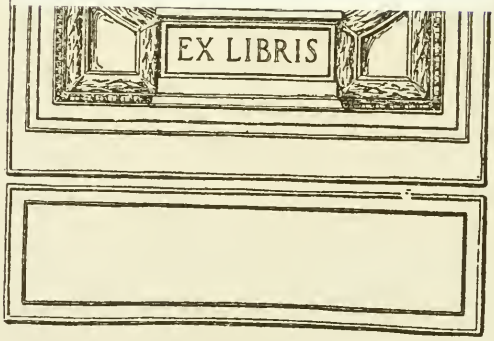

FIRST BIENNIAL

SUPPLEMENT

TO THE

ENCYCLOPÆDIA

OF

EVIDENCE

Bringing down to September, 1908, by means of annotations, citations and additions, all articles contained in the first eleven volumes of the work.

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EXPLANATORY NOTE.

This book supplements and brings down to date volumes 1 to 11, inclusive, of the Encyclopaedia of Evidence.

Figures at the top of each page indicate the pages of the original volume covered thereby. The black figures in the margin represent respectively the page and note number of the original volume to which the supplementary matter relates; matter not covered by the original is placed under the page and note number nearest to which it would logically have fallen. Such new matter may be located by the index found at the beginning of the supplementary article to which it belongs. Errors in the original text and notes have been corrected and noted in the appropriate places.

In examining a proposition in any one of the first eleven volumes the investigator should always be sure to turn to the Supplement to ascertain what, if any, decisions directly in point have been made since the original article was written. To illustrate: Suppose you are examining authorities bearing on the rule stated in the article on "Expert and Opinion Evidence," Volume 5, page 527, note 38, that an expert may not express an opinion upon the question which it is the jury's province to determine. Turn to "Expert and Opinion Evidence" in this volume; run through this to the page with the figures 517-527 at the top. Below, in the margin of the second column, are the figures 527-38, following which will be found the latest cases supporting or relating to the proposition in question.

ABBREVIATIONS.

For the purpose of saving space the style of citing certain reports has been changed as follows:

A..... Atlantic Reporter.
Am. St..... American State Reports.
Ky. L. R..... Kentucky Law Reporter.
N. Y. S..... New York Supplement.
P..... Pacific Reporter.
S.....Southern Reporter.
Tex. Civ.....Texas Civil Appeals.
Tex. Cr.....Texas Criminal.

The following abbreviations have also been adopted:

aff..... affirmed or affirming.
appr.....approved or approving.
cit..... citing.
C..... Commonwealth.
dist..... distinguished or distinguishing.
foll.....followed or following.
mod..... modified or modifying.
over.....overruled or overruling.
P..... People.
quot.....quoting.
ref..... referring.
rev.....reversed or reversing.
S.....State.

TABLE OF TITLES SUPPLEMENTED.

Cite this Supplement

Ency. of Ev. 1908 Supp.

followed by bottom page number.

SUPPLEMENTARY

Annotations, Citations and Addenda to the Articles Contained in the First Eleven Volumes of the

Encyclopædia of Evidence.

ABANDONMENT [Vol. 1.]

Preservation of property, 4-18; *Intention must be evidenced by conduct,* 5-19; *Recognizing title in another,* 5-21; *Inconsistent use of easement,* 5-21; *New use of property,* 5-21; *Abandonment of charter,* 11-38.

Definition. — Norman v. Corbley, 32 Mont. 195, 79 P. 1059; Oviatt v. Min. Co., 39 Or. 118, 65 P. 811.

1-1 Enno-S. Co. v. Fishman, 127 Mo. App. 207, 104 S. W. 1156.

2-7 Noland v. Coon, 1 Alaska 36.

2-8 Brumley v. S., 83 Ark. 236, 103 S. W. 615; Kelsoe v. Oglethorpe, 120 Ga. 951, 48 S. E. 366, 102 Am. St. 138.

2-9 Sharkey v. Candiani, 48 Or. 112, 85 P. 219; Urpman v. Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. 1027.

3-11 Reed v. Gasser, 130 Ia. 87, 106 N. W. 383; Barrett v. Coal Co., 70 Kan. 649, 79 P. 150; New England Co. v. Everett Co., 189 Mass. 145, 75 N. E. 85; Butterfield v. Reed, 160 Mass. 361, 35 N. E. 1128; Sharkey v. Candiani, 48 Or. 112, 85 P. 219; Richmond v. Bennett, 205 Pa. 470, 55 A. 17; Kreamer v. Voneida, 24 Pa. Super. 347, 213 Pa. 74, 62 A. 518; Watts v. Johnson, 105 Va. 519, 54 S. E. 317. See Enfield Co. v. Ward, 190 Mass. 314, 76 N. E. 1053.

3-13 On whom binding. — Such co-owners as do not participate in or ratify an abandonment are not bound by it. Conn v. Oberto, 32 Colo. 313, 76 P. 369.

3-15 Eisele v. Oddie, 128 Fed. 941; Gould v. C. Co., 8 Ariz. 429, 76 P. 598; Watkins v. R. Co., 123 Ia. 390, 98 N. W. 910; Welsh v. Taylor, 134 N. Y. 450, 31 N. E. 896, 18 L. R. A. 535; Haight v. Littlefield, 147 N. Y. 338, 41 N. E. 696; Conabeer v. R. Co., 156 N. Y. 474, 51 N. E. 402; Andrus v. Sugar Co., 93 App. Div. 377, 87 N. Y. S. 671, *aff.*, without opinion, 183 N. Y. 580, 76 N. E. 1088; Huffman v. Smyth, 47 Or. 573, 84 P. 80.

Involuntary absence is not an abandonment. Huffman v. Smyth, supra; Eisele v. Oddie, 128 Fed. 941; Gould v. C. Co., 8 Ariz. 429, 76 P. 598.

4-18 Empire, etc. Co. v. Min. Co., 131 Fed. 591, 603, 66 C. C. A. 99; Noland v. Coon, 1 Alaska 36; Loeser v. Gardner, 1 Alaska 641; Buffalo Z. & C. Co. v. Crump, 70 Ark. 525, 538, 69 S. W. 572; Wood v. W. Co., 147 Cal. 228, 81 P. 512; Conn v. Oberto, 32 Colo. 313, 76 P. 369; Peoria, etc. Co. v. Turner, 20 Colo. App. 474, 79 P. 915; Omar v. Soper, 11 Colo. 380, 18 P. 443, 7 Am. St. 246; Moffatt v. Blue River Co., 33 Colo. 142, 80 P. 139; Gaston v. R. Co., 120 Ga. 516, 48 S. E. 188; Rawlings v. Armel, 70 Kan. 778, 79 P. 683; Norman v. Corbley, 32 Mont. 195, 79 P. 1059; May v. Getty, 140 N. C. 310, 53 S. E. 75; Promontory R. Co. v. Argile, 28 Utah 398, 79 P. 47; Scott v. Moore, 98 Va. 668, 686, 37 S. E. 342, 81 Am. St. 749; Davis v. Dennis, 43 Wash. 54, 85 P. 1079; Urpman v.

Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. 1027.

By insane person. — Evidence will not be received to show the fact or raise the presumption that an insane person intended to abandon his possessory right. White v. Martin, 2 Alaska 495.

Preservation of property is inconsistent with intent to abandon it, though the owner may forget where the property was left. Livermore v. White, 74 Me. 452, 43 Am. Rep. 600.

5-19 Young v. Omnibus Co., 86 L. T. N. S. (Eng.) 41, Gould v. C. Co. (Ariz.), 76 P. 598; Cooper v. Shannon, 36 Colo. 98, 85 P. 175; Swain v. Webre, 106 La. 161, 30 S. 331; New England Co. v. Distill. Co., 189 Mass. 145, 75 N. E. 85; Norman v. Corbley, 32 Mont. 195, 79 P. 1059; City Bank v. Van Meter, 59 N. J. Eq. 32, 45 A. 280; Forty-second R. Co. v. Cantor, 93 N. Y. 943; Sharkey v. Candiani, 48 Or. 112, 85 P. 219; Oviatt v. Min. Co., 39 Or. 118, 65 P. 811; Calhoon v. Neely, 201 Pa. 97, 50 A. 967; Aye v. Philadelphia Co., 193 Pa. 457, 44 A. 556; Marshall v. Oil Co., 198 Pa. 83, 47 A. 927; Scott v. Moore, 98 Va. 668, 37 S. E. 342, 81 Am. St. 749, Urpman v. Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. 1027.

Intention must be evidenced by conduct. — The proof of intention must be shown by a clear, unmistakable act looking to and furnishing evidence of intent to abandon. Scarritt v. R. Co., 148 Mo. 876, 50 S. W. 905.

5-20 Young v. Omnibus Co., 86 L. T. N. S. (Eng.) 41; Buffalo, etc. Co. v. Crump, 70 Ark. 525, 538, 69 S. W. 572, 91 Am. St. 87; Leach v. Rowley, 138 Cal. 709, 72 P. 403; Wood v. Water Co., 147 Cal. 228, 81 P. 512; Butterfield v. O'Neill, 19 Colo. App. 7, 72 P. 807; Chicago, etc. R. Co. v. Wood, 30 Ind. App. 650, 66 N. E. 923; Teachout v. Capital Lodge, 128 Ia. 380, 104 N. W. 440; Galloway v. Rowlett, 24 Ky. L. R. 2503, 74 S. W. 260; Ludlow Mfg. Co. v. Orchard Co., 177 Mass. 61, 58 N. E. 181; Agnew v. Pawnee (Neb.), 113 N. W. 236; Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. 330; Brady v. Brady, 31 Misc. 411, 65 N. Y. S. 621, *aff.*, without opinion, 88 App. Div. 427, 84 N. Y. S. 1119; Denison & S. R. Co. v. R. Co., 96 Tex. 233, 72 S. W. 161, 201; Promontory Co. v. Argile, 28 Utah 398, 79 P. 47; Gill v. Malan, 29 Utah 431, 82 P. 471; Irrigation Co. v. Keel, 25 Utah 96, 69 P. 719; Scott v. Moore, 98 Va. 668, 686, 37 S. E. 342, 81 Am. St. 749; Oney v. Land Co., 104 Va. 580, 52 S. E. 343.

5-21 Gaston v. Elec. Co., 120 Ga. 516, 48 S. E. 188.

Abandonment of the beneficial use may be enough on the part of a conditional grantee. Hannibal, etc. R. Co. v. Frowein, 163 Mo. 1, 63 S. W. 500. See, on the general question of non-user, Davis v. Gale, 32 Cal. 27, 91 Am. Dec. 554; Sieber v. Frink, 7 Colo. 148, 2 P. 901; Smith v. Min. Co., 18 Mont. 432, 45 P. 632; Farwell v. R. Co., 72 N. H. 335, 56 A. 751; Oviatt v. Min. Co., 39 Or. 118, 65 P. 811; Dodge v. Marden, 7 Or. 456.

Non-use of public property is not evidence of abandonment; neither is a temporary use of it for a purpose not inconsistent with that for which it was taken. Corr v. Philadelphia, 212 Pa. 123, 61 A. 808.

Non-user and new grant of privilege to lay railroad tracks in street. See Delaware, etc. R. Co. v. Oswego, 92 App. Div. 551, 86 N. Y. S. 1027; Gaston v. Elec. Co., 120 Ga. 516, 48 S. E. 188.

Discontinuance of use of ancient lights. — See Smith v. Baxter (1900), 2 Ch. 138, 69 L. J. Ch. 437, 87 L. T. 650, 48 W. R. 458.

Neglect to repair a highway is not an abandonment. Brumley v. S., 83 Ark. 236, 103 S. W. 615.

Possession of part. — If the owner is in possession of any of the property, his right to the whole of it is absolute. Eisele v. Oddie, 128 Fed. 941.

Failure to keep easement in repair. Neglect for an unreasonable length of time to keep an easement in repair will be an abandonment (Oney v. Land Co., 104 Va. 580, 52 S. E. 343; Buntin v. Danville, 93 Va. 200, 24 S. E. 830; Norfolk v. Notting-

ham, 96 Va. 34, 30 S. E. 444; Scott v. Moore, 98 Va. 668, 37 S. E. 342, 81 A. S. R. 749), unless it continues to be of some use. Swain v. Webre, 106 La. 161, 30 S. 331; Butterfield v. O'Neill, 19 Colo. App. 7, 72 P. 807.

Recognizing title in another. Proof that the former owner recognized a third person as having title to personalty is cogent evidence of abandonment. Enno-S. Co. v. Fishman, 127 Mo. App. 207, 104 S. W. 1156.

Inconsistent use of easement, if it renders the easement unbeneficial, may conclusively show intention to abandon. New England Co. v. Distill. Co., 189 Mass. 145, 75 N. E. 85, *ref.* to Corning v. Gould, 16 Wend. (N. Y.) 531; Canny v. Andrews, 125 Mass. 155; Dillman v. Hoffman, 38 Wis. 559. To same effect, In re No. 5th St., 71 N. Y. S. 644. But, generally, mere encroachments upon a common right of way do not necessarily manifest such intention; they are, however, to be considered. King v. Murphy, 140 Mass. 254, 4 N. E. 566. Such use may be a partial abandonment, but it is not that as between a purchaser with notice and the owner of the easement. Young v. Omnibus Co., 86 L. T. N. S. (Eng.) 41.

New use of property is not evidence of intention to abandon it if the change is not subversive of the former use. This is illustrated by the cases referred to in the six following paragraphs:—

Alterations in ancient lights. Newson v. Pender, 27 Ch. D. (Eng.) 43; Scott v. Pape, 31 Id. 554, 55 L. J. Ch. 426, 54 L. T. 399; Smith v. Baxter (1900), 2 Ch. (Eng.) 138, 69 L. J. Ch. 437, 87 L. T. 650.

New building. — City Bank v. Van Meter, 59 N. J. Eq. 32, 45 A. 280.

New right of way. — Weaver v. Getz, 16 Pa. Super. 418; Tabbutt v. Grant, 94 Me. 371, 47 A. 899.

Change of right of way by agreement. — Tabbutt v. Grant, supra.

Change of location of irrigating ditch. — Bolter v. Garrett, 44 Or. 304, 75 P. 142.

Substantial change. — Johnson v. Hahne, 61 N. J. Eq. 438, 49 A. 5.

Relocation of mining claim. — An attempted relocation of a mining claim is not an abandonment of a previous valid location. Temescal, etc. Co. v. Salcido, 137 Cal. 211, 69 P. 1010.

Mining claim. — Patent for part. The mere fact that one does not include in his application to purchase a portion of his mining claim does not in itself show an abandonment of the part omitted. Miller v. Hamley, 31 Colo. 495, 74 P. 980.

6-23 **Long continued absence** and failure to pay taxes or exercise other acts of ownership may justify a judgment of abandonment (Murphy v. Dafoe, 18 S. D. 42, 99 N. W. 86; Oviatt v. Min. Co., 39 Or. 118, 65 P. 811); it is at least evidence thereof. Timber v. Desparois, 18 S. D. 587, 101 N. W. 879. But nonpayment by trustees under a mortgage is immaterial. Enfield Mfg. Co. v. Ward, 190 Mass. 314, 76 N. E. 1053.

6-26 **A ship may be derelict** though held by her anchors. The Pinmore, 121 Fed. 423.

7-29 **An abandonment** of a mining claim inures to the benefit of no one except a relocator. Badger, etc. Co. v. Min. Co., 139 Fed. 838; Norman v. Corbley, 32 Mont. 195, 79 P. 1059. But it has been said that granting a party permission to enter into possession of such a claim is an abandonment of it (Conn v. Oberto, 32 Colo. 313, 76 P. 369); a proposition admitting of doubt.

8-30 Wood v. Water Co., 147 Cal. 228, 81 P. 512; Utt v. Frey, 106 Cal. 392, 39 P. 807; Rawlings v. Armel, 70 Kan. 778, 79 P. 683; New England Co. v. Distill. Co., 189 Mass. 145, 75 N. E. 85; Russell v. Stratton, 201 Pa. 277, 50 A. 975.

9-31 Gaston v. E. R. Co., 120 Ga. 516, 48 S. E. 188; Price v. Black, 126 Ia. 304, 101 N. W. 1056.

10-34 **The cessation of work** on a mining claim, after partial or total failure, is strong evidence of abandonment. Logan, etc. Co. v. R. Co., 126 Fed. 623, 61 C. C. A. 359; Foster v. Oil Co., 90 Fed. 178, 32 C. C. A. 560; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; Tennessee Oil, etc. Co. v.

Brown, 131 Fed. 696, 65 C. C. A. 524; Acme Co. v. Williams, 140 Cal. 681, 74 P. 296; Florence Oil, etc. Co. v. Orman, 19 Colo. App. 79, 73 P. 628; Gadbury v. Gas Co., 162 Ind. 9, 67 N. E. 259; Ohio Oil Co. v. Detamore, 165 Ind. 243, 73 N. E. 906; Rawlings v. Armel, 70 Kan. 778, 79 P. 683; Bay State Co. v. Lubricating Co., 27 Ky. L. R. 1133, 87 S. W. 1102; Venture Oil Co. v. Fretts, 152 Pa. 451, 25 A. 732; Calhoon v. Neely, 201 Pa. 97, 50 A. 567; Stage v. Boyer, 183 Pa. 560, 38 A. 1035; Urpman v. Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. 1027; Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107. Failure to do required assessment work does not show an abandonment. Moffat v. Blue River Co., 33 Colo. 142, 80 P. 139.

10-35 Hammer v. Min. Co., 130 U. S. 291; McCulloch v. Murphy, 125 Fed. 147; Buffalo Zinc, etc. Co. v. Crump, 70 Ark. 525, 539, 69 S. W. 572, 91 Am. St. 87; Agnew v. Pawnee (Neb.), 113 N. W. 236; Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. 330; Scott v. Moore, 98 Va. 668, 686, 37 S. E. 342, 81 Am. St. 749.

11-36 Kelsoe v. Oglethorpe, 120 Ga. 951, 48 S. E. 366, 102 Am. St. 138; Johnson v. Hahne, 61 N. J. Eq. 438, 49 A. 5; Murphy v. Dafoe, 18 S. D. 42, 99 N. W. 86.

11-37 Price v. Black, 126 Ia. 304, 101 N. W. 1056; Hall v. S., 72 App. Div. 360, 77 N. Y. S. 282; Stage v. Boyer, 183 Pa. 560, 38 A. 1035; Calhoon v. Neely, 201 Pa. 97, 50 A. 967; Scott v. Moore, 98 Va. 668, 37 S. E. 342, 81 Am. St. 749.

The relinquishment of a natural servitude is not to be presumed from the lapse of time. Foley v. Godchaux, 48 La. Ann. 466, 19 S. 247. **Non-user** by a city of a street for forty years raises a very strong presumption of abandonment. Kelsoe v. Oglethorpe, 120 Ga. 951, 48 S. E. 366, 102 Am. St. 138.

11-38 Abandonment of charter. The suspension of construction operations by a railroad for a number of years in order that funds might be procured is not an abandonment of the charter, at least after such operations have been resumed. Collier v. R. Co., 113 Tenn. 96, 83 S. W. 155.

12-40 Of easement by non-use. Clear proof must be made to establish abandonment of an easement. Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. 330. No presumption arises from mere non-user under twenty years. Woodruff v. Paddock, 130 N. Y. 618, 29 N. E. 1021; Gaston v. R. Co., 120 Ga. 516, 48 S. E. 188.

13-42 Matters for Proof. — Opinions as to the effect of the facts testified to are incompetent. It may be shown that the use made of an easement was authorized. Gaston v. R. Co., supra. All pertinent facts indicative of intention may be proven; (New England Co. v. Distill. Co., 189 Mass. 145, 75 N. E. 85; Oviatt v. Min. Co., 39 Or. 118, 65 P. 811), as the advice of counsel (Wood v. Water Co., 147 Cal. 228, 81 P. 512; Peoria Min. etc. Co. v. Turner, 20 Colo. App. 474, 79 P. 915), a void sale of the property, and declarations of the vendor. Griseza v. Terwilliger, 144 Cal. 456, 77 P. 1034; Conn v. Oberto, 32 Colo. 313, 76 P. 369; Central T. Co. v. Culver, 35 Colo. 93, 83 P. 1061; Galloway v. Rowlett, 24 Ky. L. R. 2503, 74 S. W. 260; Noland v. Coon, 1 Alaska 36. The owner of property may testify of his intent in doing the acts relied upon to show an abandonment. Boulder, etc. Co. v. Ditch Co., 36 Colo. 455, 86 P. 101. The removal of improvements may be shown, and is persuasive in some cases (Noyes v. Douglas, 39 Wash. 314, 81 P. 724; Johnson v. Brown, 33 Wash. 588, 74 P. 677; Oviatt v. Min. Co., 39 Or. 118, 65 P. 811); but failure to take possession cannot, though the conveyance is not recorded. Bond v. Wilson, 129 N. C. 325, 40 S. E. 179. Diverting a watercourse is not evidence of abandonment. Bolter v. Garrett, 44 Or. 304, 75 P. 142. Witness may not testify as to conclusion, but should state the facts. Gaston v. R. Co., 120 Ga. 516, 48 S. E. 188.

ABATEMENT [Vol. 1.]

16-5 Jordan v. Underhill, 91 App. Div. 124, 86 N. Y. S. 620.

16-6 Phillips v. R. Co., 110 Ky. 33, 60 S. W. 941; Fleming v. R., 128 N. C. 80, 38 S. E. 253; Burnett v. R. Co., 62 S. C. 281, 40 S. E. 679.

17-8 Consolidated Co. v. Oeltjen, 189 Ill. 85, 59 N. E. 600; C. v. R. Co. (Ky.), 105 S. W. 466; Dodge v. Cornelius, 168 N. Y. 242, 61 N. E. 244; Hirsh v. R. Co., 84 App. Div. 374, 82 N. Y. S. 754.

18-9 U. S. v. R. Co., 114 Fed. 682; Chapman v. Moore (Cal.), 91 P. 324; Shanghnessy v. Church, 63 Neb. 798, 89 N. W. 263.

Copy of complaint in prior action. Romaine v. R. Co., 84 N. Y. S. 491, *cit.* Brown v. Littlefield, 7 Wend. (N. Y.) 454.

18-10 Not enough to show commencement of action. — Proof that an action was commenced does not show that it was pending when the plea of abatement was interposed. Hirsh v. R. Co., 84 App. Div. 374, 82 N. Y. S. 754.

19-12 Ashton v. Heggerty, 130 Cal. 516, 62 P. 934; Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631; Dodge v. Cornelius, 168 N. Y. 242, 61 N. E. 244; Madison v. Sulphur Co., 113 Tenn. 331, 83 S. W. 658; Cooper v. Mayfield, 94 Tex. 107, 58 S. W. 827; Level L. Co. v. Sivyer, 112 Wis. 442, 88 N. W. 317.

Parties interested since suit. — See Haas v. Righeimer, 220 Ill. 193, 77 N. E. 69.

20-13 Chapman v. Moore (Cal.), 91 P. 324.

20-14 Van Vleck v. Anderson (Ia.), 113 N. W. 853; Guinn v. Elliott, 123 Ia. 179, 98 N. W. 625.

21-16 Guinn v. Elliott, supra; Consolidated Co. v. Wisner, 38 App. Div. 369, 56 N. Y. S. 723; Jordan v. Underhill, 91 App. Div. 124, 86 N. Y. S. 620.

21-18 Bates v. Force, 139 Fed. 746; Berliner v. Seaman, 111 Fed. 679; Ashton v. Heggerty, 130 Cal. 516, 62 P. 934; Mitchell v. Pearson, 34 Colo. 278, 82 P. 446; Pratt v. Stoner, 78 Conn. 310, 61 A. 1009; Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631; Henderson, etc. Co. v. Howard, 119 La. 555, 44 S. 296; Central, etc. Co. v. Grasser Co., 119 La. 263, 44 S. 10; Gilpin v. Carroll, 92 Md. 44, 47 A. 1021; Carr v. Lyle, 126 Mich. 655, 86 N. W. 145; Piper v. Sawyer, 82 Minn. 474, 85 N. W. 206; Courtney v. Fidelity Assn. (Mo. App.), 94 S. W. 768; Reed v. Louie, 163 Mo. 519, 63 S. W. 687; Van Houten v. Stevenson, 68 N. J. Eq. 490, 64 A. 1058; Smith v. Cooperage Co., 35 Misc. 203, 71 N. Y. S. 479; Cobb v. Steel Co., 68 App. Div. 179, 74 N. Y. S. 56; Lawrence v. Freeman, 59 App. Div. 55, 69 N. Y. S. 6; Alcohn v. Hano, 96 N. Y. S. 221; McLain v. Nurnberg (N. D.), 112 N. W. 245; Donatelli v. Casciola, 215 Pa. 21, 64 A. 319; Madison v. Sulphur Co., 113 Tenn. 331, 83 S. W. 658; Carmack v. Drum, 27 Wash. 382, 67 P. 808.

Applicable to mandamus proceedings. — U. S. v. R. Co., 114 Fed. 682.

ABBREVIATIONS [Vol. 1.]

24-8 In re Lakemeyer, 135 Cal. 28, 66 P. 961, 87 Am. St. 96.

Examples. — "F. O. B." means, in connection with a sale of goods, free on board. Kilmer v. Scale Co., 36 Ind. App. 568, 76 N. E. 271; Vogt v. Schienebeck, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756.

The character "&" in an indictment means "and." Stewart v. S., 137 Ala. 33, 34 S. 818.

The dollar mark, the sign "%," meaning per cent., "c/o," meaning "care of," etc., will be judicially noticed. In re Lakemeyer, 135 Cal. 28, 66 P. 961, 87 Am. St. 96.

The meaning of the letters "R. L. D." in the records of the office of the federal revenue collector will be judicially noticed. S. v. Nippert, 74 Kan. 371, 86 P. 478.

A contract, part of the signature to which was "Mfg." instead of "Manufacturing," was admissible in evidence. Seiberling v. Miller, 207 Ill. 443, 69 N. E. 800.

"Pres.," affixed to a signature, means "president." Griffin v. Erskine, 131 Ia. 444, 109 N. W. 13.

25-14 Judicial notice has been

taken of "§§ 23, 38, 14" in the report of commissioners relative to a special assessment on property (McChesney v. Chicago, 173 Ill. 75, 50 N. E. 191), and of like characters in tax receipts. Paris v. Lewis, 85 Ill. 597; Kile v. Yellowhead, 80 Ill. 208.

26-18 The letters "M. C. R. R." in a security have been interpreted to mean "Michigan Central Railroad." Ripley v. Case, 78 Mich. 126, 43 N. W. 1097, 18 Am. St. 28.

26-19 The letters "J.P.," following the name of a person affixed to the jurat of an affidavit, indicate that the person named is a justice of the peace. Abrams v. S., 121 Ga. 170, 48 S. E. 965.

28-21 Griffin v. Erskine, 131 Ia. 444, 109 N. W. 13.

29-27 Abbreviations have been explained in contracts, such as "O.K." Penn. T. Co. v. Leman, 109 Ga. 428, 34 S. E. 679. See first note to this article.

30-33 Paris v. Lewis, 85 Ill. 597; McChesney v. Chicago, 173 Ill. 75, 50 N. E. 191; Douglass v. Byers, 69 Kan. 59, 76 P. 432, and local cases cited.

31-36 Merchants' abbreviations used in an affidavit, writ, declaration and other papers in a replevin suit may be explained. Dages v. Brake, 125 Mich. 64, 83 N. W. 1039, 84 Am. St. 556.

ABDUCTION [Vol. 1.]

Proposition by woman, 34-1; *Evidence of conspiracy,* 45-58; *Proof of age,* 47-72.

34-1 Proposition by woman. Under a statute forbidding the "taking" of an unmarried girl, it is enough to show that she and defendant quitted her father's house together in consequence of her proposal and a statement to him that she intended to leave. Reg. v. Biswell, 2 Cox C. C. (Eng.) 279; Griffin v. S., 109 Tenn. 17, 32, 70 S. W. 61.

Receiving a minor female for specified purposes is an abduction in New York. See P. v. Smith, 114 App. Div. 513, 100 N. Y. S. 259.

Detention against will may be shown by conduct which resulted in causing a woman to leave the highway and by following her, though her person was not touched. Jones v. C., 28 Ky. L. R. 213, 89 S. W. 174.

34-5 S. v. Chisenhall, 106 N. C. 676, 11 S. E. 518; S. v. Burnett, 142 N. C. 577, 55 S. E. 72.

35-11 The offense of taking a minor female for the purpose of prostitution may be committed by a woman. The gravamen of it is the purpose or intent with which the girl is taken. S. v. Rorebeck, 158 Mo. 130, 59 S. W. 67. Evidence of defendant's conduct previous to the taking is competent. P. v. Spriggs, 119 App. Div. 236, 104 N. Y. S. 539.

36-15 P. v. Lewis, 141 Cal. 543, 75 P. 189.

Abduction for marriage. — It is immaterial in a prosecution for the abduction of a minor for the purpose of marrying her that the defendant had a wife at the time the offense was committed. P. v. Cerami, 101 App. Div. 366, 91 N. Y. S. 1027.

37-19 S. v. Burnett, 142 N. C. 577, 55 S. E. 72.

38-21 The statutory words "for the purpose of prostitution" mean more than illicit acts with one person; they mean indiscriminate sexual intercourse. S. v. Rorebeck, 158 Mo. 130, 59 S. W. 67.

38-23 Evidence of the general reputation of a house is competent when its character is only collaterally involved and is attended with evidence of scienter on the part of the defendant, all the evidence being directed to show the intent to prostitute a minor. S. v. Chisenhall, 106 N. C. 676, 11 S. E. 518.

38-24 The offense may be established without showing that cohabitation and sexual intercourse followed the taking; these are only proof of the character of the abduction. S. v. Tucker, 72 Kan. 481, 84 P. 126; S. v. Neasby, 188 Mo. 467, 87 S. W. 468.

Guilt may be inferred from circumstances. — S. v. Tucker, supra.

39-27 Carnal knowledge. — Un-

der a statute making it a crime to abduct a woman for the purpose of unlawful sexual intercourse at a house of ill-fame, the purpose for which the act was done may be shown by evidence that she was taken to more than one such house. S. v. Savant, 115 La. 226, 38 S. 974.

39-29 **Evidence** to show the use of entreaty or persuasion is competent. Barker v. S., 1 Ga. App. 286, 57 S. E. 989.

40-35 **Ignorance** of minor's age no defense. Maguire v. P., 219 Ill. 16, 76 N. E. 67.

41-38 **Taking from parent.** — If the person in whose care a girl has been placed for a proper purpose takes her for a forbidden purpose, he takes her from her parent. P. v. Lewis, 141 Cal. 543, 75 P. 189; S. v. Gordon, 46 N. J. L. 432.

43-52 **Evidence** as to general character for virtue is competent. S. v. Connor, 142 N. C. 700, 55 S. E. 787.

45-58 **Proof of chastity and consent.** — If the statute is silent as to the chastity of the female, the burden of proof is not upon the state to show that she was chaste; if she was unchaste the defendant must show the fact (Griffin v. S., 109 Tenn. 17, 70 S. W. 61); and he must establish that the taking was with the parent's consent. S. v. Burnett, 142 N. C. 577, 55 S. E. 72. But if the offense depends upon the woman's chastity and corroboration is required, the fact of chastity must be established by the state. S. v. Connor, 142 N. C. 700, 55 S. E. 787.

Evidence of character in rebuttal. If testimony of the improper conduct of the prosecutrix with men at night and of admissions by her of having sexual intercourse with some of them has been received, her character has been so far assailed as to justify the state in offering evidence in rebuttal to show her good reputation. S. v. Jones, 191 Mo. 653, 90 S. W. 465.

Evidence of conspiracy. — If a man and his wife have been jointly engaged in getting a girl into their house for immoral purposes, evidence may be given of their acts and words done and spoken in promotion of their joint purpose, though both were not present at the time. S. v. Dickerhoff, 127 Ia. 404, 103 N. W. 350.

46-67 **Corroborative evidence,** whether consisting of acts or admissions, must be of such a character as tends to prove, to some extent, the guilt of the accused by connecting him with the offense. P. v. Swasey, 77 App. Div. 185, 78 N. Y. S. 1103; P. v. Miller, 70 App. Div. 592, 75 N. Y. S. 655; P. v. Smith, 114 App. Div. 513, 100 N. Y. S. 259. See "CORROBORATION," Vol. 3, pp. 667, 688, and supplemental matter, infra, under that title.

47-71 **An accomplice may give corroborating testimony** (P. v. Powell, 4 N. Y. Cr. 585), as may another person abducted at the same time by the same parties. P. v. Panyko, 71 App. Div. 324, 75 N. Y. S. 945, *aff.*, without opinion, 171 N. Y. 669, 64 N. E. 1124.

47-72 S. v. Neasby, 188 Mo. 467, 87 S. W. 468; Tores v. S. (Tex. Cr.), 63 S. W. 880.

The age of the prosecutrix may be shown by an informal, identified writing made by her neighbors, and evidence is admissible to show the ages of her brothers and sisters. S. v. Neasby, supra. A witness who has testified of the age of the prosecutrix and stated that she was born in the same year as a deceased brother of his, and that he does not recollect the year, may testify as to the date from the inscription on his brother's tombstone. Boyett v. S., 130 Ala. 77, 30 S. 475. See "AGE," Vol. 1, p. 731, and supplemental matter under that title, infra.

If, in pursuance of a statute, a child has been produced for inspection to prove her age, the fact that her appearance has been changed by her mode of dress must be given some weight, as must the fact of failure to produce the certificate of her birth. P. v. Ragone, 54 App. Div. 498, 67 N. Y. S. 23.

48-80 In the absence of any provision in the statute concerning the chastity of the female, the want of chastity is a matter of defense. The defendant may discharge the bur-

den cast on him by creating a reasonable doubt of chastity. Griffin v. S., 109 Tenn. 17, 70 S. W. 61.

48-86 If neither force, fraud, violence nor persuasion of any kind is used there is no abduction. Baumgartner v. Eigenbrot, 100 Md. 508, 60 A. 601.

49-88 The right of the father to the services of his child is sufficient to maintain the action; proof of their loss is not essential. Soper v. Igo, 28 Ky. L. R. 519, 89 S. W. 538; Washburn v. Abram, 28 Ky. L. R. 985, 90 S. W. 997.

ABORTION [Vol. 1.]

Proof of intent, 54-1; *The corpus delicti*, 55-6; *Order of proof*, 55-6; *Attempt to produce miscarriage*, 55-14; *Evidence of custom*, 55-14; *Opinions not competent*, 56-16; *Advertisement of facilities for committing*, 57-25; *Sufficiency of means used*, 57-29; *Personal administration*, 58-34; *Defendant's belief as to pregnancy*, 58-37; *Woman not an accomplice*, 60-53; *Character of corroborating evidence*, 62-59; *Dying declarations*, 65-77; *Impeachment of dying declaration*, 65-77.

54-1 S. v. Lilly, 47 W. Va. 496, 35 S. E. 837; C. v. Corkin, 136 Mass. 429.

Proof of intent. — In the absence of proof of confession or declarations, intent may be shown by evidence of the defendant's acts, measures of concealment or precautions, and other circumstances from which it may be inferred. S. v. Magnell, 3 Penne. (Del.) 307, 51 A. 606; S. v. Jones, 4 Penne. (Del.) 109, 53 A. 858. It may be shown that an instrument was made for him, though it was not used (Moore v. S., 37 Tex. Cr. 552, 40 S. W. 287); but not that he bought one before pregnancy was produced. S. v. McCoy, 15 Utah 136, 49 P. 420.

Proof of the defendant's general reputation for morality and decency may be received (S. v. Jones, 4 Penne. (Del.) 109, 53 A. 858), as may proof that he had solicited patronage as an abortionist (Clark v. P., 224 Ill. 554, 79 N. E. 941); but testimony as to general good character cannot be rebutted by proving a reputation as an abortionist. C. v. Gibbons, 3 Pa. Super. 408.

54-3 Rex v. Bond, (1906) 2 K. B. (Eng.) 389; Clark v. C., 111 Ky. 443, 63 S. W. 740.

In some states the general rule that proof of other crimes cannot be made (P. v. Jones, 31 Cal. 565; Baker v. P., 105 Ill. 452; S. v. Vance, 119 Ia. 685, 94 N. W. 204; S. v. Roseum, 119 Ia. 330, 93 N. W. 295; S. v. Rainsbarger, 71 Ia. 746, 31 N. W. 865; C. v. Grief, 16 Ky. L. R. 198, 27 S. W. 814; Spurlock v. C., 14 Ky. L. R. 605, 20 S. W. 1095; P. v. Schweitzer, 23 Mich. 301; S. v. Lapage, 57 N. H. 245, 24 Am. Rep. 69; Shaffner v. C., 72 Pa. 60, 13 Am. Rep. 649) applies to abortions upon other women than the one concerned. S. v. Crofford, 121 Ia. 395, 96 N. W. 889; Baker v. P., 105 Ill. 452.

Sale of articles for purpose of abortion. — Proof of other sales to other persons upon different occasions is incompetent. P. v. Spier, 105 N. Y. S. 741.

Reason of the rule allowing proof of other offenses. — "Upon principle and authority, it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake; or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts, producing the same result, as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain. Reg. v. Roden, 10 Moak (Eng.) 511; Reg. v. Cotton, 5 id. 479; Reg. v. Geering, 18 L. J. M. C. 215; Reg. v. Garner, 3 F. & F. 681; Rex v. Voke, R. & R., 531; Stout v. P., 4 Park. Cr. R. 71; Os-

borne v. People, 2 id. 583; Dunn v. State, 2 Ark. 229; Pierson v. P., 18 Hun (N. Y.) 239; S. v. Watkins, 9 Conn. 47; C. v. Blair, 126 Mass. 40; C. v. Corkin, 156 Mass. 429; Weed v. P., 56 N. Y. 628; Reg. v. Dale, 16 Cox Cr. Cas. 703." P. v. Seaman, 107 Mich. 348, 65 N. W. 203.

Declarations. — It may be shown that defendant when using instruments used language tending to show that he customarily performed like operations for an unlawful purpose. Rex v. Bond, (1906) 2 K. B. (Eng.) 389.

55-6 Intent to kill child. — The intent may exist without absolute knowledge that the child is quick. If the purpose was to destroy the foetus and in so doing the defendant killed a child which was quick, the criminal intent extends to the consequences of the act. Barrow v. S., 121 Ga. 187, 48 S. E. 950.

The corpus delicti. — On the issue as to whether natural causes or a criminal operation brought about the abortion, proof of openings from the uteris into the abdominal cavity, delay in calling a physician, and the statement of the deceased to the accused, just prior to her sickness, of her purpose to get rid of the child, leave no question of law for the reviewing court. Seifert v. S., 160 Ind. 464, 67 N. E. 100, 98 Am. St. 340. See "CORPUS DELICTI," Vol. 3, p. 659, and same title, infra.

Order of proof. — A physician who has made a post mortem examination may testify to the manner in which the miscarriage was produced before proof is made of the corpus delicti; such evidence tends to prove the corpus delicti. Hauk v. S., 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

55-12 Barrows v. S., 121 Ga. 187, 48 S. E. 950.

Relations of parties. — It may be shown that accused recommended other men to have intercourse with the woman, and promised to help them out of any resulting trouble. Fretwell v. S., 43 Tex. Cr. 501, 67 S. W. 1021. Proof may be made of occurrences between the parties after a prior operation (S. v. Carey, 76 Conn. 342, 56 A. 632), and that the woman had told defendant of her pregnancy and he had made prior unsuccessful attempts to cause an abortion. Sullivan v. S., 121 Ga. 183, 48 S. E. 949.

55-13 Barrows v. S., supra.

55-14 S. v. Carey, 76 Conn. 342, 56 A. 632; S. v. Magnell, 3 Penne. (Del.) 307, 51 A. 606; Barrows v. S., 121 Ga. 187, 48 S. E. 950.

Attempt to produce miscarriage. The defendant cannot show that the woman had attempted or submitted to an attempt to produce a miscarriage prior to the operation. S. v. Carey, 76 Conn. 342, 56 A. 632; Hauk v. S., 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; C. v. Felch, 132 Mass. 22.

Evidence of custom. — Medical testimony as to the prevalence of the custom among unmarried pregnant women to take means to produce a miscarriage is irrelevant. Clark v. C., 111 Ky. 443, 462, 63 S. W. 740.

55-15 Evidence as to necessity for operation. — A physician who knew the deceased and made a post mortem examination may testify that it was not necessary to produce an abortion to save life. S. v. McCoy, 15 Utah 136, 49 P. 420. If such necessity is alleged, it may be shown that the defendant had performed a like operation on another woman for the same end. P. v. Hodge, 141 Mich. 312, 104 N. W. 599.

56-16 Sufficiency of evidence to show absence of necessity. See P. v. Balkwell, 143 Cal. 259, 76 P. 1017; Hatchard v. S., 79 Wis. 357, 48 N. W. 380.

Opinions not competent. — The person upon whom instruments have been used cannot testify as to her opinions or conclusions as to the purpose for which they were used, it being contended that it was lawful. S. v. Pierce, 85 Minn. 101, 88 N. W. 417.

Circumstantial evidence. — The absence of a necessity for producing the abortion may be shown by circumstantial evidence. Diehl v. S., 157 Ind. 549, 62 N. E. 51.

56-20 S. v. Magnell, 3 Penne. (Del.) 307, 51 A. 606; S. v. Schuerman, 70 Mo. App. 518. See S. v. McCoy, 15 Utah 136, 49 P. 420.

56-23 The circumstances under which the woman visited a physician's office and the absence of

necessity for so doing may be shown, as may the fact that she tried to conceal her identity. Cook v. P., 177 Ill. 146, 52 N. E. 273.

57-25 **Advertisement of facilities for committing.** — Cards found in the defendant's trunk, in a room he occupied, tending to show that he held himself out as being in the business of procuring abortions are competent evidence (C. v. Barrows, 176 Mass. 17, 56 N. E. 830; C. v. Bishop, 165 Mass. 148, 42 N. E. 560), and it is immaterial that they were printed two or three years before the offense was committed. Weed v. P., 3 Thomp. & C. (N. Y.) 50, *aff.*, 56 N. Y. 628.

57-27 Clark v. C., 111 Ky. 443, 63 S. W. 740.

57-28 S. v. Dean, 85 Mo. App. 473.

Use of instrument. — It must be shown that an instrument was used as alleged. S. v. Magnell, 3 Penne. (Del.) 307, 51 A. 606.

57-29 S. v. Bly, 99 Minn. 74, 108 N. W. 833; S. v. Lilly, 47 W. Va. 496, 35 S. E. 837.

Sufficiency of means used. — Some statutes are not predicated on the means prescribed, but on those actually used, in which case the doses taken must be sufficient to have produced the result. The offense is not established by proof that those prescribed would be likely to have done so. Fretwell v. S., 43 Tex. Cr. 501, 67 S. W. 1021.

58-34 **Personal administration.** Evidence is competent to show that the accused sent medicine to the prosecutrix by another who knew of her condition and what it was designed to accomplish, in connection with evidence showing that he had given directions as to taking it; personal administering is not essential. Burris v. State, 73 Ark. 453, 84 S. W. 723.

58-36 Eggart v. State, 40 Fla. 527, 40 S. 144; Wilson v. C., 22 Ky. L. R. 1251, 60 S. W. 400.

58-37 **Defendant's belief as to pregnancy.** — Defendant's belief or supposition as to the woman's pregnancy is immaterial in some states. Eggart v. S., supra; C. v. Tibbetts, 157 Mass. 519, 32 N. E. 910; C. v. Surles, 165 Mass. 59, 42 N. E. 502. In others a belief that such is the fact is enough. C. v. Nailor, 29 Pa. Super. 271; Powe v. S., 48 N. J. L. 34, 2 A. 662; S. v. Magnell, 3 Penne. (Del.) 307, 51 A. 606.

59-39 S. v. Magnell, 3 Penne. (Del.) 307, 51 A. 606.

Sufficiency of evidence. — The offense is established by proof that a pregnant woman was placed in a position to be operated upon, in connection with evidence of the intent. P. v. Conrad, 102 App. Div. 566, 92 N. Y. S. 606.

59-42 State v. Dean, 85 Mo. App. 473.

60-53 **Woman not an accomplice.** S. v. Carey, 76 Conn. 342, 56 A. 632; C. v. Follansbee, 155 Mass. 274, 29 N. E. 471; P. v. Vedder, 98 N. Y. 630; C. v. Bell, 4 Pa. Super. 187; Smartt v. S., 112 Tenn. 539, 80 S. W. 586; S. v. Lilly, 47 W. Va. 496, 35 S. E. 837. See "Accomplices," Vol. 1, p. 92, and that title, infra.

60-54 **Competent witness against husband** if he has become such since offense committed, on the ground that bodily injury was inflicted. C. v. Kreuger, 17 Pa. C. C. 181.

Wife of accused is not a competent witness in his behalf, though she is in behalf of his co-defendant. Smartt v. S., 112 Tenn. 539, 80 S. W. 586.

61-55 Smartt v. S., supra.

62-59 **Character of corroborating evidence.** — On the issue as to whether an assault with intent to produce an abortion has been committed, the conduct of the woman concerned, tending to show fear of the accused and anxiety to avoid his notice, may be shown in corroboration of the evidence concerning the assault; her testimony that fear of him induced such conduct is competent. S. v. Lee, 69 Conn. 186, 37 A. 75.

Where corroboration is required, it is enough that the evidence relates to some portion of the testimony material to the issue; it need not cover every material fact. It must tend to prove the commission of the offense and identify the defendant with it. C. v. Keene, 7 Pa. Super. 293.

62-60 S. v. McCoy, 15 Utah 136,

49 P. 420; Wilson v. C., 22 Ky. L. R. 1251, 60 S. W. 400.

63-62 Stevens v. P., 215 Ill. 593, 74 N. E. 786.

Experts may testify as to the physical effect that drugs shown to have been administered by the defendant would have upon a pregnant woman, and as to whether they would give her, if they did not desire to produce a miscarriage, the quantity per day testified to have been given by him. Eggart v. S., 40 Fla. 527, 40 S. 144; C. v. Sinclair (Mass.), 80 N. E. 799. They may give opinions as to the kind of instrument used and the mode of its use. C. v. Sinclair, supra.

Non-experts. — The unskillfulness of the defendant as a physician or surgeon may be testified to by those personally acquainted with his attainments; but testimony on that point cannot rest on his reputation. Clark v. C., 111 Ky. 443, 63 S. W. 740.

63-65 Wilson v. C., 22 Ky. L. R. 1251, 60 S. W. 400; P. v. Hodge, 141 Mich. 312, 104 N. W. 599; S. v. Finley, 193 Mo. 202, 91 S. W. 942.

63-66 S. v. Crofford, 121 Ia. 395, 96 N. W. 889; S. v. Bly, 99 Minn. 74, 108 N. W. 833; C. v. Mitchell, 6 Pa. Super. 369.

Anonymous Letters. — See S. v. Kesner, 72 Kan. 87, 82 P. 720.

Evidence of declarations and admissions by conduct may be received in connection with proof of the corpus delicti. S. v. Kessner, supra. Entries in an account book kept by the defendant and containing the name of the woman operated on may be shown. C. v. Sinclair (Mass.), 80 N. E. 799.

64-75 Admissibility of declarations. — If the state proves part of a conversation between defendant and deceased after the offense was committed, he may prove the remainder. Diehl v. S., 157 Ind. 549, 62 N. E. 51. Statements made by deceased prior to the commission of the offense or thereafter are not provable if they do not relate to the act (Howard v. P., 185 Ill. 552, 57 N. E. 441; Clark v. P., 224 Ill. 554, 79 N. E. 941; but declarations as to the woman's condition and her request for means to produce an abortion are competent (Brown v. C., 26 Ky. L. R. 1269, 83 S. W. 645), and where the woman sought the defendant and voluntarily submitted to the operation, her statements to her husband as to who had operated upon her were competent. Johnson v. P., 33 Colo. 224, 80 P. 133. A statement made by a patient to her physician that an abortion had been performed upon her is incompetent. C. v. Sinclair (Mass.), 80 N. E. 799.

65-77 Dying declarations are admissible where death is an element of the offense. Montgomery v. S., 80 Ind. 338; Seifert v. S., 160 Ind. 464, 67 N. E. 100, 98 Am. St. 340; S. v. Leeper, 70 Ia. 748, 30 N. W. 501; Wilson v. C., 22 Ky. L. R. 1251, 60 S. W. 400; P. v. C., 87 Ky. 487, 9 S. W. 509, 810; Hawkins v. S., 98 Md. 355, 57 A. 27; P. v. Lonsdale, 122 Mich. 388, 81 N. W. 277; S. v. Pearce, 56 Minn. 226, 57 N. W. 652, 1065; Edwards v. S. (Neb.), 112 N. W. 611; S. v. Meyer, 65 N. J. L. 237, 47 A. 486, 86 Am. St. 634, 52 L. R. A. 346, *rev.* 64 N. J. L. 382, 45 A. 779; S. v. Dickinson, 41 Wis. 299. They must relate to the circumstances attending the injury; so far as they disclose antecedent or subsequent events they are incompetent. P. v. C., 87 Ky. 487, 9 S. W. 509, 810; Montgomery v. S., 80 Ind. 338. A statement as to the purpose for which the operation was performed is inadmissible. Montgomery v. S., supra. But it is otherwise as to the narration of the defendant's conduct in furnishing declarant with an instrument and inciting her to use it. Seifert v. S., 160 Ind. 464, 67 N. E. 100, 98 Am. St. 340. The mental soundness of the declarant may be shown by non-expert testimony. C. v. Keene, 7 Pa. Super. 293. In Pennsylvania such declarations are admissible by reason of statute. C. v. Winkelman, 12 Pa. Super. 497.

Admissible against defendant doubly indicted. — Under a statute making dying declarations evidence, it is not reason for rejecting them, as against a general objection, that the accused was on trial under two indictments, one for an attempt to procure a miscarriage, the other for procuring an abortion, all of the essential averments of both indict-

ments being in issue. C. v. Keene, 7 Pa. Super. 293.

If such declarations are reduced to writing and signed, the writing is the best evidence of the statement made at that time, and must be produced or its absence accounted for; but such writing will not preclude evidence of unwritten declarations made at other times. Dunn v. P., 172 Ill. 582, 50 N. E. 137.

Impeachment of dying declarations. These may be impeached by proving contradictory statements not made in extremis. Dunn v. P., supra. The physician of the deceased may testify that she tried to procure him to commit an abortion upon her and made statements favoring the accused. Seifert v. S., 160 Ind. 464, 67 N. E. 100, 98 Am. St. 340.

ABSTRACTS OF TITLE [Vol. 1.]

67-6 **California** has recently enacted a statute making abstracts evidence under certain conditions. Ch. 52, St. extra session 1906.

68-9 **Preliminary proof to secure registration of title.** — In a proceeding to compel the examiner of titles under an act of the nature of the Torrens' law to register an initial title, abstracts are not admissible to show title in the applicant for registration unless he has laid the foundation for the introduction of secondary evidence in accordance with the statute providing for the admission of abstracts in lieu of the original deeds. Glos v. Holberg, 220 Ill. 167, 77 N. E. 80; Glos v. Hallowell, 190 Ill. 65, 60 N. E. 62; Glos v. Talcott, 213 Ill. 81, 72 N. E. 707; Messenger v. Messenger, 223 Ill. 282, 79 N. E. 27.

Under the Texas statute providing for abstracts in actions of trespass to try title, if an abstract offered in evidence is objected to because deficient the remedy is by motion, before trial, to have the defect cured. Stokes v. Riley, 29 Tex. Civ. 373, 68 S. W. 703.

ACCESSORIES, AIDERS AND ABETTORS [Vol. 1.]

72-1 Brown v. U. S., 142 Fed. 1, 73 C. C. A. 187; Rawlins v. S., 124 Ga. 31, 52 S. E. 1; S. v. McCall, 131 N. C. 798, 42 S. E. 894; Tuttle v. S. (Tex. Cr.), 49 S. W. 82; S. v. Lilly, 47 W. Va. 496, 35 S. E. 837.

Principal's guilt must be shown by judgment; a verdict is not enough. Daughtrey v. S., 46 Fla. 109, 35 S. 397.

Rule affected by statutes. — Under some statutes accessories before the fact may be tried jointly with the principal or severally, though he be not convicted. C. v. Hicks, 118 Ky. 637, 82 S. W. 265; C. v. Bradley, 16 Pa. Super. 561; Stone v. S., 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145. See Begley v. C., 26 Ky. L. R. 598, 82 S. W. 285.

May be indicted jointly. — Rawlins v. S., 124 Ga. 31, 52 S. E. 1.

73-3 Brown v. U. S., 142 Fed. 1, 73 C. C. A. 187; C. v. Asherowski (Mass.), 82 N. E. 13.

Subsequent intent. — The intent is not to be tested by the principal's subsequent state of mind or conduct, except so far as the latter indicated his intent at the time the act was done. S. v. Palmer, 4 Penne. (Del.) 126, 53 A. 359.

Intent shown by circumstantial evidence. — C. v. Asherowski, supra.

74-4 Bliss v. U. S., 105 Fed. 508, 44 C. C. A. 324; S. v. Stark, 63 Kan. 529, 66 P. 243, 54 L. R. A. 910; C. v. Sherman, 191 Mass. 439, 78 N. E. 98.

Evidence that principal confessed the crime is admissible as substantive evidence against him; but is only corroborative as against the accessory. S. v. McCall, 131 N. C. 798, 42 S. E. 894.

74-6 Rawlins v. S., 124 Ga. 31, 52 S. E. 1.

75-7 Rawlins v. S., 124 Ga. 31, 52 S. E. 1; Tuttle v. S. (Tex. Cr.), 49 S. W. 82.

Conviction of the principal may be shown by evidence aliunde the record. C. v. House, 10 Pa. Super. 259.

76-9 **Under some statutes** the accessory may be punished though the principal be acquitted. S. v. Bogue, 52 Kan. 79, 34 P. 410; Noland v. S., 19 Ohio 131; Hanoff v. S., 37 Ohio St. 178; Goins v. S., 46 Id. 457, 21 N. E. 476; S. v. Phillips, 24 Mo. 475; S. v. Ross, 29 Mo. 32.

Pardon of principal. — The accessory is not relieved because the

principal has been pardoned. C. v. House, 10 Pa. Super. 259.

77-10 **Connection** with one of several principals is enough. S. v. Roberts, 50 W. Va. 442, 40 S. E. 484.

Conspiracy need not be shown to convict the accessory if the felony was committed in pursuance of advice and counsel. Powers v. C., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A. 245.

77-11 **In recent Kentucky cases** it has been held that an instruction to the effect that if the defendant did counsel, advise, assist, abet, encourage, cause or procure another to kill the deceased he should be found guilty, ought to be modified by adding thereto "and said killing was induced thereby." Hall v. C., 29 Ky. L. R. 485, 93 S. W. 904; Powers v. C., supra.

77-13 Ferguson v. S., 134 Ala. 63, 32 S. 760.

Absence essential. — The absence of the accessory before the fact at the time and from the place of the principal offense is an essential element of the crime. S. v. Roberts, 50 W. Va. 422, 40 S. E. 484. Under some statutes the rule is otherwise. Ferguson v. S., 134 Ala. 63, 32 S. 760; C. v. Bradley, 16 Pa. Super. 561.

Statements made by defendant several minutes after he learned of the commission of the crime are not provable. Powers v. C., 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494.

78-14 Powers v. C., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A. 245.

78-15 Scott v. S., 46 Tex. Cr. 536, 81 S. W. 294.

79-16 Pearce v. Oklahoma, 118 Fed. 425, 55 C. C. A. 550; Pearce v. Ter., 11 Okla. 438, 68 P. 504; Ferguson v. S., 134 Ala. 63, 32 S. 760.

Limitation of the rule. — Liability for the acts resulting from the general design does not extend to independent acts done by the particular malice of the principals, or of any of them. It is for the jury to say whether or not the act done by them, or either of them, was the result of the common design. Powers v. C., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A. 245.

80-18 Wilson v. U. S., 5 Ind. Ter. 610, 82 S. W. 924.

80-20 **Under the statutes of Texas** a judgment is competent, but not conclusive, evidence of the principal's conviction. Dent v. S., 43 Tex. Cr. 126, 65 S. W. 627.

81-21 **Absolute knowledge.** — It is not necessary for the accessory to have absolute or actual knowledge of all the facts going to show the criminality of the principal. Dent v. S., supra., *appr.* Tully v. C., 13 Bush (Ky.) 142, *quot.* from Vol. 1, Encyc. of Ev., p. 82, note.

82-22 S. v. Miller, 182 Mo. 370, 81 S. W. 867; Dent v. S., 43 Tex. Cr. 126, 65 S. W. 627, *appr.* Blakely v. S., cited in next note.

82-23 **Character of assistance.** It is not enough to show that the defendant aided in spiriting away the prosecuting witness so that she might not testify before the grand jury. Caylor v. S., 44 Tex. Cr. 118, 68 S. W. 982. The majority of the court distinguished Blakely v. S., 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. 912, which is stated on p. 82, Vol. 1 of this Encyclopaedia. It is said that that case was predicated on the idea that the defendant rendered some direct aid to his principal to escape arrest and prosecution. The subornation of perjury the defendant committed merely served to intensify the evidence going to show that he advised his principal to flee. One of the judges said of the Blakely case that "it carries the doctrine of accessory further than any case that I know, and, in my opinion, is not supported by the authorities, and should be overruled, which I believe is the effect of the decision in this case."

A conditional agreement not to prosecute does not make the parties to it accessories. Smith v. S. (Tex. Cr.), 100 S. W. 924.

85-26 **Burden of proof.** — The defendant has the burden of proving that he is of the class excepted by statute. S. v. Miller, 182 Mo. 370, 81 S. W. 867.

85-27 **Declarations of others.** If the offense was committed in execution of a purpose entertained by others, testimony as to the declarations of persons assembled to

carry out the purpose was competent; but not statements of those not acting with defendant. Telegrams sent after the crime was committed by those jointly indicted with defendant as co-conspirators were relevant. Powers v. C., 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494.

Declarations of the principal, in the absence of the accessory and long after the event, are not competent. S. v. Bogue, 52 Kan. 79, 34 P. 410.

86-28 Who may be. — One may be a principal in the second degree, though he could not commit the crime with which he is connected. Bishop v. S., 118 Ga. 799, 45 S. E. 614.

86-29 Bishop v. S., supra.

86-31 S. v. Palmer, 4 Penne. (Del.) 126, 53 A. 359; S. v. Berger, 121 Ia. 581, 96 N. W. 1094; Martin v. S., 44 Tex. Cr. 279, 70 S. W. 973; Grimsinger v. S., 44 Tex. Cr. 1, 69 S. W. 583.

88-32 S. v. Wolf, 112 Ia. 458, 84 N. W. 536; Howard v. C., 110 Ky. 356, 61 S. W. 756; Monroe v. S., 47 Tex. Cr. 59, 81 S. W. 726; Chenault v. S., 46 Tex. Cr. 351, 81 S. W. 971.

Compounding a felony does not make the compounder an accessory (Chenault v. S., supra, *over*. Gatlin v. S., 40 Tex. Cr. 116, 49 S. W. 87), nor does the concealment of the fact that a crime has been committed. Monroe v. S., supra.

Furnishing weapon. — Collins v. S., 138 Ala. 57, 34 S. 993.

Failure to attempt to prevent crime. S. v. Fox, 70 N. J. L. 353, 57 A. 270.

Aiding and Abetting. — On the issue as to whether defendant aided and abetted the commission of the offense by the principal, his guilt may be shown, as may his acts and declarations tending to show guilt, if there was other evidence tending to connect him with the crime, by inducing or assisting in its commission. S. v. Brown, 130 Ia. 57, 106 N. W. 379. See Coffman v. S. (Tex. Cr.), 103 S. W. 1128.

88-33 S. v. Gray, 116 Ia. 231, 89 N. W. 987; Dean v. S., 85 Miss. 40, 37 S. 501; Grimsinger v. S., 44 Tex. Cr. 1, 69 S. W. 583; Renner v. S., 43 Tex. Cr. 347, 65 S. W. 1102.

Where one encourages another by his conduct, being present, he makes himself responsible though there was no previously formed plan or agreement to do an illegal act. Thomas v. S., 130 Ala. 62, 30 S. 391; Starks v. S., 137 Ala. 9, 34 S. 687.

Watching to prevent surprise, etc. Grimsinger v. S., 44 Tex. Cr. 1, 69 S. W. 583; Winfield v. S., 44 Tex. Cr. 475, 72 S. W. 182.

90-34 S. v. Hess, 65 N. J. L. 544, 47 A. 806; S. v. King, 24 Utah 482, 68 P. 418; P. v. Coughlin, 13 Utah 58, 44 P. 94.

90-35 Jahnke v. S., 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; Newberry v. S. (Tex. Cr.), 74 S. W. 774; Renner v. S., 43 Tex. Cr. 347, 65 S. W. 1102; Mow v. P., 31 Colo. 351, 72 P. 1069.

90-36 P. v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370; Whorley v. S., 45 Fla. 123, 33 S. 849; Ramon v. S. (Tex. Cr.), 68 S. W. 987; Bibby v. S. (Tex. Cr.), 65 S. W. 193.

Individual malicious act. — If two or more engage to do an unlawful act and one of them, incited by his personal malice, though the object of his act be to further the escape of all engaged, does an act foreign to the common design, such act is not imputable to any other person. Renner v. S., 43 Tex. Cr. 347, 65 S. W. 1102.

Unity of intent. — One who loans a pistol to another and advises the latter to kill a third person on condition that he does a stated act is not possessed of the same intent and felonious design as the person who subsequently does the killing, independently of the existence of the condition. Thornton v. S., 119 Ga. 437, 46 S. E. 640.

91-37 Whorley v. S., 45 Fla. 123, 33 S. 849.

An aider and abettor may be convicted though the principal is unknown. Howard v. C., 110 Ky. 356, 61 S. W. 756.

91-38 S. v. Berger, 121 Ia. 581, 96 N. W. 1094.

ACCOMPLICES [Vol. 1.]

Authority of public prosecutor, 95-6; *Was the common law rule binding—Origin of English practice,* 100-18; *Complaints as*

corroborative evidence, 104-29; *Other like crimes*, 107-33; *Attempt to commit same crime*, 107-33; *Burden of showing witness to be an accomplice*, 112-50; *Co-indictee of accomplice competent witness*, 115-60.

94-2 Barr v. P., 30 Colo. 522, 71 P. 392.

Effect of involuntary confession. An accomplice is not disqualified to testify because his confession was brought about by unlawful means; the circumstances under which it was made may be shown as affecting the weight to be given his testimony. Rawlins v. S., 124 Ga. 31, 52 S. E. 1. The defendant cannot invoke the privilege that the witness need not incriminate himself. Barr v. P., supra.

94-3 Murphy v. S., 124 Wis. 635, 102 N. W. 1087.

95-4 It is competent to prove an unauthorized conditional promise made a witness by his own attorney. P. v. Moore, 96 App. Div. 56, 89 N. Y. S. 83.

Evidence to establish right. — Testimony of grand jurors, prosecuting officer and minutes of proceedings of jury are competent evidence to establish the claim to immunity. Murphy v. S., 124 Wis. 635, 102 N. W. 1087.

95-5 Strengthening accomplice's testimony. — Testimony of accomplice cannot be bolstered up by proving by him that prosecuting officer, at time they contracted, told him that contract would be forfeited if any innocent man should be implicated by witness' testimony. Faulkner v. S., 43 Tex. Cr. 311, 65 S. W. 1093.

Threat by prosecutor. — It cannot be shown that the prosecuting officer told witness he should have his liberty if he testified a certain way; otherwise, he would be punished. Barr v. P., 30 Colo. 522, 71 P. 392.

96-6 Authority of public prosecutor. — The prosecuting officer can not bind the state by an agreement to dismiss a case if defendant therein will testify for prosecution on trial of another and distinct offense. Tullis v. S., 41 Tex. Cr. 87, 52 S. W. 83. An agreement that party shall be admitted to bail is beyond power of such officer. Ex parte Greenhaw, 41 Tex. Cr. 278, 53 S. W. 1024. See Barr v. P., supra.

96-8 Contract between prosecuting officer and accomplice will not be regarded if made without consent of court (Reagan v. S., 49 Tex. Cr. 443, 93 S. W., 733; Ex parte Greenhaw, 41 Tex. Cr. 278, 53 S. W. 1024); at least if accomplice has testified falsely on examining trial. Cox v. S. (Tex. Cr.), 69 S. W. 145; Tullis v. S., 41 Tex. Cr. 87, 52 S. W. 83.

98-10 See Barbe v. Ter., 16 Okla. 562, 86 P. 61.

99-15 Mitchell v. S., 21 Ohio C. C. 24.

Proof of Credibility. — The credibility of accomplice's testimony may be sustained in the usual ways. Rice v. S. (Tex. Cr.), 100 S. W. 771; Butt v. S., 81 Ark. 173, 98 S. W. 723.

100-16 U. S. v. Giuliani, 147 Fed. 594; Hanley v. U. S., 123 Fed. 849, 59 C. C. A. 153; S. v. Fahey, 3 Penne. (Del.) 594, 54 A. 690; S. v. Freedman, 3 Penne. (Del.) 403, 53 A. 356; Myers v. S., 43 Fla. 500, 31 S. 275; Caldwell v. S., 50 Fla. 4, 39 S. 188; Stone v. S., 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145; King v. Wo Sow, 7 Hawaii, 734; Juretich v. P., 223 Ill. 484, 79 N. E. 181; S. v. Perry (Ia.), 105 N. W. 507; Weber v. C., 24 Ky. L. R. 1726, 72 S. W. 30; S. v. De Hart, 109 La. 570, 33 S. 605; S. v. Michel, 111 La. 434, 35 S. 629; S. v. Day; 188 Mo. 359, 87 S. W. 465; S. v. Wigger, 196 Mo. 90, 93 S. W. 390; S. v. Dilts, 191 Mo. 665, 90 S. W. 782; S. v. Jones, 32 Mont. 442, 80 P. 1095; S. v. Simon, 71 N. J. L. 142, 58 A. 107, *aff.*, without opinion, 59 A. 1118; S. v. Goldman, 65 N. J. L. 394, 47 A. 641; S. v. Register, 133 N. C. 746, 46 S. E. 21; Straub v. S., 5 Ohio C. C. (N. S.) 529; Brenton v. Ter., 15 Okla. 6, 78 P. 83, *over.* Sowers v. Ty., 6 Okla. 436, 50 P. 257; C. v. Craig, 19 Pa. Super. 81; C. v. Sayars, 21 Pa. Super. 75; S. v. Meares, 60 S. C. 527, 39 S. E. 245; S. v. Prater, 26 S. C. 198, 613, 2 S. E. 108; Hill v. S. (Tex. Cr.), 77 S.

W. 808; Reagan v. S., 49 Tex. Cr. 443, 93 S. W. 733; S. v. Fetterly, 33 Wash. 599, 74 P. 810; S. v. Roller, 30 Wash. 692, 71 P. 718; Lamphere v. S., 114 Wis. 193, 89 N. W. 128; Means v. S., 125 Wis. 650, 104 N. W. 815.

False swearing. — If an accomplice willfully swears falsely as to a material matter, his uncorroborated testimony will not sustain a conviction. Jahnke v. S. (Neb.), 104 N. W. 154.

100-17 Burnett v. S., 76 Ark. 295, 88 S. W. 956; Rucker v. S., 77 Ark. 23, 90 S. W. 151, Davis v. S., 120 Ga. 433, 48 S. E. 180; Solomon v. S., 113 Ga. 192, 38 S. E. 332; Dixon v. S., 116 Ga. 186, 42 S. E. 357; Yother v. S., 120 Ga. 204, 47 S. E. 555; Durden v. S., 120 Ga. 860, 48 S. E. 315; S. v. Rooke, 10 Idaho 388, 79 P. 82; S. v. Bond, 12 Idaho 424, 86 P. 43; Hinkle v. S., 157 Ind. 237, 61 N. E. 196; Mann v. C., 25 Ky. L. R. 1964, 79 S. W. 230; Simpson v. C., 31 Ky. L. R. 769, 103 S. W. 332; S. v. Clements, 82 Minn. 434, 85 N. W. 229; S. v. Douglas, 26 Nev. 196, 65 P. 802; Cooper v. Ty. (Okla.), 91 P. 1032; S. v. Kelliher (Or.), 88 P. 867; Clifton v. S., 46 Tex. Cr. 18, 79 S. W. 824; Custer v. S. (Tex. Cr.), 76 S. W. 476 (*compare* Hill v. S. (Tex. Cr.), 77 S. W. 808); McDaniel v. S., 48 Tex. Cr. 342, 87 S. W. 1044; Conant v. S. (Tex. Cr.), 103 S. W. 897.

Are statutes applicable to federal courts. — The affirmative is held in U. S. v. Van Leuven, 65 Fed. 78, and the negative in Hanley v. U. S., 123 Fed. 849, 59 C. C. A. 153.

Statutes not extended by construction. — Brenton v. Ty. (Okla.), 78 P. 83.

Uncorroborated testimony not sufficient on preliminary examination. S. v. Smith, 138 Ala. 111, 35 S. 42.

Accomplice not a credible witness under statutes concerning conviction for perjury. Conant v. S. (Tex. Cr.), 103 S. W. 897.

100-18 Was the common law rule binding—Origin of English Practice. — If the practice of cautioning the jury is a rule of law (the court was inclined to regard it as a rule of practice only), it was not of force in England May 14, 1776, and therefore not within the terms of our adopting act. And as a rule of practice it ceased to have any validity when the legislature prohibited the judges from advising the jury as to what had or had not been proved, or expressing any opinion as to the evidence or the weight to be given thereto. Stone v. S., 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145.

101-19 U. S. v. Giuliani, 147 Fed. 594; S. v. Fahey, 3 Penne. (Del.) 594, 54 A. 690; S. v. Freedman, 3 Penne. (Del.) 403, 53 A. 356; Best v. C., 29 Ky. L. R. 137, 92 S. W. 555; S. v. Sprague, 149 Mo. 409, 50 S. W. 901; S. v. Prater, 26 S. C. 198, 613, 2 S. E. 108; S. v. Meares, 60 S. C. 527, 39 S. E. 245; Smith v. S., 45 Tex. Cr. 405, 77 S. W. 453; S. v. Pearson, 37 Wash. 405, 79 P. 985.

Sufficiency of caution. — Uncorroborated testimony may be relied upon if it produces the most positive conviction of its truth. U. S. v. Richards, 149 Fed. 443. Direct and positive testimony will support a conviction though not corroborated. S. v. Conlin (Wash.), 88 P. 932. It is enough to say that the jury should be cautious in convicting upon unsupported testimony. S. v. Register, 133 N. C. 746, 46 S. E. 21. It will be sufficient if the court directs attention of jury to conduct of accomplice, and tells them it is a matter for their consideration, (Borck v. S. (Ala.), 39 S. 580); or to instruct that courts regard testimony of accomplices with considerable suspicion, and that it should be carefully scrutinized. Hanley v. U. S., 123 Fed. 849, 59 C. C. A. 153.

Not necessary if accomplice corroborated. — S. v. Koplan, 167 Mo. 298, 66 S. W. 967.

Caution not required. — Myers v. S., 43 Fla. 500, 31 S. 275; Bacon v. S., 22 Fla. 51; Shiver v. S., 41 Fla. 630, 27 S. 36; Murphy v. S., 124 Wis. 635, 102 N. W. 1087.

101-20 Discretion of court. — It is the character and interest of wit-

ness, as shown upon the trial, and not the mere fact of his being an accomplice, that must determine discretion of judge in commenting on his credibility. S. v. Carey, 76 Conn. 342, 56 A. 632. The giving of cautionary instructions is rather a rule of practice than of law. Stone v. S., 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145; S. v. De Hart, 109 La. 570, 33 S. 605; C. v. Wilson, 152 Mass. 12, 25 N. E. 16; C. v. Clune, 162 Mass. 206, 38 N. E. 435; S. v. Hier, 78 Vt. 488, 63 A. 877.

102-23 **The caution** must be in the words of the statute or equivalent terms. Fisher v. Ter., 17 Okla. 455, 87 P. 301. Exact words not essential. McKinney v. S., 48 Tex. Cr. 402, 88 S. W. 1012.

103-24 **The question of corroboration** is one of law, but the sufficiency of the evidence is for the jury (P. v. Adams, 72 App. Div. 166, 76 N. Y. S. 361), and the proof must extend to every material fact testified to by the accomplice. Burnett v. S., 76 Ark. 295, 88 S. W. 956. His acts, statements and declarations are not corroborative. Carrens v. S., 77 Ark. 16, 91 S. W. 30; S. v. Egbert, 125 Iowa 443, 101 N. W. 191; P. v. Green, 103 App. Div. 79, 92 N. Y. S. 508; Barnard v. S. (Tex. Cr.), 76 S. W. 475; Thompson v. S. (Tex. Cr.), 78 S. W. 691; Wallace v. S., 48 Tex. Cr. 318, 87 S. W. 1041.

103-25 P. v. Sternberg, 111 Cal. 3, 43 P. 198; People v. O'Farrell, 175 N. Y. 323, 67 N. E. 588; Eddens v. S., 47 Tex. Cr. 529, 84 S. W. 828; Wallace v. S., 48 Tex. Cr. 318, 87 S. W. 1041; Jackson v. S., 48 Tex. Cr. 648, 90 S. W. 34.

Effect of Georgia statute. — Under a code expressing that the testimony of a single witness is generally sufficient to establish a fact, and providing exceptions to the rule, the courts have no power to require corroboration of a certain character, or to declare that the testimony of two accomplices is not sufficient. Stone v. S., 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145.

104-27 P. v. Morton, 139 Cal. 719, 73 P. 609; Durden v. S., 120 Ga. 860, 48 S. E. 315; S. v. Wheeler, 116 Ia. 212, 89 N. W. 978; Frazier v. C., 25 Ky. L. R. 461, 76 S. W. 28; P. v. Ryland, 28 Hun (N. Y.) 568; Welden v. S., 10 Tex. App. 400.

104-28 Peckham v. P., 32 Colo. 140, 75 P. 422; Hargrove v. S., 125 Ga. 270, 54 S. E. 164; Dixon v. S., 116 Ga. 186, 42 S. E. 357; S. v. Bond, 12 Idaho 424, 86 P. 43; C. v. Goldberg, 4 Pa. Super. 142; S. v. Bean, 77 Vt. 384, 60 A. 807, *cit.*, C. v. Bosworth, 22 Pick. (Mass.) 397, as explained in C. v. Holmes, 127 Mass. 424.

No special corroboration is required. S. v. Bean, supra, and cases cited.

104-29 Rhodes v. S., 141 Ala. 66, 37 So. 365; P. v. Sullivan, 144 Cal. 471, 77 P. 1000; S. v. Bond, 12 Idaho 424, 86 P. 43; S. v. Waters, 132 Ia. 481, 109 N. W. 1013; S. v. Johnson, 133 Ia. 38, 110 N. W. 170; Best v. C., 29 Ky. L. R. 137, 92 S. W. 555; Fitzgerald v. S. (Neb.), 110 N. W. 676; P. v. Adams, 72 App. Div. 166, 76 N. Y. S. 361; Hill v. Ter., 15 Okla. 212, 79 P. 757, Barbe v. Ter., 16 Okla. 562, 86 P. 61; Green v. S., 49 Tex. Cr. 238, 90 S. W. 1115.

Any corroborating evidence will support a verdict. Mann v. C., 25 Ky. L. R. 1964, 79 S. W. 230.

Complaints as corroborative evidence. — Corroboration is sometimes furnished by the prosecutrix through complaints made of the outrage attempted or perpetrated on her. To be admissible, they must be closely connected with the transaction (Griffin v. S., 76 Ala. 29; P. v. Wilmot, 139 Cal. 103, 72 P. 838; Cunningham v. P., 210 Ill. 410, 71 N. E. 389; S. v. Wheeler, 116 Ia. 212, 89 N. W. 978; S. v. Carpenter, 124 Ia. 5, 98 N. W. 775; S. v. Griffin, 43 Wash. 591, 86 P. 951), and must have been voluntarily made. P. v. Wilmot, supra. Circumstances, however, sometimes excuse delay. S. v. Peres, 27 Mont. 358, 71 P. 162; Hill v. S. (Tex. Cr.), 77 S. W. 808. In some courts direct testimony cannot be given of the name of the person accused in such complaints. Reg. v. Osborne, Car. & M. (Eng.) 622; Griffin v. S., 76 Ala. 29; P. v. Wilmot, 139 Cal. 103, 72 P. 838; P. v. McGee, 1 Denio (N. Y.) 19. *Contra*, Burt v. S., 23 Ohio St. 394. The cases are not agreed whether evidence of the mention of the name is substantive proof of the guilt of the party

named. In the affirmative, S. v. Wheeler, 116 Ia. 212, 89 N. W. 978. Proper v. S., 85 Wis. 615, 55 N. W. 1035.

105-30 **As to non-essential matters.** — Contradiction of the accomplice as to some of the details of his testimony is not material if the contradicting testimony tends to corroborate him as to the main fact. Locklin v. S. (Tex. Cr.), 75 S. W. 305.

Engagement to marry. — Proof that the parties continuously associated together for two years is not sufficient corroboration of the plaintiff's testimony as to the defendant's engagement to marry her. Fine v. S., 45 Tex. Cr. 290, 77 S. W. 806.

105-31 Solomon v. S., 113 Ga. 192, 38 S. E. 332; Truelove v. S., 44 Tex. Cr. 386, 71 S. W. 601.

106-32 P. v. Morton, 139 Cal. 719, 73 P. 609; Smith v. S., 44 Tex. Cr. 53, 68 S. W. 267.

A plea of guilty may be considered; it is not conclusive. Hargrove v. S., 125 Ga. 270, 54 S. E. 164.

107-33 Cook v. S., 75 Ark. 540, 87 S. W. 1176; P. v. Howard, 135 Cal. 266, 67 P. 148; S. v. Knudston, 11 Idaho 524, 83 P. 226; S. v. Egbert, 125 Ia. 443, 101 N. W. 191; Frazier v. C., 25 Ky. L. R. 461, 76 S. W. 28; Simpson v. C., 31 Ky. L. R. 769, 103 S. W. 332; S. v. Koplan, 167 Mo. 298, 66 S. W. 967; P. v. Bissert, 71 App. Div. 118, 75 N. Y. S. 630; P. v. Patrick, 182 N. Y. 131, 74 N. E. 843; Barber v. S. (Tex. Cr.), 70 S. W. 210; Bismark v. S., 45 Tex. Cr. 54, 73 S. W. 965; Denson v. S., 47 Tex. Cr. 439, 83 S. W. 820; Wright v. S., 47 Tex. Cr. 433, 84 S. W. 593; Giles v. S., 43 Tex. Cr. 561, 67 S. W. 411.

It is sufficient if the evidence "tends to connect defendant with the commission of the offense," (P. v. Balkwell, 143 Cal. 259, 76 P. 1017); but an instruction which adds to the quoted words of the Code the words "in any way," is erroneous. P. v. Compton, 123 Cal. 403, 56 P. 44.

Proof of opportunity to commit the crime in question is not, of itself, sufficient corroboration to connect the accused with it. S. v. Wheeler, 116 Ia. 212, 89 N. W. 978; S. v. Egbert, 125 Ia. 443, 101 N. W. 191.

Other like crimes. — Evidence of similar crimes as that alleged to have been committed by the accused has been received. Lanphere v. S., 114 Wis. 193, 89 N. W. 128; S. v. Peres, 27 Mont. 358, 71 P. 162; S. v. Robinson, 32 Or. 43, 48 P. 357; S. v. Fetterly, 33 Wash. 599, 74 P. 810; Proper v. S., 85 Wis. 615; 55 N. W. 1035; O'Brien v. C., 115 Ky. 608, 74 S. W. 666; Peckham v. P., 32 Colo. 140, 75 P. 422. But it has been ruled that such evidence is not competent unless it shows system. Buck v. S. (Tex. Cr.), 83 S. W. 390. It must be confined to offenses committed before the date alleged in the indictment. P. v. Robertson, 88 App. Div. 198, 84 N. Y. S. 401. It has been denied that such proof is corroborative of the accomplice. P. v. Flaherty, 27 App. Div. 535, 50 N. Y. S. 574). It has been held in an action for seduction that it is sufficient corroboration of the prosecutrix if the evidence tends to show an act of intercourse subsequent to the first of such acts if it occurred at the time or subsequent to the promise to marry. Rucker v. S., 77 Ark. 23, 90 S. W. 151.

Attempt to commit same crime. — In a prosecution for burglary and larceny it may be shown that the defendant and two others recently attempted to commit the same crime at the same place, and that they obtained and kept a key to the building which was burglarized. Such testimony is corroborative of the testimony of an accomplice. Cook v. S., 80 Ark. 495, 97 S. W. 683.

Slight evidence from an extraneous source identifying the accused as a participator in the criminal act will be a sufficient corroboration of the accomplice to support a verdict. Hargrove v. S., 125 Ga. 270, 54 S. E. 164. The evidence need not tend directly to connect defendant with the crime. P. v. Ah Lung, 2 Cal. App. 278, 83 P. 296; S. v. Gallivan, 75 Conn. 326, 53 A. 731.

Inference of guilt. — Harrell v. S., 121 Ga. 607, 49 S. E. 703.

Must relate to material matter. Wright v. S., 47 Tex. Cr. 433, 84 S. W. 593.

Need not extend to whole case. — S. v. Jones, 115 Iowa 113, 88 N. W. 196; S. v. Stevenson, 26 Mont. 332,

67 P. 1001; P. v. Adams, 72 App. Div. 166, 76 N. Y. S. 361.

107-34 Hargrove v. S., 125 Ga. 270, 54 S. E. 164; Best v. C., 29 Ky. L. R. 137, 92 S. W. 555.

Former association and concerted action with criminals may be shown, though it occurred long anterior to the commission of the instant crime. C. v. Biddle, 200 Pa. 640, 50 A. 262.

108-35 Crittenden v. S., 134 Ala. 145, 32 S. 273; Rawlins v. S., 124 Ga. 31, 52 S. E. 1; Byrd v. S., 49 Tex. Cr. 279, 93 S. W. 114.

108-36 P. v. Hoagland, 138 Cal. 338, 71 P. 359.

It is not enough to create a grave or strong suspicion (P. v. Sciaroni, 4 Cal. App. 698, 89 P. 133; Harrell v. S., 121 Ga. 607, 49 S. E. 703; S. v. Spotted Hawk, 22 Mont. 33, 55 P. 1026); the evidence must raise a reasonable inference of guilt. Cooper v. Ter. (Okla.), 91 P. 1032. The whole testimony of the accomplice need not be corroborated. P. v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370.

108-38 P. v. Bunkers, supra; P. v. Ah Lung, 2 Cal. App. 278, 83 P. 296; Peckham v. P., 32 Colo. 140, 75 P. 422; S. v. Jones, 115 Ia. 113, 88 N. W. 196; S. v. Norris, 127 Ia. 683, 104 N. W. 282; S. v. Bartlett, 127 Ia. 689, 104 N. W. 285, S. v. Ozias (Iowa), 113 N. W. 761; Mann v. C., 25 Ky. L. R. 1964, 79 S. W. 230; Best v. C., 29 Ky. L. R. 137, 92 S. W. 555; Smith v. C., 119 Ky. 280, 83 S. W. 647; S. v. Jones, 32 Mont. 442, 80 P. 1095; S. v. Dilts, 191 Mo. 665, 90 S. W. 782; P. v. Patrick, 182 N. Y. 131, 74 N. E. 843; Locklin v. S. (Tex. Cr.), 75 S. W. 305; Stiles v. S. (Tex. Cr.), 75 S. W. 511; Moore v. S., 47 Tex. Cr. 410, 83 S. W. 1117; Sexton v. S. (Tex. Civ.), 92 S. W. 37; Byrd v. S., 49 Tex. Cr. 279, 93 S. W. 114; S. v. Conlin (Wash.), 88 P. 932.

Financial situation of accomplice in robbery, before and after crime committed, may be shown. C. v. Devaney, 182 Mass. 33, 64 N. E. 402.

Testimony of accomplice considered. While the corroborative evidence necessary to justify a conviction must come from some other than the accomplice, it is proper to consider his testimony as to the facts and circumstances in order to determine whether or not there is other evidence tending to connect accused with the offense. S. v. Carpenter, 124 Ia. 5, 98 N. W. 775.

Specific facts sworn to by accomplice need not be corroborated. P. v. Ammon, 92 App. Div. 205, 87 N. Y. S. 358, *aff'd.*, without opinion, 179 N. Y. 540, 71 N. E. 1135; People v. Strauss, 94 App. Div. 453, 88 N. Y. S. 40, *aff'd.*, without opinion, 179 N. Y. 553, 71 N. E. 1135; Hill v. Ter., 15 Okla. 212, 79 P. 757.

Remote and fragmentary evidence admissible to corroborate. Howard v. C., 118 Ky. 1, 80 S. W. 211, 81 S. W. 704.

109-39 S. v. Gallivan, 75 Conn. 326, 53 A. 731; S. v. Blain, 118 Ia. 466, 92 N. W. 650; S. v. Goldman, 65 N. J. L. 394, 47 A. 641.

110-42 Defendant's conduct as corroboration. — The flight of the accused (George v. S., 61 Neb. 669, 85 N. W. 840), his conduct when first informed of the charge, and an appeal to the prosecutrix not to appear against him are corroborative facts. S. v. Roller, 30 Wash. 692, 71 P. 718.

110-43 Crittenden v. S., 134 Ala. 145, 32 S. 273; S. v. Ruck, 194 Mo. 416, 92 S. W. 706.

Confession not conclusive as to principal's guilt. Thomas v. S., 43 Tex. Cr. 20, 62 S. W. 919.

Confession not part of res gestae. The confession of one accomplice, made in absence of the others and not a part of the res gestae, is admissible only against the confessor. S. v. McCoy, 61 W. Va. 258, 57 S. E. 294.

All the confession admissible. — If part of confession is admitted to discredit an accomplice's testimony, the whole of it may be introduced by the state. S. v. Myers, 198 Mo. 225, 94 S. W. 242.

110-44 P. v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370; King v. McGiffin, 7 Haw. 104; C. v. Devaney, 182 Mass. 33, 64 N. E. 402; S. v. Sublett, 191 Mo. 163, 90 S. W. 374; S. v. Peres, 27 Mont. 358, 71 P. 162; S. v. Lovelace (Nev.), 83 P. 330; S. v. Kincaid, 142 N. C. 657, 55 S. E. 647; Mason v. S. (Tex. Cr.), 81 S. W. 718; Harrold v. S., 46 Tex. Cr. 568, 81 S. W. 728.

111-46 P. v. Davis, 135 Cal. 162, 67 P. 59.

111-47 Clifton v. S., 46 Tex. Cr. 18, 79 S. W. 824; Hatcher v. S., 43 Tex. Cr. 237, 65 S. W. 97.

111-48 P. v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370; Hargrove v. S., 125 Ga. 270, 54 S. E. 164; S. v. Norris, 127 Iowa 683, 104 N. W. 282; Best v. C., 29 Ky. L. R. 137, 92 S. W. 555; P. v. O'Farrell, 175 N. Y. 323, 67 N. E. 588; Mosely v. S. (Tex. Cr.), 67 S. W. 103.

112-50 Burden of showing witness to be an accomplice. — The burden of proving a witness to be an accomplice is upon the party alleging it. His joinder in an indictment with the defendant does not establish that he was such. Davis v. S., 122 Ga. 564, 50 S. E. 376; Hargrove v. S., 125 Ga. 270, 54 S. E. 164; Williams v. S. (Tex. Cr.), 85 S. W. 1142; Walker v. S., 118 Ga. 757, 45 S. E. 608.

112-51 Polk v. S., 36 Ark. 117; Chitister v. S., 33 Tex. Cr. 635, 28 S. W. 683.

The test. — In some states the test is said to be, could the alleged accomplice be indicted for the offense for which the accused is being tried. S. v. Jones, 115 Ia. 113, 88 N. W. 196; Keller v. S., 102 Ga. 506, 31 S. E. 92; Stone v. S., 118 Ga. 705, 45 S. E. 630, 98 Am. St. 145 (but *compare* Walker v. S., 118 Ga. 757, 45 S. E. 608); Stone v. S., 47 Tex. Cr. 575, 85 S. W. 808.

112-53 Borck v. S. (Ala.), 39 So. 580; Baker v. S., 121 Ga. 189, 48 S. E. 967; Walker v. S., 118 Ga. 757, 45 S. E. 608; Short v. C., 25 Ky. L., R. 451, 76 S. W. 11; Best v. C., 29 Ky. L. R. 137, 92 S. W. 555; Jackson v. S., 48 Tex. Cr. 648, 90 S. W. 34; Burton v. S. (Tex. Cr.), 101 S. W. 226; Means v. S., 125 Wis. 650, 104 N. W. 815.

One may be an accomplice though he engages in the offense unwillingly (Pate v. S. (Tex. Cr.), 93 S. W. 556; Yother v. S., 120 Ga. 204, 47 S. E. 555), and without the same desire as his principal. Clifton v. S., 46 Tex. Cr. 18, 79 S. W. 824.

Feigned accomplices. — The rule concerning accomplices does not extend to detectives and others who seemingly aid in the commission of crime for the purpose of bringing the guilty to trial. State v. Hoxsie, 15 R. I. 1, 22 A. 1059, 2 Am. St. 838; P. v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370; Sanchez v. S., 48 Tex. Cr. 591, 90 S. W. 641; Porter v. P., 31 Colo. 508, 74 P. 879; S. v. Douglas, 26 Nev. 196, 65 P. 802.

Branding animals. — Leak v. S. (Tex. Cr.), 97 S. W. 476.

Duress. — One who engages in a crime because of force and against her will is not an accomplice. S. v. Rennick, 127 Ia. 294, 103 N. W. 159; Schwartz v. S., 65 Neb. 196, 91 N. W. 190. See Burton v. S. (Tex. Cr.), 101 S. W. 226.

Abortion. — A woman is not an accomplice because she knew of the pregnancy of her intimate friend, her desire to be relieved, and accompanied her to the place where abortion was committed, no aid or advice being given, and she not being present at the time. P. v. Balkwell, 143 Cal. 259, 76 P. 1017. A woman who submits to an abortion is not an accomplice. Smartt v. S., 112 Tenn. 539, 80 S. W. 586.

Seduction. — The victim of a seducer is not an accomplice. Keller v. State, 102 Ga. 506, 31 S. E. 92, 910.

Undue influence. — If a woman of the age of consent assents to incestuous intercourse, she is particeps criminis, and her testimony must be corroborated (Solomon v. S., 113 Ga. 192, 38 S. E. 332); but if she is the victim of force or fraud, or undue influence, or is too young to be able to give legal assent, so that she does not wilfully and willingly join in the act, she is not an accomplice. P. v. Stratton, 141 Cal. 604, 75 P. 166; Bridges v. S. (Neb.), 113 N. W. 1048; Schwartz v. S., 65 Neb. 196, 91 N. W. 190; Straub v. S., 5 O. C. C. (N. S.) 529; S. v. Knighten, 39 Or. 63, 64 P. 866; Lanphere v. S., 114 Wis. 193, 89 N. W. 128; Donley v. S., 44 Tex. Cr. 428, 71 S. W. 958.

Common intent—participation in same offense. See Springer v. S., 102 Ga. 447, 30 S. E. 971; Hargrove v. S., 125 Ga. 270, 54 S. E. 164.

113-54 Bird v. U. S., 187 U. S. 118; Butt v. S., 81 Ark. 173, 98 S. W. 723; P. v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370; Hargrove v. S.,

125 Ga. 270, 54 S. E. 164; Mosely v. S. (Tex. Cr.), 67 S. W. 103.

Falsification does not make one guilty thereof an accomplice. Alexander v. S., 49 Tex. Cr. 93, 90 S. W. 1112; Schackey v. S., 41 Tex. Cr. 255, 53 S. W. 877.

Wilful ignorance. — "The defendant could not close his eyes to matters which were passing about him, and allow his premises to be used in violation of law, and escape responsibility." P. v. Finucan, 80 App. Div. 407, 80 N. Y. S. 929, *cit.* P. v. Everhardt, 104 N. Y. 591, 11 N. E. 62.

Prevention of offense. — An officer who administers an oath is not an accomplice because he knew the affidavit was false. Wilson v. S., 49 Tex. Cr. 496, 93 S. W. 547.

113-55 U. S. v. Van Leuven, 65 Fed. 78; P. v. Sternberg, 111 Cal. 3, 43 P. 198; Hargrove v. S., 125 Ga. 270, 54 S. E. 164; S. v. Kelliher (Or.), 88 P. 867; Buck v. S. (Tex. Cr.), 83 S. W. 390.

Two similar crimes. — In a prosecution for receiving goods stolen on two successive days, an accomplice as to one of the thefts may testify as to the other, and his testimony is independent evidence to show the defendant's guilty knowledge and intent in regard to the transaction of which the accomplice testified. C. v. Brennor, 194 Mass. 17, 79 N. E. 799.

The jury must believe the corroborating evidence or it cannot convict. Crenshaw v. S., 48 Tex. Cr. 77, 85 S. W. 1147.

114-56 Best v. C., 29 Ky. L. R. 137, 92 S. W. 555.

An unaccepted offer not to prosecute an accused person on condition does not make the person who made it an accomplice. Robertson v. S., 46 Tex. Cr. 441, 80 S. W. 1000; Holley v. S., 49 Tex. Cr. 306, 92 S. W. 422. It is said that Gatlin v. S., 40 Tex. Cr. 116, 49 S. W. 87, and other cases to the contrary are overruled in Chenault v. S. (Tex. Cr.), 81 S. W. 971.

115-57 Held to be accomplices. Rex. v. Moores, 7 Car. & P. 270, 32 E. C. L. 507; Edmonson v. S., 51 Ark. 115, 10 S. W. 21; Richard v. S., 49 Tex. Cr. 192, 90 S. W. 1017.

Held not to be accomplices. — Birdsong v. S., 120 Ga. 850, 48 S. E. 329; Walker v. S., 118 Ga. 757, 45 S. E. 608; S. v. Jones, 115 Iowa 113, 88 N. W. 196; S. v. Hayden, 45 Iowa 11; S. v. Kuhlman, 152 Mo. 100, 53 S. W. 416, 75 Am. St. 438; S. v. Rachman, 68 N. J. L. 120, 53 A. 1046; S. v. Phillips, 18 S. D. 1, 98 N. W. 171.

115-59 A corroborated accomplice may testify as to who committed the crime. Rhodes v. S., 141 Ala. 66, 37 S. 365.

115-60 Co-indictee of accomplice competent witness. — A person jointly indicted with defendant as an accomplice is a competent witness against him though the indictment is pending (Powers v. C., 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494; Simpson v. C., 31 Ky. L. R. 769, 103 S. W. 332), or though witness has been convicted, (Barbe v. Ter., 16 Okla. 562, 86 P. 61; Rice v. S. (Tex. Cr.), 100 S. W. 771), and a motion for a new trial in favor of the accomplice is pending. S. v. Myers, 198 Mo. 225, 94 S. W. 242.

ACCORD AND SATISFACTION
[Vol. 1.]

118-8 Fogil v. Boody, 76 Conn. 194, 56 A. 526; Covell v. Carpenter, 24 R. I. 1, 51 A. 425; Gossett v. R. Co., 115 Tenn. 376, 89 S. W. 737, 1 L. R. A. (N. S.) 97.

Fraud may be shown without pleading it if plaintiff could not be assumed to know that a defense would be set up. Whitehead v. Trussed Co., 51 Misc. 664, 101 N. Y. S. 250.

118-9 Board v. Durnell, 17 Colo. App. 85, 66 P. 1073; Mitterwallner v. Supreme Lodge, 109 App. Div. 70, 95 N. Y. S. 1090; Weinberg v. Novick, 88 N. Y. S. 168; Standard S. M. Co. v. Gunter, 102 Va. 568, 46 S. E. 690; National C. R. Co. v. Petsas, 43 Wash. 376, 86 P. 662.

The authority of an attorney to make an accord must be shown by the party who asserts it, as must a ratification of his act. Fosha v. O'Donnell, 120 Wis. 336, 97 N. W. 924.

119-12 Howard v. Norton-M. Co.

(Ariz.), 89 P. 541; Bowen v. Waxelbaum, 2 Ga. App. 521, 58 S. E. 784; Mayo v. Leighton, 101 Me. 63, 63 A. 298; Burr's T. W. v. Mfg. Co., 142 Mich. 417, 105 N. W. 858; Slover v. Rock, 96 Mo. App. 335, 70 S. W. 268; Gerhart R. Co. v. Assur. Co., 94 Mo. App. 356, 68 S. W. 86; Kinney v. Brotherhood, 15 N. D. 21, 106 N. W. 44.

Satisfaction may be by exchange of claims. The agreement therefor need not be in writing. Upton v. Sugar Co., 109 La. 670, 33 S. 725.

Retention of part paid. — Plaintiff is not estopped to deny the execution of the accord by retaining so much or the satisfaction as was paid. Kinney v. Brotherhood, 15 N. D. 21, 106 N. W. 44.

120-14 Mayo v. Leighton, 101 Me. 63, 63 A. 298; Prest v. Cole, 183 Mass. 283, 67 N. E. 246.

120-15 What evidence admissible. Parol evidence may be received to show the actual consideration for the agreement, though it varies the terms of the writing. Williams v. Blumenthal, 27 Wash. 24, 67 P. 393. The intention of the parties is material, and may be evidenced by unequivocal acts—as a surrender of the former securities, release or receipt in full, or proof that the new contract has been executed to that point where it was to operate as present satisfaction of the preexisting liability. Laughead v. Frick, 209 Pa. 368, 58 A. 685, *appr.* Babcock v. Hawkins, 23 Vt. 561. In equity, proof of payment into court shows a satisfaction. In re Freeman, 117 Fed. 680.

120-16 Farmers' & M. Assn. v. Caine, 224 Ill. 599, 79 N. E. 956; Olsen v. Coal Co., 126 Ill. App. 253. But see Uvalde A. P. Co. v. N. Y., 90 App. Div. 327, 91 N. Y. S. 131.

122-22 Missouri & I. C. Co. v. Coal Co., 127 Mo. App. 320, 105 S. W. 682; Polman Co. v. St. Louis, 145 Mo. 651, 47 S. W. 563; Goodson v. Assn., 91 Mo. App. 339; Bloomington M. Co. v. Ice Co., 58 App. Div. 66, 68 N. Y. S. 699, *aff'd.*, without opinion, 171 N. Y. 673, 64 N. E. 1118.

123-23 Hand L. Co. v. Hall, 147 Ala. 561, 41 S. 78; Creighton v. Gregory, 142 Cal. 34, 75 P. 569; Fogil v. Boody, 76 Conn. 194, 56 A. 526; Bingham v. Browning, 197 Ill. 122, 64 N. E. 317; Northwestern Assn. v. Crawford, 126 Ill. App. 468; Snow v. Griesheimer, 120 Ill. App. 516; Little v. Koerner, 28 Ind. App. 625, 63 N. E. 766; Greenlee v. Mosnat, 116 Ia. 535, 90 N. W. 338; Neely v. Thompson, 68 Kan. 193, 75 P. 117; Richardson v. Taylor, 100 Me. 175, 60 A. 796; Anderson v. Granite Co., 92 Me. 429, 43 A. 21; Weber v. Board, 93 Minn. 320, 101 N. W. 296; Andrews v. Stubbs, 100 Mo. App. 599, 75 S. W. 178; Simons v. Council, 178 N. Y. 263, 70 N. E. 776; Jackson v. Volkening, 81 App. Div. 36, 80 N. Y. S. 1102; Flynn v. Hurlock, 194 Pa. 462, 45 A. 312; Daugherty v. Herndon, 27 Tex. Civ. 175, 65 S. W. 891.

Willingness to explain. — Expressing a willingness to explain any items not understood is not an admission of doubt as to the correctness of the account, or that the amount shown as a balance is open to inquiry. Neely v. Thompson, 68 Kan. 193, 75 P. 117.

Intention of parties. — See Jacobs v. Jacobs, 130 Ia. 10, 104 N. W. 489.

Payee's expressed dissent may prevent his acceptance and retention of money from being a satisfaction. Perin v. Catheart, 115 Ia. 553, 89 N. W. 12.

123-24 Lang v. Lane, 83 Ill. App. 543; American F. & M. Co. v. Lindsay, 129 Ill. App. 548; Canton U. C. Co. v. Parlin Co., 117 Ill. App. 622; Harrison v. Henderson, 67 Kan. 194, 72 P. 875; Proctor v. Hobart, 145 Mich. 503, 108 N. W. 992; Hillestad v. Lee, 91 Minn. 335, 97 N. W. 1055; Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034; Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715; West Point C. M. v. Blythe, 29 Pa. Super. 642.

Payment of balance is not enough. Harrison v. Henderson, 67 Kan. 194, 72 P. 875.

Acceptance of check for part. "Ordinarily the acceptance by a creditor of a check for a part of a disputed claim will not constitute an accord and satisfaction, although the check agrees in amount with the balance due as claimed by the debtor. In order to make it so, the check must recite, in effect, that it is in full payment of the claim, or

be so declared, expressly or by necessary implication, when the check is tendered." Hillestad v. Lee, 91 Minn. 335, 97 N. W. 1055, *cit.*, Van Dyke v. Wilder, 66 Vt. 579, 29 A. 1016; Eames v. Prosser, 157 N. Y. 289, 51 N. E. 986.

Retention of check. — If a creditor retains his debtor's check for an unreasonable length of time, pending a discussion of whether it should be received in full or not, it is for the jury to find whether it was so accepted. Fredonia G. Co. v. Elwood, 71 Kan. 464, 80 P. 969.

Notice of objection. — If the debtor is immediately notified on receipt of his check that suit will be brought to recover what is claimed to be due, there is no accord and satisfaction. Harby v. Henes, 45 Misc. 366, 90 N. Y. S. 461.

Question of fact. — Whether or not there has been such a giving and acceptance as to amount to an accord and satisfaction is for the jury to decide. Perin v. Catheart, 115 Ia. 553, 89 N. W. 12.

Knowledge of custom of county. One who receives county warrants with knowledge, or its equivalent, that the amounts allowed were on the express condition that they must be taken in full payment of the accounts, and that the balance of his claims had been disallowed, cannot recover any other amount in the absence of a protest then made, though he had previously protested. Board v. Morgan, 28 Colo. 322, 65 P. 41.

126-26 Melton v. Rittenhouse, 111 Ill. App. 30.

126-30 Upton v. Sugar Co., 109 La. 670, 33 S. 725.

127-31 Hurrle G. Co. v. Hooker, 120 Ill. App. 433; Redmond & Co. v. Air L. R. Co., 129 Ga. 133, 58 S. E. 874.

Qualified receipt. — A receipt "in full," with the addition that the sum named is accepted under protest, is not, as matter of law, an accord and satisfaction. Mitterwallner v. Supreme Lodge, 109 App. Div. 70, 95 N. Y. S. 1090.

Parol evidence is competent to show that a receipt was signed upon an unexpressed understanding. Komp v. Raymond, 175 N. Y. 102, 67 N. E. 113.

Not affected by promise of third party. — A receipt in full, standing alone and unimpeached, is not inconclusive because, in addition thereto and in connection with the sum paid, the receiptor had the promise of something from another party, distinct from the one who made the payment. Langhead v. Frick, 209 Pa. 368, 58 A. 685.

127-32 Hayes v. R. Co., 143 N. C. 125, 55 S. E. 437; Fosha v. O'Donnell, 120 Wis. 336, 97 N. W. 924.

127-34 Simons v. Council, 178 N. Y. 263, 70 N. E. 776; Creighton v. Gregory, 142 Cal. 34, 75 P. 569.

127-35 Greenlee v. Mosnat, 116 Ia. 535, 90 N. W. 338.

Where evidence is all documentary. In the absence of oral testimony affecting the letters in evidence or any dispute of fact concerning them, the question is for the court. Logan v. Davidson, 18 App. Div. 353, 45 N. Y. S. 961, *affd.*, without opinion, 162 N. Y. 624, 57 N. E. 1115.

The jury must find what claims and demands were covered by the accord and satisfaction (Mayo v. Leighton, 101 Me. 63, 63 A. 398; McCormick v. Shea, 47 Misc. 613, 94 N. Y. S. 485), and decide whether there was a good faith dispute between the parties. Beaver v. Porter, 129 Ia. 41, 105 N. W. 346; McCormick v. Shea, supra; Greenlee v. Mosnat, 116 Ia. 535, 90 N. W. 338. The question as to the inferences to be drawn from the facts proved is for the court. Canton U. C. Co. v. Parlin, 215 Ill. 244, 74 N. E. 143, 117 Ill. App. 622. It is a question of fact whether the creditor has retained a check sent him in full payment for an unreasonable time and should be held bound by his retention of it. Fredonia G. Co. v. Elwood, 71 Kan. 464, 80 P. 969.

ACCOUNTS, ACCOUNTING AND ACCOUNTS STATED [Vol. 1.]

133-2 Jordan v. Underhill, 71 App. Div. 559, 76 N. Y. S. 95.

133-3 Stitzer v. Fonder, 214 Pa. 117, 63 A. 421.

134-6 Dettering v. Nordstrom, 148 Fed. 81, 78 C. C. A. 157.

135-8 Brown v. Cragg, 230 Ill. 299, 82 N. E. 569; Butts v. Cooper (Ala.), 44 S. 616.

Evidence on plea of an accounting. Dettering v. Nordstrom, 148 Fed. 81, 78 C. C. A. 157. The use of books on an accounting by a trustee is discretionary; the court may receive any evidence which it deems proper. Cairns v. Murray, 37 Can. Sup. 163. If the parties bound themselves to keep books, those opened for that purpose are competent evidence in support of the bill. Stitzer v. Fonder, 214 Pa. 117, 63 A. 421.

137-15 Anderson v. Anderson, 24 Utah 497, 68 P. 319.

137-16 Anderson v. Anderson, supra.

138-18 Sufficiency of evidence. In the absence of mistake, fraud or duress an account stated by partners will not be opened in an action for an accounting. Wahl v. Barnum, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623; Hale v. Hale, 14 S. D. 644, 86 N. W. 650.

139-22 On a reference to take accounts a party is entitled to a commission to cross-examine the opposite party upon affidavits filed in proof of accounts. Horlick v. Eschweiler, 11 Ont. L. R. (Can.) 140.

144-34 Scope of answer. — The answer has less scope than answers in ordinary cases; the defendant under a bill for an accounting involving mutual accounts has nothing to plead in order to have the advantage of the items constituting his offsets and expenses directly connected with the matters alleged in the bill. Dettering v. Nordstrom, 148 Fed. 81, 78 C. C. A. 157; Goldthwait v. Day, 149 Mass. 185, 21 N. E. 359; Armstrong v. Bank, 37 Fed. 466. But the defendant must plead any demands he seeks to have allowed if the bill does not include them. Dettering v. Nordstrom, supra.

144-35 The burden is on receivers who are called to account to justify and vouch the accounts rendered, at least to the extent exceptions are taken. Gutterson v. I. & S. Co., 151 Fed. 72. If firm books are not produced on a partnership accounting, the partner in charge of them and of the book-keeper has the burden of showing that his contention concerning their contents is right. Sandford v. Embry, 151 Fed. 977.

148-49 The account may be sent down for an extension of the accounting from the time the auditor struck a balance to time of trial. Fricker v. Mfg. Co., 124 Ga. 165, 52 S. E. 65.

152-71 Keating I. & M. Co. v. Erie City (Tex. Civ.), 63 S. W. 546. **The account is, in effect, a complaint,** and the plaintiff cannot recover more than is stated therein to be due. Miller v. Armstrong, 123 Ia. 86, 98 N. W. 561.

Burden of proof is upon party who pleads a general settlement. If such settlement is attacked for fraud or mistake, the burden is upon the attacking party. Johnson v. Berdo, 131 Ia. 524, 106 N. W. 609. If the defendant refuses to produce the records which show the amount due, he has the burden of proof to establish the amount. Schrimplin v. Assn., 123 Ia. 102, 98 N. W. 613. The plaintiff must show the existence of the facts which justify his charges. Laurel Co. Ct. v. Pennington, 26 Ky. L. R. 124, 80 S. W. 820.

Entries in books will not be received in evidence if they are too detached from the usual course of business between the parties as merchant and customer. Bader v. Ferguson, 118 Mo. App. 34, 94 S. W. 836. Books are admissible to show the capacity in which defendant was charged therein, he not having objected to the charges as made. Love v. Ramsey, 139 Mich. 47, 102 N. W. 279.

153-73 Knight v. Taylor, 131 N. C. 84, 42 S. E. 537; Myers v. First P. Church, 11 Okla. 544, 69 P. 874; Pittsburg P. G. Co. v. Roquemore (Tex. Civ.), 88 S. W. 449; Hickman v. Grocery Co. (Tex. Civ.), 62 S. W. 1081.

The Texas statute relates only to accounts for personal property sold and delivered by plaintiff in the general course of dealing. Oden v. Grocery Co., 34 Tex. Civ. 115, 77 S. W. 967. But an account not within it is not inadmissible because it is verified. Standifer v. Hdw. Co. (Tex. Civ.), 94 S. W. 144.

A single item for services rendered during several years in one matter, which necessarily embraced many items, is not an account on which judgment can be rendered upon an affidavit as a book account regu-

larly and fairly kept. Taylor v. Addicks, 4 Penne. (Del.) 411, 55 A. 1010.

Under a statute providing for the verification of open accounts, proof cannot be made of a stated account by the creditor's affidavit, and it is immaterial that no objection was made to its admission. Wroten G. & L. Co. v. Mfg. Co. (Tex. Civ.), 95 S. W. 744.

Verified accounts are admissible only by virtue of statute. Bass v. Gobert, 113 Ga. 262, 38 S. E. 834.

153-76 Baker v. Haynes, 146 Ala. 520, 40 S. 968; Weakley v. Woodard, 2 Tenn. Ch. App. 586.

Plaintiff may negative the prima facie case made by his verified account. Kennedy v. Price, 138 N. C. 173, 50 S. E. 566.

Such statement is only admissible against the person named in it. Pittsburg P. G. Co. v. Roquemore (Tex. Civ.), 88 S. W. 449.

It is not inadmissible because it contains trade names and abbreviations (Claus v. Lee, 140 N. C. 552, 53 S. E. 433), nor because of a variation in the debtor's name in the account and verification (Pelican L. Co. v. Johnson (Tex. Civ.), 89 S. W. 439), nor because of other informalities. Davidson v. McCall Co. (Tex. Civ.), 95 S. W. 32; Owensboro W. Co. v. Hall (Ala.), 43 S. 71.

In the absence of a sworn plea of non est factum an order for goods is admissible, the account being verified. Fulton v. Sword Co., 145 Ala. 331, 40 S. 393.

154-80 **Any defense** which does not deny the reasonableness of the sums charged or the correctness of the items may be made — as that plaintiff contracted to do the work for nothing. Lucas v. Board, 67 Kan. 418, 73 P. 56.

154-82 Davidson v. McCall Co. (Tex. Civ.), 95 S. W. 32.

Errors may be shown. — Defendant may show that there were wrongful charges and omitted credits in the account filed, though he had given a note for the amount of it. Boone v. Goodlett, 71 Ark. 577, 76 S. W. 1059.

155-83 Rust v. Sanger (Tex. Civ.), 105 S. W. 66.

Sufficiency of denial. — An allegation that defendant never purchased certain of the goods and did not authorize their purchase is sufficient to prevent judgment on a verified demand based upon a book account. Davenport v. Addicks, 5 Penne. (Del.) 4, 57 A. 532.

Burden of proof. — If plaintiff's affidavit is met by a counter-affidavit the former must show the correctness of his claim by a preponderance of evidence, and if he fails to do so as to any of the items they will be disallowed. Keating I. & M. Co. v. Erie City (Tex. Civ.), 63 S. W. 546.

155-86 **Scope of statutes.** — Statutes of the kind referred to in the text do not apply to accounts stated. Martin v. Heinze, 31 Mont. 68, 77 P. 427. An account may be admissible though not verified as required. Standifer v. Hdw. Co. (Tex. Civ.), 94 S. W. 144. Statements in the form of bills of particulars are not conclusive; if different claims have been made in various statements they may all go to the jury. Snyder v. Patton, 143 Mich. 350, 106 N. W. 1106.

157-93 **Plaintiff may testify** as to his custom in keeping accounts. Mullenary v. Burton, 3 Cal. App. 263, 84 P. 159.

157-95 Jarrett v. Johnson, 116 Ill. App. 592; White City S. Bk. v. Bank, 90 Mo. App. 395; Hood v. Tyner, 3 Ind. App. 51, 28 N. E. 1033. See "Admissions," Vol. 1, p. 348, and same title, infra.

Letter written by agent. — A letter written by direction of debtor in response to request for payment is admissible though no instructions were given writer as to what should be said. Skidmore v. Johnson, 70 N. J. L. 674, 57 A. 450.

By one joint debtor. — If husband and wife are jointly and severally liable, proof may be made of his admission. Richardson v. Robinson Co., 95 Ill. App. 283.

158-1 **Plaintiff may give evidence of a sale** at any time prior to the filing of suit. Buckeye B. Co. v. Dickey, 122 Ga. 290, 50 S. E. 66.

Course of business. — It is within the discretion of the court to receive evidence of the entire business transaction between the parties, as bearing on the question as

to whether anything was due from defendant. Miller v. Carnes, 95 Minn. 179, 103 N. W. 877.

159-5 Chase v. Chase, 191 Mass. 556, 78 N. E. 115; McMullin v. Reid, 213 Pa. 338, 62 A. 924; Ivy C. & C. Co. v. Long, 139 Ala. 535, 36 S. 772.

Not an account stated. — It was said of a summary covering a year and containing one item for cash collected, items for cash to be collected, and, on the other side, one item for cash paid, and items for bills to be paid: "This can hardly be called an account stated. It shows upon its face that the transactions for the year are not closed. It gives no item of expenditure to which the plaintiff could object. It furnishes no notice of the manner in which the totals of either debit or credit are made up, and no data upon which to rest an objection to any undisclosed item that may have entered into the totals on either side of the account." McGinn v. Benner, 180 Pa. 396, 36 A. 925.

Goods sold to third person. — An account stated cannot be based on bills made out to defendant long after the sale of goods to another, merely because he retained them without objection. Brush & S. Co. v. Ross, 51 Misc. 44, 99 N. Y. S. 796.

159-8 Daytona B. Co. v. Bond, 47 Fla. 136, 36 S. 445.

It is for the jury to find whether the parties have had such dealings as makes an account an account stated. Little & H. I. Co. v. Pigg, 29 Ky. L. R. 809, 96 S. W. 455.

160-9 Allen-West C. Co. v. Hudgins, 74 Ark. 468, 86 S. W. 289.

Presumption. — Nothing appearing to the contrary, it will be presumed that an account sent in the usual way was received. Dick v. Zimmerman, 105 Ill. App. 615.

The dealings between the parties must be related to the matters stated in the account. Powers v. Ins. Co., 68 Vt. 390, 35 A. 331.

What is sufficient. — Some authorities define an account stated as an account in writing, examined and accepted by both parties (Leinbach v. Wolle, 211 Pa. 629, 61 A. 248); others that, in the absence of a statute requiring such an account to be in writing, an oral statement is binding (Quinn v. White, 26 Nev. 42, 62 P. 995, 64 P. 818; Forbes v. Wheeler, 39 Misc. 538, 80 N. Y. S. 373; Powers v. Ins. Co., 68 Vt. 390, 35 A. 331; Burritt v. Villeneuve, 92 Mich. 282, 52 N. W. 617; Goodrich v. Coffin, 83 Me. 324, 22 A. 217), though not based on writing evidencing the transactions. Converse v. Scott, 137 Cal. 239, 70 P. 13. It is said in the opinion that the earlier English cases to the contrary appear to have been overruled. The account must have been rendered by a party authorized. Kauffmann v. Judah, 78 App. Div. 632, 79 N. Y. S. 494.

162-18 Smith v. Allmon, 74 S. C. 502, 54 S. E. 1014; Sharp v. Behr, 136 Fed. 795.

Purpose for which given. — The binding force of an account stated will not be given to the mere furnishing of an account not given with a view to ascertaining the claim, establishing the balance due, or finally adjusting the account between the parties. Harrison v. Henderson, 67 Kan. 202, 72 P. 878.

162-19 Moore v. Holdoway, 138 Ala. 448, 35 S. 453; Allen-West C. Co. v. Hudgins, 74 Ark. 468, 86 S. W. 289; Atlas R. S. Co. v. Forster, 123 Ill. App. 558; Harrison v. Henderson, 67 Kan. 202, 72 P. 878; Love v. Ramsey, 139 Mich. 47, 102 N. W. 279; Wright v. Sugar Co., 146 Mich. 555, 109 N. W. 1062; Haish v. Dillon, 71 Neb. 290, 98 N. W. 818; New York Board v. Boughan, 97 N. Y. S. 402; Forbes v. Wheeler, 39 Misc. 538, 80 N. Y. S. 373; Eames V. B. Co. v. Prosser, 157 N. Y. 289, 51 N. E. 986; Oberndorfer v. Moyer, 30 Utah 325, 84 P. 1102.

Account assented to by debtor only. In some cases the rule is said to be that assent need only be given by the party sought to be charged. Leiser v. McDowell, 69 App. Div. 444, 74 N. Y. S. 1021, *cit.* Volkening v. De Graaf, 81 N. Y. 268. "The consent of the debtor must be direct and unconditional, and must appear in some way, as it is his consent that imparts to an account rendered the character of an account stated." Pierce v. Pierce, 199 Pa. 4, 48 A. 689, *cit.* McCall v. Nave, 52 Miss. 494.

A confession by an employe as to the amount of his arrearages is not an account stated. Wheeler v. Baker, 132 Mich. 507, 93 N. W. 1069.

Admission of items; denial of indebtedness. — The rule laid down in Ryan v. Gross, 48 Ala. 370, and stated in Vol. 1 of this Encyclopaedia, p. 162, note, is approved in Columbia R. P. Co. v. Tallant, 132 Fed. 271, 133 Id. 990 (on rehearing).

What constitutes. — It has been said that two things are necessary: There must be a mutual examination of each other's items and a mutual agreement as to the correctness of the allowance and disallowance of the respective claims, and of the balance on final adjustment. Charlesworth v. Whitlow, 74 Ark. 277, 85 S. W. 423.

Objections stated to agent. — If the debtor is referred to an agent in connection with the account, statements made by him to the agent relating thereto may be shown. Allen v. Uplinger, 98 Minn. 242, 107 N. W. 1131.

Parol evidence of a settlement of the amount due under a written contract is competent; it does not tend to contradict the contract. Krueger v. Dodge, 15 S. D. 159, 87 N. W. 965.

163-20 Krueger v. Dodge, supra.

163-21 An administrator may become bound in his representative capacity upon an account stated by him with a creditor of his decedent. Withers v. Sandlin, 44 Fla. 253, 32 S. 829.

164-22 Forbes v. Wheeler, 39 Misc. 538, 80 N. Y. S. 373; Manchester F. Assur. Co. v. Fitzpatrick, 120 Ill. App. 535.

A statement that the debtor would soon be prepared to settle a disputed account is not a promise to pay the demand. Atlas R. S. Co. v. Forster, 123 Ill. App. 558.

164-24 Louisville B. Co. v. Asher, 112 Ky. 138, 65 S. W. 133; Frothingham v. Satterlee, 70 App. Div. 613, 75 N. Y. S. 21.

An indorsement by the debtor of "O.K." is evidence to show assent to the account. Clark v. Hoffman, 128 Ill. App. 422.

164-25 Rust v. Sanger (Tex. Civ.), 105 S. W. 66.

Admissions by debtor may be proved though made in an effort to compromise. Baker v. Haynes, 146 Ala. 520, 40 S. 968; Matthews v. Farrell, 140 Ala. 298, 37 S. 325. But see "Admissions," Vol. 1, p. 348, and that title, infra.

A verbal promise to secure the debt may be proved. Quinn v. White, 26 Nev. 42, 62 P. 995, 64 P. 818. If the statement is signed, collateral agreements which annul and vary its terms cannot be proved. Jackson v. Drake, 37 Can. Sup. 315.

166-32 Bartholomew v. Sheppard (Tex. Civ.), 93 S. W. 218.

Admission of indefinite amount. "The mere admission of the balance remaining on one part of a transaction or agreement, to be reduced by deductions concurrently agreed to be made on another part of such transaction or agreement, such deduction not being ascertained or admitted in point of amount, does not admit any specific sum as presently due, so as to amount to evidence of an account stated either at that time or at any prior period. Such admission only shows a liability to account or a state of accounts unadjusted; nor would proof of the amount of the counterclaim to be deducted show an admitted balance of the residue sufficient to support the count of an account stated." Bloomley v. Granton, 1 U. C. C. P. 309, *appr.* in Haish v. Dillon, 71 Neb. 290, 98 N. W. 818.

167-35 Wonderly v. Christian, 91 Mo. M. App. 158; Young v. Hill, 67 N. Y. 162; Johnson v. Curtis, 3 Bro. C. C. (Eng.) 226.

167-36 McLaughlin v. U. S., 36 Ct. Cl. 138, 187.

167-39 Spellman v. Muehfeld, 166 N. Y. 245, 59 N. E. 817; Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. S. 129.

A letter from the debtor to creditor is competent to show that former objected to the account. Copland v. Tel. Co., 136 N. C. 11, 48 S. E. 501.

167-40 Farry v. Bank (N. J. Eq.), 58 A. 305; Kenneth Inv. Co. v. Bank, 96 Mo. App. 125, 70 S. W. 173; Nodine v. Bank, 41 Or. 386, 68 P. 1109; Columbia B. Co. v. Berney, 90 Mo. App. 96. See "Admissions," Vol. 1, p. 348.

Admission by silence. — The sending of his pass book to be written up

and returned with the vouchers is a demand to know what the bank claims to be the state of the depositor's account. And the return of the book, with the vouchers, is the answer to the demand, and, in effect, a request by the bank that the depositor will, in proper time, examine the account so rendered, and either sanction or repudiate it. This silence is regarded as an admission that the entries are correct. Leather M. Bk. v. Morgan, 117 U. S. 96.

Forged checks included in account. Leather M. Bk. v. Morgan, supra; Kenneth I. Co. v. Bank, 96 Mo. App. 125, 70 S. W. 173.

Weight as evidence. — "Nothing short of an estoppel, or which rises no higher than mere evidence, should have more weight in mercantile transactions than accounts rendered by one man to another, followed by acquiescence, and, above all, by subsequent dealings of the same nature." Payne v. Nicholas, 2 Phila. (Pa.) 220.

168-42 Cusick v. Boyne, 1 Cal. App. 643, 82 P. 985; Shively v. Min. Co. (Cal. App.), 89 P. 1073; Lewis v. Const. Co., 10 Idaho 214, 77 P. 336; Dewes B. Co. v. Kerwin, 107 Ill. App. 620; Lutcher & M. L. Co. v. Eells, 108 Id. 156; Little v. Pigg, 29 Ky. L. R. 809, 96 S. W. 455; Gorman v. McGowan, 44 Or. 597, 76 P. 769; Leinbach v. Wolle, 211 Pa. 629, 61 A. 248; Lodge v. Keron, 3 Phila. (Pa.) 356; McMullin v. Reid, 213 Pa. 338, 62 A. 924.

Objections to an account are waived by acquiescence in subsequent statements thereof. Syson v. Hieronymus, 127 Ala. 482, 28 S. 967.

169-46 Partnership accounts are within the general rule where an expert has been selected by the parties and a copy of the account is given each, no objection being made to it. Leinbach v. Wolle, 211 Pa. 629, 61 A. 248.

169-47 Charlesworth v. Whitlow, 74 Ark. 277, 85 S. W. 423.

169-48 Harrison v. Henderson, 67 Kan. 202, 72 P. 878.

170-52 Harrison v. Henderson, supra; Nodine v. Bank, 41 Or. 386, 68 P. 1109.

When rule not applicable. — The general rule that a failure to seasonably object to an account renders it binding has no application when invoked by the party charged — the debtor — who is bound to account for moneys collected and of the amount of which he only has knowledge. Vanuxem v. Ins. Co., 122 Fed. 107.

Does not establish maritime lien. The J. S. Warden, 155 Fed. 697.

170-53 Brown & M. Co. v. Guise (N. M.), 91 P. 716.

Agreement as to subsequent accounts. — If an objection to the account is made by the debtor and the parties agree that, as to the future, the amount to become due shall be fixed by an agreement, the debtor is not bound by the retention of subsequent accounts rendered. Pierce v. Pierce, 199 Pa. 4, 48 A. 689.

A denial of liability previous to rendition of account makes the rendering of it ineffectual. Jacobs v. Cohn, 46 Misc. 115, 91 N. Y. S. 339; Love v. Ramsey, 139 Mich. 47, 102 N. W. 279; Benedict v. Jennings, 47 Misc. 134, 93 N. Y. S. 464.

171-57 Daytona B. Co. v. Bond, 47 Fla. 136, 36 S. 445.

171-58 Withers v. Sandlin, 44 Fla. 253, 32 S. 829.

172-65 If an account is sent by mail the party charged must in terms be a party to the account, or the grounds upon which he is held liable must be clearly disclosed to him and a demand made for payment. Daytona B. Co. v. Bond, 47 Fla. 136, 36 S. 445; Allen & Co. v. Somers, 84 N. Y. S. 944.

173-67 Daytona B. Co. v. Bond, supra; Nodine v. Bank, 41 Or. 386, 68 P. 1109.

Delay of two and one-half months not unreasonable. Sharp v. Behr, 136 Fed. 795. Five months unreasonable. McLaughlin v. U. S., 36 Ct. Cl. 138.

174-69 Daytona B. Co. v. Bond; Nodine v. Bank, supra.

In Idaho the question of reasonable time is for the jury. Lewis v. C. Co., 10 Idaho 214, 77 P. 336.

174-70 McLaughlin v. U. S., 36 Ct. Cl. 138; Harrison v. Henderson, 67 Kan. 202, 72 P. 878; Chapman v. Salt Co., 57 W. Va. 395, 50 S. E. 601.

No purpose to settle. — The silent retention of an account furnished by request, without purpose to ad-

just the claim, will not raise the implication that the account was stated. Harrison v. Henderson, supra.

In case of an estoppel, there being neither fraud nor mistake, the failure to seasonably object establishes absolute liability. Daytona B. Co. v. Bond, 47 Fla. 136, 36 S. 445. In such a case the court said: "The answer to all the contentions of the defendants with reference to the items of the account is that upon the issue of stated account or not, where an account current of many items, some of which represent a just indebtedness, is delivered to the debtor, its receipt and retention without objection estops the recipient from denying liability for the items which it contains and the balance it discloses. It was not fatal to the cause of action upon the account that one or more of the items in it were without consideration, provided there was a good or valuable consideration for other items which were merged in the balance." Patillo v. Com. Co., 131 Fed. 680, 65 C. C. A. 508; Fitzgerald v. Bank, 114 Fed. 474, 52 C. C. A. 276.

176-72 Other means of proof. A settlement sheet not admitted to be correct is not conclusive evidence as to what it shows. Plano Mfg. Co. v. Kautenberger, 121 Ia. 213, 96 N. W. 743. An agent who made the settlement may testify that the debtor appeared to be satisfied, but not as to the latter's understanding concerning his remaining indebtedness. Id. The plaintiff is not concluded because bills of particulars filed by him do not agree, nor because his claims are inconsistent with receipts he has given. These papers are all for the jury. A bill of particulars may be used in testifying of the sum due. Snyder v. Patton, 143 Mich. 350, 106 N. W. 1106. It may be shown by parol that the credit was extended to another than defendant. S. v. Elmore, 68 S. C. 140, 46 S. E. 939.

Proof of demand. — Proof that the plaintiff demanded money of the defendant is irrelevant in an action to recover for three items unless it is shown on account of which item the demand was made. Ehrman v. Whelan (Miss.), 40 S. 430.

177-82 Seal L. Co. v. Mfg. Co., 98 Ill. App. 637.

178-84 Hale v. Hale, 14 S. D. 644, 86 N. W. 650.

178-86 Mattingly v. Shortell, 27 Ky. L. R. 426, 85 S. W. 215; Voight v. Brooks, 19 Mont. 374, 48 P. 549; Noyes v. Young, 32 Mont. 226, 79 P. 1063.

179-88 A note, though competent, (Gross v. Jones, 89 Miss. 44, 42 S. 802), is only prima facie evidence of an account stated. Kneeland v. Pennell, 49 Misc. 94, 96 N. Y. S. 403.

180-92 McCormick v. St. Louis, 166 Mo. 315, 65 S. W. 1038.

180-94 Amount for which judgment was taken may be strong evidence that an account stated had been rendered. Burritt v. Villenuve, 92 Mich. 282, 52 N. W. 617.

180-95 Noyes v. Young, 32 Mont. 226, 79 P. 1063; Peters' Estate, 20 Pa. Super. 223. See "Admissions," Vol. 1, p. 348, and that title, infra.

181-97 Moore v. Holdoway, 138 Ala. 448, 35 S. 453.

Contract of sale. — Evidence showing the sale of property at an agreed price, payable at a stated time or presently, tends to show the existence of an account stated. Moore v. Crosthwait, 135 Ala. 272, 33 S. 28.

181-98 Baker v. Griffin, 86 N. Y. S. 579.

181-99 Payment may be shown. Wonderly v. Christian, 91 Mo. App. 158; Baker v. Griffin, supra.

Indebtedness outside the account cannot be shown. Uhlhorn v. Hovey, 49 Misc. 638, 97 N. Y. S. 1040.

181-3 Sturgeon v. Wightman, 32 Wash. 195, 72 P. 1045.

182-4 Mattingly v. Shortell, 120 Ky. 52, 85 S. W. 215; Pavero v. Howard, 47 Misc. 347, 93 N. Y. S. 1115.

The burden of showing that assent to an account bound others than he who gave it is on plaintiff. Clark v. Hoffman, 128 Ill. App. 422.

182-5 Withers v. Sandlin, 44 Fla. 253, 32 S. 829; Poppers v. Schoenfeld, 97 Ill. App. 477; Peebles v. Yates, 88 Miss. 289, 40 S. 996; Wonderly v. Christian, 91 Mo. App. 158; Kenneth I. Co. v. Bank, 96 Mo. App. 125, 70 S. W. 173; Harman v.

Maddy Bros., 57 W. Va. 66, 49 S. E. 1009.

When account stated conclusive evidence. — Under a statute making a written instrument presumptive evidence of a consideration and placing the burden upon the attacking party, an account stated proves itself, and, in the absence of fraud or mistake, which must be specially pleaded, is conclusive. Noyes v. Young, 32 Mont. 226, 79 P. 1063. And so in the absence of such a statute. Brown & M. Co. v. Guise (N. M.), 91 P. 716.

182-6 Daytona B. Co. v. Bond, 47 Fla. 136, 36 S. 445; Kenneth I. Co. v. Bank, 96 Mo. App. 125, 70 S. W. 173; Farry v. Bank (N. J. Eq.), 58 A. 305; Frothingham v. Satterlee, 70 App. Div. 613, 75 N. Y. S. 21.

When correction will be made. — If the evidence shows that the mistake resulted in injury to plaintiff and in an unearned profit to defendant, and that the latter has not so changed his situation with reference to the subject-matter that he will be injured by the correction of the mistake, the correction will be made. Union etc. Co. v. Supply Co., 122 Mo. App. 631, 99 S. W. 804.

182-7 Guhl v. Frank, 22 Pa. Super. 531; Chapman v. Salt Co., 57 W. Va. 395, 50 S. E. 601.

In the absence of averments sufficient to surcharge and falsify an account stated no evidence is admissible, except to show that there had been no dealings between the parties, or that consent had not been given to the settlement. Columbia B. Co. v. Berney, 90 Mo. App. 96.

The quantum of proof. — The force to be given a stated account and the strength of the evidence necessary to set it aside will depend upon the circumstances. If the account has been examined and signed by the party who seeks to impeach it, and upon which settlements have been made monthly, it will require much stronger proof to open it than would be required if it had merely been delivered to the party or sent by mail and acquiesced in for a sufficient time to entitle it to be considered as an account stated. Chapman v. Salt Co., 57 W. Va. 395, 50 S. E. 601.

Receipt as evidence. — If the only testimony given is by the parties and is in direct conflict, a receipt cannot be given such effect as to turn the scale in favor of its holder. Devencenzi v. Cassinelli, 28 Nev. 222, 81 P. 41.

184-11 What may be proved. When an account is stated and a balance struck and agreed upon the cause of action must be proved as alleged, unless the pleadings are amended. Mattingly v. Shortell, 27 Ky. L. R. 426, 85 S. W. 215. Plaintiff cannot recover by proving the items of his account. Mincer v. Green, 47 Misc. 374, 94 N. Y. S. 15; Martin v. Heinze, 31 Mont. 68, 77 P. 427. Proof of the account will not sustain a recovery for a demand clearly shown to the unfounded. Withers v. Sandlin, 44 Fla. 253, 32 S. 829.

184-13 Johnson v. Berdo, 131 Ia. 524, 106 N. W. 609.

ACKNOWLEDGMENTS [Vol. 1.]

187-4 LeMesnager v. Hamilton, 101 Cal. 532, 35 P. 1054, 40 Am. St. 81; Langenbeck v. Louis, 140 Cal. 406, 73 P. 1086; Ford v. Ford, 27 App. Cas. (D. C.) 411; Long v. Powell, 120 Ga. 621, 48 S. E. 185; First Nat. Bk. v. Glenn, 10 Idaho 224, 77 P. 623; Ewing v. Jamon, 1 Haw. 134; In re Porter, Id. 297; Hawaiian T. & I. Co. v. Barton, 16 Id. 294; Burk v. Pence, 206 Mo. 315, 104 S. W. 23; Uvalde v. New York, 99 App. Div. 327, 90 N. Y. S. 131; Washburn L. Co. v. Swanby, 131 Wis. 1, 110 N. W. 806.

A certificate is not effective as to papers not required to be acknowledged. Rutherford v. Rutherford, 55 W. Va. 56, 47 S. E. 240.

Certificate equivalent to testimony. "The officer, by a solemn official act, certifies to the acts and declarations of the person appearing before him, and those acts and declarations are thereby stamped with the character of evidence tending to establish whatever those acts and declarations would establish if proved by oral testimony in a court of justice. We think that, as between the parties, a certificate of acknowledgment, when read in evidence, makes

out a prima facie case as strong as if the facts certified to had been duly sworn to in open court by a witness apparently disinterested and worthy of belief. The legal presumption of the proper performance of official duty by a public officer requires that this effect should be given it. (Downing v. Rugar, 21 Wend. 178.) While the evidence is not conclusive, as the statute provides that 'it may be rebutted and the effect thereof contested by a party affected thereby,' it is of such a character as, standing alone, to send a case to the jury, so that they may decide between the probative force of the certificate, supported by the presumption that it states the truth, on the one hand, and the evidence produced in rebuttal, whatever it may be, on the other." Albany Co. Bk. v. McCarty, 149 N. Y. 71, 43 N. E. 427; Bennett v. Edgar, 46 Misc. 231, 93 N. Y. S. 203.

Effect of irregularity. — A certificate should not be impeached because the officer performed his duty irregularly. Boldt v. Becker, 1 Neb. (unof.) 75, 95 N. W. 509; Council Bluffs Bk. v. Smith, 59 Neb. 90, 80 N. W. 270, 80 Am. St. 669; Morris v. Linton, 61 Neb. 537, 85 N. W. 565; Ronner v. Welcker, 99 Tenn. 623, 42 S. W. 439; Brand v. Salt Co., 30 Tex. Civ. 458, 70 S. W. 578.

187-5 Holland v. Webster, 43 Fla. 85, 29 S. 625; Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573; McCardia v. Billings, 10 N. D. 373, 87 N. W. 1008, 88 Am. St. 729; Kennedy v. Assn. (Tenn. Ch. App.), 57 S. W. 388.

Conclusive as to date of acknowlment. Weisiger v. Mills (Ky.), 91 S. W. 689.

Rule of United States supreme court. — "That the magistrate's certificate, when made in the form required by the statute, and duly recorded, is conclusive evidence that he has performed his duty, has not been directly adjudged by this court; but the course of its decisions has tended to this conclusion." Hitz v. Jenks, 123 U. S. 297, *cit.*, Drury v. Foster, 2 Wall. (U. S.) 24; Young v. Duvall, 109 U. S. 573.

188-6 Cook v. Bartlett, 179 Mass. 576, 61 N. E. 266.

Effect of reacknowledgment. — A defective acknowledgment may be cured by a reacknowledgment, which, except as to third persons, may be proof of the execution of the instrument as of the time of its original delivery. Webb v. Ritter, 60 W. Va. 193, 54 S. E. 484; Simmons v. Hewitt (Tex. Civ.), 87 S. W. 188.

Official character. — The signature to the acknowledgment was followed by these words and letters: "Notary Public W. C. S. T." Held, that the official character of the officer was shown thereby in connection with the caption of the deed, and that the acknowledgment was taken and the certificate made in Walker county, Texas. Williams v. Cessna (Tex. Civ.), 95 S. W. 1106.

The certificate of a United States consul to the signature and seal of a foreign officer who certified to an acknowledgment, and the seal of such officer to his capacity and authority to make the same, prove themselves by virtue of statute. Werner v. Marx, 113 La. 1002, 37 S. 905.

188-7 Swett v. Large, 122 Iowa 267, 97 N. W. 1104.

188-8 Burk v. Pence, 206 Mo. 315, 104 S. W. 23; Uvalde A. P. Co. v. New York, 99 App. Div. 327, 90 N. Y. S. 131; Swiger v. Swiger, 58 W. Va. 119, 52 S. E. 23.

189-9 Knowledge of character of instrument on part of persons executing it presumed from certificate of acknowledgment. In re Adriaans, 28 App. D. C. 515.

189-10 Walker v. Shepard, 210 Ill. 100, 71 N. E. 422; Jackson v. Schoonmaker, 4 Johns. (N. Y.) 161.

189-11 Burk v. Pence, 206 Mo. 315, 104 S. W. 23.

Presumption. — But it has been held that delivery is not presumed from the facts of acknowledgment and privy examination of grantor's wife. Tarlton v. Griggs, 131 N. C. 216, 42 S. E. 591.

190-14 Ewing v. Janion, 1 Haw. 134; In re Porter, Id. 297.

Presumption as to authority of nonresident officer. — An officer of another state, not recognized by the statutes of the forum as authorized to take acknowledgments, will not, in the absence of an official seal or

other evidence of authority, be presumed to be authorized to do so. Hayes v. Banks, 132 Ala. 354, 31 S. 464.

193-23 The character of the officer who took the acknowledgment is not a subject for evidence on the issue of forgery. West v. Oil Co., 136 Fed. 343, 69 C. C. A. 169.

194-26 Place of execution. — It may be shown that an acknowledgment was taken in the state in which the officer resided, though the venue was laid in another state. Rogers v. Pell, 47 App. Div. 240, 62 N. Y. S. 92, *aff.*, without opinion, 168 N. Y. 587, 60 N. E. 1112.

195-29 Mosier v. Momsen, 13 Okla. 41, 74 P. 905.

196-31 If the names of two grantors are used in the body of a deed and the acknowledgment uses the word "he," it cannot be shown by parol that they both acknowledged its execution. Hughes v. Wright (Tex. Civ.), 97 S. W. 525.

Silence as to fact of acknowledgment. — If the certificate fails to express the fact that the execution of the instrument was acknowledged, the defect cannot be cured by parol. Lalakea v. Sugar Co., 15 Haw. 570; Solt v. Anderson, 71 Neb. 826, 99 S. W. 678.

197-33 Aider of one certificate by another. — If there are two certificates of the same date concerning the same matter, any indefiniteness in one may be aided by an explicit statement in the other. Rogers v. Pell, 47 App. Div. 240, 62 N. Y. S. 92.

197-34 Officer may testify. — The officer who took the acknowledgment may testify to the fact, though he was agent of the grantor, or the acknowledgment was defective for other reasons. Cassidy v. Mtg. Co., 27 Tex. Civ. 211, 64 S. W. 1023; Linton v. Ins. Co., 104 Fed. 584; Brooks v. Hunt, 26 Ky. L. R. 608, 82 S. W. 296; Interstate B. Assn. v. Goforth, 94 Tex. 259, 59 S. W. 871; Bank v. Glenn, 10 Idaho 224, 77 P. 623.

Execution. — The prima facie effect of a certificate of acknowledgment as to execution and delivery may be fortified by parol proof. Burk v. Pence, 206 Mo. 315, 104 S. W. 23.

197-35 Swett v. Large, 122 Ia. 267, 97 N. W. 1104; Metropolitan L. Co. v. McColeman, 140 Mich. 333, 103 N. W. 809; Benedict v. Jones, 129 N. C. 470, 40 S. E. 221; Ronner v. Welcker, 99 Tenn. 623, 42 S. W. 439; Adams v. Smith, 11 Wyo. 200, 70 P. 1043.

What necessary to overcome certificate. — The certificate should not be overthrown upon evidence of a doubtful nature, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only upon proof so clear and convincing as to amount to a moral certainty. Albany Co. Bk. v. McCarty, 149 N. Y. 71, 43 N. E. 427; Bennett v. Edgar, 46 Misc. 231, 93 N. Y. S. 203; Banking House v. Stewart, 70 Neb. 815, 98 N. W. 34; Davis v. Kelly, 62 Neb. 642, 87 N. W. 347; Duncan v. Duncan, 203 Ill. 461, 67 N. E. 763, Elliott v. Sheppard, 179 Mo. 382, 78 S. W. 627.

198-37 Aultman-T. Co. v. Frazier, 95 Ky. 429, 26 S. W. 5.

198-38 Langenbeck v. Louis, 140 Cal. 406, 73 P. 1086; Ford v. Ford, 27 App. Cas. (D. C.) 401; Davis v. Kelly, 62 Neb. 642, 87 N. W. 347; McGuire v. Wilson (Neb.), 99 N. W. 244; Banking House v. Stewart, 70 Neb. 815, 98 N. W. 34; Benedict v. Jones, 129 N. C..470, 40 S. E. 221; Western L. & S. Co. v. Waisman, 32 Wash. 644, 73 P. 703.

Quantum of proof. — The proof must be of the clearest, strongest and most convincing character, and come from disinterested witnesses. Dickerson v. Gritten, 103 Ill. App. 351; Gritten v. Dickerson, 202 Ill. 372, 66 N. E. 1090. It must be clear, convincing and satisfactory. Adams v. Smith, 11 Wyo. 200, 70 P. 1043; Goulet v. Dubreuille, 84 Minn. 72, 86 N. W. 779; Feagles v. Tanner, 20 Ohio C. C. 86 (excluding every reasonable doubt.) Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573. The unsupported testimony of an interested witness will not usually overcome the presumption in favor of the certificate. Adams v. Smith, 11 Wyo. 200, 70 P. 1043; McCardia v. Billings, 10 N. D. 373, 87 N. W. 1008.

199-39 Long v. Branham, 30 Ky. L. R. 552, 99 S. W. 271; Ronner v. Welcker, 99 Tenn. 623, 42 S. W. 439.

202-41 Meyer v. Gossett, 38 Ark. 377; LeMesnager v. Hamilton, 101

Cal. 532, 35 P. 1054; Borland v. Walrath, 33 Ia. 130; Nicholson v. Snyder, 97 Md. 415, 55 A. 484; Benedict v. Jones, 129 N. C. 470, 40 S. E. 221; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. 622.

Acknowledgment through telephone. Where the wife acknowledged the deed through a telephone, and it was delivered, with an apparently proper acknowledgment, to the grantee, who had no notice of the manner in which the acknowledgment was made, the certificate was held conclusive. Banning v. Banning, 80 Cal. 271, 22 P. 210, 13 Am. St. 156.

202-42 First Nat. Bk. v. Glenn, 10 Idaho 224, 77 P. 623; Nicholson v. Snyder, 97 Md. 415, 55 A. 484.

203-43 Heaton v. Bank, 59 Kan. 281, 52 P. 876; Ronner v. Welcker, 99 Tenn. 623, 42 S. W. 439; Winn v. Itzel, 125 Wis. 19, 103 N. W. 220.

Weight of officer's testimony. — In the absence of a satisfactory explanation by the officer, showing that the certificate, through mistake, was honestly made, his testimony impeaching it is entitled to but little weight. Winn v. Itzel, supra.

204-46 Disputing statement of venue. — A wife cannot impeach the certificate in a collateral action because her husband was present when she executed the conveyance or the acknowledgment was taken in a different county from that stated. Harpending v. Wylie, 14 Bush (Ky.) 380.

204-50 Adams v. Smith, 11 Wyo. 200, 70 P. 1043.

205-51 Examination of wife. If the certificate is silent as to the examination of a married woman, it may be shown that such examination was not had. Adams v. Smith, supra.

Under a Texas statute of limitations, construed as defining color of title to be such a defective muniment of title as is not wanting in intrinsic fairness and honesty, a defective acknowledgment by a wife may be aided by parol proof showing that she did in fact properly acknowledge it; such proof may be made to support a plea of the statute, but not to show title. Veeder v. Gilmer (Tex. Civ.), 105 S. W. 331.

205-52 Proof of acknowledgment of lost deed. — If a deed is lost the fact that the officer explained it to the wife and took her acknowledgment as required may be shown by circumstantial evidence. Simpson v. Edens, 14 Tex. Civ. 235, 38 S. W. 474; Daniels v. Creekmore, 7 Tex. Civ. 573, 27 S. W. 148. After the lapse of a long period the proof need not go to the details of the execution of the deed. Texas L. & C. Co. v. Walker (Tex. Civ.), 105 S. W. 545.

206-53 Mather v. Jarel, 33 Fed. 366; Western L. & S. Co. v. Waisman, 32 Wash. 644, 73 P. 703.

206-54 Husband's testimony is competent to show that wife was not examined and did not acknowledge execution of deed. Chattanooga Assn. v. Vaught, 143 Ala. 389, 39 S. 215.

Insufficiency of testimony. — The husband's testimony, based only on his recollection that his wife was not present when he signed the deed, and that of two interested witnesses that the signature did not resemble her writing, is not sufficient to overcome the notary's certificate. Sassenberg v. Huseman, 182 Ill. 341, 55 N. E. 346; Gritten v. Dickerson, 202 Ill. 372, 66 N. E. 1090.

ADJOINING LAND OWNERS

[Vol. 1.]

Rule as to notice of excavation applicable to municipalities, 210-7; *Presumption that consequences of excavating were foreseen,* 212-15; *Competency of evidence to show malice in erecting structure,* 212-15; *Proof of damage,* 212-15; *Proof of intent as to depth of excavation,* 213-18; *Evidence of damage to party wall,* 215-27; *Evidence of special damage,* 215-27; *Evidence in action for contribution for building party wall,* 218-40.

209-3 Every wall of separation between two buildings is presumed to be a common or party wall, if the contrary be not shown. Bellenot v. Laube, 104 Va. 842, 52 S. E. 698.

209-4 Negligence is not presumed from the infliction of damage. Serio v. Murphy, 99 Md. 545, 58 A. 435.

210-7 Rule as to notice of excavation applicable to municipalities. The rule as to notice and the effect of giving it applies to municipal corporations and their contractors. Notice is not given by the publication of an ordinance in a newspaper and the registering of a contract pursuant thereto. Gerst v. St. Louis, 185 Mo. 191, 84 S. W. 34; Stearns v. Richmond, 88 Va. 992, 14 S. E. 847, 29 Am. St. 578.

210-8 Serio v. Murphy, 99 Md. 545, 58 A. 435; Carpenter v. R. Co., 103 Mo. App. 480, 77 S. W. 1004.

211-9 Carpenter v. Realty Co., 103 Mo. App. 480, 77 S. W. 1004; Hannicker v. Lepper (S. D.), 107 N. W. 202.

Leaving excavation without foundation walls. Hannicker v. Lepper, supra; Garvy v. Coughlan, 92 Ill. App. 582.

Negligence immaterial when land is in its natural condition. Schmoe v. Cotton, 167 Ind. 364, 79 N. E. 184; Farnandis v. R. Co., 41 Wash. 486, 84 P. 18.

In condemnation proceedings negligence is immaterial where lateral support is removed and there is liability for damage to property not taken. Fyfe v. Turtle Creek, 22 Pa. Super. 292; Farnandis v. R. Co., supra. See "EMINENT DOMAIN," Vol. 5, p. 151.

212-15 Presumption that consequences of excavating were foreseen. It is presumed that the consequences of leaving an open excavation adjoining a building were foreseen; proof that it was so left wilfully or maliciously is not necessary. Garvy v. Coughlan, 92 Ill. App. 582.

Competency of evidence to show malice in erecting structure. — Under a statute providing that the erection of any structure on one's own land, which impairs the value of adjacent land, shall create a liability to pay the damage thus caused, when the structure is maliciously erected and with an intent thereby to injure the adjacent owner, proof that the value of the adjacent land is impaired by the structure, that it serves and was not erected to serve any purpose in the use and enjoyment of the plaintiff's land, and that it is of a description, location and surroundings indicative of a controlling purpose to injure the plaintiff, sufficiently shows that it was maliciously erected for the purpose condemned by the statute. Whitlock v. Uhle, 75 Conn. 423, 53 A. 891.

Proof of damage. — The condition of land may be shown by a map after the removal of the support, and the extent of the damage may be testified to by the opinions of witnesses based on the market value of the property. Ruppert v. R. Co., 25 Pa. Super. 613.

213-17 The failure to give notice is not excused, because the adjoining owner knew of the proposed excavation, but did not know that it was to extend below the foundation of his building. Davis v. Summerfield, 131 N. C. 352, 42 S. E. 818.

Actual knowledge precludes recovery for personal injury. Pullan v. Stallman, 70 N. J. L. 10, 56 A. 116.

213-18 Proof of intent as to depth of excavation. — The intent to excavate more than a certain depth may be shown by evidence that the excavator applied to the adjoining landowner for a license to enter upon his premises, as required by the municipal building code. Blanchard v. Savarese, 97 App. Div. 58, 89 N. Y. S. 664, *aff.*, without opinion, 184 N. Y. 537, 76 N. E. 1089.

213-20 A contract between defendant and one who was doing the work of excavating is not admissible. Kopp v. R. Co., 41 Minn. 310, 43 N. W. 73.

215-27 Evidence of damage to party wall. — Evidence as to the cost of a retaining wall may be received to show the damage done, and also evidence as to value of lot before and after excavation and resulting injury. Kopp v. R. Co., supra. Qualified witnesses may give their opinions of such value. Schmoe v. Cotton, 167 Ind. 364, 79 N. E. 184. It is competent to show the use to which the affected land was put. Farnandis v. R. Co., 41 Wash. 480, 84 P. 18. The evidence of the cost of reconstructing a retaining wall must be limited to conditions existing when it fell. Jones v. Greenfield, 25 Pa. Super. 345.

Evidence of special damage.

Where there has been improper interference with a party wall plaintiff may give evidence of special damage sustained to his stock by dust and dirt, necessitating its removal and creating loss by deterioration, and show that, by other means, the use of his building was interfered with. Swisher v. Sipps, 19 Pa. Super. 43.

216-31 Transportation Co. v. Chicago, 99 U. S. 635; Moellering v. Evans, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449; Gilmore v. Driscoll, 122 Mass. 199; Matulys v. Coal Co., 201 Pa. 70, 50 A. 823; Fyfe v. Turtle Creek, 22 Pa. Super. 292. See Gillies v. Eckerson, 97 App. Div. 153, 89 N. Y. S. 609.

Increase in lateral pressure must be shown, though buildings on land. Riley v. Joint Co., 110 App. Div. 787, 97 N. Y. S. 283.

217-35 Riley v. Joint Co., supra.

Parol proof is competent to show that consent was given as part of the consideration for a conveyance of the land affected. Payne v. Moore, 31 Ind. App. 360, 66 N. E. 483, 67 N. E. 1005.

217-37 Consent to party wall. Consent to the removal of a roof in order that a party wall might be raised bars the right to recover for damage to the building, in the absence of negligence in doing the work. Riiff v. Garvey, 74 Neb. 522, 104 N. W. 1143.

218-39 Griffin v. Sansom, 31 Tex. Civ. 560, 72 S. W. 864.

218-40 Evidence in action for contribution for building party wall. The contract made for the building of a wall is competent evidence in an action for contribution. If the parties have stipulated that the expense of the wall shall be fixed by a designated person, the party attacking his estimate has the burden of proof. Watkins v. Glas (Cal. App.), 89 P. 840.

ADMIRALTY [Vol. 1.]

Breach of charter—mitigation of damages, 252-41; Collision of anchored vessels, 261-31; Presumption as to signal, 265-68; How seaworthiness determined, 267-95; Breaking of refrigerating apparatus, 267-9; Failure to produce testimony, 267-9; Customs and usages as affecting stowage, 268-18; Evidence to show deficiency of freight, 272-40; Effect of experiments, 338-39; Cost of repairs, 338-39.

228-15 Applicability of maritime law. — Except as it has been adopted by statute, the general maritime law is not the law of the United States. The Sacramento, 131 Fed. 373.

229-21 Law of forum. — As between parties or ships of different nationalities cases arising on the high seas, not within the jurisdiction of any nation, will be determined by the law of the forum. Pouppirt v. Shipping, 122 Fed. 983.

230-28 Hearsay testimony will not be given probative force, although it was first objected to when exceptions were filed to the report of the commissioner. The Anson M. Bangs, 129 Fed. 103, 63 C. C. A. 605.

244-57 Palmer v. Transp. Co., 154 Fed. 683.

244-59 Barber v. Lockwood, 134 Fed. 985.

Technical inaccuracies, except under some peremptory circumstances, are not regarded. The Metamora, 144 Fed. 936, 75 C. C. A. 576.

Pleading and Proof. — If the facts are set out and the pleadings meet the actual issues, it is immaterial that the breach of a charter which was not binding is counted upon. Keyser & Co. v. Jurvelius, 122 Fed. 218, 68 C. C. A. 664. It is too late to secure consideration of other grounds of fault than those alleged in a collision case after it has been heard on other issues. The Werdenfels, 150 Fed. 400.

245-65 Immaterial variance. — If the essential facts are alleged, the failure to interpret them properly or to give the scientific reason for their result will not be regarded as a material variance. Kelley Isl. L. & T. Co. v. Cleveland, 144 Fed. 207.

245-69 An amendment is proper to correct the estimate of value

stated if it does not involve the introduction of new facts or change the cause of action (The Minnetonka, 146 Fed. 509, 77 C. C. A. 217); and to set up a claim for loss because of cancellation of the charter party under which the ship was proceeding when stranded. Harrison v. Hughes, 119 Fed. 997. A libel against a vessel and its owner may be amended so as to make the proceeding one in rem. The San Rafael, 141 Fed. 270, 72 C. C. A. 388. An allegation of negligence may be made specific as to details. The Saranac, 132 Fed. 936. Amendments may be made at any stage of the trial. Palmer v. Transp. Co., 154 Fed. 683; Kelley Isl. L. & T. Co. v. Cleveland, 144 Fed. 207; La Bourgoyne, 144 Fed. 781, 75 C. C. A. 647.

246-75 An amendment converting an action from a proceeding in rem to one in personam will not be allowed in the absence of a general appearance or the service of a monition. The Lowlands, 147 Fed. 986.

247-83 A new defense cannot be set up by amendment after the evidence is all in, the facts sought to be pleaded having been known to the party when he answered (Brennan v. Hagan, 147 Fed. 290); nor can a special defense be set up after its merits have been thrice passed upon and the case remanded for trial on another issue. Burrill v. Crossman, 111 Fed. 192.

247-90 Verified pleadings may discredit the testimony of the party who is responsible for them, and will be considered in ascertaining the facts in a collision case. The Richmond, 143 Fed. 996.

248-99 Vacation of writ. — If a libel states a cause of action and issue is raised thereon, it is not proper, under admiralty rule fifty-one, to grant a summary motion on the pleadings to vacate an attachment because there is no replication. The Celtic Monarch, 138 Fed. 711, 71 C. C. A. 127.

249-3 An answer admitting an allegation in a libel does not preclude the libelant from proving that the fact was otherwise, the admission not being sustained by the evidence. The Volunteer, 149 Fed. 723, 79 C. C. A. 429.

249-6 Bock v. Nav. Co., 124 Fed. 711.

Interrogatories may be attached to a libel against a corporation for answer by an officer thereof who is named; they may not only call for information as to the personal knowledge of such officer, but for answers according to his information — that received in his official capacity. Bock v. Nav. Co., supra.

A verification which contains all that is essential will be sustained though not strictly in accordance with the usual form. In re Knickerbocker S. Co., 139 Fed. 713.

Unanswered interrogatories. — Judgment should not be given plaintiff on the pleadings if they raise an issue, and the interrogatories contained in the answer are not responded to. The Oregon, 116 Fed. 482, 53 C. C. A. 650.

Refusal to answer. — A party may avail himself of the privilege of refusing to answer interrogatories which will expose him to punishment or forfeiture; but his objection must be explicit. In re Knickerbocker S. Co., 139 Fed. 713.

249-8 Are answers evidence for both parties. — Judge Lowell did not pass upon the question in Bock v. Nav. Co., 124 Fed. 711. He said: "It was urged that interrogatories in admiralty are not like those permitted by equity or by statute inasmuch as they are not evidence for the deponent. This is asserted on the authority of The Serapis (D. C.), 37 Fed. 436, 442, and Havermeyers v. Compania Transatlantica (D. C.), 43 Fed. 90; but the authorities relied on in the case last mentioned do not all of them sustain the proposition to support which they are cited. In The L. B. Goldsmith, Fed. Cas. No. 8,152, the court held merely that answers to interrogatories are not conclusive evidence for either party. In Cushing v. Laird, Fed. Cas. No. 3,509, no reasons were given for the ruling, and the decision of the district court was reversed on appeal, though upon another ground. The case of Cushman v. Ryan, 1 Story 91, 103, Fed. Cas. No. 3,515, is apparently in point, so far as its language is concerned; but a closer examination shows that Mr. Justice Story had in

mind only that response to the allegations in the libel which is made by an ordinary sworn answer. He relied expressly upon the opinion of Judge Ware in Hutson v. Jordan, Fed. Cas. No. 6,959. But Judge Ware, in The David Pratt, Fed. Cas. No. 3,597, drew a distinction between the response made to a libel by the ordinary sworn answer and the response made to special interrogatories, saying: 'The master, by answering these interrogatories, would make his answers evidence; for, though the general answer of the respondent is not properly evidence any further than the charges in the libel, which are equally verified by oath, yet the answers to special interrogatories, which are sometimes subjoined to the libel and sometimes put at the hearing, are evidence.' And in Jay v. Almy, 1 Woodb. & M. 262, 267, Fed. Cas. No. 7,236, Mr. Justice Woodbury said: 'Each party in admiralty has a right, if he chooses, to the answer under oath of the other; and, if not so answering when requested, he may take the fact pro confesso. If an answer be given when asked for, it is evidence for either side.' It is not necessary now to decide if the answers to these interrogatories will be evidence for the deponent. The conflict of authority is stated in order that the correctness of the opinion expressed in The Serapis, in Havemeyers v. Compania Transatlantic, and in Benedict's Admiralty Practice, § 519, be not assumed without further consideration.''

252-41 Breach of charter — Mitigation of damages. — A charterer who has broken his contract has the burden of showing that the vessel could, with reasonable diligence, have reduced or prevented the damage sustained thereby. Cornwall v. Moore, 132 Fed. 868.

256-86 The Wyandotte, 145 Fed. 321, 75 C. C. A. 117.

The general presumption in favor of the master's authority prevails though his vessel was chartered, whether this was known to the persons who furnished the supplies or not. The Surprise, 129 Fed. 873, 64 C. C. A. 309. But if supplies are furnished the charterer at his residence, it is presumed credit was given him. The Valencia, 165 U. S. 264; Alaska etc. Co. v. Chamberlain, 116 Fed. 600, 54 C. C. A. 56.

Evidence to rebut presumption. Such presumption may be rebutted only by proof that credit was in fact given to the vessel. But in order to establish that fact it is necessary to show that such was the intention of both parties to the transaction. Cuddy v. Clement, 115 Fed. 301, 53 C. C. A. 94. It is not sufficient to show that the vendor so understood, or that he charged the supplies to the vessel, and so entered them upon his books of account. The Kalorama, 10 Wall. (U. S.) 204; The James Guy, 1 Ben. 112, 13 Fed. Cas. 7,195; The Union Express, 1 Bro. Adm. 537, 24 Fed. Cas. 14,364; The Francis, 21 Fed. 715; The St. John, 74 Fed. 842, 21 C. C. A. 141; The Columbus, 67 Fed. 553, 14 C. C. A. 522. It is not necessary, it is true, that the common intent so to bind the vessel be expressed in words or in the form of an agreement. It may be established by proof of circumstances from which the common intent may be deduced, but in all cases it is essential that the evidence shall show a purpose upon the part of the seller to sell upon the credit of the vessel, and upon the part of the purchaser to pledge the vessel. Alaska etc. Co. v. Chamberlain, 116 Fed. 600, 54 C. C. A. 56.

257-94 Burden of proof. — They who set up the defense to a bottomry bond that the supplies might have been obtained on the personal credit of the owners have the burden of showing that they had credit or funds at the port where the master obtained supplies. The Wyandotte, 145 Fed. 321, 75 C. C. A. 117.

257-1 The Winnie, 149 Fed. 725, 79 C. C. A. 431; The Echo, 131 Fed. 622; The Gertrude, 118 Fed. 130, 55 C. C. A. 80; Chicago T. Co. v. Campbell, 110 Ill. App. 366.

258-2 The Tarpon, 132 Fed. 277.

258-3 The Sicilian Prince, 128 Fed. 133; The Elizabeth, 114 Fed. 757; The Wm. Chisholm, 153 Fed. 704; Pouppirt v. Shipping Co., 122 Fed. 983.

258-4 Wilder's S. S. Co. v. Low, 112 Fed. 161, 50 C. C. A. 473.

Incompetent helmsman. — If the evidence is hopelessly conflicting as to the fault for a collision, and there is no doubt of the incompetency of a helmsman on one of the vessels, the fault will be attributed to her. The Senator Sullivan, 117 Fed. 176.

258-5 The Eagle Wing, 135 Fed. 826.

Not properly manned. — See The Gertrude, 118 Fed. 130, 55 C. C. A. 80, for evidence which failed to sustain the claim of contributory negligence because a schooner was not properly manned.

258-9 Rich v. Packet Co., 117 Fed. 751; The Fontana, 119 Fed. 853, 56 C. C. A. 365; The Genesta, 125 Fed. 423; The Wallace B. Flint, 125 Fed. 426; The Umbria, 153 Fed. 851; The H. B. Rawson, 152 Fed. 1001; The Wilkesbarre, 151 Fed. 501; Carter v. R. Co., 151 Fed. 531; The John Bossert, 148 Fed. 903; The Metamora, 144 Fed. 936, 75 C. C. A. 576; New York etc. Co. v. R. Co., 143 Fed. 991; The City of Portsmouth, 143 Fed. 856, 74 C. C. A. 608; Brigham v. Luckenbach, 140 Fed. 322; The Dauntless, 129 Fed. 785, 64 C. C. A. 243; The J. C. Ames, 121 Fed. 918; The Dauntless, 121 Fed. 420; The Gadsby, 120 Fed. 851; Wilder's S. S. Co. v. Low, 112 Fed. 161, 50 C. C. A. 473; The Arthur M. Palmer, 115 Fed. 417; The Captain Sam, 115 Fed. 1000.

Proper lookouts are persons other than officers of the deck or the helmsman. The Echo, 131 Fed. 622; Wilder's S. S. Co. v. Low, 112 Fed. 161, 50 C. C. A. 473.

No lookout. — Where a ship navigating a narrow channel has no proper lookout and neglects to signal her course at a reasonable distance, thus perplexing and misleading a meeting ship, the former is alone responsible for all damages caused by the collision even if, in the agony of collision, a different maneuvre on the part of the other ship might have avoided the accident. The S. S. Cape Breton v. Nav. Co., 36 Can. Sup. 564.

Failure to have a proper lookout is not excused by alleging navigation according to the rule, the proof showing that the boat failed to so navigate because in extremis. The James A. Lawrence, 117 Fed. 228, 54 C. C. A. 260.

Proof of defective lookout. — The unexplained failure of the officers of a boat to see what they ought to have seen or to hear what they ought to have heard is conclusive evidence of a defective lookout. The New York, 175 U. S. 187.

The absence of a trustworthy lookout, besides the helmsman, is prima facie evidence that the collision was the fault of the steamer, which has the burden of showing that the collision could not have been guarded against by a lookout. The Pilot Boy, 115 Fed. 873, 53 C. C. A. 329.

Location of a lookout. — A lookout should be placed in the bow of a ship, and it will not avail to show that her deck was so overcrowded that proper room could not be reserved for a lookout. The Vedamore, 137 Fed. 844, 70 C. C. A. 342; The Patria, 92 Fed. 411; Brigham v. Luckenbach, 140 Fed. 322.

Other contributing cause than lookout. — "It is doubtless true that the accident would not have happened if the wheelsman had not fainted, and in that sense his disability was the proximate cause of the accident; but a lookout is legally required on all navigating vessels capable of injuring others, and I think there can be no doubt that if a competent one had been properly stationed on this vessel he would have noticed the absence of proper steering and corrected the same or had the engineer stop the engine and reverse if necessary." The Wilkesbarre, 151 Fed. 501.

Special lookout not required. — The Pocomoke, 150 Fed. 193.

258-10 The Mary Buhne, 118 Fed. 1000, 54 C. C. A. 494; The Dauntless, 121 Fed. 420.

259-17 The Eagle Point, 120 Fed. 449, 56 C. C. A. 599; Wineman v. Drake, 154 Fed. 933; The Lakme, 118 Fed. 972, 55 C. C. A. 466.

The presumption against a vessel in fault will be strengthened by the silence of her log book or meager entries in it, or the removal of entries. The Sicilian Prince, 128 Fed. 133.

259-18 S. S. Arranmore v. Rudolph, 38 Can. Sup. 176; Bingham v. Luckenbach, 140 Fed. 322; Wilder's S. S. Co. v. Low, 112 Fed. 161, 50

C. C. A. 473; The Gadsby, 120 Fed. 851; Hind v. S. S. Co., 13 Haw. 112; Chicago T. Co. v. Campbell, 110 Ill. App. 366.

260-19 The George Dumois, 153 Fed. 833.

Right of schooner to channel. — A schooner has the same right to a well-known navigated channel as a steamer, and cannot be guilty of misconduct in claiming and exercising such right; she may be justified in expecting from the steamer that she would carefully contrive to watch the schooner's movements until all danger should be passed. The Ardanrose, 115 Fed. 1010, *quot.* from The Iron Chief, 63 Fed. 289, 11 C. C. A. 196.

260-20 The two mile limit. The distance of two miles, which is the distance at which lights must be made visible, is, by implication, to be taken as the distance within which vessels should be required to keep their course. The Queen Elizabeth, 122 Fed. 406, 59 C. C. A. 345; Brigham v. Luckenbach, 140 Fed. 322.

260-21 The Dauntless, 129 Fed. 715, 64 C. C. A. 243.

260-22 The Maine, 153 Fed. 635.

260-24 The Frank S. Hall, 116 Fed. 559.

A vessel which failed to display lights must show that the collision was not thereby contributed to (The Komuk, 120 Fed. 841); and so of a vessel which did not give fog signals. Baltimore S. P. Co. v. T. Co., 139 Fed. 777.

260-25 The North Star, 151 Fed. 168, 80 C. C. A. 536; The Falcon, 116 Fed. 753; The Fleetwing, 114 Fed. 409; The Alabama, 114 Fed. 214; The Jamestown, 114 Fed. 593; The Aureole, 113 Fed. 224, 51 C. C. A. 181; The Sicilian Prince, 128 Fed. 133; The Rebecca, 122 Fed. 619.

All presumptions are in favor of the vessel overtaken. The Atlantis, 119 Fed. 568, 56 C. C. A. 134.

Injury by suction. — See The Aureole, 113 Fed. 224, 51 C. C. A. 181; The Mesaba, 111 Fed. 215.

261-28 The Homer, 109 Fed. 572, 48 C. C. A. 465; Ross v. Cornell, 143 Fed. 166, 149 Fed. 196, 79 C. C. A. 514; The Newburgh, 130 Fed. 321, 64 C. C. A. 567; The Rotherfield, 123 Fed. 460; The City of Macon, 121 Fed. 686, 58 C. C. A. 434.

Practically the only defense of the moving vessel is vis major or inevitable accident. The Mary S. Blees, 120 Fed. 44; Rich v. Packet Co., 117 Fed. 751; Rebstock v. Transp. Co., 132 Fed. 174. She cannot be exonerated because her movements were controlled by a tug unless that fact is pleaded and proved. The Degama, 150 Fed. 323, 80 C. C. A. 93.

261-29 Evidence not showing vessel properly anchored. — The fact that other vessels, both before and after the collision, passed an anchored vessel in safety, does not show that she was properly anchored and did not obstruct navigation. The Caldy, 153 Fed. 837. See The Banan, 116 Fed. 900.

Place of moored vessel. — Irrespective of whether or not a vessel anchors or moors in a proper and safe place, the moving vessel must avoid her when, with reasonable practicability, she can do so, having regard for her own safety. Rebstock v. Transp. Co., 132 Fed. 174.

261-31 Collision of anchored vessels. — An anchored vessel which dragged its anchor and was in fault for having but one anchor out is presumed to be responsible for a collision with a vessel whose anchor did not drag. The Severn, 113 Fed. 578.

261-32 The C. Van Cott, 152 Fed. 1016; The Winnie, 149 Fed. 725, 79 C. C. A. 431; Chicago T. Co. v. Campbell, 110 Ill. App. 366; The Jumna, 149 Fed. 171, 79 C. C. A. 119.

262-35 The Severn, 113 Fed. 578.

262-36 The Philip Minch, 128 Fed. 578, 63 C. C. A. 14; The Iberia, 123 Fed. 865, 59 C. C. A. 306.

262-37 The Livingstone, 113 Fed. 879, 51 C. C. A. 560.

Contributory negligence must be affirmatively shown. The Nellie, 130 Fed. 213; The Newburgh, 130 Fed. 321, 64 C. C. A. 567.

262-38 The Northern Queen, 117 Fed. 906.

Custom immaterial. — The liability of a vessel which violates a statutory rule of navigation is not affected by the existence of a custom to so do under certain conditions.

The presumption of fault exists. The Transfer No. 10, 137 Fed. 666.

262-39 The Caldy, 153 Fed. 837; The Ellis, 152 Fed. 981; The Georgetown, 135 Fed. 854; The George W. Roby, 111 Fed. 601, 49 C. C. A. 481; The Westhall, 153 Fed. 1010; The Pocomoke, 150 Fed. 193.

262-40 The Komuk, 120 Fed. 841.

The same presumption exists against a vessel which breaks an agreement with another (The Luther C. Ward, 149 Fed. 787; The Werdenfels, 150 Fed. 400), and against one in charge of a licensed pilot under a compulsory statute. Rich v. Packet Co., 117 Fed. 751.

263-49 The John Fleming, 149 Fed. 904; The Zampa, 113 Fed. 541; The Livingstone, 113 Fed. 879, 51 C. C. A. 560; The Australia, 120 Fed. 220, 56 C. C. A. 568; The Pacific, 154 Fed. 943; Mitchell T. Co. v. Green, 120 Fed. 49, 56 C. C. A. 455; The Georgetown, 135 Fed. 854; The Monterey, 153 Fed. 935; Minnesota S. S. Co. v. Transp. Co., 129 Fed. 22, 63 C. C. A. 672.

The general rule applies to a vessel in tow which changes her course. The Fontana, 119 Fed. 853, 56 C. C. A. 365.

Duty of sailing vessel. — The rule requiring that where one of two vessels is to keep out of the way the other shall keep her course and speed, has been construed to require that a sailing vessel in the near presence of a steamer must beat out of its tack if there are no emergencies to prevent it. Jacobsen v. Nav. Co., 114 Fed. 705, 52 C. C. A. 407.

Change of course to avoid collision. "When a change of course is admitted or established on the part of a vessel which is under obligations to keep her course, as against another vessel which is bound to avoid the former vessel, a very close scrutiny of the conduct of the former is necessary." The General U. S. Grant, 6 Ben. 465, 10 Fed. Cas. 5,320. But, while this is so, there can be no doubt that when the vessel bound to give way does not do so in time, and as a result there is immediate danger of a collision, the other may change her course for the purpose of avoiding the apprehended collision. The Zampa, 113 Fed. 541.

263-50 The Europa, 116 Fed. 696.

263-52 The J. C. Ames, 121 Fed. 918; The Richmond, 114 Fed. 208; The Ardanrose, 115 Fed. 1010; The Pilot Boy, 115 Fed. 873, 53 C. C. A. 329.

263-54 The Northern Queen, 117 Fed. 906.

Vessel under slight motion. — A vessel which has almost come to a standstill has all the rights of an anchored vessel as against a moving steamer. Britain S. S. Co. v. Transp. Co., 131 Fed. 62, 65 C. C. A. 300; The John F. Gaynor, 130 Fed. 856, 65 C. C. A. 340.

Sheer of steamer. — To say that the erratic course of a vessel in "bounding backward and forward across the channel was due to a sheer is no defense, unless she can show that the sheer was unavoidable, that is, that the cause which started the sheer and maintained it was a force which she could not resist or guard against by that reasonable degree of skill required from a navigator in the waters where this sheer occurred. This is the doctrine of The Louisiana, 3 Wall. (U. S.) 164; The Olympia, 61 Fed. 120, 9 C. C. A. 393; The Ohio, 91 Fed. 547, 33 C. C. A. 667; The F. W. Wheeler, 78 Fed. 824, 24 C. C. A. 353; The Centurion, 100 Fed. 663, 40 C. C. A. 634; and of The Fontana, 119 Fed. 853." The Australia, 120 Fed. 220, 56 C. C. A. 568.

Evidence to overcome presumption. The presumption that the favored vessel kept on her course may be overcome by evidence, notwithstanding the improbability of her not having done so, in which case liability for the collision can only be avoided by proving the fault of the other vessel by a clear preponderance of evidence. The Eagle Wing, 135 Fed. 826.

The presumptions against the moving vessel are very strong (The Mary S. Blees, 120 Fed. 44); and so where a stationary object is run into. The Blackheath, 154 Fed. 758.

264-62 A moored vessel which breaks away must show affirmatively that she drifted because of inevitable accident or a vis major which could not have been prevented (The Wm. E. Reis, 152 Fed. 673, 143

Fed. 1013; The Tarpon, 132 Fed. 277; The Andrew Welch, 122 Fed. 557); and if placed in an exposed position must show negligence on the part of a moving steamer. The New York, 109 Fed. 909; The John H. Starin, 122 Fed. 236, 58 C. C. A. 600, *rev.* 113 Fed. 419. The presumption arising from failure to give proper signals must be overcome by clear evidence. The Annex No. 5, 117 Fed. 754.

