilt beyond a reasonable doubt.

An instruction that the presumption of innocence continues with the defendant throughout all stages of the trial until the case has been finally submitted to the jury, and the jury has found that this presumption has been overcome by the evidence beyond a reasonable doubt, is not open to the objection that it misleads the jury into thinking that the presumption only continues until the case has been submitted to the jury, nor would it have been open to this objection if the court had stopped with the expression "until the case has been finally submitted to the jury," for everything that is submitted to the jury goes with them into their deliberations, and a juror who could be so dull as to "conclude that this presumption of innocence ceased before it would avail the defendant anything, would be so dull as to be absolutely irresponsive to any intelligent instruction at all." State *v.* Krug, 12 Wash. 288, 41 Pac. 126.

a *prima facie* case by the prosecution does not remove this presumption.[82] In some jurisdictions, however, a presumption of guilt is said to arise from the possession of stolen goods,[83] or from flight,[84] and it has been held that in a murder case the possession of articles apparently taken from the deceased raised a presumption of guilt.[85]

(4.) Distinction Between Presumption of Innocence and Requirement of Proof Beyond Reasonable Doubt. — The presumption of innocence is held to be a separate and distinct proposition from the requirement that the defendant's guilt must be proved beyond a reasonable doubt, and, therefore, the accused is entitled to an instruction on both points;[86] though it has been held that an instruction on the

82. The establishment of a *prima facie* case by the prosecution does not take away from the defendant the presumption of innocence, but that presumption remains in aid of any other proofs by the defendant, and it is error for the court to instruct the jury that after a *prima facie* case against him has been made he must restore himself to the presumption of innocence. Com. *v.* Kimball, 24 Pick. (Mass.) 366.

In a criminal case the establishment of a *prima facie* case does not as in a civil case take away from the defendant the presumption of innocence, "but leaves that presumption to operate, in connection with, or in aid of, any proofs offered by him to rebut or *impair* the *prima facie* case thus made out by the State. A circumstance, *aided by that presumption* may so far rebut or *impair the prima facie* case, as to render a conviction upon it improper." Ogletree *v.* State, 28 Ala. 693.

Although by statute certain facts are made presumptive evidence against the defendant in a criminal case, if he denies them the matter is put at large and the jury must be satisfied beyond a reasonable doubt. State *v.* Rogers, 119 N. C. 793, 26 S. E. 142.

83. See article "LARCENY," Vol. VIII.

84. State *v.* MaFoo, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414.

85. Possession of the fruits of crime recently after its commission justifies the inference that the possession is guilty possession, and though only *prima facie* evidence of guilt may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence. Wilson *v.* United States, 162 U. S. 613, in which the trial court instructed the jury that they might consider that there was a presumption arising from the possession of the property of one recently murdered and that they might act upon it unless it were rebutted by the evidence.

86. Cochran *v.* United States, 157 U. S. 286; Reeves *v.* State, 29 Fla. 527, 10 So. 901; People *v.* Van Houter, 38 Hun (N. Y.) 168; Franklin *v.* State, 92 Wis. 269, 66 N. W. 107. See also Fossdahl *v.* State, 89 Wis. 482, 62 N. W. 185.

The presumption of innocence in favor of the accused in a criminal case is a separate and distinct thing from the requirement that his guilt be proved beyond a reasonable doubt. "The presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn. . . . Concluding, then, that the presumption of innocence is evidence in favor of the accused introduced by the law

latter point is sufficient without also instructing the jury as to the presumption of innocence.[87]

b. *In Civil Cases.* — It has been held that the presumption of innocence also applies in civil cases where one party is charged with conduct of a criminal nature.[88] But this appears to be merely

in his behalf, let us consider what is 'reasonable doubt.' It is of necessity the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises; thus one is a cause, the other an effect." Consequently an instruction as to reasonable doubt does not supply the place of an instruction as to the presumption of innocence where the latter is requested. Coffin *v.* United States, 156 U. S. 432. *Citing* to the latter proposition People *v.* Macard, 73 Mich. 15, 40 N. W. 784, and Texas and Indiana cases to the same effect, but recognizing that the latter are probably based on a statute, and *citing* as contra, Morehead *v.* State, 34 Ohio St. 212. But see Coffin *v.* United States, 162 U. S. 664, a second appeal of the same case.

87. Where the court fully and properly instructs the jury on reasonable doubt, its failure to instruct that the defendant is presumed to be innocent until his guilt is established is not reversible error, although such an instruction is requested. State *v.* Kennedy, 154 Mo. 268, 288, 55 S. W. 293, where the authorities are reviewed.

The failure of the court to charge the jury as to the presumption of innocence is not error where its attention is not called to this point, and where it did fully instruct the jury that they must be convinced of the defendant's guilt beyond any reasonable doubt. People *v.* Ostrander, 110 Mich. 60, 67 N. W. 1079, following People *v.* Graney, 91 Mich. 646.

88. *England.* — Rex *v.* Twyning, 2 B. & Ald. 386.

Arkansas. — Lavender *v.* Hudgens, 32 Ark. 763.

California. — Case *v.* Case, 17 Cal. 598.

Colorado. — Lampkin *v.* Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040.

Connecticut. — Mead *v.* Husted, 52 Conn. 53, 52 Am. Rep. 554.

Georgia. — Shrophire *v.* Stevenson, 17 Ga. 622.

Illinois. — Russell *v.* Baptist Theological Union, 73 Ill. 337. But see McDeed *v.* McDeed, 67 Ill. 545.

Iowa. — Jones *v.* United States Mut. Acc. Ass'n, 92 Iowa 652, 61 N. W. 485.

Michigan. — Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238, 18 N. W. 797.

Mississippi. — Wilkie *v.* Collins, 48 Miss. 496.

Missouri. — Klein *v.* Landman, 29 Mo. 259.

New York. — Hewlett *v.* Hewlett, 4 Edw. Ch. 7; Wilcox *v.* Wilcox, 46 Hun 32.

Ohio. — Jones *v.* Greaves, 26 Ohio St. 2, 20 Am. Rep. 752.

Pennsylvania. — Horan *v.* Weiler, 41 Pa. St. 470.

Texas. — Gulf, C. & S. F. R. Co. *v.* Reed, 80 Tex. 362, 15 S. W. 1105, 26 Am. St. Rep. 749.

Vermont. — Fire Ass'n of Philadelphia *v.* Merchants' Nat. Bank, 54 Vt. 657.

Wisconsin. — Cronkhite *v.* Travelers' Ins. Co., 75 Wis. 116, 43 N. W. 731, 17 Am. St. Rep. 184.

Presumption of Innocence in Civil Cause. — "When, in the trial of a civil cause, a person is charged with fraud, dishonesty, or crime, there is a legal presumption that he is innocent, and he is entitled to have such presumption considered by the jury in connection with the evidence in the case." Childs *v.* Merrill, 66 Vt. 302, 29 Atl. 532, disapproving Weston *v.* Gravlin, 49 Vt. 507.

If in a civil action a question arises, the determination of which involves the establishment of the fact that either party has been guilty of a criminal act, the other party in order to obtain a determination of

another statement of the general proposition that honesty and lawful actions are presumed, and that the burden of proof is on the party maintaining the contrary.[89]

c. *Presumption of Chastity.* — In criminal prosecutions involving the chastity of an unmarried woman, she is presumed to have been of chaste character up to the act, or time in question, notwithstanding the presumption in favor of the defendant's innocence.[90] It has been held to the contrary, however, in some cases on the ground that the latter presumption overcomes the presumption of chastity when they are conflicting.[91]

such question in his favor must overcome by a fair balance of testimony not only the evidence introduced by the party so charged, but also the legal presumption of innocence which exists in every case. "The legal presumption is that men are not guilty of fraud and dishonesty, and more strongly, that they do not commit criminal offenses. This presumption exists no more, when a man is on trial for a criminal offense, than at any other time, or on the trial of a civil case, when an attempt is made to show that a person has committed a crime. It exists at all times, and everywhere, and is a presumption the law ever makes. Hence every man, however charged with dishonesty or fraud, or a criminal act, is always entitled to have this presumption of the law weighed in his favor, and whoever asserts the contrary, must always encounter it, and be required to overcome it by evidence." Bradish *v.* Bliss, 35 Vt. 326.

The presumption of innocence of a defendant prevails in a civil action where a judgment against him will establish his guilt of a crime, and he is entitled to an instruction that he is presumed to be innocent. Grant *v.* Riley, 15 App. Div. 190, 44 N. Y. Supp. 238.

It will be presumed that an insolvent exhibits a just account of his debts and credits, and not that he has committed perjury or intended wrong in regard to such account. Hewlett *v.* Hewlett, 4 Edw. Ch. (N. Y.) 7.

Where the Fact To Be Proved Involves Moral Delinquency, the evidence should be so strong as to exclude the presumption of innocence, for innocence is presumed until guilt is proven. Corner *v.* Pendleton, 8 Md. 337.

89. See *supra,* III, 9.

90. See article "CHASTITY," Vol. III, p. 54. In a prosecution for seduction, the previous chastity of the prosecutrix is presumed. Barker *v.* Com., 90 Va. 820, 20 S. E. 776; State *v.* Wells, 48 Iowa 671; People *v.* Squires, 49 Mich. 487, 13 N. W. 828. But where a previous illicit intimacy has been shown there is no legal presumption that she has reformed and become virtuous, from the fact of a cessation of intercourse for six months previous to the act complained of. People *v.* Squires, 49 Mich. 487, 13 N. W. 828.

On a prosecution for abduction of an unmarried female of chaste character, the legal presumption is that the person abducted was chaste, and this is true notwithstanding the presumption of the defendant's innocence. Bradshaw *v.* People, 153 Ill. 156, 38 N. E. 652; Slocum *v.* People, 90 Ill. 274.

91. On a prosecution for seduction there is no presumption of the previous chastity of the prosecutrix since this is an essential element of the state's case and must be proved. Such presumption would be incompatible with the legal presumption in favor of the innocence of the accused. West *v.* State, 1 Wis. 186; Walton *v.* State, 71 Ark. 398, 75 S. W. 1; Com. *v.* Whittaker, 131 Mass. 224.

In a prosecution for a slanderous charge of fornication, it is error to instruct that the presumption is in favor of the chastity of the prosecutrix as such presumption is incompatible with the legal presumption in favor of the innocence of the de-

d. *Character.* — The general rule, both in civil[92] and criminal[93] cases, is that character is presumed to be good in the absence of evidence to the contrary, and that the defendant in a criminal case is entitled to an instruction to this effect, applied particularly to his own character.[94] In some jurisdictions, however, it is held that in the absence of evidence there is no presumption one way or the other as to the character of the defendant in a criminal prosecution.[95]

10. Judicial Proceedings. — A. GENERALLY. — Judicial proceedings of courts of general jurisdiction are presumed to be correct and regular in the absence of anything upon their face to the con-

fendant. McArthur *v.* State, 59 Ark. 431, 27 S. W. 628.

92. See article "LIBEL AND SLANDER," Vol. VIII. p. 274, n. 47.

93. See article "CHARACTER," Vol. III, p. 34; and United States *v.* Neverson, 1 Mack. (D. C.) 152; Mullen *v.* United States, 106 Fed. 892, 46 C. C. A. 22.

94. In an action for malicious prosecution, defendant's counsel having argued to the jury that plaintiff's character was bad, it was held that the plaintiff was entitled to an instruction that the legal presumption was, in the absence of evidence to the contrary, that plaintiff's character was good. Coggans *v.* Monroe, 31 Ga. 331.

In a criminal trial in the absence of evidence on the question, the presumption is that the accused had a good character previous to his alleged commission of the offense, and he is entitled to an instruction to this effect. "If the presumption exists in favor of the accused, it cannot be available to him unless he can have an instruction advising the jury of this proposition of law. This presumption, to the extent to which it exists, though less important, is as much his right in a criminal trial as the presumption in favor of his innocence." Mullen *v.* United States, 106 Fed. 892, 46 C. C. A. 22. *Contra,* Addison *v.* People, 193 Ill. 405, 62 N. E. 235; Dryman *v.* State, 102 Ala. 130, 15 So. 433.

95. Gater *v.* State (Ala.), 37 So. 692; Dryman *v.* State, 102 Ala. 130, 15 So. 433; Danner *v.* State, 54 Ala. 127, 25 Am. Rep. 662; Knight *v.* State, 70 Ind. 375; McQueen *v.* State, 82 Ind. 72; Addison *v.* People, 193 Ill. 405, 62 N. E. 235.

There is no presumption of the defendant's good character in a criminal case outside of the presumption of innocence. "If, in the absence of evidence on the subject, the presumption of good character is to weigh as much in his favor as affirmative proof of it, the necessity of proving good character would never arise; and the prosecution would frequently be in a worse case than if evidence of good character had been given — since the prosecution would be debarred from introducing evidence to overcome the *presumption.* When it is said that good character is to be presumed it is only said that, in the absence of evidence, the jury should not attribute to defendant a general bad character with respect to the qualities involved in the alleged offense, nor give weight to his assumed bad character in determining the question whether the evidence established his guilt." People *v.* Johnson, 61 Cal. 142, *per* McKinstry, J., in concurring opinion.

Where no evidence of the defendant's character is introduced, the law assumes that it is of ordinary fairness and respectability. "Under such circumstances the general character of the accused is hardly a subject to be considered by the jury; and they should determine the guilt or innocence of the accused upon the evidence before them, and wholly irrespective of the question of general character." People *v.* Bodine, 1 Denio (N. Y.) 281, 315. See also Ackley *v.* People, 9 Barb. (N. Y.) 609.

trary,[96] especially when part of the record has been lost or destroyed,[97] or after a long lapse of time.[98] This presumption is

96. *United States.* — Galpin *v.* Page, 85 U. S. 350.
California. — People *v.* Robinson, 17 Cal. 363.
Florida. — Jordan *v.* Ryan, 35 Fla. 259, 17 So. 73.
Illinois. — Johnson *v.* Mellhousin, 105 Ill. App. 367.
Iowa. — Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.
Louisiana. — Hubbell *v.* Clannon, 13 La. 494.
New York. — Blake *v.* Lyon & Fellows Mfg. Co., 77 N. Y. 626.
Ohio. — Johnson *v.* Mullin, 12 Ohio 10.
Pennsylvania. — Springbrook Road, 64 Pa. St. 451.
Tennessee. — Wilcox *v.* Cannon, 1 Cold. 369.
Texas. — Black *v.* Epperson, 40 Tex. 162. See Jones *v.* Fancher, 61 Tex. 698.
Wisconsin. — Falkner *v.* Guild, 10 Wis. 563.

"There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, until the contrary appears; this rule applies as well to every judgment or decree, rendered in the various stages of their proceedings, from their initiation to their completion, as to their adjudication that the plaintiff has a right of action." Voorhees *v.* Jackson, 10 Pet. (U. S.) 449.

Court is presumed to have been regularly held and the cause properly brought to trial. Hanes *v.* Worthington, 14 Ind. 320.

On collateral attacks on judicial proceedings it will generally be presumed in the absence of anything to the contrary that all that was necessary to be done with respect to any particular matter, by either the court or its officers, was not only done, but rightly done. Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911.

Every act of a court of competent jurisdiction is presumed to have been rightly done until the contrary appears. American Emigrant Co. *v.* Fuller, 83 Iowa 599, 50 N. W. 48.

A bond which a court is directed by statute to approve will in proceedings subsequent to it be presumed to have been approved, although no note of approval appears on the record. Cromelien *v.* Brink, 29 Pa. St. 522.

An injunction bond on which the judgment has been rendered being lost will be presumed to have been taken according to law and with the conditions recited in the judgment. Hicks *v.* Haywood, 4 Heisk. (Tenn.) 598.

When a recognizance is filed of record, the presumption is that the charge was properly preferred and investigated, and the proper decision made before it was entered into and acknowledged. Shattuck *v.* People, 5 Ill. 477; *citing* M'Carty *v.* State, 1 Blackf. (Ind.) 338; People *v.* Blankman, 17 Wend. (N. Y.) 252.

The general presumption extends to everything necessary to the support of the judgment, as well those facts which are necessary to give the court jurisdiction of the defendant, as those which are necessary to sustain its decision of fact or conclusions of law thereon. *In re* Eichhoff, 101 Cal. 600, 36 Pac. 11.

A letter of guardianship in due form will be presumed in a collateral proceeding to have been legally issued. Vanderveere *v.* Gaston, 25 N. J. L. 615.

Officers of Court Presumed To Have Been Sworn. — Where there is nothing in the record to show that a referee was not sworn, the presumption is that he was sworn as required by law. Story *v.* De Armond, 77 Ill. App. 74.

On appeal, although it does not appear from the record, the presumption is, nothing to the contrary appearing, that the lower court did its duty and that the principal sheriff as well as his deputy before taking charge of the jury were in fact sworn according to law. Smith *v.* Com., 9 Ky. L. Rep. 215, 4 S. W. 798.

97. Woodhouse *v.* Fillbates, 77 Va. 317.

98. Wilcox *v.* Cannon, 1 Cold.

merely a particular application of the general maxim *omnia praesumuntur rite et solemniter esse acta.*[99]

B. Courts of General Jurisdiction. — a. *Generally.* — On collateral attack on the judgments and proceedings of courts of general jurisdiction, the presumption is that they had jurisdiction to render the judgment or take the judicial action which they did,[1] unless

(Tenn.) 369. See Shackleford *v.* Miller, 39 Ky. 273; O'Brien *v.* Gaslin, 20 Neb. 347, 30 N. W. 274; Dingee *v.* Kearney, 2 Mo. App. 515, and *supra*, III, 6.

99. See Co. Litt. 232; Broom Leg. Max. 942; Reed *v.* Jackson, 1 East (Eng.) 355; Lyttleton *v.* Cross, 3 Barn. & C. (Eng.) 317.

1. *United States.* — Applegate *v.* Lexington & Carter County Min. Co., 117 U. S. 255; Voorhees *v.* United States Bank, 10 Pet. 449, 472; Smith *v.* Pomeroy, 2 Dill. 414; *In re* Cuddy, 131 U. S. 280; Salisbury *v.* Sands, 2 Dill. 270, 21 Fed. Cas. No. 12,251.

Alabama. — Weaver *v.* Brown, 87 Ala. 533; Goodman *v.* Winter, 64 Ala. 410, 431, 38 Am. Rep. 13; Robinson *v.* Allison, 97 Ala. 596, 12 So. 382, 604.

California. — Carpentier *v.* City of Oakland, 30 Cal. 439; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; *In re* Eichhoff, 101 Cal. 600, 36 Pac. 11; Barrett *v.* Carney, 33 Cal. 530.

Colorado. — Cochrane *v.* Parker, 12 Colo. App. 169, 54 Pac. 1027.

Connecticut. — Coit *v.* Haven, 30 Conn. 190, 79 Am. Dec. 244; Fox *v.* Hoyt, 12 Conn. 491, 31 Am. Dec. 760.

Georgia. — Kelsey *v.* Wyley, 10 Ga. 371; Bush *v.* Lindsey, 24 Ga. 245, 71 Am. Dec. 117.

Idaho. — Ollis *v.* Orr, 6 Idaho 474, 56 Pac. 162.

Illinois. — Reedy *v.* Camfield, 159 Ill. 254, 42 N. E. 833; Swearengen *v.* Gulick, 67 Ill. 208; People *v.* Seelye, 146 Ill. 189, 32 N. E. 458; Dodge *v.* Cole, 97 Ill. 338, 37 Am. Rep. 111.

Indiana. — Bateman *v.* Miller, 118 Ind. 345, 21 N. E. 292; McCormick *v.* Webster, 89 Ind. 105; Pickering *v.* State, 106 Ind. 228, 6 N. E. 611; Horner *v.* Doe, 1 Ind. 130, 48 Am. Dec. 355.

Kansas. — Comstock *v.* Adams, 23 Kan. 513, 33 Am. Rep. 191; English *v.* Woodman, 40 Kan. 752, 21 Pac. 283; Wilkins *v.* Tourtellott, 42 Kan. 176, 22 Pac. 11.

Maine. — Treat *v.* Maxwell, 82 Me. 76, 19 Atl. 98; Wells *v.* Waterhouse, 22 Me. 131.

Michigan. — Arnold *v.* Nye, 23 Mich. 286; Palmer *v.* Oakley, 2 Doug. 433, 47 Am. Dec. 41.

Minnesota. — Turrell *v.* Warren, 25 Minn. 9; Holmes *v.* Campbell, 12 Minn. 221; Stahl *v.* Mitchell, 41 Minn. 325, 43 N. W. 385.

Mississippi. — Taggert *v.* Muse, 60 Miss. 870.

Missouri. — Kincaid *v.* Storz, 52 Mo. App. 564; Gibson *v.* Vaughan, 61 Mo. 418; Huxley *v.* Harrold, 62 Mo. 516.

New Hampshire. — Wingate *v.* Haywood, 40 N. H. 437.

New Jersey. — Miller *v.* Dungan, 35 N. J. L. 389.

New York. — Calkins *v.* Packer, 21 Barb. 275; Potter *v.* Mechanics' Bank, 28 N. Y. 641, 86 Am. Dec. 273; Wright *v.* Douglass, 10 Barb. 97; Ray *v.* Rowley, 1 Hun 614; Hart *v.* Seixas, 21 Wend. 40; Chemung Canal Bk. *v.* Judson, 8 N. Y. 254.

North Carolina. — Berhhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402.

Ohio. — Trimble *v.* Longworth, 13 Ohio St. 431; Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459; Beebe *v.* Scheidt, 13 Ohio St. 406.

Oregon. — Heatherly *v.* Hadley, 4 Or. 1.

Pennsylvania. — Hering *v.* Chambers, 103 Pa. St. 172; Cummisky *v.* Cummisky, 109 Pa. St. 1.

South Carolina. — Cruger *v.* Daniel, Riley Eq. 102.

Tennessee. — Hopper *v.* Fisher, 2 Head 253.

Texas. — Williams *v.* Ball, 52 Tex. 603, 36 Am. Rep. 730; Withers *v.* Patterson, 27 Tex. 491, 86 Am. Dec. 643; Horan *v.* Wahrenberger, 9 Tex. 313, 58 Am. Dec. 145.

Vermont. — Huntington *v.* Charlotte, 15 Vt. 46.

Virginia. — Cox *v.* Thomas, 9 Gratt. 323; Woodhouse *v.* Fillbates, 77 Va. 317.

West Virginia. — Wandling *v.* Straw, 25 W. Va. 692; Mayer *v.* Adams, 27 W. Va. 244.

Wisconsin. — Ely *v.* Tallman, 14 Wis. 28.

Rule Stated. — "It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will be determined by the law creating the court or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant or his appearance in the action. But when the former exists the latter will be presumed. This is familiar law, and is asserted by all the adjudged cases. The rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face. But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed. The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law." Galpin *v.* Page, 85 U. S. 350, by Field, J.

In a proceeding to set aside a decree in another cause, the record of which is incomplete, it will be presumed that the court had before it all parties necessary and proper for the rendition of the decree as made. Westbrook *v.* Thompson, 104 Tenn. 363, 58 S. W. 223.

Nothing will be intended to be without the jurisdiction of a court of general jurisdiction. Flanders *v.* Atkinson, 18 N. H. 167; Kelsey *v.* Wyley, 10 Ga. 371; Kenney *v.* Greer, 13 Ill. 432, 54 Am. Dec. 439; Wallace *v.* Cox, 71 Ill. 548; Holmes *v.* Campbell, 12 Minn. 221; Wingate *v.* Haywood, 40 N. H. 437; Hopper *v.* Fisher, 2 Head (Tenn.) 253; Mayer *v.* Adams, 27 W. Va. 244.

Judgments by Default are presumed to have been regularly and properly entered where the record fails to show the contrary. Hersey *v.* Walsh, 38 Minn. 521, 38 N. W. 613, 8 Am. St. Rep. 689; Evans *v.* Young, 10 Colo. 316, 15 Pac. 424, 3 Am. St. Rep. 583.

the contrary appear in some legal manner.[2] This presumption extends to jurisdiction of both the subject-matter and the parties.[3]

b. *Persons Outside Territorial Jurisdiction.* — It has been held that this presumption of jurisdiction does not apply when the defendant is outside the territorial limits of the court's jurisdiction.[4]

c. *Effect of Record Recitals.* — The presumption in favor of jurisdiction is only operative when the record is silent. There is no presumption contrary to the facts shown by the record.[5]

2. For a discussion of the admissibility of extrinsic evidence to affect a judgment, see articles "PAROL EVIDENCE" and "RECORDS."