264-64 **Collision in narrow place.** If the sheering of a barge beyond the middle of a channel injures a barge in tow there, the burden is upon the former to show that reasonable diligence or skill could not have avoided the collision. The Australia, 120 Fed. 220, 56 C. C. A. 568.

265-67 **Collision with wharf.** The owner of a wharf with which a vessel has collided in consequence of an obstruction under the water has the burden of establishing contributory negligence on her part. The Nellie, 130 Fed. 213.

265-68 The Britannia, 148 Fed. 495.

Negligence presumed if an accident which should have been anticipated and guarded against happens, no means having been taken to guard against it. The Genessee, 138 Fed. 549, 70 C. C A. 673.

Presumption as to signal. — Where a light placed above a sunken wreck was burning brightly about two hours before the collision of a tug with the wreck, and it is shown that it was capable of burning for some hours after the wreck occurred, it is presumed to have been burning then, and the burden is on a tug which collided with the wreck at night to show the contrary. The Volunteer, 149 Fed. 723, 79 C. C. A. 429.

265-78 The Winnie, 149 Fed. 725, 79 C. C. A. 431; The Britannia, 148 Fed. 495; Davidson v. S. S. Co., 120 Fed. 250, 56 C. C. A. 86.

266-84 The Somers N. Smith, 120 Fed. 569; The W. G. Mason, 142 Fed. 913, 74 C. C. A. 83; The Inca, 148 Fed. 363, 78 C. C. A. 273.

266-85 Hughes v. R. Co., 113 Fed. 925, 51 C. C. A. 555 (abandonment did not occur in storm).

266-86 The Mabel S., 113 Fed. 971; Burr v. Towage Co., 132 Fed. 248, 65 C. C. A. 554.

266-87 The Resolute, 149 Fed. 1005.

266-89 The Potomac, 147 Fed. 293; The Inca, 148 Fed. 363, 78 C. C. A. 273; The W. G. Mason, 131 Fed. 632.

Tug owners have the burden of excusing a collision with a properly lighted wreck (The Volunteer, 149 Fed. 723, 79 C. C. A. 429); or with a disabled vessel which gave the usual signal (The Protector, 113 Fed. 868, 51 C. C. A. 492); to show that she kept her tow at a safe distance from an anchored dredge (The Wyomissing, 149 Fed. 241; The Overbrook, 149 Fed. 785); to prove a contract whereby a vessel was to be towed at the risk of her owners (The Somers N. Smith, 120 Fed. 569); and to show that she had the right to expect the aid of steam from a vessel which was too heavy for the tug to move. The J. S. T. Stranahan, 151 Fed. 364.

267-95 The Southwark, 191 U. S. 1.

Seaworthiness, implied contract. The implied contract is seaworthiness for the special cargo (Neilson v. Coal Co., 122 Fed. 617, 60 C. C. A. 175; The C. W. Elphicke, 122 Fed. 439, 58 C. C. A. 421; Insurance Co. v. Lloyd Co., 106 Fed. 973), and the voyage undertaken. The Nellie Floyd, 116 Fed. 80. The warranty extends to a charterer who has no actual knowledge of the unseaworthiness (The Presque Isle, 140 Fed. 202); but does not include a vessel carrying passengers. The Oregon, 133 Fed. 609, 68 C. C. A. 603.

Under the Harter act the shipowner must show that the vessel was seaworthy at the inception of the voyage, or that due diligence had been used to make her so (The Wilderoft, 201 U. S. 378; International N. Co. v. Mfg. Co., 181 U. S. 218; The Southwark, 191 U. S. 1); this rule applies regardless of whether there is conflicting testimony concerning her seaworthiness. The Wilderoft, supra.

How seaworthiness determined. "The question of seaworthiness is to be determined with reference to the custom and usages of the port

from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters." The Tjomo, 115 Fed. 919; The Titania, 19 Fed. 101.

267-1 **The presumption of seaworthiness** is not overcome by proof that a vessel sank near her wharf, because injured by pounding against another boat on the pier. National Board v. Bowring, 148 Fed. 1010.

267-2 **A shipowner cannot limit his liability** under the Harter act unless he shows affirmatively that he has properly officered and equipped his vessel for the contemplated service; it is not sufficient to show that he had no knowledge or reason to believe in the incompetency of her master. McGill v. S. S. Co., 144 Fed. 788, 75 C. C. A. 518.

267-4 Insurance Co. v. Lloyd Co., 106 Fed. 973; The Nellie Floyd, 116 Fed. 80; Neilson v. Coal & S. Co., 122 Fed. 617, 60 C. C. A. 175.

267-5 Insurance Co. v. Lloyd Co., supra; The Nellie Floyd, supra.

267-9 The Tenedos, 137 Fed. 443.

Failure to close port holes. — "It is not to be understood as intimated that failure to close port holes necessarily creates unseaworthiness. That depends on circumstances, and we accept the finding of the district court and of the court of appeals, that it did so under the circumstances of this case." International N. Co. v. Mfg. Co., 181 U. S. 218.

Breaking refrigerating apparatus. The sudden breaking down of the refrigerating apparatus of a vessel engaged in the dressed meat trade within three hours of sailing raises a presumption of unseaworthiness when she left port. The Southwark, 191 U. S. 1.

Failure to produce testimony. — On the failure to take the testimony of a ship's carpenter, named in its commission for examination, on being informed by the libelant of his whereabouts, it may be assumed that his testimony as to the vessel's seaworthiness would have been unfavorable to her. The Manitou, 116 Fed. 60, 127 Fed. 554, 63 C. C. A. 109.

268-10 The Oneida, 128 Fed. 687, 63 C. C. A. 239.

268-15 The C. W. Elphicke, 122 Fed. 439, 58 C. C. A. 421; American S. R. Co. v. Rickinson, 123 Fed. 188, 59 C. C. A. 604.

268-18 **Customs and usages as affecting stowage.** — In determining what is proper stowage, the customs and usages of the place of shipment are to be considered, and, if these are followed, and if none of the known and usual precautions for safe stowage are omitted, no breach of duty or negligence can be imputed to the ship, and in case of damage under great stress of weather the injuries will be ascribed to perils of the sea. The Tjomo, 115 Fed. 919.

269-20 Corsar v. Spreckels Co., 141 Fed. 260, 72 C. C. A. 378; Harloff v. Barber & Co., 150 Fed. 185; Dene S. S. Co. v. Trad. Co., 133 Fed. 589, 143 Id. 854, 74 C. C. A. 606.

Instability of vessel because of stowage. — It cannot be said that a vessel is seaworthy which has, at the inception of her voyage, little, if any, positive metacentric height, a list of eight or nine degrees, and her cargo so distributed that instability must increase as she proceeds. The Oneida, 128 Fed. 687, 63 C. C. A. 239.

269-23 Cau v. R. Co., 194 U. S. 427; Lazarus v. Barber, 136 Fed. 534, 69 C. C. A. 310.

If the implied warranty of seaworthiness has been varied, the shipper must show negligence. The Tjomo, 115 Fed. 919; The Southwark, 104 Fed. 103.

The hirer has the burden of showing that damage resulted from a defect in the outfit as specified in the charter party. Hills v. Leeds, 149 Fed. 878.

If notice of claim is made a condition precedent to liability, the shipper must show that it has been given if the contrary is alleged in the answer. The Westminster, 127 Fed. 680, 62 C. C. A. 406.

269-24 The Musselcrag, 125 Fed. 786.

270-30 The Presque Isle, 140 Fed. 262; The D. Harvey, 139 Fed. 755; The LaKroma, 138 Fed. 936; Doherr v. Houston, 128 Fed. 594, 64 C. C. A. 102; The Patria, 125 Fed. 425, 132 Id. 971, 68 C. C. A. 397; Pacific C. S. S. Co. v. Ban-

croft-W. Co., 94 Fed. 180, 36 C. C. A. 135.

Distinctions as to burden of proof. "When the damage is manifestly of the sort excepted the ship is under no obligation to show the promoting cause. To illustrate, if the exception is 'damage caused by peril of the sea,' and the cargo is landed drenched with salt water, it will be for the ship to show that the salt water found access to the cargo through a peril of the sea; but if the exception is 'damage by breakage,' and the article arrives broken, the ship is not required to show how it got broken — although the libelant may show that negligence of those on the ship, or of those who stowed her or discharged her, caused the break, and, showing that, may recover. If the sole damage to the cargo in the case at bar were manifestly decay, and the language of the exception were 'for decay caused by inherent defect,' the ship would have the burden of showing that 'decay was caused by inherent defect.' If, however, the sole damage was manifestly decay, and the language of the exception were 'not responsible for damage occasioned by decay of any kind'" the cause of decay must be shown to be negligence on the part of the ship. The Patria, 132 Fed. 971, 68 C. C. A. 397. (See The Folmina, 153 Fed. 364, which was certified to the supreme court on the question of burden of proof.)

271-33 The Manitou, 116 Fed. 60, 127 Fed. 554, 63 C. C. A. 109.

Relation of burden of proof to presumption. — "The casting of the burden of proof on one party or the other in a given case, does not destroy the presumptions in favor of a party, which exist under the general law of evidence. Presumptions are a sort of proof and a substitute in certain stages of a case for affirmative testimony. A disputable presumption may operate as a prima facie case upon a particular point. Thayer's Prelim. Treatise on Evidence, p. 365. A presumption operating as a prima facie case stands as proved until the prima facie is destroyed by controverting evidence. In the case before us, there is a presumption that the owner of the steamship performed his duty in making her seaworthy, and properly manning, equipping and supplying her for the voyage she was about to make. This presumption will support the burden of proof imposed until it is overthrown or controverted by some evidence." Per Gray, C. J., in The Wilderoft, 130 Fed. 521, 65 C. C. A. 145.

Effect of the Harter act. — A vessel owner cannot take advantage of § 3 of the Harter act unless he shows affirmatively that the vessel was in all respects seaworthy at the commencement of the voyage, or that due diligence had been used to make her so. The C. W. Elphicke, 117 Fed. 279, 122 Id. 439, 58 C. C. A. 421, and cases cited in next note. Such proof cannot be supplied by inferences or presumptions. The Wilderoft, 201 U. S. 378; Bradley v. R. Co., 153 Fed. 350. If the circumstances are such that the opportunity for giving testimony is solely with the vessel owner, the burden upon him is thereby increased. The Manitou, 116 Fed. 60, 127 Id. 554, 63 C. C. A. 109. If a bill of lading is issued after the goods are loaded and have passed from their owner's control, the carrier has the burden of showing owner's assent to the terms of the bill. Pacific C. Co. v. Yukon Co., 155 Fed. 29.

Injury by escaping steam. — Where the injury was done by steam escaping from valves, the court said: "Much testimony has been given to show that every proper precaution was taken and that every valve was closed before the vessel went to sea, but all testimony given under these conditions requires close scrutiny, and it is not necessarily to be accepted unless found to be inherently worthy of belief. Where an account of circumstances leading to a loss is entirely within the control of one side of a controversy, there is more of a burden upon such party than where the matter has been open to the other side for an ascertainment of the facts." The Manitou, 116 Fed. 60, (per Adams, D. J.), *aff.* 127 Fed. 554, 63 C. C. A. 109.

271-34 The Victoria, 114 Fed. 962; The Mississippi, 113 Fed. 985.

Sufficiency of packing. — See Doherr v. Houston, 123 Fed. 334.

Stowage of skins with tea. — See The Hudson, 122 Fed. 96.

271-35 It is negligent to stow barrels of cod oil over wool without securing them. The Orcadian, 116 Fed. 930.

Evidence of negligent stowage. See The Musselcrag, 125 Fed. 786.

272-37 Liability of vessel is established by showing that baggage was in good condition when it was put on board and was wet at end of voyage. Weinberger v. C. G. T., 146 Fed. 516.

272-38 Incompetent master. Under that clause of the Harter act which releases vessel owners from liability provided they exercised due diligence to make their vessel in all respects seaworthy and properly manned, they have the burden of showing that the master was competent, that he was selected with due diligence (which must be particularly specified), that he was habitually diligent, or that they rightly believed him to be so. The Fri, 140 Fed. 123; The Cygnet, 126 Id. 742, 61 C. C. A. 348.

272-40 Evidence to show deficiency of freight. — Where it is claimed that less freight than was due was delivered, it is competent to show that other consignees who shipped like freight at the same time in the same vessels received much more than they had bought and more than their bills of lading called for. An objection that such testimony would call for a disclosure of business relations with other shippers is not cause for not furnishing such evidence. Dana v. Shipping Co., 131 Fed. 158.

The shipper must prove the delivery of the goods to the vessel. The prima facie case made by a bill of lading is overthrown by proof that it was delivered before the goods were put aboard or consigned to the care of the master, and before the vessel was in port. Cunard S. S. Co. v. Kelley, 115 Fed. 678, 53 C. C. A. 310; Kelley v. S. S. Co., 120 Fed. 536.

Execution of bill of lading by carrier's agent must be shown by shipper. Cunard S. S. Co. v. Kelley, supra.

275-60 The burden of explaining an accident to a passenger and relieving itself from the imputation of negligence is upon the carrier. Walker v. S. S. Co., 117 Fed. 784; Pouppirt v. Shipping Co., 122 Fed. 983. A prima facie case of negligence is shown by proof of the breaking of a chain used in unloading heavy articles. Lewers Co. v. Kekauoha, 114 Fed. 849, 52 C. C. A. 483.

275-66 Notice taken of foreign statute. — An admiralty court may judicially notice a statute of Canada regulating navigation in Canadian waters, and also the revised international rules and regulations concerning navigation. The New York, 175 U. S. 187. The case of The Liverpool S. Co. v. Ins. Co., 129 U. S. 397, is distinguished on the ground that it did not involve a question of general maritime law, but a statutory exemption from the consequences of negligence in navigation given by an act of parliament.

275-67 Sufficient certificate. Where a statute was used in the district court by consent and was treated as part of the record, though not made such, and was certified, in obedience to a certiorari, to the court of appeals by the clerk of the district court as a true copy of the original act as published, it was properly before the appellate court though not certified to be a part of the record. The New York, supra.

276-68 Notorious facts. — Judicial notice will be taken of the intimate commercial relations existing between the ports of Puget Sound and Alaskan ports, and in the absence of contrary proof it will be inferred that the highest rate of seamen's wages at Nome was not less than the usual rate of wages paid at Tacoma. The Elihu Thompson, 139 Fed. 89.

Sack rafts. — In the absence of a statute defining or describing a sack raft, or testimony disclosing that such a thing is commonly known, it cannot be judicially known what constitutes such a raft. The Mary, 123 Fed. 609.

279-1 Neilson v. Coal Co., 122 Fed. 617, 60 C. C. A. 175.

282-27 An unsealed deposition not personally delivered into court by the officer is not admissible. The Saranac, 132 Fed. 936.

282-32 Use of deposition upon another libel. — One case may be submitted upon the testimony taken in another involving the same facts. The Oregon, 133 Fed. 609, 68 C. C. A. 603. Relevant testimony taken under examinations by counsel for three separate interests is properly before the court on the final hearing, regardless of whom it was offered by, though there were separate answers and separate issues. The Bayonne, 128 Fed. 288.

284-46 A carrier cannot object to answering an interrogatory concerning the amount of freight delivered to other consignees than libelant, on the ground that to do so would disclose their business to him. Such testimony has a bearing on the issue as to whether all the freight due libelant had been delivered. Dana & Co. v. Shipping Co., 131 Fed. 158.

284-50 The findings should be made in numbered paragraphs. The Itasca, 117 Fed. 885.

284-53 Objections, how made. A general objection that the evidence does not warrant the finding is sufficient if all the evidence is attached to the report. The Poquete Habana, 189 U. S. 453; Merritt etc. Co. v. Dredging Co., 132 Fed. 154. Exceptions must refer to the pertinent evidence. The Waiontha, 122 Fed. 719; The John H. Starin, 116 Fed. 433. If not urged they are waived. The Eliza Lines, 114 Fed. 307, 52 C. C. A. 195. An objection to hearsay testimony may be made when exceptions are filed. The Anson M. Bangs, 129 Fed. 103, 62 C. C. A. 605. A plain error in computation may be corrected in the absence of a formal exception. The Eliza Lines, 132 Fed. 242, 65 C. C. A. 538.

284-57 The Ida G. Farren, 127 Fed. 766.

285-58 Watts v. U. S., 129 Fed. 222; The Gertrude, 112 Fed. 448.

285-59 The Minnichaha, 151 Fed. 782; The Mobila, 147 Fed. 882; La Bourgogne, 144 Fed. 781, 75 C. C. A. 647.

If but little of the testimony was taken by the commissioner, the weight accorded his findings will be lessened. The Sovereign of the Seas, 139 Fed. 812.

A finding as to the cost of repairing a vessel, based upon the account of party who did the work and proof of payment of bill, sustained. Thompson v. Winslow, 130 Fed. 1001.

285-61 Stenographer's fees. — If the parties refuse to stipulate that a stenographer may be employed in a proper case, the court will authorize the employment of one, whose fees shall be taxed as costs. Rogers v. Brown, 136 Fed. 813. If testimony was taken before a tender was made and the money paid into court, the cost thereof may be taxed if it was not used until the time of the trial and was one of the grounds on which the action was defeated. The Claverburn, 148 Fed. 139.

287-73 Bill of lading. — In the absence of a charter party the bill of lading delivered to the shipper is the best evidence of the contract or as a substitute for a regularly drawn charter party. The Eva D. Rose, 151 Fed. 704.

287-74 Log book not usually evidence. — "It is well established that a log book is not ordinarily receivable in evidence in favor of the persons concerned in making it, except in a few cases relating to seamen, provided for by statute. I doubt if a mere inspection of a log book by the party against whom it is sought to be used makes it evidence for the party who made it; but under the circumstances of this case, I have examined this one." Per Adams, D.J., in Worrall v. Coal Co., 113 Fed. 549.

Evidence for some purposes. — A log book is competent evidence to show the speed of a vessel between designated points, the entries having been made before litigation was begun. The New York, 109 Fed. 909. It may be called for and used by the party who did not make it for the purpose of cross-examining witnesses if the testimony so adduced is more intelligible by a reference to it. The Kentucky, 148 Fed. 500.

Silence of log book. — The failure of the log book, or the protest made

immediately after a collision, to make mention of the absence of lights on the sailing vessel collided with is a significant fact to show that the vessel's lights were burning. The Richmond, 114 Fed. 208.

293-8 Bills of lading as evidence. Bills of lading do not prove themselves, and the shipper has the burden of showing their execution by a representative of the carrier. Cunard S. S. Co. v. Kelley, 115 Fed. 678, 53 C. C. A. 310. They are sufficient evidence of the receipt of goods (The Titania, 131 Fed. 229, 65 C. C. A. 215, 124 Fed. 975), unless executed before the goods were delivered or before the vessel reached port. Cunard S. S. Co. v. Kelley, supra; Kelley v. S. S. Co., 120 Fed. 536.

299-33 A charter party which contains a stipulation fixing the rate of demurrage is admissible to make a prima facie case for the assessment of damages in case of the delay of a vessel. The Columbia, 109 Fed. 660; Orhanovich v. The America, 4 Fed. 337; The Silica v. The Lord Warden, 30 Fed. 845. *Contra*, The Jas. A. Dumont, 34 Fed. 428. Correspondence preceding the making of the charter party which presents facts and circumstances surrounding and pertinent to it, and out of which it grew, is admissible to explain the contract. Sewall v. Wood, 135 Fed. 12, 67 C. C. A. 580. But if the correspondence is merged in the contract it may be excluded. U. S. v. Conkling, 135 Fed. 598, 68 C. C. A. 220.

300-41 Ship's tally book and mate's receipt book. — Entries in these books are not calculated to show what bales of goods were covered or uncovered, nor the character of the goods, such entries being based on declarations of the shipper. They are evidence of the number of bales and of their dimensions. Cunard S. S. Co. v. Kelley, 126 Fed. 610, 61 C. C. A. 532. See Kelley v. S. S. Co., 120 Fed. 536.

302-56 The registry of a ship is only prima facie evidence of ownership and entitled to very little weight. Post v. Schooner Lady Jane, 1 Haw. 286.

313-96 The Presque Isle, 140 Fed. 202; De Sola v. Pomares, 119 Fed. 373.

315-6 Dennis v. Slyfield, 117 Fed. 474, 54 C. C. A. 520.

315-7 Ocean S. S. Co. v. Ins. Co., 121 Fed. 882.

316-13 Prior negotiations. — Evidence of conversations between the parties prior to the issuance of a bill of lading is admissible to show their intent and to aid in construing the bill with reference thereto; and if it was issued after the goods were put on board and had passed from the control of the shipper, parol evidence may be competent to modify it. Pacific Coast Co. v. Transp. Co., 155 Fed. 29. The circumstances under which a contract for towage was made may be proved. Dady v. Bacon, 149 Fed. 401, 79 C. C. A. 221.

320-38 Cunard S. S. Co. v. Kelley, 115 Fed. 678, 53 C. C. A. 310.

321-39 The Seefahrer, 133 Fed. 793.

325-55 Statements made by the master the day after his vessel collided with another, as to how the collision occurred, are admissible against her. The Severn, 113 Fed. 578.

326-62 The Maurice, 135 Fed. 516, 68 C. C. A. 228.

326-64 A declaration of the mate made about ten minutes after an accident is not part of the res gestae. The Saranac, 132 Fed. 936.

327-71 Presumption as to insurer's loss. — After insurer has taken the usual steps to ascertain the extent of injury to a vessel and the amount of damage, and paid the sum fixed upon by the appraisement, a very strong presumption arises that the damage equalled the sum paid. Fairgrieve v. Ins. Co., 112 Fed. 364, 50 C. C. A. 286.

328-77 The Umbria, 148 Fed. 283; The Mobila, 147 Id. 882 (value of a lost vessel); La Bourgogne, 144 Id. 781, 75 C. C. A. 647 (value of lost property without market value).

329-80 Opinions of competent persons may be given as to whether a vessel had stopped when a collision occurred. The Belgian King, 125 Fed. 869, 60 C. C. A. 451.

330-91 The statements of the officers of a vessel as to the necessity

for maintaining a rate of speed are not entitled to much consideration. The Eagle Point, 120 Fed. 449, 56 C. C. A. 599.

331-97 **Liberal rule as to admissibility.** — The proper course for the district court in collision cases is to receive the testimony tendered, subject to objection, unless it be so utterly irrelevant or immaterial that there could not possibly be any doubt about it. The position of a sunken vessel may be material in fixing the fault for a collision. Minnesota S. S. Co. v. Transp. Co., 129 Fed. 22, 63 C. C. A. 672. As to a party not bound by the stipulations in the charter party concerning demurrage, evidence of the net yearly earnings of the vessel will be considered in connection with such stipulations for the purpose of assessing damages for detention. Keyser & Co. v. Jurvelius, 122 Fed. 218, 58 C. C. A. 664. The weight of goods at interior plantations prior to shipment establishes, prima facie, the amount lost. The Rose Innes, 122 Fed. 750. The refusal to insure a vessel may be some evidence of unseaworthiness. Moore & Co. v. Cornwall, 144 Fed. 22, 75 C. C. A. 180.

333-13 **Effect to be given evidence.** — More weight will be given the testimony of witnesses who have had experience as to the carrying capacity of a vessel than to the estimates of a witness based upon her plan. Hreglich v. Coal, 128 Fed. 464. The positive testimony of witnesses identifying a vessel is not overcome by entries in her log book showing that she may not have been at the place in question, or that under ordinary conditions she probably was not there at the time testified of. Ross v. R. Co., 146 Fed. 608. If there is irreconcilable conflict in the testimony, that of the witnesses who have the best opportunity of knowing the facts to which they testify and the least inducement to testify falsely should be believed. The Itasca, 117 Fed. 885. Refusal to insure a vessel is not conclusive as to her seaworthiness. Moore & Co. v. Cornwall, 144 Fed. 22, 75 C. C. A. 180.

334-15 The Dorchester, 121 Fed. 889; The Captain Sam, 115 Fed. 1000; Minnesota S. S. Co. v. Transp. Co., 129 Fed. 22, 63 C. C. A. 672; The Georgetown, 135 Fed. 854; The Martha E. Wallace, 148 Fed. 94.

The rule has less force where the question concerns lights on the other vessel. The Roman, 14 Fed. 61; The Monmouthshire, 44 Fed. 697.

335-27 The Stamford, 148 Fed. 509.

336-29 The Eagle Wing, 135 Fed. 826; The Bayonne, 128 Id. 288; The John Fleming, 149 Id. 904; The Dauntless, 121 Id. 420; The Senator Sullivan, 117 Id. 176.

Probability and improbability; lights on opposite vessel. — "The court should be slow to hold that the officers and crew of a vessel were navigating the same without lights, as by so doing they were imperiling not only the ship and its cargo, but their own lives (The Gate City, 90 Fed. 314-317); and, for like reason, the lamps upon the vessel should not be quickly condemned, as it is not probable that the vessel owner would have used an inefficient appliance of this importance to the existence of his property." The Richmond, 114 Fed. 208; Brigham v. Luckenbach, 140 Fed. 322. The positive testimony of witnesses whose duty it was to see lights on a vessel (there being nothing to intercept their vision) that there were no lights, is not overcome by evidence showing that such vessel had a light twenty or thirty minutes before the collision occurred, it not being shown to have been burning thereafter. The John H. Starin, 122 Fed. 236, 58 C. C. A. 600; The Maggie Ellen, 120 Fed. 662, 57 C. C. A. 124.

State of weather. — The pleadings in the case and the observations of witnesses, taken on the water, are better evidence of the velocity of the wind and the condition of the sea than the record of the weather bureau as to the wind, the observations being made several miles away and at a considerable elevation. The Winnie, 137 Fed. 166.

Delay in making a claim for damages may be very persuasive as to the non-existence of negligence on the part of the libeled vessel. The New York, 109 Fed. 909.

Vessel struck from behind. — The fact that a vessel was struck by a vessel moving from behind against her goes far to create a preponderance of evidence and to solve the difficulty raised by conflicting testimony. The Rebecca, 122 Fed. 619, 60 C. C. A. 251.

Observations in line of duty. — The testimony as to what a man has seen in the course of the performance of his duty will outweigh that of a witness who was not chargeable with any duty in the premises. Brigham v. Luckenbach, 140 Fed. 322; The Maggie Ellen, 120 Fed. 662, 57 C. C. A. 124.

337-30 Improbability of fact testified to. — Great weight may fairly be given to the improbability that a vessel, whose master knows she was being overtaken by a vessel, in such a position that she cannot help but know she is herself overtaking, should improperly change his course when, under the plain text of the rule, no new navigation on her part was called for, and all she had to do was to keep her course and let all overtaking vessels keep out of her way. The Nathan Hale, 113 Fed. 865, 51 C. C. A. 489. If all the evidence cannot be true, that will be rejected which was most liable to error and the elimination of which will make the harmonizing of the remainder most easy. The Helen G. Moseley, 128 Fed. 402, 63 C. C. A. 144.

337-33 The Dauntless, 129 Fed. 715, 64 C. C. A. 243.

337-35 Brigham v. Luckenbach, 140 Fed. 322; The Alabama, 114 Fed. 214; The Volunteer, 149 Fed. 723, 79 C. C. A. 429; The Fin Mac Cool, 147 Fed. 123, 77 C. C. A. 349; The Martha E. Wallace, 148 Fed. 94; The Richmond, 114 Fed. 208.

338-38 Absence of testimony. When the testimony is in conflict the failure of the vessel, against which the weight of evidence exists, to produce all its officers and crew informed of the circumstances weakens its case. The Georgetown, 135 Fed. 854; The Gladys, 135 Fed. 601; The New York, 175 U. S. 187.

338-39 Effect of experiments. Testimony as to the result of experiments conducted without notice to the opposing party and under conditions different from those existing when the collision occurred, will be received with the greatest caution, if at all. The Richmond, 114 Fed. 208.

Cost of repairs. — The cost of repairs is proved by prima facie testimony that they were rendered necessary by reason of the collision, that they were made, and at the lowest price, and the testimony of the ship's agents that they had paid the bills. The Bratsberg, 127 Fed. 1005.

338-45 Circumstantial evidence of seaworthiness, if strong and sufficient when considered in connection with the other testimony, will sustain a finding in favor of the vessel. The Wilderoft, 130 Fed. 521, 65 C. C. A. 145.

341-64 Baton Rouge P. Co. v. George, 128 Fed. 914, 63 C. C. A. 640.

341-66 Perriam v. Coast Co., 133 Fed. 140, 66 C. C. A. 206; Hume v. Spreckels Co., 115 Fed. 51, 52 C. C. A. 645; The Eliza Strong, 130 Fed. 99, 64 C. C. A. 433.

If an allowance deviates from the current of authority or is based upon a misapprehension of the facts, it will be readjusted. The Edith L. Allen, 129 Fed. 209, 63 C. C. A. 367; The Flottbek, 118 Fed. 954, 55 C. C. A. 448.

342-71 Trial de novo in circuit court of appeals. — The rule stated in the text for note 71 applies though some of the parties do not join in the appeal (The San Rafael, 141 Fed. 270, 72 C. C. A. 388), and where the finding below rests upon the alleged preponderance of the evidence. The Fin Mac Cool, 147 Fed. 123, 77 C. C. A. 349.

342-77 Only such evidence as is made a part of the bill of exceptions will be considered. The Wyandotte, 145 Fed. 321, 75 C. C. A. 117.

343-79 New evidence may be taken in a personal injury case growing out of a collision. The Homer, 109 Fed. 572, 48 C. C. A. 465.

344-83 The practice of applying for leave to take additional testimony, disapproved. Pacific S. W. Co. v. Grismore, 117 Fed. 68, 54 C. C. A. 454.

344-88 The Ferguson, 153 Fed. 366.

345-89 Gaffner v. Pigott, 116 Fed. 486, 54 C. C. A. 641.

345-91 The Volunteer, 149 Fed. 723, 79 C. C. A. 429; Coastwise T. Co. v. Packet Co., 148 Fed. 837, 78 C. C. A. 527; The Inca, 148 Fed. 363, 78 C. C. A. 273; The Edward Smith, 135 Fed. 32, 67 C. C. A. 506; Perriam v. Coast Co., 133 Fed. 140, 66 C. C. A. 206; Jameson v. Lewis, 131 Fed. 728, 65 C. C. A. 586; The Oscar B., 121 Fed. 978, 58 C. C. A. 316; Baker-W. C. Co. v. Nav. Co., 120 Fed. 247, 56 C. C. A. 83; Alaska P. Assn. v. Domenico, 117 Fed. 99, 54 C. C. A. 485; Paauhau S. P. Co. v. Palapala, 127 Fed. 920, 62 C. C. A. 552; Appeal of Cahill, 124 Fed. 63, 59 C. C. A. 519; Memphis & N. P. Co. v. Hill, 122 Fed. 246, 58 C. C. A. 610; Jacobsen v. Expedition Co., 112 Fed. 73, 50 C. C. A. 121.

Decision of lower court. — The trial judge will not be reversed though the testimony was evenly balanced (The Asher J. Hudson, 154 Fed. 354), and the reviewing court is in doubt about the finding, (The Wallace B. Flint, 130 Fed. 338, 64 C. C. A. 584); nor will his action in discrediting testimony be interfered with. The Fontana, 119 Fed. 853, 56 C. C. A. 365. If a finding has been concurred in by two courts it will ordinarily be sustained though the substantial part of the testimony was not given orally in court. Wilder's S. S. Co. v. Low, 112 Fed. 161, 50 C. C. A. 473. But if the trial judge saw none of the witnesses and there is a conflict in the evidence the entire record will be examined. Lazarus v. Barber, 136 Fed. 534, 69 C. C. A. 310; Paauhau S. P. Co. v. Palapala, 127 Fed. 920, 62 C. C. A. 552. There is less than the usual reason for adhering to his findings where the case was heard and decided years after the testimony was taken, and especially so if he fell into a misapprehension of the charge made in the libel and the trend of the proof. Mitchell T. Co. v. Green, 120 Fed. 49, 56 C. C. A. 455.

345-92 The Svealand, 136 Fed. 109, 69 C. C. A. 97.

345-94 **Rehearing.** — Leave will not be given to introduce new evidence after a decree where it might have been introduced originally, or means or knowledge of its existence was within the reach of the party. Merchants B. Co. v. Cargo, 134 Fed. 727, 67 C. C. A. 618; Kenney v. Blake, 125 Fed. 672, 60 C. C. A. 362; The McDonald, 112 Fed. 681, 50 C. C. A. 423.

ADMISSIONS [Vol. 1.]

357-1 **Definition.** — The expression of an opinion, without actual knowledge to support it, is not an admission. Aschenbach v. Keene, 46 Misc. 600, 92 N. Y. S. 764.

357-2 **The admissibility** of confessions and admissions is determinable upon the same principles; but a broad distinction lies in their weight and effect as testimony. Shelton v. S., 144 Ala. 106, 42 S. 30.

The admission of a fact, not in itself involving criminal intent, is not a confession, as that we had to kill deceased to save ourselves; it is rather a claim of justification. Owens v. S., 120 Ga. 296, 48 S. E. 21. From such an admission no presumption arises that the homicide was murder. Perkins v. S., 124 Ga. 6, 52 S. E. 17.

357-3 **Testimony given under process.** — The fact that testimony given a grand jury was in obedience to process will not render admissions therein involuntary, and they, if of an exculpatory nature, may be proved against accused. S. v. Campbell, 73 Kan. 688, 85 P. 784; S. v. Finch, 71 Kan. 793, 81 P. 494. One who testifies merely as a witness, and not as a party, does so subject to the liability of having his testimony subsequently used against him on his trial for the offense concerning which he testified on the inquest. P. v. Molineaux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. To a similar purport are Wilson v. S., 110 Ala. 1, 20 S. 415, 55 Am. St. 17; Jones v. S., 120 Ala. 303, 25 S. 204. *Contra,* S. v. Young, 119 Mo. 495, 24 S. W. 1038; S. v. O'Brien, 18 Mont. 1, 43 P. 1091, 44 P. 399; if he testified at his own request and was informed of the consequence. S. v. Simpson, 133 N. C. 676, 45 S. E. 567. The same condition has been held applicable to voluntary statements made out of court. S. v. Inman, 70 Kan. 894, 79 P. 162.

Formal caution essential. — S. v. Parker, 132 N. C. 1014, 43 S. E. 830.

360-11 Leroy P. Co. v. Van Evra, 94 Ill. App. 356.

Direct admissions competent though they show the commission of another crime than that in question. S. v. Poole, 42 Wash. 192, 84 P. 727.

360-12 Robb v. Hewitt, 39 Neb. 217, 58 N. W. 88; Gatzemeyer v. Peterson, 68 Neb. 832, 94 N. W. 974; Till v. S. (Wis.), 111 N. W. 1109.

Examples. — A statement in a motion that a party had become a nonresident since the suit was commenced admits prior residence. Fidelity & C. Co. v. Brown, 4 Ind. Ter. 397, 69 S. W. 915.

Killing a dog which, to the knowledge of the owner, had been charged with killing sheep, is a provable admission. Anderson v. Halverson, 126 Ia. 125, 101 N. W. 781.

A donee of land who recognizes in the widow of his childless donor the right to be endowed with one-half of the latter's lands impliedly admits title in the donor at the time of his death. Coberly v. Coberly, 189 Mo. 1, 87 S. W. 957.

Order of proof of indirect admissions is in the discretion of the state. Till v. S. (Wis.), 111 N. W. 1109.

361-13 **Construction of, implied.** Where a wife charged her husband with the commission of a homicide, and he replied that the person named by her was not hurt much, his statement was susceptible of the construction that he did the killing. Knight v. S., 114 Ga. 48, 39 S. E. 928.

362-14 **Admissions of a man and a woman** that they are married are competent evidence of the fact when made against their interest. C. v. Haylow, 17 Pa. Super. 541.

One who acts as executor admits that the property devised belonged

to the testator. Sullivan v. R. Co., 128 Ala. 77, 30 S. 528.

362-15 John v. S., 5 Ohio C. C. (N. S.) 200.

362-16 Tapp v. Dibrell, 134 N. C. 546, 47 S. E. 51.

363-18 Mashburn v. Dannenberg Co., 117 Ga. 567, 44 S. E. 97; Payton v. Mills Co., 28 Ky. L. R. 1303, 91 S. W. 719; Boyer v. R. Co., 97 Tex. 107, 76 S. W. 441.

Distinction between real and personal property as valued for taxation. — "It has been held that a schedule of the quality, quantity and value of personal property is competent evidence against the owner on the question of value; but the reason for such holding is based upon the fact that the owner of personal property is required by law to list and place a valuation on it. There is no such requirement with reference to real estate. The assessor is required to personally or by his deputy actually view, determine and fix the valuation of real estate for taxation. In no sense, then, is the valuation of land for taxable purposes an admission by the owner." Lewis v. R. Co., 223 Ill. 223, 79 N. E. 44. See "VALUE."

May show that assessor valued property. — If the oath is not to the valuation, but only to the correctness of the property listed, it may be shown that the assessor placed the valuation on the property. Boyer v. R. Co., 97 Tex. 107, 76 S. W. 441.

Tax returns are competent as showing the size of the tract of land claimed by the person who made them. Ivey v. Cowart, 124 Ga. 159, 52 S. E. 436.

Making a statement of land owned is in the nature of an admission that land not included was not that of the person who made the statement. Field v. Field (Tex. Civ.), 87 S. W. 726.

364-19 Nowack v. R. Co., 166 N. Y. 433, 60 N. E. 32.

Authorities collected. — "The leading authority in support of such evidence is an English case, decided after careful argument by counsel and upon full discussion by the judges. Moriarty v. R. Co., L. R. 5 Q. B. 314. It is also sustained by the cases in this state relating to the subject, some with and some without discussion. Cruikshank v. Gordon, 118 N. Y. 178, 187, 23 N. E. 457; Gray v. R. Co., 165 N. Y. 457, 59 N. E. 262; Mather v. Parsons, 32 Hun 338; Gulerette v. McKinley, 27 Hun 320; Adams v. P., 9 Hun 89. It is received even in criminal actions. P. v. Rathbun, 21 Wend. 509; Gardiner v. P., 6 Parker Cr. 155, 205; Donohue v. P., 56 N. Y. 208. The same rule prevails in other states, without exception, so far as we have been able to discover. Egan v. Bowker, 5 Allen 449; S. v. Nocton, 121 Mo. 537, 551, 26 S. W. 551; Heslop v. Heslop, 82 Pa. 537; Snell v. Bray, 56 Wis. 156, 162, 14 N. W. 14; Lyons v. Lawrence, 12 Ill. App. 531; P. v. Marion, 29 Mich. 31; C. v. Webster, 5 Cush. (Mass.) 295, 316." Nowack v. R. Co., 166 N. Y. 433, 60 N. E. 32.

Effect of attempt to suppress evidence. — The rule is that an attempt to suppress evidence is an admission that it is deemed unfavorable to the party suppressing it; but an attempt to keep an adverse witness from testifying is not an admission that the party is making an unjust or a false claim. Harrison v. Harrison, 124 Ia. 525, 100 N. W. 344.

The suppression of documents is not an admission that they would prove what is claimed. Stout v. Sands, 56 W. Va. 663, 49 S. E. 428.

364-20 S. v. Smith, 72 Vt. 366, 48 A. 647.

The conduct of a party to a suit indicating belief in the weakness of his cause is in the nature of an admission, especially if resort be had to falsehood. Neece v. Neece, 104 Va. 343, 51 S. E. 739.

365-22 Houston v. R. Co., 204 Pa. 321, 54 A. 166.

The refusal to sell property at a given price is in the nature of an admission that the owner considers it of value. Conyngham v. Baldwin, 120 Fed. 500, 56 C. C. A. 650.

365-25 King v. Franklin (Ala.), 31 S. 467; Sibley v. Nason (Mass.), 81 N. E. 887 (report to insurer); Perkins v. Rice, 187 Mass. 28, 72 N. E. 323 (existence of policy competent to show that a person was in control of property); Anderson v. Duckworth, 162 Mass. 251, 38 N. E. 510 (making repairs on property by

person who denied ownership); Pecos v. R. Co., 35 Tex. Civ. 659, 80 S. W. 867; St. Louis R. Co. v. Smith, 33 Tex. Civ. 520, 77 S. W. 28; Western U. v. Stubbs (Tex. Civ.), 94 S. W. 1083; Gulf etc. R. Co. v. Combes (Tex. Civ.), 80 S. W. 1045; South C. etc. R. Co. v. McHugh, 25 Ky. L. R. 1112, 77 S. W. 202 (verified claim for damages admission as to party liable and as to extent of loss); Snow v. R. Co., 185 Mass. 321, 70 N. E. 205 (genuineness and extent of alleged injury).

Illustrations. — A tender admits indebtedness pro tanto and the validity of the demand. Cameron v. Campbell, 141 Fed. 32, 71 C. C. A. 520; Hopkins v. Rodgers, 91 N. Y. S. 749. A statement of account made by direction and approved is an admission (Rand v. Whipple, 71 App. Div. 62, 75 N. Y. S. 740), and if rendered by the vendee is conclusive as to the price of the items specified, though a counter demand of the vendor was disputed. Ketchum v. Mill Co., 33 Wash. 92, 73 P. 1127. The price for which a part of one's land sold is an admission as to the value of the part unsold (Houston v. R. Co., 204 Pa. 321, 54 A. 166), though the sale was void because made by parol. Griseza v. Terwilliger, 144 Cal. 456, 77 P. 1034. Failure to claim a credit may be regarded in determining whether or not payment was made. Ogden v. W. O. W. (Neb.), 113 N. W. 524). Acting as executor and reviving a suit begun by the testator and joining the heirs is an admission that the property involved was owned by the testator. Sullivan v. R. Co., 128 Ala. 77, 30 S. 528. A conspiracy of the heirs to deprive grantees of land may be shown as an admission of the existence of a deed. Chew v. Jackson (Tex. Civ.), 102 S. W. 427. Fraudulent entries in the books of a public officer are admissions. Culver v. Caldwell, 137 Ala. 125, 34 S. 13. It may be shown that a person accused or suspected of committing a crime attempted to escape or avoid arrest (Graham v. S., 125 Ga. 48, 53 S. E. 816; Grant v. S., 122 Ga. 740, 50 S. E. 946; S. v. Williams, 118 Ia. 494, 92 N. W. 652; S. v. Matheson, 130 Ia. 440, 103 N. W. 137; S. v. Stewart, 65 Kan. 371, 69 P. 335; S. v. Kesner, 72 Kan. 87, 82 P. 720); that he offered to pay the value of the property stolen (Seaborn v. S. (Tex. Civ.), 90 S. W. 649), and intentionally made false statements respecting material matters. C. v. Devaney, 182 Mass. 33, 64 N. E. 402. An employer does not admit his negligence toward his employes by insuring himself against liability for injuries to them (Rupp v. Shaffer, 21 Ohio C. C. 643; Manley v. Paint Co., 76 Minn. 169, 78 N. W. 1050), nor by furnishing aid to one injured. Sias v. Light. Co., 73 Vt. 35, 50 A. 554. Making a reduction from the contract price for work is not an admission going to the sufficiency of the plans according to which the work was done. Watson v. Bigelow Co., 77 Conn. 124, 58 A. 741.

In the absence of proof as to who paid the local lodge dues for which a deceased member was liable, an offer to repay the sum, made after suit brought, is not an admission of the receipt of the money by the society. National C. v. Dillon, 212 Ill. 320, 72 N. E. 367.

A letter written concerning payment of an indebtedness for an article which contains no complaint concerning it is admissible. Hansen v. Wayer, 101 Ill. App. 212.

The officer who arrested a person accused of uttering a forged check and observed his acts may testify thereof and of his declarations. C. v. Bond, 188 Mass. 91, 74 N. E. 293.

It may be shown that one claiming to be the principal of another drew upon him for the price of goods consigned. Northern Mfg. Co. v. Wagner, 108 Wis. 584, 84 N. W. 894.

In an action of book account the defendant concedes the correctness of the charges by crediting the plaintiff with the amount thereof under a plea in offset. Cameron v. Estabrooks, 73 Vt. 73, 50 A. 638.

Remedying cause of injury. — See "NEGLIGENCE," Vol. 8, p. 914, et seq.

Precautionary measures to prevent harm. — It may be shown that prior to the infliction of an injury steps were taken to remedy the defect which caused it; doing so is an admission that ordinary care required

it. Mount Morris v. Kanode, 98 Ill. App. 373; Chicago R. Co. v. Eaton, 194 Ill. 441, 62 N. E. 784.

Remoteness of conduct. — The conduct sought to be proved must not be so remote or apparently disconnected with the matter under investigation as to create a strong probability that it is the result of other motives than a consciousness of guilt. Grant v. S., 122 Ga. 740, 50 S. E. 946.

367-27 Parulo v. R. Co., 145 Fed. 664; Bashore v. Mooney, 4 Cal. App. 276, 87 P. 553; Holston v. R. Co., 116 Ga. 656, 43 S. E. 29; Clark v. S., 117 Ga. 254, 43 S. E. 853; McElroy v. S., 125 Ga. 37, 53 S. E. 759; Chicago R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28; Pritchett v. Sheridan, 29 Ind. App. 81, 63 N. E. 865; Masons' Assn. v. Brockman, 26 Ind. App. 182, 59 N. E. 401; Springer v. Byram, 137 Ind. 15, 36 N. E. 361, 23 L. R. A. 244; Givens v. R. Co., 24 Ky. L. R. 1796, 72 S. W. 320; C. v. Dewhirst, 190 Mass. 293, 76 N. E. 1052; Sumner v. Gardiner, 184 Mass. 433, 68 N. E. 850; C. v. O'Brien, 179 Mass. 533, 61 N. E. 213; S. v. Quirk, 101 Minn. 334, 112 N. W. 409; Bathke v. Krassin, 82 Minn. 226, 84 N. W. 796; Horan v. Byrnes, 72 N. H. 93, 54 A. 945; Stecher L. Co. v. Inman, 175 N. Y. 124, 67 N. E. 213, 67 App. Div. 625, 74 N. Y. S. 1147; Schilling v. R. Co., 77 App. Div. 74, 78 N. Y. S. 1015; P. v. Koerner, 154 N. Y. 355, 48 N. E. 730; Virginia-C. C. Co. v. Kirven, 130 N. C. 161, 41 S. E. 1; John v. S., 5 Ohio C. C. (N. S.) 200; S. v. Sudduth, 74 S. C. 498, 54 S. E. 1013; S. v. Major, 70 S. C. 387, 50 S. E. 13; S. v. Mortensen, 26 Utah 312, 73 P. 562, 633; S. v. Smith, 72 Vt. 366, 48 A. 647.

Evidence of silence to be received with caution. — The maxim qui tacet, consentire videtur is to be applied with careful discrimination, and admissions inferred from acquiescence in the verbal statements of others should always be received with caution, and never ought to be received at all unless the evidence is of direct declarations of the kind which naturally calls for contradiction. It would be carrying the rule very far to hold that the silence of a frightened woman to the maudlin statement of a drunken man was an implied admission of the truth thereof. Joiner v. S., 129 Ga. 295, 58 S. E. 859. Evidence of silent acquiescence is of a dangerous character, and must be received with great caution. Phelan v. S., 114 Tenn. 483, 88 S. W. 1040.

Discrediting witness by proof of silence. — See Thompson v. Mecosta, 141 Mich. 175, 104 N. W. 694. See "Impeachment of Witnesses," Vol. 7, pp. 1, 152, et seq.

Silence not equivalent to a confession. — S. v. Edwards, 13 S. C. 30.

Non-production of book of accounts. An admission that the defendant had received from the plaintiff's decedent the sum of money sued for, and the failure to produce any book in which it was charged, tends to show that the delivery of such money did not create a debt. Blaisdell v. Davis, 72 Vt. 295, 48 A. 14.

Silence of person under arrest. — It is said in a late case that perhaps the weight of authority in this country is with those courts which hold that the mere fact of arrest is sufficient to render a statement made in the presence of the prisoner, to which he makes no reply, incompetent evidence for the reason that no assent can be presumed under such circumstances, and that the very surroundings of the accused in such cases are such as to render it entirely proper and natural for him to keep silent in the fear of misquotation or misconstruction. O'Hearn v. S. (Neb.), 113 N. W. 130, *cit.* C. v. Kenney, 12 Met. (Mass.) 235, 46 Am. Dec. 672; C. v. Walker, 13 Allen (Mass.) 570; C. v. Brailey, 134 Mass. 527, and referring to Merriweather v. C., 118 Ky. 870, 82 S. W. 592; S. v. Young, 99 Mo. 666, 12 S. W. 879; S. v. Weaver, 57 Iowa 730, 11 N. W. 675. A contrary doctrine, it is said, seems to find support in Kelley v. P., 55 N. Y. 565, 14 Am. Rep. 342, and in Murphy v. S., 36 Ohio St. 628. The former case, however, has been somewhat weakened as authority in that state by P. v. Smith, 172 N. Y. 210, 64 N. E. 814, in which it is said: Moreover, he was at the time under arrest and in the custody of an officer, and might well have been

silent without it being regarded as an acquiescence in any act proved to have been performed. To the same effect as the Nebraska case are Jackson v. C., 100 Ky. 239, 38 S. W. 422, 1091, 66 Am. St. 336; Porter v. C. (Ky.), 61 S. W. 16.

Silence of one accused; statement by associate. — A declaration made by one person connected with a crime committed jointly, in the presence of others so connected and a person not implicated, calls upon the others to make denial of it if it was false. Davis v. S., 114 Ga. 104, 39 S. E. 906.

371-32 **Incompetency of wife.** The rule stated in the text applies to a conversation overheard by a third person, though the wife is not competent to explain or deny her part therein on the trial against her husband. Ford v. S., 124 Ga. 793, 53 S. E. 335; Knight v. S., 114 Ga. 48, 39 S. E. 928.

Prosecution for wife beating. — The rule as stated applies on the trial of a husband for beating his wife, although she declines to testify against him. Joiner v. S., 119 Ga. 315, 46 S. E. 412.

Silence of wife in husbands presence. — A wife does not admit that her husband was not indebted to her by remaining silent when he said he was not indebted, at least as against those who became his creditors more than one year later. Paul v. Kunz, 188 Pa. 504, 41 A. 610; Thomas v. Butler, 24 Pa. Super. 305.

373-36 Jackson v. Drake, 37 Can. Sup. 315; McNamara v. Douglas, 78 Conn. 219, 61 A. 368; Givens v. Coal Co., 22 Ky. L. R. 1217, 60 S. W. 304; Blanding v. Cohen, 101 App. Div. 442, 92 N. Y. S. 93.

375-37 Matthews v. Farrell, 140 Ala. 298, 37 S. 325; Baker v. Haynes, 146 Ala. 520, 40 S. 968.

Mere denial of the amount is an admission of the receipt of the goods. Montgomery v. Pfluger, 3 Haw. 388.

Objection to account and retention of money paid. — One who objects to an account sent him because it is not in accordance with the contract of sale may retain money sent him on account of the contract, though it purported to be in full payment. Robinson v. Tie & L. Co., 120 Ga. 901, 48 S. E. 380.

Failure to assert claim. — Failure to assert a claim at a proper time and place is some evidence of an admission inconsistent with a claim subsequently made. Nichols v. New Britain, 77 Conn. 695, 60 A. 655; Tripp v. Macomber, 187 Mass. 109, 72 N. E. 361.

Failure to examine books of account. Though a member of a partnership may never have seen a balance sheet nor had occasion to look at the books, if he has had access to them he cannot object to any charges therein against him as between himself and co-partners. Turner v. Turner, 98 Md. 22, 55 A. 1023 (sub. nom., Safe Dep. v. Turner, 98 Md. 22, 55 A. 1023).

375-40 O'Hearn v. S. (Neb.), 113 N. W. 130.

376-42 Parulo v. R. Co., 145 Fed. 664; Eaton v. C., 28 Ky. L. R. 906, 90 S. W. 972; Stecher L. Co. v. Inman, 175 N. Y. 124, 67 N. E. 213, 67 App. Div. 625, 74 N. Y. S. 1147; P. v. Koerner, 154 N. Y. 355, 48 N. E. 730; Phelan v. S., 114 Tenn. 483, 88 S. W. 1040; S. v. Baruth (Wash.), 91 P. 977; McCord v. Elec. Co. (Wash.), 89 P. 491.

Party injured. — A party seriously injured and suffering from shock, though conscious, is not bound to give heed to every remark made in his presence relating to the occurrence which produced his condition. Schilling v. R. Co., 77 App. Div. 74, 78 N. Y. S. 1015. *Compare* Holston v. R. Co., 116 Ga. 656, 43 S. E. 29; Givens v. R. Co., 24 Ky. L. R. 1796, 72 S. W. 320.

Doubt about hearing. — If it is doubtful whether the accused heard a statement concerning his action, proof of it may be received and the jury instructed to disregard it if they believe it was not heard. Knight v. S., 114 Ga. 48, 39 S. E. 928. Where a party is near enough to hear, it is almost a necessary inference that he did hear. Virginia-C. C. Co. v. Kirven, 130 N. C. 161, 41 S. E. 1.

Conclusion that statement was heard. — A witness may not testify that he thought his statements were heard by another who was not a

party to the conversation. Urdangen v. Doner, 122 Ia. 533, 98 N. W. 317.

376-43 Eaton v. C., 28 Ky. L. R. 906, 90 S. W. 972; Stecher v. Inman, 175 N. Y. 124, 67 N. E. 213, 67 App. Div. 625, 74 N. Y. S. 1147.

Silence of guest. — A guest on an automobile ride is not in a position to give orders as to the movement of the machine, or to dissent from orders given by his host. Routledge v. Auto. Co. (Tex. Civ.), 95 S. W. 749.

376-45 Joiner v. S., 129 Ga. 295, 58 S. E. 859; Stevens v. S., 118 Ga. 806, 45 S. E. 615; P. v. Koerner, 154 N. Y. 355, 48 N. E. 730; Virginia-C. C. Co. v. Kirven, 130 N. C. 161, 41 S. E. 1; Pond v. Pond, 79 Vt. 352, 65 A. 97; S. v. Baruth (Wash.), 91 P. 977.

Calling for an answer. — The mere fact that a statement is read to an accused person does not make it incumbent on him to answer. P. v. Young, 72 App. Div. 9, 76 N. Y. S. 275.

Question of law whether reply required. — Whether the circumstances were such as to call for a reply is a preliminary question for the court. Parulo v. R. Co., 145 Fed. 664; Pierce v. Pierce, 66 Vt. 369, 29 A. 364; P. v. Mallon, 103 Cal. 513, 37 P. 512; Schilling v. R. Co., 77 App. Div. 74, 78 N. Y. S. 1015.

377-46 Silence of administrator. An administrator, if without prior knowledge of any item of the plaintiff's claim against the estate, is not bound to object to a statement made by plaintiff concerning it. Davis v. Gallagher, 124 N. Y. 487, 26 N. E. 1045.

377-47 S. v. Baruth (Wash.), 91 P. 977.

Silence in court. — One is not bound to contradict the testimony of a witness unless he is called as a witness or heard the testimony; and if it was heard it need not be contradicted unless it was material to the issue being tried against the person sought to be affected by the silence. Thayer v. Usher, 98 Me. 468, 57 A. 839 (*disting.* Blanchard v. Hodgkins, 62 Me. 119, on the ground that the defendant there was called as a witness and the testimony he failed to deny was material). To the same effect as the principal case is Caseday v. Lindstrom, 44 Or. 309, 75 P. 222; and it need not be contradicted if the person who heard it is called as a witness. Leggett v. Schwab, 111 App. Div. 341, 97 N. Y. S. 805; C. v. Burton, 183 Mass. 461, 67 N. E. 419. The fact that the witness did not deny the statement when made in her presence at a former trial was incompetent as tending to establish the falsity of her testimony. 1 Greenl. Ev., § 198, note; Melen v. Andrews, Moo. & M. (Eng.) 336, 31 R. R. 736; C. v. Kenney, 12 Met. (Mass.) 235; Blackwell v. McElwee, 96 N. C. 71, 1 S. E. 676, 60 Am. Rep. 404; Broyles v. S., 47 Ind. 251. The suggestion in Blanchard v. Hopkins, 62 Me. 119, that the rule is changed by the admission of the parties to testify is not sustained by the reasons for the exclusion or the modern authorities. Horan v. Byrnes, 72 N. H. 93, 54 A. 945. But in Illinois a party who fails to contradict the testimony of the other party to a suit on a vital point in issue practically admits the truth of such testimony. Muetzy v. Procasky, 126 Ill. App. 589.

Rule does not include conclusions. A person is not bound to reply to conclusions stated by another. Saunders v. R. Co., 99 Tenn. 130, 41 S. W. 1031.

378-49 Biggs v. Stueler, 93 Md. 100, 48 A. 727; Parker v. Ins. Co., 188 Mass. 257, 74 N. E. 286; State Bk. v. McCabe, 135 Mich. 479, 98 N. W. 20; Thomas v. Gage, 141 N. Y. 506, 36 N. E. 385; Irwin v. Buffalo Co., 39 Wash. 346, 81 P. 849.

379-52 Failure to answer letter. When a party who has received a letter stating the terms and conditions upon and purpose for which a check was sent does not refuse to accept the check or object to the statements, both check and letter are evidence of admissions. St. Joseph H. Co. v. Paper Co., 156 Ind. 665, 59 N. E. 995. It is said in the opinion: "When the party receiving the letter has in any way invited the same, or when there is any ground to infer that he acted on the letter, by partially answering or otherwise recog-

nizing the same, or when with such letter goods or other articles are forwarded with bills, and received without return or protest, unanswered letters are competent evidence of admissions by acquiescence." Fenno v. Weston, 31 Vt. 345; Gaskill v. Skene, 14 Ad. & El. (N. S.) 664, 68 E. C. L. 664; Gore v. Hansey, 3 F. & F. (Eng.) 509; Lucy v. Mouflet, 5 Hurl. & N. (Eng.) 228; Roe v. Day, 7 Car. & P. (Eng.) 705; Hayes v. Kelley, 116 Mass. 300; Sturtevant v. Wallack, 141 Mass. 119, 4 N. E. 615; Wiggins v. Burkham, 10 Wall. (U. S.) 129; 2 Whart. on Ev. (3d ed.) § 1154. One who knows that a party holds a note purporting to be signed by him must not remain silent when asked by letter if the signature thereto is genuine. Harmon v. Leberman (Tex. Civ.), 87 S. W. 203.

Promise to act. — The silence of a party who has promised to act and to whom letters have been written may be regarded as an admission that he understood the contract as did the other party. Murray v. Imp. Co., 22 Ky. L. R. 1477, 60 S. W. 648.

380-54 Foster v. Hobson, 131 Ia. 58, 107 N. W. 1101; McKnight v. Gin Co. (Tex. Civ.), 99 S. W. 198.

382-60 See infra, 610-60, et seq.

The reason for remaining silent may be explained. Cable v. Bowlus, 21 Ohio C. C. 53.

382-61 Conyngham v. Baldwin, 120 Fed. 500, 56 C. C. A. 650; South C. etc. R. Co. v. McHugh, 25 Ky. L. R. 1112, 77 S. W. 202; S. v. Quirk, 101 Minn. 334, 112 N. W. 409; S. v. Sudduth, 74 S. C. 498, 54 S. E. 1013; Phelan v. S., 114 Tenn. 483, 88 S. W. 1040.

383-62 Edwards v. Bates, 117 Fed. 526; Board v. Bank, 108 Fed. 505, 47 C. C. A. 464; Hartsell v. Masterson, 132 Ala. 275, 31 S. 616; Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916; Hayden v. Collins, 1 Cal. App. 259, 81 P. 1120; So. R. Co. v. Allison, 115 Ga. 635, 42 S. E. 15; Paulo v. Malo, 6 Haw. 390; Frike v. Orr, 109 Ill. App. 200; Breiner v. Nugent (Ia.), 111 N. W. 446; Shelbyville v. McDade, 29 Ky. L. R. 119, 92 S. W. 568; Marks v. Hardy, 117 Ky. 663, 78 S. W. 864, 1105; Skidmore v. Smith, 27 Ky. L. R. 323, 84 S. W. 1163; Hutchinson v. Nay, 183 Mass. 355, 67 N. E. 601; Cooley v. Collins, 186 Mass. 507, 71 N. E. 979; Snyder v. Patton, 143 Mich. 350, 106 N. W. 1106; Vermilion v. Parsons, 107 Mo. App. 192, 80 S. W. 916; s. c., 101 Mo. App. 602, 73 S. W. 994; Wangner v. Grimm, 169 N. Y. 421, 62 N. E. 569; Wonsetler v. Wonsetler, 23 Pa. Super. 321; Lindsey v. White (Tex. Civ.), 61 S. W. 438; Over v. R. Co. (Tex. Civ.), 73 S. W. 535; Maffi v. Stephens (Tex. Civ.), 93 S. W. 158; Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320; Repass v. Richmond, 99 Va. 508, 39 S. E. 160; Manning v. School Dist., 124 Wis. 84, 102 N. W. 356.

Admission of marriage may be against interest. Seibert's Estate, 1 Pa. C. C. 229.

Self-serving statements by decedent. It is immaterial, according to one court, that such statements were made by a person since deceased (Shaffer v. Gaynor, 117 N. C. 15, 23 S. E. 154), if not made in presence of the adverse party. Pym v. Pym, 118 Wis. 662, 96 N. W. 429.

386-65 Wonsetler v. Wonsetler, 23 Pa. Super. 321.

387-67 Detroit etc. Co. v. Applebaum, 132 Mich. 555, 94 N. W. 12; Craig v. Parret, 56 N. J. Eq. 848, 42 A. 1117.

390-75 Govin v. De Miranda, 140 N. Y. 474, 35 N. E. 626; Gallagher v. Brewster, 153 N. Y. 364, 47 N. E. 450.

Rendering a statement for services performed is an admission of the strongest character. Patterson v. Houston, 92 Ill. App. 624.

391-76 Stevens v. Gas & E. Co., 132 Ia. 597, 109 N. W. 1090.

392-77 Seitz v. Starks, 136 Mich. 90, 98 N. W. 852.

Unexecuted and undelivered contract not admissible to show who was real party in interest. United Press v. Abell Co., 79 App. Div. 550, 80 N. Y. S. 454, *aff.*, without opinion, 178 N. Y. 578, 70 N. E. 1110.

392-78 Morgan v. Tims (Tex. Civ.), 97 S. W. 832.

392-79 Miller v. Campbell, 13 Okla. 75, 74 P. 507.

392-80 Smith Bros. v. Miller

(Ala.), 44 S. 399; Hicks v. Mfg. Co., 68 App. Div. 134, 74 N. Y. S. 180.

392-81 Whatley v. S., 144 Ala. 68, 39 S. 1014; Wadleigh v. Phelps, 149 Cal. 627, 87 P. 93; Brooke v. Lowe, 122 Ga. 358, 50 S. E. 146; Hansen v. Wayer, 101 Ill. App. 212; Castner v. R. Co., 126 Ia. 581, 102 N. W. 499; Nichols-S. Co. v. Ringler (Ia.), 112 N. W. 543; Turner v. Turner, 98 Md. 22, 55 A. 1023; s. c. sub nom. Safe Dep. Co. v. Turner, 98 Md. 22, 55 A. 1023; Lambeck v. Stiefel, 71 N. J. L. 320, 59 A. 460; Chamberlain v. Iba. 181 N. Y. 486, 74 N. E. 481; Schreiner v. Kissock, 91 N. Y. S. 28; Lewis Pub. Co. v. Lenz, 86 App. Div. 451, 83 N. Y. S. 841; In re Peters, 20 Pa. Super. 223; Kaufman v. R. Co., 210 Pa. 440, 60 A. 2; McGaughey v. Bank (Tex. Civ.), 92 S. W. 1003; Bell v. Gund, 110 Wis. 271, 85 N. W. 1031.

Admission by letter. — One who replies to a letter written in a representative capacity by addressing the writer as an individual does not admit the existence of such capacity. Sullivan v. R. Co., 128 Ala. 77, 30 S. 528.

Authorship of letter must be proved. Brooke v. Lowe, 122 Ga. 358, 50 S. E. 146. See St. Louis R. Co. v. McIntyre, 36 Tex. Civ. 399, 82 S. W. 346.

Unmailed letter. — A self-charging admission does not lose all its evidential force because it is not transmitted or delivered to another. That which one admits to be true, whether in the privacy of his private journal or by a memorandum intended to aid his own memory, or only in a letter which he keeps, instead of transmitting to the one addressed, may reasonably be presumed to be true until explained or rebutted. Chadwick v. U. S., 141 Fed. 225, 72 C. C. A. 343; Medway v. U. S., 6 Ct. Cl. 421.

393-83 **The owner of property** may show that it was valued by the assessor. Boyer v. R. Co., 97 Tex. 107, 76 S. W. 441; Oldenburg v. Sugar Co., 39 Or. 564, 65 P. 869.

Tax returns as admissions concerning boundary line. — Ivey v. Cowart, 124 Ga. 159, 52 S. E. 436.

Tax returns as admission of assets. Mashburn & Co. v. Dannenberg Co., 117 Ga. 567, 44 S. E. 97.

Sworn statements of taxable property. Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597.

Assessed value of property. — The assessed value of property is an admission by its owner where he appeared before the authorities and asked a reduction, stating the cost of it, and the assessment was reduced accordingly. Gossage v. R. Co., 101 Md. 698, 61 A. 692.

Admissible on question of ownership of personalty when verified. Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895.

Unsworn return. — Burton L. Corp. v. Houston (Tex. Civ.), 101 S. W. 822.

395-84 Second Borrowers & I. B. Assn. v. Cochrane, 103 Ill. App. 29.

Conflicting admissions in books. See Oppermann B. Co. v. Pearson, 68 App. Div. 637, 74 N. Y. S. 187.

Entries in books of account need not be proved. — Entries in books and statements in reports of an officer to the corporation whose accounts he kept need not be proved in accordance with the usual requirements. Second Borrowers Assn. v. Cochrane, 103 Ill. App. 29.

395-85 Copeland v. Boston Co., 184 Mass. 207, 68 N. E. 218. See "ACCOUNTS, ACCOUNTING AND ACCOUNTS STATED," Vol. 1, p. 167, and that title, ante.

395-87 **Deed.** — A statement in a deed that it is a duplicate is an admission of the execution of the original. Hickory v. R. Co., 137 N. C. 189, 49 S. E. 202.

395-88 **Bill of lading conclusive.** In Georgia a carrier's receipt is, by statute, conclusive as to its statements concerning the condition of goods. Kavanaugh v. R. Co., 120 Ga. 62, 47 S. E. 526.

395-89 Martin v. Piano Co. (Ala.), 44 S. 112; Second Borrowers Assn. v. Cochrane, 103 Ill. App. 29; Southern Mfg. Co. v. Wagner (N. M.), 89 P. 259; Lynch v. Troxell, 207 Pa. 162, 56 A. 413.

Informal papers. — A memorandum in the handwriting of the deceased found upon his person after death was admitted as proof of his indebt-

edness. Toner v. Taggart, 5 Bin. (Pa.) 490.

Unreceipted bills found to have been in the possession of a person prior to his decease are not competent to show that such person assented to them. If they were receipted then, prima facie, there would be an admission that the goods charged for were the property of such person. Pleasanton v. Simmons, 2 Penne. (Del.) 477, 47 A. 697.

Other illustrations. — The rule given in the text applies to a minute book kept by a subordinate lodge and containing entries required by the superior body (Plattdeutsche Grot Gilde v. Ross, 117 Ill. App. 247); proofs of death made to insurer (Holleran v. Assur. Co., 18 Pa. Super. 573; Baldi v. Ins. Co., Id. 599); prices current sent by a factor to a customer (Weidner v. Olivit, 108 App. Div. 122, 96 N. Y. S. 37); I. O. U.'s (Lefevre v. Silo, 112 App. Div. 464, 98 N. Y. S. 321); a statement of assets made by the president of a corporation as against his claim of title to the property scheduled (Saginaw S. R. Co. v. Connelly, 146 Mich. 395, 109 N. W. 677); the values put by an agent on articles inventoried (Chicago T. & T. Co. v. Core, 223 Ill. 58, 79 N. E. 108); a forthcoming bond in attachment proceedings, at least where the property could be appraised if the obligee thought the value specified in the bond was excessive (Tingle v. Kelly (Ky.), 92 S. W. 303; the record of a stockholders' meeting and the schedule of creditors filed in pursuance of action taken thereat (Clarke v. Mfg. Co., 174 Mass. 434, 54 N. E. 887); naturalization record in a court of another state competent on the question of the eligibility of the person naturalized to hold office. S. v. McDonald, 108 Wis. 8, 84 N. W. 171.

395-90 Huggins v. R. Co. (Ala.), 41 S. 856; Home-R. Coal Co. v. Fores (Kan.), 67 P. 445; Pacific E. Co. v. Lumb. Co., 46 Or. 194, 80 P. 105; Morgan v. Tims (Tex. Civ.), 97 S. W. 832.

396-94 Southern etc. Co. v. Fuller, 116 Ga. 695, 43 S. E. 64; Chicago T. & T. Co. v. Core, 223 Ill. 58, 79 N. E. 108; Patterson v. Houston, 92 Ill. App. 624; Aetna L. Ins. Co. v. Pelham, 52 Misc. 658, 102 N. Y. S. 461; Kaufman v. R. Co., 210 Pa. 440, 60 A. 2; Peters' Estate, 20 Pa. Super. 223; Holleran v. Assur. Co., 18 Pa. Super. 573; Baldi v. Ins. Co., Id. 599; Lee v. Neumen, 15 S. D. 642, 91 N. W. 320.

Admission in proof of death. Statements in proof of death that insured, prior to the date of his application and three or four years before death by angina pectoris, had a mild attack of angina pectoris which was cured at that time, is not a conclusive admission that he had an incurable disease prior to the date of the policy. Baldi v. Ins. Co., 18 Pa. Super. 599; Rondinella v. Ins. Co., Id. 613.

Account for services. — In quantum meruit to recover for services the creditor is not concluded as to their value by the sum charged in his bill, neither tender nor payment being made. Shiland v. Loeb, 58 App. Div. 565, 69 N. Y. S. 11.

396-95 Fourth Nat. Bk. v. Albaugh, 188 U. S. 734; Brooks v. U. S., 146 Fed. 223, 76 C. C. A. 581; Moore v. Crosthwait, 135 Ala. 272, 33 S. 28; Story v. Nidiffer, 146 Cal. 549, 80 P. 692; P. v. Melandrez, 4 Cal. App. 396, 88 P. 372; Miller v. Kinsel, 20 Colo. App. 346, 78 P. 1075; Everett v. Hart, 20 Colo. App. 93, 77 P. 254; Central of Ga. R. Co. v. Mosely, 112 Ga. 914, 38 S. E. 350; Fitzgerald v. Coleman, 114 Ill. App. 25; Chicago R. Co. v. Henry, 218 Ill. 92, 75 N. E. 758; Bullard v. Bullard, 112 Ia. 423, 84 N. W. 513; Stacy v. C., 29 Ky. L. R. 1242, 97 S. W. 39; Sullivan v. Sullivan, 29 Ky. L. R. 239, 92 S. W. 966; Sherrard v. Cudney, 134 Mich. 200, 96 N. W. 15; Reiser v. Portere, 106 Mich. 102, 63 N. W. 1041; Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597; Richberger v. S. (Miss.), 44 S. 772; Meyer v. Spann (Miss.), 35 S. 177; Ogden v. W. O. W. (Neb.), 113 N. W. 524; Young v. Kinney (Neb.), 112 N. W. 558; Carlson v. Holm (Neb.), 95 N. W. 1125; McBlain v. Edgar, 65 N. J. L. 634, 48 A. 600; Stewart v. Gleason, 23 Pa. Super. 325; Wood v. S. (Tex. Cr.),

99 S. W. 1109; McKay v. Elder (Tex. Civ.), 92 S. W. 268; Over v. R. Co. (Tex. Civ.), 73 S. W. 535; Lewis v. England, 14 Wyo. 128, 82 P. 869.

What a party says may be evidence of an admission, whether it relates to the contents of a paper or to anything else. Cooley v. Collins, 186 Mass. 507, 71 N. E. 979.

Weight to be given. — An admission that a personal injury was the result of the injured party's negligence will not always release defendant from liability. Copley v. R. Co., 26 Utah 361, 73 P. 517.

Provable in actions for libel. — Admissions as to conduct made by the party claimed to have been libeled may be proved to establish the truth of the libel. Davis v. Hamilton, 88 Minn. 64, 92 N. W. 512, *cit.* Barkly v. Copeland, 74 Cal. 1, 15 P. 307, 5 Am. St. 413; Bullard v. Lambert, 40 Ala. 204.

Effect of evasive reply. — An evasive reply to a request to perform a duty and the failure to deny the existence of the duty is a virtual admission. Avery v. Stewart, 136 N. C. 426, 48 S. E. 775.

Need not be based upon knowledge. If admissions are made unqualifiedly it is immaterial that the party who made them had no personal knowledge of their truth. Reed v. McCord, 160 N. Y. 330, 54 N. E. 737.

Time of making. — Admissions made after the cause of action accrued may be proved. White v. White (Kan.), 90 P. 1087; Theophine v. Valchos, 53 Misc. 612, 103 N. Y. S. 776.

When must be made as to testamentary capacity. — Admissions as to the capacity of a testator must be made as of the time the will was executed unless they tend to prove that he was afflicted with permanent insanity. Gesell v. Baugher, 100 Md. 677, 60 A. 481.

Admission as to insanity of grantor. A grantee's admission of the insanity of a grantor may be testified to without giving the reasons on which his opinion rested. Stafford v. Tarter, 29 Ky. L. R. 1184, 96 S. W. 1127.

397-97 Proof of the corpus delicti. — Admissions made by an accused person cannot be shown until proof is made of every necessary element to show that the act was a crime. P. v. Grill, 3 Cal. App. 514, 86 P. 613; P. v. Frank, 2 Cal. App. 283, 83 P. 578.

A schedule in bankruptcy is admissible to show the insolvency of the party who made it. Fales v. Browning, 68 S. C. 13, 46 S. E. 545.

398-3 Manley v. McKenzie, 128 Ga. 347, 57 S. E. 705; Vizard v. Moody, 119 Ga. 918, 47 S. E. 348; Nicola Bros. Co. v. Hurst, 28 Ky. L. R. 87, 88 S. W. 1081; Palmer Transf. Co. v. Eaves, 27 Ky. L. R. 573, 85 S. W. 750; Harrison v. McReynolds, 183 Mo. 533, 82 S. W. 120; Leathers v. Tobacco Co., 144 N. C. 330, 57 S. E. 11; Williamson v. Bryan, 142 N. C. 81, 55 S. E. 77; Houston etc. R. Co. v. DeWalt, 96 Tex. 121, 70 S. W. 531, 97 Am. St. 877.

Admission by bringing action. Bringing an action against a foreign corporation is an admission that it was doing business in the jurisdiction in which the action was brought at the time thereof. So. R. Co. v. Mayes, 113 Fed. 84, 51 C. C. A. 70.

Extent of admission. — An admission that the paragraph of a complaint alleging that a copy of a protested check is hereto attached is true, admits the indorsement on the check. Wachstein v. Bank, 120 Ga. 229, 47 S. E. 586.

An admission that the contract pleaded is a true copy of that made does not admit allegations of other matters which were alleged to have been made a part of the contract but were not embodied in it as written through oversight or mistake. American etc. Wks. v. Brew. Co., 30 Wash. 178, 70 P. 236.

Admission of payment. — Under the English workmen's compensation act, 1897, an admission that within a few days after the accident defendant paid to plaintiff a certain sum, and an allegation that no claim for compensation had been made as required, the admission of payment was a fact on which plaintiff might rely and was some evidence of a claim having been duly made. Lowe v. Myers, (1906), 2 K. B. (Eng.) 265.

Manner of making immaterial. "When the answer clearly admits facts which, as a matter of law, show plaintiff's right to recover, it is immaterial how or in what manner the admission may be made. If it be by way of confession and avoidance, the issue arises upon the new matter alleged in avoidance, the burden being upon defendant to show the truth of the new matter." Eames v. Armstrong, 142 N. C. 506, 55 S. E. 405.

An express admission will be construed in connection with the allegations of the complaint as filed, rather than in relation to an amended complaint subsequently filed. Klein v. Elec. L. Co., 182 N. Y. 27, 74 N. E. 495.

Admission of ouster in ejectment. A denial in ejectment that defendant, without right or title, entered into possession, and putting in issue plaintiff's title and right of possession and averring possession in defendant, not denied by plaintiff, is an admission of ouster. Dondero v. O'Hara, 3 Cal. App. 633, 86 P. 985.

399-4 Young v. Assn., 126 Mo. App. 325, 103 S. W. 557.

Not an admission. — A denial of the execution of the bond sued upon, and "for further defense" a statement that "the alleged bond" sued on, etc., is not an admission of the execution of the bond. Reed v. Reed, 93 N. C. 462. Admission controls an inconsistent allegation under the rule that a pleading will be construed most strongly against the pleader. Irwin v. Buffalo Co., 39 Wash. 346, 81 P. 849.

401-9 Garbutt L. Co. v. Wall, 126 Ga. 172, 54 S. E. 944; Louisville R. Co. v. Scomp, 30 Ky. L. R. 487, 98 S. W. 1024; Fifer v. Coal Co., 103 Md. 1, 62 A. 1122; S. v. Henderson, 86 Mo. App. 482; Ravenswood Bk. v. Reneker, 18 Pa. Super. 192.

Implied admission. — The admission of a fact by clear and necessary implication from other facts pleaded is as effective as though it were expressly stated, notwithstanding a mere general denial. Malick v. Kellogg, 118 Wis. 405, 95 N. W. 372.

Slander. — The failure to deny immaterial allegations as to the good character of the plaintiff and his innocence of the accusations against him is not an admission of the falsity thereof. Gattis v. Kilgo, 128 N. C. 402, 38 S. E. 931.

Presumption following admission. If it affirmatively appears that the defendant claimed under no one except the common grantor to the plaintiff and himself, the fact that he so claimed must be taken as an admission that the common grantor had title, and, until something to the contrary appears, such admission raises the presumption that such grantor was the true owner. Garbutt L. Co. v. Wall, 126 Ga. 172, 54 S. E. 944; Deen v. Williams, 128 Ga. 265, 57 S. E. 427.

Joint answer not an admission of joint liability. — The mere fact of joining in a joint answer is not evidence of joint liability as charged in the complaint. Livesay v. Bank, 36 Colo. 526, 86 P. 102.

404-11 Krause v. Woodmen, 133 Ia. 199, 110 N. W. 452.

404-13 Louisville R. Co. v. Scomp, 30 Ky. L. R. 487, 98 S. W. 1024.

Same result under rules of court. Neely v. Blair, 144 Pa. 250, 22 A. 673.

Admission of title. — The failure to deny a paragraph of the complaint setting out an abstract of plaintiff's title does not admit the latter, there being a denial of his title or right of possession. Roberts v. Center, 26 Wash. 435, 67 P. 151.

Failure to act on admission not always error. See McCready v. Crane, 74 Kan. 710, 88 P. 748.

406-14 Howard v. R. Co., 24 Ky. L. R. 1051, 70 S. W. 631.

An account verified by affidavit, if not denied, entitles the plaintiff to judgment in the absence of proof. Baker v. Haynes, 146 Ala. 520, 40 S. 968. See "ACCOUNTS, ACCOUNTING AND ACCOUNTS STATED," Vol. 1, p. 129, and same title, ante.

When specific denial necessary. — It is sufficient if the denial is as specific as circumstances allow; thus, an allegation that the note in suit, which purported to be that of a corporation by its president, was not signed by authority, was a good denial of the signature. Marshall F. & Co. v. Ruffcorn, 117 Ia. 157, 90 N. W. 618.

Extent of admission. — An admis-

sion of the genuineness of the signature does not include the execution of the note of which the signature is part. Mack v. Cole, 130 Mich. 84, 89 N. W. 564.

If inconsistent defenses may be pleaded. — In one part of the answer a fact denied must be proved though its existence is admitted in another part. Houston etc. R. Co. v. De Walt, 96 Tex. 121, 70 S. W. 531, 97 Am. St. 877.

415-47 Fifer v. Coal Co., 103 Md. 1, 62 A. 1122; Rudd v. Dewey, 121 Ia. 454, 96 N. W. 973.

Admission in counter-claim. — An admission in a counter-claim may be considered for the purpose of overcoming the effect of a general denial, though it will not be conclusive. Talbot v. Laubheim, 188 N. Y. 421, 81 N. E. 163.

418-59 Kidwell v. Ketler, 146 Cal. 12, 79 P. 514, *quot.* from Brown v. Newall, 2 Myl. & C. (Eng.) 558, thus: Now it is a rule of pleading that, although a party is bound by the facts which he states, he is not bound by his statement of the legal consequences of those facts. It is for the court to judge what are those legal consequences.

Denial of indebtedness in action on bond. — The rule that, in actions to recover money upon ordinary contracts, the general denial does not put the allegation of non-payment in issue has no application to an action on an official bond or other bond of indemnity which does not create the relation of debtor and creditor. An offer to prove payment may only go to the extent of showing that a right of action never existed. Barker v. Wheeler, 62 Neb. 150, 87 N. W. 20.

419-65 The answer is not conclusive as to the quantum of damages plaintiff is entitled to. Masterson v. Heitmann (Tex. Civ.), 87 S. W. 227.

420-66 A defendant cannot object to a verdict finding the value of the property for which he is liable at the sum fixed in the answer. Curtis v. Nav. Co., 36 Wash. 55, 78 P. 133.

421-71 Chicago R. Co. v. Wirkus, 131 Ill. App. 485; Chicago R. Co. v. Jerka, 126 Id. 365.

422-76 Craig v. Burris, 4 Penne. (Del.) 156, 55 A. 353; Carpenter v. Carpenter, 126 Mich. 217, 85 N. W. 576.

423-79 Manley v. McKenzie, 128 Ga. 347, 57 S. E. 705; Vollman v. Spry, 26 Ky. L. R. 228, 80 S. W. 1092; Walter v. Meader, 38 Misc. 493, 77 N. Y. S. 407; Gossler v. Wood, 120 N. C. 69, 27 S. E. 33.

423-80 Sunday v. Dietrich, 16 Pa. Super. 640; Flegal v. Hoover, 156 Pa. 276, 27 A. 162.

Pleadings must be offered. — If the papers in a case do not contain the pleadings on which it was tried, admissions in them cannot be considered unless they are formally introduced in evidence. Marshall F. & Co. v. Ruffcorn, 117 Ia. 157, 90 N. W. 618 (*over.* anything to the contrary in Mulligan v. R. Co., 36 Ia. 181).

Either party may introduce the pleadings of the other. Palmer T. Co. v. Eaves, 27 Ky. L. R. 573, 85 S. W. 750.

In Pennsylvania the affidavit of defense is competent to prove admissions, but not to open up collateral matters not raised by offering it. Farmers' Bk. v. Bank, 30 Pa. Super. 271; Jacoby v. Ins. Co., 10 Id. 366; Neely v. Blair, 144 Pa. 250, 22 A. 673.

Purposes for which admitted. "The complaint was offered as explanatory of the witness' testimony, and as such was admissible whether it was a public record or not." S. v. Bringgold, 40 Wash. 12, 82 P. 132.

423-82 Clark v. R. Co., 179 Mo. 66, 77 S. W. 882.

423-83 Hewlett v. Hyden, 4 Ind. Ter. 176, 69 S. W. 839; Gossler v. Wood, 120 N. C. 69, 27 S. E. 33.

Extent and purpose for which admitted. — That part of an answer containing an admission may be introduced without offering that which denies the allegations of the complaint. Lewis v. R. Co., 132 N. C. 382, 43 S. E. 919. That part which contains qualifying and explanatory matter, in no way affecting the admission, need not be offered. Sawyer v. R. Co. (N. C.), 58 S. E. 598; Hedrick v. R. Co., 136 N. C. 510, 48 S. E. 830; Stewart v. R. Co., 136 N. C. 385, 48 S. E. 793.

The entire record has been admitted, but only to show the admissions. Stockwell v. Loecher, 9 Pa. Super. 241. When received a pleading is in evidence for all purposes. Hastings v. Speer, 15 Pa. Super. 115. Self-serving allegations should not go to the jury. Breiner v. Nugent (Ia.), 111 N. W. 446.

424-85 Hartsell v. Masterson, 132 Ala. 275, 31 S. 616; Boulder etc. Co. v. Ditch Co., 36 Colo. 455, 86 P. 101; Seymour v. Fueling Co., 103 Ill. App. 625; S. v. Paxton, 65 Neb. 110, 90 N. W. 983; Lewis v. Crouch (Tex. Civ.), 85 S. W. 1009; Cuneo v. De Cuneo, 24 Tex. Civ. 436, 59 S. W. 284.

The rule applies to a pleading filed in a subsequent action (Hewlett v. Hyden, 4 Ind. Ter. 176, 69 S. W. 839); and it is immaterial in any event that the cause of action is not the same. C. v. Bridge Co., 216 Pa. 108, 64 A. 209.

Rule in criminal case. — The complaint to which the defendant had pleaded guilty on a former trial is admissible without authentication if it is shown that it had been read to him and is identified as the one to which he had so pleaded. S. v. Bringgold, 40 Wash. 12, 82 P. 132.

Proof of mistake in pleading. — The attorney who drew the pleading offered in evidence may testify that by mistake he used the name of the wrong party therein. Ritchey v. Seeley, 68 Neb. 120, 93 N. W. 977, 94 N. W. 972, 97 S. W. 818.

Admissibility of transcript in other cause. — A duly authenticated transcript of the proceedings and decree in a cause in another court will be given full faith and credit in another case between the same parties. Seymour v. Fueling Co., 103 Ill. App. 625.

An admission is not binding if the party introduces testimony to controvert it. Dressner v. Delivery Co., 92 N. Y. S. 800.

425-86 General Elec. Co. v. Clark, 108 Fed. 170; Boulder etc. Co. v. Ditch Co., 36 Colo. 455, 86 P. 101; Booth v. Lenox, 45 Fla. 191, 34 S. 566; St. Paul etc. Co. v. Groc. Co., 113 Ga. 786, 39 S. E. 483; First Nat. Bk. v. Wisdom, 23 Ky. L. R. 530, 63 S. W. 461; Tague v. Caplice, 28 Mont. 51, 72 P. 297; Paxton v. S., 59 Neb. 460, 81 N. W. 383, 80 Am. St. 689; *s.c.* 60 Neb. 763, 84 N. W. 254; Limerick v. Lee, 17 Okla. 165, 87 P. 859; Fales v. Browning, 68 S. C. 13, 46 S. E. 545; Greif & Bro. v. Seligman (Tex. Civ.), 82 S. W. 533.

The pleading of an ancestor is evidence against his heirs in an action of trespass to try title. Warner v. Sapp (Tex. Civ.), 97 S. W. 125. But it has been ruled that pleadings are inadmissible where defendant and the former owner of land were the parties and the suit was compromised without notice to defendant. Texas & P. R. Co. v. O'Mahoney, 24 Tex. Civ. 631, 60 S. W. 902.

May be the best evidence. — See O'Neal v. Fenwick, 23 Ky. L. R. 1219, 64 S. W. 952.

Admission of maintenance of nuisance. — A plea in bar filed in another case in which the defendant pleaded guilty to the charge of maintaining a nuisance about the time in question and in connection with the premises in question is competent evidence in an action for that offense. S. v. Schmidt, 74 Kan. 627, 87 P. 742.

Explanation of pleading. — On the admission of a pleading drawn by the attorney general he may testify to the theory of law upon which it was drawn and filed for the purpose of depriving it of its apparent force. S. v. Paxton, 65 Neb. 110, 90 N. W. 983, *cit.* Prater v. Frazier, 11 Ark. 249; Solomon v. Solomon, 2 Ga. 18; Moore v. Hitchcock, 4 Wend. (N. Y.) 292.

Explanation of statement in subsequent trial. See Union P. R. Co. v. Connolly (Neb.), 109 N. W. 368.

Pleading by one not a party. — An answer filed in his own behalf in another action by an attorney in a pending suit, to which he is not a party or in the result of which he is not interested, otherwise than as attorney, is not admissible. Hamilton-B. Shoe Co. v. Milliken, 62 Neb. 116, 86 N. W. 913.

A plea of guilty is admissible in a civil action growing out of the same act (Wesnieski v. Vanek (Neb.), 99 N. W. 258; Risdon v. Yates, 145

Cal. 210, 78 P. 641; Hendle v. Geiler (Del.), 50 A. 632; Yaska v. Swendrzynski (Wis.), 113 N. W. 959; Hauser v. Griffith, 102 Ia. 215, 71 N. W. 223); but proof may be made of the circumstances under which it was entered. Yaska v. Swendrzynski, supra. It has no other effect than an oral admission (Risdon v. Yates, 145 Cal. 210, 78 P. 641); but this view is not everywhere accepted. Hauser v. Griffith, supra; Root v. Sturdivant, 70 Ia. 55, 29 N. W. 802; Meyers v. Dillon, 39 Or. 581, 65 P. 867, 66 P. 814. Such a plea, entered in one court to the charge of violating an ordinance, is admissible in a prosecution by the state. Ehrlick v. C., 31 Ky. L. R. 401, 102 S. W. 289.

426-88 Tague v. Caplice, 28 Mont. 51, 72 P. 297; McLemore v. R. Co., 111 Tenn. 639, 69 S. W. 338; Harris v. Water Co., 114 Tenn. 328, 85 S. W. 897.

Verification not essential. — Pecos etc. R. Co. v. Blasengame (Tex. Civ.), 93 S. W. 187, and local cases cited.

Evidence to lessen weight of admission in sworn answef. — See Booth v. Lenox, 45 Fla. 191, 34 S. 566.

427-89 Tague v. Caplice, 28 Mont. 51, 72 P. 297.

427-90 Wyles v. Berry, 116 Ky. 377, 76 S. W. 126.

427-91 Paxton v. S., 59 Neb. 460, 81 N. W. 383, 80 Am. St. 689.

428-95 Galloway v. R. Co. (Tex. Civ.), 78 S. W. 32.

If allegations are made upon a misunderstanding of the facts, and not by authority, the fact may be shown. Houston etc. R. Co. v. De Walt, 96 Tex. 121, 70 S. W. 531, 97 Am. St. 877; Galveston etc. R. Co. v. Fitzpatrick (Tex. Civ.), 91 S. W. 355.

430-100 Galveston etc. R. Co. v. Fitzpatrick, supra; Taft v. Little, 178 N. Y. 127, 70 N. E. 211.

In Pennsylvania the whole of an affidavit of defense may be offered and advantage taken of part, and the remainder contradicted. McAvoy v. Ins. Co., 27 Pa. Super. 271.

Effect of time on admission. — A pleading in another action admitting a material fact does not establish the affirmative of the issue in the absence of proof that the cause of action arose soon after the admission was made. Mandelbaum v. R. Co., 90 N. Y. S. 377.

431-3 An admission contained in one plea cannot be used to limit the effect of another plea. Chicago etc. R. Co. v. Newell, 113 Ill. App. 263, *cit.* St. Louis T. F. Co. v. Wisdom, 4 Lea (Tenn.) 695; Troy & R. Co. v. Kerr, 17 Barb. (N. Y.) 581.

A formal admission of a conclusion of law may be avoided by averments showing it to be erroneous. Hensel v. Hoffman, 74 Neb. 382, 104 N. W. 603.

433-16 Younglove v. Knox, 44 Fla. 743, 33 S. 427.

434-18 Lewis v. Crouch (Tex. Civ.), 85 S. W. 1009.

Allegations in a cross-bill. — It is error to treat as conclusive admissions in a cross-bill. "The plea in reconvention did not do away with defendant's defensive pleadings. The general denial of plaintiff's cause of action remained, and plaintiff was thereby required to prove his cause of action, including the amount of his damages. This he could do by any legitimate testimony, and for that purpose he might use as testimony any matter alleged in the cross-bill that was relevant; but it must be borne in mind that the cross-bill was not a pleading in respect to plaintiff's demand, but was a pleading in a separate suit brought by defendant against plaintiff, which our procedure permitted to be tried in the same proceeding. Its allegations, so far as plaintiff's action was concerned, should be treated as if they were allegations in an independent suit brought in another court, in which case, while they might afford testimony in support of plaintiff's demand, the court trying the latter could not treat them as conclusive admissions of record in the case because they were not contained in the pleadings that were directed to plaintiff's demand." Lewis v. Crouch, supra.

435-23 Kidwell v. Ketler, 146 Cal. 12, 79 P. 514; Tiddy v. Graves, 126 N. C. 620, 36 S. E. 127.

436-28 Belden v. Blackman, 124 Mich. 667, 83 N. W. 616.

437-31 U. S. v. Gentry, 119 Fed. 70, 55 C. C. A. 658.

437-32 Hallowell v. McLaughlin (Ia.), 111 N. W. 428; Marshall F. & Co. v. Ruffcorn, 117 Ia. 157, 90 N. W. 618; Bernard v. Coal Co., 137 Mich. 279, 100 N. W. 396; Cummings v. Hoffman, 113 N. C. 267, 18 S. E. 170; Schultz v. Culbertson, 125 Wis. 169, 103 N. W. 234.

Binding if not made by mistake. In at least one case it is held, regardless of the intention of the parties in abandoning the original pleading, that they are bound by its admissions in the absence of mistake. Lane I. Co. v. Lowder, 11 Okla. 61, 65 P. 926.

438-33 Hester v. Gairdner, 128 Ga. 531, 58 S. E. 165; Reemsnyder v. Reemsnyder, 75 Kan. 565, 89 P. 1014; Breese v. Graves, 67 App. Div. 322, 73 N. Y. S. 167; Gossler v. Wood, 120 N. C. 69, 27 S. E. 33; Noreum v. Savage, 140 N. C. 472, 53 S. E. 289; Cummings v. Hoffman, 113 N. C. 267, 18 S. E. 170; Lane I. Co. v. Lowder, 11 Okla. 61, 65 P. 926; Page v. Mfg. Co., 17 Okla. 110, 87 P. 851; Camcron & Co. v. Realmutto (Tex. Civ.), 100 S. W. 194; Houston etc. R. Co. v. DeWalt, 96 Tex. 121, 70 S. W. 531, 97 Am. St. 877; Galveston etc. R. Co. v. Fitzpatrick (Tex. Civ.), 91 S. W. 355; Schultz v. Culbertson, 125 Wis. 169, 103 N. W. 234.

Weight to be given amended pleading. — When a writing ceases to be a pleading, by reason of presence of a substitute, it is of force only as is any other declaration of facts —as an evidentiary admission of such facts—and its cogency to establish them varies according to many collateral circumstances, such as the deliberation and care with which made, the clearness of comprehension of either the maker or the reporter of the statement, or, especially when emanating from an agent, the fulness of consultation with and disclosure from the principal. Hence, it may be shown that the answer was made without consultation with, or information from, the client, but upon information obtained from others. Schultz v. Culbertson, 125 Wis. 169, 103 N. W. 234.

438-34 Competency as evidence doubtful. — "When defendant used the original declaration as an admission made by plaintiff, and its right to do so is doubtful (see Smith v. Davidson (C. C.), 41 Fed. 172; Holland v. Rogers, 33 Ark. 251; Mecham v. McKay, 37 Cal. 154; Vogel v. D. M. Osborne & Co. (Minn.), 20 N. W. 129; Corbett v. Clough (S. D.), 65 N. W. 1074), it seems to me clear that plaintiff had a right to prove that he did not make the admission." Bernard v. Coal Co., 137 Mich. 279, 100 N. W. 396, *ref.*, also, to Stewart v. P., 23 Mich. 63, 9 Am. Rep. 78.

In California an amended answer is not admissible. Miles v. Woodward, 115 Cal. 308, 46 P. 1076; Ralphs v. Hensler, 114 Cal. 196, 45 P. 1062. But the rule will not be extended, and does not apply to a verified claim against an estate. Pollitz v. Wickersham, 150 Cal. 238, 88 P. 911.

The rule of the text does not apply to an admission which is merely an opinion. McElmurray v. Blodgett, 120 Ga. 9, 47 S. E. 531. A stricken pleading does not govern the admission of testimony. Kelly v. Fejervary, 111 Ia. 693, 83 N. W. 791.

441-41 Alabama M. R. Co. v. Guilford, 114 Ga. 627, 40 S. E. 794, 119 Ga. 523, 46 S. E. 655; Lydia Pinkham M. Co. v. Gibbs, 108 Ga. 138, 33 S. E. 945; Cooley v. Abbey, 111 Ga. 443, 439, 36 S. E. 786.

442-42 Alabama M. R. Co. v. Guilford, 114 Ga. 627, 40 S. E. 794; Caldwell v. Drummond (Ia.), 96 N. W. 1122; Wyles v. Berry, 25 Ky. L. R. 606, 76 S. W. 126; Breese v. Graves, 67 App. Div. 322, 73 N. Y. S. 167; O'Connell v. King, 26 R. I. 544, 59 A. 926; Houston etc. R. Co. v. DeWalt, 96 Tex. 121, 70 S. W. 531, 97 Am. St. 877; Orange Rice Mill Co. v. McIlhinney, 33 Tex. Civ. 592, 77 S. W. 428; Prouty v. Musquiz (Tex. Civ.), 59 S. W. 568.

A plea of guilty which has been withdrawn and superseded by a plea of not guilty in a justice's court is evidence on appeal, its weight and sufficiency being for the jury. S. v. Bringgold, 40 Wash. 12, 82 P. 132; Terry v. S., 39 Tex. Cr. 628, 47 S. W. 654; C. v. Brown, 150 Mass. 330,

23 N. E. 49; Murmutt v. S. (Tex. Cr.), 67 S. W. 508; P. v. Gould, 70 Mich. 240, 38 N. W. 232, 14 Am. St. 493.

Admission in original pleading not binding. — The plaintiff may show that the declaration in the original pleading was not his. Presumptively, it was his although signed only by his attorney. For testimony to have the effect of counteracting its force, it should show not only that plaintiff had not so informed his counsel, but that he did not know that his petition contained such allegation when filed. Galloway v. R. Co. (Tex. Civ.), 78 S. W. 32. See Kirven v. Chem. Co., 145 Fed. 288, 76 C. C. A. 172, where a complaint withdrawn before defendant appeared was held inadmissible because not relied on.

Weight to be given abandoned pleading. — Whether or not such an admission is weak or strong evidence, depends largely upon the nature and character of the fact admitted, the number of times it was repeated, its materiality to the issues and the knowledge or want of knowledge of the party making the admission; and it is for the jury to say what weight shall be given it. Overton v. White, 117 Mo. App. 576, 93 S. W. 363.

Part of the record. — A withdrawn pleading should not be removed from the files without leaving an attested copy. Wyles v. Berry, 26 Ky. L. R. 606, 76 S. W. 126.

In Texas it is immaterial whether or not abandoned pleadings are verified. Texas & P. R. Co. v. Goggin, 33 Tex. Civ. 667, 77 S. W. 1053; Barrett v. Featherstone, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245, and numerous local cases cited in the first cited case; Orange Rice M. Co. v. McIlhenny, 33 Tex. Civ. 592, 77 S. W. 428; Miller v. Drought (Tex. Civ.), 102 S. W. 145; Ft. Worth & D. C. R. Co. v. Wright, 27 Tex. Civ. 198, 64 S. W. 1001; First Nat. Bk. v. Watson (Tex. Civ.), 66 S. W. 232.

In Kentucky verification is essential. Wyles v. Berry, 25 Ky. L. R. 606, 76 S. W. 126.

In Missouri abandoned pleadings are admissible though admissions in them were not authorized. Overton v. White, 117 Mo. App. 576, 93 S. W. 363.

442-43 Ruddock Co. v. Johnson, 135 Cal. xix, 67 P. 680; Miles v. Woodward, 115 Cal. 308, 46 P. 1076; Hamilton-B. Shoe Co. v. Milliken, 62 Neb. 116, 86 N. W. 913.

444-48 Open to explanation. — It is apparent from these cases (*cit.* Sullivan v. Colby, 71 Fed. 460, 18 C. C. A. 193; Brooks v. Laurent, 98 Fed. 647, 39 C. C. A. 201; Perkins v. Jones, 62 Ia. 345, 17 N. W. 573; Watterson v. Lyons, 9 Lea (Tenn.) 566; Kaehler v. Dobberpuhl, 60 Wis. 256, 18 N. W. 841) that where pleadings were involved they could only be used against the party whose pleadings they were, as evidence by way of admission made by him, and were open to explanation and rebuttal, unless sworn to with knowledge of the facts. This is shown also by the following authorities: 1 Whart. on Ev. (2d ed.) § 838, 11 Am. & Eng. Encyc. of Law (2d ed.) 449, and cases cited, n. 2; Blanks v. Klein, 53 Fed. 436, 3 C. C. A. 585; Hunter v. Hunter, 111 Cal. 261, 43 P. 756; Farson v. Gilbert, 85 Ill. App. 364; Snydacker v. Brosse, 51 Ill. 357; Potter v. Engine Co., 110 Ill. App. 430.

444-51 New v. Young, 148 Ala. 253, 41 S. 523; Burgener v. Lippold, 128 Ill. App. 590; Daub v. Engelbach, 109 Ill. 267; Gardner v. Meeker, 169 Ill. 40, 48 N. E. 307.

Unless verified with knowledge of the facts a bill is open to explanation. Potter v. Engine Co., 110 Ill. App. 430.

Allegations concerning a conclusion from the facts alleged are not admissions. Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64.

Illustration. — In the original petition the plaintiffs alleged that they were entitled to receive one-half of the proceeds realized from the sale of all the rice straw on hand at the time of the filing of the suit. By amendment to their petition they insisted that they were entitled to two-thirds of such proceeds. On the trial the defendant contended that, as the plaintiffs had admitted in their pleadings that he was entitled

to one-half of the proceeds of the rice straw, they were bound by this solemn admission in judicio, and were estopped from claiming any greater proportion of the proceeds which might be derived from a sale of this straw. The quantum of interest originally claimed by the executors was but a statement of their conclusion of what they were entitled to under their construction of the contract of partnership; if, subsequently, they discovered that this conclusion was erroneous, and that their testator had a larger interest in the rice straw, they were at liberty to amend their petition so as to claim this larger interest, and their previous allegation as to the interest which their testator had in the rice straw would in no way bind them as an admission in judicio. Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64.

Effect of decree upon admission. The court declined to concede that a decree could deprive a bill of its quality as evidence of admissions, though this point was not adjudged. Burgener v. Lippold, 128 Ill. App. 590.

444-53 **In other actions.** — A bill filed in one suit and sworn to by one of the complainants is evidence in another suit against them involving the same subject-matter. Burgener v. Lippold, supra.

445-60 Langley v. Andrews, 142 Ala. 665, 38 S. 238; Potter v. Engine Co., 110 Ill. App. 430; Nicholson v. Snyder, 97 Md. 415, 55 A. 484; Craft v. Schlag, 61 N. J. Eq. 567, 49 A. 431.

448-65 Reager v. Chappelear, 104 Va. 14, 51 S. E. 170.

448-67 **In the absence of an estoppel** a verified answer is not conclusive in another action between the same parties involving the same issue. Nicholson v. Snyder, 97 Md. 415, 55 A. 484.

449-69 Avery v. Stewart, 136 N. C. 426, 48 S. E. 775.

449-70 **The first answer** may be availed of without introducing the second. Avery v. Stewart, supra.

454-90 **Admissions in the answer; when bill amended.** — An amended bill, being treated as a new bill, the replies thereto are dropped from the pleadings, leaving the defendant to plead anew. Hence, the answer to the original bill is not an admission, though any material admissions in it may be proved like any documentary admission outside the record. Scoville v. Brock, 79 Vt. 449, 65 A. 577. Admission as to the rental value of land does not preclude the defendant from showing a decrease in such value since the answer was made. Hall v. Waddill, 78 Miss. 16, 28 S. 831, 27 S. 936.

455-92 Marks v. Taylor, 23 Utah 152, 63 P. 897.

460-4 Kidwell v. Ketler, 146 Cal. 12, 79 P. 514; Knights Templars & M. L. I. Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066, 110 Ill. App. 648.

460-5 **A complaint verified** by a guardian ad litem is not competent to contradict the ward's testimony. Schlotterer v. Ferry Co., 75 App. Div. 330, 78 N. Y. S. 202, *cit.* Buffalo etc. Co. v. Assn., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. 839.

462-6 See "CORROBORATION," Vol. 3, pp. 667, 722, and that title, infra; and "DIVORCE," Vol. 4, p. 739, and infra.

463-9 **It is necessary that the confessions be well established,** direct and certain, free from suspicion of collusion, and corroborated by independent facts and circumstances. Michalowriz v. Michalowriz, 25 App. D. C. 484, *cit.* Robbins v. Robbins, 100 Mass. 150, 97 Am. Dec. 91; Johns v. Johns, 29 Ga. 718; Kloman v. Kloman, 62 N. J. Eq. 153, 49 A. 810.

464-12 Pitcairn v. Hiss Co., 113 Fed. 492, 51 C. C. A. 323; Aikin v. Perry, 119 Ga. 263, 46 S. E. 93; Fuller v. Rapid T. Co., 16 Haw. 1, Fidelity & C. Co. v. Morrison, 129 Ill. App. 360; Hensel v. Johnson, 94 Md. 729, 51 A. 575; Gottlieb v. Grain Co., 87 App. Div. 380, 84 N. Y. S. 413; P. v. Mole, 85 App. Div. 33, 82 N. Y. S. 747; Galloway v. Floyd, 36 Tex. Civ. 379, 81 S. W. 805.

Scope of admission. — Where insurer conceded its liability under one clause of the policy, which concession involved the means by which insured came to his death, it also admitted liability under another clause

which provided for payment of another sum if death resulted from the conceded means. Fidelity & C. Co. v. Morrison, 129 Ill. App. 360. An admission of the correctness of an account carries with it an admission of the correctness of an application of payment shown therein. Blaisdell v. Davis, 72 Vt. 295, 48 A. 14. A motion in arrest of judgment on the ground that the description of the lands involved was too indefinite to sustain a judgment is an admission that there was a defect or error in the description. Ager v. S., 162 Ind. 538, 70 N. E. 808.

Admissions made in a justice's court and entered of record are binding on the appellate court when the cause is heard on the record. Merriman v. Anselment, 86 Minn. 6, 89 N. W. 1125.

464-14 Moynahan v. Perkins, 36 Colo. 481, 85 P. 1132; Cadigan v. Crabtree, 192 Mass. 233, 78 N. E. 412; Detroit v. Little Co., 146 Mich. 373, 109 N. W. 671.

465-16 Moynahan v. Perkins, 36 Colo. 481, 85 P. 1132; Perry v. Mfg. Co., 40 Conn. 313; Ager v. S., 162 Ind. 538, 70 N. E. 808; Wells etc. Council v. Littleton, 100 Md. 416, 60 A. 22; Gallagher v. McBride, 66 N. J. L. 360, 49 A. 582; Stemmler v. Mayor, 179 N. Y. 473, 72 N. E. 581.

Admissions as affecting motion for continuance. — In acting upon a motion for the continuance of a cause, the ex parte affidavits and oral admissions of former counsel may be regarded. Heyward v. Middleton, 65 S. C. 439, 43 S. E. 956.

467-20 Hicks v. Mfg. Co., 138 N. C. 319, 50 S. E. 703; Jose v. Hoyt, 106 Mo. App. 594, 81 S. W. 468.

Construction of admissions. — An oral admission that a letter was written, signed and delivered as stated, does not include all the allegations of the complaint as to the purpose, objects and intent in writing the letter; it was limited to the fact of signing, writing and delivering. Master Builders' Assn. v. Domascio, 16 Colo. App. 25, 63 P. 782. They will not be extended beyond their terms. United B. Co. v. Bass, 121 Ill. App. 299.

Made by counsel in one case not admissible in another. — Arguments made by an attorney and letters and newspaper clippings used by him in argument before a public officer are not competent evidence in an action subsequently brought against the client on another question. Miller v. U. S., 133 Fed. 337, 66 C. C. A. 399. The opinion of an attorney, adverse to his client, based on facts reported to him is incompetent evidence on a second trial of the case, there having been a change of attorneys. Hicks v. Mfg. Co., 138 N. C. 319, 50 S. E. 703.

In argument. — Issues of law are not determinable by the arguments of counsel, Voorhees v. Porter, 134 N. C. 591, 47 S. E. 31. A party who incorporates in his brief a statement of the trial court concerning an admission cannot be heard, on appeal, to deny that it was made. Pitcairn v. Hiss Co., 113 Fed. 492, 51 C. C. A. 323.

Objections to testimony. — The fact that a witness is a representative of a party may be shown by objections to his testimony referring to him as such, and by questions which draw out the fact that such witness is possessed of the papers on which the action is based. Sisk v. Ins. Co., 95 Mo. App. 695, 69 S. W. 687.

469-27 Admissions in opening statement. — Admissions fairly made in an opening statement of a civil suit may obviate the necessity for proof (Preston v. Davis, 112 Ill. App. 636; Missouri & K. T. Co. v. Vandevort, 67 Kan. 269, 72 P. 771); may be proved on subsequent trial of the same cause (Missouri & K. T. Co. v. Vandevort, supra), and will be binding on appeal. Connecticut M. L. Ins. Co. v. Hillmon, 107 Fed. 834, 46 C. C. A. 668.

470-29 By counsel in criminal case. — Admissions made by the prosecuting officer are binding on the jury. Watson v. S., 118 Ga. 66, 44 S. E. 803. Though counsel may not enter a plea of guilty without authority, his admission of facts shown by the evidence, covering every element of the offense alleged to have been committed, will be assumed to have been authorized in the absence of an objection by the

client. S. v. Kinney (S. D.), 113 N. W. 77. An admission of fact or of law will be corrected if it clearly appears to be erroneous. S. v. Foster, 130 N. C. 666, 41 S. E. 284, *mod.* S. v. Rash, 34 N. C. 382, 55 Am. Dec. 240, where it was said that it never can be error for the court to act on admissions of fact.

470-30 **An admission made in a motion for a new trial** will dispense with a rule of practice, otherwise necessary, in bringing the evidence up for review, such motion having been denied. Beck Hdw. Co. v. Crum, 127 Ga. 94, 56 S. E. 242.

Effect of consent order. — A consent order is conclusive in the cause in which it was made; but in another cause of a criminal nature is not conclusive of guilt. In re Duncan, 64 S. C. 461, 42 S. E. 433.

470-31 Barnes v. Brown, 1 Tenn. Ch. App. 726.

An accused person is bound by a stipulation setting forth what an absent witness would testify to if present; his right to be confronted by the witness is thus waived. S. v. Mortensen, 26 Utah 312, 73 P. 562, 633.

471-33 **Made without limitation.** Text sustained so far as it relates to the same case in which the stipulation was made. Stemler v. Mayor, 179 N. Y. 473, 72 N. E. 581; Fortunato v. Mayor, 74 App. Div. 441, 77 N. Y. S. 575, *aff.* 173 N. Y. 608, 66 N. E. 1109. The parties may stipulate that the evidence taken in another case, in essential respects similar, shall be evidence in a pending case, and that they will abide by the result of the former case. Such a stipulation is binding upon the successors of the attorney general who have become parties to the action. Prout v. Starr, 188 U. S. 537.

Scope of stipulation. — A stipulation in an action on a life insurance policy that plaintiff had made a prima facie case admits that he had an insurable interest in the life of the deceased to the extent of casting the burden to show otherwise upon defendant. Merchants' L. Assn. v. Treat, 98 Ill. App. 59.

473-40 **Evidence not conformable to stipulation.** — If the trial is had on the facts stipulated and evidence in addition, the latter is competent though not harmonizable with the stipulation. Hunt v. Van Burg, 75 Neb. 304, 106 N. W. 329.

476-49 **Statement in brief.** — In the absence of anything in the bill of exceptions as to admissions made in the trial court, the adoption and insertion in the brief on appeal of the statement of that court as to admissions will be binding on the reviewing court. Pitcairn v. Hiss. Co., 113 Fed. 492, 51 C. C. A. 323.

476-50 Donnelly v. Rees, 141 Cal. 56, 74 P. 433; P. v. Ouderkirk, 105 N. Y. S. 134.

Affidavits. — An affidavit is admissible though affiant be dead and it was used in previous litigation to which defendant was not a party. Collinsville G. Co. v. Phillips, 123 Ga. 830, 51 S. E. 666. An affidavit by a party and his solicitor, made at the party's request, is evidence against the party in another suit. Cornelissen v. Ort, 132 Mich. 294, 93 N. W. 617. An affidavit as to affiant's residence is conclusive upon his administrator for jurisdictional purposes. Long v. Lockman, 135 Fed. 197. Denial of knowledge of the contents of an affidavit is not reason for excluding it; the contrary may be shown. New v. Young (Ala.), 41 S. 523. Affidavits filed in bankruptcy proceedings are sufficient evidence as to the partnership (In re Henschel, 114 Fed. 968) and of the insolvency of the affiants. West Co. v. Lea Bros., 174 U. S. 590. A superseded verified claim against an estate is an admission. Pollitz v. Wickersham, 150 Cal. 238, 88 P. 911, distinguishing the case from those in which substituted pleadings are filed. The affidavit made by an applicant for a patent is not conclusive as between him and his assignee. De Laval S. Co. v. Mach. Co., 135 Fed. 772, 68 C. C. A. 474.

A petition for a franchise is not an admission that petitioner does not own the land described in it. Columbia & P. S. R. Co. v. Seattle, 33 Wash. 513, 74 P. 670.

Who may make for corporation. The power to make admissions by petition in bankruptcy may be exercised by such corporate officers as are authorized under local laws to

make a general assignment; in the absence of such laws, it resides in the directors. In re Moench Co., 130 Fed. 685, 66 C. C. A. 37.

479-59 Gray v. Tribune Co., 81 Minn. 333, 84 N. W. 113.

480-64 Cutler v. Cutler, 130 N. C. 1, 40 S. E. 689.

Admissions may be made in an affidavit for continuance. Palmer T. Co. v. Eaves, 27 Ky. L. R. 573, 85 S. W. 750.

Scope of admission. — It does not extend to the competency, relevancy or materiality of the evidence. Tague v. Caplice Co., 28 Mont. 51, 72 P. 297.

Affidavit conclusive as to what witness would have testified to if present. Gibson v. Sutton, 24 Ky. L. R. 868, 70 S. W. 188.

Application for continuance is competent to contradict testimony of party on whose behalf it was made. Scott & Co. v. Woodard (Tex. App.), 88 S. W. 406.

Admissions to secure right to open and close. — To secure the right to open and close the defendant must make admissions in his pleadings, before testimony is offered, showing a prima facie case against him. Mitchem v. Allen, 128 Ga. 407, 57 S. E. 721; Whitaker v. Arnold, 110 Ga. 857, 36 S. E. 231; Central of Ga. R. Co. v. Morgan, 110 Ga. 168, 35 S. E. 345.

What not sufficient. — An admission is not sufficient if it merely covers the execution and delivery of the note sued on by an executor; it should include the right of the plaintiff to sue on it. Reid v. Sewell, 111 Ga. 880, 36 S. E. 937.

481-65 Cimiotti U. Co. v. Bowsky, 113 Fed. 698; Rivers v. S., 118 Ga. 42, 44 S. E. 859; Ruble v. Bunting, 31 Ind. App. 654, 68 N. E. 1041; Lush v. Parkersburg, 127 Ia. 701, 104 N. W. 336; Shinkle v. McCullough, 25 Ky. L. R. 1143, 77 S. W. 196; Farnum v. Whitman, 187 Mass. 381, 73 N. E. 473; White v. Collins, 90 Minn. 165, 95 N. W. 765; Congleton v. Schreihoffer (N. J. Eq.), 54 A. 144; Hillman v. De Rosa, 92 N. Y. S. 67; Egyptian F. C. Co. v. Comisky, 40 Misc. 236, 81 N. Y. S. 673; Reed v. McCord, 160 N. Y. 330, 54 N. E. 737; Sternbach v. Friedman, 75 App. Div. 418, 78 N. Y. S. 318; Anderson v. Adams, 43 Or. 621, 74 P. 215; Munk v. Stanfield (Tex. Civ.), 100 S. W. 213.

Circumstances under which testimony was given. — It is immaterial in what case the testimony was given or the occasion on which it was given, and whether the facts of the case in which it was given were identical with those of the case on trial. It is plain we think that the jury must have understood that the statements were made under oath in a judicial proceeding where one of the questions involved related to wagering contracts. That was as far, we think, as the defendant had a right to go into the circumstances under which the statements were made.'' Farnum v. Whitman, 187 Mass. 381, 73 N. E. 473.

An accused person who voluntarily became a witness cannot object to having his testimony used against him on a second trial for the same offense even if he does not testify on that trial. C. v. House, 6 Pa. Super. 92; C. v. Doughty, 139 Pa. 383, 21 A. 228; Miller v. P., 216 Ill. 309, 74 N. E. 743 (three judges dissented); S. v. Campbell, 73 Kan. 688, 85 P. 784. See ''CROSS-EXAMINATION,'' Vol. 3, p. 801, and that title, infra. The testimony of a prosecutor may be used against him as a defendant in another action. S. v. Simpson, 133 N. C. 676, 45 S. E. 567.

482-66 One does not admit the validity of a paper title by introducing the document in evidence. Vanderbilt v. Brown, 128 N. C. 498, 39 S. E. 36.

483-68 S. v. Campbell, 73 Kan. 688, 85 P. 784; S. v. Finch, 71 Kan. 793, 81 P. 494.

484-72 Miller v. P., 216 Ill. 309, 74 N. E. 743.

Testimony before coroner. — Though a coroner is required to commit to writing the substance of the testimony taken on an inquest, witnesses who profess to remember the substance of a statement made by the accused may testify thereof. Green v. S., 124 Ga. 343, 52 S. E. 431.

Previous testimony should be proven by the official reporter though he had no recollection of it aside from his

notes. C. v. House, 6 Pa. Super. 92.

486-76 Bentley v. Spice Co. (Neb.), 95 N. W. 803.

486-79 Himrod C. Co. v. Adack, 94 Ill. App. 1; Field v. Schuster, 26 Pa. Super 82. See "Cross-Examination," Vol. 3, p. 810, and that title, infra. "Impeachment of Witnesses," Vol. 7, p. I, and same title, infra.

It is otherwise where neither husband nor wife can testify for or against each other without consent. Aldous v. Olverson, 17 S. D. 190, 95 N. W. 917.

Effect given strongest admissions. If there is conflict in the testimony of plaintiff he will be bound by the strongest admissions made in determining its effect. Cogan v. R. Co., 101 Mo. App. 179, 73 S. W. 738.

Not binding in toto. — An admission made by one party may be availed of in part only; the admittee is not bound by all the testimony of the admitter. Liesemer v. Burg, 106 Mich. 124, 63 N. W. 999; Parret v. Craig, 56 N. J. Eq. 280, 38 A. 305, 56 N. J. Eq. 848, 42 A. 1117 (no opinion).

487-81 A hearing to determine whether or not an inquest shall be held is not a legal examination within the meaning of such a statute; voluntary testimony given thereat may be used against accused. S. v. Legg, 59 W. Va. 315, 53 S. E. 545. For cases within such a statute, see Kirby v. C., 77 Va. 681; S. v. Hall, 31 W. Va. 505, 7 S. E. 422.

487-82 Spann v. Torbert, 130 Ala. 541, 30 S. 389; Southern Bk. v. Nichols, 202 Mo. 309, 100 S. W. 613; Gubernator v. Rettalack, 86 Mo. App. 184; Phillips v. Lindley, 112 App. Div. 283, 98 N. Y. S. 423; Stevenson v. Coal Co., 201 Pa. 112, 50 A. 818. See "Depositions," Vol. 4, p. 301, and that title, infra.

Not admissible in a subsequent cause where parties not the same. Parlin & O. Co. v. Vawter (Tex. Civ.), 88 S. W. 407.

A deposition of one party is not rendered incompetent because it was contradicted by the deponent under the examination of the other party. Vollkommer v. Cody, 177 N. Y. 124, 69 N. E. 277.

488-83 Profile & F. H. Co. v. Bickford, 72 N. H. 73, 54 A. 699.

A quashed deposition has no other effect than any paper containing admissions. Joy v. Ins. Co., 32 Tex. Civ. 433, 74 S. W. 822; Gross v. Coffey, 111 Ala. 468, 20 S. 428.

Proof of deposition. — In the absence of evidence showing that the statements in a suppressed deposition were made by the deponent, correctly written and signed by him, it is not competent evidence. These facts were not proven by the notarial certificate. German Ins. Co. v. Gibbs (Tex. Civ.), 92 S. W. 1068.

488-84 Southern Bk. v. Nichols, 202 Mo. 309, 100 S. W. 613.

Depositions of corporate officers; who is the party. — Under some statutes providing for the examination of parties as adverse witnesses, the president, secretary or other principal officer of a corporation is, in effect, a party, and his deposition is independent evidence in the case, though he be in court. Johnson v. St. Paul Co., 126 Wis. 492, 105 N. W. 1048; Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. It is otherwise in the case of a mere employe. Hughes v. R. Co., 122 Wis. 258, 99 N. W. 897; Eastern R. Co. v. Tuteur, 127 Wis. 382, 105 N. W. 1067.

489-88 In re Arnold's Estate, 147 Cal. 583, 82 P. 252; Cooley v. Collins, 186 Mass. 507, 71 N. E. 979; Southern Bk. v. Nichols, 202 Mo. 309, 100 S. W. 613.

Who may offer; how much must be read. — If one party offers but a part the other may introduce the remainder. Aetna Ins. Co. v. Eastman (Tex. Civ.), 80 S. W. 255. If the party who took the deposition does not introduce it the other party may; and if deponent has been examined as to different matters, only that part of the deposition which relates to one or more of them need be offered; but all that part must be introduced. Hamilton B. Shoe Co. v. Milliken, 62 Neb. 116, 86 N. W. 913, *appr.* Citizens' Bk. v. Rhutasel, 67 Ia. 316, 25 N. W. 261.

489-91 R. S. Sizer & Co. v. Melton, 129 Ga. 143, 58 S. E. 1055.

Lost deposition. — The officer before whom a lost deposition was taken

may testify to an admission therein. Marx v. Hart, 166 Mo. 503, 66 S. W. 260.

Answers to interrogatories by corporation. — The answer of the person chosen by a corporation to reply to interrogatories on its behalf may be read against it because it is the answer of the corporation, and is on the same footing as that of an individual. Welsbach I. G. L. Co. v. Incandescent Co., 83 L. T. N. S. 58, 48 W. R. 595, 69 L. J. Ch. 546 (court of appeal).

Extent of such answer. — In the case cited above, Collins, L. J., said: "It seems to me that under the present practice the answers of a company are on precisely the same footing as the answers of an individual—that is to say, they are in both cases admissions by the person who makes them, in this case the company, and being admissions they can be read against that party. It is idle to say that the admissions may be qualified. That is not ad rem. The question is, does the answer come under the category of an admission? If it does it can be read against the person who makes it with all the suggestions, sinister or otherwise, as to the amount admitted or the qualification sought to be put upon it, and that is precisely the reason why, when we have to introduce somebody who really is not the company to answer for the company, we must hedge that admission round with proper restrictions. A corporate body cannot answer for itself, and therefore necessarily somebody must answer for it. His function is to give the answer of the company. Therefore, some restriction must be put upon the knowledge which he brings to bear in answering the questions. Where is the line to be drawn? It seems to me that line has been drawn logically and practically by Brett, L.J., in Bolckow, Vaughan & Co. v. Fisher, 42 L. T. 724, 10 Q. B. Div. 161, when he said that the person who is called upon to answer is not bound to answer as to what he has learnt accidentally, and not in the ordinary course of his business." The court agreed in ruling that the person who answers is not bound to inquire as to matters that came to the knowledge of the officers and servants of the corporation apart from their positions as such, nor as to matters with which they became acquainted as officers or servants of the predecessors of the company, or accidentally and not in the ordinary course of business.

Who may offer answers; party in court. — Under some statutes answers to interrogatories are available only to the party propounding them; if he does not offer the answers in evidence the party who has given them and who is in court can not do so. Beem v. Farrell (Ia.), 113 N. W. 509, *cit.* Wells v. Bransford, 28 Ala. 200; Montgomery B. Bk. v. Parker, 5 Ala. 731; Moore v. Palmer, 14 Wash. 134, 44 P. 142. If the party entitled to do so offers the answers they must be received though the party making them is in court. Beem v. Farrell, supra; Island County v. Babcock, 20 Wash. 238, 55 P. 114.

490-92 Bills of particulars. — A bill of particulars cannot be evidence against the party furnishing it in any case or for any purpose where the pleading or notice to which the bill relates would not be evidence, as against the defendant who has raised an issue upon all the material matters set forth in the bill. Roscoe L. Co. v. Cement Co., 62 App. Div. 421, 70 N. Y. S. 1130. It may be competent evidence of admissions in a different action if they were made with the knowledge and sanction of the party who made the admissions. Eisenlord v. Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; Hutchins v. Van Vechten, 140 N. Y. 115, 35 N. E. 446. Though it was served in response to a demand a bill of particulars is not affirmative proof unless verified and identified. Hesser-M.-R. C. Co. v. Fuel Co., 114 Wis. 654, 90 N. W. 1094.

490-93 Chicago v. English, 198 Ill. 211, 64 N. E. 976; Leinhart v. Kirkwood, 130 Ill. App. 398.

501-37 A confession of judgment for a part of the sum claimed is complete proof against the party

who made it. Citizens' L. & P. Co. v. St. Louis, 34 Can. Sup. 495; Hudon C. Co. v. Shipping Co., 13 Id. 401.

503-47 In civil actions the admission by a party of any fact material to the issue is always competent evidence against him wherever, whenever or to whomsoever made. Reed v. McCord, 160 N. Y. 330, 54 N. E. 737.

Weight to be given. — When offered by the parties or their privies admissions in a deed are generally conclusive; but when offered by a stranger it is otherwise; they have the same effect as parol admissions. Peters v. Coal Co., 61 W. Va. 392, 56 S. E. 735.

503-49 Miller v. McDowell, 69 Kan. 453, 77 P. 101.

May be made to a corporate agent (McBride v. R. Co., 125 Ga. 515, 54 S. E. 674); or to the prosecutrix. Whatley v. S., 144 Ala. 68, 39 S. 1014.

503-52 Whatley v. S., 144 Ala. 68, 39 S. 1014; Story v. Nidiffer, 146 Cal. 549, 80 P. 692; Vincent v. Lumb. Co., 113 Ill. App. 463; Hofacre v. Monticello, 128 Ia. 239, 103 N. W. 488; Wright v. Reed, 118 Ia. 333, 92 N. W. 61.

504-55 Himrod C. Co. v. Adack, 94 Ill. App. 1; Seymour v. Fueling Co., 103 Ill. App. 625; Brown v. Brown, 62 Kan. 666, 64 P. 599; Allen v. Hall, 64 Neb. 256, 89 N. W. 803; Peters v. Coal Co., 61 W. Va. 392, 56 S. E. 735.

Admissions in answer. — "Where all the defendants unite in an answer, the admissions therein are to be treated in the action in which the pleading is served as the admissions of each, and not confined to the person actually verifying the same." Talbot v. Laubheim, 188 N. Y. 421, 81 N. E. 163.

Admissions of sole legatee are competent against the will. In re Miller's Estate, 31 Utah 415, 88 P. 338.

505-56 McMillan v. McDill, 110 Ill. 47; Campbell v. Campbell, 138 Ill. 612, 28 N. E. 1080; Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56; Seitz v. Starks, 136 Mich. 90, 98 N. W. 852; Parlin & O. Co. v. Vawter (Tex. Civ.), 88 S. W. 407; Stamnes v. R. Co., 131 Wis. 85, 109 N. W. 100, 925, 111 N. W. 62.

Former party. — Statements made by one formerly a party to the action are not provable if made after he ceased to be such except to impeach him as a witness. Himrod C. Co. v. Adack, 94 Ill. App. 1.

Identity of interest must exist when cause of action arose. Judd & Root v. New York, 128 Fed. 7, 62 C. C. A. 515.

Contingent or collateral interest. One who has merely a contingent or collateral interest in a suit brought by another cannot bind the parties by an admission. Ibid.

Admissions made by a judgment debtor on his examination are not competent in a subsequent trial against parties who became such thereafter. Shields v. Lewis, 24 Ky. L. R. 822, 70 S. W. 51.

507-59 Fourth Nat. Bk. v. Albaugh, 107 Fed. 819, 46 C. C. A. 655.

507-61 Illinois C. R. Co. v. Houchins, 28 Ky. L. R. 499, 89 S. W. 530, 1 L. R. A. (N. S.) 375; Whaples v. Fahys, 109 App. Div. 594, 96 N. Y. S. 323; Stevenson v. Coal Co., 201 Pa. 112, 50 A. 818; Sunday v. Dietrich, 16 Pa. Super. 640.

Effect of admission. — Proof of such admission, though it may not be entitled to the effect of an admission by all concerned, may tend legitimately to raise a presumption against them that the thing admitted may be true. Gibson v. Sutton, 24 Ky. L. R. 868, 70 S. W. 188.

Another suit on independent grounds. — The admission of one defendant is not evidence against a plaintiff in favor of another defendant sued on independent grounds. Koplan v. Gas Light Co., 177 Mass. 15, 58 N. E. 183.

Jury should be cautioned. — It often happens in suits against two defendants that evidence of admissions is competent against the one who made them and not competent against his co-defendant; yet it is every-day practice to admit it, with proper admonition to the jury as to the defendant against whom it may be considered. It is a serious error not to give such admonition. Illinois C. R. Co. v. Houchins, 28 Ky. L. R. 499, 89 S. W. 530, 1 L. R. A. (N. S.) 735.

By one of several legatees or devisees. — There is lack of harmony in the cases concerning the proof of admissions by one of several legatees or devisees respecting the testator's mental capacity. In Iowa, admissions of the proponent of, and chief beneficiary under, a will, made before its execution, are competent (Lundy v. Lundy, 118 Ia. 445, 92 N. W. 39, limiting In re Ames, 51 Ia. 596, 2 N. W. 408); and a like view is held in Kentucky (Wall v. Dimmitt, 24 Ky. L. R. 1749, 72 S. W. 300; Gibson v. Sutton, 24 Ky. L. R. 868, 70 S. W. 188), regardless of the fact that the admitter would take the same interest as heir as under the will. Wall v. Dimmitt, supra. The opposing cases are more consonant with generally recognized principles (Carpenter's Appeal, 74 Conn. 431, 51 A. 126; Wood v. Carpenter, 166 Mo. 465, 66 S. W. 172; In re Campbell's Will, 67 App. Div. 418, 73 N. Y. S. 753; In re Myer, 184 N. Y. 54, 76 N. E. 920; King v. Gilson, 191 Mo. 307, 90 S. W. 367; Hertrich v. Hertrich, 114 Ia. 643, 87 N. W. 689), even when they go to the extent of holding that admissions so made are incompetent though a conspiracy existed between the admitter and one of the other legatees (Fothergill v. Fothergill, 129 Ia. 93, 105 N. W. 377; Roberts v. Bidwell, 136 Mich. 191, 98 N. W. 1000), unless it is shown that the will was the result of a conspiracy among all of them (In re Van Dawalker's Will, 63 App. Div. 550, 71 N. Y. S. 705), and they all, at different times, but not in the presence of each other, made admissions of the same general tenor. Wood v. Carpenter, 166 Mo. 465, 66 S. W. 172.

Reason for the rule. — "The general doctrine is doubtless correct that the admissions or declarations of a party to the record may be taken as against himself or another party having a joint interest with him, but this rule can have no application to a proceeding to prove a will where other parties are interested in the estate as tenants in common. In this case the admissions or declarations of the nephew could not bind the sister, and since upon proof of a will there can be but one decree, either of rejection or of probate, the declarations of one of the parties cannot, from the very nature of the case, be received as evidence without prejudice to the rights of the other. One tenant in common cannot admit away the rights of his co-tenant. . . . The respective interests of the next of kin were not joint, but each would hold his share in severalty. There was no privity between the parties such as would permit the admissions or declarations of one to be received as evidence against the other. In re Kennedy, 167 N. Y. 163, 60 N. E. 442. See Carpenter's Appeal, 74 Conn. 431, 51 A. 126; Zimmerman v. Beatson, 39 Ind. App. 664, 79 N. E. 518, 80 N. E. 165.

An admission of marriage by one of two defendants is sufficient evidence thereof as against the admitter, but not as against a co-defendant in a prosecution for adultery. Territory v. Castro, 14 Haw. 131.

507-62 Pearson v. Adams, 129 Ala. 157, 29 So. 977; McBride v. R. Co., 125 Ga. 515, 54 S. E. 674; West v. Oil Co., 136 Fed. 343, 69 C. C. A. 169.

508-64 Stevenson v. Coal Co., 201 Pa. 112, 50 A. 818.

508-65 St. Louis etc. R. Co. v. Knowles (Tex. Civ.), 99 S. W. 867; Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56; Hall v. Clountz, 26 Tex. Civ. 348, 63 S. W. 941.

509-69 **The admissions of a party** improperly joined cannot be proven. Horan v. Byrnes, 70 N. H. 531, 49 A. 569.

510-72 Norcum v. Savage, 140 N. C. 472, 53 S. E. 289; Stewart v. Doak, 58 W. Va. 172, 52 S. E. 95; Rountree v. Gaulden, 128 Ga. 737, 58 S. E. 346.

510-73 Costello v. Graham (Ariz.), 80 P. 336; Cribbs v. Walker, 74 Ark. 104, 85 S. W. 244; Daly v. Josslyn, 7 Idaho 657, 65 P. 442; Quick v. Cotman, 124 Ia. 102, 99 N. W. 301; Collins v. Taylor, 101 Me. 542, 64 A. 946; Norcum v. Savage, 140 N. C. 472, 53 S. E. 289; Shaffer v. Gaynor, 117 N. C. 15, 23 S. E. 154; King v. Weible, 10 Pa. C. C. 521.

Must be interested at the time. Declarations made by an execution defendant, not the owner or possessor of the property, after litigation begun are not admissible. Rountree v. Gaulden, 128 Ga. 737, 58 S. E. 346.

513-78 Doe v. Edmondson, 145 Ala. 557, 40 S. 505; Holton v. Dunker, 198 Ill. 407, 64 N. E. 1050; Jonas v. Hirshburg (Ind. App.), 79 N. E. 1058; Higgins v. Spahr, 145 Ind. 167, 43 N. E. 11; Rix v. Smith, 145 Mich. 203, 108 N. W. 691.

514-79 West v. Oil Co., 136 Fed. 343, 69 C. C. A. 169; Adair v. Craig, 135 Ala. 332, 33 So. 902; Lang v. Metzger, 206 Ill. 475, 69 N. E. 493; Holton v. Dunker, 198 Ill. 407, 64 N. E. 1050; Ikand v. Minter, 4 Ind. Ter. 214, 69 S. W. 852; Severson v. Gremm, 124 Ia. 729, 100 N. W. 862; Skidmore v. Smith, 27 Ky. L. R. 323, 84 S. W. 1163; Pfeffer v. Kling, 58 App. Div. 179, 68 N. Y. S. 641, *aff.* (no opinion), 171 N. Y. 668, 64 N. E. 1125; Leary v. Corvin, 63 App. Div. 151, 71 N. Y. S. 335; Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308; Beall v. Chatham (Tex.), 99 S. W. 1116; Moore v. Robinson (Tex. Civ.), 75 S. W. 890; McKnight v. Reed, 30 Tex. Civ. 204, 71 S. W. 318.

515-80 Broughan v. Broughan, 62 Kan. 724, 64 P. 608; Burg v. Rivera, 105 La. 144, 29 S. 482 (in absence of purchaser); Interstate C. & I. Co. v. Coal Co., 105 Va. 574, 54 S. E. 593.

516-81 Exceptions to the rule concerning admissions by former owners, etc. — The exceptions to the rule are: (1) Where there has been a prima facie case of fraud established, as where the thing granted has a corpus, and the possession of the thing after the sale remains with the seller; (2) where the declarations are made in the presence of the vendee, and he acquiesces in the statements, or asserts no rights where he ought to speak, and (3) where the evidence establishes a continuing conspiracy to defraud between the vendor and vendee. Moore v. Robinson (Tex. Civ.), 75 S. W. 890. "Sayings of a person in possession of real estate or some interest therein ought not to be admitted against another unless it appears that this other claims through or under him or stands in privity with him, these declarations not being offered, apparently, to prove adverse possession on the part of the person making them. When such declarations are offered it is material to show, accurately or approximately, when they were made." Whelchel v. R. Co., 116 Ga. 431, 42 S. E. 776.

516-82 Earp v. Edgington, 107 Tenn. 23, 64 S. W. 40.

517-83 Admissions of a grantee concerning the competency of his grantor may be proved against the former's heirs. Benson v. Raymond, 142 Mich. 357, 105 N. W. 870, 108 N. W. 660.

517-84 Dedication of land; declaration while deed in escrow. — See Smith v. Glenn, 129 Cal. xviii, 62 P. 180.

517-85 Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026.

Admissions of a prior tenant are binding upon his immediate and mediate successors. Neff v. Ryman, 100 Va. 521, 42 S. E. 314.

517-86 Costello v. Graham (Ariz.), 80 P. 336.

517-88 Pearson v. Adams, 129 Ala. 157, 29 S. 977; Murphy v. Roney, 26 Ky. L. R. 634, 82 S. W. 396; Leary v. Corvin, 63 App. Div. 151, 71 N. Y. S. 335; Loos v. Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250.

Made after bar of statute complete are competent on the issue of possession. Walling v. Eggers, 31 Ky. L. R. 1009, 104 S. W. 360.

What may be shown. — Declarations against interest in regard to the nature, character or extent of the declarant's possession, the identity or location upon the face of the earth of boundaries and monuments called for in a deed, or in regard to any matter concerning the physical condition or use of the property, which must be, from the nature of things, proved by parol, are admissible. Phillips v. Laughlin, 99 Me. 26, 58 A. 64; Fall v. Fall, 100 Me. 98, 60 A. 718.

518-89 Munsey v. Hanly (Me.), 67 A. 217; Phillips v. Laughlin, 99 Me. 26, 58 A. 64, 105 Am. St. 253;

Hall v. Waddill, 78 Miss. 16, 27 S. 936, 28 S. 831; Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308; Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026.

520-90 Kennedy v. Bates, 142 Fed. 51, 73 C. C. A. 237; Phillips v. Laughlin, 99 Me. 26, 35, 58 A. 64.

Mistake in deed. — Declarations concerning a mistake in a deed and the land intended to be conveyed may be proven. Miller v. Miller, 7 Ariz. 316, 64 P. 415. But a plain, unambiguous description cannot be affected by admissions. Shaffer v. Gaynor, 117 N. C. 15, 23 S. E. 154.

520-91 Pentico v. Hays, 75 Kan. 76, 88 P. 738; Fall v. Fall, 100 Me. 98, 60 A. 718.

Declarations of deceased as to purpose for which deed given. — It may be shown by the declarations of a deceased grantee that a deed was given to secure payment of indebtedness. It was conceded that a deed absolute in form cannot be changed into a mortgage by subsequent oral declarations. "But the declarations here related to the state of mind of the parties when the deed was made; the subsequent declarations were not to show a subsequent intent, but the intent when the deed was made. It is not a case of attempting to change what was at first intended to be a deed absolute into a mortgage." Harp v. Harp, 136 Cal. 421, 69 P. 28.

520-92 Hargus v. Hayes, 83 Ark. 186, 103 S. W. 163.

521-94 Taliaferro v. Evans, 160 Mo. 380, 389, 61 S. W. 185; Kalish v. Higgins, 70 App. Div. 192, 75 N. Y. S. 397; Lent v. Shear, 160 N. Y. 462, 55 N. E. 2; Wadleigh v. Wadleigh, 111 App. Div. 367, 97 N. Y. S. 1063; Shaffer v. Gaynor, 117 N. C. 15, 23 S. E. 154; Hetrick v. Gregg, 8 Ohio N. P. 24; Muller v. Flavin, 13 S. D. 595, 616, 83 N. W. 687.

In the absence of the other party, not admissible. Stam v. Smith, 183 Mo. 464, 81 S. W. 1217; Skelley v. Vail, 27 Ind. App. 87, 60 N. E. 961.

Declarations made after conveyance. "The general rule that the declarations of a grantor, made after the execution of the grant, cannot be used to impeach it, has been so far modified that when the good faith of a transfer has been attacked by creditors and some evidence has been adduced to show a common purpose or design by the parties to hinder, delay or defraud creditors, subsequent declarations by the grantor are admissible." Boyer v. Weimer, 204 Pa. 295, 54 A. 21, *cit.* Hartman v. Diller, 62 Pa. 37; Souder v. Schechterly, 91 Pa. 83. To the same effect are Skelley v. Vail, 27 Ind. App. 87, 60 N. E. 961; Jonas v. Hirshburg (Ind. App.), 79 N. E. 1058; Walker v. Harold, 44 Or. 205, 74 P. 705.

There are cases favoring the right to prove the declarations of the grantor after the conveyance as against him, though they would be inadmissible against the grantee. Hogan v. Robinson, 94 Ind. 138; Hunsinger v. Hofer, 110 Ind. 390, 11 N. E. 463; Vansickle v. Shenk, 150 Ind. 413, 50 N. E. 381.

Declarations made intermediate the transfer and the recording of the conveyance may be proved. Bush & M. Co. v. Helbing, 134 Cal. 676, 66 P. 967.

522-97 Doe v. Edmondson, 145 Ala. 557, 40 S. 505; Anniston C. L. Co. v. Edmondson, 127 Ala. 445, 30 S. 61; Hutton v. Doxsee, 116 Ia. 13, 89 N. W. 79; Fall v. Fall, 100 Me. 98, 60 A. 718; Wall v. Beedy, 161 Mo. 625, 61 S. W. 864.

523-98 Warner v. Sapp (Tex. Civ.), 97 S. W. 125.

524-99 Pleasanton v. Simmons, 2 Penne. (Del.) 477, 47 A. 697; Mann v. Cavanaugh, 23 Ky. L. R. 238, 62 S. W. 854.

525-5 Campbell v. Eichorst, 122 Ill. App. 609; Vermillion v. LeClare, 89 Mo. App. 55; Mower v. McCarthy, 79 Vt. 142, 155, 64 A. 578, 7 L. R. A. (N. S.) 418.

Proof of possession. — An agent, who is not a party, cannot prove his possession of property owned by another by his own declarations. Whitney v. Wagener, 84 Minn. 211, 87 N. W. 602.

526-7 Bullard v. Bullard, 112 Ia. 423, 84 N. W. 513.

526-10 Lent v. Shear, 160 N. Y. 462, 55 N. E. 2; Wangner v. Grimm, 169 N. Y. 421, 431, 62 N. E. 569; Aldous v. Olverson, 17 S. D. 190, 95 N. W. 917; Bruce v. Bruce (Tex.

Civ.), 89 S. W. 435; Wooley v. Bell, 33 Tex. Civ. 399, 76 S. W. 797.

526-11 McKnight v. U. S., 130 Fed. 659; Vermillion v. LeClare, 89 Mo. App. 55.

526-14 Moravec v. Grell, 78 App. Div. 146, 79 N. Y. S. 533; Newgass v. Loan Co., 81 App. Div. 411, 80 N. Y. S. 778; Woods v. Faurot, 14 Okla. 171, 77 P. 346; Boltz v. Engelke (Tex. Civ.), 63 S. W. 899 (and in the presence of the vendee); Mower v. McCarthy, 79 Vt. 142, 155, 64 A. 578, 7 L. R. A. (N. S.) 418.

528-15 Woods v. Faurot, 14 Okla. 171, 77 P. 346.

528-16 Is the rule applicable to testimony. — In Texas it has been ruled that a vendor may testify to the facts and circumstances connected with the sale of his property; the objections made to oral admissions out of court have no application to testimony given in court. Schmitt v. Jacques, 26 Tex. Civ. 125, 62 S. W. 956. (A writ of error was denied by the supreme court.) But this distinction is not generally recognized, and has been denied in a late case. Lent v. Shear, 160 N. Y. 462, 55 N. E. 2. The court said: "Declarations made under oath do not differ in principle from declarations made without that sanction, and both come within the rule which excludes all hearsay evidence. . . . No man's property would be safe and titles would be thrown into confusion if the declarations of a grantor, out of possession, whether made under the sanction of an oath or not, could be received in evidence against his grantee."

Admissions pending transaction. Admissions made by the vendor in the presence of the vendee after he has taken possession, but pending the completion of the inventory and exchange of the papers, are competent to show the vendee's knowledge of the vendor's purpose. Bender v. Kingman, 62 Neb. 469, 87 N. W. 142.

Admissions by a bankrupt in possession may be proved after his death. Smith v. AuGres, 150 Fed. 257, 80 C. C. A. 145. The court was in doubt with regard to admissions made by the bankrupt after the trustee had succeeded to the title to the property; it was said: It is a close question whether the conditions which permit the declarations of a deceased witness existed.

As between mortgagor and mortgagee, declarations by the former, made after execution of the mortgage, are competent. Levy v. Hamilton, 68 App. Div. 277, 74 N. Y. S. 159.

528-17 Scheps v. Bank, 97 App. Div. 434, 90 N. Y. S. 26; Van Arsdale v. Buck, 82 App. Div. 383, 81 N. Y. S. 1017; Wangner v. Grimm, 169 N. Y. 421, 62 N. E. 569; Newgass v. Loan Co., 80 N. Y. S. 778.

Declarations made by the donor, not as part of the res gestae and not communicated to the donee, are not provable to show that a loan was an advancement. Garner v. Taylor (Tenn. Ch. App.), 58 S. W. 758, affirmed by supreme court without opinion.

529-20 Banning v. Marlean, 133 Cal. 485, 65 P. 964; Bank v. Levy, 138 N. C. 274, 50 S. E. 657; Shelley v. Nolen (Tex. Civ.), 88 S. W. 524.

529-21 Gage v. Trawick, 94 Mo. App. 307, 68 S. W. 85; Beers v. Aylsworth, 41 Or. 251, 69 P. 1025.

If the vendor remains in possession with the vendee's consent, the former's admissions may be proved. Avard v. Carpenter, 72 App. Div. 258, 76 N. Y. S. 105. If fraudulent representations are alleged, the statements of the vendor and statements made in his presence after the fraud was discovered may be proved. Geraghty v. Randall, 18 Colo. App. 194, 70 P. 767.

531-25 Admissions made by a vendor, while in possession by consent of his vendee, are competent in an action by the latter for the conversion of the property by execution sale (Avard v. Carpenter, 72 App. Div. 258, 76 N. Y. S. 105); and as against a deceased mortgagee though they were made subsequent to the mortgage (Levy v. Hamilton, 68 App. Div. 277, 74 N. Y. S. 159); they are also competent against creditors whose rights are dependent upon the rights of their debtor on the principle of subrogation. Fourth Nat. Bk. v. Albaugh, 107 Fed. 819, 46 C. C. A. 655.

531-26 Davis v. Buchanan, 73 Vt. 67, 50 A. 545.

532-28 Thompson v. Rosenstein (Tex. Civ.), 67 S. W. 439.

532-30 Continental Nat. Bk. v. Moore, 83 App. Div. 419, 82 N. Y. S. 302; Smith v. AuGres, 150 Fed. 257, 80 C. C. A. 145; Scheurer v. Brown, 67 App. Div. 567, 73 N. Y. S. 877; Squire v. Greene, 47 App. Div. 636, 62 N. Y. S. 48, *aff.*, without opinion, 168 N. Y. 659, 61 N. E. 1135.

532-31 Merkle v. Beidleman, 165 N. Y. 21, 58 N. E. 757; Mitchell v. Baldwin, 88 App. Div. 265, 84 N. Y. S. 1043, *cit.* Dodge v. Sav. Co., 93 U. S. 379; German-Am. Bk. v. Slade, 15 Misc. 287, 36 N. Y. S. 983; Wagner v. Grimm, 169 N. Y. 421, 62 N. E. 569.

533-32 Ellis v. Watkins, 73 Vt. 371, 50 A. 1105.

534-35 Barnett v. Ins. Co., 91 App. Div. 435, 86 N. Y. S. 842; Finance Co. v. Josephson, 88 N. Y. S. 707.

Choses in action are governed by the same rule. Cases in n. 31, supra; Tittle v. Van Valkenburg, 75 App. Div. 69, 77 N. Y. S. 786, *dist.* Von Sachs v. Kretz, 72 N. Y. 548, on the ground that it was based on the theory that the party against whom the declarations were admitted stood as trustee of the declarant.

535-36 **An assignor's declarations** prior to the assignment may be shown to aid in determining whether all his property was delivered and whether the assignment was bona fide. Armour v. Doig, 45 Fla. 162, 34 S. 249.

535-37 Oliver v. McDowell, 100 Ill. App. 45; Finance Co. v. Josephson, 88 N. Y. S. 707; Kalish v. Higgins, 70 App. Div. 192, 75 N. Y. S. 397, *aff.* on opinion below, 175 N. Y. 495, 67 N. E. 1084; Merkle v. Beidleman, 165 N. Y. 21, 58 N. E. 757; Conkling v. Weatherwax, 90 App. Div. 585, 86 N. Y. S. 139; Barnett v. Ins. Co., 91 App. Div. 435, 86 N. Y. S. 842; City Nat. Bk. v. Bridgers, 128 N. C. 322, 38 S. E. 888.

Declarations made after the transfer of a check, in the absence of the holder, cannot be shown to contradict his testimony as to the bona fides of his title. Maslon v. Sprickerhoff, 98 N. Y. S. 618.

The subsequent death of the assignor is immaterial to the application of the rule (Crawford v. Hord (Tex. Civ.), 89 S. W. 1097); and so is the fact that the declarations were heard by the assignee. Gerding v. Funk, 48 App. Div. 603, 64 N. Y. S. 423.

537-41 Fuqua v. Bogard, 22 Ky. L. R. 1910, 62 S. W. 480 (pledgor and pledgee).

537-42 Smith v. Au Gres, 150 Fed. 257, 80 C. C. A. 145; West Co. v. Lea Bros., 174 U. S. 590.

Made while not in possession may be proven against the trustee, substituted as defendant. Kuh, N. & F. Co. v. Glucklick, 120 Ia. 504, 94 N. W. 1105.

538-48 Pearson v. Adams, 129 Ala. 157, 29 S. 977; Cable Co. v. Walker, 127 Ga. 65, 56 S. E. 108; Baldwin & Co. v. Tucker, 25 Ky. L. R. 222, 75 S. W. 196; McDonough v. R. Co., 191 Mass. 509, 78 N. E. 141; Hill v. Bank, 100 Mo. App. 230, 73 S. W. 307; White City S. Bk. v. Bank, 90 Mo. App. 395; Stecher L. Co. v. Inman, 175 N. Y. 124, 67 N. E. 213, 67 App. Div. 625, 74 N. Y. S. 1147; Nowack v. R. Co., 166 N. Y. 433, 60 N. E. 32; Pecos etc. R. Co. v. Lovelady, 35 Tex. Civ. 659, 80 S. W. 867.

By master of vessel. — Admissions made by the master of a vessel after a collision and relating to it are evidence against the owner. The Severn, 113 Fed. 578; The Enterprise, 2 Curt. 320, 8 Fed. Cas. 4,497; The Potomac, 8 Wall. (U. S.) 590; Packet Co. v. Clough, 20 Wall. (U. S.) 528, See "ADMIRALTY," Vol. 1, pp. 218, 324, and same title, ante.

539-49 Northern P. R. Co. v. Kempton, 138 Fed. 992, 71 C. C. A. 246; Schiffer v. Anderson, 146 Fed. 457, 76 C. C. A. 667; Barnesville Mfg. Co. v. Love (Del.), 52 A. 267; Waters v. R. Co., 101 Ill. App. 265; Krohn v. Anderson, 29 Ind. App. 379, 64 N. E. 621; Southern R. Co. v. Railey, 26 Ky. L. R. 53, 80 S. W. 786; Copeland v. Dairy Co., 184 Mass. 207, 68 N. E. 218; Garfield v. Motor Co., 189 Mass. 395, 75 N. E. 695; State v. Pack. Co., 173 Mo. 356,

73 S. W. 645, 61 L. R. A. 464; Roth v. Wire Co., 94 Mo. App. 236, 68 S. W. 594, 602; Fowles v. Loan Co., 86 Mo. App. 103; Bowman & Co. v. Lickey, 86 Mo. App. 47, 59; Henderson W. Mills v. Edwards, 84 Mo. App. 448; Campbell v. Emslie, 101 App. Div. 369, 91 N. Y. S. 1069; L. & N. R. Co. v. Bohan, 116 Tenn. 271, 290, 94 S. W. 84; Wright v. Stewart, 19 Wash. 179, 52 P. 1020; Hall v. Ins. Co., 23 Wash. 610, 63 P. 505; Moran Bros. Co. v. Power Co., 29 Wash. 292, 69 P. 759; Hall v. Ins. Co., 23 Wash. 610, 63 P. 505, 51 L. R. A. 288.

Principal's knowledge of admissions immaterial. Carney v. Hennessey, 74 Conn. 107, 49 A. 910, 53 L. R. A. 699.

Admission by agent of both parties may be competent against both. Copeland v. Dairy Co., 184 Mass. 207, 68 N. E. 218.

Book entries made by agent in the course of his employment are admissible after his death, though not constituting a part of the res gestae. Turner v. Turner, 123 Ga. 5, 50 S. E. 969.

Sub-agent's authority. — An agent may delegate the performance of ministerial acts, and he and his principal be bound by the declarations of the sub-agent within the scope of the authority granted. Bowman & Co. v. Lickey, 86 Mo. App. 47.

Papers attached to proofs of loss. The general rule that the record of a coroner's inquest attached to proofs of death by the beneficiary of the insured is competent to prove admissions as to the cause of death (Insurance Co. v. Newton, 22 Wall. (U. S.) 32; Insurance Co. v. Higginbotham, 95 U. S. 380; Keels v. Reserve Fund Assn., 29 Fed. 198; Sharland v. Ins. Co., 101 Fed. 206, 41 C. C. A. 307; Hart v. Fraternal Alliance, 108 Wis. 490, 84 N. W. 851; Walther v. Ins. Co., 65 Cal. 417, 4 P. 413) has no application when such record is made a part of the proofs pursuant to the by-laws of insurer. Cox v. Royal Tribe, 42 Or. 365, 71 P. 73; Matzenbaugh v. P., 194 Ill. 108, 62 N. E. 546; Rhode v. Ins. Co., 129 Mich. 112, 88 N. W. 400; Bibby v. Thomas, 131 Ala. 350, 31 S. 432.

540-51 The Maurice, 135 Fed. 516, 68 C. C. A. 228; Marande v. R. Co., 124 Fed. 42, 59 C. C. A. 562; Walker Mfg. Co. v. Knox, 136 Fed. 334, 69 C. C. A. 160; Haywood v. Hamm, 77 Conn. 158, 58 A. 695; Columbus R. Co. v. Peddy, 120 Ga. 589, 48 S. E. 149; Turner v. Turner, 123 Ga. 5, 50 S. E. 969; National B. Assn. v. Quin, 120 Ga. 358, 47 S. E. 962; Helbig v. Ins. Co., 120 Ill. App. 58; Delaware C. Co. v. Mitchell, 92 Ill. App. 577; Holzhauer v. Sheeny, 31 Ky. L. R. 1238, 104 S. W. 1034; Trainor v. Schutz, 98 Minn. 213, 107 N. W. 812; Rice v. St. Louis, 165 Mo. 636, 65 S. W. 1002; Loving Co. v. Cattle Co., 176 Mo. 330, 75 S. W. 1095; Blackman v. R. Co., 68 N. J. L. 1, 52 A. 370; Holt v. Johnson, 129 N. C. 138, 39 S. E. 796; Paulton v. Keith, 23 R. I. 164, 49 A. 635; Harris v. Pack. Co., 43 Wash. 647, 86 P. 1125; Manning v. School Dist., 124 Wis. 84, 102 N. W. 356.

Agent's admissions not binding on his principal's receiver. — Smith v. Coe, 57 App. Div. 631, 68 N. Y. S. 274.

Not within scope of authority. — An agent for the delivery of goods has no authority to make declarations as to their title or ownership. Goltra v. Penland, 45 Or. 254, 77 P. 129. Nor as to their condition. Peterson v. Fruit Co., 140 Cal. 624, 74 P. 162.

Letter by agent. — A reply to a letter asking for money, written by an agent of the debtor who was asked to answer it, but given no instructions, is admissible. Skidmore v. Johnson, 70 N. J. L. 674, 57 A. 450.

Agent for mechanical purposes. The master is not bound by what an employee engaged in mechanical labor may say. King v. Gas Co., 70 N. J. L. 679, 58 A. 345.

A representative whose knowledge is that of his principal may bind the latter by an admission. Cudahy P. Co. v. Hays, 74 Kan. 124, 85 P. 811.

543-52 Pittsburgh P. G. Co. v. Kerlin Bros., 122 Fed. 414, 58 C. C. A. 648; Marande v. R. Co., 124 Fed. 42, 59 C. C. A. 562; Northern P. R. Co. v. Kempton, 138 Fed. 992, 71 C. C. A. 246; Warren L. S. Co. v. Farr, 142 Fed. 116, 73 C. C. A. 340; Westall v. Osborne, 115 Fed. 282, 53 C.

C. A. 74; Southern R. Co. v. Reeder (Ala.), 44 S. 698; Bundy v. Lumb. Co., 149 Cal. 772, 87 P. 622; Haywood v. Hamm, 77 Conn. 158, 58 A. 695; Childs v. Ponder, 117 Ga. 553, 43 S. E. 986; Chicago & E. I. R. Co. v. Keegan, 112 Ill. App. 338; Baier v. Selke, 211 Ill. 512, 71 N. E. 1074; Delaware & H. C. Co. v. Mitchell, 92 Ill. App. 577; Drusecker v. Cement Co., 93 Ill. App. 406; Alquist v. Iron Wks., 126 Ia. 67, 101 N. W. 520; Illinois Cent. R. Co. v. Houchins, 28 Ky. L. R. 499, 89 S. W. 530; Holzhouer v. Sheeny, 31 Ky. L. R. 1238, 104 S. W. 1034; McFarland v. Harbison, 26 Ky. L. R. 746, 82 S. W. 430; Butler v. R. Co., 138 Mich. 206, 101 N. W. 232; Parker v. R. Co., 83 Minn. 212, 86 N. W. 2; Wojtylak v. Coal Co., 188 Mo. 260, 87 S. W. 506; Helm v. R. Co., 98 Mo. App. 419, 72 S. W. 148; Wright Inv. Co. v. Fillingham, 85 Mo. App. 534; Salley v. R. Co., 62 S. C. 127, 40 S. E. 111; International & G. N. R. Co. v. Carr (Tex. Civ.), 91 S. W. 858; Hall v. Ins. Co., 23 Wash. 610, 63 P. 505, 51 L. R. A. 288; Harris v. Pack. Co., 43 Wash. 647, 86 P. 1125; Cook v. Mill Co., 36 Wash. 36, 78 P. 39; Roberts v. Mill Co., 30 Wash. 25, 70 P. 111; Chilcott v. Colonization Co. (Wash.), 88 P. 113.

Dangerous situation. — Statements of the defendant's fire boss and mine examiner as to the danger in the mine, made three or four days before the injury to plaintiff, have been allowed to be proved. Athens M. Co. v. Carnduff, 123 Ill. App. 178, 186.

545-53 Southern P. Co. v. Arnett, 111 Fed. 849, 50 C. C. A. 17; Fidelity & C. Co. v. Haines, 111 Fed. 337, 49 C. C. A. 379; St. Louis & S. F. R. Co. v. Crowder, 82 Ark. 562, 103 S. W. 172; Barlow Bros. Co. v. Parsons, 73 Conn. 696, 49 A. 205; Bean v. Taylor, 22 Ky. L. R. 1665, 61 S. W. 31; Spencer v. Ins. Co., 112 Mo. App. 86, 86 S. W. 899; Brownfield v. Denton, 72 N. J. L. 235, 61 A. 378; Diehl v. Watson, 89 App. Div. 445, 85 N. Y. S. 851; Leary v. Brew. Co., 77 App. Div. 6, 79 N. Y. S. 130; Harkins v. Ins. Co., 106 App. Div. 170, 94 N. Y. S. 140; Klingman v. Fish & H. Co., 19 S. D. 139, 102 N. W. 601; Stevens v. Mfg. Co., 29 Tex. Civ. 168, 67 S. W. 104.

Proof of agency. — Proof that a party went into a branch office of the defendant and was there directed to the main office where he held conversation with the receiving clerk and cashier, established their status as agents. Western U. Tel. Co. v. Wells, 50 Fla. 474, 39 S. 838.

The relation of principal and agent may be shown by the usual methods. Turner v. Turner, 123 Ga. 5, 50 S. E. 969; Cable Co. v. Walker, 127 Ga. 65, 56 S. E. 108.

Proof of duties of agent. — The fact that a person was held out by the principal to be its sales manager makes his admission binding without proof as to his duties as manager. Garfield v. Motor Car Co., 189 Mass. 395, 75 N. E. 695.

Admissions of one in possession of goods have been held competent without proof of his agency for any specific purpose. Kaufman v. Burchinell, 15 Colo. App. 520, 63 P. 786.

Offer to settle. — An offer to pay the expenses of a person injured in consequence of negligence is not an admission that the negligent person was the servant of him who made the offer. Powell v. McGlynn, 2 Ir. Rep. (1902), 154.

546-54 Sibley W. S. Co. v. Durand, 200 Ill. 354, 65 N. E. 676, 102 Ill. App. 406; Pease v. French, 197 Ill. 101, 64 N. E. 368; Helm v. R. Co., 98 Mo. App. 419, 72 S. W. 148; Huebner v. R. Co., 69 N. J. L. 327, 55 A. 273; St. Louis etc. R. Co. v. Carlisle, 34 Tex. Civ. 268, 78 S. W. 553; Sias v. Lighting Co., 73 Vt. 35, 50 A. 554.

Order of proof. — The declarations of an agent should not be received before proof of the agency, unless the party tendering them offers in good faith to supplement them by other and independent evidence of the agency; and if such offer is not made good the declarations ought to be excluded. Indiana F. Co. v. Sandlin, 125 Ga. 222, 54 S. E. 65.

546-55 Castner v. Rinne, 31 Colo. 256, 72 P. 1052; Extension G. M. Co. v. Skinner, 28 Colo. 237, 64 P. 198; Murphy v. Gumaer, 12 Colo. App. 472, 55 P. 951; Indiana F. Co. v. Sandlin, 125 Ga. 222, 54 S. E. 65; Brooks v. Lowe, 122 Ga. 358, 50 S. E. 146; Payton v. Mills Co., 28 Ky.

L. R. 1303, 91 S. W. 719; Dieckman v. Weirich, 24 Ky. L. R. 2340, 73 S. W. 1119; Fifer v. Coal Co., 103 Md. 1, 62 A. 1122; Whitney v. Wagener, 84 Minn. 211, 87 N. W. 602; S. v. Henderson, 86 Mo. App. 482; Brownfield v. Denton, 72 N. J. L. 235, 61 A. 378; Burns v. Condensed M. Co., 93 App. Div. 566, 87 N. Y. S. 883; Legnard v. Ins. Co., 81 App. Div. 320, 81 N. Y. S. 516; Jackson v. Tel. Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; Sloan v. Sloan, 46 Or. 36, 78 P. 893; Paulton v. Keith, 23 R. I. 164, 49 A. 635.

Documentary proof. — In the absence of other proof of agency, orders for money signed by the alleged agent or agreed settlements by him of claims against his alleged principal are not competent. Amicalola M. & P. Co. v. Coker, 111 Ga. 872, 36 S. E. 950.

548-61 Carney v. Hennessey, 74 Conn. 107, 49 A. 910, 53 L. R. A. 699; Haywood v. Hamm, 77 Conn. 158, 58 A. 695 (prima facie proof of agency); Fifer v. Coal Co., 103 Md. 1, 62 A. 1122; St. Louis S. R. Co. v. McIntyre, 36 Tex. Civ. 399, 82 S. W. 346; American etc. Wks. v. Brew. Co., 30 Wash. 178, 70 P. 236.

Agency once existing is presumed to have continued. Hall v. Ins. Co., 23 Wash. 610, 63 P. 505.

Effect of letters as evidence. — That "a letter received by due course of mail, purporting to be written by the managing agent of a corporation in reply to a letter addressed to the corporation, and sent through the mail, is presumptively genuine and authorized, and is admissible in evidence without further proof that such person is the managing agent of the corporation, or that the letter was written by the party by whom it purports to be signed," seems to be well recognized. St. Louis S. W. R. Co. v. McIntyre, 36 Tex. Civ. 399, 82 S. W. 346, *cit.* Missouri Pac. R. Co. v. German, 84 Tex. 141, 19 S. W. 461; Armstrong v. Thresher Co., 5 S. D. 12, 57 N. W. 1131; Bloom v. Ins. Co., 94 Ia. 359, 62 N. W. 810.

548-62 Ratification may be found in proof of silence of the principal under circumstances which required him to speak. Sloan v. Sloan, 46 Or. 36, 78 P. 893.

548-65 **Statements made by a general agent** to his principal concerning the latter's business and according to the former's duty are said to be admissible whether part of the res gestae or not (Knarston v. Ins. Co., 140 Cal. 57, 73 P. 740); but this distinction is not everywhere recognized. Butters S. & L. Co. v. Vogel, 135 Mich. 381, 97 N. W. 757.

549-66 King v. Ins. Co., 101 Mo. App. 163, 76 S. W. 55.

Authority of agent. — The declarations of an agent in possession of property as manager and custodian are not admissible to show title to it in another than his principal. Sweeney v. Sweeney, 119 Ga. 76, 46 S. E. 76.

Agent to procure evidence. — An agent appointed to look up and "see to" witnesses, no restrictions being placed upon him, is agent in whatever he does in the direct line of his employment, and his acts in trying to bribe a witness may be proven against his principal. Nowack v. R. Co., 166 N. Y. 433, 60 N. E. 32, *cit.* Chicago C. R. Co. v. McMahon, 103 Ill. 485; Snell v. Bray, 56 Wis. 156, 14 N. W. 14; Baltimore & O. R. Co. v. Rambo, 59 Fed. 75. But see Green v. Woodbury, 48 Vt. 5.

549-67 Farrell v. Dubuque, 129 Ia. 447, 105 N. W. 696; Hofacre v. Monticello, 128 Ia. 239, 103 N. W. 488.

Declarations inadmissible. — The condition of a city's building can not be proven by the declarations of its building commissioner. Chicago v. Rust, 117 Ill. App. 427.

Proof of admission. — Entries in municipal books and a letter written by the mayor are competent to prove admissions in a matter in which no governmental function is involved. Commercial W. Corp. v. Boston, 194 Mass. 460, 80 N. E. 645.

550-69 Adkins v. Monmouth, 41 Or. 266, 68 P. 737; Austin v. Forbis, 99 Tex. 234, 89 S. W. 405. The last case seems to decide that if the officer who made the admission had authority to adjust claims against the city his admission might have been proved. In the absence of such authority, it was immaterial that, as between him and the employes un-

der his control, he may have been the vice-principal of the city or of a commission, the individual members of which were also defendants.

Letter admissible to prove filing of claim against city. South Omaha v. Wrzesinski, 66 Neb. 790, 92 N. W. 1045.

Statements of the superior officers of a city, as repeated by their subordinates, may be proven. Chicago v. Brew. Co., 97 Ill. App. 583.

550-70 Foss v. Whitehouse, 94 Me. 491, 48 A. 109.

The title to public property cannot be affected by the statements of officers. Lamar County v. Talley (Tex. Civ.), 94 S. W. 1069.

Subsequent declarations may be proved to show notice of a defect in a street where that is necessary to establish municipal liability. Radichel v. Kendall, 121 Wis. 560, 99 N. W. 348; Mount Morris v. Kanode, 98 Ill. App. 373; Denver v. Cochran, 17 Colo. App. 72, 67 P. 23; Vandewater v. Wappinger, 69 App. Div. 325, 74 N. Y. S. 699.

551-74 Bailey v. Blacksher Co., 142 Ala. 254, 37 S. 827; Axtell v. R. Co., 9 Idaho 392, 74 P. 1075; Prussian Nat. Ins. Co. v. Catering Co., 113 Ill. App. 67; Cudahy P. Co. v. Hays, 74 Kan. 124, 85 P. 811; Mussellam v. R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Sisk v. Ins. Co., 95 Mo. App. 695, 69 S. W. 687; Ragsdale v. R. Co., 72 S. C. 120, 51 S. E. 540; Standefer v. Mach. Co. (Tex. Civ.), 78 S. W. 552; Hall v. Ins. Co., 23 Wash. 610, 63 P. 505; Moran Bros. Co. v. Power Co., 29 Wash. 292, 69 P. 759.

Officers of benefit society its agents. If the by-laws of a benefit society and the form provided by it on which to make proof of death impose upon a local body the duty of making such proof and of expressing an opinion as to the validity of the claim, admissions made in such proof may be proved against the superior body. Patterson v. United Artisans, 43 Or. 333, 72 P. 1095.

Admissions of principal. — An agent may communicate admissions made by his principal. Ulysses E. B. Co. v. Ins. Co., 20 Pa. Super. 384.

Admissions as to ownership of stock and persons interested in corporation. See Jones v. Mfg. Co., 27 Wash. 136, 67 P. 586.

Testimony not adopted as admissions. — A litigant does not, by implication, approve and adopt as his own all statements in depositions, testimonies and affidavits offered in his behalf, so that they may be used against him as admissions. Robert R. Sizer & Co. v. Melton, 129 Ga. 143, 58 S. E. 1055.

Private corporations are not bound by admissions made by their officers or agents as witnesses. Vohs v. Shortill, 124 Ia. 471, 100 N. W. 495; Harrison Co. v. Bank, 127 Ia. 242, 103 N. W. 121.

556-75 Fidelity & C. Co. v. Haines, 111 Fed. 337, 49 C. C. A. 379; Walker Mfg. Co. v. Knox, 136 Fed. 334, 69 C. C. A. 160; Luman v. Min. Co., 140 Cal. 700, 74 P. 307; Baldwin v. Bank, 17 Colo. App. 7, 67 P. 179; Harrison Co. v. Bank, 127 Ia. 242, 103 N. W. 121; Parker v. Tel. Co., 25 Ky. L. R. 1391, 77 S. W. 1109; Illinois C. R. Co. v. Winslow, 27 Ky. L. R. 329, 84 S. W. 1175; Straight Creek C. Co. v. Haney, 27 Ky. L. R. 1117, 87 S. W. 1114; Bachant v. R. Co., 187 Mass. 392, 73 N. E. 642; Allington Mfg. Co. v. Reduc. Co., 133 Mich. 427, 95 N. W. 562; Beunk v. Desk Co., 128 Mich. 562, 87 N. W. 793; Lee v. R. Co., 112 Mo. App. 372, 87 S. W. 12; Redmon v. R. Co., 185 Mo. 1, 84 S. W. 26; Hogan v. Kelly, 29 Mont. 485, 75 P. 81; Blackman v. R. Co., 68 N. J. L. 1, 52 A. 370; Ginsburg v. Cloak Co., 35 Misc. 389, 71 N. Y. S. 1030; Wimmer v. R. Co., 92 App. Div. 258, 86 N. Y. S. 1052; Lyman v. R. Co., 132 N. C. 721, 44 S. E. 550; McEtyre v. Cotton Mills, 132 N. C. 598, 44 S. E. 109; Darlington v. Tel. Co., 127 N. C. 448, 37 S. E. 479; Alden v. Lumb. Co., 46 Or. 593, 81 P. 385; Hannan v. Greenfield, 36 Or. 97, 58 P. 888; Matteson v. R. Co. (Pa.), 67 A. 847; Ragsdale v. R. Co., 69 S. C. 429, 48 S. E. 466; Salley v. R. Co., 62 S. C. 127, 40 S. E. 111; Houston & T. C. R. Co. v. Laforge (Tex. Civ.), 84 S. W. 1072; Cook v. Mill Co., 36 Wash. 36, 78 P. 39; Kamp v. Coxe Bros., 122 Wis. 206, 99 N. W. 366; Small v. McGovern, 117 Wis. 608, 94 N. W. 651.

Illustrations. — Where plaintiff,

after applying for leave to enter defendant's premises and examine hoops which had come from a broken vat, was shown the hoops by a person having authority to exhibit them, his remark, "those are the hoops," was admissible as part of the res gestae; but if such person had also said, "those hoops were in the same decayed condition prior to the accident," or "I knew their condition then," such declaration would have been inadmissible to prove such past fact, even if it might have been received as characterizing the act of exhibiting to plaintiff. Kamp v. Coxe Bros., 122 Wis. 206, 99 N. W. 366; Hupfer v. Distill. Co., 127 Wis. 306, 106 N. W. 831.

A declaration by defendant's superintendent, before the accident, and while the unfit employe was in the service, to the effect that the latter was given to intoxication, was competent as res gestae to the very act then being done by the superintendent on behalf of his principal, to show the knowledge he had while transacting the business; but, it was said, an admission afterward would stand upon a different footing. Chapman v. R. Co., 55 N. Y. 579; Harper v. Tel. Co., 92 Mo. App. 304.

Pending transaction. — A statement by a telegraph agent, made three days after a message was sent, that he knew it had been delivered, related to an uncompleted, pending transaction. Western U. Tel. Co. v. Barefoot (Tex. Civ.), 74 S. W. 560, *rev.* on other questions, 76 S. W. 914. See Cooper G. Co. v. Britton (Tex. Civ.), 74 S. W. 91.

Declarations made in connection with the principal's assent to the rescission of a contract do not relate to past transactions. Aetna I. Co. v. Tract. Co., 147 Fed. 95, 78 C. C. A. 262. If the agent's duty is a continuing one — as to collect insurance premiums — he may bind his principal by admissions concerning them after completion of the contract. Hall v. Ins. Co., 23 Wash. 610, 63 P. 505. Admissions made to secure renewal of a loan do not relate to past transactions. First Nat. Bk. v. Arnold, 156 Ind. 487, 60 N. E. 134.

Must not relate to the future. Declarations as to the future conduct of an agent, although made while doing an act which he purposed to repeat, are not provable. Waggoner v. Snody, 98 Tex. 512, 85 S. W. 1134.

556-76 Reports to superior officers. — A report made in the line of duty is not inadmissible because the person making it had no personal knowledge of the fact admitted therein. Virginia-C. Co. v. Knight, 106 Va. 674, 56 S. E. 725. A report made by an agent to his principal is competent to show the condition of work done for it. Lipscomb v. R. Co., 65 S. C. 148, 43 S. E. 388.

Reports to insurer. — A report made by the secretary of a corporation to its insurer is competent evidence of admissions therein in favor of an injured employe. Roche v. Iron Wks., 140 Cal. 563, 74 P. 147.

556-77 Fidelity & C. Co. v. Haines, 111 Fed. 337, 49 C. C. A. 379; Central E. Co. v. Elec. Co., 120 Fed. 925, 57 C. C. A. 197; Stanton v. Lumb. Co., 132 Ala. 635, 32 S. 299; Relley v. Campbell, 134 Cal. 175, 66 P. 220; Castner v. Rinne, 31 Colo. 256, 72 P. 1052; Hayzel v. R. Co., 19 App. D. C. 359, 369; Haney-C. Co. v. Creamery Assn., 119 Ia. 188, 93 N. W. 297; Allington Mfg. Co. v. Reduc. Co., 133 Mich. 427, 95 N. W. 562; Reason v. R. Co. (Mich.), 113 N. W. 596; Shoemaker v. Assur. Co., 75 Neb. 587, 106 N. W. 316; Utica City Nat. Bk. v. Tallman, 63 App. Div. 480, 71 N. Y. S. 861, *aff.*, without opinion, 172 N. Y. 642, 65 N. E. 1123; Wickham v. R. Co., 85 App. Div. 182, 83 N. Y. S. 146; Goetz v. R. Co., 54 App. Div. 365, 66 N. Y. S. 666; Galveston etc. R. Co. v. Levy (Tex. Civ.), 100 S. W. 195; Continental Ins. Co. v. Cummings, 98 Tex. 115, 81 S. W. 705; Sias v. Consol. L. Co., 73 Vt. 35, 50 A. 554; Hardwick S. Bk. v. Drenan, 72 Vt. 438, 48 A. 645.

Evidence as to presidency of corporation. — The election of a president being shown, and his continuing to act as such tends to show that he held the office. Clarke v. Mfg. Co., 174 Mass. 434, 54 N. E. 887. See Choctaw etc. R. Co. v.

Rolfe, 76 Ark. 220, 88 S. W. 870.

Admissions of the president of a corporation, apparently made in the discharge of his duties, are competent evidence (Masonic Temple S. D. Co. v. Langfelt, 117 Ill. App. 652; First Nat. Bk. v. Arnold, 156 Ind. 487, 497, 60 N. E. 134); and so are the admissions of the vice-president while acting as president. Vincent v. Lumb. Co., 113 Ill. App. 463.

Statement by president to board. An admission is not made out by evidence showing that the president of a corporation at a meeting of the trustees called attention to a claim against it, and then and there said that the board had formerly recognized such claim. Childs v. Ponder, 117 Ga. 553, 43 S. E. 986.

President's representative. — The admissions of a person who is sent by the president of a corporation to interview the writer of a letter may be proven. Griffen v. Elec. Co., 115 Fed. 749.

Authority of officers must be shown. To bind the corporation, statements of its officers must be supported by authority to make them (the authority being a matter of inference from the duties performed) and the admissions must be made in the performance of the duty of the agency delegated to the officer. In view of the broad executive authority to be implied from the office of president, the courts have sometimes found reason for charging the corporation with the admissions made by that officer as its general agent; but there is no such implication from the mere holding of the office of vice-president, and beyond the fact that the person who made the admission in this case was vice-president there was nothing to show any agency or official duty delegated to the person who made it. His admission of ownership of the property was not binding. Patterson v. Towing Co., 85 N. Y. S. 359.

Proof of authority not essential. A letter written by the general manager, who was also the secretary and treasurer, of the company and its controlling spirit, was received without other proof of authority to write it. White, H. Co. v. Hall, 102 Va. 284, 46 S. E. 290.

Unauthorized assignment by bank. An assignment made by the president and cashier of a bank, without authority of the board of directors, is admissible as a circumstance showing the insolvency of the bank. McGregor v. Battle, 128 Ga. 577, 585, 58 S. E. 28.

Bank officer. — There is no presumption that a director and vice-president of a bank can bind it by his admissions. Westminster Nat. Bk. v. Elec. Wks., 73 N. H. 465, 62 A. 971.

Admissions by bank cashier. — The admissions of the cashier in negotiating and conducting a transaction which devolved upon him are binding upon the bank. Blair v. Bank, 103 Va. 762, 50 S. E. 262. And so as to his admission as to the value of the services of a clerk employed by him for it. Meislahn v. Bank, 62 App. Div. 231, 70 N. Y. S. 988, *aff.*, without opinion, 172 N. Y. 631, 65 N. E. 1119.

Drawbridge tenders. — Declarations by, admissible as agents. Toll B. Co. v. Betsworth, 30 Conn. 389; Sizer & Co. v. Melton, 129 Ga. 143, 58 S. E. 1055.

Manager of telephone company may bind company by admission as to ownership of wire. Lynchburg Tel. Co. v. Booker, 103 Va. 594, 604, 50 S. E. 148; Virginia-C. Co. v. Knight, 106 Va. 674, 56 S. E. 725.

Freight agent. — Statements as to non-delivery of freight made in answer to question, admissible. Lane v. R. Co., 112 Mass. 455.

A person who was an officer in both the corporations concerned and their "ruling spirit" bound them by admissions. Huse v. Belt. Co., 121 Mo. App. 89, 97 S. W. 990.

Person acting in two capacities. The conversation of one who acts for himself and the plaintiffs, who was a corporate director, and who narrated his conversation to another director and the treasurer of the corporation, may be proved. Randall v. Claflin, 194 Mass. 560, 80 N. E. 594.

Action of committee of corporation. See Clarke v. Mfg. Co., 174 Mass. 434, 54 N. E. 887.

Admission by railroad conductor. The admission of a conductor con-

cerning the delay of a train, the schedule of which was not under his control or for the delay of which he was not responsible, are not binding. St. Louis etc. R. Co. v. Carlisle, 34 Tex. Civ. 268, 78 S. W. 553. Conductor may bind company as to manner of loss of baggage by answering passenger's inquiries. Morse v. R. Co., 6 Gray (Mass.) 450. And his admission concerning the condition of the engine in use is provable. Missouri etc. R. Co. v. Russell (Tex. Civ.), 88 S. W. 379.

Admission by motorman is incompetent to prove negligence of principal. Robinson v. R. Co., 189 Mass. 594, 76 N. E. 190; Wallace v. R. Co., 145 Ala. 682, 40 S. 89; Rogers v. R. Co., 84 N. Y. S. 974.

Authority of agent to adjust claims. In Missouri etc. R. Co. v. Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643, it was held that a written statement of defendant's claim agent was not competent evidence because it was not shown that in making it he acted within the scope of his authority. In the subsequent case of the same company against Gernan, 84 Tex. 141, 19 S. W. 461, a similar statement of the same person as to the burning of cotton was held competent, it having been shown that he was a general agent invested with authority to adjust claims against defendant. "These two cases in our opinion draw, though somewhat broadly, the line of distinction between cases in which statements of an agent are admissible against his principal and those in which they are not." Austin v. Forbis, 99 Tex. 234, 89 S. W. 405.

Admissions in contract. — Where a contract, not ultra vires, is executed in due form by the proper officers of a corporation it will be presumed that admissions therein are binding. Tague v. Caplice Co., 28 Mont. 51, 60, 72 P. 297.

Expression of opinion or conclusion. The principal is not affected by the expressed opinions or conclusions of his agent, unless it has empowered him to express them. Fidelity & C. Co. v. Haines, 111 Fed. 337, 49 C. C. A. 379.

By corporate records. — An admission may be proved by corporate records, and is evidence although it relates to the contents of a paper or to a corporate vote. "This vote may require a special notice in order to be good, but an admission made by the corporation at any time is evidence that the necessary conditions were performed." Clarke v. Mfg. Co., 174 Mass. 434, 54 N. E. 887.

Acts of promoters. — Where a corporation adopts and acts on the negotiations and inchoate contracts of the promoters who formed it, their acts and declarations, so far as they would have been competent against themselves, are competent against it. Raegener v. Brockway, 58 App. Div. 166, 68 N. Y. S. 712 (quoting the text from Abbott's Trial Ev., p. 45, § 52); *aff.*, without opinion, 171 N. Y. 629, 63 N. E. 1121.

Of members of corporation. — When a court must satisfy itself that an association was organized with a certain intent, and was not organized for a certain purpose, the declarations of some of its organizers and members, against their interest, are admissible, at least as against them, to show their intent in forming the organization. Star B. G. Assn. v. Cemetery Assn., 77 Conn. 83, 58 A. 467.

558-78 **Advice given by an attorney** will not be treated as an admission of the client's liability, especially if he disregards it. Klein v. Elec. L. Co., 182 N. Y. 27, 35, 74 N. E. 495.

559-81 Horseshoe M. Co. v. Sampling Co., 147 Fed. 517, 77 C. C. A. 213; Spurgeon v. Rhodes, 167 Ind. 1, 78 N. E. 228; Callaway v. Trust Co., 67 N. J. L. 44, 50 A. 900; Murray v. Sweasey, 69 App. Div. 45, 74 N. Y. S. 543.

Prima facie an attorney has authority to write a letter asking for an itemized bill against his client and promising that the client will pay it. McNamara v. Douglas, 78 Conn. 219, 61 A. 368.

Failure to answer letters. — An attorney who has claims for collection is not bound to deny any assertions made by the debtor; he cannot bind his client by neglect or failure to

answer letters. Irwin v. Pitts Co., 39 Wash. 346, 81 P. 849.

Employment to straighten an account. — An attorney employed merely to straighten out an account is but an agent, and his admission concerning the account binds his principal. Burraston v. Bank, 22 Utah 328, 62 P. 425.

Declarations of attorney's clerk binding. Lord, Owen & Co. v. Wood, 120 Ia. 303, 94 N. W. 842.

560-84 Waterbury v. Tract. Co., 74 Conn. 152, 50 A. 3; Sudworth v. Morton, 137 Mich. 575, 100 N. W. 769.

A conversation between the attorneys of opposing parties, in the absence of the party to be affected by it, cannot be shown. Cable Co. v. Parantha, 118 Ga. 913, 45 S. E. 787.

An attorney employed to try a cause cannot make an admission after judgment. Waterbury v. Tract. Co., 74 Conn. 152, 50 A. 3.

561-88 **It is for the jury** to find whether an admission made on a previous trial was limited or general. Kirchheimer v. Barrett, 125 Ill. App. 56, *appr.* Central B. etc. Co. v. Shoup, 28 Kan. 381, 42 Am. Rep. 163.

561-90 Virginia-C. Co. v. Knight, 106 Va. 674, 56 S. E. 725.

Letter relating to witnesses. — A letter written to the clerk of the court directing him what witnesses to summon and stating where they could be found, is not an admission that all who were working at a certain place were employes of defendant, though it was so stated. Virginia-C. Co. v. Knight, supra.

561-91 Fosha v. O'Donnell, 120 Wis. 336, 97 N. W. 924.

If made by mistake an extrajudicial admission may be withdrawn before it is acted upon (Hortz's Estate, 30 Pa. C. C. 44); it may be proven, however, the withdrawal only affecting the weight to be given it. Liberty v. Haines, 101 Me. 402, 64 A. 665.

561-92 **Pleadings for husband.** If the husband does not waive the privilege, a pleading prepared by his attorney in pursuance of communications made by the wife is not admissible against her. Leyner v. Leyner, 123 Ia. 185, 98 N. W. 628.

561-93 Woods v. Jensen, 130 Cal. 200, 62 P. 473; S. v. Werner (N. D.), 112 N. W. 60; Equitable Mfg. Co. v. Cooley, 69 S. C. 332, 48 S. E. 267.

563-96 Graves v. Graves, 70 Ark. 541, 69 S. W. 544; McIntire v. Schiffer, 31 Colo. 246, 72 P. 1056; Chicago C. R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28; S. v. Carpenter, 32 Wash. 254, 73 P. 357.

Silent acquiescence of husband in wife's statements may be shown. Hight v. Klingensmith, 75 Ark. 218, 87 S. W. 138.

Action against both. — In an action against husband and wife to reach property of his held in her name, his declarations against interest may be shown. Pullins v. Pullins, 22 Ky. L. R. 333, 62 S. W. 865.

Testimony of husband as witness for wife. — Admissions made by the husband as a witness for his wife on the trial of an independent issue between her and the party to a subsequent action are not competent as against her. Bouton v. Welch, 59 App. Div. 288, 69 N. Y. S. 407.

Disclaimer of possession. — If the wife alleges possession of property through her husband as agent, his disclaimer of possession and right thereto is competent evidence against her, as is his offer to buy the land she claimed. Pearson v. Adams, 129 Ala. 157, 29 So. 977.

563-98 Hoyt v. Zumwalt, 149 Cal. 381, 86 P. 600; Payton v. Mills Co., 28 Ky. L. R. 1303, 91 S. W. 719; Winans v. Demarest, 84 N. Y. S. 504; Aldous v. Olverson, 17 S. D. 190, 95 N. W. 917; Word v. Kennon (Tex. Civ.), 75 S. W. 365; Maffi v. Stephens (Tex. Civ.), 93 S. W. 158.

Declarations competent to show abandonment. — In a proceeding to foreclose a lien on the homestead of a married woman, her declarations as to the husband's abandonment of her may be proved. "The wife under the circumstances, no more than the husband, is exempt from the usual consequence of declarations on the faith of which she secures necessaries for herself. The decisions cited to the effect that when the husband or wife are in the actual possession of the homestead their

declarations that it is not their homestead will not defeat the homestead right have no application here whatever." Mabry v. Lumb. Co. (Tex. Civ.), 105 S. W. 1156. (Writ of error denied by supreme court.)

A receipt for goods signed by the wife has been received without proof of her agency for the purpose of showing their delivery. Smith Bros. & Co. v. Miller (Ala.), 44 S. 399.

564-99 Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666; Martin v. Rutt, 127 Pa. 380, 17 A. 993; Thomas v. Butler, 24 Pa. Super. 305, 317.

Husband and wife joint parties. Where husband and wife are joint parties, the testimony or declarations of either are admissible, though the code provides that neither can be a witness against the other. The declarations of either are not admissible against the other. Chaslavka v. Mechalek, 124 Ia. 69, 99 N. W. 154.

565-1 Duncan v. Landis, 106 Fed. 839, 860, 45 C. C. A. 666; Worthington v. Granade, 118 Ga. 584, 45 S. E. 447; Leyner v. Leyner, 123 Ia. 185, 98 N. W. 628.

Wife not estopped by silence. — A wife is not bound to deny statements made by her husband in her presence and adverse to her rights. Thomas v. Butler, 24 Pa. Super. 305.

Husband's admissions may be used to impeach testimony for wife. Thomas v. Butler, 16 Pa. Super. 268, 24 Id. 305.

565-2 Payton v. Mills Co., 28 Ky. L. R. 1303, 91 S. W. 719; Hartman v. Thompson, 104 Md. 389, 65 A. 117; Meyer v. Jewell, 88 N. Y. S. 972; Thomas v. Butler, 24 Pa. Super. 305.

Evidence of agent's acts. — What a husband has done in the management of his wife's property, such as listing it for taxation in her name, was presumably done with her knowledge, and was relevant to show her ownership of it; and so was evidence that he kept the bank account in her name relevant to show her ownership of the business he conducted; but what he said in her absence concerning her ownership thereof was not competent against her. Payton v. Mills Co., 28 Ky. L. R. 1303, 91 S. W. 719.

Authority of manager of store. The authority of the general manager of a store does not extend to admissions made to the creditors of the manager's wife in her absence, respecting her financial condition. Duncan v. Landis, 106 Fed. 839, 860, 45 C. C. A. 666.

Scope of husband's agency. — The wife's admission of her husband's agency does not imply that he was authorized to sell her property. "The rule is that to establish an agency for the wife on the part of the husband the evidence must be cogent and strong and more satisfactory than would be required by a person occupying different relations." Newberry v. Durand, 87 Mo. App. 290. The relationship does not extend the husband's authority. Hartman v. Thompson, 104 Md. 389, 408, 65 A. 117.

566-3 Undelivered letter. — The authorities are not agreed as to whether an undelivered letter from husband to wife may be proved as an admission. See Hammons v. S., 73 Ark. 495, 84 S. W. 718. The opinion cites these cases as holding such a letter privileged: Bowman v. Patrick, 32 Fed. 368; Liggett v. Glenn, 51 Fed. 381, 2 C. C. A. 286; Mercer v. S., 40 Fla. 216, 24 S. 154, 74 Am. St. 135; Wilkerson v. S., 91 Ga. 729, 17 S. E. 990, 44 Am. St. 63; Scott v. C., 94 Ky. 511, 23 S. W. 219, 42 Am. St. 371; Selden v. S., 74 Wis. 271, 42 N. W. 218, 17 Am. St. 144. And these to the contrary: Lloyd v. Pennie, 50 Fed. 4; S. v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89; S. v. Buffington, 20 Kan. 599, 27 Am. Rep. 193; S. v. Ulrich, 110 Mo. 350, 19 S. W. 656; P. v. Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. 372, 23 L. R. A. 830; S. v. Mathers, 64 Vt. 101, 23 A. 590, 33 Am. St. 921, 15 L. R. A. 268. Two members of the court dissented in the principal case. See "PRIVILEGED COMMUNICATIONS," Vol. 10, p. 76.

566-4 Belknap S. Bk. v. Land Co., 28 Colo. 326, 64 P. 212.

566-6 Thompson v. Mecosta, 141 Mich. 175, 104 N. W. 694; Hudson v. Circuit Judge, 114 Mich. 116, 72 N. W. 162, 68 Am. St. 465, 47 L. R. A. 345.

568-14 Not evidence against cestui que trust. — A husband cannot replace securities which he had mismanaged and for which he was responsible by a statement that certain stocks standing in the name of his wife were held in place of those disposed of by him. As to her, if she had not adopted it, such statement contained in an exhibit was hearsay. Putnam v. Safe D. Co., 87 App. Div. 13, 83 N. Y. S. 1091.

568-15 Johnson v. Amberson, 140 Ala. 342, 37 S. 273; Putnam v. Safe D. Co., supra; McClellan v. Grant, 83 App. Div. 599, 82 N. Y. S. 208; Leary v. Covin, 63 App. Div. 151, 71 N. Y. S. 335.

By one trustee against another. — A report made by one of two trustees is not admissible against the other. Belding v. Archer, 131 N. C. 287, 42 S. E. 800.

Against personal interest of trustees. Trustees may make admissions against their interest as such. Jarrett v. Johnson, 116 Ill. App. 592.

568-20 Ante, 460-5.

569-21 Hutchinson v. McLaughlin, 15 Colo. 492, 25 P. 317, 11 L. R. A. 287; Rarick v. Vandevier, 11 Colo. App. 116, 52 P. 743; Knights Templars & M. L. I. Co. v. Crayton, 209 Ill. 550, 563, 70 N. E. 1066, 110 Ill. App. 648; Stevens v. Casualty Co., 12 N. D. 463, 97 N. W. 862.

569-22 Hart v. Miller, 29 Ind. App. 222, 64 N. E. 239; Buffalo L. T. Co. v. Assn., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. 839.

Made prior to appointment or in individual capacity not competent. Johnston v. Coney, 120 Ga. 767, 48 S. E. 373.

569-25 Ante, 460-5.

569-26 Kingsbury v. Joseph, 94 Mo. App. 298, 68 S. W. 93; Breese v. Graves, 67 App. Div. 322, 73 N. Y. S. 167; Crouse v. Judson, 41 Misc. 338, 84 N. Y. S. 755.

570-28 Lecour v. Bank, 61 App. Div. 163, 70 N. Y. S. 419.

570-30 Hadlock v. Brooks, 178 Mass. 425, 59 N. E. 1009; Davis v. Gallagher, 124 N. Y. 487, 26 N. E. 1045; Williams v. Culver, 39 Or. 337, 64 P. 763; Lindsey v. White (Tex. Civ.), 61 S. W. 438.

Made after revocation of letters not competent against surety of representative. Freeman v. Brewster, 93 Ga. 648, 21 S. E. 165.

570-31 Breese v. Graves, 67 App. Div. 322, 73 N. Y. S. 167.

Admissions by administrator. — An administrator, subject to his responsibility to the estate, may bind it by evidence in a suit to recover for services as well as by his pleadings in an action against the estate. Kingsbury v. Joseph, 94 Mo. App. 298, 68 S. W. 93.

Weight of admission. — An item in an inventory filed by an executor of his father's estate specifying a claim against himself will not support an action or establish a set-off. It amounted only to an admission that the decedent claimed that the son owed him the sum named. Siebert v. Steinmeyer, 204 Pa. 419, 54 A. 336; Pentz v. Ins. Co., 92 Md. 444, 48 A. 139.

Respecting claims in favor of estate. The silence of inventories concerning an account, of the existence of which the administrators must have had knowledge, is in the nature of an admission that the estate has no rights therein. Crane v. Brooks, 189 Mass. 228, 75 N. E. 710.

570-32 Advertisement of sale of intestate's land not competent to show adverse possession by him at time of decease. Whitehead v. Pitts, 127 Ga. 774, 56 S. E. 1004.

571-33 Crouse v. Judson, 41 Misc. 338, 84 N. Y. S. 755.

571-34 Crouse v. Judson, supra.

571-36 By one of two receivers. Admissions made by one of two receivers are competent against both. Shirk v. Brookfield, 77 App. Div. 295, 79 N. Y. S. 225.

571-39 Davis v. Gallagher, 124 N. Y. 487, 26 N. E. 1045.

Admissions of an executor, who is not a sole legatee, as to mental capacity of testator are provable against other legatees. Stull v. Stull (Neb.), 96 N. W. 196.

572-41 Schell v. Weaver, 225 Ill. 159, 80 N. E. 95.

572-43 Sutcliffe v. Assn., 119 Ia. 220, 93 N. W. 90; Henn v. Ins. Co., 67 N. J. L. 310, 51 A. 689; Union Cent. L. Ins. Co. v. Cheever, 36 Ohio St. 201; Arnold v. Ins. Co., 20 Pa. Super. 61; Thompson v. Ins. Co., 63 S. C. 290, 41 S. E. 464.

Insured's declarations as to payment of premiums are competent. Manhattan L. Ins. Co. v. Myers, 22 Ky. L. R. 875, 59 S. W. 30.

573-44 Hews v. Assur. Soc., 143 Fed. 850, 74 C. C. A. 676; Van Frank v. Assn., 158 Ill. 560, 41 N. E. 1005; Kearney v. Ins. Co., 109 Ill. App. 609; National Union v. Hunter, 99 Ill. App. 146; Callies v. Woodmen, 98 Mo. App. 521, 72 S. W. 713; Ogden v. W. O. W. (Neb.), 111 N. W. 797; Life Assn. v. Winn, 96 Tenn. 224, 33 S. W. 1045; Atkins v. Ins. Co. (Tex. Civ.), 62 S. W. 563.

573-45 Hews v. Soc., 143 Fed. 850, 74 C. C. A. 676; Finn v. Ins. Co., 98 App. Div. 588, 90 N. Y. S. 697.

Remoteness of admissions. — A considerable latitude will be allowed in the inquiry where the representation was that insured had never been afflicted with the ailment covered by the admission. Hews v. Soc., supra.

573-46 Woodmen v. Jackson, 80 Ark. 419, 97 S. W. 673; Siebelist v. Ins. Co., 19 Pa. Super. 221; Holleran v. Assur. Co., 18 Id. 573; Voelkel v. Supreme Tent, 116 Wis. 202, 92 N. W. 1104; Hart v. Fraternal Alliance, 108 Wis. 490, 84 N. W. 851.

Proof of death made by one not a party to the action on behalf of all the beneficiaries is admissible. Fey v. Ins. Soc., 120 Wis. 358, 98 N. W. 206.

Not conclusive. — Signing and swearing to a proof of death, without intention to mislead or defraud, is not conclusive upon the beneficiary as to the cause of the death of insured, insurer not having altered its position. Supreme Tent v. Stensland, 206 Ill. 124, 68 N. E. 1098, 105 Ill. App. 267. And so if proof is accompanied by a statement that the maker declines to be bound by it. Fisher v. Assn., 188 Pa. 1, 13, 41 A. 467.

573-47 Scott v. Maddox, 113 Ga. 795, 39 S. E. 500.

Mortgagor and mortgagee. — If there is no collusion between mortgagor and mortgagee that relation does not create such privity as makes the declarations of one evidence against the other. Mower v. McCarthy, 79 Vt. 142, 155, 64 A. 578, 7 L. R. A. (N. S.) 418.

By one of several legatees or heirs. See 507-61, ante.

Admissions made by a consignor cannot bind the consignee. Bank v. Exp. Co., 127 Ia. 1, 102 N. W. 107.

In a criminal action the state, not the complaining witness, is the party, and admissions by him are not competent in favor of accused. S. v. Brady, 71 N. J. L. 360, 59 A. 6; C. v. Densmore, 12 Allen (Mass.) 535. See "Homicide," Vol. 6, pp. 566, 662.

574-48 Chicago etc. R. Co. v. Clarkson, 147 Fed. 397, 76 C. C. A. 575; Graves v. Graves, 70 Ark. 541, 69 S. W. 544; Stoddard v. Newhall, 1 Cal. App. 111, 81 P. 666; Georgia R. & B. Co. v. Fitzgerald, 108 Ga. 507, 34 S. E. 316; Schell v. Weaver, 128 Ill. App. 106; Deuterman v. Ruppel, 103 Ill. App. 106; O'Brien v. Knotts, 165 Ind. 308, 75 N. E. 594; Wright v. Reed, 118 Ia. 333, 92 N. W. 61; Jamison v. Jamison, 113 Ia. 720, 84 N. W. 705; Miller v. McDowell, 69 Kan. 453, 77 P. 101; Tripp v. Macomber, 187 Mass. 109, 72 N. E. 361; Coleman v. McGowan, 149 Mich. 624, 113 N. W. 17; Laird v. Laird, 127 Mich. 24, 86 N. W. 436; Komitsch v. DeGroot, 80 App. Div. 376, 80 N. Y. S. 970; Levy v. Hamilton, 68 App. Div. 277, 74 N. Y. S. 159; Murphey's Estate, 26 Pa. C. C. 256; Rhoades' Estate, 29 Pa. C. C. 512; Hubbard v. Cox, 76 Tex. 239, 13 S. W. 170; Chew v. Jackson (Tex. Civ.), 102 S. W. 427; Warner v. Sapp (Tex. Civ.), 97 S. W. 125; Scott v. Crouch, 24 Utah 377, 67 P. 1068.

Scope to be given admission. — See quotation from Reg. v. Overseers, 1 B. & S. Q. B. (Eng.) 768, in Stoddard v. Newhall, 1 Cal. App. 111, 81 P. 666.

Such declarations are evidence as to any fact therein stated which deceased knew or was bound to know. Turner v. Turner, 123 Ga. 5, 50 S. E. 969.

Name of grantee fraudulently omitted from patent. — The declarations of a deceased joint owner, made after the issue of a patent, are competent to show that a party was a part owner of a mining claim and that his name was fraudulently

omitted from the patent. Delmoe v. Long, 35 Mont. 139, 88 P. 778.

The declarations of a deceased grantee, made before and after the conveyance, are competent to show that a deed absolute in form was intended to secure indebtedness. Harp v. Harp, 136 Cal. 421, 69 P. 28.

Under Massachusetts statute. — In Massachusetts it is provided by statute that memoranda and written entries made by deceased shall be admissible in favor of the personal representative when a cause of action against him is supported by oral proof of admissions by deceased. This statute applies when proof of admissions is made solely to sustain testimony offered by the plaintiff, and such writings are admissible as negative testimony. Huebener v. Childs, 180 Mass. 483, 62 N. E. 729.

574-51 The declarations of a deceased person as to indebtedness are binding upon heirs or legatees. Deuterman v. Ruppel, 103 Ill. App. 106.

575-52 Thomas v. Mosher, 128 Ill. App. 479; Summerville v. Drill. Co., 119 Id. 152; Baker v. Bank, 63 Neb. 801, 89 N. W. 269; Martin v. Farrell, 66 App. Div. 177, 72 N. Y. S. 934; Miller v. Harris, 117 App. Div. 395, 102 N. Y. S. 604; Maier v. Rebstock, 92 App. Div. 587, 87 N. Y. S. 85; Pearsall v. R. Co., 2 Tenn. Ch. App. 682; Bowman v. Rector (Tenn. Ch. App.), 59 S. W. 389, *aff.* by supreme court without opinion.

Need not be made in presence of others. — If a prima facie case of joint liability has been made, the acts and declarations of one of the parties alleged to be jointly liable are admissible in aid of such prima facie case, although not made in the presence of the others. Thomas v. Mosher, 128 Ill. App. 479.

576-56 Nichols-S. Co. v. Ringler (Ia.), 112 N. W. 543; In re Kennedy's Will, 167 N. Y. 163, 177, 60 N. E. 442; Naul v. Naul, 75 App. Div. 292, 78 N. Y. S. 101.

577-59 Admissions made by one maker of a note are not evidence, after the death of both makers, against the heirs of either. Matteson v. Palsner, 56 App. Div. 91, 67 N. Y. S. 612.

578-60 Peterson Bros. v. Fruit Co., 140 Cal. 624, 74 P. 162; Rudy v. Katz, 23 Ky. L. R. 1697, 66 S. W. 18; Carlson v. Holm (Neb.), 95 N. W. 1125; Parker v. Paine, 37 Misc. 768, 76 N. Y. S. 942; Tapp v. Dibrell, 134 N. C. 546, 47 S. E. 51; Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800.

By members of limited partnership. Limited partnerships are quasi corporations, and their managers have only such authority as corporate directors; hence a single manager of such a partnership cannot bind it by his admissions unless they are made as special agent. Abington D. Co. v. Reynolds, 24 Pa. Super. 632.

580-61 Statement to commercial agency. — A statement made to a commercial agency by one member of a firm is not competent evidence of its assets and liabilities. Kliger v. Rosenfeld, 120 App. Div. 396, 105 N. Y. S. 214.

580-65 Peoria Iron Co. v. Cohen & Sons, 113 Ill. App. 30; Wilson v. Whitten, 99 Id. 233; Mackintosh v. Kimball, 101 App. Div. 494, 92 N. Y. S. 132.

583-67 Tapp v. Dibrell, 134 N. C. 546, 47 S. E. 51.

Written evidence. — Leases signed by one as a member of a firm are admissible as against him, he being connected with the firm by other evidence; they do not, however, conclusively establish a partnership. Parker v. Paine, 37 Misc. 768, 76 N. Y. S. 942.

584-73 No more satisfactory proof of the persons who form a partnership can be made than their sworn declarations. In re Henschel, 114 Fed. 968.

584-74 People's Bk. v. Harper, 114 Ga. 603, 40 S. E. 717; Parker v. Paine, 37 Misc. 768, 76 N. Y. S. 942.

585-77 Barwick v. Alderman, 46 Fla. 433, 35 S. 13.

Silence sufficient. — Sumner v. Gardiner, 184 Mass. 433, 68 N. E. 850; Reiser v. Portere, 106 Mich. 102, 63 N. W. 1041.

586-79 Guarantee Co. v. Ins. Co., 124 Fed. 170, 59 C. C. A. 376; U. S. v. Gaussen, 19 Wall. (U. S.) 198; Swift v. Trustees, 189 Ill. 584, 60 N. E. 44, 91 Ill. App. 221; S. v. Paxton, 65 Neb. 110, 90 N. W. 983; Pax-

ton v. S., 59 Neb. 460, 81 N. W. 383, 80 Am. St. 689; Yates v. Thomas, 35 Misc. 552, 71 N. Y. S. 1113; Phillips v. Eggert (Wis.), 113 N. W. 686.

Guardian's final report. — Statements in the final returns of a guardian are not admissions in judicio by his surety, although he may have instigated or approved them, and they may have been for his benefit. Rich v. Fidelity Co., 126 Ga. 466, 55 S. E. 336.

As between two sets of sureties. An officer who, in accounting to himself, as his own successor, turns over bank credits, which are afterwards entered as cash receipts on the books, prima facie relieves the bondsmen of his first term and charges those of the second with the amount of such credits. Paxton v. S., 59 Neb. 460, 81 N. W. 383, 80 Am. St. 689.

587-80 Bailey v. McAlpin, 122 Ga. 616, 50 S. E. 388; Knott v. Peterson, 125 Ia. 404, 101 N. W. 173; Wieder v. Surety Co., 42 Misc. 499, 86 N. Y. S. 105.

Reason of the rule. — "The bond was not to be responsible for any declarations of the principal, but for his conduct only. Hence, it is only his conduct in carrying on the business, or declarations accompanying his acts while so engaged, that are admissible in evidence against his surety. Bank v. Smith, 12 Allen (Mass.) 243, 90 Am. Dec. 144; Trousdale v. Phillips, 2 Swan (Tenn.) 384; Stetson v. Bank, 2 Ohio St. 167; Lewis v. Lee County, 73 Ala. 148; Cheltenham County v. Cook, 44 Mo. 29. There are some cases which seem to hold that, when the suit is against the principal and surety jointly, an admission or declaration of the principal which is competent against him is also competent against the surety. Amherst Bk. v. Root, 2 Met. (Mass.) 522; Davis v. Kingsley, 13 Conn. 285; Singer Mfg. Co. v. Reynolds, 168 Mass. 588, 47 N. E. 438, 60 Am. Rep. 417. But these cases are exceptional in character and are not recognized in all jurisdictions." Knott v. Peterson, 125 Ia. 404, 101 N. W. 173.

A statement of the moneys due from an officer whose term has just expired, handed to his successor as part of the duty of turning the office over to him, is an admission as against the sureties. Paxton v. S., 59 Neb. 460, 474, 81 N. W. 383, 80 Am. St. 689.

589-84 Not conclusive for all purposes. — Official records are competent evidence against the sureties of the officer who made them, and are conclusive if not rebutted. Paxton v. S., supra. They are not conclusive, and the sureties are not bound to impeach them by showing that entries therein were incorrect; they may show the facts concerning the time of the defalcation and the amount thereof in any way and by any testimony by which any other fact could be established. S. v. Paxton, 65 Neb. 110, 90 N. W. 983, 992, *cit.* Van Sickel v. Buffalo County, 13 Neb. 103, 120, 13 N. W. 19, 42 Am. Rep. 753; Albertson v. S., 9 Neb. 429, 2 N. W. 742, 892; Brandt, Surety, § 628.

589-89 Turner v. Mitchell, 22 Ky. L. R. 1784, 61 S. W. 468.

589-92 Barrow v. S., 121 Ga. 187, 48 S. E. 950; Somers v. S., 116 Ga. 535, 48 S. E. 779; Miller v. John, 111 Ill. App. 56, 208 Ill. 173, 70 N. E. 27; Lasher v. Littell, 202 Ill. 551, 67 N. E. 372; Standard O. Co. v. Doyle, 26 Ky. L. R. 544, 82 S. W. 271; Carson v. Hawley, 82 Minn. 204, 84 N. W. 746; Meier v. Buchter, 197 Mo. 68, 92, 94 S. W. 883; Lane v. Bailey, 29 Mont. 548, 75 P. 191; Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306, 96 N. W. 123; Cohn v. Saidel, 71 N. H. 558, 53 A. 800; McCarty v. Ins. Co., 33 Tex. Civ. 122, 75 S. W. 934; Hughes v. Grocer Co., 25 Tex. Civ. 212, 60 S. W. 981.

591-93 Meyer v. Munro, 9 Idaho 46, 71 P. 969; Hertrich v. Hertrich, 114 Ia. 643, 87 N. W. 689; Wall v. Beedy, 161 Mo. 625, 641, 61 S. W. 864; Marshall v. Faddis, 199 Pa. 397, 49 A. 225; Moore v. Robinson (Tex. Civ.), 75 S. W. 890; Mower v. McCarthy, 79 Vt. 142, 154, 64 A. 578, 7 L. R. A. (N. S.) 418.

Tendency of the evidence to establish conspiracy is enough. Harrell v. S., 121 Ga. 607, 49 S. E. 703.

592-94 Lent v. Shear, 160 N. Y. 462, 471, 55 N. E. 2.

592-95 Seitz v. Starks, 136 Mich. 90, 98 N. W. 852; P. v. Van Tassel, 156 N. Y. 561, 51 N. E. 274; Voisin v. Ins. Co., 60 App. Div. 139, 70 N. Y. S. 147; Perry v. S. (Tex. Civ.), 98 S. W. 411.

Made in the absence of co-conspirator not competent. Connecticut Mut. L. Ins. Co. v. Hillmon, 107 Fed. 834, 46 C. C. A. 668.

592-96 Porter v. P., 31 Colo. 508, 74 P. 879; Richards v. C., 24 Ky. L. R. 14, 67 S. W. 818; Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306, 96 N. W. 123; Barton v. S., 49 Tex. Civ. 121, 90 S. W. 877.

Undelivered letter. — A letter containing self-charging admissions is admissible, though not communicated to any of the writer's co-conspirators, to point to the writer as one party to the conspiracy and her relations to the persons to whom the letter was addressed. Chadwick v. U. S., 141 Fed. 225, 240, 71 C. C. A. 343.

Letter by unidentified author. — If there is no question concerning the genuineness of a letter written by a conspirator in furtherance of the conspiracy it may be received, though its authorship is not established further than to show that it was written by one of two conspirators. Ramsey v. Flowers, 72 Ark. 316, 80 S. W. 147.

593-97 P. v. Stokes (Cal. App.), 89 P. 997; Barrow v. S., 121 Ga. 187, 48 S. E. 950; Cohn v. Saidel, 71 N. H. 558, 53 A. 800; Marshall v. Faddis, 199 Pa. 397, 49 A. 225.

The same rule has been applied in case of other crimes, the admission of proof of the declarations of the accused before proof of the corpus delicti being sustained. S. v. Davis, 48 Kan. 1, 28 P. 1092; S. v. Kesner, 72 Kan. 87, 82 P. 720.

593-1 Connecticut Mut. L. Ins. Co. v. Hillmon, 107 Fed. 834, 46 C. C. A. 668; Suttles v. Sewell, 117 Ga. 214, 43 S. E. 486; P. v. McQuade, 110 N. Y. 284, 307, 18 N. E. 156, 1 L. R. A. 273; Lederer v. Adler, 46 Misc. 564, 92 N. Y. S. 827.

But not for all purposes. — The facts that some of the statements were made before the formation of the conspiracy and by some of the conspirators, does not render proof of declarations inadmissible for all purposes — as to show motive. Ramsey v. Flowers, 72 Ark. 316, 80 S. W. 147.

594-3 Lefler v. Fox, 92 N. Y. S. 227; P. v. McQuade, 110 N. Y. 284, 307, 18 N. E. 156, 1 L. R. A. 273; Cranfill v. Hayden, 97 Tex. 544, 80 S. W. 609.

594-5 Infants can neither make, nor authorize another to make, admissions. Knights Templars v. Crayton, 209 Ill. 550, 70 N. E. 1066, 110 Ill. App. 648.

595-6 Text sustained in one case (Louisville etc. R. Co. v. Berry, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646, *appr.* s. c. 2 Ind. App. 427, 28 N. E. 714), and the opposing view taken in an earlier case. Stein v. R. Co., 10 Phila. (Pa.) 440.

595-7 Hart v. Miller, 29 Ind. App. 222, 64 N. E. 239.

595-8 Admissions of one alleged to be incapable of managing property and who is a party to a proceeding for the appointment of a guardian are provable on the question of sanity. Conway v. Murphy (Ia.), 112 N. W. 764.

595-11 Statements obtained by coercion, threat or promise are subject to objection. Hardy v. U. S., 186 U. S. 224. Admissions which do not per se show guilt, though when connected with other evidence they tend to prove it, are competent without preliminary proof that they were voluntarily made. P. v. Stokes (Cal. App.), 89 P. 997. Admissions made by a person under arrest may be proved, at least if he was cautioned that they might be used against him. C. v. Devaney, 182 Mass. 33, 64 N. E. 402; S. v. Conly, 130 N. C. 683, 41 S. E. 534. In some states such caution must be given. S. v. Parker, 132 N. C. 1014, 43 S. E. 830. The fact that the father of the prosecutrix made threats against the accused does not necessarily require the exclusion of the latter's admissions. P. v. Rich, 133 Mich. 14, 94 N. W. 375.

Admissions are not rendered incompetent because subsequently conditional promises of leniency are made to admitter. Republic v. Hong Cheong, 10 Haw. 94.

Proof that admissions voluntarily

made. — The testimony showing that admissions were voluntarily made need not be in the language of the statute; it is sufficient if the substance of the condition is testified to. S. v. Newton, 29 Wash. 373, 381, 70 P. 31; S. v. Carpenter, 32 Wash. 254, 73 P. 373.

It will be presumed on appeal that the trial court ascertained that the admission was freely and voluntarily made. Whatley v. S., 144 Ala. 68, 75, 39 S. 1014.

The burden of proving that admissions were not voluntarily made is upon the person who made them. Green v. S., 124 Ga. 343, 52 S. E. 431.

While intoxicated. — Admissions made to an officer by a person he caused to become intoxicated are incompetent. McNutt v. S., 68 Neb. 207, 94 N. W. 143.

596-17 Bishop & Chapter v. Treasurer, 37 Colo. 378, 86 P. 1021; Peckham v. P., 32 Colo. 140, 75 P. 422; Barnes v. Brown, 1 Tenn. Ch. App. 727, 744.

An admission as to the time a constitutional amendment took effect, whether it be a question of law or of fact, will not be regarded. Denver v. Adams County, 33 Colo. 1, 77 P. 858.

Allegation of ownership is not a statement of a mere conclusion of law. Louisville & N. R. Co. v. Scomp, 30 Ky. L. R. 487, 98 S. W. 1024.

596-18 Collins v. U. S., 35 Ct. Cl. 122; Southern R. Co. v. Reeder (Ala.), 44 S. 699; Zimmerman Mfg. Co. v. Dunn (Ala.), 44 S. 533; Kelly v. Strouse, 116 Ga. 872, 900, 43 S. E. 280; Wall v. Moulton, 125 Ga. 121, 53 S. E. 591; Moore v. Vickers, 126 Ga. 42, 54 S. E. 810; Kroetch v. Mill Co., 9 Idaho 277, 74 P. 868; American Ins. Co. v. Walston, 111 Ill. App. 133; Halstead v. Coen, 31 Ind. App. 302, 67 N. E. 957; Rudd v. Dewey, 121 Ia. 454, 96 N. W. 973; Myers v. Goggerty, 10 Kan. App. 190, 63 P. 296; Hurst v. Williams, 31 Ky. L. R. 658, 102 S. W. 1176; Illinois Cent. R. Co. v. Colly, 27 Ky. L. R. 730, 86 S. W. 536; Finn v. Tel. Co., 101 Me. 279, 64 A. 490; Biggs v. Langhammer, 103 Md. 94, 102, 63 A. 198; Higgins v. Shepard, 182 Mass. 364, 65 N. E. 805; Hutchinson v. Nay, 183 Mass. 355, 67 N. E. 601; Musselman Groc. Co. v. Casler, 138 Mich. 24, 100 N. W. 997; Cullen v. Ins. Co., 126 Mo. App. 412, 104 S. W. 117; Schwartzman v. Cohen, 51 Misc. 635, 101 N. Y. S. 236; Roos v. Decker, 34 Misc. 168, 68 N. Y. S. 790; O'Brien v. R. Co., 55 Misc. 228, 105 N. Y. S. 238; Green v. Bauer, 15 Pa. Super. 372; Field v. Schuster, 26 Pa. Super. 82; Wall v. Melton (Tex. Civ.), 94 S. W. 358; McKnight v. Gin Co. (Tex. Civ.), 99 S. W. 198; Houston v. Stewart (Tex. Civ.), 90 S. W. 49; Watson v. Boswell, 25 Tex. Civ. 379, 61 S. W. 407; San Antonio & A. P. R. Co. v. Stone (Tex. Civ.), 60 S. W. 461; Security Mut. L. Ins. Co. v. Calvert (Tex.), 105 S. W. 320; Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026.

Contingent offer. — Admissions made in contemplation of an effort to compromise in a contingency which might or might not arise are provable. Upson v. Campbell (Tex. Civ.), 99 S. W. 1129. But it has been ruled that in cases of tort an offer to purchase peace, made either with intent to prevent a possible controversy or to end one that has arisen, cannot be used as an admission. Finn v. Tel. Co., 101 Me. 279, 64 A. 490.

The rule applies as well to the claim plaintiff as to the defense of a defendant. Biggs v. Langhammer, 103 Md. 94, 103, 63 A. 198.

Disputed and unquestioned claims. "There is a distinction between an offer or proposition to compromise a doubtful or disputed claim, and an offer to settle upon certain terms a claim that is unquestioned. An admission made in an offer of this latter character will be admissible, when one made in an offer of the former character will not." Teasley v. Bradley, 110 Ga. 497, 35 S. E. 782; Kelly v. Strouse, 116 Ga. 872, 900, 43 S. E. 280.

Admissions made to an arbitrator may be proven. Sullivan v. Sullivan, 29 Ky. L. R. 239, 92 S. W. 966.

Parol testimony showing purpose to compromise. — The writer of a letter which definitely stated the amount of damage done his property may testify that it was written to secure a compromise and was not in-

tended to be an accurate statement of his claim. Castner v. R. Co., 126 Ia. 581, 102 N. W. 499. "A party cannot render an admission incompetent by testifying that he intended it to bring about a compromise, unless there was in fact an honest controversy between the parties and a treaty, pending or proposed, to settle it without resort to litigation." Steeg v. Walls, 4 Ind. App. 18, 30 N. E. 312; St. Louis S. W. R. Co. v. Smith, 33 Tex. Civ. 520, 77 S. W. 28.

Belief of party; reasons given. — If a party believes he has a good cause of action, though litigation may show that he has not, his offer of compromise is not provable; and it is immaterial that the reasons given for his belief are not valid. Biggs v. Langhammer, 103 Md. 94, 103, 63 A. 198.

Not an offer of compromise. — An offer to contribute money to send the prosecutrix away or to take her to a physician for an unlawful purpose is not an offer of compromise, but an admission. Robb v. Hewitt, 39 Neb. 217, 58 N. W. 88; Gatzmeyer v. Peterson, 68 Neb. 832, 94 N. W. 974.

A proposition to settle made by one of the parties to a difference does not refer to a compromise, but to a determination of the facts in dispute by those who had a direct part in the transaction. Collins v. McGuire, 76 App. Div. 443, 78 N. Y. S. 527.

A conference for the purpose of fixing upon the sum due one of the parties is not in the nature of a compromise. Hunter v. Helsley, 98 Mo. App. 616, 73 S. W. 719.

Offer to pay. — The mere fact that a person offers, after suit brought, to pay a claim without costs does not, of itself, show a compromise. Draper v. Horton, 22 R. I. 592, 48 A. 945.

Offer to retract libel is not within the rule forbidding proof of offers to compromise. Dalziel v. Pub. Co., 52 Misc. 207, 102 N. Y. S. 909.

Compromise in condemnation proceedings. — In condemnation proceedings by a railroad company the right of the landowner to sue for damages accrues when the road is located. Until that time all negotiations looking toward acquiring the property are solely upon the basis of purchase and sale. Kaufman v. R. Co., 210 Pa. 440, 60 A. 2. *Contra*, Indianapolis N. T. Co. v. Dunn, 37 Ind. App. 248, 76 N. E. 269.

Statement to third party. — It may be shown that the defendant stated to a third party that he had offered a sum of money to the plaintiff. Story v. Nidiffer, 146 Cal. 549, 80 P. 692.

Repudiation of compromise. — It cannot be shown as an independent fact that the defendant told a third person that a compromise had been agreed on, and that he had decided to repudiate it. Wall v. Moulton, 125 Ga. 121, 53 S. E. 591.

May be shown for collateral purpose. It may be shown who made an offer of settlement for the purpose of determining who was a party to a contract for the exchange of the property to which such offer related. Watson v. Reed, 129 Ala. 388, 29 S. 837.

A proposition to compromise does not operate retroactively to affect previous admissions (McBride v. R. Co., 125 Ga. 515, 54 S. E. 674), though made in compromising a suit disposed of before the pending action was brought and concerning a different subject-matter. McCrum v. McCrum, 36 Ind. App. 636, 76 N. E. 415.

599-20 An offer not made "without prejudice," will not be regarded as made to buy peace unless the facts plainly show that it was made as a concession or sacrifice in behalf of peace. Chesapeake & O. R. Co. v. Stock, 104 Va. 97, 51 S. E. 161.

If liability is admitted, an offer to pay a stated sum is not an offer to buy peace, but an admission that the sum tendered was due. Blake v. Austin, 33 Tex. Civ. 112, 75 S. W. 571.

Intention controls. — See Colburn v. Groton, 66 N. H. 151, 28 A. 95, 22 L. R. A. 763; Finn v. Tel. Co., 101 Me. 279, 64 A. 490. The preliminary question of intention is for the court unless the only inference from the testimony offered shows that the intention in offering the compromise was not to buy peace. Finn v. Tel. Co., supra.

599-22 Matthews v. Farrell, 140 Ala. 298, 37 S. 325; Baker v. Haynes, 146 Ala. 520, 40 S. 968; Miller v. Kinsel, 20 Colo. App. 346, 78 P. 1075; Teasley v. Bradley, 120 Ga. 373, 47 S. E. 925; List v. List, 26 Ky. L. R. 691, 82 S. W. 446; Quinn v. White, 26 Nev. 42, 62 P. 995.

A proposition to settle "our affair" and a statement that the party addressed "should be paid," does not admit any facts. Rudd v. Dewey, 121 Ia. 454, 96 N. W. 973.

Fact must not be connected with compromise. — The only kind of an admission made during an attempt at compromise which can be proved is where there was a distinct, unqualified admission of an independent fact, made, not as a part of an attempted adjustment, but because it was a fact. Roome v. Robinson, 99 App. Div. 143, 90 N. Y. S. 1055; White v. S. S. Co., 102 N. Y. 661, 6 N. E. 289.

Testimony as to compromise. — It is not competent for a witness to testify whether or not a negotiation was in the nature of a compromise. St. Louis etc. R. Co. v. Brick Co., 198 Mo. 698, 715, 96 S. W. 1011.

A fact admitted in confidence or without prejudice is not provable. Alminowicz v. P., 117 Ill. App. 415; Baker v. Haynes, 146 Ala. 520, 40 S. 968.

600-25 Oliver v. McDowell, 100 Ill. App. 45; Ft. Worth etc. R. Co. v. Lock, 30 Tex. Civ. 426, 70 S. W. 456; Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320.

The proof of the confidential relation must be clear. Turner v. Turner, 123 Ga. 5, 50 S. E. 969.

A report made by an officer of a corporation in the course of his duty, before action brought or threatened, though afterwards communicated to its attorney, is not a privileged communication. Virginia-C. C. Co. v. Knight, 106 Va. 674, 56 S. E. 725.

601-27 See Dimon v. Keery, 54 App. Div. 318, 66 N. Y. S. 817.

603-34 See Williams v. Walden, 124 Ga. 913, 53 S. E. 564.

603-35 Bines v. S., 118 Ga. 320, 45 S. E. 376; First Nat. Bk. v. Wisdom, 23 Ky. L. R. 530, 63 S. W. 461; Thayer v. Usher, 98 Me. 468, 57 A. 839; Atherton v. Defreeze, 129 Mich. 364, 88 N. W. 886; Wojtylak v. Coal Co., 188 Mo. 260, 87 S. W. 506; Schreyer v. Bank, 74 App. Div. 478, 77 N. Y. S. 494; Winn v. Winn., 23 Tex. Civ. 617, 57 S. W. 80; International etc. Co. v. Goswick, 98 Tex. 477, 85 S. W. 785.

604-38 Admissions may be proved though made upon a prior trial of the same case. Sterling v. DeLaune (Tex. Civ.), 105 S. W. 1169.

604-39 An interpreter chosen by the parties is their joint agent, and his statements of what they say in each other's presence are their statements, and may be proved by any person who heard them, as by one of the parties; the interpreter need not be a witness. Kelly v. Benev. Assn., 2 Cal. App. 460, 84 P. 321.

604-41 Godair v. Bank, 225 Ill. 572, 80 N. E. 407. See Harrison G. Co. v. R. Co., 145 Mich. 712, 108 N. W. 1081 (if there is proof of identity); Lincoln Mill Co. v. Wissler (Neb.), 95 N. W. 857; Swing v. Walker, 27 Pa. Super. 366 (if witness knew admitter's voice).

Proof of identity. — If a person stated in a telephone directory to live at a given place bearing the same number as the admitter, is called for by the telephone there and answers, admitting identity, it is proper to prove the admission made by such person. Holzhauer v. Sheeny, 31 Ky. L. R. 1238, 104 S. W. 1034. See Merrill v. Tel. Co., 31 Tex. Civ. 614, 73 S. W. 422, as to proving knowledge of the employes of the central office of the subject-matter of a conversation over the wire.

605-43 Smith v. Au Gres, 150 Fed. 257, 80 C. C. A. 145; Jolls v. Keegan, 4 Penne. (Del.) 21, 55 A. 340; S. v. Campbell, 73 Kan. 688, 702, 85 P. 784; Allen v. Hall, 64 Neb. 256, 89 N. W. 803; S. v. Bringgold, 40 Wash. 12, 82 P. 132.

Disclosure of admissions may be compelled, though made in private conversation. Ex parte Parker, 74 S. C. 466, 55 S. E. 122.

605-44 Robinson & Co. v. Green (Ala.), 43 S. 797; Miller v. P., 216 Ill. 309, 74 N. E. 743; Frick v. Kabaker, 116 Ia. 494, 90 N. W. 498;

S. v. Thompson, 116 La. 829, 41 S. 107; Lange v. Klatt, 135 Mich. 262, 97 N. W. 708; Reiser v. Portere, 106 Mich. 102, 63 N. W. 1041; Profile & F. H. Co. v. Bickford, 72 N. H. 73, 54 A. 699; Egyptian F. Cig. Co. v. Comisky, 40 Misc. 236, 81 N. Y. S. 673; Virginia-C. Co. v. Kirven, 130 N. C. 161, 41 S. E. 1; S. v. Glover (S. D.), 113 N. W. 625.

Immaterial that admitter might be called as a witness (Stewart v. Doak, 58 W. Va. 172, 52 S. E. 95); or that admission was made in presence of adverse party. Vincent v. Soper, 113 Ill. App. 463.

Best evidence rule does not apply. A witness to whom a party has read letters may testify of admissions therein. Purinton v. Purinton, 101 Me. 250, 63 A. 925.

Compliance with statute. — If it is provided by statute how declarations made by accused persons may be proved, the statute must be complied with; if not, witnesses who heard the statement may testify. S. v. Thompson, 116 La. 829, 41 S. 107.

605-45 Graves v. Graves, 70 Ark. 541, 69 S. W. 544; Northington v. Granade, 118 Ga. 584, 45 S. E. 447.

606-46 Interest does not disqualify a witness from testifying to admissions made in his presence by testator to another, they not being addressed to him. Reid v. Sewell, 111 Ga. 880, 36 S. E. 937.

606-48 Rosenfeld v. Siegfried, 91 Mo. App. 169; Egyptian F. C. Co. v. Comisky, 40 Misc. 236, 81 N. Y. S. 673.

Proof of, by record of original trial. The admissions made by a party on the trial may be proven in a proceeding before a referee by the record of that trial. Sternbach v. Friedman, 75 App. Div. 418, 78 N. Y. S. 318.

Proved by book. — A written admission may be proved by producing the book which contains it, though such book is not evidence for any other purpose. Harrison v. Paper Co., 140 Fed. 385, 401, 72 C. C. A. 405.

606-49 Reinhardt v. Marks, 29 Ky. L. R. 388, 93 S. W. 32; Union P. R. Co. v. Connolly (Neb.), 109 N. W. 368.

Date. — Inability to fix date only affects weight of testimony. Norris v. Clark, 29 Pa. Super. 562.

Cross-examination. — A witness who testifies of the evidence given by the defendant on a former trial may be cross-examined as to other questions and answers tending to explain or qualify those testified of. Miller v. P., 216 Ill. 309, 74 N. E. 743; Reiser v. Portere, 106 Mich. 102, 63 N. W. 1041; C. v. House, 6 Pa. Super. 92, 114; Brown v. S., 119 Ga. 572, 46 S. E. 833.

606-50 Butterfield v. Kirtley, 114 Ia. 520, 87 N. W. 407; Holzhauer v. Sheeny, 31 Ky. L. R. 1238, 104 S. W. 1034; Clark v. C. (Ky.), 105 S. W. 393. See ante, 604-41.

606-51 If all that was testified to cannot be given, no evidence respecting it should be received. Salley v. R. Co., 62 S. C. 127, 80 S. E. 111.

606-52 Powell v. M'Glynn, (1902) 2 Ir. Rep. 154; Fidelity & C. Co. v. Dorough, 107 Fed. 389, 46 C. C. A. 364; Dennie v. Clark, 3 Cal. App. 760, 87 P. 59; Brown v. S., 119 Ga. 572, 46 S. E. 833; Hawkins v. Chambliss, 120 Ga. 614, 48 S. E. 169; Corning v. Dollmeyer, 123 Ill. App. 188; Campbell v. Eichorst, 122 Ill. App. 609; Adams v. Long, 114 Ill. App. 277; Millard v. Millard, 123 Ill. App. 264; Chicago R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28; Marks v. Hardy, 117 Ky. 663, 78 S. W. 864, 1105; S. v. Thompson, 116 La. 829, 41 S. 107; Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597; Chamberlain v. Iba, 181 N. Y. 486, 74 N. E. 481; Eldridge v. Hoefer, 45 Or. 239, 77 P. 874; Addous v. Oliverson, 17 S. D. 190, 95 N. W. 917; Bartley v. Comer (Tex. Civ.), 89 S. W. 82; Blaisdell v. Davis, 72 Vt. 295, 48 A. 14; Coruth v. Jones, 77 Vt. 441, 60 A. 814.

Rule applicable to oral pleading. Risdon v. Yates, 145 Cal. 210, 78 P. 641; Yaska v. Swendrzynski (Wis.), 113 N. W. 959. *Contra*, Root v. Sturdivant, 70 Ia. 55, 29 N. W. 802; Hauser v. Griffith, 102 Ia. 215, 71 N. W. 223. The California case cited disapproves the Iowa cases.

Rule not applicable to testimony. Farnum v. Whitman, 187 Mass. 381, 73 N. E. 473.

Advice of counsel. — The admitter

may testify that he acted under advice of counsel, but not to what counsel said unless that be drawn out on cross-examination. Bartley v. Comer (Tex. Civ.), 89 S. W. 82.

It is immaterial that an admission of fact was made without consulting an attorney. Harvey v. R. Co., 221 Ill. 242, 77 N. E. 569.

Explanation of omission in letters. If letters are inconsistent with testimony given by a party in support of counterclaims he may explain why the letters contained no reference thereto. Hopler v. Hunter Arms Co., 64 App. Div. 80, 71 N. Y. S. 687; Chamberlain v. Iba, 181 N. Y. 486, 74 N. E. 481.

Plea of guilty. — Reasons for making may be explained. Yaska v. Swendrzynski (Wis.), 113 N. W. 959.

Circumstances connected with signing a paper may be shown. Badanes v. Feeder, 47 Misc. 91, 93 N. Y. S. 478.

Evidence given on former trial. — If a party is cross-examined concerning testimony given by him on a former trial he may, on redirect examination, give all such testimony in reference to the facts about which he was cross-examined. Illinois S. Co. v. Wierzbicky, 206 Ill. 201, 68 N. E. 1101.

608-53 S. v. Thompson, 116 La. 829, 41 S. 107; Seibert's Estate, 1 Pa. C. C. 229.

Not always strictly applied. — Conover v. Neher, 38 Wash. 172, 80 P. 281.

609-54 Fidelity & C. Co. v. Dorough, 107 Fed. 389, 46 C. C. A. 364; Brown v. S., 119 Ga. 572, 46 S. E. 833; Bode v. S. (Neb.), 113 N. W. 996.

An exception is made in case of necessity. Fitzpatrick v. Tucker, 70 Kan. 338, 78 P. 828.

609-55 Lombard v. Chaplin, 98 Me. 309, 56 A. 903; Hunter v. Johnson, 119 Mo. App. 487, 94 S. W. 311; Aetna Ins. Co. v. Eastman (Tex. Civ.), 80 S. W. 255.

Ambiguities may be explained. Coldren v. LeGore, 118 Ia. 212, 91 N. W. 1066.

610-56 Morris v. Jamieson, 205 Ill. 87, 68 N. E. 742; Lombard v. Chaplin, 98 Me. 309, 56 A. 903; Lewis Pub. Co. v. Lenz, 86 App. Div. 451, 83 N. Y. S. 841.

Remoteness. — It has been said that the correspondence must have been written within a reasonable time. Lexow v. Belding, 72 App. Div. 446, 76 N. Y. S. 602.

Lack of writer's authority may be shown. Liberty v. Haines, 101 Me. 402, 64 A. 665.

610-57 Fidelity & C. Co. v. Dorough, 107 Fed. 389, 46 C. C. A. 364; Moore v. Crosthwait, 135 Ala. 272, 33 S. 28; Manley v. McKenzie, 128 Ga. 347, 57 S. E. 705; Seymour v. Fueling Co., 103 Ill. App. 625; Second Borrowers v. Cochrane, 103 Ill. App. 29; Pritchett v. Sheridan, 29 Ind. App. 81, 63 N. E. 865; Bullard v. Bullard, 112 Ia. 423, 84 N. W. 513; White v. Collins, 90 Minn. 165, 95 N. W. 765; Dunafon v. Barber (Neb.), 92 N. W. 198; Young v. Kinney (Neb.), 112 N. W. 558; McBlain v. Edgar, 65 N. J. L. 634, 48 A. 600; Gossler v. Wood, 120 N. C. 69, 27 S. E. 33; Contreras v. Tract. Co. (Tex. Civ.), 83 S. W. 870; Sterling v. DeLaune (Tex. Civ.), 105 S. W. 1169.

The record of the case in which admissions were made in the pleadings must be produced to prove the admissions. Colborn v. Fry, 23 Ind. App. 485, 55 N. E. 621.

610-60 **Verbal admissions** are the weakest kind of evidence, especially when the exact language cannot be given. Des Allemands L. Co. v. Timb. Co., 117 La. 1, 41 S. 332.

Admission of child. — The admissions of children of tender years should be received with more caution than those of an adult, and are to be weighed with reference to their ages and understandings. Chicago R. Co. v. Tuohy, 196 Ill. 410, 430, 63 N. E. 997.

General oral admissions are not sufficient to overcome a legal presumption. Donovan v. Driscoll, 116 Ia. 339, 90 N. W. 60.

May overcome presumption. — Undisputed evidence of an acknowledgment of the correctness of an account and of indebtedness to the amount thereof overcomes the presumption that checks and a note of prior date, not mentioned in the account, were given in payment thereof. Lewis v. England, 14 Wyo. 128, 145, 82 P. 869.

611-61 Ladd v. Distill. Co., 147

Ala. 173, 40 S. 610; Copper R. M. Co. v. McClellan, 2 Alaska 134, 153; P. v. Hill, 1 Cal. App. 414, 82 P. 398; P. v. Wardrip, 141 Cal. 229, 74 P. 744; McBride v. R. Co., 125 Ga. 515, 54 S. E. 674; Burk v. Hill, 119 Ga. 38, 45 S. E. 732; Burnett v. P., 204 Ill. 208, 226, 68 N. E. 505; Wilson v. Terry, 70 N. J. Eq. 231, 62 A. 310, 318; Earp v. Edgington, 107 Tenn. 23, 39, 64 S. W. 40.

It is presumed admissions are true. Sheperd v. T. Co., 189 Mo. 362, 373, 87 S. W. 1007.

Are unreliable at best. Des Allemonds L. Co. v. T. Co., 117 La. 1, 41 S. 332, 345.

Weakest kind of testimony if made casually to disinterested persons. Haven v. Markstrum, 67 Wis. 493, 30 N. W. 720; Emery v. S., 101 Wis. 627, 78 N. W. 145; Grotjan v. Rice, 124 Wis. 253, 102 N. W. 551.

Not to be taken as conclusively true though made in giving testimony. Houston v. R. Co., 118 Mo. App. 464, 94 S. W. 560.

By deceased persons. — Special caution should be used as to the weight to be given oral admissions by deceased persons. Russell v. Sharp, 192 Mo. 270, 290, 91 S. W. 134; Wilson v. Terry, 70 N. J. Eq. 231, 62 A. 310, 318; Roberge v. Bonner, 94 App. Div. 342, 88 N. Y. S. 91; Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Reed v. Morgan, 100 Mo. App. 713, 73 S. W. 381; Kinney v. Murray, 170 Mo. 674, 706, 71 S. W. 197; Rosenwald v. Middlebrook, 188 Mo. 58, 94, 86 S. W. 200. They are the weakest of all evidence. They cannot be contradicted. In most instances such testimony is scarcely worthy of consideration. In view of the fact that no effort was made to enforce the claim during the lifetime of decedent, when it appears he was able, and might have been compelled to pay, the evidence to support it should be clear and convincing. Clarke v. Roberts, 38 Colo. 316, 87 P. 1077, *quot.* from Bodenheimer v. Bodenheimer, 35 La. Ann. 1005. See Wilder v. Franklin, 10 La. Ann. 279; Bringier v. Gordon, 14 Id. 274; Portis v. Hill, 14 Tex. 69, 65 Am. Dec. 99.

Written casual admissions are insufficient to show payment of an acknowledged debt when payment is denied. Anderson v. Davis, 55 W. Va. 429, 47 S. E. 157. On the other hand, it is said that such admissions, deliberately made and signed, are not to be lightly regarded. Castner v. R. Co., 126 Ia. 581, 102 N. W. 499. And that written admissions made before a controversy has arisen, as to the meaning and effect of a contract, outweigh oral testimony in contradiction of the same after a controversy has arisen. Moore v. Grayson, 132 Cal. 602, 64 P. 1074.

Concerning contract rights. — Declarations based upon assurances and under the pressure of the convincing arguments of the opposing parties to a contract will not weigh much as against the declarant's manifest intention concerning the contract before it was made. Clinton Ins. Co. v. Zeigler, 101 Ill. App. 165.

Sometimes the best evidence. When the good faith or the intent of a party in a given affair is in issue, his acts and sayings in relation to it at about the time of the transaction are generally the best evidence of the fact. U. S. v. Gentry, 119 Fed. 70, 55 C. C. A. 658.

612-62 P. v. Darr, 3 Cal. App. 50, 84 P. 457; Harp v. Harp, 136 Cal. 421, 69 P. 28; Everett v. Hart, 20 Colo. App. 93, 77 P. 254; Simeone v. Lindsay (Del.), 65 A. 778; Burk v. Hill, 119 Ga. 38, 45 S. E. 732; Lipsey v. P., 227 Ill. 364, 381, 81 N. E. 348; Worth v. Zerwick, 97 Ill. App. 306; Schell v. Weaver, 128 Ill. App. 106; Castner v. R. Co., 126 Ia. 581, 102 N. W. 499; Nichols-S. Co. v. Ringler (Ia.), 112 N. W. 543; Succession of Zacharie, 119 La. 150, 43 S. 988; P. v. Rich, 113 Mich. 14, 94 N. W. 375; Bode v. S. (Neb.), 113 N. W. 996; Roach v. Burgess (Tex. Civ.), 62 S. W. 803; Scheer v. Ulrich (Wis.), 113 N. W. 661.

Exclamatory admissions made by persons suddenly injured are unpremeditated and ought to be presumed free from pretense; though deductions from the facts admitted may be incorrect. Chicago etc. R. Co. v. Clarkson, 147 Fed. 397, 77 C. C. A. 575.

May be sufficient. — The rule that admissions alone are not sufficient to convict without proof of the cor-

pus delicti is not applicable to civil cases. Worth v. Zerwick, 97 Ill. App. 306.

In a prosecution for bigamy the defendant's uncorroborated admissions are sufficient to establish the first marriage. McSein v. S., 120 Ga. 175, 47 S. E. 544.

612-63 Turner v. Turner, 123 Ga. 5, 50 S. E. 969; Murphy v. S., 122 Ga. 149, 50 S. E. 48; McBride v. R. Co., 125 Ga. 515, 54 S. E. 674; Burk v. Hill, 119 Ga. 38, 45 S. E. 732; Earp v. Edgington, 107 Tenn. 23, 40, 64 S. W. 40; Bruger v. Ins. Co., 129 Wis. 281, 109 N. W. 95.

612-64 Dennie v. Clark, 3 Cal. App. 760, 87 P. 59; Traders' Ins. Co. v. Mann, 118 Ga. 381, 45 S. E. 426; Patterson v. Houston, 92 Ill. App. 624; Murphy v. Roney, 26 Ky. L. R. 634, 82 S. W. 396; C. v. Devaney, 182 Mass. 33, 64 N. E. 402; P. v. Rich, 133 Mich. 14, 94 N. W. 375; Houston v. R. Co., 118 Mo. App. 464, 94 S. W. 560; Sheperd v. Transit Co., 189 Mo. 362, 87 S. W. 1007; Bond v. R. Co., 110 Mo. App. 131, 84 S. W. 124; Pecos etc. R. Co. v. Lovelady, 35 Tex. Civ. 659, 80 S. W. 867; Boyer v. R. Co., 97 Tex. 107, 76 S. W. 441.

Admission of contributory negligence. — "The statement of the plaintiff immediately after the accident that he was careless and he alone to blame, was not conclusive proof of contributory negligence, but was open to neutralization by showing that, on reflection and consideration, he had come to think otherwise." LaFlan v. Pulp Co., 74 Vt. 125, 52 A. 526, *cit.* Stowe v. Bishop, 58 Vt. 498, 3 A. 494, 56 Am. Rep. 569.

613-65 Owsley v. Owsley, 25 Ky. L. R. 1186, 77 S. W. 397.

613-68 Cooley v. Abbey, 111 Ga. 439, 443, 36 S. E. 786; Murphy v. P., 129 Ill. App. 533.

Abandoned pleadings not within the rule. Orange Co. v. McIlhenny, 33 Tex. Civ. 592, 77 S. W. 428; S. v. Bringgold, 40 Wash. 12, 82 P. 132; Miller v. Drought (Tex. Civ.), 102 S. W. 145; Overton v. White, 117 Mo. App. 576, 607, 93 S. W. 363.

614-69 Nicholson v. Snyder, 97 Md. 415, 425, 55 A. 484; McLemore v. R. Co., 111 Tenn. 639, 661, 69 S. W. 338; Harris v. Water Co., 114 Tenn. 328, 340, 85 S. W. 897; Yaska v. Swendrzynski (Wis.), 113 N. W. 959.

614-72 Grounds upon which party may be relieved. — One who has made solemn admissions under oath in the course of judicial proceedings will not be permitted to deny them without first showing that they were made inconsiderately or without full knowledge of the facts. Chilton v. Scruggs, 5 Lea (Tenn.) 308. If admissions are inconsiderately made or without full knowledge of the facts, the party should not be bound. Hamilton v. Zimmerman, 5 Sneed (Tenn.) 39; Blanks v. Klein, 53 Fed. 436, 3 C. C. A. 585.

614-73 Layson v. Cooper, 174 Mo. 211, 73 S. W. 472.

False representations. — Evidence of admissions by conduct is competent though induced by false representations. C. v. Hartford, 193 Mass. 464, 79 N. E. 784.

614-74 Nicholson v. Snyder, 97 Md. 415, 55 A. 484.

615-77 Connecticut Mut. Ins. Co. v. Hillmon, 107 Fed. 834, 46 C. C. A. 668; Patterson v. Houston, 92 Ill. App. 624; Lusk v. Throop, 189 Ill. 127, 135, 59 N. E. 529.

Conclusive upon an assignee who stated he had property of the assignor. In re Pool, 8 Misc. 284, 28 N. Y. S. 707.

615-79 Oral admissions do not divest admittler of title to land. Pleasanton v. Simmons, 2 Penne. (Del.) 477, 47 A. 697.

615-80 Stewart v. Gleason, 23 Pa. Super. 325; C. v. Haylow, 17 Pa. Super. 541; Phoenix Ins. Co. v. Gray, 113 Ga. 424, 38 S. E. 992.

Ambiguous admissions are for the jury. Allred v. S., 126 Ga. 537, 55 S. E. 178.

ADULTERATION [Vol. 1.]

Manner of, 616-1; *Comparison of articles,* 617-3; *Label on compound or mixture,* 617-3; *Burden of proof in civil action,* 618-7; *Judicial notice,* 620-11; *Sale*

of article for analysis, 622-15; Character not involved, 622-15.

616-1 The certificate is evidence. St. Louis v. Dairy Co., 190 Mo. 507, 89 S. W. 627; P. v. Woodbeck, 55 App. Div. 277, 67 N. Y. S. 38.

Manner of. — Proof need not be made of the particular manner in which the analysis was conducted. The testimony of the chemist who made it that he was appointed for that purpose is prima facie evidence of the fact. Vandegrift v. Meihle, 66 N. J. L. 92, 49 A. 16.

Correctness of analysis. — The state must show that the sample analyzed has not been tampered with or has not deteriorated because not properly sealed. C. v. Lockhardt, 144 Mass. 132, 10 N. E. 511.

617-2 St. Louis v. Dairy Co., 190 Mo. 507, 89 S. W. 627.

617-3 S. v. Ehringer, 67 Ohio St. 51, 65 N. E. 148.

Comparison of articles. — Proof of the purity of articles offered as samples need not necessarily be made by chemical analysis. A witness competent to do so may testify thereof after applying other tests. C. v. Mellet, 27 Pa. Super. 41.

Label on compound or mixture. The label put on a compound alleged to have been offered for sale as a pure production is competent evidence on the question as to whether it was offered as such. P. v. Berghoff, 112 App. Div. 772, 99 N. Y. S. 201.

618-4 St. Louis v. Dairy Co., 190 Mo. 507, 89 S. W. 627. St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611.

618-7 Burden of proof in civil action. — The burden of proof resting upon the plaintiff in an action to recover the price of milk may be met without proving an analysis of it, as by evidence of the nature of his herd of cattle, the manner of feeding them, that no foreign substance was added to the milk, and that it was of good quality and unskimmed. Copeland v. Dairy Co., 189 Mass. 342, 75 N. E. 704.

619-8 S. v. Rogers, 95 Me. 94, 49 A. 564.

620-11 Judicial notice. — It can not be known to the judicial mind that milk containing less than a stated per cent of butter fat is universally conceded to be wholesome. St. Louis v. Dairy Co., 190 Mo. 507, 89 S. W. 627.

620-12 Defendant may show that he did not sell the article and that the person who made the sale was not his agent or employe and did not account to him therefor. Diersing v. S., 9 Ohio C. C. (N. S.) 214.

One charged with selling oleomargarine colored to resemble butter may show that cotton-seed oil is, commercially, a constituent of oleomargarine; and such testimony may be rebutted by proof that such oil does not necessarily give that article the color of butter. C. v. Mellet, 27 Pa. Super. 41.

Variance. — Defendant may show that the sale of the forbidden article was made by his clerk and in violation of his instructions. Williams v. S., 4 Ohio C. C. (N. S.) 193.

621-13 S. v. Rogers, 95 Me. 94, 49 A. 564; C. v. Farren, 9 Allen (Mass.) 489; Vandegrift v. Meihle, 66 N. J. L. 92, 49 A. 16.

It is not material to show that pure milk frequently falls below the standard fixed by statute. S. v. Campbell, 64 N. H. 402, 13 A. 585, 10 Am. St. 419.

622-15 Sale of article for analysis. — The defense that the article was sold in order that it might be analyzed by the proper officer must be sustained by proof that there was a refusal to sell it in the course of trade, or that it was sold under compulsion, real or supposed, in pursuance of a demand for such purpose. Lansing v. S., 73 Neb. 124, 102 N. W. 254.

Character not involved. — If the violation of the law has been habitual the defendant's character is immaterial. C. v. Kolb, 13 Pa. Super. 347.

ADULTERY [Vol. 1.]

License to marry, 625-4; Statutory method of proving marriage not exclusive, 625-6; Presumption of authority to perform marriage ceremony, 625-6:

Weight of evidence arising from proof of opportunity, 629-26; Acts of intimacy; remoteness, 629-26; Anterior misconduct, 629-28; Proof of time of conception, 630-32; Time and place, 631-34.

624-1 Cartier v. U. S., 148 Fed. 804, 78 C. C. A. 494; Tison v. S., 125 Ga. 7, 53 S. E. 809; C. v. Nick, 29 Pa. C. C. 8; Dixon v. S. (Tex. Cr.), 97 S. W. 692.

Claim of marriage. — Testimony that a person claimed to be married has no probative value. Tison v. S., 125 Ga. 7, 53 S. E. 809.

625-3 **In South Carolina** the fact of marriage may be proved by general reputation and the declarations of the parties. S. v. Still, 68 S. C. 37, 46 S. E. 524, citing local cases and saying: This principle is also sustained by numerous other decisions, among which may be mentioned Miles v. U. S., 103 U. S. 304, and Wolverton v. S., 16 Ohio 173, 47 Am. Dec. 373. Proof that they held themselves out to be married may be made to supplement other evidence that they were husband and wife. S. v. Nelson, 39 Wash. 221, 81 P. 721.

Understanding of witness. — A witness may testify that he understood defendant had been married. Coons v. S., 49 Tex. Cr. 256, 91 S. W. 1085.

Defendant's paramour may testify as to his marriage because of having met his wife. Reynolds v. U. S. (Ind. Ter.), 103 S. W. 762.

625-4 Republic v. Waipa, 10 Haw. 442.

Identity. — Proof of the identity of the parties need not be very strong. Ibid.

License to marry. — Proof need not be made that the parties were licensed to marry, and if the license is put in evidence it need not be shown that it was issued by proper authority. Ibid.

Variation in name. — It may be shown that the name of one of the parties is not the name used in the certificate. S. v. Thompson, 31 Utah 228, 87 P. 709.

625-6 Republic v. Kuhia 10 Haw. 440; Lyman v. P., 198 Ill. 544, 64 N. E. 974, 98 Ill. App. 386; S. v. Eggleston, 45 Or. 346, 77 P. 738; S. v. Thompson, 31 Utah 228, 87 P. 709.

The testimony of one who witnessed a marriage need not be supplemented by proof that the officiating minister was ordained or authorized to solemnize marriage, where the parties have lived together many years and raised a family. Lyman v. P., 198 Ill. 544, 64 N. E. 974, 98 Ill. App. 386.

Presumption of authority to perform marriage ceremony. — It is presumed that the person who performed the marriage ceremony was authorized to do so. Republic v. Kuhia, 10 Haw. 440.

Statutory method of proving marriage not exclusive. — A statute providing for proof of marriage by a recorded certificate or a certified copy of it does not exclude other methods of proof. S. v. Nelson, 39 Wash. 221, 81 P. 721.

626-7 Republic v. Kahakauila, 10 Haw. 28; Reynolds v. U. S. (Ind. Ter.), 103 S. W. 762; S. v. Kimball, 74 Vt. 223, 52 A. 430.

626-9 **Extrajudicial admission** may be proved against the party who made it and is sufficient as to him, but not as against the co-defendant. Ter. v. Castro, 14 Haw. 131.

626-11 S. v. Eggleston, 45 Or. 346, 77 P. 738; Coons v. S., 49 Tex. Cr. 256, 91 S. W. 1085.

627-14 **Proof that prosecution was instituted by consort.** — The fact that the consort of the defendant testified before the grand jury in response to a subpoena is not proof that he instituted the prosecution. S. v. Loftus, 128 Ia. 529, 104 N. W. 906. A husband may make an information charging his wife's paramour with adultery. C. v. Barr, 25 Pa. Super. 609. It need not be shown beyond a reasonable doubt that the prosecution was instituted by the proper person. Whether it was or not is for the court to decide. S. v. Harmann (Ia.), 112 N. W. 632.

627-15 Counts v. S., 49 Tex. Cr. 329, 94 S. W. 220; S. v. Thompson, 31 Utah 228 87 P. 709.

627-16 C. v. Shanor, 29 Pa. Super. 358.

A photograph is competent though taken some years before the trial. S. v. Hasty, 121 Ia. 507, 96 N. W. 1115. See "IDENTITY," Vol. 6, p. 910.

628-22 Adultery by living together. — The statutory offense of adultery "by living together" is established by proof that the parties have so lived and have had intercourse; it need not be shown that they have lived together as husband and wife. Shaw v. S., 49 Tex. Cr. 379, 91 S. W. 1087.

Continuous relations. — If the evidence shows that the parties continuously roomed together the state will not be required to elect on which act of intercourse it will rely, though a particular date is alleged. Proof may be made of distinct acts in explanation of or as characterizing their acts and conduct. S. v. Higgins, 121 Ia. 19, 95 N. W. 244.

628-23 Hill v. S., 137 Ala. 66, 34 S. 406; S. v. Kimball, 74 Vt. 223, 52 A. 430; Monteith v. S., 114 Wis. 165, 89 N. W. 828.

628-24 S. v. Thompson, 133 Ia. 741, 111 N. W. 319; U. S. v. Griego, 11 N. M. 392, 72 P. 20; S. v. Kimball, 74 Vt. 223, 52 A. 430; Monteith v. S., 114 Wis. 165, 89 N. W. 828; Till v. S. (Wis.), 111 N. W. 1109.

The scope of the evidence admissible is very extended. Coons v. S., 49 Tex. Cr. 256, 91 S. W. 1085; Roller v. S., 43 Tex. Cr. 433, 66 S. W. 777; S. v. Thompson, 31 Utah 228, 87 P. 709; S. v. Nelson, 39 Wash. 221, 81 P. 721.

629-25 S. v. Thompson, 133 Ia. 741, 111 N. W. 319; U. S. v. Griego, 11 N. M. 392, 72 P. 20; S. v. Eggleston, 45 Or. 346, 77 P. 738.

Acts of intimacy; remoteness. — Acts of intimacy, short of intercourse, may be proven if of recent date; but not if they antedate the offense four or five years. French v. S., 47 Tex. Cr. 571, 85 S. W. 4.

629-26 See cases 629-25.

Weight of evidence arising from proof of opportunity. — Proof only of an opportunity to commit adultery is insufficient to convict unless there be proof also of an adulterous mind on the part of both parties; and to prove this state of mind circumstantial evidence is admissible to show a purpose or inclination to commit the act. S. v. Scott, 28 Or. 331, 42 P. 1; S. v. Eggleston, 45 Or. 346, 77 P. 738. If proof of an adulterous disposition has been made, evidence of an opportunity to commit the act is admissible, and from these combined factors the commission of the crime may be reasonably inferred. S. v. Eggleston, supra; S. v. Kimball, 74 Vt. 223, 52 A. 430; Monteith v. S., 114 Wis. 165, 89 N. W. 828. But it is said in a late case: The crime may not be inferred from the mutual disposition of the accused and another to have intercourse, when coupled with no proof save that of the opportunity to indulge therein. S. v. Thompson, 133 Ia. 741, 111 N. W. 319. The Iowa case last cited is approved in Till v. S. (Wis.), 111 N. W. 1109, where the rule is more carefully stated than in many cases. It was said that the statement that proof of inclination and opportunity suffice is correct only when it is understood that inclination means more than ordinary human tendencies, and the rule must extend to proof of conduct reasonably suggesting specific libidinous tendency of each of the parties toward the other, and opportunity must be understood as meaning more than mere chance, and must include proof that the parties have been together in equivocal circumstances, such as would lead the guarded discretion of a reasonable and just man under the circumstances to the conclusion of guilt beyond a reasonable doubt.

629-27 Sutton v. S., 124 Ga. 815, 53 S. E. 381; S. v. Eggleston, 45 Or. 346, 77 P. 738.

629-28 Hill v. S., 137 Ala. 66, 34 S. 406; Republic v. Waipa, 10 Haw. 442; S. v. Eggleston, 45 Or. 346, 77 P. 738; C. v. Burk, 2 Pa. C. C. 12; S. v. Potter, 52 Vt. 33; S. v. Nelson, 39 Wash. 221, 81 P. 721.

Conflict in Texas. — "The rule in this state was that former acts of intercourse could not be proven, not only in incest and adultery, but in rape, in order to shed light on the offense charged. Burnett v. State,

32 Tex. Cr. 86, 22 S. W. 47; Funderburg v. S., 23 Tex. App. 392, 5 S. W. 244. But this doctrine as to rape has been overruled. Smith v. State (Tex. Cr.), 73 S. W. 401, 74 S. W. 556. It has also been overruled as to incest. Clifton v. S., 46 Tex. Cr. 18, 79 S. W. 824. We can see no distinction as to incest and adultery. However, these authorities are limtied as to other acts of carnal intercourse.'' French v. S., 47 Tex. Cr. 571, 85 S. W. 4.

Anterior misconduct. — It is not proper to show that the accused ran away with other men than her alleged paramour a good while before she was indicted. Quinn v. S. (Tex. Cr.), 101 S. W. 248.

Election by state. — If the state elects as to the act it relies on, proof of acts within a year and a half before the indictment found is not proper. S. v. Harmann (Ia.), 112 N. W. 632.

630-32 Hill v. S., 137 Ala. 66, 34 S. 406; S. v. Eggleston, 45 Or. 346, 77 P. 738.

Continuous acts. — Evidence of continuous acts of intercourse within the statute of limitations may be proved as constituting part of the offense. French v. S., 47 Tex. Cr. 571, 85 S. W. 4.

Acts against which statute has run. P. v. Hendrickson, 53 Mich. 525, 19 N. W. 169; U. S. v. Griego, 11 N. M. 392, 72 P. 20.

Conduct after indictment. — Where acts of intercourse after the indictment cannot be proven (S. v. Hilberg, 22 Utah 27, 61 P. 215), the association of the parties thereafter may be shown, including the attendance of the defendant upon his paramour during illness. S. v. Snowden, 23 Utah 318, 331, 65 P. 479. Letters addressed by accused to the woman are competent. Monteith v. S., 114 Wis. 165, 89 N. W. 828.

Proof of time of conception. — Medical testimony as to the time an unmarried female conceived is not objectionable as proving another subsequent adulterous act. S. v. Thompson, 31 Utah 228, 87 P. 789.

631-34 Nobles v. S., 127 Ga. 212, 56 S. E. 125; Coons v. S., 49 Tex. Cr. 256, 91 S. W. 1085. See Counts v. S., 49 Tex. Cr. 329, 94 S. W. 220. *Contra*, C. v. Shanor, 29 Pa. Super. 358.

Time and place. — Evidence of general cohabitation characterized by suspicious circumstances dispenses with the need of proof as to any particular time or place when or where the act was committed. S. v. Kimball, 74 Vt. 223, 52 A. 430.

632-38 Supplies furnished paramour. — It is competent to show that defendant furnished the woman with necessaries. Hill v. S., 137 Ala. 66, 34 S. 406.

632-39 Paramour's letters, if not connected with accused, inadmissible. S. v. Loftus, 128 Ia. 529, 104 N. W. 906.

633-41 Jackson v. S. (Tex. Cr.), 101 S. W. 807.

633-43 C. v. Shaffer, 27 Pa. C. C. 415.

633-43, 45 The divorced wife of accused may testify against him except concerning confidential communications. If defendant's paramour is not on trial or is not accused, her husband may testify. S. v. Nelson, 39 Wash. 221, 81 P. 721. *Contra*, as to last point. C. v. Nick, 29 Pa. C. C. 8.

Husband or wife competent witness. Pruett v. S., 141 Ala. 69, 37 S. 343; Campbell v. S., 133 Ala. 158, 32 S. 635; S. v. Koller, 129 Ia. 111, 105 N. W. 391.

Husband or wife competent to prove marriage of the other. C. v. McGanghan, 29 Pa. C. C. 361; C. v. Fitzpatrick, 18 Pa. Super. 529. *Contra*, Republic v. Kahakauila, 10 Haw. 28.

Rule in civil action. — The rule of the text applies in an action by a husband for the alienation of his wife's affections and causing her to commit adultery. Graves v. Harris, 117 Ga. 817, 45 S. E. 239; Bishop v. Bishop, 124 Ga. 293, 52 S. E. 743.

In an action of crim. con. the husband of the woman in the case is not a competent witness to forge a single link in the chain of circumstances pointing to her criminal conduct. Cornelius v. Hambey, 150 Pa. 359, 24 A. 515.

633-46 S. v. Hasty, 121 Ia. 507, 96 N. W. 1115.

634-47 Admissions of specific

facts, not themselves constituting the crime, nor any part of it, but furnishing links in the chain of circumstantial evidence leading to proof thereof, may be shown in any order. Till v. S. (Wis.), 111 N. W. 1109.

Conduct of accused, after illness of his paramour, may be described and opinions given concerning his appearance. Ibid.

634-53 Circumstances indicating that a married man had been in the room of an unmarried woman, together with the fact that he had paid her marked attentions, will support a verdict of guilty. S. v. Schaedler, 116 Ia. 488, 90 N. W. 91.

635-58 Insufficient evidence. Manuel v. S., 45 Tex. Cr. 96, 74 S. W. 30; Paul v. S., 49 Tex. Cr. 20, 90 S. W. 171; Taylor v. S., 48 Tex. Cr. 216, 87 S. W. 148.

Habitual intercourse not shown. Boswell v. S., 48 Tex. Cr. 47, 85 S. W. 1076; Curlee v. S. (Tex. Cr.), 98 S. W. 840.

Family relations. — If the state shows that defendant left his home and resided elsewhere, he may show that his wife rendered his life unsafe. S. v. Koller, 129 Ia. 111, 105 N. W. 391.

Propriety of situation. — If the state alleges that defendant carried his paramour to his place it may be shown that his father owned the property and that the woman went there under a contract with him for legitimate purposes. Hill v. S., 137 Ala. 66, 34 S. 406.

The rules of the church of which the defendant was a priest, relating to the cleanliness of his house, are immaterial on a prosecution for adultery with his housekeeper. Lenert v. S. (Tex. Cr.), 63 S. W. 563.

ADVERSE POSSESSION [Vol. 1.]

Quantum of proof, 642-6; *Rule as to easements,* 642-6; *Shifting of burden of proof,* 643-7; *Adverse use of water,* 645-11; *Presumption as to use of easement,* 646-12; *Administrator's possession that of heirs,* 653-25; *Presumption when vendor remains in possession,* 666-49; *Subsequent entry by grantor,* 666-49; *Presumption arising from relationship,* 669-56; *Presumption as to time of possession,* 669-56; *Color of title as affecting weight of evidence,* 672-60; *Rule where title void in part,* 672-60; *Admissions after title acquired,* 682-78; *Presumption between parties claiming adversely,* 694-5.

640-3 Hoyle v. Mann, 144 Ala. 516, 41 S. 835; Driver v. King, 145 Ala. 585, 40 S. 315; Webb v. Rhodes, 28 Ind. App. 393, 61 N. E. 735; Logsdon v. Dingg, 32 Ind. App. 158, 69 N. E. 409; Batchelder v. Robbins, 95 Me. 59, 49 A. 210; Sell v. McAnaw, 158 Mo. 466, 59 S. W. 1003; Perkins L. & L. Co. v. Irvin, 200 Mo. 485, 98 S. W. 580.

Verdict may be directed, though it is irregular to do so. Owens v. Meredith, 117 Ky. 402, 78 S. W. 145. The practice is recognized. McKee v. Grand Rapids, 133 Mich. 272, 95 N. W. 85.

641-5 Nevin v. Disharoon (Del.), 66 A. 362.

Presumption not conclusive where possession has been shared with another. Nevin v. Disharoon, supra.

642-6 Lawrence v. Land Co., 144 Ala. 524, 41 S. 612; Gaither v. Gage, 82 Ark. 51, 100 S. W. 80; Clarke v. Clarke, 133 Cal. 667, 66 P. 10; Abbott v. Pond, 142 Cal. 393, 76 P. 60; Gurnsey v. Water Co. (Cal. App.), 92 P. 326; Carney v. Hennessey, 77 Conn. 577, 60 A. 129; Nevin v. Disharoon (Del.), 66 A. 362; Pennington v. Lewis, 4 Penne. (Del.) 447, 56 A. 378; Wilson v. Johnson, 51 Fla. 370, 41 S. 395; Kaaihue v. Crabbe, 3 Haw. 768; White v. Harris, 206 Ill. 584, 69 N. E. 519; McClenahan v. Stevenson, 118 Ia. 106, 91 N. W. 925; Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; Walling v. Eggers, 25 Ky. L. R. 1563, 78 S. W. 428; Batchelder v. Robbins, 95 Me. 59, 49 A. 210; Todd v. Weed, 84 Minn. 4, 86 N. W. 756; Cohn v. L. Co., 80 Miss.

649, 32 S. 292; Lewis v. Upton, 90 App. Div. 453, 86 N. Y. S. 397; Monk v. Wilmington, 137 N. C. 322, 49 S. E. 345; Crist v. Boust, 26 Pa. Super. 543; Sutton v. Whetstone (S. D.), 112 N. W. 850; McAllen v. Alonzo (Tex. Civ.), 102 S. W. 475; English v. Openshaw, 28 Utah 241, 78 P. 476; Illinois Steel Co. v. Budzisz, 115 Wis. 68, 84, 90 N. W. 1019.

Quantum of proof. — It is enough if the evidence reasonably satisfied the jury; it is not required that it shall be satisfied. Lawrence v. Land Co., 144 Ala. 524, 41 S. 612. A preponderance is sufficient. Morrison v. Bomer, 195 Mo. 535, 94 S. W. 524. "Clear proof" not required. Heller v. Hawley, 8 Ohio C. C. (N. S.) 265. But in some cases it is said that the proof must be clear and positive (Barrs v. Brace, 38 Fla. 265, 20 S. 991; Gilbert v. L. & T. Co., 53 Fla. 319, 43 S. 754), and that it will be strictly construed. Lampman v. Van Alstyne, 94 Wis. 417, 69 N. W. 171; Fuller v. Worth, 91 Wis. 406, 64 N. W. 995; Pritchard v. Lewis, 125 Wis. 604, 104 N. W. 989, 1 L. R. A. (N. S.) 565; Roby v. Calumet Co., 211 Ill. 173, 71 N. E. 822; Calhoun v. Moore, 79 Ark. 109, 94 S. W. 931; Nathan v. Dierssen, 146 Cal. 63, 79 P. 739.

If a parol gift of land is made the basis for a claim by adverse possession, it must be shown by clear and convincing evidence. Raleigh v. Wells, 29 Utah 217, 81 P. 908.

Must also prove negative facts, as that successive owners of the land were not under disability. Evans v. Scott, 37 Tex. Civ. 373, 83 S. W. 874; Wright v. Fanning (Tex. Civ.), 86 S. W. 786; Austin v. Hall, 93 Tex. 595, 57 S. W. 563; Dees Bros. v. Harrison (Tex. Civ.), 95 S. W. 1093, following, though doubting, the other cases cited; Landry v. Landry, 105 La. 362, 29 S. 900. *Contra,* Fankboner v. Corder, 127 Ind. 164, 26 N. E. 835; Arnold v. Limeburger, 122 Ga. 72, 49 S. E. 812; Travis v. Hall, 95 Tex. 116, 65 S. W. 1077; Romine v. Littlejohn (Tex. Civ.), 106 S. W. 439.

Rule as to easements. — At common law the long enjoyment of an easement created the presumption that the claim or use was adverse; hence it was not necessary for the claimant to show that he claimed it as a right. The other party had the burden of showing that the use was permissive. O'Daniel v. O'Daniel, 88 Ky. 185, 10 S. W. 638; Wilkins v. Barnes, 79 Ky. 323; Newcome v. Crews, 98 Ky. 339, 32 S. W. 947; Anderson v. Southworth, 25 Ky. L. R. 776, 76 S. W. 391; Brown v. Barton, 26 Ky. L. R. 711, 82 S. W. 405. See infra, 646-12.

Heirs must show that decedent's widow occupied the land on which she lived as a homestead, and not adversely. Reno v. Blackburn (Ky.), 72 S. W. 775.

643-7 Stockley v. Cissna, 119 Fed. 812, 56 C. C. A. 324. See "EJECTMENT," Vol. 5, p. 1, and that title, infra.

Shifting of burden of proof. — If the facts to show prescription are difficult to prove and are more within the knowledge of one party than the other, as where the question is at what time a heavy building ceased to sink, the burden of proof is discharged by showing the time within which such buildings cease to sink; that being done, the burden shifts to the opposite party to overcome the prima facie case, and rebut the presumption of prescription. Chapman v. Assn., 108 La. 283, 32 S. 371. One who wishes to defeat the effect of adverse possession by showing that his own title was derived from the government within the statutory period has the burden of doing so. Baty v. Elrod, 66 Neb. 735, 92 N. W. 1032, 97 N. W. 343. The onus is on the party who seeks to show that the possession proved was permissive or subservient. Gardner v. Wright (Or.), 91 P. 286; Horbach v. Boyd, 64 Neb. 129, 89 N. W. 644; Gurnsey v. Water Co. (Cal. App.), 92 P. 326. The same rule governs as to any other allegation made to defeat the running of the statute, as that the use was not continuous, or such as to substantially interfere with the owner's rights. Gardner v. Wright, supra.

644-9 Occupancy must be of land claimed by the party. Rich v. Min. Co., 147 Fed. 380, 77 C. C. A. 558.

What acts insufficient. — Title to

wild lands cannot be acquired by merely taking a deed of a township or tract of timber land, running lines around it, keeping off trespassers and making occasional lumbering operations. Chandler v. Wilson, 77 Me. 76; Hudson v. Coe, 79 Me. 83, 8 A. 249, 1 Am. St. 288; Soper v. Lawrence Bros., 98 Me. 268, 56 A. 908. Camping and hunting are not sufficient. Nona M. Co. v. Wright (Tex.), 102 S. W. 1118. Plowing furrows around prairie land not enough. Jones v. Goss, 115 La. 926, 40 S. 357.

644-10 Roberson v. Downing, 126 Ga. 175, 54 S. E. 1020; Glover v. Sage, 87 Minn. 526, 92 N. W. 471; Knight v. Denman, 64 Neb. 814, 90 N. W. 863; Bowers v. Ledgerwood, 25 Wash. 14, 64 P. 936; Suksdorf v. Humphrey, 36 Wash. 1, 77 P. 1071; Unzelman v. Snohomish, 40 Wash. 588, 82 P. 911; Lohse v. Burch, 42 Wash. 156, 84 P. 722.

Evidence of intent is better shown by acts than by words. Wasmund v. Harm, 36 Wash. 170, 78 P. 777.

Intention need not have existed at the time of entry, but must exist before statute begins to run. Knight v. Denman, 64 Neb. 814, 90 N. W. 863; Cervena v. Thurston, 59 Neb. 343, 80 N. W. 1048. *Contra,* Purtle v. Bell, 225 Ill. 523, 80 N. E. 350.

Testimony as to intention uncorroborated by confirmatory acts is not convincing. Knight v. Denman, supra.

645-11 Hope v. Shiver, 77 Ark. 177, 90 S. W. 1003; Pennington v. Lewis, 4 Penne. (Del.) 447, 56 A. 378; White v. Harris, 206 Ill. 584, 69 N. E. 519; Lohse v. Burch, 42 Wash. 156, 84 P. 722; Illinois Steel Co. v. Budzisz, 115 Wis. 68, 86, 90 N. W. 1019.

Proof of possession is not excused because the owner of land knows that somebody is asserting a hostile paper title. Kennedy v. Sanders, 90 Miss. 524, 43 S. 913.

Adverse use of water. — An adverse use of water cannot be initiated until the person entitled to the superior use is deprived of its benefits to such an extent as to be informed of the invasion of his rights. Britt v. Reed, 42 Or. 76, 70 P. 1029; Carson v. Hayes, 39 Or. 97, 65 P. 814.

Execution of lease to the land involved is competent to show the assertion of ownership. Staley v. Stone (Tex. Civ.), 92 S. W. 1017.

646-12 Reagan v. Hodges, 70 Ark. 563, 69 S. W. 581; Illinois C. R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751; Warth v. Baldwin, 27 Ky. L. R. 339, 84 S. W. 1148; Montgomery County v. Bean, 26 Ky. L. R. 568, 82 S. W. 240; Romine v. Littlejohn (Tex. Civ.), 106 S. W. 439; Lohse v. Burch, 42 Wash. 156, 84 P. 722.

Presumption as to use of easement. The presumption that the continuous and uninterrupted use of a right of way is adverse is overcome by failing to show that it was established for the claimant's benefit, or that its use was claimed as a right. Warth v. Baldwin, 27 Ky. L. R. 339, 84 S. W. 1148.

Must be under claim of right. — A party may claim adversely knowing that his title is defective, but he must do so under claim of right or title. McDaniel v. Iron & S. Co. (Ala.), 44 S. 705.

647-14 Henry v. Brown, 143 Ala. 446, 39 S. 325; Courtney v. Ashcraft, 31 Ky. L. R. 1324, 105 S. W. 106; Brown v. Hartford, 173 Mo. 183, 73 S. W. 140; Knight v. Denman, 64 Neb. 814, 90 N. W. 863; Monk v. Wilmington, 137 N. C. 322, 49 S. E. 345; Huss v. Jacobs, 210 Pa. 145, 51 A. 991; George v. R. Co., 38 Wash. 480, 80 P. 767; Illinois S. Co. v. Budzisz, 115 Wis. 68, 85, 90 N. W. 1019.

Evidence of occupation prior to a decree of foreclosure is incompetent in favor of an heir against a purchaser under a mortgage given by the former's ancestor (Reagan v. Hodges, 70 Ark. 563, 69 S. W. 581), and so of occupation before judgment in ejectment. Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026. A judgment of restitution in an action of forcible entry and detainer is competent to show lack of continuous possession. George v. R. Co., 38 Wash. 480, 80 P. 767.

Entry by holder of legal title. Temporary interruption of possession by a trespasser, if speedily redressed, is immaterial; but an entry

by the holder of the legal title under claim of right and holding jointly with the adverse possessor interrupts his possession. Chastang v. Chastang, 141 Ala. 451, 463, 37 S. 799, 109 Am. St. 45.

648-15 Butler v. Butler, 133 Ala. 377, 32 S. 579; Nevin v. Disharoon (Del.), 66 A. 362; Roby v. Dock Co., 211 Ill. 173, 71 N. E. 822; Stalford v. Goldring, 197 Ill. 156, 64 N. E. 395; McClenahan v. Stevenson, 118 Ia. 106, 91 N. W. 925; Chenault v. Quisenberry, 26 Ky. L. R. 462, 81 S. W. 690; Glover v. Sage, 87 Minn. 526, 92 N. W. 471; Kirton v. Bull, 168 Mo. 622, 68 S. W. 927; Heckescher v. Cooper, 203 Mo. 278, 101 S. W. 658; Johnston v. Albuquerque, 12 N. M. 20, 72 P. 9; Morehouse v. Burgot, 22 Ohio C. C. 174; Raleigh v. Wells, 29 Utah 217, 81 P. 908; Port Townsend v. Lewis, 34 Wash. 413, 75 P. 982; Pritchard v. Lewis, 125 Wis. 604, 104 N. W. 989.

Evidence to show hostility. — It may be shown that lands constituting part of a railroad right of way were platted, the subdivisions marked, the plats recorded, the taxes paid by the claimant and that his rights were locally recognized. Northern P. R. Co. v. Spokane (Wash.), 88 P. 135.

Use of railroad right of way must be inconsistent with company's rights. Smith v. R. Co., 5 Ohio C. C. (N. S.) 194.

Non-exclusive use of wharf right. Montgomery v. Shaver, 40 Or. 244, 66 P. 923.

Parol evidence is competent to show that a deed conveying a life estate was intended to convey the fee, and that the grantee took possession of the land and occupied it exclusively, adversely and continuously with acquiescence of grantor. Breland v. O'Neal, 88 Miss. 449, 40 S. 865.

Acts of ownership exercised by the holder of the paper title during time of adverse possession may be proved. Kaaihue v. Crabbe, 3 Haw. 768.

Need not be undisputed. — Heller v. Hawley, 8 Ohio C. C. (N. S.) 265.

Slight acts indicating ownership in another, though consented to, are not conclusive against the one claiming adversely. West v. Webster (Tex. Civ.), 87 S. W. 196.

Claim of exclusive right may be inferred from the manner of occupancy, as by erecting, repairing and occupying buildings, leasing them and collecting rents, selling and offering to sell the property. Rennert v. Shirk, 163 Ind. 542, 72 N. E. 546.

Conveyance of land. — The conveyance of a specific part of a tract is the most emphatic evidence of assertion of title. York v. Hutcheson, 37 Tex. Civ. 367, 83 S. W. 895; Dowdell v. Soc., 114 La. 49, 38 S. 16.

Acts done by owner. — Where proof is made of the acts done on land by the claimant it is proper to show that the owner of the title was doing like acts thereon and the extent of such acts. Chastang v. Chastang, 141 Ala. 451, 462, 37 S. 799, 109 Am. St. 45.

Eavesdripping prevents a use from being exclusive. Lins v. Seefeld, 126 Wis. 610, 105 N. W. 917.

It is sufficient if the land is put to use in a manner to apprise the neighbors that it is in the exclusive use and enjoyment of another. Eckert v. Weilmuenster, 103 Ill. App. 490, *cit.* Lancey v. Brock, 110 Ill. 609; St. Louis etc. R. Co. v. Nugent, 152 Ill. 119, 39 N. E. 263.

Opinions as to title: — A conveyancer cannot testify of his opinion concerning the validity of the claimant's title. Luce v. Parsons, 192 Mass. 8, 77 N. E. 1032.

649-16 Heckescher v. Cooper, 203 Mo. 278, 101 S. W. 658; Kane v. Sholars (Tex. Civ.), 90 S. W. 937.

If the possession comports with the usual management of like lands by their owners, the evidence of adverse possession is sufficient. Lampman v. Van Alstyne, 94 Wis. 417, 69 N. W. 171; Illinois S. Co. v. Budzisz, 106 Wis. 499, 82 N. W. 534; Illinois S. Co. v. Jeka, 119 Wis. 122, 95 N. W. 97; Clithero v. Fenner, 122 Wis. 356, 99 N. W. 1027. But it is competent to show why the claimant was allowed to remain in possession. Brucke v. Hubbard, 74 S. C. 144, 158, 54 S. E. 249.

A third party may testify as to the possession of land. Dorlan v. Westervitch, 140 Ala. 283, 37 S. 382.

Conclusion. — A statement that one

was in open and notorious possession of land is a conclusion. Driver v. King, 145 Ala. 585, 40 S. 315.

Acts of ownership must be continuous and notorious. — Chastang v. Chastang, 141 Ala. 451, 37 S. 799, 109 Am. St. 45; Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026.

Insufficient acts. — The masting of hogs on land, or the ranging of cattle, or the conducting of a sugar camp will not constitute adverse possession. Courtney v. Asheraft, 31 Ky. L. R. 1324, 105 S. W. 106. Nor will the occasional cutting of timber. Combs v. Combs, 24 Ky. L. R. 1691, 72 S. W. 8.

649-17 Illinois S. Co. v. Jeka, 123 Wis. 419, 101 N. W. 399.

650-18 Miskwabik D. Assn. v. Croze, 140 Mich. 194, 103 N. W. 558; Travis v. Hall, 37 Tex. Civ. 143, 83 S. W. 425; Illinois S. Co. v. Bilot, 109 Wis. 418, 428, 84 N. W. 855, 85 N. W. 402.

651-19 Pennington v. Lewis, 4 Penne. (Del.) 447, 56 A. 378; Illinois S. Co. v. Bilot, supra.

Entire tract need not be continuously cultivated. — Johnson v. Thomas, 23 App. D. C. 141, 151.

Land may be enclosed though fence in street, it seems. Howison v. Masson, 29 App. D. C. 338.

Inclosure and cultivation. — It is well settled that, while inclosure is the most tangible evidence of adverse occupation, cultivation is the equivalent of inclosure for this purpose. Johnson v. Thomas, 23 App. D. C. 141, 151, *cit.* Maxwell v. Dawson, 151 U. S. 586.

Actual inclosure not necessary if evidence shows a continuous, open, actual, exclusive and adverse possession. Howison v. Masson, 29 App. D. C. 338; Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026.

Cutting timber and paying taxes may be proved as circumstances to aid in determining the fact and fixing the extent of adverse possession. Chastang v. Chastang, 141 Ala. 451, 37 S. 799, 109 Am. St. 45.

In Texas merely enclosing land does not show adverse possession; the statute requires cultivation, use or enjoyment. McDonald v. McCrabb (Tex. Civ.), 105 S. W. 238.

Inclosure must be maintained, and must extend around the land. Johnston v. Albuquerque, 12 N. M. 20, 72 P. 9.

Valuable improvements are strong proof of possession. Dowdell v. Soc., 114 La. 49, 38 S. 16; Hill v. Min. Co., 103 Ill. App. 41.

652-21 Nevin v. Disharoon (Del.), 66 A. 362; Illinois S. Co. v. Jeka, 123 Wis. 419, 101 N. W. 399; Illinois S. Co. v. Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. 905.

Using wood lot for the purpose of obtaining wood for use, sufficient. Pitman v. Hill, 117 Wis. 318, 94 N. W. 40.

653-23 Swafford v. Herd (Ky.), 65 S. W. 803.

Exception is made as to such part as may be in the actual possession of another. Courtney v. Asheraft, 31 Ky. L. R. 1324, 105 S. W. 106; Chastang v. Chastang, 141 Ala. 451, 463, 37 S. 799, 109 Am. St. 45.

Extent of possession under color of title. — A claimant holding adversely under paper color of title holds in accordance with the boundaries fixed thereby. Chastang v. Chastang, supra.

Actual occupancy. — In Texas only so much of a tract as is actually occupied can be claimed by adverse possession. Thompson v. Dutton, 96 Tex. 205, 71 S. W. 544.

Boundaries must be shown. — One who holds adversely without paper color of title must show the extent of his adverse possession by proof as clear and definite as to the tract claimed as would be required by conveying it by deed. Chastang v. Chastang, 141 Ala. 451, 37 S. 799, 109 Am. St. 45; McDaniel v. Iron Co. (Ala.), 44 S. 705.

653-25 Roberson v. Downing Co., 126 Ga. 175, 54 S. E. 1020; Murphy v. C., 187 Mass. 361, 73 N. E. 524; Beam v. Gardiner, 18 Pa. Super. 245; Sutton v. Whetstone (S. D.), 112 N. W. 850; Travis v. Hall, 37 Tex. Civ. 143, 83 S. W. 425.

Relation of landlord and tenant. To make the tenant's possession inure to the benefit of the landlord, the relation of landlord and tenant must be shown to have existed. Carlyle v. Pruett, 37 Tex. Civ. 384, 84 S. W. 372.

Extent of tenant's possession. When a tenant is placed in possession of a definite part of a larger tract of land, his possession will not avail the landlord beyond the part so claimed and held; but if the tenant's possession is not limited it will cover all the land owned by the landlord, regardless of the part occupied. Bell v. Coal Co., 155 Fed. 712. Tenant's possession of land not included in landlord's deed is simply a circumstance for jury. Illinois C. R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751.

Adverse possession by wife of tenant. — The wife of a tenant in joint occupation of land with him cannot claim it adversely to the landlord without showing that he had notice of her claim. Sizemore v. Trimble, 26 Ky. L. R. 8, 80 S. W. 477.

A tenant may testify how long he remained in possession of leased land. Hackett v. Webster, 97 Md. 404, 55 A. 480.

Lands leased must be identified. Where land claimed without paper title is leased to different tenants, the parts leased must be identified. Hackett v. Webster, supra.

When a question of fact. — If a judgment for possession is rendered against a tenant in possession, who subsequently leases the land, it is a question of fact whether, during the interim, his possession was that of the lessor. Logan v. Robertson (Tex. Civ.), 83 S. W. 395.

Administrator's possession that of heirs. — Though an administrator mistakenly assumes the right to hold the lands of his decedent in his representative capacity, his possession is not adverse to the heirs until knowledge that he has repudiated his holding in that capacity is brought to them. Ashford v. Ashford, 136 Ala. 631, 34 S. 10.

655-27 Cochran v. Moerer (Tex. Civ.), 105 S. W. 1138.

Sufficiency of proof. — Evidence showing a survey of the land for the purpose of cutting it into blocks, numbering the houses on it and the exaction of leases from their occupants, proves that the entry of the owner was made animo clamandi, and was good as matter of law. Illinois S. Co. v. Budzisz, 115 Wis. 68, 86, 90 N. W. 1019.

Entries by others than disseizors not material. Batchelder v. Robbins, 95 Me. 59, 49 A. 210.

Formal statement not necessary. The owner's animus clamandi may be inferred from circumstances; a formal declaration is not essential. Illinois S. Co. v. Budzisz, supra.

Evidence to show interruption. The secret and undisclosed intention of one who claims to own land in going upon it is immaterial; the effectiveness of his act depended upon whether it bore upon its face an intention to resume possession. Murphy v. C., 187 Mass. 361, 371, 73 N. E. 361.

Interruption of use of water. — See Oregon C. Co. v. Ditch Co., 41 Or. 209, 69 P. 455, 93 Am. St. 701.

Fences down. — The failure to constantly maintain the fences enclosing land does not interrupt the adverse possession. Kane v. Sholars (Tex. Civ.), 90 S. W. 937.

Unsuccessful suit immaterial. — McAllen v. Alonzo (Tex. Civ.), 102 S. W. 475.

Void judgment inadmissible. — Barrett v. McKinney (Tex. Civ.), 93 S. W. 240.

656-28 Bradbury v. Dumond, 80 Ark. 82, 96 S. W. 390; Tudor Mfg. Co. v. Greenwald Co., 5 Ohio C. C. (N. S.) 37.

Intention to return is immaterial if the party has left no indicia of a continuing possession. Hoyle v. Mann, 144 Ala. 516, 41 S. 835.

An abandonment is not shown by procuring a patent to a portion of the land adversely possessed; the patent was only evidentiary of the fact that the land was vacant. Asher v. Howard, 28 Ky. L. R. 1097, 91 S. W. 270. It is shown by the removal of all improvements after a survey which showed that land had been inclosed by mistake. Noyes v. Douglas, 39 Wash. 314, 81 P. 724. No abandonment of highway in absence of estoppel. Morehouse v. Burgot, 22 Ohio C. C. 174. Absence from inclosed land for a reasonable time is not an abandonment, there being no proof of an intention to give it that effect. Richards v. Haskins, 72 Neb. 195,

100 N. W. 151. The party who alleges an abandonment must show it. Agnew v. Pawnee City (Neb.), 113 N. W. 236. See "ABANDONMENT," Vol. 1, p. 1, and that title, ante.

657-29 Bell v. Coal Co., 155 Fed. 712; Brown v. Hartford, 173 Mo. 183, 73 S. W. 140; Johnson v. Brown, 33 Wash. 588, 74 P. 677.

658-30 Gurnsey v. Water Co. (Cal. App.), 92 P. 326; Hill v. Min. Co., 103 Ill. App. 41; O'Flaherty v. Mann, 196 Ill. 304, 63 N. E. 727; Rennert v. Shirk, 163 Ind. 542, 72 N. E. 546; Sawbridge v. Fergus Falls, 101 Minn. 378, 112 N. W. 385; Illinois S. Co. v. Bilot, 109 Wis. 418, 429, 84 N. W. 855, 85 N. W. 402.

As between grantor and grantee. It is not required that a grantor remaining in possession give direct notice of his hostile claim, if the acts done are so open, notorious and hostile as to show clearly his intentions. Kelly v. Palmer, 91 Minn. 133, 97 N. W. 578; McClenahan v. Stevenson, 118 Ia. 106, 91 N. W. 925; Meeks v. Garner, 93 Ala. 17, 8 S. 378, 11 L. R. A. 196; Knight v. Knight, 178 Ill. 553, 53 N. E. 306.

Cost of land and improvements. The claimant may show what he paid for the land, the cost of an improvement put on it by his predecessor in title, and that the latter brought an action for trespass on the land. Luce v. Parsons, 192 Mass. 8, 77 N. E. 1032.

659-33 Horbach v. Boyd, 64 Neb. 129, 89 N. W. 644; Lanham v. Bowlby (Neb.), 112 N. W. 324; Gardner v. Wright (Or.), 91 P. 286; Nona M. Co. v. Wright (Tex.), 102 S. W. 1118.

Testimony as to intent, if not fortified by acts, is not convincing. Bush v. Griffin (Neb.), 107 N. W. 247; Knight v. Denman, 64 Neb. 814, 90 N. W. 863.

Sufficiency of acts. — The acts need not be such as will bring to the owner knowledge of the fact of adverse possession; it is enough if they should be presumed to do so if he exercises reasonable care and diligence. Williams v. Shepherdson (Neb.), 95 N. W. 827; Lawrence v. Land Co., 144 Ala. 524, 41 S. 612; Missouri L. & M. Co. v. Jewell, 200 Mo. 707, 98 S. W. 578; Carney v. Hennessey, 74 Conn. 107, 49 A. 910, 92 Am. St. 199, 53 L. R. A. 699. As between grantor and grantee the acts of the former in conveying the land, causing himself to be named as owner upon maps and plats and openly and publicly claiming it as his own will suffice. Horbach v. Boyd, 64 Neb. 129, 89 N. W. 644.

Not necessary that knowledge be compelled. — Lawrence v. Land Co., supra.

661-37 Evidence of general reputation is not competent to show ownership or title. Henry v. Brown, 143 Ala. 446, 39 S. 325.

661-38 Acquiescence by owner in the use of an easement may be proved. Walling v. Eggers, 25 Ky. L. R. 1563, 78 S. W. 428.

Owner's knowledge. — In some cases the rule is thus stated: less proof of a general character is required when it appears that the possession and claim were in fact brought to the owner's knowledge. Batchelder v. Robbins, 95 Me. 59, 49 A. 210.

661-39 Turner v. Ladd, 42 Wash. 274, 84 P. 866.

Appointment of a receiver for a corporation and such interruptions of the use of its easement as were essential to its continued use are not fatal to its rights. Hindley v. R. Co., 42 Misc. 56, 85 N. Y. S. 561.

Interruption by trespassers immaterial. — Gardner v. Wright (Or.), 91 P. 286.

Unsuccessful suit not an interruption. — Gardner v. Wright, supra; Moore v. Greene, 19 How. (U. S.) 69.

662-40 Hoyle v. Mann, 144 Ala. 516, 41 S. 835; Walling v. Eggers, 25 Ky. L. R. 1563, 78 S. W. 428; Luce v. Parsons, 192 Mass. 8, 77 N. E. 1032; So. Omaha v. Meehan, 71 Neb. 230, 98 N. W. 691; Clithero v. Fenner, 122 Wis. 356, 99 N. W. 1027.

Deed not controlling. — The presumption that the deed covers all the land conveyed is overcome by proof that the grantor had acquired title by adverse possession to a strip adjoining that conveyed where he transferred possession to it in connection with the land conveyed. Clithero v. Fenner, 122 Wis. 356, 99 N. W. 1027.

Payment of taxes may be combined with actual possession. Gaither v. Gage & Co., 82 Ark. 51, 100 S. W. 80; Philadelphia M. & T. Co. v. Palmer, 32 Wash. 455, 73 P. 501.

662-41 Henry v. Brown, 143 Ala. 446, 39 S. 325; Messer v. Bank, 149 Cal. 122, 84 P. 835; Hooper v. Stuart, 23 App. D. C. 434; Zweibel v. Myers, 69 Neb. 294, 95 N. W. 597; Pohlman v. Evangelical Church, 60 Neb. 364, 83 N. W. 201; Murray v. Romine, 60 Neb. 94, 82 N. W. 318; Holdrege v. Livingston (Neb.), 112 N. W. 341; Montague v. Maranda, 71 Neb. 805, 99 N. W. 653; Johnston v. Case, 131 N. C. 491, 42 S. E. 957; Morehouse v. Burgot, 22 Ohio C. C. 174; Gardner v. Wright (Or.), 91 P. 286; Brucke v. Hubbard, 74 S. C. 144, 160, 54 S. E. 249; Illinois S. Co. v. Budzisz, 106 Wis. 499, 82 N. W. 534; 80 Am. St. 54, 48 L. R. A. 830; Clithero v. Fenner, 122 Wis. 356, 99 N. W. 1027, 106 Am. St. 978; Closuit v. Lumb. Co., 130 Wis. 258, 110 N. W. 222.

Grantor's possession of land not included in deed cannot inure to benefit of grantee unless possession was delivered to him. Illinois S. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751.

Claimant may be defeated by showing paramount outstanding title in third persons, though no privity be established between them and defendant. Waters v. Durrenee, 119 Ga. 934, 47 S. E. 216.

663-42 Walling v. Eggers, 31 Ky. L. R. 1009, 104 S. W. 360.

Under certain statutes the benefit of the record and possession of a vendor does not inure to the vendee unless his possession is under the record of the deed on which he relies. Logan v. Robertson (Tex. Civ.), 83 S. W. 395.

664-44 The requirement of continuity is satisfied by proof of a parol transfer. Illinois S. Co. v. Jeka, 119 Wis. 122, 95 N. W. 97; Murray v. Romine, 60 Neb. 94, 82 N. W. 318; South Omaha v. Meehan, 71 Neb. 230, 98 N. W. 691.

666-48 Collins v. Colleran, 86 Minn. 199, 90 N. W. 364; Kelly v. Palmer, 91 Minn. 133, 97 N. W. 578; Walker v. Killian, 62 S. C. 482, 40 S. E. 887; Thompson v. Camper, 106 Va. 315, 55 S. E. 674.

In some cases it is said that there is no presumption that possession was adverse. Monk v. Wilmington, 137 N. C. 322, 49 S. E. 345; Parker v. Banks, 79 N. C. 480. *Contra*, Ruffin v. Overby, 88 N. C. 369.

666-49 Gilbert v. L. & T. Co., 53 Fla. 319, 43 S. 754; Barrs v. Brace, 38 Fla. 265, 20 S. 991; Roth v. Munzenmaier, 118 Ia. 326, 91 N. W. 1072; Missouri etc. Co. v. Jewell, 200 Mo. 707, 98 S. W. 578; Heckescher v. Cooper, 203 Mo. 278, 101 S. W. 658; Horbach v. Boyd, 64 Neb. 129, 89 N. W. 644; Troxell v. Johnson, 52 Neb. 46, 71 N. W. 968; Johanson v. R. Co., 73 N. J. L. 767, 64 A. 1061; Bland v. Beasley (N. C.), 58 S. E. 993; Montgomery v. Shaver, 40 Or. 244, 66 P. 923; Love v. Turner, 71 S. C. 322, 51 S. E. 101; Hatch v. Lusignan, 117 Wis. 428, 94 N. W. 332.

Presumption when vendor remains in possession. — If the evidence is not clear as to whether a vendor remained in possession for himself or for the vendee, it will be presumed that his possession was by sufferance and with the understanding that it would be yielded up on demand. Succession of Zebriska, 119 La. 1076, 44 S. 893, *dist.* Roe v. Bundy, 45 La. Ann. 398, 12 S. 759; Horbach v. Boyd, 64 Neb. 129, 89 N. W. 644; Gardner v. Wright (Or.), 91 P. 286; McClenahan v. Stevenson, 118 Ia. 106, 91 N. W. 925.

Subsequent entry by grantor. — But if the grantor subsequently makes an entry upon the land granted it is not to be presumed that he does so in subordination to the title granted, especially if several years intervened between the grant and the entry. Horbach v. Boyd, 64 Neb. 129, 89 N. W. 644; Gardner v. Wright, supra.

Dower right. — A widow whose dower is not assigned is presumed to possess in her right of dower, notwithstanding remarriage. Reed v. Hackney, 69 N. J. L. 27, 54 A. 229.

667-50 Meurin v. Kopplin (Tex. Civ.), 100 S. W. 984.

667-51 U. S. v. Chaves, 159 U. S. 452; Love v. Turner, 71 S. C. 322, 51 S. E. 101; Smith v. Cornelius, 41 W. Va. 59, 23 S. E. 599.

There is no presumption from the

fact that the state made a second grant that it had re-acquired title after the first grant. Love v. Turner, 71 S. C. 322, 51 S. E. 101.

668-53 **Possession is presumptively rightful.** — Langston v. Cothran (S. C.), 58 S. E. 956. Every one is presumed to possess for himself. Succession of Zebriska, 119 La. 1076, 44 S. 893. Long continued possession coupled with notorious acts of ownership raise the presumption of a grant from the record owner. Flanagan v. Mathiesen, 70 Neb. 223, 97 N. W. 287; Townsend v. Boyd, 217 Pa. 386, 66 A. 1099; U. S. v. Chavez, 175 U. S. 509; Carter v. Tpk. Co., 22 Pa. Super. 162; In re Mayor, 73 App. Div. 394, 77 N. Y. S. 31; Jenkins v. McMichael, 21 Pa. Super. 161; Doty v. Jameson, 29 Ky. L. R. 507, 93 S. W. 638.

668-54 Fletcher v. Fuller, 120 U. S. 534; Penny v. Coal Co., 138 Fed. 769, 71 C. C. A. 135; Albertina v. Kapiolani, 14 Haw. 321; Kapiolani v. Cleghorn, 14 Haw. 330; Rennert v. Shirk, 163 Ind. 542, 72 N. E. 546; Wilkins v. Nicolai, 99 Wis. 178, 74 N. W. 103; Meyer v. Hope, 101 Wis. 123, 77 N. W. 720.

Presumption is one of fact only. Carlisle v. Gibbs (Tex. Civ.), 98 S. W. 192, citing several cases.

Burden of proof. — Any one disputing the presumption has the burden of establishing his contention. Meyer v. Hope, 101 Wis. 123, 77 N. W. 720; Closuit v. Lumb. Co., 130 Wis. 258, 110 N. W. 222.

Under adverse possession by husband and wife he is presumed to be in possession. Drinkwater v. Crist, 83 Ark. 293, 103 S. W. 733.

668-55 Illinois S. Co. v. Budzisz, 106 Wis. 499, 514, 82 N. W. 534; Illinois S. Co. v. Jeka, 119 Wis. 122, 95 N. W. 97; Illinois S. Co. v. Bilot, 109 Wis. 418, 440, 84 N. W. 855, 85 N. W. 402, 82 Am. St. 905; Pitman v. Hill, 117 Wis. 318, 94 N. W. 40.

669-56 **Presumption arising from relationship.** — The relations of the parties to each other will give rise to a presumption that the use of property is permissive and not adverse—as between father and son. That presumption continues until there is open assertion of hostile title other than mere possession, and knowledge thereof comes to the owner regardless of the extent of the dominion exercised by the possessor. Collins v. Colleran, 86 Minn. 199, 90 N. W. 364; O'Boyle v. McHugh, 66 Minn. 390, 69 N. W. 37. Such presumption may be rebutted by proof that a parol gift of the land was made to the son. Malone v. Malone, 88 Minn. 418, 93 N. W. 605.

Presumption as to time of possession. There is no presumption that a claimant's actual possession began at the date of his deed. Stockley v. Cissna, 119 Fed. 812, 56 C. C. A. 324.

No presumption when deed void. If a deed is void because the grantor was dissesed there is no presumption of occupation under it. Murphy v. C., 187 Mass. 361, 375, 73 N. E. 524.

669-57 Bradbury v. Dumond, 80 Ark. 82, 96 S. W. 390; Smith v. R. Co., 5 Ohio C. C. (N. S.) 194.

670-58 Bradbury v. Dumond, supra; Dangerfield v. Williams, 26 App. D. C. 508; Baxter & Co. v. Wetherington, 128 Ga. 801, 58 S. E. 467; Roberson v. Downing, 126 Ga. 175, 54 S. E. 1020; Godfrey v. Power Co., 228 Ill. 487, 81 N. E. 1089; Bellefontaine Co. v. Niedringhaus, 181 Ill. 426, 55 N. E. 184; Jones v. Goss, 115 La. 926, 40 S. 357; Murphy v. C., 187 Mass. 361, 375, 73 N. E. 524; Lang v. Min. Co., 145 Mich. 370, 108 N. W. 678; Smith v. R. Co., 5 Ohio C. C. (N. S.) 194; Illinois S. Co. v. Bilot, 109 Wis. 418, 440, 84 N. W. 855, 85 N. W. 402, 83 Am. St. 905.

In Georgia possession will not extend beyond the land actually occupied unless deed has been recorded. Baxley v. Baxley, 117 Ga. 60, 43 S. E. 436.

672-59 Wade v. McDougle, 59 W. Va. 113, 128, 52 S. E. 1026.

Extent of possession for wharfage purposes. Montgomery v. Shaver, 40 Or. 244, 66 P. 923.

Possession of timber. — If the deed under which a claim is asserted excepted the timber on the land conveyed, adverse possession of the land would not affect the right to the timber. Weatherwax Lumb. Co.

v. Ray, 38 Wash. 545, 80 P. 775; Brodack v. Morsbach, 38 Wash. 72, 80 P. 275.

672-60 Tennessee C. Co. v. Linn, 123 Ala. 112, 26 S. 245, 82 Am. St. 108; Smith v. R. Co., 5 Ohio C. C. (N. S.) 194.

Authorities to the contrary. — In expressing his dissent from the view of the majority in Tennessee C. Co. v. Linn, supra, Tyson, J., said the following cases are to the contrary: Vancleave v. Milliken, 13 Ind. 105; Teabout v. Daniels, 38 Ia. 158; Magee v. Magee, 37 Miss. 138; Rannels v. Rannels, 52 Mo. 108; La Frombois v. Jackson, 8 Cow. (N. Y.) 589; Tate v. Southard, 3 Hawks (N. C.) 119, 14 Am. Dec. 578 and note; Green v. Kellum, 2 Pa. 258; McCall v. Neely, 3 Watts (Pa.) 69.

If a deed is in evidence, though claimant does not rely on it, he can not claim beyond its limits unless he establishes possession. South v. Deaton, 113 Ky. 312, 68 S. W. 137, 1105.

Deed does not extend to new land formed by accretion, though purporting to convey same in connection with principal tract. Stockney v. Cissna, 119 Fed. 812, 56 C. C. A. 324.

Color of title as affecting weight of evidence. — The essential elements of adverse possession are similar whether there is color of title or not, though on the question of fact, of whether a possession has the essentials of adverse character, particularly the element charging the owner with notice of the hostile invasion of his right, more persuasive evidence is required in the latter case than in the former. Ill. S. Co. v. Bilot, 109 Wis. 418, 442, 84 N. W. 855, 85 N. W. 402, 83 Am. St. 905.

Rule where title void in part. — If the title was void as to part of the land conveyed, the occupation of the part to which the grantee had title will not give him constructive possession of that to which he had no title, except as he actually occupies it. Mitchell v. Bond, 84 Miss. 72, 84, 36 S. 148; Henry v. Brown, 143 Ala. 446, 39 S. 325.

Parol evidence is competent to show how much land the plaintiff claimed to own by virtue of adverse possession. Dorland v. Westervitch, 140 Ala. 283, 37 S. 382.

673-61 Crist v. Bonst, 26 Pa. Super. 543.

Exception to the rule. — The general rule does not govern where one takes and maintains a few acres in an uncultivated township for the mere purpose of gaining title to the entire township. Lawrence v. Land Co., 144 Ala. 524, 41 S. 612, *cit.* Chandler v. Spear, 22 Vt. 388; Jackson v. Woodruff, 1 Cow. (N. Y.) 276, 13 Am. Dec. 525.

The adverse possession of land under a deed will not extend to the land of one not a party to the deed, though it be included in the deed held by the claimant, no part of the land being occupied. Walsh v. Wheelwright, 96 Me. 174, 189, 52 A. 649, *over.* Noyes v. Dyer, 25 Me. 468.

If by mistake the wrong tract is conveyed and the grantee occupies that which he was entitled to, his possession will result in title. Moore v. Crump, 84 Miss. 612, 37 S. 109.

674-62 Tennessee C. Co. v. Linn, 123 Ala. 112, 135, 26 S. 245, 82 Am. St. 108; Powers v. Hatter (Ala.), 44 S. 859; Roberts v. Merwin (Conn.), 68 A. 377; Johnson v. Thomas, 23 App. D. C. 141, 151; Kountze v. Hatfield, 30 Ky. L. R. 589, 99 S. W. 262; Hackett v. Webster, 97 Md. 404, 55 A. 480; South Omaha v. Meehan, 71 Neb. 230, 98 N. W. 691; Love v. Turner, 71 S. C. 322, 51 S. E. 101; White v. Eavenson (Tex. Civ.), 101 S. W. 1029; Waller v. Leonard, 89 Tex. 507, 35 S. W. 1045; Webb v. Lyeria (Tex. Civ.), 94 S. W. 1095; Wade v. McDougle, 59 W. Va. 113, 127, 52 S. E. 1026.

Payment of taxes. — As bearing on the extent of a claimant's possession it may be shown on what land he paid taxes. White v. Eavenson, supra.

Extent of adverse possession. — It is not required that the possessor, in the absence of an inclosure, be in a physical, constant, visible occupancy by improvement of every part of the premises. It is enough if the improvement made in one place suggests the hostile possession of surrounding land. Illinois S. Co. v. Jeka, 123 Wis. 419; 101 N. W. 399.

674-63 Doe ex dem. Anniston v.

Edmondson, 145 Ala. 557, 40 S. 505; Street v. Collier, 118 Ga. 470, 45 S. E. 294; Little v. Crawford, 13 Idaho 146, 88 P. 974; Columbia etc. R. Co. v. Seattle, 33 Wash. 513, 523, 74 P. 670.

Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title. Cameron v. U. S., 148 U. S. 301. A patent to a deceased person is not color of title in favor of one not his heir if it is not shown that he conveyed the land. Doe ex dem. Anniston v. Edmondson, 145 Ala. 557, 40 S. 505. An antedated deed is color of title from the date of its execution. Ibid. Under the Texas statute color of title is such a defective muniment of title as is not wanting in intrinsic fairness and honesty. Hussey v. Moser, 70 Tex. 42, 7 S. W. 606. A wife's deed of separate property does not constitute color of title in the absence of a proper acknowledgment, but it may be shown by parol that such acknowledgment was made. Veeder v. Gilmer (Tex. Civ.), 105 S. W. 331. A deed not naming a grantee is not admissible to prove color of title. Nelson v. Cooper, 108 Fed. 919, 48 C. C. A. 140.

674-64 Hoyle v. Mann, 144 Ala. 516, 41 S. 835; Dorlan v. Westervitch, 140 Ala. 283, 37 S. 382; Reddick v. Long, 124 Ala. 260, 27 S. 402; Henry v. Brown, 143 Ala. 446, 39 S. 325; Dangerfield v. Williams, 26 App. D. C. 508; Gilbert v. L. & T. Co., 53 Fla. 319, 43 S. 754; Roth v. Munzenmaier, 118 Ia. 326, 91 N. W. 1072; McCash v. Penrod, 131 Ia. 631, 109 N. W. 180; Mitchell v. Bond, 84 Miss. 72, 36 S. 148; Perkins' L. & L. Co. v. Irvin, 200 Mo. 485, 98 S. W. 580; Alford v. Williams (Tex. Civ.), 91 S. W. 636; Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026; McCann v. Welch. 106 Wis. 142, 81 N. W. 996; Hatch v. Lusignan, 117 Wis. 428, 94 N. W. 332; Pitman v. Hill, 117 Wis. 318, 94 N. W. 40.

Entry must be shown. — A deed offered to show color of title must be accompanied or followed by proof showing that the grantee entered and claimed under it. National Bk. v. Iron Co., 108 Ala. 635, 19 S. 47; Henry v. Frohlichstein (Ala.), 43 S. 126.

Certainty of description. — If the deed describes the land so as to enable a surveyor to ascertain and locate it, the deed is admissible (Dorlan v. Westervitch, 140 Ala. 283, 295, 37 S. 382); otherwise it is not competent to prove color of title. Atlanta & W. P. R. Co. v. R. Co., 125 Ga. 529, 540, 54 S. E. 736.

676-67 **Tax receipts** are competent to show the assertion of title to the exclusion of that claimed by the defendant. Staley v. Stone (Tex. Civ.), 92 S. W. 1017. But they, if not ancient documents, must be proved. Chastang v. Chastang, 141 Ala. 451, 462, 37 S. 799, 109 Am. St. 45.

677-68 Carney v. Hennessey, 74 Conn. 107, 49 A. 910, 92 Am. St. 199, 53 L. R. A. 699; Murray v. Romine, 60 Neb. 94, 82 N. W. 318; Hesser v. Siepmann, 35 Wash. 14, 76 P. 295.

A parol contract for the sale of land or a gift of it by parol and occupancy of it may be the basis of adverse possession. Murphy v. Roney, 26 Ky. L. R. 634, 82 S. W. 396; Malone v. Malone, 88 Minn. 418, 93 N. W. 605. But the privity existing between the parties must be severed by assertion of an adverse right clearly brought home to the vendor. Marbach v. Holmes, 105 Va. 178, 52 S. E. 828.

678-70 **A complaint** in an intervention suit containing self-serving declarations is not admissible in favor of any one claiming under or through plaintiff. Sutton v. Whetstone (S. D.), 112 N. W. 850.

678-71 Henry v. Frolichstein (Ala.), 43 S. 126; Nathan v. Diersen, 146 Cal. 63, 79 P. 739; Leverett v. Loeb, 117 La. 310, 41 S. 584.

The record of a suit between plaintiff and defendant's grantor is competent to show that the latter's entry was under a contract. Marbach v. Holmes, 105 Va. 178, 52 S. E. 828.

The will of a widow made while in possession under her statutory right, not admissible in favor of her devisees. Allison v. Robinson, 136 Ala. 434, 34 S. 966.

Books, leases and orders of town of-

ficers indicating acts of ownership on the part of a town are competent evidence, in connection with proof of occupation by its lessees, to show adverse possession. Murphy v. C., 187 Mass. 361, 73 N. E. 524.

Adjustment of boundary line. — A town may prove by an indenture between it and the owner of land adjoining that in dispute the adjustment of the boundary line and a mutual release of claims to title. Murphy v. C., supra.

679-72 Patton v. Fox, 179 Mo. 525, 78 S. W. 804.

A deed from husband to wife, executed before marriage, is competent to show the extent of her claim, whether or not title was shown to have been in him. Alford Bros. v. Williams (Tex. Civ.), 91 S. W. 636.

Unrecorded deed admissible against holder of subsequent deed recorded where claimant in possession when later deed executed. Roberts v. Decker, 120 Wis. 102, 97 N. W. 519.

A map or plat of the lands in question, if shown to be correct, is competent to identify them. Driver v. King, 145 Ala. 585, 595, 40 S. 315.

679-73 Doe ex dem. Anniston v. Edmondson, 145 Ala. 557, 40 S. 505; Godfrey v. Power Co., 228 Ill. 487, 498, 81 N. E. 1089; Davis v. Clinton, 25 Ky. L. R. 2021, 79 S. W. 259; Reed v. Haekney, 69 N. J. L. 27, 54 A. 229; Sutton v. Whetstone (S. D.), 112 N. W. 850.

Sheriff's deed to plaintiff's grantor is not evidence of possession by plaintiff. Prevatt v. Harrelson, 132 N. C. 250, 43 S. E. 800.

Deed to record owner competent without proof that grantor had title. Nathan v. Dierssen, 146 Cal. 63, 79 P. 739.

Land must be identified. — Deeds executed by one claiming title independently of paper evidence are competent to show that he was asserting title, if accompanied by plats showing the location of the tracts conveyed. Hackett v. Webster, 97 Md. 404, 413, 55 Atl. 480.

679-74 Rennert v. Shirk, 163 Ind. 542, 72 N. E. 546; Sawbridge v. Fergus Falls, 101 Minn. 378, 112 N. W. 385; Flanagan v. Mathiesen, 70 Neb. 223, 97 N. W. 287; Staley v. Stone (Tex. Civ.), 92 S. W. 1017.

The execution of leases to land not in controversy may be shown to establish acts of ownership over the whole tract. South v. Deaton, 113 Ky. 312, 68 S. W. 137, 1105.

Inventory and appraisement of estate not competent to show that deceased exercised acts of ownership over land. Nathan v. Dierssen, 146 Cal. 63, 79 P. 739.

680-75 Merwin v. Backer (Conn.), 68 A. 373; Merwin v. Morris, 71 Conn. 555, 42 A. 855; Miskwabik D. Assn. v. Croze, 140 Mich. 194, 103 N. W. 558; Langston v. Cothran (S. C.), 58 S. E. 956; Staley v. Stone (Tex. Civ.), 92 S. W. 1017.

Payment of taxes some evidence that state has parted with its title. Busby v. R. Co., 45 S. C. 312, 23 S. E. 50. It is a significant circumstance, inconsistent with any other theory than that the payor claimed the property. Pitman v. Hill, 117 Wis. 318, 94 N. W. 40; Drcdla v. Patz (Neb.), 111 N. W. 136. It may be shown who listed the property for taxation and when the several parties paid the taxes on it. Walling v. Eggers, 25 Ky. L. R. 1563, 78 S. W. 428. And when title is claimed by a town it may be shown that the property was not assessed. Murphy v. C., 187 Mass. 361, 371, 73 N. E. 524. Payment of taxes on an entire tract held without color of title does not show possession of it. (Hackett v. Webster, 97 Md. 404, 55 A. 480). Is not evidence of actual or constructive possession. Archibald v. R. Co., 157 N. Y. 574, 52 N. E. 567; Consolidated I. Co. v. Mayor, 166 N. Y. 92, 59 N. E. 713.

Reason for not paying taxes. — A witness may not testify of his uncommunicated reason for not paying taxes. Lawrence v. Land Co., 144 Ala. 524, 41 S. 612.

The fact that land was assessed to a person is not proof that he had paid taxes, or of ownership. Kennedy v. Sanders, 90 Miss. 524, 43 S. 913.

As against a claim of title by a city, the acts of its officers in assessing land is good, if not the best, evidence that it was possessed adversely to it. Mayor etc. v. Rowe (Md.), 67 A. 93.

Failure to return land for taxation. It may be shown that the claimant

did not return land for taxation. Driver v. King, 145 Ala. 585, 40 S. 315; Trustees v. Lulia, 16 Haw. 630. The fact that the land was not assessed to the claimant is not controlling; he may have held under an unrecorded deed or a parol contract. Lusk v. Pelter, 101 Va. 790, 45 S. E. 333. Significance attaches to non-payment of taxes by claimant, and none can be given to his supposition that he had paid them. Standard Q. Co. v. Habishaw, 132 Cal. 115, 64 P. 113; Todd v. Weed, 84 Minn. 4, 86 N. W. 756.

Assessment books not conclusive. Assessment books made from the assessment lists are not conclusive as to whom the land was assessed. The claimant may testify that he returned the land for taxation, the lists having been destroyed. Doe ex dem Anniston v. Edmondson, 145 Ala. 557, 40 S. 505.

An inventory of property owned by claimant, though in the handwriting of the tax assessor, is competent to prove that the land in question was not returned by him for taxation. Webb v. Lyerla (Tex. Civ.), 94 S. W. 1095.

Parol testimony is sufficient to show payment of taxes. Roth v. Munzenmaier, 118 Ia. 326, 91 N. W. 1072.

681-76 Lawrence v. Land Co., 144 Ala. 524, 41 S. 612; Driver v. King, 145 Ala. 585, 40 S. 315; Henry v. Brown, 143 Ala. 446, 39 S. 325; Carney v. Hennessey, 74 Conn. 107, 49 A. 910, 92 Am. St. 199, 53 L. R. A. 699; Wilson v. Johnson, 51 Fla. 370, 41 S. 395; Trustees v. Lulia, 16 Haw. 630; McClenahan v. Stevenson, 118 Ia. 106, 91 N. W. 925; Luce v. Parsons, 192 Mass. 8, 77 N. E. 1032; Zweibel v. Myers, 69 Neb. 294, 95 N. W. 597; Hindley v. R. Co., 42 Misc. 56, 85 N. Y. S. 561; Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67; English v. Openshaw, 28 Utah 241, 78 P. 476; Lusk v. Pelter, 101 Va. 790, 45 S. E. 333; Port Townsend v. Lewis, 34 Wash. 413, 75 P. 982; Northern Pac. R. Co. v. Spokane (Wash.), 88 P. 135; Illinois S. Co. v. Jeka, 119 Wis. 122, 95 N. W. 97; Kreckeberg v. Leslie, 111 Wis. 462, 87 N. W. 450.

Unverified pleading not conclusive. Tennessee C. Co. v. Linn, 123 Ala. 112, 136, 26 S. 245, 82 Am. St. 108. Loose expressions in pleadings and testimony will not overcome the tenor of the evidence. Hooper v. Stuart, 23 App. D. C. 434.

Taking deed to land in dispute not act of mere licensee. Smith v. R. Co., 5 Ohio C. C. (N. S.) 194; Zweibel v. Myers, 69 Neb. 294, 95 N. W. 597.

A sworn disclaimer of title in a tax return is strong proof against open, notorious and continuous possession. Mayor v. Rowe (Md.), 67 A. 93.

Buying tax certificate and accepting redemption money from owner, through county treasurer, is a recognition of owner's title. Zweibel v. Myers, 69 Neb. 294, 95 N. W. 597; Hull v. R. Co., 21 Neb. 371, 32 N. W. 162.

Admission by will. — Ashford v. Ashford, 136 Ala. 631, 639, 34 S. 10.

Declaration of third person acting for another, competent. Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026.

Agreement to resurvey is an interruption of possession. Baty v. Elrod, 66 Neb. 735, 92 N. W. 1032, 97 N. W. 343.

Declarations made when land entered upon, immaterial. Kinley's Heirs v. Neely, 1 Phila. (Pa.) 118.

The petition of an administrator for an order to sell the lands of his intestate for division among the heirs, and the orders and proceedings made and had thereupon are admissible to show that he was administrator and that he held possession as such up to the time his vendee was put in possession. Ashford v. Ashford, 136 Ala. 631, 34 S. 10.

Admissions do not constitute an estoppel, but may be proved. Thompson v. Thompson, 93 Ky. 435, 20 S. W. 373; Murphy v. Roney, 26 Ky. L. R. 634, 82 S. W. 396. In the form of a stipulation may be used on subsequent trial of case if not limited. Nathan v. Dierssen, 146 Cal. 62, 79 P. 739. By tenant bind his successor. Neff v. Ryman, 100 Va. 521, 42 S. E. 314. By husband, immaterial as to wife. Baty v. Elrod, 66 Neb. 735, 92 N. W. 1032, 97 N. W. 343. A casual verbal admission will not overcome a presumption. Closuit v. Lumb. Co., 130 Wis.

258, 110 N. W. 222. May overcome other significant evidence. Truman v. Raybuck, 207 Pa. 357, 56 A. 944. Inadmissible if inconsistent with acts of person claiming benefit thereof. Butler v. Butler, 133 Ala. 377, 32 S. 579. Admission of nonclaim may be proven. Kane v. Scholars (Tex. Civ.), 90 S. W. 937. But an admission in the nature of an opinion, though competent, is not binding. Montgomery County v. Bean, 26 Ky. L. R. 568, 82 S. W. 240.

Non-payment of taxes immaterial on question of claimant's intent to claim title. Bush v. Griffin (Neb.), 107 N. W. 247.

Disclaimer. — "A single lisp of acknowledgment by defendant that he claims no title fastens a character upon his possession which makes it unavailing for ages." Warren v. Frederichs, 83 Tex. 380, 18 S. W. 750; Texas W. R. Co. v. Wilson, 83 Tex. 153, 18 S. W. 325; Hand v. Swann, 1 Tex. Civ. 241, 21 S. W. 282; McDonald v. McCrabb (Tex. Civ.), 105 S. W. 238.

682-77 Walling v. Eggers, 31 Ky. L. R. 1009, 104 S. W. 360; Barrett v. McKinney (Tex. Civ.), 93 S. W. 240.

Negotiations for the purchase of land to settle a dispute do not per se establish a relinquishment of rights acquired. Clithero v. Fenner, 122 Wis. 356, 99 N. W. 1027.

682-78 Shirey v. Whitlow, 80 Ark. 444, 97 S. W. 444; Rennert v. Shirk, 163 Ind. 542, 72 N. E. 546; Riggs v. Riley, 113 Ind. 268, 15 N. E. 253; Logsdon v. Dingg, 32 Ind. App. 158, 69 N. E. 409; Wood v. Kuper, 150 Ind. 622, 50 N. E. 755; Lamoreaux v. Creveling, 103 Mich. 501, 61 N. W. 783; Sherrard v. Cudney, 134 Mich. 200, 96 N. W. 15; Baty v. Elrod, 66 Neb. 735, 92 N. W. 1032, 97 N. W. 343; Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67; Beam v. Gardner, 18 Pa. Super. 245.

Admissions after title acquired. Taking a lease explains previous possession and rebuts any claim that it was adverse if this is done before bar of statute is complete. McClenahan v. Stevenson, 118 Ia. 106, 91 N. W. 925. The authorities are not in accord as to the conclusive effect of so doing after the statute has run. The affirmative is held in Church v. Burghardt, 8 Pick. (Mass.) 327, and Vickery v. Benson, 26 Ga. 582, and the negative in School Dist. v. Benson, 31 Me. 381, 52 Am. Dec. 618; Bradford v. Guthrie, 4 Brewst. (Pa.) 351; Shirey v. Whitlow, 80 Ark. 444, 97 S. W. 444.

For jury. — Weight of acknowledgment after title complete is for jury. Shirey v. Whitlow, supra.

683-80 Emmett v. Perry, 100 Me. 139, 60 A. 872.

Declarations of decedent, made upon the land, are competent to show the location of his line, and it is immaterial what the character of his occupancy was. Emmett v. Perry, supra. But declarations of decedent, not in possession and not claiming title, are inadmissible. Doe ex dem. Anniston v. Edmondson, 145 Ala. 557, 40 S. 505. The declarations of a deceased person while in possession under an unconsummated verbal contract to buy the land, may be proved against his vendor who relies upon the former's occupancy. Walsh v. Wheelwright, 96 Me. 174, 186, 52 A. 649.

683-81 Powers v. Bank, 136 Cal. 486, 60 P. 151; Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275.

683-82 Maxwell L. G. Co. v. Dawson, 151 U. S. 586; Doe ex dem Anniston v. Edmondson, 145 Ala. 557, 40 S. 505; Tennessee Coal Co. v. Linn, 123 Ala. 112, 26 S. 245, 82 Am. St. 108; Henry v. Brown, 143 Ala. 446, 39 S. 325; Miskwabik D. Assn. v. Croze, 140 Mich. 194, 103 N. W. 558; Gardner v. Wright (Or.), 91 P. 286; Northern P. R. Co. v. Spokane (Wash.), 88 P. 135.

Conclusion. — Testimony that possession was notorious is merely a conclusion. Acme B. Co. v. R. Co., 115 Ga. 494, 42 S. E. 8. But possession signifies occupancy. Nathan v. Dierssen, 146 Cal. 63, 79 P. 739.

684-84 Authority exercised may be proven. — The claim of a county to land may be sustained by proof of the orders made by its governing body concerning it through a series of years, and by a map designating the land as county property, the map having been in the county's possession many years. Victoria v. Vic-

toria (Tex. Civ.), 94 S. W. 368, *rev.* on other questions, 101 S. W. 190.

684-85 Ross v. McManigal, 61 Neb. 90, 84 N. W. 610; Beam v. Gardner, 18 Pa. Super. 245; Glezen v. Haskins, 23 R. I. 601, 51 A. 219; Neff v. Ryman, 100 Va. 521, 42 S. E. 314.

Tenant may testify that he claimed land as his own in an action between his landlord and a stranger. South v. Deaton, 113 Ky. 312, 68 S. W. 137, 1105.

Presumption arising from lease. The acceptance of a void lease raises a mere presumption of the recognition of the lessor's title, which is rebuttable by parol evidence showing that lessee theretofore claimed to have a perfect title and rightful possession and asserted his rights to lessor. Broad v. Beatty, 73 Ark. 106, 83 S. W. 339.

Cestui que trust and trustee occupy the relation of landlord and tenant — the possession of one is that of the other. McClenahan v. Stevenson, 118 Ia. 106, 91 N. W. 925.

Entry under a record title adverse to the landlord will ripen into a title by adverse possession if not disturbed. Townsend v. Boyd, 217 Pa. 386, 66 A. 1099.

685-86 Dahlem v. Abbott, 146 Mich. 605, 110 N. W. 47; Fenton v. Miller, 94 Mich. 204, 53 N. W. 957; Beam v. Gardner, 18 Pa. Super. 245; Logan v. Ward, 58 W. Va. 366, 52 S. E. 398, 5 L. R. A. (N. S.) 156.

686-87 Soper v. Lawrence, 98 Me. 268, 56 A. 908; Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67; Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870; Cox v. Tompkinson, 39 Wash. 70, 80 P. 1005.

686-88 Rich v. Min. Co., 147 Fed. 380, 77 C. C. A. 558; Bentley v. Executor, 79 Miss. 302, 30 S. 709; Cole v. Lester, supra; Dobbins v. Dobbins, supra; Cox v. Tompkinson, supra; Logan v. Ward, 58 W. Va. 366, 52 S. E. 398, 5 L. R. A. (N. S.) 156.

Character of grantor's possession. It may be shown in rebuttal of testimony tending to show notice to co-owners that the grantor of the claimant lived with her on the land, returned it for taxation and paid the taxes on it as part of the estate he was administering, and that, after the death of his grantee, he held himself out as being in possession in his representative capacity. Ashford v. Ashford, 136 Ala. 631, 34 S. 10.

Knowledge of co-owner. — It is not competent for a witness to testify that one of the owners knew that a co-owner was in possession claiming the land as his own. Ibid.

In the absence of acknowledgment of the co-tenancy, notice of adverse holding need not be given. Roberts v. Decker, 120 Wis. 102, 97 N. W. 519.

What facts sufficient. — The failure of the co-tenants to receive their share of the rental value of the premises, the existence upon the public records of a deed purporting to convey to the claimant full title to the land and a mortgage thereon executed by him are sufficient to show that the co-tenants' rights are barred. McCann v. Welch, 106 Wis. 142, 81 N. W. 996.

Stronger evidence is required than in other cases, but it need not be of a different kind. Cox v. Tomlinson, 39 Wash. 70, 80 P. 1005; Rich v. Min. Co., 147 Fed. 380, 77 C. C. A. 558.

Burden of proof is on party who alleges adverse possession. Rich v. Min. Co., Id.

687-89 Arnold v. Limeburger, 122 Ga. 72, 49 S. E. 812; Street v. Collier, 118 Ga. 470, 45 S. E. 294.

688-91 McCann v. Welch, 106 Wis. 142, 81 N. W. 996.

688-92 **Adverse possession** may ripen into title to the share of the property to which the possessor was entitled. Sires v. Melvin (Ia.), 113 N. W. 106.

689-93 Cox v. Tompkinson, 39 Wash. 70, 80 P. 1005.

689-94 Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870; Whitaker v. Jenkins, 138 N. C. 476, 51 S. E. 104.

It is presumed that the possession was adverse from the beginning and so continued. Dobbins v. Dobbins, Id.

690-95 Sires v. Melvin (Ia.), 113 N. W. 106; Wood v. Fleet, 36 N. Y. 499, 93 Am. Dec. 528; Rhea v. Craig, 141 N. C. 602, 54 S. E. 408; Long v. Long, 30 Tex. Civ. 368, 70 S. W. 587.

Effect of disability on presumption. The disability of some of the parties during the time of adverse possession does not rebut the presumption of law as to the ouster. Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870.

690-97 Baxley v. Baxley, 117 Ga. 60, 43 S. E. 436.

Only moral fraud will prevent possession under color of title from becoming complete. Street v. Collier, 118 Ga. 470, 45 S. E. 29; Arnold v. Limeburger, 122 Ga. 72, 49 S. E. 812.

691-98 Delay in bringing action to quiet title does not show bad faith. Laws v. Newkirk, 39 Colo. 78, 88 P. 861.

691-99 If possession was begun in good faith, the fact that it is afterwards held in bad faith is immaterial. Brewster v. Hewes, 113 La. 45, 36 S. 883.

692-1 McDaniel v. Iron Co. (Ala.), 44 S. 705; McCann v. Welch, 106 Wis. 147, 81 N. W. 996; Hatch v. Lusignan, 117 Wis. 428, 94 N. W. 332.

Motive immaterial. — Knight v. Denman, 64 Neb. 814, 90 N. W. 863, and local cases cited.

692-2 Gunnison v. R. Co., 130 Fed. 259, 64 C. C. A. 505; Pitman v. Hill, 117 Wis. 318, 94 N. W. 40.

Good faith presumed where possession open and notorious under claim of right. Baxley v. Baxley, 117 Ga. 60, 43 S. E. 436; Blumer v. R. L. Co., 129 Ia. 32, 105 N. W. 342; Leverett v. Loeb, 117 La. 310, 41 S. 584; Godfrey v. Dixon, 228 Ill. 487, 499, 81 N. E. 1089; Brewster v. Hewes, 113 La. 45, 36 S. 883.

Evidence of good faith cannot be directly testified to by a third person. Baxley v. Baxley, 117 Ga. 60, 43 S. E. 436. Claimant may testify that he paid for land in good faith (Acme B. Co. v. R. Co., 115 Ga. 494, 42 S. E. 8); and as to the bona fides of his original entry. Baxley v. Baxley, supra.

Facts showing good faith. — Gardner v. Wright (Or.), 91 P. 286.

693-3 Must act in good faith. Jasperson v. Scharnikow, 150 Fed. 571, 80 C. C. A. 373.

Contrary doctrine. — Under statutes making the bona fides of claimants a condition to recovery, mere notice of an adverse claim believed to be ill-founded will not bar a recovery; but it is otherwise as to actual notice of an adverse claim superior and paramount to that obtained under paper title. Brodack v. Morsbach, 38 Wash. 72, 80 P. 275; Arnold v. Woodward. 14 Colo. 164, 23 P. 444; Latta v. Clifford, 47 Fed. 614; Hunt v. Dunn, 74 Ga. 120; Templet v. Baker, 12 La. Ann. 658. Entry under title acquired at a foreclosure sale is in good faith. Cox v. Tompkinson, 39 Wash. 70, 80 P. 1005.

The good faith required is the belief of the purchaser that he is buying the land from the owner, and, in establishing his good faith, he is not required to show that his grantor's grantor had title. Bennett v. Calmes, 116 La. 598, 40 S. 911.

693-4 Bell v. Coal Co., 155 Fed. 712.

Older title prevails where both parties claim from common source. McAllen v. Alonzo (Tex. Civ.), 102 S. W. 475.

Is a rule of evidence merely. — Mann v. Hossack (Tex. Civ.), 96 S. W. 767.

694-5 Presumption between parties claiming adversely. — If both parties claim by adverse possession and there are no superior muniments of title, there is no presumption in favor of either party. Dorlan v. Westervitch, 140 Ala. 283, 37 S. 382.

695-7 Shanline v. Wiltsie, 70 Kan. 177, 78 P. 436; Scott v. Williams, 74 Kan. 448, 87 P. 550; Williams v. Shepherdson (Neb.), 95 N. W. 827; Canfield v. Clark, 17 Or. 473, 21 P. 443, 11 Am. St. 845; Bowers v. Ledgerwood, 25 Wash. 14, 64 P. 936; Wilcox v. Smith, 38 Wash. 585, 80 P. 803; Suksdorf v. Humphrey, 36 Wash. 1, 77 P. 1071; Thornely v. Andrews (Wash.), 88 P. 757; Fieldhouse v. Leisberg (Wyo.), 88 P. 214.

Mistake as to quantity of land under will. — A devisee who takes possession of more land than is devised may acquire title to it though he acted under a mistake. Johnson v. Thomas, 23 App. D. C. 141.

696-8 Fisher v. Bennehoff, 121 Ill. 426, 13 N. E. 150; Dyer v. Eldridge, 136 Ind. 654, 36 N. E. 522; Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; Sharrard v.

Cudney, 134 Mich. 200, 96 N. W. 15; Clark v. Thornburg, 66 Neb. 717, 92 N. W. 1056; Lindley v. Johnston, 42 Wash. 257, 84 P. 822; Wade v. McDougle, 59 W. Va. 113, 128, 52 S. E. 1026.

696-9 Rennert v. Shirk, 163 Ind. 542, 551, 72 N. E. 546, *cit.*, besides many of the cases referred to in the original article, Carney v. Hennessey, 74 Conn. 107, 49 A. 910, 53 L. R. A. 649; Grim v. Murphy, 110 Ill. 271; O'Flaherty v. Mann, 196 Ill. 304, 63 N. E. 727; Richwine v. Church, 135 Ind. 80, 90, 34 N. E. 737; Riggs v. Riley, 113 Ind. 208, 15 N. E. 253; Brown v. Anderson, 90 Ind. 93; Pittsburgh R. Co. v. Stickley, 155 Ind. 312, 58 N. E. 192; Palmer v. Dosch, 148 Ind. 10, 47 N. E. 176; Webb v. Rhodes, 28 Ind. App. 393, 61 N. E. 735; Logsdon v. Dingg, 32 Ind. App. 158, 69 N. E. 409; Jordan v. Riley, 178 Mass. 524, 60 N. E. 7; Bond v. O'Gara, 177 Mass. 139, 58 N. E. 275, 83 Am. St. 265; Metcalfe v. McCutchen, 60 Miss. 145; Tex v. Pflug, 24 Neb. 666, 39 N. W. 839, 8 Am. St. 231; Baty v. Elrod, 66 Neb. 735, 92 N. W. 1032, 97 N. W. 343; Crary v. Goodman, 22 N. Y. 170; Rowland v. Williams, 23 Or. 515, 32 P. 402; Brown v. McKinney, 9 Watts (Pa.) 565, 36 Am. Dec. 139; Erck v. Church, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641 and note; Hightower v. Smith, 7 Yerg. (Tenn.) 500; Harne v. Smith, 79 Tex. 310, 15 S. W. 240, 23 Am. St. 340; Burnell v. Maloney, 39 Vt. 579, 94 Am. Dec. 358; Bowers v. Ledgerwood, 25 Wash. 14, 64 P. 936; Thornely v. Andrews (Wash.), 88 P. 757.

Parol testimony is competent to show who occupied and used the land in controversy. Carney v. Hennessey, 74 Conn. 107, 49 A. 910, 92 Am. St. 199, 53 L. R. A. 699.

697-10 Shirey v. Whitlow, 80 Ark. 444, 97 S. W. 444; Atkins v. Pfaffe (Ia.), 114 N. W. 187; Weeks v. Upton, 99 Minn. 410, 109 N. W. 828; Logan v. Meade (Tex. Civ.), 98 S. W. 210; Erickson v. Murlin, 39 Wash. 43, 80 P. 853; Bowers v. Ledgerwood, 25 Wash. 14, 64 P. 936.

The presumption is that the land was inclosed in good faith. Shirey v. Whitlow, 80 Ark. 444, 97 S. W. 444.

699-11 Wilson v. Hunter, 59 Ark. 626, 28 S. W. 419, 43 Am. St. 63; Shirey v. Whitlow, supra; Logsdon v. Dingg, 32 Ind. App. 158, 69 N. E. 409.

Acts and conduct of the parties may be shown. Carney v. Hennessey, 77 Conn. 577, 60 A. 129; Weeks v. Upton, 99 Minn. 410, 109 N. W. 828.

Burden of proof. — The party who alleges the existence of an agreement to surrender possession on the location of the boundary has the burden of establishing the terms thereof. Crosby v. Church (Tex. Civ.), 99 S. W. 584.

Claim "by limitation" need not have been made at any time. Logan v. Meade (Tex. Civ.), 98 S. W. 210.

699-12 McDaniel v. Iron Co. (Ala.), 44 S. 705; Yesler v. Holmes, 39 Wash. 34, 80 P. 851.

699-14 Tennessee C. Co. v. Linn, 123 Ala. 112, 26 S. 245, 82 Am. St. 108; Rennert v. Shirk, 163 Ind. 542, 72 N. E. 546; Cervena v. Thurston, 59 Neb. 343, 80 N. W. 1048; Freedman v. Oppenheim, 187 N. Y. 101, 79 N. E. 841; Heller v. Cohen, 154 N. Y. 299, 48 N. E. 527; Gardner v. Wright (Or.), 91 P. 286; Hatch v. Lusignan, 117 Wis. 428, 94 N. W. 332.

701-17 Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026.

AFFIDAVITS [Vol. 1.]

703-1 S. v. Williams, 76 S. C. 135, 56 S. E. 783.

A verified complaint may be regarded as an affidavit if so intended. S. v. Peterson, 29 Wash. 571, 70 P. 71. But see Gawtry v. Doane, 51 N. Y. 84.

Administering an oath and the recital of the fact in the record do not show that an affidavit was made. Black v. Cochran, 21 Pa. C. C. 326.

704-3 Western P. Co. v. Fried, 33 Mont. 7, 81 P. 394; Benepe-O. Co. v. Scheidegger, 32 Mont. 424, 80 P. 1024.

Insufficient statement of facts may be helped by the record of which affidavit is part. Flood v. Libby, 38

Wash. 366, 80 P. 533; Wiley v. Carson, 15 S. D. 298, 89 N. W. 475.

If the affidavit is jurisdictional in nature, departure from the words of the statute is hazardous. See Ayres v. Judge, 90 Mich. 380, 51 N. W. 461; Nichols v. Nichols, 128 N. C. 108, 38 S. E. 296; Hopkins v. Hopkins, 132 N. C. 22, 43 S. E. 508; DeArmond v. DeArmond, 92 Tenn. 42, 20 S. W. 422; Hinkle v. Lovelace, 204 Mo. 208, 102 S. W. 1015.

705-7 Vogelman v. Lewit, 48 Misc. 625, 96 N. Y. S. 207; Graham v. Smart, 42 Wash. 205, 84 P. 824.

706-8 Pelegrinelli v. River L. Co., 1 Cal. App. 593, 82 P. 695; Gay v. Torrance, 145 Cal. 144, 78 P. 540; Clark v. Jackson, 222 Ill. 13, 78 N. E. 6.

Personal knowledge of the facts recited must be stated (Shaw v. Ashford, 110 Mich. 534, 68 N. W. 281), unless they are evidenced by public records. Robinson v. Judge, 142 Mich. 70, 105 N. W. 25.

707-10 McCain v. Bonner, 122 Ga. 842, 51 S. E. 36.

708-11 Absence of date in jurat not fatal. Paulson v. Beaman, 32 Can. Sup. 655.

Silence of jurat. — "It is not essential that the jurat state that the affidavit was sworn to in the presence of or before the notary who verifies the fact by his certificate. That fact is presumed from the official statement that the affidavit was sworn to. Hosea v. S., 47 Ind. 180; Trice v. Jones, 52 Miss. 138; C. v. Keefe, 7 Gray (Mass.) 332; Clement v. Bullens, 159 Mass. 193, 34 N. E. 173. A similar presumption is entertained when the jurat fails to state by whom the affidavit was signed and sworn to. Briggs v. Yetzer, 103 Iowa 342, 72 N. W. 647." Black v. R. Co., 122 Ia. 32, 96 N. W. 984.

708-12 Colman v. Goodnow, 36 Minn. 9, 29 N. W. 338; Sebasta v. Court (Neb.), 109 N. W. 166, *over.* Bantley v. Finley, 43 Neb. 794, 62 N. W. 213; Finane v. Hotel & Imp. Co., 3 N. M. 256, 5 P. 725; Minor v. Marshall, 6 N. M. 194, 27 P. 481; Hill v. Bldg. Co., 6 S. D. 160, 60 N. W. 752.

708-13 Fidelity Ins. Co. v. Iron Co., 81 Fed. 439; Cox v. Stern, 170 Ill. 442, 48 N. E. 906; Bloomingdale v. Chittenden, 75 Mich. 305, 42 N. W. 836; Peterson v. Fowler, 76 Mich. 258, 43 N. W. 10; Turner v. St. John, 8 N. D. 245, 78 N. W. 340; Ainslie v. Kohn, 16 Or. 363, 19 P. 97; S. v. Williams, 76 S. C. 135, 56 S. E. 783.

May be essential if affidavit is to be used as evidence, though not in other cases. Turner v. St. John, 8 N. D. 245, 78 N. W. 340.

Absence of seal. — If an affidavit is taken in open court the absence of the clerk's seal is immaterial. Hymer v. Holyfield (Tex. Civ.) 87 S. W. 722. And so generally if seal not required by statute. Meldrum v. U. S., 151 Fed. 177, 80 C. C. A. 545; Clement v. Bullens, 159 Mass. 193, 34 N. E. 173; Schaefer v. Kienzel, 123 Ill. 430, 15 N. E. 164; Wiley v. Carson, 15 S. D. 298, 89 N. W. 475.

709-14 Pallady v. Beatty, 15 Okla. 626, 83 P. 428.

711-19 Meldrum v. U. S., 151 Fed. 177, 80 C. C. A. 545; Albright v. Clay Co., 5 Penne. (Del.) 198, 62 A. 726; Abrams v. S., 121 Ga. 170, 48 S. E. 965; Black v. R. Co., 122 Ia. 32, 96 N. W. 984.

712-23 Conflicting presumptions. "The presumption that an officer acts within his jurisdiction and that his acts are lawfully performed will prevail over the prima facie presumption that the venue of the affidavit is the place where the oath is administered." Salzer L. Co. v. Claflin (N. D.), 113 N. W. 1036, *cit.* Teutonia L. & B. Co. v. Turrell, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. 419, and cases cited in this note in the original work.

713-29 Presumption. — It will be presumed that a deputy who signed the jurat was a de jure deputy. Southern R. Co. v. Hundley (Ala.), 44 S. 195.

714-30 "J. P." signifies justice of the peace. Abrams v. S., 121 Ga. 170, 48 S. E. 965.

714-31 Signature in firm name. Where an affidavit purported to have been sworn to before a firm was admitted to have been sworn to before one of the firm, it was said to be at most an irregularity which the court could cause to be

corrected nunc pro tunc. Two Mountains Election Case, 31 Can. Sup. 437.

Expiration of commission. — Failure of certificate to show when officer's commission terminates, immaterial. Brown Mfg. Co. v. Gilpin, 120 Mo. App. 130, 96 S. W. 669; Baskowitz v. Guthrie, 99 Mo. App. 304, 73 S. W. 227.

714-33 Mahon v. S., 46 Tex. Cr. 234, 79 S. W. 28.

716-36 Abrams v. S., 121 Ga. 170, 48 S. E. 965; Black v. R. Co., 122 Ia. 32, 96 N. W. 984; Wiley v. Carson, 15 S. D. 298, 89 N. W. 475; Hansford v. Snyder (W. Va.), 59 S. E. 975.

Judicial notice not taken of power of foreign officers. Teutonia L. & B. Co. v. Turrell, 19 Ind. App. 469, 49 N. E. 852. But in Missouri such notice is taken of the seals of notaries public. Brown Mfg. Co. v. Gilpin, 120 Mo. App. 130, 96 S. W. 669.

716-37 Shockley v. Turnell, 114 Ga. 378, 40 S. E. 279; Brunswick Hdw. Co. v. Bingham, 107 Ga. 270, 33 S. E. 56; Ballew v. Broach, 121 Ga. 421, 49 S. E. 297; Howell v. Groc. Co., 121 Ga. 461, 49 S. E. 299; Jackson v. S., 161 Ind. 36, 67 N. E. 690; Metcalfe v. Carr, 133 Mich. 123, 94 N. W. 734; Manheimer v. Dosh, 36 Misc. 857, 74 N. Y. S. 922, *appr.* the case stated from New York in note to the original work; Connalley v. Wallace, 51 W. Va. 181, 41 S. E. 167.

In New York, by virtue of statute, an affidavit purporting to be sworn to before a foreign notary, duly appointed, if it has a proper certificate annexed, is admissible. Isman v. Wayburn, 54 Misc. 86, 104 N. Y. S. 491.

In Texas an affidavit may be made before a foreign notary. Latimer v. R. Co. (Tex. Civ.), 88 S. W. 444.

In New Mexico an affidavit made before an officer of another jurisdiction empowered to administer oaths is competent. Genest v. Las Vegas Assn., 11 N. M. 251, 67 P. 743.

In Nebraska a similar rule prevails, and it is there held that a United States consul abroad may take affidavits for use in state courts. Browne v. Palmer, 66 Neb. 287, 92 N. W. 315.

Under the Illinois statute the certificate of a foreign notary must state that he has authority to administer oaths. Henning v. Libke, 104 Ill. App. 303; Desnoyers S. Co. v. Bank, 188 Ill. 312, 58 N. E. 994.

In Georgia the certificate of a foreign notary is sufficient if his seal is attached. Simpson v. Ricker, 120 Ga. 418, 47 S. E. 965.

In Minnesota the same rule prevails. Wood v. R. Co., 42 Minn. 411, 44 N. W. 308, 7 L. R. A. 149.

In England the same rule has long prevailed. O'Mealy v. Newell, 8 East 364; Walrond v. Van Moses, 8 Mod. 322; Haggett v. Ineff, 5 De G., M. & G. 910; Cole v. Sherard, 11 Exch. 482.

And so elsewhere. — U. S. v. Libby, 1 Woodb. & M. 221, 26 Fed. Cas. 15,597; Denmead v. Maack, 2 McArthur (D. C.) 472; Conolly v. Riley, 25 Md. 402.

717-38 Signing by the affiant must be proved. Locklayer v. Locklayer, 139 Ala. 354, 35 S. 1008; Meadows v. Alexander (Ga.), 57 S. E. 901; Hathaway v. Smith, 117 Ga. 946, 43 S. E. 984. Signature not necessary under some statutes. Holman v. S., 144 Ala. 95, 39 S. 646; Albritton v. Williams, 132 Ala. 647, 32 S. 636.

Variance. — It was stated in the body of the affidavit that "Mrs. J. R." appeared; the signature was "M. N. R.," and it was held to be the affidavit of "M. N. R." Raley v. Mayor, 120 Ga. 365, 47 S. E. 972.

719-45 In re African Farms, [1906], 1 Ch. (Eng.) 640; Boston M. Co. v. Ould-C. Co., 123 Ga. 458, 51 S. E. 466; Wetzstein v. Min. Co., 26 Mont. 193, 66 P. 943; Pallady v. Beatty, 15 Okla. 626, 83 P. 428. *Contra.* — In re Chartered S. & T. Co., [1900], 2 Ch. (Eng.) 870.

In divorce proceedings the party must make affidavit. Hinkle v. Lovelace, 204 Mo. 208, 102 S. W. 1015.

Presumption. — If the allegations are direct and positive it will be presumed that the facts stated were within affiant's knowledge. Kinney v. Reeves, 142 Ala. 604, 39 S. 29;

Birmingham R. Co. v. Barron (Ala.), 43 S. 346.

719-46 A bookkeeper is not an agent. — Merriman Co. v. Thomas, 103 Va. 24, 48 S. E. 490.

720-49 A statement that the facts are within the personal knowledge of the attorney shows a good reason for his being the affiant. Pallady v. Beatty, 15 Okla. 626, 83 P. 428.

720-50 Birmingham R. Co. v. Barron (Ala.), 43 S. 346.

722-55 Johnson v. Tanner, 126 Ga. 718, 56 S. E. 80; Hicks v. Portwood, 129 Ga. 307, 58 S. E. 837; Horton v. Fulton (Ga.), 60 S. E. 1059.

722-56 In a civil action may be used in criminal case. S. v. Pratt, 3 Penne. (Del.) 264, 51 A. 604.

In one action may be used in another. Yoki v. Bank, 87 Minn. 295, 91 N. W. 1101.

Caption immaterial if other facts show affiant intended affidavit to be used in a particular case. Johnson v. Tanner, 126 Ga. 718, 56 S. E. 80.

726-66 S. v. Harmon, 4 Penne. (Del.) 580, 60 A. 866.

726-67 By a party in interlocutory proceeding competent only to impeach affiant. Graham v. Smart, 42 Wash. 205, 84 P. 824.

Admissible in contempt proceedings (Warner v. Martin, 124 Ga. 387, 52 S. E. 446), and, in the discretion of the court, on the hearing of an application for temporary alimony. Rogers v. Rogers, 103 Ga. 763, 30 S. E. 659; Whitfield v. Whitfield, 127 Ga. 419, 56 S. E. 490.