3. Horner *v.* Doe, 1 Ind. 130, 48 Am. Dec. 355; American Emigrant Co. *v.* Fuller, 83 Iowa 599, 50 N. W. 48; Galpin *v.* Page, 85 U. S. 350.

4. Cunningham *v.* Spokane Hydraulic Co., 18 Wash. 524, 52 Pac. 235; Galpin *v.* Page, 18 Wall. (U. S.) 350; Rand *v.* Ranson, 154 Mass. 87, 28 N. E. 6, 26 Am. St. Rep. 210, 12 L. R. A. 574; Mastin *v.* Gray, 19 Kan. 458, 27 Am. Rep. 149. See also Central Grain & Stock Exch. *v.* Board of Trade, 125 Fed. 463; Earle *v.* Chesapeake & O. R. Co., 127 Fed. 235; Green *v.* Equitable Mut. L. & E. Ass'n, 105 Iowa 628, 75 N. W. 635; Downer *v.* Shaw, 22 N. H. 277. *Contra.* — See Newcomb *v.* Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222.

Jurisdiction Over Foreign Corporation. — Jurisdiction is presumed to have been properly acquired over a foreign corporation defendant, although it does not appear from the record that such corporation was doing business in the state at the date of service of process, or that service was made within the state on a duly authorized agent. Johnston *v.* Mutual Reserve L. Ins. Co., 104 App. Div. 550, 93 N. Y. Supp. 1052. But see Cunningham *v.* Spokane Hydraulic Co., 18 Wash. 524, 52 Pac. 235. The rule in the federal courts, however, is otherwise. Earle *v.* Chesapeake & O. R. Co., 127 Fed. 235.

5. *United States.* — Galpin *v.* Page, 18 Wall. 350; Hickey *v.* Stewart, 3 How. 750.

Alabama. — Falkner *v.* Christian, 51 Ala. 495.

California. — Whitwell *v.* Barbier, 7 Cal. 54; *In re* Eichhoff, 101 Cal. 600, 36 Pac. 11; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742.

Delaware. — Frankel *v.* Satterfield, 9 Houst. 201.

Illinois. — Law *v.* Grommes, 158 Ill. 492, 41 N. E. 1080; Harris *v.* Lester, 80 Ill. 307; Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457.

Maine. — Penobscot R. Co. *v.* Weeks, 52 Me. 456.

Minnesota. — Davis *v.* Hudson, 29 Minn. 27; Culver *v.* Hardenbargh, 37 Minn. 225, 33 N. W. 792; Barber *v.* Morris, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836; Godfrey *v.* Valentine, 39 Minn. 336, 40 N. W. 163, 12 Am. St. Rep. 657.

Missouri. — Freeman *v.* Thompson, 53 Mo. 183.

Oregon. — Heatherly *v.* Hadley, 4 Or. 1; Northcut *v.* Lemery, 8 Or. 316.

Pennsylvania. — Messinger *v.* Kintner, 4 Bin. 97; Hering *v.* Chambers, 103 Pa. St. 172, 175; Wall *v.* Wall, 123 Pa. St. 545, 16 Atl. 598, 10 Am. St. Rep. 549.

South Carolina. — James *v.* Smith, 2 Rich. 183.

Texas. — Withers *v.* Patterson, 27 Tex. 491, 86 Am. Dec. 643.

Virginia. — Wade *v.* Hancock, 76 Va. 620; Dillard *v.* Central Virginia Iron Co., 82 Va. 734, 1 S. E. 124; Blanton *v.* Carroll, 86 Va. 539, 10 S. E. 329.

Wisconsin. — Pollard *v.* Wegener, 13 Wis. 569; Ely *v.* Tallman, 14 Wis. 28.

If the record shows the manner of service of process, nothing will be presumed regarding it. Falkner *v.* Guild, 10 Wis. 563.

Where the facts as to service of process appearing in the record show a lack of jurisdiction, there can be no presumption that jurisdiction was properly acquired, in the absence of

d. *Exercise of Special Statutory Powers.* — The presumption extended to the action of courts of general jurisdiction has no application when they are exercising special statutory powers in the manner prescribed by the statute and not according to the course of the common law;[6] though it has been held to the contrary.[7] But where such powers are exercised according to the

a finding indicating that other facts were considered by the court in determining its jurisdiction. Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457; Bannon *v.* People, 1 Ill. App. 496. But where the court adjudges that it has jurisdiction it will be presumed that it acted on facts not shown in the record or otherwise acquired jurisdiction, although the record itself is insufficient to support such a finding. Bannon *v.* People, 1 Ill. App. 496; Moore *v.* Neil, 39 Ill. 256, 89 Am. Dec. 303. See also Ely *v.* Tallman, 14 Wis. 28.

In an action upon a judgment of a court of a sister state where the record shows the facts upon which its jurisdiction depends there is no presumption, but the record will be taken as expressive of the entire truth. Old Wayne Mut. L. Ass'n *v.* Flynn, 31 Ind. App. 473, 68 N. E. 327.

Where the Recitals Are Contradictory the presumption is in favor of the truth of the one which would render the judgment valid. Conrad *v.* Baldwin, 3 Iowa 207.

Where the petition to vacate a decree does not exhibit the entire record upon which the decree was based, if there be any seeming inconsistency between the portions of the record pleaded they must be presumed to be explained by that portion of the record which is not shown. Long *v.* Eisenbeis, 18 Wash. 423, 51 Pac. 1061.

6. *United States.* — Thatcher *v.* Powell, 6 Wheat. 119; Harvey *v.* Tyler, 2 Wall. 328.

Alabama. — Goodwin *v.* Sims, 86 Ala. 102, 5 So. 587, 11 Am. St. Rep. 21; Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785; Graham *v.* Reynolds, 45 Ala. 578.

Illinois. — Chicago & N. W. R. Co. *v.* Galt, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674; Donlin *v.* Hettinger, 57 Ill. 348.

Indiana. — Cone *v.* Cotton, 2 Blackf. 82.

Maine. — Prentiss *v.* Parks, 65 Me. 559.

Maryland. — Shivers *v.* Wilson, 5 Har. & J. 130, 9 Am. Dec. 497.

Massachusetts. — Kelley *v.* Kelley, 161 Mass. 111, 36 N. E. 837, 42 Am. St. Rep. 389, 25 L. R. A. 806.

Michigan. — Wight *v.* Warner, 1 Doug. 384.

New York. — Denning *v.* Corwin, 11 Wend. 647; Striker *v.* Kelly, 7 Hill 9; Embury *v.* Conner, 3 N. Y. 511, 53 Am. Dec. 325.

Ohio. — Adams *v.* Jeffries, 12 Ohio 253, 40 Am. Dec. 477.

Oregon. — Northcut *v.* Lemery, 8 Or. 316; Furgeson *v.* Jones, 17 Or. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

Tennessee. — Earthman *v.* Jones, 2 Yerg. (Tenn.) 484; Barry *v.* Patterson, 3 Humph. 313.

Texas. — Mitchell *v.* Runkle, 25 Tex. Supp. 132; Brown *v.* Wheelock, 75 Tex. 385.

Virginia. — Pulaski County *v.* Stuart, 28 Gratt. 872; Chesterfield Co. *v.* Hall, 80 Va. 321.

Cases Transferred From County to District Court. — In those cases which are transferred from the county to the district court, the latter exercises a special jurisdiction only, and the same presumptions will not be indulged as when in the exercise of its general jurisdiction. Bruhn *v.* National Bank, 54 Tex. 152.

7. Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Falkner, *v.* Guild, 10 Wis. 563; Newcomb *v.* Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222.

The presumption in favor of the regularity of judicial proceedings applies not only to common law but to special statutory proceedings of courts of general jurisdiction. "It is true that the proceedings under special statutes have sometimes been made an exception to this general rule as to the presumption, even in courts of general jurisdiction. But

course of the common law or chancery practice, the usual presumptions attach to the court's action.[8]

e. *Where Several Possible Grounds of Action Appear* the court is presumed to have acted on the ground which gave it jurisdiction.[9]

f. *Legality of Session of Court.* — In favor of the validity of a court's action it will be presumed to have been legally in session at the time such action was taken, unless the contrary appears.[10]

g. *Facts and Proceedings Essential to Jurisdiction.* — **(1.) Generally.** — All the facts essential to jurisdiction are presumed to exist and to have been found by the court,[11] and all the proceedings

without entering into the inextricable labyrinth of cases on the subject, we will only say that we can see, upon principle, no reason for the distinction. The general presumption in favor of the regularity of the proceeding of such courts is founded on the character of the court itself. And that character is the same, whether it is under a special statute or under the common law. I cannot see that a difference in the source of its authority to act can make any rational distinction as to the presumption in favor of the regularity of its action." *In re* Marchant's Estate, 121 Wis. 526, 99 N. W. 320, *quoting* from Falkner *v.* Guild, 10 Wis. 563.

8. Voorhees *v.* Jackson, 10 Pet. (U. S.) 449; Galpin *v.* Page, 18 Wall. U. S. 350; Goudy *v.* Hall, 36 Ill. 313, 87 Am. Dec. 217; Nichols *v.* Mitchell, 70 Ill. 258; Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52; Denning *v.* Corwin, 11 Wend. (N. Y.) 647; Pulaski County *v.* Stuart, 28 Gratt. (Va.) 872.

9. If several grounds are apparent from the record whereon the court might have acted, it is presumed to have acted on that ground which gave it jurisdiction and not upon the others. Woodhouse *v.* Fillbates, 77 Va. 317.

10. Where by complying with the law in certain particulars it was possible for a court to have been legally in session on the day when it appears the trial took place, it will be presumed on appeal, in the absence of a showing to the contrary, that it was legally held. Talbert *v.* Hopper, 42 Cal. 397.

When a proceeding appears to have been at a general or special term, the presumption of law is in favor of the regularity of said term and of the jurisdiction of the court. This presumption may be rebutted, it is true, by showing affirmatively that there was no order of the judge or court appointing the special term, or where the court can see from the public law that the judge was required to be in another place holding another court. Cook *v.* Renick, 19 Ill. 598.

In all cases where it appears that it was possible and competent for a court to have been in session on a given date and there is nothing in the record to show that the terms and conditions authorizing a session have not been fully answered, it must be presumed that what was done by the court below was properly and legally done, and that the prerequisite steps necessary to constitute a legal court were taken. Stockslager *v.* United States, 116 Fed. 590, in which on a motion to quash an indictment presented, it was held that it would be presumed that the proper notice necessary to the validity of the special term of court had been given as required by law.

In the absence of any showing on the subject it will be assumed that a special term of the probate court was properly and lawfully held. State *v.* Nolan, 99 Mo. 569, 12 S. W. 1047. "Such presumption of jurisdiction has been expressly held by this court to be applicable to proceedings in the probate court of Missouri."

11. Matthews *v.* Hoff, 113 Ill. 90; Jackson *v.* State, 104 Ind. 516, 3 N. E. 863; Thornton *v.* Baker, 15 R. I. 553, 10 Atl. 617, 2 Am. St. Rep. 925; Wells *v.* Mason, 5 Ill. 84; Clarey *v.* Marshall, 34 Ky. 95; Lyne *v.* Sanford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852.

That the Amount in Controversy

necessary to the validity of the court's action are presumed to have been taken.[12]

(2.) Facts Required to Appear of Record. — Where certain facts are required by law to appear of record in order to make the proceeding valid there can be no presumption as to those essential facts.[13]

(3.) Cause of Action Complete. — It is presumed that the right of action accrued before the institution of the action,[14] unless the contrary appears.[15]

(4.) Notice and Service of Process. — (A.) GENERALLY. — In support of a judgment or decree it is presumed that notice essential to the validity of the court's action was given,[16] and that

did not exceed the limit fixed by statute defining the court's jurisdiction. Barbee *v.* Shannon, 1 Ind. Ter. 199, 40 S. W. 584. Or was not too small. Town of Bridgeport *v.* Blinn, 43 Conn. 274.

Consent of the Parties although it does not appear of record will be presumed where it appears that such consent would have given the court jurisdiction to try an issue which was tried. Ratcliff *v.* Ratcliff, 12 Smed. & M. (Miss.) 134.

12. Doolittle *v.* Holton, 26 Vt. 588; Steinhardt *v.* Baker, 163 N. Y. 410, 57 N. E. 569; Newcomb *v.* Newcomb, 76 Ky. 544, 26 Am. Rep. 222; Falkner *v.* Guild, 10 Wis. 563. See Morris *v.* Gentry, 89 N. C. 248; Phelps *v.* Smith, 16 W. Va. 522.

13. Nothing can be presumed for or against a record as to those indispensable requisites necessary to the validity of the record as a judicial proceeding, but as to those not required by law to be incorporated in the record the action must be presumed to have been properly taken. Dyson *v.* State, 26 Miss. 362.

What may be presumed in favor of judgments and the records thereof depends largely upon what those records must show, a question which cannot be discussed in this place or work. See article "RECORDS."

14. Austin *v.* Austin, 43 Ill. App. 488.

In a proceeding to set aside as fraudulent a judgment based on a suit on a note payable on demand, dated one day before the suit was commenced, where no copy of the note is found in the record the court will presume that the judgment is correct and that days of grace were waived in the note and the suit commenced within the proper time. Cahn *v.* Farmers' & Traders' Bank, 1 S. D. 237, 46 N. W. 185.

15. The presumption of law is that the several acts or steps in the course of a legal proceeding take place in the order necessary to give them legal effect, but whenever an inquiry into the priority of acts on the same day becomes necessary in order to protect the rights of parties the ordinary presumption must give way to the facts of the case. Thus in an action of replevin for a certain amount of lead ore where it appeared that the action was begun in the forenoon and the ore was not severed from the earth until late in the afternoon of the same day, it was held that the writ was invalid and that the court was bound to recognize that it was issued before the cause of action accrued, although the law ordinarily does not take cognizance of a fraction of a day. Knowlton *v.* Culver, 2 Pinn. (Wis.) 243, 1 Chand. 214, 52 Am. Dec. 156, *distinguishing* Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105; Clute *v.* Clute, 3 Denio (N. Y.) 263.

16. *Colorado.* — Evans *v.* Young, 10 Colo. 316, 15 Pac. 424, 3 Am. St. Rep. 583.

Illinois. — Harris *v.* Lester, 80 Ill. 307.

Indiana. — Albertson *v.* State, 95 Ind. 370; Baltimore & O. & C. R. Co. *v.* North, 103 Ind. 486, 3 N. E. 144. See Cassady *v.* Miller, 106 Ind. 69, 5 N. E. 713.

Kentucky. — Sorrell *v.* Samuels, 20 Ky. L. Rep. 1498, 49 S. W. 762.

Massachusetts. — Brown *v.* Wood, 17 Mass. 68.

process was regularly and properly served or appearance made.[17]

Minnesota. — Davis *v.* Hudson, 29 Minn. 27.

New York. — Steinhardt *v.* Baker, 163 N. Y. 410, 57 N. E. 629.

Ohio. — Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459.

Texas. — Guilford *v.* Love, 49 Tex. 715.

The Recital of Notice in the Decree raises a presumption of notice though this fact appears nowhere else in the record. Toliver *v.* Morgan, 75 Iowa 619, 34 N. W. 858.

Where a decree recites that due notice of the pendency of the suit had been given by publication in accordance with the statute, the presumption is that it was shown in some proper way and this presumption is conclusive against collateral attacks, unless overthrown by such state of the whole record as excludes the possibility of the finding being true. Figge *v.* Rowlen, 84 Ill. App. 238.

Bankruptcy. — Notice to Creditors. Where a defendant pleads a discharge under the federal bankruptcy law, his certificate raises a presumption that the legal notice required has been given to creditors, and where nothing appears to the contrary the presumption stands firm. "Such notice was indispensable before the final adjudication that he was a bankrupt." Norris *v.* Goss, 2 Spears L. (S. C.) 80.

17. *United States.* — Elder *v.* Richmond Gold & Silv. Min. Co., 58 Fed. 536, 7 C. C. A. 354.

Arkansas. — McConnell *v.* Day, 61 Ark. 464, 33 S. W. 731.

California. — *In re* Eichhoff, 101 Cal. 600, 36 Pac. 11.

Georgia. — Mayer *v.* Hover, 81 Ga. 308, 7 S. E. 562.

Illinois. — Matthews *v.* Hoff, 113 Ill. 90; Nickrans *v.* Wilk, 161 Ill. 76, 43 N. E. 741; Benefield *v.* Albert, 132 Ill. 665, 24 N. E. 634.

Indiana. — Cassady *v.* Miller, 106 Ind. 69, 5 N. E. 713; Knane *v.* Kimmer, 77 Ind. 215; Woolery *v.* Grayson, 110 Ind. 149, 10 N. E. 935. See First Nat. Bank *v.* Hanna, 12 Ind. App. 240, 39 N. E. 1054.

Iowa. — Loving *v.* Pairo, 10 Iowa 282, 77 Am. Dec. 108; Seely *v.* Reid, 3 Gr. 374; Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350.

Kentucky. — Russell *v.* Durham, 16 Ky. L. Rep. 516, 29 S. W. 16.

Minnesota. — Kipp *v.* Fullerton, 4 Minn. 366.

Missouri. — Dingee *v.* Kearney, 2 Mo. App. 515; Hamer *v.* Cook, 118 Mo. 476, 24 S. W. 180.

New York. — Sloane *v.* Martin, 77 Hun 249, 28 N. Y. Supp. 332.

Oregon. — Bank of Colfax *v.* Richardson, 34 Or. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

South Dakota. — Stoddard Mfg. Co. *v.* Mattice, 10 S. D. 253, 72 N. W. 891.

Texas. — Lyle *v.* Horstman (Tex. Civ. App.), 25 S. W. 802.

Wisconsin. — Sommermeyer *v.* Schwartzer, 89 Wis. 66, 61 N. W. 311.

The presumption is that the court found the service of process sufficient. Cosby *v.* Powers, 137 Ind. 694, 37 N. E. 321. See also Harris *v.* Lester, 80 Ill. 307.

Service on Infant Defendants Presumed though the decree does not so recite. Benefield *v.* Albert, 132 Ill. 665, 24 N. E. 634.

Where a sale of lands of infants in pursuance of a decree of the circuit court was attacked collaterally, and the record showed that process was ordered against the infants and that at the following term a guardian *ad litem* was appointed, it was held that as nothing appeared to the contrary it would be presumed that they were regularly brought into court. Brackenridge *v.* Dawson, 7 Ind. 383.

Date of Service presumed to be such as would render the judgment valid. Stephens *v.* Turner, 9 Tex. Civ. App. 623, 29 S. W. 937.

In support of a *scire facias* issued from a circuit court upon a default judgment of a justice's court, it will be presumed that the summons was served in time, although the *scire facias* merely stated that the summons had been served on the defendant without showing the time of service. Wilcox *v.* Ratliff, 5 Blackf.

(B.) Constructive Service of Process. — Some courts hold that no presumptions can be indulged in favor of jurisdiction acquired by constructive service of process;[18] while others seem to hold that the judgment of a court of general jurisdiction is entitled to the same presumptions regardless of the manner of acquiring jurisdiction.[19] The reason for this difference, however, seems to be that

(Ind.) 561. It will not be presumed that an officer of the court in serving process neglected his duty. Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350; or served the process outside the county. State *v.* Williamson, 57 Mo. 192.

18. Galpin *v.* Page, 18 Wall. (U. S.) 350; Neff *v.* Pennoyer, 3 Sawy. 298, 17 Fed. Cas. No. 10,083; Brownfield *v.* Dyer, 7 Bush (Ky.) 505; Hallett *v.* Righters, 13 How. Pr. (N. Y.) 43; Boyland *v.* Boyland, 18 Ill. 551.

19. *California.* — Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742.

Minnesota. — Gemmell *v.* Rice, 13 Minn. 371.

Oregon. — Bank of Colfax *v.* Richardson, 34 Or. 518, 54 Pac. 359, 75 Am. St. Rep. 664.

South Carolina. — Hunter *v.* Ruff, 47 S. C. 525, 25 S. E. 65, 58 Am. St. Rep. 907.

Texas. — Martin *v.* Burns, 80 Tex. 676, 16 S. W. 1072; Lawler's Heirs *v.* White, 27 Tex. 250; Stewart *v.* Anderson, 70 Tex. 588, 8 S. W. 295; Buse *v.* Bartlett, 1 Tex. Civ. App. 335, 21 S. W. 52; Iiams *v.* Root, 22 Tex. Civ. App. 413, 55 S. W. 411.

Utah. — Hoagland *v.* Hoagland, 19 Utah 103, 57 Pac. 20.

Wisconsin. — Nash *v.* Church, 10 Wis. 303, 78 Am. Dec. 678.

"There has been much difference of opinion in courts for whose decisions we have the highest respect, as to whether the same presumptions will be indulged in favor of jurisdiction when reliance is placed on citation by publication and seizure of property, as will be when personal service made within the territory over which the court has jurisdiction is relied upon. It seems to us that there can be no substantial reason for holding in the one case that it must be affirmatively shown that such process as the law declares sufficient was properly executed, while in the other this will be presumed if the record does not show to the contrary. Whether the jurisdiction of a court be general or special, it can not be made to depend upon the character of the process through which it acquires power over the person or thing to be affected by its final adjudication. The constitution confers jurisdiction, but the legislature prescribes the process through which persons and things may be brought within its reach and made subject to its exercise. It seems to us illogical to hold, when the averments of the pleadings show that personal service might have been made within the jurisdiction, that this will be presumed to have been done if the record be silent, or do not show to the contrary, where the court has exercised or assumed to exercise the power to make a final judgment, but to hold that the same presumption will not be indulged as to the proper citation by publication, or as to the seizure of property where the pleadings show that these things were necessary to be done, and could have been done, before the court assumed the power to render a final judgment. In either case, the presumption that the court did not render a final judgment until it was authorized to do so, arises from the fact that to have done otherwise would have been a breach of duty which is never presumed from the doing of an act that may have been legal." Stewart *v.* Anderson, 70 Tex. 588, 8 S. W. 295.

It is not necessary to incorporate a copy of notice or proof of publication in a record from a court of general jurisdiction, and if not so incorporated they will be presumed sufficient. A want of jurisdiction will not be presumed in a court of general authority, and where the record from such court is silent or

some courts regard the statutory provisions for constructive service as in derogation of the common law, and therefore require that a full compliance with the law be shown by the record.[20] A recital or finding of the due service of process is, however, generally regarded as sufficient, the presumption being that the necessary steps were taken.[21]

(5.) Authority of Attorney to Enter Appearance. — The presumption as to the authority of an attorney who has entered an appearance to do so is elsewhere discussed.[22]

(6.) Sufficient Showing to Warrant Court's Action Presumed. (A.) GENERALLY. — It is presumed that before judicial action was taken sufficient facts appeared or a sufficient showing was made to warrant the action of the court.[23]

does not aver all the facts necessary to show that jurisdiction was properly exercised, it will be presumed that the court legally acquired power over the subject-matter and over the parties. Wright *v.* Marsh, 2 Gr. (Iowa) 94.

20. Galpin *v.* Page, 1 Sawy. (U. S.) 309; and see cases *supra*, note 6.

The question as to what the record of a judgment must show is largely determinative of what can be presumed in its support, but a discussion of it is outside the scope of this work and must be looked for elsewhere.

21. *United States.* — Applegate *v.* Lexington & Carter County Min. Co., 117 U. S. 255.

Arkansas. — McLain *v.* Duncan, 57 Ark. 49, 20 S. W. 597.

California. — Crew *v.* Pratt, 119 Cal. 139, 51 Pac. 38; Matter of Newman, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742.

Illinois. — Moore *v.* Neil, 39 Ill. 256, 89 Am. Dec. 303.

Indiana. — Essig *v.* Lower, 120 Ind. 239, 21 N. E. 1090; Goodell *v.* Starr, 127 Ind. 198, 26 N. E. 793.

Iowa. — Fanning *v.* Krapfl, 68 Iowa 244, 26 N. W. 133; Wright *v.* Marsh, 2 Gr. 94.

Kansas. — Haynes *v.* Cowen, 15 Kan. 637.

Mississippi. — Saffarans *v.* Terry, 12 Smed. & M. 690.

Missouri. — Roberts *v.* St. Louis Merch. L. Imp. Co., 126 Mo. 460, 29 S. W. 584; Charley *v.* Kelley, 120 Mo. 134, 25 S. W. 571; Kane *v.* McCown, 55 Mo. 181.

Ohio. — Buchanan *v.* Roy, 2 Ohio St. 251.

Tennessee. — Walker *v.* Cottrell, 6 Baxt. 257; Gilliland *v.* Cullum, 6 Lea 521.

Texas. — Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

Utah. — Amy *v.* Amy, 12 Utah 278.

Virginia. — Wilcher *v.* Robertson, 78 Va. 602.