Objection to an affidavit should cover only so much of it as is incompetent. Leath v. Hinson, 117 Ga. 589, 43 S. E. 985.

Similar to parol testimony. — Affidavits for relief on the ground of surprise, mistake, excusable neglect, etc., are considered rather as parol testimony than as documentary evidence. Casto v. Shew, 32 Ind. App. 338, 68 N. E. 1041.

For continuance may be read as testimony of absent witness (Mise v. C., 25 Ky. L. R. 2207, 80 S. W. 457), and is entitled to same weight as if in the form of a deposition. Johnson v. C., 22 Ky. L. R. 1185, 61 S. W. 1005.

Failure to file. — It is within the discretion of the court to admit affidavits though they have not been duly filed. Boston M. Co. v. Ould-C. Co., 123 Ga. 458, 51 S. E. 466.

The amount involved in an appeal may be determined from affidavits. Falkners G. M. Co. v. McKinnery, (1901) App. Cas. 581.

Not admissible in equity on the merits if objected to and no previous consent given. Herold v. Craig, 59 W. Va. 353, 53 S. E. 466.

Allegations on information and belief will not support a motion to quash an indictment unless the state so agrees or the trial court orders that it may be used as evidence. Smith v. Mississippi, 162 U. S. 592; Tarrance v. Florida, 188 U. S. 519.

Offered to contradict may be used for all purposes if subsequently put in evidence by the opposing party without reservation. Connecticut Mut. L. Ins. Co. v. Hillmon, 188 U. S. 208.

Of third party, not evidence. Halliday v. Lambright, 29 Tex. Civ. 226, 68 S. W. 712.

Of husband, that deed to homestead made in good faith, competent to show that holder of notes given in pursuance of affidavit was innocent purchaser. Cooper v. Ford, 29 Tex. Civ. 253, 69 S. W. 487.

As to value in replevin may be conclusive. Park v. Robinson, 15 S. D. 551, 91 N. W. 344; Weyerhaeuser v. Foster, 60 Minn. 223, 61 N. W. 1129; Butts v. Woods, 4 N. M. 343, 16 P. 617.

AFFRAY [Vol. 1.]

728-11 Proof that profane and violent language was used in a public place by two persons and accompanied by the drawing of a razor, making threatening gestures with a plank and taking hold of each other, thereby terrorizing and disturbing citizens, establishes the commission of an affray. Blackwell v. S., 119 Ga. 314, 46 S. E. 432.

728-13 Gamble v. S., 113 Ga. 701, 39 S. E. 301.

Highway is a public place, but not a house where people are gathered to dance, though it be "near" a highway. Gamble v. S., supra.

The presence of seven persons makes a place public. S. v. Fritz, 133 N. C. 725, 45 S. E. 957.

729-16 Breach of public peace. A conviction may be had for disturbing the public peace, though no person testified that he was disturbed by defendant's conduct. Staucliff v. U. S., 5 Ind. Ter. 486, 82 S. W. 882.

729-25 Coyle v. S. (Tex. Cr.), 72 S. W. 847.

AGE [Vol. 1.]

732-2 Burden of proof. — If good faith as to a person's age is a defense to an action the defendant must establish his good faith. Farr v. Waterman (Tex. Civ.), 95 S. W. 65. A breach of warranty as to age must be shown by the party alleging it. Bowen v. Ins. Co., 82 App. Div. 458, 81 N. Y. S. 840.

732-4 Hunt v. Council, 64 Mich. 671, 31 N. W. 576, 8 Am. St. 855.

732-6 Coffin plate, obituary notice and certificate of the board of health, all resting on statements made to the undertaker by members of decedent's family, are incompetent. Dinan v. Council, 201 Pa. 363, 50 A. 999.

733-7 S. v. Palmberg, 199 Mo. 233, 97 S. W. 566; Neill v. S., 49 Tex. Cr. 219, 91 S. W. 791; Smith v. S. (Tex. Cr.), 73 S. W. 401.

733-9 Levels v. R. Co., 196 Mo. 606, 94 S. W. 275.

United States census reports. Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055; Murray v. Supreme Hive, 112 Tenn. 664, 80 S. W. 827.

Foreign census reports and board of health records. — Murray v. Supreme Hive, supra.

Statements made in a census taken of Indians are not competent to show the age of one enumerated therein, the law not providing for a statement of that fact, though it was required by the department under the supervision of which the census was taken. Hegler v. Faulkner, 153 U. S. 109.

School register, kept in conformity with statute, competent. Levels v. R. Co., 196 Mo. 606, 94 S. W. 275; S. v. Day, 188 Mo. 359, 87 S. W. 465.

School enumeration lists admissible if made regularly; otherwise not. Levels v. R. Co., supra.

Register of births. — Certified copy of entry in register, made under statute, is evidence of date of birth as well as of fact of birth. In re Goodrich [1904], Prob. (Eng.) 138, *disappr.* In re Wintle, L. R. 9 Eq. (Eng.) 373; Reg. v. Weaver, L. R. 2 C. C. (Eng.) 85. And so of a certified copy of the register of a parish of a Catholic church kept in accordance with its rules. Hancock v. Council, 67 N. J. L. 614, 52 A. 301.

733-10 Record of vital statistics inadmissible unless it was kept in pursuance of a statute, custom of a church or locality; if the former, the statute should be proved. Pirrung v. Council, 104 App. Div. 571, 93 N. Y. S. 575.

733-11 Hegler v. Faulkner, 153 U. S. 109; S. v. Scroggs, 123 Ia. 649, 96 N. W. 723; Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541; Bailey v. Fly, 35 Tex. Civ. 410, 80 S. W. 675.

The person who performed the baptismal ceremony has been permitted to testify to the date on which he did so, and to refresh his recollection from a record he kept. S. v. Callahan, 18 S. D. 150, 99 N. W. 1100.

Entry in lodge records. — An entry in the minute book of a lodge, of which deceased was a member, made prior to the issue of a policy to him and in the usual course of business, is not admissible to show his age. Connecticut L. Ins. Co. v. Schwenk, 94 U. S. 593.

734-13 Swift & Co. v. Rennard, 119 Ill. App. 173; Clark v. C., 29 Ky. L. R. 154, 92 S. W. 573; Whalen v. Nisbet, 95 Ky. 464, 26 S. W. 188; Bryant v. McKinney, 29 Ky. L. R. 951, 96 S. W. 809; S. v. Hazlett, 14 N. D. 490, 105 N. W. 617; Union Cent. L. Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. 715, 36 L. R. A. 271.

Grandfather's bible may be the family bible. S. v. Hazlett, 14 N. D. 490, 500, 105 N. W. 617.

Limited to original entries. — Bryant v. McKinney, 29 Ky. L. R. 951, 96 S. W. 809.

734-14 S. v. Miller, 71 Kan. 200,

80 P. 51; Shorten v. Judd, 56 Kan. 43, 42 P. 337, 54 Am. St. 587; Dupoyster v. Gagani, 84 Ky. 403, 1 S. W. 652; S. v. Snover, 63 N. J. L. 382, 43 A. 1059.

Record not admissible after parent has testified of child's age from independent recollection, even to refresh memory, if not made contemporaneously. S. v. Menard, 110 La. 1093, 35 S. 360. Is not the best evidence. Loose v. S., 120 Wis. 115, 97 N. W. 526.

735-15 S. v. Marshall, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63.

Declarations of the person may be proved. P. v. Howard, 143 Cal. 316, 76 P. 1116; Swift & Co. v. Rennard, 119 Ill. App. 173; Taylor v. Grand Lodge, 101 Minn. 72, 111 N. W. 919. They are not convincing because resting on hearsay. Lake v. Combs, 84 Ark. 21, 104 S. W. 544, 1094.

If age is part of corpus delicti it cannot be proven solely on the voluntary written confession of accused. Wistrand v. P., 213 Ill. 72, 72 N. E. 748.

Testimony incompetent if but an opinion based on statements of others whose information was hearsay. P. v. Colbath, 141 Mich. 189, 104 N. W. 633.

735-16 Cherry v. S., 68 Ala. 29; McCollum v. S., 119 Ga. 308, 46 S. E. 413; Mash v. P., 220 Ill. 86, 77 N. E. 92; Chicago v. Lewandouski, 190 Ill. 301, 60 N. E. 497; Travelers' Ins. Co. v. Cotton Mills, 27 Ky. L. R. 653, 85 S. W. 1090; C. v. Stevenson, 142 Mass. 466, 8 N. E. 341; Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541; Grand Lodge v. Bartes, 69 Neb. 631, 96 N. W. 186, 98 N. W. 715, 111 Am. St. 577; Pearce v. Kyzer, 16 Lea (Tenn.) 521; Swink v. French, 11 Lea (Tenn.) 78, 47 Am. Rep. 277; Curry v. S. (Tex. Cr.), 94 S. W. 1058; Union Cent. L. Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. 715, 36 L. R. A. 271; S. v. Cain, 9 W. Va. 559; Loose v. S., 120 Wis. 115, 97 N. W. 526.

Presence of parents in court does not render the person whose age is in question incompetent to testify thereof. S. v. Scroggs, 123 Ia. 649, 96 N. W. 723; S. v. Miller, 71 Kan. 200, 80 P. 51. But the party must testify of his knowledge as to age, and not to what his parents have said. Johnson v. S., 42 Tex. Cr. 298, 59 S. W. 898.

735-17 Letter of brother to insured not competent. Bowen v. Ins. Co., 68 App. Div. 342, 74 N. Y. S. 101.

Affidavit of father in a suit in chancery not competent. Haines v. Guthrie, 13 Q. B. D. (Eng.) 818; Bowen v. Ins. Co., supra.

Hearsay is competent if based upon information obtained from deceased relatives of the party. Donley v. S., 44 Tex. Cr. 428, 71 S. W. 958.

736-19 Republic v. Parsons, 10 Haw. 601; S. v. Scroggs, 123 Ia. 649, 96 N. W. 723.

Comparison of persons. — It is not proper to put witnesses on the stand for the sole purpose of having them testify of their age for a purpose of comparison with one whose age is in question. Poynor v. Holzgraf, 35 Tex. Civ. 233, 79 S. W. 829.

Age not fixed by inspection, though appearance might be satisfying to jury, because of difficulty of preserving evidence in bill of exceptions. Wistrand v. P., 213 Ill. 72, 72 N. E. 748. But it has been said that the age of a Chinaman can be approximately fixed by inspection, which may overcome positive testimony. Ark Foo v. U. S., 128 Fed. 697, 63 C. C. A. 249.

737-20 S. v. Trusty, 122 Ia. 82, 97 N. W. 989; Clark v. C., 29 Ky. L. R. 154, 92 S. W. 573; Levels v. R. Co., 196 Mo. 606, 94 S. W. 275, S. v. Callahan, 18 S. D. 145, 154, 99 N. W. 1099; Loose v. S., 120 Wis. 115, 97 N. W. 526.

Mother's silence in deposition as to age of son does not negative her subsequent testimony on that point. Halliday v. Lambright, 29 Tex. Civ. 226, 68 S. W. 712.

Father may refresh recollection by a memorandum made at the time of child's birth though it is not produced; the failure to produce it affects only the weight of his testimony. Loose v. S., 120 Wis. 115, 97 N. W. 526.

Witness' knowledge. — A witness

whose knowledge is based on a register of births, church records and acquaintance with the party's family may testify. Mash v. P., 220 Ill. 86, 77 N. E. 92. As may one whose knowledge is based on publication of marriage banns. Grand Lodge v. Bartes, 69 Neb. 631, 96 N. W. 186, 98 N. W. 715, 111 Am. St. 577. It is presumed that a wife who lived with her husband twenty years knows his age, and she will not be disqualified though her first information may have come from an incompetent source. Ibid. Though uncertain of his own and a brother's age a witness raised with the latter may testify thereof approximately. Hancock v. Council, 69 N. J. L. 308, 55 A. 246.

Declarations of witness competent in rebuttal. S. v. Trusty, 122 Ia. 82, 97 N. W. 989.

Declarations of relatives incompetent if living unless they cannot be produced to testify. S. v. Trusty, supra, *cit.* P. v. Mayne, 118 Cal. 516, 50 P. 654, 62 Am. Rep. 256; Mason v. Fuller, 45 Vt. 29.

Declarations of deceased persons competent. — Travelers' Ins. Co. v. Cotton Mills, 27 Ky. L. R. 653, 85 S. W. 1090.

Proofs of death are not conclusive as to age of insured, though verified. Bowen v. Ins. Co., 82 App. Div. 458, 81 N. Y. S. 840.

Wife of accused not competent to prove age of her daughter, the prosecutrix. S. v. Deputy, 3 Penne. (Del.) 19, 50 A. 176.

Reason for false statement. — It is not competent for a witness to state the reason which induced deceased to make a false statement as to his age. Levels v. R. Co., 196 Mo. 606, 620, 94 S. W. 275.

Proof of age may be based on knowledge of collateral facts occurring about the time the party was born. Donley v. S., 44 Tex. Cr. 428, 71 S. W. 958; Curry v. S. (Tex. Cr.), 94 S. W. 1058.

737-22 **Conclusions based on appearance** and declarations not entitled to much weight. Supreme Conclave v. Saylor, 79 Miss. 62, 29 S. 790.

738-24 **Witnesses who have known a person eight years** may testify of his age at the time they first knew him, basing opinions on size and appearance. Donley v. S., 44 Tex. Cr. 428, 71 S. W. 958.

After fully stating his means of knowledge and basis of opinion as to the age of an absent person, any witness may give his opinion, notwithstanding the parents of the party have testified of his age. S. v. Grubb, 55 Kan. 678, 41 P. 951. *Contra*, Valley M. L. Assn. v. Teewalt, 79 Va. 421.

738-25 **A physician well acquainted with a person** may testify of the age of a woman, his opinion being based on her appearance, size and development. Bice v. S., 37 Tex. Cr. 38, 38 S. W. 803.

738-27 S. v. Day, 188 Mo. 359, 87 S. W. 465; Hancock v. Council, 69 N. J. L. 308, 55 A. 246; S. v. Callahan, 18 S. D. 150, 99 N. W. 1100.

738-28 **The age of a horse** cannot be proved by works on veterinary science, nor solely by a comparison made by the jury of the horse in question with other horses. Brady v. Shirley, 14 S. D. 447, 85 N. W. 1002.

ALIBI [Vol. 1.]

741-3 P. v. Morris, 3 Cal. App. 1, 84 P. 463.

Defense affirmative in its nature. C. v. Gutshall, 22 Pa. Super. 269. May be submitted as a separate issue. S. v. Hier, 78 Vt. 488, 63 A. 877.

Evidence of, inadmissible in habeas corpus to test validity of imprisonment under writ of extradition. Ex parte Edwards (Miss.), 44 S. 827.

Order of proof. — Having notice that an alibi would be set up, the state may prove in its case in chief by an admission of defendant as to his whereabouts. S. v. Swisher, 186 Mo. 1, 84 S. W. 911.

743-9 S. v. Worthen, 124 Ia. 408, 100 N. W. 330; C. v. Gutshall, 22 Pa. Super. 269.

744-10 Glover v. U. S., 147 Fed. 426, 77 C. C. A. 450, *cit.*, among others, these cases: Landis v. S., 70 Ga. 651, 48 Am. Rep. 588; French v. S., 12 Ind. 670, 74 Am. Dec. 229;

Howard v. S., 50 Ind. 190; P. v. Garbutt, 17 Mich. 9, 22, 97 Am. Dec. 162; Pollard v. S., 53 Miss. 410, 24 Am. Rep. 703; Cunningham v. S., 56 Miss. 269, 21 Am. Rep. 630; S. v. Taylor, 118 Mo. 153, 24 S. W. 449; S. v. Waterman, 1 Nev. 453; P. v. McCann, 16 N. Y. 58, 69 Am. Dec. 642; O'Connell v. P., 87 N. Y. 377; Wyatt Chappel v. S., 7 Coldw. (Tenn.) 92; Dove v. S., 3 Heisk. (Tenn.) 348.

744-11 Hatch v. S., 144 Ala. 50, 40 S. 113; P. v. Morris, 3 Cal. App. 1; 84 P. 463; P. v. Lang, 142 Cal. 482, 76 P. 232; Barr v. P., 30 Colo. 522, 71 P. 392; C. v. Tucker, 189 Mass. 457, 486, 75 N. E. 261; S. v. King, 174 Mo. 647, 74 S. W. 627; Burns v. S., 75 Ohio St. 407, 79 N. E. 929; Tucker v. Ter., 17 Okla. 56, 87 P. 307; Tinsley v. S. (Tex. Cr.), 106 S. W. 347.

745-12 Prater v. S., 107 Ala. 26, 18 S. 238; Parham v. S., 147 Ala. 57, 42 S. 1; Henderson v. S., 120 Ga. 504, 48 S. E. 167; Ryals v. S., 125 Ga. 266, 54 S. E. 168; Ransom v. S., 2 Ga. App. 826, 59 S. E. 101; Hauser v. P., 210 Ill. 253, 71 N. E. 416; S. v. Worthen, 124 Ia. 408, 100 N. W. 330; Wilburn v. Ter., 10 N. M. 402, 62 P. 968; C. v. Gutshall, 22 Pa. Super. 269; S. v. Ward, 61 Vt. 153, 17 A. 483; S. v. Hier, 78 Vt. 488, 63 A. 877.

746-13 Hatch v. S., 144 Ala. 50, 40 S. 113, *over.* Pickens v. S., 115 Ala. 42, 22 S. 551; Henderson v. S., 120 Ga. 504, 48 S. E. 167; Ransom v. S., 2 Ga. App. 26, 59 S. E. 101; Hauser v. P., 210 Ill. 253, 71 N. E. 416; Briggs v. P., 219 Ill. 330, 76 N. E. 499; Wilburn v. Ter., 10 N. M. 402, 62 P. 968; C. v. Gutshall, 22 Pa. Super. 269; S. v. Powers, 72 Vt. 168, 47 A. 830.

746-14 S. v. Worthen, 124 Ia. 408, 100 N. W. 330; S. v. Thomas (Ia.), 109 N. W. 900.

747-17 Jones v. P., 116 Ill. App. 64.

Self-serving declarations cannot be proved. Thornton v. S., 117 Wis. 338, 93 N. W. 1107. See "Admissions," Vol. 1, p. 1, and that title, ante, 357-1.

748-18 **Scope of proof.** — If the offense consists of a single act, alleged to have been done at a stated hour, the proof need only cover the time alleged. P. v. Morris, 3 Cal. App. 1, 84 P. 463. This is not inconsistent with the rule that the evidence must cover the whole time of the transaction in question. Barr v. P., 30 Colo. 522, 71 P. 392. The evidence need go no further than to show that accused was not at the place when the event under investigation occurred. Fortson v. S., 125 Ga. 16, 53 S. E. 767. To entitle the defense of alibi to consideration the evidence must show that at the very time of the commission of the offense the accused was so far away, or that the circumstances were such that he could not, with ordinary exertion, have reached the place of the crime so as to have been concerned in it. Barbe v. Ter., 16 Okla. 562, 86 P. 61; Tucker v. Ter., 17 Okla. 56, 87 P. 307; Mays v. S., 72 Neb. 723, 101 N. W. 979. The proof must cover the whole of the time of the commission of the crime so as to render it impossible or highly improbable that accused could have committed the act. Briggs v. P., 219 Ill. 330, 345, 76 N. E. 499; Eckhardt v. P., 116 Ill. App. 408.

748-19 Burns v. S., 75 Ohio St. 407, 79 N. E. 929; Tucker v. Ter., 17 Okla. 56, 87 P. 307; S. v. Ward, 61 Vt. 153, 192, 17 A. 483.

Evidence of an alibi is to be scanned with care and attention. S. v. Worthen, 124 Ia. 408, 100 N. W. 330; P. v. Portenga, 134 Mich. 247, 96 N. W. 17; P. v. Tice, 115 Mich. 219, 73 N. W. 108, 69 Am. St. 560.

749-20 S. v. Fair, 35 Wash. 127, 76 P. 731.

751-22 LaToon v. Ter., 16 Haw. 351; Baines v. S., 43 Tex. Cr. 490, 66 S. W. 847.

752-24 **"An alibi is the instinctive and favorite resort of conscious guilt** as well as the natural defense of innocence; but an unsuccessful attempt to establish it is necessarily highly prejudicial to the accused, for the obvious reason that such a defense implies an admission of the truth of the facts alleged against him, and the correctness of the in-

ference drawn from them if they remain uncontradicted." S. v. Terrio, 98 Me. 17, 28, 56 A. 217.

Use of false evidence an admission of guilt. S. v. Ward, 61 Vt. 153, 192, 17 A. 483.

ALIENATING AFFECTIONS
[Vol. 1.]

756-1 **Proof of marriage** by certificate. Fratini v. Caslini, 66 Vt. 273, 29 A. 252.

757-3 Gregg v. Gregg, 37 Ind. App. 210, 75 N. E. 674; Jonas v. Hirshburg, 18 Ind. App. 581, 48 N. E. 656.

757-4 Sexton v. Sexton, 129 Ia. 487, 105 N. W. 314; Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639.

Record of husband's conviction for assault upon wife, inadmissible, he not having pleaded guilty. Fratini v. Caslini, 66 Vt. 273, 29 A. 252.

Wife may testify of husband's conduct. — Notwithstanding a statute protecting privileged communications between husband and wife she may testify of her husband's conduct toward her before and after the wrong complained of. Sexton v. Sexton, 129 Ia. 487, 105 N. W. 314, *cit.* Henry v. Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. 580; Ash v. Prunier, 105 Fed. 722, 44 C. C. A. 675; Horner v. Yance, 93 Wis. 352, 67 N. W. 720; Beach v. Brown, 20 Wash. 266, 55 P. 46, 72 Am. St. 98, 43 L. R. A. 114; Driver v. Driver, 153 Ind. 88, 54 N. E. 389; Perry v. Lovejoy, 49 Mich. 529, 14 N. W. 485. The principal case is followed in Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639.

Wife a competent witness when plaintiff. Lockwood v. Lockwood, 67 Minn. 476, 490, 70 N. W. 784.

Husband not competent to testify against wife if she objects. Stanley v. Stanley, 27 Wash. 570, 68 P. 187.

Plaintiff may show his financial condition when he married and the amount of money expended for his family. Frank v. Berry, 128 Ia. 223, 103 N. W. 358.

757-5 Rubenstein v. Rubenstein, 60 App. Div. 238, 69 N. Y. S. 1067.

758-6 **Defendant's self-serving declarations** inadmissible if not part of the res gestae. Eagon v. Eagon, 60 Kan. 697, 57 P. 942; Nevins v. Nevins, 68 Kan. 410, 75 P. 492.

759-11 Dodge v. Rush, 28 App. D. C. 149; Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639, recognizing the rule of the text so far as declarations to a third person are concerned, they not being a part of the res gestae.

Declarations of husband to wife may be shown as illustrating the father's attitude toward their living together. Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639; Williams v. Williams, 20 Colo. 51, 37 P. 614. But such evidence should be strictly limited to showing the relations of husband and wife, and the effect of the influence on the mind of the spouse whose affections are said to have been alienated. They are not to be regarded as against defendant. Hardwick v. Hardwick, supra.

Husband's declarations to third party, in defendant's absence, are competent to show the effect of defendant's wrongful interference with his son and his efforts to estrange the couple. Nevins v. Nevins, 68 Kan. 410, 75 P. 492. His declarations to a third person of his intention to leave his wife may be proved. Lockwood v. Lockwood, 67 Minn. 476, 491, 70 N. W. 784. Some courts hold that his declarations as to the reasons for separation are competent. Baker v. Baker, 16 Abb. N. C. (N. Y.) 293; Remsen v. Hay, 14 N. Y. Wkly. Dig. 443.

Declarations made after action brought inadmissible. Nevins v. Nevins, 68 Kan. 410, 75 P. 492; Stanley v. Stanley, 27 Wash. 570, 68 P. 187.

759-13 Angell v. Reynolds, 26 R. I. 160, 58 A. 625.

760-14 Rinehart v. Bills, 82 Mo. 534.

Desertion of husband must be shown. Codoni v. Donati (Cal. App.), 91 P. 423.

760-15 Callis v. Merriweather, 98 Md. 361, 57 A. 201; Rinehart v. Bills, 82 Mo. 534; Weston v. Weston, 86 App. Div. 159, 83 N. Y. S. 528.

Times and places can be proved only to the extent plaintiff has complied with an order requiring a bill of particulars. Weston v. Weston, 68 App. Div. 483, 74 N. Y. S. 38, 86 App. Div. 159, 83 N. Y. S. 528. But in the absence of such a bill, evidence of similar facts and circumstances prior to the date alleged and connected with and explanatory of those stated is proper. Dodge v. Rush, 28 App. D. C. 149.

Adultery may be established by a preponderance of evidence. Sieber v. Pettit, 200 Pa. 58, 49 A. 763. Shown by the proofs. Billings v. Albright, 66 App. Div. 239, 73 N. Y. S. 22.

Admission of adultery by wife in letter to defendant, written in plaintiff's presence, may be shown, in contradiction of defendant's testimony, by a copy in her handwriting. Weston v. Weston, 86 App. Div. 159, 83 N. Y. S. 528.

Bad character of plaintiff's wife is immaterial unless knowledge thereof is brought home to him and he is shown to have consented to her acts. Frank v. Berry, 128 Ia. 223, 103 N. W. 358; White v. White (Kan.), 90 P. 1087.

760-16 **Slight items of evidence** are admissible to show improper relations between the parties. Dow v. Bullfinch, 192 Mass. 281, 78 N. E. 416.

The plaintiff wife may show the state of her health at time of marriage, and that it was injuriously affected by that which led to interference by her husband's father; such testimony tends to show lack of cause for interference. She may also show defendant's subsequent treatment of her as tending to show his motive for interfering with her and her husband's relations toward each other, and the temporary leaving of defendant's home in pursuance of notice served upon her and her husband. Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639. All effects of the abandonment may be shown. Lockwood v. Lockwood, 67 Minn. 476, 70 N. W. 784. Plaintiff's wife may show improper relations between her husband and defendant a considerable period before separation, the intimacy continuing till that occurred. Linck v. Vorhauer, 104 Mo. App. 368, 79 S. W. 478.

Admissions by defendant made after the separation of plaintiff and her husband may be proved. White v. White (Kan.), 90 P. 1087. If made over a telephone there must be proof of identity. Dunham v. McMichael, 214 Pa. 485, 63 A. 1007. See "Admissions," Vol. 1, p. 350, 604, and that title, ante, 604-41.

761-19 Dodge v. Rush, 28 App. D. C. 149; Nevins v. Nevins, 68 Kan. 410, 75 P. 492; Rath v. Rath (Neb.), 89 N. W. 612; Sieber v. Pettit, 200 Pa. 58, 49 A. 763.

761-20 White v. White (Kan.), 90 P. 1087; Stanley v. Stanley, 27 Wash. 570, 68 P. 187.

Reputed wealth may be shown with regard to compensatory damages and actual wealth in connection with the demand for exemplary damages. Leavell v. Leavell, 114 Mo. App. 24, 89 S. W. 55. But if there is more than one defendant, the reputed wealth of one cannot be shown. Ibid.

762-22 Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417; Multer v. Knibbs, 193 Mass. 556, 79 N. E. 762.

Defendant's statements made after the wife left home may be proved. Christensen v. Thompson, 123 Ia. 717, 99 N. W. 591.

762-23 Eagon v. Eagon, 60 Kan. 697, 57 P. 942; Multer v. Knibbs, 193 Mass. 556, 79 N. E. 762; Leavell v. Leavell, 114 Mo. App. 24, 89 S. W. 55; Love v. Love, 98 Mo. App. 562, 73 S. W. 255; Reading v. Gazzam, 200 Pa. 70, 49 A. 889.

Defendant's conduct. — The wife may show that defendant made improper advances toward her, and, on being repulsed, threatened her. White v. White (Kan.), 90 P. 1087.

762-25 Hodgkinson v. Hodgkinson, 43 Neb. 269, 61 N. W. 577; Love v. Love, 98 Mo. App. 562, 73 S. W. 255.

763-27 Gregg v. Gregg, 37 Ind. App. 210, 75 N. E. 674; Nevins v. Nevins, 68 Kan. 410, 75 P. 492; Multer v. Knibbs, 193 Mass. 556, 79 N. E. 762.

Void marriage may be annulled with-

out incurring responsibility. Becker v. Becker, 29 Pa. C. C. 521.

No presumption that a parent acted for the best interest of his child arises where the issue is solely as to whether the parent did and said the things alleged, it not being claimed that they were justifiable. Klein v. Klein, 31 Ky. L. R. 28, 101 S. W. 382.

763-28 Multer v. Knibbs, 193 Mass. 556, 79 N. E. 762; Stanley v. Stanley, 27 Wash. 570, 68 P. 187.

Not a conclusion for a father to testify that he did not advise his son to leave his wife. Leavell v. Leavell, 114 Mo. App. 24, 89 S. W. 55.

Evidence to show malice. — It may be shown, as a link in a chain of evidence to establish a purpose to effect a separation, that one of the husband's parents objected to plaintiff having children. Lockwood v. Lockwood, 67 Minn. 476, 489, 70 N. W. 784. Acts done or submitted to by plaintiff's wife without defendant's knowledge cannot be shown. Lane v. Spence, 70 Neb. 204, 97 N. W. 299.

Proof of malice and falsehood overcomes the presumption of good faith. Railsback v. Railsback, 12 Ind. App. 659, 40 N. E. 276. It may be shown that defendant made statements concerning plaintiff, the falsity of which he could easily have ascertained. Nevins v. Nevins, 68 Kan. 410, 75 P. 492.

764-29 Dodge v. Rush, 28 App. D. C. 149; Gregg v. Gregg, 37 Ind. App. 210, 75 N. E. 674; Billings v. Albright, 66 App. Div. 239, 73 N. Y. S. 22; Weston v. Weston, 86 App. Div. 159, 83 N. Y. S. 528; Reading v. Gazzam, 200 Pa. 70, 49 A. 889.

Loss of support is an element of damages, though the only evidence is that showing the circumstances and conditions of life of the parties. Stanley v. Stanley, 32 Wash. 489, 73 P. 596.

Value of wife's services may be shown by husband. Rudd v. Dewey, 121 Ia. 454, 96 N. W. 973.

Injury to character an element of damage. Linck v. Vorhauer, 104 Mo. App. 368, 79 S. W. 478.

764-30 Adams v. Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. 266; Gregg v. Gregg, 37 Ind. App. 210, 75 N. E. 674.

Mental anguish, disgrace, mortification and injury to feelings are to be inferred; they need not be specially alleged. Nevins v. Nevins, 68 Kan. 410, 75 P. 492; Klein v. Klein, 31 Ky. L. R. 28, 101 S. W. 382.

Disposition made of plaintiff's children may be shown. Rudd v. Dewey, 121 Ia. 454, 96 N. W. 973.

Health of plaintiff wife after husband left and the fact that she was cared for by neighbors may be shown. Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639.

765-32 Love v. Love, 98 Mo. App. 562, 73 S. W. 255.

Financial standing and earning capacity of husband may be shown, though he is not a party. Harvey v. Harvey, 75 Neb. 557, 106 N. W. 660.

765-33 Declarations of plaintiff's wife. — All the facts and circumstances concerning the relation of husband and wife to each other, in so far as they disclose their mutual love and affection, may be shown, as may the effect of the wrong on their attitude toward each other. Hence her declarations and statements to him or in his presence may be shown; but not her declarations to a third party, they not being a part of the res gestae. Billings v. Albright, 66 App. Div. 239, 73 N. Y. S. 22.

765-34 Angell v. Reynolds, 26 R. I. 160, 58 A. 625; Rudd v. Rounds, 64 Vt. 432, 25 A. 438; Churchill v. Lewis, 17 Abb. N. C. 226; Allen v. Beseeker, 105 N. Y. S. 416.

Husband's improper relations with other women than defendant may be shown though his wife was not aware of them. Angell v. Reynolds, 26 R. I. 160, 58 A. 625; Wolf v. Frank, 92 Md. 138, 48 A. 132.

Plaintiff's income may be shown as may the fact that part of it has been applied to meet living expenses, these having been proved as ground of damage. Dunham v. McMichael, 214 Pa. 485, 63 A. 1007.

Wife's willingness. — The fact that defendant was no more guilty than plaintiff's wife may be proven.

Sieber v. Pettit, 200 Pa. 58, 49 A. 763.

766-35 **Wife's bad character** can be shown if specially pleaded. Frank v. Berry, 128 Ia. 223, 103 N. W. 358; Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639.

766-36 **Complaint by husband in action for divorce** competent as a declaration, he having furnished the facts alleged. Stanley v. Stanley, 32 Wash. 489, 73 P. 596.

Institution and dismissal of a divorce suit by plaintiff's husband may be shown. Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639.

766-38 Gregg v. Gregg, 37 Ind. App. 210, 75 N. E. 674; Nevins v. Nevins, 68 Kan. 410, 75 P. 492; White v. White (Kan.), 90 P. 1087; Leavell v. Leavell, 114 Mo. App. 24, 89 S. W. 55.

ALTERATION OF INSTRUMENTS

[Vol. 1.]

Shifting of burden of proof as to non-apparent material alteration, 773-1; Effect of admission of alteration, 773-1; Burden of explaining apparent material alteration, 773-1; Altered papers admissible in discretion of court, 779-32; Distinction as to admissibility of altered executory or executed writings, 779-33; Alteration of paper to conform to agreement, 785-48.

773-1 Merritt v. Dewey, 218 Ill. 599, 75 N. E. 1066, 2 L. R. A. (N. S.) 217; Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; University v. Hayes, 114 Ia. 690, 87 N. W. 664; Colby v. Foxworthy (Neb.), 114 N. W. 174; Galloway v. Bartholomew, 44 Or. 75, 74 P. 467; Gettysburg Nat. Bk. v. Gage, 4 Pa. Super. 505; Slyfield v. Willard, 43 Wash. 179, 86 P. 392; Lawrence v. Meenach (Wash.), 88 P. 1120.

Shifting of burden of proof as to non-apparent material alteration. After plaintiff has made his case in chief defendant has the burden of showing a non-apparent material alteration; evidence to that effect being introduced and not denied, plaintiff must show justification for the change. Merritt v. Dewey, 218 Ill. 599, 75 N. E. 1066, 2 L. R. A. (N. S.) 217, *cit.* Winter v. Pool, 100 Ala. 503, 14 S. 411; Glover v. Gentry, 104 Ala. 222, 16 S. 38; Shroeder v. Webster, 88 Ia. 627, 55 N. W. 569; Maguire v. Eichmeier, 109 Ia. 301, 80 N. W. 395; Capital Bk. v. Armstrong, 62 Mo. 59; National Bk. v. Madden, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. 633; Gleason v. Hamilton, 138 N. Y. 353, 34 N. E. 283, 21 L. R. A. 210; Dewees v. Bluntzer, 70 Tex. 406, 7 S. W. 820.

Effect of admission of alteration. An admission that the paper has been altered carries with it the burden of showing that the change was not fraudulent. Robertson v. Vasey, 125 Ia. 526, 101 N. W. 271; Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 S. E. 515.

Burden of explaining material alteration. — If such an alteration has been made, the party offering the instrument must explain. Kahai v. Kamai, 8 Haw. 694; Landt v. McCullough, 206 Ill. 214, 69 N. E. 107; Gage v. Chicago, 225 Ill. 218, 80 N. E. 127; Grand Lodge v. Young, 123 Ill. App. 628; University v. Hayes, 114 Ia. 690, 87 N. W. 664; Rambousek v. Council, 119 Ia. 263, 93 N. W. 277; Marshall v. Wilhite, 4 Ohio C. C. 203; Gettysburg Nat. Bk. v. Gage, 4 Pa. Super. 505; In re Potter, 16 Pa. Super. 576; Consumers' Ice Co. v. Jennings, 100 Va. 719, 42 S. E. 879. But if execution of instrument is admitted and alteration alleged, defendant must show that alteration was made. Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895.

Effect of showing alteration. — If the execution of the paper is proved and an alteration is shown, plaintiff still has the onus of proving the contract. Graham v. Middleby, 185 Mass. 349, 70 N. E. 416.

774-3 Dennie v. Clark, 3 Cal. App. 760, 87 P. 59; Landis v. Morrissey, 69 Cal. 86, 10 P. 258; Goldsmith v. Newhouse, 19 Colo. App. 1, 72 P. 809; Patton v. Fox, 169 Mo. 97, 69 S. W. 287; Cox v. Mignery, 126 Mo. App. 669, 105 S. W. 675;

Mobley v. Griffin, 104 N. C. 112, 10 S. E. 142; Helms v. Green, 105 N. C. 251, 11 S. E. 470, 18 Am. St. 893; Burnette v. Young (Va.), 57 S. E. 641; Price v. Stanbra (Wash.), 88 P. 115; Herring v. Lee, 22 W. Va. 661, 672.

Original contract may be proved by parol. — Germania F. Ins. Co. v. Lange, 193 Mass. 67, 78 N. E. 746.

Consent to alterations is provable by parol. — S. v. Baird, 13 Idaho 126, 89 P. 298.

774-4 Acme F. Co. v. Tousey, 148 Mich. 697, 112 N. W. 484.

775-5 Gandy v. Bissell, 72 Neb. 356, 100 N. W. 803.

The understandings of the respective parties as to the scope of the obligation assumed, not communicated to each other, cannot be proved. Graham v. Middleby, 185 Mass. 349, 70 N. E. 416.

Admissions as to execution of main instrument do not affect the right to prove alterations in it thereafter, no estoppel being shown. Dennie v. Clark, 3 Cal. App. 760, 87 P. 59.

776-8 Gray v. Freeman, 37 Tex. Civ. 556, 84 S. W. 1105.

776-9 See Graham v. Middleby, 185 Mass. 349, 70 N. E. 416.

Evidence to show alteration in record of city. — Cox v. Mignery, 126 Mo. App. 669, 105 S. W. 675.

Court record. — An entry of the acknowledgment of the execution of a deed taken in open court, which described the land conveyed, is competent evidence on the issue of an alteration in the description. Kalbach v. Mathis, 104 Mo. App. 300, 78 S. W. 684.

776-10 Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211.

776-11 W. W. Kimball Co. v. Piper, 111 Ill. App. 82.

777-17 Gettysburg Nat. Bk. v. Gage, 4 Pa. Super. 505.

777-18 Kalbach v. Mathis, 104 Mo. App. 300, 78 S. W. 684.

777-20 Magnifying glass used by witnesses may be taken to jury room. Grand Lodge v. Young, 123 Ill. App. 628, *cit.* Kannon v. Galloway, 2 Baxt. (Tenn.) 230; Morse v. Blanchard, 117 Mich. 37, 75 N. W. 93; Short v. S., 63 Ind. 376.

778-24 Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895.

778-25 Gaskins v. Allen, 137 N. C. 426, 49 S. E. 919.

778-26 Matthews v. DeWerff, 73 Ark. 625, 83 S. W. 327; Zimmer v. Farr, 225 Ill. 457, 80 N. E. 261; University v. Hayes, 111 Ia. 690, 87 N. W. 664; Rogers v. Costigan, 25 Ky. L. R. 1349, 78 S. W. 121.

778-29 Quantum of proof. Plaintiff suing on a note alleged to have been altered is not bound to establish his good faith beyond a reasonable doubt. Wood v. Skelley (Mass.), 81 N. E. 872.

Admission made in pleading, on the assumption that the contract sued on was unaltered, is not provable in an action on the changed instrument. Koons v. Car Co., 203 Mo. 227, 101 S. W. 49.

If the alterations are material the instrument should not be received without explanation. Landt v. McCullough, 206 Ill. 214, 69 N. E. 107.

Admissible for certain purposes. Though an altered paper is not admissible as the basis of an action, it is competent evidence to show all the facts in relation to its execution as a part of the original transaction, and the changes made in it, in connection with evidence of all the facts and circumstances, in an action to recover the original demand. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211.

779-32 Forbes v. Taylor, 139 Ala. 286, 35 S. 855; Hayes v. Wagner, supra.

Paper admissible. — Upon its being shown that no change has been made in the paper since it came to him who offers it the paper should be received. Mulkey v. Long, 5 Idaho 213, 47 P. 949; S. v. Baird, 13 Idaho 126, 89 P. 298.

Altered papers admissible in discretion of court. — Though an alteration be apparent on inspection, if it is not an unusual or extraordinary one, the court may admit it after proof of its execution. Graham v. Middleby, 185 Mass. 349, 70 N. E. 416. It is proper for the court to determine, upon inspection and the evidence, whether further proof in explanation of the alterations shall then be required before the instrument be admitted. His action in this respect rests upon sound discre-

tion and is not subject to exception. Wood v. Skelley (Mass.), 81 N. E. 872.

779-33 **Alterations may be explained** by the instrument itself or by extrinsic evidence. Gage v. Chicago, 225 Ill. 218, 80 N. E. 127.

Distinction as to admissibility of altered executory or executed writings. — There is a distinction as to the admissibility of instruments evidencing executory contracts and those which evidence executed contracts, and that distinction extends to those parts of an instrument which are executory, though other parts of it are executed. The distinction is well illustrated by an altered conveyance of land containing covenants. The alteration does not divest title, but it destroys all the grantees' rights under the covenants and the paper as evidence of the covenants. And the mooted distinction turns upon the inquiry whether, in such case, the altered deed may still be adduced in evidence of the title which passed by it in its original form. The negative view is favored by these cases: Babb v. Clemson, 10 Serg. & R. (Pa.) 419; Withers v. Atkinson, 1 Watts (Pa.) 236; Chesley v. Frost, 1 N. H. 145; Newell v. Mayberry, 3 Leigh (Va.) 250; Bliss v. McIntyre, 18 Vt. 466; Batchelder v. White, 80 Va. 103. Favoring or holding the opposing view are Doe v. Hirst, 3 Stark. (Eng.) 60; Jackson v. Gould, 7 Wend. (N. Y.) 364; Lewis v. Payn, 8 Cow. (N. Y.) 71; Pattison v. Luckley, L. R. 10 Ex. (Eng.) 330, 44 L. J., Ex. 180, 33 L. T. 360; Davidson v. Cooper, 11 M. & W. (Eng.) 778, 12 L. J., Ex. 467; Ward v. Lumley, 5 H. & N. (Eng.) 87, 29 L. J., Ex. 322, 1 L. T. 376; Hutchins v. Scott, 2 M. & W. (Eng.) 809, M. & H. 194, 6 L. J. Ex. 186; Alabama S. L. Co. v. Thompson, 104 Ala. 570, 16 S. 440, 53 Am. St. 80; Burgess v. Blake, 128 Ala. 105, 28 S. 963, 86 Am. St. 78; Burnett v. McCluey, 78 Mo. 676, 687.

779-34 Whitehead v. Emmerich, 38 Colo. 13, 87 P. 790; Kahai v. Kamai, 8 Haw. 694; Abbott v. Abbott, 189 Ill. 488, 59 N. E. 958, 82 Am. St. 270; Pierce Co. v. Casler, 194 Mass. 423, 80 N. E. 494.

Intent of maker. — The maker of an instrument should be permitted to testify as to his intention concerning the clause alleged to be altered as bearing upon his consent to the alteration. Cabell v. McKinney 31 Ind. App. 548, 68 N. E. 601.

779-35 Bishop v. Bishop, (1905), 2 Ch. (Eng.) 455, limit. Pigot's Case, 11 Rep. 26*b*; Aldous v. Cornwell, L. R. 3 Q. B. (Eng.) 573; Manuel v. Flynn (Cal. App.), 90 P. 463; Leppert v. Flaggs, 101 Md. 71, 60 A. 450; Fisherdick v. Hutton, 44 Neb. 122, 62 N. W. 488.

In New Jersey immaterial allegations are fatal. Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232; Jones v. Crowley, 57 N. J. L. 222, 30 A. 871.

In Missouri the rule as stated in the corresponding note to the Encyclopaedia is adhered to. Kelly v. Thuey, 143 Mo. 422, 45 S. W. 300.

780-36 Landt v. McCullough, 206 Ill. 214, 69 N. E. 107; Consumers' I. Co. v. Jennings, 100 Va. 719, 42 S. E. 879; Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 S. E. 515.

782-38 **Effect of fraudulent alteration.** — A material and fraudulent alteration prevents the party responsible for it from establishing the contract evidenced by the altered paper by any other evidence, such as defendant's duplicate. Philip Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 S. E. 515; Newell v. Mayberry, 3 Leigh (Va.) 250.

782-39 New York L. Ins. Co. v. Martindale, 75 Kan. 142, 88 P. 559; Adams v. Faircloth (Tex. Civ.), 97 S. W. 507.

783-42 Koons v. Car Co., 203 Mo. 227, 101 S. W. 49.

784-45 Fisherdick v. Hutton, 44 Neb. 122, 62 N. W. 488.

785-48 Sanitary Dist. v. Allen, 178 Ill. 330, 53 N. E. 109.

Alteration of paper to conform to agreement. — One party to a contract may not, without consent of the other, alter the paper evidencing the contract after its execution to make it conform to the agreement — as by adding an interest clause. Merritt v. Dewey, 218 Ill. 599, 75 N. E. 1066, 2 L. R. A. (N. S.) 217, *foll.* Kelly v. Trumble, 74 Ill. 428, and correcting a misappre-

hension as to the scope of Ryan v. Bank, 148 Ill. 349, 35 N. E. 1120. To the same purport are Evans v. Foreman, 60 Mo. 449; Fay v. Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752. To the contrary is Osborn v. Hall, 160 Ind. 153, 66 N. E. 457, which cites Jackson v. Johnson, 67 Ga. 167; Duker v. Franz, 70 Ky. 273, 3 Am. Rep. 314; Hervey v. Harvey, 15 Me. 357; Ames v. Colburn, 11 Gray (Mass.) 390, 71 Am. Dec. 723; McRaven v. Crisler, 53 Miss. 542; Foote v. Hambrick, 70 Miss. 157, 11 S. 567, 35 Am. St. 631; Clute v. Small, 17 Wend. (N. Y.) 237; Wallace v. Tice, 32 Or. 283, 51 P. 733; Chamberlain v. Wright (Tex. Civ.), 35 S. W. 707; McClure v. Little, 15 Utah 379, 49 P. 298, 62 Am. St. 938; Derby v. Thrall, 44 Vt. 413, 8 Am. Rep. 389.

785-50 Hipp v. Ins. Co., 128 Ga. 491, 57 S. E. 892, 12 L. R. A. (N. S.) 319.

787-56 Norwich Bk. v. Hyde, 13 Conn. 279; Merritt v. Boyden, 191 Ill. 136, 60 N. E. 907, 85 Am. St. 246; Hollen v. Davis, 59 Ia. 444, 13 N. W. 413, 44 Am. Rep. 688; Garrard v. Haddan, 67 Pa. 82.

789-63 Bishop v. Bishop, (1905), 2 Ch. (Eng.) 455.

790-67 In re Potter, 16 Pa. Super. 576; Burnette v. Young (Va.), 57 S. E. 641.

791-69 Germania F. Ins. Co. v. Lange, 193 Mass. 67, 78 N. E. 746.

795-80 First Nat. Bk. v. Weidenbeck, 97 Fed. 896, 38 C. C. A. 131. The rule is not varied because the parties erased the name of the guarantor who became such without the maker's knowledge. Ibid.

798-89 Marshall v. Wilhite, 4 Ohio C. C. 203; Sunday v. Dietrich, 16 Pa. Super. 640.

800-95 **The addition of "surety"** to the name of one of the makers of a note did not render them any the less joint and several obligors to the payee; it only affected their rights as between themselves. Galloway v. Bartholomew, 44 Or. 75, 74 P. 467.

804-10 New York L. Ins. Co. v. Martindale, 75 Kan. 142, 88 P. 559.

804-12 Merritt v. Dewey, 218 Ill. 599, 75 N. E. 1066, 2 L. R. A. (N. S.) 217.

806-22 Bowers v. Rineard, 209 Pa. 545, 58 A. 912.

807-24 **Place of payment under statute.** — See Port Huron E. & T. Co. v. Sherman, 14 S. D. 461, 85 N. W. 1008.

807-25 Morris v. Bank, 37 Tex. Civ. 97, 83 S. W. 36.

808-32 Landt v. McCullough, 206 Ill. 214, 222, 69 N. E. 107; Pyle v. Ourlatt, 92 Ill. 209; Catlin C. Co. v. Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. 216.

810-36 Gunkel v. Seiberth, 27 Ky. L. R. 455, 85 S. W. 733; Newland v. Soc., 137 Mich. 335, 100 N. W. 612; Kalbach v. Mathis, 104 Mo. App. 300, 78 S. W. 684; Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213; McKenzie v. Barrett (Tex. Civ.), 98 S. W. 229; Rodriguez v. Haynes, 76 Tex. 225, 13 S. W. 296; Kansas Mut. L. Ins. Co. v. Coalson, 22 Tex. Civ. 64, 54 S. W. 388.

Presumption applies to public records. — Cox v. Mignery, 126 Mo. App. 669, 105 S. W. 675.

Slight evidence will overcome the presumption that the alteration was made before or at the time the instrument was delivered. Rogers v. Page, 140 Fed. 596, 72 C. C. A. 164.

Presumption. — If the alleged alteration was made by the same hand and with the same ink, it is presumed that it was contemporaneous with the execution of the paper. Paul v. Leeper, 98 Mo. App. 515, 72 S. W. 715.

812-38 Klein v. Bank, 69 Ark. 140, 61 S. W. 572, 86 Am. St. 183; Gist v. Gans, 30 Ark. 285; Catlin v. Lloyd, 180 Ill. 398, 54 N. E. 214, 72 Am. St. 216; Gage v. Chicago, 225 Ill. 218, 80 N. E. 127; Grand Lodge v. Young, 123 Ill. App. 628; Stayner v. Joyce, 120 Ind. 99, 22 N. E. 89; Willett v. Shepard, 34 Mich. 106; Wilson v. Hayes, 40 Minn. 531, 42 N. W. 467, 12 Am. St. 754, 4 L. R. A. 196.

813-39 Kahai v. Kamai, 8 Haw. 694; Wheadon v. Turregano, 112 La. 931, 36 S. 808; Messi v. Freehede, 113 La. 679, 37 S. 600; Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 S. E. 515.

815-45 Jackson v. Day, 80 Miss. 800, 31 S. 536.

815-47 Burton v. Ins. Co., 88 Mo. App. 392, 96 Mo. App. 204, 70 S.

W. 172; Cox v. Mignery, 126 Mo. App. 669, 105 S. W. 675; Brinn v. Cohen, 107 N. Y. S. 37; Sunday v. Dietrich, 16 Pa. Super. 640.

Cutting off part of a paper with a sharp tool is a suspicious circumstance. Burton v. Ins. Co., supra.

An interlineation is suspicious if it appears to be contrary to the probable meaning of the instrument as it was originally, or if it be in a different writing from the body of the paper, or destroys its validity. Cox v. Mignery, 126 Mo. App. 669, 105 S. W. 675.

818-50 Rosenbloom v. Finch, 37 Misc. 818, 76 N. Y. S. 902.

821-62 Stringfellow v. Petty (N. M.), 89 P. 258.

821-63 Landt v. McCullough, 218 Ill. 607, 75 N. E. 1069.

The changes made must be satisfactorily accounted for. In re Potter, 16 Pa. Super. 576.

Alterations in a deed executed to cure defects in a prior deed may be explained by a comparison of them, both being competent evidence. Wilder v. E. T. Co., 216 Ill. 493, 75 N. E. 194.

822-65 Heard v. Tappan, 116 Ga. 930, 43 S. E. 375; Pahukula v. Parke, 6 Haw. 210; Leppert v. Flaggs, 101 Md. 71, 60 A. 450; Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 S. E. 515.

822-66 Heard v. Tappan, supra; Pahukula v. Parke, supra; Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211; Winters v. Mowrer, 1 Pa. Super. 47.

823-69 Winters v. Mowrer, supra; Consumers' I. Co. v. Jennings, 100 Va. 719, 42 S. E. 879.

824-70-71 Winters v. Mowrer, supra. See as to question of intent under statute, Port Huron E. & T. Co. v. Sherman, 14 S. D. 461, 85 N. W. 1008.

824-73 Stringfellow v. Petty (N. M.), 89 P. 258.

AMBIGUITY [Vol. 1.]

Understanding of parties, 826-1; Deception of party to contract, 832-13; Evidence to show what covered by policy, 846-43; Extrinsic evidence concerning wills, 852-60; Intention as to unborn child, 852-60.

826-1 Burlee D. D. Co. v. Besse, 130 Fed. 444, 64 C. C. A. 646; Union S. Co. v. Jones, 128 Fed. 672, 63 C. C. A. 224; United E. & C. Co. v. Broadnax, 136 Fed. 351, 69 C. C. A. 177; Kentucky etc. Co. v. Ins. Co., 146 Fed. 695, 77 C. C. A. 121; Noyes v. Marlott, 156 Fed. 753; Louisville R. Co. v. Higginbotham (Ala.), 44 S. 872; Rhodes v. Purvis, 74 Ark. 227, 85 S. W. 235; Dugan v. Kelly, 75 Ark. 55, 86 S. W. 831; Hawley v. Kafitz, 148 Cal. 393, 83 P. 248, 3 L. R. A. (N. S.) 741; Cutten v. Pearsall, 146 Cal. 690, 81 P. 25; Levis v. P. & D. Co., 1 Cal. App. 241, 81 P. 1086; Gardiner v. McDonough, 147 Cal. 313, 81 P. 964; Peterson v. Chaix (Cal. App.), 90 P. 948; Bryan v. Bigelow, 77 Conn. 604, 60 A. 266; Whipple v. Geddis, 25 App. D. C. 333; Byrd v. Marietta Co., 127 Ga. 30, 56 S. E. 86; Townsend v. Product Co., 127 Ga. 342, 56 S. E. 436; Vail v. Ins. Co., 192 Ill. 567, 61 N. E. 651; Davis v. Ins. Co., 208 Ill. 375, 70 N. E. 359; Cameron v. Sexton, 110 Ill. App. 381; Sanitary Dist. v. McMahon, 110 Ill. App. 510; Citizens' Bk. v. Chambers, 129 Ia. 414, 105 N. W. 692; McCreary v. Skidmore (Ky.), 99 S. W. 219; Smith v. Smith, 24 Ky. L. R. 1964, 72 S. W. 766; Neale v. American Co., 186 Mass. 303, 71 N. E. 566; Langford v. Manchester (Mass.), 81 N. E. 884; Helper v. Mfg. Co., 138 Mich. 593, 101 N. W. 804; Bowins v. English, 138 Mich. 178, 101 N. W. 204; S. v. Fellows, 98 Minn. 179, 107 N. W. 542, 108 N. W. 825; Rieger v. Brew. Co., 106 Mo. App. 513, 80 S. W. 969; Wheeler v. Moore (Neb.), 111 N. W. 120; Hill v. Hill (N. H.), 67 A. 406; Finucane Co. v. Board, 190 N. Y. 76, 82 N. E. 737; Williams v. Gridley, 96 N. Y. S. 978; Stewart v. R. Co., 141 N. C. 253, 53 S. E. 877; Kentucky Mfg. Co. v. S. Co., 77 S. C. 92, 57 S. E. 676; Robertson v. Warren (Tex. Civ.), 100 S. W. 805; San Antonio etc. R. Co. v. Timon (Tex. Civ.), 99 S. W. 418; Smith v. R. Co. (Tex. Civ.), 105 S. W. 528; Grout v. Moulton, 79 Vt. 122, 64 A. 453; Baleh v. Arnold, 9 Wyo. 17, 59 P. 434.

Rule extends to legal effect of writing. — Union S. Co. v. Jones, 128 Fed. 672, 63 C. C. A. 224, and cases

cited; Peterson v. Chaix (Cal. App.), 90 P. 948.

Understanding of parties to an unambiguous contract cannot be shown under a statute providing that when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it; neither can such understanding be shown because one of the parties resided in another state and the contract was made in yet another, in which it would have been construed otherwise than in the state of its performance. Inman M. Co. v. American C. Co., 133 Ia. 71, 110 N. W. 287. See Capital City C. Co. v. Moody (Ia.), 110 N. W. 903.

826-2 Higgins v. Dawson, (1902), App. Cas. (Eng.) 1; Harmon v. Thompson, 119 Ky. 528, 84 S. W. 569.

830-9 Cox v. Wilson, 25 Pa. Super. 635.

Prior negotiations may be regarded to ascertain whether the parties intended a clause in the contract to provide for stipulated damages or a penalty. U. S. v. Steel Co., 205 U. S. 105. And to show that the balance of the purchase money was to be paid out of the profits of an enterprise referred to in the contract, the language being that it was to be paid as provided hereafter. Morrison v. Dickey, 122 Ga. 417, 50 S. E. 178.

The nature of an instrument may be testified to though it is in evidence, the action not being based on it. P. v. Messer, 148 Mich. 168, 111 N. W. 854.

831-10 See Bowers v. Andrews, 52 Miss. 606; Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780; Mudd v. Dillon, 166 Mo. 110, 65 S. W. 973; Gorham v. Settegast (Tex. Civ.), 98 S. W. 665.

832-11 Ivey v. Cotton Mills, 143 N. C. 189, 55 S. E. 613.

832-13 Deserres v. Brault, 37 Can. Sup. 613; Prescott v. Hixon, 22 Ind. App. 139, 53 N. E. 391; Swarts v. Cohen, 11 Ind. App. 20, 38 N. E. 536; Helper v. Mfg. Co., 138 Mich. 593, 101 N. W. 804; Ivey v. Cotton Mills, 143 N. C. 189, 55 S. E. 613.

Deception of party to contract. — In Sellers v. R. Co., 77 S. C. 361, 57 S. E. 1102, the court, though ruling that the railroad ticket in question was unambiguous, said that when the judge, "in construing an instrument concludes that upon its face it is reasonably calculated to mislead a man of ordinary intelligence, then it becomes his duty to allow the introduction of parol testimony for the purpose of enabling the jury to determine whether the individual in its particular instance was misled."

Duration of insurance policy. Travelers' Ins. Co. v. Grand Army, 86 Miss. 135, 38 S. 779.

Property covered by such policy. Prudential F. Ins. Co. v. Alley, 104 Va. 356, 51 S. E. 812.

Applicable to official bonds. — Baker County v. Huntington, 46 Or. 275, 79 P. 187.

Silence of contract may be aided. Savage v. Salem Mills, 48 Or. 1, 85 P. 69; Blake v. Miller (Ia.), 112 N. W. 158. But this is doubtful. Union S. Co. v. Jones, 128 Fed. 672, 63 C. C. A. 224; Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964; Thompson v. Libby, 34 Minn. 374, 26 N. W. 1; Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380; Hei v. Heller, 53 Wis. 415, 10 N. W. 620; Wiener v. Whipple, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775.

Surrounding circumstances do not include the prior representations, proposals and negotiations of a promissory character leading up to, and superseded by, the written agreement. Union S. Co. v. Jones, 128 Fed. 672, 63 C. C. A. 224, *cit.* Union Stock etc. Co. v. Western etc. Co., 59 Fed. 49, 7 C. C. A. 660, 668; Bast v. Bank, 101 U. S. 93; Oelrichs v. Ford, 23 How. (U. S.) 49; Ferguson C. Co. v. Trust Co., 118 Fed. 791, 55 C. C. A. 529.

833-14 Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964.

833-15 To determine who is maker of note. — Holt v. Swectzer, 23 Ind. App. 237, 55 N. E. 254.

833-16—Callender Co. v. Flint, 187 Mass. 104, 72 N. E. 345; Darnell v. Lafferty, 113 Mo. App. 282, 88 S. W. 784; Great Western P. Co. v. Belcher, 127 Mo. App. 133, 104 S. W. 894.

834-17 In re Garnier, 147 Cal.

457, 82 P. 68; Moayon v. Moayon, 114 Ky. 855, 72 S. W. 33, 102 Am. St. 303, 60 L. R. A. 415.

Description of debt secured may be made certain. Boyes v. Masters, 17 Okla. 460, 89 P. 198.

834-18 Shafer v. Sloan, 3 Cal. App. 335, 85 P. 162.

835-19 Howard v. Adkins, 167 Ind. 184, 78 N. E. 665; Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355; Shenandoah L. Co. v. Clarke, 106 Va. 100, 55 S. E. 561.

Letters and plats used in connection with the making of a contract are competent to explain an ambiguity in it. Bent v. Trimboli, 61 W. Va. 509, 56 S. E. 881.

Whether sale was by acre or in gross may be shown, if deed ambiguous, by the circumstances and situation of the parties when deed executed and their subsequent conduct. Winton v. McGraw, 60 W. Va. 98, 54 S. E. 506.

838-25 Laclede C. Co. v. Tie Co., 185 Mo. 25, 84 S. W. 76; Smith Premier T. Co. v. Rowan, 143 N. C. 97, 55 S. E. 417.

838-26 Prior and contemporaneous declarations. — According to the weight of authority parol evidence of statements made in the negotiations preceding the making of the contract, if not of a contractual character, is competent. Kilby Mfg. Co. v. Fire P. Co., 132 Fed. 957, 66 C. C. A. 67; Hebb v. Welsh, 185 Mass. 335, 70 N. E. 440; Knick v. Knick, 75 Va. 12; Richardson v. Bank, 94 Va. 130, 26 S. E. 413; Shenandoah L. Co. v. Clarke, 106 Va. 100, 55 S. E. 561; Smith v. Piano Co., 194 Mass. 193, 80 N. E. 527; Lambert H. E. Co. v. Carmody, 79 Conn. 419, 65 A. 141; Okie v. Person, 23 App. D. C. 170. *Contra*, Titchenell v. Jackson, 26 W. Va. 460; Scraggs v. Hill, 37 W. Va. 706, 17 S. E. 185.

838-27 Harris v. Oakley, 130 N. Y. 1, 28 N. E. 530; Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691 (notwithstanding the testimony contradicted one description in the deed, if it enabled the court more certainly to arrive at the parties' intention).

839-28 Consolidated D. Mfg. Co. v. Holliday, 131 Fed. 384; Harten v. Loffler, 29 App. D. C. 490, 503; Thomas v. Troxel, 26 Ind. App. 322, 59 N. E. 683; Frazier v. Myers, 132 Ind. 71, 31 N. E. 536; Beck & P. Lith. Co. v. Evansville, 25 Ind. App. 662, 58 N. E. 859; Laclede C. Co. v. Tie Co., 185 Mo. 25, 84 S. W. 76; Camardella v. Holmes, 97 App. Div. 120, 89 N. Y. S. 616; Missouri R. Co. v. Anderson, 36 Tex. Civ. 121, 81 S. W. 781; Glenn v. Bldg. & L. Co., 99 Va. 695, 40 S. E. 25; Shenandoah L. Co. v. Clarke, 106 Va. 100, 55 S. E. 561.

840-30 Harris v. Oakley, 130 N. Y. 1, 28 N. E. 530; Winton v. McGraw, 60 W. Va. 98, 54 S. E. 506.

Previous user by grantee of land conveyed may be shown to aid in establishing the extent of the grant. "The time when, and the circumstances under which, an instrument is made, supply the best and surest mode of expounding it, and when the obvious intention is to give a title to what has been taken and retained before the actual grant, it is manifest that what has been so taken and retained is cogent evidence of what is granted." Van Diemen's L. Co. v. Marine Board, [1906] App. Cas. (Eng.) 92.

840-31 Direct evidence of intent, inadmissible. Baleh v. Arnold, 9 Wyo. 17, 59 P. 434.

841-32 Schultz v. Simmons (Wash.), 90 P. 917.

843-37 Southern R. Co. v. Cofer (Ala.), 43 S. 102; Jones v. Anderson, 82 Ala. 302, 2 S. 911; Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964; Daniel v. Bkg. Co., 124 Ga. 1063, 53 S. E. 573; Morningstar v. Cunningham, 110 Ind. 328, 11 N. E. 593, 59 Am. Rep. 211; Corneil v. Lumb. Co., 71 Mich. 350, 39 N. W. 7; Savage v. Salem Mills, 48 Or. 1, 85 P. 69; Hirsh v. Salem Mills, 40 Or. 601, 67 P. 949, 68 P. 733; Barnes v. Leidigh, 46 Or. 43, 79 P. 51; Edmonds v. Bank, 215 Pa. 547, 64 A. 671; Lovering v. Miller (Pa.), 67 A. 209; Shrewsbury v. Tufts, 41 W. Va. 212, 23 S. E. 692.

Cannot contravene contract. — McCulsky v. Klosterman, 20 Or. 108, 25 P. 366, 10 L. R. A. 785; Holmes v. Whitaker, 23 Or. 319, 31 P. 705.

"**Undivided bonds**" may be identified by parol, including what was said when the parties contracted. Crittenden v. Cobb, 156 Fed. 535.

Local meaning of gross ton. — Higgins v. P. & A. Co., 120 Cal. 629, 52 P. 1080.

Usage as to computing weight by the pound cannot be shown in contravention of statute. Hale v. Milliken (Cal. App.), 90 P. 365.

Usage or custom may be shown to explain the meaning of terms that otherwise would be ambiguous. Peet v. Peet, 229 Ill. 341, 82 N. E. 376.

844-38 Mortality table. — It may be shown what mortality table insurer used when the policy in question issued. Provident S. L. Soc. v. Bailey, 118 Ky. 36, 80 S. W. 452.

844-39 Citizens' S. Bk. v. Chambers, 129 Ia. 414, 105 N. W. 692.

844-40 Lindblom v. Fallett, 145 Fed. 805, 76 C. C. A. 369; Harten v. Loffler, 29 App. D. C. 490; L'Engle v. Ins. Co., 48 Fla. 82, 37 S. 462; Jacobs v. Parodi, 50 Fla. 541, 39 S. 833; Harman v. P., 214 Ill. 454, 73 N. E. 760; Giger v. Busch, 122 Ill. App. 13; Jackson v. Hardin, 27 Ky. L. R. 1110, 87 S. W. 1119; Harris v. Ins. Co., 190 Mass. 361, 77 N. E. 493, 4 L. R. A. (N. S.) 1137; Miller v. Supply Co., 150 Mich. 292, 114 N. W. 61; Gravity C. Co. v. Sisk (Tex. Civ.), 95 S. W. 724; Chesapeake & O. R. Co. v. R. Co., 57 W. Va. 641, 672, 50 S. E. 890; Scraggs v. Hill, 37 W. Va. 706, 17 S. E. 185.

Rule applies to field notes of a survey, and declarations of a deceased patentee may be proven against his heirs. Warner v. Sapp (Tex. Civ.), 97 S. W. 125; Hamilton v. Blackburn (Tex. Civ.), 95 S. W. 1094; Wilkins v. Clawson, 37 Tex. Civ. 162, 83 S. W. 732.

845-41 Identity of actions. — If the records of actions do not establish their identity, parol evidence is competent to do so. Wiehe v. Atkins, 126 Ill. App. 1; Rubel v. Title G. & T. Co., 101 Ill. App. 439; Wright v. Griffey, 147 Ill. 496, 35 N. E. 732; Leopold v. Clinago, 150 Ill. 568, 37 N. E. 892; Jordan v. McDonnell (Ala.), 44 S. 101.

Party to action. — It may be shown by parol that a person voluntarily made himself a party. Cage v. Owens (Tex. Civ.), 103 S. W. 1191.

846-42 Barcus v. Gates, 130 Fed. 364; Sewall v. Wood, 135 Fed. 12, 67 C. C. A. 580; Lowrey v. Hawaii, 206 U. S. 206; Hannon v. Espalla, 148 Ala. 313, 42 S. 443; Pringle v. King (Ariz.), 78 P. 367; Massey v. Dixon, 81 Ark 337, 99 S. W. 383; San Miguel Min. Co. v. Stubbs (Colo.), 90 P. 842; L'Engle v. Ins. Co., 48 Fla. 82, 37 S. 462; Morrison v. Dickey, 119 Ga. 698, 46 S. E. 863, 122 Ga. 417, 50 S. E. 178; Novelty Mfg. Co. v. Wiseberg, 126 Ga. 800, 55 S. E. 923; Thomas v. Troxel, 26 Ind. App. 322, 59 N. E. 683; Morrison Mfg. Co. v. Bryson, 129 Ia. 645, 103 N. W. 1016, 106 N. W. 153; Jenkins v. Kirtley, 70 Kan. 801, 79 P. 671; Versailles v. Brown, 29 Ky. L. R. 1223, 96 S. W. 1108; Fidelity & C. Co. v. News Co., 31 Ky. L. R. 725, 103 S. W. 297; Denis v. Tilton, 120 La. 226, 45 S. 112; Smith v. Piano Co., 194 Mass. 193, 80 N. E. 527; Hebb v. Welsh, 185 Mass. 335, 70 N. E. 440; Fullam v. Wright (Mass.), 82 N. E. 711; Laclede C. Co. v. Tie Co., 185 Mo. 25, 67, 84 S. W. 76; Tanenbaum v. Levy, 83 App. Div. 319, 82 N. Y. S. 171; New York H. W. Co. v. O'Rourke, 86 N. Y. S. 1116; Sholl v. Prince Line, 109 App. Div. 591, 96 N. Y. S. 368; Watson v. Lamb, 75 Ohio St. 481, 79 N. E. 1075; International R. Co. v. Jones (Tex. Civ.), 91 S. W. 611; Carr v. Jones, 29 Wash. 78, 69 P. 646; Bent v. Trimboli, 61 W. Va. 509, 56 S. E. 881; Shrewsbury v. Tufts, 41 W. Va. 212, 23 S. E. 692; Perkins v. Owen, 123 Wis. 238, 101 N. W. 415; Excelsior W. Co. v. Messinger, 116 Wis. 549, 93 N. W. 459; Corbett v. Joannes, 125 Wis. 370, 104 N. W. 69; Loree v. Mfg. Co. (Wis.), 114 N. W. 449.

The facts, circumstances and knowledge of the parties existing when the contract was made and which may aid in understanding it may be proven. Loree v. Mfg. Co., supra.

The parties to a contract may be identified by parol. Wuertz v. Braun, 113 App. Div. 459, 99 N. Y. S. 340; Schuster v. Snawder, 31 Ky. L. R. 254, 101 S. W. 1194; Blake v. Miller (Ia.), 112 N. W. 158.

Term of teacher's contract. — Henry School Tp. v. Meredith, 32 Ind. App. 607, 70 N. E. 393.

A difference in supposed duplicates of a contract may be solved by pa-

rol. Bowman v. Poppenberg, 53 Misc. 373, 103 N. Y. S. 245.

The maker of a note signed by one who was president of a company and expressed in the plural form may be shown to be the company, by proof that the payee had no account with the president, and by a memorandum showing that he regarded the company as his debtor. Dunbar B. & L. Co. v. Martin, 53 Misc. 312, 103 N. Y. S. 91.

The party to whom material was to be furnished and the quantity he might need may be shown by parol. Laclede C. Co. v. Tie Co., 185 Mo. 25, 66, 84 S. W. 76.

The assignor of a judgment may testify of the interest assigned under an ambiguous assignment. First N. Bk. v. Miller, 48 Or. 587, 87 P. 892.

The intent with which a release was executed may be shown. El Paso & S. R. Co. v. Darr (Tex. Civ.), 93 S. W. 166.

Indefinite consideration. — If the writing states the consideration indefinitely, the ambiguity may be removed. Burke v. Mead, 159 Ind. 252, 64 N. E. 880; Howard v. Adkins, 167 Ind. 184, 78 N. E. 665.

A blank may be filled in accordance with the intention of the parties. Leffler Co. v. Dickerson, 1 Ga. App. 63, 57 S. E. 911; Fresno C. & I. Co. v. Hart (Cal.), 92 P. 1010.

A memorandum is open to fuller explanation of its intended scope and effect than a formal contract. Wright v. Anderson, 191 Mass. 148, 77 N. E. 704.

846-43 Lindblom v. Fallett, 145 Fed. 805, 76 C. C. A. 369; Kilby Mfg. Co. v. Fire P. Co., 132 Fed. 957, 66 C. C. A. 67; Brackett & Co. v. G. Co., 127 Ga. 672, 56 S. E. 762; Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Martin v. Ferguson, 31 Ky. L. R. 590, 103 S. W. 257; Wolverine L. Co. v. Ins. Co., 145 Mich. 558, 108 N. W. 1088; Miller v. Supply Co., 150 Mich. 292, 114 N. W. 61; Houston T. Co. v. Lee (Tex. Civ.), 97 S. W. 842.

Evidence to show what covered by policy. — Parol evidence is not competent to show that a building not described in a fire policy was intended to be covered by it. Collins v. Ins. Co., 44 Minn. 440, 46 N. W. 906; Bromberg v. Assn., 45 Minn. 318, 47 N. W. 975. But such evidence is admissible to show of what the building described consisted—as that it included an annex as a substantial part of it. Boak F. Co. v. Assur. Co., 84 Minn. 419, 87 N. W. 932. And to show whether the word "warehouse" was applicable to an "elevator." Fireman's Fund Ins. Co. v. Ins. Co., 2 Cal. App. 690, 84 P. 253.

847-44 Stone v. Mulvane, 217 Ill. 40, 75 N. E. 421; Ferguson v. Connally, 33 Tex. Civ. 245, 76 S. W. 609.

847-45 Read P. Co. v. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122.

847-46 Albert v. R. Co., 107 Va. 256, 58 S. E. 575.

847-47 Hamilton v. Smith, 74 Conn. 374, 50 A. 884; Harten v. Loffler, 29 App. D. C. 490, 503; Leverett v. Bullard, 121 Ga. 534, 49 S. E. 591; Walden v. Walden, 128 Ga. 126, 57 S. E. 323; Aylett v. Keaweanahi, 8 Haw. 320; Nahaolelua v. Kaaahu, 10 Haw. 18; Howard v. Adkins, 167 Ind. 184, 78 N. E. 665; Ritzman v. Carl (Ia.), 110 N. W. 587; Mayberry v. Beck, 71 Kan. 609, 81 P. 191; Jackson v. Hardin, 27 Ky. L. R. 1110, 87 S. W. 1119; Haskell v. Friend (Mass.), 81 N. E. 962; Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340; Staub v. Hampton, 117 Tenn. 706, 101 S. W. 776; St. Louis, etc. R. Co. v. Payne (Tex. Civ.), 104 S. W. 1077; Missouri, etc. R. Co. v. Anderson, 36 Tex. Civ. 121, 81 S. W. 781; Snooks v. Wingfield, 52 W. Va. 441, 44 S. E. 277.

Rule applied to tax list. — Chapman v. Zobelein (Cal.), 92 P. 188; Best v. Wohlford, 144 Cal. 733, 78 P. 293; Baird v. Monroe, 150 Cal. 560, 89 P. 352; Fox v. Townsend (Cal.), 91 P. 1004; McCash v. Penrod, 131 Ia. 631, 109 N. W. 180.

Evidence of intention inadmissible in opposition to the description in deed. Herman v. Dunman (Tex. Civ.), 95 S. W. 80.

A subsequent deed executed to validate a void one may be explained. Davis v. Miller (Ala.), 44 S. 639;

Larkin v. Trammel (Tex. Civ.), 105 S. W. 552.

Applicable to sheriff's levy. — Reed v. Munn, 148 Fed. 737.

Explanation of inapt technical terms. McSurley v. Venters, 31 Ky. L. R. 963, 104 S. W. 365.

Terms of sale may be shown by proof of circumstances when deed was made and conduct of parties under it. Winton v. McGraw, 60 W. Va. 98, 54 S. E. 506.

Meaning of privileges and appurtenances may be elucidated by proof of grantor's acts and declarations prior and subsequent to execution of deed. Fayter v. North, 30 Utah 156, 83 P. 742, 6 L. R. A. (N. S.) 410.

Limitation of the rule. — Parol evidence is not admissible both to describe the land and to apply the description. Powers v. Rude, 14 Okla. 381, 79 P. 89; Ferguson v. Blackwell, 8 Okla. 489, 58 P. 647.

The estate intended to be conveyed may be shown by parol. Slusher v. Slusher, 31 Ky. L. R. 570, 102 S. W. 1188.

What may be shown. — "It is always competent to give in evidence existing circumstances, such as the actual condition and situation of the land, buildings, passages, watercourses and other local objects in order to give a definite meaning to language used in the deed, and to show the sense in which particular words were probably used by the parties, especially in matters of description." Clayton v. Court, 58 W. Va. 253, 52 S. E. 103, 2 L. R. A. (N. S.) 598, quoting the extract from C. J. Shaw in Salesbury v. Andrews, 19 Pick. (Mass.) 250.

The claims assumed by a clause in a deed may be identified by parol. Gage v. Cameron, 212 Ill. 146, 164, 72 N. E. 204.

Acts of the parties after conveyance of land may be proved. Howe v. Collins, 98 Me. 445, 57 A. 587.

849-49 Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691.

849-50 See Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895.

849-51 Hall v. Conlee, 23 Ky. L. R. 177, 62 S. W. 899.

Erratum. — The words "a description applicable to" should be substituted for "the extrinsic of."

Deeds emanating from the common grantor, though not conveying the land in question, may be competent to show what particular part of an entire tract owned by him when they were executed was intended to be granted one of the parties to the suit. Lee v. Giles, 124 Ga. 494, 52 S. E. 806.

850-52 Polushie v. Zacklynski, 37 Can. Sup. 177; Davis v. Miller (Ala.), 44 S. 639; Blanchard v. Floyd, 93 Ala. 53, 9 S. 418; Nenage v. Burke, 43 Minn. 211, 45 N. W. 155; Walker v. Miller, 139 N. C. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157; Cobb v. Bryan (Tex. Civ.), 97 S. W. 513.

850-54 Okie v. Person, 23 App. D. C. 170; Buffington v. McNally, 192 Mass. 198, 78 N. E. 309; Phillips v. Barnes, 105 Mo. App. 421, 80 S. W. 43; Dougherty v. Chestnutt, 86 Tenn. 1, 5 S. W. 444; Cockrell v. Egger (Tex. Civ.), 99 S. W. 568; O'Neill v. Ogden (Utah), 89 P. 464; Pine Beach I. Corp. v. Amusement Co., 106 Va. 810, 56 S. E. 822.

Evidence of the conduct of parties under a lease cannot include dealings of the lessee with one claiming adversely to him as tenant at will of the lessor, the latter not having authorized the lessee's conduct. Walker I. Co. v. Steel & W. Co., 185 Mass. 463, 70 N. E. 937.

851-55 Carroll v. Miner, 1 Pa. Super. 439 (writ levied admissible).

Understanding of witness as to scope of levy on property cannot be proved. Ibid.

852-57 Explanatory. — In aid of the process of construction and interpretation, extrinsic evidence may be received for the purpose of rightly understanding the meaning of a will. Thompson v. Betts, 74 Conn. 576, 51 A. 564.

852-58 Clark v. Goodridge, 51 Misc. 140, 100 N. Y. S. 824 (devise by street number held to include a contiguous lot inclosed with it).

852-60 Extrinsic evidence concerning wills. — A will which is certain in terms is not ambiguous because it does not dispose of all the testator's lands. Taylor v. Horst, 23 Wash. 446, 63 P. 231. The meaning

of local words or phrases used in a will executed in a foreign country, which have a different meaning from the same words or phrases in the jurisdiction in which the will is being construed, with which it may be presumed the testator was familiar, may be shown by parol, though the foreign meaning be established by the usage or custom of merchants or by statute or judicial decision. Peet v. Peet, 229 Ill. 341, 82 N. E. 376. Testator's declarations incompetent to establish meaning of will. Ibid. "Evidence of such extrinsic circumstances as the testator's relations to persons, or the amount, character and condition of his estate, is sometimes admissible to explain ambiguities of description in his will, but never to determine the construction or the extent of the devises therein contained. King v. Ackerman, 2 Black 408, 418, 17 L. ed. 292, 298; Barber v. Pittsburg etc. R. Co., 166 U. S. 83, 109, 41 L. ed. 925, 936, 17 Sup. Ct. 488; McAleer v. Schneider, 2 App. D. C. 461." Atkins v. Best, 27 App. D. C. 148.

Intention as to unborn child. Though a statute declares that unless it shall appear by the will of a testator, to whom a child is born after the will was made, that it was the intention to disinherit such child, he shall share in the estate, it is held in Illinois that parol evidence is admissible to show the character of the property devised, the confidence of the testator in his wife to manage such property, the ages of the children and their relations to the testator for the purpose of ascertaining his intention concerning the unborn child. Peet v. Peet, 229 Ill. 341, 82 N. E. 376; Hawhe v. R. Co., 165 Ill. 561, 46 N. E. 240. *Compare* Lurie v. Radnitzer, 166 Ill. 609, 46 N. E. 1116, 57 Am. St. 157; Chicago etc. R. Co. v. Wasserman, 22 Fed. 872 (opinion by Brewer) seems to be opposed to the Illinois case, from the judgment in which three judges dissented.

854-62 In re Pearson, 52 Misc. 273, 102 N. Y. S. 965; In re Knight, 20 Phila. (Pa.) 151.

A complete blank in a will cannot be filled by parol—as a legacy to Mr. ———— (Baylis v. Attorney-General, 2 Atk. (Eng.) 239; Hunt v. Hort, 3 Bro. C. C. (Eng.) 312). But it is otherwise as to a partial blank —as my granddaughter—though testator had three granddaughters. In re Hubbuck [1905], Prob. (Eng.) 129. And so if there are any words to which a reasonable meaning may be attached—as to Mrs. C., in which case it may be shown that testator was accustomed to speak of a particular person by the initial of her name. Abbot v. Massie, 3 Ves. (Eng.) 148; Clayton v. Lord Nugent, 13 M. & W. (Eng.) 200.

855-64 Parol evidence not admissible to create an ambiguity in order that it may be explained by like evidence. American H. Co. v. Dalvin, 119 Ga. 186, 45 S. E. 983.

856-68 Allred v. S., 126 Ga. 537, 55 S. E. 178; Wolverine L. Co. v. Ins. Co., 145 Mich. 558, 108 N. W. 1088; Phillips v. Barnes, 105 Mo. App. 421, 80 S. W. 43; Bellis v. Henwood, 6 Pa. C. C. 78.

856-69 A party who secures a construction by the court cannot complain of it if the meaning given the paper was not antagonistic. Zerr v. Klug, 121 Mo. App. 286, 98 S. W. 822.

ANCIENT DOCUMENTS [Vol. 1.]

860-2 McGuire v. Blount, 199 U. S. 142; Hyde v. McFaddin, 140 Fed. 433, 72 C. C. A. 655; Ford v. Ford, 27 App. D. C. 401; Riviere v. Wilkens, 31 Tex. Civ. 454, 72 S. W. 608.

Time of execution. — Papers executed twenty-two years after occurrence of the matters to which they relate are not ancient documents. The Brig Juno, 36 Ct. Cl. 239.

860-3 Sixteen years is too short a period to raise a presumption that recitals in a deed are true. Lohse v. Burch, 42 Wash. 156, 84 P. 722.

860-7 The mere fact that a paper was dated forty years earlier than the time it was offered in evidence does not make it an ancient document in the absence of knowledge of its appearance or its custody. Bunner v. Ison, 8 Ohio C. C. (N. S.) 260.

861-13 McGuire v. Blount, 199 U. S. 142.

861-14 Woodward v. Keck (Tex. Civ.), 97 S. W. 852.

862-15 Hamilton v. Smith, 74 Conn. 374, 50 A. 884; Hedger v. Ward, 15 B. Mon. (Ky.) 106; Phillips v. Reservoir Co., 184 Mass. 404, 68 N. E. 848; McCreary v. Coggeshall, 74 S. C. 42, 53 S. E. 978; Dutton v. Wright (Tex. Civ.), 85 S. W. 1025.

Ancient records favored. — An ancient deed, if found where such a deed might be expected to be found, and if the possession has been in conformity with it, is admissible in evidence without proof of its execution. When secondary evidence is admissible to establish a title, the law is very liberal in allowing the introduction of ancient records as well as ancient deeds. Phillips v. Reservoir Co., 184 Mass. 404, 68 N. E. 848.

862-16 Swafford v. Herd, 23 Ky. L. R. 1556, 65 S. W. 803; Bunner v. Ison, 8 Ohio C. C. (N. S.) 260.

Not always received though genuineness admitted. — Webb v. Ritter, 60 W. Va. 193, 220, 54 S. E. 484.

Admissibility not affected by laches. Murphy v. Cady, 145 Mich. 33, 108 N. W. 493.

862-17 McGuire v. Blount, 199 U. S. 142; Swafford v. Herd, 23 Ky. L. R. 1556, 65 S. W. 803; In re Butrick, 185 Mass. 107, 69 N. E. 1044; Riviere v. Wilkens, 31 Tex. Civ. 454, 72 S. W. 608.

865-27 McCreary v. Coggeshall, 74 S. C. 42, 61, 53 S. E. 978.

865-30 A letter written to an individual concerning public land is not to be regarded as being in improper custody in the land office. Woodward v. Keck (Tex. Civ.), 97 S. W. 852.

865-34 In re Butrick, 185 Mass. 107, 67 N. E. 1044.

866-37 Woodward v. Keck, supra.

868-46 Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; Harlan v. Howard, 79 Ky. 373; In re Butrick, supra; Kansas City v. Scarritt, 169 Mo. 471, 487, 69 S. W. 283; Jones v. Neal (Tex. Civ.), 98 S. W. 417.

871-58 If there is evidence of contemporaneous acts showing that the instruments are genuine, proof of possession is not essential. Hodge v. Palms, 117 Fed. 396, 54 C. C. A. 570.

872-64 Other corroborative facts, such as references in later deeds, the appointment of an attorney in fact to recover the land from any adverse claimant and to sell it, and neighborhood belief as to the ownership of the land affected, have been considered. Jones v. Neal (Tex. Civ.), 98 S. W. 417.

873-69 O'Neal v. R. Co., 140 Ala. 378, 37 S. 275. See Texas etc. Co. v. Gwin, 29 Tex. Civ. 1, 67 S. W. 892, 68 S. W. 721.

873-71 Presumption limited. "We think there is a distinction to be drawn as to the extent of presumptions to be indulged in between those cases where, accompanying the possession of the property, title is relied on through judicial proceedings, where it is shown that the records have been loosely kept, and cases of private transactions between the parties. In the former, after great lapse of time, presumptions will be indulged in favor of the regularity of the proceedings, even to the extent of supplying important omissions; but in the latter the reason for such presumption does not exist." O'Neal v. R. Co., 140 Ala. 378, 37 S. 275.

875-81 White v. Hutchings, 40 Ala. 253.

An unacknowledged and unwitnessed deed is not admissible without proof of its execution. O'Neal v. R. Co., supra.

877-94 Handwriting of signer of pension vouchers need not be proved. Murphy v. Cady, 145 Mich. 33, 108 N. W. 493.

By witness familiar with signature. Hamilton v. Smith, 74 Conn. 374, 50 A. 884.

877-95 Roe v. Rawlins, 7 East (Eng.) 232; McCreary v. Coggeshall, 74 S. C. 42, 61, 53 S. E. 978; Cantey v. Platt, 2 McCord (S. C.) 261.

878-97 Sydnor v. Assn. (Tex. Civ.), 94 S. W. 451.

879-5 Recital that a sale was made under order of probate court establishes the fact where records destroyed. Williams v. Cessna, (Tex.

Civ.), 95 S. W. 1106, *cit.* White v. Jones, 67 Tex. 638, 4 S. W. 161.

879-9 Jones v. Neal (Tex. Civ.), 98 S. W. 417, citing several local cases.

880-14 Jones v. Neal, supra; Bentley v. McCall, 119 Ga. 530, 46 S. E. 645.

881-16 Bentley v. McCall, supra; Riviere v. Wilkens, 31 Tex. Civ. 454, 72 S. W. 608; Jones v. Neal (Tex. Civ.), 98 S. W. 417.

The copy must come from a record authorized by law. Williamson v. Work, 33 Tex. Civ. 369, 77 S. W. 266.

881-17 Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275.

882-21 Rule the same in Georgia. — Bentley v. McCall, 119 Ga. 530, 46 S. E. 645.

"When an original deed is assailed as a forgery, proof that it is thirty years old, with proof of possession of it by the grantee and other matters of corroboration, renders it admissible in evidence as an ancient document." Riviere v. Wilkens, 31 Tex. Civ. 454, 72 S. W. 608; Williamson v. Work, 33 Tex. Civ. 369, 77 S. W. 266.

Age of the record may be shown by extraneous evidence; the record of a deed is evidence that it was filed for record. Riviere v. Wilkens, supra.

885-36 Woodward v. Keck (Tex. Civ.), 97 S. W. 852.

885-39 If an affidavit of forgery is made under the statute the burden is upon the party offering a certified copy of an ancient and recorded deed to show the existence and genuineness of the original. Chatman v. Hodnett, 127 Ga. 360, 56 S. E. 439; Bentley v. McCall, 119 Ga. 530, 96 S. E. 645.

886-45 Sydnor v. Assn. (Tex. Civ.), 94 S. W. 451; Webb. v. Ritter, 60 W. Va. 193, 233, 54 S. E. 484. See "Deeds," Vol. 4, p. 187, n. 95.

886-46 Rollins v. R. Co., 73 N. J. L. 64, 62 A. 929; Webb v. Ritter, supra; Wilson v. Braden, 56 W. Va. 372, 49 S. E. 409, 107 Am. St. 822.

886-52 Woodward v. Keck (Tex. Civ.), 97 S. W. 852.

To show that grantee was administrator (Gunn v. Turner, 13 Ont. L. R. (Can.) 158), or that a person named was the widow or sole heiress of a decedent. Wilson v. Braden, supra.

887-56 Fuller v. Saxton, 20 N. J. L. 61.

887-57 Woodward v. Keck, supra.

ANIMALS [Vol. 1.]

Opinions as to identity, 889-3; *Range animals,* 889-3; *Brand evidence of ownership prior to recording,* 890-4; *Presumption of dog's viciousness,* 898-29; *Presumption of negligence in keeping dog,* 898-29.

889-1 Mark with unrecorded brand competent evidence of ownership (Hurst v. Ter., 16 Okla. 600, 86 P. 280), notwithstanding statute declares unrecorded brand not to be lawful. S. v. Cardelli, 19 Nev. 319, 10 P. 433.

Proof of ownership is not made by showing that horses bore certain brands and that one of the brands belonged to the person alleged to be their owner. S. v. DeWolfe, 29 Mont. 415, 74 P. 1084. See Hurst v. Ter., supra.

Not much weight given to brands as evidence of title under some circumstances. Turnbow v. Beckstead, 25 Utah 468, 71 P. 1062.

889-3 S. v. Wolfley, 75 Kan. 406, 89 P. 1046, 93 P. 337.

Opinions as to identity. — The opinions of experienced men are competent to show whether or not a colt, whose conduct they have observed in connection with a certain mare, was her foal. Miller v. Ter. (Ariz.), 80 P. 321.

Range animals. — Evidence that a horse has run at large upon partially inclosed land in an open country shows that he is within a statute concerning the burden of proof in case of the larceny of range animals. S. v. Eubank, 33 Wash. 293, 74 P. 378.

890-4 S. v. Dunn, 13 Idaho 9, 88 P. 235; Ter. v. Smith, 12 N. M. 229, 78 P. 42.

Brand evidence of ownership prior to recording. — The brand, when recorded, is evidence of ownership

prior to the time it was recorded if due diligence was used in having it recorded. Ter. v. Meredith (N. M.), 91 P. 731. Evidence of use of the brand in another jurisdiction, long before the time in question, is competent on the question of the owner's good faith in having it recorded, as well as to show defendant's knowledge of it as the brand of the owner. Ibid. But in Texas a certificate of registration recorded after the alleged theft is not admissible to prove ownership of the animal alleged to have been stolen; it is competent only to aid in establishing its identity. Turner v. S., 39 Tex. Cr. 322, 45 S. W. 1020.

890-6 An offer to pay the value of an animal may be proven as tending to show ownership. Seaborn v. S. (Tex. Cr.), 90 S. W. 649. See "ADMISSIONS," Vol. 1, p. 348, and that title, ante.

The age of an animal may be proven to show that it was old enough to have been branded before defendant sold his brand to plaintiff. Belknap v. Belknap (S. D.), 107 N. W. 692.

890-8 Turner v. S., 39 Tex. Cr. 322, 45 S. W. 1020; S. v. Dunn, 13 Idaho 9, 88 P. 235.

Certified copy competent evidence. Seaborn v. S. (Tex. Cr.), 90 S. W. 649.

891-11 Bill of sale from a third person to the person claiming title is admissible to prove ownership. Seaborn v. S., supra.

891-12 Under the Idaho statute the rule is to the contrary of that stated in the text. S. v. Dunn, 13 Idaho 9, 88 P. 235.

892-15 Burden of proof is on defendant whose horse has been permitted to run at large in the streets to show contributory negligence on plaintiff's part. Decker v. McSorley, 111 Wis. 91, 86 N. W. 554.

Proof of running at large. — The fact that an animal was permitted to run at large may be shown by the fact that it was frequently at large upon the streets prior to the accident. Ibid. See Donley v. Fowler, 147 Mich. 288, 110 N. W. 1097.

Suffering an animal to be at large is shown by evidence that he had broken through the fence into plaintiff's premises on three prior occasions. Hadtke v. Grzyll, 130 Wis. 275, 110 N. W. 225.

892-16 Hays v. Miller (Ala.), 43 S. 818.

Rule applies to keepers. — Molloy v. Starin, 113 App. Div. 852, 99 N. Y. S. 603.

The rule applies to bees; but the absolute liability attaching to the owners of wild beasts in confinement does not extend to the keeper of bees; it rests upon negligence in their management. Parsons v. Manser, 119 Ia. 88, 93 N. W. 86, 97 Am. St. 283; Petey Mfg. Co. v. Dryden, 5 Penne. (Del.) 166, 62 A. 1056.

The doctrine of scienter has no application to one who keeps a very large number of bees near the land of another; liability depends upon the reasonableness of the use made by defendant of his own premises. Lucas v. Pettit, 12 Ont. L. R. (Can.) 448.

892-17 Hays v. Miller (Ala.), 43 S. 818; Parsons v. Manser, 119 Ia. 88, 93 N. W. 86, 92 Am. St. 283, 62 L. R. A. 132.

893-18 Fritsche v. Clemow, 109 Ill. App. 355; Bogodonow v. L. & S. Co., 91 N. Y. S. 331; Quigley v. Exp. Co., 27 Pa. Super. 116; Curtis v. Schlosser, 14 Pa. C. C. 600; Eddy v. R. Co., 25 R. I. 451, 56 A. 677.

Notice to agent imputable to owner. Brown v. Green, 1 Penne. (Del.) 535, 42 A. 991; O'Neill v. Blase, 94 Mo. App. 648, 68 S. W. 764; Lynch v. Kineth, 36 Wash. 368, 78 P. 923.

Liability not always dependent on vicious propensity. — If a horse is where it should not be and does an injury, liability therefor may be established without proving knowledge of his vicious propensity. Healey v. Ballentine, 66 N. J. L. 339, 49 A. 511; Eddy v. R. Co., 25 R. I. 451, 56 A. 677.

894-19 Palmer v. Coyle, 187 Mass. 136, 72 N. E. 844; Talmage v. Mills, 80 App. Div. 382, 80 N. Y. S. 637.

Declarations made by the driver of a horse, otherwise than as a part of the res gestae, insufficient to show that the owner had notice. Quigley v. Exp. Co., 27 Pa. Super. 116. Such declarations inadmissible. Harris v.

Pack. Co., 43 Wash. 647, 86 P. 1125.

Identity of animal which inflicted the injury may be shown by evidence that one of a similar description, driven to the same wagon, had previously kicked at other persons. Tolmie v. Standard O. Co., 59 App. Div. 332, 69 N. Y. S. 841.

894-20 Proof of viciousness. After evidence of acts of viciousness has been given, further evidence of the reputation of the animal is admissible to prove defendant's knowledge of his viciousness. Hence, the manner in which he has been used and declarations of defendant may be proven. Palmer v. Coyle, 187 Mass. 136, 72 N. E. 844.

Knowledge of the tendency of a horse to bite may be inferred from proof that he was often muzzled. Poland v. Minshall, 96 N. Y. S. 200.

895-21 Subsequent conduct may be proven. — Palmer v. Coyle, supra; Harris v. Pack. Co., 43 Wash. 647, 86 P. 1125.

895-23 Photograph inadmissible to show that horse was gentle. Morgan v. Hendricks (Vt.), 67 A. 702.

Knowledge of the vicious character of an animal may be shown by proof that it was one of a herd of range animals, which were generally wild, vicious and dangerous. Harris v. Pack. Co., supra.

Habits of Horses. — "A reasonably accurate and reliable prophecy as to what a horse will do under given conditions may be premised upon a knowledge of what he ordinarily has done under similar conditions." Hence, evidence of his habits in like circumstances may be proven. Johnstone v. Tuttle (Mass.), 81 N. E. 886; Bemis v. Temple, 162 Mass. 342, 38 N. E. 970, 26 L. R. A. 254; Broderick v. Higginson, 169 Mass. 482, 48 N. E. 269, 61 Am. St. 296; Palmer v. Coyle, 187 Mass. 136, 72 N. E. 844; Buckley v. Exp. Co., 22 R. I. 358, 48 A. 7.

Burden of proof is on plaintiff to show negligence in caring for a domestic animal of dangerous propensities. Curtis v. Schlosser, 14 Pa. C. C. 600.

896-24 A license to keep a dog is not evidence of ownership by the licensee in the absence of proof to connect him with the issuance of it. Jordan v. Carberry, 185 Mass. 181, 69 N. E. 1062.

Burden of showing ownership on plaintiff. Laguttuta v. Chisholm, 65 App. Div. 326, 72 N. Y. S. 905.

897-26 In Louisiana the lightest fault on the part of the owner of a dog will render him liable to a person injured—some fault must be shown. Martinez v. Bernhard, 106 La. 368, 30 S. 901, 87 Am. St. 306, 55 L. R. A. 671. A later case makes it incumbent on the owner to show that the dog had always been of a kind temper, had never attempted to bite, and had never given occasion to suspect that he would bite; failing to do so, it is presumed the owner was at fault in not confining the dog. Bentz v. Page, 115 La. 560, 39 S. 599.

Variance. — If it is alleged that defendant kept a dog he knew was accustomed to bite, the action is not sustained by proof that defendant knew the dog had a savage and ferocious disposition. Fritsche v. Clemow, 109 Ill. App. 355.

897-27 Reynolds v. Hussey, 64 N. H. 64, 5 A. 458.

Keeping a dog chained is not evidence that his owner knew him to be vicious. Fritsche v. Clemow, supra.

The doctrine of constructive notice has not been extended to actions against the owners of dogs, particularly in the absence of proof that the dog was of a savage and ferocious nature. Fettman v. Heneken, 91 N. Y. S. 773, *cit.* Laherty v. Hogan, 1 N. Y. St. 84.

Admission by killing after mischief done is evidence of dog's vicious disposition. Peeler v. McMillan, 91 Mo. App. 310. But killing by another than defendant cannot be proved unless latter's consent be shown. Holmes v. Murray, 207 Mo. 413, 105 S. W. 1085.

897-28 Gladstone v. Brinkhurst, 70 N. J. L. 130, 56 A. 142; Boler v. Sorgenfrei, 86 N. Y. S. 180; Fitzgerald v. Warholy, 109 App. Div. 606, 96 N. Y. S. 243; Mann v. Weiand, 81 Pa. 243.

Scope of owner's knowledge. Proof that a dog has a propensity

to attack strangers is not cause for imputing to his owner notice that he is likely to injure the person who is temporarily caring for him. Emmons v. Stevane, 73 N. J. L. 349, 64 A. 1014.

Attacks on other dogs may be shown where a person has been molested. Rowe v. Ehrmanntraut, 92 Minn. 17, 99 N. W. 211.

Evidence tendered under a specific offer to show that the dog had attacked the witness cannot be used on appeal to show its general behavior. Deitrich v. Kettering, 212 Pa. 356, 61 A. 927.

898-29 Presumption of dog's viciousness. — It has been suggested that when a person keeps a dog for the purpose of guarding his property it is not unreasonable to infer knowledge on his part of its vicious propensity and negligence in allowing him to be at large. Hanke v. Friederich, 140 N. Y. 224, 35 N. E. 487; Laguttuta v. Chisholm, 65 App. Div. 326, 72 N. Y. S. 905. In the absence of proof that a dog was kept for such a purpose or that his owner had knowledge of his viciousness, notice or negligence is not presumed because the dog was at large. Leonard v. Donoghue, 87 App. Div. 104, 84 N. Y. S. 60.

Presumption of negligence in keeping dog. — Negligence is presumed if notice of the dog's propensity to bite is proven. The silence of the owner and his wife on the trial raises the inference that their testimony would have been unfavorable. Boler v. Sorgenfrei, 86 N. Y. S. 180.

898-30 Brice v. Bauer, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. 454; Hahnke v. Friederich, 140 N. Y. 224, 35 N. E. 487; Grissom v. Hofins, 39 Wash. 51, 80 P. 1002.

Knowledge of a member of the family of the owner of a dog is the knowledge of the owner. Duval v. Barnaby, 75 App. Div. 154, 77 N. Y. S. 337; Boler v. Sorgenfrei, 86 N. Y. S. 180; Soronen v. VonPustau, 112 App. Div. 437, 98 N. Y. S. 431.

Owner's knowledge not shown by proof that an employe gave warning concerning the dog. Brogodonow v. L. & S. Co., 91 N. Y. S. 331.

898-31 Where absolute liability for the injuries done by dogs is imposed evidence of their character or disposition is not admissible. Kelly v. Alderson, 19 R. I. 544, 37 A. 12; Carroll v. Marcoux, 98 Me. 259, 56 A. 848.

A witness may testify of a dog's reputation though his information came from a single individual. Fisher v. Weinholzer, 91 Minn. 22, 97 N. W. 426.

899-34 Grissom v. Hofins, 39 Wash. 51, 80 P. 1002.

900-36 Hunter v. Exp. Co., 98 N. Y. S. 234.

Injury to child who had previously annoyed dog. Schilling v. Smith, 76 App. Div. 464, 78 N. Y. S. 586.

If negligence is alleged it must be proved. Cooper v. Cashman, 190 Mass. 75, 76 N. E. 461. In the absence of a statute conditioning the right of action, plaintiff need not prove, in the first instance, his freedom from negligence. Hussey v. King, 83 Me. 568, 22 A. 476.

900-37 Feldman v. Sellig, 110 Ill. App. 130; Garland v. Hewes, 101 Me. 549, 64 A. 914.

The prima facie case made by showing that a dangerous animal was kept with knowledge of his propensity can be rebutted only by proof that plaintiff, with knowledge of the animal's tendencies, wantonly excited him or voluntarily or unnecessarily put himself in the way of the animal. Hunter v. Exp. Co., 98 N. Y. S. 234.

Burden of proof. — Under a statute giving a right of action for an injury done by a dog without fault of plaintiff, the burden is on the latter to prove that he was free from negligence. Garland v. Hewes, 101 Me. 549, 64 A. 914.

Presumption under fence laws. — In absence of evidence there is a presumption of fact, if an animal is killed at a point where a railroad company is required to maintain fences, that the entry was made at the point of collision. Sowders v. R. Co., 127 Mo. App. 119, 104 S. W. 1122.

900-39 Dees v. R. Co., 127 Mo. App. 353, 104 S. W. 485; Logan v. R. Co., 111 Mo. App. 674, 86 S. W. 565.

Quantum of proof. — If the evidence is circumstantial the circumstances proved must negative every other reasonable hypothesis save

that of defendant's negligence. Gibson v. R. Co. (Ia.), 113 N. W. 927.

901-40 Dees v. R. Co., 127 Mo. App. 353, 104 S. W. 485.

901-42 Warrick v. Reinhardt (Ia.), 111 N. W. 983; Texas & P. R. Co. v. Slator (Tex. Civ.), 102 S. W. 156.

Proof of pedigree may be shown by a printed register or book of pedigrees kept up by or in the interest of breeders for the information of the public, if it is generally accepted as authoritative. Warrick v. Reinhardt, supra.

In the absence of proof of market value the intrinsic value of an animal may be proven. International etc. R. Co. v. Carr (Tex. Civ.), 91 S. W. 858; Gulf etc. R. Co. v. Cooper (Tex. Civ.), 88 S. W. 301. See "VALUE."

902-43 Columbus R. Co. v. Woolfolk, 128 Ga. 631, 58 S. E. 152.

902-44 St. Louis etc. R. Co. v. Philpot, 72 Ark. 23, 77 S. W. 901; Ft. Worth etc. R. Co. v. Hickox (Tex. Civ.), 103 S. W. 202.

ANSWERS [Vol. 1.]

906-3 Monroe C. Co. v. Becker, 147 U. S. 47; Dravo v. Fabel, 132 U. S. 487; Atlantic T. Co. v. Chapman, 145 Fed. 820, 76 C. C. A. 396; Fields v. Colby Comr., 102 Mich. 449, 60 N. W. 1048; Gates v. Grand Rapids, 134 Mich. 96, 95 N. W. 998; Hudson v. Barham, 101 Va. 63, 43 S. E. 189, 99 Am. St. 884.

907-5 Goggins v. Risley, 13 Pa. Super. 316; McGary v. McDermott, 207 Pa. 620, 57 A. 46; Alexander v. Muse, 112 Tenn. 233, 79 S. W. 117.

910-6 Jacobs v. Van Sickle, 127 Fed. 62, 61 C. C. A. 598; Ford v. Taylor, 137 Fed. 149; Pinney v. Pinney, 46 Fla. 559, 35 S. 95; Mayo v. Hughes, 51 Fla. 495, 40 S. 499; Ocala F. & M. Wks. v. Lester, 49 Fla. 347, 369, 38 S. 56; Hannaman v. Wallace, 97 Ill. App. 46; Salsbury v. Ware, 183 Ill. 505, 56 N. E. 149; Evans v. Evans (N. J. Eq.), 59 A. 564; Goggins v. Risley, 13 Pa. Super. 316; Bussier v. Weekey, 11 Id. 463; Galbraith v. Galbraith, 190 Pa. 225, 42 A. 683; McGary v. McDermott, 207 Pa. 620, 57 A. 46; Lance v. Lehigh, 16 Phila. (Pa.) 38; Hopkins v. Stoneroad, 21 Pa. Super. 168.

Evidence of one witness with corroborating circumstances, sufficient. Gundaker v. Ehrgott, 209 Pa. 284, 58 A. 476.

In Georgia it is only where discovery is sought that two witnesses or one witness and corroborating circumstances are required to rebut the answer, as to facts within defendant's knowledge, responsive to the discovery sought. Toomer v. Warren, 123 Ga. 477, 51 S. E. 393.

910-7 Phelps v. Root, 78 Vt. 493, 63 A. 941; Veile v. Blodgett, 49 Vt. 270; Field v. Wilbur, 49 Vt. 157; McLane v. Johnson, 59 Vt. 237, 9 A. 837.

910-8 Gantt v. Cox, 199 Pa. 208, 48 A. 992.

915-21 **Testimony that is evasive or in conflict with the answer** may, in connection with other circumstances, overcome the effect of the answer as evidence. Ocala etc. v. Lester, 49 Fla. 347, 38 S. 56.

The contradictions of the answer by the testimony must be of a serious character to wholly overcome the former. Rushbrook C. Co. v. Jenkins, 214 Pa. 517, 63 A. 891.

919-33 Southern L. & S. Co. v. Verdier, 51 Fla. 570, 40 S. 676; Mayo v. Hughes, 51 Fla. 495, 40 S. 499; Tyler v. Toph, 51 Fla. 597, 40 S. 624; Bussier v. Weekey, 11 Pa. Super. 463; Vashon v. Barrett, 105 Va. 490, 54 S. E. 705.

Burden of proving unresponsive allegations is upon defendant. Tyler v. Toph, 51 Fla. 597, 40 S. 624.

919-35 Godwin v. Phifer, 51 Fla. 441, 459, 41 S. 597.

If a replication is filed the usual general denial is not to be taken as true, but must be proven by a preponderance of the testimony. Pinney v. Pinney, 46 Fla. 559, 35 S. 95; Parken v. Safford, 48 Fla. 290, 37 S. 567.

920-37 Mayo v. Hughes, 51 Fla. 495, 40 S. 499; McCoy v. Kane, 19 Pa. Super. 187; Rushbrook C. Co. v. Jenkins, 214 Pa. 517, 63 A. 891; Veile v. Blodgett, 49 Vt. 270.

An answer is responsive when it directly traverses the substance of

each material allegation of the bill, is not made on information but on personal knowledge, and which introduces no new matter. Goggins v. Risley, 13 Pa. Super. 316. It is so when confined to such facts as are required by the bill and those inseparably connected with them, forming a part of one and the same transaction, whether it discharges or charges defendant. Maxwell v. L. & I. Co., 45 Fla. 425, 34 S. 255; Southern L. & S. Co. v. Verdier, 51 Fla. 570, 40 S. 676.

921-38 Pinney v. Pinney, 46 Fla. 559, 35 S. 95; Veile v. Blodgett, 49 Vt. 270.

926-44 Maxwell v. L. & I. Co., 45 Fla. 425, 34 S. 255.

926-47 Corporation v. Eden, 62 N. J. Eq. 542, 50 A. 606; Gantt v. Cox, 199 Pa. 208, 48 A. 992; Bussier v. Weckey, 11 Pa. Super. 463.

926-48 Lee v. Fertilizer Co., 44 Fla. 787, 796, 33 S. 456; Maxwell v. L. & I. Co., 45 Fla. 425, 34 S. 255; Godwin v. Phifer, 51 Fla. 441, 459, 41 S. 597; Roach v. Glos, 181 Ill. 440, 54 N. E. 1022; Bowers v. McGavock, 114 Tenn. 438, 85 S. W. 893.

927-49 Goddard v. R. Co., 104 Ill. App. 526.

928-51 Barton v. Alliance, 85 Md. 14, 33, 36 A. 658; Royston v. Horner, 75 Md. 557, 24 A. 25.

928-55 Barlow v. McDowell, 118 Ill. App. 506.

928-56 Klenk v. Byrne, 143 Fed. 1008; Mayo v. Hughes, 51 Fla. 495, 40 S. 499; Southern L. & S. Co. v. Verdier, 51 Fla. 570, 40 S. 676; Hoock v. Sloman, 145 Mich. 19, 108 N. W. 447; Greilick v. Rogers, 144 Mich. 313, 107 N. W. 885; Craft v. Schlag, 61 N. J. Eq. 567, 49 A. 431.

All the answer must be used as admissions if any of it is used — the explanations given as well as the direct statements. Reager v. Chappelear, 104 Va. 14, 51 S. E. 170; Clinch etc. Co. v. Harrison, 91 Va. 122, 21 S. E. 660. See "ADMISSIONS," ante.

Admissions in an answer not mentioned in the note of testimony nor in the order of submission are not evidence. Tait v. Land Mtg. Co., 132 Ala. 193, 31 S. 623.

Admissions binding. — Millard v. Millard, 123 Ill. App. 264; Chicago etc. R. Co. v. P., 120 Ill. App. 306.

928-57 General E. Co. v. Bullock, 138 Fed. 412; General E. Co. v. Mfg. Co., 128 Fed. 738, 63 C. C. A. 448; Farley v. Kittson, 120 U. S. 303; Atlantic T. Co. v. Chapman, 145 Fed. 820, 76 C. C. A. 396; Besson & Co. v. Goodman, 147 Fed. 887.

928-59 Braxton v. Liddon, 49 Fla. 280, 38 S. 717.

929-61 Mankey v. Willoughby, 21 App. D. C. 314; Parken v. Safford, 48 Fla. 290, 37 S. 567; Marvel v. Fralinger (N. J. Eq.), 63 A. 166.

929-62 Conly v. Nailor, 118 U. S. 127; Jacobs v. Van Sickle, 127 Fed. 62, 61 C. C. A. 598.

931-65 Sworn answers to interrogatories. — If an unverified answer is prayed for and the body of the bill contains interrogatories addressed to the defendant, to which he makes verified answers, these are not entitled to more weight than an ex parte affidavit. Marvel v. Fralinger, 67 N. J. Eq. 622, 63 A. 166.

932-66 Competent on application for receiver. — A verified answer, under amendment to equity rule 41, can be used at the hearing of an ex parte application for appointment of a receiver with the probative force of an affidavit, and its allegations sustain the issue to the same extent as in other cases (Ford v. Taylor, 137 Fed. 149). Answer is not conclusive upon the court. Barron v. Meyers, 140 Mich. 431, 103 N. W. 842.

932-67 Craft v. Schlag, 61 N. J. Eq. 567, 49 A. 431.

Waiver. — If complainant recognizes the answer as sufficient for a hearing upon it and the bill, he waives formal defects in the verification of the answer. Lee v. Bradley, 44 Fla. 787, 796, 33 S. 456.

934-70 Veile v. Blodgett, 49 Vt. 270; Baugher v. Conn, 1 Pa. C. C. 184.

935-72 Gantt v. Cox, 199 Pa. 208, 48 A. 992.

937-78 Competency of answer against co-defendant. — The answer of one defendant is evidence against a co-defendant where the latter claims through the person whose answer it is proposed to read; when the co-defendants are jointly interested as partners or otherwise, and where the respondent refers in his

own answer to that of his co-defendant for further information. The first rule has no application where the answer is of a defendant who had parted with all interest in the property involved when the answer was made and was therefore not interested in the result of the suit, his infant co-defendants asserting their rights to the property. Sawyers v. Sawyers, 106 Tenn. 597, 61 S. W. 1022.

APPEAL BONDS [Vol. 1.]

940-1 **Recitals in the bond** of matters recited as being of record, if not supported by the record, are of no avail. Parnass v. Ryerson, 128 Ill. App. 489.

940-5 **In the absence of a seal** on a bond executed by a corporation, the authority of the officer who executed it may be shown by the corporate records. Campbell v. Pope, 96 Mo. 468, 10 S. W. 187.

941-7 **In the absence of a denial of the fact** it will be presumed that an order of supersedeas was issued in accordance with official duty. U. S. F. & G. Co. v. Boyd, 29 Ky. L. R. 598, 94 S. W. 35.

941-8 **Introduction of bond in evidence** by the party who gave it is almost equivalent to a confession of judgment. Proudfoot v. Gudichsen, 102 Ill. App. 482.

942-30 **Dismissal of appeal.** — In an action of debt upon an appeal bond, a special traverse being pleaded, a certified copy of a court order is admissible to show that the appeal was not finally dismissed, and it may be shown that a motion was granted to reinstate it. Rogers v. Barth, 117 Ill. App. 323.

ARBITRATION AND AWARD [Vol. 1.]

952-14 Hurst v. Funston (Tex. Civ.), 91 S. W. 319.

Presumption. — If the duty of arbitrators required the parties to submit evidence, it is presumed they did so. Proctor & G. Co. v. Oil Co., 128 Ga. 606, 622, 57 S. E. 879.

955-24 **Under the California code** the exclusion of evidence must be shown to have prejudiced the rights of complainant; general statements do not establish the fact. Manson v. Wilcox, 140 Cal. 206, 73 P. 1004.

956-27 Vincent v. Ins. Co., 120 Ia. 272, 94 N. W. 458.

957-28 Manson v. Wilcox, 140 Cal. 206, 73 P. 1004; Wood v. Hingley, 5 Haw. 157; English v. School Dist., 165 Pa. 21, 30 A. 506; Van Winkle v. Ins. Co., 55 W. Va. 286, 47 S. E. 82.

958-37 Inverness R. & C. Co. v. McIsaac, 37 Can. Sup. 134.

An award is competent to show that a party claiming to be a party thereto by verbal submission was such party; such evidence may be met by oral or documentary proof showing the contrary. Levy v. Ins. Co., 58 W. Va. 546, 52 S. E. 449.

A prior award between the parties, made under an oral submission, may be proven by parol. Horne v. Hutchins, 71 N. H. 128, 51 A. 651.

The revocation of a written submission cannot be shown by parol. Mand v. Patterson, 19 Ind. App. 619, 49 N. E. 974.

959-39 **A copy of an agreement for arbitration** is admissible under the usual conditions, and its execution may be proved by circumstantial evidence. Proctor & G. Co. v. Oil & F. Co., 128 Ga. 606, 617, 57 S. E. 879.

960-46 **An award** can only be proven by the fact itself, and not by admissions or statements of the arbitrators. Miller v. Carnes, 95 Minn. 179, 103 N. W. 877.

961-50 **An award is admissible** to show what the contract between the parties was, though, as construed by the arbitrators, the contract was impossible of performance. E. E. Souther I. Co. v. Power Co., 109 Mo. App. 353, 84 S. W. 450.

964-58 Schmidt v. Glade, 126 Ill. 485, 18 N. E. 762; Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. 163.

965-61 **Evidence is inadmissible** to explain the action of arbitrators in reconsidering their original award and making a second one. Brown v. Durham, 110 Mo. App. 424, 85 S. W. 120.

967-69 Lehigh C. & N. Co. v. Zehner, 25 Pa. C. C. 124.

968-73 **Evidence as to the quali-**

fications of the umpire is immaterial if he never acted. Kaplan v. Ins. Co., 73 N. J. L. 780, 65 A. 188.

969-81 Notice of meeting is presumed to have been given if arbitrators appeared at the time and place appointed. Reesman v. Ins. Co., 3 Pa. C. C. 1.

970-83 Jensen v. Farm & Live Stock Co., 27 Utah 66, 74 P. 427.

A transcript of the evidence given before arbitrators is competent to show what matters they considered. Jensen v. Farm & Live Stock Co., supra.

Refusal to hear evidence concerning a certain matter may be shown. Harker v. Hough, 7 N. J. L. 428; Ruckman v. Ransom, 35 N. J. L. 565; Caldwell v. Brooks, 10 N. D. 575, 88 N. W. 700.

The omission from the award of one of the items submitted cannot be shown by parol at law, no misconduct being alleged against the arbitrators. Kaplan v. Ins. Co., 73 N. J. L. 780, 65 A. 188. "Even in equity, except in cases of accident or mistake, such decision is final unless corruption or misconduct be imputed to them." Ibid.

973-87 Jensen v. Farm & Live Stock Co., 27 Utah 66, 74 P. 427.

Proof of proceedings. — An arbitrator may testify as to the course of the argument before him, what claims were made and what admitted. Duke of Buccleuch v. Board, L. R. 5 H. of L. (Eng.) 418, 462. And upon what basis the valuation of the assets and liabilities was made. In re Southampton, 12 Ont. L. R. (Can.) 214.

974-93 Manson v. Wilcox, 140 Cal. 206, 73 P. 1004; Corrigan v. Rockefeller, 67 Ohio St. 354, 66 N. E. 95.

975-98 Impeachment of award. A paper containing an opinion of the arbitrators and signed and delivered by them with the award, giving reasons for the latter, if not referred to in the award, made a part of it nor required by the submission, is not admissible to impeach the award. Corrigan v. Rockefeller, supra; London D. Co. v. St. Pauls, 32 L. J. Q. B. (Eng.) 30.

Prejudice of an arbitrator is not shown by proof of service in a similar capacity; nor improper conduct by an error of judgment. Van Winkle v. Ins. Co., 55 W. Va. 286, 47 S. E. 82.

976-99 Fraud may be shown by proof that creates a belief, not merely a suspicion — it need not be clear, cogent and convincing. Perry v. Ins. Co., 137 N. C. 402, 49 S. E. 889.

976-2 Perry v. Ins. Co., supra.

Gross inadequacy, shocking to the moral sense, is evidence for the jury on the question of fraud and corruption or partiality and bias. Ibid.

976-3 Stone v. Baldwin, 226 Ill. 338, 80 N. E. 890; Seaton v. Kendall, 171 Ill. 410, 49 N. E. 561.

977-4 Mississippi C. O. Co. v. Buster, 84 Miss. 91, 36 S. 146; Van Winkle v. Ins. Co., 55 W. Va. 286, 47 S. E. 82.

977-5 Cross v. Cross, 56 W. Va. 185, 49 S. E. 129.

978-13 Proctor & G. Co. v. Oil & F. Co., 128 Ga. 606, 621, 57 S. E. 879; Notley v. Davies, 5 Haw. 43; Vincent v. Ins. Co., 120 Ia. 272, 94 N. W. 458; Seibert v. Ins. Co., 132 Ia. 58, 106 N. W. 507; Kaplan v. Ins. Co., 73 N. J. L. 780, 65 A. 188; Caldwell v. Brooks, 10 N. D. 575, 88 N. W. 700; Gardner v. Lincoln, 5 Phila. (Pa.) 24; Rigdill v. Dupree (Tex. Civ.), 85 S. W. 1166; Jensen v. Farm & Live Stock Co., 27 Utah 66, 74 P. 427; Van Winkle v. Ins. Co., 55 W. Va. 286, 47 S. E. 82.

978-14 Award as evidence. — An award made between others than the parties to the action and covering another subject-matter is not competent evidence. Multnomah County v. Williamette T. Co. (Or.), 89 P. 389.

ARSON [Vol. 1.]

981-2 Corpus delicti not shown. Brown v. C., 87 Va. 215, 12 S. E. 472; S. v. Pienick (Wash.), 90 P. 645.

Shown by circumstantial evidence. S. v. Millmeier, 102 Ia. 692, 72 N. W. 275. See "Corpus Delicti," Vol. 3, p. 659, and that title, infra.

Absence of owner's consent need not not be proven. Caddell v. S. (Tex. Cr.), 97 S. W. 705.

982-3 Davis v. S., 141 Ala. 62, 37 S. 676; S. v. Watson, 47 Or. 543, 85 P. 336. See "CIRCUMSTANTIAL EVIDENCE," Vol. 3, p. 60, and that title, infra.

Age and intelligence of accused and all surrounding circumstances may be regarded. S. v. Jackson, 3 Penne. (Del.) 15, 50 A. 270.

Intent is an essential element in a prosecution for maliciously burning property to defraud insurer. Mai v. P., 224 Ill. 414, 79 N. E. 633.

Compulsion must be shown to have been imminent and to have rested on a well founded apprehension of physical danger. Ross v. S. (Ind.), 82 N. E. 781.

982-4 Williams v. S., 125 Ga. 741, 54 S. E. 661; S. v. Millmeier, 102 Ia. 692, 72 N. W. 275; S. v. Jones, 106 Mo. 302, 17 S. W. 366; S. v. Pienick (Wash.), 90 P. 645.

Testimony that there was no explosive substance in the house burned is competent. Davis v. S., 141 Ala. 62, 37 S. 676.

982-5 Colbert v. S., 125 Wis. 423, 104 N. W. 61.

982-6 S. v. McLain, 43 Wash. 267, 86 P. 390.

982-7 A dwelling house may consist of the upper story of a building occupied as a dwelling though the lower story be used for business. S. v. Jones, 171 Mo. 401, 71 S. W. 680.

982-8 The title of vacant private property must be shown by deed. Goldsmith v. S., 46 Tex. Cr. 556, 81 S. W. 710.

Allegation as to ownership must be proven. P. v. Butler, 62 App. Div. 508, 71 N. Y. S. 129.

Defendant's receipt for rent is competent evidence. S. v. Watson, 47 Or. 543, 85 P. 336.

A certified copy of proceedings in bankruptcy showing the appointment of complainant as trustee is sufficient. Morgan v. S., 120 Ga. 499, 48 S. E. 238.

982-9 S. v. Perry, 74 S. C. 551, 54 S. E. 764; Harrell v. S., 121 Ga. 607, 49 S. E. 703.

Ownership of a public house of worship need not be proved. S. v. Hunt, 190 Mo. 353, 88 S. W. 719.

A lease by the owner does not constitute a variance from an allegation of ownership. Dunlap v. S. (Tex. Cr.), 98 S. W. 845.

983-10 If title is in an officer by virtue of the law it may be proved without the deed. Hester v. S. (Tex. Cr.), 51 S. W. 932; Morgan v. S., 120 Ga. 499, 48 S. E. 238.

983-12 Proof of identity of the property burned may be sufficient without proving ownership. P. v. Davis, 135 Cal. 162, 67 P. 59.

984-18 Prosecuting witness can not testify that he does not know of anyone who holds ill-will against him. Moore v. S. (Tex. Cr.), 103 S. W. 188.

985-23 Mitchell v. S., 140 Ala. 118, 37 S. 76; Kinchien v. S., 50 Fla. 102, 39 S. 467; P. v. Wagner, 180 N. Y. 58, 72 N. E. 577; S. v. Ledford, 133 N. C. 714, 45 S. E. 944; S. v. McLain, 43 Wash. 267, 86 P. 390.

Threats against an officer of the vessel burned may be proven. King v. Brown, 3 Haw. 114.

Conditional threats may be proved when there is evidence of bad feeling, though the condition has no longer any effect. C. v. Crowe, 165 Mass. 139, 42 N. E. 563.

985-24 Threats made against the owner of property located so near to that which burned as to cause the burned property to take fire may be proved. Bond v. C., 83 Va. 581, 3 S. E. 149.

986-28 Silence of accused. — Testimony that accused said nothing about persons in the house and that they could have been rescued if witness had known of their presence there is incompetent in the absence of anything to suggest that arson was committed as a cover for crime. S. v. Harvey, 130 Ia. 394, 106 N. W. 938.

986-29 Dunlap v. S. (Tex. Cr.), 98 S. W. 845.

Parol proof of the contents of a policy should not be allowed unless the failure to produce the paper is excused. S. v. Harvey, 130 Ia. 394, 106 N. W. 938. But if accused fails to produce the policy, the agent who issued it may testify of its contents, and refresh his memory from a record thereof. S. v. Mann, 39 Wash. 144, 81 P. 561.

987-31 The agent who issued the policy may testify that the property was not over insured. S. v. Harvey, 130 Ia. 394, 106 N. W. 938.

The sworn value of a stock of goods as given in an application for a trader's license may be proven, the application having been made shortly before the fire. Hooker v. S., 98 Md. 145, 160, 56 A. 390.

987-33 Impressions that complainant had informed defendant concerning the insurance are not provable. P. v. Gotshall, 123 Mich. 474, 82 N. W. 274.

987-34 The value of property is to be fixed as of the time it was insured, and in its then condition. P. v. Helwig, 146 Cal. 601, 80 P. 1030.

Accused may show what directions he gave as to the use of the insurance money when he left the policy for collection. P. v. Fitzgerald, 156 N. Y. 253, 267, 50 N. E. 846.

988-40 The existence of a mortgage on the burned property and the time of its payment may be shown. Joy v. Ins. Co., 32 Tex. Civ. 433, 74 S. W. 822.

The income of accused and its connection with the destroyed property may be shown, he having insurance on some personalty lost in the building. Dunlap v. S. (Tex. Cr.), 98 S. W. 845.

988-43 Evidence of threats by a third person is incompetent, nothing being shown to implicate him. S. v. McLain, 43 Wash. 267, 86 P. 390.

988-44 S. v. Perry, 74 S. C. 551, 54 S. E. 764.

988-45 Davis v. S., 141 Ala. 62, 37 S. 676; Bines v. S., 118 Ga. 320, 45 S. E. 376; Williams v. S., 125 Ga. 741, 54 S. E. 661.

Direct evidence of the burning and circumstantial evidence from which the jury could infer that the fire was not accidental establishes the corpus delicti independently of the confession. Westbrook v. S., 91 Ga. 11, 16 S. E. 100; Bines v. S., 118 Ga. 320, 45 S. E. 376.

If the burning is conceded, slight evidence that it was the result of incendiarism will render a confession admissible. S. v. Rogoway, 45 Or. 601, 78 P. 987, 81 P. 234.

989-46 Davis v. S., 141 Ala. 62, 37 S. 676; P. v. Davis, 135 Cal. 162, 67 P. 59; P. v. Wagner, 180 N. Y. 58, 72 N. E. 577; S. v. Rogoway, supra; Joy v. Ins. Co., 32 Tex. Civ. 433, 74 S. W. 822; S. v. Mann, 39 Wash. 144, 81 P. 561.

Implied admissions, when they constitute the strongest evidence both of the commission of a crime and defendant's guilt, should be proved beyond a reasonable doubt. Dunlap v. S. (Tex. Cr.), 98 S. W. 845.

Acts and declarations of defendant's wife inadmissible. Ray v. S., 43 Tex. Cr. 234, 64 S. W. 1057. But where the husband is being separately tried as accessory to his wife, her admissions, if competent against her, may be proved. S. v. Mann, 39 Wash. 144, 81 P. 561.

The removal of property from the burned building by accused may be shown; the fact that the fire was some days later only affects the weight of such evidence. S. v. Mann, supra.

An admission as to previous fires in other buildings is not competent in a prosecution for arson to secure insurance money. P. v. Brown, 110 App. Div. 490, 96 N. Y. S. 957.

Declaration of purpose to escape from prison may be proven. Bines v. S., 118 Ga. 320, 45 S. E. 376.

989-50 S. v. Harvey, 130 Ia. 394, 106 N. W. 938.

990-51 The refusal of defendant to allow an examination of his goods after a fire cannot be shown in a prosecution for committing arson to get insurance money. P. v. Brown, 110 App. Div. 490, 96 N. Y. S. 957.

990-52 Possession of goods by accessory cannot be shown unless defendant connected therewith. Ray v. S., 43 Tex. Cr. 234, 64 S. W. 1057.

990-53 Raymond v. C., 29 Ky. L. R. 785, 96 S. W. 515; P. v. Butler, 62 App. Div. 508, 71 N. Y. S. 129; Smith v. S. (Tex. Cr.), 105 S. W. 501.

If threats have been made by accused against complaining witness and against the owner of other property, proof may be made of the burning of the latter, after circumstantial evidence has been received to connect defendant therewith, to show a guilty agency or intent in

setting fire to the property in question. Mitchell v. S., 140 Ala. 118, 37 S. 76.

Proof of a prior similar offense can not be made. S. v. Graham, 121 N. C. 623, 28 S. E. 409.

Former fires in property of the same owner cannot be proved unless a connection is shown between them and the fire in question. P. v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846.

An acquittal under a charge of causing the burning of other property is competent evidence to rebut the testimony indicated in the preceding paragraph. Ibid; Mitchell v. S., supra.

990-54 S. v. Thompson, 97 N. C. 496, 1 S. E. 921.

A prior crime cannot be shown as against accessories before the fact, though the arson is alleged to have been committed to conceal it. S. v. McCall, 131 N. C. 798, 42 S. E. 894.

Confession as to having caused another fire at the same time and as to larceny of a horse is competent. S. v. Jones, 171 Mo. 401, 71 S. W. 680.

991-56 A subsequent attempt may be proven. — Kramer v. C., 87 Pa. 299.

992-58 Shoes and proof of footprints. — Davis v. S., 141 Ala. 62, 44 S. 545; Heidelbaugh v. S. (Neb.), 113 N. W. 145; Krens v. S., 75 Neb. 294, 106 N. W. 27; Moore v. S. (Tex. Cr.), 103 S. W. 188.

992-59 Evidence of experiments is not competent to sustain a theory that accused caused the fire by certain means in the absence of proof showing that the thing experimented with was used by him. Hooker v. S., 98 Md. 145, 56 A. 390. Experiments made under dissimilar conditions are not of evidentiary value. P. v. Gotshall, 123 Mich. 474, 82 N. W. 274.

992-60 Expert testimony is incompetent on the question of the effect of opening doors and windows on the draft. P. v. Brown, 110 App. Div. 490, 96 N. Y. S. 957.

An opinion as to who made footprints is incompetent if given by a witness who has not qualified himself. Heidelbaugh v. S. (Neb.), 113 N. W. 145. But it is said that identity of footprints may be established by opinions. S. v. Millmeier, 102 Ia. 692, 72 N. W. 275; Crumes v. S., 28 Tex. App. 516, 13 S. W. 868; S. v. Ward, 61 Vt. 153, 17 A. 483.

It is not proper to show that the chief of the fire department had the premises watched at night for a week after the fire. P. v. Brown, 110 App. Div. 490, 96 N. Y. S. 957.

992-61 Circumstantial evidence insufficient. Scott v. C., 28 Ky. L. R. 911, 90 S. W. 960; S. v. Morney, 196 Mo. 43, 93 S. W. 1117; P. v. Wagner, 71 App. Div. 399, 75 N. Y. S. 950; P. v. Johnson, 70 App. Div. 308, 75 N. Y. S. 234; P. v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846; Jones v. C., 103 Va. 1012, 49 S. E. 663.

Insufficient evidence. — Chapman v. S., 157 Ind. 300, 61 N. E. 670.

Circumstantial evidence sufficient. S. v. Millmeier, 102 Ia. 692, 72 N. W. 275; P. v. Wagner, 180 N. Y. 58, 72 N. E. 577; S. v. McLain, 43 Wash. 267, 86 P. 390.

ASSAULT AND BATTERY
[Vol. 1.]

Intention to do harm, 995-1; *Consent to surgical operation,* 995-1; *Neglect to make outcry,* 997-5; *Social ostracism of plaintiff,* 997-5; *Plea of guilty, competent,* 997-7; *Declarations in answer to questions competent,* 1011-13.

995-1 Intention to do harm need not be shown; it is enough to prove that the assault and battery was wrongful and unlawful, or the result of negligence. (Mohr v. Williams, 95 Minn. 261, 104 N. W. 12; Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403; Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132.) Proof that defendant was a lunatic does not absolve him from liability for compensatory damages. Feld v. Borodofski, 87 Miss. 727, 40 S. 816. See generally, as to intent, Gibeline v. Smith, 106 Mo. App. 545, 80 S. W. 961.

Consent to surgical operation on one ear does not justify an operation on the other; it is for the jury to find

whether consent was to be implied from the circumstances. Mohr v. Williams, 95 Minn. 261, 104 N. W. 12.

Presumption. — The legal presumption of innocence attends the defendant. McKinstry v. Collins, 76 Vt. 221, 56 A. 985. *Contra*, Kurz v. Doerr, 180 N. Y. 88, 72 N. E. 926, 86 App. Div. 507, 83 N. Y. S. 736.

Preponderance of evidence will justify a recovery if the assault and battery was not of a character to be attended with infamy or in any way felonious. (Solomon v. Buechele, 119 Ill. App. 595.) In some cases the rule is so declared without qualification (Blackmore v. Ellis, 70 N. J. L. 264, 57 A. 1047; Kurz v. Doerr, 180 N. Y. 88, 72 N. E. 926; Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640), though exemplary damages be claimed. St. Ores v. McGlashen, 74 Cal. 148, 15 P. 452.

The time alleged is not of the essence of the wrong. Bruske v. Neugent, 116 Wis. 488, 93 N. W. 454.

996-3 **The accidental striking** of one person in a malicious effort to hit another is malicious. Davis v. Collins, 69 S. C. 460, 48 S. E. 469.

997-5 Birmingham etc. Co. v. Mullen, 138 Ala. 614, 35 S. 701; LeLaurin v. Murray, 75 Ark. 232, 87 S. W. 131; Levidow v. Starin, 77 Conn. 600, 60 A. 123; Dannenberg v. Berkner, 118 Ga. 885, 45 S. E. 682; Chicago C. T. Co. v. Mahoney, 230 Ill. 562, 82 N. E. 868; Conklin v. R. Co. (Mass.), 82 N. E. 23; Henderson v. Agon, 148 Mich. 252, 111 N. W. 778; Shaefer v. R. Co., 98 Mo. App. 445, 72 S. W. 154; Robinson v. Stahl (N. H.), 67 A. 577.

Previous threats may be proven on the issue of self-defense, plaintiff being the aggressor. Moran v. Vicroy, 24 Ky. L. R. 2415, 74 S. W. 244.

Threats need not be personal to the plaintiff if they were so broad as to indicate general malice including him within its scope. Conklin v. R. Co. (Mass.), 82 N. E. 23.

Neglect to make outcry does not create legal presumption against woman assaulted (Witzka v. Moudry, 83 Minn. 78, 85 N. W. 911). But silence may be proved, as may continuance of cordial relations between her and defendant, and any other facts not harmonizable with experience. Champagne v. Haney, 189 Mo. 709, 88 S. W. 92.

The subject-matter of the altercation which led to the assault and battery may be shown. Coruth v. Jones, 77 Vt. 441, 60 A. 814.

Prior provocation may be shown to explain the res gestae. LeLaurin v. Murray, 75 Ark. 232, 87 S. W. 131.

Conduct after the assault immaterial (Lenfest v. Robbins, 101 Me. 176, 63 A. 729). But such conduct may be connected with the event (Shaefer v. R. Co., 98 Mo. App. 445, 72 S. W. 154). Evidence not confined to time of assault if exemplary damages are claimed. Prentiss v. Shaw, 56 Me. 427; Lenfest v. Robbins, 101 Me. 176, 63 A. 729.

Trial of defendant is not part of the res gestae, and the record of his acquittal is not admissible. Stevens v. Friedman, 58 W. Va. 78, 51 S. E. 132.

Social ostracism of plaintiff and his family may be proved where the wrong was participated in by many. Britton v. Young, 36 Ind. App. 622, 74 N. E. 905, 76 N. E. 327.

997-6 Coruth v. Jones, 77 Vt. 441, 60 A. 814.

Disposition made of defendant's property after assault may be shown. Myers v. Moore, 3 Ind. App. 226, 28 N. E. 724.

997-7 **Plea of guilty, competent**; but circumstances under which it was made may be shown. Yaska v. Swendrzynski (Wis.), 113 N. W. 959; Wesnieski v. Vanek (Neb.), 99 N. W. 258; McKinstry v. Collins, 76 Vt. 221, 56 A. 985.

Testimony of another party who was sued for the same wrong is not admissible against defendant, though it was alleged that the party first sued acted under defendant's direction. Murphy v. Cuff, 177 N. Y. 314, 69 N. E. 697.

997-8 Sellman v. Wheeler, 95 Md. 751, 54 A. 512.

Expressions indicating pain are admissible if injuries are latent. Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961.

997-9 **Opinions as to the extent of the injuries** inflicted are competent (Morrize v. Begaso, 190 Mass. 87, 76 N. E. 460; Willet v. Johnson,

13 Okla. 563, 76 P. 174). But conclusions are not. Shaefer v. R. Co., 98 Mo. App. 445, 72 S. W. 154.

Plaintiff's appearance may be shown. Barlow v. Hamilton (Ala.), 44 S. 657.

998-11 Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961; Coruth v. Jones, 77 Vt. 441, 60 A. 814; Barton v. Bruley, 119 Wis. 326, 96 N. W. 815; Paulson v. S., 118 Wis. 89, 94 N. W. 771.

998-12 Lenfest v. Robbins, 101 Me. 176, 63 A. 729.

998-13 Dannenberg v. Berkner, 118 Ga. 885, 45 S. E. 682; Lowe v. Ring, 123 Wis. 107, 101 N. W. 381.

Defendant's disposition may be shown by his testimony on cross-examination as to an assault made on a third person. Lee v. Longwell, 136 Mich. 458, 99 N. W. 379.

Real character of plaintiff may be shown by specific instances and his reputed character by general reputation; and the first may be done though defendant had no knowledge of each instance. McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503; Henning v. Bartz, 1 Ohio C. C. (N. S.) 389. But see third note, infra.

Remoteness of instance of conduct is not ground for excluding evidence, it being presumed that there was no change in character. McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503.

998-15 Shaefer v. R. Co., 98 Mo. App. 445, 454, 72 S. W. 154.

Previous particular assaults and batteries committed by plaintiff cannot be proven to show that the injuries complained of were received in them, nor to prove his quarrelsome disposition. Lowe v. Ring, 123 Wis. 107, 101 N. W. 381.

998-16 Birmingham etc. Co. v. Mullen, 138 Ala. 614, 35 S. 701; Sellman v. Wheeler, 95 Md. 751, 54 A. 512.

Empty eye socket may be exhibited. Orscheln v. Scott, 90 Mo. App. 352.

Plaintiff's drunkenness may be shown, and the fact that he fell from a horse after the assault and did not complain of any injury until thereafter. Patrick v. Kenton, 23 Ky. L. R. 1408, 65 S. W. 157.

The physical condition of deceased wife of plaintiff, whose death resulted from an assault, may be testified to by him. McKinstry v. Collins, 76 Vt. 221, 56 A. 985.

Complaints made after the assault may be proven. Stevens v. Friedman, 58 W. Va. 78, 51 S. E. 132.

Photograph of plaintiff taken after assault inadmissible unless correctness shown (Martin v. Moore, 99 Md. 41, 57 A. 671); of assailant admissible. Henning v. Bartz, 1 Ohio C. C. (N. S.) 389.

Physical condition of a child born after the assault cannot be shown unless the issue is raised by the pleadings, and then it must be shown to have been the result of the assault. Haupt v. Swenson, 125 Ia. 694, 101 N. W. 520.

999-17 Henning v. Bartz, 1 Ohio C. C. (N. S.) 389.

Profert of assailant may be denied in discretion of court; the relative size of the two men may be shown otherwise. McFarland v. S., 83 Ark. 98, 103 S. W. 169.

999-18 Swigart v. Ballou, 106 Ill. App. 226.

It is for the jury to determine whether a parent, guardian or teacher has administered unreasonable, unnecessary and cruel punishment to a child under his care. Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640, *cit.* Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; Hinkle v. S., 127 Ind. 490, 26 N. E. 777; S. v. Washington, 104 La. 443, 29 S. 55, 81 Am. St. 141; Johnson v. S., 2 Humph. (Tenn.) 283, 36 Am. Dec. 322; Patterson v. Nutter, 78 Me. 509, 7 A. 273, 57 Am. Rep. 818; C. v. Randall, 4 Gray (Mass.) 36, and *ref.* to S. v. Jones, 95 N. C. 588, 59 Am. Rep. 282, as holding that the judgment of the parent is final unless malice is shown. See S. v. Thornton, 136 N. C. 610, 48 S. E. 602.

1000-22 Sweet v. Boyd (Ia.), 98 N. W. 601. Notwithstanding there is also a plea of the general issue. Wells v. Englehart, 118 Ill. App. 217.

Defense must be pleaded specially. Myers v. Moore, 3 Ind. App. 226, 28 N. E. 724.

1000-23 Wells v. Englehart, 118 Ill. App. 217; Torian v. Terrell, 29 Ky. L. R. 306, 93 S. W. 10; Monize v. Begaso, 190 Mass. 87, 76 N. E. 460; Orscheln v. Scott, 90 Mo. App.

352, 366; McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503; Gutzman v. Clancy, 114 Wis. 589, 90 N. W. 1081; Monson v. Lewis, 123 Wis. 583, 101 N. W. 1094.

Burden of proof is not upon defendant to establish justification under an allegation that the wrong was done without just cause or provocation, the answer being a general denial. Cassidy v. Cady, 49 Misc. 478, 97 N. Y. S. 1046.

Defendant need not show that he retreated or that he could not do so. Chabot v. Davis (N. H.), 68 A. 409.

Conclusion of witness that he acted in self-defense is incompetent testimony. It seems he may testify that he believed he was in danger and that he attempted to prevent the threatened injury. Evans v. Elwood, 123 Ia. 92, 98 N. W. 584.

Under a plea of the general issue self-defense cannot be proven. Blackmore v. Ellis, 70 N. J. L. 264, 57 A. 1047; Mangold v. Oft, 63 Neb. 397, 88 N. W. 507; Yaska v. Swendrznski (Wis.), 113 N. W. 959; Barlow v. Hamilton (Ala.), 44 S. 657; Price v. Grzyll (Wis.), 114 N. W. 100.

It is for the jury to find whether the force used in self-defense was such as reasonably appeared necessary; the honest belief of the party is immaterial. McQuiggan v. Ladd, 79 Vt. 90, 105, 64 A. 503.

1000-24 Justification is not shown by proof of a challenge to fight. Lizana v. Lang, 90 Miss. 469, 43 S. 477.

1000-27 It is for the jury to find whether defendant acted reasonably. Chabot v. Davis (N. H.), 68 A. 409.

1000-28 Milam v. Milam (Wash.), 90 P. 595.

1001-32 Smith v. Fahey (W. Va.), 60 S. E. 250.

An officer's return on process is only prima facie evidence in his favor, though the plaintiff was a party to the action in which it issued. McKinstry v. Collins, 76 Vt. 221, 56 A. 985.

Presumption. — Such return is fortified by the presumption in favor of the due performance of official duty. Ibid.

1001-33 Birmingham etc. Co. v. Mullen, 138 Ala. 614, 35 S. 701; Levidow v. Starin, 77 Conn. 600, 60 A. 123; Doerhoefer v. Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7; Sellman v. Wheeler, 95 Md. 751, 54 A. 512.

Petition for opening a highway is competent to show good faith on the part of public officers sued for an assault committed in pursuance of assumed duty. Chase v. Watson, 75 Vt. 385, 56 A. 10.

1001-34 Damages are presumed without proof of actual injury. Armstrong v. Rhoads, 4 Penne. (Del.) 151, 53 A. 435.

1001-35 LeLaurin v. Murray, 75 Ark. 232, 87 S. W. 131; Shoemaker v. Jackson, 128 Ia. 488, 104 N. W. 503; Carson v. Singleton, 23 Ky. L. R. 1626, 65 S. W. 821.

The test is not that of time, but of causal relation, and provocation happening a longer time previous than in ordinary cases may be shown in exceptional circumstances. Shoemaker v. Jackson, 128 Ia. 488, 104 N. W. 503. See Ward v. White, 86 Va. 212, 9 S. E. 1021, 19 Am. St. 883.

1001-36 McNeil v. Mullin, 70 Kan. 634, 79 P. 168.

1001-37 Ambiguous acts, such as the buying of beer, use of vituperative language, etc., cannot be proven. "The inquiry at the most cannot extend beyond acts of lewdness which quite necessarily evince looseness in sexual morals." Barton v. Bruley, 119 Wis. 326, 96 N. W. 815.

Declarations of a wife to her husband, made some hours after the alleged indecent assault was committed, may be shown. Hopkinson v. Perdue, 8 Ont. L. R. (Can.) 228.

1001-38 Plaintiff's quarrelsome disposition, having been proved on the issue of self-defense, may be considered in mitigation of compensatory damages, because it has a bearing upon his suffering on account of humiliation and disgrace. Lowe v. Ring, 123 Wis. 107, 101 N. W. 381.

1002-39 Mitchell v. Gambill, 140 Ala. 316, 37 S. 290; LeLaurin v. Murray, 75 Ark. 232, 87 S. W. 131; Armstrong v. Rhoads, 4 Penne. (Del.) 151, 53 A. 435; Hubbard v. Perlie, 25 App. D. C. 477; Berkner

v. Dannenberg, 116 Ga. 954, 43 S. E. 463; Doerhoefer v. Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7; Mangold v. Oft, 63 Neb. 397, 88 N. W. 507; Palmer v. Winston, 131 N. C. 250, 42 S. E. 604; Daniel v. Giles, 108 Tenn. 242, 66 S. W. 1128; Barrette v. Carr, 75 Vt. 425, 56 A. 93.

In New York and Pennsylvania the rule is otherwise. Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 545; Genung v. Baldwin, 77 App. Div. 584, 79 N. Y. S. 569; Robinson v. Rupert, 23 Pa. 523.

Provocation of a minor may prevent a recovery from his father, unless the latter is shown to have been negligent. Miller v. Meche, 111 La. 143, 35 S. 491.

1002-40 Mitchell v. Gambill, 140 Ala. 316, 37 S. 290; Armstrong v. Rhoads, 4 Penne. (Del.) 151, 53 A. 435; Hendle v. Geiler, Penne. (Del.), 50 A. 632; Alabama & V. R. Co. v. Harz, 88 Miss. 681, 42 S. 201; Daniel v. Giles, 108 Tenn. 242, 66 S. W. 1128; Leachman v. Cohen (Tex. Civ.), 91 S. W. 809.

1003-41 LeLaurin v. Murray, 75 Ark. 232, 87 S. W. 131; Lizana v. Lang, 90 Miss. 469, 43 S. 477; Davis v. Collins, 69 S. C. 460, 48 S. E. 469.

1003-43 Doerhoefer v. Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7; Edwards v. Wessinger, 65 S. C. 161, 43 S. E. 518.

Proof of conviction and fine not competent to mitigate damages. Armstrong v. Rhoads, 4 Penne. (Del.) 151, 53 A. 435.

1003-44 Record is admissible to show plea of guilty, but is not conclusive as to the right to recover (Wagner v. Gibbs, 80 Miss. 53, 31 S. 434; Hendle v. Geiler, Penne. (Del.), 50 A. 632). If unexplained, such plea to a charge of having wilfully, maliciously and unlawfully committed the offense justifies an award of exemplary damages. Wagner v. Gibbs, supra.

The arrest of defendant being shown by plaintiff, the former may prove that he was discharged. James v. R. Co., 80 App. Div. 364, 80 N. Y. S. 710.

1004-45 Wagner v. Gibbs, 80 Miss. 53, 31 S. 434.

1004-47 Shupack v. Gordon, 79 Conn. 298, 64 A. 740; Berkner v. Dannenberg, 116 Ga. 951, 43 S. E. 463; Carmody v. Transit Co., 122 Mo. App. 338, 99 S. W. 495; Cody v. Gremmler, 121 Mo. App. 359, 99 S. W. 46; Stevens v. Friedman, 58 W. Va. 78, 51 S. E. 132.

1004-48 Barlow v. Hamilton (Ala.), 44 S. 657; Hendle v. Geiler, Penne. (Del.), 50 A. 632; Chicago C. T. Co. v. Mahoney, 230 Ill. 562, 82 N. E. 868; Doerhoefer v. Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7; Warner v. Talbot, 112 La. 817, 36 S. 743; Henderson v. Agon, 148 Mich. 252, 111 N. W. 778; Wagner v. Gibbs, 80 Miss. 53, 31 S. 434; Kitteringham v. McClutchie (Miss.), 41 S. 65; Baxter v. Magill, 127 Mo. App. 392, 105 S. W. 679; Kerley v. Germscheid (S. D.), 106 N. W. 136; Smith v. Fahey (W. Va.), 60 S. E. 250.

Injury to the feelings may be found though there is no direct evidence on the point. Morgan v. Langford, 126 Ga. 58, 54 S. E. 818.

In California exemplary damages may be awarded if there has been oppression, fraud or malice, actual or presumed. St. Ores v. McGlashen, 74 Cal. 148, 15 P. 452.

1004-49 Blackmore v. Ellis, 70 N. J. L. 364, 57 A. 1047; Lowe v. Ring, 123 Wis. 107, 115, 101 N. W. 381.

Malice will be inferred if defendant acted wantonly, grossly and outrageously. Chicago C. T. Co. v. Mahoney, 230 Ill. 562, 82 N. E. 868.

1004-50 Injury to reputation cannot be recovered for as special damages, though the assault was accompanied by improper solicitation, unless it is directly pleaded. Sletten v. Madison, 122 Wis. 251, 99 N. W. 1020. But see Wolf v. Trinkle, 103 Ind. 355, 3 N. E. 110.

1004-52 Willet v. Johnson, 13 Okla. 563, 76 P. 174; Baxter v. Magill, 127 Mo. App. 392, 105 S. W. 679.

In Kentucky the rule is otherwise. Givens v. Berkley, 21 Ky. L. R. 1653, 56 S. W. 158; Beavers v. Bowen, 24 Ky. L. R. 882, 70 S. W. 195. Earlier cases to the contrary are overruled.

1005-54 The pecuniary condition of plaintiff at the time of the assault and after is immaterial, the purpose for which it was offered not being disclosed. McQuiggan v. Ladd, 79 Vt. 90, 104, 64 A. 503.

The professional standing and reputation of plaintiff and the nature and extent of his practice before and after injury may be shown. Conklin v. R. Co. (Mass.), 82 N. E. 23.

1005-55 Hubbard v. Perlie, 25 App. D. C. 477; Evans v. Elwood, 123 Ia. 92, 98 N. W. 584; Doerhoefer v. Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7; Sellman v. Wheeler, 95 Md. 751, 54 A. 512; Gutzman v. Clancy, 114 Wis. 589, 90 N. W. 1081.

Compensation for mental suffering, though physical injury not inflicted. Carmody v. Transit Co., 122 Mo. App. 338, 99 S. W. 495.

Medical expenses incurred by a married woman. Willet v. Johnson, 13 Okla. 563, 76 P. 174.

1005-56 Pain, loss of time and medical treatment held to be special damages. Irby v. Wilde (Ala.), 43 S. 574.

Aggravation of plaintiff's mental disorder must be alleged. Lindsay v. R. Co., 141 Mich. 204, 104 N. W. 656.

1006-57 Moody v. S. (Tex. Cr.), 105 S. W. 1127; Greer v. S. (Tex. Cr.), 106 S. W. 359.

The presumption is that a teacher exercised his judgment properly in punishing a pupil. S. v. Thornton, 136 N. C. 610, 48 S. E. 602; Greer v. S. (Tex. Cr.), 106 S. W. 359.

1006-58 S. v. Schmidt, 19 S. D. 585, 104 N. W. 259.

1006-63 In Georgia the jury may find, from their own knowledge, that a pair of scissors is an instrument of the like kind as a sword, dirk or knife. Norwood v. S., 3 Ga. App. 325, 59 S. E. 828.

1006-64 Hext v. S. (Tex. Cr.), 90 S. W. 43.

1006-65 Great bodily injury. It is usually for the jury to find whether such injury was intended, and the evidence may disclose the circumstances under which it was inflicted and its nature and extent. Lambert v. S. (Neb.), 114 N. W. 775.

A declaration of intent to kill, firing in the direction of the person threatened, and flight, are circumstances to sustain a finding that the pistol was loaded. Mazzotte v. Ter., 8 Ariz. 270, 71 P. 911.

1006-66 In Texas the presumption of intent to injure arises from an infliction of injury. Thompson v. S. (Tex. Cr.), 89 S. W. 1081.

1006-67 Lambert v. S. (Neb.), 114 N. W. 775.

1006-68 Lipscomb v. S., 130 Wis. 238, 109 N. W. 986.

A prima facie case is made by the state when it proves that a gun was pointed at a person within shooting distance, with an apparent purpose to fire, the assailed person not knowing that it was not loaded. Lipscomb v. S., 130 Wis. 238, 109 N. W. 986, *cit.* S. v. Shepard, 10 Ia. 126; S. v. Herron, 12 Mont. 230, 29 P. 819; Beach v. Hancock, 27 N. H. 223; S. v. Cherry, 11 Ired. L. (N. C.) 475; Crow v. S., 41 Tex. 468; and *disappr.* Nevada v. Napper, 6 Nev. 113. To same effect, Lockland v. S., 45 Tex. Cr. 87, 73 S. W. 1054.

An assault may be committed by pointing an unloaded pistol at another if accompanied by a threat to shoot. Price v. U. S., 156 Fed. 950.

Discharge of pistol after the assault may be shown to prove that it had been loaded. P. v. Wells, 145 Cal. 138, 78 P. 470.

1007-70 Transactions preceding assault may be shown. Lockland v. S., 45 Tex. Cr. 87, 73 S. W. 1054.

1007-71 S. v. Thornhill, 177 Mo. 691, 76 S. W. 948; Gill v. S., 48 Tex. Cr. 39, 85 S. W. 1062; Davis v. S. (Tex. Cr.), 90 S. W. 646.

1007-72 All the conversation may be proven, what was said to the declarant and what he said. (Fields v. S., 46 Fla. 84, 94, 35 S. 185). At least whatever was said relating to the statement testified to on direct examination. S. v. Leuhrsman, 123 Ia. 476, 99 N. W. 140.

Self-serving declarations are not admissible. Ellington v. S., 48 Tex. Cr. 387, 88 S. W. 361. See "Admissions;" "Declarations."

1007-75 Whittle v. S. (Tex. Cr.), 95 S. W. 1084; Yeary v. S. (Tex. Cr.), 66 S. W. 1106.

1007-76 Lambert v. S. (Neb.), 114 N. W. 775.

Custom as to right of way of loaded wagon not provable if one of the parties did not know of the load. Tubbs v. S. (Tex. Cr.), 95 S. W. 112.

Assaulted party armed. — The prosecuting witness may testify whether or not he was armed. Tuberville v. S. (Miss.), 38 S. 333.

Simultaneous assaults on prosecutor and his wife may be shown. Gray v. S. (Tex. Cr.), 86 S. W. 764.

All the physical effects of the affray may be proven although two offenses may be established. Starr v. S., 160 Ind. 661, 67 N. E. 527; Scott v. S., 46 Tex. Cr. 305, 81 S. W. 950.

Acts of third party after the assault are immaterial. Moody v. S. (Tex. Cr.), 105 S. W. 1127.

Conduct of pupil, alleged to have been assaulted, under former teacher is immaterial in action against present teacher. Greer v. S. (Tex. Cr.), 106 S. W. 359.

1008-77 S. v. Tucker, 75 Conn. 201, 52 A. 741; Starr v. S., 160 Ind. 661, 67 N. E. 527; Thompson v. S. (Tex. Cr.), 89 S. W. 1081; Yeary v. S. (Tex. Cr.), 66 S. W. 1106; Wilson v. S. (Tex. Cr.), 78 S. W. 232. See Cole v. S., 2 Ga. App. 734, 59 S. E. 24.

1008-78 Herd v. S. (Tex. Cr.), 99 S. W. 1119; Chambless v. S., 49 Tex. Cr. 354, 94 S. W. 220. But see S. v. McCann, 43 Or. 155, 72 P. 137.

Continuous assault may be shown. S. v. Koonse, 123 Mo. App. 655, 101 S. W. 139.

Declarations made the day after the assault may be proven to show whether the violence was merely threatened or actually begun. S. v. McFadden, 42 Wash. 1, 84 P. 401.

1008-79 S. v. Raymo, 76 Vt. 430, 57 A. 993.

1008-80 S. v. Kapelino (S. D.), 108 N. W. 335; Martin v. S., 47 Tex. Cr. 174, 82 S. W. 657.

1008-81 Weapon probably used is admissible. S. v. Costello, 29 Wash. 366, 69 P. 1099.

1008-82 Proof of the finding of other weapons than that alleged on the person of the defendant is improper, but not fatal to a judgment for the state. P. v. Wells, 145 Cal. 138, 78 P. 470.

1008-83 Prosecutor's physical condition may be shown to aid jury in fixing amount of fine. Beavers v. S. (Ala.), 44 S. 401.

1009-84 S. v. Quong, 8 Idaho 191, 67 P. 491; Whittle v. S. (Tex. Cr.), 95 S. W. 1084.

1009-88 Mayes v. S. (Tex. Cr.), 100 S. W. 386.

1009-91 Garner v. S., 28 Fla. 113, 133, 9 S. 835; Fields v. S., 46 Fla. 84, 93, 35 S. 185; Starr v. S., 160 Ind. 661, 67 N. E. 527.

The person threatened need not be named; the jury may determine who was referred to. Starr v. S., 160 Ind. 661, 67 N. E. 527.

1009-92 Whittle v. S. (Tex. Cr.), 95 S. W. 1084.

1009-95 Intent may be inferred from the manner of the attack, the weapon used and the location and character of the wound inflicted (Newport v. S., 140 Ind. 299, 39 N. E. 926; Starr v. S., 160 Ind. 661, 67 N. E. 527; Larkin v. S., 163 Ind. 375, 71 N. E. 959). And from the doing of the act. S. v. Surry, 23 Wash. 655, 63 P. 557; S. v. Thornton, 136 N. C. 610, 48 S. E. 602; S. v. Koonse, 123 Mo. App. 655, 101 S. W. 139.

Intent is not to be inferred where no physical injury done, though statute gives a right of action for bodily pain, constraint, sense of shame or other disagreeable mental emotion (Tubbs v. S. (Tex. Cr.), 95 S. W. 112). It may be otherwise in case of indecent assaults upon women by men (Ibid., and cases cited). And is otherwise where bodily injury is inflicted. Thompson v. S. (Tex. Cr.), 89 S. W. 1081.

Circumstantial evidence is competent to establish the intent to provoke another to commit an assault. Heard v. S., 38 Ind. App. 511, 78 N. E. 358.

Revenge is as reprehensible as malice. S. v. Thornton, 136 N. C. 610, 48 S. E. 602.

Presumption. — Where the intention exists to assault a person, and, by inadvertence, the assault is made on another, it is presumed to have been done with unlawful intent. P. v. Wells, 145 Cal. 138, 78 P. 470; P. v. Suesser, 142 Cal. 354, 75 P. 1093.

Motive is not an element of the offense of a secret assault; it may, however, be established for the purpose of identifying the wrongdoer. S. v. Carmon, 145 N. C. 481, 59 S. E. 657.

1009-96 S. v. Raymo, 76 Vt. 430, 57 A. 993.

Fear of the defendant before and at the time of assault may be shown but not by declarations of complainant anterior thereto. S. v. Raymo, supra.

1009-97 Other crimes cannot be shown. Simpson v. S., 47 Tex. Cr. 578, 85 S. W. 16; Livingston v. S., 47 Tex. Cr. 405, 83 S. W. 1111.

1010-98 Coleman v. S., 45 Tex. Cr. 120, 74 S. W. 24.

1010-3 Payment of fines for fighting cannot be proved by the state on cross-examination, fighting not involving moral turpitude. Pollok v. S. (Tex. Cr.), 101 S. W. 231.

1011-13 Declarations in answer to questions competent. — Statements of a young child in answer to questions from her mother are competent if part of the res gestae, though the child was not competent to testify. Thomas v. S., 47 Tex. Cr. 534, 84 S. W. 823.

A complaint of the defendant's conduct made in answer to an incidental question put to one child by another is competent to corroborate the testimony of the assaulted child, too young to give consent, and to show the consistency of her conduct. The court observed: The mere fact that the statement is made in answer to a question is not of itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will have that effect, but such a question as "What is the matter?" or "Why are you crying?" will not. King v. Osborne, (1905), 1 K. B. (Eng.) 551. See Queen v. Lillyman, (1896), 2 Q. B. (Eng.) 167.

1012-19 Wilson v. S. (Tex. Cr.), 67 S. W. 106.

1012-22 Confession of prosecutrix to defendent as to intercourse with others may be proven. Wilson v. S. (Tex. Cr.), 67 S. W. 106.

1012-24 Wilcox v. U. S. (Ind. Ter.), 103 S. W. 774.

1012-25 Evidence as to official character is incompetent in favor of a policeman charged with shooting a suspected person he was trying to arrest. S. v. Surry, 23 Wash. 655, 63 P. 557.

1013-30 Harrison v. S. (Tex. Cr.), 102 S. W. 412; Chapman v. S., 48 Tex. Cr. 18, 85 S. W. 1073; Edmondson v. S., 1 Ga. App. 116, 57 S. E. 947.

1013-31 Self-defense is not involved in a prosecution under the Oregon statute for an assault with a cowhide, being then armed with a deadly weapon. S. v. Taylor (Or.), 93 P. 252.

The party at fault, or one who voluntarily enters a combat, may not excuse himself on the ground of self-defense unless he shows that he withdrew therefrom. Starr v. S., 160 Ind. 661, 67 N. E. 527.

Duty of assaulted person to retreat. S. v. Harrigan, 4 Penne. (Del.) 129, 55 A. 5.

1013-32 Menach v. S. (Tex. Cr.), 97 S. W. 503; Money v. S. (Tex. Cr.), 97 S. W. 90; Greer v. S. (Tex. Cr.), 106 S. W. 359.

Directions given a teacher by school authorities are not provable to show the absence of malice. S. v. Thornton, 136 N. C. 610, 48 S. E. 602.

1013-33 The habit of the people with whom defendant associated of amusing themselves by throwing knives at each other cannot be proven. McCardell v. S. (Tex. Cr.), 77 S. W. 446.

Proof of heat of blood does not rebut the statutory presumption of malice. C. v. Scanlan, 2 Pa. C. C. 605.

1014-35 A warrant for defendant's arrest, sworn out by the prosecuting witness, is competent to show malice (S. v. Sullivan, 55 W. Va. 597, 47 S. E. 267). But it is otherwise as to a civil action to recover damages for the same assault involved in a criminal case, and as to filing charges against defendant as an officer. S. v. Ratledge, 5 Penne. (Del.) 91, 58 A. 944.

1014-36 Roper v. U. S. (Ind. Ter.), 104 S. W. 584.

1014-37 Evidence of a former assault of which complainant knew is competent. Turner v. S., 5 Ohio C. C. 537.

The habit of the prosecuting witness as to carrying arms may be shown. Fields v. S., 46 Fla. 84, 95, 35 S. 185.

1015-45 See P. v. Colletta, 65 App. Div. 570, 72 N. Y. S. 903.

1015-50 Shubert v. S., 127 Ga. 42, 55 S. E. 1045; Reese v. S. (Tex. Cr.), 98 S. W. 842.

1015-51 C. v. Brungess, 23 Pa. C. C. 13.

1015-52 Johnston v. U. S., 154 Fed. 445; Money v. S. (Tex. Cr.), 97 S. W. 90.

1015-53 Force may not be used to regain possession of chattels which have been parted with. Lockland v. S., 45 Tex. Cr. 87, 73 S. W. 1054.

1016-54 S. v. Scott, 142 N. C. 583, 55 S. E. 69; George v. S., 47 Tex. Cr. 545, 84 S. W. 1057.

1016-55 S. v. Scott, supra.

1016-57 P. v. Craig (Cal.), 91 P. 997; Gray v. S. (Tex. Cr.), 86 S. W. 764.

1017-70 The influence of the chastisement upon a pupil cannot be shown by the teacher. S. v. Thornton, 136 N. C. 610, 48 S. E. 602.

1018-75 Menach v. S. (Tex. Cr.), 97 S. W. 503.

1018-79 Money v. S. (Tex. Cr.), 97 S. W. 90.

In Georgia opprobrious words may justify a moderate assault (Price v. S., 118 Ga. 60, 44 S. E. 820). But the aggressor in the use of opprobrious words cannot establish a defense to a violent battery by showing the use of like words provoked by him. Sutton v. S., 2 Ga. App. 659, 58 S. E. 1108.

1018-81 Verbal abuse and insult may be shown only in mitigation of punishment. S. v. Leuhrsman, 123 Ia. 476, 99 N. W. 140.

1019-82 Wilson v. S. (Tex. Cr.), 78 S. W. 232.

1019-84 S. v. McCann, 43 Or. 155, 72 P. 137.

1019-85 S. v. Thornton, 136 N. C. 610, 48 S. E. 602.

Actual character may, it seems, be proven if defendant is a newcomer. Money v. S. (Tex. Cr.), 97 S. W. 90.

1020-91 King v. Osborne, (1905), 1 K. B. (Eng.) 551.

1020-92 A protest and exclamation by a child renders the rule as to assent inapplicable. P. v. Colletta, 65 App. Div. 570, 72 N. Y. S. 903.

1020-97 Tuberville v. S. (Miss.), 38 S. 333.

ASSENT [Vol. 2.]

Capacity, 3-5; *Knowledge*, 3-5.

3-5 Capacity to assent is to be determined in reference to the particular transaction and not in the abstract Jacks v. Estee, 139 Cal. 507, 73 P. 247.

Knowledge of the material facts is a prerequisite to assent. National Bk. v. Graham, 16 Colo. App. 498, 66 P. 684.

Presumption of knowledge. — See infra, 10-40.

4-8 Assent evidenced by a writing can only be overthrown by clear proof. Sure evidence of fraud, or some other ground from which want of assent may be inferred. Choctaw & M. R. Co. v. Newton, 140 Fed. 225, 71 C. C. 665.

4-9 Willson v. Fertilizer Co., 67 S. C. 467, 46 S. E. 279 (assent to assignment of a personal contract); Taylor etc. Co. v. Nichols (N. J.), 65 A. 695 (acting under a written contract); Royster v. Heck, 29 Ky. L. R. 634, 94 S. W. 8; Graves v. Morgan, 182 Mass. 161, 65 N. E. 50; Reddy v. Raymond, 194 Mass. 367, 80 N. E. 484 (assent by creditors to assignment by a debtor).

4-10 DeWolff v. Exp. Co. (Md.), 67 A. 1099. See Southern R. Co. v. Johnson, 2 Ga. App. 36, 58 S. E. 333 (shipper must declare value of goods shipped); Moore v. Thompson, 93 Mo. App. 336, 67 S. W. 680 (failure to repudiate after knowledge of an assignment)..

6-24 Russell v. May, 77 Ark. 89, 90 S. W. 617; Whitaker v. Whitaker, 175 Mo. 1, 74 S. W. 1029; Peters v. Berkemeier, 184 Mo. 393, 83 S. W. 747; Whiting v. Hoglund, 127 Wis. 135, 106 N. W. 391.

9-36 Henderson v. Mahoney, 31 Tex. Civ. 539, 72 S. W. 1019. See Webster v. Keck, 64 Neb. 1, 89 N. W. 410.

9-37 Walter Pratt & Co. v. Metzger, 78 Ark. 177, 95 S. W. 451; Whiting v. Davidge, 23 App. D. C. 156; Toledo Scale Co. v. Garrison, 28 App. D. C. 243; Rounsaville v. Mfg. Co., 127 Ga. 735, 56 S. E. 1030; Mower H. C. Co. v. Hill. (Iowa), 113 N. W. 467; Paris Mfg. Co. v. Carle, 116 Mo. App. 581, 92 S. W. 748; Johnston v. Ins. Co., 93 Mo. App. 580; Rose v. R. Co., 35 Mont. 70, 88 P. 767; Alexander v. Ferguson, 73 N. J. L. 479, 63 A. 998; Weddington v. Ins. Co., 141 N. C. 234, 54 S. E.

271; Reed v. Coughran (S. D.), 111 N. W. 559; Farlow v. Chambers (S. D.), 110 N. W. 94; Bostwick v. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246.

Proof of fraud rebuts the presumption of assent. Shook v. Mfg. Co., 75 Kan. 301, 89 P. 653; St. Louis J. Co. v. Bennett, 75 Kan. 743, 90 P. 246; Western Mfg. Co. v. Cotton, 31 Ky. L. R. 1130, 104 S. W. 758; Bostwick v. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246.

Intoxication as defense. — See Kuhlman v. Weiben, 129 Ia. 188, 105 N. W. 445; Hauber v. Leibold (Neb.), 107 N. W. 1042; Case Co. v. Meyers (Neb.), 111 N. W. 602; Waldron v. Angleman, 71 N. J. L. 166, 58 A. 568; Fowler v. Water Co., 208 Pa. 473, 57 A. 959.

Mental incapacity — effect of. Allen v. Allen, 79 Vt. 173, 64 A. 1110. See Jacks v. Estee, 139 Cal. 507, 73 P. 247.

Party unable to read. — In such cases fraud is more easily established. Muller v. Kelley, 116 Fed. 545; American J. Co. v. Witherington, 81 Ark. 134, 98 S. W. 695; Melle v. Candelora, 88 N. Y. S. 385; Hicks v. Harbison, 212 Pa. 437, 61 A. 958; Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830.

10-40 Cau v. R. Co., 194 U. S. 427; St. Louis etc. R. Co. v. Puckett, 82 Ark. 603, 101 S. W. 762; Mears v. R. Co., 75 Conn. 171, 52 A. 610, 56 L. R. A. 472; Atlantic C. L. R. Co. v. Dexter, 50 Fla. 180, 39 S. 634; Evansville etc. R. Co. v. Kevekordes (Ind. App.), 69 N. E. 1022; Chicago etc. Co. v. Dunlap, 71 Kan. 67, 80 P. 34; John Hood Co. v. Pneumatic Co., 191 Mass. 27, 77 N. E. 638; Phoenix Mfg. Co. v. R. Co., 196 Mo. 663, 94 S. W. 235; Nashville etc. R. Co. v. Stone, 112 Tenn. 348, 79 S. E. 1031; St. Louis etc. R. Co. v. McIntyre, 36 Tex. Civ. 399, 82 S. W. 346; Ullman v. R. Co., 112 Wis. 168, 88 N. W. 1103. *Contra,* Baltimore etc. R. Co. v. Fox, 113 Ill. App. 189; Elgin etc. R. Co. v. Mach. Co., 98 Ill. App. 311; Wabash R. Co. v. Thomas, 222 Ill. 337, 78 N. E. 777, 7 L. R. A. (N. S.) 1041; Chicago etc. R. Co. v. Stock Farm, 194 Ill. 9, 61 N. E. 1095; Central R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679. See Carpenter v. R. Co. (Del.), 64 A. 252.

Assent presumed from repeated shipments. — Texas R. Co. v. Byers Bros. (Tex.), 84 S. W. 1087.

Signature of bill of lading by shipper raises a presumption of assent. O'Malley v. R. Co., 86 Minn. 380, 90 N. W. 974. See Patrick v. R. Co. (Ind. Ter.), 88 S. W. 330.

To conditions on back of bill of lading. — Baltimore etc. R. Co. v. Doyle, 142 Fed. 669, 74 C. C. A. 245.

10-41 Hailparn v. S. S. Co., 50 Misc. 566, 99 N. Y. S. 464.

Presentation of shipping order by agent. — Russell v. R. Co., 70 N. J. L. 808, 59 A. 150, 67 L. R. A. 433.

10-42 Coggswell v. Weir, 101 N. Y. S. 188; Olds v. R. Co., 107 App. Div. 26, 94 N. Y. S. 924.

11-16 Keyes-M. Co. v. R. Co., 113 Mo. App. 144, 87 S. W. 553; Hoover v. R. Co., 113 Mo. App. 688, 88 S. W. 769; Houston etc. R. Co. v. Smith (Tex.), 97 S. W. 836; Chicago etc. R. Co. v. Halsell, 36 Tex. Civ. 522, 81 S. W. 1243. See Frasier v. R. Co., 73 S. C. 140, 52 S. E. 964.

Terms of an oral contract may be proved by an unsigned bill of lading. Missouri etc. R. Co. v. Patrick, 144 Fed. 632, 75 C. C. A. 434.

No merger where time to read the contract is not given. McNeill v. R. Co. (Tex.), 86 S. W. 32.

11-17 Adams Exp. Co. v. Carnahan, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647; Wolff v. Exp. Co. (Md.), 67 A. 1099; Southern Exp. Co. v. Stevenson, 89 Miss. 233, 42 S. 670. *Contra,* Southern Exp. Co. v. Briggs, 1 Ga. App. 294, 57 S. E. 1066.

Receipt book. — Assent is presumed where the receipt comes from a receipt book kept by the shipper and habitually used. Bernstein v. Weir, 40 Misc. 635, 83 N. Y. S. 48; Fried v. Exp. Co., 51 Misc. 669, 100 N. Y. S. 1007.

Delivery by agent. — Carrier must show the agent's authority to make a special contract. Hayes v. Exp. Co. (N. J.), 65 A. 1044; Woolsey v. R. Co., 114 App. Div. 281, 94 N. Y. S. 56; Adams Exp. Co. v. Adams, 29 App. D. C. 250.

Notice will not always raise a presumption of assent. Adams Exp. Co. v. Bratton, 106 Ill. App. 563; Hayes v. Exp. Co. (N. J.), 65 A.

1044. See McMillan v. Exp. Co., 123 Iowa 236, 98 N. W. 629.

12-48 Remmel v. Griffin, 81 Ark. 269, 99 S. W. 70; Parsons v. Lane, 97 Minn. 98, 106 N. W. 485; Johnson v. Casualty Co., 73 N. H. 259, 60 A. 1009; Rayburn v. Casualty Co., 138 N. C. 379, 50 S. E. 762; Travelers' Ins. Co. v. Jones, 32 Tex. Civ. 146, 73 S. W. 978.