A recital of the acquirement of jurisdiction by publication will in a collateral proceeding be presumed to have been based upon sufficient showing. Reedy *v.* Camfield, 159 Ill. 254, 42 N. E. 833.

Non-Resident Defendant. — Although, when summons was served on a non-resident by publication, the record must show this fact, yet when it appears in some manner, a full compliance with all the requirements to make such service valid will be presumed. Figge *v.* Rowlen, 185 Ill. 234, 57 N. E. 195; Hoagland *v.* Hoagland, 19 Utah 103, 57 Pac. 20; Amy *v.* Amy, 12 Utah 278, 42 Pac. 1121.

22. See article "ATTORNEY AND CLIENT," Vol. II.

23. Credit Foncier of America *v.* Rogers, 10 Neb. 184, 4 N. W. 1012; Brown *v.* Wood, 17 Mass. 68 (where a will was proved by only two subscribing witnesses, it is presumed that the other was sufficiently accounted for).

Where from a decree *pro confesso* it appears that the court below was satisfied that all things necessary to entitle complainant to the relief sought were proved, the appellate

(B.) Affidavits. — Where a certain affidavit is required by law to be filed prior to the rendition of judgment, or other judicial action, the presumption is in the absence of anything to the contrary that it was filed,[24] and that it was sufficient to warrant the action of the court.[25] But such presumption does not arise when the record shows the contrary.[26]

court will presume that they were made to appear in a proper manner, and that the court rendering such decree performed its duty. Harrison *v.* Kramer, 3 Iowa 543.

Although the probate records do not show upon their face that it had been proved that the personalty was exhausted before the order for the sale of real estate was made, yet in support of such a sale the legal presumption is that the judge acted in accordance with law, and that this fact was made to appear. McNair *v.* Hunt, 5 Mo. 301.

Where a judgment upon failure to answer was entered upon the first day of a term of the court and signed by the clerk, it must be presumed that it was entered while the court was in session and that due proof was made of the non-appearance of the defendant, though such proof does not appear of record. Bunker *v.* Rand, 19 Wis. 253, 88 Am. Dec. 684.

Commissioners appointed by the court are presumed to have had the qualifications required by law. Chicago, B. & Q. R. Co. *v.* Chamberlain, 84 Ill. 333, 342.

In an action on a bond given by the husband to comply with an order granting alimony, the bill upon which the order was based being lost, the presumption is that its allegations were sufficient to authorize the granting of the order requiring the defendant to give the bond sued on. Gibson *v.* Patterson, 75 Ga. 549.

A *nunc pro tunc* order made in one suit when offered in evidence in another suit will, in the absence of rebutting evidence, be presumed to have been made on sufficient evidence. State *v.* Vaile, 122 Mo. 33, 26 S. W. 672.

Where the record of a judgment shows that the action was founded upon a bond, the copy of which was set out at length in the complaint, it will be presumed in support of the judgment that it was rendered after due proof of the execution of the bond declared on. Knickerbocker *v.* Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595.

24. Dean *v.* Thatcher, 32 N. J. L. 470; Newcomb *v.* Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222.

Affidavit Made to Secure Order for Publication of Summons. — Adams *v.* Cowles, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74; Hardy *v.* Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; Iiams *v.* Root, 22 Tex. Civ. App. 413, 55 S. W. 411. See also International Develop. Co. *v.* Howard, 113 Ky. 450, 68 S. W. 459.

25. Affidavit for Publication of Summons. — Gemmell *v.* Rice, 13 Minn. 371. Affidavits made to authorize the issuance of an order of attachment and an order for the service of summons by mail are presumed to have been sufficient, on collateral attack on the judgment, nothing appearing to the contrary. Head *v.* Daniels, 38 Kan. 13, 15 Pac. 911.

Where an order made by a county judge required a judgment debtor to appear before a referee and answer on oath concerning his property recites expressly that it had been made to appear before such judge "by the affidavit" of one of the attorneys of the plaintiff that judgment had been recovered in the action, that execution thereon against the property of the defendant therein had been duly issued and that said judgment remained wholly unpaid, such recital is clearly sufficient *prima facie* to show that such proof had been made by a regular affidavit. It is a presumption which the law raises in support of judicial authority and proceedings. Rugg *v.* Spencer, 59 Barb. (N. Y.) 383.

26. Walter *v.* Alexander, 2 Gill (Md.) 204. But see Gemmell *v.* Rice, 13 Minn. 371.

(7.) Location of Land Involved. — When necessary to support a judgment, it will be presumed in the absence of anything to the contrary that the land forming the subject of the action was within the territorial limits of the court's jurisdiction.[27]

C. Courts of Special and Inferior Jurisdiction. — There is no presumption of jurisdiction in favor of the action of courts of special and inferior jurisdiction, but their jurisdiction must affirmatively appear.[28]

D. When Jurisdiction Appears. — When jurisdiction of the person and the subject-matter affirmatively appears, the same general presumptions of regularity and validity attach to the judicial action of the court, even though it be one of special and inferior jurisdiction,[29] or, be exercising special powers committed to it by

27. See Wright *v.* Watson, 11 Humph. (Tenn.) 529; Rogers *v.* Cady, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100.

The land against which a vendor's lien is sought to be enforced is presumed to be within the territorial jurisdiction of the court rendering a decree enforcing the lien, where the record does not show the location of the land. Foster *v.* Givens, 67 Fed. 684, 14 C. C. A. 625.

28. *England.* — Howard *v.* Gosset, 10 Q. B. 359, 59 E. C. L. 359; London *v.* Cox, L. R., 2 H. L. 239.

United States. — Galpin *v.* Page, 18 Wall. 350; Gray *v.* Larrimore, 4 Sawy. 638, 10 Fed. Cas. No. 5,721.

Alabama. — Chamblee *v.* Cole, 128 Ala. 649, 30 So. 630.

Arkansas. — McClure *v.* Hill, 36 Ark. 268.

Connecticut. — Raymond *v.* Bell, 18 Conn. 81.

Illinois. — Von Kettler *v.* Johnson, 57 Ill. 109; People *v.* Seelye, 146 Ill. 189, 32 N. E. 458; Kenney *v.* Greer, 13 Ill. 432, 54 Am. Dec. 439.

Iowa. — Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52; Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122.

Maine. — Green *v.* Haskell, 24 Me. 180.

Maryland. — Clark *v.* Bryan, 16 Md. 171.

Michigan. — Truesdale *v.* Hazzard, 2 Mich. 344.

Mississippi. — Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49.

Missouri. — Rohland *v.* St. Louis & S. F. R. Co., 89 Mo. 180, 1 S. W. 147; McCloon *v.* Beattie, 46 Mo. 391.

Nebraska. — Kuker *v.* Beindorff, 63 Neb. 91, 88 N. W. 190.

New Hampshire. — Tebbetts *v.* Tilton, 31 N. H. 273.

New Jersey. — Graham *v.* Whitely, 26 N. J. L. 254.

New York. — *In re* Baker, 173 N. Y. 249, 65 N. E. 1100; Chemung Canal Bk. *v.* Judson, 8 N. Y. 254; People *v.* Koeber, 7 Hill 39.

Oregon. — Farley *v.* Parker, 6 Or. 105, 25 Am. Rep. 504.

Pennsylvania. — Fowler *v.* Jenkins, 28 Pa. St. 176.

Tennessee. — Hopper *v.* Fisher, 2 Head 253.

Texas. — Williams *v.* Ball, 52 Tex. 603, 36 Am. Rep. 730.

Vermont. — Vaughn *v.* Congdon, 56 Vt. 111, 48 Am. Rep. 758.

West Virginia. — Mayer *v.* Adams, 27 W. Va. 244.

By Statute in Iowa the proceedings of officers of all courts of limited and inferior jurisdiction within the state shall like those of a general and superior jurisdiction be presumed regular, except in regard to matters required to be entered of record and except where otherwise expressly declared. Church *v.* Crossman, 49 Iowa 444.

29. Chicago, B. & Q. R. Co. *v.* Chamberlain, 84 Ill. 333; Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52; Hiatt *v.* Simpson, 35 N. C. 72; Merritt *v.* Baldwin, 6 Wis. 439. See Erwin *v.* Lowry, 7 How. (U. S.) 172.

There is no presumption that a

statute.[30] Where jurisdiction appears upon the face of the proceedings, or has been established, the subsequent proceedings are presumed to have been regular and valid.[31]

E. Federal Courts. — The federal district and circuit courts are on collateral attack entitled to the same presumptions as any other court of general jurisdiction, both as to jurisdiction,[32] and

justice's court has jurisdiction in an action upon a judgment rendered therein, but when jurisdiction has been made to appear the same presumptions are indulged in favor of proceedings in these courts as in courts of general jurisdiction. Hopper *v.* Lucas, 86 Ind. 43, *citing* Wilkinson *v.* Moore, 79 Ind. 397; Mills *v.* Martin, 19 Johns. (N. Y.) 7; Jolley *v.* Foltz, 34 Cal. 321.

If it affirmatively appear that in reference to the proceeding which is brought into question the tribunal had jurisdiction by law of the subject-matter and had lawfully acquired jurisdiction of the parties, the same presumption will be indulged in favor of the proceedings had as if the court were one of general powers, and the verity of these presumptions cannot be questioned collaterally. Argo *v.* Barthand, 80 Ind. 63.

30. Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52.

The strictness with which the proceedings of inferior tribunals are scrutinized, or where a court has exercised a special statutory jurisdiction applies only in respect of the question of jurisdiction, and when that is established the maxim *omnia rite acta praesumuntur* applies to them as well as to courts of general jurisdiction. Hence upon an application under the right of way act to the circuit court for the appointment of commissioners, the giving of proper notice and the presentation of the petition will give the court jurisdiction. Its subsequent action in the exercise of that jurisdiction in the appointment of commissioners will be presumed to be correct and that they had the requisite qualifications. Chicago, B. & Q. R. Co. *v.* Chamberlain, 84 Ill. 333.

31. *Alabama.* — Pettus *v.* McClannahan, 52 Ala. 55.

Connecticut. — Raymond *v.* Bell, 18 Conn. 81.

Indiana. — Featherston *v.* Small, 77 Ind. 143.

Iowa. — Morrow *v.* Weed, 4 Iowa 77, 66 Am. Dec. 122; Little *v.* Sinnet, 7 Iowa 324; Smith *v.* Engle, 44 Iowa 265; Davenport Mut. Sav. F. & L. Ass'n *v.* Schmidt, 15 Iowa 213.

Nebraska. — Kuker *v.* Beindorff, 63 Neb. 91, 88 N. W. 190.

Pennsylvania. — Fowler *v.* Jenkins, 28 Pa. St. 176.

When a court has jurisdiction every intendment is in favor of the regularity and sufficiency of the subsequent proceedings, especially will it be presumed that the court obeyed the mandate of a statute governing the proceedings. Rector, etc., of Trinity Church *v.* Higgins, 4 Rob. (N. Y. Super. Ct.) 1.

32. *United States.* — Dowell *v.* Applegate, 152 U. S. 327; Evers *v.* Watson, 156 U. S. 527; Skirving *v.* National L. Ins. Co., 59 Fed. 742; Erwin *v.* Lowry, 7 How. 172.

Alabama. — Hundley *v.* Chadick, 109 Ala. 575, 19 So. 845.

Arkansas. — Byers *v.* Fowler, 12 Ark. 218, 54 Am. Dec. 271.

Indiana. — Hays *v.* Ford, 55 Ind. 52.

Michigan. — Arnold *v.* Nye, 23 Mich. 286.

Minnesota. — Turrell *v.* Warren, 25 Minn. 9; Sandwich Mfg. Co. *v.* Earl, 56 Minn. 390, 57 N. W. 938.

Mississippi. — Goodsell *v.* Delta & P. L. Co., 72 Miss. 580, 18 So. 452.

Missouri. — Reed *v.* Vaughn, 15 Mo. 137, 55 Am. Dec. 133.

Nevada. — *Ex parte* Hill, 5 Nev. 154.

New York. — Ruckman *v.* Cowell, 1 N. Y. 505; Griswold *v.* Sedgwick, 1 Wend. 126. See Morse *v.* Cloyes, 11 Barb. 100.

"The courts of the United States though possessing a limited jurisdiction, yet in the intendment of law

regularity.[33] But in a direct proceeding the presumption is against their jurisdiction of the subject-matter of the action.[34]

F. Probate Courts. — The judgments and judicial acts of courts of probate are generally accorded the same presumptions as courts of general jurisdiction,[35] at least, as to those matters over which their jurisdiction extends.[36] The fact that they have a limited jurisdiction does not deprive their acts of such presumptions.[37] In some jurisdictions, however, they are regarded as courts of inferior and special jurisdiction and as such only entitled to the presumptions which attach to the judgments of such courts,[38] especially

stand upon the same footing as courts of record of general jurisdiction. All the presumptions which are indulged in favor of superior tribunals of general jurisdiction are equally extended to the courts of the United States. In pleading a judgment or decree of one of these courts there is no more necessity for showing the facts which confer jurisdiction than in a plea of a judgment of the highest tribunal known to the law." Reed *v.* Vaughan, 15 Mo. 137, 55 Am. Dec. 133.

Bankruptcy. — The powers of the district court in bankruptcy cases being special and summary, the jurisdiction of the court in such proceedings must be shown. Morse *v.* Presby, 25 N. H. 299. But see Howes *v.* Carlisle, 21 Ky. L. Rep. 613, 52 S. W. 936; Morris *v.* Goss, 2 Spears L. (S. C.) 68.

33. Wonderly *v.* Lafayette County, 150 Mo. 635, 51 S. W. 745, 73 Am. St. Rep. 474, 45 L. R. A. 386; Mail *v.* Maxwell, 107 Ill. 554; *Ex parte* Hill, 5 Nev. 154. See Turner *v.* Bank of North America, 4 Dall. (U. S.) 8.

34. Dowell *v.* Applegate, 152 U. S. 327. The circuit courts of the United States possess no powers except such as the constitution and the acts of congress confer upon them and "the legal presumption is that every cause is without their jurisdiction until and unless the contrary affirmatively appears." United States *v.* Southern Pac. R. Co., 49 Fed. 297; Earle *v.* Chesapeake & O. R. Co., 127 Fed. 235.

35. See article "Executors and Administrators," Vol. V, p. 452. Davis *v.* Hudson, 29 Minn. 27; Steele *v.* Tutwiler, 68 Ala. 107; Wood *v.* Crawford, 18 Ga. 526; Bush *v.* Lindsey, 24 Ga. 245, 71 Am. Dec. 117; Townsend *v.* Downer, 32 Vt. 183; Matson *v.* Swenson, 5 S. D. 191, 58 N. W. 570; State *v.* Nolan, 99 Mo. 569, 12 S. W. 1047; Lethbridge *v.* Lauder, 13 Wyo. 9, 76 Pac. 682.

The presumption is in favor of the regularity of the proceedings of probate courts, they being placed upon the footing of superior courts; and nothing appearing in the record to the contrary an order of sale and conveyance of a slave belonging to minors will be presumed to have been authorized upon a sufficient showing and for the benefit of the minors. Redmond *v.* Anderson, 18 Ark. 449.

36. Upon any matters within the scope of its powers the judgment of a probate court is presumed to be regular and is entitled to the same presumptions as that of any other court of general jurisdiction. Martin *v.* Robinson, 67 Tex. 378, 3 S. W. 550; Guilford *v.* Love, 49 Tex. 715.

37. Hess *v.* Cole, 23 N. J. L. 116; Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136.

Probate courts are courts of limited jurisdiction, but while acting within the scope of their authority are not courts of inferior as contradistinguished from courts of superior jurisdiction. People *v.* Seelye, 146 Ill. 189, 32 N. E. 458.

38. See Potwine's Appeal, 31 Conn. 381; Overseers of Poor *v.* Gullifer, 49 Me. 360, 77 Am. Dec. 265; Sigourney *v.* Sibley, 21 Pick. (Mass.) 101, 32 Am. Dec. 248; People's Sav. Bank *v.* Wilcox, 15 R. I. 258, 3 Atl. 211, 2 Am. St. Rep. 894; and article "Executors and Administrators," Vol. V, p. 455.

when exercising special powers not within their general authority.[39]

G. County Courts. — The same presumptions apply to county courts of general jurisdiction,[40] or when of limited but not inferior jurisdiction,[41] or where jurisdiction of subject-matter has been acquired,[42] as in the case of any other court of general jurisdiction.

H. Justice's Court. — A justice of the peace court being an inferior court, its judgments are not entitled to any presumptions as to jurisdiction.[43] But when jurisdiction affirmatively appears its proceedings are presumed to be regular and valid.[44] And in some states, apparently, owing to its different constitution, its judgments are entitled to the same presumptions as are ordinarily applied to those of courts of general jurisdiction.[45]

I. Judgments of Foreign Courts. — The judgments of foreign courts of general jurisdiction are accorded the same presumptions as those of domestic courts of the same rank.[46] And the corre-

39. Vogelsang *v.* Dougherty, 46 Tex. 466; Bowser *v.* Williams, 6 Tex. Civ. App. 197, 25 S. W. 453.

40. Matthews *v.* Hoff, 113 Ill. 90; People *v.* Cole, 84 Ill. 327; Barnard *v.* Barnard, 119 Ill. 92, 8 N. E. 320.

41. People *v.* Cole, 84 Ill. 327.

42. Davenport Mut. Sav. F. & L. Ass'n *v.* Schmidt, 15 Iowa 213.

43. See *supra*, "Courts of Inferior Jurisdiction."

44. Hiatt *v.* Simpson, 35 N. C. 72.

45. See Fox *v.* Hoyt, 12 Conn. 491, 31 Am. Dec. 760; Stevens *v.* Mangum, 27 Miss. 481; Billings *v.* Russell, 23 Pa. St. 189, 62 Am. Dec. 330; Clark *v.* McComman, 7 Watts & S. (Pa.) 469; Turner *v.* Ireland, 11 Humph. (Tenn.) 447; Heck *v.* Martin, 75 Tex. 469, 13 S. W. 51, 16 Am. St. Rep. 915; Williams *v.* Ball, 52 Tex. 603, 36 Am. Rep. 730; Wright *v.* Hazen, 24 Vt. 143.

46. *England.* — Robertson *v.* Struth, 5 A. & E. (N. S.) 942.

United States. — Lincoln *v.* Tower, 2 McLean 473.

Alabama. — Hassell *v.* Hamilton, 33 Ala. 280; Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785.

Arkansas. — Munn *v.* Sturges, 22 Ark. 389; Lockhart *v.* Locke, 42 Ark. 17. See Hallum *v.* Dickinson, 54 Ark. 311, 15 S. W. 775.

California. — Cummings *v.* O'Brien, 122 Cal. 204, 54 Pac. 742.

Illinois. — Horton *v.* Critchfield, 18 Ill. 133, 65 Am. Dec. 701; Dunbar *v.* Hallowell, 34 Ill. 168, 85 Am. Dec. 304; Glos *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665.

Indiana. — Bailey *v.* Martin, 119 Ind. 103, 21 N. E. 346; Old Wayne Mut. L. Ass'n *v.* Flynn, 31 Ind. App. 473, 68 N. E. 327.

Iowa. — Lattonrett *v.* Cook, 1 Iowa 1, 63 Am. Dec. 428.

Kansas. — Butcher *v.* Bank, 2 Kan. 70, 83 Am. Dec. 446; Dodge *v.* Coffin, 15 Kan. 277.

Kentucky. — Scott *v.* Coleman, 5 Litt. 349, 15 Am. Dec. 71; Davis *v.* Connelly, 4 B. Mon. 136.

Maryland. — Bank of United States *v.* Merchants' Bank, 7 Gill 415.

Massachusetts. — Buffum *v.* Stimpson, 5 Allen 591, 81 Am. Dec. 767; Van Norman *v.* Gordon, 172 Mass. 576, 53 N. E. 267, 70 Am. St. Rep. 304, 44 L. R. A. 840.

Minnesota. — Stahl *v.* Mitchell, 41 Minn. 325, 43 N. W. 385.

Missouri. — Seymour *v.* Newman, 77 Mo. App. 578.

New York. — Pringle *v.* Woolworth, 90 N. Y. 502; Shumway *v.* Stillman, 4 Cow. 292, 15 Am. Dec. 374; Leach *v.* Linde, 70 Hun 145, 24 N. Y. Supp. 176, *affirmed* 142 N. Y. 628, 37 N. E. 565.

Pennsylvania. — Mink *v.* Shaffer, 124 Pa. St. 280, 16 Atl. 805; Reber *v.* Wright, 68 Pa. 471.

South Carolina. — Coskery *v.* Wood, 52 S. C. 516, 30 S. E. 475.

Texas. — Henry *v.* Allen, 82 Tex. 35, 17 S. W. 515.

sponding rule is applied to the judgments of inferior foreign courts.[47]

J. Direct Attack. — It has been held that there is no presumption of jurisdiction in case of a direct attack upon a judgment.[48] But it has been said that a judgment of a court of general jurisdiction is always presumed to be correct;[49] and when such a judgment is directly attacked for fraud, or other reason,[50] the burden of proof is upon the attacking party. The rule of appellate practice of course is that the error of the court below must be made to appear affirmatively.

West Virginia. — Stewart *v.* Stewart, 27 W. Va. 167.

In an action upon a foreign judgment where it clearly appears that the court rendering the judgment had a judge, clerk and seal, the presumption is that it was a court of general jurisdiction and had jurisdiction of the subject-matter and the parties, and that the proceedings were regular. American Mut. L. Ins. Co. *v.* Mason, 159 Ind. 15, 64 N. E. 525; Bailey *v.* Martin, 119 Ind. 103, 21 N. E. 346.

In an action upon a judgment of a foreign court of general jurisdiction it is not necessary to show that service was made on residents, but the judgment is presumed to be valid. Hale *v.* Tyler, 104 Fed. 757.

The transcript of a foreign judgment rendered by a court of general jurisdiction at a special term and properly certified under the acts of congress is *prima facie* evidence of a valid judgment, although the record does not affirmatively show a compliance with the statutory requisitions authorizing special terms. The court will presume in the absence of evidence to the contrary that the requisitions of the statute were complied with. McLendon *v.* Dodge, 32 Ala. 491.

A record of a judgment rendered in another state properly authenticated under the act of congress regulating the authentication of foreign judgments by having the proper certificates and signatures of the clerk and judge and the seal of the court appended thereto will be presumed *prima facie* to be valid and binding and entitled to full faith and credit, although the judgment may not be signed by the judge of the court rendering it; and in general whenever a judicial record which would be valid and binding in this state comes properly authenticated from another state it will be presumed to be valid and binding in the state from which it comes until the contrary is shown. French *v.* Pease, 10 Kan. 51.

Where Dependent Wholly Upon a Statute in derogation of the common law, jurisdiction of a court of another state is not presumed. Kohn *v.* Haas, 95 Ala. 478, 12 So. 577; Kelley *v.* Kelley, 161 Mass. 111, 36 N. E. 837, 42 Am. St. Rep. 389, 25 L. R. A. 806. See *supra*, "Exercise of Special Statutory Powers."

Contra. — But when the record fails to disclose jurisdictional facts jurisdiction should not be presumed. Warren *v.* McCarthy, 25 Ill. 83; Bimeler *v.* Dawson, 5 Ill. 536, 39 Am. Dec. 430; Rangely *v.* Webster, 11 N. H. 299; Cunningham *v.* Spokane Hydraulic Co., 18 Wash. 524, 52 Pac. 235. But see Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877. See Com. *v.* Blood, 97 Mass. 538.

47. In support of a judgment by a justice of another state it will be presumed that all of the preliminary steps necessary to authorize the entry of the judgment and not required to appear of record, were properly taken. Morgan *v.* Neville, 74 Pa. St. 52.

48. Trimble *v.* Longworth, 13 Ohio St. 431, 439; Blythe *v.* Hinckley, 84 Fed. 228.

49. Harman *v.* Lynchburg, 33 Gratt. (Va.) 37.

50. See article "Judgments," Vol. VII, p. 864.

11. Official Acts and Proceedings. — A. Generally. — In accordance with the general presumptions of regularity and right doing, it is presumed in the absence of evidence to the contrary that public officers have regularly performed their duty in accordance with law. This presumption, however, is merely one phase of the broad maxim that all things are presumed to be rightly done until the contrary is shown, and cannot be applied without regard to the particular case and the facts and issues involved in it.[51]

51. *England.* — Williams *v.* Eyton, 4 H. & N. 357; Sichel *v.* Lambert, 15 C. B. (N. S.) 781.

United States. — Dunlop *v.* United States, 165 U. S. 486; Hayes *v.* United States, 170 U. S. 637; United States *v.* Arredondo, 6 Pet. 691; Nofire *v.* United States, 164 U. S. 657.