Delivery of insurance application. See Aetna I. Co. v. Ryan, 53 Misc. 614, 103 N. Y. S. 756; Hartford F. Ins. Co. v. Whitman, 75 Ohio St. 312, 79 N. E. 459.

12-52 Malone v. Exp. Co., 86 N. Y. S. 1039; Calvin v. Fargo, 47 Misc. 642, 94 N. Y. S. 377; Engferman v. S. S. Co., 84 N. Y. S. 201.

12-53 Saunders v. R. Co., 128 Fed. 15, 62 C. C. A. 523; Boling v. R. Co., 189 Mo. 218, 88 S. W. 35; Rose v. R. Co., 35 Mont. 70, 88 P. 767; Aplington v. Pullman Co., 110 App. Div. 250, 97 N. Y. S. 329; Jacobs v. R. Co., 19 Pa. Super. 13; Mogill v. R. Co., 25 Pa. Super. 164; Dagnall v. R. Co., 69 S. C. 110, 48 S. E. 97; Gulf etc. R. Co. v. Riney (Tex.), 92 S. W. 54.

Presumption from signature. — Daniels v. R. Co., 62 S. C. 1, 39 S. E. 762.

Immateriality of lack of signature. Freeman v. R. Co., 71 Kan. 327, 80 P. 592.

Limitation must be expressed in clear and unambiguous language. Dow v. R. Co., 81 App. Div. 362, 80 N. Y. S. 941.

Posting of notice in waiting room insufficient. Norman v. R. Co., 65 S. C. 517, 44 S. E. 83.

Pass. — Duncan v. R. Co., 113 Fed. 508; Boering v. R. Co., 20 App. D. C. 500; Holly v. R. Co., 119 Ga. 767, 47 S. E. 188; Dow v. R. Co., 81 App. Div. 362, 80 N. Y. S. 941.

Mileage book. — Kast v. R. Co., 28 Pa. Super. 107.

Excursion ticket. — Jacobs v. R. Co., 208 Pa. 535, 57 A. 982.

1000 mile ticket. — Spiess v. R. Co., 71 N. J. L. 90, 58 A. 116.

13-54 The Majestic, 166 U. S. 375; Little Rock etc. R. Co. v. Record, 74 Ark. 125, 85 S. W. 421; McCollum v. R. Co., 31 Utah 494, 88 P. 663.

"Look on the back." — Freeman v. R. Co., 71 Kan. 327, 80 P. 592.

13-55 Suits against directors. The assent of a director to the wrongful incurring of indebtedness by a corporation will not be presumed from his mere negligence in attending to corporate business. Chick v. Fuller, 114 Fed. 23, 51 C. C. A. 648; Taylor v. C., 25 Ky. L. R. 374, 75 S. W. 244; Thomas v. Penniman (Md.), 66 A. 291; Appleton v. Malting Co., 65 N. J. Eq. 375, 54 A. 454; Williams v. Brewster, 117 Wis. 370, 93 N. W. 479.

ASSIGNMENTS [Vol. 2.]

16-1 Wm. Brandt's Sons & Co. v. Rubber Co., (1905) App. Cas. (Eng.) 454; In re Berkebile, 144 Fed. 572; Wooster v. Trowbridge, 120 Fed. 667, 57 C. C. A. 129; S. W. Com. Co. v. Owesney (Ariz.), 85 P. 724; Bauer v. State, 144 Cal. 740, 78 P. 280; Forsyth v. Ryan, 17 Colo. App. 511, 68 P. 1055; Andrews v. Church Co., 1 Ga. App. 560, 58 S. E. 130; Columbia F. & Tr. Co. v. Bank, 116 Ky. 364, 76 S. W. 156; Harlow v. Bartlett, 96 Me. 294, 52 A. 638; Leopuld v. Weeks, 96 Md. 280, 53 A. 937; Hovey v. R. Co., 135 Mich. 147, 97 N. W. 398; Ebel v. Piehl, 134 Mich. 64, 95 N. W. 1004; Sullivan v. Visconti, 68 N. J. L. 543, 53 A. 598; Donovan v. Middlebrook, 95 App. Div. 365, 88 N. Y. S. 607; Zilke v. Woodley, 36 Wash. 84, 78 P. 299; Dickerson v. Spokane, 35 Wash. 414, 77 P. 730.

A question of fact. — See Forsyth v. Ryan, 17 Colo. App. 511, 68 P. 1055; Hixson Map Co. v. Post Co. (Neb.), 98 N. W. 872.

Extent of assignment is governed by intent of parties. Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949.

Unexpressed intention is immaterial. Provident Nat. Bk. v. Hartnett Co. (Tex. Civ.), 100 S. W. 1024.

Direct testimony of assignor as to his intent is proper. Crocker v. Muller, 40 Misc. 685, 83 N. Y. S. 189.

16-2 Wooster v. Trowbridge, 120 Fed. 667, 57 C. C. A. 129; Bunnell v. Bronson, 78 Conn. 679, 63 A. 396. See Virginia-C. C. Co. v. McNair, 139 N. C. 326, 51 S. E. 949.

16-3 Cushing v. Chapman, 115 Fed. 237; Forsyth v. Ryan, 17 Colo. App. 511, 68 P. 1055; Mathison v. Magnuson, 226 Ill. 368, 80 N. E. 885; National City Bk. v. Torrent, 130 Mich. 259, 89 N. W. 938; Cogan v. Mfg. Co., 69 N. J. Eq. 358, 60 A. 408; Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927; Randel v. Vanderbilt, 78 N. Y. S. 124, *aff.* 180 N. Y. 547, 73 N. E. 1131.

Potential existence of debt is sufficient to sustain a parol equitable assignment. Campbell v. Grant Co., 36 Tex. Civ. 641, 82 S. W. 794.

17-4 Forsyth v. Ryan, 17 Colo. App. 511, 68 P. 1055; Gray v. Bever, 122 Ill. App. 1; Bernstein v. Horth, 85 N. Y. S. 263; Haller v. Ingraham, 101 N. Y. S. 789; German Ins. Co. v. Gibbs (Tex. Civ.), 92 S. W. 1068; Standifer v. Hdw. Co. (Tex. Civ.), 94 S. W. 144.

17-5 Harlow v. Bartlett, 96 Me. 294, 52 A. 638; Comer v. Floore (Tex. Civ.), 88 S. W. 246.

18-6 Lutter v. Grosse, 26 Ky. L. R. 585, 82 S. W. 278; Armstrong v. Chisolm, 99 App. Div. 465, 91 N. Y. S. 299.

Check. — Fortier v. Delgardo, 122 Fed. 604, 59 C. C. A. 180. See Provident Nat. Bk. v. Hartnett (Tex. Civ.), 97 S. W. 689, 100 S. W. 1024.

18-7 Andrews v. Frierson, 134 Ala. 626, 33 S. 6; W. U. Tel. Co. v. Ryan, 126 Ga. 191, 55 S. E. 21; Wamsley v. Ward, 61 W. Va. 65, 55 S. E. 998.

Claim for wages. — Western & A. R. Co. v. Inv. Co., 128 Ga. 74, 57 S. E. 100; Usher v. R. Co., 125 Ga. 809, 54 S. E. 704; Whitcomb v. Waterville, 99 Me. 75, 58 A. 68.

19-8 Wheelock v. Hull, 124 Ia. 752, 100 N. W. 863. See Columbia F. & T. Co. v. Bank, 116 Ky. 364, 76 S. W. 156; Campbell v. Grant, 36 Tex. Civ. 641, 82 S. W. 794; Wamsley v. Ward, 61 W. Va. 65, 55 S. E. 998.

20-9 Staninger v. Tabor, 103 Ill. App. 330; First State Bk. v. Thuet, 88 Minn. 364, 93 N. W. 1; Phinney v. S., 36 Wash. 236, 78 P. 927.

21-10 Kuhnes v. Cahill, 128 Ia. 594, 104 N. W. 1025; Columbia F. & T. Co. v. Bank, 116 Ky. 364, 76 S. W. 158; Pennell v. Ennis, 126 Mo. App. 355, 103 S. W. 147; Loan & Sav. Bk. v. Bank, 74 S. C. 210, 54 S. E. 364.

21-11 Bowker v. Haight, 146 Fed. 257; Donohoe-K. Bkg. Co. v. R. Co., 138 Cal. 183, 71 P. 93; Love v. Stock Exch., 5 Ind. Ter. 202, 82 S. W. 721, 67 L. R. A. 617, *aff.* in Poland v. Love (Ind. Ter.), 103 S. W. 759; Lonier v. Bank, 149 Mich. 483, 112 N. W. 1119; Pennell v. Ennis, 126 Mo. App. 355, 103 S. W. 147; Baltimore & O. R. Co. v. Bank, 102 Va. 753, 47 S. E. 837.

22-14 Donohoe-K. Bkg. Co. v. R. Co., 138 Cal. 183, 71 P. 93; Fulton v. Gesterding, 47 Fla. 150, 36 S. 56; Reviere v. Chambliss, 120 Ga. 714, 48 S. E. 122; Clark v. Bank, 72 Kan. 1, 82 P. 582; Borough v. Montgomery (N. J.), 60 A. 954; Izzo v. Ludington, 79 N. Y. S. 744, *aff.* 178 N. Y. 621, 70 N. E. 1100; Curtis Bros. L. Co. v. McLoughlin, 80 App. Div. 636, 80 N. Y. S. 1016; Nelson v. Nelson, 31 Wash. 116, 71 P. 749; Frederick v. Grain Co. (Wash.), 91 P. 570.

24-18 Duryea v. Harvey, 183 Mass. 429, 67 N. E. 351; Bone v. Holmes (Mass.), 81 N. E. 290 (bond).

Non-delivery not evidence of fraud upon creditors. Young v. Upson, 115 Fed. 192.

25-21 Howe v. Howe, 97 Me. 422, 54 A. 908; Ebel v. Piehl, 134 Mich. 64, 95 N. W. 1004.

25-22 Holmes v. Seaman, 117 App. Div. 381, 102 N. Y. S. 616; Rettig v. Becker, 11 Pa. Super. 395; Moody v. Rowland (Tex. Civ.), 102 S. W. 911.

Pre-existing debt as consideration. Bank of Yolo v. Bank, 3 Cal. App. 561, 86 P. 820.

Adequacy may be material question. Uncas Paper Co. v. Corbin, 75 Conn. 675, 55 A. 165.

But an assignment may be made as a gift. Ebel v. Piehl, 134 Mich. 64, 95 N. W. 1004; Henderson v. R. Co., 131 Mich. 438, 91 N. W. 630.

25-23 Evidence of consideration, immaterial. Forsyth v. Ryan, 17 Colo. App. 511, 68 P. 1055; Quigley v. Welter, 95 Minn. 383, 104 N. W. 236; Wallace v. LeRoy, 57 W. Va. 263, 50 S. E. 243. And see Campbell v. Grant Co., 36 Tex. Civ. 641, 82 S. W. 794; Devine v. Warner, 76 Conn. 229, 56 A. 562.

26-26 Driscoll v. Driscoll, 143 Cal. 528, 77 P. 471; McGuire v. Murphy, 107 App. Div. 104, 94 N. Y. S. 1005.

Mere possession of written evidence of chose in action raises no presumption that holder holds as assignee. Fitger v. Guthrie, 89 Minn. 330, 94 N. W. 888; Richardson v. Drug Co. (Mo.), 69 S. W. 398.

Assent of assignee to payment to the debtor not presumed. President v. Thorp, 79 Conn. 194, 64 A. 205.

26-27 Want of consideration must be proved by the party alleging it. Driscoll v. Driscoll, 143 Cal. 528, 77 P. 471; Colorado F. & I. Co. v. Kidwell, 20 Colo. App. 8, 76 P. 922. But see Rettig v. Becker, 11 Pa. Super. 395.

Assignee must establish all the facts upon which he bases his claim. Price Bros. v. Cushing (Ia.), 110 N. W. 1030 (in an assignment of profits, the fact that a business was carried on at a profit must be shown); Virginia-C. C. Co. v. McNair, 139 N. C. 326, 51 S. E. 949 (in an assignment of accounts, the fact that the specific accounts come within the general assignment must be shown. And see Standifer v. Hdw. Co. (Tex. Civ.), 94 S. W. 144; Reinhardt v. Mark, 29 Ky. L. R. 388, 93 S. W. 32 (assignment as security); Wagenhurst v. Wineland, 20 App. D. C. 85 (equitable assignee); Darlington-M. L. Co. v. Surety Co., 35 Tex. Civ. 346, 80 S. W. 238 (authority of agent); Gulf etc. R. Co. v. Eldredge, 35 Tex. Civ. 467, 80 S. W. 556 (notice to debtor).

27-28 Sintes v. Commerford, 112 La. 706, 36 S. 656; Quigley v. Welter, 95 Minn. 383, 104 N. W. 236; Houser v. Richardson, 90 Mo. App. 134; Cogan v. Mfg. Co., 69 N. J. Eq. 809, 64 A. 973; Campbell v. Grant Co., 36 Tex. Civ. 641, 82 S. W. 794.

Debtor must show an injury before he can complain of want of notice. Knickerbocker T. Co. v. Coyle, 139 Fed. 792; Columbia F. & Tr. Co. v. Bank, 116 Ky. 364, 76 S. W. 156; Nielsen v. Albert Lea, 91 Minn. 388, 98 N. W. 195; Shepherd v. R. Co., 29 Pa. Super. 291.

Evidence to establish notice. Third Nat. Bk. v. Atlantic City, 139 Fed. 792, *over.* 126 Fed. 413; Bunnell v. Bronson, 78 Conn. 679, 63 A. 396; President v. Thorp, 79 Conn. 194, 64 A. 205; Peterson v. Ball, 121 Ia. 544, 97 N. W. 79 (need not be in writing); Sintes v. Commerford, 112 La. 706, 36 S. 656.

Proof of recording is proof of notice to third persons. Fordyce v. Mephetrige, 71 Ark. 327, 73 S. W. 1096; Kansas City etc. R. Co. v. Joslin, 74 Ark. 551, 86 S. W. 435; Bush v. R. Co., 76 Ark. 497, 89 S. W. 86; Whitcomb v. Waterville, 99 Me. 75, 58 A. 68; Cogan v. Mfg. Co., 69 N. J. Eq. 358, 60 A. 408; Park Brew. Co. v. McDermott, 25 R. I. 95, 54 A. 924; Standifer v. Hdw. Co. (Tex. Civ.), 94 S. W. 144; McConaghy v. Clark, 35 Wash. 689, 77 P. 1084.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS [Vol. 2.]

29-1 Common law assignment valid although a statute is in existence. Memphis Sav. Bk. v. Honchens, 115 Fed. 96, 52 C. C. A. 176; Lucy v. Freeman, 93 Minn. 274, 101 N. W. 167; Young v. Stone, 61 App. Div. 364, 70 N. Y. S. 558, *aff.* 174 N. Y. 517, 68 N. E. 1118.

Assignment by operation of law. In re Salmon, 143 Fed. 395; Pollock v. Jones, 124 Fed. 163; Smith v. McCadden, 138 Ala. 284, 36 S. 376; Locke v. Martin, 145 Ala. 274, 40 S. 387; Hines v. Hays, 26 Ky. L. R. 967, 82 S. W. 1007; Smith v. Huntsberry, 30 Ky. L. R. 867, 99 S. W. 911; Brookshier v. Ins. Co., 91 Mo. App. 599.

29-2 Statute must be strictly followed. Young v. Stone, 70 N. Y. S. 558, *aff.* 174 N. Y. 517, 68 N. E. 1118.

Acknowledgment necessary. See Bloomingdale v. Weil, 29 Wash. 611, 70 P. 94.

Recording. — Huddleson v. Polk, 70 Neb. 483, 97 N. W. 624; Bingham v. Ozmun (Okla.), 92 P. 147. See Peeples v. Woolen Mills (Tex. Civ.), 90 S. W. 61.

29-5 Deed of trust. — Heath v. Wilson, 139 Cal. 362, 73 P. 182.

Mortgage. — Smead v. Chandler, 71 Ark. 505, 76 S. W. 1066; Wylly-G. Co. v. Williams, 53 Fla. 872, 42 S. 910; Joas v. Jordan (S. D.), 113 N. W. 73.

Bill of sale. — Young v. Stone, 61 App. Div. 364, 70 N. Y. S. 558, *aff.* 174 N. Y. 517, 68 N. E. 1118.

Change of control the test. — Ives v. Sanguinetti (Ariz.), 85 P. 480; Tapp, L. & Co. v. Williams, 83 Ark. 182, 103 S. W. 161.

31-9 Kaufman v. Simon, 80 Miss. 189, 31 S. 713; Hilliard v. Shoe Co., 76 Vt. 57, 56 A. 283.

32-15 The acceptance of the assignee may be proved by his signature to the deed of assignment. Reddy v. Raymond, 194 Mass. 367, 80 N. E. 484.

33-20 Lacy v. Gunn, 144 Cal. 511, 78 P. 30; Reddy v. Raymond, 194 Mass. 367, 80 N. E. 484; Weston v. Nevers, 72 N. H. 65, 54 A. 703; Royster v. Heck, 29 Ky. 634, 94 S. W. 8.

Rescission of assent not manifested by bringing an action upon a claim. Lacy v. Gunn, supra.

Time within which a creditor may assent, is of the essence. Moulton v. Bartlett (Mass.), 80 N. E. 619; National Bk. v. Bailey, 179 Mass. 415, 60 N. E. 925.

34-21 Union Sav. Bk. & Tr. Co. v. Lounge Co. (Ind. App.), 47 N. E. 846; Pitman v. Marquardt, 20 Ind. App. 431, 50 N. E. 894.

34-26 Roberts v. Roberts, 102 Md. 131, 62 A. 161, 1 L. R. A. (N. S.) 782.

37-38 A court will not presume a fraudulent intent unless the terms of the deed are such as to preclude any other inference. Davis Co. v. Augustus, 105 Va. 843, 54 S. E. 985.

38-41 Davis Co. v. Augustus, supra. See Claflin Co. v. Harrison, 44 Fla. 218, 31 S. 818.

Retention of exempt property. Long v. Campbell, 133 Ala. 353, 32 S. 591; Armour v. Doig, 45 Fla. 162, 34 S. 249.

Debtor to approve claims submitted. Davis Co. v. Augustus, supra.

Compromise of disputed claims. Davis Co. v. Augustus, supra.

Allowance of attorney's fees to assignee. Davis Co. v. Augustus, supra.

Stipulation for release of debtor from undischarged debts. Davis Co. v. Augustus, supra.

41-52 Armour v. Doig, 45 Fla. 162, 34 S. 249; Hayes v. Ammon, 90 App. Div. 604, 85 N. Y. S. 607.

43-59 Davis Co. v. Augustus, supra.

Violation of promises in consideration of which time for payment of debts was extended. Third Nat. Bk. v. Wheel Co., 66 App. Div. 293, 73 N. Y. S. 114.

Relationship of parties. City Nat. Bk. v. Bridgers, 128 N. C. 322, 38 S. E. 888.

Inadequacy of consideration. Bishop v. Dry Goods Co., 30 Ky. 725, 99 S. W. 644.

Confession of judgment. International Tr. Co. v. Bank, 101 Ill. App. 548.

Keeping deed of assignment prepared for registration. Friedenwald Co. v. Sparger, 128 N. C. 446, 39 S. E. 64.

48-72 Bishop v. Dry Goods Co., 30 Ky. 725, 99 S. W. 644.

49-73 Bank v. Bridgers, 128 N. C. 322, 38 S. E. 888.

50-77 Armour v. Doig, 45 Fla. 162, 34 S. 249.

Declarations admissible on proof of a conspiracy. Bank v. Bridgers, 128 N. C. 322, 38 S. E. 888.

ASSUMPSIT [Vol. 2.]

53-1 Money had and received. Harr v. Roome, 28 App. D. C. 214; McGee v. McGee, 125 Ill. App. 436; Pease v. Bamford, 96 Me. 23, 51 A. 234; Devries v. Hawkins, 70 Neb. 656, 97 N. W. 792.

Services rendered. — Cox v. Peltier, 159 Ind. 355, 65 N. E. 6; Fry v. Fry, 119 Mo. App. 476, 94 S. W. 990; Babcock v. Anson, 106 N. Y. S. 642; McDermott v. Aid Soc., 24 R. I. 527, 54 A. 58.

Services rendered relatives presumed to be gratuitous. Gill v Donovan, 96 Md. 518, 54 A. 117; Begin v. Begin, 98 Minn. 122, 107 N. W. 149; Brown v. Cumming, 27 R. I. 369, 62 A. 378.

The common counts. — Cummings v. Synnott, 120 Fed. 86, 56 C. C. A. 490; Turner v. Owen, 122 Ill. App. 501; Stuckey v. Hardy (Ind. App.), 41 N. E. 606; Ft. Wayne v. Haberkorn, 15 Ind. App. 479, 44 N. E. 322; Franck v. McGilvray, 144 Mich. 318, 107 N. W. 886; Plefka v. R. Co., 147 Mich. 641, 111 N. W. 194; Henderson v. Koenig, 192 Mo. 690, 91 S.

W. 88; McCullough v. Gas Co., 213 Pa. 110, 62 A. 521; Reilley v. Petroleum Co., 213 Pa. 595, 63 A. 253.

Recovery allowed without proof of fixed price. Rumford Falls Boom Co. v. Paper Co., 96 Me. 96, 51 A. 810.

Proof under general issue. — McCrea v. Parsons, 112 Fed. 917, 50 C. C. A. 612; Ward v. Min. Co., 98 Ill. App. 227.

Laying the promise in the declaration — necessity for. — New Port News v. Potter, 122 Fed. 321, 58 C. C. A. 483; Potomac L. Co. v. Miller, 26 App. D. C. 230; Wo Sing & Co. v. Kwong Chong Wai Co., 16 Haw. 17; Brown v. Starbird, 98 Me. 292, 56 A. 902; Wheeling Co. v. Steel Co. (W. Va.), 57 S. E. 826; Waid v. Dixon, 55 W. Va. 191, 46 S. E. 918.

What proof necessary to allow assumpsit on sealed instruments. Brown v. Ins. Co., 21 App. D. C. 325; Fry v. Talbot (Md.), 66 A. 664; Conroy v. Acc. Co., 27 R. I. 467, 63 A. 356.

54-5 Wheeling Co. v. Steel Co. (W. Va.), 57 S. E. 826.

Seal as surplusage. — Horner v. Beasley (Md.), 65 A. 820.

54-6 Stewart Mfg. Co. v. Mfg. Co., 67 N. J. L. 577, 52 A. 391; Hale v. Hale, 32 Pa. Super. 37; Harrison v. McMillan, 109 Tenn. 77, 69 S. W. 973.

Effect of waiver of tort. — Kleinbohe v. Hoffman House, 50 Misc. 127, 97 N. Y. S. 1122.

55-7 Richards v. Richman, 5 Penne. (Del.) 558, 64 A. 238; Continental C. Co. v. Maxwell, 127 Ill. App. 19; McKinnie v. Lane, 230 Ill. 544, 82 N. E. 878 (payment in property an equivalent to payment in money).

58-13 Verification of plea casts burden of proving the joint liability upon the plaintiff. Martin v. Tramer, 125 Ill. App. 474.

58-16 Doe v. Allen, 1 Cal. App. 560, 82 P. 568; Watson v. Fagner, 208 Ill. 136, 70 N. E. 23.

59-19 Burton v. Mfg. Co., 132 N. C. 17, 43 S. E. 480; Lawrence v. Hester, 93 N. C. 79. See Cleveland etc. R. Co. v. Moore (Ind.), 82 N. E. 52; Michigan Yacht Co. v. Busch, 143 Fed. 929, 75 C. C. A. 109.

59-20 Richards v. Richman, 5 Penne. (Del.) 558, 64 A. 238; Gill v. Donovan, 96 Md. 518, 54 A. 117.

60-23 Holloway & Bro. v. Shoe Co., 151 Fed. 216, 80 C. C. A. 568; Massey v. Greenabaum Bros., 5 Penne. (Del.) 20, 58 A. 804; Johnson v. Lee Toma Co., 16 Haw. 693; McKinnie v. Lane, 230 Ill. 544, 82 N. E. 878; McArthur Bros. Co. v. Whitney, 202 Ill. 527, 67 N. E. 163; Oleese v. Fruit Co., 211 Ill. 539, 71 N. E. 1034; Ryan v. Horton, 122 Ill. App. 514; Newman v. Lumley, 125 Ill. App. 382; Rubens v. Hill, 213 Ill. 523; Weigand v. Cannon, 118 Ill. App. 635; Union Elev. R. Co. v. Nixon, 99 Ill. App. 502, *aff.* 199 Ill. 235, 65 N. E. 314; Peden v. Scott, 35 Ind. App. 370, 73 N. E. 1099; Board of Comrs. v. Gibson, 158 Ind. 471, 63 N. E. 982; Stuckey v. Hardy (Ind. App.), 41 N. E. 606; Cann v. Rector, 111 Mo. App. 164, 85 S. W. 994; Empire Co. v. Hull Co., 51 W. Va. 474, 41 S. E. 917.

Where contract is at an end or plaintiff has been wrongfully prevented from completing it, proof may be made under the common counts. McGonigal v. Raughley (Del.), 63 A. 801; Richards v. Richman, 5 Penne. (Del.) 558, 64 A. 238; Zapel v. Ennis, 104 Ill. App. 175; Cook v. R. Co., 28 Mont. 509, 73 P. 131; Viles v. Tract. Co., 79 Vt. 311, 65 A. 104.

60-24 Newport News v. Potter, 122 Fed. 321, 58 C. C. A. 483; Peden v. Scott, 35 Ind. App. 370, 73 N. E. 1099; Stuckey v. Hardy (Ind. App.), 41 N. E. 606; Risley v. Beaumont, 71 N. J. L. 372, 59 Atl. 145; Empire Coal Co. v. Hull Co., 51 W. Va. 474, 41 S. E. 917.

Lease. — Rubens v. Hill, 115 Ill. App. 565, *aff.* 213 Ill. 523, 72 N. E. 1127. See Leach v. Chimney Co., 110 Ill. App. 338.

Promissory note. — Federation W. G. Co. v. Glass Co., 58 W. Va. 477, 52 S. E. 518.

Sealed instrument. — Strobridge L. Co. v. Gallagher, 2 Pa. C. C. 356.

Work not covered by contract specifications. — Wilson v. Wilson, 106 Mo. App. 501, 80 S. W. 711. But see Streater Tel. Co. v. Const. Co., 217 Ill. 577, 75 N. E. 546.

61-26 Clark v. Holway, 101 Me. 391, 64 A. 642; Miller v. Wilbur, 76 Vt. 73, 56 A. 280. See Wilson v.

Taylor, 148 Ala. 672, 41 S. 824; McKenna v. McKenna, 118 Ill. App. 240; Shiland v. Loeb, 58 App. Div. 565, 69 N. Y. S. 11.

62-32 See Bryant v. Broadwell, 140 Cal. 490, 74 P. 33; Fry v. Talbott (Md.), 66 A. 664; Babcock v. Anson, 106 N. Y. S. 642.

62-33 Camp v. Behlow, 2 Cal. App. 699, 84 P. 251; Kitchen v. Clark, 120 Ill. App. 105; Thompson v. Hoppert, 120 Ill. App. 588; Ross v. Knox, 71 N. H. 249, 51 A. 910.

Prevention of performance — effect. Thompson v. Hoppert, 120 Ill. App. 588; Viles v. Tract. Co., 79 Vt. 311, 65 A. 104.

ATHEIST [Vol. 2.]

65-4 Jones v. S., 145 Ala. 51, 40 S. 947; C. v. Kauffman, 1 Pa. C. C. 410. See C. v. Geary, 9 Pa. C. C. 60.

Infants. — For cases discussing the religious belief of children, see infra, "INFANTS."

66-6 Clinton v. S., 53 Fla. 98, 43 S. 312; § 1503, Gen. St. 1906; S. v. Williams, 111 La. 179, 35 S. 505, *over.* S. v. Washington, 49 La. 1602, 42 L. R. A. 553*n*; Act 29, p. 39, Laws of 1886; S. v. Lu Sing (Mont.), 85 P. 521; § 3161, Code Civ. Proc.; C. v. Kauffman, 1 Pa. C. C. 410.

67-7 S. v. King, 117 Ia. 484, 91 N. W. 768.

Dying declaration may be affected by declarant's lack of religious belief. State v. Zorn, 202 Mo. 12, 100 S. W. 591. But should not be excluded on that ground. S. v. Hood (W. Va.), 59 S. E. 971.

In New York a contrary rule is now established in a well reasoned opinion. Brink v. Stratton, 176 N. Y. 150, 68 N. E. 148.

68-11 **Interrogation** of witness as to his religious belief, proper. C. v. Kauffman, 1 Pa. C. C. 410.

ATTACHMENT [Vol. 2.]

Actions on bonds to discharge, 81-34; *Admissions and declarations,* 87-48; *Circumstantial evidence,* 87-48; *Action on claim bond,* 88-52; *Punitive damages,* 95-88.

72-1 **Clear proof necessary.** Gatward v. Wheeler, 10 Idaho 66, 77 P. 23; Brandenburgh v. Malcolm, 102 Ill. App. 302; Chazy M. L. Co. v. Deely, 84 N. Y. S. 396.

In Georgia, a defective affidavit may be considered as "testimony." Price v. Cohen, 118 Ga. 261, 45 S. E. 225.

73-3 Elliott v. Orendorff Co., 71 Kan. 665, 81 P. 500; Abel v. Duffy, 106 La. 260, 30 S. 833; Schoeneman v. Sowle, 102 Minn. 466, 113 N. W. 1061; First Nat. Bk. v. Anderson, 101 Minn. 107, 111 N. W. 947; Waller v. Deranleau (Neb.), 94 N. W. 1038; Stone Milling Co. v. McWilliams, 121 Mo. App. 319, 98 S. W. 828; Bowles L. S. Co. v. Hunter, 91 Mo. App. 333; Jones v. Hoefs, 14 N. D. 232, 103 N. W. 751; Williams v. Farmers' Co., 13 Okla. 5, 73 P. 269; Dunn v. Claunch, 13 Okla. 577, 76 P. 143.

75-8 **Matters precedent to the attachment,** admissible. Dimmock v. Cole, 130 Mich. 601, 90 N. W. 333.

Non-residence. — Webb v. Wheeler (Neb.), 112 N. W. 369.

76-11 Dimmock v. Cole, 130 Mich. 601, 90 N. W. 333.

77-15 Schnull v. Cuddy, 36 Ind. App. 262, 74 N. E. 1030.

79-25 Dunn v. Claunch, 13 Okla. 577, 76 P. 143 (may be made at time of hearing).

The complaint and original affidavit constitute part of the record upon motion to dissolve. Goldman v. Flotter, 142 Cal. 388, 76 P. 58.

Ex parte affidavits not sufficient where the application to discharge was made by a third person claimant. See U. S. v. Neely, 146 Fed. 764.

Oral admission at former trial insufficient. Goldman v. Flotter, supra.

79-26 Williams v. Gin & G. Co., 13 Okla. 5, 73 P. 269.

80-27 Sparks v. Bell, 137 Cal. 415, 70 P. 281.

Motion based on judgment opens the door for counter affidavits. Belmont v. Iron Co., 80 App. Div. 537, 80 N. Y. S. 771.

Motion to vacate made by a judgment creditor of defendant opens the door. Pfluke v. Papulias, 42 Misc. 18, 85 N. Y. S. 543; National Bk. v. Tasker, 1 Pa. C. C. 173.

80-29 Sparks v. Bell, 137 Cal. 415, 70 P. 281.

Weight to be given affidavits on appeal. — Fremont Brew. Co. v. Pekarek (Neb.), 95 N. W. 12; Schoeneman v. Sowle, 102 Minn. 466, 113 N. W. 1061.

81-31 Recitals in bond as to the sufficiency of affidavit conclude the defendant. Bailey v. Indemnity Co. (Cal. App.), 91 P. 416.

81-34 Action on bonds to discharge. — In an action on a bond given to obtain the discharge of an attachment, the plaintiff has the burden of proving due execution of the bond (Pierce Co. v. Casler, 194 Mass. 423, 80 N. E. 494), an actual release of the attachment (Hesser v. Rowley, 139 Cal. 410, 73 P. 156), and such other facts as are necessary to establish his right to a recovery. Flegel v. Koss, 47 Or. 366, 83 P. 847.

Sheriff's records. — Hesser v. Rowley, 139 Cal. 410, 73 P. 156.

83-40 Roberts v. Burr, 135 Cal. 156, 67 P. 46; Claflin v. Harrison, 44 Fla. 218, 31 S. 818; American Nat. Bk. v. Lee, 124 Ga. 863, 53 S. E. 268; People's Nat. Bk. v. Harper, 114 Ga. 603, 40 S. E. 717; City Nat. Bk. v. Crahan (Ia.), 112 N. W. 793; Torreyson v. Turnbaugh, 105 Mo. App. 439, 79 S. W. 1002; Vermillion v. Parsons, 118 Mo. App. 260, 94 S. W. 298; Kelley-G. Shoe Co. v. Solly, 114 Mo. App. 222, 89 S. W. 889; Connersville B. Co. v. Lowry, 104 Mo. App. 186, 77 S. W. 771; Graham Paper Co. v. Crowther, 92 Mo. App. 273; Cotton Mills v. Weil, 129 N. C. 452, 40 S. E. 218; Willard Mfg. Co. v. Tierney, 133 N. C. 630, 45 S. E. 1026.

Proof of a special interest and right to possession by claimant, is sufficient. Roberts v. Burr, 135 Cal. 156, 67 P. 46.

Estoppel of claimant by holding out another as owner. Anheuser-B. Brew. Co. v. Kickam, 119 Ill. App. 58.

Confusion of goods. — The claimant has the burden of separating and identifying the goods of the debtor. Kelley-G. Shoe Co. v. Solly, 114 Mo. App. 222, 89 S. W. 889.

Loss of title by the claimant who has proved that he acquired it must be shown by the plaintiff in attachment. Lipschitz v. Halperin, 53 Misc. 280, 103 N. Y. S. 202.

84-42 Alabama rule. — Roberts, L. & Co. v. Ringeman, 145 Ala. 678, 40 S. 81; British & A. Mtg. Co. v. Cody, 135 Ala. 622, 33 S. 832; Arnold v. Cofer, 135 Ala. 364, 33 S. 539; Ringeman v. Wiggs Bros., 146 Ala. 685, 40 S. 323.

85-43 See Pelzer Mfg. Co. v. Pitts, 76 S. C. 349, 57 S. E. 29.

Fraudulent transfer. — The burden is upon the plaintiff to show that the claimant's possession is the result of fraud. Hicks Co. v. Thomas, 114 La. 219, 38 S. 148; Torreyson v. Turnbaugh, 105 Mo. App. 439, 79 S. W. 1002; Handlan-B. Mfg. Co. v. Const. Co., 124 Mo. App. 349, 101 S. W. 702; Stone v. Cassidy, 75 Ark. 603, 87 S. W. 621.

86-45 Claflin v. Harrison, 44 Fla. 218, 31 S. 818; Connersville B. Co. v. Lowry, 104 Mo. App. 186, 77 S. W. 771; Ottumwa Nat. Bk. v. Totten, 114 Mo. App. 97, 89 S. W. 65.

Ex parte affidavit. — See supra, 79-25.

87-46 Purchaser with notice of an attachment lien. Stillman v. Hamer, 70 Kan. 469, 78 P. 836.

Mortgagee of pledged property. Ottumwa Nat. Bk. v. Totten, 114 Mo. App. 97, 89 S. W. 65.

87-47 Arnold v. Cofer, 135 Ala. 364, 33 S. 539; Graham Paper Co. v. Crowther, 92 Mo. App. 273.

87-48 Admissions and declarations. — The declarations of the attachment debtor concerning the ownership of the property are admissible only when he was in possession at the time. Roberts L. & Co. v. Ringeman, 145 Ala. 678, 40 S. 81; Ohde v. Hoffman (Ia.), 90 N. W. 750; Wright v. Tanner, 92 Minn. 94, 99 N. W. 422; Vermillion v. Parsons, 118 Mo. App. 260, 94 S. W. 298; Torreyson v. Turnbaugh, 105 Mo. App. 439, 79 S. W. 1002.

Declarations of agent of claimant. See People's Nat. Bk. v. Harper, 114 Ga. 603, 40 S. E. 717.

Circumstantial evidence. — The ownership and possession of the property claimed may be shown by either direct or circumstantial evidence. See Rice, S. & Co. v. Solly, 176 Mo. 107, 75 S. W. 398; Groesbeck v. Evans (Tex. Civ.), 83 S.

W. 430; American Nat. Bk. v. Lee, 124 Ga. 863, 53 S. E. 268.

Claimant may testify directly. Lipschitz v. Halperin, 53 Misc. 280, 103 N. Y. S. 202.

Relationship of parties. — Wright v. Tanner, 92 Minn. 94, 99 N. W. 422.

Purchase at judicial sale does not estop claimant. Hagar v. Haas, 66 Kan. 333, 71 P. 822.

87-50 Amount received at a sheriff's sale is admissible. Ohde v. Hoffman (Ia.), 90 N. W. 750.

88-51 Plaintiff need not prove himself a creditor of defendant. Faulkner & Co. v. Cook, 83 Ark. 205, 103 S. W. 384; Graham Paper Co. v. Crowthers, 92 Mo. App. 273.

88-52 Regularity and validity of the levy admitted. — Claflin Co. v. Harrison, 44 Fla. 218, 31 S. 818. See Hawkins & Co. v. McAllister, 86 Miss. 84, 38 S. 225.

Grounds of attachment are admitted to exist. Wagner v. Wolf, 75 Neb. 780, 106 N. W. 1024.

Action on claim bond. — In an action on a claim bond, the claimant has the burden of proving ownership of the property. Goldstein v. Goldman, 74 App. Div. 356, 77 N. Y. S. 699.

89-60 Lord, Owen & Co. v. Wood, 120 Ia. 303, 94 N. W. 842; Tyler v. Bowen, 124 Ia. 452, 100 N. W. 505; McFaddin v. Sims (Tex. Civ.), 97 S. W. 335.

Prima facie case established by proof that the property attached as property of the debtor was in the plaintiff's possession. Maziroff v. C. Bank, 135 Mich. 390, 97 N. W. 763. See Brown v. Boyer, 91 Minn. 140, 97 N. W. 736.

Burden of proving a discharge under a bond is upon the defendant. Waller v. Deranleau (Neb.), 94 N. W. 1038.

Liability of a corporation. — Carey v. Wolff, 72 N. J. L. 510, 63 A. 270.

90-63 Admissible on issue of good faith. Cline v. Hackbarth, 30 Tex. Civ. 591, 71 S. W. 48.

Lost writ. — Secondary evidence of a lost writ is admissible. Hamilton v. Maxwell, 133 Ala. 233, 32 S. 13.

90-65 Anvil Gold Min. Co. v. Hoxsie, 125 Fed. 724; McGill v. Fuller (Wash.), 88 P. 1038. See Waller v. Deranleau (Neb.), 94 N. W. 1038.

91-68 Butterfield v. Kirtley, 115 Ia. 207, 88 N. W. 371.

By wife of attachment defendant. Cline v. Hackbarth, 30 Tex. Civ. 591, 71 S. W. 48.

91-69 Lord, Owen & Co. v. Wood, 120 Ia. 303 94 N. W. 842.

By agent of attachment plaintiff. Carey v. Wolff, 72 N. J. L. 510, 63 A. 270; Lord, Owen & Co. v. Wood, supra.

91-70 See Bucki & Son L. Co. v. Lumb. Co., 121 Fed. 233, 57 C. C. A. 469; Voss v. Bender, 32 Wash. 566, 73 P. 697.

92-73 Delay in recording deed is evidence on question of fraudulent disposition of property. Cline v. Hackbarth, 30 Tex. Civ. 591, 71 S. W. 48.

Plan to hold an auction to obtain money to pay debts is strong evidence on the question of fraudulent intent in removal of goods. Tullis v. McClary, 128 Ia. 493, 104 N. W. 505.

93-74 Upon the issue of fraud by purchaser as to seller's creditors, in obtaining property, evidence of the attachment debtor's reputation as to solvency is admissible. Hooks v. Pafford, 34 Tex. Civ. 516, 78 S. W. 991.

94-76 Evidence that a debtor has never refused to pay is admissible. Tullis v. McClary, 128 Ia. 493, 104 N. W. 505.

94-78 *Compare.* — Engelke & F. Mill. Co. v. Grunthal, 46 Fla. 349, 35 S. 17; Wehle v. Spelman, 25 Hun (N. Y.) 99.

94-83 See the following cases: Vandiver v. Waller, 143 Ala. 411, 39 S. 136; Lord, Owen & Co. v. Wood, 120 Ia. 303, 94 N. W. 842; S. v. Parsons, 109 Mo. App. 432, 84 S. W. 1019; Wallingford v. Kaiser, 110 App. Div. 503, 96 N. Y. S. 981; Low v. Smith (Tex. Civ.), 77 S. W. 32; Hooks v. Pafford, 34 Tex. Civ. 516, 78 S. W. 991; Voss v. Bender, 32 Wash. 566, 73 P. 697; McGill v. Fuller (Wash.), 88 P. 1038.

Mere proof of issue and levy of writ will not warrant a verdict for substantial damages. New Sharon C. Co. v. Knowlton, 132 Ia. 672, 108

N. W. 770. See Lawson v. Goodwin, 37 Tex. Civ. 484, 84 S. W. 279.

Loss of time is an element of damage. Tullis v. McClary, 128 Ia. 493, 104 N. W. 505.

Release of damages is admissible. Hayes v. Merc. Co., 27 Mont. 264, 70 P. 975.

An inventory and appraisement is evidence of the value. Green v. McCracken, 64 Kan. 330, 67 P. 857.

95-87 Vandiver v. Waller, 143 Ala. 411, 39 S. 136; Kilmer v. Gallaher, 120 Ia. 575, 95 N. W. 180; S. v. Parsons, 109 Mo. App. 432, 84 S. W. 1019. *Contra,* McGill v. Fuller (Wash.), 88 P. 1038; Chisenhall v. Hines (Tex. Civ.), 100 S. W. 362.

In federal courts, the rule existing in the state in which the case originated is applied. Fidelity Co. v. Bucki, 189 U. S. 135.

Need not be proved to have been actually paid. Oakes v. Smith, 121 Ga. 317, 48 S. E. 942; Plymouth Co. v. U. S. F. & G. Co., 35 Mont. 23, 88 P. 565.

95-88 Evidence of profits which are definitely ascertainable is admissible. Hayes v. Merc. Co., 27 Mont. 264, 70 P. 975; Pittsburgh etc. Co. v. Hdw. Co., 143 N. C. 54, 55 S. E. 422; McGill v. Fuller (Wash.), 88 P. 1038. And see Fidelity Co. v. Bucki, 189 U. S. 135; Vandiver & Co. v. Waller, 143 Ala. 411, 39 S. 136; Plymouth Co. v. Guaranty Co., 35 Mont. 23, 88 P. 565; Hume v. Netter (Tex. Civ.), 72 S. W. 865.

Punitive damages. — Evidence of wantonness or recklessness upon the part of defendant is admissible to establish motive as a basis for punitive damages. Vandiver v. Waller, supra; Tyler v. Bowen, 124 Ia. 452, 100 N. W. 505; Pittsburg etc. R. Co. v. Hdw. Co., 143 N. C. 54, 55 S. E. 422; Harkleroad v. Leonard, 28 Tex. Civ. 133, 67 S. W. 127.

Against corporations. — Corey v. Wolff, 72 N. J. L. 510, 63 A. 270.

Statute held to be necessary in Washington. McGill v. Fuller (Wash.), 88 P. 1038.

95-89 *Compare.* — Miller v. Baker, 25 Ky. L. R. 1858, 79 S. W. 187.

96-91 Failure to use reasonable care to lessen the injury may be shown. Pittsburg etc. R. Co. v. Hdw. Co. 143 N. C. 54, 55 S. E. 422.

ATTENDANCE OF WITNESSES
[Vol. 2.]

Attendance at bankruptcy proceedings, 105-31; *Attendance of officers of foreign corporation,* 109-54; *Orders to produce,* 116-85.

100-1 Griggsby Const. Co. v. R. Co., 123 Fed. 751; International etc. R. Co. v. Richmond, 28 Tex. Civ. 513, 67 S. W. 1029.

Waiver of defect in subpoena, by voluntary appearance. In re Abbey Press, 134 Fed. 51, 66 C. C. A. 161.

100-4 Strict construction of authority to take recognizances. Police justice cannot accept a cash deposit in place of bail for appearance of witness. McNamara v. Wallace, 97 App. Div. 76, 89 N. Y. S. 591.

101-7 Mere order by the court to appear and testify, insufficient. In re Depue, 185 N. Y. 60, 77 N. E. 798.

Omission of name of case fatal. In re Haines, 67 N. J. L. 442, 51 A. 929.

Reliance upon a subpoena obtained by the opposite party. — A defendant in a criminal action has no right to rely upon the attendance of witnesses subpoenaed by the state. S. v. Campbell, 73 Kan. 688, 720, 85 P. 784.

102-9 Rule of court. — Subpoena issued in accordance with rule 7, par. 4, rules of circuit court of United States, held proper. Despeaux v. R. Co., 147 Fed. 926. See Importers' & T. Nat. Bk. v. Lyons, 134 Fed. 510; P. v. Wyatt, 99 N. Y. S. 114, *aff.* 186 N. Y. 383, 79 N. E. 330.

102-10 Deputy sheriff cannot insert additional names. Manuel v. S., 45 Tex. Cr. 96, 74 S. W. 30.

New York rule. — A subpoena to testify as a witness is process, and under § 24 N. Y. Code Civ. Proc. may be issued by the attorney without application to the court. Lowther v. Lowther, 115 App. Div. 307, 100 N. Y. S. 965.

102-12 Attendance before commissioner. — Bliss v. Milholland, 26 Pa. C. C. 129.

Notary public. — Burns v. Court, 140 Cal. 1, 73 P. 597, *over.* Lezinsky v.

Court, 72 Cal. 510, 14 P. 104; McIntyre v. P., 227 Ill. 26, 81 N. E. 33.

Auditor. — Sizer v. Milton, 129 Ga. 143, 58 S. E. 1055.

Committing magistrate. — Farnham v. Colman, 19 S. D. 342, 103 N. W. 161.

Coroner. — Moore v. Box Butte Co. (Neb.), 111 N. W. 469.

By the attorney, in proceedings supplementary to execution, under the New York procedure. Lowther v. Lowther, 115 App. Div. 307, 100 N. Y. S. 965.

Receivers. — Fidelity & C. Co. v. MacAfee Co. (N. J.), 65 A. 879.

Before referee in bankruptcy. — By virtue of the Bankruptcy act of 1898, c. 541, and General Orders in Bankruptcy, No. 3 (89 Fed. IV) the equity procedure for requiring the attendance of witnesses out of court, is followed and blank subpoenas issued by the clerk may be filled up by the referee. In re Abbey Press, 134 Fed. 51, 66 C. C. A. 161.

103-13 Before grand jury. — Coppenhaver v. S., 160 Ind. 540, 67 N. E. 453; In re Archer, 134 Mich. 408, 96 N. W. 442; P. v. Sexton, 187 N. Y. 495, 80 N. E. 396.

103-15 Municipal councils. — In Ex parte Conrades, 185 Mo. 411, 85 S. W. 160, the municipal council of St. Louis was held to have power to appoint a committee to examine tax records, with power to subpoena witnesses and send for persons and papers, etc.

103-16 Municipal committee. Yard's Case, 10 Pa. C. C. 41.

But a school committee has no such power. Morrison v. Lawrence, 186 Mass. 456, 72 N. E. 91.

103-17 See Ex parte Caldwell, 138 Fed. 487.

104-20 In re Edison, 68 N. J. L. 494, 53 A. 696; Robb's Petition, 11 Pa. C. C. 442.

104-21 Subpoena duces tecum, before commissioner. In re Edison, 68 N. J. L. 494, 53 A. 696, it was said to be doubtful whether, under the New Jersey statute, a subpoena duces tecum could be issued in connection with an order for the attendance of a witness before a commissioner authorized to act by another state.

In Pennsylvania, commissioner appointed by foreign court has, by statute, power to subpoena witnesses. Bliss v. Milholland, 26 Pa. C. C. 129.

104-22 In re Abbey Press, 134 Fed. 51, 66 C. C. A. 161.

104-23 Process in bankruptcy proceedings issues out of the court, under its seal, tested by the clerk, and blanks, so prepared, are issued to the referee upon his application. In re Abbey Press, 134 Fed. 51, 66 C. C. A. 161.

105-24 Under the national bankruptcy law, the court having jurisdiction of the proceedings has been held to have authority to compel the attendance of witnesses for examination by an examiner in another district. In re Williams, 123 Fed. 321.

105-26 See Interstate Commerce Com. v. Baird, 194 U. S. 25.

105-27 Subpoena duces tecum not authorized. In re Outcault, 149 Fed. 228.

105-28 Climie v. Appanoose County, 125 Ia. 292, 101 N. W. 98. *Compare* Buckman v. R. Co., 121 Mo. App. 299, 98 S. W. 820.

105-29 Fidelity & C. Co. v. MacAfee Co. (N. J.), 65 A. 879.

Subpoena in some states has no coercive force outside the county. See Anderson v. Sheep Co., 12 Idaho 418, 86 P. 41; Underwood v. Fosha, 73 Kan. 408, 85 P. 564; S. v. Romero, 117 La. 1003, 42 S. 482; S. v. Nix, 111 La. 812, 35 S. 917.

105-30 § 876 U. S. Rev. St. (U. S. Comp. St. 1901, p. 667) now lays down the same rule; Blood v. Morrin, 140 Fed. 918; Magone v. Min. Co., 135 Fed. 846.

105-31 Attendance at bankruptcy proceedings. — § 41 of the Bankruptcy Act has been held to modify and limit the general rule as to the attendance of witnesses. It is held that no one shall be compelled to attend as a witness at a distance of more than 100 miles, and also, that no one shall be compelled to leave the state wherein he resides, no matter how near his residence to the seat of the proceedings. In re Hemstreet, 117 Fed. 568; In re Cole, 133 Fed. 414. See In re Sturgeon, 139 Fed. 608, 71 C. C. A. 592.

106-33 See Kottcamp v. York County, 28 Pa. Super 96.

106-38 Com. Title Ins. & Tr. Co. v. Slack, 18 Pa. C. C. 593.

106-39 Doyle v. Transit Co., 124 Mo. App. 504, 101 S. W. 598; Godwin v. S., 44 Tex. Cr. 599, 73 S. W. 804.

Subpoena good only for term for which it is issued. Buckman v. R. Co., 121 Mo. App. 299, 98 S. W. 820. *Contra*, Brady v. S., 120 Ga. 181, 47 S. E. 535.

106-40 Egan v. Finney, 43 Or. 599, 72 P. 133. See In re Haines, 67 N. J. L. 442, 51 A. 929.

Service on person claiming to represent the witness. In re Depue, 185 N. Y. 60, 77 N. E. 798.

By telephone. — Improper under Texas Code Cr. Proc. (1895), Art. 515. Ex parte Terrell (Tex. Cr.), 95 S. W. 536.

By telegraph, proper. Finney v. Egan, 43 Or. 599, 72 P. 133.

107-43 Service on agent of corporation must show that the corporation was doing business in the state. Central Exch. v. Board, 125 Fed. 463, 60 C. C. A. 299.

Affidavit of service, necessary. In re Haines, 67 N. J. L. 492, 51 A. 929.

107-44 S. v. Oil Co., 194 Mo. 124, 91 S. W. 1062; In re Haines, 67 N. J. L. 442, 51 A. 929; In re Depue, 185 N. Y. 60, 77 N. E. 798; Egan v. Finney, 42 Or. 599, 72 Pac. 133; Com. Title Ins. & Tr. Co. v. Slack, 18 Pa. C. C. 593.

Contract to pay witness for loss of time, against public policy and void. Wright v. Somers, 125 Ill. App. 256. See Ramschasel's Estate, 24 Pa. Super. 262.

Attendance of witness without service of a subpoena gives right to the statutory fees. Griggsby v. R. Co., 123 Fed. 751; Anderson v. Sheep Co., 12 Idaho 418, 86 P. 41; Climie v. County, 125 Ia. 292, 101 N. W. 98; Great Falls Co. v. Jenkins, 33 Mont. 417, 84 P. 74; Egan v. Finney, 42 Or. 599, 72 P. 133; International etc. R. Co. v. Richmond, 28 Tex. Civ. 513, 67 S. W. 1029. *Contra*, Graeco-R. Church v. Cohen, 1 Alaska 32; Buckman v. R. Co., 121 Mo. App. 299, 98 S. W. 820.

Expert. — An expert is entitled to a reasonable fee, as such. Farmer v. Water Co., 86 Minn. 59, 90 N. W. 10. See Schofield v. Little, 2 Ga. App. 286, 58 S. E. 666; Main v. County, 74 Neb. 155, 103 N. W. 1038.

Statutes allowing witnesses fees are to be strictly construed. Veidt v. R. Co., 109 Mo. App. 102, 82 S. W. 1122.

108-48 In re Haines, 67 N. J. L. 442, 51 A. 929; In re Consol. Rendering Co. (Vt.), 66 A. 790.

109-54 New York statute has been held unconstitutional as depriving a witness of his liberty without due process of law. In re Com., 45 Misc. 46, 90 N. Y. S. 808.

Attendance of officers of foreign corporation. — In Missouri, under par. 8983, Rev. St. 1899, the court, in an action against a corporation for a violation of the anti-trust law, will upon application by the attorney-general issue an order to the attorneys of record of defendant foreign corporations, requiring the presence of such officers of the corporation as are necessary, and if they fail to appear, judgment will be given against the corporation by default. S. v. Oil Co., 194 Mo. 124, 91 S. W. 1062. But *compare* Central Exch. v. Board, 125 Fed. 463, 60 C. C. A. 299.

110-56 Object. — A subpoena duces tecum gives counsel no right to inspect the books ordered to be produced, but is for the purpose of aiding the witness in his own testimony. Franklin v. Judson, 96 App. Div. 607, 88 N. Y. S. 904.

110-60 Inherent power, in court of equity. U. S. v. Assn., 148 Fed. 486.

110-61 U. S. v. Assn., supra.

Party. — Banks v. Lighting Co., 79 Conn. 116, 64 A. 14.

So it may issue to a witness called before a grand jury (In re Archer, 134 Mich. 408, 96 N. W. 442), or to witnesses called before a municipal investigating committee. Ex parte Conrades, 185 Mo. 411, 85 S. W. 160.

111-65 Crocker-W. Co. v. Bullock, 134 Fed. 241; Danceel v. Mach. Co., 128 Fed. 753; Miller v. Life Assn., 139 Fed. 864; Peterson Bros. v. Fruit Co., 140 Cal. 624, 74 P. 162; Bentley v. P., 104 Ill. App. 353, 107 Ill. App. 245; Consol. Coal Co. v. Jones, 120 Ill. App. 139; In re Archer, 134 Mich. 408, 96 N. W. 442.

Prima facie case of materiality must

be established. U. S. v. Assn., 154 Fed. 268.

Subpoena must make reasonable demands. — Santa Fe P. R. Co. v. Davidson, 149 Fed. 603; McDonald v. Mfg. Co., 143 Mich. 17, 106 N. W. 279.

111-66 Dorris v. Coal Co., 215 Pa. 638, 64 A. 855.

112-67 U. S. v. Tobacco Co., 146 Fed. 557. And see Hale v. Henkel, 201 U. S. 43; S. v. Oil Co., 194 Mo. 124, 91 S. W. 1062; Ex parte Conrades, 185 Mo. 411, 85 S. W. 160; In re Consol. Rendering Co. (Vt.), 66 A. 790.

Not a violation of the 4th amendment to the Constitution. Santa Fe P. R. Co. v. Davidson, 149 Fed. 603.

112-68 U. S. v. Tobacco Co., 146 Fed. 557.

114-75 In re Consol. Rendering Co. (Vt.), 66 A. 790.

Documents must be produced in court, and any objection as to their incriminating nature may then be made. U. S. v. Collins, 146 Fed. 553.

115-78 Trade secrets protected. Crocker-W. Co. v. Bullock, 134 Fed. 241.

115-81 U. S. v. Assn., 148 Fed. 486; S. v. Oil Co., 194 Mo. 124, 91 S. W. 1062; In re Consol. Rendering Co. (Vt.), 66 A. 790.

What court determines. — On the taking of a deposition in another federal district by a commissioner, the claim of privilege is to be passed upon by the court of that district. Crocker-W. Co. v. Bullock, 134 Fed. 241.

116-84 Dancel v. Mach. Co., 128 Fed. 753; Crocker-W. Co. v. Bullock, 134 Fed. 241.

116-85 Orders to produce. — Parties having documents in their possession, in court, may be required to produce them by a direct order of the court, such power being inherent in the courts as a result of the provisions making parties competent as witnesses. Banks v. Lighting Co., 79 Conn. 116, 64 A. 14. See Whitten v. Tel. Co., 141 N. C. 361, 54 S. E. 289.

116-86 Com. Title Ins. & Tr. Co. v. Slack, 18 Pa. C. C. 593.

Corporations. — A corporation is under no legal duty to produce its officer as an adverse witness, and therefore an injunction against the corporation until such officer appeared was held erroneous. Central Exch. v. Board, 125 Fed. 463, 60 C. C. A. 299.

118-92 Wallace v. Tract. Co., 145 Ala. 682, 40 S. 89.

Where attorney declines the court's offer to attach he cannot complain of a subsequent refusal to grant a continuance. Brady v. S., 120 Ga. 181, 47 S. E. 535.

118-94 City of Dallas v. Lentz (Tex. Civ.), 81 S. W. 55.

118-95 Gardner v. U. S., 5 Ind. Ter. 150, 82 S. W. 704.

125-43 Pittman v. S., 51 Fla. 94, 41 S. 385 (full discussion of the subject).

Testimony must be shown to be admissible and material. S. v. Pope (Ga.), 58 S. E. 815; S. v. Berger (Ia.), 90 N. W. 621.

Continuance, discretion of court as to, not allowed to infringe upon the right to the compulsory attendance of witnesses. Rodgers v. S., 144 Ala. 32, 40 S. 572.

Admission by prosecution as to what the witnesses asked for by defendant would testify is no ground for refusal of compulsory process. S. v. Fairfax, 107 La. 624, 31 S. 1011. *Compare* Davis v. C., 25 Ky. L. R. 1426, 77 S. W. 1101.

Attendance not guaranteed. — Smith v. S., 118 Ga. 61, 44 S. E. 817. See S. v. Pope (Ga.), 58 S. E. 815.

At common law, no compulsory process for the attendance of witnesses. Pittman v. S., 51 Fla. 94, 41 S. 385.

6th Amendment to federal constitution guaranteeing compulsory process applies to powers exercised by the government of the United States and not to those of the state. Pittman v. S., 51 Fla. 94, 41 S. 385.

Right to examine and consult privately, out of court, not covered by the constitutional guaranty of compulsory process. S. v. Goodson, 116 La. 388, 40 S. 771.

126-44 In Florida, the defendant is entitled to compulsory process at the expense of the county. De Soto County Comrs. v. Howell, 51 Fla. 160, 40 S. 192, *cit.* Buckman v. Alexander, 24 Fla. 46, 3 S. 817.

126-48 Limited number of witnesses. — Upon a proper showing be-

ing made, the statutory limitation does not apply. S. v. Freddy, 117 La. 121, 41 S. 436.

All the eye-witnesses to a murder need not be called. S. v. Stewart, 117 La. 476, 41 S. 798.

127-50 Goldsmith v. Haskell, 105 N. Y. S. 327.

Voluntary attendance. — A witness is protected though he is present voluntarily and not in obedience to a subpoena. See Underwood v. Fosha, 73 Kan. 408, 85 P. 564, for a full discussion of the subject. *Contra,* Currie F. Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268; Lewis v. Miller, 115 Ky. 623, 74 S. W. 691.

127-51 Bolz v. Crone, 64 Kan. 570, 67 P. 1108.

Agent of foreign corporation. Kinsey v. Mfg. Co., 94 N. Y. S. 455. *Contra,* Currie F. Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268.

129-57 See Underwood v. Fosha, 73 Kan. 408, 85 P. 564.

Public policy. — Murray v. Wilcox, 122 Ia. 188, 97 N. W. 1087.

State comity. — Martin v. Bacon, 76 Ark. 158, 88 S. W. 863.

130-60 Goldsmith v. Haskell, 105 N. Y. S. 327.

130-65 Morrow v. Dudley, 144 Fed. 441.

Attendance at summary proceedings for dispossession of tenant, protected. Richardson v. Smith (N. J.), 65 A. 162.

Attendance at judical sale not protected. Greenleaf v. Bank, 133 N. C. 292, 45 S. E. 638, 63 L. R. A. 499.

130-68 Goldsmith v. Haskell, 105 N. Y. S. 327.

Attorneys are exempt while in actual attendance on court. Greenleaf v. Bank, 133 N. C. 292, 45 S. E. 638, 63 L. R. A. 499.

131-73 Bolz v. Crone, 64 Kan. 570, 67 P. 1108.

In Kentucky, the rule is held to relate solely to the venue, and not to prevent service of a subpoena issued by the court of the residence of the witness. Linn v. Hagan, 27 Ky. L. R. 996, 87 S. W. 763.

131-77 Non-resident. — A plaintiff in a suit may be served with process in another action based upon the wrongfulness of the original action. Iron Dyke Co. v. R. Co., 132 Fed. 208.

132-79 White v. Marshall, 23 Ohio C. C. 376.

132-80 Tendering an issue of fact amounts to a waiver of privilege. White v. Marshall, supra.

132-81 Delay of three weeks in applying to set aside the service, not a waiver. Morrow v. Dudley, 144 Fed. 441.

132-82 Martin v. Bacon, 76 Ark. 158, 88 S. W. 863; Murray v. Wilcox, 122 Ia. 188, 97 N. W. 1087; Goldsmith v. Haskell, 105 N. Y. S. 327.

ATTORNEY AND CLIENT
[Vol. 2.]

In criminal proceedings, 146-33; *Transactions between attorney and client,* 154-66; *Documentary evidence,* 157-76; *Liens,* 172-17.

Judicial notice. — Where attorneys obtain their right to practice through and by reason of the authority of the highest court in the state, judicial notice will be taken of their status. Nolan v. R. Co. (Okla.), 91 P. 1128.

136-2 In proceedings before land department. — See Mulligan v. Smith, 32 Colo. 404, 76 P. 1063.

Collateral attack. — License to practice law can be impeached collaterally only by what affirmatively appears on the face of the record; parol evidence is inadmissible. Fish v. Pub. Co., 102 Mo. App. 6, 74 S. W. 641.

136-4 Not a criminal proceeding. In re Burnette, 73 Kan. 609, 85 P. 575; In re Parsons, 35 Mont. 478, 90 P. 163.

In Illinois, disbarment proceedings are started by information, and rules of evidence of criminal law apply. P. v. Sullivan, 218 Ill. 419, 75 N. E. 1005.

136-5 P. v. Keegan, 30 Colo. 71, 69 P. 524 (prosecution must prove a demand for money detained).

136-6 In re Burnette, 73 Kan. 609, 85 P. 575. See P. v. Kelsey, 32 Colo. 1, 75 P. 390.

137-7 Power of court is summary and judicial; an investigation rather than action or suit. In re Durant (Conn.), 67 A. 497. See In re Watt, 154 Fed. 678.

Manner of trial, to be determined by the court, so long as there is no oppression. In re Durant, supra.

Notice to defendant and opportunity to be heard, essential. Goode v. Steele, 8 Idaho 538, 69 P. 319.

Judgment for contempt not conclusive in a subsequent action to disbar for the same offense. P. v. O'Brien, 196 Ill. 250, 63 N. E. 667.

No reinvestigation of facts where an attorney has been convicted of crime. (Sembl.) In re Newby (Neb.), 107 N. W. 850.

Conviction of the crime alleged, not a prerequisite. In re Smith, 73 Kan. 743, 85 P. 584; In re Thresher, 33 Mont. 441, 84 P. 876. *Compare* In re Delmas, 139 Cal. xix, 72 P. 402.

Proof of conviction of the crime which is the basis of the proceedings is sufficient to warrant disbarment. S. v. Gebhardt, 87 Mo. App. 542.

Judgment of conviction of crime, effect in disbarment proceedings undetermined. P. v. Burton, 39 Colo. 164, 88 P. 1063.

Where a crime is charged, disbarment proceedings will not be begun pending the trial. In re Newby (Neb.), 107 N. W. 850.

Pardon granted one convicted of crime is no defense to disbarment proceedings. P. v. Burton, supra; P. v. Gilmore, 214 Ill. 569, 73 N. E. 737. But the fact of a pardon, to be considered. P. v. Payson, 215 Ill. 476, 74 N. E. 383.

Misconduct previous to admission to the bar, is competent evidence. P. v. Propper, 220 Ill. 455, 77 N. E. 208.

Statute of limitations, no defense. In re Smith, 73 Kan. 743, 85 P. 584. But see In re Elliott, 73 Kan. 151, 84 P. 750.

Manufactured evidence competent as an admission. — P. v. Brown, 218 Ill. 301, 75 N. E. 907.

Depositions taken in another action, admissible to show a consciousness of guilt. In re Durant (Conn.), 67 A. 497.

Hearsay rule applies, but testimony of a deceased witness in another trial is admissible where cross-examination was had by defendant, the matters involved being substantially the same, although the parties were not the same. In re Durant (Conn.), 67 A. 497.

Judgment of sister state in disbarment proceedings, admissible. P. v. Miller, 195 Ill. 621, 63 N. E. 504.

Privileged communication, waiver. In re Burnette, 73 Kan. 609, 85 P. 575. See In re Elliott, 73 Kan. 151, 84 P. 750.

Testimonial of good character signed by various judges, inadmissible. P. v. Sullivan, 218 Ill. 419, 75 N. E. 1005.

Evidence may be heard before a referee and reported to the court. P. v. Mead, 29 Colo. 344, 68 P. 241; P. v. Frisch, 218 Ill. 275, 75 N. E. 904; S. v. Byrnes, 100 Minn. 76, 110 N. W. 341; In re Newby (Neb.), 107 N. W. 850; In re Whittemore, 14 N. D. 487, 105 N. W. 232. *Contra,* In re Duncan, 64 S. C. 461, 42 S. E. 433.

Depositions may be taken and used on the hearing. P. v. Kelsey, 32 Colo. 1, 75 P. 390; S. v. McRae, 49 Fla. 389, 38 S. 605; S. v. Mosher, 128 Ia. 82, 103 N. W. 105; In re Burnette, 73 Kan. 609, 85 P. 575.

Witnesses are properly examined in open court, at the instance of the attorney. In re Duncan, 64 S. C. 461, 42 S. E. 433.

138-10 See Bar Assn. v. Casey (Mass.), 81 N. E. 892. *Compare* P. v. Matthews, 217 Ill. 94, 75 N. E. 444. An attorney can only be tried on charges alleged in the information, and proof of other acts is insufficient to sustain a disbarment.

138-11 P. v. Robinson, 32 Colo. 241, 75 P. 922. See In re Adriaans, 28 App. Cas. (D. C.) 515; P. v. Thornton, 228 Ill. 42, 81 N. E. 793; Tudor v. C., 27 Ky. L. R. 87, 84 S. W. 522; In re Dodge, 93 Minn. 131, 100 N. W. 684; Ex parte St. Rayner (Or.), 70 P. 537.

More than a mere preponderance of evidence, necessary. In re Smith, 73 Kan. 743, 85 P. 584.

Reasonable certainty. — In re Parsons, 35 Mont. 478, 90 P. 163.

Clear and satisfactory. — P. v. Thornton, 228 Ill. 42, 81 N. E. 793.

Sworn accusation is not sufficient, in the absence of other evidence, to justify disbarment, the defendant not appearing. In re Burnett, 70 Kan. 229, 78 P. 440.

Clear preponderance both as to the

act and the motive. Zachary v. S., 53 Fla. 94, 43 S. 925.

138-12 In re Dodge, 93 Minn. 131, 100 N. W. 684.

139-13 Lake City E. L. Co. v. McCrary, 132 Ia. 624, 110 N. W. 19; Department of Health v. Babcock, 84 N. Y. S. 604. See Van Gordon v. Goldamer (N. D.), 113 N. W. 609.

139-15 Aaron v. U. S., 155 Fed. 833; Brown v. Arnold, 131 Fed. 723, 67 C. C. A. 125; Harniska v. Dolph, 133 Fed. 158, 66 C. C. A. 224; Doe v. Abbott (Ala.), 44 S. 637; Pacific Pav. Co. v. Vizelich, 141 Cal. 4, 74 P. 352. See People's Bank v. Rauer, 2 Cal. App. 445, 84 Pac. 329; Bigham v. Kistler, 114 Ga. 453, 40 S. E. 303; P. v. Parker, 231 Ill. 478, 83 N. E. 282; Uehlein v. Burk, 119 Ia. 742, 94 N. W. 243; Hirsh v. Fisher, 138 Mich. 95, 101 N. W. 48; Patterson v. Yancey, 97 Mo. App. 681, 71 S. W. 845; Davis v. Cohn, 96 Mo. App. 587, 70 S. W. 727; Ebel v. Stringer, 73 Neb. 249, 102 N. W. 466; Cutting v. Jessmer, 101 App. Div. 283, 91 N. Y. S. 658; Austin v. Lubricant Co., 85 N. Y. S. 362; Hookey v. Greenstein, 119 App. Div. 209, 104 N. Y. S. 621; Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129; Nolan v. R. Co. (Okla.), 91 P. 1128; McBurnett v. Lampkin (Tex. Civ.), 101 S. W. 864; Texas & P. R. Co. v. McCarty, 29 Tex. Civ. 616, 69 S. W. 229.

141-16 Aaron v. U. S., 155 Fed. 833; Doe v. Abbott (Ala.), 44 S. 637; Bigham v. Kistler, 114 Ga. 453, 40 S. E. 303; Uehlein v. Burk, 119 Ia. 742, 94 N. W. 243; Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129; Nolan v. R. Co. (Okla.), 91 P. 1128.

142-17 Horseshoe Min. Co. v. Sampling Co., 147 Fed. 517, 77 C. C. A. 213. See Bank of Batesville v. Maxey, 76 Ark. 472, 88 S. W. 968.

142-18 Doe v. Abbott (Ala.), 44 S. 637. See Mobile Land Imp. Co. v. Gass, 142 Ala. 520, 39 S. 229; Pacific Pav. Co. v. Vizelich, 141 Cal. 4, 74 P. 352; Bigham v. Kistler, 114 Ga. 453, 40 S. E. 303; Ebel v. Stringer, 73 Neb. 249, 102 N. W. 466.

143-20 See Barkley Cem. Assn. v. McCune, 119 Mo. App. 349, 95 S. W. 295.

143-25 *Contra.* — Hirsh v. Fisher, 138 Mich. 95, 101 N. W. 48.

Attorney acting in a justice's court acts as attorney in fact and not as an attorney at law. Cutting v. Jessmer, 101 App. Div. 283, 91 N. Y. S. 658.

Plaintiff may be estopped from denying his attorney's authority. Plank v. Hertha, 132 Ia. 213, 109 N. W. 732.

Waiver of right to rebut by laches. S. v. Harris, 14 N. D. 501, 105 N. W. 621.

Conclusive in favor of persons who have acquired rights. Williams v. Johnson, 112 N. C. 424, 17 S. E. 496, 34 Am. St. 513.

144-26 See S. v. Harris, 14 N. D. 501, 105 N. W. 621.

County. — Lake City E. L. Co. v. McCrary, 132 Ia. 624, 110 N. W. 19.

Presumption as to powers of deputy district attorney. — S. v. Guglielmo, 46 Or. 250, 79 P. 577, 80 P. 103.

144-28 Simmons v. Davenport, 140 N. C. 407, 53 S. E. 225.

Good faith of agreement based upon a contingent fee must be established by the attorney. Hamilton v. Holmes, 48 Or. 453, 87 P. 154. But the ordinary contract of employment, between attorney and client, need not be affirmatively shown to have been fairly made. Clifford v. Braun, 71 App. Div. 432, 75 N. Y. S. 856; Werner v. Knowlton, 107 App. Div. 158, 94 N. Y. S. 1054.

Contingent fee of one-half, not prima facie unconscionable. Ransom v. Cutting, 188 N. Y. 447, 81 N. E. 324.

146-33 In criminal proceeding. No presumption that an attorney appearing in a criminal proceeding appears by the authority of the prosecuting witness. Beiswanger v. Bonding Co., 98 Md. 287, 57 A. 202.

146-34 Sheehan v. Erbe, 103 App. Div. 7, 92 N. Y. S. 862.

Corporation liable for an employment by a director. — Germania etc. Co. v. Hargis, 23 Ky. L. R. 874, 64 S. W. 516. See Breathitt C., I. & L. Co. v. Gregory, 25 Ky. L. R. 1507, 78 S. W. 148; Union Surety & G. Co. v. Tenney, 200 Ill. 349, 65 N. E. 688.

Identity of two corporations may be shown. Randolph v. R. Co., 118 Mo. App. 460, 94 S. W. 309.

Retainer of one member of a firm is proof of the retainer of the firm, in the absence of other evidence. Lockwood v. Dillenbeck, 104 App. Div. 71, 93 N. Y. S. 321.

Bringing suit in the name of a person is only prima facie evidence that such person is the client and party interested and may be rebutted. Tisdale v. Troy (Ala.), 44 S. 601. On the issue of who employed the attorney, a claim for services presented to one of the persons is admissible. Fairchild v. Whitmore (Cal. App.), 91 P. 336.

Hearsay inadmissible. — Miner v. Rickey (Cal. App.), 90 P. 718.

146-36 Name of the attorney on judge's docket as attorney for a party and that he ordered witnesses with the knowledge of the party, is competent to show employment. Higbee v. Spangler, 127 Mo. App. 220, 104 S. W. 1143.

District attorney held to have ratified signing of the information by another. S. v. Guglielmo, 46 Or. 250, 80 P. 103, 69 L. R. A. 466.

147-37 Dorr v. Dudley (Ia.), 112 N. W. 203; Patterson v. Fleenor, 28 Ky. L. R. 582, 89 S. W. 705; Bissell v. Zorn, 122 Mo. App. 688, 99 S. W. 458.

Conduct reasonably inducing an attorney to believe his services are desired. Morris v. Kesterson (Tex.), 88 S. W. 277.

Evidence held insufficient in Altkrug v. Horowitz, 111 App. Div. 420, 97 N. Y. S. 716; Kneeland v. Hurdy, 97 N. Y. S. 957.

On issue of existence of an implied contract, the result of services rendered is immaterial. Davis v. Walker, 131 Ala. 204, 31 S. 554.

147-38 Markey v. R. Co., 185 Mo. 348, 84 S. W. 61.

147-39 Contract express or implied must be shown. Caldwell v. Bigger (Kan.), 90 P. 1095; Lillis v. Casualty Co., 131 Mich. 301, 91 N. W. 165.

Evidence of receipt of benefit by a stranger, insufficient. Davis v. Trimble, 76 Ark. 115, 88 S. W. 920; Duckwall v. Williams, 29 Ind. 650, 63 N. E. 232; Forman v. Board, 119 La. 49, 43 S. 908; Trimble v. R. Co., 201 Mo. 372, 100 S. W. 7.

Estoppel of stranger. — Kelly v. Assn., 2 Cal. App. 460, 84 P. 321.

Estoppel of town. — Newton v. Hamden, 79 Conn. 237, 64 A. 229.

Failure by co-administrator to disclaim services. Ward v. Koenig (Md.), 67 A. 236.

Circumstances surrounding a trial may serve as a ratification. Van Gordon v. Goldamer (N. D.), 113 N. W. 609.

Employment of Counsel to assist the attorney shown by knowledge of client of such fact. Allen v. Parrish, 65 Kan. 496, 70 P. 351. See Emben v. Bicksler, 34 Colo. 496, 83 P. 636; Dorr v. Dudley (Ia.), 112 N. W. 203. *Compare* Lathrop v. Hallett, 20 Colo. App. 207, 77 P. 1095; In re Matter of Counsel, 32 Ct. Cl. 231.

148-45 Parol evidence inadmissible where there is a written agreement. Spurrier v. Bullard, 131 Ia. 123, 107 N. W. 1036.

Correspondence may establish the relation. Union S. & G. Co. v. Tenney, 200 Ill. 349, 65 N. E. 688.

Retainer by corporation. — Letter signed by secretary prima facie evidence of employment. Union S. & G. Co. v. Tenney, 102 Ill. App. 95.

Filing of warrant of attorney is required to be made on demand in some states. In such a case, proof that the action was originally brought with the consent of the plaintiff is not enough. Fisher v. Reach, 202 Pa. 74, 51 A. 599. See C. v. R. Co., 27 Pa. C. C. 123; Gregory v. Hanna, 1 Haw. 118.

Claim for legal services, presented to an insolvent corporation, is admissible in an action against a third person for the same services, as tending to show who was the principal. Fairchild v. Whitmore (Cal. App.), 91 P. 336.

149-47 Such a letter is inadmissible unless it constitutes part of the res gestae, or is acquiesced in by the opposite party. Duysters v. Crawford, 69 N. J. L. 614, 55 A. 823. See Marshall v. Piggott (Neb.), 111 N. W. 592.

149-50 Davis v. Walker, 131 Ala. 204, 31 S. 554.

150-51 Admissions by agent. Fowler v. Land Co., 18 S. D. 131, 99 N. W. 1095.

Declarations of an attorney are not admissible to prove the fact of his

employment. Worley v. Hineman, 6 Ind. App. 240, 33 N. E. 260.

151-56 **Negligence as a defense.** O'Donohoe v. Whitty, 2 Ont. 424, 20 Can. L. J. 146; Hubbard v. Ellithorpe (Ia.), 112 N. W. 796.

Negligence alleged in recoupment. Keith v. Marcus, 181 Mass. 377, 63 N. E. 924.

152-59 *Compare.* — Barnes v. Squier, 193 Mass. 21, 78 N. E. 731.

154-64 Whinery v. Brown, 36 Ind. App. 276, 75 N. E. 605. See Boyett v. Payne, 141 Ala. 475, 37 S. 585; Vooth v. McEachen, 91 App. Div. 30, 86 N. Y. S. 431.

154-66 **Transactions between attorney and client.** — The relationship existing between attorney and client is regarded as fiduciary and confidential, and in all transactions between them by which the attorney benefits he has the burden of showing entire good faith and fairness. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682; Klein v. Borchert, 89 Minn. 377, 95 N. W. 215; Sheehan v. Erbe, 103 App. Div. 7, 92 N. Y. S. 862; Landis v. Wintermute, 40 Wash. 673, 82 P. 1000; Young v. Murphy, 120 Wis. 49, 97 N. W. 496; Vanasse v. Reid, 111 Wis. 303, 87 N. W. 192.

No presumption of fraud where an attorney takes a conveyance of land in payment of fees. Lindt v. Linder, 117 Ia. 110, 90 N. W. 596.

154-67 P. v. Banking Co., 112 App. Div. 166, 98 N. Y. S. 290; Simmons v. Davenport, 140 N. C. 407, 53 S. E. 225.

Performance of services and the continuing existence of the debt must be proved by the attorney. Loomis v. Mullins, 31 Ky. L. R. 231, 101 S. W. 913.

Retainer fee recoverable though no services are proved to have been performed. Union S. & G. Co. v. Tenney, 200 Ill. 349, 65 N. E. 688; Blair v. Fireproofing Co., 191 Mass. 333, 77 N. E. 762.

155-68 **Performance of useless work.** — Leo v. Leyser, 36 Misc. 549, 73 N. Y. S. 941.

155-69 See Watson v. Min. Co., 118 Ga. 603, 45 S. E. 460; Bissell v. Zorn, 122 Mo. App. 688, 99 S. W. 458.

155-71 **Defendant has the burden** of proving any new matter set up by him in defense to the action. Fuller v. Stevens (Ala.), 39 S. 623 (set-off); Weil v. Fineran, 78 Ark. 87, 93 S. W. 568 (fraud); Wessel v. Bishop (Neb.), 107 N. W. 220 (part payment); Bogart v. Tannenbaum, 103 N. Y. S. 98 (gratuitous service).

156-73 See Roche v. Baldwin, 135 Cal. 522, 65 P. 459, 67 P. 903.

Proof can only be made of the services alleged in the complaint. Higgins v. Matlock (Tex. Civ.), 95 S. W. 571.

156-74 Davis v. Farwell (Vt.), 67 A. 129.

156-75 *Compare.* — Davis v. Fischer, 90 N. Y. S. 301.

Diaries of a deceased attorney are admissible to prove the services rendered. Burke v. Baker, 97 N. Y. S. 768. See Fisher v. Mayor, 67 N. Y. 73.

157-76 **Documentary evidence.** Letters from the defendant to the attorney are admissible to show the services rendered, although they reflect on the character of defendant's business. Stern v. Daniel (Wash.), 91 P. 552.

158-79 Boyd v. Trust Co., 85 App. Div. 581, 83 N. Y. S. 539, *aff.* 176 N. Y. 556, 68 N. E. 1114.

On appeal, the presumption is that the lower court followed the established rule in estimating value of services. Forrester v. Min. Co., 29 Mont. 397, 409, 74 P. 1088, 76 P. 211; Ottofy v. Keyes, 91 Mo. App. 146.

158-81 Fuller v. Stevens (Ala.), 39 S. 623; Heiberger v. Worthington, 23 App. Cas. (D. C.) 565; Carlisle v. Barnes, 102 App. Div. 573, 92 N. Y. S. 917; Myers v. Pearce, Vol. 13-23 Ohio C. C. 661. See In re Rapp (Neb.), 110 N. W. 661.

Evidence that it is an unreasonable fee, not admissible unless so excessive as to appear grossly unfair. Burke v. Baker, 97 N. Y. S. 768.

Severable contract. — Boyd v. Trust Co., 85 App. Div. 581, 83 N. Y. S. 539, *aff.* 176 N. Y. 556, 68 N. E. 1114.

Where the express contract is void, evidence of reasonable value admissible. McCurdy v. Dillon, 135 Mich. 678, 98 N. W. 746; In re Snyder, 190 N. Y. 66, 82 N. E. 742.

Counsel employed to assist an attorney is not bound by a limitation upon the fee, if he does not know of it. Gates v. McClenahan (Ia.), 103 N. W. 969.

158-82 See Dempsey v. Wells, 109 Mo. App. 470, 84 S. W. 1015; Simmons & W. v. Davenport, 140 N. C. 407, 53 S. E. 225.

Claim of a lien is not conclusive that the value of the services rendered was not greater than the lien claim. Gilmore v. McBride, 156 Fed. 464.

Declarations of third persons not under oath, inadmissible. Miner v. Rickey (Cal. App.), 90 Pac. 718.

Reasonable value is not to be determined by the value to the client. Kingsbury v. Joseph, 94 Mo. App. 298, 68 S. W. 93.

Order of court allowing certain fees is not conclusive as to their reasonableness against persons not parties. Hays v. Johnson, 30 Ky. L. R. 614, 99 S. W. 332.

Value of services in absence of any evidence may properly be found by the court from its own knowledge and experience. Pearce v. Albright, 12 N. M. 202, 76 P. 286, and it has been held that the value must be determined upon sworn testimony, which is to be weighed by the court in view of its own experience and knowledge. McMullen v. Reynolds, 209 Ill. 504, 70 N. E. 1041. See Dinkelspiel v. Pons, 119 La. 236, 43 S. 1018.

Retainer. — To determine the reasonableness of a retainer fee, the ability and reputation of the attorney, the probability of the extent of interference with other business, and the subsequent business done for the client, may be shown. Blair v. Fireproofing Co., 191 Mass. 333, 77 N. E. 762.

161-85 Webster v. Loeb, 112 Mo. App. 139, 86 S. W. 463. See Bissell v. Zorn, 122 Mo. App. 688, 99 S. W. 458.

Account stated is conclusive evidence of the value. Lane & Bodley Co. v. Taylor, 80 Ark. 469, 97 S. W. 441, 7 L. R. A. (N. S.) 924; Cusick v. Boyne, 1 Cal. App. 643, 82 P. 985.

In the absence of other testimony, an award of a greater amount than is set forth in the account is error. Bates v. School Dist. No. 10 (Wash.), 88 P. 944.

Account rendered need not specify minor expenses. Treakle v. Abstract Co., 83 Ark. 258, 103 S. W. 174; Taussig v. R. Co., 186 Mo. 269, 85 S. W. 378.

161-87 Morehead v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340; Smith v. Couch, 117 Mo. App. 267, 92 S. W. 1143; Forrester v. Min. Co., 29 Mont. 397, 409, 74 P. 1088, 76 P. 211; Schlesinger v. Dunne, 36 Misc. 529, 73 N. Y. S. 1014; Heblich v. Slater, 217 Pa. 404, 66 A. 655.

Where no evidence concerning attorney's standing has been given, an instruction in reference thereto is erroneous. Smith v. Couch, 117 Mo. App. 267, 92 S. W. 1143.

162-88 Forrester v. Min. Co., supra.

Securing legislation. — Town of Hempstead v. New York, 86 App. Div. 300, 83 N. Y. S. 806.

Financial condition of a judgment debtor is admissible to show the value of an attorney's services in making the collection. Boyett v. Payne, 141 Ala. 475, 37 S. 585.

162-89 Morehead v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340; Trimble v. R. Co., 201 Mo. 372, 100 S. W. 7; Smith v. Couch, 117 Mo. App. 267, 92 S. W. 1143; Schlesinger v. Dunne, 36 Misc. 529, 73 N. Y. S. 1014; Heblich v. Slater, 217 Pa. 404, 66 A. 655; Littell v. Saulsberry, 40 Wash. 550, 82 P. 909.

Value of land for which abstracts were furnished. Morehead v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340.

164-91 Trimble v. R. Co., 201 Mo. 372, 100 S. W. 7. See Smith v. Couch, 117 Mo. App. 267, 92 S. W. 1143; Forrester v. Min. Co., 29 Mont. 397, 409, 74 P. 1088, 76 P. 211; Schlesinger v. Dunne, 36 Misc. 529, 73 N. Y. S. 1014.

Life imprisonment instead of death penalty in murder case. Weldon & H. v. Finley, 31 Ky. L. R. 1050, 104 S. W. 701.

164-92 Germania etc. Co. v. Hargis, 23 Ky. L. R. 874, 64 S. W. 516.

165-94 Fuller v. Stevens (Ala.), 39 S. 623.

Scale of attorney's fees fixed by a bar association, held inadmissible in

the absence of preliminary proof of authenticity. Bingham v. Spruill, 97 Ill. App. 374.

166-95 Proof of the same attorney's charges in other matters, inadmissible. Fuller v. Stevens, supra.

166-96 Heblich v. Slater, 217 Pa. 404, 66 A. 655.

166-97 Smith v. Couch, 117 Mo. App. 267, 92 S. W. 1143.

167-1 Duckwall v. Williams, 29 Ind. App. 650, 63 N. E. 232.

168-3 Roche v. Baldwin, 135 Cal. 522, 65 P. 459; s. c. 143 Cal. 186, 76 P. 956; Fairchild v. Whitmore (Cal. App.), 91 P. 336; Morehead v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340; Reed v. Reed, 24 Ky. L. R. 2438, 74 S. W. 207; Dinkelspiel v. Pons, 119 La. 236, 43 S. 1018.

168-5 Walker v. Mfg. Co., 128 Ga. 831, 58 S. E. 475; Germania etc. Co. v. Hargis, 23 Ky. L. R. 874, 64 S. W. 516.

169-7 **Evidence** as to per diem charge improper where the services could not properly be computed on that basis. Hughes v. Ferriman, 119 Ill. App. 169.

170-12 **Chicago attorney** is not an expert on reasonable charges in Arizona. Harmann v. Rose, 129 Ill. App. 337.

170-13 **Affidavits.** — Expert testimony as to the value of services may be presented by affidavits, in those cases in which the use of affidavits is proper. Hutchinson v. Hutchinson, 105 Ill. App. 349.

171-14 **Attorney** testifying as an expert testifies to the general value of the services after being informed as to what was done; any matters relating to the ability of the other attorney may be brought out on cross-examination. Fuller v. Stevens (Ala.), 39 S. 623.

172-15 Fuchs v. Tone, 218 Ill. 445, 75 N. E. 1014.

Facts must be in evidence. — Roche v. Baldwin, 143 Cal. 186, 76 P. 956. See s. c. 135 Cal. 522, 65 P. 459, 67 P. 903.

172-16 Fowler v. Land Co., 18 S. D. 131, 99 N. W. 1095; Morehead v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340.

Question to be asked an expert is, what is the usual and customary charge for such services. If there is no such charge, it is proper to ask what such services are reasonably worth. Maneaty v. Steele, 112 Ill. App. 19. See Sexton v. Bradley, 110 Ill. App. 495.

172-17 Sexton v. Bradley, supra; Lee v. Lomax, 219 Ill. 218, 76 N. E. 377; Germania etc. Co. v. Hargis, 23 Ky. L. R. 874, 64 S. W. 516; Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340; Dinkelspiel & H. v. Pons, 119 La. 236, 43 S. 1018; Brownrigg v. Massengale, 97 Mo. App. 190, 70 S. W. 1103; Mack v. Miller, 87 App. Div. 359, 84 N. Y. S. 440; Schlesinger v. Dunne, 36 Misc. 529, 73 N. Y. S. 1014.

Court may also use its own experience and knowledge. — Gates v. McClenahan (Ia.), 103 N. W. 969; Hutchinson v. Hutchinson, 105 Ill. App. 349.

Lien. — Burden of proving the existence of the grounds of lien and the amount due is upon the party asserting the lien. Walker v. Mfg. Co., 128 Ga. 831, 58 S. E. 475.

173-20 Wilkinson v. P., 226 Ill. 135, 80 N. E. 699; Chicago U. T. Co. v. Ertrachter, 228 Ill. 114, 81 N. E. 816; Smart v. Lodge No. 2, 6 Ohio C. C. (N. S.) 15. See "COMPETENCY," Vol. 3, p. 227.

BAILMENTS [Vol. 1.]

177-1 Fleet v. Hertz, 98 Ill. App. 564 (containing full discussion of this question). See Ott v. Sweatman, 15 Pa. C. C. 97.

178-3 **Burden** is on those furnishing goods to a person who later becomes a bankrupt, to prove a bailment. In re Wells, 140 Fed. 752. See In re Wood, 140 Fed. 964.

178-5 **Ownership.** — There is a presumption that property found in the possession of a person belongs to him. In re Wood, 140 Fed. 964.

178-7 **Parol evidence** has been held admissible to show whether a transaction was a loan or a deposit of money, although a certificate of deposit had been issued. S. v. Bank (Ia.), 113 N. W. 500.

178-10 See Potter v. Mill Co., 101 Mo. App. 581, 73 S. W. 1005.

Testimony of warehouseman is competent to aid in determining the character of a transaction. Savage v. Mills Co., 48 Or. 1, 85 P. 69. See

Thompson v. Jordan, 164 Ind. 551, 73 N. E. 1087.

179-17 See Jungclaus v. R. Co., 99 Minn. 515, 108 N. W. 1118.

180-24 Holstein v. Phillips, 116 N. C. 366, 59 S. E. 1037.

181-35 Bissell v. Harris (Neb.), 95 N. W. 779.

Bank. — Sherwood v. Bank, 131 Ia. 528, 109 N. W. 9.

183-39 **Evidence of a local custom** to receive goods is admissible to prove the bailment. Sherwood v. Bank, 131 Ia. 528, 109 N. W. 9.

183-40 **Delivery to carrier.** The shipper must show delivery to the carrier, at a customary place, during the usual business hours, to an authorized agent. Spofford v. R. Co., 11 Pa. Super. 97.

Burden on the state to prove delivery, in an action for embezzlement. S. v. Sienkiewiez, 4 Penne. (Del.) 59, 55 A. 346.

183-43 **It may be shown** that the defendant was the ostensible proprietor of the hotel and that he held himself out as such by advertisements, and the fact that he was not the actual owner does not prevent his becoming liable as bailee for goods received at the hotel. Ross v. Daugherty, 127 Ill. App. 572.

183-44 McCurdy v. Carpet Co., 94 Minn. 326, 102 N. W. 873.

Terms of disputed oral contract of storage. — Phenix Co. v. Storage Co., 189 Mass. 82, 75 N. E. 258.

Parol evidence inadmissible to vary written contract of bailment. Savage v. Mills Co., 48 Or. 1, 85 P. 69.

186-66 Phenix Co. v. Storage Co., 189 Mass. 82, 75 N. E. 258.

187-69 **Bailor** may show that the bailee had knowledge that the goods would be damaged by freezing. Phenix Co. v. Storage Co., 189 Mass. 82, 75 N. E. 258.

187-70 **Proof that cattle** were of a superior breed, admissible. Darr v. Donovan, 73 Neb. 424, 102 N. W. 1012.

Warehouseman is presumed to know that flour will be injured if it comes in contact with oil. Sibley Co. v. Durand Co., 200 Ill. 354, 65 N. E. 676.

187-73 *Contra.* — Barker v. Storage Co., 79 Conn. 342, 65 A. 143.

187-74 **Agistor's care** measured by the care of an ordinarily prudent man under like circumstances. Darr v. Donovan, 73 Neb. 424, 102 N. W. 1012.

Custom to insure books left at a bindery may be shown. Pauksztis v. Book Co., 212 Pa. 403, 61 A. 901.

188-78 But it must first be shown that the plaintiff knew of such advertisements and relied upon them. Moneyweight Co. v. Woodward, 29 Pa. Super. 142.

189-97 Emdin v. Haas, 92 N. Y. S. 312.

192-6 Hackney v. Perry (Ala.), 44 S. 1029; Dieterle v. Bekin, 143 Cal. 683, 77 P. 664; Hunter v. Ricke, 127 Ia. 108, 102 N. W. 826; Sherwood v. Bank, 131 Ia. 528, 109 N. W. 9; Baehr v. Downey, 133 Mich. 163, 94 N. W. 750; Horton v. Hotel Co., 114 Mo. App. 357, 89 S. W. 363; Dixon v. McDonnell, 92 Mo. App. 479; Shropshire v. Sidebottom, 30 Mont. 406, 76 P. 941; Manson v. Assn. (N. J.), 60 A. 1120; Jackson v. McDonald, 70 N. J. L. 594, 57 A. 126; Toplitz v. Timmins, 88 N. Y. S. 946; Polack v. O'Brien, 114 App. Div. 366, 100 N. Y. S. 385; Snell v. Cornell, 93 App. Div. 136, 87 N. Y. S. 1; Simonoff v. Fox, 46 Misc. 249, 91 N. Y. S. 757. See Wheeler v. Blumenthal, 107 N. Y. S. 57. *Compare* McDonald v. Miser, 2 Ohio C. C. (N. S.) 313.

192-7 The Genessee, 138 Fed. 549, 70 C. C. A. 673; Swenson v. Snare, 145 Fed. 727; Powers v. Jughardt, 101 App. Div. 53, 91 N. Y. S. 556. See Selesky v. Vollmer, 107 App. Div. 300, 95 N. Y. S. 130.

Loss by fire raises no such presumption. Lyman v. R. Co., 132 N. C. 721, 44 S. E. 550.

192-8 **Massachusetts rule,** as stated in the text, has been followed by the courts of Iowa and Ohio. Hunter v. Ricke, 127 Ia. 108, 102 N. W. 826; McDonald v. Miser, 2 Ohio C. C. (N. S.) 313.

193-10 Shropshire v. Sidebottom, 30 Mont. 406, 76 P. 941. *Compare* Dieterle v. Bekin, 143 Cal. 683, 77 P. 664.

194-11 Swenson v. Snare, 145 Fed. 727; Polack v. O'Brien, 114 App. Div. 366, 100 N. Y. S. 385; Lyman v. R. Co., 132 N. C. 721, 44 S. E. 550; McDonald v. Miser, 2 Ohio C. C. (N. S.) 313; Baker-L. Mfg. Co. v. Clayton (Tex. Civ.), 103 S. W. 197.

194-12 See Phipps v. Hotel, 22 Times L. R. (Eng.) 49; Hunter v. Ricke, 127 Ia. 108, 102 N. W. 826; Selesky v. Vollmer, 107 App. Div. 300, 95 N. Y. S. 130; Hislop v. Ordner, 28 Tex. Civ. 540, 67 S. W. 337; Hildebrand v. Carroll, 106 Wis. 324, 82 N. W. 145.

195-15 Phipps v. Hotel, 22 Times L. R. (Eng.) 49.

195-16 Dieterle v. Bekin, 143 Cal. 683, 77 P. 664; Sherwood v. Bank, 131 Ia. 528, 109 N. W. 9; Shropshire v. Sidebottom, 30 Mont. 406, 76 P. 941; Bissell v. Harris (Neb.), 95 N. W. 779; Sulpho Co. v. Allen, 66 Neb. 295, 92 N. W. 354. See Snell v. Cornwell, 93 App. Div. 136, 87 N. Y. S. 1.

196-21 Hunter v. Ricke, 127 Ia. 108, 102 N. W. 826; Wisecarver v. Long, 120 Ia. 59, 94 N. W. 467.

Loss through inevitable accident. Bissell v. Harris (Neb.), 95 N. W. 779.

While proof that tents were delivered to the bailee in good condition and returned in a damaged condition might establish a prima facie case of negligence, an instruction that the bailee must then account for the damage need not be given. Baker-L. Mfg. Co. v. Clayton (Tex. Civ.), 103 S. W. 197.

197-22 Sulpho Co. v. Allen, 66 Neb. 295, 92 N. W. 354.

198-24 Wisecarver v. Long, 120 Iowa 59, 94 N. W. 467.

198-28 On the issue of negligence in storing butter, evidence that plaintiff's butter in other storage places kept well, and that the butter of other persons stored with the defendant was damaged, is admissible. Rudell v. Storage Co., 136 Mich. 528, 99 N. W. 756.

It has been held that on the issue of defendant's negligence in supplying cattle with water, the plaintiffs could show that their cattle in another pasture and under the care of another bailee were better supplied. Tuttle v. Moody (Tex. Civ.), 94 S. W. 134. *Compare* Welch v. Fransioli (Wash.), 90 P. 644.

199-30 General custom of agistors has been held admissible upon the question of negligence in not maintaining fences. Arrington Bros. v. Fleming, 117 Ga. 449, 43 S. E. 691, 97 Am. St. 169.

200-39 Ross v. Dougherty, 127 Ill. App. 572; Weaver v. Stables (Wash.), 89 P. 154.

Ordinary care. — Haralson v. Hahl (Tex. Civ.), 85 S. W. 1008.

203-55 Where there is a conflict in the evidence, the question whether there has been a redelivery is one of fact for the jury. Simonoff v. Fox, 46 Misc. 249, 91 N. Y. S. 757.

204-59 McCurdy v. Carpet Co., 94 Minn. 326, 102 N. W. 873.

Loss of household goods. — Sentimental value. Barker v. Storage Co., 79 Conn. 342, 65 A. 143.

204-64 Negligent care of cattle; damage. Darr v. Donovan, 73 Neb. 424, 102 N. W. 1012.

204-69 Expert evidence is admissible to prove the value of lost household goods. Barker v. Storage Co., 79 Conn. 342, 65 A. 143.

BANKRUPTCY [Vol. 2.]

Presumption against jurisdiction, 209-3; Number of examinations, 216-28; Variance, 228-66; Ruling of referee on objections to evidence, 232-80; Evidence by bankrupt in support of petition, 232-80.

208-1 In re Coddington, 118 Fed. 281; McGowan v. Knittel, 137 Fed. 453, 69 C. C. A. 595; In re American Pub. Co., 15 Okla. 177, 79 P. 762.

Involuntary appearance of the debtor at the hearing; effect. See Troy Wagon Wks. v. Vastbinder, 130 Fed. 232.

Appearance without bringing books, shifts the burden of proof to the debtor. Bogen v. Protter, 129 Fed. 533, 64 C. C. A. 63.

Burden of proving partnership in proceedings against such partnership. See Jones v. Burnham, 138 Fed. 986, 71 C. C. A. 240.

209-3 Presumption against jurisdiction. — Burden of proving that debtor belongs to such a class as may be declared involuntary bankrupt, is upon the claimant. In re Pilger, 118 Fed. 206; Philpot v. O'Brion, 126 Fed. 167, 61 C. C. A. 111. *Compare* In re Trust Co., 152 Fed. 152.

210-5 In re Williams, 123 Fed. 321 (full discussion).

210-8 See In re McGowan, 134 Fed. 498.

Great latitude where the issue is a fraudulent transfer of property. In re Luber, 152 Fed. 492.

Verified schedules of a bankrupt are competent. In re Mandel, 127 Fed. 863.

Books of bankrupt are competent evidence, though not conclusive. In re Docker-F. Co., 123 Fed. 190.

Record of state court in proceedings in which a receiver was appointed, admissible. Blue Mountain Co. v. Portner, 131 Fed. 57, 65 C. C. A. 295.

Opened judgment is inadmissible. McGowan v. Knittel, 137 Fed. 453, 69 C. C. A. 595. But see dissenting opinion at p. 1015.

English practice. — On the hearing of the petition, the petitioning creditor can require the production of the debtor's books and may call the debtor himself. In re X. Y., (1902) 1 K. B. (Eng.) 98.

211-9 **Admission** in writing of inability to pay debts and willingness to be adjudged a bankrupt is an act of bankruptcy, and no proof of insolvency is necessary. In re Duplex R. Co., 142 Fed. 906.

Admission by corporation. — In re Moench & S. Co., 130 Fed. 685, 66 C. C. A. 37.

Admission of insolvency by the debtor is not necessarily an admission of inability to pay its debts and a willingness to be adjudged a bankrupt. In re Wilmington H. Co., 120 Fed. 179. *Compare* Brinkly v. Smithwick, 126 Fed. 686.

As to competency and weight of declarations of bankrupt, see In re Foster, 126 Fed. 1014.

211-11 **Adjudication** of bankruptcy, admissible as evidence of insolvency. Calkins v. Bank, 99 Mo. App. 509, 73 S. W. 1098. *Compare* Swartz v. Frank, 183 Mo. 438, 82 S. W. 60.

212-12 Edelstein v. U. S., 149 Fed. 636, 79 C. C. A. 328; In re Billing, 145 Fed. 395; DeGraaf v. Lang, 92 App. Div. 564, 87 N. Y. S. 78.

Adjudication is res judicata of the question of the bankrupt's residence as against a creditor who has acquiesced in the adjudication. In re Hintze, 134 Fed. 141.

213-15 In re Fellerman, 149 Fed. 244.

Alleged bankrupt for whose property a receiver has been appointed must submit to an examination even pending a hearing on the petition. In re Fleischer, 151 Fed. 81.

214-21 **Right of a creditor** to have an examination of a third person is not absolute. In re Andrews, 130 Fed. 383.

Refusal of referee to subpoena the bankrupt's wife a proper exercise of discretion. In re Doherty, 135 Fed. 432.

Order for examination of a witness may, in the discretion of the court, be made upon an oral application. In re Abbey Press, 134 Fed. 51.

215-26 **Certain latitude** allowed in order to determine whether the business is her own or her husband's. In re Worrell, 125 Fed. 159.

216-28 **Number of examinations of witness.** — Witness may be required to attend before the referee for further examination. In re Hooks S. Co., 138 Fed. 954.

217-32 **Listed creditor** may obtain the examination before he has proved his claim. In re Kuffler, 153 Fed. 667.

217-33 **Personal hearing** by referee necessary. In re Wilde's Sons, 131 Fed. 142.

217-34 See U. S. v. Simon, 146 Fed. 89.

219-43 In re Romine, 138 Fed. 837; In re Lipset, 119 Fed. 379; In re Sturgeon, 139 Fed. 608, 71 C. C. A. 592; Bank v. Johnson, 143 Fed. 463, 74 C. C. A. 597.

Referee has power to exclude inadmissible evidence. In re Wilde's Sons, 131 Fed. 142.

Referee must certify objections to his rulings, for revision, only in such matters as where he is by law empowered to enter orders that under the law may then become final. In re Romine, 138 Fed. 837.

Referee on objection should not excuse witness from answering questions. Dressel v. Lumb. Co., 119 Fed. 531.

219-44 See In re Romine, supra; In re Davison, 143 Fed. 673.

Referee cannot punish for contempt.

Bank v. Johnson, 143 Fed. 463, 74 C. C. A. 597.

222-49 **President of a bankrupt corporation** may be required to disclose the combination of a safe alleged to contain assets. In re Hooks S. Co., 138 Fed. 954.

224-56 U. S. v. Goldstein, 132 Fed. 789; In re Hooks S. Co., supra. See U. S. v. Simon, 146 Fed. 89.

On the general principle involved, see Burrell v. Montana, 194 U. S. 572.

If court is convinced that the answer cannot incriminate him, the bankrupt must answer the question. In re Levin, 131 Fed. 388.

Books of account must be turned over; the question of their incriminating character is for the court. In re Rosenblatt, 143 Fed. 663.

Immunity limited to such criminal proceedings as may arise out of the conduct of his business. Edelstein v. U. S., 149 Fed. 636, 79 C. C. A. 328.

226-58 **Private papers** need not be produced. In re Wheeler & Co., 151 Fed. 542.

227-60 Whitney v. Dresser, 200 U. S. 532; In re Dresser, 135 Fed. 495, 67 C. C. A. 207; In re Carter, 138 Fed. 846. See Mason v. Furniture Co., 149 Fed. 898.

Filing of objections does not meet the prima facie case made out by a verified statement of the claim. In re Castle Braid Co., 145 Fed. 224.

Statutory form of proof must be strictly followed. In re Dunn Co., 132 Fed. 719.

Proof of judgments must be made, the referee not being bound to search the records. In re Rosenberg, 144 Fed. 442.

Taxes being matter of public record need not be proved as a claim, to be allowed. In re Prince, 131 Fed. 546.

A petitioning creditor whose claim has been allowed by the court at the time of the adjudication of bankruptcy need not present it for allowance by the referee, as it is regarded as res judicata. Ayres v. Cone, 138 Fed. 778.

227-61 **Referee is bound to consider** the credibility of witnesses, and is not required to allow a claim merely because it is uncontradicted. In re Cannon, 133 Fed. 837.

228-64 In re Domenig, 128 Fed. 146, applying the Pennsylvania statute.

228-66 **Variance.** — The general rules of variance apply, and a claimant who has filed a statement of his claim under oath cannot sustain it by evidence of an indebtedness arising in a different manner. In re Lansaw, 118 Fed. 365.

228-68 **Pleadings as admissions.** See In re Carter, 138 Fed. 846.

229-72 In re Baerncoff, 117 Fed. 975; In re Chamberlain, 125 Fed. 629; In re Hamilton, 133 Fed. 823; In re Keefer, 135 Fed. 885; In re Hendrick, 138 Fed. 473; In re Eades, 143 Fed. 293, 74 C. C. A. 431; In re Jacobs, 144 Fed. 868; In re Kolster, 146 Fed. 138.

Burden of proof never shifts. — In re Walder, 152 Fed. 489.

230-73 In re Leslie, 119 Fed. 406. See In re Lewin, 155 Fed. 501.

231-75 In re Goodhile, 130 Fed. 782. *Compare* In re Alphin & C. Co., 131 Fed. 824; In re Weisen Bros., 135 Fed. 442.

In proceedings before a referee to require a bankrupt to turn over money in his possession, the same rule has been applied. In re Alphin & C. Co., supra; In re Weisen Bros., supra.

231-76 In re Goodhile, 130 Fed. 782. See In re Alphin & C. Co., supra.

Testimony of bankrupt given at the creditors meeting is admissible against him, though it proves a fraudulent concealment by him. In re Leslie, 119 Fed. 406.

231-77 **Unexpected surplus** from unlisted property. In re Hamilton, 133 Fed. 823.

Failure to list salary of a public officer. In re Doherty, 135 Fed. 432.

232-80 See In re Halsell, 132 Fed. 562; In re Taplin, 135 Fed. 861; In re Walder, 152 Fed. 489.

Ruling of referee on objections to evidence. See In re Knaszak, 151 Fed. 503 (same rule applies as upon the examination before the referee, and all testimony excluded must be taken down and made part of the record).

Evidence by bankrupt in support of petition. — Bankrupt may file papers in opposition to objections to his discharge, though he is not bound

to do so. In re Hendrick, 138 Fed. 473.

232-81 In re Dauchy, 122 Fed. 688; In re Chamberlain, 125 Fed. 629; In re Hamilton, 133 Fed. 823; In re Jacobs, 144 Fed. 868; In re Kolster, 146 Fed. 138; In re Cohen, 149 Fed. 908; In re Garrison, 149 Fed. 178, 79 C. C. A. 126; Troeder v. Lorsch, 150 Fed. 710, 80 C. C. A. 376; In re Leslie, 119 Fed. 406.

232-82 See Rand v. Sage, 94 Minn. 344, 102 N. W. 864; Broadway Tr. Co. v. Manheim, 47 Misc. 415, 95 N. Y. S. 93; Bailey v. Gleason, 76 Vt. 115, 56 A. 537.

Burden on bankrupt to show either that the debt was duly scheduled or that the creditor had notice of the proceedings. Weidenfeld v. Tillinghast, 54 Misc. 90, 104 N. Y. S. 712; Graber v. Gault, 103 App. Div. 511, 93 N. Y. S. 76; Fields v. Rust, 36 Tex. Civ. 350, 82 S. W. 331; Wineman v. Fisher, 135 Mich. 604, 98 N. W. 404; Armstrong v. Sweeney, 73 Neb. 775, 103 N. W. 436; *Contra*, Lafoon v. Kerner, 138 N. C. 281, 50 S. E. 654.

233-85 Rosenfeld v. Siegfried, 91 Mo. App. 169; Whitson v. Bank, 105 Mo. App. 605, 80 S. W. 327; New York Inst. v. Crockett, 117 App. Div. 269, 102 N. Y. S. 412; Custard v. Widgerson, 130 Wis. 412, 110 N. W. 263.

Certificate of discharge admissible as a basis of proof that the debt in question was released by the discharge. Nation v. Jones (Ga.), 59 S. E. 330.

233-86 See In re Griffin Bros., 154 Fed. 537.

236-95 Young v. Stevenson, 73 Ark. 480, 84 S. W. 623; Custard v. Widgerson, 130 Wis. 412, 110 N. W. 263.

236-96 Santa Rosa Bk. v. White, 139 Cal. 703, 73 P. 577; Bluthenthal v. Jones, 51 Fla. 396, 41 S. 533. See Bailey v. Gleason, 76 Vt. 115, 56 A. 537.

236-97 Alling v. Straka, 118 Ill. App. 184; Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060; Gatliff v. Mackey, 31 Ky. L. R. 947, 104 S. W. 379; Laffoon v. Kerner, 138 N. C. 281, 50 S. E. 654.

Presumptions, 242-6.

237-1 Bunel v. O'Day, 125 Fed. 303; Grant v. Stimpson, 79 Conn. 617, 66 A. 166; Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631; Zachmann v. Zachmann, 201 Ill. 380, 66 N. E. 256, 94 Am. St. 180; Bowman v. Little, 101 Md. 273, 61 A. 1084. See McAllen v. Alonzo (Tex. Civ.), 102 S. W. 475.

239-2 Chatham v. Mills, 137 Cal. 298, 70 P. 91, 92 Am. St. 175; Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631; Lewis v. Sizemore, 25 Ky. L. R. 1354, 78 S. W. 122; Sergent v. Mfg. Co., 112 Ky. 888, 23 Ky. L. R. 2226, 66 S. W. 1036; Wallace v. Wallace (N. J.), 67 A. 612; Mayer v. Davis, 119 App. Div. 96, 103 N. Y. S. 943; In re Kelley, 46 Misc. 541, 95 N. Y. S. 57; Tracy v. Frey, 95 App. Div. 579, 88 N. Y. S. 874; In re Leaming, 25 Pa. C. C. 438. See Kennington v. Catoe, 68 S. C. 470, 47 S. E. 719.

One of strongest presumptions of law. Adger v. Ackerman, 115 Fed. 124, 52 C. C. A. 568.

Proof to overcome need not remove every reasonable doubt. Godfrey v. Rowland, 16 Haw. 377.

Recognition by putative father, not enough to overcome the presumption of legitimacy. Bethany H. Co. v. Hale, 64 Kan. 367, 67 P. 848.

Proof of antenuptial conception does not overcome presumption. Zachmann v. Zachmann, 201 Ill. 380, 66 N. E. 256, 94 Am. St. 180.

Proof that wife was guilty of adultery during the period of gestation does not rebut presumption. Godfrey v. Rowland, 16 Haw. 377; Town of Canaan v. Avery, 72 N. H. 591, 58 A. 509.

Legitimacy or illegitimacy, an issue of fact, resting upon proof of the impotency or non-access of the husband. S. v. Liles, 134 N. C. 735, 47 S. E. 750.

In Kentucky, the presumption has been held to be conclusive. Buckner v. Buckner, 120 Ky. 596, 27 Ky. L. R. 1032, 87 S. W. 776.

241-3 Chatham v. Mills, 137 Cal. 298, 70 P. 91, 92 Am. St. 175. See Wallace v. Wallace (N. J.), 67 A. 612. *Contra*, Evans v. S., 165 Ind.

369, 74 N. E. 244, *aff.*, 75 N. E. 651.

242-4 Land v. S., 84 Ark. 199, 105 S. W. 90; Gooding v. S., 39 Ind. App. 42, 78 N. E. 257; Corcoran v. Higgins, 194 Mass. 291, 80 N. E. 231; S. v. Liles, 134 N. C. 735, 47 S. E. 750; S. v. Addington, 143 N. C. 683, 57 S. E. 398.

Complainant may employ private counsel to assist the prosecuting attorney. Harley v. Judge, 140 Mich. 642, 104 N. W. 21.

242-5 See Shailer v. Bullock, 78 Conn. 65, 61 A. 65. *Compare* Suckow v. S., 122 Wis. 156, 99 N. W. 440.

242-6 Alminowicz v. P., 117 Ill. App. 415; Priel v. Adams (Neb.), 91 N. W. 536; S. v. Knutson, 18 S. D. 444, 101 N. W. 33.

Proof beyond a reasonable doubt necessary in Wisconsin. Menn v. S. (Wis.), 112 N. W. 38. See Busse v. S., 129 Wis. 171, 108 N. W. 64. *Compare* Sonnenberg v. S., 124 Wis. 124, 102 N. W. 233.

Presumption, in bastardy proceedings is that the woman is single. See S. v. Liles, 134 N. C. 735, 47 S. E. 750.

243-7 Evans v. S., 165 Ind. 369, 74 N. E. 244, *aff.* 75 N. E. 651.

Accusation of paternity, made at the trial, is admissible as evidence of constancy of accusation. Baxter v. Gormley, 186 Mass. 168, 71 N. E. 575.

244-9 Alminowicz v. P., 117 Ill. App. 415.

Offer of defendant to take complainant to a doctor was held to be an admission and not an offer of compromise. Gatzemeyer v. Peterson, 68 Neb. 832, 94 N. W. 974.

244-12 S. v. Lowell, 123 Ia. 427, 99 N. W. 125.

Accusation made in travail admissible. Johnson v. Walker, 86 Miss. 757, 39 S. 49, 109 Am. St. 733, 1 L. R. A. (N. S.) 470. *Compare* Burns v. Donoghue, 185 Mass. 71, 69 N. E. 1060 (accusation in time of travail admissible, when the constancy of the accusation has been established).

Previous declarations that another was the father, admissible to impeach complainant. Zimmerman v. P., 117 Ill. App. 54.

246-15 Impeachment by testimony given in a trial for seduction. McCalman v. S., 121 Ga. 491, 49 S. E. 609.

247-16 Declaration of third person admissible to contradict him as a witness. Walker v. S., 165 Ind. 94, 74 N. E. 614.

247-17 P. v. Wilson, 136 Mich. 298, 99 N. W. 6.

248-19 *Compare* P. v. Wilson, 136 Mich. 298, 99 N. W. 6.

248-20 Allred v. S. (Ala.), 44 S. 60; Stahl v. S. (Cal.), 74 P. 238; Zimmerman v. P., 117 Ill. App. 54; Erickson v. Schmill, 62 Neb. 368, 87 N. W. 166.

Question of paternity is for the jury. Gutherie v. S. (Neb.), 96 N. W. 243.

Prostitute. — See Rinehart v. S., 23 Ind. App. 419, 55 N. E. 504.

Letter containing an admission of intercourse is competent as contradicting the complainant's denial of intercourse with others. Walker v. S., 165 Ind. 94, 74 N. E. 614.

251-26 Kelly v. S., 133 Ala. 195, 32 S. 56, 91 Am. St. 25.

252-28 Cross-examination of defendant as to particular acts of misconduct should be limited to an attack upon his veracity. Shailer v. Bullock, 78 Conn. 65, 61 A. 65.

252-30 See S. v. Lowell, 123 Ia. 427, 99 N. W. 125; Menn v. S. (Wis), 112 N. W. 38.

Date of conception must be a fixed definitely enough to permit the defendant to prepare to meet the charge. P. v. Wilson, 136 Mich. 298, 99 N. W. 6.

Where the act of intercourse alleged was said to have occurred more recently than the natural period of gestation would allow, the complainant must show that the child was of premature birth. Souchek v. Karr (Neb.), 111 N. W. 150.

252-33 See Stahl v. S., 67 Kan. 864, 74 P. 238; S. v. Lowell, 123 Ia. 427, 99 N. W. 125; Erickson v. Schmill, 62 Neb. 368, 87 N. W. 166; Mayer v. Davis, 103 N. Y. S. 943.

253-35 Experienced nurse may testify as to the development of the child. Souchek v. Karr (Neb.), 111 N. W. 150.

253-36 McCalman v. S., 121 Ga. 491, 49 S. E. 609.

254-37 Later decisions generally hold that it is proper to exhibit the child to the jury. Kelley v. S., 133 Ala. 195, 32 S. 56, 91 Am. St. 25;

Higley v. Bostick, 79 Conn. 97, 63 A. 786; Shailer v. Bullock, 78 Conn. 65, 61 A. 65. See S. v. Patterson, 18 S. D. 251, 100 N. W. 162; Land v. S., 84 Ark. 199, 105 S. W. 90; Stahl v. S., 67 Kan. 864, 74 P. 238.

Presence of child in court not improper. Benes v. P., 121 Ill. App. 103; Johnson v. Walker, 86 Miss. 757, 39 S. 49, 109 Am. St. 733, 1 L. R. A. (N. S.) 470; Esch v. Grane, 72 Neb. 719, 101 N. W. 978; Johnson v. S. (Wis.), 113 N. W. 674.

255-39 Evans v. S., 165 Ind. 369, 74 N. E. 244, *aff.*, 75 N. E. 651; Gatzemeyer v. Peterson, 68 Neb. 832, 94 N. W. 974.

Corroboration necessary in England. See Harvey v. Anning, 67 J. P. (Eng.) 73, 87 L. T. N. S. 687.

255-40 Intimacy of parties. — See Johnson v. Walker, 86 Miss. 757, 39 S. 49, 109 Am. St. 733, 1 L. R. A. (N. S.) 470; Priel v. Adams (Neb.), 91 N. W. 536; Morgan v. Stone (Neb.), 93 N. W. 743.

Previous intercourse. — P. v. Dupounce, 133 Mich. 1, 94 N. W. 388.

Former conviction of fornication cannot be shown. McCalman v. S., 121 Ga. 491, 49 S. E. 609.

Testimony of father of complainant that he carried a message from her to the defendant to come and marry her as he had promised to do, held inadmissible. McCalman v. S., supra.

256-43 *Contra.* — McCalman v. S., supra.

Records of preliminary proceedings admissible to prove a compliance with statutory requirements. McLaughlin v. Joy, 100 Me. 517, 62 A. 348.

256-44 Testimony of mother given at the preliminary hearing is admissible to impeach the complainant. Morgan v. Stone (Neb.), 93 N. W. 743.

BELIEF [Vol. 2.]

Declarations, 261-17.

258-2 See Ferguson v. Boyd (Ind.), 81 N. E. 71.

259-4 Grout v. Stewart, 96 Minn. 230, 104 N. W. 966; Strasser v. Goldberg, 120 Wis. 621, 98 N. W. 554.

260-8 Hill v. Page, 108 App. Div. 71, 95 N. Y. S. 465.

261-16 P. v. Hoffman (Mich.), 105 N. W. 838. See Eatman v. S., 48 Fla. 21, 37 S. 576.

261-17 Declarations. — Declarations either oral or written are some evidence of a person's belief. In re Painter, 150 Cal. 498, 89 P. 98.

261-19 S. v. Bessa, 115 La. 259, 38 S. 985 (belief of witness whether a man like the accused or the accused himself would commit such a crime as that charged, inadmissible).

263-27 Gilliland v. Committee, 141 N. C. 482, 54 S. E. 413. See "EXPERT AND OPINION EVIDENCE."

Statement, "map is correct or nearly so," does not destroy effect of evidence. Dickinson v. Smith (Wis.), 114 N. W. 133.

Identification need not be positive. Jordan v. S., 50 Fla. 94, 39 S. 155; S. v. Richards, 126 Ia. 497, 102 N. W. 439; S. v. Barrington, 198 Mo. 23, 111, 95 S. W. 235 (identification of garments need not be upon the positive assertion of witness).

BENEFICIAL ASSOCIATIONS [Vol. 2.]

266-1 See Bradford v. Assn., 26 App. Cas. (D. C.) 268; Lumbard v. Grant, 35 Misc. 140, 71 N. Y. S. 459.

Voluntary association is neither a partnership nor a corporation. Ostrom v. Greene, 161 N. Y. 353, 55 N. E. 919.

267-4 See Scow v. League, 223 Ill. 32, 79 N. E. 42; Moore v. Council, 65 Kan. 452, 70 P. 352; Moon v. Flack (N. H.), 65 A. 829; Williamson v. Randolph, 48 Misc. 96, 96 N. Y. S. 644; Franklin v. Burnham, 40 Misc. 566, 82 N. Y. S. 882; Beeman v. Lodge, 29 Pa. Super. 387; Marshall v. Assn., 18 Pa. Super. 644; Crow v. Council, 26 Pa. Super. 411; Beeman v. Lodge, 215 Pa. 627, 64 A. 792; Spiritual & P. T. v. Vincent, 127 Wis. 93, 105 N. W. 1026.

Relation between members is contractual. Dingwall v. Assn., 4 Cal. App. 565, 88 P. 597; United B. v. Dinkle, 32 Ind. App. 273, 69 N. E. 707.

Association has the burden of proving that a change in the constitution or by-laws, which constitute the contract, was made with the

consent of the other party. Johnson v. Fountain, 135 N. C. 385, 47 S. E. 463. *Compare* Head Camp v. Woods, 34 Colo. 1, 81 P. 261.

267-5 Fraternal Assn. v. Hitchcock, 121 Ill. App. 402 (by-law contra public policy). See Froelich v. Assn., 93 Mo. App. 383; Rosenthal v. Reinfeld, 48 Misc. 652, 96 N. Y. S. 199; Thompson v. Brotherhood (Tex. Civ.), 91 S. W. 834.

267-6 See Kalbitzer v. Goodhue, 52 W. Va. 435, 44 S. E. 264. But see Lumbard v. Grant, 71 N. Y. S. 459 (members of association can take a renewal lease from it); Boston B. Assn. v. Club, 37 Misc. 521, 75 N. Y. S. 1076 (one member can not obtain an injunction against the association).

267-7 Remedies of members as between themselves. — The law of corporations and the law of copartnerships are to be resorted to in the absence of statutory regulations, to regulate the relations of the members. Ostrom v. Greene, 161 N. Y. 353, 55 N. E. 919. See Carter v. Oil Co., 182 Pa. 551, 38 A. 571.

Proceedings to try a member of a medical society were held not to be as formal and technical as proceedings at law, substantial compliance with the constitution and by-laws being sufficient. S. v. Society, 91 Mo. App. 76.

268-12 Knapp v. Brotherhood, 128 Ia. 566, 105 N. W. 63; Hudnall v. M. W., 103 Mo. App. 356, 77 S. W. 84; Westerman v. Lodge, 196 Mo. 670, 94 S. W. 470; Shotliff v. Woodmen, 100 Mo. App. 138, 73 S. W. 326; Sovereign C. v. Carrington (Tex. Civ.), 90 S. W. 921; Cosmopolitan Assn. v. Koegel, 104 Va. 619, 52 S. E. 166.

268-13 Littleton v. Council, 98 Md. 453, 56 A. 798; Cosmopolitan Assn. v. Koegel, 104 Va. 619, 52 S. E. 166.

269-14 Maxwell v. Assn., 104 N. Y. S. 815; Duffy v. Ins. Co., 142 N. C. 103, 55 S. E. 79; Beeman v. Lodge, 215 Pa. 627, 64 A. 792; Myers v. Society, 29 Pa. Super. 492.

269-15 See Sovereign C. v. Carrington (Tex. Civ.), 90 S. W. 921.

Constitution and by-laws furnished local lodge by the supreme council, and used, need not be further authenticated. Home Circle v. Shelton (Tex. Civ.), 81 S. W. 84.

270-16 Recognition of rule that benefit certificates are to be liberally construed. Gruwell v. Council, 126 Mo. App. 496, 104 S. W. 884.

Admissions of insured are evidence against his beneficiary, contrary to the general rule of insurance. Callies v. Woodmen, 98 Mo. App. 521, 72 S. W. 713; Taylor v. Lodge, 101 Minn. 72, 111 N. W. 919.

"**The only rule** for the admission and exclusion of testimony is that of common fairness." Barker v. Maccabees, 135 Mich. 499, 98 N. W. 24. *Compare* Rose v. Patricians, 126 Mich. 577, 85 N. W. 1073.

It has been held that hearings in claims for benefits, if conducted fairly and according to the specified rule of the association, will not be interfered with although the rules governing suits at law were not followed, since the parties by their contract of membership, contemplated such procedure. Derry v. Maccabees, 135 Mich. 494, 98 N. W. 23.

BEST AND SECONDARY EVIDENCE [Vol. 2.]

Proceedings in which it is not required, 278-5; *Admission that copy produced is correct,* 355-79.

276-1 Primary evidence is that which affords the greatest certainty of the fact in question. Mendocino County v. Peters, 2 Cal. App. 24, 82 P. 1122.

277-3 P. v. Wiemers, 225 Ill. 17, 80 N. E. 45; Glos v. Talcott, 213 Ill. 81, 72 N. E. 707; Merchants Co. v. Egan, 222 Ill. 494, 78 N. E. 800; Young v. P., 221 Ill. 51, 77 N. E. 536; Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903, *rev.* 66 App. Div. 650, 74 N. Y. S. 1136; Avery v. Stewart, 134 N. C. 287, 46 S. E. 519; Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782; Scott v. R. Co., 43 Or. 26, 72 P. 594.

The most conclusive proof of its correctness does not render a copy admissible unless sufficient grounds are established. Security T. Co. v.

Robb, 142 Fed. 78, 73 C. C. A. 302.

278-5 **Proceedings in which it is not required.** — Proceedings to condemn land are comparatively informal, and it is not error to refuse to apply the best evidence rule. Stafford Spr. R. Co. v. Mfg. Co. (Conn.), 66 A. 775.

Best evidence not required on motion for nunc pro tunc order. Harris v. Jennings, 64 Neb. 80, 89 N. W. 625.

279-7 Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782.

Weakness of secondary evidence no bar. Campbell v. S., 123 Ga. 533, 51 S. E. 644.

279-9 See Montgomery v. Dormer, 181 Mo. 5, 79 S. W. 913.

280-11 Security Tr. Co. v. Robb, 142 Fed. 78, 73 C. C. A. 302.

280-12 **Rule flexible.** — Mattson v. R. Co., 98 Minn. 296, 108 N. W. 517.

281-15 Spencer v. Ins. Co., 112 Mo. App. 86, 86 S. W. 899; Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903, *rev.* 66 App. Div. 650, 74 N. Y. S. 1136; Keller v. Faickney (Tex. Civ.), 94 S. W. 103.

282-17 Bruce v. Bruce (Tex. Civ.), 89 S. W. 435; Taylor v. Woodmen, 42 Wash. 304, 84 P. 867.

282-18 **Compromising memorandum.** — Young v. P., 221 Ill. 51, 77 N. E. 536.

282-20 Powers v. Hatter (Ala.), 44 S. 859; Franklin v. Pritchard, 122 Ga. 605, 50 S. E. 342; McFadden v. Ross, 14 Ind. App. 312, 41 N. E. 607; Jenkins v. Lutz, 26 Ind. App. 150, 59 N. E. 288; Brier v. Davis, 122 Ia. 59, 96 N. W. 983; Gulliford v. McQuillen, 75 Kan. 454, 89 P. 927; Conkling v. Nicholas, 133 Mich. 651, 95 N. W. 745; S. v. Lentz, 184 Mo. 223, 83 S. W. 970; Hoffman Co. v. R. Co., 119 Mo. App. 495, 94 S. W. 597; Larson v. Cox, 68 Neb. 44, 93 N. W. 1011; Heller v. Heine, 38 Misc. 816, 78 N. Y. S. 887; Barton-P. Co. v. Mercantile Co., 18 Okla. 137, 89 P. 1128; St. Louis etc. R. Co. v. Kennedy (Tex. Civ.), 96 S. W. 653; Hart v. Godkin, 122 Wis. 646, 100 N. W. 1057.

Postmark and date on letter. Kirkland v. S., 143 Ala. 45, 37 S. 352.

Books of account. — Eatman v. S., 48 Fla. 21, 37 S. 576; Willson v. Morse, 117 Ia. 581, 91 N. W. 823; Dick v. Biddle Bros. (Md.), 66 A. 21; Davis v. Council (Mass.), 81 N. E. 294; Barrie v. R. Co., 125 Mo. App. 96, 102 S. W. 1078; Fitch v. Martin, 74 Neb. 538, 104 N. W. 1072; Rosenstock v. Dessar, 109 App. Div. 10, 95 N. Y. S. 1064; Smith v. Castle, 81 App. Div. 638, 81 N. Y. S. 18; La Rue v. Elevator Co., 17 S. D. 91, 95 N. W. 292; Fidelity etc. Co. v. Mtg. Co. (Tex. Civ.), 90 S. W. 197; Rogers v. O'Barr & D. (Tex. Civ.), 76 S. W. 593; Berry v. Joiner (Tex. Civ.), 101 S. W. 289.

Telegram. — Whether the telegram filed for transmission or the one delivered to the addressee is the original, depends upon whether the telegraph company is the agent of the one sending or the one to whom it is sent. Bond v. Hurd, 31 Mont. 314, 78 P. 579; Young v. P., 221 Ill. 51, 77 N. E. 536; Yeiser v. Cathers (Neb.), 97 N. W. 840; Carlson v. Holm (Neb.), 95 N. W. 1125; Buchanan v. Tel. Co. (Tex. Civ.), 100 S. W. 974; Western U. T. Co. v. Kopp, 35 Tex. Civ. 663, 80 S. W. 840; Cobb v. Boom Co., 57 W. Va. 49, 49 S. E. 1005.

Petitions. — P. v. R. Co., 231 Ill. 514, 83 N. E. 193; Siegel v. Liberty, 118 Wis. 599, 95 N. W. 402.

Insurance policy. — Hartford Ins. Co. v. Enoch, 72 Ark. 47, 77 S. W. 899; Tilley v. Cox, 119 Ga. 867, 47 S. E. 219; S. v. Harvey, 130 Ia. 394, 106 N. W. 938; Waller v. Cockfield, 111 La. 595, 35 S. 778; Speiser v. Ins. Co., 119 Wis. 530, 97 N. W. 207.

Railroad rules. — R. Co. v. Goodson, 118 Ga. 833, 45 S. E. 680; Barschow v. R. Co., 147 Mich. 226, 110 N. W. 1057.

Freight way-bills. — Haas v. Chubb, 67 Kan. 787, 74 P. 230; Keller v. R. Co., 10 Pa. Super. 240; Texas C. R. Co. v. Fowler (Tex. Civ.), 102 S. W. 732; Texas etc. R. Co. v. Lynch (Tex. Civ.), 87 S. W. 884.

Negotiable instruments. — Allen etc. Co. v. Bank, 129 Ga. 748, 59 S. E. 813; Merrill v. Tunbrell, 123 Ia. 375, 98 N. W. 879; Land Co. v. Whiteman, 92 Minn. 55, 99 N. W. 362.

Miscellaneous writings. — Baker v. Cotney (Ala.), 43 S. 786; Marx v. Ely (Ala.), 41 S. 411; McCarthy v. R. Co., 79 Conn. 73, 63 A. 725; Knott v. Peterson, 125 Ia. 404, 101 N. W. 173; Wheelock v. Hull, 124 Ia. 752,

100 N. W. 863; McGuire v. County, 133 Ia. 636, 111 N. W. 34; Atchison R. Co. v. Palmore, 68 Kan. 545, 75 P. 509, 64 L. R. A. 90; Pepper v. Pepper & Co., 25 Ky. L. R. 155, 74 S. W. 739; Lane v. Bailey, 29 Mont. 548, 75 P. 191; Rathborne v. Hatch, 90 App. Div. 151, 85 N. Y. S. 768; Crane v. Bennett, 77 App. Div. 102, 79 N. Y. S. 66; Cobb v. Bryan (Tex. Civ.), 97 S. W. 513; Texas etc. R. Co. v. Smith, 34 Tex. Civ. 571, 79 S. W. 614.

282-21 Wilson v. S. (Ala.), 39 S. 776; Hirsh v. Beverly, 125 Ga. 657, 54 S. E. 678; Naugle v. Harreld, 100 Ill. App. 524; Chicago etc. Coal Co. v. Moran, 110 Ill. App. 664; Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38, *aff.* 110 Ill. App. 664; C. v. Parlin & O. Co., 118 Ky. 168, 80 S. W. 791, 26 Ky. L. R. 58; Watson v. Min. & S. Co., 31 Mont. 513, 79 P. 14; Jos. Schlitz Brew. Co. v. Grimmon, 28 Nev. 235, 81 P. 43; Robbins v. Bank, 90 N. Y. S. 288; Pringey v. Guss, 16 Okla. 82, 86 P. 292; Richardson v. Morris, 26 Pa. Super. 192; Flach v. Zanderson (Tex. Civ.), 91 S. W. 348; Reynolds v. Reynolds, 42 Wash. 107, 84 P. 579; Plano Mfg. Co. v. Bergmann, 102 Wis. 21, 78 N. W. 157.

Coupon railroad ticket. — McCollum v. R. Co., 31 Utah 494, 88 P. 663.

Specifications of written contract best evidence of extra work. Taft v. Little, 178 N. Y. 127, 70 N. E. 211.

283-22 **Parol evidence admissible** to establish a modification of a contract under seal. American Food Co. v. Halstead, 165 Ind. 633, 76 N. E. 251; Snow v. Griesheimer, 220 Ill. 106, 77 N. E. 110.

284-24 **Carbon copies as counterparts.** — Hopkins v. S., 52 Fla. 39, 42 S. 52; Cole v. Power Co., 216 Pa. 283, 65 A. 678; Chesapeake etc. R. Co. v. Stock, 104 Va. 97, 51 S. E. 161.

Lease executed in duplicate. — Peaks v. Cobb, 192 Mass. 196, 77 N. E. 881.

Accident report. — Virginia-C. Chem. Co. v. Knight, 106 Va. 674, 56 S. E. 725.

Bill of lading. — Walker v. R. Co., 76 S. C. 308, 56 S. E. 952.

284-25 McPhelemy v. McPhelemy, 78 Conn. 180, 61 A. 477; Reeder v. Jones (Del.), 65 A. 571; Jordan v. S., 127 Ga. 278, 56 S. E. 422; Vizard v. Moody, 117 Ga. 67, 43 S. E. 426; Haines v. Goodlander, 73 Kan. 183, 84 P. 986; Louisville B. Co. v. R. Co., 25 Ky. L. R. 405, 75 S. W. 285; Stamper v. C., 30 Ky. L. R. 992, 100 S. W. 286; Davis v. Council (Mass.), 81 N. E. 294; Exposition Co. v. Kuenzel, 108 Mo. App. 105, 82 S. W. 1099; Kannow v. Assn. (Neb.), 107 N. W. 563; Salem Tract. Co. v. Anson, 41 Or. 562, 67 P. 1015, 69 P. 675; Scott v. R. Co., 43 Or. 26, 72 P. 594; C. v. Clymer, 217 Pa. 302, 66 A. 560; Busby v. S. (Tex. Cr.), 103 S. W. 638.

Preliminary proof of qualifications of witness. Wilson v. Wood, 127 Ga. 316, 56 S. E. 457.

Examination must be by custodian. Sykes v. Beck, 12 N. D. 242, 96 N. W. 844; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132. But see In re Colton, 129 Ia. 542, 105 N. W. 1008.

Mere inferences of examiner not admissible. Mendel v. Boyd, 71 Neb. 657, 99 N. W. 493; Cobb v. Bryan (Tex. Civ.), 97 S. W. 513.

285-26 See Sykes v. Beck, 12 N. D. 242, 96 N. W. 844, 852.

285-27 Woodall v. S., 145 Ala. 662, 39 S. 718; Curtis v. Parker, 136 Ala. 217, 33 S. 935; Williams v. S. (Ala.), 43 S. 720; Indianapolis R. Co. v. Waddington (Ind.), 82 N. E. 1030; Morgan v. Lumb. Co., 105 Mo. App. 239, 79 S. W. 997; Levelsmeier v. R. Co., 114 Mo. App. 412, 90 S. W. 104; S. v. Hayes, 138 N. C. 660, 50 S. E. 623; Belding v. Archer, 131 N. C. 287, 42 S. E. 800; Ledford v. Emerson, 138 N. C. 502, 51 S. E. 42; Empire Co. v. Hench, 219 Pa. 135, 67 A. 995; Breeden v. Martens (S. D.), 112 N. W. 960; Callaghan v. McGown (Tex. Civ.), 90 S. W. 319; International R. Co. v. Lynch (Tex. Civ.), 99 S. W. 160.

286-28 **Institution of previous suit.** — Fowler v. Pritchard, 148 Ala. 261, 41 S. 667.

Contents of record. — Daly v. Everett Co., 31 Wash. 252, 71 P. 1014.

Location of a crossing within corporate limits. — Indianapolis R. Co. v. Waddington (Ind.), 82 N. E. 1030.

286-29 Garrison v. Glass, 139 Ala. 512, 36 S. 725. *Compare* Wright v. Roberts, 116 Ga. 194, 42 S. E. 369.

287-32 Joyce v. Joyce (Conn.),

67 A. 374; Ruemer v. Clark, 105 N. Y. S. 659; Grabill v. S. (Tex. Cr.), 97 S. W. 1046.

Explanation of testimony in chief allowed, although it involves the opinion of the witness as to his rights under a written contract. Shields v. Norton, 143 Fed. 802, 74 C. C. A. 254.

Cross-examination to show discrepancy between a notice and testimony of witness concerning it inadmissible, — both being before the court. Norman v. Corbley, 32 Mont. 195, 79 P. 1059.

288-36 Presumption of writing. Allen v. Hopson, 119 Ky. 215, 83 S. W. 575, 26 Ky. L. R. 1148; Barschow v. R. Co., 147 Mich. 226, 110 N. W. 1057.

Where there was no allegation in the complaint that the contract was in writing, and that fact did not appear, parol proof of the contract is admissible. Union Foundry Co. v. Langford, 145 Ala. 667, 39 S. 765.

288-37 Kelly v. Levee Dist., 74 Ark. 202, 85 S. W. 249, 87 S. W. 638; Ruddock Cypress Co. v. Peyret, 113 La. 867, 37 S. 858; Sykes v. Beck, 12 N. D. 242, 96 N. W. 844; Matthews v. Thatcher, 33 Tex. Civ. 133, 76 S. W. 61; Patterson v. Knapp (Tex. Civ.), 99 S. W. 125; Clawson v. Wilkins (Tex. Civ.), 93 S. W. 1086.

Assessment rolls best evidence of increase in taxed valuation. Carlisle v. Chehalis Co., 32 Wash. 284, 73 P. 349.

Nature of corporation must be determined from articles of incorporation. Gitzhoffen v. Hospital (Utah), 88 P. 691.

Records of city council. — Town of Jackson v. Ellis, 116 Ga. 719, 43 S. E. 53.

Whether an instrument was recorded. Seivert v. Galvin (Wis.), 113 N. W. 680.

288-38 Northrop v. Chase, 76 Conn. 146, 56 A. 518; Cummins v. Hayden, 2 Houst. (Del.) 400; Vizard v. Moody, 117 Ga. 67, 43 S. E. 426; Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767; Goslin v. C., 28 Ky. L. R. 683, 90 S. W. 223; Bonner v. C., 30 Ky. L. R. 992, 99 S. W. 1150; Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; Fontelieu v. Fontelieu, 116 La. 866 41 S. 120; Cummings v. Brown, 181 Mo. 711, 81 S. W. 158; Quinby v. Ayres (Neb.), 95 N. W. 464; Tuck v. Rottkowsky, 47 Misc. 386, 93 N. Y. S. 1112; Rosenberg v. Goldstein, 38 Misc. 753, 78 N. Y. S. 831; Bank v. Miller (Or.), 87 P. 892; S. v. True, 116 Tenn. 294, 95 S. W. 1028; Southern R. Co. v. Seymour, 113 Tenn. 523, 83 S. W. 674; Grabill v. S. (Tex. Cr.), 97 S. W. 1046; Hagan v. Holderby (W. Va.), 57 S. E. 289.

Justices' records the best evidence. Davis v. S., 89 Miss. 21, 42 S. 542; S. v. Ireland, 89 Miss. 763, 42 S. 797. *Compare* Eggett v. Allen, 119 Wis. 625, 96 N. W. 803.

Orders of court. — S. v. Thresher, 77 Conn. 70, 58 A. 460.

Abandoned pleading. — Smith v. R. Co. (Tex. Civ.), 105 S. W. 528.

Docket entries of referee. — Davis v. Ives, 75 Conn. 611, 54 A. 922.

Filing of claim in probate court. Gillespie v. Campbell (Ala.), 43 S. 28.

Bill of particulars. — Idaho Co. v. Kalanquin, 8 Idaho 101, 66 P. 933.

Letters of administration regular on their face are presumed to be originals. Sharpe v. Hodges, 121 Ga. 798, 49 S. E. 775.

289-39 Mears v. Smith, 19 S. D. 79, 102 N. W. 295.

289-41 Sheffield v. Oil Co. (Ga.), 59 S. E. 725.

Acts of school board. — Mendel v. School Dist., 121 Wis. 80, 98 N. W. 932.

Judicial notice that records are kept of association meetings and are the best evidence. Norwich Ins. Co. v. R. Co., 46 Or. 123, 78 P. 1025.

Corporation records as the best evidence. Central Elec. Co. v. Sprague Co., 120 Fed. 925, 57 C. C. A. 197; Blanton v. Kentucky D. Co., 120 Fed. 318; Nixon v. Goodwin, 3 Cal. App. 358, 85 P. 169; Garmany v. Lawton, 124 Ga. 876, 53 S. E. 669; Corcoran v. Sonora Co., 8 Idaho 651, 71 P. 127; Ehrlich v. Chevra Wizna, 86 N. Y. S. 820; Braxmar v. Stanton, 110 App. Div. 167, 96 N. Y. S. 1096; S. v. Merchant (Wash.), 92 P. 890. But they are not the only evidence. Smelter Co. v. Worthen Co. (Ariz.), 85 P. 729; Selley v. Lub. Co., 119 Ia. 591, 93 N. W. 590; S. v. Farrier, 114 La. 579, 38 S. 460; Ismon v. Loder 135 Mich. 345, 97 N. W. 769.

Lease, certified by corporation, is original evidence under Illinois statute. Chicago etc. R. Co. v. Weber, 219 Ill. 372, 76 N. E. 489.

Certified statement of a book account not original evidence under the Indiana statute. Coppes v. Assn. (Ind. App.), 67 N. E. 1022.

290-43 Tutwiler Coal etc. Co. v. Wheeler (Ala.), 43 S. 15; Arnold v. Cofer, 135 Ala. 364, 33 S. 539; Beardsley v. Hill, 77 Ark. 244, 91 S. W. 757; Hope v. Shiver, 77 Ark. 177, 90 S. W. 1003; Barrow v. Grant, 116 La. 952, 41 S. 220; Neely v. Sugar Co., 138 Mich. 469, 101 N. W. 664; Crane v. Waldron, 133 Mich. 73, 94 N. W. 593; Graham v. Warren, 81 Miss. 330, 33 S. 71; Houck v. Patty, 100 Mo. App. 302, 73 S. W. 389; Montpelier Co. v. School Dist., 115 Wis. 622, 92 N. W. 439.

290-44 See Volhard v. Volhard, 119 App. Div. 266, 104 N. Y. S. 578; Stephens v. Fraus (S. D.), 106 N. W. 56; Davis v. Ragland (Tex. Civ.), 93 S. W. 1099.

Abstract of title is secondary evidence. Glos v. Talcott, 213 Ill. 81, 72 N. E. 707.

Record of a deed is not the best evidence of the deed. Tucker v. Duncan, 224 Ill. 453, 79 N. E. 613.

Lease. — Southern R. Co. v. Leard, 146 Ala. 349, 39 S. 449.

290-45 Rollins v. R. Co., 73 N. J. L. 64, 62 A. 929. See Dawson v. Orange, 78 Conn. 96, 61 A. 101.

Title bond. — Combs v. Krish, 27 Ky. L. R. 154, 84 S. W. 562; Jones v. Coal Co., 29 Ky. L. R. 623, 94 S. W. 6.

Original patent the best evidence. Butt v. Mastin, 143 Ala. 321, 39 S. 217.

Mortgage. — Brynjolfson v. Dagner, 15 N. D. 332, 109 N. W. 320.

Ownership of a railroad cannot be shown by parol. Black v. R. Co., 110 Mo. App. 198, 85 S. W. 96.

Parol evidence admissible to complete the description. Howard v. Adkins, 167 Ind. 184, 78 N. E. 665.

290-46 Stephens v. Head, 138 Ala. 455, 35 S. 565; S. v. Songer, 76 Ark. 169, 88 S. W. 903; Reeder v. Jones (Del.), 65 A. 571; O'Brien v. Woburn, 184 Mass. 598, 69 N. E. 350; Cook v. R. Co. (Neb.), 110 N. W. 718; Cooke v. Comrs., 13 Okla. 11, 73 P. 270 (auditing of account by board of health); Hicks v. Pogue, 33 Tex. Civ. 333, 76 S. W. 786; Devanney v. Hanson, 60 W. Va. 3, 53 S. E. 603 (proceedings of city council); Rohloff v. Assn., 130 Wis. 61, 109 N. W. 989 (certificate of death). See Anniston L. Co. v. Edmondson, 141 Ala. 366, 37 S. 424; Ripton v. Brandon (Vt.), 67 A. 541 (assessment books).

Rates filed with interstate commerce commission. — Sloop v. R. Co. (Mo. App.), 84 S. W. 111; Summers v. R. Co. (Mo. App.), 79 S. W. 481.

Patent from state land office. — Covington v. Berry, 76 Ark. 460, 88 S. W. 1005; Boynton v. Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20.

291-47 Brasch v. Tie Co., 80 Ark. 425, 97 S. W. 445; Allen v. McKay, 139 Cal. 94, 72 P. 713; City of Denver v. Spencer, 34 Colo. 270, 82 P. 590, 2 L. R. A. (N. S.) 147 (action of board of park commissioners provable by parol); S. v. Cahill, 131 Ia. 155, 105 N. W. 691; Kinney v. Howard, 133 Ia. 94, 110 N. W. 282; S. v. Junkin (Neb.), 113 N. W. 256 (records contradictory); Baker County v. Huntington, 46 Or. 275, 79 P. 187.

291-48 Mandelbaum v. R. Co., 90 N. Y. S. 377.

Judgment. — Carhart v. Oddenkirk, 20 Colo. App. 402, 79 P. 303.

Transcript of testimony. — Estes v. R. Co., 111 Mo. App. 1, 85 S. W. 909.

Admissions in pleadings. — Colboru v. Fry, 23 Ind. App. 485, 55 N. E. 621.

Proceedings before committing magistrate. — Bell v. S. (Miss.), 38 S. 795.

Time of bringing an action. — Mullenary v. Burton, 3 Cal. App. 263, 84 P. 159.

Parol evidence of service of process is secondary evidence. Lipscomb v. Bank, 66 Kan. 243, 71 P. 583.

Construction put upon statute of foreign state proved by decisions of highest court of such state and not by opinions of lawyers. Clark v. Eltinge, 39 Wash. 696, 83 P. 901.

293-51 White v. Timber Co., 119 Fed. 989, *aff.* 121 Fed. 779, 58 C. C. A. 55; Lorenz v. U. S., 24 App. Cas. (D. C.) 337; Manning v. S., 46 Tex. Cr. 326, 81 S. W. 957.

Record book is itself the best evi-

dence of the record. Brucke v. Hubbard, 74 S. C. 144, 54 S. E. 249.

294-53 See Cook v. R. Co. (Neb.), 110 N. W. 718. *Compare* Porter v. U. S. (Ind. Ter.), 104 S. W. 855.

294-54 Calloway v. S. (Tex. Cr.), 94 S. W. 902.

294-56 Mauldin v. R. Co., 73 S. C. 9, 52 S. E. 677.

295-58 Blanton v. Distill. Co., 120 Fed. 318; Dorough v. Harrington, 148 Ala. 305, 42 S. 557; McCleskey v. Cotton Co., 147 Ala. 573, 42 S. 67 (meaning of "cypher words" may be established by parol); Louisville etc. R. Co. v. Johnson, 135 Ala. 232, 33 S. 661 (population of a town); Culver v. Caldwell, 137 Ala. 125, 34 S. 13 (making of examination of account is provable by parol); S. v. Matlock, 5 Penne. (Del.) 401, 64 A. 259 (whether a person voted may be proved by parol); Atlantic etc. R. Co. v. Dexter, 50 Fla. 180, 39 S. 634, 111 Am. St. 116 (delivery to carrier need not be proved by the bill of lading); Leon v. Kerrison, 47 Fla. 178, 36 S. 173 (ownership of chattel is provable by parol); Mason v. S., 1 Ga. App. 534, 58 S. E. 139; Minn. Lumb. Co. v. Hobbs, 122 Ga. 20, 49 S. E. 783 (making of statement that a lease existed is provable by parol); Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275 (fact of litigation may be established by parol); Landry v. Lapos, 113 La. 697, 37 S. 606 (adjudication at judicial sale provable by parol); Minn. D. Co. v. Johnson, 96 Minn. 91, 104 N. W. 1149, 107 N. W. 740 (existence of a tenancy provable by parol); Keylon v. R. Co., 114 Mo. App. 66, 89 S. W. 337; De Voe v. R. Co., 174 N. Y. 1, 66 N. E. 568; Lipschutz v. Weatherly, 140 N. C. 365, 53 S. E. 132 (sending of a reply telegram may be proved by parol); Oliver v. Hutchinson, 41 Or. 443, 69 P. 139, 1024; Mitchiner v. Tel. Co., 70 S. C. 522, 50 S. E. 190 (existence of quarantine); Oliver v. Columbia Co., 65 S. C. 1, 43 S. E. 307 (purchase of railroad ticket); Bink v. S., 48 Tex. Cr. 598, 89 S. W. 1075; Echols v. Merc. Co., 38 Tex. Civ. 65, 84 S. W. 1082 (time when indebtedness was contracted); Collins v. S., 47 Tex. Cr. 497, 84 S. W. 585 (defendant may be asked whether he had a liquor license); Phillips v. Welts, 40 Wash. 501, 82 P. 737 (minutes of board of county commissioners not the exclusive evidence of its doings).

295-59 Western U. T. Co. v. Cline, 8 Ind. App. 364, 35 N. E. 564.

297-61 See Gordon v. Funkhouser, 100 Va. 675, 42 S. E. 677. *Compare* Bush v. McCarty Co., 127 Ga. 308, 56 S. E. 430.

297-62 Doll v. Merc. Co., 33 Mont. 80, 81 P. 625.

297-63 Connor v. Nevada, 188 Mo. 148, 86 S. W. 256; Empire Co. v. Hench, 219 Pa. 135, 67 A. 995.

Title to corporate office. — Stovell v. Min. Co., 38 Colo. 80, 87 P. 1071; Smelter Co. v. Gardiner (Ariz.), 85 P. 729.

Corporate existence and nature. Dick v. S. (Md.), 68 A. 286; S. v. Wise, 186 Mo. 42, 84 S. W. 954.

297-64 Drews v. Burton, 76 S. C. 362, 57 S. E. 176; Smith v. Bank (Tex. Civ.), 95 S. W. 1111; House v. Holland (Tex. Civ.), 94 S. W. 153.

298-67 See Hagins v. Ins. Co., 72 S. C. 216, 51 S. E. 683.

298-68 **Memorandum** secondary evidence to witness' memory. S. v. Mann, 39 Wash. 144, 81 P. 561; Manchester Assur. Co. v. R. Co., 46 Or. 162, 79 P. 60, 69 L. R. A. 475; P. v. Silvers (Cal. App.), 92 P. 506.

298-69 *Compare* Meyer v. Ins. Co., 127 Wis. 293, 106 N. W. 1087.

299-70 Halverson v. Elec. Co., 35 Wash. 600, 77 P. 1058; Conover v. Neher-R. Co., 38 Wash. 172, 80 P. 281; Laudermilk v. S., 47 Tex. Cr. 427, 83 S. W. 1107.

Qualifications of petitioners. — Ahern v. Irr. Dist., 39 Colo. 409, 89 P. 963.

Performance of religious ceremony of marriage. — Massuco v. Tomasi (Vt.), 67 A. 551.

Proof of indebtedness. — Stein v. Board (Ia.), 113 N. W. 339.

300-71 **Entry in family bible** not admissible to prove age, while the maker is alive. S. v. Miller, 71 Kan. 200, 80 P. 51.

Confession by an accused person must be shown by testimony of person to whom it was made and not by a stenographic copy. P. v. Silvers (Cal. App.), 92 P. 506.

300-75 **Oral identification** of mutilated writing. Baltes Co. v. Sutton, 32 Ind. App. 14, 69 N. E. 179.

301-77 Size of foot-print may be established by testimony, though the stick used to measure with is not produced. Weaver v. S., 46 Tex. Cr. 607, 81 S. W. 39.

Identification of land by a copy of original plat allowed. Chicago v. LeMoyne, 119 Fed. 662, 56 C. C. A. 278.

301-78 Underwood v. C., 119 Ky. 384, 27 Ky. L. R. 8, 84 S. W. 310.

301-79 Gaston v. R. Co., 120 Ga. 516, 48 S. E. 188; Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69; Baltes Land etc. Co. v. Sutton, 32 Ind. App. 14, 69 N. E. 179; Brusseau v. Lower Brick Co., 133 Ia. 245, 110 N. W. 577; S. v. Bennett (Ia.), 110 N. W. 150; S. v. McKinnon, 99 Me. 166, 58 A. 1028; Land Co. v. Whiteman, 92 Minn. 55, 99 N. W. 362; Rollins v. R. Co., 73 N. J. L. 64, 62 A. 929; Missouri etc. R. Co. v. Crum, 35 Tex. Civ. 609, 81 S. W. 72.

Existence of an instrument of record not provable by parol. Shannon v. Summers, 86 Miss. 619, 38 S. 345.

302-80 P. v. Barker, 144 Cal. 705, 78 P. 266.

305-89 Cooley v. Collins, 186 Mass. 507, 71 N. E. 979.

No presumption that there is better evidence of a loan than the admission of the party. Schell v. Weaver, 225 Ill. 159, 80 N. E. 95.

306-90 For a full discussion of the authorities, see Purinton v. Purinton, 101 Me. 250, 63 A. 925.

306-91 Brown v. Ins. Co., 14 Haw. 80; Purinton v. Purinton, 101 Me. 250, 63 A. 925.

307-93 **Handwriting.** — Castor v. Bernstein, 2 Cal. App. 703, 84 P. 244.

307-94 **Testimony of plaintiff** as to what occurred at a former trial is not secondary to the testimony of the stenographer at the trial. Dickman v. MacDonald, 50 Misc. 531, 99 N. Y. S. 429.

308-98 Southern R. Co. v. Howell, 135 Ala. 639, 34 S. 6; Carhart v. Oddenkirk, 20 Colo. App. 402, 79 P. 303; Patton v. Bank, 124 Ga. 965, 974, 53 S. E. 664; U. S. Ins. Co. v. Harvey, 129 Ill. App. 104; Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767; Western U. T. Co. v. Cline, 8 Ind. App. 364, 35 N. E. 564; Ruemer v. Clark, 105 N. Y. S. 659; Bank v. Miller (Or.), 87 P. 892.

Grounds must be stated. — Tucker v. Duncan, 224 Ill. 453, 79 N. E. 613.

Call for the papers, not necessary. Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903, *rev.* 68 App. Div. 650, 74 N. Y. S. 1136.

Failure to object to want of notice. Considine v. Dubuque, 126 Iowa 283, 102 N. W. 102.

308-99 White v. Bank, 119 Ill. App. 354; Doll v. Merc. Co., 33 Mont. 80, 81 P. 625; McCormack v. Mandelbaum, 102 App. Div. 302, 92 N. Y. S. 425; Rosenberg v. Goldstein, 38 Misc. 753, 78 N. Y. S. 831. *Contra,* Mansfield v. Bell, 24 Pa. Super. 447.

309-3 Bickley v. Bickley, 136 Ala. 548, 34 S. 946; Bauer v. S., 144 Cal. 740, 78 P. 280; Trust Co. v. Elliott, 36 Colo. 238, 84 P. 980; Conant v. Jones, 120 Ga. 568, 48 S. E. 234; Haas v. Chubb, 67 Kan. 787, 74 P. 230; C. v. Parlin Co., 118 Ky. 168, 80 S. W. 791, 26 Ky. L. R. 58; Strand v. R. Co., 101 Minn. 85, 111 N. W. 958, 112 N. W. 987; Zollman v. Tarr, 93 Mo. App. 234; Price v. Clevenger, 99 Mo. App. 536, 74 S. W. 894; Samuelson v. Mfg. Co. (Neb.), 95 N. W. 809; Hall v. Callingham (N. J.), 65 A. 123; Kann v. Weir, 95 N. Y. S. 584; Quinn v. R. Co., 91 App. Div. 489, 86 N. Y. S. 883; Avery v. Stewart, 143 N. C. 287, 46 S. E. 519; Morris v. Shoe Co. (Tex. Civ.), 99 S. W. 178.

Photograph must be shown to be a correct representation. Porter v. Buckley, 147 Fed. 140, 78 C. C. A. 138.

Primary evidence must have been itself admissible. Meyer v. Ins. Co., 127 Wis. 293, 106 N. W. 1087.

309-4 See Jones v. Neal (Tex. Civ.), 98 S. W. 417.

310-6 S. v. Conroy, 126 Ia. 472, 102 N. W. 417; June v. Labadie, 132 Mich. 135, 92 N. W. 937; Nelson Mfg. Co. v. Shreve, 104 Mo. App. 474, 79 S. W. 488; First Nat. B. v. Wright, 104 Mo. App. 242, 78 S. W. 686; Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927; Whitwell v. Johnson (Neb.), 96 N. W. 272; S. v. Freshwater, 30 Utah 442, 85 P. 447.

Proof of delivery and receipt of let-

ters must be made. Hardin v. R. Co., 120 Mo. App. 203, 96 S. W. 681.

Letter received as a reply is presumed to be genuine. Loverin v. Bumgarner, 59 W. Va. 46, 52 S. E. 1000.

Need not be clear and convincing proof. S. v. Leasia, 45 Or. 410, 78 P. 328.

Telegram. — Authenticity must be shown. Yeiser v. Cathers, 5 Neb. Unof. 204, 97 N. W. 840; Peycke v. Shinn, 68 Neb. 343, 94 N. W. 135; Cobb v. Boom Co., 57 W. Va. 49, 49 S. E. 1005.

310-8 Houston etc. R. Co. v. De Berry, 34 Tex. Civ. 180, 78 S. W. 736.

310-9 Anders v. R. Co., 19 Pa. Super. 564; Houghtalling v. Houghtalling (Ia.), 112 N. W. 197; Davis v. Ragland (Tex. Civ.), 93 S. W. 1099.

310-11 Arbuckle v. Matthews, 73 Ark. 27, 83 S. W. 326; Phillips v. Reservoir Co., 184 Mass. 404, 68 N. E. 848; Webster v. Purcell, 186 N. Y. 549, 79 N. E. 1118, *aff.* 106 App. Div. 360, 94 N. Y. S. 1050; Jones v. Neal (Tex. Civ.), 98 S. W. 417; Dickinson v. Smith (Wis.), 114 N. W. 133.

Lithograph map of great age and long use. Houston v. Finnigan (Tex. Civ.), 85 S. W. 470.

311-12 Roberts Bros. v. Dover, 72 N. H. 147, 55 A. 895; Collins v. McGuire, 76 App. Div. 443, 78 N. Y. S. 527; Massuco v. Tomasi (Vt.), 67 A. 551.

311-13 Northern A. R. Co. v. Key (Ala.), 43 S. 794.

311-14 Kerr v. Woodmen, 117 Fed. 593; 54 C. C. A. 655; Board of Comrs. v. Tollman, 145 Fed. 753, 75 C. C. A. 317; Trust Co. v. Elliott, 36 Colo. 238, 84 P. 980; Conant v. Jones, 120 Ga. 568, 48 S. E. 234; McCaughn v. Young, 85 Miss. 277, 37 S. 839; S. v. Barrington, 198 Mo. 23, 95 S. W. 235; S. v. Leasia, 45 Or. 410, 78 P. 328.

Proof of handwriting of alleged writer of letter. Whitwell v. Johnson (Neb.), 96 N. W. 272.

311-16 Johnson v. Franklin (Tex. Civ.), 76 S. W. 611. *Compare* Masterson v. Harris, 37 Tex. Civ. 145, 83 S. W. 428.

Parol evidence that a deed was executed. Baltes Land etc. Co. v. Sutton, 32 Ind. App. 14, 69 N. E. 179.

312-18 Proctor etc. Co. v. Oil Co., 128 Ga. 606, 57 S. E. 879; Bright v. Allan, 203 Pa. 386, 53 A. 248; International H. Co. v. Campbell (Tex. Civ.), 96 S. W. 93; Jones v. Neal (Tex. Civ.), 98 S. W. 417.

312-19 See Arbuckle v. Matthews, 73 Ark. 27, 83 S. W. 326.

312-20 Ming v. Olster, 195 Mo. 460, 92 S. W. 898.

Presumptive evidence of existence of original. Sims v. Schenssler (Ga.), 58 S. E. 693.

312-21 Trust Co. v. Elliott, 36 Colo. 238, 84 P. 980; Rudgear v. Leather Co., 108 Ill. App. 227.

313-23 Proctor & G. Co. v. Blakely Co., 128 Ga. 606, 57 S. E. 879.

313-24 Kries v. Land Co., 121 Mo. App. 184, 98 S. W. 1086.

313-25 See Carpenter v. Jones, 76 Ark. 163, 88 S. W. 871; Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; Lancaster v. Lee, 71 S. C. 280, 51 S. E. 139; Carter v. Wood, 103 Va. 68, 48 S. E. 553.

314-26 P. v. Weimers, 225 Ill. 17, 80 N. E. 45.

316-33 See Hayes v. Wagner, 113 Ill. App. 299.

316-34 P. v. Ellenbogen, 114 App. Div. 182, 99 N. Y. S. 897.

316-35 Arkansas etc. Ins. Co. v. Woolverton, 82 Ark. 476, 102 S. W. 226; Bauer v. S., 144 Cal. 740, 78 P. 280; Conant v. Jones, 120 Ga. 568, 48 S. E. 234; O'Neill Mfg. Co. v. Harris, 127 Ga. 640, 56 S. E. 739; Meyer v. Purcell, 214 Ill. 62, 73 N. E. 392; Hiss v. Hiss, 228 Ill. 414, 81 N. E. 1056; Restaurant v. McElligott, 227 Ill. 317, 81 N. E. 388; Concord Apart. House Co. v. O'Brien, 228 Ill. 360, 81 N. E. 1038; Gibbs v. Potter, 166 Ind. 471, 77 N. E. 942; Brier v. Davis, 122 Ia. 59, 96 N. W. 983; Considine v. Dubuque, 126 Ia. 283, 102 N. W. 102; Drake v. Holbrook, 25 Ky. L. R. 1489, 78 S. W. 158; Safe Deposit Co. v. Turner, 98 Md. 22, 55 A. 1023; Conkling v. Nicholas, 133 Mich. 651, 95 N. W. 745; Howie Bros. v. Pratt, 83 Miss. 15, 35 S. 216; Ellison v. Dunlap (Mo.), 78 S. W. 155; Hanna v. Ins. Co., 109 Mo. App. 152, 82 S. W. 1115; Morey v. Clopton, 103 Mo. App. 368, 77 S. W. 467;

S. v. Barrington, 198 Mo. 23, 95 S. W. 235, 260; Brookshire v. Chillicothe Co., 91 Mo. App. 599; Zollman v. Tarr, 93 Mo. App. 234; City of So. Omaha v. Wrzensinski, 66 Neb. 790, 92 N. W. 1045; Brunnemer v. Cook, 89 App. Div. 406, 85 N. Y. S. 954; Manchester Assur. Co. v. R. Co., 46 Or. 162, 79 P. 60, 69 L. R. A. 475; Mulhearn v. Roach, 24 Pa. Super. 483; La Rue v. El. Co., 17 S. D. 91, 95 N. W. 292; Stephens v. Fous (S. D.), 106 N. W. 56; Johnson v. Franklin (Tex. Civ.), 76 S. W. 611; S. v. Champoux, 33 Wash. 339, 74 P. 557; Bazelon v. Lyon, 128 Wis. 337, 107 N. W. 337; Kelly etc. Co. v. La Crosse Co., 120 Wis. 84, 97 N. W. 674.

Lost pass. — International etc. R. Co. v. Lynch (Tex. Civ.), 99 S. W. 160.

Ballots destroyed. — P. v. Davidson, 2 Cal. App. 100, 83 P. 161.

Lost pardon. — Yzaguirre v. S., 48 Tex. Cr. 514, 85 S. W. 14.

Lost bill of sale. — Shultis v. Rice, 114 Mo. App. 274, 89 S. W. 357.

318-37 Sims v. Scheussler, 2 Ga. App. 466, 58 S. E. 693; S. v. Horine, 70 Kan. 256, 78 P. 411; Day v. S. (Tex. Cr.), 101 S. W. 806.

Deed. — Carpenter v. Smith, 76 Ark. 447, 88 S. W. 976; Cox v. McDonald, 118 Ga. 414, 45 S. E. 401; Houston v. S., 124 Ga. 417, 52 S. E. 757; Fuller v. Keesee, 31 Ky. L. R. 1099, 104 S. W. 700; Graton v. Land Co., 189 Mo. 322, 87 S. W. 37; Lancaster v. Lee, 71 S. C. 280, 51 S. E. 139; Lockridge v. Corbett, 31 Tex. Civ. 676, 73 S. W. 96.

Tax deed. — Kries v. Holladay-K. Co., 121 Mo. App. 184, 98 S. W. 1086.

Ballots. — Montgomery v. Dormer, 181 Mo. 5, 79 S. W. 913.

Schedule of debts filed by administrator. Rhodus v. Heffernan, 47 Fla. 206, 36 S. 572.

318-38 Choctaw etc. R. Co. v. McAlester (Ind. Ter.), 104 S. W. 821.

318-39 Hodge v. Palms, 117 Fed. 396, 54 C. C. A. 570; Patterson v. Drake, 126 Ga. 478, 55 S. E. 175; Silva v. Newport, 31 Ky. L. R. 897, 104 S. W. 314; Haynes v. S. (Tex. Civ.), 85 S. W. 1029.

Judicial records. — Holford v. James, 136 Fed. 553, 69 C. C. A. 263; Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767 (adoption proceedings); Smith v. Gowdy, 29 Ky. L. R. 832, 96 S. W. 566; Moulierre v. Coco, 116 La. 845, 41 S. 113; Fontelieu v. Fontelieu, 116 La. 866, 41 S. 120; Wise v. Thread Co., 84 Miss. 200, 36 S. 244 (justice's judgment roll); Given v. Given, 25 Pa. Super. 467; Latta v. Wiley (Tex. Civ.), 92 S. W. 433; Houston etc. R. Co. v. DeBerry, 34 Tex. Civ. 180, 78 S. W. 736; Smith v. Ridley, 30 Tex. Civ. 158, 70 S. W. 235 (alias execution); Schroeder v. Klipp, 120 Wis. 245, 97 N. W. 909 (order of board).

318-41 Williams v. Miles, 73 Neb. 193, 102 N. W. 482, 106 N. W. 769; In re Rogers (Vt.), 67 A. 726.

319-42 Norris v. Billingsley, 48 Fla. 102, 37 S. 564; Peaks v. Cobb, 192 Mass. 196, 77 N. E. 881.

319-43 **Abstract of title admissible** after proof of loss of original deed and the record. Glos v. Wheeler, 229 Ill. 272, 82 N. E. 234.

319-44 See Brasch v. Tie Co., 80 Ark. 425, 97 S. W. 445.

319-45 **Loss by fire** after an opportunity to produce. Rudgear v. Leather Co., 206 Ill. 74, 69 N. E. 30.

319-46 Dennis v. Crocker-H. Co. (Cal. App.), 91 P. 425; P. v. Hemple, 4 Cal. App. 120, 87 P. 227; Stephan v. Metzger, 95 Mo. App. 609, 69 S. W. 625; Nelson v. Mfg. Co. (S. D.), 105 N. W. 630.

321-51 **Alteration** under misapprehension does not estop. Gibbs v. Potter, 166 Ind. 471, 77 N. E. 942.

321-52 Nelson v. Mfg. Co. (S. D.), 105 N. W. 630.

322-13 Thistlewaite v. Pierce, 30 Ind. App. 642, 66 N. E. 755.

322-54 **Destruction by request** of adverse party. Gould v. S., 71 Neb. 651, 99 N. W. 541.

323-59 Bond v. Hurd, 31 Mont. 314, 78 P. 579; Avery v. Stewart, 134 N. C. 287, 46 S. E. 519.

323-61 Garmany v. Lawton, 124 Ga. 876, 53 S. E. 669; S. v. Leasia, 45 Or. 410, 78 P. 328; S. v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

General passenger agent can testify as to loss of ticket. Chiles v. R. Co., 69 S. C. 327, 48 S. E. 252.

323-62 **Certificates of custodians of public records** not exclusive. S. v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

324-63 Stuart v. Mitchum, 135 Ala. 546, 33 S. 670; Burkhart v. Loughridge, 30 Ky. L. R. 303, 98 S. W. 291; Liles v. Liles, 183 Mo. 326, 81 S. W. 1101.

324-64 June v. Labadie, 132 Mich. 135, 92 N. W. 937; First Nat. Bk. v. Wright, 104 Mo. App. 242, 78 S. W. 686; Gould v. S., 71 Neb. 651, 99 N. W. 541; Wolf Co. v. Galbraith (Tex. Civ.), 94 S. W. 1100.

325-75 See Williams v. Cessna (Tex. Civ.), 95 S. W. 1106.

Under rule of court. — Cox v. McDonald, 118 Ga. 414, 45 S. E. 401.

327-76 See Baltimore etc. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523.

327-78 Williamson v. Work, 33 Tex. Civ. 369, 77 S. W. 266.

Affidavit of co-defendant not sufficient. Gann v. Roberts, 32 Tex. Civ. 561, 74 S. W. 950.

327-82 See Atchison R. Co. v. Palmore, 68 Kan. 545, 75 P. 509, 64 L. R. A. 90.

328-85 Bickley v. Bickley, 136 Ala. 548, 34 S. 946; La Rue v. El. Co., 17 S. D. 91, 95 N. W. 292.

Admission by attorney of inability to produce. Union Surety Co. v. Tenney, 200 Ill. 349, 65 N. E. 688.

329-89 Brown v. Harkins, 131 Fed. 63, 65 C. C. A. 301; Uzzell v. Horn, 71 S. C. 426, 51 S. E. 253.

Rule stated. — Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803.

Mere statement of the circumstances may be sufficient. — Atchison R. Co. v. Palmore, 68 Kan. 545, 75 P. 509, 64 L. R. A. 90.

330-90 June v. Labadie, 132 Mich. 135, 92 N. W. 937; Reeder v. Wilber, 18 S. D. 426, 100 N. W. 1099; Taliaferro v. Rice (Tex. Civ.), 103 S. W. 464.

330-91 Cullinan v. Hosmer, 100 App. Div. 148, 91 N. Y. S. 607.

331-93 Tagert v. S., 143 Ala. 88, 39 S. 293, 111 Am. St. 17; Butt v. Mastin, 143 Ala. 321, 39 S. 217; Saunders v. Roofing Co., 148 Ala. 519, 41 S. 982; Post v. Leland, 184 Mass. 601, 69 N. E. 361; Brigger v. Ins. Co., 77 N. Y. S. 362; Avery v. Stewart, 134 N. C. 287, 46 S. E. 519.

331-94 Price v. Oatman (Tex. Civ.), 77 S. W. 258.

332-96 Slight evidence where card was not intended to be preserved. — Atchison R. Co. v. Palmore, 68 Kan. 545, 75 P. 509, 64 L. R. A. 90.

332-97 Carter v. Wood, 103 Va. 68, 48 S. E. 553.

Clear proof of lost deed. — Houghtalling v. Houghtalling (Ia.), 112 N. W. 197.

333-99 McCaughn v. Young, 85 Miss. 277, 37 S. 839; Frugia v. Trueheart (Tex. Civ.), 106 S. W. 736.

333-3 S. v. Bennett (Ia.), 110 N. W. 150; Peaks v. Cobb, 192 Mass. 196, 77 N. E. 881; Chiles v. R. Co., 69 S. C. 327, 48 S. E. 252.

334-4 Dupee v. Horseshoe Co., 117 Fed. 40, 54 C. C. A. 426; Stuart v. Mitchum, 135 Ala. 546, 33 S. 670; Construction Co. v. Meador, 143 Ala. 336, 39 S. 216; Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; Newton v. Donnelly, 9 Ind. App. 359, 36 N. E. 769; McCaughn v. Young, 85 Miss. 277, 37 S. 839; Liles v. Liles, 183 Mo. 326, 81 S. W. 1101; Strause v. Braunreuter, 14 Pa. Super. 125.

334-5 Owensboro Co. v. Hall (Ala.), 43 S. 71; Taggert v. S., 143 Ala. 88, 39 S. 293, 111 Am. St. 17; Sheffield v. Oil Co., 3 Ga. App. 200, 59 S. E. 725; Abersol v. Coal Co., 106 Ill. App. 235; Avery v. Stewart, 134 N. C. 287, 46 S. E. 519; Day v. S. (Tex. Cr.), 101 S. W. 806.

Diligent and reasonable. — Randolph v. Hudson, 12 Okla. 516, 74 P. 946.

Statement of witness that he did not have the letter, insufficient. Bagnell Tie Co. v. Goodrich, 82 Ark. 547, 102 S. W. 228.