Alabama. — Guesnard *v.* Louisville & N. R. Co., 76 Ala. 453; Harvey *v.* Thorpe, 28 Ala. 250, 65 Am. Dec. 344.

Arkansas. — Rice *v.* Harrell, 24 Ark. 402; Wheat *v.* Smith, 50 Ark. 276.

California. — Williams *v.* Bergin, 116 Cal. 56, 47 Pac. 877; Powers *v.* Hitchcock, 129 Cal. 325, 61 Pac. 1076; Rice *v.* Cunningham, 29 Cal. 492; Robertson *v.* Alameda Free Pub. Lib., 136 Cal. 403, 69 Pac. 88. Code Civ. Proc. § 1963, subd. 15.

Colorado. — Colorado Fuel Co. *v.* Maxwell Land Grant Co., 22 Colo. 71, 43 Pac. 556; San Juan County *v.* Oliver, 7 Colo. App. 515, 44 Pac. 362.

Connecticut. — Booth *v.* Booth, 7 Conn. 367; State *v.* Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623.

Florida. — Scott *v.* State, 43 Fla. 396, 31 So. 244; Dupuis *v.* Thompson, 16 Fla. 69.

Georgia. — Doe *v.* Biggers, 6 Ga. 188; Gibbs *v.* Patterson, 75 Ga. 549; Solomon *v.* Peters, 37 Ga. 251, 92 Am. Dec. 69; Jones *v.* Cordele Guano Co., 94 Ga. 14, 20 S. E. 265.

Illinois. — Spring *v.* Kane, 86 Ill. 580; People *v.* The Auditor, 3 Ill. 567; Niantic Bank *v.* Dennis, 37 Ill. 381; Robinson *v.* School Directors Dist. No. 4, 96 Ill. App. 604.

Indiana. — Mullikin *v.* Bloomington, 72 Ind. 161; Talbott *v.* Hale, 72 Ind. 1; Culbertson *v.* Milhollin, 22 Ind. 362, 85 Am. Dec. 428; Enos *v.* State, 131 Ind. 560, 31 N. E. 357.

Iowa. — Spitler *v.* Scofield, 43 Iowa 571; Eggers *v.* Redwood, 50 Iowa 289; Rowan *v.* Lamb, 4 Gr. 468; Black *v.* Minneapolis & St. L. R. Co., 122 Iowa 32, 96 N. W. 984.

Kansas. — Valley Twp. *v.* King Iron Bridge & Mfg. Co., 4 Kan. App. 622, 45 Pac. 660; Morrill *v.* Douglass, 14 Kan. 293.

Kentucky. — Bate *v.* Speed, 10 Bush 644; Buckner *v.* Bush, 1 Duv. 394, 85 Am. Dec. 634; Terry *v.* Bleight, 3 T. B. Mon. 270, 16 Am. Dec. 101; Phelps *v.* Ratcliffe, 3 Bush 334.

Louisiana. — Fanchonette *v.* Grange, 9 Rob. 86; Soniat *v.* Miles, 32 La. Ann. 164; Elder *v.* New Orleans, 31 La. Ann. 500; Templeton *v.* Morgan, 16 La. Ann. 438; Sage *v.* Board of Liquidation, 37 La. Ann. 412.

Maine. — Mills *v.* Gilbreth, 47 Me. 320, 74 Am. Dec. 487; Snow *v.* Weeks, 75 Me. 105; Emery *v.* Brann, 67 Me. 39.

Massachusetts. — Bruce *v.* Holden, 21 Pick. 187; Clapp *v.* Thomas, 5 Allen 158; Gilmore *v.* Holt, 4 Pick. 258.

Michigan. — Blair *v.* Compton, 33 Mich. 414; Westbrook *v.* Miller, 56 Mich. 148, 22 N. W. 256; Peck *v.* Cavell, 16 Mich. 9.

Minnesota. — Gillette-Herzog Mfg. Co. *v.* Board of Com'rs, 69 Minn, 297, 72 N. W. 123; Deering *v.* Peterson, 75 Minn. 118, 77 N. W. 568; St. Peter's Church, Shakopee, *v.* Scott Co., 12 Minn. 395.

Mississippi. — Dyson *v.* State, 26 Miss. 362; Davany *v.* Koon, 45 Miss. 71; Hamblen *v.* Hamblen, 33 Miss. 455, 69 Am. Dec. 358.

Missouri. — City of St. Joseph *v.* Farrell, 106 Mo. 437, 17 S. W. 497; Baker *v.* Underwood, 63 Mo. 384; Ivy *v.* Yancey, 129 Mo. 501, 31 S. W. 937; State *v.* Mastin, 103 Mo.

508, 15 S. W. 529; Roberts *v.* Central Lead Co., 95 Mo. App. 581, 69 S. W. 630.

Nebraska. — Brown *v.* Helsley, 96 N. W. 187; Tierney *v.* Cornell, 3 Neb. 267; State *v.* Savage, 65 Neb. 714, 91 N. W. 716.

New Hampshire. — Wheelock *v.* Hall, 3 N. H. 310; State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162; Shackford *v.* Newington, 46 N. H. 415.

New Jersey. — Mayor, & Council of Newark *v.* State, 32 N. J. L. 453; Mercer County Tract. Co. *v.* United New Jersey R. & C. Co., 64 N. J. Eq. 588, 54 Atl. 819; State *v.* Morristown, 33 N. J. L. 57.

New York. — People *v.* Dalton, 46 App. Div. 264, 61 N. Y. Supp. 263; Smith *v.* Buffalo, 159 N. Y. 427, 54 N. E. 62; People *v.* Crane, 125 N. Y. 535, 26 N. E. 736; Leland *v.* Cameron, 31 N. Y. 115; Smith *v.* Poillon, 87 N. Y. 590, 41 Am. Rep. 402.

North Carolina. — Clifton *v.* Wynne, 80 N. C. 145; Gregg *v.* Mallett, 111 N. C. 74, 15 S. E. 936.

North Dakota. — Pine Tree Lumb. Co. *v.* Fargo, 12 N. D. 360, 96 N. W. 357.

Ohio. — Reynolds *v.* Schweinefus, 27 Ohio St. 311; Ward *v.* Barrows, 2 Ohio St. 241.

Oklahoma. — Pentecost *v.* Stiles, 5 Okla. 500, 49 Pac. 921; Watkins *v.* Havighorst, 13 Okla. 128, 74 Pac. 318.

Oregon. — McLeod *v.* Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491.

Pennsylvania. — Cronise *v.* Cronise, 54 Pa. St. 255; Murphy *v.* Chase, 103 Pa. St. 260; Smith *v.* Walker, 98 Pa. St. 133.

South Carolina. — Sternberger *v.* McSween, 14 S. C. 35; Woody *v.* Dean, 24 S. C. 499; Douglass *v.* Owens, 5 Rich. L. 534.

South Dakota. — See Lyman County *v.* State, 11 S. D. 391, 78 N. W. 17.

Tennessee. — Frierson *v.* Galbraith, 8 Heisk. 22; Sheafer *v.* Mitchell, 109 Tenn. 181, 71 S. W. 86.

Texas. — Sadler *v.* Anderson, 17 Tex. 245; Howard *v.* Perry, 7 Tex. 259; Portis *v.* Hill, 30 Tex. 529, 98 Am. Dec. 481.

Vermont. — Drake *v.* Mooney, 31 Vt. 617, 76 Am. Dec. 145; Adams *v.* Jackson, 2 Aik. 145; Lycoming Ins. Co. *v.* Wright, 60 Vt. 515, 12 Atl. 103.

Wisconsin. — Tainter *v.* Lucas, 29 Wis. 375; Van Buren *v.* Downing, 41 Wis. 122; State *v.* Kempf, 69 Wis. 470, 34 N. W. 226, 2 Am. St. Rep. 753.

Wyoming. — *State v.* State Board Land Com'rs, 7 Wyo. 478, 53 Pac. 292.

Every officer acting under sanction of an oath or in whom the government reposes a trust will be presumed to have done his duty until the contrary is proved. "This is a principle of the first necessity in society, and indispensable for the preservation of the rights of those who by law are obliged to commit their interest to the management of the public agents. The law reposes a special trust in the officer, and the citizen is obliged to trust him. Precarious and perplexing indeed, would the situation of the individual be, if he were obliged to prove that the officer had done his duty. . . . This principle is equally applicable to a proceeding against the officer, and to a proceeding against the right of an individual, derived through the act of the officer." Hickman *v.* Boffman, 3 Ky. 348, 362.

Presumption of Performance by Proper Officer. — Where the records show the performance of certain official acts, the presumption is that each act was performed by the proper officer whose duty it was to perform that particular act. Thus where the records of the county commissioners' office contain a book showing a regular return of a particular tract of land for assessment and an assessment, the presumption is that the respective duties were performed by the proper officers, that is, that the return and valuation was the work of the assessor, and that the tax was duly imposed by the commissioners. M'Coy *v.* Michew, 7 Watts & S. (Pa.) 386.

Effect of Penalty for Breach of Duty. — The presumption is that the officers of the government have done their duty, and this presumption may be strengthened in a particular case

Improbability Does Not Overcome Presumption. — Where the good faith and legal action of officers is not impossible under the circumstances, the mere improbability on the facts of its having been so would not of itself overcome the presumption.[52]

The Conditions Requiring Performance must appear before any presumption arises.[53]

B. Conclusiveness. — This presumption is not conclusive but prevails only till the contrary appears.[54]

C. Unofficial Acts. — The presumption of regularity and proper performance of duty does not extend to unofficial acts.[55]

by the fact that heavy statutory penalties would be incurred by neglect of duty. United States *v.* Crusell, 14 Wall. (U. S.) 1.

52. However improbable it may be that the general venire list of three hundred names should not contain the name of at least one colored man, if the jury commissioners had made their selection without discrimination considering that one-fourth of the population was negroes, yet such a thing is not impossible, and the presumption is that the jury commissioners did their duty. State *v.* Baptiste, 105 La. 661, 30 So. 147.

53. Although the law requires that every post-master shall promptly report every delinquency, neglect or malpractice of mail contractors which comes to his knowledge, there can be no presumption that this duty was performed without proof of knowledge on his part. United States *v.* Carr, 132 U. S. 644.

54. *California.* — Robertson *v.* Alameda Free Pub. Lib., 136 Cal. 403, 69 Pac. 88 (C. C. P. § 1963, subd. 15).

Colorado. — People *v.* Board of County Com'rs, 6 Colo. 202.

Indiana. — Milburn *v.* Phillips, 136 Ind. 680, 34 N. E. 983, 36 N. E. 360.

Kansas. — Morrill *v.* Douglass, 14 Kan. 293.

Louisiana. — Sage *v.* Board of Liquidation, 37 La. Ann. 412.

Maryland. — Kershner *v.* Kershner, 36 Md. 309.

Michigan. — Auditor General *v.* Hill, 97 Mich. 80, 56 N. W. 219.

Missouri. — Carpenter *v.* King, 42 Mo. 219.

Ohio. — Skinner *v.* Brown, 17 Ohio St. 33.

Oregon. — Barnhart *v.* Ehrhart, 33 Or. 274, 54 Pac. 195.

South Carolina. — Sternberger *v.* McSween, 14 S. C. 35.

Wisconsin. — Befay *v.* Wheeler, 84 Wis. 135, 53 N. W. 1121.

55. Fouke *v.* Jackson County, 84 Iowa 616, 51 N. W. 71; Houston *v.* Perry, 3 Tex. 390.

"The general rule is that an officer of the law is presumed to have done his duty. So, when a public officer has done an act which should be preceded by certain preliminary steps, it will be presumed that they were taken. All these presumptions, however, must be limited to his acts as an officer. They do not apply to his precedent acts done as an agent." Hence this rule has no application to a constable who distrains and sells goods under a landlord's warrant, he being the agent of the landlord and not an officer of the law. Murphy *v.* Chase, 103 Pa. St. 260.

"It has frequently been held by this and other courts, that where an officer of a former government assumes to act in discharge of an official attribute, in the absence *of all evidence* to show what are his precise powers, he will be presumed to act within the scope of their legitimate extent. But this presumption can never be invoked to sustain the acts of an officer outside of, or contrary to the usual and well recognized functions and duties of his office. . . . The correct rule, as recognized by this and every other court, unquestionably is, that where an officer of well known, defined and limited powers performs an act at

D. Official Duties Delegated to Private Person. — Where a public officer has delegated an official duty to a private person who is under no legal obligation and has no legal authority to perform it, there is no presumption that the duty has been performed.[56]

E. Summary or Ex Parte Proceedings. — It has been held that this presumption does not apply to summary or *ex parte* proceedings.[57]

F. Does Not Supply Proof of Independent Fact. — This presumption does not supply proof of an independent and a material fact.[58]

G. Vital Jurisdictional Fact. — This presumption is not sufficient to show a vital jurisdictional fact, but where required action is shown to have been taken, it will be presumed to have been regularly taken in accordance with law.[59]

variance with or beyond the scope of his usual authority, the burthen of proving its validity rests upon the party seeking to sustain it. Otherwise, the party seeking to overthrow such a presumption would be forced to prove a negative." Jones *v.* Muisbach, 26 Tex. 235.

56. James *v.* State, 21 Tex. App. 353, 17 S. W. 422, holding that a notice of election given by the clerk of the court to a private person to be posted could not be presumed to have been posted. The presumption which obtains that a clerk will do and has done his official duty can not be extended to a private person, who is under no legal obligation to perform the duty or task imposed upon him.

57. Morton *v.* Reeds, 6 Mo. 64; City of Ft. Smith *v.* Dodson, 51 Ark. 447, 11 S. W. 687, 14 Am. St. Rep. 62, 4 L. R. A. 252; Keane *v.* Kannovan, 21 Cal. 291, 82 Am. Dec. 738; Williams *v.* Underhill, 58 Ill. 137. But see article "Title" as to what presumptions attach to the acts of officers in making tax sales, upon which question the cases are apparently conflicting.

58. The fact that property was captured by a military officer and sent forward by him, and that there is an unclaimed fund in the treasury derived from sales of property of the same kind as that captured, coupled with the presumption that officers are presumed to have done their duty; does not warrant the conclusion that the property captured was delivered by the military officer to a treasury agent, that it was sold by the latter and that the proceeds were conveyed into the treasury. "The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. . . . Nowhere is the presumption held to be a substitute for proof of an independent and material fact." United States *v.* Ross, 92 U. S. 281, distinguishing Crusell's Case, 14 Wall. (U. S.) 1. See Irwin *v.* Mayes, 31 Tex. Civ. App. 517, 73 S. W. 33, *infra,* III, 11, K, a, note.

59. Rowan *v.* Lamb, 4 Gr. (Iowa) 468.

The ordinary presumption that a public officer has done his duty should never be allowed to sustain a vital jurisdictional fact; but where the fact that on an application to a surrogate for an order to sell the real estate of a decedent a guardian was appointed for the infant heirs is made out independently and without the aid of such presumption, the question being only as to the time when it was done and the proof showing it might have been made in proper time, the law will presume that the appointment was made the requisite time before the parties in interest were by the order to show cause against the sale. Sheldon *v.* Wright, 7 Barb. (N. Y.) 39.

H. When Directly Attacked. — When the action of an officer is directly attacked and its legality denied there is no presumption of its regularity.[60]

I. Unconstitutional Law. — There is no presumption that a public officer has complied with an unconstitutional statute.[61]

J. Performance Within Jurisdiction. — Where it is shown that an officer has performed an act within the scope of his authority, the presumption is that its performance occurred within his territorial jurisdiction.[62]

K. Preliminary Acts or Conditions. — a. *Generally.* — Precedent acts and conditions essential to the validity of the subsequent act in question are presumed to have been regularly and properly performed.[63]

60. In collateral proceedings the presumption may sometimes be indulged that taxation has been legally imposed, but in a case where the action of the ministerial and judicial officers whose duty it is to impose it is called directly in question by the tax payers and their authority and jurisdiction denied, such a presumption does not, and from the very nature of things cannot, arise. Bate *v.* Speed, 10 Bush (Ky.) 644.

61. Deering & Co. *v.* Peterson, 75 Minn. 118, 77 N. W. 568.

62. Where a verification is taken by an officer judicially known and recognized as having authority, the presumption is that the act was done within his jurisdiction; otherwise there will be a presumption that he had violated his official obligations by exercising his functions outside of the jurisdiction. Dennison *v.* Story, 1 Or. 272. See Shattuck *v.* People, 5 Ill. 477. See article "Affidavits," Vol. I, p. 711, nn. 19, 20.

In a return of service by a constable if no place of service is named, the presumption is that it was within his precinct. Richardson *v.* Smith, 1 Allen (Mass.) 541.

63. *United States.* — Nofire *v.* United States, 164 U. S. 657.

Alabama. — Christian & Craft Co. *v.* Coleman, 125 Ala. 158, 27 So. 786.

Colorado. — Colorado Fuel & I. Co. *v.* State Board Land Com'rs, 14 Colo. App. 84, 60 Pac. 367.

Illinois. — Chicago B. & Q. R. Co. *v.* Chamberlain, 84 Ill. 333.

Kansas. — Valley Twp. *v.* King Iron Bridge & Mfg. Co., 4 Kan. App. 622, 45 Pac. 660.

Maryland. — Wellersburg & W. N. Plank Road Co. *v.* Bruce, 6 Md. 457.

Michigan. — Calender *v.* Olcott, 1 Mich. 344; Westbrook *v.* Miller, 56 Mich. 148, 22 N. W. 256.

Mississippi. — Wray *v.* Doe, 10 Smed. & M. 452.

New York. — Jackson *v.* Cole, 4 Cow. 587.

North Dakota. — Pine Tree Lumb. Co. *v.* Fargo, 12 N. D. 360, 96 N. W. 357.

Ohio. — Ward *v.* Barrows, 2 Ohio St. 241.

Pennsylvania. — Morgan *v.* Neville, 74 Pa. St. 52. See also Murphy *v.* Chase, 103 Pa. St. 260.

South Carolina. — Norris *v.* Goss, 2 Spears 80.

Texas. — Thompson *v.* State, 23 Tex. Civ. App. 370, 56 S. W. 603; Titus *v.* Kimbro, 8 Tex. 210.

Vermont. — Chandler *v.* Spear, 22 Vt. 388.

Wisconsin. — Huey *v.* Van Wie, 23 Wis. 613; Delaney *v.* Schuette, 49 Wis. 366, 5 N. W. 796.

The law will presume official acts of public officers to have been rightly done unless the circumstances of the case overturn this presumption; and acts done which pre-suppose the existence of other acts to make them legally operative are presumptive proof of the latter. Tierney *v.* Cornell, 3 Neb. 267.

Acts which purport to have been done by public officers in their official capacity and within the scope of their duty will be presumed to have been regular and in accordance with their authority. Thus, under a statute providing that no license shall be

b. *Preliminary Showing.* — Where the legality of an officer's action is dependent upon a preliminary showing to be made to him, the presumption is that such showing was made before his action was taken.[64]

L. Official Conveyance. — a. *Generally.* — Where a conveyance has been made by an officer by virtue of his office, it is presumed that he has taken all the preliminary steps necessary to make his action legal.[65] It has been held, however, that this general rule

issued to a foreign insurance company until a copy of its by-laws has been filed with the secretary of state, where it appears that the secretary has issued to such company a license to make insurance contracts, it must be presumed until the contrary is shown that the secretary of state did his duty and that therefore the license was not issued until the company had complied with the law and filed a copy of its by-laws. Lycoming Ins. Co. *v.* Wright, 60 Vt. 515, 12 Atl. 103.

Does Not Apply in Support of Forfeiture. — The general presumption in favor of the regularity of official action cannot be extended to holding that where an officer is authorized in a certain manner to forfeit rights in one person and bestow them upon another, the mere fact that he has attempted to confer the rights upon such other person will not render unnecessary any proof that he has enforced the forfeiture in a legal manner. Irwin *v.* Mayes, 31 Tex. Civ. App. 517, 73 S. W. 33.

64. It is presumed that an officer did his duty and that his action was based upon the requisite showing. Howard *v.* Perry, 7 Tex. 259.

65. Wray *v.* Doe, 10 Smed. & M. (Miss.) 452; Hickman *v.* Skinner, 3 T. B. Mon. (Ky.) 211; Terry *v.* Bleight, 3 T. B. Mon. (Ky.) 270, 16 Am. Dec. 101. See also Ivy *v.* Yancey, 129 Mo. 501, 31 S. W. 937, and article "Deeds," Vol. IV, p. 153, n. 46.

The legal presumption is that an officer does his duty when acting under general power, such as a sale under *fi. fa.* Dupuis *v.* Thompson, 16 Fla. 69.

Where the lower court finds that an order of sale was duly issued upon a decree, it will be presumed that it was certified or attested by the clerk where the law requires this to be done. C. C. P. § 1963, subd. 15. Spaulding *v.* Howard, 121 Cal. 194, 53 Pac. 563.

Where the execution under which a sale was made has been lost, the court will presume in support of the sale that it contained the necessary return, the presumption being that the constable, a sworn officer, did his duty. "The general rule is, that when an officer is required to do an act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be intended that he has fully performed it, unless the contrary be shown." Doe *v.* Biggers, 6 Ga. 188.

In support of a sale of lands on execution it will be presumed that the officer acted in accordance with the law and first ascertained that there were no sufficient goods and chattels on which to levy, although the execution was irregular and might have been quashed because authorizing him to levy on chattels and land indiscriminately, and this is especially true after a lapse of fifty years. Baker *v.* Underwood, 63 Mo. 384.

Unless the contrary appears it will be presumed that the sheriff in making a judicial sale gave all the notice required by law. Soniat *v.* Miles, 32 La. Ann. 164. See also Brandon *v.* Snows, 2 Stew. (Ala.) 255.

An Appraisement by the sheriff of property taken and sold on execution will be presumed. Mercer *v.* Doe, 6 Ind. 80.

No Application to Acts Required to Appear of Record. — In Hilton *v.* Bender, 69 N. Y. 75, it is held that the rule laid down by Greenleaf that when authority is given by law to officers to make sales of land upon being duly licensed by the courts, and they are required to advertise the

does not apply to vital and necessary jurisdictional facts.[66]

b. *Tax Sales and Deeds.* — The question of what presumption, if any, arises in support of the sheriff in making a tax sale, and in support of tax deeds, is fully discussed elsewhere.[67]

c. *Forfeiture of Title.* — This presumption will not be indulged where it would operate to work a forfeiture of property, or a transfer of title.[68]

M. Execution of Writs and Process. — The presumption is that an officer in the execution of writs and process has acted regularly and lawfully,[69] unless his return on its face shows the

sales in a particular manner and to observe other formalities in their proceedings, the lapse of a sufficient time, usually fixed at thirty years, raises a conclusive presumption that all the legal formalities were observed, does not apply to records and public documents which are supposed to remain in the custody of the officers charged with their preservation, but these must be proved or their loss accounted for and supplied by secondary evidence.

66. On a collateral attack on an execution sale after an attachment, such a vital jurisdictional fact as a levy upon the property cannot be presumed; but a levy appearing to have been made it will be presumed to have been regularly and properly made. Rowan *v.* Lamb, 4 Gr. (Iowa) 468.

67. See articles "Taxation" and "Title."

68. Where a law allotting to soldiers and officers a certain amount of land as a bounty provides that the surveyor general may upon six weeks' published notice sell a certain portion of each allotment to recover compensation for his services if they have not been paid for within two years, in an action by a purchaser under such a sale whose deed recites that the required notice was given, it is nevertheless incumbent upon the plaintiff to prove that the notice was actually given. There can be no presumption that the law in this respect was complied with on the ground that it was the official duty of the surveyor general as a public officer to give such notice, since this presumption cannot be indulged to the extent of making it available to work a forfeiture of property or a transfer of the title from one individual to another. "The maxim *omnia praesumuntur rite et solemnitur esse acta* has been applied to acts of a judicial and official character when necessary to sustain the judgments of courts and protect officers from penalties and forfeitures, and in like cases it has been applied to acts of individuals, and especially in cases in which the officer or individual was prosecuted for omission of duty." But the presumption is only entertained when a breach of duty would be an actual violation of the law. Hill *v.* Draper, 10 Barb. (N. Y.) 454, *distinguishing* Hartwell *v.* Root, 19 Johns. (N. Y.) 345, and Wallace *v.* Maxwell, 1 J. J. Marsh. (Ky.) 447; and *disapproving* Hickman *v.* Skinner, 3 T. B. Mon. (Ky.) 211.

69. Pursley *v.* Hayes, 22 Iowa 11, 92 Am. Dec. 350.

The presumption is that the attaching officer did his duty and executed the writ according to law. Hedrick *v.* Osborne & Co., 99 Ind. 143.

Where an execution against C. was placed in the hands of an officer and it appeared that C. was in possession of a pair of horses when the execution was delivered and until its return day and afterwards sold them and the officer subsequently took the horses from the purchaser and sold them under execution, it was held in an action of trespass against the officer by the purchaser from C. that in the absence of any positive proof it would be presumed from the circumstances that a levy had been lawfully made by the officer before the return day of the execution. Hartwell *v.* Root, 19 Johns. (N. Y.) 345, 10 Am. Dec. 232.

On a collateral attack on the levy

contrary.[70] Where the law requires everything done to be set out in the return, there is no presumption that anything was done which does not appear in the return.[71]

N. Assessment and Levying of Taxes. — It is presumed that public officers have properly performed their legal duties in making assessments and levying taxes.[72]

and proceedings in attachment where the sheriff in his return failed to state that the property attached is the property of the defendant, it was held that it will be presumed that the officer had legally performed his duty, and that the levy had been duly and properly made. The principle is universal in its application that presumptions are allowed where the facts to be presumed are consistent with the duty, trust or power authorized and tend to subserve the purposes of justice; but when the act would be unauthorized by the trust or office, or contrary to the duty of the party assuming the power no such presumption can be admitted. Rowan *v.* Lamb, 4 Gr. (Iowa) 468.

The Return of a sworn officer is presumed to be correct until the contrary is shown, even in a proceeding where its correctness is directly in issue. Bruce *v.* Holden, 21 Pick. (Mass.) 187.

70. Where the officer makes a return of execution upon a summons, without stating how it was done, the presumption is that it was done according to law. But where it appears from the return that the law has not been complied with, the presumption cannot arise that the process has been properly executed. Case *v.* Colston, 1 Metc. (Ky.) 145.

71. Dawson *v.* State Bank, 3 Ark. 505.

72. See article "Taxation." In an action involving the validity of a tax for general revenue, it will be presumed in the absence of proof to the contrary that the tax authorities discharged the duties imposed upon them, and that the board of equalization held annual sessions at the time required by law. Adams *v.* Osgood, 60 Neb. 779, 84 N. W. 257.

The law presumes that a taxing officer on whom is imposed a specific duty has regularly performed his duty and that the proceeding in the required respect was regularly performed; and in an attack made against the levy and collection of the usual and ordinary taxes on the ground that the assessment list was not taken by the required officer it will be presumed that the listing was regularly done until the contrary appears. Pentecost *v.* Stiles, 5 Okla. 500, 49 Pac. 921.

"Where it is shown that a levy for taxes was made by the board of county commissioners, which, under some circumstances, would be legal, and, under others, would be excessive and illegal, it will be presumed, in the absence of evidence showing the existence of conditions that would make it excessive, that the board acted within the law in making the levy, and that it is legal." Harper *v.* Conway Springs, 9 Kan. App. 609, 58 Pac. 488; Bergman *v.* Bullitt, 43 Kan. 709, 23 Pac. 938.

In the absence of contrary evidence a municipal council is presumed to have performed its duty, to make tax levies from year to year as the indebtedness fund required. State *v.* Mutty, 39 Wash. 624, 82 Pac. 118.

An assessment roll is presumed to be correct. Wathen *v.* Allison Ditch Dist. No. 2, 213 Ill. 138, 72 N. E. 781.

Assessments being regularly entered on the assessment books of the county, the presumption is that public officers do their duty and correct an error or irregularity, if one exist, in the manner provided by law. Chamberlain Bkg. House *v.* Woolsey, 60 Neb. 516, 83 N. W. 729.

The action of an officer or assessing body in valuing property for assessment is presumptively fair and impartial. State *v.* Savage, 65 Neb. 714, 91 N. W. 716.

The presumption of law is that the board of equalization performed their duty and corrected any inequality in the assessment of taxes. Guy *v.* Washburn, 23 Cal. 111.

O. Official Contracts. — Contracts of public officials made in their official capacity, if within the scope of their authority, are presumed to have been made in view of and in conformity with the law.[73]

P. Records. — The records of a public officer are presumed to truly represent the business transactions shown thereby,[74] and to have been correctly kept.[75]

Where a Record Is Required To Be Kept by a public officer, the presumption is that he has done so in accordance with the law.[76]

73. While acting within the scope of their official duties upon any subject-matter over which they have control and are empowered to act, the presumption is that public officials obey the law when entering into contracts, and that they do not act in a different mode from that prescribed. So all contracts made by public officials, if within the scope of their power and authority, are presumed to be made in view of and in conformity with the law making them valid. Gillette-Herzog Mfg. Co. *v.* Board of Com'rs, 69 Minn. 297, 72 N. W. 123.

The acts of a public officer having competent authority are presumed to be in conformity with the law. Thus where the selectmen of a town borrowed money and gave the note of the town for it, reciting a vote to pay a certain sum to each volunteer for three years or during the war, and that the money was advanced for the purpose of that vote, it was held that until the contrary is shown it will be presumed that the selectmen acted rightly and borrowed the money for a lawful purpose, which would be for future enlistments only. Shackford *v.* Newington, 46 N. H. 415. See the extended discussion of the authorities in this case.

In support of a deed to the supervisors of a county it will be presumed that title to the land thereby conveyed was wanted for a legitimate purpose, and that the supervisors acted in accordance with their official duty and the true interests of the county. Thayer *v.* McGee, 20 Mich. 195, 209.

74. The law presumes that a public officer faithfully performs his official duty, and that the records of his office truly represent the business transactions entered therein. Paxton *v.* State, 59 Neb. 460, 81 N. W. 383, 80 Am. St. Rep. 689.

75. Books of a county treasurer and auditor presumed to have been correctly kept. Hemingway *v.* State, 68 Miss. 371, 416, 8 So. 317.

The failure of a sheriff's book to show a charge for service of citation is more in the nature of a negative presumption or inference of fact legitimate in argument before the jury than a presumption of law proper as such to be given in the charge, and a charge which in effect gives the same legal effect to the negative presumption arising from the want of such entry in the fee book as the affirmative return on the citation itself that it had been served, is error. Randall *v.* Collins, 52 Tex. 435.

76. Testimony Given Before Magistrate or Coroner. — Where testimony given before a magistrate on a preliminary examination (Davis *v.* State, 17 Ala. 415; Hightower *v.* State, 58 Miss. 636); or before a coroner (Woods *v.* State, 63 Ind. 353; Overtoom *v.* Chicago & E. I. R. Co., 181 Ill. 323, 54 N. E. 898), is by law required to be reduced to writing, the presumption is that they performed their duty, and secondary evidence of such testimony is not admissible until the presumption is overcome or the writing accounted for.

The law presumes that the auditor and treasurer each complied with the law in making charges and credits on their books as to receipts and disbursement warrants, and as to furnishing each other with monthly statements of the same. Hemingway *v.* State, 68 Miss. 371, 416, 8 So. 317.

Records of Recorder. — Matters appearing of record in the records kept by the recorder are presumed to have been entered in the regular course of the business of his office.[77]

Q. Forwarding and Filing of Documents. — Where an officer is charged with the duty of forwarding[78] or of filing[79] documents deposited with him, the presumption is that this duty has been properly performed.

R. Regularity of Meeting of Board. — Notice. — The presumption is in favor of the legality and regularity of a meeting of a public board,[80] and, therefore, that the proper notice was given to its members.[81]

S. Permitting Violation of Law. — The presumption is that public officers do not knowingly permit a violation of the law which it is their duty to prevent.[82]

77. Where a discharge appears in the margin of the record of a mortgage, the presumption of law is that the discharge has been regularly and honestly entered in the regular and legal course of business in the recorder's office. Rice *v.* Cunningham, 29 Cal. 492. See article "Records."

78. When the bond of a public officer to the commonwealth has been duly taken and acknowledged, the law will presume that it has been duly transmitted to the auditor general unless the contrary is shown. Com. *v.* Read, 2 Ashm. (Pa.) 261, 277.

In the absence of evidence to the contrary, it is presumed that officers charged with the duty of forwarding to the clerk of the court for Charleston district abstracts of judgments rendered in other districts of the state have performed their duty, and that therefore lands throughout the state are bound by such judgments in conformity with an act of the legislature. Dawkins *v.* Smith, 1 Hill Eq. (S. C.) 369.

79. Where it is shown that a certificate of the consolidation of certain companies was deposited with the secretary of state in his office, the presumption is that he filed the same of record and that it remains of record. Com. *v.* Atlantic & Gt. W. R. Co., 53 Pa. St. 1, 19.

80. Where the record of the meeting of a board of supervisors shows that they met on a certain day and transacted business, the presumption is that all of the supervisors were present, or at least a quorum. Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.

Where the legality of a meeting of the state land board depended upon whether an absent member had been properly notified of the meeting, the presumption is in favor of the regularity of the meeting, and that the register of the board did his duty and gave the required notice. Colorado F. & I. Co. *v.* State Board Land Com'rs, 14 Colo. App. 84, 60 Pac. 367.

81. Where there is an entry in the proceedings before the county commissioners in effect reciting that all the notices required by the statute had been given, it will be assumed in the absence of a showing to the contrary that the statute was fully complied with. Montgomery *v.* Wasem, 116 Ind. 343, 355, 15 N. E. 795, 19 N. E. 184.

A regular town meeting is presumed to have been held after legal notice, unless it shall be shown that the time or manner of holding it was not according to an appointment of the town, or so unreasonable as to raise a presumption of fraud. Gilmore *v.* Holt, 4 Pick. (Mass.) 258. See also Ford *v.* Clough, 8 Me. 334, 23 Am. Dec. 513.

82. The law presumes that public officers charged with the performance of official duty have not neglected the same; hence it is presumed that state land commissioners would not permit a corporation to occupy

T. Officers Acting in Dual Capacity. — Where it does not appear in which capacity one holding two offices acted, the presumption is that he acted in that capacity which would make his act legal and effective.[83]

U. Joint Action of Body. — Where joint action by the members of an official body is necessary, the presumption is that their action was joint.[84]

V. Persons Who May Claim Benefit. — This presumption applies in favor not only of the officer himself,[85] but, also, in favor of third persons interested in, or affected by the discharge of the officer's duties.[86]

W. Officer of Foreign Jurisdiction. — This presumption of the regular performance of duty is extended to the officers of a foreign jurisdiction.[87]

and make a canal upon public lands without proper authority. Hays *v.* Hill, 23 Wash. 730, 63 Pac. 576.

83. Where it appears that an oath attached to an instrument was made before one who was both a notary and a justice of the peace, and who was incompetent to administer such an oath as a notary, it will be presumed that he administered the oath in his proper capacity. Whittington *v.* Whittington, 24 La. Ann. 157.

84. Where a written permission to use public streets is signed by all the members of a township committee, the presumption is in the absence of evidence to the contrary that there was point deliberation and action by the committee, since official action is presumed to have been regularly taken in compliance with the law. West Jersey Traction Co. *v.* Camden Horse R. Co., 52 N. J. Eq. 452, 471, 29 Atl. 333.

Where only one of two overseers of the poor has acted, the consent of the other will be presumed upon the presumption in favor of the performance of official duty. The presumption in favor of the performance of official duty is very strong, "and that the duty was not performed must be shown by calling those whose relation to the transaction can put a direct negative upon it unless their absence be accounted for." Downing *v.* Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223; *citing* Williams *v.* East India Co., 3 East (Eng.) 192.

85. Hemingway *v.* State, 68 Miss. 371, 8 So. 317; Putman *v.* State, 49 Ark. 449, 5 S. W. 715.

86. *United States.* — Pillow *v.* Roberts, 13 How. 472; Hoyt *v.* Hammekin, 14 How. 346.

Arkansas. — Dawson *v.* State Bank, 3 Ark. 505.

Connecticut. — Brownell *v.* Palmer, 22 Conn. 119.

Iowa. — Spitler *v.* Scofield, 43 Iowa 571.

Kentucky. — Hickman *v.* Boffman, 3 Ky. 348.

Maine. — Tozier *v.* School Dist. No. 2, 39 Me. 556.

Michigan. — Yelverton *v.* Steele, 36 Mich. 62.

Missouri. — Bettis *v.* Logan, 2 Mo. 2.

New York. — Arent *v.* Squire, 1 Daly 347; Nichols *v.* Mase, 94 N. Y. 160.

Between third persons, the presumption is that public officers have done their duty. Therefore a purchaser of personal property at a sheriff's sale need not prove that the sale was duly advertised, nor that it was regular. It devolves upon the opposite party to show its illegality. Brandon *v.* Snows, 2 Stew. (Ala.) 255.

87. In the absence of proof to the contrary, it is to be presumed that the official act of an officer in another state has been performed as required by the law of that state; hence, a protest appearing on its face to have been made by a regular notary of another state who certifies to its truth of his own knowledge is presumed to be a legal and valid

X. Officer of Former Government. — The action of an officer of a former government if apparently in the discharge of his duty is, in the absence of all evidence as to his precise powers, presumed to be within the scope of his authority.[88]

Y. Application to Particular Officers. — This general presumption has been applied to many different classes of officers, such as attorneys at law,[89] auditors,[90] clerks of courts,[91] and their deputies,[92] constables,[93] coroners,[94] custom-house officers,[95] election

protest under the laws of that state. Frierson *v.* Galbraith, 12 Lea (Tenn.) 129.

88. Jones *v.* Muisbach, 26 Tex. 235.

A grant of land made by a Mexican alcalde before the war will be presumed o have been in the course of his ordinary and customary duties, and within the scope of his legitimate authority, and the burden of proof lies upon him who controverts the validity of such a grant to show that it was not made by a competent officer, nor in the forms prescribed by law. Reynolds *v.* West, 1 Cal. 322.

89. *Arkansas.* — Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262.

Georgia. — Fambles *v.* State, 97 Ga. 625, 25 S. E. 365.

Indiana. — Doe *v.* Brown, 8 Blackf. 443.

Maine. — Mattocks *v.* Young, 66 Me. 459.

Nebraska. — White *v.* Merriam, 16 Neb. 96, 19 N. W. 703.

Rhode Island. — Holmes *v.* Peck, 1 R. I. 242.

South Carolina. — Rice *v.* Bamberg, 59 S. C. 498, 38 S. E. 209.

Texas. — Merritt *v.* Clow, 2 Tex. 582.

Wisconsin. — Andrews *v.* Thayer, 30 Wis. 228; Beem *v.* Kimberly, 72 Wis. 343, 39 N. W. 542.

See article "Attorney and Client."

90. Hemingway *v.* State, 68 Miss. 371, 416, 8 So. 317.

91. *United States.* — Slicer *v.* Pittsburg Bank, 16 How. 571.

Alabama. — Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484.

California. — Powers *v.* Hitchcock, 129 Cal. 325, 61 Pac. 1076; Spaulding *v.* Howard, 121 Cal. 194, 53 Pac. 563.

Illinois. — Regent *v.* People, 96 Ill. App. 189; Niantic Bank *v.* Dennis, 37 Ill. 381.

Indiana. — Mountjoy *v.* State, 78 Ind. 172.

Michigan. — Morse *v.* Hewett, 28 Mich. 481.

Missouri. — Blodgett *v.* Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307; State *v.* Lord, 118 Mo. 1, 23 S. W. 764.

Nebraska. — McPherson *v.* Commercial Nat. Bank, 61 Neb. 695, 85 N. W. 895.

New York. — Schermerhorn *v.* Talman, 14 N. Y. 93.

Texas. — Caudle *v.* Williams (Tex. Civ. App.), 51 S. W. 560; Hipp *v.* Bissell, 3 Tex. 18.

Wisconsin. — Delaney *v.* Schuette, 49 Wis. 366, 5 N. W. 796; Noonan *v.* State, 55 Wis. 258, 12 N. W. 379.

The legal presumption is that the clerk of the court faithfully discharges the duties imposed upon him by statute, and the presumption is, therefore, that he duly indexed the transcript of a judgment on the day it was filed in his office in accordance with his usual custom, and he may testify to supplement this presumption as to his uniform custom in regard to such matters. Gate City Abstract Co. *v.* Post, 55 Neb. 742, 76 N. W. 471.

92. Miller *v.* Lewis, 4 N. Y. 554.

93. McLane *v.* Moore, 51 N. C. 520; Doe *v.* Biggers, 6 Ga. 188; Tucker *v.* Bond, 23 Ark. 268; Culbertson *v.* Milhollin, 22 Ind. 362, 85 Am. Dec. 428.

94. People *v.* Dalton, 46 App. Div. 264, 61 N. Y. Supp. 263; Woods *v.* State, 63 Ind. 353.

95. Since public officers are presumed to do their duty, in a controversy between the owner of imported goods, and a common car-

commissioners[96] and officers,[97] equalization boards,[98] governors,[99] interstate commerce commissioners,[1] judges,[2] jury commissioners,[3] justices of the peace,[4] land agents,[5] notaries public,[6] overseers of the

rier, who has advanced the duty on them, the action of the custom house officers in raising the appraised value of the goods and imposing a penalty for under-valuation is presumed to have been proper, and the burden is upon the owner to show that the carrier was negligent in failing to take an appeal from the decision, and that he was thereby injured. Guesnard *v.* Louisville & N. R. Co., 76 Ala. 453.

96. It is presumed that election commissioners have done their duty, since they are sworn officers of the law. Motley *v.* Wilson, 26 Ky. L. Rep. 1011, 82 S. W. 1023.

97. Phelan *v.* Walsh, 62 Conn. 260, 25 Atl. 1; Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; State *v.* Kempf, 69 Wis. 470, 34 N. W. 226, 2 Am. St. Rep. 753; People *v.* Bates, 11 Mich. 362, 83 Am. Dec. 745.

See article "Elections." Vol. V, p. 111.

98. Guy *v.* Washburn, 23 Cal. 111; Adams *v.* Osgood, 60 Neb. 779, 84 N. W. 257.

99. Goodrich *v.* Beaman, 37 Iowa 563; McCutchin *v.* Platt, 22 Wis. 561; State *v.* Johnson, 40 Ga. 164.

1. In a contest between a combination of interstate carriers and a shipper, it is presumed that the interstate commerce commission performed its duty, and directed and required publication of the schedules of rates of such carriers when it approved the same. Railroad *v.* Horne, 106 Tenn. 73, 59 S. W. 134.

2. See *supra*, "Judicial Proceedings," III, 10.

Since it is the duty of the county judge to immediately pay over and deposit with the county treasurer moneys collected for the use of the county, the presumption in the absence of evidence to the contrary is that he has performed his duty. Staples *v.* Llano County, 9 Tex. Civ. App. 201, 28 S. W. 569.

3. State *v.* Baptiste, 105 La. 661, 30 So. 147. The presumption is that the jury commissioners and the clerk of the criminal court in selecting persons to serve as grand jurors obeyed the law and proceeded in the manner prescribed by statute. Regent *v.* People, 96 Ill. App. 189.

4. *United States.* — Carpenter *v.* Dexter, 8 Wall. 513.

Alabama. — Davis *v.* State, 17 Ala. 415.

Georgia. — Highfield *v.* Phelps, 53 Ga. 59.

Illinois. — Shattuck *v.* People, 5 Ill. 477.

Indiana. — State *v.* Carter, 6 Ind. 37.

Iowa. — Snell *v.* Eckerson, 8 Iowa 284.

Louisiana. — Whittington *v.* Whittington, 24 La. Ann. 157.

Maine. — State *v.* Adams, 78 Me. 486, 7 Atl. 267.

Massachusetts. — Tacey *v.* Noyes, 143 Mass. 449, 9 N. E. 830; Stevens *v.* Taft, 3 Gray 487.

Michigan. — Hourtienne *v.* Schnoor, 33 Mich. 274; Saunders *v.* Tioga Mfg. Co., 27 Mich. 520; Love *v.* Wood, 55 Mich. 451, 21 N. W. 887.

Missouri. — Linderman *v.* Edson, 25 Mo. 105; Price *v.* Springfield Real Estate Ass'n, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595.

Vermont. — Underwood *v.* Hart, 23 Vt. 120.

5. A State Land Agent being a public officer, acting under his official oath in the discharge of his official duties, is presumed to have acted in conformity with the law, in the absence of any showing to the contrary. Rice *v.* Harrell, 24 Ark. 402.

6. Montreuil *v.* Pierre, 9 La. 356; Black *v.* Minneapolis & St. L. R. Co., 122 Iowa 32, 96 N. W. 984; McAndrew *v.* Radway, 34 N. Y. 511; Mitchner *v.* Holmes, 117 Mo. 185, 22 S. W. 1070; Frierson *v.* Galbraith, 12 Lea (Tenn.) 129.

Where a notary certifies in his protest that he demanded payment, although he does not state that he took the note with him or presented it for payment, it will be presumed

poor,[7] recorder of the general land office[8] and recording officers generally,[9] school directors[10] and officers,[11] sheriffs[12] and their deputies,[13] county boards of supervisors,[14] public surveyors,[15] town

until the contrary is shown that he did his duty, and had the bill or note with him. Harbour *v.* Taylor, 7 Rob. (La.) 32.

7. Red Willow Co. *v.* Davis, 49 Neb. 796, 69 N. W. 138; Thornton *v.* Campton, 18 N. H. 20.

8. A statement in an abstract of title that patents therein mentioned were recorded raises a presumption that they were properly countersigned by the recorder of the general land office, the presumption being that he regularly performed his official duty in this respect. McLeod *v.* Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491.

9. Holmes *v.* Cleveland C. & C. R. Co., 93 Fed. 100; City of Greeley *v.* Hamman, 17 Colo. 30, 28 Pac. 460; Collins *v.* Valleau, 79 Iowa 626, 43 N. W. 284, 44 N. W. 904; Morrill *v.* Douglas, 14 Kan. 293; Hall *v.* Kellogg, 16 Mich. 135; Com. *v.* Atlantic & Gt. W. R. Co., 53 Pa. St. 9; Harrison *v.* McMurray, 71 Tex. 122, 8 S. W. 612.

Where a deed was filed for record with the recording officer and the fee paid, and the records were soon after destroyed, it was held that it would be presumed that the officer did his duty and recorded the deed. Harrison *v.* McMurray, 71 Tex. 122, 8 S. W. 612.

10. Since the directors of a school district are forbidden to employ a teacher not legally qualified, in the absence of anything to the contrary it will be presumed that the directors did their duty, and that the teacher was legally qualified, in an action by him to recover for his services. McShane *v.* School District, 70 Mo. App. 624.

11. Smith *v.* Knox Dist. Twp., 42 Iowa 522; Scott *v.* Joint School-dist. No. 16, 51 Wis. 554, 8 N. W. 398.

12. *California.* — Curtis *v.* Herrick, 14 Cal. 117, 73 Am. Dec. 632.

Indiana. — Elston *v.* Castor, 101 Ind. 426, 51 Am. Rep. 754.

Iowa. — Rowan *v.* Lamb, 4 Gr. 468.

Kentucky. — Case *v.* Colston, 1 Metc. 145.

Louisiana. — Drouet *v.* Rice, 2 Rob. 374; Brosnaham *v.* Turner, 16 La. 433.

Mississippi. — Cooper *v.* Granberry, 33 Miss. 117.

Missouri. — Ivy *v.* Yancey, 129 Mo. 501, 31 S. W. 937.

Nebraska. — Gilbert *v.* Brown, 9 Neb. 90, 2 N. W. 376.

New Hampshire. — Wheelock *v.* Hall, 3 N. H. 310.

Ohio. — Armstrong *v.* McCoy, 8 Ohio 128, 31 Am. Dec. 435.

Pennsylvania. — Borlin *v.* Com., 110 Pa. St. 454, 1 Atl. 404.

Rhode Island. — Foster *v.* Berry, 14 R. I. 601.

South Dakota. — Guernsey *v.* Tuthill, 12 S. D. 584, 82 N. W. 190.

Texas. — Giddings *v.* Day, 84 Tex. 605, 19 S. W. 682.

Vermont. — Bank of United States *v.* Tucker, 7 Vt. 134.

13. Putman *v.* State, 49 Ark. 449, 5 S. W. 715; Emery *v.* Brann, 67 Me. 39; Smith *v.* Com., 9 Ky. L. Rep. 215, 4 S. W. 798.

14. Thayer *v.* McGee, 20 Mich. 195.

All reasonable presumptions must be made in favor of the regularity and validity of the action of public officers and tribunals, and this applies to the actions of a board of supervisors in a proceeding for the removal of the county clerk. State *v.* Prince, 45 Wis. 610.