Search for absent witness must be diligent before secondary evidence of his former testimony is admissible. Allen v. S., 84 Ark. 178, 105 S. W. 70.

334-6 McEntyre v. Hairston (Ala.), 44 S. 417; S. v. Matlack, 5 Penne. (Del.) 401, 64 A. 259; Thompson v. R. Co., 131 Mich. 95, 90 N. W. 1037; Nelson Mfg. Co. v. Shreve, 104 Mo. App. 474, 79 S. W. 488.

Utmost good faith must be shown. Prussing v. Jackson, 208 Ill. 85, 69 N. E. 771.

334-7 Andrews v. S. (Ala.), 44 S. 696; Everett v. Hart, 20 Colo. App. 93, 77 P. 254; Denny v. Bank, 118 Ga. 221, 44 S. E. 982; Wolters v. Redward, 16 Haw. 25; Smith v. Garris, 131 N. C. 34, 42 S. E. 445.

335-9 Bascomb v. Toner, 5 Ind.

App. 229, 31 N. E. 856; Cullinan v. Hosmer, 100 App. Div. 148, 91 N. Y. S. 607.

336-11 Saunders v. Tuscambia Co., 148 Ala. 519, 41 S. 982; Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; Everett v. Hart, 20 Colo. App. 93, 77 P. 254; Trust Co. v. Elliott, 36 Colo. 238, 84 P. 980; Guilford Co. v. Granite Co., 23 App. Cas. (D. C.) 1; Randolph v. Hudson, 12 Okla. 516, 74 P. 946; Edgefield Mfg. Co. v. Maryland Co., 78 S. C. 73, 58 S. E. 969.

Predecessor in title. — Bower v. Cohen, 126 Ga. 35, 54 S. E. 918.

337-12 McEntyre v. Haieston (Ala.), 44 S. 417; Koehler v. Schilling, 70 N. J. L. 585, 57 A. 154; Avery v. Stewart, 134 N. C. 287, 46 S. E. 519.

338-13 Ryan v. Shaneyfelt, 146 Ala. 683, 40 S. 223; O'Neill Mfg. Co. v. Harris, 127 Ga. 640, 56 S. E. 739; Orchard v. Collier, 171 Mo. 390, 71 S. W. 677; Porch v. S. (Tex. Civ.), 99 S. W. 102; Thompson v. Chaffee (Tex. Civ.), 89 S. W. 285; Day v. S. (Tex. Cr.), 101 S. W. 806.

Where a writing is executed in counterpart, search must be made in the place of deposit of each part. Brown v. Harkins, 131 Fed. 63, 65 C. C. A. 301.

338-14 Samuelson v. Mfg. Co. (Neb.), 95 N. W. 809.

339-16 See Woodenware Co. v. Harmon, 128 Wis. 177, 107 N. W. 299.

339-18 Wolters v. Redward, 16 Haw. 25; Koehler v. Schilling, 70 N. J. L. 585, 57 A. 154; Taliaferro v. Rice (Tex. Civ.), 103 S. W. 464.

340-25 See Leesville Mfg. Co. v. Wood Wks., 75 S. C. 342, 55 S. E. 768.

340-26 Alabama Const. Co v. Meador, 143 Ala. 336, 39 S. 216; McEntyre v. Haieston (Ala.), 44 S. 417; S. v. Matlack, 5 Penne. (Del.) 401, 64 A. 259. *Contra,* Thompson v. Chaffee (Tex. Civ.), 89 S. W. 285.

342-30 Smith v. Garris, 131 N. C. 34, 42 S. E. 445.

342-32 Orchard v. Collier, 171 Mo. 390, 71 S. W. 677.

343-36 Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; Patterson v. Drake, 126 Ga. 478, 55 S. E. 175; Bower v. Cohen, 126 Ga. 35, 54 S. E. 918; Smith v. Hightower, 3 Ga. App. 197, 59 S. E. 593; Cox v. McDonald, 118 Ga. 414, 45 S. E. 401; Cooley v. Collins, 186 Mass. 507, 71 N. E. 979; Liles v. Liles, 183 Mo. 326, 81 S. W. 1101; Chiles v. R. Co., 69 S. C. 327, 48 S. E. 252; Leesville Mfg. Co. v. Wood Wks., 75 S. C. 342, 55 S. E. 768; Taliaferro v. Rice (Tex. Civ.), 103 S. W. 464.

Proof of loss, being for the consideration of the court, may be made while the jury is not present. Degg v. S. (Ala.), 43 S. 484.

344-37 Turner v. Elliott, 127 Ga. 338, 56 S. E. 434; Koehler v. Schilling, 70 N. J. L. 585, 57 A. 154; Avery v. Stewart, 134 N. C. 287, 46 S. E. 519.

344-38 P. v. Dolan, 186 N. Y. 4, 78 N. E. 569.

344-39 Crawford v. McDonald, 84 Ark. 415, 106 S. W. 206; P. v. Weimers, 225 Ill. 17, 80 N. E. 45; White v. White (Kan.), 90 P. 1087; Mattson v. R. Co., 98 Minn. 296, 108 N. W. 517.

If prosecuting witness has control of a letter which is in another jurisdiction, he must produce it. S. v. Teasdale, 120 Mo. App. 692, 97 S. W. 995.

346-47 Tilley v. Cox, 119 Ga. 867, 47 S. E. 219; Baltimore etc. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523; Prussing v. Jackson, 208 Ill. 85, 69 N. E. 771; German-A. Bldg. Assn. v. Droge (Ind. App.), 41 N. E. 397; Cooley v. Collins, 186 Mass. 507, 71 N. E. 979; Koehler v. Schilling, 70 N. J. L. 585, 57 A. 154.

Traced to hostile witness. — Stark v. Burke, 131 Ia. 684, 109 N. W. 206.

Where letters are forgotten by witness, but are within jurisdiction of court, secondary evidence not admissible. S. v. McCoy, 70 Kan. 672, 79 P. 156.

Duplicate copy in possession of a third person should be produced. Peaks v. Cobb, 192 Mass. 196, 77 N. E. 881.

347-51 Contents of letter sent to the wife may be proved. De Leon v. Ter. (Ariz.), 80 P. 348.

347-53 Preston v. Hirsch (Cal. App.), 90 P. 965; Smith v. Gowdy, 29 Ky. L. R. 832, 96 S. W. 566; Staunchfield v. Jeutter (Neb.), 96 N. W. 642; Sykes v. Beck, 12 N. D. 242, 96 N. W. 844; Peeples v. Woolen Mills (Tex. Civ.), 90 S. W.

61; Seaborn v. S. (Tex. Cr.), 90 S. W. 649; Clement v. Graham, 78 Vt. 290, 63 A. 146.

Municipal ordinances are public records, independent of any statute. Florida C. R. Co. v. Seymour, 44 Fla. 557, 33 S. 424.

347-54 Dupee v. Horseshoe Co., 117 Fed. 40, 54 C. C. A. 426; Sellers v. Farmer (Ala.), 43 S. 967; Ritter v. S., 70 Ark. 472, 69 S. W. 262; Proctor & G. Co. v. Blakely Co., 128 Ga. 606, 57 S. E. 879; Wright v. R. Co., 118 Mo. App. 392, 94 S. W. 555; Price v. Clevenger, 99 Mo. App. 536, 74 S. W. 894; Hirsch v. Lumb. Co., 69 N. J. L. 509, 55 A. 645; Gulf etc. R. Co. v. Harris, Tex Civ., 72 S. W. 71. *Compare* Sterling v. R. Co. (Tex. Civ.), 86 S. W. 655.

349-56 McDonald v. Erbes, 231 Ill. 295, 83 N. E. 162; Interstate Inv. Co. v. Bailey, 29 Ky. L. R. 468, 93 S. W. 578; Pringey v. Guss, 16 Okla. 82, 86 P. 292.

Discussion of authorities. — Bruger v. Ins. Co., 129 Wis. 281, 109 N. W. 95.

350-60 See Parker v. Ballard, 123 Ga. 441, 51 S. E. 465.

351-64 Records of foreign army. In re McClellan (S. D.), 107 N. W. 681.

352-71 Chicago etc. R. Co. v. Fitzhugh, 82 Ark. 179, 100 S. W. 1149; Brownlee v. Reiner, 147 Cal. 641, 82 P. 324; Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916; Sheffield v. Oil Co., 3 Ga. App. 200, 59 S. E. 725; In re Rodriguez, 13 Haw. 202; Union Surety Co. v. Tenney, 200 Ill. 349, 65 N. E. 688; Musselam v. R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Ivey v. Mills, 143 N. C. 189, 55 S. E. 613; Hanson v. Lindstran, 15 N. D. 584, 108 N. W. 798; Barton-P. Mfg. Co. v. Merc. Co., 18 Okla. 137, 89 P. 1128; Aaron v. R. Co., 68 S. C. 98, 46 S. E. 556; Leesville Mfg. Co. v. Morgan Wks., 75 S. C. 342, 55 S. E. 768; Nelson v. Mfg. Co. (S. D.), 105 N. W. 630; Western Union Tel. Co. v. Kapp, 35 Tex. Civ. 663, 80 S. W. 840; Higgins v. Matlock (Tex. Civ.), 95 S. W. 571; Underwriters' F. Assn. v. Henry (Tex. Civ.), 79 S. W. 1072; Texas Cent. R. Co. v. Fowler (Tex. Civ.), 102 S. W. 732.

Notice required although the writing is one which the defendant could not be compelled to produce. S. v. Barnett, 110 Mo. App. 592, 85 S. W. 613.

Letter-press copy, not admissible in absence of notice to produce the original. King v. Compress Co., 35 Tex. Civ. 653, 81 S. W. 114.

Letter traced to co-defendant. Young v. P., 221 Ill. 51, 77 N. E. 536.

Notice not necessary where there is no reason to suppose that the letter is in his custody. Kelly etc. Co. v. La Crosse Co., 120 Wis. 84, 97 N. W. 674.

355-77 Norris v. Billingsley, 48 Fla. 102, 37 S. 564; Hayes v. Wagner, 113 Ill. App. 299; Peake v. Cobb, 192 Mass. 196, 77 N. E. 881; Bryan v. Boyce (Tex. Civ.), 92 S. W. 820. *Compare* Thompson v. Ins. Co., 77 S. C. 294, 57 S. E. 848.

Carbon copy has been held to be such a counterpart as to be admissible without notice given to produce the original. Cole v. Power Co., 216 Pa. 283, 65 A. 678.

355-79 Kinard v. S., 1 Ga. App. 146, 58 S. E. 263; Cleveland etc. R. Co. v. Patton, 104 Ill. App. 550; Continental Ins. Co. v. Chew, 11 Ind. App. 330, 38 N. E. 417; White v. White (Kan.), 90 P. 1087.

Admission that copy produced is correct will excuse the giving of notice. Beard v. R. Co., 143 N. C. 136, 55 S. E. 505. See Ivey v. Mills, 143 N. C. 189, 55 S. E. 613.

355-80 Safe Deposit Co. v. Turner, 98 Md. 22, 55 A. 1023; Kohl v. Bradley, 130 Wis. 301, 110 N. W. 265.

356-81 Bickley v. Bickley, 136 Ala. 548, 34 S. 946.

358-88 Thompson v. Ins. Co., 77 S. C. 294, 57 S. E. 848.

361-99 Yarborough v. Hughes, 139 N. C. 199, 51 S. E. 904; Hanson v. Lindstrom, 15 N. D. 584, 108 N. W. 798; Thompson v. Ins. Co., 77 S. C. 294, 57 S. E. 848; Presidio County v. Clarke (Tex. Civ.), 85 S. W. 475.

362-7 Counts v. S., 48 Tex. Cr. 629, 89 S. W. 972.

365-16 Nelson v. Mfg. Co. (S. D.), 105 N. W. 630; Loverin v. Bumgarner, 59 W. Va. 46, 52 S. E. 1000.

Notice to produce letters written to two named persons does not require

the production of letters written to one of such persons. Bryson v. Boyce (Tex. Civ.), 92 S. W. 820.

366-21 Thompson v. Ins. Co., 77 S. C. 294, 57 S. E. 848; Leesville Mfg. Co. v. Wood Wks., 75 S. C. 342, 55 S. E. 768.

Service of notice at the trial, on a witness who resides seventy miles away, insufficient. Beard v. R. Co., 143 N. C. 136, 55 S. E. 505.

369-32 Thompson v. Ins. Co., 77 S. C. 294, 57 S. E. 848; Continental F. Assn. v. Bearden, 29 Tex. Civ. 569, 69 S. W. 982; Sheldon C. Co. v. Miller (Tex. Civ.), 90 S. W. 206.

371-39 S. v. Madeira, 125 Mo. App. 508, 102 S. W. 1046.

Proof of service of notice is not established by mere statement of counsel that notice was served. Landt v. McCullough, 206 Ill. 214, 69 N. E. 107.

374-51 Dick v. Biddle (Md.), 66 A. 21; Spring Garden Ins. Co. v. Whayland, 103 Md. 699, 64 A. 925; First Nat. Bk. v. El. Co. (Minn.), 114 N. W. 265; Sisk v. Ins. Co., 95 Mo. App. 695, 69 S. W. 687; Carr v. Ins. Co., 115 App. Div. 755, 101 N. Y. S. 158; P. v. Dolan, 186 N. Y. 4, 78 N. E. 569; Hess-M. Co. v. Brown, 84 N. Y. S. 168; Stephens v. Faus (S. D.), 106 N. W. 56; La Rue v. Elevator Co., 17 S. D. 91, 95 N. W. 292; McGaughey v. Bank (Tex. Civ.), 92 S. W. 1003; Sheldon C. Co. v. Miller (Tex. Civ.), 90 S. W. 206; Kothman v. Faseler (Tex. Civ.), 84 S. W. 390; International H. Co. v. Campbell (Tex. Civ.), 96 S. W. 93; Western U. T. Co. v. Salter (Tex. Civ.), 95 S. W. 549; McCollum v. R. Co., 31 Utah 494, 88 P. 663; S. v. Mann, 39 Wash. 144, 81 P. 561; Nunn v. Jordan, 31 Wash. 506, 72 P. 124; Shine v. Culver, 42 Wash. 484, 85 P. 271; Loverin v. Bumgarner, 59 W. Va. 46, 52 S. E. 1000.

376-53 Uzzell v. Horn, 71 S. C. 426, 51 S. E. 253; S. v. Freshwater, 30 Utah 442, 85 P. 447.

Denial of existence. — Hiss v. Hiss, 228 Ill. 414, 81 N. E. 1056.

Destruction of telegrams. — Hallet v. Aggergaard (S. D.), 114 N. W. 696.

379-66 Merritt v. Jordan, 65 N. J. Eq. 772, 60 A. 183. *Compare* Phoenix Ins. Co. v. Jacobs, 23 Ind. App. 509, 55 N. E. 778.

Secondary evidence not struck out upon subsequent production of the primary. Gulf etc. R. Co. v. Leatherwood, 29 Tex. Civ. 507, 69 S. W. 119.

Copy of lost instrument admissible subsequent to admission of parol evidence of its contents. Hagey v. Schroeder, 30 Ind. App. 151, 65 N. E. 598.

380-71 Landt v. McCullough, 206 Ill. 214, 69 N. E. 107.

380-73 Supreme Council v. Champe, 127 Fed. 541, 63 C. C. A. 550; Eatman v. S., 48 Fla. 21, 37 S. 576; Pape v. Ferguson, 28 Ind. App. 298, 62 N. E. 712.

382-85 P. v. Christian, 144 Mich. 247, 107 N. W. 919. See S. v. Barrington, 198 Mo. 23, 95 S. W. 235, 260.

384-88 Barnett v. Lucas, 27 Ind. App. 441, 61 N. E. 683; Bank v. Linzee, 166 Mo. 496, 65 S. W. 735; Griffin v. R. Co., 115 Mo. App. 549, 91 S. W. 1015; Davis v. Montgomery, 205 Mo. 271, 103 S. W. 979; Southern R. Co. v. Seymour, 113 Tenn. 523, 83 S. W. 674.

This proposition is fully discussed in Powers v. Hatter (Ala.), 44 S. 859.

384-89 Kelley v. Levee Dist., 74 Ark. 202, 85 S. W. 249, 87 S. W. 638; Parker v. Ballard, 123 Ga. 441, 51 S. E. 465; Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767; Glos v. Wheeler, 229 Ill. 272, 82 N. E. 234; Martin v. Brand, 182 Mo. 116, 81 S. W. 443; Staunchfield v. Jeutter (Neb.), 96 N. W. 642.

384-90 See P. v. Davidson, 2 Cal. App. 100, 83 P. 161.

385-91 See P. v. Christian, 144 Mich. 247, 107 N. W. 919; Nelson Mfg. Co. v. Shreve, 104 Mo. App. 474, 79 S. W. 488.

Letter-press copies not duplicate originals. Menasha W. W. Co. v. Harmon, 128 Wis. 177, 107 N. W. 299.

385-92 Virginia etc. Co. v. Knight, 106 Va. 674, 56 S. E. 725.

Carbon copies are duplicate originals. International H. Co. v. Elfstrom, 101 Minn. 263, 112 N. W. 252; Wright v. R. Co., 118 Mo. App. 392, 94 S. W. 555; Chesapeake & O. R. Co. v. Stock, 104 Va. 97, 51 S.

E. 161; Hopkins v. S., 52 Fla. 39, 42 S. 52.

Triplicate bill of lading. — Walker v. R. Co., 76 S. C. 308, 56 S. E. 952.

Copy allowed by stipulation to be used in the place of the original becomes the best evidence. McCarthy v. R. Co., 79 Conn. 73, 63 A. 725.

387-97 Campbell v. S., 123 Ga. 533, 51 S. E. 644.

May refresh his memory by use of memorandum. S. v. Mann, 39 Wash. 144, 81 P. 561.

387-1 Brier v. Davis, 122 Ia. 59, 96 N. W. 983; Kelly etc. Co. v. La Crosse Co., 120 Wis. 84, 97 N. W. 674.

388-6 Insurance policy, used the previous year, may be admitted as a copy. Edgefield Mfg. Co. v. Casualty Co., 78 S. C. 73, 58 S. E. 969.

Photographic reproductions admissible as secondary evidence. In re McClellan (S. D.), 107 N. W. 681.

Stenographer's Notes of previous testimony should be shown to be correct. Degg v. S. (Ala.), 43 S. 484.

Mutilated original. — Senterfeit v. Shealey, 71 S. C. 259, 51 S. E. 142.

390-12 Bickerdike v. S., 144 Cal. 698, 78 P. 277; Houston v. S., 124 Ga. 417, 52 S. E. 757.

BIAS [Vol. 2.]

393-2 Juror must be tested before the jury is sworn. Jacobs v. S., 1 Ga. App. 519, 57 S. E. 1063.

Where juror is learned to have been incompetent as having served at the previous term, it is not ground for new trial, though it would have been ground for a challenge. Jordan v. S., 119 Ga. 443, 46 S. E. 679.

394-3 Sullivan v. Padrosa, 122 Ga. 338, 50 S. E. 142.

Examination on motion mandatory upon the court. Robinson v. Howell, 66 S. C. 326, 44 S. E. 931.

Request for examination is necessary. Tucker v. Mills, 76 S. C. 539, 57 S. E. 626.

394-4 Jarvis v. S., 138 Ala. 17, 34 S. 1025.

394-6 Presumption is in favor of the competency of a juror. S. v. Hamilton, 74 Kan. 461, 87 P. 363.

Mind of the court and not of the juror must be satisfied that the challenged juror is free from bias. S. v. Caron, 118 La. 349, 42 S. 960.

395-9 See S. v. Caron, supra.

395-13 S. v. Tighe, 27 Mont. 327, 71 P. 3.

Inquiry to aid in determining upon a peremptory challenge, improper. Dimmack v. Tract Co., 58 W. Va. 226, 52 S. E. 101.

396-18 Neglect to challenge grand juror, the objection to whom was known, amounts to a waiver. C. v. Craig, 19 Pa. Super. 81.

397-19 Gregory v. S., 148 Ala. 566, 42 S. 829; Sullivan v. Padrosa, 122 Ga. 338, 50 S. E. 142; Nobles v. S., 127 Ga. 212, 56 S. E. 125; S. v. Cornelius, 118 La. 146, 42 S. 754; S. v. Hayes, 69 S. C. 295, 48 S. E. 251; Yardley v. S. (Tex. Cr.), 100 S. W. 399.

397-20 Coppenhaver v. S., 160 Ind. 540, 67 N. E. 453; Ray v. S., 108 Tenn. 282, 67 S. W. 553.

Question as to whether the juror would be influenced by an appeal to any higher law than the law of the land, is improper. Fuller v. S. (Tex. Cr.), 95 S. W. 541.

397-21 Hardy v. U. S., 186 U. S. 224; Strickland v. S. (Ala.), 44 S. 90; Coleman v. S. (Ala.), 44 S. 184; Mann. v. S., 134 Ala. 1, 32 S. 704; Johnson v. S., 44 Tex. Cr. 332, 71 S. W. 25.

Scruple against awarding punitive damages. Yazoo R. Co. v. Roberts, 88 Miss. 80, 40 S. 481.

398-22 S. v. Croney, 31 Wash. 122, 71 P. 783.

Statement by juror that the man who committed the crime ought to be punished does not disqualify. S. v. Perioux, 107 La. 601, 31 S. 1016.

398-24 Patrick v. S., 45 Tex. Cr. 587, 78 S. W. 947.

Prejudice against railways. — St. Louis etc. R. Co. v. Hooser (Tex. Civ.), 97 S. W. 708; Chicago etc. R. Co. v. Fetzer, 113 Ill. App. 280.

399-26 Prejudice against liquor business does not disqualify juror in an action for illegal sale of liquor. Ellis v. Brooks (Tex.), 102 S. W. 94.

399-27 Prejudice against actions brought by non-residents. Naylor v. R. Co., 66 Kan. 407, 71 P. 835.

399-28 Prejudice against defense of insanity. S. v. Croney, 31 Wash. 122, 71 P. 783.

399-29 **Prejudice against negro.** Sullivan v. Padrosa, 122 Ga. 338, 50 S. E. 142; Woodroe v. S. (Tex. Cr.), 96 S. W. 30.

Prejudice against Indians. — P. v. Chutnacut, 141 Cal. 682, 75 P. 340.

Juror not disqualified by regarding white men more credible than Chinese. Wise v. Tong Ong, 16 Haw. 457.

400-36 Tarpey v. Madsen, 26 Utah 294, 73 P. 411.

Employe of stockholder not within the rule. Dimmack v. Tract. Co., 58 W. Va. 226, 52 S. E. 101.

400-37 **Connection with an indemnity insurance company** may be inquired into. Marande v. R. Co., 124 Fed. 42, 59 C. C. A. 562; Vindicator Min. Co. v. Firstbrook, 36 Colo. 498, 86 P. 313; Cripple Creek Min. Co. v. Brabant, 37 Colo. 423, 87 P. 794; Brusseau v. Lower Brick Co., 133 Ia. 245, 110 N. W. 577; Foley v. Pack. Co., 119 Ia. 246, 93 N. W. 284; Swift & Co. v. Platte, 68 Kan. 1, 72 P. 271, *rev.* on rehearing 74 P. 635; Dow Wire Co. v. Morgan, 29 Ky. L. R. 854, 96 S. W. 530; Spoonick v. Backus Co., 89 Minn. 354, 94 N. W. 1079; Antletz v. Smith, 97 Minn. 217, 106 N. W. 517; Vion v. Lumb. Co., 99 Minn. 97, 108 N. W. 891; Grant v. R. Co., 100 App. Div. 234, 91 N. Y. S. 805; Faber v. Coal Co., 124 Wis. 554, 102 N. W. 1049. *Compare* Coolidge v. Hallaner, 126 Wis. 244, 105 N. W. 568; Howard v. Lumb. Co., 129 Wis. 98, 108 N. W. 48; Chybowski v. Bucyrus Co., 127 Wis. 332, 106 N. W. 833; *Contra*, Eckhart v. Schaefer, 101 Ill. App. 500.

Question concerning connection with indemnity insurance company improper when asked without good reason. Hoyt v. D. Mfg. Co., 112 App. Div. 755, 98 N. Y. S. 1031.

Relation as employe. — Tucker v. Mills, 76 S. C. 539, 57 S. E. 626.

400-38 *Compare* Imboden v. P. (Colo.), 90 P. 608.

401-44 Robinson v. Howell, 66 S. C. 326, 44 S. E. 931.

Cousin in the third degree of wife of accused, excluded. S. v. Caron, 118 La. 349, 42 S. 960.

401-47 S. v. Fullerton, 90 Mo. App. 411; S. v. Tighe, 27 Mont. 327, 71 P. 3.

402-48 **Members of anti-saloon league** qualified to act as jurors in a case of alleged illegal sale of liquors. S. v. Sultan, 142 N. C. 569, 54 S. E. 841.

402-50 P. v. Albers, 137 Mich. 678, 100 N. W. 908; Fugate v. S., 85 Miss. 86, 37 S. 557.

402-52 **Juror cannot be asked** whether he wishes to sit on the jury. Abby v. Wood, 43 Wash. 379, 86 P. 558.

Knowledge or ignorance concerning questions of law, not a proper subject of inquiry. P. v. Conklin, 175 N. Y. 333, 67 N. E. 624; Ryan v. S., 115 Wis. 488, 92 N. W. 271.

Questions upon matters as to which the juror is bound by court's instructions, are improper. S. v. Perioux, 107 La. 601, 31 S. 1016.

402-54 So. Covington etc. R. Co. v. Weber, 26 Ky. L. R. 922, 82 S. W. 986; Swift v. Platte, 68 Kan. 1, 72 P. 271, *rev.* on rehearing, 74 P. 635.

403-61 P. v. Warner, 147 Cal. 546, 82 P. 196; S. v. King, 174 Mo. 647, 74 S. W. 627; Taylor v. S., 44 Tex. Cr. 547, 72 S. W. 396.

Effect of indictment upon the mind of juror cannot be investigated. Niezorawski v. S., 131 Wis. 166, 111 N. W. 250.

404-66 **When existence of opinion will not disqualify.** See Jarvis v. S., 138 Ala. 17, 34 S. 1025.

404-67 See Hughes v. S., 109 Wis. 397, 85 N. W. 333.

405-69 **Counsel cannot insist on framing questions.** — Sullivan v. Padrosa, 122 Ga. 338, 50 S. E. 142.

406-72 Jacobs v. S., 1 Ga. App. 519, 57 S. E. 1063; Johnson v. S., 44 Tex. Cr. 332, 71 S. W. 25.

Court may fully explain the statutory questions. — Sullivan v. Padrosa, 122 Ga. 338, 50 S. E. 142.

406-73 S. v. Malmberg, 14 N. D. 523, 105 N. W. 614.

Bias does not disqualify. — Timma v. Timma, 72 Kan. 73, 82 P. 481.

407-74 U. S. v. Post, 128 Fed. 950.

407-76 Hampton v. S., 50 Fla. 55, 39 S. 421; Chicago etc. R. Co. v. Smith, 226 Ill. 178, 80 N. E. 716; Kennedy v. Murphy, 112 Ill. App. 607; Isaac v. U. S. (Ind. Ter.), 104 S. W. 588; S. v. Malmberg, 14 N. D. 523, 105 N. W. 614; Olson v. R. Co., 24 Utah 460, 68 P. 148.

Limit of cross-examination is in the discretion of the court. Abelson v. R. Co., 84 Ark. 181, 105 S. W. 81; S. v. Hamilton, 74 Kan. 461, 87 P. 363; S. v. May, 172 Mo. 630, 72 S. W. 918; Glenn v. Tract. Co., 206 Pa. 135, 55 A. 860.

Wide latitude in cross-examination. Williams v. R. Co., 42 Wash. 597, 84 P. 1129.

Where witness' testimony is uncontradicted, cross-examination to show bias is not permissible. Regester v. Regester (Md.), 64 A. 286.

Ill feeling cannot be shown by cross-examination unless witness denies such feeling. Sasser v. S., 129 Ga. 541, 59 S. E. 255.

407-78 See S. v. Dalton, 43 Wash. 278, 86 P. 590.

407-80 Fields v. S., 46 Fla. 84, 35 S. 185; Atlanta etc. R. Co. v. McManus, 1 Ga. App. 302, 58 S. E. 258; S. v. Seery, 129 Ia. 259, 105 N. W. 511; S. v. Broadbent, 27 Mont. 342, 71 P. 1; Taylor & Co. v. R. Co., 84 N. Y. S. 282; In re Steenwerth, 97 App. Div. 116, 89 N. Y. S. 654; Iaquinto v. Bauer, 104 App. Div. 56, 93 N. Y. S. 388; Miller v. Ter., 15 Okla. 422, 85 P. 239; Norfolk etc. R. Co. v. Birchfield, 105 Va. 809, 54 S. E. 879.

Fact and manner of interest of the witness may be inquired into. National E. Co. v. Fagan, 115 Ill. App. 590.

Witness may be asked whether he knew that he had to establish a certain fact before he could recover. Kramer v. R. Co., 86 N. Y. S. 33.

It may be shown that the witness was promised immunity. Reese v. S., 44 Tex. Cr. 34, 68 S. W. 283.

Refusal to allow inquiry into relation of attorney and client existing between the witness and the attorney for plaintiff not an abuse of discretion. Birmingham R. Co. v. Lintner, 141 Ala. 420, 38 S. 363.

408-81 Rarden v. Cunningham, 136 Ala. 263, 34 S. 26; Cook v. S. (Ala.), 44 S. 549; Morris v. S. (Ala.), 39 S. 608; Sanford v. S., 143 Ala. 78, 39 S. 370; Taylor v. S., 121 Ga. 348, 49 S. E. 303; Coffman v. S. (Tex. Cr.), 103 S. W. 1128.

408-82 Porter v. P., 31 Colo. 508, 74 P. 879; P. v. Harper, 145 Mich. 402, 108 N. W. 689; S. v. Anslinger, 171 Mo. 600, 71 S. W. 1041.

Statement of witness in regard to a reward offered him, is admissible. Mullins v. C., 23 Ky. L. R. 2433, 67 S. W. 824.

408-84 Alford v. S., 47 Fla. 1; 36 S. 436; Goss v. Goss, 102 Minn. 346, 113 N. W. 690; Creeping Bear v. S., 113 Tenn. 322, 87 S. W. 653.

For a full discussion of the necessity of preliminary cross-examination of a witness, see P. v. Mallon, 116 App. Div. 425, 101 N. Y. S. 814.

Hostility can be shown by oral declarations only after inquiring with particularity as to the time and place. S. v. Bardelli, 78 Vt. 102, 62 A. 44.

408-85 Paradise v. S., 131 Ala. 26, 31 S. 722; Robertson v. R. Co., 142 Ala. 216, 37 S. 831; Morris v. S., 146 Ala. 66, 41 S. 274; O'Neal v. Curry, 134 Ala. 216, 32 S. 697; Beal v. S., 138 Ala. 94, 35 S. 58; Eatman v. S., 48 Fla. 21, 37 S. 576; Fields v. S., 46 Fla. 84, 35 S. 185; Georgia etc. R. Co. v. Stanley, 1 Ga. App. 487, 57 S. E. 1042; S. v. Crea, 10 Idaho 88, 76 P. 1013; Toledo etc. R. Co. v. Stevenson, 122 Ill. App. 654; Goss v. Goss, 102 Minn. 346, 113 N. W. 690; S. v. Darling, 202 Mo. 150, 100 S. W. 631; Lambeck v. Stiefel, 71 N. J. L. 320, 59 A. 460; Salzman v. Mandel, 50 Misc. 634, 98 N. Y. S. 825; Sue v. S. (Tex. Cr.), 105 S. W. 804; Houston etc. R. Co. v. McCarty (Tex. Civ.), 89 S. W. 805.

Cross-examination to show hostility not considered a collateral inquiry. Cook v. S. (Ind.), 82 N. E. 1047; S. v. Malmberg, 14 N. D. 523, 105 N. W. 614.

Attempt by witness to dissuade attendance of other witnesses. S. v. Koller, 129 Ia. 111, 105 N. W. 391.

Attempt of the witness to intimidate other witnesses. S. v. Rutledge (Ia.), 113 N. W. 461.

Attempt of witness to obtain signed statement from others showing nonliability of defendant. Houston Co. v. Dial, 135 Ala. 168, 33 S. 268.

Fact that witness induced another person to get off the defendant's bond. Sapp v. S. (Tex. Cr.), 77 S. W. 456; P. v. Row, 135 Mich. 505, 98 N. W. 13.

Discharge from employment.

Houston etc. R. Co. v. Wilson, 37 Tex. Civ. 405, 84 S. W. 274.

Written declarations competent to establish friendly feeling. P. v. Thorne, 148 Mich. 203, 111 N. W. 741.

Declarations in a letter manifesting ill-will, admissible. Lambeck v. Stiefel, 71 N. J. S. 320, 59 A. 460.

Remarks imputing ill-will may be shown upon cross-examination. P. v. Ryan (Cal.), 92 P. 853.

Declarations showing ill-will. — Lederer v. Lederer, 108 App. Div. 228, 95 N. Y. S. 623.

Threats made by witness against the defendant. Vaughn v. S., 52 Fla. 122, 41 S. 881.

Hostility provable by any competent evidence. Gumby v. R. Co., 65 App. Div. 38, 72 N. Y. S. 551, *aff.* 171 N Y. 635, 63 N. E. 1117.

Hostility of witness may be shown by testimony of party. Brink v. Stratton, 176 N. Y. 150, 68 N. E. 148

Interest of police officer in securing a conviction may be shown to be merely to secure the punishment of the guilty person. P. v. Wenzel, 189 N. Y. 275, 82 N. E. 130.

Question as to what an employe of defendant said to witness about the matter is proper. Louisville etc. R. Co. v. Sherrell (Ala.), 44 S. 631.

Hostility of father of witness, a minor, to defendant may be shown. Bennefield v. S., 134 Ala. 157, 32 S. 717.

Hostility toward father of defendant cannot be shown. McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503.

Ill-will may be shown but not the cause of it. McDuffie v. S., 121 Ga. 580, 49 S. E. 708.

Deadly enmity toward defendant. McMasters v. S., 81 Miss. 374, 33 S. 2.

Indictments against witness for assault upon defendant, competent. Purdee v. S., 118 Ga. 798, 45 S. E. 606.

Suit pending by plaintiff against witness. Gosdin v. Williams (Ala.), 44 S. 611.

Suit instituted against witness by plaintiff. Collins v. McGuire, 76 App. Div. 443, 78 N. Y. S. 527.

It may be established that the witness swore out a warrant for the arrest of the prosecutor. Cross v. S., 147 Ala. 125, 41 S. 875.

Witness a member of a mob to hang defendant. S. v. Hamilton, 65 Kan. 183, 69 P. 162.

Whether a feeling of hostility is justified cannot be inquired into. Seymour v. Bruske, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691.

Proper for court to refuse to allow details of hostility. S. v. Baird, 79 Vt. 257, 65 A. 101; Wright v. Anniston (Ala.), 44 S. 151; Henderson v. S., 49 Tex. Cr. 269, 91 S. W. 569.

409-88 That the witness belongs to a certain gang or crowd may be shown. Jackson v. S. (Tex. Cr.), 67 S. W. 497.

410-90 South Covington R. Co. v Constans, 25 Ky. L. R. 158, 74 S. W. 705; Missouri etc. R. Co. v. Cherry (Tex. Civ.), 97 S. W. 712.

410-91 Funderburk v. S., 145 Ala. 661, 39 S. 672; S. v. Lortz, 186 Mo. 122, 84 S. W. 906; S. v. Broadbent, 27 Mont. 342, 71 P. 1; Creeping Bear v. S., 113 Tenn. 322, 87 S. W. 653.

Activity in prosecution of the suit. Borck v. S. (Ala.), 39 S. 580; S. v. Roller, 30 Wash. 692, 71 P. 718.

Advice of witness that the action be brought. Atlantic etc. R. Co. v. Powell, 127 Ga. 805, 56 S. E. 1006.

Membership in same labor union may be shown. P. v. Cowan, 1 Cal. App. 411, 82 P. 339.

Contribution of money by witness to aid in the prosecution of the suit. Miller v. Ter., 149 Fed. 330, 79 C. C. A. 268.

Hostile relations between husband and wife. Fischer v. Brady, 47 Misc. 401, 94 N. Y. S. 25.

Partizanship. — Briscoe v. R. Co., 118 Mo. App. 668, 95 S. W. 276.

Fear as cause of bias. — Smith v. S., 44 Tex. Cr. 53, 68 S. W. 267.

410-93 Brown v. S., 119 Ga. 572, 46 S. E. 833; Sakolski v. Schenkel, 50 Misc. 151, 98 N. Y. S. 190; Sexton v. S., 48 Tex. Cr. 497, 88 S. W. 348.

Witness concubine of deceased. — S. v. Craft, 117 La. 213, 41 S. 550.

412-99 Loverman v. Brown, 138 Ala. 608, 35 S. 708.

Whether witness was paid for attending. — Southern R. Co. v. Morris, 143 Ala. 628, 42 S. 17.

How much a witness was paid for attending is proper inquiry. Brown

v. R. Co., 43 Misc. 374, 87 N. Y. S. 461.

Payment for investigations. — S. v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

Concealment by witness of fact that he was surgeon of the defendant railroad. Glenn v. Tract. Co., 206 Pa. 135, 55 A. 860.

Physician employed to make an examination for purpose of becoming a witness. A. B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818.

Employment of physician by defendant may be shown. Chicago etc. R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087.

Cross-examination of physician upon independent cases of the same character, not allowed. Chicago etc. R. Co. v. Schmitz, 113 Ill. App. 295, *aff.* 211 Ill. 446, 71 N. E. 1050; Chicago etc. R. Co. v. Smith, 226 Ill. 178, 80 N. E. 716.

Likelihood of an employe to be discharged. Missouri etc. R. Co. v. Smith, 31 Tex. Civ. 332, 72 S. W. 418.

Rule that employes should say nothing as to accidents. Toledo etc. R. Co. v. Ward, 2 Ohio C. C. (N. S.) 256.

Relation of witness as employe. Central R. v. Bagley, 121 Ga. 781, 49 S. E. 780; Gulf etc. R. Co. v. Hays (Tex. Civ.), 89 S. W. 29; Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415; United Oil Co. v. Miller, 19 Colo. App. 46, 73 P. 627.

Witness an agent of party calling him. Louisville etc. R. Co. v. Munford, 24 Ky. L. R. 416, 68 S. W. 635.

413-1 Birmingham R. Co. v. Rutledge, 142 Ala. 195, 39 S. 338.

Witness who is also plaintiff may be asked whether he instituted the action because defendant compelled him to pay a debt. Lowe v. Ring, 123 Wis. 107, 101 N. W. 381.

Fact that witness is the husband of the washerwoman of the deceased is too remote. Hall v. S., 137 Ala. 44, 34 S. 680.

413-2 Isaac v. U. S. (Ind. Ter.), 104 S. W. 588; Hirsh v. Tel. Co., 92 N. Y. S. 794.

Interest as taxpayer. — Styles v. Decatur, 131 Mich. 443, 91 N. W. 622.

Pecuniary loss if defendant is not convicted may be shown. Teston v. S., 50 Fla. 138, 39 S. 787.

Liability of witness to settle the debt incurred. Nesbit v. Crosby, 74 Conn. 554, 51 A. 550.

Ultimate liabilty of the witness for the accident. Hedlun v. Min. Co., 16 S. D. 261, 92 N. W. 31.

Witness charged with the commission of the same crime. S. v. Rosa, 71 N. J. L. 316, 58 A. 1010; Wilkerson v. S., 140 Ala. 165, 37 S. 265.

Prosecution instituted against witness for similar offense may be shown. McCormack v. S., 133 Ala. 202, 32 S. 268.

414-3 Vindicator Min. Co. v. Firstbrook, 36 Colo. 498, 86 P. 313.

415-6 Sylvester v. S., 46 Fla. 166, 35 S. 142; Southern R. Co. v. S. (Ind. App.), 72 N. E. 174; Timma v. Timma, 72 Kan. 73, 82 P. 481; Missouri etc. R. Co. v. Smith, 31 Tex. Civ. 332, 72 S. W. 418.

Size of contingent fee of attorney who volunteers as witness. New Omaha etc. Co. v. Johnson, 67 Neb. 393, 93 N. W. 778.

Witness may be asked whether he would have voluntarily appeared for the other party. Wooley v. Bell, 33 Tex. Civ. 399, 76 S. W. 797.

BIGAMY [Vol. 2.]

416-1 See S. v. Allen, 113 La. 705, 37 S. 614; P. v. Goodrode, 132 Mich. 542, 94 N. W. 14; S. v. St. John, 94 Mo. App. 229, 68 S. W. 374; S. v. Goulden, 134 N. C. 743, 47 S. E. 450; C. v. Bernard, 27 Pa. C. C. 12; McCombs v. S. (Tex. Cr.), 99 S. W. 1017; Hearne v. S. (Tex. Cr.), 97 S. W. 1050 (proof must be beyond a reasonable doubt).

Identity of parties of the two marriages must be clearly established, Goad v. S., (Tex. Cr.), 102 S. W. 121.

A common law marriage will sustain a conviction for bigamy. Burks v. S. (Tex. Cr.), 94 S. W. 1040. *Contra*, Bates v. S., 9 Ohio C. C. (N. S.) 273.

Cohabitation and acknowledgment, not creating a valid marriage, indictment for bigamy will not lie. Bates v. S., 9 Ohio C. C. (N. S.) 273.

416-2 Richardson v. S., 103 Md. 112, 63 A. 317.

Second marriage while the first wife

is still alive must be established beyond a reasonable doubt, and evidence of a divorce granted for bigamy is inadmissible, since in a civil suit a mere preponderance of the evidence is enough. S. v. Sharkey, 73 N. J. L. 491, 63 A. 866.

416-3 S. v. Cain, 106 La. 708, 31 S. 300; S. v. Long, 143 N. C. 670, 57 S. E. 349.

Divorce must be proved by defendant. C. v. Gravinow, 27 Pa. C. C. 461.

Burden is upon defendant to show that he did not know his first wife was alive for the seven prior years. S. v. Goulden, 134 N. C. 743, 47 S. E. 450.

Under Arkansas statute, burden is upon the state to prove that defendant knowingly married another's wife. Brook v. S., 74 Ark. 58, 84 S. W. 1033.

Where a second marriage has been formally consummated, it will not be presumed that the first marriage has been legally dissolved, but the burden is upon defendant to establish that fact. Fletcher v. S. (Ind.), 81 N. E. 1083.

416-5 **Certificate** of marriage sufficient. S. v. Rocker, 130 Ia. 239, 106 N. W. 645.

Marriage license is admissible upon the issue of the first marriage. De Lucenay v. S. (Tex. Cr.), 68 S. W. 796.

Record proof of marriage is admissible against the objection that a defendant is entitled to meet the witness face to face. Sokel v. P., 212 Ill. 238, 72 N. E. 382. *Compare* P. v. Goodrode, 132 Mich. 542, 94 N. W. 14.

417-6 **First wife** may testify to the fact of marriage, under some statutes. Richardson v. S., 103 Md. 112, 63 A. 317. *Compare* Barber v. P., 203 Ill. 543, 68 N. E. 93.

Testimony of person present at a marriage in a foreign country. Sokel v. P., 212 Ill. 238, 72 N. E. 382.

417-7 Williams v. S. (Ala.), 44 S. 57; Caldwell v. S., 146 Ala. 141, 41 S. 473; S. v. Rocker, 130 Ia. 239, 106 N. W. 645; P. v. Goodrode, 132 Mich. 542, 94 N. W. 14; S. v. Long, 143 N. C. 670, 57 S. E. 349; S. v. Goulden, 134 N. C. 743, 47 S. E. 450; C. v. Henning, 10 Phila. (Pa.) 209.

Defendant's uncorroborated admissions are sufficient. McSein v. S., 120 Ga. 175, 47 S. E. 544.

417-8 Rice v. C., 31 Ky. L. R. 1354, 105 S. W. 123; S. v. St. John, 94 Mo. App. 229, 68 S. W. 374.

Where a statutory marriage is relied upon, proof of a common law marriage is insufficient. Burton v. S. (Tex. Cr.), 101 S. W. 226.

417-9 S. v. Hughes, 35 Kan. 626, 12 P. 28, 57 Am. St. 195.

Allegation of marriage may be proved by any competent evidence, direct or circumstantial. S. v. Pendleton, 67 Kan. 180, 72 P. 527.

417-10 See S. v. St. John, 94 Mo. App. 229, 68 S. W. 374.

Proof of cohabitation and recognition is admissible upon the issue of marriage, but is not sufficient to overcome the presumption that defendant is innocent. S. v. Hansbrough, 181 Mo. 348, 80 S. W. 900.

418-11 Ferrell v. S., 45 Fla. 26, 34 S. 220; Sokel v. P., 212 Ill. 238, 72 N. E. 382. See S. v. Rocker, 130 Ia. 239, 106 N. W. 645; S. v. Kniffen, 44 Wash. 485, 87 P. 837.

Celebration of a marriage having been shown, the presumption is that the marriage was valid. This presumption is rebuttable. Barber v. P., 203 Ill. 543, 68 N. E. 93.

418-15 S. v. Rocker, 130 Ia. 239, 106 N. W. 645.

419-16 **Testimony** of eye-witness sufficient. McSein v. S., 120 Ga. 175, 47 S. E. 544.

Testimony of minister who performed ceremony is admissible. Kuehn v. S. (Tex. Cr.), 69 S. W. 526.

419-17 See S. v. Steupper, 117 Ia. 591, 91 N. W. 912.

419-18 Murphy v. S., 122 Ga. 149, 50 S. E. 48.

Second wife is competent to testify to her own marriage after the first marriage has been established, but she is not competent to testify to the first marriage. Barber v. P., 203 Ill. 543, 68 N. E. 93.

419-20 Parnell v. S., 126 Ga. 103, 54 S. E. 804. See S. v. Goulden, 134 N. C. 743, 47 S. E. 450.

Honest belief in a divorce no defense. Rice v. C., 31 Ky. L. R. 1354, 105 S. W. 123; Rogers v. C., 24 Ky. L. R. 119, 68 S. W. 14.

Fact that the woman knew that de-

fendant had a wife living at the time, irrelevant. Richardson v. S., 103 Md. 112, 63 A. 317.

419-21 Welch v. S., 46 Tex. Cr. 528, 81 S. W. 50.

Honest belief that the woman was not married is a defense, under the Arkansas statute. Brooks v. S., 74 Ark. 58, 84 S. W. 1033.

420-23 McCombs v. S. (Tex. Cr.), 99 S. W. 1017.

Where the first marriage charged in an indictment is void because of a previous valid marriage, the wife being alive, no conviction can be had under the indictment. Lane v. S., 82 Miss. 555, 34 S. 353.

BILLS OF PARTICULARS [Vol. 2.]

421-1 Stern v. R. Co., 98 App. Div. 619, 90 N. Y. S. 299; Silva v. Blair, 141 Cal. 599, 75 P. 162; Weedon v. Weedon, 34 Pa. Super. 358.

421-2 Kelsey v. Punderford, 76 Conn. 271, 56 A. 579; Royal Phosphate Co. v. Van Ness, 53 Fla. 135, 43 S. 916.

421-3 McKinnie v. Lane, 230 Ill. 544, 82 N. E. 878; Dixon v. Bunnell, 52 Misc. 560, 102 N. Y. S. 775; St. Albans B. Co. v. Aldridge, 112 App. Div. 803, 99 N. Y. S. 398.

421-4 Dunn v. Foley, 78 Conn. 670, 63 A. 122.

422-6 Yawger v. Backs, 119 Ill. App. 61.

Perfect exactness and agreement between the bill of particulars and the proof are not required. Devalinger v. Maxwell, 4 Penne. (Del.) 185, 54 A. 684; Stewart v. Knight, 166 Ind. 498, 76 N. E. 743.

422-7 Bill of particulars is not of itself sufficient evidence of the price of goods sold to warrant a verdict. U. S. Paper Co. v. Gruhn, 86 N. Y. S. 730.

An unverified bill of particulars does not constitute affirmative proof of any fact as against the other party. Hesser etc. Co. v. Fuel Co., 114 Wis. 654, 90 N. W. 1094.

BILLS AND NOTES [Vol. 2.]

426-1 Presumption not conclusive. — Fuller v. Shields, 3 Phila. (Pa.) 361.

427-4 Haslach v. Wolf, 73 Neb. 658, 103 N. W. 317.

428-7 Time when indorsements were made. — Redden v. Lambert, 112 La. 740, 36 S. 668.

429-12 Note dated and payable in New York is presumed to have been made and indorsed there. Chemical Nat. Bk. v. Kellogg, 183 N. Y. 92, 75 N. E. 1103.

429-14 Utah Nat. Bk. v. Jones, 109 App. Div. 526, 96 N. Y. S. 338.

429-16 Variance as to date of payment must have caused surprise, to be fatal. Black v. Epstein, 93 Mo. App. 459, 67 S. W. 736.

430-17 Leffler v. Dickerson, 1 Ga. App. 63, 57 S. E. 911.

431-21 Caskey v. Douglas (Tex. Civ.), 95 S. W. 562.

432-23 Kellam v. Brode, 1 Cal. App. 315, 82 P. 213.

435-31 Baily v. Birkhofer, 123 Ia. 59, 98 N. W. 594.

437-35 Bank named, presumption is that it is in maker's home town. Baily v. Birkhofer, supra.

440-44 Where no place of payment is stated, evidence of place of residence of payee is immaterial and inadmissible. Ray v. Anderson, 119 Ga. 926, 47 S. E. 205.

440-45 Parol evidence inadmissible to clear up an ambiguity, where jurisdiction is involved alone, and must be determined from the face of the note. Baily v. Birkhofer, 123 Ia. 59, 98 N. W. 594.

444-65 Word "dollars" inserted by court. Eldridge v. Kay, 124 Ill. App. 136.

445-74 Marginal figures and words cannot supply the amount of a note left blank. Chestnut v. Chestnut, 104 Va. 539, 52 S. E. 348, 2 L. R. A. (N. S.) 879.

446-79 Declaration on an order to pay "all sums of money due for lumber" not sustained by proof of an order to pay "amount due on lumber shipped." Leatherbery v. Spottswood, 145 Ala. 655, 39 S. 588.

Declaration on a note of a specified sum not sustained by proof of a note with a blank sum. Chestnut v. Chestnut, 104 Va. 539, 52 S. E. 348, 2 L. R. A. (N. S.) 879.

447-83 Cannot be assumed that more interest was paid than the note called for. Henderson v.

Lightner, 29 Ky. L. R. 301, 92 S. W. 945.

447-94 Remission of interest for the first year. Tisdale v. Mallett, 73 Ark. 31, 84 S. W. 481.

448-98 See Viets v. Silver, 15 N. D. 51, 106 N. W. 35.

"Per annum" may be added by the court in construing the contract as to interest. Brooks v. Boyd, 1 Ga. App. 65, 57 S. E. 1093.

449-9 See Talbott v. Heinze, 25 Mont. 4, 63 P. 624; Kempner v. Patrick (Tex. Civ.), 95 S. W. 51.

Cotemporaneous written agreement varying contract of indorsement. Crilly v. Gallice, 148 Fed. 835, 78 C. C. A. 525; New Blue Springs Co. v. DeWitt, 65 Kan. 665, 70 P. 647.

Clause written below the note. Black v. Epstein, 93 Mo. App. 459, 67 S. W. 736.

450-12 Graham v. Remmel, 76 Ark. 140, 88 S. W. 899 (insurance policy to be satisfactory); Oakland Cem. v. Lakins, 126 Ia. 121, 101 N. W. 778; McKnight v. Parsons (Ia.), 113 N. W. 858 (conditional delivery); Hill v. Hall, 191 Mass. 253, 77 N. E. 831 (note to become binding only if certain bonds were sold by the maker); Central Sav. Bk. v. O'Connor, 132 Mich. 578, 94 N. W. 11; Mendenhall v. Ulrich, 94 Minn. 100, 101 N. W. 1057; Earle v. Owings, 72 S. C. 362, 51 S. E. 980 (note not containing all the terms of the transaction); Elwell v. Turney, 39 Wash. 615, 81 P. 1047 (clear preponderance of evidence necessary); Hodge v. Smith, 130 Wis. 326, 110 N. W. 192.

452-14 Martin v. McCune, 8 Pa. Super. 84.

453-19 See Muller v. Swanton, 140 Cal. 249, 73 P. 994; Whitehead v. Emmerich, 38 Colo. 13, 87 P. 790; Hutchins v. Langley, 27 App. D. C. 234; Union Cent. Ins. Co. v. Wynne, 123 Ga. 470, 51 S. E. 389; Farrington v. Stuckey (Ind. Ter.), 104 S. W. 647; Chapman v. Chapman, 132 Ia. 5, 109 N. W. 787; Begley v. Combs, 27 Ky. L. R. 1115, 87 S. W. 1081; Felch v. West Brookfield, 184 Mass. 309, 68 N. E. 227; Central Sav. Bk. v. O'Connor, 132 Mich. 578, 94 N. W. 11; Central Sav. Bk. v. O'Connor, 139 Mich. 82, 94 N. W. 11; Oppenheimer v. Kruckman, 84 N. Y. S. 129; Jamestown Assn. v. Allen, 172 N. Y. 291, 64 N. E. 952; Guthrie etc. Co. v. Rhodes (Okla.), 91 P. 1119; Homewood Bk. v. Heckert, 207 Pa. 231, 56 A. 431.

Renewal at maturity. — Wolf v. Wolf, 2 Pa. Super. 590.

Note not to be extended. — First Nat. Bk. v. Wells, 98 Mo. App. 573, 73 S. W. 293.

Payments to be made as goods are delivered. Beattyville Bk. v. Roberts, 117 Ky. 689, 78 S. W. 901.

Note payable only out of dividends. Fuller v. Law, 207 Pa. 101, 56 A. 333.

454-20 Earle v. Enos, 130 Fed. 467 (agreement not to hold accommodation maker); Bass v. Sanborn, 119 Mo. App. 103, 95 S. W. 955; First Nat. Bk. v. Dick, 22 Pa. Super. 445; Cit. Nat. Bk. v. Commer (Tex. Civ.), 86 S. W. 625 (parol contract of indemnity may be shown).

455-21 Butler v. Keller, 19 Pa. Super. 472.

455-22 Appleby v. Barrett, 28 Pa. Super. 349.

Payment only out of proceeds of sale. — Nottingham v. Ackiss (Va.), 57 S. E. 592. *Contra,* Evans v. Freeman, 142 N. C. 61, 54 S. E. 847.

456-25 Oral agreement subsequently reduced to writing. National Bk. v. Shaw, 218 Pa. 612.

457-33 Polhemus v. Prudential Co. (N. J. L.), 67 A. 303.

Presumption that signatures on a note were affixed in the order in which they appear. Beem v. Farrell (Ia.), 113 N. W. 509.

458-37 Sutherland v. County, 42 Misc. 38, 85 N. Y. S. 696.

460-41 Burkhalter v. Perry, 127 Ga. 438, 56 S. E. 631.

460-42 Western Scraper Co. v. McMillen, 71 Neb. 686, 99 N. W. 512. See Daniel v. Glidden, 38 Wash. 556, 80 P. 811; English & S. etc. Co. v. Loan & Tr. Co., 70 Neb. 435, 97 N. W. 612.

Note signed by a person as president, with corporation seal attached, is presumptively the note of the corporation. Reed v. Fleming, 209 Ill. 390, 70 N. E. 667.

Presence of corporate seal immaterial. Daniel v. Glidden, 38 Wash. 556, 80 P. 811.

462-44 Ross v. De Campi, 140 Ala. 327, 36 S. 1003.

462-45 *Compare* Columbia Finance Co. v. Mitchell, 24 Ky. L. R. 1844, 72 S. W. 350.

462-46 Presumption that joint guarantors should contribute equally to discharge any liability. McDavid v. McLean, 202 Ill. 354, 66 N. E. 1075.

462-47 Trammell v. Fertilizer Wks., 121 Ga. 778, 49 S. E. 739.

Position of signatures to be considered. Shead v. Moore, 31 Wash. 283, 71 P. 1010.

Third person signing above the payee, presumed a surety. Redden v. Lambert, 172 La. 740, 36 S. 668.

464-56 One joint maker not bound by the admissions of the other. Hayman v. Lambden, 97 Md. 33, 54 A. 962. *Compare* Nicholson v. Snyder, 97 Md. 415, 55 A. 484.

464-57 Western Grocer Co. v. Lackman, 75 Kan. 34, 88 P. 527; Western Scraper Co. v. McMillen, 71 Neb. 686, 99 N. W. 512.

Ambiguity may be explained. Dunbar Box Co. v. Martin, 53 Misc. 312, 103 N. Y. S. 91.

467-61 Parol evidence inadmissible to limit liability prima facie joint and several to a mere several liability. City Deposit Bk. v. Green, 130 Ia. 384, 106 N. W. 942.

Parol evidence of a custom inadmissible to show that parties prima facie indorsers signed as makers. Harnett v. Holdrege, 73 Neb. 570, 103 N. W. 277.

467-62 Trammell v. Fertilizer Wks., 121 Ga. 778, 49 S. E. 739; Caudle v. Ford, 24 Ky. L. R. 1764, 72 S. W. 270 (knowledge of payee); Black v. McCarley, 31 Ky. L. R. 1198, 104 S. W. 987 (married woman as surety); Jennings v. Moore, 189 Mass. 197, 75 N. E. 214; Willoughby v. Ball, 18 Okla. 535, 90 P. 1017; Windhorst v. Bergendahl (S. D.), 111 N. W. 544.

469-63 Kaufman v. Barbour, 98 Minn. 158, 107 N. W. 1128; People's Nat. Bk. v. Schepflin, 73 N. J. L. 29, 62 A. 333.

Mere form of note does not determine relations of parties, parol evidence being admissible in explanation. Helvie v. McKain, 32 Ind. App. 507, 70 N. E. 178.

Accommodation maker can show his position. Morgan v. Thompson, 72 N. J. L. 244, 62 A. 410.

In action by creditor. — Shank v. Exch. Bk., 124 Ga. 508, 52 S. E. 621.

470-64 Note signed by partners individually may be shown to be a firm note. Young v. Stevenson, 73 Ark. 480, 84 S. W. 623.

Not admissible to prove a renunciation by holder, as to one party, under the Negotiable Instruments Law. Baldwin v. Daly, 41 Wash. 416, 83 P. 724.

472-72 Luster v. Robinson, 76 Ark. 255, 88 S. W. 896; Kitchen v. Holmes, 42 Or. 252, 70 P. 830.

473-74 Payee holding legal title in trust. Jones v. Day (Tex. Civ.), 88 S. W. 424.

473-75 Johnson v. Bank, 134 Ia. 731, 112 N. W. 165.

474-76 Parol evidence admissible to show that plaintiff indorsed as trustee. Graham v. Troth, 69 Kan. 861, 77 P. 92.

475-84 Wells v. Hobson, 91 Mo. App. 379.

Delivery presumed to have been before maturity. Exchange Bk. v. Veirs, 3 Cal. App. 71, 84 P. 455.

475-85 Peevey v. Tapley, 148 Ala. 320, 42 S. 561; Baum v. Palmer, 165 Ind. 513, 76 N. E. 108; Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; Digan v. Mandel, 167 Ind. 586, 79 N. E. 899; Damman v. Vollenweider, 126 Ia. 327, 101 N. W. 1130; Cox v. Cox, 25 Ky. L. R. 1934, 79 S. W. 220; Bass v. Wellesley, 192 Mass. 526, 78 N. E. 543; Harris v. Tinder, 109 Mo. App. 563, 83 S. W. 94; Sears v. Daly, 43 Or. 346, 73 P. 5; Stoddard v. Lyon, 18 S. D. 207, 99 N. W. 1116; Bruce v. Wanzer, 18 S. D. 155, 99 N. W. 1102; Ritchie County Bk. v. Bee (W. Va.), 59 S. E. 181.

Execution must be proved under plea of non est factum. Memphis Coffin Co. v. Patton (Tex. Civ.), 106 S. W. 697.

Effect of verified plea of non est factum. Home Nat. Bk. v. Hill, 165 Ind. 226, 74 N. E. 1086; Godman v. Henby, 37 Ind. App. 1, 76 N. E. 423; McCormick v. Higgins, 37 Ind. App. 107, 76 N. E. 775.

No presumption that a note was regularly executed. Sears v. Daly, 43 Or. 346, 73 P. 5.

Where no denial of the execution under oath, execution is to be presumed according to the purport of

the note. Milwaukee Tr. Co. v. Van Valkenburgh (Wis.), 112 N. W. 1083.

Instruments set up in answer. Sparks v. Const. Co. (Okla.), 91 P. 839.

Burden on plaintiff to show agency or ratification. Sears v. Daly, 43 Or. 346, 73 P. 5.

476-86 Gandy v. Bissell, 72 Neb. 356, 100 N. W. 803; Moak v. Stevens, 45 Misc. 147, 91 N. Y. S. 903; Poess v. Bank, 43 Misc. 45, 86 N. Y. S. 857. *Compare* Godman v. Henby, 37 Ind. App. 1, 76 N. E. 423.

Conclusive presumption. — Massachusetts Nat. Bk. v. Snow, 187 Mass. 159, 72 N. E. 959.

Burden is on plaintiff to prove that notes were delivered to a third person to be delivered to plaintiff upon the happening of a contingency. Jones v. Jones, 101 Me. 447, 64 A. 815.

477-90 Taylor v. Taylor, 138 Mich. 658, 101 N. W. 832.

Declarations of maker denying execution, admissible. Pahukula v. Parke, 6 Haw. 210.

Admission that a signature over which a note is written is genuine does not admit that the note was executed. Mack v. Cole, 130 Mich. 84, 89 N. W. 564.

477-91 Circumstances surrounding alleged execution. Gandy v. Bissell, 72 Neb. 356, 100 N. W. 803.

Testimony of subscribing witness. Groff v. Groff, 209 Pa. 603, 59 A. 65.

Subscribing witness need not be produced. Mississippi Lumb. Co. v. Kelly, 19 S. D. 577, 104 N. W. 265.

Entries in account book must be contemporaneous. Wells v. Hobson, 91 Mo. App. 379.

Production of note signed by mark proves nothing by itself. Clark v. Clark, 28 Ky. L. R. 1069, 91 S. W. 284.

477-92 Ayrhart v. Wilhelmy (Ia.), 112 N. W. 782.

478-94 Ratification of unauthorized signature. Harmon v. Leberman (Tex. Civ.), 87 S. W. 203.

478-96 Gasquet v. Pechin, 143 Cal. 515, 77 P. 481.

479-4 Santa Rosa Bk. v. Paxton, 149 Cal. 195, 86 P. 193.

Note not admissible without proof of the authority of the agent to sign it. Dreeben v. Bank (Tex.), 99 S. W. 850.

480-5 Gates v. Hdw. Co., 146 Ala. 692, 40 S. 509; Noble v. Gilliam, 136 Ala. 618, 33 S. 861; Tyson v. Bray, 117 Ga. 689, 45 S. E. 74; Chestnut v. Chestnut, 104 Va. 539, 52 S. E. 348, 2 L. R. A. (N. S.) 879.

Effect of such statute. — Stewart v. Gleason, 23 Pa. Super. 325.

Such statute does not apply to action by indorsee against the maker. Gumaer v. Sowers, 31 Colo. 164, 71 P. 1103.

Plea of non est factum sufficient to require proof of execution of lost note. Martin v. Jesse French Co. (Ala.), 44 S. 112.

Where there is no plea of non est factum, question of the execution of the note should not be submitted. Walker v. Tomlinson (Tex. Civ.), 98 S. W. 906.

Execution admitted by failure to deny under oath. Ellis v. Wheel Co. (Tex. Civ.), 95 S. W. 689.

Special plea of non est factum, setting up a material alteration, admits the execution of the note. Brown v. Johnson Bros., 135 Ala. 608, 33 S. 683.

Affidavit of one of several joint and several makers requires proof of the execution of the note. First Nat. Bk. v. Shaw, 149 Mich. 362, 112 N. W. 904.

Rule applies in justice's courts whether or not the defendant appears. O'Donnell v. Wade (Mich.), 114 N. W. 870.

Under a statute requiring a defendant who intends to deny the execution of a note to file notice of such intent, evidence that parties who were sued as co-makers did not sign as such, is admissible without such notice. Lyndon Sav. Bk. v. International Co., 75 Vt. 224, 54 A. 191.

Seal of corporation need not be affixed. Sheffield v. Bank, 2 Ga. App. 221, 58 S. E. 386.

Signature of neither maker nor indorser need be proved. Hibernia Bk. Co. v. Smith, 89 Miss. 298, 42 S. 345.

In absence of affidavit, authority of agent need not be proved. Dexter v. Powell, 14 Pa. Super. 162.

480-6 Under plea of non est factum defendant can prove an altera-

tion. Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895.

Adoption of signature placed on the note by another person. Harris v. Tinder, 109 Mo. App. 563, 83 S. W. 94.

480-8 Patton v. Bank, 124 Ga. 965, 53 S. E. 664.

481-16 **Presumption conclusive** only when party receiving money has in no way contributed to the fraud or mistake. Ford v. Bank, 74 S. C. 180, 54 S. E. 204.

Burden of proof is on plaintiff to show an acceptance, where it is denied. Carrara Paint Co. v. Bank, 9 Ohio C. C. (N. S.) 150.

482-18 Ragsdale v. Gresham, 141 Ala. 308, 37 S. 367.

485-32 "Excepted" may be explained. Cortelyou v. Maben, 22 Neb. 697, 36 N. W. 159, 3 Am. St. 284.

485-36 Keating v. Morissey (Cal. App.), 91 P. 677; Moore v. Gould (Cal.), 91 P. 616; Ellison v. Simmons (Del.), 65 A. 591; Towles v. Tanner, 21 App. Cas. (D. C.) 530; Perry State Bk. v. Elledge, 109 Ill. App. 179; Woodworth v. Veitch, 29 Ind. App. 589, 64 N. E. 932; Harris v. Pate (Ind. Ter.), 104 S. W. 812; Power v. Hambrick, 25 Ky. L. R. 30, 74 S. W. 660; Holmes v. Farris, 97 Mo. App. 305, 71 S. W. 116; Colborn v. Arbecam, 54 Misc. 623, 104 N. Y. S. 986; Moak v. Stevens, 45 Misc. 147, 91 N. Y. S. 903; Danner v. Hess, 19 Pa. Super. 182.

Note under seal imports consideration both as to makers, indorsers, or sureties. Rogers v. Rogers (Del.), 66 A. 374; Smith v. Hightower, 3 Ga. App. 197, 59 S. E. 593; In re Sunderland, 29 Pa. C. C. 267.

Due bill implies consideration. Doty v. Dickey, 29 Ky. L. R. 900, 96 S. W. 544; Locher v. Kuechenmeister, 120 Mo. App. 701, 98 S. W. 92.

Non-negotiable note does not import consideration. Joseph v. Catron (N. M.), 81 P. 439; Pfaff's Estate, 31 Pa. C. C. 462.

Giving of evidence by holder does not destroy the presumption. In re Pinkerton, 49 Misc. 363, 99 N. Y. S. 492.

Burden is on plaintiff to show consideration from all the evidence. Best v. Bank, 37 Colo. 149, 85 P. 1124.

When presumption will not be given much weight. Carman v. Carrico, 25 Ky. L. R. 2143, 80 S. W. 216.

487-37 MacFarlane v. Lowell, 9 Haw. 438; Dawson v. Wombles, 123 Mo. App. 340, 100 S. W. 547; Kramer v. Kramer, 90 App. Div. 176, 86 N. Y. S. 129.

Notes negotiable in form presumed to be based on sufficient consideration even in the absence of a recital of "value received." Taylor v. Taylor, 138 Mich. 658, 101 N. W. 832.

Recital of invalid consideration. Hickok v. Bunting, 92 App. Div. 167, 86 N. Y. S. 1059.

487-38 Gates v. Hdw. Co., 146 Ala. 692, 40 S. 509; Brown v. Johnson Bros., 135 Ala. 608, 33 S. 683; Holmes v. Horn, 120 Ill. App. 359; Luke v. Koenen, 120 Ia. 103, 94 N. W. 278; Cox v. Cox, 25 Ky. L. R. 1934, 79 S. W. 220; Farnsworth v. Fraser, 137 Mich. 296, 100 N. W. 400; No. Pac. R. Co. v. Holmes, 88 Minn. 389, 93 N. W. 606; Brown v. Roberts, 90 Minn. 314, 96 N. W. 793; Holmes v. Farris, 97 Mo. App. 305, 71 S. W. 116; Chapman v. Snyder, 1 Neb. 230, 95 N. W. 346; Emerson v. Scheffer, 113 App. Div. 19, 98 N. Y. S. 1057; N. Y. Ceiling Co. v. Leonard, 48 Misc. 500, 96 N. Y. S. 187; Harris v. Buchanan, 100 App. Div. 403, 91 N. Y. S. 484; Atlantic T. Co. v. Water Co., 76 N. Y. S. 647; Schneider v. Bechtold, 3 Phila. (Pa.) 50; Masterson v. Heitmann (Tex. Civ.), 87 S. W. 227; Pelton v. Lake Co. (Wis.), 112 N. W. 29. *Compare* Huntington v. Shute, 180 Mass. 371, 62 N. E. 380, 91 Am. St. 309.

Burden upon acceptor. — Ragsdale v. Gresham, 141 Ala. 308, 37 S. 367.

Breach of warranty as failure of consideration. Elmoore v. Booth, 83 Ark. 47, 102 S. W. 393.

Action against decedent's estate. Kiesewitter v. Kress, 24 Ky. L. R. 1239, 70 S. W. 1065.

Preponderance of evidence necessary. Chicago etc. Co. v. Ward, 113 Ill. App. 327.

488-39 **Violation of law.** — Alabama Nat. Bk. v. Parker, 146 Ala. 513, 40 S. 987.

Usury. — Ferguson v. Bien, 47 Misc. 618, 94 N. Y. S. 459.

Note given in satisfaction of gambling debt. Pritchett v. Sheridan, 29 Ind. App. 81, 63 N. E. 865.

Illegality of part of consideration. Pritchett v. Sheridan, supra.

Clear proof. — Yowell v. Walker, 118 La. 28, 42 S. 635.

489-41 Lombard v. Bryne, 194 Mass. 236, 80 N. E. 489.

490-42 Creditor holding confidential relation has burden of proving a consideration. In re Dutton, 205 Pa. 244, 54 A. 903.

490-48 Any competent evidence. Clarke v. Union Stock Co., 13 Ont. L. R. (Can.) 102.

Surrounding circumstances. — Knee v. McDowell, 25 Pa. Super. 641.

Rules of board of trade admissible to prove illegality. McAyeal v. Gullett, 202 Ill. 214, 66 N. E. 1048.

491-50 Holmes v. Horn, 120 Ill. App. 359; McPeters v. English, 141 N. C. 491, 54 S. E. 417; Davis v. Evans, 142 N. C. 464, 55 S. E. 344.

491-51 Broadway Tr. Co. v. Fry, 40 Misc. 680, 83 N. Y. S. 103.

Contradiction of the writing. Burns v. Sparks, 26 Ky. L. R. 688, 82 S. W. 425.

Want of consideration between indorser and indorsee. Peabody v. Munson, 211 Ill. 324, 71 N. E. 1006.

493-54 Patton v. Bank, 124 Ga. 965, 53 S. E. 664.

493-56 Stringfellow v. Ivie, 73 Ala. 209; McCourt v. Peppard, 126 Wis. 326, 105 N. W. 809.

Want of consideration. — People's Nat. Bk. v. Schepflin, 73 N. J. L. 29, 62 A. 333.

494-57 Dial v. McKay (Ala.), 43 S. 218; Aultman T. Co. v. Knoll, 71 Kan. 109, 79 P. 1074; German Am. etc. Co. v. McCulloch, 28 Ky. L. R. 133, 89 S. W. 5; Holmes v. Farris, 97 Mo. App. 305, 71 S. W. 116; National P. Bk. v. Saitta, 55 Misc. 93, 106 N. Y. S. 328.

494-60 Sebring v. Hazard, 128 Mich. 330, 87 N. W. 257; Currey v. Harden, 109 Mo. App. 678, 83 S. W. 770; Shepard v. Padgitt, 91 Mo. App. 473. *Compare* Hathorn v. Wheelwright, 99 Me. 351, 59 A. 517.

495-63 Ditto v. Slaughter, 28 Ky. L. R. 1164, 92 S. W. 2.

Bill alleging a gift not sustained by proof of a consideration for the note. Sellers v. Sellers (Ala.), 39 S. 990.

495-67 Cancellation by mistake. McCormick v. Shea, 50 Misc. 592, 99 N. Y. S. 467.

Mistake in paying before due. — Collins v. Kelsey (Tex. Civ.), 97 S. W. 122.

496-69 Champion Funding & F. Co. v. Heskett, 125 Mo. App. 516, 102 S. W. 1050; Steven v. Henderson (Neb.), 110 N. W. 646.

Any affirmative defense. — Bank of Com. v. Schlegel, 66 Kan. 509, 72 P. 210; Sears v. Daly, 43 Or. 346, 73 P. 5; Clark v. Eltinge, 34 Wash. 323, 75 P. 866.

Defense of forgery. — Wilmington Sav. Bk. v. Waste, 76 Vt. 331, 57 A. 241; Towles v. Tanner, 21 App. Cas. (D. C.) 530.

Mental incompetency. — Rogers v. Rogers (Del.), 66 A. 374; Ireland v. White, 105 Me. 233, 66 A. 477.

496-70 Bullard v. Smith, 28 Mont. 387, 72 P. 761.

497-71 Merritt v. Dewey, 218 Ill. 599, 75 N. E. 1066 (material alteration); Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895 (subsequent alteration); Emerson v. Opp, 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24 (alteration with consent of maker); Wing v. Martel, 95 Me. 535, 50 A. 705 (illegality); Allerton v. Grundy, 67 N. J. L. 55, 50 A. 352 (statutory defense).

497-72 Clear and satisfactory evidence required. Russell v. Scofield (Wis.), 113 N. W. 1094.

497-73 Crabtree v. Sisk, 30 Ky. L. R. 572, 99 S. W. 268.

497-74 Surrounding circumstances as evidence of forgery. Gregory v. Gregory, 129 Ill. App. 96.

Attending facts and circumstances may be regarded as the equivalent of another witness. Adams v. Ashman, 203 Pa. 536, 53 A. 375.

498-76 Burns v. Goddard, 72 S. C. 355, 5 S. E. 915; Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. See Crosby v. Wells, 73 N. J. L. 790, 67 A. 295.

Similar fraud on other persons, admissible. Yakima Val. Bk. v. McAllister, 37 Wash. 566, 79 P. 1119, 107 Am. St. 823, 1 L. R. A. 1075.

False representations. — Campbell v. Park, 128 Ia. 181, 101 N. W. 861.

499-77 McNamara v. Douglas, 78 Conn. 219, 61 A. 368; Ditto v. Slaughter, 28 Ky. L R. 1164, 92 S. W. 2.

Mental capacity may be inquired into to determine the effect of threats. Nebraska Bond Co. v. Klee, 70 Neb. 383, 97 N. W. 476.

500-80 Deming Inv. Co. v. Wallace, 73 Kan. 291, 85 P. 139; Sebring v. Hazard, 128 Mich. 330, 87 N. W. 257; Alexander v. Vidootzky, 49 Misc. 471, 97 N. Y. S. 992; Karner v. Ross (Tex. Civ.), 95 S. W. 46. See Shenandoah Bk. v. Gravatte, 4 Neb. 591, 95 N. W. 694.

Indorsement obtained by fraud. Nethercutt v. Hopkins, 38 Wash. 577, 80 P. 798.

501-86 **Counterclaim for fraud** not sustained by evidence of breach of warranty. Halliwell Co. v. Stewart, 103 Mo. App. 182, 77 S. W. 124.

501-89 Vette v. Evans, 111 Mo. App. 588, 86 S. W. 504. *Contra*, Broyles v. Absher, 107 Mo. App. 168, 80 S. W. 703.

501-92 Tisdale v. Mallett, 73 Ark. 31, 84 S. W. 481; Blinn Lumb. Co. v. McArthur, 150 Cal. 610, 89 P. 436; Downing v. Donegan, 1 Cal. App. 710, 82 P. 1111; Romines v. McFarland, 103 Ill. App. 269; Carver v. Forry, 158 Ind. 76, 62 N. E. 697; Boyd v. Bank, 24 Ky. L. R. 756, 69 S. W. 964; Ewing v. Ewing, 26 Ky. L. R. 580, 82 S. W. 292; Taylor v. Taylor, 138 Mich. 658, 101 N. W. 832; McCauley v. Darrow (Mont.), 91 P. 1059; Royster Guano Co. v. Marks, 135 N. C. 59, 47 S. E. 127; Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518; Stone v. Pettus (Tex. Civ.), 103 S. W. 413; Dodrill v. Gregory, 60 W. Va. 118, 53 S. E. 922.

Application of a payment to note in suit. Eastham v. Patty, 37 Tex. Civ 336, 83 S. W. 885.

Presumption that note unpaid at maturity remains so. Dresser v. Trust Co., 108 N. Y. S. 577.

Fact of loss of note does not change the rule. Walston v. Davis, 146 Ala. 510, 40 S. 1017.

Payment to, and authority of, agent. U. S. Wringer Co. v. Cooney, 214 Ill. 520, 73 N. E. 803.

Payment subsequent to date when due must be established by a preponderance of the probabilities. McKeen v. Cook, 73 N. H. 410, 62 A. 729.

Need not be proved beyond a reasonable doubt. Walston v. Davis, 146 Ala. 510, 40 S. 1017.

502-93 Bray v. Bray, 128 Ia. 234, 103 N. W. 477; Ellis v. Blackerby, 25 Ky. L. R. 1557, 78 S. W. 181; Page Woven W. F. Co. v. Pool, 133 Mich. 323, 94 N. W. 1053; Engle v. Betz, 214 Pa. 185, 63 A. 457.

Notes admissible, although not marked as paid. Chouteau Land Co. v. Chrisman, 172 Mo. 610, 72 S. W. 1062.

Possession by indorser presumptive evidence that he has performed his contract as endorser. Hill v. Buchanan, 71 N. J. L. 301, 60 A. 952.

This presumption does not change the burden of proof. Dodrill v. Gregory, 60 W. Va. 118, 53 S. E. 922.

504-94 Sarraille v. Calmon, 142 Cal. 651, 76 P. 497; Bush v. Brandecker, 123 Mo. App. 470, 100 S. W. 48; Goff v. Byers Bros., 70 Neb. 1, 96 N. W. 1037.

Possession by legatee of payee. Sturgis v. Baker, 39 Or. 541, 65 P. 810.

Possession by indorsee. Murto v. Lemon, 19 Colo. App. 314, 75 P. 160.

504-95 **Presumption** of payment after lapse of time, rebuttable. Ayres v. Ayres, 69 N. J. Eq. 343, 60 A. 422.

Illinois Statute fixes limit at ten years. U. S. etc. Co. v. Cooney, 214 Ill. 520, 73 N. E. 803.

505-97 **Indorsement.** Iberial C. Co. v. Cristen, 112 La. 451, 36 S. 491.

Indorsement, showing an overpayment. Gibbs v. Bank, 123 Ia. 736, 99 N. W. 703.

507-98 Harrar v. Croney, 13 Pa. C. C. 193.

Presumption that taking note of a third person is payment, is rebuttable. Bryant v. Grady, 98 Me. 389, 57 A. 92; Paddock & F. Co. v. Sim-

mons, 186 Mass. 152, 71 N. E. 298. In re Van Haagen, 8 Pac. C. C. 84.

Receiving non-negotiable note, not presumptive evidence of payment. Wade v. Curtis, 96 Me. 309, 51 A. 762.

508-99 Menzel v. Prim (Cal.), 91 P. 754. See Sarraille v. Calmon, 142 Cal. 651, 76 P. 497; Hildebrandt v. Fallot, 46 Misc. 615, 92 N. Y. S. 804.

Novation. Held v. Caldwell-Easton Co., 97 App. Div. 301, 89 N. Y. S. 954.

Burden of proving that note of a third person was received in payment of debt is on the debtor. Willow River Lumb. Co. v. Furniture Co., 102 Wis. 636, 78 N. W. 762.

509-1 Mechanics' Nat. Bk. v. Kielkopf, 22 Pa. Super. 128.

Burden of proving acceptance as payment is on the debtor. Philadelphia v. Neill, 211 Pa. 353, 60 A. 1033.

510-2 Baugher v. Conn, 1 Pa. C. C. 184.

Words implying a loan. Bush v. Brandecker, 123 Mo. App. 470, 100 S. W. 48.

510-3 Herron Co. v. Mawby (Cal.), 89 P. 872. See Inter-State Bk. v. Ringo, 72 Kan. 116, 83 P. 119; Goodall v. Norton, 88 Minn. 1, 92 N. W. 445.

Certified check as payment. St. Regis Paper Co. v. Tonawanda Co., 94 N. Y. S. 946.

Presumption is that a check is not received as payment. Citizens Bk. v. Kretschmar (Miss.), 44 S. 930; Meyer v. Doherty (Wis.), 113 N. W. 671.

Endorsement "Paid" on a check drawn on a bank and payable to the same bank is prima facie evidence of receipt by the bank of the amount. Patterson v. Bank, 73 Neb. 384, 102 N. W. 765.

511-4 Keyser v. Hinkle, 127 Mo. App. 62, 106 S. W. 98. See Miners' Bk. v. Rogers, 123 Mo. App. 569, 100 S. W. 534; Omaha v. Clarke, 66 Neb. 33, 92 N. W. 146. *Contra,* Steger v. Jackson, 31 Ky. L. R. 434, 102 S. W. 329.

Burden of proof on the person alleging the receipt as satisfaction. Stevens v. Taylor (Tex. Civ.), 102 S. W. 791.

511-5 Question of intention. First Nat. Bk. v. Gridley, 112 App. Div. 398, 98 N. Y. S. 445; Fuller Buggy Co. v. Waldron, 112 App. Div. 814, 99 N. Y. S. 561.

Novation. Lauer v. Yetzer, 3 Pa. Super. 461.

Receipt and acceptance of renewal note constitutes payment of original note. Citizens' etc. Bk. v. Platt, 135 Mich. 267, 97 N. W. 694.

Burden of proof upon defendant. Fuller Buggy Co. v. Waldron, 114 App. Div. 365, 99 N. Y. S. 920.

512-6 Authority implied from facts and circumstances. Dawson v. Wombles, 111 Mo. App. 532, 86 S. W. 271.

No presumption that a person having authority to collect interest has authority to collect the principal. Highley v. Dennis (Tex. Civ.), 88 S. W. 400.

513-8 Thompson v. Buehler, 1 Neb. 590, 95 N. W. 854; Highley v. Dennis (Tex. Civ.), 88 S. W. 400.

Authority to receive a tender. Stevens v. Taylor (Tex. Civ.), 102 S. W. 791.

514-12 Burden of proving settlement is on party alleging it. Bray v. Bray, 128 Ia. 234, 103 N. W. 477.

514-19 Gregory v. Jones, 101 Mo. App. 270, 73 S. W. 899. Discussion of authorities.

Books of account of plaintiff's testator not admissible to prove payments on a note to avoid the statute of limitations. Small v. Rose, 97 Me. 286, 54 A. 726.

515-20 Identification of note as connected with the account. Lyngar v. Shafer, 125 Mo. App. 398, 102 S. W. 630.

Proof of payment to show that limitations have not run. Fowles v. Joslyn, 135 Mich. 333, 97 N. W. 790.

515-24 Stone v. Pettus (Tex. Civ.), 103 S. W. 413.

Receipt most satisfactory evidence. Connelly v. Sullivan, 119 Ill. App. 469.

Receipt is subject to explanation.

Dawson v. Wombles, 111 Mo. App. 532, 86 S. W. 271.

Receipts admissible, though not connected with the transaction by direct evidence. Royster G. Co. v. Marks, 135 N. C. 59, 47 S. E. 127.

515-25 Bond v. Wilson, 131 N. C. 505, 42 S. E. 956.

515-27 Garner v. Garner, 70 S. C. 424, 50 S. E. 5.

Credit of payment proved by exhibiting check. Hill v. Petit, 23 Ky. L. R. 2001, 66 S. W. 188.

516-28 Barrickman v. Barrickman, 25 Ky. L. R. 1285, 77 S. W. 685.

516-29 Stumm v. Goetz, 79 Conn. 310, 64 A. 810; Foss v. Smith, 79 Vt. 434, 65 A. 553.

Oral declarations of deceased maker showing payment, admissible to take the case out of the statute of limitations. Fowles v. Joslyn, 135 Mich. 333, 97 N. W. 790.

516-30 Evidence to show inability of defendant to pay, admissible. Dick v. Marvin, 188 N. Y. 426, 81 N. E. 162.

517-33 McCaffery v. Burkhardt, 97 Minn 1, 105 N. W. 971.

517-36 Parol evidence admissible to show that a note has been discharged by performance of an undertaking which it was given to secure. Oakland Cemetery v. Lakins, 126 Ia. 121, 101 N. W. 778.

518-37 Tullis v. McClary, 128 Ia. 493, 104 N. W. 505; Stanley v. Penny, 75 Kan. 179, 88 P. 875; Theard v. Gueringer, 115 La. 242, 38 S. 979; Marstens v. Oil Co. (Or.), 90 P. 151.

Prima facie case by production of the note. Holmes v. Farris, 97 Mo. App. 305, 71 S. W. 116.

Notes not produced presumed to be negotiable. In re Williams, 120 Fed. 542.

Original payee in possession after several transfers. Dunlap v. Kelley, 105 Mo. App. 1, 78 S. W. 664.

Implied warranty, where note is transferred by payee, that it is genuine. Miller v. Stebbins, 77 Vt. 183, 59 A. 844.

Presumption that note was made for personal benefit of payee. McGuffin v. Coyle, 16 Okla. 648, 85 P. 954, dissenting opinion, 86 P. 962, 6 L. R. A. (N. S.) 524.

Payee of lost note. — Embree v. Emerson, 37 Ind. App. 16, 74 N. E. 44, 1100.

Presumption not affected by blank indorsement of payee. Hughes v. Black (Ala.), 39 S. 984; Home Bk. v. Stewart (Neb.), 110 N. W. 947.

518-38 Meyer v. Foster, 147 Cal. 166, 81 P. 402; Buck v. Aqueduct Co., 76 Vt. 75, 56 A. 285.

Unindorsed note payable to bearer found among the effects of a deceased person, who was not the payee, will not be presumed to have belonged to him. Hair v. Edwards, 104 Mo. App. 213, 77 S. W. 1089.

518-39 Murto v. Lemon, 19 Colo. App. 314, 75 P. 160; Gumaer v. Sowers, 31 Colo. 164, 71 P. 1103; Holmes v. Horn, 120 Ill. App. 359; Bennett v. Bk., 117 Ill. App. 382; Adams v. Connelly, 118 Ill. App. 441; Hibernia Bk. etc. Co. v. Smith, 89 Miss. 298, 42 S. 345; Dawson v. Wombles, 123 Mo. App. 340, 100 S. W. 547; Sanford v. Lichtenberger, 62 Neb. 501, 87 N. W. 305; Michigan Mut. L. Ins. Co. v. Klatt, 2 Neb. 872, 92 N. W. 325; Arons v. Ziegfeld, 52 Misc. 571, 102 N. Y. S. 898; Poess v. Bank, 43 Misc. 45, 86 N. Y. S. 857; Beaman v. Ward, 132 N. C. 68, 43 S. E. 545; Brynjolfson v. Osthus, 12 N. D. 42, 96 N. W. 261; Price v. Bank, 14 Okla. 268, 79 P. 105; Hutchings v. Reinhalter, 23 R. I. 518, 51 A. 429; Watford v. Windham, 64 S. C. 509, 42 S. E. 597; Myrick etc. Co. v. Jackson (Tex. Civ.), 99 S. W. 143; Lodge v. Lewis, 32 Wash. 191, 72 P. 1009. *Compare,* First Nat. Bk. v. Sprout (Neb.), 110 N. W. 713.

Sufficient evidence of ownership to support a suit. New Haven Mfg. Co. v. Pulp Co., 76 Conn. 126, 55 A. 604.

Presumption where note is indorsed but interest coupon is not indorsed. Milwaukee T. Co. v. Van Valkenburgh (Wis.), 112 N. W. 1083.

Possession of drafts by bank. National etc. Bk. v. Bank, 172 N. Y. 102, 64 N. E. 799.

Check. — Cleary v. De Beck Co., 104 N. Y. S. 831.

Rule of court requiring a verified plea, when ownership of indorsee is disputed, does not change any rule of evidence or increase plaintiff's burden of proof. Hughes v. Black (Ala.), 39 S. 984.

Possession of note by plaintiff indorsee, who has himself indorsed, is prima facie evidence of ownership. Gumaer v. Jackson, 37 Colo. 39, 86 P. 885; Van Vlissingen v. Roth, 121 Ill. App. 600.

Payable to bearer. — Massachusetts Nat. Bk. v. Snow, 187 Mass. 159, 72 N. E. 959.

Mere possession of unindorsed note payable "to order," does not raise a presumption of ownership. Baker v. Warner, 16 S. D. 292, 92 N. W. 393.

520-40 Pelletier v. Bank, 114 La. 174, 38 S. 132.

Denial of ownership in the answer casts burden of proof upon plaintiff indorsee. Overholt v. Dietz, 43 Or. 194, 72 P. 695.

On denial of indorsee's ownership, he has the burden of showing that the indorsement is that of the payee. Payne v. Liebee, 3 Neb. 448, 91 N. W. 851.

520-41 Lodge v. Lewis, 32 Wash. 191, 72 P. 1009.

Introduction of note, with an indorsement, without proof of the indorsement, raises a presumption that the holder is only the equitable owner. Tyson v. Joyner, 139 N. C. 69, 51 S. E. 803.

No presumption that agent has authority to sign his principal's name as accommodation indorser of his own notes. Wheeling Ice etc. Co. v. Connor, 61 W. Va. 111, 55 S. E. 982.

521-42 *Compare.* In re Church (Vt.), 67 A. 549.

Indorsement does not prove itself, but must be established. Zlotnick v. Greenfeld, 90 N. Y. S. 1086; Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447.

Indorsement of itself imports no contract, and burden is upon plaintiff indorsee to establish a contract. Lowry v. Tivy, 70 N. J. L. 457, 57 A. 267, *aff.* 71 N. J. L. 681, 60 A. 1134.

Indorsement need not be proved unless denied under oath. Neal v. Gray, 124 Ga. 510, 52 S. E. 622.

Possession of note purporting to be indorsed by a payee is prima facie evidence that it was so indorsed and therefore evidence of title. Huntley v. Hutchinson, 91 Minn. 244, 97 N. W. 971.

Burden of proving execution of indorsement is upon claimant. Schele v. Wagner, 163 Ind. 20, 71 N. E. 127.

Undated indorsement presumed to have been made at date of note. Murto v. Lemon, 19 Colo. App. 314, 75 P. 160.

Treasurer of corporation is presumed to have authority to indorse notes. Black v. Bank, 96 Md. 399, 54 A. 88.

522-45 Bryan v. Harr, 21 App. Cas. (D. C.) 190; Harrell v. Bank, 128 Ga. 504, 57 S. E. 869; Parr v. Erickson, 115 Ga. 873, 42 S. E. 240; Perry Bank v. Elledge, 109 Ill. App. 179; Dewey v. Merritt, 106 Ill. App. 156; Harris v. Pate (Ind. Ter.), 104 S. W. 812; Youle v. Fosha (Kan.), 90 P. 1090; Scott v. Mfg. Co., 70 Kan. 498, 78 P. 823, 80 P. 955; Wilkins v. Usher, 29 Ky. L. R. 1232, 97 S. W. 37; Hilliard v. Taylor, 114 La. 883, 38 S. 594; First Nat. Bk. v. Person, 101 Minn. 30, 111 N. W. 730; Hahn v. Bradley, 92 Mo. App. 399; Benedict v. Kress, 97 App. Div. 65, 89 N. Y. S. 607; Wehrmann v. Beech, 7 Ohio C. C. (N. S.) 367; Price v. Bank, 14 Okla. 268, 79 P. 105; Gibbes Mach. Co. v. Roper, 47 S. C. 39, 57 S. E. 667; Bank of Monticello v. Dooly, 113 Wis. 590, 89 N. W. 490; Hodge v. Smith, 130 Wis. 326, 110 N. W. 192.

Claimant producing a bill of lading with indorsed draft attached. Willard Mfg. Co. v. Tierney, 133 N. C. 630, 45 S. E. 1026.

Presumption extends to all the incidents attached, such as a mortgage, or coupons for interest. Milwaukee Tr. Co. v. Van Valkenburgh (Wis.), 112 N. W. 1083.

Presumption that transfer was before maturity. Coney v. Mitamura, 10 Haw. 64.

Presumption does not arise until the

indorsement is proved, where such indorsement is denied under oath. James v. Blackman, 68 Kan. 723, 75 P. 1017.

Presumption is that indorsement was made in regular course of business. Kerr v. Anderson (N. D.), 111 N. W. 614.

Holder of note as collateral presumed to be a holder for value. Black v. Bank, 96 Md. 399, 54 A. 88.

523-46 First Nat. Bk. v. Moore, 148 Fed. 953, 77 C. C. A. 581; Old Nat. Bk. v. Marcy, 79 Ark. 149, 95 S. W. 145; Evans v. Freeman, 142 N. C. 61, 54 S. E. 847; Price v. Bank, 14 Okla. 268, 79 P. 105; City Deposit Bk. v. Green, 130 Ia. 384, 106 N. W. 942. But see Tischler v. Shurman, 49 Misc. 257, 97 N. Y. S. 360.

Contrary rule as to accommodation paper. — National Bk. v. Mfg. Co., 117 App. Div. 370, 102 N. Y. S. 478.

Knowledge of collateral Agreement. State Bk. v. Cook, 125 Ia. 111, 100 N. W. 72.

523-47 *Compare* Mercantile G. Co. v. Hilton, 191 Mass. 141, 77 N. E. 312.

524-48 Woodall & Son v. Bank (Ala.), 45 S. 194; Meyer v. Lovdal (Cal.), 92 P. 322; Union Coll. Co. v. Buckman, 150 Cal. 159, 88 P. 708; Finegan v. Green, 130 Ill. App. 445; Ray v. Baker, 165 Ind. 74, 74 N. E. 619; State Bk. v. Cook, 125 Ia. 111, 100 N. W. 72; Keegan v. Rock, 128 Ia. 39, 102 N. W. 805; Kennedy v. Gibson, 68 Kan. 612, 75 P. 1044; Abmeyer v. Bank (Kan.), 92 P. 1109; Wing v. Martel, 95 Me. 535, 50 A. 705; Savage v. Goldsmith, 181 Mass. 420, 63 N. E. 918; Stouffer v. Fletcher, 146 Mich. 341, 109 N. W. 684; Glines v. Bank, 132 Mich. 638, 94 N. W. 195; Robbins v. Printing Co., 91 Minn. 491, 98 N. W. 331, 867; First State Bk. v. Hammond, 104 Mo. App. 403, 79 S. W. 493; Stewart & Co. v. Andes, 110 Mo. App. 243, 84 S. W. 1134; Hahn v. Bradley, 92 Mo. App. 399; Clifford Bkg. Co. v. Comm. Co., 195 Mo. 262, 94 S. W. 527; Chapman v. Snyder, 1 Neb. 230, 95 N. W. 346; Lahrman v. Bauman (Neb.), 107 N. W. 1008; Halloek v. Young, 72 N. H. 416, 57 A. 236; National Bk. v. Foley, 54 Misc. 126, 103 N. Y. S. 553; Orr v. Terra Cotta Co., 45 Misc. 350, 92 N. Y. S. 521; Consolidation Nat. Bk. v. Kirkland, 99 App. Div. 121, 91 N. Y. S. 353; German-A. Bk. v. Cunningham, 97 App. Div. 244, 89 N. Y. S. 836; Mitchell v. Baldwin, 88 App. Div. 265, 84 N. Y. S. 1043; Hall v. Whiton, 37 Misc. 756, 76 N. Y. S. 509; Singer Mfg. Co. v. Summers, 143 N. C. 102, 55 S. E. 522; Kerr v. Anderson (N. D.), 111 N. W. 614; Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081; Loeb v. Mellinger, 12 Pa. Super. 592; First Nat. Bk. v. Furman, 4 Pa. Super. 415; Reeper v. Greevy, 5 Pa. Super. 316; Cook v. Tubing etc. Co. (R. I.), 65 A. 641; McGill v. Young, 16 S. D. 360, 92 N. W. 1066; Capital Sav. Bk. v. Bank, 77 Vt. 189, 59 A. 827; Keene v. Behan, 40 Wash. 505, 82 P. 884. *Compare* Bradwell v. Pryor, 221 Ill. 602, 77 N. E. 1115.

Rule does not apply to defense of failure of consideration. Sheffield v. Bank, 2 Ga. App. 221, 58 S. E. 386; Freittenberg v. Rubel, 123 Ia. 154, 98 N. W. 624; Chapman v. Snyder, 1 Neb. 230, 95 N. W. 346.

Consideration illegal. — See Tourneaux v. Gilliss, 1 Cal. App. 546, 82 P. 627.

Gaming note. — Askegaard v. Dalen, 93 Minn. 354, 101 N. W. 503.

Note fraudulently placed in circulation. Merchant L. & T. Co. v. Welter, 205 Ill. 647, 68 N. E. 1082; McKnight v. Parsons (Ia.), 113 N. W. 858; Gegesters Co. v. Reed, 185 Mass. 226, 70 N. E. 53; Mendenhall v. Uhlrich, 94 Minn. 100, 101 N. W. 1057; Southerland v. Mead, 80 App. Div. 103, 80 N. Y. S. 504.

Forgery. — Howie v. Lewis, 14 Pa. Super. 232.

Negotiable bonds. — McVicar Tr. Co. v. R. Co., 136 Fed. 678.

Check fraudulently certified. — Detroit Nat. Bk. v. Trust Co., 145 Mich. 656, 108 N. W. 1092.

Purchaser of accepted draft. Stouffer v. Fletcher, 146 Mich. 341, 109 N. W. 684.

Warehouse receipts. — National Bk. v. Chatfield, 118 Tenn. 481, 101 S. W. 765.

If indorser is not holder in due course, burden is on him to show that some person under whom he claims, was such a holder. Hawkins v. Young (Ia.), 114 N. W. 1041.

Fraud must first be established by defendant. — First Nat. Bk. v. Person, 101 Minn. 30, 111 N. W. 730.

Reason for rule is that proof of fraud suggests a transfer made to another for the use of the first party. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192.

525-50 Haslach v. Wolf, 73 Neb. 658, 103 N. W. 317.

525-53 Goetting v. Day, 87 N. Y. S. 510; Bode v. Werner, 4 Ohio C. C. (N. S.) 158.

526-58 In a suit on a note, it may be shown that the payee named therein was not the real owner. Rhomberg v. Avenarius (Ia.), 112 N. W. 548.

526-61 Hallock v. Young, 72 N. H. 416, 57 A. 236. See Jameson v. Heim, 43 Wash. 153, 86 P. 165.

Presumption from failure of plaintiff to testify. Aragon Coffee Co. v. Rogers, 105 Va. 51, 52 S. E. 843.

Evidence must show actual bad faith. Glines v. Bank, 132 Mich. 638, 94 N. W. 195.

Knowledge of facts sufficient to put a prudent man on inquiry, not enough. First Nat. Bk. v. Moore, 148 Fed. 953, 77 C. C. A. 581.

Actual knowledge of the payee's fraud may be shown by facts and circumstances as well as by direct evidence. Stewart v. Andes, 110 Mo. App. 243, 84 S. W. 1134.

Any evidence tending to show bad faith, admissible. Perth Amboy Co. v. Chapman, 178 N. Y. 558, 70 N. E. 1104, *aff.* 80 App. Div. 556, 81 N. Y. S. 38; McGill v. Young, 16 S. D. 360, 92 N. W. 1066; Capitol Sav. Bk. v. Bank, 77 Vt. 189, 59 A. 827.

Where plaintiff is admitted to be a purchaser for value without notice, evidence of fraud is inadmissible. First Nat. Bk. v. Busch, 102 Minn. 365, 113 N. W. 898.

526-62 Johnson County Bk. v. Rapp (Wash.), 91 P. 382. *Compare* Hunt v. Van Burg, 75 Neb. 304, 106 N. W. 329.

Fraudulent business. — Loftin v. Hill, 131 N. C. 105, 42 S. E. 548.

527-67 Goette v. Sutton, 128 Ga. 179, 57 S. E. 308.

Parol evidence inadmissible to vary contract of indorsement. Citizens' Bk. v. Jones, 121 Cal. 30, 53 P. 354.

527-69 Kinsel v. Ballou (Cal.), 91 P. 620; Torbert v. Montague, 38 Colo. 325, 87 P. 1145; Hopkins v. Merrill, 79 Conn. 626, 66 A. 174; Jaster v. Currie, 69 Neb. 4, 94 N. W. 995; Smith v. Boyer, 46 Or. 143, 79 P. 497; Halbach v. Trester, 102 Wis. 530, 78 N. W. 759.

Inadmissible to change status of one who appears to be a regular indorser. Barringer v. Wilson, 97 Tex. 583, 80 S. W. 994; Riverview L. Co. v. Dance, 98 Va. 239, 35 S. E. 720.

Indorsement without recourse may be explained by parol evidence. Carroll v. Nodine, 41 Or. 412, 69 P. 51.

Parol evidence to show the special contract between indorsers is admissible. Wilson v. Hendee (N. J.), 66 A. 413.

528-71 Specific title alleged must be proved as laid. Digan v. Mandel, 167 Ind. 586, 79 N. E. 899.

528-72 Note produced containing additional indorsements, no variance. De Clerque v. Campbell, 231 Ill. 442, 83 N. E. 224.

528-79 Regular notorial certificate raises a presumption that presentment was made at a proper time. Columbian Bkg. Co. v. Bowen (Wis.), 114 N. W. 451.

529-84 Presumption that notice mailed was received. Phoenix Brew. Co. v. Weiss, 23 Pa. Super. 519.

Presumption of due diligence in serving notice of protest, is rebuttable. Siegel v. Dubinsky, 56 Misc. 681, 107 N. Y. S. 678.

530-85 Defendant indorser must prove that presentment of a note payable on demand was not made within a reasonable time. German-Am. Bk. v. Mills, 99 App. Div. 312, 91 N. Y. S. 142.

Burden of proof is on defendant maker to show ability and willingness to pay at place of presentment specified in note — payee need not

prove a presentment. Florence Oil Co. v. Bank, 38 Colo. 119, 88 P. 182.

530-86 Siegel v. Dubinsky, 56 Misc. 681, 107 N. Y. S. 678; Fuller Buggy Co. v. Waldron, 112 App. Div. 814, 99 N. Y. S. 561.

531-89 **Usage of trade** allowing a delay in demand. Merritt v. Jackson, 181 Mass. 69, 62 N. E. 987.

531-90 Nelson v. Kastle, 105 Mo. App. 187, 79 S. W. 730.

531-92 State Bk. v. McCabe, 135 Mich. 479, 98 N. W. 20.

532-99 **Burden of proof** on indorsers to show that they were relieved from liability on a note by failure to protest, where a renewal note had been given and accepted. Citizens' C. & S. Bk. v. Platt, 135 Mich. 267, 97 N. W. 694.

532-2 **Certificate of protest** not evidence of any collateral facts. Nelson v. Kastle, 105 Mo. App. 187, 79 S. W. 730.

Testimony of notary, who has no independent recollection of the facts, based on an inspection of his certificate. Nelson v. Grondahl, 13 N. D. 363, 100 N. W. 1093.

532-3 See Second Nat. Bk. v. Smith, 118 Wis. 18, 94 N. W. 664.

Sufficiency of proof of giving notice of dishonor. Gouchen v. Novelty Co., 116 Mo. App. 99, 91 S. W. 447.

Contemporaneous facts and circumstances, constituting a course of action, admissible upon question of waiver of presentment. Baumeister v. Kuntz, 53 Fla. 340, 42 S. 886.

Proof of protest, averred in the declaration, need not be made unless put in issue by a proper plea. Bank v. Wetzel, 58 W. Va. 1, 50 S. E. 886.

Judicial notice not taken of what constitutes reasonable hours on a business day. This depends upon custom and is a matter of proof. Columbian Bkg. Co. v. Bowen (Wis.), 114 N. W. 451.

533-6 **Certificate of protest** evidence of demand. Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575.

534-10 Torbert v. Montague, 38 Colo. 325, 87 P. 1145; Jenkinson Co. v. Eggers, 28 Pa. Super. 151.

535-16 **Evidence of waiver inadmissible** where no allegation in complaint. Galbraith v. Shepard, 43 Wash. 698, 86 P. 1113.

Under averments of demand and notice, evidence of a waiver is inadmissible. Bayless v. Harris, 124 Mo. App. 234, 101 S. W. 617.

Allegation of written protest cannot be sustained by proof of an oral protest. Kelley v. Theiss, 77 App. Div. 81, 78 N. Y. S. 1050.

535-17 **Parol evidence** admissible to show the contract made by a person signing on the back of a note, before delivery. Elliott v. Moreland, 69 N. J. L. 216, 54 A. 224.

536-18 DeClerque v. Campbell, 231 Ill. 442, 83 N. E. 224; Siemans & Halske Co. v. Ten Broeck, 97 Mo. App. 173, 70 S. W. 1092; Thompson v. Thompson & B., 121 Mo. App. 524, 97 S. W. 242; Oexner v. Loehr, 106 Mo. App. 412, 80 S. W. 690, s. c. 93 S. W. 333.

Indorsements before delivery raise a presumption that the parties are joint makers. Keyser v. Warfield, 103 Md. 161, 63 A. 217.

537-20 Kinsel v. Wieland, 38 Colo. 296, 88 P. 153; Herndon v. Lewis, 175 Mo. 116, 74 S. W. 976; Herrick v. Edwards, 106 Mo. App. 633, 81 S. W. 466. *Compare* Harnett v. Holdrege, 73 Neb. 570, 103 N. W. 277; Lyndon Sav. Bk. v. International Co., 75 Vt. 224, 54 A. 191.

Inadmissible to vary status of a party whom the law declares is an indorser. Baumeister v. Kuntz, 53 Fla. 340, 42 S. 886.

541-32 De Clerque v. Campbell, 231 Ill. 442, 83 N. E. 224; Naftzker v. Lantz, 137 Mich. 441, 100 N. W. 601.

Proof of execution necessary under special plea. Peevey v. Tapley, 148 Ala. 320, 42 S. 561.

By statute, it is held that in the absence of a denial of the genuineness of the signature, the burden is upon the defendant to prove nonexecution by him. Gray v. Bennett (Ia.), 105 N. W. 377.

541-33 Talbott v. Hedge, 5 Ind. App. 555, 32 N. E. 788; Dreeben v. Bank (Tex. Civ.), 93 S. W. 510.

Admission by payee that a note sued on was made for an excessive

amount, discredits the evidentiary force of the note. Hollins v. Electric Co. (N. J. Eq.), 56 A. 1041.

Slight proof of condition at time of signing. — Wood v. Skelley (Mass.), 81 N. E. 872.

542-37 Fisher v. Diehl, 94 Md. 112, 50 A. 432.

Non-negotiable note as evidence of indebtedness. Brown v. Woodward, 75 Conn. 254, 53 A. 112.

BLOODSTAINS [Vol. 2.]

544-1 Davis v. S., 126 Ala. 44, 28 S. 617; Walker v. S. (Ala.), 45 S. 640; P. v. Antony, 146 Cal. 124, 79 P. 858; P. v. Hong Ah Duck, 61 Cal. 387; P. v. Olsen, 1 Cal. App. 17, 81 P. 676; Davis v. S., 122 Ga. 564, 50 S. E. 376; S. v. Rice, 7 Idaho 762, 66 P. 87; S. v. Brown, 168 Mo. 449, 68 S. W. 568; S. v. Hensack, 189 Mo. 295, 88 S. W. 21.

Existence of bloodstains may be testified to without producing the clothes. C. v. Pope, 103 Mass. 440. But where the state has possession of the clothing, it may be required to produce it before testimony can be given concerning it. Johnson v. S., 80 Miss. 798, 32 S. 49.

Absence of bloodstains, although deceased bled profusely, is not to be considered as important, or as raising any presumption, especially where defendant had had an opportunity to remove them. P. v. Jackson, 182 N. Y. 66, 74 N. E. 565. See Vaughn v. S., 130 Ala. 18, 30 S. 669.

Clothing with bloodstains need not be identified by direct and conclusive evidence. P. v. Neufeld, 165 N. Y. 43, 58 N. E. 786. See S. v. Moore, 168 Mo. 432, 68 S. W. 358.

545-2 Walker v. S., 139 Ala. 56, 35 S. 1011 (blood on box in defendant's possession); P. v. Antony, 146 Cal. 124, 79 P. 858; Cole v. S., 48 Tex. Cr. 439, 88 S. W. 341.

547-7 Richards v. S., 82 Wis. 172, 51 N. W. 652.

Blood-stained clothes of deceased inadmissible, where they would serve in no way to settle any issue. Melton v. S., 47 Tex. Cr. 451, 83 S. W. 822; Cole v. S., 45 Tex. Cr. 225, 75 S. W. 527; Crenshaw v. S., 48 Tex. Cr. 77, 85 S. W. 1147.

547-8 *Compare* Walker v. S. (Ala.), 45 S. 640.

"**Every witness** possessing the full use of his senses is competent to testify to the existence of blood or presence of bloodstains." S. v. Rice, 7 Idaho 762, 66 P. 87.

548-9 P. v. Neufeld, 165 N. Y. 43, 58 N. E. 786.

Presumption as to blood being human blood. M'Cabe v. C. (Pa.), 8 A. 45.

548-10 S. v. Rice, 7 Idaho 762, 66 P. 87.

Evidence of result of an examination by an expert inadmissible, unless the identity of the article examined is first established and it is shown that it has not been tampered with. S. v. McAnarney, 70 Kan. 679, 79 P. 137; S. v. Garrington, 11 S. D. 178, 76 N. W. 326; S. v. Hossack, 116 Ia. 194, 89 N. W. 1077.

549-14 Bloodstains on clothes of defendant who is alleged to have committed rape. Roszczyniala v. S. 125 Wis. 414, 104 N. W. 113.

BONDS [Vol. 2.]

554-1 U. S. Comp. St. 1901, pp. 670, 671, now regulate this matter; Laffan v. U. S., 122 Fed. 333, 58 C. C. A. 495; U. S. v. Pierson, 145 Fed. 814, 76 C. C. A. 390.

Such transcript need not contain all the transactions of the officer. Goff v. U. S., 22 App. Cas. (D. C.) 512.

557-18 Judgment against the principal is inadmissible in an action by the sureties where it does not appear that such judgment was rendered for items chargeable against the debtor during the life of the bond. U. S. v. Meade, 8 Ariz. 367, 76 P. 467.

558-24 Guilford G. Co. v. Granite Co., 23 App. Cas. (D. C.) 1 (allegation of performance of conditions precedent not supported by proof of waiver of such conditions); White v. Manning (Tex. Civ.), 102 S. W. 1160 (misspelling a word does not create a variance).

559-29 Clerical errors not considered as creating fatal variance.

Hollister v. U. S., 145 Fed. 773, 76 C. C. A. 337.

560-36 See U. S. Fidelity Co. v. Fossati (Tex. Civ.), 81 S. W. 1038.

560-37 **No variance** where bond declared on was described as the bond of defendant and the bond offered in evidence was the joint and several bond of defendant and another. Magerstadt v. Rudolph, 108 Ill. App. 140.

561-39 **Proof of authority** of a mayor to execute a "note" does not sustain an action on a bond. Gutta Percha Mfg. Co. v. Attalla (Ala.), 39 S. 719.

564-54 Gutta Percha Mfg. Co. v. Attalla (Ala.), 39 S. 719.

Where complaint is on a bond, proof of a deed of trust is a fatal variance. Union F. Co. v. Johnson (Ala.), 43 S. 752.

564-62 Allen v. Houck (Tex. Civ.), 92 S. W. 993, liquor dealer's bond); Farr v. Waterman (Tex. Civ.), 95 S. W. 65 (defense of good faith must be established by defendant); Burwell v. Burwell, 103 Va. 314, 49 S. E. 68 (burden is on defendant to show that a bond given by a parent to a child was obtained by the latter by fraud or undue influence).

565-63 **Proof in action** on a penal bond need not be beyond a reasonable doubt. Cox v. Thompson, 37 Tex. Civ. 607, 85 S. W. 34.

566-70 **Execution is admitted** where the answer is not verified. Campbell v. Harrington, 93 Mo. App. 315.

566-73 **Presumption** that the parties intended to execute such a bond as the law required. Chambers v. Cline, 60 W. Va. 588, 55 S. E. 999.

567-81 **Delivery of stay bond** to clerk of court sufficiently shown by its production by him and docket entries. Nolan v. Fidelity Co., 2 Cal. App. 1, 82 P. 1119.

568-84 **As to delivery** in escrow, generally, see Blair v. Bank, 103 Va. 762, 50 S. E. 262.

569-89 **Necessity of producing** minutes of the court to show approval. U. S. Fidelity Co. v. Fossati (Tex. Civ.), 81 S. W. 1038.

569-91 Chamberlain v. Fernbach, 118 Ill. App. 145; Graham v. Middleby, 185 Mass. 349, 70 N. E. 416; Gein v. Little, 43 Misc. 421, 89 N. Y. S. 488; Considine v. Gallagher, 31 Wash. 669, 72 P. 469.

570-94 **In action on sheriff's bond,** recitals in the judgment of the main action, prima facie evidence of the facts. Phillips v. Eggert (Wis.), 113 N. W. 686.

570-96 **Mere poverty or insolvency** will not rebut the presumption unless they show a continued inability to pay. Guillou v. Redfield, 205 Pa. 293, 54 A. 886.

No presumption of payment until after twenty years; financial condition of parties, habit of plaintiff as to promptness in making collections and all relevant circumstances are admissible. Janvier v. Culbreth, 5 Penne. (Del.) 505, 63 A. 309.

570-98 Fidelity & D. Co. v. Robertson, 136 Ala. 379, 34 S. 933.

572-8 Curtiss v. McCune (Neb.), 94 N. W. 984.

573-13 See Graham v. Middleby, 185 Mass. 349, 70 N. E. 416.

573-14 McVicar Tr. Co. v. R. Co., 136 Fed. 678; Parsons v. Cement Co., 80 Conn. 58, 66 A. 1024.

573-18 **Mere surmise** and suspicion of alteration not enough to put a purchaser on inquiry. Hibbs v. Brown, 112 App. Div. 214, 98 N. Y. S. 353.

574-20 Taber v. Boston, 190 Mass. 101, 76 N. E. 727 (bond purporting to contain entire agreement); Blair v. Bank, 103 Va. 762, 50 S. E. 262 (unwritten condition in a bond may be shown by parol where the bond on its face appears to be incomplete); Coughran v. Hollister, 15 S. D. 318, 89 N. W. 647 (parol evidence admissible of surrounding circumstances to make an insufficient statutory bond effective as a common law bond).

574-21 McGuire v. Gerstley, 204 U. S. 489; Orion K. Mills v. Fidelity Co., 137 N. C. 565, 50 S. E. 304, 70 L. R. A. 167 (in absence of fraud, mistake or ambiguity, parol evidence is inadmissible of prelim-

inary negotiations); Fidelity Co. v. Harder, 212 Pa. 96, 61 A. 880 (evidence of a parol contemporaneous agreement admissible where it was an inducement to the giving of the bond).

Parol evidence inadmissible to show a condition upon which an obligor signed. Wylie v. Bank, 63 S. C. 406, 41 S. E. 504; Bieber v. Gans, 24 App. Cas. (D. C.) 517.

574-22 Central Lumb. Co. v. Kelter, 201 Ill. 503, 66 N. E. 543, 102 Ill. App. 333.

Admissible without proof of execution where its execution is not in issue. Penton v. Williams (Ala.), 43 S. 211.

Bond of a deceased, not impeached for fraud or mistake, is conclusive evidence of the debt, against the administrator. Woody v. Schaaf, 106 Va. 799, 56 S. E. 807.

575-26 Admissions of a servant, principal in an employe's bond, as to matters within the scope of his employment, are competent against the surety. Guarantee Co. v. Ins. Co., 124 Fed. 170, 59 C. C. A. 376.

578-35 See Sachs v. Surety Co., 177 N. Y. 551, 69 N. E. 1130, 72 App. Div. 60, 76 N. Y. S. 335.

579-39 Wylie v. Bank, 63 S. C. 406, 41 S. E. 504.

Acknowledgment is prima facie proof of signing and sealing. Ramsay v. P., 97 Ill. App. 283.

579-42 Penton v. Williams (Ala.), 43 S. 211 (execution by mark without subscribing witness).

580-45 Proof of ratification. Central L. Co. v. Kelter, 201 Ill. 503, 66 N. E. 543, 102 Ill. App. 333.

580-46 U. S. Fidelity Co. v. Fossati (Tex. Civ., 81 S. W. 1038 schedules of property signed by the sureties and attached to the bond are admissible to prove execution by such sureties).

580-50 Wylie v. Bank, 63 S. C. 406, 41 S. E. 504 (delivery to third person as trustee for obligee).

581-51 Coughran v. Hollister, 15 S. D. 318, 89 N. W. 647 (parol evidence admissible); Tatum v. Tatum, 101 Va. 77, 43 S. E. 184 (surrounding circumstances admissible).

581-56 Nagle v. U. S., 145 Fed. 302, 76 C. C. A. 181.

581-58 Laffan v. U. S., 122 Fed. 333, 58 C. C. A. 495; U. S. v. Pierson, 145 Fed. 814, 76 C. C. A. 390 (statement of account from books of treasury department); Paducah v. Jones, 31 Ky. L. R. 1203, 104 S. W. 971 (sureties are not estopped by confession of a breach by the principal).

Judgment in favor of defendant in attachment suit is conclusive evidence that the attachment was wrongful and of the liability of obligors on the attachment bond. Anvil G. M. Co. v. Hoxsie, 125 Fed. 724, 59 C. C. A. 492.

Judgment against administrator is at least prima facie evidence of the debt, in an action against the surety of his bond. American B. Co. v. U. S., 23 App. Cas. (D. C.) 535.

BOOKS [Vol. 2.]

Census, 585-25; *Books containing pedigree of animals,* 586-30.

583-4 Judicial notice may be taken on appeal, of books of history and theology, although excluded by the lower court. Hilton v. Roylance, 25 Utah 129, 69 P. 660.

584-15 Banco De Sonora v. Casualty Co., 124 Ia. 576, 100 N. W. 532, 104 Am. St. 367 (Bouvier's Law Dictionary admissible to prove a rule of the civil law).

585-18 See Scott v. R. Co., 43 Or. 26, 72 P. 594.

585-19 Williamson's History of Maine, admissible. Lazel v. Boardman (Me.), 69 A. 97 (slight weight on the question of boundary).

History of Mormon Church, admissible. Hilton v. Roylance, 25 Utah 129, 69 P. 660.

585-20 Government weather report, admissible. Scott v. R. Co., 43 Or. 26, 72 P. 594.

585-24 City directory competent to prove that certain persons were residents and not strangers. P. v. Hoffman, 142 Mich. 531, 105 N. W. 838.

585-25 Census. — Census reports are competent to prove facts of a

public nature, but not to prove details as to individual persons and other private matter. Eubanks v. Alspaugh, 139 N. C. 520, 52 S. E. 207; Gregory v. Woodberry, 53 Fla. 566, 43 S. 504; Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201; Gorham v. Settegast (Tex. Civ.), 98 S. W. 665. See Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055; Murray v. Hive, 112 Tenn. 664, 80 S. W. 827.

Population under federal census, judicially noticed. Ferrell v. Ellis, 129 Ia. 614, 105 N. W. 993; Page v. McClure, 79 Vt. 83, 64 A. 451.

586-26 Copy of newspaper article published as an interview with the witness, inadmissible. Southern P. Co. v. Cavin, 144 Fed. 348, 75 C. C. A. 350; Southern P. Co. v. Schuyler, 135 Fed. 1015, 68 C. C. A. 409.

Mercantile reports inadmissible to prove who compose a partnership, where they appear to be based on information given by the firm. Marks v. Hardy, 25 Ky. L. R. 1909, 78 S. W. 1105.

586-27 Tri-S. M. Co. v. Breisch, 145 Mich. 232, 108 N. W. 657.

Circular letters sent out by commission men, not a proper basis for testimony as to market values. Texas & P. R. Co. v. Slator (Tex. Civ.), 102 S. W. 156.

Circular letters from a mercantile association are not "prices current or commercial lists," and evidence of values within § 1810, code of 1896 of Alabama. Kentucky Ref. Co. v. Connor, 145 Ala. 664, 39 S. 728.

Market reports need not be produced by witness who testifies concerning them. Texas & P. R. Co. v. Slator (Tex. Civ.), 102 S. W. 156.

586-28 Market reports in daily paper regularly made and correctly kept, admissible, although the editor had no personal knowledge of the transactions. Bullard v. Stewart (Tex. Civ.), 102 S. W. 174.

"**Standard price** lists and market reports" shown to be in general circulation and relied on by the commercial world and by those engaged in the trade, are admissible as evidence of market values of articles of trade. St. Louis etc. R. Co. v. Pearce, 82 Ark. 353, 101 S. W. 760.

Market reports of such newspapers as the commercial world rely upon, are admissible. Moseley v. Johnson, 144 N. C. 274, 56 S. E. 922.

586-29 *Contra.* — K. & L. of A. v. Weber, 101 Ill. App. 488; Walsh v. Ins. Co., 30 Ia. 133; Mut. L. Ins. Co. v. Bratt, 55 Md. 200. Union P. Lodge v. Surety Co. (Neb.), 113 N. W. 263.

586-30 Books containing pedigree of animals. — Pedigree of an animal as affecting value may be established by printed book of pedigree shown to be authoritative and kept by or in the interest of breeders for the information of the public. Warrick v. Reinhardt (Ia.), 111 N. W. 983.

Private catalogue of the pedigree of a horse is hearsay and inadmissible. Louisville etc. R. Co. v. Frazee, 24 Ky. L. R. 1273, 71 S. W. 437.

587-31 Counsel cannot recount in detail statements in scientific books, as this would be indirectly admitting evidence of their contents. Elliott v. Ferguson, 37 Tex. Civ. 40, 83 S. W. 56.

Professed tests of air-brakes, appearing in back of a book of instructions, are inadmissible. Illinois C. R. Co. v. Stith, 27 Ky. L. R. 596, 85 S. W. 1173.

588-33 Rules of master car builders association admissible to show the proper construction of a car. Leas v. Exp. Co. (Tex. Civ.), 99 S. W. 859.

588-34 Opinion based upon work of particular authors may be supported by giving the names of such authors. Scott v. R. Co., 43 Or. 26, 72 P. 294.

590-38 Chicago C. R. Co. v. Douglas, 104 Ill. App. 41; S. v. Blackburn (Ia.), 114 N. W. 531; S. v. Peterson, 110 Ia. 647, 82 N. W. 329; S. v. Carpenter, 124 Ia. 5, 98 N. W. 775.

590-39 Reasons reviewed. Scott v. R. Co., 43 Or. 26, 72 P. 594.

591-41 Birmingham R. Co. v.

Moore, 148 Ala. 115, 42 S. 1024; Oakley v. S., 135 Ala. 29, 33 S. 693.
Technical medical terms may be judicially noticed, but it is not error to receive in evidence a standard medical dictionary as an aid to the memory and understanding of the court. S. v. Wilhite, 132 Ia. 226, 109 N. W. 730.
591-42 Oakley v. S., 135 Ala. 29, 33 S. 693.
591-46 Contents of medical books cannot be proved by witnesses testifying from memory. Chicago C. R. Co. v. Douglas, 104 Ill. App. 41.
591-48 S. v. Donovan, 128 Ia. 44, 102 N. W. 791.
591-50 See McEvoy v. Lommel, 78 App. Div. 324, 80 N. Y. S. 71.
592-51 S. v. Blackburn (Ia.), 114 N. W. 531; Harper v. Weikel, 28 Ky. L. R. 650, 89 S. W. 1125.
Contents of a treatise cannot be put before a jury by the subterfuge of reading from it in cross-examination. S. v. Thompson, 127 Ia. 440, 103 N. W. 377.
593-54 Cronk v. R. Co., 123 Ia. 349, 98 N. W. 884.
593-55 S. v. Blackburn (Ia.), 114 N. W. 531; Harper v. Weikel, 28 Ky. L. R. 650, 89 S. W. 1125.
593-58 *Compare.* — McEvoy v. Lommel, 78 App. Div. 324, 80 N. Y. S. 71.

BOOKS OF ACCOUNT [Vol. 2.]

Party deceased, 629-8.

601-5 Anderson v. Kannow, 72 Neb. 32, 99 N. W. 824 (party may use a book of account containing accounts with third person, kept by himself, in an action against the vendee of his business). See Harmon v. Decker, 41 Or. 587, 68 P. 11.
602-6 Gill v. Staylor, 93 Md. 453, 49 A. 650.
603-12 Based on necessity. Kossuth Co. Bk. v. Richardson (Ia.), 106 N. W. 923; Proctor v. Proctor, 26 Ky. L. R. 348, 81 S. W. 272; Galbraith v. Starks, 117 Ky. 915, 79 S. W. 1191, 25 Ky. L. R. 2090; In re Wheeler, 13 Phila. (Pa.) 370; Barnes v. Barnes, 106 Va. 319, 56 S. E. 172.
603-13 See Montgomery v. Pfluger, 3 Haw. 388.
604-16 Temple v. Magruder, 36 Colo. 390, 85 P. 832, Mills' Ann. St. (Colo.) 4817; Hurd's Rev. St. (Ill.) 1903, Ch. 51, § 3; also § 15, Ev. Act; Richardson v. Benes, 115 Ill. App. 532; Garlick v. Assn., 129 Ill. App. 402; § 4623, (Ia.) Code; Kossuth Co. Bk. v. Richardson (Ia.), 106 N. W. 923; Gen. St. (Minn.) 1894, § 5738; Wimmer v. Key, 87 Minn. 402, 92 N. W. 228; § 346, (Neb.) Code Civ. Proc.; Cather v. Damerell, 5 Neb. Unof. 490, 99 N. W. 35; Donner v. S., 72 Neb. 263, 100 N. W. 305; § 3031 Comp. L. (N. M.) 1897; McKenzie v. King (N. M.), 93 P. 703; § 4189 (Wis.) Rev. St. 1898; Bazelon v. Lyon, 128 Wis. 337, 107 N. W. 337; Kelly v. Crawford, 112 Wis. 368, 88 N. W. 296; Milwaukee T. Co. v. Warren, 112 Wis. 505, 87 N. W. 801; Brown v. Warner, 116 Wis. 358, 93 N. W. 17.
Minnesota statute covers accounts between one of the parties and a third person. Coleman v. Assn., 77 Minn. 31, 79 N. W. 588; Union etc. Ins. Co. v. Prigge, 90 Minn. 370, 96 N. W. 917.
605-17 See Baker v. Halleck, 128 Mich. 180, 87 N. W. 100.
606-18 Claimant incompetent to verify his book of accounts. Cather v. Damerell, 5 Neb. Unof. 490, 99 N. W. 35.
606-20 Rule in Florida. — See Chapin v. Mitchell, 44 Fla. 225, 32 S. 875.
607-22 Keeping a clerk who has not such knowledge as would enable him to testify upon the subject of the goods sold, does not render books of account inadmissible. Van-Name v. Barber, 115 App. Div. 593, 100 N. Y. S. 987.
607-23 *Compare.* — Hinkle v. Smith, 127 Ga. 437, 56 S. E. 464; Bush v. Fourcher, 3 Ga. App. 43, 59 S. E. 459.
607-24 See McKenzie v. King (N. M.), 93 P. 703.
608-27 Trainor v. Assn., 204 Ill. 616, 68 N. E. 650; Garlick v. Assn., 129 Ill. App. 402; Richardson v. Benes, 115 Ill. App. 532; Frick v. Kabaker, 116 Ia. 494, 90 N. W. 498. See S. v. Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171; In re Receivership S. Co., 118 La. 242, 42 S. 789; Pettey v. Benoit, 193 Mass. 233, 79 N. E. 245; McKenzie v. King (N. M.), 93 P. 703; Hurley v.

Macey, 94 App. Div. 9, 87 N. Y. S. 924; State Bk. v. Brown, 96 App. Div. 441, 89 N. Y. S. 381; Bouldin v. Mills (Tex. Civ.), 86 S. W. 795, and cases cited.

Clerk making entries in books of a bank, need not be required to verify such entries. Continental Nat. Bk. v. Bank, 108 Tenn. 374, 68 S. W. 497.

611-37 Rouyer v. Miller, 16 Ind. App. 519, 44 N. E. 51, 45 N. E. 674.

611-38 Davie v. Lloyd, 38 Colo. 250, 88 P. 446.

611-39 Davie v. Lloyd, supra.

612-44 *Compare.*—Kelly v. Crawford, 112 Wis. 368, 88 N. W. 296.

Tablet of plain sheets of paper. Lewis v. England, 14 Wyo. 128, 82 P. 869, 2 L. R. A. (N. S.) 401.

Fly leaf of a bible held a book of account. Stephan v. Metzger, 95 Mo. App. 609, 69 S. W. 625.

Stubs of check books admissible. Tobin v. Portland Mills, 41 Or. 269, 68 P. 743, 1108.

613-48 Yick Wo v. Underhill (Cal. App.), 90 P. 967; Bush v. Fourcher, 3 Ga. App. 43, 59 S. E. 459; Holden v. Spier, 65 Kan. 412, 70 P. 348; Lewis v. England, 14 Wyo. 128, 82 P. 869, 2 L. R. A. (N. S.) 401.

Diary entries of attorney admissible. Burke v. Baker, 111 App. Div. 422, 97 N. Y. S. 768.

613-49 Ledger account inadmissible which contains no entries of payments admittedly made. Dugan v. Longstaff, 52 Misc. 288, 102 N. Y. S. 1120.

613-51 Sheets torn from a book, inadmissible, where the mutilation is not explained. Carroll v. School, 2 Phila. (Pa.) 260.

615-57 Entries in Chinese, admissible. Yick Wo v. Underhill (Cal. App.), 90 P. 967.

Dots and crosses may be used to indicate particular matters. Cather v. Damerell, 5 Neb. Unof. 490, 99 N. W. 35.

Entries consisting principally of hieroglyphics and signs, inadmissible. In re German, 16 Phila. (Pa.) 318; In re Kelley, 18 Pa. C. C. 117.

615-62 Place v. Baugher, 159 Ind. 232, 64 N. E. 852.

615-63 Dodge v. Morrow, 14 Ind. App. 534, 41 N. E. 967, *aff.* 43 N. E. 153; Kossuth Co. Bk. v. Richardson, 132 Ia. 370, 106 N. W. 923, 109 N. W. 809; Bader v. Schult, 118 Mo. App. 22, 94 S. W. 834; Wells v. Hobson, 91 Mo. App. 379; McKnight v. Newell, 207 Pa. 562, 57 A. 39; In re Barry, 18 Phila. (Pa.) 31; In re Groff, 14 Phila. (Pa.) 306; Kelly v. Crawford, 112 Wis. 368, 88 N. W. 296; Lewis v. England, 14 Wyo. 128, 82 P. 869, 2 L. R. A. (N. S.) 401.

Time when entries were made may be proved by statement of the enterer as to his custom. Mullenary v. Burton, 3 Cal. App. 263, 84 P. 159.

616-64 Murray v. Dickens (Ala.), 42 S. 1031 (entries made once a week held sufficient); Drumm F. C. Co. v. Edmisson, 17 Okla. 344, 87 P. 311 (entries made several days after delivery are incompetent).

617-67 Benners v. Maloney, 3 Phila. (Pa.) 57.

618-72 Putnam v. Grant, 101 Me. 240, 63 A. 816; McKnight v. Newell, 207 Pa. 562, 57 A. 39.

618-73 Ayer v. Sterneck, 18 Phila. (Pa.) 310.

620-81 Idol v. Const. Co., 1 Cal. App. 92, 81 P. 665; Richardson v. Benes, 115 Ill. App. 532; Montgomery Co. v. Bean, 26 Ky. L. R. 568, 82 S. W. 240; Dick v. Biddle Bros., 105 Md. 308, 66 A. 21; Cameron L. Co. v. Somerville, 129 Mich. 552, 89 N. W. 346; Bader v. Schult, 118 Mo. App. 22, 94 S. W. 834; Donner v. S., 72 Neb. 263, 100 N. W. 305; In re Haas, 18 Phila. (Pa.) 185.

621-84 Norman P. S. Co. v. Ford, 77 Conn. 461, 59 A. 499.

622-88 Drumm F. Co. v. Bank, 107 Mo. App. 426, 81 S. W. 503; Rogers v. O'Barr (Tex. Civ.), 81 S. W. 750; VanName v. Barber, 115 App. Div. 593, 100 N. Y. S. 987 (entries taken from order book).

623-89 Holloway & Bro. v. Shoe Co., 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704; Clark v. Mulcahy, 190 Mass. 64, 76 N. E. 236; Hoogewerff v. Flack, 101 Md. 371, 61 A. 184 (ledger entries must be shown to be original entries); Stokes v. Fenner, 10 Phila. (Pa.) 14 (where accounts in day-book have been posted to ledger, day-book is admissible without producing the ledger).

623-90 See McGrath v. Stein, 148 Ala. 370, 42 S. 454; Armour Pack.

Co. v. Produce Co. (Ala.), 39 S. 680 (particular account which is relevant must be specified); Bush v. Fourcher, 3 Ga. App. 43, 59 S. E. 459; S. v. Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171; Taylor-W. Co. v. Atkinson, 127 Mich. 633, 87 N. W. 89; Hurley v. Macey, 94 App. Div. 9, 87 N. Y. S. 924; Lewis v. England, 14 Wyo. 128, 82 P. 869, 2 L. R. A. (N. S.) 401 (ledger slips of original entries or explanatory of day slips, are admissible).

624-91 **Ledger admissible** if daybook is also introduced. Hughes v. Clark, 109 Ill. App. 107, and if books of original entry are destroyed. Burr v. Schute, 25 Ohio C. C. 735.

624-93 Ins. Co. v. Wannemacher, 15 Pa. Super. 580.

624-94 Handy v. Smith, 77 Conn. 165, 58 A. 694 (must be more than mere memoranda); Norman P. S. Co. v. Ford, 77 Conn. 461, 59 A. 499 (entry which is mere recital of a past transaction is inadmissible); Wiggins v. Wilson, 123 Ill. App. 663.

625-97 Murray & P. v. Dickens (Ala.), 42 S. 1031; Montgomery Co. v. Beau, 26 Ky. L. R. 568, 82 S. W. 240; Bouldin v. Ricemills Co. (Tex. Civ.), 86 S. W. 795. See Barker v. S., 73 Neb. 469, 103 N. W. 71.

626-98 Reiley v. Torkomian, 78 Conn. 645, 63 A. 516 (entries by attorney not accustomed to keep accounts); Kossuth Bk. v. Richardson, 132 Ia. 370, 106 N. W. 923, 109 N. W. 809; McKnight v. Newell, 207 Pa. 562, 57 A. 39 (must be a regularly kept book of the firm).

626-99 See Stephan v. Metzger, 95 Mo. App. 609, 69 S. W. 625.

626-1 **Book of a firm** containing only its account with the defendant is inadmissible. McKnight v. Newell, 207 Pa. 562, 57 A. 39.

627-2 Murray & P. v. Dickens (Ala.), 42 S. 1031; Alabama Const. Co. v. Wagnon, 137 Ala. 388, 34 S. 352; Wright v. Charbonneau, 122 Ill. App. 52; S. v. Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171; Drumm-F. Com. Co. v. Bank, 107 Mo. App. 426, 81 S. W. 503; Hurley v. Macey, 94 App. Div. 9, 87 N. Y. S. 924. See Collins v. Carlin, 106 App. Div. 204, 94 N. Y. S. 317; Bloomington M. Co. v. Ice Co., 171 N. Y. 673, 64 N. E. 1118, *aff.* 58 App. Div. 66, 68 N. Y. S. 699. Imhoff v. Fleurer, 2 Phila. (Pa.) 35; In re Barry, 18 Phila. (Pa.) 31; Atchison etc. R. Co. v. Williams (Tex. Civ.), 86 S. W. 38; Rogers v. O'Barr (Tex. Civ.), 81 S. W. 750.

Bookkeeper must have had personal knowledge of the transaction. Union C. L. Ins. Co. v. Prigge, 90 Minn. 370, 96 N. W. 917.

Books kept by agent of plaintiff, admissible. Wright v. R. Co., 118 Mo. App. 392, 94 S. W. 555.

628-3 Schnellbacher v. McLaughlin Co., 108 Ill. App. 486; Rothenberg v. Herman, 90 N. Y. S. 431.

Testimony by clerk who has no personal knowledge, insufficient. Gould v. Hartley, 187 Mass. 561, 73 N. E. 656.

629-6 Holloway v. Shoe Co., 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704; Temple v. Magruder, 36 Colo. 390, 85 P. 832 (statutory requirement); Lester W. S. Co. v. Oliver Co., 1 Ga. App. 244, 58 S. E. 212; West Chicago R. Co. v. Moras, 111 Ill. App. 531; Kossuth Co. Bk. v. Richardson, 132 Ia. 370, 106 N. W. 923, 109 N. W. 809; Mings v. Griggsby Co. (Tex. Civ.), 106 S. W. 192.

Account must appear to be complete. Capen v. Sheldon, 78 Vt. 39, 61 A. 864.

Books of account, material upon the issue of fraud need not be verified when admitted against the interest of the party whose transactions it recorded. Kuh etc. Co. v. Glucklick, 120 Ia. 504, 94 N. W. 1105.

629-8 Yick Wo v. Underhill (Cal. App.), 90 P. 967; Idol v. Const. Co., 1 Cal. App. 92, 81 P. 665; Handy v. Smith, 77 Conn. 165, 58 A. 694.

Party deceased. — Where the party making the entry is deceased, his executrix may introduce his book of accounts upon proof of his handwriting, without accompanying it with evidence as to the time and manner in which the entries were made. Davie v. Lloyd, 38 Colo. 250, 88 P. 446.

630-11 **When wife** is competent to prove the books. Cather v. Damerell, 5 Neb. Unof. 490, 99 N. W. 35.

630-13 Chapin v. Mitchell, 44 Fla. 225, 32 S. 875. *Compare* Stuart v. Lord, 138 Cal. 672, 72 P. 142.

631-14 Yick Wo v. Underhill (Cal. App.), 90 P. 967 (testimony of third persons admissible); Cameron L. Co. v. Somerville, 129 Mich. 552, 89 N. W. 346; McKenzie v. King (N. M.), 93 P. 703; Van Name v. Barber, 115 App. Div. 593, 100 N. Y. S. 987; Hurley v. Macey, 94 App. Div. 9, 87 N. Y. S. 924.

Testimony of witnesses that they settled bills rendered them, which were correct copies of the account books, is insufficient. Stone v. Cronin, 72 App. Div. 565, 76 N. Y. S. 605. See Rathborne v. Hatch, 80 App. Div. 115, 80 N. Y. S. 347.

632-20 **General manager** may verify books of account instead of the bookkeeper; "if the element of personal knowledge is present, it can make no difference on principle that the bookkeeper himself is dead or otherwise absent." Pelican L. Co. v. Johnson (Tex. Civ.), 98 S. W. 207.

633-23 Gould v. Hartley, 187 Mass. 561, 73 N. E. 656.

634-28 Cameron L. Co. v. Somerville, 129 Mich. 552, 89 N. W. 346, Bulkley v. Wood, 4 Pa. Super. 391; Charleston S. Inst. v. Bank, 73 S. C. 545, 54 S. E. 216.

634-30 McGrath v. Stein, 148 Ala. 370, 42 S. 454; Delahoyde v. P., 212 Ill. 554, 72 N. E. 732; S. v. Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171; Cameron L. Co. v. Somerville, 129 Mich. 552, 89 N. W. 346; Britian v. Fender, 116 Mo. App. 93, 92 S. W. 179.

Copy of account book, the original book having been admitted to be correct, is not admissible. Fitch v. Martin, 74 Neb. 538, 104 N. W. 1072.

Such admissions are binding upon a surety. Hall v. Fidelity Co., 77 Minn. 24, 79 N. W. 590.

635-32 See Dancel v. Mach. Co., 137 Fed. 157.

636-36 **Entry of items** disconnected with the business, does not render incompetent entries properly made. Yick Wo v. Underhill (Cal. App.), 90 P. 967

637-40 Britian v. Fender, 116 Mo. App. 93, 92 S. W. 179.

Coupon book a proper item of charge on a merchant's book. Rogers v. O'Barr (Tex. Civ.), 81 S. W. 750.

637-41 **Shopkeepers' books** are not evidence of transactions in real estate. Galbraith v. Starks, 117 Ky. 915, 79 S. W. 1191, 25 Ky. L. R. 2090.

638-43 **Amount and date** of delivery may be established by book of accounts. Montgomery v. Pfluger, 3 Haw. 388.

Weights, measurements, or quantities may be established by books of account. Wright v. Charbonneau, 122 Ill. App. 52.

638-45 **Carpenter** cannot prove a claim for nursing by entries in his books. In re Marsh, 28 Pa. C. C. 190.

640-49 Burke v. Baker, 111 App. Div. 422, 97 N. Y. S. 768. *Compare* S. v. Lewis, 31 Wash. 75, 71 P. 778.

640-50 Temple v. Magruder, 36 Colo. 390, 85 P. 832; In re German, 16 Phila. (Pa.) 318. *Compare* In re Kelley, 18 Pa. C. C. 117; Kwiecinski v. Newman, 137 Mich. 287, 100 N. W. 391; Cather v. Damerell, 5 Neb. Unof. 490, 99 N. W. 35.

640-51 **Memorandum** in a book of original entries kept by a physician held inadmissible. Hottle v. Weaver, 206 Pa. 87, 55 A. 838; Langolf v. Pfromer, 2 Phila. (Pa.) 17; In re Foreman, 20 Pa. C. C. 627.

641-56 **Amount due** for carriage of employes. Idol v. Const. Co., 1 Cal. App. 92, 81 P. 665.

641-58 Rathborne v. Hatch, 80 App. Div. 115, 80 N. Y. S. 347 (books of account of agent as to purchases from or sales to third party by the agent are inadmissible in an action by him against his principal for commissions); In re Horner, 26 Pa. C. C. 383 (books of stock broker containing running account were held not books of original entry).

641-59 **Bill-broker.** — See American T. Co. v. Wyman, 92 Mo. App. 294.

642-63 Jacobs v. Morganthaler,

149 Mich. 1, 112 N. W. 492 (*cit.* 2 Encyc. of Ev.).

643-64 In re Marsh, 28 Pa. C. C. 190.

646-73 Proctor v. Proctor, 26 Ky. L. R. 348, 81 S. W. 272; Gregory v. Jones, 101 Mo. App. 270, 73 S. W. 899; Brown v. Bronson, 93 App. Div. 312, 87 N. Y. S. 872; Simons v. Steele, 82 App. Div. 202, 81 N. Y. S. 737.

Entries of payments on a note inadmissible. Gregory v. Jones, 101 Mo. App. 270, 73 S. W. 899.

On an allegation of payment of a note by delivery of lumber, entries in books of account are admissible. Blackshear v. Dekle, 120 Ga. 766, 48 S. E. 311.

May be competent part of res gestae. Wiggins v. Wilson, 123 Ill. App. 663.

647-74 Yick Wo v. Underhill (Cal. App.), 90 P. 967; Rothschild v. Sessell, 103 Ill. App. 274. Rule in Missouri and Wyoming is contra. Stephan v. Metzger, 95 Mo. App. 609, 69 S. W. 625; Lewis v. England, 14 Wyo. 128, 82 P. 869, 2 L. R. A. (N. S.) 401.

Loan of a large sum cannot be proved. Harmon v. Decker, 41 Or. 587, 68 P. 11, 1111.

647-75 Entry on merchant's books of money paid out for the benefit of another is inadmissible. Mings v. Const. Co. (Tex. Civ.), 106 S. W. 192.

648-77 Gregory v. Jones, 101 Mo. App. 270, 73 S. W. 899.

649-83 Money collected by defendants on behalf of plaintiff, not the subject of book account. Ins. Co. v. Wannemacher, 15 Pa. Super. 580.

649-85 Hill v. Hill, 29 Ky. L. R. 201, 92 S. W. 924.

Identification not necessary to the extent required in ordinary books of account. Whisler v. Whisler, 117 Ia. 712, 89 N. W. 1110.

650-88 See Van Name v. Barber, 115 App. Div. 593, 100 N. Y. S. 987.

650-89 See Galbraith v. Starks, 117 Ky. 915, 79 S. W. 1191, 25 Ky. L. R. 2090.

Promissory notes may be proper items of book charge, but only where the course of dealing of the parties is to that effect. Freehart v. Stanford, 77 Vt. 36, 58 A. 790.

651-90 Page v. Hazelton (N. H.), 66 A. 1049.

In Wisconsin, limit is five dollars. Brown v. Warner, 116 Wis. 358, 93 N. W. 17.

653-1 Delivery of goods may be proved by books of account. Bloomington Min. Co. v. Ice Co., 171 N. Y. 673, 64 N. E. 1118, *aff.* 58 App. Div. 66, 68 N. Y. S. 699.

Book entry must purport to show delivery. In re Groff, 14 Phila. (Pa.) 306.

655-7 Thomson v. Flanegan, 6 Phila. (Pa.) 13.

655-8 In re Baizley, 25 Pa. C. C. 432. *Compare* Pettey v. Benoit, 193 Mass. 233, 79 N. E. 245.

656-9 In re Wheeler, 13 Phila. (Pa.) 370.

657-14 Charge on books against the wife, is not conclusive evidence that they were not sold on the credit of the husband. Taylor-W. Co. v. Atkinson, 127 Mich. 633, 87 N. W. 89.

657-16 Bouldin v. Ricemills Co. (Tex. Civ.), 86 S. W. 795 (not evidence of quality, condition, or grade of goods sold); Cooley v. Collins, 186 Mass. **507**, 71 N. E. 979 (not admissible to prove to whom credit was given for payment of rent). But see Love v. Ramsey, 139 Mich. 47, 102 N. W. 279.

Books of account inadmissible to show a credit **given** to agent of an insurance company, personally, in payment of a life insurance premium. Horine v. Ins. Co., 27 Ky. L. R. 893, 87 S. W. 274.

658-21 Jacobs v. Morganthaler, 149 Mich. 1, 112 N. W. 492 (*cit.* 2 Encyc. of Ev.).

660-28 *Compare* Huebener v. Childs, 180 Mass. 483, 62 N. E. 729.

662-32 Perry State B. v. Elledge, 99 Ill. App. 307.

662-34 Bush v. Fourcher, 3 Ga. App. 43, 59 S. E. 459. *Compare* Tobler v. Austin (Tex. Civ.), 71 S. W. 407.

664-37 Moynahan v. Perkins, 36 Colo. 481, 85 P. 1132; Johnson v. S., 125 Ga. 243, 54 S. E. 184; Wilber

v. Scherer, 13 Ind. App. 428, 41 N. E. 837; Mayberry v. Holbrook, 182 Mass. 463, 65 N. E. 849; *Contra*, Dick v. Biddle Bros., 105 Md. 308, 66 A. 21; Wagonseller v. Brown, 7 Pa. C. C. 663; Owen v. Rothermel, 21 Pa. Super. 561 (must be a book of original entry); Hubbard C. etc. Co. v. Nichols (Tex. Civ.), 89 S. W. 795.

Party may refresh his memory by entries made by his bookkeeper. Fay v. Walsh, 190 Mass. 374, 77 N. E. 44.

664-38 Rathborne v. Hatch, 80 App. Div. 115, 80 N. Y. S. 347; Bloomington Min. Co. v. Ice Co., 171 N. Y. 673, 64 N. E. 1118, *aff.* 58 App. Div. 66, 68 N. Y. S. 699; Jackson v. S., 49 Tex. Cr. 215, 91 S. W. 574.

664-40 Page v. Hazelton (N. H.), 66 A. 1049. See Hill v. Hill, 115 La. 490, 39 S. 503.

665-41 Second B. B. Assn. v. Cochrane, 103 Ill. App. 29.

Preliminary proof required. See Globe S. Bk. v. Bank, 64 Neb. 413, 89 N. W. 1030.

Discovery of private memorandum containing admissions, may be ground for new trial. Owsley v. Owsley, 117 Ky. 47, 77 S. W. 397.

665-42 Milhollen v. Mfg. Co. (Ia.), 112 N. W. 812.

666-43 See Forbes Co. v. Leonard, 119 Ill. App. 629.

666-47 See Succession of Magi, 107 La. 208, 31 S. 660.

667-50 State Bk. v. Brown, 96 App. Div. 441, 89 N. Y. S. 381 (competent in an action on the bond of a cashier); Secor v. S., 118 Wis. 621, 95 N. W. 942 (admissible in an action of embezzlement.)

667-52 West Chicago R. Co. v. Moras, 111 Ill. App. 531.

668-53 Kent v. Richardson, 8 Idaho 750, 71 P. 117; McKeen v. Bk., 24 R. I. 542, 54 A. 49 (rule discussed).

672-73 Knapp v. Trust Co., 199 Mo. 640, 98 S. W. 70 (full discussion of this principle).

672-74 U. S. v. Greene, 146 Fed. 793. For full discussion of this question, see McKeen v. Bank, 24 R. I. 542, 54 A. 49; Duty v. Storrs (Tex. Civ.), 70 S. W. 357.

673-77 U. S. v. Greene, 146 Fed. 793; Duty v. Storrs (Tex. Civ.), 70 S. W. 357.

674-84 *Compare* Atchison etc. Co. v. Williams (Tex. Civ.), 86 S. W. 38.

674-85 Duty v. Storrs (Tex. Civ.), 70 S. W. 357.

676-90 Delbridge v. Assn., 98 Ill. App. 96.

677-91 **Books of corporation**, required by law to be kept, and identified by proper custodians, are admissible against third persons without further authentication. Hurwitz v. Gross (Cal. App.), 91 P. 109.

677-94 **Books of account** of corporation not per se evidence of an indebtedness against the corporation in an action to charge directors. Minor v. Crosby, 76 App. Div. 561, 78 N. Y. S. 594.

678-95 See Girard T. Co. v. Loving, 71 Kan. 558, 81 P. 200 (not admissible to prove that defendant is a stockholder); Folsom Bldg. etc. Assn. v. Gogel, 24 Pa. Super 539.

In an action by a corporation against its members, its account books are admissible only under such circumstances as would render them admissible generally. Trainer v. Assn., 204 Ill. 616, 68 N. E. 650.

678-97 See Moore v. Rohrbacker, 30 Pa. Super 568.

680-1 *Compare* Harmon v. Decker, 41 Or. 587, 68 P. 11, 111.

Where customer retains a pass-book, without objection to the account shown, his action tends to establish an admission of its correctness. Dewes Brew. Co. v. Kerwin, 107 Ill. App. 620.

680-5 Atlanta T. etc. Co. v. Close, 115 Ga. 939, 42 S. E. 265.

682-9 See Simpson v. Bank, 129 Fed. 257, 63 C. C. A. 371; Curry v. Lanning, 106 App. Div. 615, 94 N. Y. S. 535; Stokes v. Fenner, 10 Phila. (Pa.) 14; Lewis v. England, 14 Wyo. 128, 82 P. 869, 2 L. R. A. (N. S.) 401.

682-12 **Cross-examination** as to portions of accounts not put in evidence is proper. Devencenzi v. Cassinelli, 28 Nev. 222, 81 P. 41.

Ledger used by party to refresh memory of a witness is admissible in behalf of his adversary as part of the cross-examination. Logan v. Freerks, 14 N. D. 127, 103 N. W. 426.

Admission of books of accounts of a deceased person, does not render the opposite party competent to testify as to such transactions. Whisler v. Whisler, 117 Ia. 712, 89 N. W. 1110.

682-13 Succession of Moise, 107 La. 717, 31 S. 990; Page v. Hazelton (N. H.), 66 A. 1049.

684-19 Moore v. Phillips, 6 Pa. Super. 570.

684-24 Identity of two names may be shown. Imhoff v. Fleurer, 2 Phila. (Pa.) 35.

684-25 Cather v. Damerell, 5 Neb. Unof. 490, 99 N. W. 35.

Ledger entries admissible to explain marks in day slips. Lewis v. England, 14 Wyo. 128, 82 P. 869, 2 L. R. A. (N. S.) 401.

Words "on contract" may be explained. Norman P. S. Co. v. Ford, 77 Conn. 461, 59 A. 499.

685-27 Smith v. Castle, 81 App. Div. 638, 81 N. Y. S. 18 (plaintiff may be cross-examined as to items of the account).

685-28 Irregularities must be gross, to keep books from the jury. Bush v. Fourcher, 3 Ga. App. 43, 59 S. E. 459.

Irregularities and inaccuracies, may warrant the setting aside of a verdict. Barnes v. Barnes, 106 Va. 319, 56 S. E. 172.

Subpoena duces tecum unnecessary as a basis for cross-examination, where books have been voluntarily produced. Elliott v. Moreland, 69 N. J. L. 216, 54 A. 224.

686-31 Drinking habits of bookkeeper, admissible. Seiber v. Merc. Co. (Tex. Civ.), 90 S. W. 516.

687-36 Dodge v. Morrow, 14 Ind. App. 534, 41 N. E. 967, *aff.* 43 N. E. 153; Echols v. Merc. Co. (Tex. Civ.), 84 S. W. 1082 (testimony of a witness as to when an indebtedness evidenced by books of account accrued, is the primary evidence).

688-37 Rogers v. O'Barr (Tex. Civ.), 76 S. W. 593 (books of account the best evidence of the account).

688-38 Robinson v. S., 125 Ga. 247, 54 S. E. 189; Davis v. Council (Mass.), 81 N. E. 294, 10 L. R. A. (N. S.) 722; Smith v. Castle, 81 App. Div. 638, 81 N. Y. S. 18; Drumm etc. Co. v. Edmisson, 17 Okla. 344, 87 P. 311; Fidelity & D. Co. v. Texas Co. (Tex. Civ.), 90 S. W. 197; Bouldin v. Ricemills Co. (Tex. Civ.), 86 S. W. 795.

689-39 Merritt v. Bush, 122 Ill. App. 189; Putnam v. Grant, 101 Me. 240, 63 A. 816; In re Holland, 18 Phila. (Pa.) 146.

Where loss of a book of account is alleged, next best evidence is a book from which entries were copied. Galbraith v. Starks, 117 Ky. 915, 79 S. W. 1191, 25 Ky. L. R. 2090.

689-40 Wright v. R. Co., 118 Mo. App. 392, 94 S. W. 555; Sterling v. R. Co. (Tex. Civ.), 86 S. W. 655.

689-41 See Stephan v. Metzger, 95 Mo. App. 609, 69 S. W. 625.

690-44 Frick v. Kabaker, 116 Ia. 494, 90 N. W. 498; Kannow v. Assn. (Neb.), 107 N. W. 563; Mendel v. Boyd, 71 Neb. 657, 99 N. W. 493; Salem L. & T. Co. v. Anson, 41 Or. 562, 67 P. 1015, 69 P. 675. See Crawford v. Roney, 126 Ga. 763, 55 S. E. 499; Smythe v. Evans, 209 Ill. 376, 70 N. E. 906; Plank v. Assn., 28 Ind. App. 259, 62 N. E. 652.

692-47 LaRue v. El. Co., 17 S. D. 91, 95 N. W. 292 (destruction admitted).

Notice to produce unnecessary, where the existence of the account book is denied. C. v. Sinclair (Mass.), 80 N. E. 799.

BOUNDARIES [Vol. 2.]

695-1 Douglas L. Co. v. Thayer, 107 Va. 292, 58 S. E. 1101.

Title derived from state need not be shown where both parties claim through same source. Handshoe v. Conley, 27 Ky. L. R. 277, 84 S. W. 1140.

Abstract of grant, properly certified, is admissible. Marshall v. Corbett, 137 N. C. 555, 50 S. E. 210.

696-5 Surveyor's plat is competent to correct the calls in both the certificate and patent. Hogg v. Lusk, 27 Ky. L. R. 840, 86 S. W. 1128.

Omission from patent may be supplied from the original survey. Kerr v. DeLaney, 28 Ky. L. R. 1140, 91 S. W. 286.

Judicial notice taken of method of issuing a patent. Kimball v. McKee, 149 Cal. 435, 86 S. W. 1089; Stanford v. Bailey, 122 Ga. 404, 50 S. E. 161; Huxford v. Pine Co., 124 Ga. 181, 52 S. E. 439.

697-11 Lee v. Giles, 124 Ga. 494, 52 S. E. 806. *Compare* Clark v. Gallagher, 74 Vt. 331, 52 A. 539.

697-12 Sloan v. King, 29 Tex. Civ. 599, 69 S. W. 541.

Calls in a deed not controlled by a line previously run. Elliott v. Jefferson, 133 N. C. 207, 45 S. E. 558.

697-13 San Miguel Co. v. Bonner, 33 Colo. 207, 79 P. 1025 (latent ambiguity in mining location certificate); Okie v. Person, 23 App. Cas. (D. C.) 170 (latent ambiguity in a lease); Haskell v. Friend (Mass.), 81 N. E. 962; Watson v. New York, 67 App. Div. 573, 73 N. Y. S. 1027, 175 N. Y. 475, 67 N. E. 1091.

697-14 Carney v. Hennessey, 77 Conn. 577, 60 A. 129; Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691 (two irreconcilable descriptions); Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; Rix v. Smith, 145 Mich. 203, 108 N. W. 691; Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340 (admissible to locate point of beginning); Zerbey v. Allan, 215 Pa. 383, 64 A. 587 (omitted course may be supplied); McKean v. Roan (Tex. Civ.), 106 S. W. 404.

698-16 Collins v. McKay (Mont.), 92 P. 295.

698-17 Gertzer v. Kammerer, 13 Phila. (Pa.) 190.

698-19 See Wilson v. Lumb. Co., 143 Fed. 705, 74 C. C. A. 529; Quade v. Pillard (Ia.), 112 N. W. 646; Board of Comrs. v. Taylor, 133 Ia. 453, 108 N. W. 927; Goodson v. Fitzgerald (Tex. Civ.), 90 S. W. 898.

699-24 Perkins v. Brinkley, 133 N. C. 348, 45 S. E. 652.

700-26 Vendee estopped by recitals. Krauth v. Hahn, 23 Ky. L. R. 1261, 65 S. W. 18.

700-27 Recitals in grant by state are sufficient proof of regularity. Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340.

700-31 Martin v. Conley, 30 Ky. L. R. 720, 99 S. W. 613; Breakey v. Woolsey, 149 Mich. 86, 112 N. W. 719; Brown v. Johnson (Tex. Civ.), 73 S. W. 49.

Agreement must be executed. Farr v. Woolfolk, 118 Ga. 277, 45 S. E. 230; Uker v. Thieman, 132 Ia. 79, 107 N. W. 167; Le Comte v. Carson (W. Va.), 49 S. E. 238; Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026.

Lands must be contiguous. Cavanaugh v. Wholey, 143 Cal. 164, 76 P. 979.

Revocation of such an agreement. Geoghegan v. Turner, 26 Ky. L. R. 537, 82 S. W. 244.

701-32 Sherman v. King, 71 Ark. 248, 72 S. W. 571.

701-33 Dierssen v. Nelson, 138 Cal. 394, 71 P. 456; Farr v. Woolfolk, 118 Ga. 277, 45 S. E. 230; Purtle v. Bell, 225 Ill. 523, 80 N. E. 350; Sonnemann v. Mertz, 221 Ill. 362, 77 N. E. 550; Kitchen v. Chantland, 130 Ia. 618, 105 N. W. 367; Fields v. Sizemore, 32 Ky. L. R. 237, 105 S. W. 438; Frazier v. Develop. Co., 27 Ky. L. R. 815, 86 S. W. 983; Berry v. Evans, 28 Ky. L. R. 22, 89 S. W. 12; Amburgy v. Lumb. Co., 28 Ky. L. R. 551, 89 S. W. 680; Lost Creek C. Co. v. Napier, 28 Ky. L. R. 369, 89 S. W. 264; Cheatham v. Hicks, 28 Ky. L. R. 66, 88 S. W. 1093; Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; Hoar v. Hennessy, 29 Mont. 253, 74 P. 452; McKean v. Roan (Tex. Civ.), 106 S. W. 404.

701-34 See Moore v. Mauney, 25 Ky. L. R. 2274, 80 S. W. 458.

702-35 Adams v. Betz, 166 Ind. 161, 78 N. E. 649; Curley v. Starr, 30 Ky. L. R. 974, 99 S. W. 972; Alexander v. Parks, 24 Ky. L. R. 2113, 72 S. W. 1105.

702-37 Purtle v. Bell, 225 Ill. 523, 80 N. E. 350; Hollinsworth v. Barrett, 28 Ky. L. R. 280, 89 S. W. 107; Gardner v. White, 24 Ky L. R. 2444, 74 S. W. 206; Higginson v. Schaneback, 23 Ky L. R. 2230, 66 S. W. 1040; Lynch v. Egan, 67 Neb.

541, 93 N. W. 775; LeComte v. Freshwater, 56 W. Va. 336, 49 S. E. 238; Wade v. McDougle, 59 W. Va. 113, 52 S. E. 1026.

Where true line is known, such an agreement cannot be made. Lewis v. Ogram, 149 Cal. 505, 87 P. 60.

702-38 Anderson v. Huebel (Wis.), 113 N. W. 975.

702-39 Sheets v. Sweeney, 136 Ill. 336, 26 N. E. 648.

703-43 Sonnemann v. Mertz, 221 Ill. 362, 77 N. E. 550.

703-45 Woodford v. Clay, 32 Ky. L. R. 922, 107 S. W. 269; Albanesius v. Mfg. Co. (N. J.), 67 A. 1025.

Building of a fence may be explained. Western U. Oil Co. v. Newlove, 145 Cal. 772, 79 P. 542.

703-46 Roberts v. Dry Goods Co. (Tex. Civ.), 92 S. W. 1060.

703-47 See Benz v. St. Paul, 89 Minn. 31, 93 N. W. 1038; Parrish v. Williams (Tex. Civ.), 79 S. W. 1097; Mays v. Hinchman, 57 W. Va. 602, 50 S. E. 823.

Agreement may be implied from acts and declarations. Purtle v. Bell, 225 Ill. 523, 80 N. E. 350; Stumpe v. Kopp, 201 Mo. 412, 99 S. W. 1073.

Written agreement admissible. Samples v. Smyth, 30 Ky. L. R. 498, 98 S. W. 1047.

703-49 Morgan v. Lewis, 30 Ky. L. R. 747, 99 S. W. 676; Lindley v. Johnston, 42 Wash. 257, 84 P. 822.

703-50 Kincaid v. Vickers, 217 Ill. 423, 75 N. E. 527.

704-51 Statements of party admissible to prove the agreement. Berry v. Evans, 28 Ky. L. R. 22, 89 S. W. 12.

704-54 Deidrich v. Simmons, 75 Ark. 400, 87 S. W. 649; Adams v. Betz, 166 Ind. 161, 78 N. E. 649.

704-56 Scott v. Baird, 145 Mich. 116, 108 N. W. 737.

704-57 Taylor v. Reising, 13 Idaho 226, 89 P. 943; Thompson v. Borg, 90 Minn. 209, 95 N. W. 896.

704-58 Cleveland etc. I. Co. v. Gauthier, 143 Mich. 296, 106 N. W. 862.

705-61 Knoll v. Randolph (Neb.), 92 N. W. 195, *aff.* (Neb.), 94 N. W. 964.

705-62 Original plat always admissible and of potent weight. Bell County Co. v. Hendrickson, 24 Ky. L. R. 371, 68 S. W. 842.

705-64 Must purport to be official acts of the surveyor. Stumpe v. Kopp, 201 Mo. 412, 99 S. W. 1073.

706-65 Moylahn v. Hanelt (Wis.), 114 N. W. 102.

706-67 Hamilton v. Saunders (Tex. Civ.), 73 S. W. 1069.

706-71 Private survey of entire township presumed to conform to government survey. Taylor v. Reising, 13 Idaho 226, 89 P. 943.

706-72 In re Boundaries of Pulehunui, 4 Haw. 239; In re Boundaries of Kapahulu, 5 Haw. 94.

707-77 Twombly v. Lord (N. H.), 66 A. 486 (competent to establish boundary line).

707-78 Schwede v. Hemich, 29 Wash. 124, 69 P. 643; Newmeister v. Goddard, 125 Wis. 82, 103 N. W. 241.

708-82 Pereles v. Gross, 126 Wis. 122, 105 N. W. 217.

708-83 Board of Comrs. v. Taylor, 133 Ia. 453, 108 N. W. 927.

708-84 Original map admissible where plat is ambiguous. McLane v. Grice (Tex. Civ.), 66 S. W. 709.

708-86 Inadmissible against persons not parties to the partition. Harper v. Anderson, 130 N. C. 538, 41 S. E. 1021.

709-87 Calls in senior survey are controlling. Hill v. Dalton 140 N. C. 9, 52 S. E. 273.

709-88 Hamilton v. Blackburn (Tex. Civ.), 95 S. W. 1094.

710-96 Bates v. Baker, 31 Ky. L. R. 47, 101 S. W. 340 (report of surveyor appointed by court); Shive v. Garman, 30 Ky. L. R. 1368, 101 S. W. 300 (presumption that a survey made in accordance with a will and acquiesced in, is correct); Watkins v. Havighorst, 13 Okla. 128, 74 P. 318.

710-97 See Brown v. Min. Co., 3 Cal. App. 474, 86 P. 744.

Lines presumed to be run upon the ground, in accordance with the surveyor's report and plan. Adams v. Clapp, 99 Me. 169, 58 A. 1043.

710-99 Morgan v. Rentro, 30 Ky. L. R. 533, 99 S. W. 311.

Presumption that officers did their

duty in highway proceedings. Quinn v. Baage (Ia.), 114 N. W. 205.

710-1 Christ v. Tent, 16 Okla. 375, 84 P. 1074.

711-2 Frederitzie v. Boeker, 193 Mo. 228, 92 S. W. 227; Clark v. Thornburg, 66 Neb. 717, 92 N. W. 1056; Bock v. Porterfield (Neb.), 114 N. W. 597; Hurn v. Alter (Neb.), 113 N. W. 986; Trinwith v. Smith, 42 Or. 239, 70 P. 816; Propper v. Wohlwend (S. D.), 112 N. W. 967; Thatcher v. Matthews (Tex. Civ.), 105 S. W. 1006; Thayer v. Spokane Co., 36 Wash. 63, 78 P. 200; Stangair v. Roads, 41 Wash. 583, 84 P. 405.

Monuments control both field notes and plats. Canavan v. Dugan, 10 N. M. 316, 62 P. 971.

Original corners conclusive though located incorrectly. Washington R. Co. v. Young, 29 Utah 108, 80 P. 382.

No presumption that a line, long acquiesced in, was a properly established and determined boundary line. Atascosa County v. Alderman (Tex. Civ.), 91 S. W. 846.

711-3 Resurrection Min. Co. v. Min. Co., 129 Fed. 668, 64 C. C. A. 180; Meyer etc. Co. v. Steinfeld (Ariz.), 80 P. 400; Wheeler v. Benjamin, 136 Cal. 51, 68 P. 313; Beniamina v. Clark, 3 Haw. 247; Liddle v. Blake, 131 Ia. 165, 105 N. W. 649; Kendrick v. Burchett, 28 Ky. 342, 89 S. W. 239; Tarvin v. Coke & C. Co., 25 Ky. 2246, 80 S. W. 504; Chambers v. Tharp, 29 Ky. 271, 93 S. W. 627; Morgan v. Renfro, 30 Ky. L. R. 533, 99 S. W. 311; Hall v. Caplis, 109 La. 483, 33 S. 570; Wilson v. Sidle, 4 Ohio N. P. (N. S.) 465; Esnelman v. Rankin, 32 Pa. Super 254; Rook v. Greenewald, 22 Pa. Super. 641; Ridgell v. Atherton (Tex. Civ.), 107 S. W. 129; Thompson v. Fuhrmann, 130 Wis. 375, 110 N. W. 236.

712-4 Kentucky L. etc. Co. v. Crabtree, 113 Ky. 922, 70 S. W. 31; Masterson v. Ribble, 34 Tex. Civ. 270, 78 S. W. 358.

712-5 Kimball v. McKee, 149 Cal. 435, 86 P. 1089; Currier v. Jones, 121 Ia. 160, 96 N. W. 766; Rowell v. Weinemann, 119 Ia. 256, 93 N. W. 279; Rowell v. Clark, 119 Ia. 299, 93 N. W. 280; Bell County L. etc. Co. v. Hendrickson, 24 Ky. L. R. 371, 68 S. W. 842 (natural object not clearly identified); Chapman v. Hamblet, 100 Me. 454, 62 A. 215; P. v. Hall, 43 Misc. 117, 88 N. Y. S. 276; Seabrook v. Ice Co. (Or.), 89 P. 417; Christenson v. Simmons, 47 Or. 184, 82 P. 805; Goodson v. Fitzgerald (Tex. Civ.), 90 S. W. 898; Hamilton v. Blackburn (Tex. Civ.), 95 S. W. 1094; Jaggers v. Stringer (Tex. Civ.), 106 S. W. 151; Green v. Pennington, 105 Va. 801, 54 S. E. 877.

712-6 Continuous line. — Jackson v. Land Assn., 51 W. Va. 482, 41 S. E. 920.

712-7 Liddle v. Blake, 131 Ia. 165, 105 N. W. 649.

713-9 Vincent v. Blanton, 27 Ky. L. R. 489, 85 S. W. 703; Keystone Co. v. River Co. (Tex. Civ.), 96 S. W. 64. See Hornberger v. Giddings, 31 Tex. Civ. 283, 71 S. W. 989.

713-12 Presumption that **surveyor** ran out the lines of the adjoining surveys called for. Stensoff v. Jackson (Tex. Civ.), 89 S. W. 445.

713-16 Pereles v. Gross, 126 Wis. 122, 105 N. W. 217.

714-20 Ratliff v. May, 27 Ky. L. R. 164, 84 S. W. 731; Matthews v. Thatcher, 33 Tex. Civ. 133, 76 S. W. 61.

Different monument cannot be substituted. Resurrection Min. Co. v. Min. Co., 129 Fed. 668, 64 C. C. A. 180.

Inadmissible to correct a mistake in a call. Hamilton v. Blackburn (Tex. Civ.), 95 S. W. 1094.

714-21 Court survey cannot correct mistake in government survey. Strunz v. Hood, 44 Wash. 99, 87 P. 45.

715-23 Couch v. Texas etc. R. Co., 99 Tex. 464, 90 S. W. 860; Martin v. Mitchell, 32 Tex. Civ. 385, 74 S. W. 565.

715-24 Warner v. Sapp (Tex. Civ.), 97 S. W. 125; White v. Smith (Tex. Civ.), 67 S. W. 1028; Sloan v. King, 33 Tex. Civ. 537, 77 S. W. 48; Selkirk v. Watkins (Tex. Civ.), 105 S. W. 1161; Summerfield v.

White, 54 W. Va. 311, 46 S. E. 154.

Field notes admissible. Giddings v. Thompson (Tex. Civ.), 92 S. W. 1043.

Omitted course may be supplied from the description in a deed to an adjoining lot. Zerbey v. Allan, 215 Pa. 383, 64 A. 587.

715-25 Resurrection Min. Co. v. Min. Co., 129 Fed. 668, 64 C. C. A. 180; Collins v. McKay (Mont.), 92 P. 295; Reed v. Burrell (Neb.), 108 N. W. 155; Nystrom v. Lee (N. D.), 114 N. W. 478; White v. Amrhien, 14 S. D. 270, 85 N. W. 191; Stangair v. Roads, 41 Wash. 583, 84 P. 405; Douglas L. Co. v. Thayer Co. 107 Va. 292, 58 S. E. 1101.

Evidence of reputation as to location of lost monument, inadmissible where it can be ascertained from the description in a deed. Smith v. Trustees, 89 App. Div. 475, 86 N. Y. S. 34.

Extrinsic evidence admissible to locate beginning corners. Matthews v. Thatcher, 33 Tex. Civ. 133, 76 S. W. 61.

716-27 Function of resurvey. Pereles v. Gross, 126 Wis. 122, 105 N. W. 217.

716-29 Survey not rejected because the surveyor began at northern extremity instead of southern as the original surveyor did. Shrake v. Laflin (Neb.), 92 N. W. 184.

716-30 Morgan v. Renfro, 30 Ky. L. R. 533, 99 S. W. 311; Barrow v. Lyons (Tex. Civ.), 86 S. W. 773.

Resurveys must be made according to the instructions of general land office. Phillips v. Hink (S. D.), 114 N. W. 699; Nystrom v. Lee (N. D.), 114 N. W. 478.

717-31 Morgan v. Lewis, 29 Ky. L. R. 197, 92 S. W. 970; Chambers v. Tharp, 29 Ky. L. R. 271, 93 S. W. 627; Asheville L. Co. v. Lang, 146 N. C. 311, 59 S. E. 703; Marshall v. Corbett, 137 N. C. 555, 50 S. E. 210.

717-32 Survey must be construed by reference to the calls in the grant, and such calls cannot be aided by reference to lines and calls in other surveys not mentioned in the field notes. Coleman County v. Stewart (Tex. Civ.), 65 S. W. 383.

717-35 McDonald v. McCrabb (Tex. Civ.), 105 S. W. 238; Battles v. Barnett (Tex. Civ.), 100 S. W. 817.

717-37 Leonard v. Forbing, 109 La. 220, 33 S. 203; S. v. Pulp Co. (Tenn.), 104 S. W. 437 (presumption as to permanency of boundary lines); Matthews v. Thatcher, 33 Tex. Civ. 133, 76 S. W. 61. See Hornberger v. Giddings, 31 Tex. Civ. 283, 71 S. W. 989.

718-40 Reed v. Burrell (Neb.), 108 N. W. 155.

Lost monuments presumed to have been at distances called for. Keystone Mills Co. v. Lumb. Co. (Tex. Civ.), 96 S. W. 64.

718-41 See Mappin v. Liblerty, (1903), 1 Ch. 118, 72 L. J. Ch. 63, 87 L. T. N. S. 523; Dickinson v. Imp. Co., 77 Ark. 570, 92 S. W. 21; Everett v. Fall River, 189 Mass. 513, 75 N. E. 946; Gray v. Kelley, 194 Mass. 533, 80 N. E. 651; Pell v. Pell, 35 Misc. 472, 71 N. Y. S. 1092, 169 N. Y. 607, 62 N. E. 1099, 73 N. Y. S. 81; Warren v. Gloversville, 80 N. Y. S. 912; Mott v. Eno, 97 App. Div. 580, 90 N. Y. S. 608; Paige v. R. Co., 178 N. Y. 102, 70 N. E. 213; Pittsburgh, etc. R. Co. v. Machine Co., 208 Pa. 73, 57 A. 191; Sweatman v. Bathrick, 17 S. D. 138, 95 N. W. 422; Wegge v. Madler, 129 Wis. 412, 109 N. W. 223.