Where the facts giving a supervisor jurisdiction to issue a warrant for the taking of property for the non-payment of taxes have been shown, it will be presumed in an action of trespass against him for such taking that he properly and legally performed his official duty, but where the jurisdictional facts have not been shown no such presumption will be made. Clark *v.* Axford, 5 Mich. 182.

15. Under the presumption that official duty has been regularly performed it will be presumed that a deputy surveyor-general properly per-

clerks,[16] and treasury officers of counties, states or the United States.[17]

12. Non-Production, Fabrication, Suppression, and Spoliation of Evidence. — A. Failure to Produce Evidence. — a. *Generally.* The failure or refusal of a party to produce evidence peculiarly within his knowledge and control, and which would have an important bearing upon the facts in dispute, warrants the inference that it would be unfavorable to his contention,[18] especially where

formed his duty in surveying the boundary lines of an Indian reservation. Barnhart *v.* Ehrhart, 33 Or. 274, 54 Pac. 195.

16. State *v.* Potter, 52 Vt. 33.

17. United States *v.* Adams, 24 Fed. 348; Paxton *v.* State, 59 Neb. 460, 81 N. W. 383, 80 Am. St. Rep. 689; Murray *v.* Smith, 28 Miss. 31; Spaulding *v.* Arnold, 125 N. Y. 194, 26 N. E. 295.

In an action against a city collector and treasurer for arresting the plaintiff under a warrant issued by the defendant for the non-payment of taxes by the plaintiff, the warrant *prima facie* proves itself. It is sustained by the ordinary presumption of correctness which attaches to the proceedings of officers; hence the burden is upon the plaintiff to show that the warrant was erroneously issued. Snow *v.* Weeks, 75 Me. 105.

18. *England.* — Armory *v.* Delamirie, 1 Stra. 505.

United States. — Pacific Coast S. S. Co. *v.* Bancroft-Whitney Co., 94 Fed. 180; Kirby *v.* Tallmadge, 160 U. S. 379.

Alabama. — Mordecai *v.* Beal, 8 Port. 529.

Arkansas. — Miller *v.* Jones, 32 Ark. 337.

Georgia. — Harrison *v.* Kiser, 79 Ga. 588, 4 S. E. 320.

Indiana. — Westevelt *v.* National Mfg. Co., 33 Ind. App. 18, 69 N. E. 169.

Kentucky. — Benjamin *v.* Ellinger, 80 Ky. 472.

Louisiana. — Johnson *v.* Marx-Levy & Bro., 109 La. 1036, 34 So. 68.

Massachusetts. — Cheney *v.* Gleason, 125 Mass. 166, 176.

Michigan. — See Ruppe *v.* Steinbach, 48 Mich. 465, 12 N. W. 658; Battersbee *v.* Calkins, 128 Mich. 569, 87 N. W. 760.

Missouri. — Thompson *v.* Chappell, 91 Mo. App. 297.

New Hampshire. — Cross *v.* Bell, 34 N. H. 82.

New Jersey. — Eckel *v.* Eckel, 49 N. J. Eq. 587, 27 Atl. 433; Clark *v.* Hornbeck, 17 N. J. Eq. 430.

New York. — Timlin *v.* Standard Oil Co., 126 N. Y. 514, 27 N. E. 786, 22 Am. St. Rep. 845. See Clark *v.* Miller, 4 Wend. 628.

Ohio. — Christy *v.* Douglas, Wright, 486.

Pennsylvania. — Fowler *v.* Sergeant, 1 Grant Cas. 355; Lee *v.* Lee, 9 Pa. St. 169.

South Dakota. — See Rossiter *v.* Boley, 13 S. D. 370, 83 N. W. 428.

Tennessee. — Webster *v.* Whitworth (Tenn. Ch.), 63 S. W. 290.

Texas. — Darby *v.* Roberts, 3 Tex. Civ. App. 427, 22 S. W. 529.

West Virginia. — Bindley *v.* Martin, 28 W. Va. 773.

Where a party has the means and opportunity to prove a material fact and fails or neglects to prove it, the fair and just presumption is that it does not exist. Roney *v.* Moss, 74 Ala. 390; Wood *v.* Holly Mfg. Co., 100 Ala. 326, 349, 13 So. 948, 46 Am. St. Rep. 56.

Where a complainant in equity makes a record a part of his bill and relies upon it to show certain facts, his failure to produce it raises a presumption that its production would have disproved the allegations of the bill. Clark *v.* Oakley, 4 Ark. 236.

For an Exhaustive Discussion of the cases on this question, see the elaborate dissenting opinion of Simmons, C. J., in Western & A. R. Co. *v.* Morrison, 102 Ga. 319, 29 S. E. 104, 66 Am. St. Rep. 173, 40 L. R. A. 84.

Failure to Produce Whole Record. As a general rule, where a party

he has the burden of proof,[19] or the other party has made a *prima facie* case.[20]

No Legal Presumption arises in such cases, however, but merely a logical inference from the circumstances, the force and effect of which is a question entirely for the jury.[21]

b. *Failure to Offer Strongest Evidence.* — The failure of a party to offer the strongest evidence within his power warrants a strong inference that if produced it would be unfavorable to his case.[22] And this is the rule independent of any question of whether the

relies upon the record of a court of general jurisdiction as proof, he must introduce the whole of it, and if he does not the presumption from silence or absence will be against him and not in his favor. Towne *v.* Milner, 31 Kan. 207, 1 Pac. 613. Ogden *v.* Walters, 12 Kan. 282, 79 Am. Dec. 537.

Physical Examination. — Refusal to Submit To. — See article "PHYSICAL EXAMINATION," Vol. IX.

19. Where a party having the burden of proof fails to produce strong evidence within his power without explanation, this fact raises a presumption that it would, if produced, make against him. Pruyn *v.* Young, 51 La. Ann. 320, 25 So. 125.

20. Where one party has evidence upon a point as to which the other party has made a *prima facie* case but fails to present it, the law is well settled that such failure may be taken as an admission that such evidence if presented would not aid the party who has it. Chicago & W. I. R. Co. *v.* Newell, 113 Ill. App. 263; East St. Louis Connect. R. Co. *v.* Altgen, 112 Ill App. 471.

21. See Doty *v.* State, 7 Blackf. (Ind.) 427; Minch *v.* New York & Q. C. R. Co., 80 App. Div. 324, 80 N. Y. Supp. 712; Kirkpatrick *v.* Allemannia F. Ins. Co., 102 App. Div. 327, 92 N. Y. Supp. 466; Sugarman *v.* Brengel, 68 App. Div. 377, 74 N. Y. Supp. 167; Diel *v.* Missouri Pac. R. Co., 37 Mo. App. 454; Ellis *v.* Sanford, 106 Iowa 743, 75 N. W. 660; Western & Atl. R. Co. *v.* Morrison, 102 Ga. 319, 29 S. E. 104, 66 Am. St. Rep. 173, 40 L. R. A. 84; and cases in note 18 *supra*.

Where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him. It is an inference of fact, not a presumption of law. But the fact that the trial court in instructing the jury used the word, "presumption" instead of "inference," is not reversible error if the remainder of the charge shows that the judge did not intend and the jury could not have understood the word presumption to mean more than inference. Hall *v.* Vanderpool, 156 Pa. St. 152, 26 Atl. 1069.

Contra. — Where a party to a controversy fails to examine a material and important witness in his behalf, the law raises the presumption that such witness's evidence if given would be adverse to such party. Dewing *v.* Hutton, 48 W. Va. 576, 37 S. E. 670.

Where the burden is on a party to prove a material fact in issue not otherwise clear the failure without excuse to produce an important and necessary witness to such fact raises the conclusive presumption that such witness's testimony if produced would be adverse to the contention of such party. Vandervort *v.* Fouse, 52 W. Va. 214, 43 S. E. 112; Garber *v.* Blatchley, 51 W. Va. 147, 41 S. E. 222; Union Trust Co. *v.* McClellan, 40 W. Va. 405, 21 S. E. 1025. In such case the opposite party is entitled to the benefit of the presumption raised, as to what the evidence of the absent witness would be. Garber *v.* Blatchley, 51 W. Va. 147, 41 S. E. 222.

22. Congregational Church *v.* Morris, 8 Ala. 182, 191; Mordecai *v.* Beal, 8 Port. (Ala.) 529; Cockerell *v.* Smith, 1 La. Ann. 1; Spring Garden Mut. Ins. Co. *v.*

evidence suppressed was technically the "best" or "primary" evidence.[23]

Where Books contain the best and strongest evidence as to a fact in issue and are within possession or control of one of the parties, his unexplained failure to produce them warrants the inference that they would have been unfavorable to him.[24]

c. *Failure to Produce Documentary Evidence After Notice.* The unexplained failure of a party in possession of documentary evidence to produce the same after proper notice or when otherwise

Evans, 9 Md. 1, 66 Am. Dec. 308.

Where a certain species of evidence is conclusive upon the point in issue, the failure of the party upon whom the burden of proof lies to produce it raises the presumption that it does not exist. Succession of Hubee, 20 La. Ann. 97.

The non-production of papers essential in the trial of a cause which are proved to be in the possession of one of the parties, unexplained, raises a presumption that they contain something which would tend to the disadvantage of the party retaining them if they were produced. Eckel *v.* Eckel, 49 N. J. Eq. 587, 27 Atl. 433.

23. "The failure to produce the strongest evidence in the power of a party raises a strong inference against him. One of the general rules of evidence, of universal application, is, that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degree of proof, speaking in a more general and enlarged sense of the terms, when tendered as evidence of a fact. The meaning of the rule is, not that courts require the strongest possible assurance of the matters in question; but that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party's possession or power; because the absence of the primary evidence raises a presumption, that, if produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party. . . . For a like reason, even in cases where the higher and inferior testimony cannot be resolved into primary and secondary evidence, technically, so as to compel the production of the higher; and the inferior is, therefore, admissible and competent without first accounting for the other, the same presumption exists in full force and effect against the party withholding the better evidence." Clifton *v.* United States, 4 How. (U. S.) 242.

24. Bach *v.* Cornen, 5 La. Ann. 109; Merwin *v.* Ward, 15 Conn. 377; Chaffee *v.* United States, 18 Wall. (U. S.) 516; Cartier *v.* Troy Lumb. Co., 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470; State *v.* New Orleans Waterworks Co., 107 La. 1, 31 So. 395.

Books of Account. — Paige *v.* Stephens, 23 Mich. 357.

Where the books of a co-partnership are in the possession of one of the co-partners, in a proceeding to settle the co-partnership business his failure without excuse to produce the books in evidence will be considered as a strong circumstance against him. Wallace *v.* Berger, 14 Iowa 183. Where a party's books would show the character of the transactions in dispute, his failure to produce them warrants an inference that they would be damaging to his cause. United States *v.* Flemming, 18 Fed. 907. If one who by the nature of his agreement is bound to keep an account of profits refuses or neglects to produce it upon the trial of a cause involving the settlement of his accounts, the jury will be justified in charging him beyond what it can be shown he received. Dickey *v.* M'Cullough, 2 Watts & S. (Pa.) 88.

legally required to do so,[25] warrants an inference that it would be unfavorable to him.[26] This circumstance, however, raises no legal presumption as to what such suppressed evidence would show;[27] nor does it supply the place of other necessary evidence.[28] But

25. See article "BEST AND SECONDARY EVIDENCE," Vol. II, p. 352 *et seq.*

26. Mantonya *v.* Reilly, 184 Ill. 183, 56 N. E. 425; Schreyer *v.* Turner Flouring Mills Co., 29 Or. 1, 43 Pac. 719. See also Mills *v.* Fellows, 30 La. Ann. 824; Devlan *v.* Wells, 65 N. J. L. 213, 47 Atl. 467; Darby *v.* Roberts, 3 Tex. Civ. App. 427, 22 S. W. 529.

If a party withhold from inspection a book containing entries affording very material evidence on the issues on the ground that it is private, the court and jury have the right to infer that it contains evidence unfavorable to him. Lowell *v.* Todd, 15 U. C. C. P. 306.

Where one party claims that a particular writing is a forgery, and the other upon demand refuses to produce it for inspection, his conduct "can only be interpreted as an admission that such inspection would tend to prove" its falsity. Sharon *v.* Hill, 26 Fed. 337.

If after notice a party fail to produce documentary evidence in his possession, the jury may consider this fact as a circumstance in passing upon any alleged fact which would be made to appear, or not to appear by the production of the documents. Reavis *v.* Orenshaw, 105 N. C. 369, 10 S. E. 907.

In Attorney General *v.* Halliday, 26 U. C. Q. B. 397, 411, an instruction to the effect that the non-production by a party of his books containing material evidence after notice to produce is strong presumptive evidence against him, was held proper and not open to the objection that it led the jury to think that this fact raised a presumption of law.

Where a deed to a testator comes into the possession of his executor who does not produce or account for its loss, the most favorable intendment as to its contents will be made for the benefit of the heirs. Livingston *v.* Newkirk, 3 Johns. Ch. (N. Y.) 312.

Where No Notice Has Been Given to a party to produce a written agreement, his failure to produce it raises no unfavorable presumption against him. Sullivan *v.* Cranz, 21 Tex. Civ. App. 498, 52 S. W. 272. See also Emerson *v.* Fisk, 6 Me. 200, 206, 19 Am. Dec. 206.

27. Hunt *v.* Collins, 4 Iowa 56; Cartier *v.* Troy Lumb. Co., 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470; Cross *v.* Bell, 34 N. H. 82; Life & Fire Ins. Co. *v.* Mechanic F. Ins. Co., 7 Wend. (N. Y.) 31. But see Crescent City Ice Co. *v.* Ermann, 36 La. Ann. 841; Benjamin *v.* Ellinger, 80 Ky. 472; and *infra*, "SPOLIATION OF EVIDENCE."

See article "BEST AND SECONDARY EVIDENCE," Vol. II, p. 376, *et seq.*

A charge that everything may be presumed against the destroyer of a document is too broad and indefinite. Bott *v.* Wood, 56 Miss. 136. "There is great danger that the maxim may be carried too far. It cannot properly be pushed to the extent of dispensing with the necessity of other evidence and should be regarded 'as merely matter of inference in weighing the effect of evidence in its own nature applicable to the subject in dispute.'"

Cannot Relieve the Opposite Party From the Burden of Proving His Case. — Gage *v.* Parmelee, 87 Ill. 329.

28. Life & Fire Ins. Co. *v.* Mechanic F. Ins. Co., 7 Wend. (N. Y.) 31.

Suppression by one party to a suit of a document relied upon as evidence by the opposite party is not equivalent to an admission of the truth of the claim of the latter respecting its contents, and does not dispense with the necessity of *prima facie* proof of such claim sufficient to sustain a judgment or decree, but where a *prima facie* case is made and doubt is cast upon it by rebuttal evidence or otherwise, suppression of the document raises a strong inference against the party

it does authorize the admission of secondary evidence, and after secondary evidence of the contents of a suppressed book or document has been given every legitimate inference possible to be drawn therefrom will be made against the party who might have produced the best evidence, and in favor of his adversary.[29]

d. *Evidence or Testimony Incompetent or Conditionally Competent.* — (1.) **Generally.** — Objecting to and securing the exclusion of evidence as incompetent, is not a suppression of evidence war-

failing to produce it and determines the point in favor of the other party. Stout *v.* Sands, 56 W. Va. 663, 49 S. E. 428. To the same effect Springfield Garden Mut. Ins. Co. *v.* Evans, 9 Md. 1, 66 Am. Dec. 308. See also Walsh *v.* Gilmor, 3 H. & J. (Md.) 383, 6 Am. Dec. 502.

In an action to foreclose a vendor's lien, plaintiff's petition charged that the deeds conveying the land to defendant retained the vendor's lien; it was held that the failure to produce the deeds on trial after notice rendered secondary evidence admissible but did not prove their contents, or that they recited a vendor's lien retained. Gayle *v.* Perryman, 6 Tex. Civ. App. 20, 24 S. W. 850.

29. *Illinois.* — Cartier *v.* Troy Lumb. Co., 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470.

Minnesota. — McGuiness *v.* School Dist., 39 Minn. 499, 41 N. W. 103.

Mississippi. — Bott *v.* Wood, 56 Miss. 136.

New Hampshire. — Cross *v.* Bell, 34 N. H. 82.

New York. — Life & Fire Ins. Co. *v.* Mechanic F. Ins. Co., 7 Wend. 31; Jackson *v.* M'Vey, 18 Johns. 330; Wylde *v.* Northern R. Co., 14 Abb. Pr. (N. S.) 213; Barber *v.* Lyon, 22 Barb. 622.

Oregon. — Schreyer *v.* Turner Flour. Mills Co., 29 Or. 1, 43 Pac. 719.

See article "Best and Secondary Evidence," Vol. II, p. 376, *et seq.*

Slight Secondary Evidence of the contents of a paper is sufficient against the party who might remove all doubts by producing the original, but who refuses to do so after proper notice. Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

Where it appears from the case stated that a note was in the possession of the plaintiff and was not produced at the trial, every fair presumption that can arise from withholding it is to be made against him as to those parts of the contents that do not appear from the evidence given. Symington *v.* McLin, 18 N. C. 291.

Rule Stated. — "The refusal to produce books, under a notice, lays the foundation for the introduction of secondary evidence. It affords neither presumptive nor *prima facie* evidence of the fact sought to be proved by them. A party cannot infer from the refusal to produce books which have been called for, that if produced they would establish the fact which he alleges they would prove. The party in such a case may give secondary evidence of the contents of such books or papers; and if such secondary evidence is vague, imperfect, and uncertain as to dates, sums, boundaries, etc., every intendment and presumption as to such particulars shall be against the party who might remove all doubt by producing the higher evidence. Life & Fire Ins. Co. (N. Y.) *v.* Mech. Fire Ins. Co., 7 Wend. 33, 34. All inferences shall be taken from the inferior evidence most strongly against the party refusing to produce; but the refusal itself raises no presumption of suspicion or imputation to the discredit of the party, except in a case of spoliation or equivalent suppression. There the rule is that *omnia praesumuntur contra spoliatorem.* In other words, with the exception just mentioned, the refusal to produce books or papers upon notice is not an independent element from which anything can be inferred as to the point which is sought to be proved by the books

ranting any unfavorable inference against the objector;[30] nor does the failure to produce incompetent evidence warrant such an inference even though it might have been admitted by consent of the adverse party;[31] neither does the failure to produce the declarations of the adverse party which would have been incompetent in his behalf because self-serving.[32]

(2.) Privilege, Privileged Communications, and Testimony of Witnesses Competent Only by Consent. — The almost universal rule in criminal cases is that the defendant's claim of his privilege against testifying warrants no unfavorable inference or presumption against him.[33] But whether the claim by a party in a civil case of his privilege against testimony tending to incriminate him can be considered as a circumstance against him, the courts are not in accord.[34]

or papers. Nor can any views of policy growing out of the refusal be associated with the secondary evidence to enlarge the province of the jury, to infer or presume the existence of the fact to which that evidence relates. For considerations of policy, being the source, origin, and support of artificial presumptions, having no application to conclusions as to actual matter of fact, the finding of a jury in conformity with such considerations, and not according to their actual conviction of the truth, resolves itself into a rule or presumption of law." Hanson *v.* Eustace's Lessee, 2 How. (U. S.) 653, 708.

30. Evidence Excluded on Objection. — Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101. But see People *v.* Hovey, 92 N. Y. 554.

31. Where a party's books and the entries therein cannot be admitted in evidence on his own behalf as primary proof without the consent of the adverse party, no presumption can arise against him from his failure to produce them. Cartier *v.* Troy Lumb. Co., 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470. See also Merwin *v.* Ward, 15 Conn. 377.

Where a defendant in a personal injury action has shown statements of physicians who examined plaintiff before the accident warranting an inference that she was then suffering from nervous trouble similar to that alleged to be due to the injury sued for, the failure of the defendant to call such physicians as witnesses on the chance that the plaintiff would waive her right to exclude such testimony on the ground of privilege does not warrant an inference that their testimony would be adverse to the defendant. Pronk *v.* Brooklyn Heights R. Co., 68 App. Div. 390, 74 N. Y. Supp. 375.

32. Since a party cannot introduce his own declarations in evidence, the failure of the other party to introduce them raises no presumption that they would militate against the latter; hence, in an action for breach of contract to marry where the plaintiff introduces the defendant's letters to her, the failure of the defendant to introduce her letters to him does not justify an instruction that this latter fact raises a presumption that such letters would be unfavorable to his contention. Law *v.* Woodruff, 48 Ill. 399.

33. See *infra*, III, 12, A, g, (3.), and also article "PRIVILEGE," III, 9, n. 22.

34. Where a party in a civil action refuses to answer relevant questions on the ground of privilege, the jury may infer therefrom that the evidence would have been unfavorable to him. Central Stock & Grain Exch. *v.* Board of Trade, 196 Ill. 396, 63 N. E. 740; Morgan *v.* Kendall, 124 Ind. 454, 24 N. E. 143, 9 L. R. A. 445; Andrews *v.* Frye, 104 Mass. 234. See also *In re* De Gottardi, 114 Fed. 328. *Contra.* — Rose *v.* Blakemore, Ry. & M. 382, 21 E. C. L. 465; Carne *v.* Litchfield, 2 Mich. 340; Phelin *v.* Kenderline, 20 Pa. St. 354; Nunn *v.* Brandon, 24 Ont. 375; Friess *v.* New York Cent. & H. R. R. Co., 67 Hun

Failure to introduce, or refusal to consent to the admission of privileged communications,[35] or the testimony of witnesses[36] which are only competent by consent of the party refusing to produce them or permit their introduction, raises no unfavorable inference or presumption against him, since this would destroy the benefit of the privilege.

e. *Criminal Case.* — (1.) **Generally.** — While the failure of the accused in a criminal case to offer any evidence is not an admission of guilt,[37] yet, where strong evidence has been introduced against the defendant, and it appears that he has within his power evidence not equally available to the state which would show the actual facts, his failure to produce such evidence warrants the jury in inferring that it would make against him.[38] But no unfavorable inference

205, 22 N. Y. Supp. 104; Lloyd *v.* Passingham, 16 Ves. Jr. 59, 64. See also Carter *v.* Beals, 44 N. H. 408, 412, and article "PRIVILEGE."

35. See article "PRIVILEGED COMMUNICATIONS." The refusal of a party to waive his privilege as to communications made to his physician, or his failure to call the physician as a witness, raises no presumption against him. Arnold *v.* Maryville, 110 Mo. App. 254, 85 S. W. 107.

On the contest of a will the failure of the administrator with the will annexed, to introduce the testimony of the decedent's physician as to the latter's mental condition raises no inference against such administrator where the testimony of a physician is privileged, although the privilege might have been waived. Brackney *v.* Fogle, 156 Ind. 535, 60 N. E. 303.

36. The Refusal of One Spouse To Consent to the Examination of the Other as a witness against him or her raises no unfavorable presumption because it is not a case of suppression of evidence. National German-American Bk. *v.* Lawrence, 77 Minn. 282, 79 N. W. 1016; Knowles *v.* People, 15 Mich. 408. See article "HUSBAND AND WIFE," Vol. VI, p. 893. *Contra.* — People *v.* Hovey, 92 N. Y. 554. See also Carpenter *v.* Pennsylvania R. Co., 13 App. Div. 328, 43 N. Y. Supp. 203.

37. The accused in a criminal case may rely upon the presumption of innocence in his favor and upon the insufficiency of the evidence introduced by the prosecution, and his failure to offer any evidence is not an admission of his guilt. State *v.* Carr, 25 La. Ann. 407.

38. *Indiana.* — Lee *v.* State, 156 Ind. 541, 60 N. E. 299; Doty *v.* State, 7 Blackf. 427.

Iowa. — State *v.* Rodman, 62 Iowa 456, 17 N. W. 663; State *v.* Cousins, 58 Iowa 250, 12 N. W. 281.

Kansas. — State *v.* Grebe, 17 Kan. 458.

Maine. — State *v.* McAllister, 24 Me. 139.

Michigan. — People *v.* Hendrickson, 53 Mich. 525, 19 N. W. 169.

New York. — People *v.* Dyle, 21 N. Y. 578; People *v.* Hovey, 92 N. Y. 554.

North Carolina. — State *v.* Smallwood, 75 N. C. 104.

Pennsylvania. — Com. *v.* McMahon, 145 Pa. St. 413, 22 Atl. 971.

Virginia. — Taylor *v.* Com., 90 Va. 109, 17 S. E. 812.

Where strong circumstantial evidence has been offered against a defendant in a criminal case and it is apparent that he is so situated that he could offer evidence of all the facts and circumstances as they exist, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural inference is, that if produced, it would tend to sustain the charge, but this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution. Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

arises from his failure to call an alleged accomplice,[39] nor from the fact that on his preliminary examination he failed to offer any evidence.[40]

(2.) Character of Defendant in Criminal Case. — No unfavorable inference or presumption arises against the defendant in a criminal case from his failure to offer evidence of his good character.[41]

f. *Failure to Call Witness.* — **(1.) Generally.** — The unexplained failure to call and examine as a witness a person who has peculiar knowledge of material facts in issue warrants the inference that his testimony would have been unfavorable to the party to whom the witness was available and who would naturally be expected to produce him under the circumstances.[42] And this is especially true

Where the defendant who has been contradicted by two witnesses fails to call in his own behalf a witness who, as the evidence showed, was fully able to confirm his testimony if it was true, and whose interest was identical with the defendant's, without assigning any reason for the failure, the jury may draw inferences unfavorable to his case, it being incumbent upon the defendant, in view of the evidence as to the absent witness, to show that he was not accessible. United States *v.* Schindler, 10 Fed. 547.

39. State *v.* Cousins, 58 Iowa 250, 12 N. W. 281.

40. Failure to Offer Evidence on Preliminary Examination. — The failure of a defendant to introduce any evidence in his own behalf upon his preliminary examination before the magistrate raises no presumption or inference against him where the statute expressly gives him the election to make or not to make a defense on his cross-examination before the magistrate. Templeton *v.* People, 27 Mich. 501.

41. Ormsby *v.* People, 53 N. Y. 472; State *v.* Dockstader, 42 Iowa 436.

42. *Canada.* — Lowell *v.* Todd, 15 U. C. C. P. 306.

United States. — The Joseph B. Thomas, 81 Fed. 578; *In re* Kellogg, 113 Fed. 120; Graves *v.* United States, 150 U. S. 118; Runkle *v.* Burnham, 153 U. S. 216.

Alabama. — Roney *v.* Moss, 74 Ala. 390.

Arkansas. — Miller *v.* Jones, 32 Ark. 337.

Colorado. — Oppenlander *v.* Left Hand Ditch Co., 18 Colo. 142, 31 Pac. 854.

Connecticut. — Palmer *v.* Green, 6 Conn. 14.

Georgia. — East Tenn. V. & G. R. Co. *v.* Douglass, 94 Ga. 547, 19 S. E. 885; Hoffer *v.* Gladden, 75 Ga. 532.

Illinois. — Central Stock & Grain Exch. *v.* Chicago Board of Trade, 196 Ill. 396, 63 N. E. 740; Village of Princeville *v.* Hitchcock, 101 Ill. App. 588.

Indiana. — Lee *v.* State, 156 Ind. 541, 60 N. E. 299.

Kentucky. — Benjamin *v.* Ellinger, 80 Ky. 472, 4 Ky. L. Rep. 317; Roseberry *v.* Wilson, 24 Ky. L. Rep. 285, 68 S. W. 417.

Louisiana. — Crescent City Ice Co. *v.* Ermann, 36 La. Ann. 841.

Massachusetts. — Whitney *v.* Bayley, 4 Allen 173; Cheney *v.* Gleason, 125 Mass. 166, 176. See Reynolds *v.* Sweetser, 15 Gray 78.

Michigan. — Vergin *v.* Saginaw, 125 Mich. 499, 84 N. W. 1075; Higman *v.* Stewart, 38 Mich. 513. See also Cross *v.* Lake Shore & M. S. R. Co., 69 Mich. 363, 37 N. W. 361, 13 Am. St. Rep. 399.

Mississippi. — Bunckley *v.* Jones, 79 Miss. 1, 29 So. 1000; Anderson *v.* Cumberland Tel. & Tel. Co., 38 So. 786.

Missouri. — Baldwin *v.* Whitcomb, 71 Mo. 651.

Montana. — Territory *v.* Hanna, 5 Mont. 248, 5 Pac. 252.

New Jersey. — Eckel *v.* Eckel, 49 N. J. Eq. 587, 27 Atl. 433.

New York. — *In re* Bernsee, 63 Hun 628, 17 N. Y. Supp. 669; Kirkpatrick *v.* Allemannia F. Ins. Co., 102

App. Div. 327, 92 N. Y. Supp. 466; Banagan *v.* Clark, 37 Misc. 483, 75 N. Y. Supp. 1019; Wennerstrom *v.* Kelly, 7 Misc. 173, 27 N. Y. Supp. 326; Yula *v.* New York & Q. C. R. Co., 39 Misc. 59, 78 N. Y. Supp. 770.

North Carolina.— Black *v.* Wright, 31 N. C. 447.

Oregon. — Wimer *v.* Smith, 22 Or. 469, 30 Pac. 416.

Pennsylvania. — Frick *v.* Barbour, 64 Pa. St. 120; Hall *v.* Vanderpool, 156 Pa. St. 152, 26 Atl. 1069.

South Carolina. — Murray *v.* South Carolina R. Co., 10 Rich. L. 227, 70 Am. Dec. 219.

Tennessee. — Wright *v.* Durrett (Tenn. Ch.), 52 S. W. 710.

Texas. — Schram *v.* Strouse (Tex. Civ. App.), 28 S. W. 262; Bailey *v.* Hicks, 16 Tex. 222.

Vermont. — State *v.* Smith, 71 Vt. 331, 45 Atl. 219; Seward *v.* Garlin, 33 Vt. 583.

West Virginia. — Dewing *v.* Hutton, 48 W. Va. 576, 37 S. E. 670; Vandervort *v.* Fouse, 52 W. Va. 214, 43 S. E. 112.

While the failure of the plaintiff in a personal injury action to call the physician who attended her to corroborate her own testimony raises no presumption that if present he would not corroborate the plaintiff as to her injuries, nevertheless, the jury may consider this fact and the defendant is entitled to an instruction to this effect. Minch *v.* New York & Q. C. R. Co., 80 App. Div. 324, 80 N. Y. Supp. 712.

Where a party seeking to avoid a transaction as fraudulent, his unexplained failure to secure the testimony of a third person in whose presence the alleged fraudulent representations were made warrants an inference that the testimony of such person if produced would have been adverse to such party's contention. "Of course, what effect is to be given to the failure of a party to produce such evidence would depend upon all the circumstances of the case; but when wholly unexplained, it is a matter to be considered, and such effect given to it as the court or jury should deem it entitled to." Wimer *v.* Smith, 22 Or. 469, 30 Pac. 416.

The unexplained absence of husband or wife from the trial and their omission to testify in an action to impeach a conveyance to her as in fraud of his creditors would create an unfavorable presumption against the defendant spouses. Throckmorton *v.* Chapman, 65 Conn. 441, 32 Atl. 930. See also Toomey *v.* Lyman, 61 Hun 623, 15 N. Y. Supp. 883.

Where a witness for the plaintiff has testified to seeing the defendant commit an act of adultery with one G., which the defendant denies, the the failure of the plaintiff to call G. in corroboration raises no inference against him, but the defendant's failure to call G. as a witness raises an inference that G.'s testimony would be prejudicial to her. Kenyon *v.* Kenyon, 88 Hun 211, 34 N. Y. Supp. 720.

In an action for damages for causing the death of plaintiff's intestate, the unexplained failure of the plaintiff to call as a witness the deceased's brother, who was the only person present at the time of the injury, was held sufficient to warrant unfavorable inferences against the plaintiff. Lebanon Coal & Mach. Ass'n *v.* Zerwick, 77 Ill. App. 486.

The failure of the plaintiff in a personal injury action to call as a witness a person to whom he claims defendant's foreman made a damaging statement is a circumstance against him when the foreman has denied making the alleged statement. Galveston, H. & S. A. R. Co. *v.* Walker (Tex. Civ. App.), 85 S. W. 28.

Passengers Who Saw Accident. The fact that the defendant railway company in an action against it for personal injuries fails to call as witnesses passengers whose names were taken at the time of the accident, raises no legal presumption that if called their testimony would have been adverse to the defendant. "I am aware of no rule creating such a presumption against a party, or even permitting the testimony he presents to be looked upon less favorably, for his failure to call other persons as witnesses, except in the case of witnesses in the employ of the party, or in some other way so related to or associated with him that the law presumes that they would be

when the latter has the burden of proof,[43] or the evidence is strongly against him.[44]

Evidence Explaining the Absence of a material witness is admissible when the failure to produce him would warrant an unfavorable inference.[45]

(2.) Employes. — An employe of one of the parties, who has peculiar knowledge of the facts in issue and is presumably disposed to testify most favorably to his employer, should be called as a witness by the latter and his unexplained failure to do so warrants an inference that the testimony would be unfavorable to him.[46]

favorably disposed to him if called." Yula *v.* New York & Q. C. R. Co., 39 Misc. 59, 78 N. Y. Supp. 770.

43. Carter *v.* Chambers, 79 Ala. 223.

44. See Cheney *v.* Gleason, 125 Mass. 166; Knight *v.* Capito, 23 W. Va. 639.

It is among the strongest circumstantial proofs against a person that he omits to give evidence to repel circumstances of suspicion against him which he would have it in his power to give if those circumstances of suspicion were unfounded. Black *v.* Wright, 31 N. C. 447.

The failure or refusal of a party to produce testimony which might reasonably be supposed to be within his power, to explain or rebut circumstances of suspicion, strengthens the presumption arising from those circumstances. Thompson *v.* Shannon, 9 Tex. 536.

45. Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121; Brown *v.* Barse, 10 App. Div. 444, 342 N. Y. Supp. 306.

46. Gulf, C. & S. R. Co. *v.* Ellis, 54 Fed. 481; The Fred. M. Laurence, 15 Fed. 635; Atlanta & W. P. R. Co. *v.* Holcombe, 88 Ga. 9, 13 S. E. 751; Schwier *v.* New York Cent. & H. R. R. Co., 90 N. Y. 558 (failure to call engineer in charge of train causing the injury in question); Ludwig *v.* Metropolitan St. R. Co., 71 App. Div. 210, 75 N. Y. Supp. 667. See also Whitney *v.* Ticonderoga, 127 N. Y. 40, 27 N. E. 403; Day *v.* New Orleans Pac. R. Co., 35 La. Ann. 694; Gallagher *v.* Hastings, 21 App. D. C. 88.

Where a railroad company is charged with the negligent killing of a horse upon its track, the absence at the trial of the agents or servants of the company who were on the train when the horse was killed raises a strong inference against the company. Murray *v.* South Carolina R. Co., 10 Rich. L. (S. C.) 227.

The failure of the defendant to call the motorman in charge of the car which injured the plaintiff at a street crossing warrants the assumption that the motorman made no effort to check the speed of the car until the plaintiff was struck. "It is familiar doctrine that the failure of an employer to call a witness who was in his employ at the time of the accident, and who is presumed to be friendly, and to have some knowledge of the accident, without any attempt to explain the reasonable failure, raises a strong presumption that the testimony of the employe will be damaging to such party." Hicks *v.* Nassau Elec. R. Co., 47 App. Div. 479, 62 N. Y. Supp. 597.

In an action against a street railway company for injuries alleged to have been caused by the negligence of the defendant's motorneer, the failure of the defendant to call such motorneer as a witness, although he was available as such, warrants an instruction to the jury that they are at liberty to presume that the testimony of the motorneer, if introduced, would not have been favorable to the cause of the defendant. "It is true that no unfavorable inference arises in ordinary cases from the mere failure to call as a witness one whom the other party had the same opportunity of calling or one whose testimony would be merely cumulative. There is also great danger of such a presumption being allowed to supersede the necessity of other evidence, in-

And the mere production of such an employe in court where he is available to the adverse party does not as a matter of law relieve the employer of any unfavorable inference arising from his failure to examine such employe.[47] But where the employment has terminated previous to the trial,[48] or there is nothing to show that it has

stead of being used merely as a means of weighing the effect of the evidence actually produced applicable to the subject in dispute. . . . It is true the plaintiff might have procured his attendance by subpœna and thus obtain his testimony; but he was not bound to do so. This would have amounted substantially to going 'into the enemy's camp' and calling the very man charged with the negligence which caused the injury." Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341.

But the failure to examine witnesses who are employes will not justify the application of the presumption of negligence, unless they were present at the occurrence in question, or it be made evident that they had knowledge which the employer desired to conceal. Peetz *v.* St. Charles St. R. Co., 42 La. Ann. 541, 7 So. 688.

47. In Western & Atlantic R. Co. *v.* Morrison, 102 Ga. 319, 29 S. E. 104, 66 Am. St. Rep. 173, 40 L. R. A. 84, which was an action for damages against a railroad company, it appeared that one W., who was employed by the defendant company as fireman at the time of the accident, and who had excellent opportunities for knowing the truth of the matter, was present in court at the instance of the defendant but was not called by the latter to testify in its behalf. Plaintiff's counsel in argument contended that the failure of the defendant to examine this witness was a circumstance justifying the inference that his testimony would have been prejudicial to the defendant. Defendant objected to this as improper argument and requested an instruction that the production of the witness in court where he might have been called by the plaintiff in his own behalf was sufficient to relieve the defendant of any presumption arising from the failure to examine him. The refusal of the trial court to give this instruction was held no error, on the ground that the whole matter was one for the jury, and that the limits of the argument were largely in the discretion of the trial court. The cases of Davis *v.* Central R. Co., 75 Ga. 645; Anderson *v.* Savannah Press Pub. Co., 100 Ga. 454, 28 S. E. 216; Washington *v.* State, 87 Ga. 12, 13 S. E. 131; Johnson *v.* State, 88 Ga. 606, 15 S. E. 667, were held not to be inconsistent with the principal case. But see the elaborate and exhaustive dissenting opinion of Simmons, C. J., and the apparently contrary case of Davis *v.* Central R. R. Co., *supra.*

Where the plaintiff in a personal injury action calls a physician as a witness, but fails to ask him as to the result of an X-ray examination of the injury, the nature of which is not apparent from objective symptoms, the defendant is entitled to an instruction that the witness's testimony if given would have been adverse to the plaintiff even though the fact of the examination was brought out by the defendant himself who might have made the witness its own. "The defendant was not bound to prove its defense by plaintiff's expert physician, who, at plaintiff's request, made a careful examination of the injured parts to ascertain the extent of their injury; and the burden was upon the plaintiff not only to produce him but also to interrogate him as to facts within his knowledge relating to the important issue, or expose himself to the hazard of unfavorable inferences." Kane *v.* Rochester R. Co., 74 App. Div. 575, 77 N. Y. Supp. 776, following Milliman *v.* Rochester R. Co., 3 App. Div. 109, 39 N. Y. Supp. 274.

48. Reynolds *v.* International & G. N. R. Co. (Tex. Civ. App.) 85 S. W. 323.

Where a hospital association is sued for the alleged negligence of one of its nurses who has since not

continued,[49] no such inference unfavorable to the employer arises.

(3.) Attorney in Case. — The failure of a party to call his attorney in the case who had peculiar knowledge of the alleged facts on which such party's case rested has been held to warrant an unfavorable inference where no question of privileged communication was involved,[50] though it has also been held to the contrary on the ground that it is ordinarily improper for an attorney in the case to testify on behalf of his client.[51]

g. *Failure of Party to Testify.* — **(1.) Generally.** — The failure of a party to testify in his own behalf as to disputed matters within his personal knowledge warrants the inference that his testimony would be unfavorable to his contention on those points.[52] This

been in the defendant's employ for several years, no unfavorable inference can be indulged against the defendant for its failure to produce such nurse as a witness. Ward *v.* St. Vincent's Hospital, 65 App. Div. 64, 72 N. Y. Supp. 587.

49. The failure of the defendant to summon a witness who was an employe at the time of the accident and preceding the trial, in the absence of any proof that he remained in its employ, or was accessible, or was even living at the time of the trial, cannot sustain any presumption against the defendant. Sauer *v.* Union Oil Co., 43 La. Ann. 699, 9 So. 566.

50. The fact that the complainant's attorney made affidavit to the bill cannot relieve the complainant of the inference to be drawn from his failure to call such attorney as a witness to the facts stated in the bill, which sought to set aside a compromise agreement which had been drafted and signed by the attorney, on the ground that it did not express the real agreement. Wright *v.* Durrett (Tenn. Ch.), 52 S. W. 710.

51. The failure of plaintiff's attorney to testify in corroboration of a witness testifying in behalf of the plaintiff as to the execution of the contract which was drawn after consulting such attorney and afterwards shown to him, was held to be no ground for discrediting such witness's testimony, not only because it did not appear that the attorney could testify to the execution of the contract, but also because it would have been improper for him to testify in behalf of his client. Gardner *v.* Benedict, 75 Hun 204, 27 N. Y. Supp. 3.

52. *United States.* — The Silver Moon, 1 Hask. 262, 22 Fed. Cas. No. 12,856.

Alabama. — East *v.* Pace, 57 Ala. 521.

Arkansas. — Matthews *v.* Lanier, 33 Ark. 91; Fordyce *v.* McCants, 55 Ark. 384, 18 S. W. 371.

Colorado. — Union Pac. R. Co. *v.* Hepner, 3 Colo. App. 313, 33 Pac. 72.

Georgia. — Emory *v.* Smith, 54 Ga. 273.

Louisiana. — Bastrop State Bank *v.* Levy, 106 La. 586, 31 So. 164.

Maryland. — Safe Deposit & Trust Co. *v.* Turner, 98 Md. 22, 55 Atl. 1023.

Massachusetts. — Whitney *v.* Bayley, 4 Allen 173.

Michigan. — Cole *v.* Lake Shore & M. S. R. Co., 81 Mich. 156, 45 N. W. 983.

New Jersey. — Eckel *v.* Eckel, 49 N. J. Eq. 587, 27 Atl. 433.

New York. — Nutting *v.* Kings County El. R. Co., 21 App. Div. 72, 47 N. Y. Supp. 327; Brooks *v.* Steen, 6 Hun 516; Watson *v.* Oswego St. R. Co., 7 Misc. 562, 28 N. Y. Supp. 84; Ham *v.* Gilmore, 7 Misc. 596, 28 N. Y. Supp. 126.

Pennsylvania. — Hall *v.* Vanderpool, 156 Pa. St. 152, 26 Atl. 1069.

Tennessee. — Jackson *v.* Blanton, 2 Baxt. 63; Dunlap *v.* Haynes, 4 Heisk. 476.

In an action of ejectment where the disputed question is rightful possession of the land sued for, the failure of the defendant who is present

fact, however, does not raise any legal presumption or shift the burden of proof.[53] And it has been held that no unfavorable infer-

in court to testify in his own behalf is a circumstance to be considered by the jury against the defendant's right to the property in controversy. Payne *v.* Crawford, 102 Ala. 387, 14 So. 854.

Where a party is afforded an opportunity of explaining by interrogatories propounded to him by the opposite party, and fails and refuses to do so, the rational and legal presumption is that the disclosure of the truth would make against him. Mitchell *v.* Napier, 22 Tex. 120.

Where the Plaintiff in a Personal Injury Action is absent from the trial and fails to testify without any explanation, the jury may properly consider this circumstance as tending to impeach the good faith of her claim. Cole *v.* Lake Shore & M. S. R. Co., 95 Mich. 77, 54 N. W. 638.

Where a Party Is Charged With Fraud and fails to come forward and testify to repel the charge, he generates by his failure an unfavorable presumption against his cause. Stephenson *v.* Kilpatrick, 166 Mo. 262, 65 S. W. 773.

Where the petition distinctly charges fraud, defendant's unexplained failure to appear and testify to his own innocence will be regarded as a strong circumstance against him, whether or not he was subpœnaed by the opposite party. Mabary *v.* McClurg, 74 Mo. 575.

A Party's Refusal to Answer Questions solely on the ground that immaterial testimony is called for must be considered against him the same as any other refusal to produce evidence within the power of the witness. Harding *v.* American Glucose Co., 182 Ill. 551, 55 N. E. 577, 643, 74 Am. St. Rep. 189, 64 L. R. A. 738.

Where the defendant Is Sworn But Does Not Testify, all presumptions must be taken most strongly against him. Anker *v.* Smith, 87 N. Y. Supp. 479.

Where One Party to a Suit Testifies to alleged facts equally within the knowledge of the other party, and the latter does not offer himself as a witness and no reason is given why he is not called, the jury may take the failure to testify into consideration in determining what credit they ought to give to the party who has testified. Perkins *v.* Hitchcock, 49 Me. 468. See also Union Bank *v.* Stone, 50 Me. 595, 79 Am. Dec. 631.

In Equity. — The omission of a party to testify to facts within his knowledge, in explanation of, or to control testimony given by others in his presence is a proper subject for consideration in equity as well as at law. McDonough *v.* O'Niel, 113 Mass. 92; *citing* Whitney *v.* Bayley, 4 Allen (Mass.) 173.

53. Thompson *v.* Davitte, 59 Ga. 472; and cases in preceding note. But see Hoffer *v.* Gladden, 75 Ga. 532.

The failure of a party, who is present at a trial, to testify does not shift the burden of proof, but when the evidence establishes a *prima facie* case against a party and the issue is as to a matter particularly within the knowledge of such party, then his failure to testify, if he is present, warrants the presumption in aid of that evidence that he can not rebut the case made against him. Werner *v.* Litzsinger, 45 Mo. App. 106. See also Meagley *v.* Hoyt, 125 N. Y. 771, 26 N. E. 719.

Where a party to a suit is a competent witness in his own behalf, the question whether any, and if so, what inferences are to be drawn from the fact that he does not testify, is for the jury. Carter *v.* Beals, 44 N. H. 408. *Contra.* When a defendant in a civil case can by his own testimony throw light upon matters at issue necessary to his defense and peculiarly within his own knowledge and fails to go upon the witness stand, the presumption is raised and will be given effect that the facts, as he would have them, do not exist. Bastrop State Bank *v.* Levy, 106 La. 586, 31 So.

ence is warranted in such case from the mere failure to testify.[54]

(2.) Limitations of Rule. — It has been held that the failure of a party to testify warrants no unfavorable inference against him where it does not appear that there were any facts within his knowledge which were not as fully known to other witnesses;[55] or where the evidence of the adverse party is not sufficient to *prima facie* satisfy the burden of proof resting upon him,[56] or is wholly favorable to the party not testifying;[57] or, where the latter has been mentally incapacitated,[58] or is only a nominal party to the action.[59]

(3.) Defendant in Criminal Case. — Although the defendant in a criminal prosecution is a competent witness in his own behalf, the general rule, frequently by statute, is that his failure to testify cannot be considered by the jury in determining his guilt or in-

164; School Board *v.* Trimble, 33 La. Ann. 1073. See also Mitchell *v.* Napier, 22 Tex. 120.

54. Baker *v.* People, 105 Ill. 452; Village of Princeville *v.* Hitchcock, 101 Ill. App. 588; Moore *v.* Wright, 90 Ill. 470. See also Thompson *v.* Davitte, 59 Ga. 472. But see Central Stock & Grain Exch. *v.* Board of Trade, 196 Ill. 396, 63 N. E. 740.

No inference of law should arise one way or the other from the failure of a party to testify in his own behalf even in a civil case, since the adverse party might have introduced him as a witness, and a party might have refrained from testifying in his own behalf from other motives besides the consciousness that the facts within his knowledge if disclosed would make against his own side of the case. Lowe *v.* Massey, 62 Ill. 47.

55. Weeks *v.* McNulty, 101 Tenn. 495, 48 S. W. 809, 70 Am. St. Rep. 693, 43 L. R. A. 185. See also Hitchcock *v.* Davis, 87 Mich. 629, 49 N. W. 912; Wilson *v.* St. Louis & S. F. R. Co., 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624.

56. In an action by the first against the second mortgagee for a conversion of the mortgaged property, the failure of the defendant to testify in his own behalf that he had no notice of the plaintiff's prior unrecorded mortgage is not a circumstance from which an unfavorable presumption against him is to be indulged when the record shows that he was absent from the state at the time of the trial, and that the plaintiff's case did not make out against him a *prima facie* showing of notice. "When the evidence is conflicting or circumstantial and it appears to be in the power of a party to contradict or explain, a presumption can and should be indulged against him if he should fail to testify without satisfactory reason." But no such presumption should be indulged against a "defendant for not introducing himself to disprove facts essential to plaintiff's recovery which he has failed to *prima facie* establish. He may remain silent until plaintiff has shown a case which calls upon him to speak in denial or explanation." Pollak *v.* Davidson, 87 Ala. 551, 6 So. 312.

57. A presumption can not, and ought not, to be indulged against a party, who does not introduce and examine himself as a witness, merely to support the uncontradicted evidence, favorable to him, which his adversary introduces. Without subjecting himself to the imputation of withholding evidence, he may properly rely on that his adversary introduces, when it is without contradiction. McGar *v.* Adams, 65 Ala. 106.