Boundary on a way. — Lemay v. Furtado, 182 Mass. 280, 65 N. E. 395; Gould v. Wagner (Mass.), 82 N. E. 10; McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076.

Rule does not apply to railroad right of way. Couch v. R. Co., 99 Tex. 464, 90 S. W. 860.

Stream. — Walls v. Cunningham, 123 Wis. 346, 101 N. W. 696.

Quantity of land actually within the description of the deed is evidence to rebut the presumption. Kennedy v. Tract. Co., 77 App. Div. 484, 78 N. Y. S. 937.

Presumption does not arise where conveyance is by municipal authorities of New York City. Graham v. Stern, 51 App. Div. 406, 64 N. Y. S. 728, 168 N. Y. 517, 61 N. E. 891, 85 Am. St. 694.

Public highways which were such when New York was a Dutch col-

ony, are owned entirely by the public. Paige v. R. Co., 178 N. Y. 102, 70 N. E. 213; Lansing v. R. Co., 38 Misc. 384, 77 N. Y. S. 889.

Presumption of intention to convey fee to entire street where control ceases to be of importance to grantor. See Johnson v. Grenell, 112 App. Div. 620, 98 N. Y. S. 629, 188 N. Y. 407, 81 N. E. 161.

718-42 Huff v. Exp. Co., 195 Ill. 257, 63 N. E. 105; Western U. T. Co. v. Krueger, 36 Ind. App. 348, 74 N. E. 25; Hamlin v. Atty.-G. (Mass.), 81 N. E. 275; Van Winkle v. Van Winkle, 184 N. Y. 193, 77 N. E. 33; Watson v. New York, 67 App. Div. 573, 73 N. Y. S. 1027, 175 N. Y. 475, 67 N. E. 1091; Jacquemin v. Finnegan, 39 Misc. 628, 80 N. Y. S. 207; Tietjen v. Palmer, 121 App. Div. 233, 105 N. Y. S. 790.

718-43 Boyd v. R. Co., 28 Pa. C. C. 314; Wiess v. Goodhue (Tex. Civ.), 102 S. W. 793 (alley).

Express words explicitly excluding the highway necessary. Van Winkle v. Van Winkle, 39 Misc. 593, 80 N. Y. S. 612.

719-44 *Compare* Trowbridge v. Ehrich, 116 App. Div. 457, 101 N. Y. S. 995.

719-46 Thompson v. Maloney, 199 Ill. 276, 65 N. E. 236, 93 Am. St. 133. See Owen v. Brookport, 208 Ill. 35, 69 N. E. 952; Smith v. Beloit, 122 Wis. 396, 100 N. W. 877.

720-50 Smith v. Stacey, 68 App. Div. 521, 73 N. Y. S. 1022.

Declarations of grantor, contemporaneous with making of the deed, are admissible. Rix v. Smith, 145 Mich. 203, 108 N. W. 691.

720-51 Clarke v. Case, 144 Mich. 148, 107 N. W. 893.

720-53 Chappell v. Roberts (Ala.), 43 S. 489; Brundred v. McLaughlin, 213 Pa. 115, 62 A. 565 (engineer who has made measurements can testify to location of a boundary, though the question calls for his opinion).

Rebuttal of expert opinion. Clark v. Gallagher, 74 Vt. 331, 52 A. 539.

Witness need not be a surveyor to testify to a measurement of a lot made by himself. Gunkel v. Seiberth, 27 Ky. L. R. 455, 85 S. W. 733.

Opinions of other surveyors incompetent to show how lines should be run, where the surveyor who made them has testified and the calls of the deeds are clear. Griffin v. Barbee, 29 Tex. Civ. 325, 68 S. W. 698.

Testimony of non-expert witness who located lines from government monuments will prevail over a resurvey not based on such monuments. Baty v. Elrod, 66 Neb. 735, 92 N. W. 1032, 97 N. W. 343.

721-57 Evidence of excessive acreage in adjacent surveys inadmissible where construction must be by courses and distances. Matthews v. Thatcher, 33 Tex. Civ. 133, 76 S. W. 61.

721-59 Camp v. League (Tex. Civ.), 92 S. W. 1062; Simmons v. Jamieson, 32 Wash. 619, 73 P. 700.

721-61 Rowell v. Weinemann, 119 Ia. 256, 93 N. W. 279.

Surveyor may testify that a line he has run corresponded with the call in the original survey. Hamilton v. Saunders (Tex. Civ.), 73 S. W. 1069.

721-62 See Pereles v. Gross, 126 Wis. 122, 105 N. W. 217.

722-74 Statements in Williamson's History of Maine, admissible. Lazell v. Boardman (Me.), 69 A. 97.

723-76 Russell v. Robinson (Ala.), 44 S. 1040.

723-77 Klinker v. Schmidt, 114 Ia. 695, 87 N. W. 661.

Testimony of old inhabitants inadmissible to establish public ownership of land to which plaintiff shows paper title. Dawson v. Orange, 78 Conn. 96, 61 A. 101.

724-87 Southern I. Wks. v. R. Co., 131 Ala. 649, 31 S. 723; Rowell v. Weinemann, 119 Ia. 256, 93 N. W. 279; Kentucky L. Co. v. Crabtree, 113 Ky. 922, 70 S. W. 31; Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782; Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340; Bland v. Beasley, 140 N. C. 628, 53 S. E. 443; Goodson v. Fitzgerald (Tex. Civ.), 90 S. W. 898; Douglas L. Co. v. Thayer, 107 Va. 292, 58 S. E. 1101.

Boundary must have been of such interest as to have provoked local discussion and general interest.

Matthews v. Thatcher, 33 Tex. Civ. 133, 76 S. W. 61.

724-89 **Reputation originating** seventeen years back is not competent. Bland v. Beasley, 140 N. C. 628, 53 S. E. 443.

Disputed monuments may be corroborated by showing that they correspond with lines of early settlers. Bridenbaugh v. Bryant (Neb.), 112 N. W. 571.

724-90 Phillips v. Stewart, 29 Ky. L. R. 1199, 97 S. W. 6.

Reputation must be general. Bland v. Beasley, 140 N. C. 628, 53 S. E. 443.

725-95 Hamilton v. Smith, 74 Conn. 374, 50 A. 884; Phillips v. Stewart, 29 Ky. L. R. 1199, 97 S. W. 6. See Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782; Bullard v. Hollingsworth, 140 N. C. 634, 53 S. E. 441.

726-97 Yow v. Hamilton, supra; Bullard v. Hollingsworth, supra; Hill v. Dalton, 140 N. C. 9, 52 S. E. 273.

Rule that declarant must be dead applies to hearsay evidence, but not to evidence of common reputation. Hemphill v. Hemphill, 138 N. C. 504, 51 S. E. 42.

726-99 Driver v. King, 145 Ala. 585, 40 S. 315; Emmett v. Perry, 100 Me. 139, 60 A. 872; Dibble v. Cole, 102 App. Div. 229, 92 N. Y. S. 938; Fincannon v. Sudderth, 144 N. C. 587, 57 S. E. 337; Warner v. Sapp (Tex. Civ.), 97 S. W. 125; Matthews v. Thatcher, 33 Tex. Civ. 133, 76 S. W. 61; Hathaway v. Goslant, 77 Vt. 199, 59 A. 835.

Recitals in a deed are hearsay, and incompetent because of interest. Hemphill v. Hemphill, 138 N. C. 504, 51 S. E. 42.

Declarations of defendant against interest are admissible. Manuel v. Flynn (Cal. App.), 90 P. 463.

726-1 Hill v. Dalton, 140 N. C. 9, 52 S. E. 273.

726-2 Goodson v. Fitzgerald (Tex. Civ.), 90 S. W. 898.

727-3 Mellor v. Walmsley, (1905) 2 Ch. D. (Eng.) 164; Keystone Mills Co. v. Lumb. Co. (Tex. Civ.) 96 S. W. 64.

729-14 See Hamilton v. Smith, 74 Conn. 374, 50 A. 884; Cravath v. Baylis, 113 App. Div. 666, 99 N. Y. S. 973; Camp v. League (Tex. Civ.), 92 S. W. 1062.

729-17 Hamilton v. Smith, supra; Bullard v. Hollingsworth, 140 N. C. 634, 53 S. E. 441; Hemphill v. Hemphill, 138 N. C. 504, 51 S. E. 42; Hill v. Dalton, 140 N. C. 9, 52 S. E. 273; Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782; Westfelt v. Adams, 131 N. C. 379, 42 S. E. 823.

729-18 Southern I. Wks. v. R. Co., 131 Ala. 649, 31 S. 723.

730-19 **Sufficient** if monument described can be identified. Westfelt v. Adams, 131 N. C. 379, 42 S. E. 823.

BREACH OF PROMISE [Vol. 2.]

734-3 Grubbs v. Pence, 24 Ky. L. R. 2183, 73 S. W. 785. See Birum v. Johnson, 87 Minn. 362, 92 N. W. 1.

735-10 Smith v. Compton, 67 N. J. L. 548, 52 A. 386.

736-12 Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197; McKee v. Mouser, 131 Ia. 203, 108 N. W. 228; Massucco v. Tomassi, 78 Vt. 188, 62 A. 57, 67 A. 551.

Relations of the parties remote in time, may be excluded. Parrish v. Parrish, 67 Kan. 323, 72 P. 844.

In Georgia, plaintiff is incompetent as a witness in an action for breach of promise to marry. Graves v. Rivers, 123 Ga. 224, 51 S. E. 318.

736-13 Graves v. Rivers, 123 Ga. 224, 51 S. E. 318.

Origin and continuance of acquaintance may be shown. Hahn v. Bettingen, 84 Minn. 512, 88 N. W. 10.

736-14 McMaster v. Spencer, 129 Ill. App. 131.

737-18 McKee v. Mouser, 131 Ia. 203, 108 N. W. 228.

738-23 Sramek v. Sklenar, 73 Kan. 450, 85 P. 566.

Evidence of seduction is not admissible to prove the contract. Wrynn v. Downey, 27 R. I. 454, 63 A. 401, 4 L. R. A. (N. S.) 615.

739-27 Massucco v. Tomassi (Vt.), 67 A. 551.

739-31 Cain v. Corley (Tex. Civ.), 99 S. W. 168.

741-40 **Seduction** not evidence of a breach of the contract. Wrynn v. Downey, 27 R. I. 454, 63 A. 401, 4 L. R. A. (N. S.) 615.

Offer of compromise is incompetent. Wrynn v. Downey, supra.

741-45 **Necessity for, discussed.** Clark v. Corey, 24 R. I. 137, 52 A. 811.

742-47 Grubbs v. Pence, 24 Ky. L. R. 2183, 73 S. W. 785.

742-48 Birum v. Johnson, 87 Minn. 362, 92 N. W. 1.

742-50 **Insanity** may be shown. O'Reilly v. Sweeney, 54 Misc. 408, 105 N. Y. S. 1033.

744-62 **Disease** must be such as to render the making of the marriage contract, and the consummation of the marriage by marital intercourse, impossible. Smith v. Compton, 67 N. J. L. 548, 52 A. 386.

745-63 **On ground of public policy,** the fact that plaintiff has consumption may be shown as a defense. Grover v. Zook, 44 Wash. 489, 87 P. 638.

745-68 See Mickens v. Phillips (Va.), 51 S. E. 354.

746-71 Colburn v. Marble (Mass.), 82 N. E. 28.

746-72 Welker v. Metcalf, 209 Pa. 373, 58 A. 687.

747-75 Williams v. Fahn, 119 Ia. 746, 94 N. W. 252. See Colburn v. Marble (Mass.), 82 N. E. 28.

747-76 **Where defendant** gives evidence of specific acts of unchastity, plaintiff cannot prove a good reputation for chastity, in rebuttal. Colburn v. Marble (Mass.), 82 N. E. 28.

748-78 Brown v. Bannister, 14 Haw. 34; Sramek v. Sklenar, 73 Kan. 450, 85 P. 566; Cain v. Corley (Tex. Civ.), 99 S. W. 168.

748-79 **Evidence of new promise** proper. Parrish v. Parrish, 67 Kan. 323, 72 P. 844.

748-80 McMaster v. Spencer, 129 Ill. App. 131.

Renewed Promises.—Cain v. Corley (Tex. Civ.), 99 S. W. 168.

749-83 Poehlmann v. Kertz, 105 Ill. App. 249.

749-84 Brown v. Bannister, 14 Haw. 35.

749-85 Herriman v. Layman, 118 Ia. 590, 92 N. W. 710.

Both actual and reputed wealth may be considered. McKee v. Mouser, 131 Ia. 203, 108 N. W. 228.

750-86 Birum v. Johnson, 87 Minn. 362, 92 N. W. 1; Smith v. Compton, 67 N. J. L. 548, 52 A. 386. *Compare* Johansen v. Modahl (Neb.), 94 N. W. 532.

750-88 Smith v. Compton, 67 N. J. L. 548, 52 A. 386; Massucco v. Tomassi (Vt.), 67 A. 551.

751-90 **Inquiry as to wealth** previous to time of promise may be proper. Massucco v. Tomassi (Vt.), 67 A. 551.

751-92 Massucco v. Tomassi, 78 Vt. 188, 62 A. 57, 67 A. 551.

751-98 Birum v. Johnson, 87 Minn. 362, 92 N. W. 1; Heasley v. Nichols, 38 Wash. 485, 80 P. 769.

752-1 Grubbs v. Pence, 24 Ky. L. R. 2183, 73 S. W. 785.

752-7 **Exemplary damages** may be awarded. Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557; Sneve v. Lunder, 100 Minn. 5, 110 N. W. 99.

753-8 **That plaintiff contracted a venereal disease** from defendant cannot be shown. Charan v. Sebasta, 131 Ill. App. 330.

753-12 Smith v. Compton, 67 N. J. L. 548, 52 A. 386.

754-17 McCarty v. Heryford, 125 Fed. 46; Lanigan v. Neely, 4 Cal. App. 760, 89 P. 441 (full discussion); Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197; Graves v. Rivers, 123 Ga. 224, 51 S. E. 318; Poehlmann v. Kertz, 105 Ill. App. 249; Charan v. Sebesta, 131 Ill. App. 330; Sramek v. Sklenar, 73 Kan. 450, 85 P. 566.

Must be specially pleaded. — Herriman v. Layman, 118 Ia. 590, 92 N. W. 710.

Physical examination of plaintiff cannot be had since action is not one for a personal injury. Pitt v. Dunlap, 54 Misc. 115, 105 N. Y. S. 846.

754-18 Wrynn v. Downey, 27 R. I. 454, 63 A. 401, 4 L. R. A. (N. S.) 615 (full discussion).

755-24 Colburn v. Marble (Mass.), 82 N. E. 28.

Must be pleaded in mitigation. Herriman v. Layman, 118 Ia. 590, 92 N. W. 710.

756-30 *Compare* Colburn v. Marble (Mass.), 82 N. E. 28.

756-33 Smith v. Compton, 67 N. J. L. 548, 52 A. 386.

757-40 McCarty v. Heryford, 125 Fed. 46.

757-41 Heasley v. Nichols, 38 Wash. 485, 80 P. 769.

BRIBERY [Vol. 2.]

760-1 S. v. Meysenbury, 171 Mo. 1, 71 S. W. 229; P. v. Van De Carr, 87 App. Div. 386, 84 N. Y. S. 461.

760-6 Tinkle v. Wallace, 167 Ind. 382, 79 N. E. 355; P. v. McGarry, 136 Mich. 316, 99 N. W. 147.

Circumstantial evidence warrants a conviction, provided it excludes every reasonable hypothesis but that of guilt. Vernon v. U. S., 146 Fed. 121, 76 C. C. A. 547.

761-9 See U. S. v. Dietrich, 126 Fed. 676.

761-10 See P. v. Hammond, 132 Mich. 422, 93 N. W. 1084; Rudolph v. S., 128 Wis. 222, 107 N. W. 466.

Attempt to suppress testimony or induce perjury is admissible. P. v. Salsburg, 134 Mich. 537, 96 N. W. 936.

Language employed must show an offer. Evans v. S., 48 Tex. Cr. 620, 89 S. W. 1080.

761-11 S. v. Woodward, 182 Mo. 391, 81 S. W. 857, 103 Am. St. 646; S. v. Miller, 182 Mo. 370, 81 S. W. 867; Lee v. S., 47 Tex. Cr. 620, 85 S. W. 804.

Promise to pay in the future is sufficient. Schultz v. S., 125 Wis. 452, 104 N. W. 90.

762-19 See Dunn v. S., 125 Wis. 181, 102 N. W. 935.

763-22 Facts naturally indicating such an agreement are admissible. S. v. Gardner, 88 Minn. 130, 92 N. W. 529.

763-25 See S. v. Gardner, supra.

763-26 For full discussion, see C. v. Killian, 194 Mass. 153, 80 N. E. 222.

Statements of defendant as res gestae and not confession. P. v. McGarry, 136 Mich. 316, 99 N. W. 147.

763-27 C. v. Killian, 194 Mass. 153, 80 N. E. 222. See S. v. Woodward, 182 Mo. 391, 81 S. W. 857, 103 Am. St. 646.

763-28 See S. v. Campbell, 73 Kan. 688, 85 P. 784.

764-30 Haynes v. C., 104 Va. 854, 52 S. E. 358.

Evidence of solicitation for a bribe in another matter, admissible to prove intent or motive (Higgins v. S., 157 Ind. 57, 60 N. E. 685), or to establish a common scheme. S. v. Ames, 90 Minn. 183, 96 N. W. 330.

Other acts of conspirators, admissible, as showing the purpose of the conspiracy. S. v. Schnettler, 181 Mo. 173, 79 S. W. 1123.

764-31 Proceedings at meeting at which defendant was present, admissible as res gestae. Chapline v. S., 77 Ark. 444, 95 S. W. 477; Butt v. S., 81 Ark. 173, 98 S. W. 723.

764-33 *Compare* Lee v. S., 47 Tex. Cr. 620, 85 S. W. 804.

That bribe-giver drew from bank approximately the amount of money alleged to have been given as a bribe, is inadmissible to corroborate her. P. v. Bissert, 71 App. Div. 118, 75 N. Y. S. 630, 172 N. Y. 643, 65 N. E. 1120.

765-37 See Garner v. S. (Tex. Cr.), 97 S. W. 98; Dunn v. S., 125 Wis. 181, 102 N. W. 935.

765-38 P. v. Salsbury, 134 Mich. 537, 96 N. W. 936; Lounder v. S., 46 Tex. Cr. 121, 79 S. W. 552.

Circumstantial evidence sufficient to connect the defendant with the person who actually received the money. S. v. Ames, 90 Minn. 183, 96 N. W. 330.

767-43 See P. v. Jackson, 47 Misc. 60, 95 N. Y. S. 286.

767-49 See Evans v. S., 48 Tex. Cr. 620, 89 S. W. 1080.

768-53 Dunn v. S., 125 Wis. 181, 102 N. W. 935; Schutz v. S., 125 Wis. 452, 104 N. W. 90.

768-57 Johnson v. S. (Tex Cr.), 92 S. W. 257; Ex parte Richards, 44 Tex. Cr. 561, 72 S. W. 838.

Act sought to be influenced must appear to have been within the officer's power. P. v. McGarry, 136 Mich. 316, 99 N. W. 147; P. v. Mol, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871; P. v. Ellen, 138 Mich. 34, 100 N. W. 1008.

Valid law must be shown to be in existence authorizing and requiring the officer to act. S. v. Butler, 178 Mo. 272, 77 S. W. 560; S. v. Lehman, 182 Mo. 424, 81 S. W. 1118, 103 Am. St. 670, 66 L. R. A. 490. *Compare* P. v. Jackson, 121 App. Div. 856, 106 N. Y. S. 1046.

Contract let need not be legal at that time. S. v. Campbell, 73 Kan. 688, 85 P. 784.

769-59 S. v. Gardner, 88 Minn. 130, 92 N. W. 529.

Denial of witness that he knew of any bribery does not entitle him to immunity. S. v. Murphy, 128 Wis. 201, 107 N. W. 470; Rudolph v. S., 128 Wis. 222, 107 N. W. 466.

770-66 See C. v. Brown, 23 Pa. Super. 470.

Evidence as to good character of coconspirator, incompetent. Schultz v. S. (Wis.), 113 N. W. 428.

771-69 See P. v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370.

771-71 P. v. Bissert, 71 App. Div. 118, 75 N. Y. S. 630, 172 N. Y. 643, 65 N. E. 1120.

771-72 Butt v. S., 81 Ark. 173, 98 S. W. 723.

771-73 P. v. Bunkers, 2 Cal. App. 197, 84 P. 364.

Flight of witness not sufficient corroboration of the testimony of accomplices. Birch v. S. (Tex. Cr.), 106 S. W. 344.

772-75 P. v. Mol, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871; P. v. McGarry, 136 Mich. 316, 99 N. W. 147; P. v. Salsbury, 134 Mich. 537, 96 N. W. 936; Schutz v. S., 125 Wis. 452, 104 N. W. 90; s. c. (Wis.), 113 N. W. 428.

Order of proof is in discretion of court. Chapline v. S., 77 Ark. 444, 95 S. W. 477; Butt v. S., 81 Ark. 173, 98 S. W. 723; P. v. Bunkers, 2 Cal. App. 197, 84 P. 364.

Declarations of all parties present at the time of the transaction are admissible, though they are not conspirators. S. v. Lehman, 182 Mo. 424, 81 S. W. 1118, 103 Am. St. 670, 66 L. R. A. 490.

BURDEN OF PROOF [Vol. 2.]

775-1 Chicago etc. Tract. Co. v. Mee, 218 Ill. 9, 75 N. E. 800, 2 L. R. A. (N. S.) 725.

775-2 Rupp v. Sarpy, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; S. v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

777-8 Kwong L. Y. Co. v. Alliance Co., 16 Haw. 674.

Burden of proof, a technical, legal phrase. Laurence Prince v. Compress Co., 112 Mo. App. 49, 86 S. W. 873.

Non-existence of alleged facts may properly be found where no evidence is introduced. Miller v. Engle, 3 Cal. App. 325, 85 P. 159.

779-13 Englehart v. Richter, 136 Ala. 562, 33 S. 939 (as to incompetency of witness); Smith v. S., 74 Ark. 397, 85 S. W. 1123 (that confession is voluntary); Sherman v. S., 2 Ga. App. 148, 58 S. E. 393 (that evidence procured by search was obtained after a legal arrest); Western U. Tel. Co. v. Sloss (Tex. Civ.), 100 S. W. 354 (law of a foreign forum).

779-14 Askew v. S., 3 Ga. App. 79, 59 S. E. 311 (that indictment was subsequent to the commission of the offense); Interstate etc. Co. v. Coal Co., 105 Va. 574, 54 S. E. 593 (burden of rebutting presumption that owner of the surface owns all above and below); S. v. Newton, 39 Wash. 491, 81 P. 1002 (that offense was committed within statutory period of limitations.)

779-15 Roberts v. Padgett, 82 Ark. 331, 101 S. W. 753; Appeal of O'Brien, 100 Me. 156, 60 A. 880; Vertrees v. County, 75 Neb. 332, 106 N. W. 331; Omaha St. R. Co. v. Boesen, 74 Neb. 764, 105 N. W. 303; Rupp v. Sarpy, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; Klunk v. R. Co., 74 Ohio St. 125, 77 N. E. 752.

Burden upon defendant of proving an affirmative defense does not shift. Supreme Tent v. Stensland, 105 Ill. App. 267.

780-16 Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201.

781-19 Eagle I. Co. v. Baugh, 147 Ala. 613, 41 S. 663; Brown v. Cragg, 230 Ill. 299, 82 N. E. 569; Ainsfield Co. v. Rasmussen, 30 Utah 453, 85 P. 1002.

Preponderance of evidence not necessary to rebut a mere prima facie case. Toledo etc. R. Co. v. Star Mills, 146 Fed. 953, 77 C. C. A. 203.

Where two reasonably probable theories of an injury exist. Peat v. R. Co., 128 Wis. 86, 107 N. W. 355.

Preponderance of witnesses not enough. Marcotte v. Sheridan, 91 N. Y. S. 744.

782-21 Dorough v. Harrington, 148 Ala. 305, 42 S. 557.

782-22 Evidence must not only be of greater convincing power, but must be such as to satisfy or convince the jury of the truth of the

contention. Anderson v. Brass Co., 127 Wis. 273, 106 N. W. 1077.

783-27 Chicago T. Co. v. Campbell, 110 Ill. App. 366.

784-28 Schell v. R. Co. (Wis.), 113 N. W. 657.

785-31 Thomas v. Tilley, 147 Ala. 189, 41 S. 854 (gift by deceased); Buffalo Zinc Co. v. Crump, 70 Ark. 525, 69 S. W. 572 (forfeiture of mining claim); Deadman v. Yantis, 230 Ill. 243, 82 N. E. 592; Ewell v. Turney, 39 Wash. 615, 81 P. 1047.

Burden of proof a relative term, and more than mere preponderance of evidence is sometimes required. Liberty v. Haines (Me.), 68 A. 738.

785-32 Allen v. Riddle, 141 Ala. 621, 37 S. 680; Redwood v. Rogers, 105 Va. 155, 53 S. E. 6.

787-37 **Proceedings** in disbarment. P. v. Sullivan, 218 Ill. 419, 75 N. E. 1005.

790-48 U. S. v. Greene, 146 Fed. 803; U. S. v. Richards, 149 Fed. 443; Alexis v. U. S., 129 Fed. 60, 63 C. C. A. 502; Little v. S., 145 Ala. 662, 39 S. 674; P. v. Wong Sang Ling, 3 Cal. App. 221, 84 P. 843; S. v. Samuels (Del.), 67 A. 164; S. v. Adams (Del.), 65 A. 510; S. v. Collins, 5 Penne. (Del.) 263, 62 A. 224; S. v. Harmon, 4 Penne. (Del.) 580, 60 A. 866; S. v. Kavanaugh, 4 Penne. (Del.) 131, 53 A. 335; S. v. Brinte, 4 Penne. (Del.) 551, 58 A. 258; S. v. Carr, 4 Penne. (Del.) 523, 57 A. 370; S. v. Emory, 5 Penne. (Del.) 126, 58 A. 1036; Lucas v. S., 75 Neb. 11, 105 N. W. 976; S. v. Lax, 71 N. J. L. 386, 59 A. 18; S. v. Jones, 71 N. J. L. 543, 60 A. 396; P. v. Gluck, 188 N. Y. 167, 80 N. E. 1022; S. v. Pressler (Wyo.), 92 P. 806.

Defendant must be acquitted where the evidence can be reconciled upon any reasonable hypothesis of his innocence. S. v. Hutchings, 30 Utah 319, 84 P. 893.

Each separate fact need not be proved beyond a reasonable doubt. Pitts v. S., 140 Ala. 70, 37 S. 101.

But where evidence is circumstantial, each material circumstance should be proved beyond a reasonable doubt. P. v. Weber, 149 Cal. 325, 86 P. 671.

Reasonable doubt may arise from want of evidence. Nix v. S. (Tex. Cr.), 74 S. W. 764.

Uncontradicted evidence is not conclusive. S. v. Momberg, 14 N. D. 291, 103 N. W. 566.

791-49 **All incidental** or subsidiary facts need not be proven beyond a reasonable doubt. Osburn v. S., 164 Ind. 262, 73 N. E. 601.

791-50 McKinnie v. S., 44 Fla. 143, 32 S. 786.

Venue must be proved beyond a reasonable doubt. Keeler v. S., 73 Neb. 441, 103 N. W. 64.

791-52 Sikes v. S., 120 Ga. 494, 48 S. E. 153; S. v. Kendall, 143 N. C. 659, 57 S. E. 340.

792-53 Parrish v. S., 139 Ala. 16, 36 S. 1012.

Drunkenness.—S. v. Yates, 132 Ia. 475, 109 N. W. 1005; S. v. Sparegrove, 134 Ia. 599, 112 N. W. 83.

Insanity.—P. v. Suesser, 142 Cal. 354, 75 P. 1093; S. v. Clark, 34 Wash. 485, 76 P. 98.

Alibi.—S. v. Thomas (Ia.), 109 N. W. 900.

Proof to the satisfaction of the jury. S. v. Jones, 71 N. J. L. 543, 60 A. 396.

792-55 Atlanta L. Corp. v. Austin, 122 Ga. 374, 50 S. E. 124; Warner v. Warner, 30 Ind. App. 578, 66 N. E. 760; Jones v. Coal Co., 29 Ky. L. R. 623, 94 S. W. 6; Campbell v. Campbell Co., 117 La. 402, 41 S. 696 (intervener); Gibson v. Swofford, 122 Mo. App. 126, 97 S. W. 1007; Swain v. McMillan, 30 Mont. 433, 76 P. 943; Rupp v. Sarpy County, 71 Neb. 382; 98 N. W. 1042, 102 N. W. 242; Liberty P. Co. v. Mfg. Co., 178 N. Y. 219, 70 N. E. 501; Sheldon v. Wright (Vt.), 67 A. 807.

Burden of proof is determined by the pleadings and not by the condition of proof. Adams v. Pease, 113 Ill. App. 356.

Where action is prosecuted against two or more joint defendants, if the burden of proof as to either one of them is upon the plaintiff, the court has the right to give him the burden in the whole case. New Ellerslie Club v. Stewart, 29 Ky. L. R. 414, 93 S. W. 598.

794-57 Roberts v. Padgett, 82 Ark. 331, 101 S. W. 753; Walling v. Eggers, 25 Ky. L. R. 1563, 78 S. W. 428; Chaplin etc. Co. v. Nelson

County, 25 Ky. L. R. 1154, 77 S. W. 377; Dovey v. Lain, 117 Ky. 20, 77 S. W. 383.

794-59 Rosenthal v. Pine Hill, 157 Fed. 83; Nash v. Cooney, 108 Ill. App. 211; New Ellerslie Club v. Stewart, 29 Ky. L. R. 414, 93 S. W. 598; Clifton v. Weston, 54 W. Va. 250, 46 S. E. 360.

795-61 Prince v. Kennedy, 3 Cal. App. 404, 85 P. 859; DeLaval D. Co. v. Steadman (Cal. App.), 92 P. 877; Dieterle v. Bekin, 143 Cal. 683, 77 P. 664; Coates v. Miller, 99 Ill. App. 227; Sears v. Vaughan, 230 Ill. 572, 82 N. E. 881; Gatlin v. Vaut, 6 Ind. Ter. 254, 91 S. W. 38; Collier v. Monger, 75 Kan. 550, 89 P. 1011; Dovey v. Lam, 117 Ky. 20, 77 S. W. 383; Bailey v. Porter, 30 Ky. L. R. 915, 99 S. W. 932; Bogart v. Tannenbaum, 53 Misc. 310, 103 N. Y. S. 98; Fleitmann v. Ashley, 172 N. Y. 628, 65 N. E. 1116, 60 App. Div. 201, 69 N. Y. S. 1099; Jones v. R. Co., 67 S. C. 181, 45 S. E. 188; Ensfield Co. v. Rasmussen, 30 Utah 453, 85 P. 1002.

Set-Off.—O'Neal v. Curry, 134 Ala. 216, 32 S. 697; Western Coal Co. v. Hollenbeck, 72 Ark. 44, 80 S. W. 145; Holmes v. McKennan, 120 Ill. App. 320; Pocono I. Co. v. Ice Co., 214 Pa. 640, 64 A. 398.

Recoupment.—Sayles v. Quinn (Mass.), 82 N. E. 713; Truax v. Heartt, 135 Mich. 150, 97 N. W. 394.

Counterclaim.—Simonoff v. Horwitz, 95 N. Y. S. 522.

Payment.—Bossi v. Baehr (Wis.), 113 N. W. 433.

Contributory negligence.—Weil v. Fineran, 78 Ark. 87, 93 S. W. 568 (fraud); Murphy v. Bank, 82 Ark. 131, 100 S. W. 894 (appeal from judgment); Crawford v. Gose (Ind. App.), 82 N. E. 984; Clements v. Stapleton (Ia.), 113 N. W. 546 (revocation of agreement); Osmers v. Furey, 32 Mont. 581, 81 P. 345 (justification of seizure); Vertrees v. Gage County, 75 Neb. 332, 106 N. W. 331; Agnew v. Pawnee (Neb.), 113 N. W. 236 (abandonment of way); Cady v. Casualty Co. (Wis.), 113 N. W. 967 (suicide as defense).

Burden as to particular facts may be regulated by statute. Lowden v. Pennsylvania Co. (Ind. App.), 82 N. E. 941; Stewart v. R. Co. (Ia.), 113 N. W. 764; Kelsall v. R. Co. (Mass.), 82 N. E. 674. See Toledo etc. R. Co. v. Star Mills, 146 Fed. 953, 77 C. C. A. 203.

795-62 Hunt v. Osborn (Ind. App.), 82 N. E. 933.

796-64 Michels v. West, 109 Ill. App. 418; Goodnough Merc. Co. v. Galloway, 48 Or. 239, 84 P. 1049; Daley v. Iselin, 212 Pa. 279, 61 A. 919; Banderer v. Gunther (Tex. Civ.), 87 S. W. 851.

796-65 Chicago etc. R. Co. v. Jennings, 114 Ill. App. 622.

796-66 Gatlin v. Vaut, 6 Ind. Ter. 254, 91 S. W. 38.

798-71 Dowdell v. Home Soc., 114 La. 49, 38 S. 16; Walker v. Carpenter, 144 N. C. 674, 57 S. E. 461.

798-74 Shattuck v. Costello, 8 Ariz. 22, 68 P. 529; Chaplin etc. Co. v. Nelson, 25 Ky. L. R. 1154, 77 S. W. 377.

Where payment is the only issue left in a case, the general issue having been abandoned, the burden is upon the defendant. Swift & Co. v. Mutter, 115 Ill. App. 374.

799-75 General denial and plea of payment. Cunningham v. Springer (N. M.), 82 P. 232.

799-76 Hollander v. Farber, 52 Misc. 507, 102 N. Y. S. 506. Liberty P. Co. v. Mfg. Co., 178 N. Y. 219, 70 N. E. 501.

801-82 Under California Code, it does not devolve upon plaintiff to prove his negative allegations. Holmes v. Warren, 145 Cal. 457, 78 P. 954; Petaluma Pav. Co. v. Singley, 136 Cal. 616, 69 P. 426.

803-86 Cleveland etc. R. Co. v. Moore (Ind.), 82 N. E. 52.

803-87 Atlantic Tr. Co. v. Water Co., 72 App. Div. 539, 76 N. Y. S. 647; Daley v. Iselin, 212 Pa. 279, 61 A. 919.

804-91 Richardson v. S., 77 Ark. 321, 91 S. W. 758; S. v. Connor, 142 N. C. 700, 55 S. E. 787.

804-92 Davis v. Arnold, 143 Ala. 228, 39 S. 141; Gains v. S. (Ala.), 43 S. 137; Swinhart v. R. Co., 207 Mo. 423, 105 S. W. 1043.

Relationship to a felon as an excuse. S. v. Miller, 182 Mo. 370, 81 S. W. 867.

806-98 U. S. v. Breese, 131 Fed. 915; Parrish v. S., 139 Ala. 16, 36

S. 1012; S. v. Samuels (Del.), 67 A. 164.

807-99 Glover v. U. S., 147 Fed. 426, 77 C. C. A. 450, *rev.* 6 Ind. Ter. 262, 91 S. W. 41; Post v. U. S., 135 Fed. 1, 67 C. C. A. 569, 70 L. R. A. 989; S. v. Lax, 71 N. J. L. 386, 59 A. 18; C. v. Beckwith, 27 Pa. C. C. 481.

807-3 See S. v. Harmon, 4 Penne. (Del.) 580, 60 A. 866.

808-5 Kwong Lee Yuen Co. v. Assur. Co., 16 Haw. 674; Rupp v. Sarpey, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; Colston v. Bean, 78 Vt. 283, 62 A. 1015.

808-6 Klunk v. R. Co., 74 Ohio St. 125, 77 N. E. 752.

810-11 Toledo etc. R. Co. v. Mills Co., 146 Fed. 953, 77 C. C. A. 203; Cleveland etc. R. Co. v. Hadley (Ind.), 82 N. E. 1025 (presumption from res ipsa loquitur); Cover v. Hatten (Ia.), 113 N. W. 470 (presumption that residence at a place continues).

811-15 Winn v. Itzel, 125 Wis. 19, 103 N. W. 220.

811-16 Muncie Wheel Co. v. Finch, 150 Mich. 274, 113 N. W. 1107.

Right to open and close. Atlanta L. Corp. v. Austin, 122 Ga. 374, 50 S. E. 124.

812-17 Chicago etc. R. Co. v. White, 73 Neb. 870, 103 N. W. 661; Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325 (confusion of terms, "preponderance of evidence" and "burden of proof").

812-18 Waterbury Lumb. Co. v. Hinckley, 75 Conn. 187, 52 A. 739; Brown v. S., 125 Ga. 8, 53 S. E. 767.

812-20 Bogart v. Tannenbaum, 53 Misc. 310, 103 N. Y. S. 98; Bandered v. Gunther (Tex. Civ.), 87 S. W. 851.

BURGLARY [Vol. 2.]

813-1 Leonard v. S. (Ala.), 43 S. 214; S. v. Brady, 121 Ia. 561, 91 N. W. 801, 97 N. W. 62; Keeler v. S., 73 Neb. 441, 103 N. W. 64; S. v. Hutchings, 30 Utah 319, 84 P. 893.

814-2 Gunter v. S. 79 Ark. 432, 96 S. W. 181; Bruen v. P., 206 Ill. 417; 69 N. E. 24; Dunn v. C., 27 Ky. L. R. 113, 84 S. W. 321.

"**Home**" may be inferred to be a dwelling. Williams v. S., 2 Ga. App. 394, 58 S. E. 549. See Cronan v. S., 113 Tenn. 539, 82 S. W. 477; Jackson v. S., 49 Tex. Civ. 215, 91 S. W. 788 (may be proved by circumstantial evidence).

814-3 *Contra* where the owner is a witness. Caddell v. S., 49 Tex. Cr. 133, 90 S. W. 1013.

814-4 Bird v. S., 49 Tex. Cr. 96, 90 S. W. 651.

814-5 Bird v. S., supra; Price v. S. (Tex. Civ.), 83 S. W. 185.

815-6 Bruen v. P., 206 Ill. 417, 69 N. E. 24.

Conduct of prosecuting witness after the burglary is inadmissible. Johnson v. S. (Tex. Cr.), 76 S. W. 925.

815-7 Lewis v. S., 85 Miss. 35, 37 S. 497; S. v. McGuire, 193 Mo. 215, 91 S. W. 939; Blackwell v. S. (Tex. Cr.), 73 S. W. 960; Johnson v. S. (Tex. Cr.), 107 S. W. 52.

Proof of ownership not very strictly required. S. v. Peebles, 178 Mo. 475, 77 S. W. 518; Scoville v. S. (Tex. Cr.), 81 S. W. 717 (occupancy and possession sufficient).

816-9 S. v. Wright (Del.), 66 A. 364; P. v. Evans, 150 Mich. 443, 114 N. W. 223.

Actual force need not be proved. Hays v. S. (Tex. Cr.), 100 S. W. 926.

Breaking by detective without a felonious intent but at the instigation of the defendant, is an unlawful breaking. C. v. Seybert, 4 Pa. C. C. 152.

817-10 Dupree v. S (Ala.), 42 S. 1004; Gilbert v. S., 116 Ga. 819, 43 S. E. 47; S. v. Arthur (Ia.), 109 N. W. 1083; S. v. Donovan, 125 Ia. 239, 101 N. W. 122; S. v. Swift, 120 Ia. 8, 94 N. W. 269; S. v. Peebles, 178 Mo. 475, 77 S. W. 518; S. v. Helms, 179 Mo. 280, 78 S. W. 592; Berry v. S. (Tex. Cr.), 91 S. W. 579; Green v. S., 49 Tex. Cr. 238, 90 S. W. 1115; Miller v. S. (Tex. Cr.), 77 S. W. 800; Winsky v. S., 126 Wis. 99, 105 N. W. 480.

Cross-examination as to custom of closing a door, proper. Adkinson v. S., 48 Fla. 1, 37 S. 522.

817-11 Keeler v. S., 73 Neb. 441, 103 N. W. 64; S. v. Thompson, 24 Utah 314, 67 P. 789.

818-13 S. v. Richards, 29 Utah,

310, 81 P. 142; Winsky v. S., 126 Wis. 99, 105 N. W. 480.

818-15 S. v. Wright (Del.), 66 A. 364; Taylor v. S. (Miss.), 37 S. 498.

818-16 S. v. Williams, 120 Ia. 36, 94 N. W. 255.

818-17 Russell v. S. (Ala.), 38 S. 291; P. v. Noon, 1 Cal. App. 44, 81 P. 746; Walker v. S., 44 Fla. 466, 32 S. 954; Brown v. S., 85 Miss. 27, 37 S. 497; S. v. Peebles, 178 Mo. 475, 77 S. W. 518; Moseley v. S., 43 Tex. Cr. 559, 67 S. W. 414; Del-Mont v. S. (Wyo.), 88 P. 623.

820-18 **Testimony as to other larcenies** by defendant admissible to prove intent. P. v. Nagle, 137 Mich. 88, 100 N. W. 273.

820-19 See Long v. S., 81 Miss. 448, 33 S. 224.

820-20 **Evidence of other crimes** admissible to establish the res gestae, to prove a relevant or competent fact connecting defendant with the crime charged, to explain the intent of the defendant, or to make out his guilt by circumstances. Glenn v. S. (Tex. Cr.), 76 S. W. 757; Perry v. S. (Tex. Cr.), 78 S. W. 513; Johnson v. S. (Tex. Cr.), 107 S. W. 52; Bright v. S. (Tex. Cr.), 74 S. W. 912; Herndon v. S. (Tex. Cr.), 99 S. W. 558.

821-21 Russell v. S. (Ala.), 38 S. 291; Leonard v. S. (Ala.), 43 S. 214; Ragland v. S., 71 Ark. 65, 70 S. W. 1039 (plat showing tracks, etc., admissible); Cook v. S., 80 Ark. 495, 97 S. W. 683 (previous attempt admissible); P. v. Lowrie, 4 Cal. App. 137, 87 P. 253 (evidence that burglarious tools were not found upon a search of defendant's room, is inadmissible); Jenkins v. S., 2 Ga. App. 684, 58 S. E. 1115; Miller v. P., 229 Ill. 376, 82 N. E. 391; Bruen v. P., 206 Ill. 417, 69 N. E. 24 (possession of keys of other buildings admissible); S. v. Leonard (Ia.), 112 N. W. 784 (possession of burglarious tools by a confederate); S. v. Arthur (Ia.), 109 N. W. 1083; S. v. Williams, 120 Ia. 36, 94 N. W. 255; S. v. Toohey, 203 Mo. 674, 102 S. W. 530; Brott v. S., 70 Neb. 395, 79 N. W. 593 (actions of bloodhounds inadmissible); P. v. Loomis, 178 N. Y. 400, 70 N. E. 919, (evidence of former burglary, incompetent); Hollengshead v. S. (Tex. Cr.), 67 S. W. 114; Bartley v. S., 47 Tex. Cr. 41, 83 S. W. 190; McAnally v. S. (Tex. Cr.), 73 S. W. 404; Odell v. S. (Tex. Cr.), 71 S. W. 971; McCoy v. S., 48 Tex. Cr. 30, 85 S. W. 1072 (possession of skeleton key); S. v. Royce, 38 Wash. 111, 80 P. 268 pawn ticket unlawfully taken from defendant, admissible.)

822-22 Reid v. S. (Miss.), 38 S. 320; S. v. DeWitt, 191 Mo. 51, 90 S. W. 77.

822-23 Leonard v. S. (Ala.), 43 S. 214; Dupree v. S., 148 Ala. 620, 42 S. 1004; Russell v. S. (Ala.), 38 S. 291; Cowan v. S., 136 Ala. 101, 34 S. 193; S. v. Leonard (Ia.), 112 N. W. 784; Kennedy v. S., 71 Neb. 765, 99 N. W. 645; S. v. Deatherage, 35 Wash. 326, 77 P. 504.

Attempt to escape. — Kennedy v. S., 71 Neb. 765, 99 N. W. 645.

823-24 S. v. Bates, 182 Mo. 70, 81 S. W. 408; Keeler v. S., 73 Neb. 441, 103 N. W. 64; Blackwell v. S. (Tex. Cr.), 73 S. W. 960; Taylor v. S. (Tex. Cr.), 107 S. W. 58; Del-mont v. S. (Wyo.), 88 P. 623.

823-25 Dupree v. S., 148 Ala. 620, 42 S. 1004; S. v. Armstrong, 170 Mo. 406, 70 S. W. 874; Jackson v. S., 49 Tex. Cr. 215, 91 S. W. 788; S. v. Royce, 38 Wash. 111, 80 P. 268.

Confession of petit larceny not admissible to prove burglary. Richardson v. S. (Miss.), 33 S. 441.

823-26 McCormick v. S., 141 Ala. 75, 37 S. 377; Gunter v. S., 79 Ark. 432, 96 S. W. 181; P. v. Lang, 142 Cal. 482, 76 P. 232; P. v. Lowrie, 4 Cal. App. 137, 87 P. 253; Jackson v. S., 49 Fla. 3, 38 S. 599; Gravitt v. S., 114 Ga. 841, 40 S. E. 1003, 88 Am. St. 63; Flanaghan v. P., 214 Ill. 170, 73 N. E. 347; Miller v. P., 229 Ill. 376, 82 N. E. 391; S. v. Donavan, 125 Ia. 239, 101 N. W. 122; S. v. Brundige, 118 Ia. 92, 91 N. W. 920; S. v. Williams, 120 Ia. 36, 94 N. W. 255; S. v. Swift, 120 Ia. 8, 94 N. W. 269; S. v. Raphael, 123 Ia. 452, 99 N. W. 151, 101 Am. St. 334; S. v. Steidley (Ia.), 113 N. W. 333; Short v. C., 25 Ky. L. R. 451, 76 S. W. 11; P. v. Gregory, 130 Mich. 522, 90 N. W. 414; P. v. Nagle, 137 Mich. 88, 100 N. W. 273; S. v. Armstrong, 170 Mo. 406, 70 S. W. 874; S. v. Drew, 179 Mo. 315, 78 S. W. 594, 101 Am. St. 474 (monographic note); S. v. Toohey, 203 Mo. 674, 102 S. W.

530; Carano v. S., 3 Ohio C. C. (N. S.) 629; Johnson v. S. (Tex. Cr.), 107 S. W. 52; Perry v. S. (Tex. Cr.), 78 S. W. 513; Strickland v. S. (Tex. Cr.), 78 S. W. 689; Mass v. S. (Tex. Cr.), 81 S. W. 46; Archibald v. S., 47 Tex. Cr. 153, 83 S. W. 189; Nightingale v. S. (Tex. Cr.), 95 S. W. 531; Branch v. C., 100 Va. 837, 41 S. E. 862; Winsky v. S., 126 Wis. 99, 105 N. W. 480; Delmont v. S. (Wyo.), 88 P. 623.

Possession by those connected with defendant. Pointer v. S., 148 Ala. 676, 41 S. 929.

Possession by confederate. — P. v. Wilson, 133 Mich. 517, 95 N. W. 536.

Possession by wife of defendant. Jenkins v. S., 2 Ga. App. 684, 58 S. E. 1115.

Possession must be exclusive. P. v. Barker, 144 Cal. 705, 78 P. 266; S. v. Wright (Del.), 66 A. 364.

Identification of property necessary. Jordan v. S., 119 Ga. 443, 46 S. E. 679; Stevens v. S. (Tex. Cr.), 95 S. W. 505.

Unlawful seizure no defense. S. v. Howard, 203 Mo. 600, 102 S. W. 504.

Possession of other stolen goods. S. v. Brady, 121 Ia. 561, 91 N. W. 801, 97 N. W. 62; S. v. Hullen, 133 N. C. 656, 45 S. E. 513.

825-27 McCormick v. S., 141 Ala. 75, 37 S. 377.

826-28 See S. v. Mahoney, 122 Ia. 168, 97 N. W. 1089.

CANCELLATION OF INSTRUMENTS [Vol. 2.]

828-1 Mortimer v. McMullen, 102 Ill. App. 593, 202 Ill. 413, 67 N. E. 20; Skajewski v. Skaya (Minn.), 114 N. W. 247; Burrows v. Fitch (W. Va.), 57 S. E. 283.

829-2 Derby v. Donahoe, 208 Mo. 684, 106 S. W. 632.

829-3 McCaskill v. Lumb. Co. (Ala.), 44 S. 405; Turner v. Washburn, 25 Ky. L. R. 2198, 80 S. W. 460.

829-4 Smith v. Moore, 142 N. C. 277, 55 S. E. 275; Gardner v. McConlogue, 8 Pa. C. C. 424.

829-7 Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276; Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56. See Champeau v. Champeau (Wis.), 112 N. W. 36.

829-8 Cooper v. Moore, 55 Misc. 102, 104 N. Y. S. 1049; Teter v. Teter, 59 W. Va. 449, 53 S. E. 779; Vance v. Davis, 118 Wis. 548, 95 N. W. 939.

829-9 Britt v. Britt, 30 Pa. C. C. 217.

830-12 Moore v. Baker, 65 N. J. Eq. 104, 55 A. 106; Harpold v. Moss (Tex. Civ.), 106 S. W. 1131.

830-13 Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213.

830-17 Dorris v. McManus, 3 Cal. App. 576, 86 P. 909; Mortimer v. McMullen, 102 Ill. App. 593, 202 Ill. 413, 67 N. E. 20; Church v. Marsh, 133 Ia. 51, 110 N. W. 161; Skajewski v. Skaya (Minn.), 114 N. W. 247; Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573; Brown v. Click, 59 W. Va. 172, 53 S. E. 16; Burrows v. Fitch (W. Va.), 57 S. E. 283; Boyle v. Robinson, 129 Wis. 567, 109 N. W. 623; Champeau v. Champeau (Wis.), 112 N. W. 36; Winn v. Itzel, 125 Wis. 19, 103 N. W. 220.

Burden of proving knowledge of fraud, so as to set running the statute of limitations, is upon the defendant. Smith v. Linder, 77 S. C. 535, 58 S. E. 610.

Where fraud is alleged there can be no recovery merely upon proof of mistake. Burk v. Johnson, 146 Fed. 209, 76 C. C. A. 567. See Miller v. Piatt, 33 Pa. Super. 547.

831-21 Harraway v. Harraway, 136 Ala. 499, 34 S. 836; Cannon v. Gilmer, 135 Ala. 302, 33 S. 659.

Husband benefiting by wife's deed. Cheuvront v. Cheuvront, 54 W. Va. 171, 46 S. E. 233.

831-22 Griffin v. Miller, 188 Mo. 327, 87 S. W. 455.

831-24 Vance v. Davis, 118 Wis. 548, 95 N. W. 939.

831-27 Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56; Leach v. Hirshman, 90 Miss. 723, 44 S. 33; Krause v. Krause (N. J. Eq.), 55 A. 1095.

831-28 Reese v. Schutte, 133 Ia. 681, 108 N. W. 525; Cooper v. Moore, 55 Misc. 102, 104 N. Y. S. 1049.

832-30 Peck v. Bartelme, 220 Ill. 199, 77 N. E. 216; Chadwell v. Reed,

198 Mo. 359, 95 S. W. 227; Teter v. Teter, 59 W. Va. 449, 53 S. E. 779.

Mere fact of conveyance to a stranger, does not shift the burden of proof from the children of a grantor. Hayman v. Wakeham, 133 Mich. 363, 94 N. W. 1062.

832-33 Hudson v. Hudson, 144 N. C. 449, 57 S. E. 162. See Reese v. Shutte, 133 Ia. 681, 108 N. W. 525.

832-34 Maze v. Maze, 30 Ky. L. R. 679, 99 S. W. 336 (parties to antenuptial contract); Horner v. Bell, 102 Md. 435, 62 A. 736; Sheehan v. Erbe, 77 App. Div. 176, 79 N. Y. S. 43; Goodhue v. Goodhue, 3 Ohio N. P. (N. S.) 225; Owings v. Turner, 48 Or. 462, 87 P. 160.

833-36 Western Mfg. Co. v. Colton, 31 Ky. L. R. 1130, 104 S. W. 758.

Subsequent declarations of grantor, inadmissible. Adair v. Craig, 135 Ala. 332, 33 S. 902.

833-37 Nettleton v. Coryl, 20 Pa. Super. 250.

On an issue of mental incapacity, grantor may be produced in court. Beach v. Kent, 142 Mich. 347, 105 N. W. 867.

833-40 Burrows v. Fitch (W. Va.), 57 S. E. 283; Hale v. Hale, (W. Va.), 59 S. E. 1056.

833-41 Spencer v. Merwin (Conn.), 68 A. 370.

834-42 Brown v. Click, 59 W. Va. 172, 53 S. E. 16.

Preponderance of evidence sufficient to support finding of fraud by lower court. Moore v. Irish, 43 Wash. 640, 86 P. 942.

834-43 Stapleton v. Haight (Ia.), 113 N. W. 351; Miller v. Pratt, 33 Pa. Super. 547.

834-46 Mastin v. Noble, 157 Fed. 506; Treat v. Russell, 128 Fed. 847, 63 C. C. A. 575; Smith v. Collins, 148 Ala. 672, 41 S. 825; McNutt v. McNutt, 76 Ark. 14, 88 S. W. 589; Pittinger v. Pittinger, 208 Ill. 582, 70 N. E. 699; Mortimer v. McMullen, 102 Ill. App. 593, 202 Ill. 413, 67 N. E. 20; Western Mfg. Co. v. Cotton & L., 31 Ky. L. R. 1130, 104 S. W. 758; Smith v. Humphreys, 104 Md. 285, 65 A. 57; Shajewski v. Skaya (Minn.), 114 N. W. 247; Wilson v. Maxon, 56 W. Va. 194, 49 S. E. 123; Lockwood v. Allen, 113 Wis. 474, 89 N. W. 492; First Nat. Bk. v. Buetow, 123 Wis. 285, 101 N. W. 927.

Complainant cannot maintain his case by his own testimony, alone. Marsh v. Cortis, 150 Fed. 121, 80 C. C. A. 75.

835-51 Hagan v. Ward, 86 App. Div. 620, 83 N. Y. S. 436.

835-52 Hardy v. Dyas, 203 Ill. 211, 67 N. E. 852.

835-53 Mitchell Mfg. Co. v. Kempner & Co., 84 Ark. 349, 105 S. W. 880.

835-55 Scott v. Hackfeld, 17 Haw. 66.

836-57 Uncorroborated testimony of grantor, insufficient. Britt v. Britt, 30 Pa. C. C.. 217.

836-59 Hall v. Winam, 14 Haw. 306.

836-61 Mental incapacity should be clearly established. Fehr v. Edwards, 129 Ia. 61, 105 N. W. 349.

837-63 Sterling v. Sterling, 98 App. Div. 426, 90 N. Y. S. 306. See Chadwell v. Reed, 198 Mo. 359, 95 S. W. 227.

837-66 Treat v. Russell, 128 Fed. 847, 63 C. C. A. 575; Bluett v. Wilce, 43 Wash. 492, 86 P. 853.

837-68 Spoonheim v. Spoonheim, 14 N. D. 380, 104 N. W. 845.

CAPACITY [Vol. 2.]

Professional capacity, 850-48.

839-1 Demaree v. C., 28 Ky. L. R. 1374, 91 S. W. 1131 (that accused's lack of intelligence amounted almost to idiocy); Citzens' R. Co. v. Robertson (Tex. Civ.), 91 S. W. 609.

Capacity to form criminal intent by a boy ten years of age may be proved by testimony of a person who knew him, to the effect that he was bright mentally and talked with good sense. Neville v. S., 148 Ala. 681, 41 S. 1011.

Ability of a person to converse intelligently cannot be testified by witness. Ames v. Ames, 75 Neb. 473, 106 N. W. 584.

840-3 Citizens' R. Co. v. Robertson (Tex. Civ.), 91 S. W. 609 (opinion of witnesses whether plaintiff had sufficient intelligence to appre-

ciate the danger of going on a street-car track without looking and listening, inadmissible).

840-6 **Judicial notice** taken that persons engaged in business who can neither read nor write have their faculty of memory more acutely developed. P. v. Martin, 32 N. Y. S. 933.

840-7 Saffer v. Mast, 223 Ill. 108, 79 N. E. 32; Simmons v. Kelsey (Neb.), 107 N. W. 122. See Nelson v. Thompson (N. D.), 112 N. W. 1058.

841-12 Johnson v. Highland 124 Wis. 597, 102 N. W. 1085 (opinion of witness whether another person had the necessary knowledge and ability to steer an engine safely).

843-19 Louisville etc. R. Co. v. Daniel, 28 Ky. L. R. 1146, 91 S. W. 691 (full discussion); Buffalo C. Co. v. Hodges, 30 Ky. L. R. 346, 98 S. W. 274 (habits of industry or laziness, admissible); Cameron Mill Co. v. Anderson, 98 Tex. 156, 78 S. W. 8, *aff.* 34 Tex. Civ. 105, 81 S. W. 282 (party injured but not killed, evidence admissible). *Compare* Davis v. Hornman, 141 Ala. 479, 37 S. 789.

843-20 See Illinois C. R. Co. v. Andrews, 116 Ill. App. 8.

Incapacity may be so proved. So. Kansas R. Co. v. Sage (Tex. Civ.), 80 S. W. 1038.

843-21 Lake Shore etc. R. Co. v. Teeters, 166 Ind. 335, 77 N. E. 599, *aff.* 74 N. E. 1014 (testimony by the party injured).

Opinion of plaintiff as to earning capacity as evidence of extent of injury. Patton v. Sanborn, 133 Ia. 650, 110 N. W. 1032.

843-22 Reiter-C. Mfg. Co. v. Hamlin, 144 Ala. 192, 40 S. 280, Southern Car Co. v. Bartlett, 137 Ala. 234, 34 S. 20; Bonneau v. R. Co. (Cal.), 93 P. 106; Chicago C. R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; Waldie v. R. Co., 78 App. Div. 557, 79 N. Y. S. 922; Lewes v. Crane, 78 Vt. 216, 62 A. 60 (earnings shortly before). See Southern C. O. Co. v. Skipper, 125 Ga. 368, 59 S. E. 110.

844-23 Northern P. R. Co. v. Wendel, 156 Fed. 336; So. R. Co. v. Howell, 135 Ala. 639, 34 S. 6; W. Chicago R. Co. v. Dougherty, 209 Ill. 241, 70 N. E. 586; Bourke v. Butte Co., 33 Mont. 267, 83 P. 470; Galveston etc. R. Co. v. Still (Tex. Civ.), 100 S. W. 176; St. Louis etc. R. Co. v. Knowles (Tex. Civ.), 99 S. W. 867; So. R. Co. v. Stockdon, 106 Va. 693, 56 S. E. 713.

Evidence of income derived in violation of law, inadmissible. Murray v. R. Co., 118 App. Div. 35, 102 N. Y. S. 1026.

844-24 **Offer of higher wages** and promotion, admissible. Montgomery v. R. Co., 73 S. C. 503, 53 S. E. 987. *Compare* Mississippi etc. R. Co. v. Hardy, 88 Miss. 732, 41 S. 505.

Testimony of engineer that he had learned no business or trade, admissible. Southern K. R. Co. v. Sage (Tex. Civ.), 80 S. W. 1038.

845-25 Gulf etc. R. Co. v. Sauter (Tex. Civ.), 103 S. W. 201 (prospective musical talent, where fingers were injured).

Evidence of vocation and earnings of the father, admissible to prove the possible earning capacity of a minor son. Fishburn v. R. Co., 127 Ia. 483, 103 N. W. 481. *Compare* Brown v. R. Co., 127 Mo. App. 499, 106 S. W. 83.

845-26 Phillips v. R. Co., 4 Q. B. D. (Eng.) 406, 5 Q. B. D. (Eng.) 78 (physician's practice); Comstock v. R. Co., 77 Conn. 65, 58 A. 465.

Character and magnitude of business may be shown. Burns v. Dunham, 148 Cal. 208, 82 P. 959; Heer v. Warren-S. Co., 118 Wis. 57, 94 N. W. 789.

845-27 Louisville etc. R. Co. v. Daniel, 28 Ky. L. R. 1146, 91 S. W. 691.

Conviction of crime two years previous, inadmissible. Missouri etc. R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493.

845-31 Morrow v. Mfg. Co., 70 S. C. 242, 49 S. E. 573.

845-32 Town of Elba v. Bullard (Ala.), 44 S. 412.

846-37 Semet S. Co. v. Wilcox, 143 Fed. 839, 74 C. C. A. 635.

846-38 Dunn & L. Bros. v. Gunn (Ala.), 42 S. 686; Southern R. Co. v. Dean, 128 Ga. 366, 57 S. E. 702; Southern K. R. Co. v. Sage (Tex. Civ.), 80 S. W. 1038; Houston etc. R. Co. v. Fanning (Tex. Civ.), 91 S. W. 344 (party may testify that on account of his injuries his earn-

ing capacity by manual labor has depreciated one-half).

847-39 Federal Betterment Co. v. Reeves (Kan.), 93 P. 627; Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273; Young v. Beveridge (Neb.), 115 N. W. 766 ("whether the deceased was able to do the work of a common laborer is not a matter so exclusively within the domain of medical science that witnesses who were acquainted with him . . . could not testify in reference thereto"). But see St. Louis R. Co. v. Dempsey (Tex. Civ.), 89 S. W. 786; Jesse v. S., 46 Tex. Cr. 444, 80 S. W. 999.

Effect of injury. — San Antonio Tr. Co. v. Flory (Tex. Civ.), 100 S. W. 200. But see Wells, F. & Co. v. Boyle (Tex. Civ.), 87 S. W. 164.

848-40 Dixon v. S., 139 Ala. 104, 36 S. 784 (ability of defendant to walk a certain distance without certain effects appearing). See Altig v. Altig (Ia.), 114 N. W. 1056.

850-48 Professional capacity. Father is qualified to prove the elocutionary ability of his daughter. Cleveland etc. R. Co. v. Hadley (Ind. App.), 82 N. E. 1025.

851-52 Blunck v. R. Co. (Ia.), 115 N. W. 1013 (testimony that bridges and culverts were insufficient to carry off flood water competent where it appears that witnesses testified as to conditions actually within their knowledge).

851-59 Baker v. Cotney, 142 Ala. 566, 38 S. 131; Colorado Co. v. York, 38 Colo. 239, 88 P. 181.

852-64 Size of a car may be shown by testimony as to size of other cars in same series. Chicago etc. R. Co. v. Howell, 208 Ill. 155, 70 N. E. 15.

CARRIERS [Vol. 2.]

Ownership of means of transportation, 864-3; *Circumstantial evidence,* 879-64; *Connecting carriers,* 879-64.

864-3 Ownership of means of transportation need not be proved. Cownie G. Co. v. Transp. Co., 130 Ia. 327, 106 N. W. 749, 4 L. R. A. (N. S.) 1060.

865-4 Texas & P. R. Co. v. Ray Bros., 37 Tex. Civ. 622, 84 S. W. 691.

865-5 Bank of Irwin v. Exp. Co., 127 Ia. 1, 102 N. W. 107.

865-6 Clark v. R. Co., 189 N. Y. 93, 81 N. E. 766; Reel v. Exp. Co., 30 Pa. C. C. 304. See Gulf etc. R. Co. v. Jackson, 99 Tex. 343, 89 S. W. 968.

865-7 St. Louis etc. R. Co. v. Kilberry, 83 Ark. 87, 102 S. W. 894; Wabash R. Co. v. Thomas, 222 Ill. 337; Chicago etc. R. Co. v. Igo, 130 Ill. App. 373; Isham v. R. Co., 112 App. Div. 612, 98 N. Y. S. 609.

866-8 Consignee presumed to be owner. — Bank v. Exp. Co., 127 Ia. 1, 102 N. W. 107.

866-9 Carpenter v. R. Co. (Del.), 64 A. 252; Adams Exp. Co. v. Adams, 29 App. Cas. (D. C.) 250; Cleveland etc. R. Co. v. Potts, 33 Ind. App. 564, 71 N. E. 685, (bill of lading varying shipping receipt); Chicago etc. R. Co. v. Dunlap, 71 Kan. 67, 80 P. 34; Jenkins v. R. Co., 73 S. C. 289, 53 S. E. 480.

866-10 Wabash R. Co. v. Thomas, 222 Ill. 337; Pennsylvania R. Co. v. Anda Co., 131 Ill. App. 426; Balt. etc. R. Co. v. Fox, 113 Ill. App. 180; Atchison etc. R. Co. v. Bilinsky, 107 Ill. App. 504; Adams Exp. Co. v. Bratton, 106 Ill. App. 563; Powers Merc. Co. v. Wells, 93 Minn. 143, 100 N. W. 735.

866-11 Cau v. R. Co., 194 U. S. 427; Atlantic etc. R. Co. v. Dexter, 50 Fla. 180, 39 S. 634, 111 Am. St. 116; Cleveland etc. R. Co. v. Patton, 203 Ill. 376, 67 N. E. 804; Evansville etc. R. Co. v. Kevekordes (Ind. App.), 69 N. E. 1022; Gerry v. Exp. Co., 100 Me. 519, 62 A. 498; DeWolff v. Exp. Co. (Md.), 67 A. 1099; Singer v. Despatch Co., 191 Mass. 499, 77 N. E. 882; Royal C. Co. v. Weir, 48 Misc. 376, 95 N. Y. S. 575; Dobson v. R. Co., 38 Misc. 582, 78 N. Y. S. 82. And see "ASSENT."

Contract signed by shipper. Georgia etc. R. Co. v. Greer, 2 Ga. App. 516, 58 S. E. 782.

867-13 Evansville etc. R. Co. v. Kevekordes (Ind. App.), 69 N. E. 1022; U. S. Exp. Co. v. Joyce, 36 Ind. App. 1, 69 N. E. 1015; Chicago etc. R. Co. v. Hare, 36 Ind. App. 422, 75 N. E. 867 (recitals prima facie evidence). *Compare* Myers v.

R. Co., 120 Mo. App. 288, 96 S. W. 787.

867-14 St. Louis etc. R. Co. v. Pearce, 82 Ark. 353, 101 S. W. 760; Kalina v. R. Co., 69 Kan. 172, 76 P. 438. *Compare* The Tampico, 151 Fed. 689; Hoye v. R. Co., 191 N. Y. 101, 83 N. E. 586.

867-15 St. Louis etc. R. Co. v. Bashear (Tex. Civ.), 108 S. W. 1032; Texas etc. R. Co. v. Crowley (Tex. Civ.), 86 S. W. 342; St. Louis & S. F. R. Co. v. Honea (Tex. Civ.), 84 S. W. 267.

867-16 Missouri etc. R. Co v. Com. Co. (Tex. Civ.), 87 S. W. 871.

868-23 **Contract of carriage** need not be express. Southern R. Co. v. Johnson, 2 Ga. App. 36, 58 S. E. 333.

869-27 Clark v. Clyde S. S. Co., 148 Fed. 243 (not conclusive evidence); Central of Ga. R. Co. v. Henderson (Ala.), 44 S. 542 (receipt); Musselman v. R. Co., 31 Ky. L. R. 908, 104 S. W. 337.

869-28 Southern R. Co. v. Allison, 115 Ga. 635, 42 S. E. 15 (not admissible in behalf of the carrier).

870-34 Missouri etc. R. Co. v. Patrick, 144 Fed. 632, 75 C. C. A. 434 (unsigned bill of lading is evidence of an oral contract of shipment); Southern Exp. Co. v. Hill, 81 Ark. 1, 98 S. W. 371; St. Louis etc. R. Co. v. Watkins (Tex. Civ.), 100 S. W. 162 (may be by circumstantial evidence).

872-40 Ragsdale v. R. Co., 69 S. C. 429, 48 S. E. 466; Texas & P. R. Co. v. Lynch (Tex. Civ.), 87 S. W. 884. See Walker v. R. Co., 76 S. C. 308, 56 S. E. 952.

873-41 **Parol evidence** competent to prove delivery although the bill of lading is not produced. Atlantic etc. R. Co. v. Dexter, 50 Fla. 180, 39 S. 634, 111 Am. St. 116.

873-43 San Antonio & A. P. R. Co. v. Timon (Tex. Civ.), 99 S. W. 418.

874-45 See Cohen v. R. Co. (Tex. Civ.), 98 S. W. 437.

875-47 Southern R. Co. v. Cofer (Ala.), 43 S. 102.

875-48 Stearns v. R. Co., 148 Mich. 271, 111 N. W. 769; Cappel v. Weir, 45 Misc. 419, 90 N. Y. S. 394; Needy v. R. Co., 22 Pa. Super. 489.

876-49 Northern Pac. R. Co. v. Kempton, 138 Fed. 992, 71 C. C. A. 246 (contract silent as to time and manner of performance).

877-50 Southern Exp. Co. v. Hill, 84 Ark. 368, 105 S. W. 877 (receipt as evidence of marks as to destination); Musselman v. R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Illinois Cent. R. Co. v. Nelson, 30 Ky. L. R. 114, 97 S. W. 757 (testimony must be clear to overcome it); Strawn v. R. Co., 120 Mo. App. 135, 96 S. W. 488; Roy v. R. Co., 42 Wash. 572, 85 P. 53 (want of authority of carrier's agent to issue receipt may be shown, although the bill of lading has been negotiated). And see Swedish Am. Bk. v. R. Co., 96 Minn. 436, 105 N. W. 69.

877-51 Missouri etc. R. Co. v. Simonson, 64 Kan. 802, 68 P. 653, 91 Am. St. 248, 57 L. R. A. 765 (statute making a bill of lading conclusive evidence of weight of goods shipped, held unconstitutional).

877-53 Cafiero v. Welsh, 8 Phila. (Pa.) 130; Texas & P. R. Co. v. Kelly (Tex. Civ.), 74 S. W. 343 (by terminal carrier).

878-56 Foley v. R. Co., 96 N. Y. S. 182; Thyll v. R. Co., 84 N. Y. S. 175. See Jean v. Flagg, 45 Misc. 421, 90 N. Y. S. 289.

878-61 St. Louis etc. R. Co. v. Musgrove (Ala.), 45 S. 229; St. Louis etc. R. Co. v. Keys, 6 Ind. Ter. 396, 98 S. W. 138; Thaxter v. R. Co., 123 Mo. App. 636, 100 S. W. 1102; Walker Bros. v. R. Co., 137 N. C. 163, 49 S. E. 84; Watson v. R. Co., 145 N. C. 236, 59 S. E. 55 (under a statute imposing a penalty for delay, plaintiff has the burden of proof).

879-62 **Non-arrival of goods** after a reasonable time is sufficient evidence of loss. Southern R. Co. v. Montag, 1 Ga. App. 649, 57 S. E. 933.

879-64 **Circumstantial evidence.** Missouri etc. R. Co. v. Simonson, 64 Kan. 802, 68 P. 653, 91 Am. St. 248, 57 L. R. A. 765. Fact that seal on a car was unbroken is competent on the issue whether the carrier delivered all the goods intrusted to it.

Connecting carriers. — Receipt of connecting carrier, averring damage to goods when received, not admissible to charge the initial carrier. Hirson v. R. Co., 99 N. Y. S. 431.

879-65 Yazoo etc. R. Co. v. Cox (Miss.), 40 S. 547; Fullbright v. R. Co., 118 Mo. App. 482, 94 S. W. 992; McFall v. Wabash R. Co., 117 Mo. App. 477, 94 S. W. 570 (presumption that delay caused by a wreck was negligent); Harper F. Co. v. Exp. Co., 144 N. C. 639, 57 S. E. 458 (presumption of negligence from long delay); Texas & P. R. Co. v. Capper (Tex. Civ.), 84 S. W. 694. See Ficklin v. R. Co., 117 Mo. App. 211, 93 S. W. 861; Ratliff v. R. Co., 118 Mo. App. 644, 94 S. W. 1005; Sterling v. R. Co. (Tex. Civ.), 86 S. W. 655.

880-66 Taft Co. v. Exp. Co., 133 Ia. 522, 110 N. W. 897.

Contributory negligence must be established by the carrier. Cook v. R. Co. (Neb.), 110 N. W. 718.

880-67 Louisville etc. R. Co. v. Smitha, 145 Ala. 686, 40 S. 117; Coweta County v. R. Co. (Ga. App.), 60 S. E. 1018; Ohlen v. R. Co., 2 Ga. App. 323, 58 S. E. 511; Pennsylvania R. Co. v. Anda Co., 131 Ill. App. 426; Michigan Cent. R. Co. v. Osmus, 129 Ill. App. 79; Adams Exp. Co. v. Walker, 119 Ky. 121, 83 S. W. 106, 67 L. R. A. 412; Nairn v. R. Co., 126 Mo. App. 707, 106 S. W. 102; Alexander v. McNally, 112 Mo. App. 563, 87 S. W. 1; Rieser v. Exp. Co., 45 Misc. 632, 91 N. Y. S. 170; Hoffberg v. Bumford, 88 N. Y. S. 940; Meredith v. R. Co., 137 N. C. 478, 50 S. E. 1; Everett v. R. Co., 138 N. C. 68, 50 S. E. 557, 1 L. R. A. (N. S.) 985; Pennsylvania R. Co. v. Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443; Nashville etc. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031; Gulf etc. Co. v. Roberts (Tex. Civ.), 85 S. W. 479; Gulf etc. R. Co. v. Oil Co. (Tex. Civ.), 99 S. W. 430; St. Louis etc. R. Co. v. McIntyre, 36 Tex. Civ. 399, 82 S. W. 346.

Proof of delivery in an injured condition must be accompanied with proof that the goods were received by the carrier in good condition. Lynch v. R. Co., 90 N. Y. S. 378.

Presumption not applicable where specific acts of negligence are averred. Galm v. R. Co., 113 Mo. App. 591, 87 S. W. 1015.

881-68 Southern R. Co. v. Levy, 144 Ala. 614, 39 S. 95; Southern R. Co. v. Aldredge, 142 Ala. 368, 38 S. 805; Adams Exp. Co. v. Walker, 119 Ky. 121, 83 S. W. 106; Merritt C. Co. v. R. Co., 128 Mo. App. 420, 107 S. W. 462. See McCord v. R. Co., 76 S. C. 469, 57 S. E. 477.

Carrier has burden of proving a claim of ownership in itself of the property. Valentine v. R. Co., 187 N. Y. 121, 79 N. E. 849.

881-70 Proof of delay, insufficient in an action for negligent delay. McCrary v. R. Co., 109 Mo. App. 567, 83 S. W. 82.

882-72 Williams v. R. Co., 117 Ga. 830, 43 S. E. 980; Bushnell v. R. Co., 118 Mo. App. 618, 94 S. W. 1001; Anderson v. R. Co., 93 Mo. App. 677, 67 S. W. 707; Van Akin v. R. Co., 92 App. Div. 23, 87 N. Y. S. 871; Thyll v. R. Co., 84 N. Y. S. 175; Dobson v. R. Co., 38 Misc. 582, 78 N. Y. S. 82; Davenport v. R. Co., 10 Pa. Super. 47; Peterson v. R. Co., 19 S. D. 122, 102 N. W. 595; Nashville etc. R. Co. v. Stone, 112 Tenn. 348, 79 S. W. 1031; Hecht v. R. Co. (Wis.), 113 N. W. 68. *Compare* Georgia etc. R. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807; Norton v. Exp. Co., 123 Mo. App. 233, 100 S. W. 502; Rowan v. Wells, 80 App. Div. 31, 80 N. Y. S. 226; St. Louis etc. R. Co. v. Brosius (Tex. Civ.), 105 S. W. 1131; Texas & P. R. Co. v. Dishman (Tex. Civ.), 85 S. W. 319.

Presumption of negligence from failure to deliver arises even under a special, limited liability contract. Georgia etc. R. Co. v. Greer, 2 Ga. App. 516, 58 S. E. 782.

883-73 Louisville etc. R. Co. v. Smitha, 145 Ala. 686, 40 S. 117; B. & O. etc. R. Co. v. Fox, 113 Ill. App. 180; Adams Exp. Co. v. Bratton, 106 Ill. App. 563; Chicago etc. R. Co. v. Woodward, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810; Powers v. R. Co., 130 Ia. 615, 105 N. W. 345; Cincinnati etc. R. Co. v. Greening, 30 Ky. L. R. 1180, 100 S. W. 825; Louisville etc. R. Co. v. Brown, 28 Ky. L. R. 772, 90 S. W. 567; Keyes-M. Liv. Co. v. R. Co., 105 Mo. App. 556, 80 S. W. 53; Nelson v. R. Co., 28 Mont. 297, 72 P. 642; Chicago etc. R. Co. v. Slattery (Neb.), 107 N. W. 1045; Trace v. R. Co., 26 Pa. Super. 466; International etc. R. Co. v. Nowaski (Tex. Civ.), 106 S. W. 437; Thomas v. Exp. Co. (Tex. Civ.),

95 S. W. 723. See St. Louis etc. R. Co. v. Kilberry, 83 Ark. 87, 102 S. W. 894; Tiller & S. v. R. Co. (Ia.), 112 N. W. 631 (carrier has burden of showing an excuse for delay); Wente v. R. Co. (Neb.), 112 N. W. 300; Pennsylvania Co. v. Yoder, 1 Ohio C. C. (N. S.) 283.

883-74 Morse v. R. Co., 97 Me. 77, 53 A. 874; Illinois C. R. Co. v. Davis (Miss.), 43 S. 674; Lewis v. R. Co., 71 N. J. L. 339, 59 A. 1117, 70 N. J. L. 132, 56 A. 128.

884-75 Cau v. R. Co., 194 U. S. 427; Louisville R. Co. v. Dunlap, 148 Ala. 23, 41 S. 826; Southern R. Co. v. Levy, 144 Ala. 614, 39 S. 95; Atlanta etc. R. Co. v. Broome, 3 Ga. App. 641, 60 S. E. 355; Southern R. Co. v. Montag, 1 Ga. App. 649, 57 S. E. 933; Georgia So. R. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807; Cownie G. Co. v. Transp. Co., 130 Ia. 327, 106 N. W. 749, 4 L. R. A. (N. S.) 1060; Chicago etc. R. Co. v. Dunlap, 71 Kan. 67, 80 P. 34; Kalina v. R. Co., 69 Kan. 172, 76 P. 438; Tower Co. v. R. Co., 184 Mass. 472, 69 N. E. 348; Kansas City R. Co. v. Heard, 87 Miss. 378, 39 S. 1011; Hurst v. R. Co., 117 Mo. App. 25, 94 S. W. 794; McFall v. R. Co., 117 Mo. App. 477, 94 S. W. 570; Wabash R. Co. v. Sharpe (Neb.), 107 N. W. 758; Chicago etc. R. Co. v. Slattery (Neb.), 107 N. W. 1045; Parker v. R. Co., 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827; Menner v. Del. Co., 7 Pa. Super. 135; Allam v. R. Co., 3 Pa. Super. 335; St. Louis etc. R. Co. v. Brosins (Tex. Civ.), 105 S. W. 1131; Fentiman v. R. Co. (Tex. Civ.), 98 S. W. 939; Bosley v. R. Co., 54 W. Va. 563, 580, 46 S. E. 613.

886-77 Cau v. R. Co., 194 U. S. 427; Washburn-C. Co. v. Johnston, 125 Fed. 273, 60 C. C. A. 187; Jones v. R. Co., 91 Minn. 229, 97 N. W. 893, 103 Am. St. 507; Elam v. R. Co. (Mo. App.), 93 S. W. 851; Grier v. R. Co., 108 Mo. App. 565, 84 S. W. 158.

888-79 Central of Ga. R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679; Atlanta etc. R. Co. v. Broome, 3 Ga. App. 641, 60 S. E. 355; Fockens v. Exp. Co., 99 Minn. 404, 109 N. W. 834 (perishable fruit); Brennisen v. R. Co., 101 Minn. 120, 111 N. W. 945; Brennisen v. R. Co., 100 Minn. 102, 110 N. W. 362.

889-83 Ohlen v. R. Co., 2 Ga. App. 323, 58 S. E. 511; Cohn v. Platt, 48 Misc. 378, 95 N. Y. S. 535; Texas & P. R. Co. v. Kelley (Tex. Civ.), 74 S. W. 343.

890-84 St. Louis & S. F. R. Co. v. Pearce, 82 Ark. 353, 101 S. W. 760; St. Louis etc. Co. v. Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317; Kansas City S. R. Co. v. Embry, 76 Ark. 589, 90 S. W. 15; St. Louis etc. R. Co. v. Birdwell, 72 Ark. 502, 82 S. W. 835; Atlanta etc. R. Co. v. Broome, 3 Ga. App. 641, 60 S. E. 355; Susong v. R. Co., 115 Ga. 361, 41 S. E. 566; Michigan Cent. R. Co. v. Vehicle Co., 124 Ill. App. 158; Powers v. R. Co., 130 Ia. 615, 105 N. W. 345; Cincinnati etc. R. Co. v. Greening, 30 Ky. L. R. 1180, 100 S. W. 825; Bullock v. Despatch Co., 187 Mass. 91, 72 N. E. 256; Cote v. R. Co., 182 Mass. 290, 65 N. E. 400, 94 Am. St. 656; Paterson v. R. Co., 95 Minn. 57, 103 N. W. 621; Jones v. R. Co., 115 Mo. App. 232, 91 S. W. 158; Berkowitz v. R. Co., 109 App. Div. 878, 96 N. Y. S. 825; Huggins v. R. Co. (S. C.), 60 S. E. 694; Cooper v. R. Co., 78 S. C. 81, 58 S. E. 930; Walker v. R. Co. (S. C.), 56 S. E. 952; Willett v. R. Co., 66 S. C. 477, 45 S. E. 93; Cane Hill S. Co. v. R. Co. (Tex. Civ.), 95 S. W. 751; Bibb v. R. Co., 37 Tex. Civ. 508, 84 S. W. 663; Gulf etc. R. Co. v. Pitts, 37 Tex. Civ. 212, 83 S. W. 727; Ft. Worth etc. R. Co. v. Shanley, 36 Tex. Civ. 291, 81 S. W. 1014; Houston etc. R. Co. v. Bath (Tex. Civ.), 90 S. W. 55; Texas & P. R. Co. v. Capper (Tex. Civ.), 84 S. W. 694; Houston & T. C. R. Co. v. Scott, 99 Tex. 326, 89 S. W. 763; Texas & P. R. Co. v. Crowley (Tex. Civ.), 86 S. W. 342; St. Louis etc. R. Co. v. Byers (Tex. Civ.), 90 S. W. 720; Missouri etc. R. Co. v. Mazzie, 29 Tex. Civ. 295, 68 S. W. 56. *Contra*, Rolfe v. R. Co., 144 Mich. 169, 107 N. W. 899; Reason v. R. Co., 150 Mich. 50, 113 N. W. 596; Texas & P. R. Co. v. Scoggin (Tex. Civ.), 90 S. W. 521 (presumption does not apply where shipper accompanies the cattle); Texas etc. R. Co. v. Gray (Tex. Civ.), 99 S. W. 1125; Missouri etc. R. Co. v. Clayton (Tex. Civ.), 84 S. W. 1069 (presumption is rebuttable).

Connecting carrier which is shown

to have received part of a bill of goods is presumed to have received all. Bradley v. R. Co., 77 S. C. 317, 57 S. E. 1101.

Burden of proof on initial carrier to show that the damage did not occur on its line. Norfolk etc. R. Co. v. Wilkinson, 106 Va. 775, 56 S. E. 808.

Part of damage having been traced to initial carrier, there is a presumption that it is responsible for all. Cincinnati etc. R. Co. v. Pless, 3 Ga. App. 400, 60, S. E. 8.

Initial carrier has burden of proving that delay was caused by connecting carrier. Watson v. R. Co., 145 N. C. 236, 59 S. E. 55.

Statutory presumption from failure to furnish shipper information on demand. Russell v. R. Co., 87 Miss. 806, 40 S. 1015.

Sufficiency of receipt under South Carolina statute. Jonesville Mfg. Co. v. R. Co., 77 S. C. 480, 58 S. E. 422.

Effect of recitals in receipt given prior carrier. Southern R. Co. v. Waters, 125 Ga. 520, 54 S. E. 620.

891-85 **Proof** that carrier received goods in good condition casts burden on it to show a delivery in good condition to connecting carrier. Orem F. Co. v. R. Co. (Md.), 66 A. 436.

891-86 Beede v. R. Co., 90 Minn. 36, 95 N. W. 454.

891-87 Willett v. R. Co., 66 S. C. 477, 45 S. E. 93 (expressman is a connecting carrier).

891-88 Walter v. R. Co., 142 Ala. 474, 39 S. 87; R. Co. v. Stevens, 29 Ky. L. R. 1079, 96 S. W. 888 (initial carrier has burden of showing that it carried the goods properly); Winslow Bros. v. R. Co. (S. C.), 60 S. E. 709.

892-89 Harper F. Co. v. Exp. Co., 144 N. C. 639, 57 S. E. 458.

892-90 Atlantic R. Co. v. Dexter, 50 Fla. 180, 39 S. 634, 111 Am. St. 116; Cincinnati etc. R. Co. v. Greening, 30 Ky. L. R. 1180, 100 S. W. 825; Cleve v. R. Co. (Neb.), 108 N. W. 982. See Needy v. R. Co., 22 Pa. Super. 489.

Presence of shipper under no obligation to care for animals. Nelson v. R. Co., 28 Mont. 297, 72 P. 642.

893-94 Judd & R. v. New York, 130 Fed. 991; Taft Co. v. Exp. Co., 133 Ia. 522, 110 N. W. 897 (lack of ice in refrigerator car); Powers v. R. Co., 130 Ia. 615, 105 N. W. 345 (good condition on delivery to carrier; Ratcliff v. R. Co., 118 Mo. App. 644, 94 S. W. 1005; Anderson v. R. Co., 93 Mo. App. 677, 67 S. W. 707 (proof of delay, by circumstances); Peerless Mfg. Co. v. R. Co., 73 N. H. 328, 61 A. 511 (facilities for protecting its yards from fire); So. Kansas R. Co. v. Bennett (Tex. Civ.), 103 S. W. 1115 (injury to other cattle in same train); Chicago etc. R. Co. v. Gillett (Tex. Civ.), 99 S. W. 712 (unusual delay is evidence of negligence).

897-2 Stone v. S. S. Co., 139 N. C. 193, 51 S. E. 894. See Pennsylvania R. Co. v. Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443 (usage as to delivery).

897-3 Lake Shore etc. R. Co. v. Gibson, 8 Ohio C. C. (N. S.) 345.

898-6 **Receipt** showing acceptance of car in good order, admissible. Modern M. Co. v. R. Co., 140 Mich. 570, 104 N. W. 19.

898-7 St. Louis etc. R. Co. v. Crowder, 82 Ark. 562, 103 S. W. 172; St. Louis etc. R. Co. v. Frazar (Tex. Civ.), 97 S. W. 325; Missouri etc. R. Co. v. Stanchfield (Tex. Civ.), 90 S. W. 517.

899-8 Southern R. Co. v. Railey, 26 Ky. L. R. 53, 80 S. W. 786 (assurance by agent as to when car would be delivered); Musselman v. R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Louisville & N. R. Co. v. Brown, 28 Ky. L. R. 772, 90 S. W. 567; Maller v. R. Co., 106 N. Y. S. 784; St. Louis etc. R. Co. v. Watkins (Tex. Civ.), 100 S. W. 162.

899-10 Chicago etc. R. Co. v. Kapp, 37 Tex. Civ. 203, 83 S. W. 233 (expert evidence admissible on question of reasonableness of time of movement).

899-11 Texas & P. R. Co. v. Slator (Tex. Civ.), 102 S. W. 156 (opinion of witness as to whether cattle pens were sufficient, inadmissible, that being the very question which the jury were to determine).

900-13 See Naas v. R. Co., 96 Minn. 84, 104 N. W. 717.

901-16 Texas & P. R. Co. v. Beal (Tex. Civ.), 97 S. W. 329; Williams v. Elec. Co. (Tex. Civ.), 85 S. W.

1160 (partial failure of proof as to some alleged matters of damage, immaterial).

901-17 Contents of a box shipped may be shown, though recovery cannot be had for some articles because of misdescription. Bottum v. R. Co., 72 S. C. 375, 51 S. E. 985, 2 L. R. A. (N. S.) 773.

901-18 See Southern Exp. Co. v. Owens, 146 Ala. 412, 41 S. 752.

902-19 Texas & P. R. Co. v. Stephens (Tex. Civ.), 86 S. W. 933; Texas & P. R. Co. v. Dishman (Tex. Civ.), 85 S. W. 319; Gulf etc. R. Co. v. Roberts (Tex. Civ.), 85 S. W. 479; Missouri etc. R. Co. v. Allen (Tex. Civ.), 87 S. W. 168.

902-21 Marshall M. Co. v. R. Co., 126 Mo. App. 455, 104 S. W. 478 (value at place of shipment); Atchison etc. R. Co. v. Nation (Tex. Civ.), 92 S. W. 823; Texas etc. R. Co. v. Ellerd (Tex. Civ.), 87 S. W. 362; Texas etc. R. Co. v. Hack Line (Tex. Civ.), 101 S. W. 1042 (evidence of actual value proper where no market value is obtainable); Atchison etc. R. Co. v. Veale (Tex. Civ.), 87 S. W. 202.

Evidence as to value due to special circumstances inadmissible, unless such facts were known to the carrier at the time. Louisville etc. R. Co. v. Mink, 31 Ky. L. R. 833, 103 S. W. 294.

903-22 Cleveland etc. R. Co. v. Patton, 203 Ill. 376, 67 N. E. 804; Cincinnati etc. R. Co. v. Pendleton, 29 Ky. L. R. 721, 96 S. W. 434; Chicago etc. R. Co. v. Todd, 74 Neb. 712, 105 N. W. 83; Ft. Worth etc. R. Co. v. Richards (Tex. Civ.), 105 S. W. 236; St. Louis etc. R. Co. v. Berry (Tex. Civ.), 93 S. W. 1107.

903-24 Texas & P. R. Co. v. Coggin (Tex. Civ.), 90 S. W. 523.

904-26 Lydon v. Brew. Co., 133 Fed. 830; Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935; Forbes v. R. Co. (Ia.), 113 N. W. 477 (person riding beyond his original destination, presumed to remain a passenger); Anderson v. R. Co., 196 Mo. 442, 93 S. W. 394.

904-28 Alabama C. R. Co. v. Bates (Ala.), 43 S. 98; Chicago etc. R. Co. v. Lowenrosen, 125 Ill. App. 194, *aff.* 222 Ill. 506, 78 N. E. 813; Lincoln Tr. Co. v. Webb, 72 Neb. 136, 102 N. W. 258.

904-29 Dysart v. R. Co., 122 Fed. 228, 58 C. C. A. 592; Vassor v. R. Co., 142 N. C. 68, 54 S. E. 849; Missouri etc. R. Co. v. Huff, 98 Tex. 110, 81 S. W. 525.

904-30 Wieland v. R. Co., 1 Cal. App. 343, 82 P. 226; East St. Louis Co. v. Zink, 229 Ill. 180, 82 N. E. 283 (custom to carry passengers in an employe's car).

905-31 In an action to recover a penalty for refusing to issue a transfer, plaintiff need not prove his case beyond a reasonable doubt. Kerin v. R. Co., 53 Misc. 568, 103 N. Y. S. 769.

905-32 See Birmingham etc. Co. v. Turner (Ala.), 45 S. 671; Holt v. R. Co., 174 Mo. 524, 74 S. W. 631 (carrier must prove a defense of refusal to pay a fare).

906-36 Coine v. R. Co., 123 Ia. 458, 99 N. W. 134 (receipt issued by agent admissible in connection with parol evidence); Nickles v. R. Co., 71 S. C. 102, 54 S. E. 255 (that some consideration was given for a pass may be shown by parol).

906-37 Coine v. R. Co., 123 Ia. 458, 99 N. W. 134; Pennsylvania Co. v. Loftis, 72 Ohio St. 288, 74 N. E. 179. *Compare* Crabtree v. R. Co., 101 Me. 485, 64 A. 842; Missouri etc. R. Co. v. Harrison, 97 Tex. 611, 80 S. W. 1139.

Ticket signed by purchaser is a contract and cannot be varied by parol. Bachman v. S. S. Co., 152 Fed. 403.

906-38 See Chiles v. R. Co., 69 S. C. 327, 48 S. E. 252.

906-39 Chicago C. R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087 (transfer).

906-41 Chicago etc. Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341; Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935; Chaffe v. R. Co. (Mass.), 82 N. E. 497. See Ball v. L. & P. Co., 146 Ala. 309, 39 S. 584 (custom not to charge a fare for infants); Wabash R. Co. v. Jellison, 124 Ill. App. 652; O'Donnell v. R. Co., 106 Ill. App. 287; Radley v. R. Co., 44 Or. 332, 75 P. 212; Lewis v. Elec. Co. (Tex. Civ.), 88 S. W. 489.

Circumstantial evidence may establish the fact that an employe, for some purposes, was a passenger.

Enos v. R. Co., 28 R. I. 291, 67 A. 5.

907-42 See Brigham v. R. Co., 2 Cal. App. 522, 84 P. 306; Kramer v. R. Co., 114 App. Div. 804, 100 N. Y. S. 276.

908-43 Mageau v. R. Co., 102 Minn. 399, 113 N. W. 1016 (that death was caused by the injury); Estes v. R. Co., 110 Mo. App. 725, 85 S. W. 627 (effect of the accident on other persons is admissible); McArthur v. R. Co., 53 Misc. 292, 103 N. Y. S. 102 (that no report of accident was made by defendant's employes may be shown); Sturges v. Coach Co., 107 N. Y. S. 270.

908-44 Penn. R. Co. v. McCaffrey, 149 Fed. 404, 79 C. C. A. 224; Bonneau v. R. Co. (Cal.), 93 P. 106; Cody v. R. Co., 148 Cal. 90, 82 P. 666; Valente v. R. Co. (Cal.), 91 P. 481; Patterson v. R. Co., 147 Cal. 178, 81 P. 531; Reiss v. R. Co. (Del.), 67 A. 153; Kehan v. R. Co., 28 App. Cas. (D. C.) 108; Chicago etc. T. Co. v. Mee, 218 Ill. 9, 75 N. E. 800, 2 L. R. A. (N. S.) 725; Whittlesey v. R. Co., 121 Ia. 597, 90 N. W. 516, 97 N. W. 66; Savage v. R. Co., 186 Mass. 203, 71 N. E. 531; Thurston v. R. Co., 137 Mich. 231, 100 N. W. 395; Young v. R. Co. (Mo. App.), 84 S. W. 175; Taillon v. Mears, 29 Mont. 161, 74 P. 421; Lincoln T. Co. v. Shepherd (Neb.), 107 N. W. 764; Omaha R. Co. v. Boesen, 74 Neb. 764, 105 N. W. 303; Lincoln T. Co. v. Brookover (Neb.), 109 N. W. 168; Lincoln T. Co. v. Webb, 73 Neb. 136, 102 N. W. 258; Baum v. R. Co., 108 N. Y. S. 265; Greer v. R. Co., 50 Misc. 560, 99 N. Y. S. 428; Hollahan v. R. Co., 73 App. Div. 164, 76 N. Y. S. 751; Domenico v. R. Co. (Tex. Civ.), 90 S. W. 60; Beaty v. R. Co. (Tex. Civ.), 91 S. W. 365; Rambie v. R. Co. (Tex. Civ.), 100 S. W. 1022.

Injury from fall of elevator. Griffen v. Manice, 174 N. Y. 505, 66 N. E. 1109, 74 App. Div. 371, 77 N. Y. S. 626.

Plaintiff has burden of proving the fact on which he bases the presumption of negligence. Kefauver v. R. Co., 122 Fed. 966.

909-45 Alton L. & T. Co. v. Oller, 119 Ill. App. 181; Springer v. Schultz, 105 Ill. App. 544; Indianapolis etc. R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201; R. Co. v. Warren, 74 Kan. 244, 86 P. 131, 89 P. 656; LeBlanc v. Sweet, 107 La. 355, 31 S. 766, 90 Am. St. 303; Cincinnati Tr. Co. v. Holzenkamp, 74 Ohio St. 379, 78 N. E. 529, 6 L. R. A. (N. S.) 800; Palmer v. R. Co., 206 Pa. 574, 56 A. 49, 63 L. R. A. 507. *Compare* Renders v. R. Co., 144 Mich. 387, 108 N. W. 368.

909-46 Atlantic etc. R. Co. v. Crosby, 53 Fla. 400, 43 S. 318 (construing ch. 4071, p. 113, laws of 1891); Freeman v. R. Co., 117 Ga. 78, 43 S. E. 410; Spurlock v. Tract. Co., 118 La. 1, 42 S. 575 (*compare* McGinn v. R. Co., 118 La. 811, 43 S. 450); United R. etc. Co. v. Woodbridge, 97 Md. 629, 55 A. 444; Firebaugh v. Elec. Co., 40 Wash. 658, 82 P. 995, 2 L. R. A. (N. S.) 836.

909-47 Price v. R. Co., 75 Ark. 479, 88 S. W. 575, 112 Am. St. 79; Kohner v. Tract. Co., 22 App. Cas. (D. C.) 181, 62 L. R. A. 875; Chicago Tract. Co. v. Mommsen, 107 Ill. App. 353; Chicago etc. Co. v. Crosby, 109 Ill. App. 644; McGinn v. R. Co., 118 La. 811, 43 S. 450; Yazoo etc. R. Co. v. Humphrey, 83 Miss. 721, 36 S. 154; Trotter v. R. Co., 122 Mo. App. 405, 99 S. W. 508; Woas v. Transit Co., 198 Mo. 664, 96 S. W. 1017, 7 L. R. A. (N. S.) 231; Lincoln Tract. Co. v. Heller, 72 Neb. 127, 100 N. W. 197, 102 N. W. 262; Lincoln Tract. Co. v. Webb, 72 Neb. 136, 102 N. W. 258; Gott v. R. Co., 110 App. Div. 18, 96 N. Y. S. 945; Goss v. R. Co., 48 Or. 439, 87 P. 149; Spear v. R. Co., 3 Pa. C. C. 472, s. c. 5 Pa. C. C. 393; Ault v. Cowan, 20 Pa. Super. 616 (carrier must be connected with the injury in some way); Anderson v. R. Co., 77 S. C. 434, 58 S. E. 149; Galveston etc. R. Co. v. Crier (Tex. Civ.), 100 S. W. 1177 (no presumption where facts show a derailment caused by cyclone); Allen v. R. Co., 35 Wash. 221, 77 P. 204.

Mere fact of passenger's death, without showing how he was killed, raises no presumption of negligence. Western M. R. Co. v. S., 95 Md. 637, 53 A. 969.

910-48 Hooper v. R. Co., 155 Fed. 273; Feitl v. R. Co., 113 Ill. App. 381; Goss v. R. Co., 48 Or. 439, 87 P. 149.

911-49 Southern R. Co. v. Cunningham, 123 Ga. 90, 50 S. E. 979; Fitch v. Tract. Co., 124 Ia. 665, 100 N. W. 618; Louisville & N. R. Co. v. Board, 28 Ky. L. R. 921, 90 S. W. 944 (passenger thrown from car by persons unknown); Wadsworth v. R. Co., 182 Mass. 572, 66 N. E. 421.

912-51 Hunterson v. Tract. Co., 205 Pa. 568, 55 A. 543. See Choctaw etc. R. Co. v. Hickey, 81 Ark. 579, 99 S. W. 839.

912-52 Texas etc. R. Co. v. Gardner, 114 Fed. 186, 52 C. C. A. 142; Metropolitan R. Co. v. Warren, 74 Kan. 244, 89 P. 656, 86 P. 131.

912-53 Griffin v. R. Co., 1 Cal. App. 678, 82 P. 1084; Evansville etc. R. Co. v. Mills, 37 Ind. App. 598, 77 N. E. 608; Redmon v. R. Co., 185 Mo. 1, 84 S. W. 26; Todd v. R. Co., 126 Mo. App. 684, 105 S. W. 671; Willis v. R. Co., 111 Mo. App. 580, 86 S. W. 567; Lomas v. R. Co., 111 App. Div. 332, 97 N. Y. S. 658, *aff.* 81 N. E. 1169. *Compare* Yazoo etc. R. Co. v. Humphrey, 83 Miss. 721, 36 S. 154; Young v. R. Co. (Mo. App.), 84 S. W. 175 (jerks on freight train); Hawk v. R. Co. (Mo. App.), 108 S. W. 1119; Bussell v. R. Co., 125 Mo. App. 441, 102 S. W. 613; White v. R. Co., 215 Pa. 462, 64 A. 676 (question for the jury).

913-54 Fitch v. Tract. Co., 124 Ia. 665, 100 N. W. 618; Moser v. R. Co., 25 Ky. L. R. 154, 74 S. W. 1090; Partelow v. R. Co. (Mass.), 81 N. E. 894; Timmes v. R. Co., 183 Mass. 193, 66 N. E. 797. See Conroy v. R. Co., 139 Mich. 173, 102 N. W. 641, 104 N. W. 319; Hirsch v. R. Co., 48 Misc. 527, 96 N. Y. S. 333; Flynn v. Transit Co., 48 Misc. 529, 96 N. Y. S. 259; Johnson v. R. Co., 88 N. Y. S. 866.

913-55 Chicago etc. R. Co. v. Pural, 127 Ill. App. 652, *aff.* 224 Ill. 324, 79 N. E. 686; Wabash R. Co. v. Jellison, 124 Ill. App. 652; Morgan v. R. Co., 32 Ky. L. R. 330, 105 S. W. 961; Davis v. R. Co., 113 Ky. 267, 68 S. W. 140; Western M. R. Co. v. S., 95 Md. 637, 53 A. 969; Ferguson v. R. Co., 123 Mo. App. 590, 100 S. W. 537; Evers v. Ferry Co., 116 Mo. App. 130, 92 S. W. 118; Winter v. R. Co., 49 Misc. 131, 96 N. Y. S. 1009; Dougherty v. R. Co., 213 Pa. 346, 62 A. 926; Dearden v. R. Co. (Utah), 93 P. 271; Firebaugh v. Elec. Co., 40 Wash. 658, 82 P. 995, 2 L. R. A. (N. S.) 836.

Fall of elevator. — Hubener v. Heide, 73 App. Div. 200, 76 N. Y. S. 758. And see Griffin v. Manice, 174 N. Y. 505, 66 N. E. 1109, 74 App. Div. 371, 77 N. Y. S. 626; Springer v. Schultz, 105 Ill. App. 544; Orcutt v. Bldg. Co., 201 Mo. 424, 99 S. W. 1062.

Hand rail giving way. McCarty v. R. Co., 105 Mo. App. 596, 80 S. W. 7.

Gate on street car giving way. Aston v. Transit Co., 105 Mo. App. 226, 79 S. W. 999.

Electric shock. — D'Arcy v. R. Co., 82 App. Div. 263, 81 N. Y. S. 952; Verrone v. R. I. Co., 27 R. I. 370, 62 A. 512.

No presumption where injury was caused by the burning out of a fuse. R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087, 102 Ill. App. 202.

Bolt in cable slot. — Chicago U. T. Co. v. Crosby, 109 Ill. App. 644.

Collision from train breaking in two sections. Feldschneider v. R. Co., 122 Wis. 423, 99 N. W. 1034.

Heating of a plate over wheel by friction. Powell v. R. Co., 88 App. Div. 133, 84 N. Y. S. 337.

Flying up of trap door. — Baum v. R. Co., 108 N. Y. S. 265.

Collapse of trap door. — Jorden v. R. Co., 122 Mo. App. 330, 99 S. W. 492.

Passenger's heel catching on step. Rattan v. R. Co., 120 Mo. App. 270, 96 S. W. 735.

Stepping on electrified plate in street car. McRae v. R. Co., 125 Mo. App. 562, 102 S. W. 1032.

914-58 Platform. — Leveret v. R. Co., 110 La. 399, 34 S. 579.

914-59 Dinnigan v. Peterson, 3 Cal. App. 764, 87 P. 218; Minihan v. R. Co. (Mass.), 83 N. E. 871.

915-60 Ryckman v. R. Co., 10 Ont. L. R. (Can.) 419; Central R. Co. v. Geopp (Ala.), 45 S. 65; Valente v. R. Co. (Cal.), 91 P. 481; Sambuck v. R. Co., 138 Cal. xix, 71 P. 174; Elgin Tract. Co. v. Wilson, 217 Ill. 47, 75 N. E. 436; Pennsylvania Co. v. Purvis, 128 Ill. App. 367; Chicago C. R. Co. v. Pural, 127 Ill. App. 652; Sedoff v. R. Co., 124 Ill. App. 609; New York etc. R. Co. v. Callahan (Ind. App.), 81 N. E.

670; Larkin v. R. Co., 118 Ia. 652, 92 N. W. 891; Mitchell v. R. Co. (Ia.), 114 N. W. 622; Southern R. Co. v. Brewer, 32 Ky. L. R. 1374, 108 S. W. 936; Southern R. Co. v. Brewer, 32 Ky. L. R. 43, 105 S. W. 160; Chaffe v. R. Co. (Mass.), 82 N. E. 497; Savage v. R. Co., 186 Mass. 203, 71 N. E. 531; Kansas City etc. R. Co. v. Nichols (Miss.), 38 S. 371; Hunt v. R. Co., 126 Mo. App. 79, 103 S. W. 1088; Magrane v. R. Co., 183 Mo. 119, 81 S. W. 1158; Haas v. R. Co., 111 Mo. App. 706, 90 S. W. 1155; Wilbur v. R. Co., 110 Mo. App. 689, 85 S. W. 671; Estes v. R. Co., 110 Mo. App. 725, 85 S. W. 627; Goodloe v. R. Co., 120 Mo. App. 194, 96 S. W. 482; Hamilton v. R. Co., 114 Mo. App. 504, 89 S. W. 893; Rowdin v. R. Co., 208 Pa. 623, 57 A. 1125; Palmer v. R. Co., 206 Pa. 574, 56 A. 49, 63 L. R. A. 507; Enos v. R. Co., 28 R. I. 291, 67 A. 5; Simone v. R. I. Co. (R. I.), 66 A. 202; O'Clair v. R. I. Co., 27 R. I. 448, 63 A. 238; Williams v. R. Co., 39 Wash. 77, 80 P. 1100; Howe v. R. Co., 30 Wash. 569, 70 P. 1100, 60 L. R. A. 949; Russell v. R. Co. (Wash.), 92 P. 288; Jordan v. Seattle Co. (Wash.), 92 P. 284.

Collision with car of another line. Osgood v. Tract. Co., 137 Cal. 280, 70 P. 169, 92 Am. St. 171.

Presumption not waived by alleging the cause with particularity. Lobb v. R. Co. (Wash.), 93 P. 420.

915-61 Chicago etc. R. Co. v. Grimm, 25 Ind. App. 494, 57 N. E. 640; Clark v. R. Co., 24 Pa. Super. 609; International R. Co. v. Thompson, 34 Tex. Civ. 67, 77 S. W. 439.

915-62 Chicago etc. Co. v. Mee, 218 Ill. 9, 75 N. E. 800, 2 L. R. A. (N. S.) 725; Wolf v. Tract. Co., 119 Ill. App. 481; Thurston v. R. Co., 137 Mich. 231, 100 N. W. 395; Brower v. Public Service (N. J.), 64 A. 1052; Munzer v. R. Co., 45 Misc. 568, 91 N. Y. S. 21; Bamberg v. R. Co., 53 Misc. 403, 103 N. Y. S. 297; Fagan v. R. I. Co., 27 R. I. 51, 60 A. 672. *Compare* North Jersey etc. R. Co. v. Purdy, 142 Fed. 955, 74 C. C. A. 125; Houghton v. R. Co., 1 Cal. App. 576, 82 P. 972; Jones v. R. Co., 99 Md. 64, 57 A. 620; Hamilton v. R. Co., 114 Mo. App. 504, 89 S. W. 893; Walters v. R. Co. (Wash.), 93 P. 419.

Presumption of negligence where the immediate cause of the injuries was the plaintiff's jumping for fear of a collision. Palmer v. R. Co., 206 Pa. 574, 56 A. 49, 63 L. R. A. 507.

915-63 Whittlesey v. R. Co., 121 Ia. 597, 90 N. W. 516; Western Maryland C. Co. v. Shivers, 101 Md. 391, 61 A. 618; Egan v. R. Co. (Mass.), 80 N. E. 696.

916-64 So. Pac. Co. v. Cavin, 144 Fed. 348, 75 C. C. A. 350; Minahan v. R. Co., 138 Fed. 37, 70 C. C. A. 463; Bonneau v. R. Co. (Cal.), 93 P. 106; Hill v. R. Co., 126 Ill. App. 152; Brimmer v. R. Co., 101 Ill. App. 198; Cincinnati etc. R. Co. v. Bravard, 38 Ind. App. 422, 76 N. E. 899; Indiana etc. T. Co v. McKinney, 39 Ind. App. 86, 78 N. E. 203; Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201; Cronk v. R. Co., 123 Ia. 349, 98 N. W. 884; Louisville St. R. Co. v. Brownfield, 29 Ky. L. R. 1097, 96 S. W. 912; Brown v. R. Co., 88 Miss. 687, 41 S. 383; O'Gara v. Transit Co., 204 Mo. 724, 103 S. W. 54; Bowlin v. R. Co., 125 Mo. App. 419, 102 S. W. 631; Heyde v. Transit Co., 102 Mo. App. 537, 77 S. W. 127; Omaha St. R. Co. v. Boesen, 74 Neb. 764, 105 N. W. 303; Swigelsky v. R. Co., 91 N. Y. S. 350; Klinger v. Traction Co., 92 App. Div. 100, 87 N. Y. S. 864; Overcash v. Light Co., 144 N. C. 572, 57 S. E. 377; Illinois Cent. R. Co. v. Porter, 117 Tenn. 13, 94 S. W. 666; Galveston etc. R. Co. v. Gracia (Tex. Civ.), 100 S. W. 198; Norton v. R. Co. (Tex. Civ.), 108 S. W. 1044; Galveston etc. R. Co. v. Green (Tex. Civ.), 91 S. W. 380; Davis v. R. Co. (Tex. Civ.), 93 S. W. 222; St. Louis etc. R. Co. v. Harkey (Tex. Civ.), 88 S. W. 506.

918-65 *Compare.* — Chicago etc. Co. v. Leonard, 126 Ill. App. 189; Cassady v. R. Co., 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285; Hamilton v. R. Co., 114 Mo. App. 504, 89 S. W. 893; Logan v. R. Co., 183 Mo. 582, 82 S. W. 126; D'Arcy v. R. Co., 82 App. Div. 263, 81 N. Y. S. 952.

Fall of elevator. — Orcutt v. Bldg. Co., 201 Mo. 424, 99 S. W. 1062.

918-66 Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087.

Device for registering fares. Weir v. R. Co., 112 App. Div. 109, 98 N. Y. S. 268.

Car window. — Cleveland etc. R. Co. v. Hadley (Ind.), 82 N. E. 1025. *Contra.*— Strembel v. R. Co., 110 App. Div. 23, 96 N. Y. S. 903.

Falling trolley pole. — Cincinnati Tract. Co. v. Holzenkamp, 74 Ohio St. 379, 78 N. E. 529, 6 L. R. A. (N. S.) 800.

918-71 Georgia R. Co. v. Adams, 127 Ga. 408, 56 S. E. 409; Hebblethwaite v. R. Co., 192 Mass. 295, 78 N. E. 477; Smith v. Transit Co., 120 Mo. App. 328, 97 S. W. 218; Allen v. R. Co., 35 Wash. 221, 77 P. 204.

Rear fender left down. Whilt v. Public Service (N. J.), 64 A. 972.

Sparks and cinders. — St. Louis etc. R. Co. v. Parks (Tex. Civ.), 73 S. W. 439.

Piece of coal from tender. Louisville & N. R. Co. v. Reynolds, 24 Ky. L. R. 1402, 71 S. W. 516.

Hand of conductor striking passenger in grasping for the rail. Kohner v. Tract Co., 22 App. Cas. (D. C.) 181, 62 L. R. A. 875.

919-72 See Spear v. R. Co., 5 Pa. C. C. 393.

Explosion on street car. Patterson v. R. Co., 147 Cal. 178, 81 P. 531; Brod v. Transit Co., 115 Mo. App. 202, 91 S. W. 993; Trotter v. R. Co., 122 Mo. App. 405, 99 S. W. 508; German v. R. Co., 107 App. Div. 354, 95 N. Y. S. 112.

919-75 No presumption where passenger on street car alighted at a street remote from her home. Georgia R. Co. v. McAllister, 126 Ga. 447, 54 S. E. 957, 7 L. R. A. (N. S.) 1177.

919-76 Joyce v. R. Co., 147 Cal. 274, 82 P. 204; Colorado Spr. Co. v. Petit, 37 Colo. 326, 86 P. 121; Reiss v. R. Co. (Del.), 67 A. 153; Blake v. R. Co., 57 W. Va. 300, 50 S. E. 408. *Compare* Chicago etc. R. Co. v. Winfrey, 67 Neb. 13, 93 N. W. 526; Barnes v. R. Co., 42 Misc. 622, 87 N. Y. S. 608.

920-77 Kefauver v. R. Co., 122 Fed. 966; Barringer v. R. Co., 73 Ark. 548, 85 S. W. 94, 87 S. W. 814; Kansas City S. R. Co. v. Davis, 83 Ark. 217, 103 S. W. 603; Renfro v. R. Co., 2 Cal. App. 317, 84 P. 357; Boone v. Transit Co., 139 Cal. 490, 73 P. 243; Cody v. R. Co., 148 Cal. 90, 82 P. 666; Denver etc. T. Co. v. Rush, 19 Colo. App. 70, 73 P. 664; City & S. R. Co. v. Svedborg, 20 App. Cas. (D. C.) 543; Kehan v. R. Co., 28 App. Cas (D. C.) 108; Georgia R. Co. v. Reeves, 123 Ga. 697, 51 S. E. 610; Houghton v. R. Co., 26 Ky. L. R. 393, 81 S. W. 695; United R. Co. v. Woodbridge, 97 Md. 629, 55 A. 444; Bell v. R. Co., 125 Mo. App. 660, 103 S. W. 144; Lincoln Tract Co. v. Shepherd (Neb.), 107 N. W. 764; Paul v. R. Co., 30 Utah 41, 83 P. 563.

920-78 Louisville & N. R. Co. v. Board, 28 Ky. L. R. 921, 90 S. W. 944; Western M. R. Co. v. S., 95 Md. 637, 53 A. 969; Bussell v. R. Co., 125 Mo. App. 441, 102 S. W. 613; Erwin v. R. Co., 94 Mo. App. 289, 68 S. W. 88. *Compare* Chicago etc. R. Co. v. Mann (Neb.), 111 N. W. 379.

920-79 See Blumenthal v. Elec. Co., 129 Ia. 322, 105 N. W. 588.

Condition of cars after the accident may be shown. Elgin etc. R. Co. v. Wilson, 217 Ill. 47, 75 N. E. 436.

922-84 Lack of appliances prescribed by law for an elevator. Bullock v. Exchange Co., 24 R. I. 50, 52 A. 122.

924-86 See Walling v. R. Co. (Tex. Civ.), 106 S. W. 417.

That street car brakes previously held does not rebut the presumption of negligence. Dougherty v. R. Co., 213 Pa. 346, 62 A. 926.

924-87 Cronk v. R. Co., 123 Ia. 349, 98 N. W. 884; Logan v. R. Co., 183 Mo. 582, 82 S. W. 126.

926-91 Excessive speed while passing over a switch. Texas etc. R. Co. v. Clippinger (Tex. Civ.), 106 S. W. 155.

927-92 Mitchell v. R. Co. (Ia.), 114 N. W. 622; Murray v. R. Co., 25 R. I. 209, 55 A. 491; Nickles v. R. Co., 74 S. C. 102, 54 S. E. 255.

928-95 *Compare.* — Overcash v. Light Co., 144 N. C. 572, 57 S. E. 377.

Prior assaults.— Indianapolis St. R. Co. v. Dawson, 31 Ind. App. 605, 68 N. E. 909.

That other passengers alighted without injury cannot be shown. Merryman v. R. Co. (Ia.), 113 N. W. 357.

929-96 See Union Tract. Co. v. Sullivan, 38 Ind. App. 513, 76 N. E. 116.

930-99 See Woas v. Transit Co., 198 Mo. 664, 96 S. W. 1017.

932-3 Trumbull v. Donahue, 18 Colo. App. 460, 72 P. 684; South Covington etc. R. Co. v. Riegler, 26 Ky. L. R. 666, 82 S. W. 382; Redmon v. R. Co., 185 Mo. 1, 84 S. W. 26. See Wagoner v. R. Co., 118 Mo. App. 239, 94 S. W. 293; Blackman v. R. Co., 68 N. J. L. 1, 52 A. 370; Weinstein v. R. Co., 52 Misc. 468, 102 N. Y. S. 512; Cain v. R. Co., 74 S. C. 89, 54 S. E. 244.

933-4 Atlantic etc. R. Co. v. Crosby, 53 Fla. 400, 43 S. 318.

933-6 Pittsburgh etc. R. Co. v. Haislup, 39 Ind. App. 394, 79 N. E. 1035; Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360, 71 N. E. 201; Hutcheis v. R. Co., 128 Ia. 279, 103 N. W. 779; St. Louis etc. R. Co. v. Coats (Tex. Civ.), 103 S. W. 662; International etc. R. Co. v. Hugen (Tex. Civ.), 100 S. W. 1000.

934-12 Chicago etc. T. Co. v. Lowenrosen, 125 Ill. App. 194, *aff.* 222 Ill. 506, 78 N. E. 813; Hutcheis v. R. Co., 128 Ia. 279, 103 N. W. 779; Fitch v. Tract. Co., 124 Ia. 665, 100 N. W. 618; Jameson v. R. Co., 193 Mass. 560, 79 N. E. 750; Taillon v. Mears, 29 Mont. 161, 74 P. 421. *Compare* Evansville etc. R. Co. v. Mills, 37 Ind. App. 598, 77 N. E. 608.

Stockman has burden of showing that he was rightfully riding in stock car. Lake Shore etc. R. Co. v. Teeters (Ind. App.), 74 N. E. 1014.

935-14 Texas etc. R. Co. v. Gardner, 114 Fed. 186, 52 C. C. A. 142; Boone v. Transit Co., 139 Cal. 490, 73 P. 243; MacFeat v. R. Co., 5 Penne. (Del.) 52, 62 A. 898; Union Tract. Co. v. Sullivan, 38 Ind. App. 513, 76 N. E. 116; Harris v. R. Co., 32 Ind. App. 600, 70 N. E. 407; Pennsylvania Co. v. Fertig, 34 Ind. App. 459, 70 N. E. 834; Jones v. R. Co., 99 Md. 64, 57 A. 620; Selman v. R. Co. (Tex. Civ.), 101 S. W. 1030; Gulf etc. R. Co. v. Booth (Tex. Civ.), 97 S. W. 128; Lewis v. Elec. Co. (Tex. Civ.), 88 S. W. 489; St. John v. R. Co. (Tex. Civ.), 80 S. W. 235.

936-15 Burden on plaintiff to show that in spite of contributory negligence the carrier could have prevented the injury. Richmond etc. R. Co., v. Allen, 101 Va. 200, 43 S. E. 356.

939-22 Lexington R. Co. v. Herring, 29 Ky. L. R. 794, 96 S. W. 558. **Custom of railroad** known to passenger to keep the place safe while a train was receiving passengers. Illinois C. R. Co. v. Proctor, 31 Ky. L. R. 494, 102 S. W. 826.

940-27 Boarding crowded street car not negligence per se. Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935.

940-28 *Compare* Bromley v. R. Co., 193 Mass. 453, 79 N. E. 775.

941-32 Production of check with evidence of non-delivery, sufficient. Zeigler v. R. Co., 87 Miss. 367, 39 S. 811.

Plaintiff must prove a delivery to the carrier. Lustig v. Nav. Co., 38 Misc. 802, 78 N. Y. S. 885.

Assent from signing ticket limiting liability for loss of baggage. Rose v. R. Co., 35 Mont. 70, 88 P. 767.

Delivery is established prima facie by production of a check. Graham & N. Co. v. Young, 117 Ill. App. 257; Fasy v. Nav. Co., 77 App. Div. 469, 79 N. Y. S. 1103, *aff.* 177 N. Y. 591, 70 N. E. 1098.

Baggage on a street car. Sperry v. R. Co., 79 Conn. 565, 65 A. 962.

Judicial notice that drummer's sample trunks are treated as personal baggage. Fleischman v. R. Co., 76 S. C. 237, 56 S. E. 974.

942-33 Central of Ga. R. Co. v. Jones (Ala.), 43 S. 575; Hubbard

v. R. Co., 112 Mo. App. 459, 87 S. W. 52; Saleeby v. R. Co., 99 App. Div. 163, 90 N. Y. S. 1042; Fleischman v. R. Co., 76 S. C. 237, 56 S. E. 974. See Southern R. Co. v. Edmundson, 123 Ga. 474, 51 S. E. 388; Campbell v. R. Co. (Neb.), 111 N. W. 126.

Presumption of negligence from derailment. Thomas v. R. Co., 131 N. C. 590, 42 S. E. 964.

942-36 See Fasy v. Nav. Co., 77 App. Div. 469, 79 N. Y. S. 1103, *aff.* 177 N. Y. 591, 70 N. E. 1098; Galveston etc. R. Co. v. Schafermeyer, 31 Tex. Civ. 586, 72 S. W. 1037.

Baggage check issued by a terminal carrier is a receipt and prima facie evidence of receipt of baggage. Park v. R. Co., 78 S. C. 302, 58 S. E. 931.

943-39 See International etc. R. Co. v. Sammon, 35 Tex. Civ. 96, 79 S. W. 854.

Mental suffering may be shown to have been caused by an unwarranted expulsion. McGhee v. Cashin (Ala.), 40 S. 63.

Evidence as to damages for wrongful expulsion. Coine v. R. Co., 123 Ia. 458, 99 N. W. 134.

Mental suffering presumed from physical pain. International etc. R. Co. v. Johnson (Tex. Civ.), 95 S. W. 595; Galveston etc. R. Co. v. Gracia (Tex. Civ.), 100 S. W. 198.

943-40 St. Louis etc. R. Co. v. Foster (Tex. Civ.), 103 S. W. 194. See Louisville etc. Co. v. Gaddie, 31 Ky. L. R. 502, 102 S. W. 817; Tennessee etc. R. Co. v. Brasher, 29 Ky. L. R. 1277, 97 S. W. 349; Chesapeake etc. R. Co. v. Lynch, 28 Ky. L. R. 467, 89 S. W. 517.

943-41 See Little Rock R. Co. v. Dobbins, 78 Ark. 553, 95 S. W. 788; Summerfield v. Transit Co., 108 Mo. App. 718, 84 S. W. 172.

943-42 Southern R. Co. v. Hawkins, 28 Ky. L. R. 364, 89 S. W. 258.

943-44 See Houston etc. R. Co. v. Batchler, 37 Tex. Civ. 116, 83 S. W. 902.

CAUSE [Vol. 2.]

Direct testimony, 951-20.

946-5 Wabash S. D. Co. v. Black, 126 Fed. 721, 61 C. C. A. 639; Furbush v. C. Co., 131 Mich. 234, 91 N. W. 135; Gulf C. R. Co. v. Boyce (Tex. Civ.), 87 S. W. 395.

947-7 Knights T. Co. v. Crayton, 110 Ill. App. 648; Tackman v. Brotherhood, 132 Ia. 64, 106 N. W. 350 (presumption to be treated as evidence in the case); American B. Assn. v. Stough, 26 Ky. L. R. 1093, 83 S. W. 126; Aetna Life Ins. Co. v. Millard, 26 Ky. L. R. 589, 82 S. W. 364, 68 L. R. A. 285; Clemens v. R. N. of A., 14 N. D. 116, 103 N. W. 402; Stevens v. Casualty Co., 12 N. D. 463, 97 N. W. 862; Travelers Ins. Co. v. Rosch, Vol. 13-23 Ohio C. C. 491; Sovereign Camp v. Boehme (Tex. Civ.), 97 S. W. 847.

947-9 Rumbold v. Council, 103 Ill. App. 596; Hardinger v. Brotherhood (Neb.), 103 N. W. 74.

947-10 Waters-P. Oil Co. v. Deselms, 18 Okla. 107, 89 P. 212.

948-14 Knights Templar v. Crayton, 110 Ill. App. 648, *aff.* 209 Ill. 550, 70 N. E. 1066; National W. Co. v. Smith, 108 Ill. App. 477; Variety Mfg. Co. v. Landaker, 129 Ill. App. 630. *Compare* Chambers v. Modern Woodmen, 18 S. D. 173, 99 N. W. 1107. See "CORONER'S INQUEST," Vol. 3, p. 568.

949-16 National Council v. O'Brien, 112 Ill. App. 40 (death certificate produced from public records, competent); Krapp v. Ins. Co., 143 Mich. 369, 106 N. W. 1107; Ohmeyer v. Sup. Circle, 91 Mo. App. 189 (certificate of death admissible); McKinstry v. Collins, 76 Vt. 221, 56 A. 985, *rev.* s. c. 74 Vt. 147, 52 A. 438 (public records incompetent).

950-18 See "EXPERIMENTS," Vol. 5, p. 471.

951-20 See Spurlock v. Tract. Co., 118 La. 1, 42 S. 575.

Direct testimony. — Prosecutrix in action for seduction may testify that she yielded her person to the defendant because of his promises (S. v. Bennett (Ia.), 110 N. W. 150), or because of hypnotic suggestions by the defendant. S. v. Donovan, 128 Ia. 44, 102 N. W. 791.

Witness may answer the question why he left a place where he was being treated by specialists. Bruns-

wick etc. R. Co. v. Hoodenpyle, 129 Ga. 174, 58 S. E. 705.

951-21 Southern R. Co. v. Taylor, 148 Ala. 52, 42 S. 625; Kight v. R. Co., 21 App. Cas. (D. C.) 494; Kendrick v. Furman (Neb.), 115 N. W. 541 (cause of water backing up above a dam; Nichols v. R. Co., 25 Utah 240, 70 P. 996; Lounsbury v. Davis, 124 Wis. 432, 102 N. W. 941.

951-22 Owen v. R. Co., 109 Mo. App. 608, 83 S. W. 92; Texas & P. R. Co. v. Warner (Tex. Civ.), 93 S. W. 489; Taylor v. R. Co., 36 Tex. Civ. 658, 83 S. W. 738.

Result of common observation admissible. McCabe v. Tract. Co. (Tex. Civ.), 88 S. W. 387.

Fright of horses—cause. Foster v. Lumb. Co., 141 Mich. 316, 104 N. W. 617; McCullough v. R. Co., 101 Mich. 234, 59 N. W. 618.

Eye witness may testify that "a loose wire across the street caused the horses to run away." Dublin Co. v. Frazier (Tex. Civ.), 103 S. W. 197.

952-23 White v. Ins. Co., 97 Mo. App. 590, 71 S. W. 707; Multnomah Co. v. Towing Co. (Or.), 89 P. 389.

Veterinary surgeon. — Welch v. Fransioli (Wash.), 90 P. 644.

Cattle dealer. — St. Louis etc. R. Co. v. White, 97 Tex. 493, 76 S. W. 947, *rev.* 80 S. W. 77.

Cattle expert. — Kennon v. S., 46 Tex. Cr. 359, 82 S. W. 518.

Building experts. — Friedman Co. v. Assur. Co., 133 Mich. 212, 94 N. W. 757.

952-24 P. Gas. Co. v. Porter, 102 Ill. App. 461; Dunn v. R. Co., 130 Ia. 580, 107 N. W. 616; Baltimore B. R. Co. v. Sattler, 100 Md. 306, 59 A. 654; Tighe v. R. Co. (Mo. App.), 107 S. W. 1034 (cause of an explosion); Schultz v. R. Co., 181 N. Y. 33, 73 N. E. 491; O'Doherty v. Tel. Co., 113 App. Div. 636, 99 N. Y. S. 351; Meehan v. R. Co., 13 N. D. 432, 101 N. W. 183; Riser v. R. Co., 67 S. C. 419, 46 S. E. 47; Nickles v. R. Co., 74 S. C. 102, 54 S. E. 255.

Whether injuries were such as would be produced by a certain cause, held improper question. MacFeat v. R. Co., 5 Penne. (Del.) 52, 62 A. 898.

952-25 Texas etc. R. Co. v. Cochrane, 29 Tex. Civ. 383, 69 S. W. 984. *Compare* Akin v. Lumb. Co., 88 Minn. 119, 92 N. W. 537.

952-26 Castner Co. v. Davies, 154 Fed. 938; Erickson v. Wire Co., 193 Mass. 119, 78 N. E. 761 (cause of bursting of steam main).

952-27 Frederick Mfg. Co. v. Devlin, 127 Fed. 71, 62 C. C. A. 53.

952-28 Donk Bros. C. Co. v. Stroff, 200 Ill. 483, 66 N. E. 29.

952-29 **Railway expert.** — Southern Kan. Co. v. Sage (Tex. Civ.), 94 S. W. 1074.

953-32 Burkett v. S. (Ala.), 45 S. 682 (whether wound received caused the death); Chadwick v. Ins. Co., 143 Mich. 481, 106 N. W. 1122; Flaherty v. Gas. Co., 30 Pa. Super. 446; Endowment Rank K. P. v. Steele, 108 Tenn. 624, 69 S. W. 336; Ozark v. S. (Tex. Cr.), 100 S. W. 927.

953-33 Travelers' Ins. Co. v. Bingham (Ky.), 105 S. W. 894; Birmingham R. Co. v. Enslen, 144 Ala. 343, 39 S. 74; Southern R. Co. v. Hobbs (Ala.), 43 S. 844; Chicago R. Co. v. Foster, 128 Ill. App. 571, *aff.* 226 Ill. 288, 80 N. E. 762 (question as to whether the disease might have been caused by the fall, proper); Franklin v. R. Co., 188 Mo. 533, 87 S. W. 930; Wood v. R. Co., 181 Mo. 433, 81 S. W. 152; Redmon v. R. Co., 185 Mo. 1, 84 S. W. 26; S. v. White, 48 Or. 416, 87 P. 137; Mayor v. Klasing, 111 Tenn. 134, 76 S. W. 814; Barker v. R. Co., 51 W. Va. 423, 41 S. E. 148. *Compare* Glasgow v. R. Co., 191 Mo. 347, 89 S. W. 915; Taylor v. R. Co., 185 Mo. 239, 84 S. W. 873; Newton v. R. Co., 106 App. Div. 415, 94 N. Y. S. 825.

Answer must not be speculative. Huba v. R. Co., 85 App. Div. 199, 83 N. Y. S. 157; Higgins v. Tract. Co., 96 App. Div. 69, 89 N. Y. S. 76; Lyon v. Grand Rapids, 121 Wis. 609, 99 N. W. 311.

953-34 Clemons v. S., 48 Fla. 9, 37 S. 647 (whether wound could have been caused by blow from fist); Chicago v. Bork, 128 Ill. App. 357, *aff.* 227 Ill. 60, 81 N. E. 27; Chicago v. Didier, 227 Ill. 571, 81 N. E. 698; Chicago etc. Co. v. Roberts, 229 Ill. 481, 82 N. E. 401; Chicago v. Saldman, 129 Ill. App. 282, *aff.* 225 Ill. 625, 80 N. E. 349; Chicago etc. R. Co. v. Foster, 128 Ill. App. 571, *aff.* 226 Ill. 288, 80 N. E. 762; West Chicago S. R. Co. v. Dougherty, 209 Ill. 241, 70 N. E. 586; Boehm v. Detroit, 141 Mich.

277, 104 N. W. 626; Ahern v. R. Co., 102 Minn. 435, 113 N. W. 1019; Decken v. R. Co., 102 Minn. 99, 112 N. W. 901; Smith v. Kansas City, 125 Mo. App. 150, 101 S. W. 1118; S. Omaha v. Sutliffe, 72 Neb. 746, 101 N. W. 997; Graham v. Bauland Co., 97 App. Div. 141, 89 N. Y. S. 595; Wagner v. R. Co., 79 App. Div. 591, 80 N. Y. S. 191, *aff.* 176 N. Y. 610, 68 N. E. 1125; Jones v. Warehouse Co., 137 N. C. 337, 49 S. E. 355; Hickey v. R. Co. (Tex. Civ.), 95 S. W. 763; Lewis v. Crane, 78 Vt. 216, 62 A. 60; Hocking v. Spring Co., 131 Wis. 532, 111 N. W. 685; Schultz v. R. Co. (Wis.), 113 N. W. 658; Hallum v. Omro, 122 Wis. 337, 99 N. W. 1051 (abnormal carriage). *Compare* Chicago v. France, 124 Ill. App. 648; Illinois C. R. Co. v. Smith, 111 Ill. App. 177, *rev.* 208 Ill. 608, 70 N. E. 628 (opinion by physicians that injury was caused in a certain way invasion of province of jury); Lutz v. R. Co., 123 Mo. App. 499, 100 S. W. 46; Riser v. R. Co., 67 S. C. 419, 46 S. E. 47.

954-37 Redmon v. R. Co., 185 Mo. 1, 84 S. W. 26.

954-38 Wabash D. Co. v. Black, 126 Fed. 721, 61 C. C. A. 639; St. Louis etc. R. Co. v. Hook, 83 Ark. 584, 104 S. W. 217; Kansas City etc. R. Co. v. Blaker, 68 Kan. 244, 75 P. 71, 64 L. R. A. 81; Continental C. Co. v. Hunt, 28 Ky. L. R. 1006, 90 S. W. 1056; Glasgow v. R. Co., 191 Mo. 347, 89 S. W. 915 (habits of intoxication inadmissible where not shown to have any connection with the diseased condition alleged to be due to the injury); Horst v. Lewis (Neb.), 103 N. W. 460 (no decrease in earnings may be shown to be due to fact that boys stayed out of school to work); Clemens v. R. M. of A., 14 N. D. 116, 103 N. W. 402; Waters-P. Oil Co. v. Deselms, 18 Okla. 107, 89 P. 212; Gulf, C. & S. F. R. Co. v. Harbison (Tex. Civ.), 88 S. W. 452; Missouri, K. & T. R. Co. v. Lynch (Tex. Civ.), 90 S. W. 511; Fleming & Son v. Pullen (Tex. Civ.), 97 S. W. 109; Mahoney v. R. Co., 78 Vt. 244, 62 A. 722. See standard Mills v. Cheatham, 125 Ga. 649, 54 S. E. 650.

Careful habits of deceased. — Chicago & A. R. Co. v. Wilson, 128 Ill. App. 88, *aff.* 225 Ill. 50, 80 N. E. 56; Wisenger v. Coal Co., 119 Ill. App. 298.

That an injury was not caused as alleged. Hickey v. R. Co. (Tex. Civ.), 95 S. W. 763.

955-39 Heinmiller v. Winston, 131 Ia. 32, 107 N. W. 1102, 6 L. R. A. (N. S.) 150 (that other horses were frightened by the steam shovel); Fleming & Son v. Pullen (Tex. Civ.), 97 S. W. 109.

General cause tending to bring about the improper alignment of all machines upon the same floor may be evidenced by the fact that other machines also worked improperly. Standard Mills v. Cheatham, 125 Ga. 649, 54 S. E. 650.

"It is a fallacy to assume that a sequence of events of necessity indicates an interdependence of the one upon the other, or a causal relation between them." Thompson v. Williams, 100 Md. 195, 60 A. 26 (case dealing with the fraudulent intent in a conveyance).

955-40 Sprague v. R. Co., 70 Kan. 359, 78 P. 828 (fires started by other locomotives); Baltimore etc. R. Co. v. Sattler, 100 Md. 306, 59 A. 654 (injury to land of other persons in the neighborhood by smoke; Lamb v. R. Co., 217 Pa. 564, 66 A. 762. See Welch v. Fransioli (Wash.), 90 P. 644; Hansen v. Lumb. Co., 41 Wash. 349, 83 P. 102.

956-41 So. R. Co. v. Railey, 26 Ky. L. R. 53, 80 S. W. 786. See Huggard v. Refining Co., 132 Ia. 724, 109 N. W. 475; Missouri, K. & T. R. Co. v. Greenwood (Tex. Civ.), 89 S. W. 810. *Compare* Peterson v. R. Co., 19 S. D. 122, 102 N. W. 595.

956-42 Kansas City etc. R. Co. v. Perry, 65 Kan. 792, 70 P. 876; St. Louis etc. R. Co. v. Noland, 75 Kan. 691, 90 P. 273.

CERTIFICATES [Vol. 2.]

962-1 See U. S. v. Hempstead, 153 Fed. 483; P. v. Willard, 150 Cal. 543, 89 P. 124 (certificate of physician as to a person's insanity).

963-2 Barbee v. Findlay, 221 Ill. 251, 77 N. E. 590; Snead & Co. v. Field, 124 Ill. App. 558; Concord Apart. House v. O'Brien, 128 Ill. App. 437, 228 Ill. 360, 81 N. E. 1038;

Hebert v. Dewey, 191 Mass. 403, 77 N. E. 822. See Robins v. Goddard, (1904) 2 Ch. D. (Eng.) 261, *rev.* (1905) 1 K. B. 294.

No special form required. Getchell etc. Co. v. Peterson, 124 Ia. 599, 100 N. W. 550.

963-3 Jonesboro etc. R. Co. v. Dist., 80 Ark. 316, 97 S. W. 281; Robles v. Cooksey (Tex. Civ.), 70 S. W. 584. See Brown v. R. Co., 209 Ill. 402, 70 N. E. 905.

Certificate of cause of death produced from public records. National Council v. O'Brien, 112 Ill. App. 40; Ohmeyer v. Supreme Circle, 91 Mo. App. 189.

Certificate of clerk of court as to recording of will. Hymer v. Holyfield (Tex. Civ.), 87 S. W. 722.

Certificate of birth returned by physician. Vanderbilt v. Mitchell (N. J.), 67 A. 97, *rev.* 63 A. 1107.

Where an officer is authorized to certify only in the absence of another officer, such absence must affirmatively appear. Smallwood v. Kimball, 129 Ga. 49, 58 S. E. 640.

Statute making certificate of commissioners in condemnation proceedings prima facie evidence, held constitutional, being a rule of procedure. Chicago T. T. Co. v. Chicago, 217 Ill. 343, 75 N. E. 499.

By the Kentucky statute a certified copy of the inspector of mines is prima facie evidence of facts therein recited. Andricus v. Coal Co., 28 Ky. L. R. 704, 90 S. W. 233.

State weighmaster's certificate. S. v. Goffee, 192 Mo. 670, 91 S. W. 486.

964-5 Words added to certificate of acknowledgment of mortgage do not affect the mortgage. Burnside v. Mealer, 26 Ky. L. R. 79, 80 S. W. 785.

965-6 Equitable Mfg. Co. v. Davis Co. (Ga.), 60 S. E. 262 (certificate of notary as to execution of a bond, inadmissible); Walker v. Shepard, 210 Ill. 100, 71 N. E. 422; Boyd v. R. Co., 103 Ill. App. 199 (certificate as to non-existence of fact or record); Chicago etc. Co. v. Vance, 64 Kan. 686, 68 P. 606; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132; St. Louis F. Co. v. Beilharz (Tex. Civ.), 88 S. W. 512 (certificate of forfeiture of permit of corporation).

967-11 Hamilton v. McAuley, 27 Tex. Civ. 256, 65 S. W. 205.

968-15 Smithers v. Lowrance (Tex.), 93 S. W. 1064, *over.* s. c. (Tex. Civ.), 91 S. W. 606; Strickel v. Turberville, 28 Tex. Civ. 469, 67 S. W. 1058; Harper v. Dodd, 30 Tex. Civ. 287, 70 S. W. 223. See Foster v. Myers, 117 La. 216, 41 S. 551; Pope v. Anthony, 29 Tex. Civ. 298, 68 S. W. 521.

970-20 Jonesboro etc. R. Co. v. Dist., 80 Ark. 316, 97 S. W. 281.

Presumption does not arise where two certificates have been issued to different persons for the same office. P. v. Davidson, 2 Cal. App. 100, 83 P. 161.

970-22 Woodworth v. McKee, 126 Ia. 714, 102 N. W. 777; Harper v. Marion County, 33 Tex. Civ. 653, 77 S. W. 1044. *Compare* James v. James, 35 Wash. 650, 77 P. 1080.

Certificate to an affidavit taken in open court requires no seal. Hymer v. Holyfield (Tex. Civ.), 87 S. W. 722.

Absence of seal of state on certificate of secretary of state as to increase in corporate capitalization, immaterial. Person & R. Co. v. Lipps, 219 Pa. 99, 67 A. 1081.

Certified copy of duly recorded deed need not indicate presence of a seal thereon. East Coast Lumb. Co. v. Ellis-Y. Co. (Fla.), 45 S. 826.

970-23 Seal necessary to certificate of acknowledgment of a deed. Peters v. Reichenbach, 114 Wis. 209, 90 N. W. 184.

972-32 See Browning v. Lovett, 29 Ky. L. R. 692, 94 S. W. 661; Williamson v. Musick, 60 W. Va. 59, 53 S. E. 706.

972-33 Commerce Co. v. Morris, 27 Tex. Civ. 553, 65 S. W. 1118.

973-35 Recitals not conclusive. Buster v. Warren, 35 Tex. Civ. 644, 80 S. W. 1063; Columbian B. Assn. v. Leeds, 128 Ill. App. 195 (clear, convincing and satisfactory evidence necessary to overcome); Gritten v. Dickerson, 202 Ill. 372, 66 N. E. 1090; Duncan v. Duncan, 203 Ill. 461, 67 N. E. 763.

Certificate of acknowledgment by married woman can be impeached only by clear proof of fraud, and the burden of proof is on her. Johnson Lumb. Co. v. Leonard (N. C.), 59 S. E. 134.

973-36 See Ellis v. Lehman (Tex. Civ.), 106 S. W. 453.

Tax commissioner cannot contradict

his certificate. S. v. Baltimore (Md.), 65 A. 369.

Justice of peace estopped from denying his certificate. Matthews v. Dare, 20 Md. 249.

State cannot make certificate of state weighmaster, conclusive. S. v. Goffee, 192 Mo. 670, 91 S. W. 486.

976-50 Galloway v. Bradburn, 119 Ky. 49, 82 S. W. 1013 (certificate of officers of election prima facie correct); Browning v. Lovett, 29 Ky. L. R. 692, 94 S. W. 661 (election officer cannot impeach his certificate); Stafford v. Sheppard, 57 W. Va. 84, 50 S. E. 1016 (ballots primary and higher evidence). See Williamson v. Musick, 60 W. Va. 59, 53 S. E. 706.

980-62 Ewen v. Wilbor, 99 Ill. App. 132, *aff.* 208 Ill. 492, 70 N. E. 575 (certified copy of the record of the notary and not his certificate of protest should be presented).

980-64 Patton v. Bank, 124 Ga. 965, 53 S. E. 964; Ewen v. Wilbor, 99 Ill. App. 132, *aff.* 208 Ill. 492, 70 N. E. 575; Rolla State Bk. v. Pezoldt, 95 Mo. App. 404, 69 S. W. 51; Nelson v. Kastle, 105 Mo. App. 187, 79 S. W. 730; German-Am. Bk. v. Mills, 99 App. Div. 312, 91 N. Y. S. 142; Schlesinger v. Schultz, 110 App. Div. 356, 96 N. Y. S. 383; Solomon v. Cohen, 94 N. Y. S. 502; Nelson v. Grondahl, 13 N. D. 363, 100 N. W. 1093; Farmers' Nat. Bk. v. Marshall, 9 Pa. Super. 621; Second Nat. Bk. v. Smith, 118 Wis. 18, 94 N. W. 664; Columbian Bk. Co. v. Bowen (Wis.), 114 N. W. 451.

Copy of notarial certificate must under the statute be filed with the complaint in order to be used in evidence. Mason v. Kilcourse, 71 N. J. L. 472, 59 A. 21.

982-70 Schofield v. Palmer, 134 Fed. 753.

983-71 Schofield v. Palmer, 134 Fed. 753 (Virginia statute repealed); Rolla State Bk. v. Pezoldt, 95 Mo. App. 404, 69 S. W. 51; Mason v. Kilcourse, 71 N. J. L. 472, 59 A. 21 (proper presentment and due notice must appear upon the face of the certificate).

984-73 Nelson v. Kastle, 105 Mo. App. 187, 79 S. W. 730 (lack of funds as reason for non-payment).

984-75 London & R. P. Bk. v. Carr, 54 Misc. 94, 105 N. Y. S. 679.

988-5 Second Nat. Bk. v. Smith, 118 Wis. 18, 94 N. W. 664 (sufficient if it identifies the instrument and shows that it has been dishonored).

988-10 Schlesinger v. Schultz, 110 App. Div. 356, 96 N. Y. S. 383; Columbian Bk. Co. v. Bowen (Wis.), 114 N. W. 451 (presumption of presentment at a proper time).

992-23 Solomon v. Cohen, 94 N. Y. S. 502.

995-33 Mason v. Kilcourse, 71 N. J. L. 472, 59 A. 21; Kupferberg v. Horowitz, 52 Misc. 488, 102 N. Y. S. 502 (every presumption is made in favor of the regularity of a notary's protest and certificate).

995-34 Mason v. Kilcourse, 71 N. J. L. 472, 59 A. 21. See German-Am. Bk. v. Mills, 99 App. Div. 312, 91 N. Y. S. 142.

997-42 Second Nat. Bk. v. Smith, 118 Wis. 18, 94 N. W. 664.

998-43 Siegel v. Dubinsky, 107 N. Y. S. 678.

998-45 Nelson v. Grondahl, 13 N. D. 363, 100 N. W. 1093 (testimony by notary as to his invariable custom, proper).

CHARACTER [Vol. 3.]

Proof of reputation as bearing upon issue of negligence, 3-3; *Evidence of character of deceased person not a party,* 5-7; *Character of co-defendant not on trial not provable,* 7-13; *Proof of character of stranger to action,* 34-98.

3-1 Moore v. Dozier, 128 Ga. 90, 57 S. E. 110.

3-2 Moore v. Dozier, supra; Leverich v. Frank, 6 Or. 212.

Both real and reputed character are sometimes involved in litigation, and then the two are distinguished, as where the defendant justifies an assault and battery on the ground of self-defense, claiming that his conduct was affected by his knowledge that plaintiff was quarrelsome and dangerous. McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503.

3-3 Columbia Nat. Bk. v. MacKnight, 29 App. D. C. 580; Hardwick v. Hardwick, 130 Ia. 230, 106

N. W. 639; Texas M. R. v. Dean, 98 Tex. 517, 85 S. W. 1135.

Character as bearing on earning capacity. Cameron etc. Co. v. Anderson, 98 Tex. 156, 81 S. W. 282.

Petitioner's character is involved in habeas corpus proceedings to secure the custody of minor children. Moore v. Dozier, 128 Ga. 90, 57 S. E. 110.

Proof of reputation as bearing upon issue of negligence. — Proof of reputation of a decedent is competent upon the issue as to his exercise of ordinary care in his calling, in the absence of witnesses as to what was done just prior to the accident. Illinois C. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435; Chicago etc. R. Co. v. Gunderson, 174 Ill. 495, 51 N. E. 708; Illinois C. R. Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358; Chicago & A. R. Co. v. Wilson, 128 Ill. App. 88. See infra, 20-50. But it has been held that evidence of prudence is irrelevant in an action to recover for death. McQuisten v. R. Co., 150 Mich. 332, 113 N. W. 1118; Schultz v. S. (Wis.), 113 N. W. 428.

4-4 Consolidated S. Co. v. Morgan, 160 Ind. 241, 66 N. E. 696; Louisville & N. R. Co. v. Daniel, 28 Ky. L. R. 1146, 91 S. W. 691; Mattingly v. Shortell, 27 Ky. L. R. 426, 85 S. W. 215; Chesapeake & O. R. Co. v. Riddle, 24 Ky. L. R. 1687, 72 S. W. 22; Donaldson v. Dobbs, 35 Tex. Civ. 439, 80 S. W. 1084 (and local cases cited); McElroy v. Phink, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1053.

Evidence of character is not admissible in a civil action to meet evidence of specific wrongful acts. Colburn v. Marble (Mass.), 82 N. E. 28.

5-6 Coruth v. Jones, 77 Vt. 441, 60 A. 814; Clement v. Skinner, 72 Vt. 159, 47 A. 788.

5-7 Good character of propounder of a will provable against allegation that will executed by reason of threats and fraud. Hannah v. Anderson, 125 Ga. 407, 54 S. E. 131.

Evidence of character of deceased person not a party may be competent on the question of conspiracy to defraud. Continental Nat. Bk. v. Bank, 1 Tenn. Ch. App. 449, 488.

Evidence of reputation for honesty and integrity not admissible, no attack being made. Ellwood v. Walter, 103 Ill. App. 219, *dist.* Sprague v. Craig, 51 Ill. 288.

6-10 Poler v. Poler, 32 Wash. 400, 73 P. 372.

6-12 Carson v. S., 128 Ala. 58, 29 S. 608; S. v. Denel, 63 Kan. 811, 66 P. 1037.

Such evidence is especially appropriate if insanity is the defense. Maston v. S., 83 Miss. 647, 36 S. 70.

Character of defendant's parents immaterial in a murder case. Smith v. S., 142 Ala. 14, 39 S. 329.

7-13 U. S. v. Breese, 131 Fed. 915, 926; Edgington v. U. S., 164 U. S. 361; S. v. Cather, 121 Ia. 106, 96 N. W. 722; Horton v. S., 84 Miss. 473, 36 S. 1033; Maston v. S., 83 Miss. 647, 36 S. 70; Saye v. S. (Tex. Cr.), 99 S. W. 551.

Admission may take the place of evidence. Beard v. S., 44 Tex. Cr. 402, 71 S. W. 960.

Character of co-defendant not on trial not provable on separate trial of co-indictee. Omer v. C., 95 Ky. 353, 25 S. W. 594; Walls v. S., 125 Ind. 400, 25 N. E. 457; Schultz v. S. (Wis.), 113 N. W. 428.

7-14 S. v. King, 122 Ia. 1, 96 N. W. 712; S. v. Denel, 63 Kan, 811, 66 P. 1037; C. v. Beingo, 217 Pa. 60, 66 A. 153; Phelan v. S., 114 Tenn. 483, 507, 88 S. W. 1040; Orange v. S., 47 Tex. Cr. 337, 83 S. W. 385.

7-15 S. v. Denel, 63 Kan. 811, 66 P. 1037; Phelan v. S., 114 Tenn. 483, 507, 88 S. W. 1040.

7-16 Maston v. S., 83 Miss. 647, 36 S. 70.

8-19 Taylor v. S., 148 Ala. 565, 42 S. 997; Henderson v. S., 120 Ga. 504, 48 S. E. 167, Howell v. S., 124 Ga. 698, 52 S. E. 649; Culver v. S., 124 Ga. 822, 53 S. E. 316; Sweet v. S., 75 Neb. 263, 106 N. W. 31; S. v. MacQueen, 69 N. J. L. 522, 55 A. 1006; P. v. Hughson, 154 N. Y, 153, 47 N. E. 1092; P. v. Elliott, 163 N. Y. 11, 57 N. E. 103; P. v. Childs, 85 N. Y. S. 627; S. v. Dickerson, 77 Ohio St. 34, 82 N. E. 969; C. v. Beingo, 217 Pa. 60, 66 A. 153; C. v. Dingman, 26 Pa. Super. 615; S. v. Moyer, 58 W. Va. 146, 52 S. E. 30; Schutz v. S., 125 Wis. 452, 104 N. W. 90 (correcting a dictum in Bernhardt v. S., 82 Wis. 23, 51 N. W.

1009); Grabowski v. S., 126 Wis. 447, 105 N. W. 805.

In opposition to the rule stated in the text are Eggleston v. S., 129 Ala. 80, 30 S. 582; McClellen v. S., 140 Ala. 99, 37 S. 239.

11-20 **Proof of good character** made after verdict, not cause for new trial. Washington v. S., 124 Ga. 423, 52 S. E. 910.

11-21 U. S. v. Breese, 131 Fed. 915, 926; S. v. Stewart (Del.), 67 A. 786; S. v. Carr, 4 Penne. (Del.) 523, 57 A. 370; S. v. Brown, 4 Penne. (Del.) 120, 52 A. 354; S. v. Conlan, 3 Penne. (Del.) 218, 50 A. 95; Henderson v. S., 120 Ga. 504, 48 S. E. 167; Fordham v. S., 125 Ga. 791, 54 S. E. 694; Culver v. S., 124 Ga. 822, 53 S. E. 316; Brazil v. S., 117 Ga. 32, 43 S. E. 460; Sweet v. S., 75 Neb. 263, 106 N. W. 31; P. v. Ellenbogen, 99 N. Y. S. 897; C. v. Dingman, 26 Pa. Super. 615; Niezorawski v. S., 131 Wis 166, 111 N. W. 250.

Proof of good character will not negative a confession. S. v. Foster (Ia.), 114 N. W. 36.

Good character of accused may be regarded in determining where the truth lies as between conflicting witnesses. Maddox v. S., 118 Ga. 69, 44 S. E. 822.

12-22 Eacock v. S. (Ind.), 82 N. E. 1039, 1046; S. v. King, 122 Ia. 1, 96 N. W. 712; C. v. Dingman, 26 Pa. Super. 615; S. v. Stentz, 33 Wash. 444, 74 P. 588; Niezorawski v. S., 131 Wis. 166, 111 N. W. 250.

12-23 **Failure to give evidence** of good character may be commented upon by the state. S. v. Davis, 3 Penne. (Del.) 220, 50 A. 99.

13-24 S. v. Nussenholtz, 76 Conn. 92, 55 A. 589; Clinton v. S., 53 Fla 98, 43 S. 312; Wilcox v. U. S. (Ind. Ter.), 103 S. W. 774; S. v. Thompson, 127 Ia. 440, 103 N. W. 377; Newman v. C., 28 Ky. L. R. 81, 88 S. W. 1089; S. v. Beckner, 194 Mo. 281, 91 S. W. 892; Puryear v. S. (Tex. Cr.), 98 S. W. 258; Moore v. S., 46 Tex. Cr. 54, 79 S. W. 565; Bays v. S. (Tex. Cr.), 99 S. W. 561; Melton v. S., 47 Tex. Cr. 451, 83 S. W. 822 (*over.* Martin v. S., 44 Tex. Cr. 279, 70 S. W. 973, and Everett v. S., 30 Tex. App. 682, 18 S. W. 674); S. v. Grove, 61 W. Va. 697, 57 S. E. 296.

Order of proof. — Evidence as to the character of a co-defendant should not be received until there is some proof of his guilt. McLeod v. S., 128 Ga. 17, 57 S. E. 83.

13-25 S. v. Kelleher, 201 Mo. 614, 100 S. W. 470.

13-26 Carson v. S., 128 Ala. 58, 29 S. 608; Weaver v. S., 83 Ark. 119, 102 S. W. 713; Cook v. S., 46 Fla. 20, 35 S. 665; S. v. Boyd, 178 Mo. 2, 16, 76 S. W. 979; Biester v. S., 65 Neb. 276, 91 N. W. 416; Holloway v. S., 45 Tex. Cr. 303, 77 S. W. 14.

Negative evidence does not put character in issue, as that defendant had never before been arrested for crime. Posey v. U. S., 26 App. D. C. 302; S. v. Marfaudille (Wash.), 92 P. 939.

An emphatic denial of the charge and a vigorous characterization of the prosecuting witness by defendant do not justify an inquiry into his antecedents. King v. Rouse, (1904) 1 K. B. (Eng.) 184.

14-28 **The rule applies** nothwithstanding the reception of evidence tending to show that deceased had committed a crime. Kennedy v. S., 140 Ala. 1, 37 S. 90.

Rule not violated by testimony as to what witness knew of deceased. Bays v. S. (Tex. Cr.), 99 S. W. 561.

When relevant. — It is only when a showing of self-defense is made that the reputation of deceased for rashness, viciousness and turbulence is material. S. v. Zorn, 202 Mo. 12, 100 S. W. 591.

If self-defense is pleaded and the circumstances are such that defendant was presumed to know the characteristics of deceased, a sufficient foundation is laid for proof of deceased's disposition and tendencies. P. v. Lamar, 148 Cal. 564, 83 P. 993.

Evidence as to the size and strength of a deceased person is not connected with his character. Kelley v. P., 229 Ill. 81, 82 N. E. 198.

Under a statute authorizing the state to prove decedent's reputation, if defendant has proved threats, proof of reputation cannot be made if accused has not attacked it unless he shows knowledge of the threats. Arnwine v. S. (Tex. Cr.), 99 S. W. 97, 96 S. W. 4.

Defendant's ignorance of the general

reputation of deceased does not prevent him showing what it was. S. v. Feeley, 194 Mo. 300, 92 S. W. 663 (*over.* S. v. Kenwade, 121 Mo. 405, 26 S. W. 347).

If defendant was the aggressor he cannot attack deceased's character. Osburn v. S., 164 Ind. 262, 73 N. E. 601.

Testimony as to the relations of deceased and defendant is incompetent on direct examination. S. v. Crea, 10 Idaho 88, 76 P. 1013.

In a prosecution for rape defendant may show how bad complainant's character was. Neace v. C., 23 Ky. L. R. 125, 62 S. W. 733.

Character of deceased for peaceableness is not affected by evidence that he claimed to have been robbed. Smith v. S., 142 Ala. 14, 39 S. 329.

14-29 Character of deceased. Thrawley v. S., 153 Ind. 375, 55 N. E. 95. *Contra,* as to character of decedent. Kelly v. P., 229 Ill. 81, 82 N. E. 198; Carr v. S., 21 Ohio C. C. 43.

Evidence of character of deceased may be competent to meet issue raised by defendant. Martin v. S., 44 Tex. Cr. 279, 70 S. W. 973.

14-31 See Dusek v. S., 48 Tex. Cr. 519, 89 S. W. 271.

14-32 LaFollette etc. Co. v. Minton, 117 Tenn. 415, 428, 101 S. W. 178.

14-33 Maloy v. S., 52 Fla. 101, 41 S. 791; Clinton v. S., 53 Fla. 98, 43 S. 312; Newman v. C., 28 Ky. L. R. 81, 88 S. W. 1089; Calhoon v. C., 23 Ky. L. R. 1188, 64 S. W. 965; Barnes v. C., 24 Ky L. R. 1143, 70 S. W. 827; S. v. Barnett, 203 Mo. 640, 102 S. W. 506; S. v. Brooks, 202 Mo. 106, 100 S. W. 416. See "Credibility," Vol. 3, p. 751, and that title, infra.

Defendant's reputation for violence and turbulence is not provable to affect his credibility as a witness. S. v. Beckner, 194 Mo. 281, 91 S. W. 892; Dolan v. S., 81 Ala. 11, 1 S. 707.

Evidence of character of defendant as a witness must be limited to his capacity as such. The mere fact that a man has been arrested does not show that his character is bad. S. v. Nussenholtz, 76 Conn. 92, 55 A. 589; Newman v. C., 28 Ky. L. R. 81, 88 S. W. 1089.

15-36 Norris v. S. (Tex. Cr.), 106 S. W. 136.

15-38 Simmonds v. Simmonds, 35 Tex. Civ. 151, 79 S. W. 630; Jones v. S. (Tex. Cr.), 106 S. W. 126; Casey v. S. (Tex. Cr.), 97 S. W. 496.

In Texas if a witness has been attacked by laying a predicate for his impeachment later, or his character assailed in any way, his reputation may be sustained before directly impeaching testimony is offered. Harris v. S., 49 Tex. Cr. 338, 94 S. W. 227.

16-39 S. v. Beckner, 194 Mo. 281, 91 S. W. 892; S. v. Fogg, 206 Mo. 696, 105 S. W. 618.

16-40 Brown v. S., 142 Ala. 287, 38 S. 268; Brown v. S. (Tex. Cr.), 106 S. W. 368.

16-41 Missouri etc. R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493.

16-42 Missouri etc. R. Co. v. Dumas, supra; Harris v. S., 49 Tex. Cr. 338, 94 S. W. 227; Contreras v. T. Co. (Tex. Civ.), 83 S. W. 870; Fox v. Robbins (Tex. Civ.), 70 S. W. 597.

18-44 LaFollette etc. Co. v. Minton, 117 Tenn. 415, 428, 101 S. W. 178; Chesapeake etc. R. Co. v. Fortune, 107 Va. 412, 59 S. E. 1095.

Only where the witness is a stranger to the action. Warren v. S. (Tex. Cr.), 103 S. W. 888; Jeffreys v. S. (Tex. Cr.), 103 S. W. 886; Harris v. S., 49 Tex. Cr. 338, 94 S. W. 227.

20-50 Smith v. S., 142 Ala. 14, 39 S. 329; P. v. Tibbs, 143 Cal. 100, 76 P. 904; P. v. Wade, 118 Cal. 672, 50 P. 841; S. v. Conlan, 3 Penne. (Del.) 218, 50 A. 95; Wistrand v. P., 218 Ill. 323, 75 N. E. 891; Wilcox v. U. S. (Ind. Ter.), 103 S. W. 774; S. v. Cather, 121 Ia. 106, 96 N. W. 722; S. v. Bessa, 115 La. 259, 38 S. 985; Maston v. S., 83 Miss. 647, 36 S. 70; Horton v. S., 84 Miss. 473, 36 S. 1033; S. v. Anslinger, 171 Mo. 600, 71 S. W. 1041; P. v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718; S. v. Dickerson, 77 Ohio St. 34, 82 N. E. 969; Gregory v. S. (Tex. Cr.), 94 S. W. 1041; Orange v. S., 47 Tex. Cr. 337, 83 S. W. 385; S. v. Moyer, 58 W. Va. 146, 52 S. E. 30; Schultz v. S. (Wis.), 113 N. W. 428.

Same rule applies to civil actions where defendants seek to show plaintiff's character. Dannenberg v. Berkner, 118 Ga. 885, 45 S. E. 682; Earley v. Winn, 129 Wis. 291, 109 N. W. 633.

One accused of negligent homicide may prove his general reputation for caution and prudence. Saye v. S. (Tex. Cr.), 99 S. W. 551. See ante, 3-3.

General character for honesty and integrity is the specific trait involved in bribery. Schultz v. S. (Wis.), 113 N. W. 428.

On trial of a slander suit an allegation that plaintiff whipped her mother, made it proper to show that she quarreled with and ill-treated her. Earley v. Winn, 129 Wis. 291, 109 N. W. 633. See this case for illustrations of the rule.

In a trial for larceny it is improper to ask a witness for defendant if he ever heard of his stealing. S. v. Briscoe, 3 Penne. (Del.) 7, 50 A. 271.

21-52 S. v. Carpenter, 32 Wash. 254, 73 P. 357; Schultz v. S. (Wis.), 113 N. W. 428.

If reputation for violence and quarrelsomeness when drunk has been shown the state may show the person's general reputation for peace, quiet and good citizenship. S. v. Feeley, 194 Mo. 300, 318, 92 S. W. 663; Hussey v. S., 87 Ala. 121, 6 S. 420.

21-53 S. v. Jones, 4 Penne. (Del.) 109, 53 A. 858; S. v. Beckner, 194 Mo. 281, 91 S. W. 892, 3 L. R. A. (N. S.) 535; S. v. Barnett, 203 Mo. 640, 102 S. W. 506.

On the issue as to the custody of minor children, proof of the general reputation of their mother for chastity is competent, as is proof of specific acts tending to show she is not a proper person to have their custody. Moore v. Dozier, 128 Ga. 90, 57 S. E. 110.

Opinions are not competent to show that a person is not possessed of the character essential for a particular purpose, at least if the facts and circumstances can be given the jury. Moore v. Dozier, 128 Ga. 90, 57 S. E. 110; Sumner v. Sumner, 118 Ga. 590, 45 S. E. 509.

21-54 Cook v. S., 46 Fla. 20, 35 S. 665.

21-57 Wistrand v. P., 218 Ill. 323, 75 N. E. 891; Wilcox v. U. S. (Ind. Ter.), 103 S. W. 774; Harper v. U. S. (Ind. Ter.), 104 S. W. 673; S. v. Griggsby, 117 La. 1046, 42 S. 497; Roch v. S. (Tex. Cr.), 105 S. W. 202; Serna v. S. (Tex. Cr.), 105 S. W. 795.

22-58 Armstrong v. Little, 4 Penne. (Del.) 255, 54 A. 742; S. v. Jones, 4 Penne. (Del.) 109, 53 A. 858; Maloy v. S., 52 Fla. 101, 41 S. 791; Dunlap v. S. (Tex. Cr.), 98 S. W. 845; Myers v. S (Tex. Cr.), 101 S. W. 1000; Missouri etc. R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493; Contreras v. T. Co. (Tex. Civ.), 83 S. W. 870; Price v. Wakeham (Tex. Civ.), 107 S. W. 132; S. v. Grove, 61 W. Va. 697, 57 S. E. 296.

Accused testifying as a witness may as a witness be impeached the same as any other witness. Maloy v. S., 52 Fla. 101, 41 S. 791.

23-59 Calhoon v. C., 23 Ky L. R. 1188, 64 S. W. 965.

23-61 Louisville etc. R. Co. v. Steenberger, 24 Ky. L. R. 761, 69 S. W. 1094; Helm v. C., 26 Ky. L. R. 165, 81 S. W. 270; S. v. Beckner, 194 Mo. 281, 289, 91 S. W. 892; S. v. Grubb, 201 Mo. 585, 99 S. W. 1083, 1090; S. v. Oliphant (Mo. App.), 107 S. W. 32; Powers v. S., 117 Tenn. 363, 97 S. W. 815.

24-62 S. v. Blackburn (Ia.), 114 N. W. 531 (applying the statute to the prosecutrix).

25-65 McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503.

25-67 Perry v. S. (Ala.), 43 S. 18.

26-68 York v. Everton, 121 Mo. App. 640, 97 S. W. 604; S. v. Sibley, 132 Mo. 102, 33 S. W. 167, 53 Am. St. 477.

Evidence of notorious character for lewdness is proper where a father sets up justification for homicide in protection of his daughter; but questionable acts cannot be shown if defendant had no knowledge of them. Gossett v. S., 123 Ga. 431, 51 S. E. 394.

27-70 Owens v. S., 120 Ga. 209, 47 S. E. 545.

Such evidence is competent only when there is testimony tending to establish self-defense. Green v. S., 143 Ala. 2, 10, 39 S. 362 (*over.* Fields v. S., 47 Ala. 603).

It is not competent to show the good moral character of deceased and his abstinence from the use of profane language, to rebut testimony that he used such language when he attacked defendant. Bowles v. C., 103 Va. 816, 48 S. E. 527.

Questions as to character for peace and quiet should include the characteristics of violence, turbulence and bloodthirstiness. Tribble v. S., 145 Ala. 23, 40 S. 938.

27-71 Powers v. S., 117 Tenn. 363, 97 S. W. 815.

27-73 Powers v. S., supra.

28-74 S. v. Viscome, 78 Vt. 485, 63 A. 877.

28-75 Should be limited to a reasonable time previous to, and connected with, the offense. Lynch v. P., 33 Colo. 128, 79 P. 1015.

28-76 P. v. Tibbs, 143 Cal. 100, 76 P. 904.

In Iowa the rule is contrary to that stated in the text. S. v. Blackburn (Ia.), 110 N. W. 275.

In a criminal action for slander evidence as to the character of the prosecutrix at time of trial is inadmissible, the offense having been committed a year before. Bowers v. S., 45 Tex. Cr. 185, 75 S. W. 299.

28-78 Wong Hoon Kan v. Lui Yan, 16 Haw. 734; Earley v. Winn, 129 Wis. 291, 109 N. W. 633.

Misdeeds of a testator, long anterior to the making of the will, are too remote to have bearing on his capacity. Graham v. Deuterman, 217 Ill. 235, 75 N. E. 480.

28-79 S. v. Blackburn (Ia.). 114 N. W. 531.

Rule applies though accused is the witness; he cannot complain because the time inquired about antedated commission of offense. S. v. Hayden, 131 Ia. 1, 107 N. W. 929.

29-83 Lynch v. P., 33 Colo, 128, 79 P. 1015.

29-85 S. v. Conlan, 3 Penne. (Del.) 218, 50 A. 95.

Reputation in place where witness does business and passes most of his time may be shown, though he lives elsewhere. Atlantic R. Co. v. Reynolds, 117 Ga. 47, 43 S. E. 456.

30-91 Alford v. S., 47 Fla. 1, 36 S. 436; Douglass v. Agne, 125 Ia. 67, 99 N. W. 550; Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639; S. v. Prins, 117 Ia. 505, 91 N. W. 758; S. v. Norman (Ia.), 113 N. W. 340; Craft v. Barron, 28 Ky. L. R. 98, 88 S. W. 1099; P. v. Mix, 149 Mich. 260, 112 N. W. 907; P. v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718.

Erratum. — People v. Hamilton, p. 32 top of first column, should be cited 29 Mich. 173.

A period of two and one-half years and a distance of twelve miles are not too remote. P. v. Nunley, 142 Cal. 441, 76 P. 45.

32-92 S. v. Norman (Ia.), 113 N. W. 340.

33-93 Reputation seven years before issue arose and in another state is too remote. S. v. Shouse, 188 Mo. 473, 87 S. W. 480.

33-94 Craft v. Barron, 28 Ky. L. R. 98, 88 S. W. 1099; McQuiggan v. Ladd, 79 Vt. 90, 101, 64 A. 503.

It is not presumed that a witness of bad character is reforming. Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639.

33-96 Craft v. Barron, 28 Ky. L. R. 98, 88 S. W. 1099.

34-97 Douglass v. Agne, 125 Ia. 67, 99 N. W. 550; P. v. Mix, 149 Mich. 260, 112 N. W. 907.

34-98 Proof of character of stranger to action. — Proof of the character of a person not a party to the action nor a witness therein may be important in ascertaining the motive of a person in going to defendant's home, and of the latter's knowledge of his purpose in so doing. Rumsey v. S., 126 Ga. 419, 55 S. E. 167. This may be true of the character of a person in whose defense or for whose protection a parent has acted. Gossett v. S., 123 Ga. 431, 51 S. E. 394. Proof of the general repute of women who went to an alleged disorderly house is competent to show that accused knew of their characters and the nature of their business. S. v. Steen, 125 Ia. 307, 101 N. W. 96. See ante, 5-7.

34-99 Lowdan v. U. S., 149 Fed. 673, 79 C. C. A. 361; Mullen v. U. S., 106 Fed. 892, 46 C. C. A. 22; McKnight v. U. S., 97 Fed. 208, 38 C. C. A. 115; Wilhite v. S., 84 Ark. 67, 104 S. W. 531; Biester v. S., 65 Neb. 276, 91 N. W. 416.

No presumption arises as to character in the absence of evidence. Dryman v. S., 102 Ala. 130, 15 S. 433;

Gater v. S., 141 Ala. 10, 37 S. 341; Fields v. U. S., 27 App. D. C. 433, 448; S. v. Gartrell, 171 Mo. 489, 71 S. W. 1045; S. v. Anslinger, 171 Mo. 600, 71 S. W. 1041. It is not presumed that there has been a reformation. See "CHASTITY," infra, 54-2.

Presumption of good character may be overcome by a preponderance of the evidence. S. v. Roupetz, 73 Kan. 663, 85 P. 778.

35-2 S. v. Dickerson, 77 Ohio St. 34, 82 N. E. 969.

35-4 **The business honor** of another may be testified of from witness' knowledge. Continental Nat. Bk. v. Bank, 1 Tenn. Ch. App. 450, 491.

35-5 Spotswood v. Spotswood, 4 Cal. App. 711, 89 P. 362.

35-6 Hughes v. S. (Ala.), 44 S. 694; S. v. Briscoe, 3 Penne. (Del.) 7, 50 A. 271; S. v. Conlan, 3 Penne. (Del.) 218, 50 A. 95; Sylvester v. S., 46 Fla. 166, 176, 35 S. 142; Nelms v. S., 123 Ga. 575, 51 S. E. 588; S. v. Stone, 96 Minn. 482, 105 N. W. 187; P. v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718; S. v. Thoemke, 11 N. D. 386, 92 N. W. 480; S. v. Roderick, 77 Ohio St. 301, 82 N. E. 1082; Bowers v. S., 45 Tex. Cr. 185, 75 S. W. 299; Allison v. Wood, 104 Va. 765, 52 S. E. 559.

Reputation cannot be shown by the view taken of defendant by a portion of the community. Stevens v. C., 30 Ky. L. R. 290, 98 S. W. 284.

36-7 Banks v. S. (Ala.), 39 S. 921; S. v. Thompson, 127 Ia. 440, 103 N. W. 377; Harris v. Co., 25 Ky. L. R. 297, 74 S. W. 1044; Hensley v. C., 31 Ky. L. R. 386, 102 S. W. 268; S. v. Stone, 96 Minn. 482, 105 N. W. 187; S. v. Beckner, 194 Mo. 281, 91 S. W. 892; P. v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718; C. v. Brown, 23 Pa. Super. 470; Connell v. S., 45 Tex. Cr. 142, 75 S. W. 512; Heffington v. S., 41 Tex. Cr. 315, 54 S. W. 755; S. v. Carpenter, 32 Wash. 254, 73 P. 357; Schultz v. S. (Wis.), 113 N. W. 428.

Testimony that defendant carried a pistol at time offense was committed is competent to show his character. S. v. Spaugh, 199 Mo. 147, 97 S. W. 901.

Accused cannot testify that he had never before been arrested or accused of crime. S. v. Marfaudille (Wash.), 92 P. 939. But the admission of such testimony is not reversible error. Posey v. U. S., 26 App. D. C. 302.

In Texas particular acts of misconduct by defendant may be shown on the cross-examination of his witnesses, as may the fact that they had heard of such acts. Holloway v. S., 45 Tex. Cr. 303, 77 S. W. 14. *Compare* Connell v. S., 45 Tex. Cr. 142, 75 S. W. 512, which distinguishes Childers v. S., 30 Tex. Cr. 160, on the ground that there the parties were strangers to each other, and that defendant knew of the specific act or declaration of deceased with regard to himself, which was held provable.

37-8 Columbia Nat. Bk. v. MacKnight, 29 App. D. C. 580; Lyman v. Tribune, 13 Haw. 453; Colburn v. Marble (Mass.), 82 N. E. 28; Palmer v. Coyle, 187 Mass. 136, 72 N. E. 844; Smitley v. Pinch, 148 Mich. 670, 112 N. W. 686; Allison v. Wood, 104 Va. 765, 52 S. E. 559; Earley v. Winn, 129 Wis. 291, 109 N. W. 633.

If the real character of a party is involved particular instances of its manifestation may be shown. McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503, and local cases cited.

37-9 Warrick v. S., 125 Ga. 133, 53 S. E. 1027; Andrews v. S., 118 Ga. 1, 43 S. E. 852; Hendrickson v. C., 23 Ky. L. R. 1191, 64 S. W. 954; S. v. Roderick, 77 Ohio St. 301, 82 N. E. 1082.