58. The failure of the plaintiff in a personal injury action to testify in his own behalf raises no unfavorable inference against him, if it appears that his mind was impaired by his injury. Cramer *v.* Burlington, 49 Iowa 213.

59. Nominal Party. — The rule that when a party to the suit in testifying withholds evidence of material facts, this is to be taken as a circumstance against him, does not apply where the witness is sued as

nocence.[60] The defendant is entitled to the benefit of this rule in spirit as well as in letter.[61] The failure to testify, however, must be distinguished from the failure to offer other evidence.[62]

h. *Limitations of Rule.* — **(1.) Generally.** — A party is not bound to produce all the witnesses to the transaction in question, or who may be able to shed light on the subject in issue,[63] nor witnesses

guardian and is therefore only nominally a party. Muckelroy *v.* House, 21 Tex. Civ. App. 673, 52 S. W. 1038.

60. *United States.* — United States *v.* Pendergast, 32 Fed. 198.

California. — People *v.* Streuber, 121 Cal. 431, 53 Pac. 918.

Illinois. — Farrell *v.* People, 133 Ill. 244, 24 N. E. 423.

Kansas. — State *v.* Skinner, 34 Kan. 256, 8 Pac. 420.

Maine. — State *v.* Landry, 85 Me. 95, 26 Atl. 998 (by virtue of statute apparently changing the previous rule to the contrary; see State *v.* Cleaves, 59 Me. 298, 8 Am. Rep. 422; State *v.* Bartlett, 55 Me. 200).

Massachusetts. — Com. *v.* Hanley, 140 Mass. 457, 5 N. E. 468.

Missouri. — State *v.* Robinson, 117 Mo. 649, 23 S. W. 1066.

New York. — People *v.* Watson, 54 Hun 637, 7 N. Y. Supp. 532; People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830.

Texas. — McCoy *v.* State (Tex. Crim.), 81 S. W. 46.

Vermont. — State *v.* O'Grady, 65 Vt. 66, 25 Atl. 905.

See also article "PRIVILEGE," III, 9, note 22.

Comment by Prosecuting Attorney Improper. — Failure of the defendant in a criminal case to testify upon any given point cannot be commented upon in argument by the district attorney. People *v.* Sanders, 114 Cal. 216, 46 Pac. 153. It is the duty of the court on request to prevent the prosecuting attorney from arguing to the jury that the failure of the defendant to testify is evidence against him. State *v.* Cameron, 40 Vt. 555.

In the Absence of a Statute expressly providing that no unfavorable inference shall be drawn from the accused's failure to testify, it has been held that the jury may draw the logical inference which might arise under the particular circumstances. Parker *v.* State, 61 N. J. L. 308, 39 Atl. 651. *affirmed* 62 N. J. L. 801, 45 Atl. 1092. See also State *v.* Bartlett, 55 Me. 200, 216.

Instruction by Court. — In some states the defendant is entitled to an instruction embodying this general principle, without request. State *v.* Myers, 8 Wash. 177, 35 Pac. 580, 756. See State *v.* Landry, 85 Me. 95, 26 Atl. 998. In others a request therefor is necessary. People *v.* Flynn, 73 Cal. 511, 15 Pac. 102. See also Farrell *v.* People, 133 Ill. 244, 24 N. E. 423. The defendant cannot complain of the giving of such an instruction. Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750. But under some statutes the court is prohibited from referring to the matter at all. State *v.* Pearce, 56 Minn. 226, 57 N. W. 652.

61. On a prosecution for keeping intoxicating liquors with intent to sell them, where the only evidence against the defendant is that he was seen in a room adjoining the barroom with his sleeves rolled up, it is error to charge the jury that an inference of guilt may be drawn from the failure to offer explanatory evidence which is within the power of the accused although such instruction is qualified by the statement that the evidence, which it must be apparent he can produce, must be evidence other than his own testimony; such an instruction is misleading. Com. *v.* Maloney, 113 Mass. 211.

62. Com. *v.* Harlow, 110 Mass. 411; State *v.* O'Grady, 65 Vt. 66, 25 Atl. 905; State *v.* Rodman, 62 Iowa 456, 17 N. W. 663.

63. Carter *v.* Chambers, 79 Ala. 223; Baldwin *v.* Brooklyn Heights R. Co., 99 App. Div. 496, 91 N. Y. Supp. 59.

A party is not bound to introduce every witness to a fact that might be called. He need only prove the

who have no other or better knowledge of the matter in dispute than those who are produced,[64] nor those who would naturally be antagonistic to him because of their relations with the adverse party,[65] or could only testify to facts admitted by the pleadings.[66] Nor is there any necessity for a party to produce merely cumulative evidence,[67] or additional evidence which he may have in support of a *prima facie*,[68] well established,[69] or uncontradicted case,[70] and no inference arises from his failure to do so.

facts sufficiently. And before any unfavorable inference from the withholding of evidence can be drawn it must distinctly appear that the evidence not introduced could more clearly explain the fact in controversy than the evidence offered. Patton *v.* Rambo, 20 Ala. 485.

No presumption arises unfavorable to the prosecution in a criminal case from the failure to examine all the witnesses to the transaction, or every person to whom a dying declaration was made. "All the law requires is sufficient proof; and a party is not bound to introduce all the witnesses to the facts." Jackson *v.* State, 77 Ala. 18.

64. Fitzpatrick *v.* Woodruff, 15 Jones & S. (N. Y. Super. Ct.) 436; Stickney *v.* Ward, 21 Misc. 449, 47 N. Y. Supp. 597; Bleecker *v.* Johnston, 69 N. Y. 309.

65. See Kenyon *v.* Kenyon, 88 Hun 211, 34 N. Y. Supp. 720; Carpenter *v.* Pennsylvania R. Co., 13 App. Div. 328, 43 N. Y. Supp. 203. See *supra*, III, 12, A, f, (2.), and III, 12, A, h, (2), notes 72-73.

66. **Facts Admitted by Pleadings.** No unfavorable inference can be drawn against a party for his failure to call as witnesses in his own behalf his own employes to prove the existence of facts admitted by the allegations of the pleadings. East Tennessee V. & G. R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315.

67. See Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341; Mooney *v.* Holcomb, 15 Or. 639, 16 Pac. 716; Norfolk & W. R. Co. *v.* Brown, 91 Va. 668, 22 S. E. 496.

In an action of trespass brought by a purchaser from the defendants in attachment against the sheriff and his sureties for the wrongful levy of such attachment, when the plaintiff himself has testified as to the purchase of the goods from the attachment debtors, to the circumstances of the transaction and to the consideration paid, his failure to introduce the debtors as witnesses, they being present in court, is not a suspicious circumstance against the validity of the transaction, and a charge of the court that such failure does not authorize any presumption against the plaintiff is properly given. "There is a rule of evidence to the effect, that a party who has it in his power to produce the best evidence, which he withholds, or leaves unexplained a material question of fact, by an intentional withholding of explanatory evidence, such conduct may give rise to unfavorable inferences against him; but this rule of evidence does not apply when the evidence withheld is of no higher degree than that introduced, is not explanatory of any fact left in uncertainty, but is purely cumulative." Haynes *v.* McRae, 101 Ala. 318, 13 So. 270. To the same effect Pollak *v.* Harmon, 94 Ala. 420, 10 So. 156.

68. Where a party makes a *prima facie* case no inference can be drawn against him for his failure to produce further evidence. See M'Call *v.* Barnheart, 2 Watts (Pa.) 112.

69. See Flynn *v.* New York El. R. Co., 50 N. Y. Super. Ct. 375; Com. *v.* McMahon, 145 Pa. St. 413, 22 Atl. 971; East Tennessee, V. & G. R. Co. *v.* Kane, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315.

70. Although the non-production of evidence clearly within the power of a party creates a strong presumption that if produced it would be against him, yet where the evidence offered is uncontradicted there is no

(2.) Evidence Equally Accessible. — Where evidence or testimony is equally accessible and available to both parties, no unfavorable inference or presumption arises against either from his failure to produce it,[71] except where a witness is in the employ of one of the parties,[72] or otherwise favorably disposed to him.[73]

(3.) Witness Whose Attendance Cannot Be Compelled. — No unfavor-

necessity for producing more satisfactory evidence and no such presumption arises. Mooney *v.* Holcomb, 15 Or. 639, 16 Pac. 716.

71. *United States.* — Atchison, T. & S. F. R. Co. *v.* Phipps, 125 Fed. 478.

Alabama. — Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435; Brock *v.* State, 123 Ala. 24, 26 So. 329; Coppin *v.* State, 123 Ala. 58, 26 So. 333.

Connecticut. — Scovill *v.* Baldwin, 27 Conn. 316.

Georgia. — Davis *v.* Central R. Co., 75 Ga. 645.

Iowa. — State *v.* Rosier, 55 Iowa 517, 8 N. W. 345.

Massachusetts. — See Sturtevant *v.* Wallack, 141 Mass. 119, 4 N. E. 615.

Michigan. — Cross *v.* Lake Shore & M. S. R. Co., 69 Mich. 363, 37 N. W. 361, 13 Am. St. Rep. 399; Cole *v.* Lake Shore & M. S. R. Co., 81 Mich. 156, 45 N. W. 983.

Missouri. — Farmers' Bank *v.* Worthington, 145 Mo. 91, 46 S. W. 745.

New York. — People *v.* Sweeney, 41 Hun 332, (*distinguishing* Gordon *v.* People, 33 N. Y. 501, on this ground). See Horowitz *v.* Hamburg-American Packet Co., 18 Misc. 24, 41 N. Y. Supp. 54.

Pennsylvania. — M'Call *v.* Barnheart, 2 Watts 112.

Tennessee. — See Webster *v.* Whitworth (Tenn. Ch.), 63 S. W. 290.

Texas. — Reynolds *v.* International & G. N. R. Co. (Tex. Civ. App.), 85 S. W. 323.

Vermont. — Daggett *v.* Champlain Mfg. Co., 72 Vt. 332, 47 Atl. 1081; State *v.* Smith, 71 Vt. 331, 45 Atl. 219.

See article "Circumstantial Evidence," Vol. III, p. 147.

Where both parties to a civil action have subpœnaed the same witness, it is error to instruct the jury that they may draw inferences unfavorable to either party from their failure to place him upon the witness stand, although the witness has knowledge of one of the material facts in issue. Erie R. Co. *v.* Kane, 118 Fed. 223, 55 C. C. A. 129.

While it is held in some cases that it is the duty of the state in criminal trials to produce all witnesses within reach of process whose testimony will shed light upon the transaction, its failure to do so does not justify an inference unfavorable to the state when the witnesses are equally available to both parties. State *v.* Smith, 71 Vt. 331, 45 Atl. 219.

In Wood *v.* Agostines, 72 Vt. 51, 47 Atl. 108, it was held proper for the court to prohibit counsel for the plaintiff from arguing that the jury should draw an inference unfavorable to the defendant from his failure to call a certain witness who was equally within the reach of both parties, when so far as appeared, the plaintiff had as much knowledge as the defendant of what such person knew of the matter in controversy.

Question for Jury. — What inference shall be drawn from the failure to call a witness equally within the reach of both parties, is for the jury to say under all the circumstances. Harriman *v.* Reading & L. St. R. Co., 173 Mass. 28, 53 N. E. 156.

When Other Party Has Not Made Prima Facie Case. — The failure of the defendant railway company, in an action for personal injuries, to introduce evidence equally available to the plaintiff raises no inference against the defendant, if the plaintiff has not established a *prima facie* case. Donald *v.* Chicago, B. & Q. R. Co., 93 Iowa 284, 61 N. W. 971, 33 L. R. A. 492, *distinguishing* Clifton *v.* United States, 45 U. S. 242.

72. See *supra*, III, 12, A, f, (2.).

73. See Carpenter *v.* Pennsylvania R. Co., 13 App. Div. 328, 43 N. Y. Supp. 203.

able inference arises against a party because of his failure to produce a witness whose attendance cannot be compelled,[74] nor where he has unsuccessfully exhausted legal process for securing the attendance of a witness.[75]

(4.) Does Not Supply Proof Essential to Adversary's Case. — The failure to produce evidence or witnesses, while under some circumstances it may give rise to unfavorable inferences and strengthen the adversary's case, cannot take the place of proof of an independent and essential fact.[76]

B. FABRICATION. — The fabrication of evidence by a party warrants an unfavorable inference against him.[77]

74. First Nat. Bank *v.* Hyland, 53 Hun. 108, 6 N. Y. Supp. 87. See also Savannah, F. & W. R. Co. *v.* Gray, 77 Ga. 440, 3 S. E 158; McGuire *v.* Broadway & S. A. R. Co., 62 Hun 623, 16 N. Y. Supp. 922; Peetz *v.* St. Charles St. R. Co., 42 La. Ann. 541, 7 So. 688; Pease *v.* Smith, 61 N. Y. 477; Hoard *v.* State, 15 Lea (Tenn.) 318.

75. Witness Was Not Within the Reach of Process. — State *v.* Buckman, 74 Vt. 309, 52 Atl. 427.

Where a party has subpœnaed a witness and the court issued an attachment to compel his attendance without effect, no unfavorable inference can be drawn from the absence of the witness. Manhattan L. Ins. Co. *v.* Alexander, 89 Hun 449, 35 N. Y. Supp. 325.

76. *United States.* — Hanson *v.* Eustace, 2 How. 653.

Alabama. — Jewell *v.* Center, 25 Ala. 493.

Colorado. — Union Pac. R. Co. *v.* Hepner, 3 Colo. App. 313, 33 Pac. 72.

Connecticut. — Merwin *v.* Ward, 15 Conn. 377.

Indiana. — Lockwood *v.* Rose, 125 Ind. 588, 25 N. E. 710.

Kansas. — Nay *v.* Mograin, 24 Kan. 75.

Massachusetts. — Cove *v.* Dighton, S. & S. St. R. Co., 173 Mass. 117, 53 N. E. 133; Berney *v.* Dinsmore, 141 Mass, 42, 5 N. E. 273, 55 Am. Rep. 445.

Missouri. — Diel *v.* Missouri Pac. R. Co., 37 Mo. App. 454.

New Hampshire. — Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

Vermont. — Arbuckle *v.* Templeton, 65 Vt. 205, 25 Atl. 1095.

Virginia. — Norfolk & W. R. Co. *v.* Brown, 91 Va. 668, 22 S. E. 496.

See also *infra*, "SPOLIATION OF EVIDENCE" and *supra*, "FAILURE TO PRODUCE DOCUMENTARY EVIDENCE AFTER NOTICE."

Contra. — Armory *v.* Delamirie, 1 Stra. (Eng.) 505.

Fraud cannot be presumed from the failure of the defendant to introduce the testimony of her husband to explain the alleged fraudulent transaction, of which he had the best knowledge, if the evidence is otherwise insufficient to show fraud. Ellis *v.* Sanford, 106 Iowa 743, 75 N. W. 660.

The Failure of an Accused to Contradict an Accomplice's Testimony by introducing witnesses present at the trial, who, if the testimony of the accomplice had been false, might have contradicted him, raises no presumption in favor of the accomplice's testimony since the accused has the right to rely upon the statute requiring the testimony of the accomplice to be corroborated. State *v.* Hull, 26 Iowa 292.

77. Winchell *v.* Edwards, 57 Ill. 41; Allen *v.* United States, 164 U. S. 492. See article "CIRCUMSTANTIAL EVIDENCE," Vol. III, p. 145, *et seq*; and "ALIBI," Vol. I.

"Undoubtedly, the fabrication of evidence by a party accused of crime is always a circumstance to be taken against him as tending to prove his guilt. It may sometimes constitute a strong and even powerful circumstance to be weighed in connection with other evidence in the case, but it does not create a legal presumption against him." and it is error to

C. Eloignment of Witnesses — A strongly unfavorable inference against a party is warranted by his action in preventing the attendance, or rendering unavailable the testimony of material witnesses.[78] But no such inference is warranted against an accused who is not shown to have been responsible for such action.[79]

D. Spoliation of Evidence. — a. *Generally.* — The wrongful spoliation or destruction of written evidence raises an inference that the evidence destroyed would have been unfavorable to the spoliator.[80] This inference, however, does not supply the place

instruct the jury that it does. Sater *v.* State, 56 Ind. 378.

An Unsuccessful Attempt to Prove an Alibi in a criminal case is always a circumstance against the prisoner, yet such failure like the failure to prove or explain any other material fact which the defendant had or is presumed to have had the means of proving or explaining is merely a circumstance to be weighed and considered by the jury. Kilgore *v.* State, 74 Ala. 1. And does not raise a legal presumption against the defendant. Porter *v.* State, 55 Ala. 95, 107; Sawyers *v.* State, 15 Lea (Tenn.) 694; Toler *v.* State, 16 Ohio St. 583. See more fully article "Alibi," Vol. I.

78. Cruikshank *v.* Gordon, 118 N. Y. 178, 23 N. E. 457; Carpenter *v.* Willey, 65 Vt. 168, 26 Atl. 488; Pratt *v.* Battles, 34 Vt. 391; Houser *v.* Austin, 2 Idaho 188, 10 Pac. 37.

Where one party to a suit has facilitated the absence from the trial of a witness, who has peculiar knowledge of the facts in issue, the presumption is that the testimony of such a witness would be unfavorable to such party. Frank Waterhouse *v.* Rock Island Alaska Min. Co., 97 Fed. 466.

79. State *v.* Huff, 161 Mo. 459, 61 S. W. 900, 1104.

80. *England.* — Gray *v.* Haig, 20 Beav. 219.

United States. — Askew *v.* Odenheimer, Baldw. 380, 2 Fed. Cas. No. 587; Dinniny *v.* The Sam Sloan, 65 Fed. 125.

California. — Fox *v.* Hale & N. Silv. Min. Co., 108 Cal. 369, 41 Pac. 328; Johnson *v.* White, 46 Cal. 328.

Illinois. — Winchell *v.* Edwards, 57 Ill. 41; Tauton *v.* Keller, 167 Ill. 129, 47 N. E. 376.

Indiana. — Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Iowa. — Warren *v.* Crew, 22 Iowa 315; Turner *v.* Hawkeye Tel. Co., 41 Iowa 458, 20 Am. Rep. 605.

Maryland. — Love *v.* Dilley, 64 Md. 238, 1 Atl. 59, 4 Atl. 290.

Massachusetts. — Stone *v.* Sanborn, 104 Mass. 319, 6 Am. Rep. 238; "Joannes" *v.* Bennett, 5 Allen 169, 8 Am. Dec. 738.

Michigan. — Francis *v.* Barry, 69 Mich. 311, 37 N. W. 353.

Missouri. — Hays *v.* Bayliss, 82 Mo. 209; State *v.* Chamberlain, 89 Mo. 129, 1 S. W. 145.

New Hampshire. — State *v.* Knapp, 45 N. H. 148.

New York. — Blade *v.* Noland, 12 Wend. 173, 27 Am. Dec. 126; Ames *v.* Manhattan L. Ins. Co., 31 App. Div. 180, 52 N. Y. Supp. 759.

North Carolina. — Henderson *v.* Hoke, 21 N. C. 119.

Pennsylvania. — Diehl *v.* Emig, 65 Pa. St. 320.

South Carolina. — Halyburton *v.* Kershaw, 3 Desaus. 105.

Wyoming. — Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581.

Where a party has wrongfully destroyed the only written evidence of the fact which is in existence, the presumptions are against his testimony as to the contents of such writing and in favor of the testimony of his adversary. Downing *v.* Plate, 90 Ill. 268.

A trustee who intentionally, without accident or mistake, destroys the written evidence of his trust places himself in a position where the court is bound to make all reasonable presumptions against him. Jones *v.* Knauss, 31 N. J. Eq. 609.

The destruction by a vendor of his contract to convey is strong pre-

of affirmative evidence of the contents of such a writing, but only arises in support of secondary evidence of its contents,[81] though it has been held to the contrary.[82] It may be overcome by satis-

sumptive evidence against his contention that it contained a clause forfeiting the rights of the vendee for any breach of the terms of payment. Warren *v.* Crew, 22 Iowa 315.

Where a partner who keeps the books of the firm has kept them in such a manner as to render it impossible to determine correctly the state of the accounts between the partners, all the presumptions are against him in an action for dissolution and settlement, this being a proper case for the application of the presumption in *odium spoliatoris*. Dimond *v.* Henderson, 47 Wis. 172, 2 N. W. 73.

Spoliation of a Ship's Papers at the time of capture, unexplained, raises the most unfavorable inferences as to her ownership, employment and destination. The Bermuda, 3 Wall. (U. S.) 514, 550. Thus in a prize court if the spoliation of a ship's papers be unexplained, condemnation ensues from defects in the evidence which the party is not permitted to supply. The Olinde Rodrigues, 174 U. S. 510.

Destruction Must Have Been With Fraudulent Intent. — The maxim *omnia praesumuntur contra spoliatorem* will not be applied unless the evidence makes it clear that the party against whom it is sought to be invoked has concealed or destroyed evidence for the purpose of defeating the rights of the adverse party. Lucas *v.* Brooks, 23 La. Ann. 117. See also Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581; Miltenberger *v.* Croyle, 27 Pa. St. 170; Drosten *v.* Mueller, 103 Mo. 624, 15 S. W. 967; Welty *v.* Lake Superior Term. & T. R. Co., 100 Wis. 128, 75 N. W. 1022; Lamore *v.* Frisbie, 42 Mich. 186, 3 N. W. 910.

81. Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581; Askew *v.* Odenheimer, Baldw. 380, 2 Fed. Cas. No. 587. See also Fox *v.* Hale & N. Silv. Min. Co., 108 Cal. 369, 41 Pac. 328.

"The purport of the paper must be proved to have been what it is surmised to have been." M'Reynolds *v.* M'Cord, 6 Watts (Pa.) 288.

The presumption arising from the fact of spoliation of evidence does not relieve the other party from introducing evidence tending affirmatively to prove his case so far as he has the burden. It cannot supersede the necessity of other evidence. The presumption is regarded as merely matter of inference in weighing the effect of evidence in its nature applicable to the question in dispute. Patch Mfg. Co. *v.* Protection Lodge, 77 Vt. 294, 60 Atl. 74, 107 Am. St. Rep. 668; Gage *v.* Parmelee, 87 Ill. 329.

82. Where it appears that a party has fraudulently destroyed documentary evidence of the transactions in question for the purpose of cutting off investigation, it is not necessary for the adverse party to introduce secondary evidence as to the contents or character of the evidence destroyed before the presumption in *odium spoliatoris* can be invoked, but his allegations as to the contents of such a document will be taken to be true. "It would seem too plain for argument, that if secondary evidence were at hand, all need for the application of the rule would cease, and that if the rule could not be applied, unless upon the production of secondary evidence, then the spoiler could assure his success, by cutting off every source of information and every supply of evidence; could become successive in proportion to the destruction he had wrongfully wrought. The authorities give no countenance to such an idea. It is because of the very fact that the evidence of the plaintiff, the proofs of his claim, or the muniments of his title, have been destroyed, that the law, in hatred of the spoiler, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the loss proved, and thus defeats the wrongdoer by the very means he had so confidently employed to perpetrate

factory explanation,[83] and it has been held that no inference arises where the contents of the destroyed writing have been otherwise shown.[84] No inference arises against an innocent party because of the act of his co-party;[85] nor does such conduct justify the exclusion of other independent evidence offered by the spoliator.[86]

b. *Alteration of Instruments.* — The effect of the alteration of an instrument is elsewhere treated.[87]

the wrong." Pomeroy *v.* Benton, 77 Mo. 64, 85. See also Lee *v.* Lee, 9 Pa. St. 169.

83. The Olinde Rodrigues, 174 U. S. 510; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

84. The maxim in *odium spoliatoris* is only applicable to the destruction of a written instrument, and where the contents of such instruments are proved there is no occasion for resorting to the maxim. Bott *v.* Wood, 56 Miss. 136. See also Pomeroy *v.* Benton, 77 Mo. 64, 86; St. Louis *v.* Reg., 25 Can. Sup. Ct. 649.

85. In an action to re-establish a conveyance which had been destroyed by one of the defendants, who was named as a grantor in the deed and who never executed it, and who does not defend, no presumption as to the contents of the deed will be made against the other defendant who had nothing to do with its destruction. Blake *v.* Blake, 56 Wis. 392, 14 N. W. 173. See also Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023.

86. Stone *v.* Sanborn, 104 Mass. 319, 6 Am. Rep. 238.

87. See article "ALTERATION OF INSTRUMENTS," Vol. I.

PRETENSE.—See False Pretenses.

PRIMARY AND SECONDARY EVIDENCE.—See Best and Secondary Evidence; Deeds; Records.

PRINCIPAL AND ACCESSORY.—See Accessories.

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