Same rule applies to prosecutrix for rape. S. v. Detwiler, 60 W. Va. 583, 55 S. E. 654.

In Texas particular acts done by the prosecuting witness may be proven to show his recklessness. Coleman v. S., 45 Tex. Cr. 120, 74 S. W. 24.

37-10 In re Durant (Conn.), 67 A. 497; S. v. Blackburn (Ia.), 110 N. W. 275; Powers v. S., 117 Tenn. 363, 97 S. W. 815; Jones v. S. (Tex. Cr.), 101 S. W. 993.

In Oregon it is so provided by statute. S. v. White, 48 Or. 416, 87 P. 137.

39-11 Graham v. Deuterman, 217 Ill. 235, 75 N. E. 480.

39-12 Price v. Wakcham (Tex. Civ.), 107 S. W. 132.

39-13 Warrick v. S., 125 Ga. 133, 53 S. E. 1027; Clark v. C., 29 Ky. L. R. 154, 92 S. W. 573.

40-20 Russell v. S. (Neb.), 110 N. W. 380.

41-21 S. v. Stewart (Del.), 67 A. 786; Lee v. Andrews (Mich.), 114 N. W. 672; P. v. Turney, 124 Mich. 542, 83 N. W. 273; Carp v. Ins. Co., 203 Mo. 295, 101 S. W. 78, 94.

41-24 S. v. Stewart (Del.), 67 A. 786; S. v. Prins, 117 Ia. 505, 91 N. W. 758; S. v. Blackburn (Ia.), 110 N. W. 275; S. v. Boyd, 178 Mo. 2, 76 S. W. 979; Lamb v. Littman, 132 N. C. 978, 44 S. E. 646; Vaughn v. S. (Tex. Cr.), 101 S. W. 445; Wolff v. Tel. Co. (Tex. Civ.), 94 S. W. 1062.

Membership in an order is not evidence of good reputation. Vaughn v. S, (Tex. Cr.), 101 S. W. 445.

42-25 A father may testify of the character of his son. Brown v. S., 142 Ala. 287, 38 S. 268.

42-28 An ex parte certificate of character given by a teacher is inadmissible. Whatley v. S., 144 Ala. 68, 39 S. 1014. And so of a certificate by an army officer. Taylor v. S., 120 Ga. 857, 48 S. E. 361. And of a certificate given pursuant to law to a school teacher. Russell v. S. (Neb.), 110 N. W. 380.

42-30 Smitley v. Pinch, 148 Mich. 670, 112 N W. 686.

42-31 Tingley v. Times Co. (Cal.), 89 P. 1097, 1107; Vickers v. P., 31 Colo. 491, 73 P. 845; Moore v. Dozier, 128 Ga. 90, 57 S. E. 110.

43-32 Gordan v. S., 140 Ala. 29, 36 S. 1009; Powers v. S., 117 Tenn. 363, 97 S. W. 815.

43-34 Day v. Ross, 154 Mass. 13, 27 N. E. 676; Smitley v. Pinch, 148 Mich. 670, 112 N. W. 686; Johnson v. S. (Miss.), 40 S. 324; Sinclair v. S., 87 Miss. 330, 39 S. 522; P. v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718; S. v. Dickerson, 77 Ohio St. 34, 82 N. W. 969; Milliken v. Long, 188 Pa. 411, 41 A. 540; Mitchell v. S. (Tex. Cr.), 100 S. W. 930; S. v. Underwood, 35 Wash. 558, 572, 77 P. 863; S. v. Creaman (W. Va.), 57 S. E. 405; Spencer v. S. (Wis.), 112 N. W. 462.

44-37 Tingley v. Times Co. (Cal.), 89 P. 1097, 1107.

45-39 In Colorado the cross-examination may occur after the witness has testified, and if his lack of qualification appears his testimony will be stricken out. Vickers v. P., 31 Colo. 491, 73 P. 845.

45-41 Mitchell v. S., 148 Ala. 618, 42 S. 1014; Crawford v. S., 112 Ala. 1, 21 S. 214; Douglass v. S. (Tex. Cr.), 98 S. W. 840.

47-46 Ross v. S., 139 Ala. 144, 36 S. 718.

47-47 Owens v. S., 120 Ga. 209, 47 S. E. 545.

Witness may be asked as to defendant's disposition when intoxicated, he having been in that state when the crime was committed; but cannot be asked how often he drank. Cook v. S., 46 Fla. 20, 35 S. 665.

48-49 P. v. Tubbs, 147 Mich. 1, 110 N. W. 132.

49-50 Not concluded by testimony as to general reputation, but may show that conduct varied. P. v. Lamar, 148 Cal. 564, 83 P. 993.

49-51 Ross v. S., 139 Ala. 144, 36 S. 718; Carson v. S., 128 Ala. 58, 29 S. 608; Weaver v. S., 83 Ark. 119, 102 S. W. 713; P. v. Perry, 144 Cal. 748, 78 P. 284; Cook v. S., 46 Fla. 20, 35 S. 665; Owens v. S., 120 Ga., 209, 47 S. E. 545; S. v. Richards, 126 Ia. 497, 102 N. W. 439; Barnes v. C., 24 Ky. L. R. 1143; 70 S. W. 827; Newton v. C., 31 Ky. L. R. 327. 102 S. W. 264; S. v. Beckner, 194 Mo. 281, 91 S. W. 892; S. v. O'Kelley, 121 Mo. App. 178, 98 S. W. 804; McCormick v. S., 66 Neb. 337, 92 N. W. 606; Gulf etc. R. Co. v. Hays (Tex. Civ.), 89 S. W. 29; Green v. Dodge, 79 Vt. 73, 64 A. 499.

Convictions for crime may be shown to impeach a witness' character. S. v. Griggsby, 117 La. 1046, 42 S. 497. See "CREDIBILITY," Vol. 3, p. 751; "CROSS-EXAMINATION," Vol. 3. p. 801, and those titles, infra.

Accused may be asked as to particular wrong-doing. Carr v. S., 81 Ark. 589, 99 S. W. 831.

49-52 Allred v. S., 126 Ga. 537, 55 S. E. 178.

49-53 P. v. Weber, 149 Cal. 32, 86 P. 671, 678; P. v. Moran, 144 Cal. 48, 77 P. 777; Cook v. S., 46 Fla. 20, 35 S. 665· S. v. Boyd, 178 Mo.

2, 18, 76 S. W. 979; Bearden v. S., 44 Tex. Cr. 578, 73 S. W. 17.
50-54 S. v. Boyd, 178 Mo. 2, 18, 76 S. W. 979; City of Greenville v. Spencer, 77 S. C. 50, 57 S. E. 638.
50-55 **Testimony** that deceased was prosecuted, improper. Bearden v. S., 44 Tex. Cr. 578, 73 S. W. 17.
50-56 P. v. Weber, 149 Cal. 325, 86 P. 671; Powers v. S., 117 Tenn. 363, 97 S. W. 815.
50-57 S. v. Dickerson, 77 Ohio St. 34, 82 N. E. 969.
51-59 Carson v. S., 128 Ala. 58, 29 S. 608.
51-62 Biester v. S., 65 Neb. 276, 91 N. W. 416; S. v. Rodrigues, 115 La. 1004, 40 S. 438.
52-64 S. v. Collins, 5 Penne. (Del.) 263, 62 A. 224; Miller v. P., 229 Ill. 376, 82 N. E. 391; S. v. King, 122 Ia. 1, 96 N. W. 712; Sweet v. S., 75 Neb. 263, 106 N. W. 31; Latimer v. S., 55 Neb. 609, 620, 76 N. W. 207, 70 Am. St. 403; Baum v. S., 6 Ohio C. C. (N. S.) 515.

CHASTITY [Vol. 3.]

54-1 **Chastity,** as involved in the law of seduction, means physical, rather than moral purity. Washington v. S., 124 Ga. 423, 52 S. E. 910; P. v. Kehoe, 123 Cal. 224, 55 P. 911.
If the chastity of a decedent is not attacked in a homicide trial, proof thereof is not material. Bullard v. S., 127 Ga. 289, 56 S. E. 429; Burnett v. P., 204 Ill. 208, 226, 68 N. E. 505.
54-2 Wilhite v. S., 84 Ark. 67, 104 S. W. 531; Caldwell v. S., 73 Ark. 139, 83 S. W. 929, 108 Am. St. 28; Rucker v. S., 77 Ark. 23, 90 S. W. 151; McTyier v. S., 91 Ga. 245, 18 S. E. 140; Kerr v. U. S. (Ind. Ter.), 104 S. W. 809; Greenman v. O'Riley, 144 Mich 534, 108 N. W. 421; S. v. Kelley, 191 Mo. 680, 90 S. W. 834.
Presumption as to reformation. — There is no presumption after proof of specific acts of unchastity unless a considerable period has intervened. Woodward v. Republic, 10 Haw. 416. Unchastity being proven, is presumed to continue. Kerr v. U. S. (Ind. Ter.), 104 S. W. 809, *cit.* P. v. Squires, 49 Mich. 487, 13 N. W. 828.
55-3 **Chastity is not involved** in a prosecution for rape if prosecutrix is under age of consent. P. v. Wilmot, 139 Cal. 103, 72 P. 838; P. v. Johnson, 106 Cal. 289, 39 P. 622; P. v. Harlan, 133 Cal. 16, 65 P. 9.
55-4 S. v. Drake, 128 Ia. 539, 105 N. W. 54.
Burden of proof is met by a preponderance of the evidence. Wilhite v. S., 84 Ark. 67, 104 S. W. 531. By raising a reasonable doubt. Kerr v. U. S. (Ind. Ter.), 104 S. W. 809.
56-6 Smitley v. Pinch, 148 Mich. 670, 112 N. W. 686. See S. v. Drake, 128 Ia. 539, 105 N. W. 54.
General reputation of person with whom prosecutrix associated not provable. Woodruff v. S., 72 Neb. 815, 829, 101 N. W. 1114. Otherwise as to the lewd and unchaste character of her associates. Woodruff v. S., supra.
57-7 S. v. Drake, 128 Ia. 539, 105 N. W. 54; Powell v. S. (Miss.), 20 S. 4; Woodruff v. S., 72 Neb. 815, 829, 101 N. W. 1114; P. v. Nelson, 153 N. Y. 90, 46 N. E. 1040.
58-10 Smitley v. Pinch, 148 Mich. 670, 112 N. W. 686.
58-11 **Admissions** made after defendant had seduced the prosecutrix are not provable. Wilhite v. S., 84 Ark. 67, 104 S. W. 531.

CIRCUMSTANTIAL EVIDENCE [Vol. 3.]

63-2 U. S. v. Greene, 146 Fed. 803; Buckler v. Kneezell (Tex. Civ.), 91 S. W. 367.
63-3 Dimmick v. U. S., 135 Fed. 257, 70 C. C. A. 141; S. v. Tyre (Del.), 67 A. 199; S. v. Collins, 5 Penne. (Del.) 263, 62 A. 224; Dunn v. S., 166 Ind. 694, 78 N. E. 198; Buckler v. Kneezell (Tex. Civ.), 91 S. W. 367.
64-5 P. v. Lonnen, 139 Cal. 634, 73 P. 586; P. v. Clark, 145 Cal. 727, 79 P. 434; S. v. Stevens, 119 Ia. 675, 94 N. W. 241; S. v. Foster, 14 N. D. 561, 105 N. W. 938; McKinney v. S., 48 Tex. Cr. 402, 88 S. W. 1012; S. v. Overson, 30 Utah 22, 83 P. 557.
A confession excuses a charge on circumstantial evidence. Burk v. S. (Tex. Cr.), 95 S. W. 1064.

65-8 Sears v. Vaughan, 230 Ill. 572, 82 N. E. 881.
65-9 U. S. v. Greene, 146 Fed. 803.
66-12 No. Chicago St. R. Co. v. Rodert, 203 Ill. 413, 67 N. E. 812; C. v. Asherowski (Mass.), 82 N. E. 13; Buckler v. Kneezell (Tex. Civ.), 91 S. W. 367.
67-13 No. Chicago St. R. Co. v. Rodert, supra; C. v. Asherowski, supra; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.
68-18 Neal v. R. Co., 129 Ia. 5, 105 N. W. 197.
68-19 Georgia R. & E. Co. v. Harris, 1 Ga. App. 714, 57 S. E. 1076; Early v. S. (Tex. Cr.), 97 S. W. 82.
In Colorado it is provided by statute that no person shall suffer the death penalty on a conviction on circumstantial evidence alone. See Covington v. P., 36 Colo. 183, 85 P. 832, for evidence held not to be of that nature.
69-23 S. v. Francis, 199 Mo. 671, 694, 98 S. W. 11.
70-31 Vernon v. U. S., 146 Fed. 121, 76 C. C. A. 547; U. S. F. & G. Co. v. Bank, 145 Fed. 273; Georgia R. & E. Co. v. Harris, 1 Ga. App. 714, 57 S. E. 1076; Neal v. R. Co, 129 Ia. 5, 105 N. W. 197; Chicago etc. R. Co. v. Wood, 66 Kan. 613, 72 P. 215.
In civil cases circumstantial evidence is insufficient if it is equally consistent with the contention of both parties Georgia etc. R. Co. v. Harris, 1 Ga. App. 714, 57 S. E. 1076; Grayson v. Lofland, 21 Tex. Civ. 503, 52 S. W. 121; Brewer v. Cochran (Tex. Civ.), 99 S. W. 1033; Brister v. R. Co., 88 Miss. 431, 40 S. 325. It need not rise to that degree of certainty which will exclude any and every other reasonable hypothesis; the jury may decide between two or more theories. Chicago etc. R. Co. v. Wood, 66 Kan. 613, 72 P. 215.
72-33 Edwards v. Ter., 8 Ariz. 342, 71 P. 458; P. v. Olsen, 1 Cal. App. 17, 81 P. 676; S. v. Cohen, 108 Ia. 208, 78 N. W. 857, 75 Am. St. 213; S. v. Harmann (Ia.), 112 N. W. 632; S. v. Blydenburg (Ia.), 112 N. W. 634.
73-34 U. S. v. Greene, 146 Fed. 803, 832; Dunn v. S., 166 Ind. 694, 78 N. E. 198.
73-35 Smith v. S., 137 Ala. 22, 34 S. 396; Spraggins v. S., 139 Ala. 93, 35 S. 1000; Duckworth v. S., 83 Ark. 192, 103 S. W. 601; Carr v. S., 81 Ark. 589, 99 S. W. 831.
74-36 Dunn v. S., 166 Ind. 694, 78 N. E. 198; S. v. Langford, 74 S. C. 460, 55 S. E. 120; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.
Every incriminating circumstance which the jury may consider as evidence of guilt must be established to a moral certainty or beyond a reasonable doubt. Lamb v. S., 69 Neb. 212, 217, 95 N. W. 1050; *cit.* Davis v. S., 51 Neb. 301, 70 N. W. 984; Morgan v. S., 51 Neb. 672, 71 N. W. 788; Johnson v. S., 53 Neb. 103, 73 N. W. 463; Smith v. S., 61 Neb. 296, 85 N. W. 49. See 97-15, infra.
75-38 See S. v. Johnson, 14 N. D. 288, 103 N. W. 565.
75-40 Dunn v. S., 166 Ind. 694, 78 N. E. 198; S. v. Johnson, supra; Fields v. R. Co., 113 Mo. App. 642, 88 S. W. 134.
76-42 S. v. Thompson, 127 Ia. 440, 103 N. W. 377; Haywood v. S., 90 Miss. 461, 43 S. 614.
77-46 Gordon v. S., 147 Ala. 42, 41 S. 847; S. v. Foster, 14 N. D. 561, 105 N. W. 938; C. v. Kovovic, 209 Pa. 465, 58 A. 857; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.
78-48 S. v. Collins, 5 Penne. (Del.) 263, 62 A. 224; S. v. Thompson, 127 Ia. 440, 103 N. W. 377; S. v. Sloan, 35 Mont. 367, 89 P. 829; S. v. Coleman, 17 S. D. 594, 615, 98 N. W. 175.
79-51 U. S. v. Greene, 146 Fed. 803; C. v. Kovovic, 209 Pa. 465, 58 A. 857.
80-52 Hickory v. U. S., 151 U. S. 303; S. v. Rome, 64 Conn. 329, 30 A. 57; Slack v. Harris, 200 Ill. 96, 65 N. E. 669; S. v. Crofford, 121 Ia. 395, 96 N. W. 889; S. v. Foster, 14 N. D. 561, 105 N. W. 938.
81-53 Slack v. Harris, 200 Ill. 96, 65 N. E. 669; S. v. Foster, 14 N. D. 561, 105 N. W. 938.
81-55 See S. v. Coleman, 17 S. D. 594, 616, 98 N. W. 175.
82-59 Rogers v. Ins. Co., 138 Cal. 285, 71 P. 348; S. v. Samuels (Del.) 67 A. 164; Economy etc. Co. v. Sheridan, 200 Ill. 439, 65 N. E. 1070, 103 Ill. App. 146; Slack v. Harris, 200 Ill. 96, 65 N. E. 669; Houston

etc. R. Co. v. Adams (Tex. Civ.), 98 S. W. 222.

82-60 U. S. v. Greene, 146 Fed. 803; Murphy v. S., 118 Ga. 780, 45 S. E. 609; S. v. Levy, 9 Idaho 483, 75 P. 227; Everett v. P., 216 Ill. 478, 75 N. E. 188; S. v. Bulecheck (Ia.), 110 N. W. 929; C. v. Kovovic, 209 Pa. 465, 58 A. 857; S. v. Langford, 74 S. C. 460, 55 S. E. 120; S. v. Glover (S. D.), 113 N. W. 625; Holder v. S. (Tenn.), 104 S. W. 225; Maroney v. S., 45 Tex. Cr. 524, 78 S. W. 696.

83-63 S. v. Crofford, 121 Ia. 395, 96 N. W. 889.

84-65 See Thompson v. S., 30 Tex. Cr. 325, *mod.* in McCandless v. S., 42 Tex. Cr. 655, 62 S. W. 745, and in Holloway v. S., 45 Tex. Cr. 303, 77 S. W. 14.

85-67 Jackson v. S., 49 Tex. Cr. 215, 91 S. W. 788; Jordan v. S. (Tex. Cr.), 104 S. W. 900.

85-69 Grayson v. Lofland (Tex. Civ.), 52 S. W. 121; Brewer v. Cochran (Tex. Civ.), 99 S. W. 1033.

86-74 Perovich v. U. S., 205 U. S. 86; Dimmick v. U. S., 135 Fed. 257, 70 C. C. A. 141; Vaughn v. S., 130 Ala. 18, 30 S. 669; P. v. Olsen, 1 Cal. App. 17, 81 P. 676; S. v. Samuels (Del.), 67 A. 164; Campbell v. S., 124 Ga. 432, 52 S. E. 914; S. v. Levy, 9 Idaho 483, 75 P. 227; S. v. Blydenburg (Ia.), 112 N. W. 634; S. v. Bulecheck (Ia.), 110 N. W. 929; S. v. Westcott, 130 Ia. 1, 104 N. W. 341; S. v. Hewsack, 189 Mo. 295, 88 S. W. 21; S. v. Knapp, 70 Ohio St. 380, 71 N. E. 705; S. v. Coleman, 17 S. D. 594, 98 N. W. 175; Buel v. S., 104 Wis. 132, 80 N. W. 78; Schwantes v. S., 127 Wis. 160, 106 N. W. 237; Curran v. S., 12 Wyo. 553, 76 P. 577.

91-88 See Westbrook v. S., 91 Ga. 11, 16 S. E. 100.

92-90 S. v. Hutchings, 30 Utah 319, 84 P. 893.

92-91 U. S. v. Greene, 146 Fed. 803; Vernon v. U. S. 146 Fed. 121, 76 C. C. A. 547; Dimmick v. U. S., 135 Fed. 257, 70 C. C. A. 141; U. S. v. Richards, 149 Fed. 443; Duckworth v. S., 83 Ark. 192, 103 S. W. 601; P. v. Staples, 149 Cal. 405, 86 P. 886; P. v. Taggart, 1 Cal. App. 423, 82 P. 396; S. v. Samuels (Del.), 67 A. 164; S. v. Tyre (Del.), 67 A. 199; S. v. Collins, 5 Penne. (Del.) 263, 62 A. 224; Watson v. S., 118 Ga. 66, 44 S. E. 803; Jackson v. S., 118 Ga. 780, 45 S. E. 604; S. v. Levy, 9 Idaho 483, 75 P. 227; S. v. Blydenburg (Ia.), 112 N. W. 634; S. v. Sweizenski, 73 Kan. 733, 85 P. 800; S. v. Ferrio, 98 Me. 17, 31, 56 A. 217; S. v. Morney, 196 Mo. 43, 93 S. W. 1117; S. v. Hewsack, 189 Mo. 295, 88 S. W. 21; S. v. Allen, 34 Mont. 403, 414, 87 P. 177; S. v. Sloan, 35 Mont. 367, 89 P. 829; S. v. Hudson, 66 S. C. 394, 44 S. E. 968; S. v. Langford, 74 S. C. 460, 55 S. E. 120; S. v. Coleman, 17 S. D. 594, 98 N. W. 175; S. v. Glover (S. D.), 113 N. W. 625; Strong v. S. (Tex. Cr.), 105 S. W. 785; Porch v. S. (Tex. Cr.), 99 S. W. 102; Schwantes v. S. 127 Wis. 160, 106 N. W. 237; Buel v. S., 104 Wis. 132, 80 N. W. 78.

93-92 P. v. Staples, 149 Cal. 405, 86 P. 886; Riley v. S., 1 Ga. App. 651, 57 S. E. 1031; Sikes v. S., 120 Ga. 494, 48 S. E. 153; S. v. Morney, 196 Mo. 43, 93 S. W. 1117.

94-95 S. v. Scott, 177 Mo. 665, 76 S. W. 950; S. v. Morney, supra; S. v. Hudson, 66 S. C. 394, 44 S. E. 968; S. v. Jackson, 68 S. C. 53, 46 S. E. 538.

95-99 Perovich v. U. S., 205 U. S. 86; Barker v. S., 126 Ala. 69, 28 S. 685; Butt v. S., 81 Ark. 173, 98 S. W. 723; S. v. Collins, 5 Penne. (Del.) 263, 62 A. 224; Delahoyde v. P., 212 Ill. 554, 72 N. E. 732; S. v. Francis, 199 Mo. 671, 692, 98 S. W. 11; S. v. Scott, 177 Mo. 665, 76 S. W. 950; S. v. Morney, 196 Mo. 43, 93 S. W. 1117; S. v. Sanders, 75 S. C. 409, 56 S. E. 35; Horn v. S., 12 Wyo. 80, 73 P. 705.

96-3 Parham v. S., 147 Ala. 57, 42 S. 1; Spraggins v. S., 139 Ala. 93, 35 S. 1000.

96-6 Jackson v. S., 118 Ga. 780, 45 S. E. 604.

It is not required that the jury be so convinced that they would be willing to act upon the evidence in matters of highest concern to their own interests. Bowen v. S., 140 Ala. 65, 37 S. 233.

96-7 See Spraggins v. S., 139 Ala. 93, 35 S. 1000.

96-8 Parham v. S., 147 Ala. 57, 42 S. 1; Bowen v. S., 140 Ala. 65, 37 S. 233; Strickland v. S. (Ala.), 44 S. 90; P. v. Olsen, 1 Cal. App. 17, 81 P. 676.

In a civil case it is not necessary that every other hypothesis should be excluded than that relied upon. Brister Co. v. R. Co., 88 Miss 431, 40 S. 325.

96-9 Vernon v. U. S., 146 Fed. 121, 76 C. C. A. 547; Bowen v. S., 140 Ala. 65, 37 S. 233; Strickland v. S. (Ala.), 44 S. 90; Campbell v. S., 124 Ga. 432, 52 S. E. 914; New v. S., 124 Ga. 143, 52 S. E. 160; Everett v. P., 216 Ill. 478, 75 N. E. 188.

97-10 Gordon v. S., 147 Ala. 42, 41 S. 847; Edwards v. Ter., 8 Ariz. 342, 76 P. 458; Lackey v. S., 67 Ark. 416, 55 S. W. 213; Duckworth v. S., 83 Ark. 192, 103 S. W. 601; Carr v. S., 81 Ark. 589, 99 S. W. 831; P. v. Olsen, 1 Cal. App. 17, 81 P. 676; Sikes v. S., 120 Ga. 494, 48 S. E. 153; S. v. Francis, 199 Mo. 671, 694, 98 S. W. 11; S. v. Sloan, 35 Mont. 367, 89 P. 829; Porch v. S. (Tex. Cr.), 99 S. W. 102; Young v. S., 47 Tex. Cr. 197, 82 S. W. 1035.

97-15 S. v. Adams, 138 N. C. 688, 695, 50 S. E. 765. It was said in this case: If the judge charges in substance that the law presumes the defendant to be innocent and the burden is upon the state to show his guilt, and that upon all the testimony they must be fully satisfied of his guilt, he has done his duty. But compare with 74-36, supra.

In Montana it is error to instruct that a conviction may be had if the evidence satisfies the "guarded judgment" of the jury. S. v. Allen, 34 Mont. 403, 87 P. 177; S. v. Sloan, 35 Mont. 367, 89 P. 829.

98-16 Haywood v. S., 90 Miss. 461, 43 S. 614; Parks v. S., 46 Tex. Cr. 100, 79 S. W. 301.

99-21 Calhoun v. S., 143 Ala. 11, 39 S. 378; Coleman v. S., 59 Miss. 484.

99-22 Chicago U. T. Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341; Von Carlowitz v. Bernstein, 28 Tex. Civ. 8, 66 S. W. 464.

99-23 Graves v. Rivers, 123 Ga. 224, 51 S. E. 318; St. Louis etc. R. Co. v. Watkins (Tex. Civ.), 100 S. W. 162; Walker v. Dickey (Tex. Civ.), 98 S. W. 658. See "CONTRACTS," Vol. 3, p. 510, and that title, infra.

99-24 A gift may be so shown. Lord v. Ins. Co., 27 Tex. Civ. 139, 65 S. W. 699.

100-25 The sending of papers may be proven by circumstantial evidence. Cain v. Corley (Tex. Civ.), 99 S. W. 168.

100-27 The value of the use of a vessel may be shown by such evidence. The North Star, 151 Fed. 168, 80 C. C. A. 536.

100-29 S. v. Sweizewski, 73 Kan. 733, 85 P. 800.

101-30 Stiles v. Stiles, 167 Ill. 576, 47 N. E. 867; Heyman v. Heyman, 210 Ill. 524, 71 N. E. 591.

101-31 U. S. v. Greene, 146 Fed. 803, 874.

102-37 Berry v. Ewen, 27 Ky. L. R. 467, 85 S. W. 227; Wiggington v. Minter, 28 Ky. L. R. 79, 88 S. W. 1082; Deepwater Council v. Renick, 59 W. Va. 343, 53 S. E. 552.

103-38 The San Rafael, 141 Fed. 270, 72 C. C. A. 388; Omaha W. Co. v. Schamel, 147 Fed. 502, 78 C. C. A. 68; Monarch etc. Co. v. Devoe, 36 Colo. 270, 85 P. 633; Slack v. Harris, 200 Ill. 96, 65 N. E. 669; Fields v. R. Co., 113 Mo. App. 642, 88 S. W. 134; Minard v. R. Co. (N. J. L.), 64 A. 1054; Fleming v. Pullen (Tex. Civ.), 97 S. W. 109.

103-40 No. Chicago St. R. Co. v. Rodert, 203 Ill. 413, 67 N. E. 812; Chicago etc. R. Co. v. Wood, 66 Kan. 613, 72 P. 215.

104-41 McInerney v. U. S., 143 Fed. 729, 74 C. C. A. 655; Hodge v. S., 98 Ala. 10, 13 S. 385, 39 Am. St. 17; Hargrove v. S., 147 Ala. 97, 41 S. 972; Roszczyniala v. S., 125 Wis. 414, 104 N. W. 113.

104-42 Vaughn v. S., 130 Ala. 18, 30 S. 669.

104-43 Vernon v. U. S., 146 Fed. 121, 76 C. C. A. 547; Bloom v. S., 68 Ark. 336, 58 S. W. 41; C. v. Costley, 118 Mass. 2.

104-45 Ball v. C., 27 Ky. L. R. 448, 85 S. W. 226.

105-46 P. v. Woods, 147 Cal. 265, 81 P. 652.

105-47 Howard v. C., 118 Ky. 1, 80 S. W. 211, 81 S. W. 704.

108-59 Meisenheimer v. S., 73 Ark. 407, 84 S. W. 494; Holland v. C., 26 Ky. L. R. 790, 82 S. W. 596.

108-60 Bush v. S., 136 Ala. 85, 33 S. 878; Joiner v. S., 119 Ga. 315, 46 S. E. 412; Davis v. S., 122 Ga. 564, 50 S. E. 376; S. v. Westcott,

130 Ia. 1, 104 N. W. 341; S. v. Knapp, 70 Ohio St. 380, 71 N. E. 705; Curran v. S., 12 Wyo. 553, 76 P. 577.

110-67 Lorenz v. U. S., 24 App. D. C. 337; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

110-68 U. S. v. Greene, 146 Fed. 803; Holder v. S. (Tenn.), 104 S. W. 225.

112-69 Barker v. S., 126 Ala. 69, 28 S. 685; S. v. Roberts, 201 Mo. 702, 728, 100 S. W. 484.

In Missouri that which is probable or even possible may be testified of. Fields v. R. Co., 113 Mo. App. 642, 88 S. W. 134, citing local cases.

113-78 Holder v. S. (Tenn.), 104 S. W. 225.

114-79 Smith v. S., 137 Ala. 22, 34 S. 396; Bowen v. S., 140 Ala. 65, 37 S. 233; Vaughn v. S., 130 Ala. 18, 30 S. 669; Lorenz v. U. S., 24 App. D. C. 337.

119-94 Sanderson v. S. (Ind.), 82 N. E. 525; S. v. Spaugh, 200 Mo. 571, 98 S. W. 55.

119-95 U. S. v. Greene, 146 Fed. 803, 826.

119-96 U. S. v. Greene, 146 Fed. 803, 826; Chapline v. S., 77 Ark. 444, 95 S. W. 477; Sanderson v. S. (Ind.), 82 N. E. 525. See U. S. v. Richards, 149 Fed. 443; P. v. Eldridge, 147 Cal. 782, 82 P. 442; P. v. Donnolly, 143 Cal. 394, 77 P. 177; McLeroy v. S., 125 Ga. 240, 54 S. E. 125; Tedford v. P., 219 Ill. 23, 76 N. E. 60.

121-97 Podolski v. Stone, 186 Ill. 540, 58 N. E. 340.

121-99 Reasonable latitude allowed in direct and in cross-examination, even though the matters were not touched upon in direct examination. Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131.

123-5 Dimmick v. U. S., 135 Fed. 257, 70 C. C. A. 141; Pointer v. U. S., 151 U. S. 396, 414.

123-6 Davis v. S., 122 Ga. 564, 50 S. E. 376; S. v. Levy, 9 Idaho 483, 75 P. 227; Sanderson v. S. (Ind.), 82 N. E. 525; S. v. Heusack, 189 Mo. 295, 88 S. W. 21; Holder v. S. (Tenn.), 104 S. W. 225; Schwantes v. S., 127 Wis. 160, 179, 106 N. W. 237.

A difficulty between deceased and a brother of accused the day before the homicide may be proved. Sanders v. S., 134 Ala. 74, 32 S. 654.

Ill-feeling between the fathers of deceased and accused may be shown. Rawlins v. S., 124 Ga. 31, 52 S. E. 1.

123-8 S. v. Coleman, 17 S. D. 594, 98 N. W. 175. See P. v. Staples, 149 Cal. 405, 86 P. 886.

124-9 S. v. Coleman, supra; P. v. Weber, 149 Cal. 32, 86 P. 671.

124-10 S. v. Coleman, supra.

124-11 Bowen v. S., 140 Ala. 65, 37 S. 233; P. v. White, 176 N. Y. 331, 346, 68 N. E. 630; Turner v. S., 48 Tex. Cr. 585, 89 S. W. 975.

124-12 P. v. Cook, 148 Cal. 334, 83 P. 43; Gallegos v. S., 48 Tex. Cr. 58, 85 S. W. 1150.

124-14 Thiede v. Ter., 159 U. S. 510; P. v. Staples, 149 Cal. 405, 86 P. 886; Roberts v. S., 123 Ga. 146, 51 S. E. 374.

125-15 Shaw v. S., 102 Ga. 660, 29 S. E. 477; Sanderson v. S. (Ind.), 82 N. E. 525; Whitney v. C., 24 Ky. L. R. 2524, 74 S. W. 257; S. v. Spaugh, 200 Mo. 571, 594, 98 S. W. 55; S. v. Coleman, 17 S. D. 594, 98 N. W. 175; Holder v. S. (Tenn.), 104 S. W. 225; Cortez v. S., 47 Tex. Cr. 10, 83 S. W. 812, 43 Tex. Cr. 384, 66 S. W. 453.

125-16 P. v. White, 176 N. Y. 331, 346, 68 N. E. 630.

126-18 Ray v. S., 147 Ala. 5, 41 S. 519; S. v. Samuels (Del.), 67 A. 164; S. v. Ruck, 194 Mo. 416, 435, 92 S. W. 706.

126-19 C. v. Asherowski (Mass.), 82 N. E. 13.

126-20 See S. v. Adams (Del.), 65 A. 510; Herndon v. S. (Tex. Cr.), 99 S. W. 558.

126-21 S. v. Adams, 138 N. C. 688, 50 S. E. 765.

127-23 Nobles v. S., 127 Ga. 212, 56 S. E. 125; Lipham v. S., 125 Ga. 52, 53 S. E. 817; Potter v. Clapp, 203 Ill. 592, 68 N. E. 81.

128-30 Spraggins v. S., 139 Ala. 93, 35 S. 1000; Parham v. S., 147 Ala. 57, 42 S. 1; Mazzotte v. Ter., 8 Ariz. 270, 71 P. 911; S. v. Samuels (Del.), 67 A. 164; Rawlins v. S., 124 Ga. 31, 52 S. E. 1; S. v. Thompson, 127 Ia. 440, 103 N. W. 377; S. v. Quen, 48 Or. 347, 86 P. 791.

128-31 Perovich v. U. S., 205 U. S. 86; S. v. Rosa, 72 N. J. L. 462, 62 A. 695.

129-34 **Disconnected threats** may not be proved. Daniel v. S., 103 Ga. 202, 29 S. E. 767; Horton v. S., 110 Ga. 739, 35 S. E. 659.

Scope of evidence. — "Where guilty knowledge is the gist of the offense, anything going to show the existence of such knowledge is admissible, and it is immaterial when or from what source such knowledge was acquired." Bashinski v. S., 122 Ga. 164, 50 S. E. 54, 123 Ga. 508, 51 S. E. 499.

129-35 Lipsey v. P., 227 Ill. 364, 81 N. E. 348; Delahoyde v. P., 212 Ill. 554, 72 N. E. 732; C. v. Asherowski (Mass.), 82 N. E. 13.

129-36 Lipsey v. P., 227 Ill. 364, 81 N. E. 348.

130-37 **Possession of poison** by one charged with administering it at the time of so doing must be shown. S. v. Blydenburg (Ia.), 112 N. W. 634; S. v. Francis, 199 Mo. 671, 98 S. W. 11.

130-38 S. v. Samuels (Del.), 67 A. 164; Roberts v. S., 123 Ga. 146, 51 S. E. 374.

Purchase of ammunition. — Holder v. S. (Tenn.), 104 S. W. 225.

130-39 Perovich v. U. S., 205 U. S. 86; Baker v. S., 126 Ala. 69, 28 S. 685; Spraggins v. S., 139 Ala. 93, 35 S. 1000; Bowen v. S., 140 Ala. 65, 37 S. 233; Mazzotte v. Ter., 8 Ariz. 270, 71 P. 911; Schley v. S., 48 Fla. 53, 37 S. 518; Seats v. S., 122 Ga. 173, 50 S. E. 65; Campbell v. S., 124 Ga. 432, 52 S. E. 914; Bull v. C., 29 Ky. L. R. 949, 96 S. W. 817; S. v. Hewsack, 189 Mo. 295, 88 S. W. 21; C. v. Kovovic, 209 Pa. 465, 58 A. 857; Younger v. S., 12 Wyo. 24, 73 P. 551.

131-40 S. v. Morney, 196 Mo. 43, 93 S. W. 1117.

131-42 See Seats v. S., 122 Ga. 173, 50 S. E. 65.

132-48 S. v. Heusack, 189 Mo. 295, 88 S. W. 21; P. v. Smith, 172 N. Y. 210, 64 N. E. 814.

Trailing by bloodhounds. — See "Identity," Vol. 6, p. 931, and same title, infra.

132-49 Whitney v. C., 24 Ky. L. R. 2524, 74 S. W. 257; S. v. Adams, 138 N. C. 688, 50 S. E. 765.

133-50 Mack v. S. (Fla.), 44 S. 706; S. v. Herbert, 63 Kan. 516, 66 P. 235; S. v. Hopkirk, 84 Mo. 278.

Identification of horse by sound of hoof beat. Holder v. S. (Tenn.), 104 S. W. 225.

Identification of person communicating by telephone. See "Admissions," Vol. 1, p. 604, and supra; also Shawyer v. Chamberlain, 113 Ia. 742, 84 N. W. 661, 86 Am. St. 411; Deering v. Shumpik, 67 Minn. 348, 69 N. W. 1088; Ex parte Terrell (Tex. Cr.), 95 S. W. 536.

Reproduction of sound by phonograph. See Boyne City etc. R. Co. v. Anderson, 146 Mich. 328, 109 N. W. 429, 8 L. R. A. (N. S.) 306.

134-53 Smith v. S., 137 Ala. 22, 34 S. 396; Hargrove v. S., 147 Ala. 97, 41 S. 972; Jackson v. S., 118 Ga. 780, 45 S. E. 604; S. v. Langford, 74 S. C. 460, 55 S. E. 120; Porch v. S. (Tex. Cr.), 99 S. W. 102; Jenkins v. S., 45 Tex. Cr. 173, 75 S. W. 312; Thompson v. S., 45 Tex. Cr. 397, 77 S. W. 449; Turner v. S., 48 Tex. Cr. 585, 89 S. W. 975.

Waiver of privilege. — If defendant voluntarily surrenders his shoes for the purpose of comparing them with footprints he waives his constitutional privilege. S. v. Arthur, 129 Ia. 235, 105 N. W. 422.

Witness must express definite opinion or cannot testify as to tracks. Smith v. S., 45 Tex. Cr. 405, 77 S. W. 453; Parker v. S., 46 Tex. Cr. 461, 80 S. W. 1008.

135-54 Holder v. S. (Tenn.), 104 S. W. 225.

135-55 Weaver v. S., 46 Tex. Cr. 607, 81 S. W. 39; Parker v. S., supra.

136-60 P. v. Olsen, 1 Cal. App. 17, 81 P. 676; Davis v. S., 122 Ga. 564, 50 S. E. 376; S. v. Heusack, 189 Mo. 295, 88 S. W. 21; Roszczyniala v. S., 125 Wis. 414, 104 N. W. 113.

137-64 U. S. v. Greene, 146 Fed. 803, 873; Perovich v. U. S., 205 U. S. 86; Strickland v. S. (Ala.), 44 S. 90; Barker v. S., 126 Ala. 69, 28 S. 685; S. v. Ferrio, 98 Me. 17, 29, 56 A. 217.

138-66 Herndon v. S. (Tex. Cr.), 99 S. W. 558.

138-67 Jackson v. S., 118 Ga. 780, 45 S. E. 604; S. v. Langford, 74 S. C. 460, 55 S. E. 120; Curran v. S., 12 Wyo. 553, 76 P. 577; Younger v. S., 12 Wyo. 24, 73 P. 551.

Possession may be shown by cir-

cumstantial evidence. P. v. Nunley, 142 Cal. 105, 75 P. 676.

138-69 Lipsey v. P., 227 Ill. 364, 81 N. E. 348.

138-70 Bowen v. S., 140 Ala. 65, 37 S. 233; Strickland v. S. (Ala.), 44 S. 90; S. v. Barnes, 47 Or. 592, 85 P. 998; Buel v. S., 104 Wis. 132, 80 N. W. 78.

138-71 Turner v. S., 48 Tex. Cr. 585, 89 S. W. 975.

138-72 Davis v. S., 122 Ga. 564, 50 S. E. 376; C. v. Kovovic, 209 Pa. 465, 58 A. 857.

138-73 Vaughn v. S., 130 Ala. 18, 30 S. 669; Bull v. C., 29 Ky. L. R. 949, 96 S. W. 817; Turner v. S., 48 Tex. Cr. 585, 89 S. W. 975.

139-75 P. v. Olsen, 1 Cal. App. 17, 81 P. 676; Holder v. S. (Tenn.), 104 S. W. 225.

140-77 P. v. Weber, 149 Cal. 32, 86 P. 671.

140-80 **Departure of parties** who had opportunity to commit the crime may be shown, though no accusation has been made against them. Haywood v. S., 90 Miss. 461, 43 S. 614.

140-82 U. S. v. Greene, 146 Fed. 803, 872; Mazzotte v. Ter., 8 Ariz. 270, 71 P. 911; P. v. Staples, 149 Cal. 405, 86 P. 886; P. v. Easton, 148 Cal. 50, 82 P. 840; Jackson v. S., 118 Ga. 780, 45 S. E. 604; Grant v. S., 122 Ga. 740, 50 S. E. 946; Morello v. P., 226 Ill. 388, 400, 80 N. E. 903; S. v. Matheson, 130 Ia. 440, 103 N. W. 137; S. v. Spaugh, 200 Mo. 571, 599, 98 S. W. 55; S. v. Ryan, 47 Or. 338, 349, 82 P. 703, 1 L. R. A. (N. S.) 862; C. v. Kovovic, 209 Pa. 465, 58 A. 857.

141-83 S. v. Deatherage, 35 Wash. 326, 77 P. 504.

142-87 S. v. Langford, 74 S. C. 460, 55 S. E. 120.

Failure of accused to improve an opportunity to escape is not provable. Kennedy v. S., 101 Ga. 559, 28 S. E. 979; neither is the fact that he voluntarily surrendered himself, the state not having shown flight. Vaughn v. S., 130 Ala. 18, 30 S. 669.

143-88 Bines v. S., 118 Ga. 320, 45 S. E. 376; Jamison v. P., 145 Ill. 357, 34 N. E. 486.

143-91 S. v. Spaugh, 200 Mo. 571, 600, 98 S. W. 55.

144-92 U. S. v. Greene, 146 Fed. 803, 827; Grant v. S., 122 Ga. 740, 50 S. E. 946; S. v. Shaw, 73 Vt. 149, 50 A. 863.

144-95 P. v. Easton, 148 Cal. 50, 82 P. 840.

145-2 U. S. v. Greene, 146 Fed. 803, 872.

Flight presumptive evidence of guilt. S. v. Poe, 123 Ia. 118, 98 N. W. 587. *Contra*, S. v. Hunt, 141 Mo. 626, 43 S. W. 389.

145-3 P. v. Staples, 149 Cal. 405, 86 P. 886.

145-4 C. v. Devaney, 182 Mass. 33, 64 N. E. 402.

147-8 Choctaw M. R. Co. v. Newton, 140 Fed. 225, 71 C. C. A. 655; Eacock v. S. (Ind.), 82 N. E. 1039; Allen v. C., 26 Ky. L. R. 807, 82 S. W. 589; P. v. Salsbury, 134 Mich. 537, 96 N. W. 936; Standard O. Co. v. S., 117 Tenn. 618, 672, 100 S. W. 705; Wills v. Central Co. (Tex. Civ.), 88 S. W. 265; Patch Mfg. Co. v. Lodge, 77 Vt. 294, 326, 60 A. 74; Carpenter v. Willey, 65 Vt. 168, 26 A. 488.

Failure to enter business transaction in books may be shown. Lipsey v. P., 227 Ill. 364, 81 N. E. 348.

148-12 Vaughn v. S., 130 Ala. 18, 30 S. 669; Kennon v. S., 46 Tex. Cr. 359, 82 S. W. 518.

150-21 S. v. Heusack, 189 Mo. 295, 88 S. W. 21; P. v. White, 176 N. Y. 331, 346, 68 N. E. 630.

151-22 S. v. Coleman, 17 S. D. 594, 98 N. W. 175.

CITIZENS AND ALIENS [Vol. 3.]

Competency of witnesses in naturalization proceedings, 156-20; *Perjury in such proceedings,* 156-20; *Proof of good character,* 156-20; *Evidence in deportation proceedings,* 157-21.

153-1 **A residence shown to have been established** is presumed to have continued until the contrary is proved. S. v. Jackson, 79 Vt. 504, 65 A. 657, 8 L. R. A. (N. S.) 1245.

153-2 Lucas v. U. S., 163 U. S. 612, 48 L. R. A. 282; Ehrlich v. Weber, 114 Tenn. 711, 88 S. W. 188; S. v. Jackson, supra.

153-3 Minneapolis v. Reum, 56 Fed. 576, 6 C. C. A. 31; Pang Sho Yin v. U. S., 154 Fed. 660; U. S. v. Wong Kim Ark, 169 U. S. 649 (if the parties were not employed in

any official capacity under a foreign government); Gaddie v. Mann, 147 Fed. 955; Ehrlich v. Weber, 114 Tenn. 711, 88 S. W. 188; S. v. Jackson, 79 Vt. 504, 65 A. 657, 8 L. R. A. (N. S.) 1245.

154-6 **The burden** of establishing naturalization is not met by merely negative presumptions, nor by the opinions of witnesses. Richardson v. Amsdon, 85 N. Y. S. 342.

154-9 S. v. Jackson, supra.

Naturalization is not established by the alien's affidavit that he took up his citizenship in the United States. Richardson v. Amsdon, 85 N. Y. S. 342.

155-10 Fay v. Taylor, 31 Misc. 32, 63 N. Y. S. 572.

Voting at a lawful election in a particular state is not conclusive evidence of domicil or citizenship there. Gaddie v. Mann, 147 Fed. 955, *cit.* Woodworth v. St. Paul, 18 Fed. 282; Easterly v. Goodwin, 35 Conn. 279, 95 Am. Dec. 237; Enfield v. Ellington, 67 Conn. 459, 34 A. 818; Smith v. Croom, 7 Fla. 81, and *dist.* Shelton v. Tiffin, 6 How. (U. S.) 163.

No presumption arises as to citizenship from the fact that the claimant made leases and did other acts respecting real estate which legally might only be done by a citizen. Richardson v. Amsdon, 85 N. Y. S. 342.

156-18 Buckley v. McDonald, 33 Mont. 483, 84 P. 1114; S. v. Jackson, 79 Vt. 504, 65 A. 657, 8 L. R. A. (N. S.) 1245; Devanney v. Hanson, 60 W. Va. 3, 53 S. E. 603.

156-20 **Naturalization** is prima facie proof of prior alienage. Peacock v. U. S., 125 Fed. 583, 60 C. C. A. 389.

Competency of witnesses in naturalization proceedings. — In proceedings for the naturalization of aliens under the act of June, 1906, a witness who vouches for the applicant must have known him for five years continuously preceding the filing of the petition; it is not enough that he had so known the applicant for five years before the time of the hearing. In re Welsh, 159 Fed. 1014. An American woman becomes an alien by marrying an alien, notwithstanding she continues to reside in the United States; hence she is incompetent as a witness in naturalization proceedings. In such a case a qualified substitute cannot be called as a witness. In re Martorana, 159 Fed. 1010. The petition for admission to citizenship may be supported by other witnesses than those who verified the petition; nor need it be supported by persons within sec. 5 of the act of 1906 if sufficient cause be shown for summoning others. In re Schatz, 161 Fed. 237. Only such witnesses may testify at the hearing as have had their names posted for ninety days. In re O'Dea, 158 Fed. 703.

Perjury. — The manifest of the ship in which an alien came to the United States is competent to show that his testimony as to the time of his arrival is false, proof of identity being made. Such paper was not sufficient to sustain a conviction, the entry in it being based on the defendant's unsworn statement. Sullivan v. U. S., 161 Fed. 253. An applicant for citizenship is not an accomplice with a witness who swears falsely in a proceeding for naturalization in such sense as requires the jury to be cautioned concerning his testimony unless it appears that such false testimony was given at the applicant's solicitation or suggestion. Holmgren v. U. S., 156 Fed. 439.

Good moral character of applicant for naturalization is not shown where it appears that he continued to knowingly use a fraudulent certificate of naturalization. In re Diblerico, 158 Fed. 905.

157-21 **Evidence in deportation proceedings; right of alien to remain.** — Under the statutes governing the right of Chinese laborers to remain in the United States, the evidence in favor thereof is limited to the certificate of residence pro vided for, or proof of inability to procure such certificate. U. S. v. Yee Gee You, 152 Fed. 157. Uncontradicted testimony is not conclusive as to the right to remain. U. S. v. Sing Lee, 125 Fed. 627.

No presumption exists against Chinese who entered the United States without certificates in 1898 or prior thereto. U. S. v. Chin Sing, 153 Fed. 590.

Certificate conclusive as to occupation. — U. S. v. Gin Hing, 8 Ariz. 416, 76 P. 639. As to persons who have not been previous residents the statutory certificate is the only evidence in favor of their right to remain, and that, as to the government, is only prima facie evidence. Wan Shing v. U. S., 140 U. S. 424; Li Sing v. U. S., 180 U. S. 486. But see U. S. v. Kol See, 132 Fed. 136. But the rule is not strictly applied to a certificate granted a Chinaman on his return from China, where he had been temporarily. U. S. v. Quong Chee (Ariz.), 89 P. 525. In such a case the certificate may be supplemented by parol testimony showing the occupation of the holder when formerly in this country. U. S. v. Quong Chee (Ariz.), 89 P. 525.

A certificate not conformable to law is not competent evidence in deportation proceedings. Lee Yuen Sue v. U. S., 146 Fed. 670, 77 C. C. A. 96; U. S. v. Yong Yew, 83 Fed. 832; U. S. v. Gin Hing, 8 Ariz. 416, 76 P. 639; U. S. v. Chu Chee, 93 Fed. 797, 35 C. C. A. 613.

Sufficient evidence of the fact that a person is a native of China is furnished by his physical appearance and garb. Low Foon Yin v. U. S., 145 Fed. 791, 76 C. C. A. 355; U. S. v. Hung Chang, 134 Fed. 19, 67 C. C. A. 93.

Proof of identity may be made by witnesses who state their ability to testify thereof from experience, though they are not ethnologists. U. S. v. Hung Chang, 134 Fed. 19, 67 C. C. A. 93.

The age of a Chinaman can be approximately arrived at from a personal inspection, which may overcome positive testimony. Ark Foo v. U. S., 128 Fed. 697, 63 C. C. A. 249.

The burden of proof is upon a Chinaman alleged to be a laborer to prove his right to enter or remain in the United States. U. S. v. Yee Gee You, 152 Fed. 157; U. S. v. Chin Sing, 153 Fed. 590; Low Foon Yin v. U. S., 145 Fed. 791, 76 C. C. A. 355; Lee Yuen Sue v. U. S., 146 Fed. 670, 77 C. C. A. 96; Chin Bak Kan v. U. S., 186 U. S. 193; Toy Tong v. U. S., 146 Fed. 343, 76 C. C. A. 621; Li Sing v. U. S., 180 U. S. 486; Lee Joe Yen v. U. S., 148 Fed. 682, 78 C. C. A. 427. It is upon the same party when he asserts citizenship or the right to be deported to another country than China. U. S. v. Sing Lee, 125 Fed. 627; U. S. v. Hoy Way, 156 Fed. 247. But it has been ruled in a late case in the district court for New York that the government has the burden of showing that a Chinaman whom it seeks to deport is not entitled to remain. Ex parte Loung June, 160 Fed. 251.

The proof required is produced when it satisfies a rational mind dealing with a serious matter of personal concern. U. S. v. Lee Huen, 118 Fed. 442, 457; U. S. v. Hung Chang, 134 Fed. 19, 27, 67 C. C. A. 63. Evidence showing that a person sought to be deported is a Chinaman and not of the exempt class, supports the presumption that he was not born in the United States. Ex parte Loung June, 160 Fed. 251.

It is presumed that a person of the Mongolian race coming to this country from China is an alien. To overcome such presumption and the demonstrative evidence afforded by such person's appearance the proof must be convincing. Ex parte Lung Wing Wun, 161 Fed. 211.

The record made by a federal commissioner in deportation proceedings is not evidence of the facts on which his decision was made. Ex parte Lung Wing Wun, 161 Fed. 211. See Ex Parte Loung June, 160 Fed. 251.

Findings of the immigration officer, affirmed by the secretary of commerce and labor, if fairly made, are final and conclusive upon the citizenship of a Chinese person claiming the right to enter the United States by reason of being born therein. U. S. v. Ju Toy, 198 U. S. 253.

Testimony of a person to his place of birth is hearsay, and not convincing unless corroborated. Ex parte Lung Wing Wun, 161 Fed. 211.

Admissions or statements voluntarily made by the person whose deportation is sought in replying to questions by the officers who arrested him, either before or after the arrest, are competent against him. U. S. v. Hung Chang, 134 Fed. 19, 67

C. C. A. 93. But positive testimony corroborated by circumstantial evidence is not overcome by inconsistent statements made to an officer by one sought to be deported. Moy Suey v. U. S., 147 Fed. 697, 78 C. C. A. 85.

Chinese are competent witnesses in proceedings under the exclusion acts. U. S. v. Louie Juen, 128 Fed. 522; U. S. v. Sing Lee, 71 Fed. 680.

Deportation proceedings are civil in their nature, and the refusal of defendant to testify may be considered against him. U. S. v. Hung Chang, 134 Fed. 19, 67 C. C. A. 93. But *compare* Ark Foo v. U. S., 128 Fed. 697, 63 C. C. A. 249, where the alleged alien was not requested to testify.

157-22 Ehrlich v. Weber, 114 Tenn. 711, 88 S. W. 188.

157-24 Richardson v. Amsdon, 85 N. Y. S. 342

Mere removal does not result in loss of citizenship. S. v. Jackson, 79 Vt. 504, 65 A. 657, 8 L. R. A. (N. S.) 1245.

158-25 Foreign certificate of naturalization admissible. Newcomb v. Newcomb, 22 Ky. L. R. 286, 57 S. W. 2.

Recitals in deeds are not very convincing as against the fact of long-continued absence. Recitals in wills and codicils may be regarded, but are not controlling. Richardson v. Amsdon, 85 N. Y. S. 342.

158-27 Alienage of native born woman results from her marriage to an alien though her residence continues to be in the United States, by virtue of act of congress of March 2, 1907. In re Martorana, 159 Fed. 1010.

COMPETENCY [Vol. 3.]

Prejudicial effect, 180-55; *Evidence obtained by means of judicial proceeding,* 181-65; *Obtained through incompetent witness,* 183-70; *Competency of juror on subsequent trial,* 237-8

168-2 Brown v. Brown (Neb.), 108 N. W. 180.

168-3 S. v. Simes, 12 Idaho 310, 85 P. 914; Cleveland v. Rowe, 99 Minn. 444, 109 N. W. 817; Paterson v. R. Co., 95 Minn. 57, 103 N. W. 621.

Competency a question for court both on the law and the facts. Degg v. S. (Ala.), 43 S. 484; P. v. Bradford, 1 Cal. App. 41, 81 P. 712; Hoch v. P., 219 Ill. 265, 76 N. E. 356; King v. Hanson, 13 N. D. 85, 99 N. W. 1085; Borneman v. R. Co., 19 S. D. 459, 104 N. W. 208.

Understanding of oath. — Whether a witness understood the nature and obligation of an oath is a question for the court. Freasier v. S. (Tex. Cr.), 84 S. W. 360.

169-8 See King v. Hanson, 13 N. D. 85, 99 N. W. 1085.

170-10 When the question of admissibility of evidence rests upon disputed facts, the court may submit the evidence to the jury with proper hypothetical instructions. King v. Hanson, 13 N. D. 85, 99 N. W. 1085.

175-24 Standley v. Moss, 114 Ill. App. 612; S. v. O'Malley, 132 Ia. 696, 109 N. W. 491.

175-27 Bise v. U. S., 144 Fed. 374, 74 C. C. A. 1.

176-28 Ladd v. Williams, 104 Mo. App. 390, 79 S. W. 511.

176-35 The court may call witnesses touching the competency of the alleged incompetent witness. S. v. Simes, 12 Idaho 310, 85 P. 914.

177-36 See S. v. Simes, supra.

177-39 Error to refuse to allow examination into competency of witness merely because she had testified on previous trial of same case. Young v. S., 122 Ga. 725, 50 S. E. 996.

177-43 Young v. S., supra.

178-47 See S. v. Simes, 12 Idaho 310, 85 P. 914.

178-48 S. v. Simes, supra.

180-55 Prejudicial effect. — The mere fact that evidence may prejudice the jury against the defendant in a criminal case is not a valid ground of objection if it is otherwise competent. P. v. Soeder, 150 Cal. 12, 87 P. 1016; Ellington v. S., 48 Tex. Cr. 160, 87 S. W. 153.

181-65 Adams v. New York, 192 U. S. 585; Imboden v. P. (Colo.), 90 P. 608; Mossman v. Therson, 118 Ill. App. 574; S. v. Royce, 38 Wash.

111, 80 P. 268. See S. v. Griffin, 43 Wash. 591, 86 P. 951.

Evidence obtained by means of judicial proceeding is incompetent by U. S. Rev. St. § 860 (U. S. Comp. St. 1901, p. 661). But the right to object is confined to the witness. Voluntary affidavits of justification on bond are not within the statute. Radford v. U. S., 129 Fed. 49, 63 C. C. A. 491.

182-66 Adams v. New York, 192 U. S. 585; Duren v. Thomasville, 125 Ga. 1, 53 S. E. 814; Jacobs v. P., 117 Ill. App. 195 (judgment *aff.* in 218 Ill. 500, 75 N. E. 1034); S. v. Schmidt, 71 Kan. 862, 80 P. 948; C. v. Tucker, 189 Mass. 457, 76 N. E. 127; S. v. Suiter, 78 Vt. 391, 63 A. 182; S. v. Krinski, 78 Vt. 162, 62 A. 37 (*dist.* S. v. Slamon, 73 Vt. 212, 50 A. 1097, 87 Am. St. 711); S. v. Barr, 78 Vt. 97, 62 A. 43; S. v. Royce, 38 Wash. 111, 80 P. 268. See Johnson v. S. (Tex. Cr.), 76 S. W. 925 (property taken from defendant when arrested is admissible); Roszczyniala v. S., 125 Wis. 414, 104 N. W. 113.

182-67 Adams v. New York, 192 U. S. 585, (*dist.* Boyd v. U. S., 116 U. S. 616); Imboden v. P. (Colo.), 90 P. 608; S. v. Aspara, 113 La. 940, 37 S. 883; S. v. Royce, 38 Wash. 111, 80 P. 268. See Jackson v. S., 118 Ga. 780, 45 S. E. 604.

Contra. — Where defendant has been arrested under an illegal warrant for carrying concealed weapons, evidence obtained by a search of his person while in custody is not admissible. Sherman v. S., 2 Ga. App. 686, 58 S. E. 1122, s. c., 2 Ga. App. 148, 58 S. E. 393; Hughes v. S., 2 Ga. App. 29, 58 S. E. 390 (*dist.* Duren v. Thomasville, 125 Ga. 1, 53 S. E. 814, on ground that there the search disclosed only incriminatory circumstances, while in the case at bar it disclosed the only facts necessary to conviction); Evans v. S., 106 Ga. 519, 32 S. E. 659, 71 Am. St. 276 (*dist.* Williams v. S., 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 264, on ground that there the search was made while defendant was lawfully in custody); Hammock v. S., 1 Ga. App. 126, 58 S. E. 66. Same in case of illegal arrest for vagrancy. Gainer v. S., 2 Ga. App. 126, 58 S. E. 295.

182-68 *Contra.* — S. v. Height, 117 Ia. 650, 91 N. W. 935, 59 L. R. A. 437; S. v. Sheridan, 121 Ia. 164, 96 N. W. 730 (evidence secured by a wrongful search of defendant's house, under a search warrant issued without authority of law for sole purpose of obtaining evidence against him, held incompetent because a violation of constitutional immunity from unlawful seizures and searches).

183-70 Grant v. S., 124 Ga. 757, 53 S. E. 334 (even though one of the parties to the communication is incompetent to testify in rebuttal).

Evidence obtained through incompetent witness. — Evidence cannot be objected to by a party merely because obtained through a witness who is incompetent against him. C. v. Johnson, 213 Pa. 432, 62 A. 1064.

183-71 Union S. & C. Co. v. Wagoner, 36 Colo. 375, 85 P. 836.

183-72 See Brown v. S., 85 Miss. 511, 37 S. 957.

183-74 Warren L. S. Co. v. Farr, 142 Fed. 116, 73 C. C. A. 340; German-A. Ins. Co. v. Brown, 75 Ark. 251, 87 S. W. 135 (*cit.* Reynolds v. S., 27 Neb. 90, 42 N. W. 903, 20 Am. St. 659; Fillmore v. R. Co., 2 Wyo. 94); Dow v. S., 77 Ark. 464, 92 S. W. 28; Chicago v. Bundy, 210 Ill. 39, 71 N. E. 28; Cook v. Lantz, 116 Ill. App. 472; Policemen's Assn. v. Ryce, 115 Ill. App. 95, judgment *aff.* in 213 Ill. 9, 72 N. E. 764; Indianapolis T. Co. v. Romans (Ind. App.), 79 N. E. 1068; Nelson v. R. Co., 30 Ky. 1254, 100 S. W. 1181; S. v. Grubb, 201 Mo. 585, 99 S. W. 1083; Cobb v. Bryan (Tex. Civ.), 97 S. W. 513; Grabowski v. S., 126 Wis. 447, 105 N. W. 805.

Right to rebut. — It is error to refuse to allow opposite party to rebut secondary evidence with evidence of same character. McCormack v. Mandlebaum, 102 App. Div. 302, 92 N. Y. S. 425.

185-77 McCormack v. Mandlebaum, supra.

186-82 Warren L. S. Co. v. Farr, 142 Fed. 116, 73 C. C. A. 340; Cross v. S., 147 Ala. 125, 41 S. 875; Mills v. Starin, 119 App. Div. 336, 104 N. Y. S. 230. See Jefferson Co. v. Anchoria Co., 32 Colo. 176, 75 P. 1070, 64 L. R. A. 925; Yank v. Bordeaux, 29 Mont. 74, 74 P. 77.

186-83 Union S. & C. Co. v. Wagoner, 36 Colo. 375, 85 P. 836 (admission of irrelevant or immaterial evidence gives no right to rebut same); Pichon v. Martin, 35 Ind. App. 167, 73 N. E. 1009.

187-87 But see Port Townsend R. Co. v. Barbare (Wash.), 89 P. 710.

192-9 A stipulation as to what an absent witness would testify to is not a waiver of the incompetency of such testimony. S. v. Lenhrsman, 123 Ia. 476, 99 N. W. 140.

198-32 Standley v. Moss, 114 Ill. App. 612.

No presumption that a child under fourteen years of age is competent to testify. S. v. Labriola (N. J. L.), 67 A. 386.

199-36 Intoxication at the time of the occurence testified to goes only to the credibility of the witness. S. v. Sejours, 113 La. 676, 37 S. 599.

200-42 Deaf mute seventeen years old, possessing intelligence of a child of ten, competent. S. v. Smith, 203 Mo. 695, 102 S. W. 526 (*cit.* S. v. Burns (Ia.), 78 N. W. 681; Swift v. Applebone, 23 Mich. 251).

201-43 Dobbins v. R. Co., 79 Ark. 85, 95 S. W. 794.

201-45 Dobbins v. R. Co., supra.

203-55 Stone v. S., 118 Ga. 705, 45 S. E. 630; Trafton v. Osgood, 74 N. H. 98, 65 A. 397; Wells v. Ter., 15 Okla. 195, 81 P. 425.

Though rendered civilly dead by sentence of life imprisonment, witness not thereby made incompetent to testify. Martin v. Ter., 14 Okla. 593, 78 P. 88.

203-56 Illinois C. R. Co. v. McManus, 26 Ky. L. R. 675, 82 S. W. 399; Bise v. U. S., 5 Ind. Ter. 602, 82 S. W. 921; Gulf etc. R. Co. v. Johnson (Tex. Civ.), 86 S. W. 34; Watson v. S., 48 Tex. Cr. 539, 89 S. W. 270; Quillen v. C., 105 Va. 874, 54 S. E. 333; S. v. Newland, 37 Wash. 428, 79 P. 983 (perjury). See S. v. Champoux, 33 Wash. 339, 74 P. 557.

204-60 Although the punishment may in the discretion of the jury be limited to imprisonment in the county jail or only a fine if confinement in the penitentary is a possible alternative, the offense is a felony and conviction thereof disqualifies the witness. Quillen v. C., 105 Va. 874, 54 S. E. 333.

205-65 S. v. Landrum, 127 Mo. App. 653, 106 S. W. 1111. See Robinson v. S., 50 Fla. 115, 39 S. 465; Illinois C. R. Co. v. McManus, 26 Ky. L. R. 675, 82 S. W. 399.

205-67 Gulf etc. R. Co. v. Johnson, 98 Tex. 76, 81 S. W. 4. But see s. c. (Tex. Civ.), 77 S. W. 648; Rice v. S. (Tex. Cr.), 100 S. W. 771 (even though the three days for moving for new trial has passed).

206-72 S. v. Landrum, 127 Mo. App. 653, 106 S. W. 1111.

Where the statute disqualifies the witness convicted "in any court in this state" it must appear that the conviction was in that state. Robinson v. S., 50 Fla. 115, 39 S. 465.

206-73 Change in law removing this ground of disability cannot operate retrospectively to remove previous infamy. S. v. Landrum (Mo.), 106 S. W. 1111, *cit.* S. v. Grant, 79 Mo. 113, 49 Am. Rep. 218.

206-74 Quillen v. C., 105 Va. 874, 54 S. E. 333. See Watson v. S., 48 Tex. Cr. 539, 89 S. W. 270 (mere promise by third party to sheriff to pay witness' fine insufficient to remove disability).

207-75 Thrash v. S., 79 Ark. 347, 96 S. W. 360; Vance v. S., 70 Ark. 272, 68 S. W. 37; Bise v. U. S., 5 Ind. Ter. 602, 82 S. W. 921, s. c. 144 Fed. 374, 74 C. C. A. 1, Gulf etc. R. Co. v. Johnson, 98 Tex. 76, 81 S. W. 4; Grabill v. S. (Tex. Cr.), 97 S. W. 1046. *Contra*, S. v. Landrum, 127 Mo. App. 653, 106 S. W. 1111 (by statute infamy may be shown by witness' own testimony).

207-78 See Gulf etc. R. Co. v. Johnson, 98 Tex. 76, 81 S. W. 4.

Admission on cross examination insufficient. — Bise v. U. S., 5 Ind. Ter. 602, 82 S. W. 921 (*cit.* Southern Ins. Co. v. White, 58 Ark. 277, 24 S. W. 425; Scott v. S., 49 Ark. 156, 4 S. W. 750), s. c. 144 Fed. 374; Vance v. S., 70 Ark. 272, 68 S. W. 37; Thrash v. S., 79 Ark. 347, 96 S. W. 360.

207-79 See Bise v. U. S., supra.

208-84 Miller v. S., 46 Tex. Cr. 59, 79 S. W. 567 (*cit.* Stetter's Case, 22 Fed. Cas. 1,314, No. 13,380; U. S. v. Jones, 26 Fed. Cas. 644, No. 15,493).

211-6 Provident etc. Soc. v. King, 216 Ill. 416, 75 N. E. 166.
211-11 See Bise v. U. S., 144 Fed. 374, 74 C. C. A. 1.
Competent for state. — Wong Din v. U. S., 135 Fed. 702, 68 C. C. A. 340; P. v. Van Wormer, 175 N. Y. 188, 67 N. E. 299; S. v. Cobley, 128 Ia. 114, 103 N. W. 99; S. v. Myers, 198 Mo. 225, 94 S. W. 242; Burdett v. S. (Tex. Cr.), 101 S. W. 988.
Incompetent for state. — S. v. White, 48 Or. 416, 87 P. 137.
212-12 **Incompetent.** — S. v. White, 48 Or. 416, 87 P. 137; Coffman v. S. (Tex. Cr.), 103 S. W. 1128. See Burdett v. S. (Tex. Cr.), 101 S. W. 988.
213-13 Wells v. Ter., 15 Okla. 195, 81 P. 425.
213-14 S. v. White, 48 Or. 416, 87 P. 137.
213-15 S. v. Myers, 198 Mo. 225, 94 S. W. 242; S. v. White, supra.
213-16 S. v. White, supra (dismissal discretionary).
215-23 S. v. De Maio, 69 N. J. L. 590, 55 A. 644 (where court is composed of single judge he can not be called); Maitland v. Zanga, 14 Wash. 92, 44 P. 117. *Contra*, S. v. Court, 34 Mont. 107, 85 P. 870, holding the judge competent to prove irregularity in the drawing of the jury.
217-29 S. v. Houghton, 45 Or. 110, 75 P. 887.
217-30 *Contra.* — S. v. Houghton, 45 Or. 110, 75 P. 887.
217-32 *Contra.* — S. v. Bringgold, 40 Wash. 12, 82 P. 132; Zitske v. Goldberg, 38 Wis. 216 (justice of peace may testify as to what took place before him). See also Eggett v. Allen, 119 Wis. 625, 96 N. W. 803; Hughes v. R. Co., 126 Wis. 525, 106 N. W. 526.
218-36 Chicago R. Co. v. Collier (Neb.), 95 N. W. 472 (*cit.* Richards v. S., 36 Neb. 17, 53 N. W. 1027; Wood R. Bk. v. Dodge, 36 Neb. 708, 55 N. W. 234). See Hughes v. R. Co., 126 Wis. 525, 106 N. W. 526.
Discretion of court. — The right to call a juror as a witness rests somewhat in the court's discretion. It must "clearly appear that the party offering" him "exercised proper diligence before he was impaneled, and was not apprised of the fact that he knew anything material to the case." International R. Co. v. Foster (Tex. Civ.), 100 S. W. 1017.
Juror at coroner's inquest may be sworn as witness. Reg. v. Winegarner, 17 Ont. (Can.) 208.
219-38 See Chicago R. Co. v. Collier (Neb.), 95 N. W. 472.
220-44 Birmingham Co. v. Moore (Ala.), 42 S. 1024; Richards v. Sanderson, 39 Colo. 270, 89 P. 769; Covington C. & B. Co. v. Hull, 28 Ky. L. R. 1038, 90 S. W. 1055; Battle Creek v. Haak, 139 Mich. 514, 102 N. W. 1005; Devoy v. Tr. Co., 192 Mo. 197, 91 S. W. 140; Meisch v. Sippy, 102 Mo. App. 559, 77 S. W. 141; Pickens v. Coal Co., 58 W. Va. 11, 50 S. E. 872.
221-46 Chicago v. Saldman, 225 Ill. 625, 80 N. E. 349; Lee v. Rhode Island Co. (R. I.), 66 A. 835.
222-47 Lee v. Rhode Island Co., supra.
223-52 See Pickens v. Coal Co., 58 W. Va. 11, 50 S. E. 872.
223-53 Wolfgram v. Schoepke, 123 Wis. 19, 100 N. W. 1054. See Chicago v. Saldman, 225 Ill. 625, 80 N. E. 349.
227-63 **Competent to show** that the answer agreed upon in a special verdict was the opposite of that shown by the written verdict. Wolfgram v. Schoepke, 123 Wis. 19, 100 N. W. 1054.
227-64 See Wolfgram v. Schoepke, supra.
230-77 See Chicago v. Saldman, 225 Ill. 625, 80 N. E. 349.
230-83 *Contra.* — Pickens v. Coal Co., 58 W. Va. 11, 50 S. E. 872 (incompetent to show that one party treated them to liquor). See Chicago v. Saldman, 225 Ill. 625, 80 N. E. 349.
232-87 Brown L. Co. v. Lehman, 134 Ia. 712, 112 N. W. 185 (competent to prove that jury considered matter not properly before them). But see Clark v. Van Vleck (Ia.), 112 N. W. 648 (incompetent as to what elements were included in the damages awarded).
The consideration by the jury of the foreman's statements as to matters not in evidence may be shown by juror's affidavit. Douglass v. Agne, 125 Ia. 67, 99 N. W. 550.

233-92 King v. Elton, 2 Cal. App. 145, 83 P. 261; S. v. O'Brien, 35 Mont. 482, 90 P. 514; Midgley v. Bergerman, 30 Utah 17, 83 P. 466; Pence v. Min. Co., 27 Utah 378, 75 P. 934.

233-93 Black v. B. T. Co., 26 Utah 451, 73 P. 514.

234-94 Bailey v. S. (Tex. Cr.), 97 S. W. 694.

In civil cases. — The statute renders juror's affidavit admissible in civil as well as criminal cases. Galveston R. Co. v. Roberts (Tex. Civ.), 91 S. W. 375.

234-97 But see Bailey v. S., supra.

234-98 Walton v. M. & T. Co., 123 Fed. 209; Chicago v. Saldman, 225 Ill. 625, 80 N. E. 349; Pittsburgh R. Co. v. Collins, 168 Ind. 467, 80 N. E. 415.

234-1 Birmingham L. & P. Co. v. Moore, 148 Ala. 115, 42 S. 1024; Birmingham R. & E. Co. v. Mason, 144 Ala. 387, 39 S. 590 (competent to show that document improperly in jury room was not read or considered); Covington Co. v. Hull, 28 Ky. L. R. 1038, 90 S. W. 1055.

237-8 Competency of juror on subsequent trial. — One who was a juryman on a former trial of the case is competent to testify to what he saw during a view by the jury. Hughes v. R. Co., 126 Wis. 525, 106 N. W. 526 (*cit.* Burdick v. Hunt, 43 Ind. 381; Cramer v. Burlington, 42 Ia. 315; Hewitt v. Chapman, 49 Mich. 4, 12 N. W. 888; Sands v. Robinson, 12 Smed. & M. (Miss.) 704, 51 Am. Dec. 132); Hull v. R. Co., 76 S. C. 278, 57 S. E. 28, 10 L. R. A. (N. S.) 1213.

237-9 See Sargent v. Johns, 206 Pa. 386, 55 A. 1051.

238-11 Wilkinson v. P., 226 Ill. 135, 80 N. E. 699.

238-12 Bishop v. Hilliard, 227 Ill. 382, 81 N. E. 403.

238-13 Wilkinson v. P., supra; S. v. Shour, 196 Mo. 202, 95 S. W. 405.

239-15 Strickland v. S. (Ala.), 44 S. 90; Palmer v. P., 112 Ill. App. 527; Int. etc. R. Co. v. Hugen (Tex. Civ.), 100 S. W. 1000 (facts held to show no abuse of discretion in allowing witness to testify). See McWhorter v. S., 118 Ga. 55, 44 S. E. 873; Phillips v. S., 121 Ga. 358, 49 S. E. 290; Davis v. S., 120 Ga. 843, 48 S. E. 305; S. v. Stewart (W. Va.), 60 S. E. 591.

Where a witness' testimony has been contradicted it is error to exclude his testimony in rebuttal merely because in the interim he violated the rule of exclusion. Illinois etc. R. Co. v. Ely, 83 Miss. 519, 35 S. 873.

In absence of misunderstanding or mistake, testimony of witness for accused violating the rule is properly excluded. Martin v. C., 30 Ky. L. R. 1196, 100 S. W. 872.

Waiver by failure to call attention to known violation of rule. Palmer v. P., 112 Ill. App. 527.

239-16 See Palmer v. P., supra.

240-17 Palmer v. P., supra.

240-19 See Phillips v. S., 121 Ga. 358, 49 S. E. 290.

241-21 Nelson v. S. (Ala.), 43 S. 18; Thompkins v. C., 28 Ky. L. R. 642, 90 S. W. 221; Schaumloeffel v. S., 102 Md. 470, 62 A. 803; S. v. Bailey, 190 Mo. 257, 88 S. W. 733 (especially where list of additional witnesses has been furnished before trial); S. v. Henderson, 186 Mo. 473, 85 S. W. 576; S. v. Myers, 198 Mo. 225, 94 S. W. 242. *Contra*, S. v. Barber, 13 Idaho 65, 88 P. 418 (by statute); S. v. Kelliher (Or.), 88 P. 867.

242-22 Prosecuting attorney. Statute does not apply to prosecuting attorney whose name is signed to the information. S. v. Thompson (Kan.), 91 P. 79, *cit.* S. v. Bundy, 71 Kan. 779, 81 P. 459, holding the same as to witnesses whose sworn statements were attached to the information.

242-24 S. v. Whituah, 129 Ia. 211, 105 N. W. 432. *Contra*, S. v. Barber, 13 Idaho 65, 88 P. 418 (by statute).

242-26 See S. v. Matthews, 133 Ia. 398, 109 N. W. 616. *Compare* Shaffer v. U. S., 24 App. D. C. 417.

242-27 S. v. Pray, 126 Ia. 249, 99 N. W. 1065; Crenshaw v. Gardner, 25 Ky. L. R. 506, 76 S. W. 26 (exclusion of witness held no abuse of discretion); S. v. Cambron (S. D.), 105 N. W. 241; S. v. Sexton, 37

Wash. 110, 79 P. 634; S. v. Champoux, 33 Wash. 339, 74 P. 557.

243-30 S. v. Thompson (Kan.), 91 P. 79.

243-31 See S. v. Arthur (Ia.), 109 N. W. 1083; S. v. Brown (Ia.), 109 N. W. 1010.

244-33 Res gestae declarations, admissible as spontaneous statements, are competent notwithstanding the incompetency of the declarant. Beal etc. Co. v. Carr (Ark.), 108 S. W. 1053. See "RES GESTAE," 316-84.

COMPOUNDING OFFENSES [Vol. 3.]

246-3 Acceptance of the costs from parties charged with crime is some evidence of the guilt of the magistrate before whom they were arraigned. S. v. Furr, 121 N. C. 606, 28 S. E. 552.

246-4 Commission of crime must be shown. S. v. Leeds, 68 N. J. L. 210, 52 A. 288; *cit.* Brittin v. Chegary, 20 N. J. L. 625; Swope v. Ins. Co., 93 Pa. 251. To the same effect are P. v. Bryon, 103 Cal. 675, 37 P. 754; S. v. Hanson, 69 N. J. L. 42, 54 A. 841; S. v. Hodge, 142 N. C. 665, 55 S. E. 626.

Defendant's knowledge of the commission of the offense compounded must be shown. S. v. Henning, 33 Ind. 189; P. v. Bryon, 103 Cal. 675, 37 P. 754.

246-5 Record of acquittal is at least prima facie evidence in favor of accused. S. v. Hanson, 69 N. J. L. 42, 54 A. 841. Is not conclusive. P. v. Buckland, 13 Wend. (N. Y.) 592.

COMPROMISE AND SETTLEMENT [Vol. 3.]

249-1 Danes v. Slitor, 113 Ia. 81, 91 N. W. 817.

250-3 See Hitchcock v. Davis, 87 Mich. 629, 49 N. W. 912; Dailey v. Assn., 133 Mich. 403, 95 N. W. 326.

251-5 Upton v. Adeline Co., 109 La. 670, 33 S. 725; Dixon v. Dixon, 107 Mo. App. 682, 82 S. W. 547.

251-6 Johnston v. Mulcahy (Cal. App.), 88 P. 491; Upton v. Adeline Co., 109 La. 670, 33 S. 725; Rutan v. Huck, 30 Utah 217, 83 P. 833; Timm v. Timm, 34 Wash. 228, 75 P. 879.

252-7 Johnson v. Berdo, 131 Ia. 524, 106 N. W. 609; Mullins v. Vanarsdall, 25 Ky. L. R. 1979, 79 S. W. 224.

253-8 Settlement by parents for injuries to child is presumed to cover only such claims as accrued in their favor up to the time it was made. Meyers v. Zoll, 119 Ky. 480, 84 S. W. 543.

253-9 Greenlee v. Mosnat, 126 Ia. 330, 101 N. W. 1122.

Declarations of the parties are provable. Hunter v. Helsley, 98 Mo. App. 616, 73 S. W. 719.

256-12 Use of the words "all accounts" does not make the receipt conclusive. Hitchcock v. Davis, 87 Mich. 629, 49 N. W. 912.

256-13 Greenlee v. Mosnat, 126 Ia. 330, 101 N. W. 1122.

256-14 In re Roberts, (1905) 1 Ch. (Eng.) 704; Illinois R. Co. v. Manion, 113 Ky. 7, 67 S. W. 40; Davenport v. Dubach Co., 112 La. 943, 36 S. 812; Bjorklund v. Seattle Co., 35 Wash. 439, 77 P. 727.

256-15 Illinois R. Co. v. Manion, supra; Fidelity Co. v. Tinsley, 30 Ky. L. R. 1095, 100 S. W. 272.

258-17 Johnson v. Berdo, 131 Ia. 524, 106 N. W. 609; Billau v. Kern (Ia.), 107 N. W. 307; Cunningham v. Belknap, 22 Ky. L. R. 1580, 60 S. W. 837; Tansey v. R. Co., 90 Mo. App. 101; Linton v. Cathers, 70 Neb. 598, 97 N. W. 799; Reimer v. Club, 84 N. Y. S. 561; Southard v. Curley, 134 N. Y. 148, 31 N. E. 330, 30 Am. St. 642, 16 L. R. A. 561; Simpson v. Thompson (Tex. Civ.), 95 S. W. 94.

A general settlement is an affirmation defense to be shown by the party setting it up. Johnson v. Berdo, 131 Ia. 524, 106 N. W. 609; Barber v. Maden, 126 Ia. 402, 102 N. W. 120.

258-18 Hitchcock v. Davis, 87 Mich. 629, 49 N. W. 912; Dixon v. Dixon, 107 Mo. App. 682, 82 S. W. 547.

258-19 See Timm v. Timm, 34 Wash. 228, 75 P. 879; Grubbs v. Ferguson, 136 N. C. 60, 48 S. E. 551.

259-20 See Mason v. R. Co., 131 Ia. 468, 109 N. W. 1; Home S. Bk. v. Otterbach (Ia.), 112 N. W. 769; Fidelity Co. v. Tinsley, 30 Ky. L.

R. 1095, 100 S. W. 272; Johnson v. R. Co., 101 Minn. 396, 112 N. W. 534.

259-21 Power v. Hambrick, 25 Ky. L. R. 30, 74 S. W. 660; Simpson v. Thompson (Tex. Civ.), 95 S. W. 94.

259-22 Johnson v. Berdo, 131 Ia. 524, 106 N. W. 609; Austin v. Whitcher (Ia.), 110 N. W. 910; Flora v. Chapman (Neb.), 110 N. W. 664.

260-23 **Proof that voters** at a school district meeting left the same without voting on the compromise proposition because of intimidation is proper; as is evidence of the reputation of the claimant for peaceableness or otherwise. Gering v. School Dist. (Neb.), 107 N. W. 250.

Evidence as to the validity of the claim settled is not admissible. Cowen v. Rouss, 40 Misc. 105, 81 N. Y. S. 276.

262-27 See Bache v. Schauble, 154 Fed. 859.

262-28 Great Northern R. Co. v. Kasischke, 104 Fed. 440, 43 C. C. A. 626; Meyer v. Haas, 126 Cal. 560, 58 P. 1042; Pioneer Co. v. Romanowicz, 186 Ill. 9, 57 N. E. 864; Indiana R. Co. v. Fowler, 201 Ill. 152, 66 N. E. 394, 94 Am. St. 158; Hitchcock v. Davis, 87 Mich. 629, 49 N. W. 912; Schus v. Powers-S. Co., 85 Minn. 447, 89 N. W. 68, 89 Am. St. 571, 57 L. R. A. 297; Burik v. Dumlee Co., 66 N. J. L. 420, 49 A. 442; Bjorklund v. Seattle E. Co., 35 Wash. 439, 77 P. 727.

CONCLUSIVE EVIDENCE [Vol. 3.]

268-3 **Proof of good character** is never conclusive as to innocence. S. v. Jones, 32 Mont. 442, 80 P. 1095.

Admission of guilt of a felony of which a witness was convicted is conclusive. Fuller v. S., 147 Ala. 35, 41 S. 774. But see infra, 290-91, 290-92.

Account stated not generally conclusive. Peebles v. Yates, 88 Miss. 289, 40 S. 996. See "ACCOUNTS," etc., Vol. 1, p. 129, and that title, ante, 132-1.

268-4 **Articles of incorporation** are conclusive evidence of the nature and character of the organization. Gould v. Fuller, 79 Minn. 414, 82 N. W. 673; Craig v. Assn., 88 Minn. 535, 93 N. W. 669. And of the fact of organization. In re Milwaukee R. Co., 124 Wis. 490, 102 N. W. 401. But see dissenting opinon.

Certficates of acknowledgment are conclusive in the absence of fraud or mistake. Ellis v. Lehman (Tex. Civ.), 106 S. W. 453, *cit.* Herring v. White, 6 Tex. Civ. 249, 25 S. W. 1016; Atkinson v. Reed (Tex. Civ.), 49 S. W. 260; Miller v. Yturria, 69 Tex. 549, 7 S. W. 206. To same effect (as to date of acknowledgment), Weisiger v. Mills, 28 Ky. L. R. 1208, 91 S. W. 689.

Statement in contempt proceedings by the court of matters occurring in the presence of the judge imports absolute verity. Mahoney v. S., 33 Ind. App. 655, 72 N. E. 151.

269-5 Ebner v. Heid, 2 Alaska 600.

Judicial record imports verity. Quigg v. P., 211 Ill. 17, 71 N. E. 886; Martin v. Todd, 121 Ill. App. 230; May v. Hammond, 146 Mass. 439, 15 N. E. 925; Bent v. Stone, 184 Mass. 92, 68 N. E. 46; Warburton v. Gourse, 193 Mass. 203, 79 N. E. 270. It is otherwise as to the record of a judgment rendered in justice's court. Albie v. Jones, 81 Ark. 414, 102 S. W. 222. *Contra,* Montgomery v. Alden, 133 Ia. 675, 108 N. W. 234.

269-6 Lord v. Dowling Co., 52 Fla. 313, 42 S. 585; Salemonson v. Thompson, 13 N. D. 182, 101 N. W. 320.

269-7 Pratt v. Griffin, 223 Ill. 349, 79 N. E. 102; Carpenter v. Auditor General, 144 Mich. 251, 107 N. W. 878; Cook v. Cook, 124 Mich.

430, 83 N. W. 96; Munroe v. Winegar, 128 Mich. 309, 87 N. W. 396; Sweatman v. Dean, 86 Miss. 641, 38 S. 231; Miles v. Ballantine (Neb.), 93 N. W. 708; Jones v. Danforth, 71 Neb. 722, 99 N. W. 495; Rye v. Guffey (Tex. Civ.), 95 S. W. 622; Barrett v. McKinney (Tex. Civ.), 93 S. W. 240; Davis v. Ragland (Tex. Civ.), 93 S. W. 1099; Floyd v. Watkins, 34 Tex. Civ. 3, 79 S. W. 612; Scudder v. Cox, 35 Tex. Civ. 416, 80 S. W. 872.

Under void statute. — A judgment of a partition under which the shares were determined according to a void statue cannot be attached collaterally. Staats v. Wilson (Neb.), 107 N. W. 230, 109 N. W. 379.

269-8 In re Harper, 133 Fed. 970; Cramer v. Mfg. Co., 93 Fed. 636, 35 C. C. A. 508; Greenwich Ins. Co. v. Friedman Co., 142 Fed. 944, 74 C. C. A. 114; Logan v. I. & C. Co., 139 Ala. 548, 36 S. 729; Page v. Garver (Cal. App.), 90 P. 481; Dime Sav. Bk. v. McAlenney, 78 Conn. 208, 61 A. 476; Jones v. Smith, 120 Ga. 642, 48 S. E. 134; Phillips v. Phillips, 67 Kan. 324, 76 P. 842; Jones v. Hubbard, 193 Mo. 147, 90 S. W. 1137; Podesta v. Binns, 69 N. J. Eq. 387, 60 A. 815; Earp v. Minton, 138 N. C. 202, 50 S. E. 624; Boyd v. Wallace, 10 N. D. 78, 84 N. W. 760; Haines v. Hall, 209 Pa. 104, 58 A. 125; Morrison v. Berlin, 37 Wash. 600, 79 P. 1114; Kolpack v. Kolpack, 128 Wis. 169, 107 N. W. 457; Fulton v. Pomeroy, 111 Wis. 663, 87 N. W. 831.

First judgment conclusive as against foreign judgment. — A domestic judgment, prior in time to a judgment rendered on the same issue between the same parties in another state, is conclusive evidence of the rights of the parties though the prior judgment was not pleaded in the subsequent action. Grimm v. Barrington, 109 Mo. App. 35, 84 S. W. 357.

270-9 Thornton v. Natchez, 88 Miss. 1, 41 S. 498; S. v. Carron, 73 N. H. 434, 456, 62 A. 1044; Rogers v. Ingersoll, 104 App. Div. 630, 93 N. Y. S. 1145; Keith v. Alger, 114 Tenn. 1, 85 S. W. 71.

A recital in a decree that cause was retained for further proceedings though made after a prior decree which said nothing of such detention is conclusive. Settle v. Settle, 141 N. C. 553, 54 S. E. 445.

Finding that decedent left property within the jurisdiction is conclusive. Jordan v. R. Co., 125 Wis. 581, 104 N. W. 803.

271-10 Groton B. & M. Co. v. Brick Co., 136 Fed. 27, 68 C. C. A. 577; Alaska C. Co. v. Debney, 2 Alaska 303; In re James, 99 Cal. 374, 33 P. 1122, 37 Am. St. 60; Ropes v. Goldman, 52 Fla. 630, 42 S. 822, Plummer v. Wells & Co., 6 Ind. Ter. 189, 90 S. W. 303; Boyd v. Taylor (Mass.), 81 N. E. 277; Burke v. Assn., 25 Mont. 315, 64 P. 879, 87 Am. St. 416; Miles v. Ballantine (Neb.), 93 N. W. 708; Ayres v. Duggan, 57 Neb. 750, 78 N. W. 296; McDevitt v. Connell (N. J. Eq.), 63 A. 504; May v. Getty, 140 N. C. 310, 53 S. E. 75; Altman v. Dist., 35 Or. 85, 56 P. 291, 76 Am. St. 468; Baker v. Baker, 26 Pa. Super. 553; Moore v. Hanscom (Tex.), 106 S. W. 876; Templeton v. Ferguson, 89 Tex. 47, 33 S. W. 329; Bouldin v. Miller, 87 Tex. 359; 28 S. W. 940; Chappell v. Chappell (Wash.), 89 P. 166.

Court minutes and files inadmissible to impeach the record. Ballerina v. Court, 2 Cal. App. 759, 84 P. 225.

271-11 White v. Martin, 2 Alaska 495; Koehler v. Mfg. Co., 146 Cal. 335; 80 P. 73; Medina v. Medina, 22 Colo. 146, 43 P. 1001; Huntington v. Newport Co., 78 Conn. 35, 61 A. 59; Van Dyke v. Van Dyke, 125 Ga. 491, 54 S. E. 537; Ayres v. Deering (Kan.), 90 P. 794; Clevenger v. Figley, 68 Kan. 699, 75 P. 1001; Alabama R. Co. v. Thomas, 86 Miss. 27, 38 S. 770; Van Stewart v. Miles, 105 Mo. App. 242, 79 S. W. 988; Clark v. Parks, 75 Neb. 676, 106 N. W. 770; Reich v. Cochran, 105 App. Div. 542, 94 N. Y. S. 404; Wilkins v. McCorkle, 112 Tenn. 688, 80 S. W. 834; Penn v. Case, 36 Tex. Civ. 4, 81 S. W. 349; Campbell v. Upson (Tex. Civ.), 81 S. W. 358.

272-12 Tomlin v. Woods, 125 Ia. 367, 101 N. W. 135; Thompson v. Williamson, 67 N. J. Eq. 212, 58 A. 602, Levison v. Blumenthal, 25 Pa. Super. 55.

272-13 Eau Claire Nat. Bk. v.

Benson, 128 Fed. 277, 62 C. C. A. 591; Israel v. Israel, 130 Fed. 237; McHatton v. Rhodes, 143 Cal. 275, 76 P. 1036. Reilly v. Cooper, 119 Ill. App. 347; Leathe v. Thomas, 109 Ill. App. 434; Roberts v. Leutzke, 39 Ind. App. 577, 78 N. E. 635; Guykendall v. Doe, 129 Ia. 453, 105 N. W. 698; Richardson & B. Co. v. Stove Co., 28 Utah 85, 77 P. 1.

Judgments of federal courts are given the same effect in state courts. Thornton v. Natchez, 88 Miss. 1, 41 S. 498.

272-14 Haddock v. Haddock, 201 U. S. 562; Harding v. Harding, 198 U. S. 317, Coram v. Ingersoll, 148 Fed. 169, 78 C. C. A. 303; Lamb v. River Co., 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558; Forrest v. Fey, 218 Ill. 165, 75 N. E. 789, 1 L. R. A. (N. S.) 740; Bleakley v. Barclay, 75 Kan. 462, 89 P. 906, 10 L. R. A. (N. S.) 230; Weyburn v. Watkins (Miss.), 44 S. 145; El Capitan L. & C. Co. v. Lees (N. M.), 86 P. 924; Gleason v. Ins. Co., 189 N. Y. 100, 81 N. E. 777; Blumle v. Kramer, 14 Okla. 266, 79 P. 215; Levison v. Blumenthal, 25 Pa. Super. 55.

273-15 Edelstein v. U. S., 149 Fed. 636, 79 C. C. A. 328; Welsh v. Koch (Cal. App.), 88 P. 604; Collins v. Maude, 144 Cal. 289, 77 P. 945; Mortgage T. Co. v. Redd, 38 Colo. 458, 88 P. 473; Roberts v. Leutzke, 39 Ind. App. 577, 78 N. E. 635; Maynard v. Waidlich, 156 Ind. 562, 60 N. E. 348; McDermott v. Gray, 198 Mo. 266, 95 S. W. 431; Kelly v. Gebhart, 180 Mo. 588, 79 S. W. 427; Gulling v. Bank (Nev.), 89 P. 25; Schlosser v. Beemer, 40 Or. 412, 67 P. 299; Bank v. Richardson, 34 Or. 518, 54 P. 359, 75 Am. St. 664; Rye v. Guffey P. Co. (Tex. Civ.), 95 S. W. 622; Kruegel v. Stewart (Tex. Civ.), 81 S. W. 365. See Roach v. Curtis, 115 App. Div. 765, 101 N. Y. S. 333.

The judge who signed an order cannot testify as to the grounds on which he acted. Blue Mountain I. & S. Co. v. Portner, 131 Fed. 57, 65 C. C. A. 295.

Judgment entered pursuant to agreement by an attorney unauthorizedly appointed by the court to represent defendant in the action is within the rule. Barrett v. McKinney (Tex. Civ.), 93 S. W. 240.

273-16 S. v. Weber, 96 Minn. 422, 105 N. W. 490.

273-18 Blue Mountain I & S. Co. v Portner, 131 Fed. 57, 65 C. C. A. 295; Clay v. Bilby, 72 Ark. 101, 78 S. W. 749; Ballard v. Hunter, 74 Ark. 174, 85 S. W. 252; Johnson v. Lessner (Ark.), 91 S. W. 763; Waldron v. Faenzer, 79 Ark. 16, 94 S. W. 925; In re Davis (Cal.), 86 P. 183; Crawford v. McDonald, 88 Tex. 626, 33 S. W. 325; Davis v. Ragland (Tex. Civ.), 93 S. W. 1099. See Cohen v. Portland Lodge, 152 Fed. 357; Babcock v. Wolffrath, 35 Tex. Civ. 512, 80 S. W. 642.

In New York "the want of jurisdiction to render the particular judgment may always be asserted and raised directly or collaterally, either from an inspection of the record itself when offered in behalf of the party claiming under it, or upon extraneous proof, which is always admissible for that purpose. There is but one solitary exception to this rule, and that is in a case where jurisdiction depends on a fact that is litigated in a suit and is adjudged in favor of the party who avers jurisdiction. Then the question of jurisdiction is judicially decided, and the judgment record is conclusive on that question until set aside or reversed by a direct proceeding." O'Donoghue v. Boies, 159 N. Y. 87, 99, 53 N. E. 537. See P. v. Connor, 142 N. Y. 130, 36 N. E. 807.

And so in Missouri. — Hinkle v. Lovelace, 204 Mo. 208, 102 S. W. 1015; Jewett v. Boardman, 181 Mo. 647, 81 S. W. 186.

Effect of recitals in judgments. — If a judgment recites that the defendant had been duly and legally served, the balance of the record cannot be received in evidence; but if it is silent as to service, or recites a citation which is void, or specifies the method of citation, the record is competent to sustain or overthrow it. Dunn v. Taylor (Tex. Civ.), 94 S. W. 347; Luteher v. Allen (Tex. Civ.), 95 S. W. 572. Recital in judgment of jurisdictional facts raises a presumption of regularity. Wallace v. Adams, 143 Fed. 716, 74 C. C. A. 540. In another case the judgment was silent as to the

necessary affidavit of service, but the record affirmatively showed an insufficient affidavit. This overcame the presumption in favor of the judgment. Stoneman v. Bilby (Tex. Civ.), 96 S. W. 50 (writ of error denied by superior court), *cit.* Earnest v. Glaser, 32 Tex. Civ. 378, 74 S. W. 605; Babcock v. Wolffrath, 35 Tex. Civ. 512, 80 S. W. 642. A recital going beyond the question at issue will be disregarded. Gray v. Russell (Tex. Civ.), 91 S. W. 235.

The record which may be consulted in such a case consists, at least, of the petition, citation and return. Parol evidence is incompetent. Lutcher v. Allen (Tex. Civ.), 95 S. W. 572.

Silence of judgment as to jurisdictional facts not ground of collateral attack. Craig v. Somers, 55 N. J. L. 525, 27 A. 639; McDevitt v. Connell (N. J. Eq.), 63 A. 504.

In case of a variance between the judgment and the return of service as to who was served, the recital in the judgment will prevail. Livingston v. M. S. Co. 77 Ark. 379, 91 S. W. 752.

274-19 Cormack v. Marshall, 211 Ill. 519, 71 N. E. 1077, 67 L. R. A. 787; Mahon v. P., 218 Ill. 171, 75 N. E. 768; Bleakley v. Barclay, 75 Kan. 462, 89 P. 906; 10 L. R. A. (N. S.) 230; Charles v. R. Co., 124 Mo. App. 293, 101 S. W. 680; S. v. Mulloy, 111 Mo. App. 679, 86 S. W. 569; Kolpack v. Kolpack, 128 Wis. 169, 107 N. W. 457.

The record is decisive so far as it speaks, but so far as is consistent with it, patrol testimony is competent to show what was in fact involved, considered and established. Stone v. R. Co., 75 Kan. 600, 90 P. 251; Gulling v. Bank (Nev.), 89 P. 25.

Not conclusive as to domicil of decedent. Frome v. Thormann, 102 Wis. 17, 653, 79 N. W. 39, 176 U. S. 350.

Collateral issues are not within the doctrine. Lowe v. Ozmun, 3 Cal. App. 387, 86 P. 729.

The appointment of an administrator may be attacked collaterally in a criminal case involving an offense committed in connection therewith. U. S. v. Bradford, 148 Fed. 413.

274-20 Coram v. Ingersoll, 148 Fed. 169, 78 C. C. A. 303; Haug v. R. Co., 102 Fed. 74, 42 C. C. A. 167; In re Reynolds, 133 Fed. 585.

274-21 Last Chance M. Co. v. M. Co., 157 U. S. 683; Hearn v. Ayres, 77 Ark. 497, 92 S. W. 768; San Gabriel V. Bk. v. T. Co. (Cal. App.), 86 P. 727; Sacramento Bk. v. Montgomery, 146 Cal. 745, 81 P. 138; County Bk. v. Jack, 148 Cal. 437, 83 P. 705; Robinson v. Blood (Cal.), 91 P. 258; Tootle v. McClellan (Ind. Ter.), 103 S. W. 766; Tomlin v. Woods, 125 Ia. 367, 101 N. W. 135; Ruppin v. McLachlan, 122 Ia. 343, 98 N. W. 153; Sodini v. Sodini, 94 Minn. 301, 102 N. W. 861; Burke v. Assn., 25 Mont. 315 64 P. 879, 87 Am. St. 416; Monroe v. Turner, 114 App. Div. 634, 100 N. Y. S. 27.

A default judgment is conclusive only as to matters well pleaded. Pence v. Long, 38 Ind. App. 63, 77 N. E. 961; Allen v. Rice, 16 Ind. App. 572, 45 N. E. 800; Barton v. Anderson, 104 Ind. 578, 4 N. E. 420.

In New York the question of jurisdiction to render a default judgment may be inquired into though the judgment is a domestic one. In re McGarren, 112 App. Div. 503, 98 N. Y. S. 415.

274-23 Griffis v. Bank (Ind. App.), 79 N. E. 230; Fluker v. De Grange, 117 La. 331, 41 S. 591; In re Dougherty, 34 Mont. 336, 86 P. 38.

Interlocutory orders are not subject to collateral attack. Harrah v. S., 38 Ind. App. 495, 76 N. E. 443, 77 N. E. 747, *cit.* S. v. Musser, 4 Ind. App 407, 30 N. E. 944; S. v. Wheeler, 127 Ind. 451, 26 N. E. 552, 1008. To same effect, Gates v. Paul, 127 Wis. 628, 107 N. W. 492.

Judgments by confession are within the rule, and will be given effect in another state though its laws do not recognize such judgments. Cuykendall v. Doe, 129 Ia. 453, 105 N. W. 698.

Judgments by consent are within the principle. Jones v. Hubbard, 193 Mo. 147, 90 S. W. 1137; Baldwin v. Rice, 44 Misc. 64, 89 N. Y. S. 743.

274-24 Hattan v. Turman, 30 Ky. L. R. 194, 97 S. W. 770; S. v. Carron, 73 N. H. 434, 455, 62 A. 1044; Sherburne v. Portsmouth, 72 N. H. 539, 58 A. 38; Pittsfield v. Exeter, 69 N. H. 336, 41 A. 82.

Conclusiveness of finding by incorporators of amount subscribed for capital stock. See Louisiana P. E. Co. v. Kuenzel, 108 Mo. App. 105, 82 S. W. 1099, and cases cited.

But one inquest on same body. Morgan v. San Diego Co., 3 Cal. App. 454, 86 P. 720.

274-25 Mankato v. Pav. Co. 142 Fed. 329, 73 C. C. A. 439; Page v. Chase Co., 145 Cal. 578, 79 P. 278; Krotz v. L. Co., 34 Ind. App. 577, 73 N. E. 273; Minnesota D. Co. v. Johnson, 94 Minn. 150, 102 N. W. 381; Fred Kruk B. Co. v. Healey, 71 Neb. 662, 99 N. W. 489, 101 N. W. 329; Minzesheimer v. Doolittle, 60 N. J. Eq. 394, 45 A. 611; Thompson v. Williamson, 67 N. J. Eq. 212, 58 A. 602; Allred v. Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924; Campbell v. Upson, 98 Tex. 442, 84 S. W. 817.

276-26 Wetmore v. Karrick, 205 U. S. 141; Old Wayne M. L. Assn. v. McDonough, 204 U. S. 8; Pennoyer v. Neff, 95 U. S. 714; Nat. Exch. Bk. v. Wiley, 195 U. S. 257; Phoenix B. Co. v. Castleberry, 131 Fed. 175, 65 C. C. A. 481; Frawley v. Pennsylvania C. Co., 124 Fed. 259; Alaska C. Co. v. Debney, 2 Alaska 303; Karrick v. Wetmore, 25 App. D. C. 415; Olson v. F. P. Co., 116 Ill. App. 573; Field v. Field, 215 Ill. 496, 74 N. E. 443; Tootle v. McClellan (Ind. Ter.), 103 S. W. 766; Thornily v. Prentice, 121 Ia. 89, 96 N. W. 728; Chicago T. & T. Co. v. Smith, 185 Mass. 363, 70 N. E. 426; Chicago R. Co. v. Hitencock Co., 60 Neb. 722, 84 N. W. 97; Fogg v. Ellis, 61 Neb. 829, 86 N. W. 494; Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311; Grider v. Corbin, 116 App. Div. 818, 102 N. Y. S. 181; Taylor v. Syme, 162 N. Y. 513, 57 N. E. 83; Baldwin v. Rice, 44 Misc. 64, 89 N. Y. S. 743; Fenton v. Ins. Co., 15 N. D. 365, 109 N. W. 363; Barrett v. McKinney (Tex. Civ.), 93 S. W. 240; Humprey v. Beaumont I. Co. (Tex. Civ.), 93 S. W. 180; Dunn v. Taylor (Tex. Civ.), 94 S. W. 347; Babcock v. Wolffarth, 35 Tex. Civ. 512, 80 S. W. 642; S. v. Wheeler, 43 Wash. 183, 86 P. 394.

If there has been actual service of process and the court has passed on the plea of personal privilege its judgment in favor of jurisdiction will be binding on the courts of another jurisdiction. Tootle v. McClellan (Ind. Ter.), 103 S. W. 766; Sipe v. Copwell, 59 Fed. 970, 8 C. C. A. 419; Jaster v. Currie, 198 U. S. 144, *Contra*, Jones v. Jones, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. 447.

Inconsistent recitals in the record open the way to impeach affirmative statements by negative ones. Reizer v. Mertz, 223 Ill. 555, 565, 79 N. E. 283.

If the record discloses that the service was insufficient it will not be presumed that other or different service was made. Johnson v. Hunter, 147 Fed. 133, 77 C. C. A. 359.

No presumption in favor of jurisdicton of justice of peace. Ferguson v. Basin C. M. (Cal.), 93 P. 867.

276-27 Roberts v. Leutzke, 39 Ind. App. 577, 78 N. E. 635; American Ins. Co. v. Mason, 159 Ind. 15, 64 N. E. 525; Cizek v. Cizek (Neb.), 99 N. W. 28; Southern P. L. Co. v. Ward, 16 Okla. 131, 85 P. 459; Providence County S. Bk. v. Hughes, 26 R. I. 73, 58 A. 254.

Judgment must be within the issues raised. — S. v. Haverly, 62 Neb 787, 87 N. W. 959; Banking House v. Dukes, 70 Neb. 648, 97 N. W. 805, and local cases cited, also these: Ex parte Lange, 18 Wall. (U. S.) 163; Steele v. Palmer, 41 Miss. 88; Armstrong v. Barton, 42 Miss. 506; Williamson v. Probasco, 8 N. J. Eq. 571; Munday v. Vail, 34 N. J. L. 418; Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706; Spoors v. Coen, 44 Ohio St. 497, 9 N. E. 132; Sheldon v. Newton, 3 Ohio St. 494; Seamster v. Blackstock, 83 Va. 232, 2 S. E. 36, 5 Am. St. 262; Anthony v. Kasey, 83 Va. 338, 5 S. E. 176, 5 Am. St. 277; Strobe v. Downer, 13 Wis. 11, 80 Am. Dec. 709; Straight v. Harris, 14 Wis. 553.

276-28 Israel v. Israel, 148 Fed. 576, 79 C. C. A. 32; Agnew v. Bank, 69 Neb. 654, 96 N. W. 189.

276-29 Walsh v. Walsh (Neb.), 95 N. W. 1025.

276-31 The test is the identity of the rights involved. — Kay v. Gray, 30 Pa. Super. 450; Myers v. Kingston Co., 126 Pa. 582, 17 A. 891. See Montgomery v. Alden, 133 Ia. 675, 108 N. W. 234; Kolpack v. Kolpack, 128 Wis. 169, 107 N. W. 457.

277-34 Drennan v. Bunn, 124 Ill. 175, 16 N. E. 100, 7 Am. St. 354; Meyer v. Purcell, 214 Ill. 62, 73 N. E. 392; Friend v. Ralston, 35 Wash. 422, 77 P. 794; Henry v. Ind. Co., 36 Wash. 553, 79 P. 42.

279-38 McDermott v. Gray, 198 Mo. 266, 285, 95 S. W. 431.

279-39 **Conclusive as to assignment** of dower. Briggs v. Manning, 80 Ark. 304, 97 S. W. 289.

Conclusive upon administrator's sureties in action on his bond. Briggs v. Manning, supra, *cit.* S. v. Wood, 51 Ark. 205, 10 S. W. 624, and other local cases.

279-43 In re Davis (Cal.), 86 P. 183.

Decree of distribution conclusive as to status of distributees. Estate of Nolan, 145 Cal. 559, 79 P. 428.

280-46 Scott v. McNeal, 154 U. S. 34; Duncan v. Stewart, 25 Ala. 408; Stevenson v. Court, 62 Cal. 60; Thomas v. P., 107 Ill. 517; Perry v. St. Joseph, 29 Kan. 299; French v. Frazier, 7 J. J. Marsh. (Ky.) 425; Johnson v. Beazley, 65 Mo. 250; Morgan v. Dodge, 44 N. H. 255; S. v. White, 7 Ired. (N. C.) 116; Moore v. Smith, 11 Rich. (S. C.) 569; D'Arusement v. Jones, 4 Lea (Tenn.) 251; Withers v. Patterson, 27 Tex. 491; Andrews v. Avory, 14 Gratt. (Va.) 229; Wisconsin T. Co. v. Bank, 105 Wis. 464, 81 N. W. 642.

280-49 S. v. Corron, 73 N. H. 434, 62 A. 1044, noting that early opposing cases have been overruled; Cutter v. Evans, 115 Mass. 27; Way v. Lewis, Id. 26; Ruggles v. Bernstein, 188 Mass. 232, 74 N. E. 366, Blanding v. Cohen, 101 App. Div. 442, 92 N. Y. S. 93.

Bonds in judicial proceedings. — Sureties on such bonds are bound by judgment against principal. Price v. Carlton, 121 Ga. 12, 48 S. E. 721; Holmes v. Langston, 110 Ga. 861, 36 S. E. 251.

Judgment between maker and holder of note is conclusive between former and surety. Beh v. Bay, 127 Ia. 246, 103 N. W. 119; Bank v. Ketchum, 66 Wis. 428, 29 N. W. 216.

281-50 Jenkins v. S., 76 Md. 255, 23 A. 608; Leppert v. Flaggs, 101 Md. 71, 60 A. 450.

In Georgia judgment against the principal is only prima facie evidence against sureties on administrators' and guardians' bonds. Price v. Carlton, 121 Ga. 12, 48 S. E. 721, and cases cited p. 23.

A suit for contribution is not barred by a judgment in action on the bond against one surety and in favor of the personal representatives of another. Comstock v. Keating, 115 Mo. App. 372, 91 S. W. 416.

A judgment discharging a surety is conclusive against his co-surety in a suit by the latter for contribution. Ruff v. Montgomery, 83 Miss. 185, 36 S. 67; Nelson v. Webster, 72 Neb. 332, 100 N. W. 411.

Judgment against principal and surety is conclusive as to former's liability to latter, he having paid it. Reed v. Humphrey, 69 Kan. 155, 76 P. 390.

282-59 Alaska C. Co. v. Debney, 2 Alaska 303.

282-63 Clark v. Barber, 21 App. D. C. 274.

283-64 McHenry v. Brackin, 93 Minn. 510, 101 N. W. 960; Thelen v. Thelen, 75 Minn. 433, 78 N. W. 108.

283-65 Andrews v. Andrews, 188 U. S. 14; s. c. 176 Mass 92, 57 N. E. 333; German S. & L. Soc. v. Dormitzer, 192 U. S. 125; Bell v. Bell, 181 U. S. 175; Ingram v. Ingram, 143 Ala. 129, 42 S. 24, 111 Am. St. 31; In re Culp, 2 Cal. App. 70, 83 P. 89.

283-67 Field v. Field, 215 Ill. 496, 74 N. E. 443; Forrest v. Fey, 218 Ill. 165, 75 N. E. 789, 1 L. R. A. (N. S.) 740; Matter of Kimball, 155 N. Y. 62, 49 N. E. 331, and local cases cited.

284-68 Bell v. Bell, 185 U. S. 175; Beeman v. Kitzman, 124 Ia. 86, 99 N. W. 171.

284-69 McCoy v. Able, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; Board of Comrs. v. Newlin, 132 Ind. 27, 31 N. E. 465; Baltimore R. Co. v. Scholes, 14 Ind. App. 524, 43 N. E. 156.

Overwhelming weight of evidence must be adduced to show fraud or mistake. Mundy v. R. Co., 67 Fed. 633, 14 C. C. A. 583; Elliott v. R. Co., 74 Fed. 707, 21 C. C. A. 3; Choctaw R. Co. v. Newton, 140 Fed. 225, 71 C. C. A. 655. Evidence held to be sufficient. Fruin-Bam-

brick C. Co. v. R. Co., 140 Fed. 465.

284-70 Choctaw R. Co. v. Newton, 140 Fed. 225, 71 C. C. A. 655; Fruin-Bambrick C.Co. v.R. Co., supra; Concord A. H. Co. v. O'Brien, 228 Ill. 360, 81 N. E. 1038; Carnegie P. L. Assn. v. Harris (Tex. Civ.), 97 S. W. 520; Kilgore v. Soc., 89 Tex. 465, 35 S. W. 145; Brin v. McGregor (Tex. Civ.), 45 S. W. 923.

285-72 Bloomfield v. Board (N. J.), 65 A. 890; Fogg v. Ocean City (N. J. Eq.), 66 A. 609.

286-73 Sacramento P. Co. v. Anderson, 1 Cal. App. 672, 82 P. 1069.

286-74 Rogers v. S., 72 Ark. 565, 82 S. W. 169; Andrews v. P., 32 Colo. 193, 79 P. 1031; Wade v. L. Co., 51 Fla. 628, 41 S. 72; Missouri etc. R. Co. v. Simons, 75 Kan. 130, 88 P. 551 (*cit.* local cases); S. v. Mead, 71 Mo. 266 (*over.* Pacific R. Co. v. Governor, 23 Mo. 353, 66 Am. Dec. 673); S. v. Field, 119 Mo. 593, 24 S. W. 752; Cox v. Mignery, 126 Mo. App. 669, 105 S. W. 675; S. v. Frank, 60 Neb. 327, 83 N. W. 74; Colburn v. McDonald, 72 Neb. 431, 100 N. W. 961; Stetter v. S. (Neb.), 110 N. W. 761; Stratton v. S. (Neb.), 112 N. W. 361; Matter of Stickney, 185 N. Y. 107, 77 N. E. 993; New York v. Smith, 148 N. Y. 540, 42 N. E. 1088; S. v. Pack. Co. 135 N. C. 62, 47 S. E. 411; Bank v. Comrs., 119 N. C. 214, 25 S. E. 966; S. v. Rogers, 22 Or. 348, 364, 30 P. 74; Currie v. S. P. Co., 21 Or. 566, 28 P. 884; Portland v. Yick, 44 Or. 439, 75 P. 706.

287-75 **Authenticated published statutes** are conclusive as to the days on which the acts and resolutions therein were approved. Gibson v. Anderson, 131 Fed. 39, 65 C. C. A. 277, *foll.* Field v. Clark, 143 U. S. 649.

287-76 Montgomery v. Gaston, 126 Ala. 425, 28 S. 497, 85 Am. St. 42, 51 L. R. A. 396; S. v. Brodie, 148 Ala. 381, 41 S. 180; S. v. Bank, 79 Conn. 141, 64 A. 5; Wade v. L. Co., 51 Fla. 628, 41 S. 72; Division of Howard, 15 Kan. 154; County Seat of Linn Co., 15 Kan. 379; Durfee v. Harper, 22 Mont. 354, 56 P. 582; Palatine Ins. Co. v. R. Co., 34 Mont. 268, 85 P. 1032 (*over.* S. v. Long, 21 Mont. 26, 52 P. 645); S. v. Pack. Co., 135 N. C. 62, 47 S. E. 411; Comrs. v. Pack. Co., 135 N. C. 62, 47 S. E. 411· Wilson v. Markley, 133 N. C. 616, 45 S. E. 1023; S. v. Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; White v. Hinton, 3 Wyo. 753, 30 P. 953, 17 L. R. A. 66; S. v. Cahill, 12 Wyo. 225, 75 P. 433.

Journals must be explicit. — "An enrolled statute imports absolute verity and is conclusive evidence of the passage of the act and its validity unless the journals of the legislature show affirmatively, clearly, conclusively, and beyond all doubt, that the act was not passed regularly and legally." In re Taylor, 60 Kan. 87, 55 P. 340; S. v. Andrews, 64 Kan. 474, 67 P. 870; Missouri etc. R. Co. v. Simons, 75 Kan. 130, 88 P. 551. See Cox v. Mignery, 126 Mo. App. 669, 105 S. W. 675.

In Connecticut the existence of an act of which the records kept by the secretary of state are silent may be established by other evidence. S. v. Norwalk, 77 Conn. 257, 265, 58 A. 759; S. v. Bank, 79 Conn. 141, 64 A. 5.

Rule applies to official record of contents of ordinance. Cox v. Mignery, 126 Mo. App. 669, 105 S. W. 675, Fogg v. Ocean City S. Co. (N. J. Eq.), 66 A. 609.

288-77 King v. Davis, 137 Fed. 198; Cully v. Shirk, 131 Ind. 76, 30 N. E. 882; 31 Am. St. 414; Tyler v. Davis, 37 Ind. App. 557, 75 N. E. 3; Goddard v. Harbour, 56 Kan. 744, 44 P. 1055, 54 Am. St. 608; Orchard v. Peake, 69 Kan. 510, 77 P. 281; Warren v. Wilner, 61 Kan. 719, 60 P. 745; Thomas v. Ireland, 88 Ky. 581, 11 S. W. 653; Sykes v. Keating, 118 Mass. 517; Sodini v. Sodini, 94 Minn. 301, 102 N. W. 861; Smoot v. Judd, 184 Mo. 508, 83 S. W. 481 (*over.* s. c. 161 Mo. 673, 61 S. W. 854); Newcomb v. R. Co., 182 Mo. 687, 81 S. W. 1069; Kerr v. R. Co., 113 Mo. App. 1, 87 S. W. 596; Bolles v. Bowen, 45 N. H. 124; Benwood Iron Wks. v. Hutchinson, 101 Pa. 359; Bennethum v. Bowers, 133 Pa. 332, 19 A. 361; Ben Franklin Co. v. W. Co., 25 Pa. Super. 628; Philadelphia S. F. Soc. v. Purcell, 24 Pa. Super. 205; Barrows v. Rubber Co., 13 R. I. 48; McKinstry v. Collins, 76 Vt. 221, 56 A. 985; Columbian G. Co. v. Townsend, 74 Vt. 183, 52 A. 432; McDaniels v. De Groot, 77 Vt. 160, 59 A. 166; Preston v. Kindrick 94 Va. 760, 27 S. E. 588; Tal-

bott v. Southern Oil Co., 60 W. Va. 423, 55 S. E. 1009.

An amended return, made with or without notice, is not open to collateral attack. Ranch v. Werley, 152 Fed. 509, *cit.* Herman v. Santee, 103 Cal. 519, 37 P. 509, 52 Am. St. 145; Burr v. Seymour, 43 Minn. 401, 45 N. W. 715, 19 Am. St. 245; Smoot v. Judd, 184 Mo. 508, 83 S. W. 481; Weaver v. So. Oregon Co., 30 Or. 348, 48 P. 167; Frisk v. Reigelman, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. 198.

If return is not full or explicit, inquiry into the facts will be allowed. Parks Bros. & Co. v. B. Wks., 204 Pa. 453, 54 A. 334.

Informalities, including errors in the name of the person designated in the return, will not support a collateral attack on the judgment. Sodini v. Sodini, 94 Minn. 301, 102 N. W. 861, *cit.* Oswald v. Kampmann, 28 Fed. 36; Peck v. Strauss, 33 Cal. 678; Hollingsworth v. S., 111 Ind. 289, 12 N. E. 490; Wilson v. Call, 49 Ia. 463; Smith v. Bradley, 14 Miss. 485; Campbell v. Hays, 41 Miss. 561; Crizer v. Gorren, 41 Miss 563; Regby v. Lefevre, 58 Miss. 639; Kelly v. Harrison, 69 Miss. 856; 12 S. 261.

Cases reviewed. — The English and American authorities on the general subject are reviewed in extenso in Smoot v. Judd, 184 Mo. 508, 83 S. W. 481.

In Illinois return may be contradicted only to excuse a default. Cooke v. Haungs, 113 Ill. App. 501; Kline v. Kline, 104 Ill. App. 274.

If the return is open to construction parol evidence is competent to show what the officer in fact has done. Jackson v. Tenney, 17 Okla. 495, 87 P. 867.

288-79 Hearn v. Ayres, 77 Ark. 497, 92 S. W. 768; McKinstry v. Collins, 76 Vt. 221, 56 A. 985.

288-81 Taussig v. R. Co., 186 Mo. 269, 280, 85 S. W. 378.

Return not conclusive as to official capacity of person who made it though court has treated it as good. Buck v. Hawley, 129 Ia. 406, 105 N. W. 688.

289-82 National M. Co. v. Greene C. C. Co. (Ariz.), 89 P. 535, 9 L. R. A. (N. S.) 1062; Goble v. Brenneman, 75 Neb. 309, 106 N. W. 440; Wilson v. Shipman, 34 Neb. 273, 52 N. W. 576, 33 Am. St. 660; Johnson v. Carpenter (Neb.), 108 N. W. 161; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Marin v. Potter, 15 N. D. 284, 107 N. W. 970.

In Kentucky it is provided by stat ute that a return may be questioned for fraud or mistake. See Utter v. Smith, 25 Ky. L. R. 2272, 80 S. W. 447.

289-84 Fraud on plaintiff's part need not be shown. National M. Co. v. Greene C. C. Co. (Ariz.), 89 P. 535, 9 L. R. A. (N. S.) 1062.

289-85 The authorities are reviewed in Smoot v. Judd, 184 Mo. 508, 83 S. W. 481.

290-89 Choctaw & M. R. Co. v. Newton, 140 Fed. 225, 71 C. C. A. 655; Christian v. R. & L. Co., 120 Ga. 314, 47 S. E. 923; Moultrie R. Co. v. Hill, 120 Ga. 730, 48 S. E. 143; Lasher v. Colton, 225 Ill. 234, 80 N. E. 122; U. S. B. Co. v. Ruddy, 203 Ill. 306, 67 N. E. 799; Highley v. Bank, 185 Ill. 565, 57 N. E. 436; C. v. B. Co., 26 Ky. L. R. 121, 80 S. W. 772; McDonald v. Smith, 139 Mich. 211, 102 N. W. 668; Buchanan v. Buchanan (N. J. Eq.), 68 A. 780; Ingersoll v. English, 66 N. J. L. 463, 49 A. 737; Alcolm Co. v. Brenack, 98 N. Y. S. 199; Manhattan L. Co. v. Weill, 98 N. Y. S. 686.

In Massachusetts a party calling an adverse witness does not hold him out as credible. Emerson v. Wark, 185 Mass. 427, 70 N. E. 482.

290-91 Theis v. G. L. Co., 34 Wash. 23, 74 P. 1004.

Admission by tender, conclusive. Wiener v. Auerbach, 98 N. Y. S. 686.

Written admission of service conclusive. Franklin v. Conrad-S. Co., 137 Fed. 737, 70 C. C. A. 171.

290-92 Evidence to be believed must not only proceed from the mouth of a credible witness, but it must be credible in itself, such as the common experience and observation of mankind can approve as probable under the circumstances. Daggers v. Van Dyck, 37 N. J. Eq. 130; Buchanan v. Buchanan (N. J. Eq.), 68 A. 780. See "ADMISSIONS," Vol. 1, pp. 348, 612, 613, and that title, ante, 612-64.

291-93 Christian v. R. & L. Co., 120 Ga. 314, 47 S. E. 923; Chesa-

peake S. Co. v. Fossett, 30 Ky. L. R. 1175, 100 S. W. 825.

291-94 See Schneider v. Sulzer, 212 Ill. 87, 72 N. E. 19.

291-95 Weil v. S. (Tex. Cr.), 90 S. W. 644.

CONFESSIONS [Vol. 3.]

297-1 Shelton v. S., 144 Ala. 106, 42 S. 30; Owens v. S., 120 Ga. 296, 48 S. E. 21; Spicer v. C., 21 Ky. L. R. 528, 51 S. W. 802.

A confession is in the nature of positive testimony so as to excuse a charge on circumstantial evidence. Burk v. S. (Tex. Cr.), 95 S. W. 1064.

298-3 Shelton v. S., 144 Ala. 106, 42 S. 30; Folds v. S., 123 Ga. 167, 51 S. E. 305; Ramson v. S., 2 Ga. App. 826, 59 S. E. 101; S. v. Campbell, 73 Kan. 688, 85 P. 784.

298-4 Shelton v. S., 144 Ala. 106, 42 S. 30; Owens v. S., 120 Ga. 296, 48 S. E. 21; Tipton v. C., 25 Ky. L. R. 1547, 78 S. W. 174.

Confession must be unqualified. S. v. Abrams, 131 Ia. 479, 108 N. W. 1041. If the evidence conflicts concerning the confession the question is for the jury. S. v. Westcott, 130 Ia. 1, 104 N. W. 341.

298-5 Lowe v. S., 125 Ga. 55, 53 S. E. 1038; Ransom v. S., 2 Ga. App. 826, 59 S. E. 101.

Expressing, out of court, a desire to plead guilty is equivalent to a confession. Abrams v. S., 121 Ga. 170, 48 S. E. 965.

Need not be specific as to details. Cook v. S., 124 Ga. 653, 53 S. E. 104.

May be too general to be competent. Young v. S., 6 Ohio C. C. (N. S.) 53.

299-11 P. v. Sullivan, 3 Cal. App. 502, 86 P. 831; P. v. Philbon, 138 Cal. 530, 71 P. 650; P. v. Ah Lung, 2 Cal. App. 278, 83 P. 296; Joiner v. S., 119 Ga. 315, 46 S. E. 412; S. v. Spiker, 131 Ia. 194, 108 N. W. 233; Finch v. C., 29 Ky. L. R. 87, 92 S. W. 940; C. v. Dewhirst, 190 Mass. 293, 76 N. E. 1052; C. v. McCabe, 163 Mass. 98, 39 N. E. 777; C. v. Funai, 146 Mass. 570, 16 N. E. 458; O'Hearn v. S. (Neb.), 113 N. W. 130; S. v. Rosa, 72 N. J. L. 462, 62 A. 695; S. v. Nagle, 25 R. I. 105, 54 A. 1063; S. v. Sudduth, 74 S. C. 498, 54 S. E. 1013; Johnson v. S., 47 Tex. Cr. 523, 84 S. W. 824; Clay v. S. (Wyo.), 86 P. 17.

Silence is not an admission if it was not voluntary, or was the result of artifice. Geiger v. S., 70 Ohio St. 400, 71 N. E. 721.

One in official custody may keep silence without making an admission. P. v. Smith, 172 N. Y. 210, 234, 64 N. E. 814. *Contra*, P. v. Sullivan, 3 Cal. App. 502, 86 P. 834; P. v. Amaya, 134 Cal. 531, 66 P. 794.

Statements of arresting officer need not be answered. P. v. Amaya, supra.

300-12 O'Hearn v. S. (Neb.), 113 N. W. 130.

300-13 Simmons v. S., 115 Ga. 574; Lumpkin v. S., 125 Ga. 24, 53 S. E. 810; P. v. Smith, 172 N. Y. 210, 233, 64 N. E. 814.

300-14 Jones v. S., 2 Ga. App. 433, 58 S. E. 559; Lumpkin v. S., 125 Ga. 24, 53 S. E. 810; Geiger v. S., 70 Ohio St. 400, 71 N. E. 721.

Manifestation of aversion by wife to husband accused of shooting her does not call upon him to ask an explanation, she having declared him innocent. P. v. Smith, 172 N. Y. 210, 64 N. E. 814.

301-15 Adcock v. S., 73 Ark. 625, 83 S. W. 318; Smith v. S., 74 Ark. 397, 85 S. W. 1123; Griner v. S., 121 Ga. 614, 49 S. E. 700; Ginn v. S., 161 Ind. 292, 68 N. E. 294; S. v. Westcott, 130 Ia. 1, 104 N. W. 341; Carpenter v. C., 29 Ky. L. R. 107, 92 S. W. 552; Van Dalsen v. C., 28 Ky. L. R. 238, 89 S. W. 255; S. v. Robertson, 111 La. 35, 35 S. 375; S. v. Gianfala, 113 La. 463, 37 S. 30; Green v. S., 96 Md. 384, 54 A. 104; Dunmore v. S., 86 Misc. 788, 39 S. 69; S. v. Jones, 171 Mo. 401, 71 S. W. 680; S. v. Hottman, 196 Mo. 110, 126, 94 S. W. 237; S. v. Church, 199 Mo. 605, 98 S. W. 16; S. v. Spaugh, 200 Mo. 571, 98 S. W. 55; P. v. Kent, 41 Misc. 191, 83 N. Y. S. 948; S. v. Daniels, 134 N. C. 641, 46 S. E. 743; Wade v. Wade, 2 Ohio C. C. (N. S.). 189; C. v. Johnson, 217 Pa. 77, 66 A. 233; S. v. Perry, 74 S. C. 551, 54 S. E. 764; Turner v. S., 48 Tex. Cr. 585, 89 S. W. 975; S. v. Poole, 42 Wash. 192, 84 P. 727; Horn v. S., 12 Wyo. 80, 73 P. 705.

"A statement is voluntary unless made under the influence of a threat

or menace which inspires dread or alarm, or induced by artifice or by a promise or inducement of some profit, benefit or amelioration of punishment.'' Anderson v. S. (Wis.), 114 N. W. 112; Hintz v. S., 125 Wis. 405, 104 N. W. 110.

An unfinished confession in the form of a newspaper article, although taken from the person of accused, is it seems admissible. S. v. MacQueen, 69 N. J. L. 522, 55 A. 1006.

Involuntary admissions or confessions may be shown to contradict accused as a witness. Smith v. S., 137 Ala. 22, 34 S. 396; Burgess v. S., 148 Ala. 654, 42 S. 681.

303-16 Rex v. Ryan, 9 Ont. L. R. (Can.) 137; Peck v. S., 147 Ala. 100, 41 S. 759; P. v. Silvers (Cal. App.), 92 P. 506; Johnson v. S., 1 Ga. App. 129, 57 S. E. 934; C. v. Phillips, 26 Ky. L. R. 543, 82 S. W. 286; Owsley v. C., 31 Ky. L. R. 5, 101 S. W. 366; S. v. Alexander, 109 La. 557, 33 S. 600; Watts v. S., 99 Md. 30, 57 A. 542; S. v. Force, 69 Neb. 162, 95 N. W. 42; S. v. Nagle, 25 R. I. 105, 54 A. 1063.

Advice by employe of prosecutor. Smith v. S., 125 Ga. 252, 54 S. E. 190.

304-18 Stevens v. S., 138 Ala. 71, 35 S. 122; Campbell v. S. (Ala.), 43 S. 743; Owsley v. C., 31 Ky. L. R. 5, 101 S. W. 366; S. v. Landers (S. D.), 114 N. W. 717; S. v. Vey (S. D.), 114 N. W. 719; Roszezyniala v. S., 125 Wis. 414, 104 N. W. 113.

The test is, was the inducement held out such as to result in any fair risk of a false confession. S. v. Sherman, 35 Mont. 512, 522, 90 P. 981.

Statutes exist in some jurisdictions regulating confessions as evidence. Ginn v. S., 161 Ind. 292, 68 N. E. 294; Ter. v. Matsumoto, 16 Haw. 267.

305-19 Peck v. S., 147 Ala. 100, 41 S. 759; Hillburn v. S., 121 Ga. 344, 49 S. E. 318; Owsley v. C., 31 Ky. L. R. 5, 101 S. W. 366; S. v. Hernia, 68 N. J. L. 299, 53 A. 85; S. v. Nagle, 25 R. I. 105, 54 A. 1063.

305-20 Layton v. S. (Tex. Cr.), 107 S. W. 819. See O'Hearn v. S. (Neb.), 113 N. W. 130, favoring the rule of exclusion arguendo.

306-21 Stevens v. S., 138 Ala. 71, 35 S. 122; Hamilton v. S., 147 Ala. 110, 41 S. 940; Hooker v. S., 75 Ark. 67, 86 S. W. 846; Williams v. S., 48 Fla. 65, 37 S. 521; Folds v. S., 123 Ga. 167, 51 S. E. 305; Ginn v. S., 161 Ind. 292, 68 N. E. 294; S. v. Penney, 113 Ia. 691, 84 N. W. 509; S. v. Icenbice, 126 Ia. 16, 101 N. W. 273; S. v. Westcott, 130 Ia. 1, 104 N. W. 341; Pearsall v. C., 29 Ky. L. R. 222, 92 S. W. 589; Hathaway v. C., 26 Ky. L. R. 630, 82 S. W. 400; S. v. Lewis, 112 La. 872, 36 S. 788; S. v. Hogan, 117 La. 863, 42 S. 352; S. v. Rugero, 117 La. 1040, 42 S. 495; S. Baudoin, 115 La. 773, 40 S. 42; Birkenfeld v. S., 104 Md. 253, 65 A. 1; S. v. Church, 199 Mo. 605, 636, 98 S. W. 16; S. v. Jones, 171 Mo. 401, 71 S. W. 680; S. v. Armstrong, 203 Mo. 554, 102 S. W. 503; S. v. Johnny (Nev.), 87 P. 3; S. v. Hernia, 68 N. J. L. 299, 53 A. 85; S. v. MacQueen, 69 N. J. L. 522, 55 A. 1006; P. v. White, 176 N. Y. 331, 349, 68 N. E. 630; S. v. Daniels, 134 N. C. 641, 46 S. E. 743; S. v. Exum, 138 N. C. 599, 50 S. E. 283; S. v. Smith, 138 N. C. 700, 50 S. E. 859; S. v. Horner, 139 N. C. 603, 52 S. E. 136; S. v. Jones (N. C.), 59 S. E. 353 *(cit.* local cases); Wade v. S., 2 Ohio C. C. (N. S.) 189; S. v. Blodgett (Or.), 92 P. 820; S. v. Landers (S. D.), 114 N. W. 717; S. v. Vey (S. D.), 114 N. W. 719; Reeves v. S., 47 Tex. Cr. 340, 83 S. W. 803; Fonseca v. S., 48 Tex. Cr. 28, 85 S. W. 1069; Bink v. S., 48 Tex. Cr. 598, 89 S. W. 1075; S. v. Blay, 77 Vt. 56, 58 A. 794; S. v. Poole, 42 Wash. 192, 84 P. 727; Hintz v. S., 125 Wis. 405, 104 N. W. 110; Stoddard v. S. (Wis.), 112 N. W. 453; Clay v. S. (Wyo.), 86 P. 17.

Immaterial that defendant was under arrest for prior offense. Reinhard v. S. (Tex. Cr.), 106 S. W. 128. Legality of arrest is immaterial. Brown v. S., 3 Ga. App. 479, 60 S. E. 216.

307-22 Stoddard v. S. (Wis.), 112 N. W. 453.

307-23 Perovich v. U. S., 205 U. S. 86.

A confession is not inadmissible because made while a chain was locked around defendant's neck, the other end being fastened to a pole and the officer to whom the confession was made was the only person with accused at the time, and had a pistol

in his pocket. McNish v. S., 47 Fla. 69, 36 S. 176. But *compare* S. v. Westcott, 130 Ia. 1, 104 N. W. 341, and see S. v. Gorham, 67 Vt. 365, 31 A. 845.

307-24 Owsley v. C., 31 Ky. L. R. 5, 101 S. W. 366.

308-25 S. v. Penney, 113 Ia. 691, 84 N. W. 509; S. v. Novak, 109 Ia. 717, 79 N. W. 465; Green v. S., 96 Md. 384, 54 A. 104; S. v. Banusik (N. J. L.), 64 A. 994; Ter. v. Emilio (N. M.), 89 P. 239; P. v. White, 176 N. Y. 331, 349, 68 N. E. 630; S. v. Bohanon, 142 N. C. 695, 55 S. E. 797.

308-26 Brewer v. S., 72 Ark. 145, 78 S. W. 773; Hilburn v. S., 121 Ga. 344, 49 S. E. 318; S. v. Westcott, 130 Ia. 1, 104 N. W. 341; S. v. Johnny (Nev.), 87 P. 3; Hintz v. S., 125 Wis. 405, 104 N. W. 110; Roszczyniala v. S., 125 Wis. 414, 104 N. W. 113.

309-27 Peck v. S., 147 Ala. 100, 41 S. 759.

309-28 Birkenfeld v. S., 104 Md. 253, 65 A. 1; Green v. S., 96 Md. 384, 54 A. 104; S. v. Blodgett (Or.), 92 P. 820; S. v. Landers (S. D.), 114 N. W. 717.

309-29 Sorenson v. U. S., 143 Fed. 820, 74 C. C. A. 468; P. v. Silvers (Cal. App.), 92 P. 506; McNish v. S., 45 Fla. 83, 34 S. 219; Mackmasters v. S., 82 Miss. 459, 34 S. 156; S. v. Nagle, 25 R. I. 105, 54 A. 1063.

The hope or fear may be induced by one person and the resulting confession be made to another, in the absence of the former, without rendering it admissible, though the person to whom the confession was made had no knowledge of the acts or words of the other. Griner v. S., 121 Ga. 614, 49 S. E. 700.

310-30 King v. Paakaula, 3 Haw. 30; S. v. Jones, 171 Mo. 401, 71 S. W. 680.

State not responsible for remark made by bystander. Roszczyniala v. S., 125 Wis. 414, 104 N. W. 113.

311-31 P. v. Silvers (Cal. App.), 92 P. 506; King v. Kamakana, 3 Haw. 313. See S. v. Coats, 174 Mo. 396, 74 S. W. 864; S. v. Perry, 74 S. C. 551, 54 S. E. 764.

Inducements made by a third person in officer's presence ground for excluding confession. S. v. Sherman, 35 Mont. 512, 90 P. 981. And so by father of minor, no officer being present. S. v. Force, 69 Neb. 162, 95 N. W. 42. Inducements by police judge, not acted on, immaterial. Geiger v. S., 2 Ohio C. C. (N. S.) 174, *rev.* on another question, 70 Ohio St. 400, 71 N. E. 721.)

312-33 **Confession voluntarily made** one month after remarks inducing hope, competent. S. v. Vey (S. D.), 114 N. W. 719.

312-35 White v. S., 70 Ark. 24, 65 S. W. 937; S. v. Hunter, 181 Mo. 316, 80 S. W. 955.

312-37 P. v. White, 176 N. Y. 331, 349, 68 N. E. 630.

A promise to protect from mob violence does not render a confession inadmissible. Brewer v. S., 72 Ark. 145, 78 S. W. 773.

313-38 Milner v. S., 124 Ga. 86, 52 S. E. 302; S. v. Johnny (Nev.), 87 P. 3; Grimsinger v. S., 44 Tex. Cr. 1, 18, 69 S. W. 583.

313-39 Edmonson v. S., 72 Ark. 585, 82 S. W. 203; S. v. Willing, 129 Ia. 72, 105 N. W. 355; Maxwell v. S. (Miss.), 40 S. 615; Jackson v. S. (Tex. Cr.), 97 S. W. 312.

314-41 **It is immaterial** that accused was in a calaboose surrounded by a crowd of white men, he being colored. Hilburn v. S., 121 Ga. 344, 49 S. E. 318.

314-42 Stevens v. S., 138 Ala. 71, 35 S. 122.

314-43 **Violence** made necessary by accused's resistance to arrest does not affect the competency of a confession. Ter. v. Emilio (N. M.), 89 P. 239.

314-44 Green v. C., 26 Ky. L. R. 1221, 83 S. W. 638.

314-45 Green v. C., supra.

315-47 See Hooker v. S., 75 Ark. 67, 86 S. W. 846.

Fear of mob violence is immaterial unless it existed prior to or contemporaneously with making of statement. Smith v. S., 142 Ala. 14, 39 S. 329.

315-48 McNish v. S., 45 Fla. 83, 34 S. 219.

315-51 Rex v. Ryan, 9 Ont. L. R. (Can.) 137; S. v. Westcott, 130 Ia. 1, 104 N. W. 341; S. v. Wilson, 172 Mo. 420, 72 S. W. 696; P. v. White, 176 N. Y. 331, 348, 68 N. E.

630; S. v. Landers (S. D.), 114 N. W. 717; Spencer v. S., 48 Tex. Cr. 580, 90 S. W. 638; Cortez v. S., 47 Tex. Cr. 10, 83 S. W. 812. But see Bram v. U. S., 168 U. S. 532.

316-52 See Tines v. C., 25 Ky. L. R. 1233, 77 S. W. 363; Geiger v. S., 70 Ohio St. 400, 71 N. E. 721.

In Texas a distinction is made where the fraud practiced on accused has reference to the crime itself—as where it was pretended that he had been seen taking the goods and threatened with prosecution if he did not settle for them. Cook v. S., 32 Tex. Cr. 27, 22 S. W. 23, 40 Am. St. 758.

316-54 Connors v. S., 95 Wis. 77, 69 N. W. 981; Roszczyniala v. S., 125 Wis. 414, 104 N. W. 113.

318-56 Green v. S., 96 Md. 384, 54 A. 104; S. v. Jones, 171 Mo. 401, 71 S. W. 680; S. v. Banusik (N. J. L.), 64 A. 994; Henderson v. S. (Tex. Cr.), 95 S. W. 131.

It is not material that defendant was not represented by counsel nor informed of his right to remain silent. S. v. Washing, 36 Wash. 485, 78 P. 1019.

318-58 Jones v. S., 137 Ala. 12, 34 S. 681; Thayer v. S., 138 Ala. 39, 35 S. 406; Stevens v. S., 138 Ala. 71, 35 S. 122; Smith v. S., 142 Ala. 14, 39 S. 329; Richardson v. S., 145 Ala. 46, 41 S. 82; P. v. Walker, 140 Cal. 153, 73 P. 831; Ter. v. Matsumoto, 16 Haw. 267; Birkenfeld v. S., 104 Md. 253, 65 A. 1; C. v. Davaney, 182 Mass. 33, 64 N. E. 402; C. v. Corcoran, 182 Mass. 465, 65 N. E. 821; Dunmore v. S., 86 Miss. 788, 39 S. 69; S. v. Banusik (N. J. L.), 64 A. 994; S. v. Nagle, 25 R. I. 105, 54 A. 1063; S. v. Henderson, 74 S. C. 477, 55 S. E. 117; S. v. Vey (S. D.), 114 N. W. 719; S. v. Blay, 77 Vt. 56, 58 A. 794.

318-59 S. v. Henderson, 74 S. C. 477, 55 S. E. 117.

Rule applies to postoffice inspector in case of prisoners accused of violating postal laws. Sorensen v. U. S., 143 Fed. 820, 74 C. C. A. 468.

319-60 S. v. Alexander, 109 La. 557, 33 S. 600; S. v. Banusik (N. J. L.), 64 A. 994.

319-61 McNish v. S., 45 Fla. 83, 34 S. 219.

319-62 P. v. Silvers (Cal. App.), 92 P. 506.

319-63 S. v. Stebbins, 188 Mo. 387, 87 S. W. 460. See S. v Landers (S. D.), 114 N. W. 717.

Confession may be proven if attorney has informed accused he cannot grant immunity. Howard v. C., 28 Ky. L. R. 737, 90 S. W. 578.

319-64 A slight assault made by a detective on accused two days prior to his confession is not cause for excluding it. Ter. v. Matsumoto, 16 Haw. 267.

320-67 Johnson v. S., 1 Ga. App. 129, 57 S. E. 934.

320-69 See Owsley v. C., 31 Ky. L. R. 5, 101 S. W. 366.

321-72 Peck v. S., 147 Ala. 100, 41 S. 759; Owsley v. C., supra; Watts v. S., 99 Md. 30, 57 A. 542; S. v. Church, 199 Mo. 605, 632, 98 S. W. 16. See Green v. S., 96 Md. 384, 54 A. 104.

Method of trying issue of sanity. See S. v. Church, 199 Mo. 605, 98 S. W. 16.

322-73 See Birkenfeld v. S., 104 Md. 253, 65 A. 1.

322-74 Jones v. S., 137 Ala. 12, 34 S. 681; Parrish v. S., 139 Ala. 16, 41, 36 S. 1012; Talbert v. S., 140 Ala. 96, 37 S. 78; Plant v. S., 140 Ala. 52, 37 S. 159; Davis v. S., 141 Ala. 62, 37 S. 676; Braham v. S., 143 Ala. 23, 38 S. 919; Ince v. S., 77 Ark. 426, 93 S. W. 65; P. v. Weber, 149 Cal. 325, 86 P. 671; P. v. Fallon, 149 Cal. 287, 86 P. 698; Ranson v. S., 2 Ga. App. 826, 59 S. E. 101; S. v. Campbell, 73 Kan. 688, 85 P. 784; Richburger v. S., 90 Miss. 806, 44 S. 772; S. v. Lu Sing, 34 Mont. 31, 85 P. 521; S. v. Nagle, 25 R. I. 105, 54 A. 1063; S. v. Vey (S. D.), 114 N. W. 719; Reinhard v. S. (Tex. Cr.), 106 S. W. 128; S. v. Blay, 77 Vt. 56, 58 A. 794; Roszczyniala v. S., 125 Wis. 414, 104 N. W. 113; Anderson v. S. (Wis.), 114 N. W. 112,

Must be voluntary in the largest sense of the word. Johnson v. S., 1 Ga. App. 129, 57 S. E. 934; Mill v. S., 3 Ga. App. 414, 60 S. E. 4.

Statements made by accused to his wife, overheard by third person, may be proved though she is incompetent as a witness. Ford v. S., 124 Ga. 793, 53 S. E. 335.

May be made before accusation.—

Purdy v. S. (Tex. Cr.), 97 S. W. 480; S. v. Royce, 38 Wash. 111, 80 P. 268.

323-75 Rex v. Martin, 9 Ont. L. R. (Can.) 218; Barddell v. S., 144 Ala. 54, 39 S. 975; Carr v. S., 81 Ark. 589, 99 S. W. 831.

324-78 S. v. Wenzel, 72 N. H. 396, 56 A. 918; Knapp v. S., 4 Ohio C. C. (N. S.) 184; S. v. Lawrence, 74 Ohio St. 38, 77 N. E. 266; Barnett v. S. (Tex. Cr.), 99 S. W. 556.

A confession including crimes other than that involved is admissible as a whole if the jury is directed to disregard all that relates to any other crime. S. v. Knapp, 70 Ohio St. 380, 71 N. E. 705; Gore v. P., 162 Ill. 259, 44 N. E. 500. Confession of previous embezzlement under same contract competent. Zuckerman v. P., 213 Ill. 114, 72 N. E. 741. And so if independent crime part of same scheme. S. v. Jones, 171 Mo. 401, 71 S. W. 680; Campos v. S. (Tex. Cr.), 97 S. W. 100. In some cases no restriction seems to be imposed. See S. v. Poole, 42 Wash. 192, 84 P. 727; S. v. Dalton, 43 Wash. 278, 86 P. 590. A confession that one is guilty of a misdemeanor is not provable to show that a subsequent similar act was committed with like intent, the law having changed the offense to a felony and added to the penalty. S. v. Wenzel, 72 N. H. 396, 56 A. 918.

324-80 P. v. Weber, 149 Cal. 325, 86 P. 671; P. v. Jan John, 144 Cal. 284, 77 P. 950.

324-81 S. v. Hogan, 117 La. 863, 42 S. 352; C. v. Devaney, 182 Mass. 33, 64 N. E. 402.

325-82 S. v. Adams (Del.), 65 A. 510; P. v. Flannelly, 128 Cal. 83, 60 P. 670; S. v. Phillips, 118 Ia. 660, 92 N. W. 876; S. v. Spaugh, 200 Mo. 571, 599, 98 S. W. 55; C. v. Bidelle, 200 Pa. 647, 50 A. 264; S. v. Shaw, 73 Vt. 149, 50 A. 863; S. v. Deatherage, 35 Wash. 326, 77 P. 504.

325-83 Bines v. S., 118 Ga. 320, 45 S. E. 376; Delaney v. S., 48 Tex. Cr. 594, 90 S. W. 642.

326-86 S. v. Hogan, 117 La. 863, 42 S. 352; S. v. Rugero, 117 La. 1040, 42 S. 495; S. v. MacQueen, 69 N. J. L. 522, 55 A. 1006; S. v. Hernia, 68 N. J. L. 299, 53 A. 85.

326-88 Manis v. S. (Tex. Cr.), 81 S. W. 709; Binkley v. S. (Tex. Cr.), 100 S. W. 780.

327-90 McNish v. S., 45 Fla. 83, 34 S. 219; Henderson v. S. (Tex. Cr.), 95 S. W. 131.

327-91 Curry v. S. (Tex. Cr.), 94 S. W. 1058; Jones v. S. (Tex. Cr.), 106 S. W. 126; Buckner v. S. (Tex. Cr.), 106 S. W. 363.

The Texas statute prohibits proof of acts of accused, as well as his words, if he has not been warned. Lasister v. S., 49 Tex. Cr. 532, 94 S. W. 233.

Caution not necessary if confession made to officer before arrest. Briby v. S. (Tex. Cr.), 90 S. W. 31. Though officer had a search warrant. Gibson v. S., 47 Tex. Cr. 489, 83 S. W. 1119. And so if made as part of act of surrender. Gregory v. S. (Tex. Cr.), 94 S. W. 1041.

Confession and warning need not be simultaneous if former was made under circumstances showing that warning was in mind, though it was made to another person than the one who gave the caution. Stephens v. S., 49 Tex. Cr. 489, 93 S. W. 545. Rule the same when made to officer who gave warning, only six or seven hours intervening. Johnson v. S., 47 Tex. Cr. 523, 84 S. W. 824. But the intervention of a week makes the caution too remote, the confession being made to another than the person who gave the warning. Barth v. S., 39 Tex. Cr. 381, 46 S. W. 228, 73 Am. St. 935; McDaniel v. S., 46 Tex. Cr. 560, 81 S. W. 301; Binkley v. S. (Tex. Cr.), 100 S. W. 780.

Statement to accused that he would probably die within an hour does not avoid effect of caution. Jackson v. S., 49 Tex. Cr. 215, 91 S. W. 788.

327-92 Kennon v. S., 46 Tex. Cr. 359, 82 S. W. 518.

327-93 Delaney v. S., 48 Tex. Cr. 594, 90 S. W. 642; Herndon v. S. (Tex. Cr.), 99 S. W. 558; Salinas v. S. (Tex. Cr.), 102 S. W. 116.

It is insufficient merely to say to accused that any statement that he should make might be used for or against him. Adams v. S., 48 Tex. Cr. 90, 86 S. W. 334, and local cases cited.

Confession made after conviction may be proved on new trial though accused was not warned after his conviction, the time between warning and confession having been

brief. Yancey v. S., 45 Tex. Cr. 366, 76 S. W. 571.

328-95 Sorenson v. U. S., 143 Fed. 820, 74 C. C. A. 468.

330-3 King v. Kamakana, 3 Haw. 313; Zuckerman v. P., 213 Ill. 114, 72 N. E. 741; S. v. Michel, 111 La. 434, 35 S. 629; P. v. Maxfield, 146 Mich. 103, 108 N. W. 1087; S. v. Hernia, 68 N. J. L. 299, 53 A. 85; P. v. White, 176 N. Y. 331, 68 N. E. 630; S. v. Middleton, 69 S. C. 72, 48 S. E. 35.

Confessions may be proven without preliminary testimony if the circumstances show they were prima facie voluntary. Bush v. S., 136 Ala. 85, 33 S. 878; Heningburg v. S. (Ala.), 45 S. 246.

Proper objection to admission of involuntary confession must be made. P. v. Silvers, 6 Cal. App. 69, 92 P. 506.

Proof that the officer held out no inducements to make the confession permits reception of evidence of it though there was no testimony concerning the conduct of a third person present. Richardson v. S., 145 Ala. 46, 41 S. 82.

331-4 Plant v. S., 140 Ala. 52, 37 S. 159; Smith v. S., 142 Ala. 14, 39 S. 329; S. v. Stallings, 142 Ala. 112, 38 S. 261; Smith v. S., 74 Ark. 397, 85 S. W. 1123; McWhorter v. S., 118 Ga. 55, 44 S. E. 873; S. v. Stebbins, 188 Mo. 387, 87 S. W. 460.

Proof may be wholly circumstantial. Bush v. S., 136 Ala. 85, 33 S. 878.

Jury need not be excluded during the preliminary inquiry. Hintz v. S., 125 Wis. 405, 104 N. W. 110; and cases cited; S. v. Sperman, 35 Mont. 512, 90 P. 981. *Contra,* S. v. Vey (S. D.), 114 N. W. 719.

331-5 S. v. Blodgett (Or.), 92 P. 820; Gregory v. S. (Tex. Cr.), 94 S. W. 1041; Watson v. S., 48 Tex. Cr. 323, 87 S. W. 1158; Cortez v. S., 47 Tex. Cr. 10, 83 S. W. 812.

331-6 **Proof may be** made by any person who heard the warning. Henderson v. S. (Tex. Cr.), 95 S. W. 131.

332-9 S. v. Campbell, 129 Ia. 154, 105 N. W. 395.

332-12 Andrews v. P., 33 Colo. 193, 79 P., 1031; S. v. Foster (Ia.), 114 N. W. 36 (inducements in the morning, confession in the afternoon); Pearsall v. C., 29 Ky. L. R. 222, 92 S. W. 589; Green v. C., 26 Ky. L. R. 1221, 83 S. W. 638; Howard v. C., 28 Ky. L. R. 737, 90 S. W. 578; S. v. Rugero, 117 La. 1040, 42 S. 495; S. v. Force, 69 Neb. 162, 95 N W.. 42; S. v. Middleton, 69 S. C. 72, 48 S. E. 35; Hintz v. S., 125 Wis. 405, 104 N. W. 110.

Error in admitting a confession may not be prejudicial if it appears later substantially the same confession was made voluntarily and without any improper influence which led to the making of the original. Whitney v. C., 24 Ky. L. R. 2524, 74 S. W. 257; Andrews v. P., 33 Colo. 193, 204, 79 P. 1031.

333-13 McNish v. S., 45 Fla. 83, 34 S. 219; S. v. Force, 69 Neb. 162, 95 N. W. 42.

333-14 Smith v. S., 74 Ark. 397, 85 S. W. 1123; S. v. Westcott, 130 Ia. 1, 104 N. W. 341; C. v. Phillips, 26 Ky. L. R. 543, 82 S. W. 286; Mackmasters v. S., 82 Miss. 459, 34 S. 156; Johnson v. S., 48 Tex. Cr. 423, 88 S. W. 223.

For the jury.—"Whether subsequent confessions, of themselves wholly unexceptionable, were made under previous influences still operating on the mind," is for the jury to determine. Milner v. S., 124 Ga. 86, 52 S. E. 302.

333-15 S. v. Westcott, 130 Ia. 1, 104 N. W. 341; Mackmasters v. S., 82 Miss. 459, 34 S. 156; S. v. Force, 69 Neb. 162, 95 N. W. 42.

The time intervening between the two confessions is a material element determining whether the later one was the result of the influence which led to the former. S. v. Force, 69 Neb. 162, 95 N. W. 42, *cit.* Taylor v. S., 37 Neb. 788, 56 N. W. 623; S. v. Fisher, 6 Jones' L. (N. C.) 478; S. v. Henry, 65 Tenn. 539; Reeves v. S. (Tex. Cr.), 24 S. W. 518. If repeated on the trial several days later all doubt as to the competency of the confession is removed. Whitney v. C., 24 Ky. L. R. 2524, 74 S. W. 257; S. v. Johnny (Nev.), 87 P. 3.

334-16 S. v. Mitchell, 130 Ia. 697, 107 N. W. 804; Little v. S., 87 Miss. 512, 40 S. 165.

334-18 Parker v. Conture, 63 Vt. 449, 21 A. 1102.

Is sometimes an admission and explainable. Yaska v. Swendrzynski

(Wis.), 113 N. W. 959. See "Admissions," vol. 1, p. 348, and that title, ante.

334-20 S. v. Hopkins, 13 Wash. 5, 42 P. 627; S. v. Poole, 42 Wash. 192, 84 P. 727.

336-23 **Sworn statement** obtained from defendant by county attorney under pretense of desiring to use it against others, incompetent. Tines v. C., 25 Ky. L. R. 1233, 77 S. W. 363.

336-24 Green v. S., 124 Ga. 343, 52 S. E. 431; Anderson v. S. (Wis.), 114 N. W. 112.

337-25 Wilson v. S., 110 Ala. 1, 20 S. 415, 55 Am. St. 17; Jones v. S., 120 Ala. 303, 25 S. 204; S. v. Finch, 71 Kan. 793, 81 P. 494; P. v. Malineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

337-26 Adams v. S., 129 Ga. 248, 58 S. E. 822.

Under oath admissible. — The testimony of persons who knew they were suspected, though not formally charged, given without warning and without being represented by counsel, is not competent evidence against them. Tuttle v. P., 33 Colo. 243, 79 P. 1035.

338-27 **Sworn statement** of person not under accusation, made at an illegal hearing, is competent against him. S. v. Legg, 59 W. Va. 315, 53 S. E. 545.

338-31 S. v. Blay, 77 Vt. 56, 58 A. 794.

338-32 S. v. May, 62 W. Va. 129, 57 S. E. 366.

339-35 **Testimony given before grand jury** in obedience to process may be proven. S. v. Campbell, 73 Kan. 688, 85 P. 784. If made under the advice of counsel and subsequently affirmed under oath. Wade v. S., 2 Ohio C. C. (N. S.) 189. And so made after being warned. Grimsinger v. S., 44 Tex. Cr. 1, 18, 69 S. W. 583. Warning need not be specific. Smith v. S., 48 Tex. Cr. 509, 90 S. W. 37.

340-37 Smith v. S., supra.

341-38 Tuttle v. P., 33 Colo. 243, 79 P. 1035.

341-40 Johnson v. S., 119 Ga. 257, 45 S. E. 960; S. v. Height, 117 Ia. 650, 91 N. W. 935, *cit.* Rex v. Warickshall, 1 Leach (Eng.) 263; Rex v. Griffin, Russ & R. (Eng.) 151; Whitney v. C., 24 Ky. L. R. 2524, 74 S. W. 257; C. v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; S. v. Motley, 7 Rich. L. (S. C.) 327; S. v. Middleton, 69 S. C. 72, 48 S. E. 35.

Admitting proof of the facts disclosed by an incompetent confession is not forbidden by the usual clause in the fundamental law against compelling accused persons to be witnesses against themselves. S. v. Middleton, 69 S. C. 72, 48 S. E. 35.

Confessor not incompetent witness against associates, though confession made under improper circumstances. Rawlins v. S., 124 Ga. 31, 45, 52 S. E. 1.

342-41 S. v. Moran, 131 Ia. 645, 109 N. W. 187; S. v. Height, 117 Ia. 650, 91 N. W. 935, 94 Am. St. 323, 59 L. R. A. 437; C. v. Phillips, 26 Ky. L. R. 543, 82 S. W. 286; Jones v. S. (Tex. Cr.), 96 S. W. 930, and local cases cited.

343-43 Bush v. S., 136 Ala. 85, 33 S. 878; Smith v. S., 74 Ark. 397, 85 S. W. 1123; Zuckerman v. P., 213 Ill. 114, 72 N. E. 741; Thurman v. S. (Ind.), 82 N. E. 64; Howard v. C., 28 Ky. L. R. 737, 90 S. W. 578; Pearsall v. C., 29 Ky. L. R. 222, 92 S. W. 589; C. v. Antaya, 184 Mass. 326, 68 N. E. 331; C. v. Hudson, 185 Mass. 402, 70 N. E. 436; S. v. Sherman, 35 Mont. 512, 90 P. 981, *(dist.* S. v. Tighe, 27 Mont. 327, 71 P. 3); S. v. MacQueen, 69 N. J. L. 522, 55 A. 1006; S. v. Hernia, 68 N. J. L. 299, 53 A. 85; S. v. Rogoway, 45 Or. 601, 78 P. 987; S. v. Blodgett (Or.), 92 P. 320; C. v. Johnson, 217 Pa. 77, 66 A. 233; S. v. Middleton, 69 S. C. 72, 48 S. E. 35; S. v. Landers (S. D.), 114 N. W. 717; S. v. Perry, 74 S. C. 551, 54 S. E. 764; S. v. Washing, 36 Wash. 485, 78 P. 1019; Hintz v. S., 125 Wis. 405, 104 N. W. 110.

344-44 Sorenson v. U. S., 143 Fed. 820, 74 C. C. A 468; Campbell v. S. (Ala.), 43 S. 743; S. v. Stallings, 142 Ala. 112, 38 S. 261; Smith v. S., 74 Ark. 397, 85 S. W. 1123; Watts v. S., 99 Md. 30, 57 A. 542.

345-46 Ginn v. S., 161 Ind. 292, 68 N. E. 294; Hank v. S., 148 Ind. 238, 252, 46 N. E. 127, 47 N. E. 465; Thurman v. S. (Ind.), 82 N. E. 64;

S. v. Icenbice, 126 Ia. 16, 101 N. W. 273; S. v. Jones, 171 Mo. 401, 71 S. W. 680; S. v. Spaugh, 200 Mo. 571, 597, 98 S. W. 55; Herndon v. S. (Tex. Cr.), 99 S. W. 558.

345-47 King v. Paakaula, 3 Haw. 30; S. v. Icenbice, 126 Ia. 16, 101 N. W. 273; S. v. Stebbins, 188 Mo. 396, 87 S. W. 460.

345-49 Adams v. S., 129 Ga. 248, 58 S. E. 822; Zuckerman v. P., 213 Ill. 114, 72 N. E. 741.

346-51 P. v. White, 176 N. Y. 331, 350, 68 N. E. 630.

In the absence of a motion to exclude the confession of a connected crime, the jury may consider the testimony showing that it was involuntary. Zuckerman v. P., 213 Ill. 114, 72 N. E. 741.

346-52 Wilson v. U. S., 162 U. S. 613; S. v. Westcott, 130 Ia. 1, 104 N. W. 341; S. v. Foster (Ia.), 114 N. W. 36; C. v. Hudson, 185 Mass. 402, 70 N. E. 436; P. v. Maxfield, 146 Mich. 103, 108 N. W. 1087; Johnson v. S., 49 Tex. Cr. 314, 94 S. W. 224; Hintz v. S., 125 Wis. 405, 104 N. W. 110; Clay v. S. (Wyo.), 86 P. 17.

If proof of a confession improperly obtained has been received, the error will be presumed to have been cured by an instruction to disregard it. S. v. Moran, 131 Ia. 645, 109 N. W. 187.

347-55 Bailey v. S. (Tex. Cr.), 97 S. W. 694.

A verified transcript of a confession taken in shorthand is admissible, the verification being made on the witness stand. Lowe v. S., 125 Ga. 55, 53 S. E. 1038.

347-56 Confessions made to a legal adviser, not an attorney, are not privileged. S. v. Smith, 138 N. C. 700, 50 S. E. 859.

348-57 Rex v. Martin, 9 Ont. L. R. (Can.) 218; Strickland v. S. (Ala.), 44 S. 90; Burnett v. P., 204 Ill. 208, 68 N. E. 505; S. v. Coats, 174 Mo. 396, 74 S. W. 864; S. v. Myers, 198 Mo. 225, 94 S. W. 242; P. v. Loomis, 76 App. Div. 243, 78 N. Y. 578; S. v. Knapp, 70 Ohio St. 380, 71 N. E. 705; Bailey v. S. (Tex. Cr.), 97 S. W. 694; McKinney v. S., 48 Tex. Cr. 402, 88 S. W. 1012; Follis v. S. (Tex. Cr.), 101 S. W. 242.

What witness said to accused is competent. Strickland v. S. (Ala.), 44 S. 90.

If more than one confession was made all may be proven. Lowe v. S., 125 Ga. 55, 53 S. E. 1038; P. v. White, 176 N. Y. 331, 350, 68 N. E. 630.

348-58 Green v. C., 26 Ky. L. R. 1221, 83 S. W. 638; Green v. S., 96 Md. 384, 54 A. 104; S. v. Lu Sing, 34 Mont. 31, 85 P. 521.

349-63 S. v. Busse, 127 Ia. 318, 100 N. W. 536.

350-64 S. v. Coats, 174 Mo. 396, 74 S. W. 864.

350-66 See S. v. Tighe, 27 Mont. 327, 71 P. 3, ruled under statute.

350-67 Brewer v. S., 72 Ark 145, 78 S. W. 773; S. v. Brinte, 4 Penne. (Del.) 551, 58 A. 258; S. v. Powell, 5 Penne. (Del.) 24, 61 A. 966; S. v. Coats, 174 Mo. 396, 74 S. W. 864; McKinney v. S., 48 Tex. Cr. 402, 88 S. W. 1012.

351-70 A confession cannot be proven by parol if reduced to writing and signed. S. v. Usher, 126 Ia. 287, 102 N. W. 101; S. v. Busse, 127 Ia. 318, 100 N. W. 536. But oral testimony must be objected to. Wright v. S., 82 Miss. 421, 34 S. 4.

In California a confession written in shorthand and transcribed is best proven by the testimony of the officer in whose presence it was made. The writing may be used to refresh his recollection. P. v. Silvers (Cal. App.), 92 P. 506.

A written confession is not inadmissible because it covers offenses with others than the prosecutrix; as to these it will be disregarded. Wistrand v. P., 218 Ill. 323, 75 N. E. 891.

351-72 If accused has signed the confession voluntarily and with knowledge, the fact that it does not contain the questions asked him is immaterial. S. v. Brinte, 4 Penne. (Del.) 551, 58 A. 258.

Proof of confession made in foreign language and translated. S. v. Abbatto, 64 N. J. L. 658, 47 A. 10; S. v. Banusik (N. J. L.), 64 A. 994.

353-86 There is no presumption that statements against interest are true beyond that which permits proof of them. Being shown, the presumption no longer accompanies them. Clay v. S., 15 Wyo. 42, 86 P. 17, *cit.* Welsh v. S., 96 Ala. 92, 11 S. 450.

353-87 Markey v. S., 47 Fla. 38, 37 S. 53; Jones v. S., 2 Ga. App. 433, 58 S. E. 559; McAllister v. S., 2 Ga. App. 654, 58 S. E. 1110; Burnett v. P., 204 Ill. 208, 68 N. E. 505; C. v. Devaney, 182 Mass. 33, 64 N. E. 402; S. v. Hutchings, 30 Utah 319, 84 P. 893.

Weight of, not to be lessened by proof of performance of duty in general. S. v. Foster (Ia.), 114 N. W. 36.

354-88 Brown v. S., 44 Fla. 28, 32 S. 107; Mitchell v. S., 43 Fla. 76, 33 S. 1009.

354-89 Shelton v. S., 144 Ala. 106, 42 S. 30.

355-90 Burnett v. P., 204 Ill. 208, 68 N. E. 505.

Competent as tending to show condition of defendant's mind. Braham v. S., 143 Ala. 28, 39, 38 S. 919; Ince v. S., 77, Ark. 426, 93 S. W. 65.

355-91 S. v. Stebbins, 188 Mo. 387, 87 S. W. 460.

355-94 S. v. Hogan, 117 La. 863, 42 S. 352; S. v. Church, 199 Mo. 605, 632, 98 S. W. 16; Jefferds v. P., 5 Park. Cr. (N. Y.) 522; P. v. Kent, 41 Misc. 191, 83 N. Y. S. 948.

356-95 P. v. Kent, 41 Misc. 191, 83 N. Y. S. 948.

356-96 Corroboration required. Rucker v. S., 2 Ga. App. 140, 58 S. E. 295; Griner v. S., 121 Ga. 614, 49 S. E. 700.

357-99 Follis v. S. (Tex. Cr.), 101 S. W. 242; Curran v. S., 12 Wyo. 553, 76 P. 577.

357-1 Johnson v. S., 142 Ala. 1, 37 S. 937; P. v. Eldredge, 3 Cal. App. 648, 86 P. 832; Williams v. S., 125 Ga. 741, 54 S. E. 661; Bines v. S., 118 Ga. 320, 45 S. E. 376; McAllister v. S., 2 Ga. App. 654, 58 S. E. 1110; C. v. Burgess, 28 Ky. L. R. 1128, 91 S. W. 266; Knapp v. S., 4 Ohio C. C. (N. S.) 184; Follis v. S. (Tex. Cr.), 101 S. W. 242.

359-2 Davis v. S., 141 Ala. 62, 37 S. 676; Meisenheimer v. S., 73 Ark. 407, 84 S. W. 494; Sanders v. S., 118 Ga. 329, 45 S. E. 365; Joiner v. S., 119 Ga. 315, 46 S. E. 412; S. v. Coats, 174 Mo. 396, 74 S. W. 864; S. v. Knapp, 70 Ohio St. 380, 71 N. E. 705; Gallegos v. S., 49 Tex. Cr. 115, 85 S. W. 1150; Curran v. S., 12 Wyo. 553, 76 P. 577.

359-3 Bradford v. S., 146 Ala. 150, 41 S. 471; S. v. Icenbice, 126 Ia. 16, 101 N. W. 273; S. v. Westcott, 130 Ia. 1, 104 N. W. 341; *cit.* Flower v. U. S., 116 Fed. 241, 53 C. C. A. 271; Ryan v. S., 100 Ala. 94, 14 S. 868; Meisenheimer v. S., 75 Ark. 407, 84 S. W. 494; P. v. Jones, 123 Cal. 65, 55 P. 698; Gantling v. S., 41 Fla. 587, 26 S. 737; Holland v. C., 26 Ky. L. R. 790, 82 S. W. 596; S. v. Banusik (N. J. L.), 64 A. 994; S. v. Knapp, 70 Ohio St. 380, 71 N. E. 705; S. v. Rogoway, 45 Or. 601, 78 P. 987; Ex parte Patterson (Tex. Cr.), 95 S. W. 1061; Bradshaw v. S., 49 Tex. Cr. 165, 94 S. W. 223; Gallegos v. S., 49 Tex. Cr. 115, 90 S. W. 492; Sowles v. S. (Tex. Cr.), 105 S. W. 178; Follis v. S., (Tex. Cr.), 101 S. W. 242; S. v. Blay, 77 Vt. 56, 58 A. 794.

Confession competent on question of identity. S. v. Icenbice, 126 Ia. 16, 101 N. W. 273.

359-4 S. v. Blodgett (Or.), 92 P. 820.

359-5 S. v. Von Kutzleben (Ia.), 113 N. W. 484; C. v. Johnson, 217 Pa. 77, 66 A. 233.

359-6 S. v. Adams (Del.), 65 A. 510; Calvin v. S., 118 Ga. 73, 44 S. E. 848; Keith v. S., 157 Ind. 376, 61 N. E. 716; S. v. Von Kutzleben (Ia.), 113 N. W. 484; S. v. Willing, 129 Ia. 72, 105 N. W. 355; C. v. Antaya, 184 Mass. 326, 68 N. E. 331; S. v. Sherman, 35 Mont. 512, 90 P. 981; C. v. Johnson, 217 Pa. 77, 66 A. 233; Herndon v. S. (Tex. Cr.), 99 S. W. 558; Clay v. S. (Wyo.), 86 P. 17; Horn v. S., 12 Wyo. 80, 73 P. 705.

360-7 King v. Marks, 1. Haw. 81. **If the inculpatory statements** are admitted in court it is proper to refuse to charge that they should be considered with caution, though it be claimed they were made jokingly. Horn v. S., 12 Wyo. 80, 73 P. 705.

360-10 S. v. Brinte, 4 Penne. (Del.) 551, 58 A. 258; King v. Marks, 1 Haw. 81.

Confessions deliberately made and precisely identified are among the most satisfactory and effectual proofs of guilt. Shelton v. S., 144 Ala. 106, 111, 42 S. 30, *cit.* McAdory v. S., 62 Ala. 154.

361-11 Rex v. Martin, 9 Ont. L. R. (Can.) 218; Sorenson v. U.

S., 143 Fed. 820, 74 C. C. A. 468; S. v. Brinte, 4 Penne. (Del.) 551, 58 A. 258; Lunsford v. C., 23 Ky. L. R. 709, 63 S. W. 781.

361-12 See Burk v. S. (Tex. Cr.), 95 S. W. 1064.

361-13 King v. Marks, 1 Haw. 81; S. v. Myers, 198 Mo. 225, 94 S. W. 242; Watson v. S., 48 Tex. Cr. 323, 87 S. W. 1158.

362-16 Porter v. C., 22 Ky. L. R. 1657, 61 S. W. 16.

CONFUSION OF GOODS [Vol. 3.]

365-10 Wright v. E. I. T. Co., 128 Fed. 462; Mayer v. Wilkens, 37 Fla. 344, 19 S. 632; Post v. Bird, 28 Fla. 1, 9 S. 888; Mugge v. Jackson, 53 Fla. 323, 43 S. 91; First Nat. Bk. v. Schween, 127 Ill. 573, 20 N. E. 681, 11 Am. St. 174; Peterson v. Polk, 67 Miss. 163, 6 S. 615; Kelly-G. S. Co. v. Sally, 114 Mo. App. 222, 89 S. W. 889; Rose v. Sharpless, 33 Gratt. (Va.) 153.

366-15 **Burden on execution creditor.** — If a trustee has a perfect legal title to goods so that a creditor of his debtor cannot levy on them, such creditor has the burden of identifying the goods not covered by the trustee's title and therefore subject to his levy. Weaver v. Neal Co., 61 W. Va. 57, 55 S. E. 909.

CONSIDERATION [Vol. 3.]

370-1 Conant v. Jones, 120 Ga. 568, 48 S. E. 234; Jost v. Wolf, 130 Wis. 37, 110 N. W. 232.

370-2 **Conclusive** as to the parties and their privies, and consideration prima facie presumed as against others. Woody v. Schaaf, 106 Va. 799, 56 S. E. 807; Watkins v. Robertson, 105 Va. 269, 54 S. E. 33; Davis v. Jernigan, 71 Ark. 494, 76 S. W. 554. See Trout v. R. Co. 107 Va. 576, 59 S. E. 394.

370-4 Atchison etc. R. Co. v. Van Ordstrand, 67 Kan. 386, 73 P. 113, citing local cases; Illinois C. R. Co. v. Heath, 26 Ky. L. R. 19, 80 S. W. 502.

370-5 Willcox v. Priester, 68 S. C. 106, 46 S. E. 553; Chicago etc. R. Co. v. Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. 39; Rapid T. R. Co. v. Smith, 98 Tex. 553, 86 S. W. 322.

Lack of consideration may be admitted in pleading. McClelland v. Bullis, 34 Colo. 69, 81 P. 771.

371-8 Williams v. Hall, 79 Cal. 606, 21 P, 965; Henke v. Assn., 100 Cal. 429, 34 P. 1089; Cox v. Cox, 25 Ky. L. R. 1934, 79 S. W. 220; Noyes v. Young, 32 Mont. 226, 79 P. 1063.

371-10 McGue v. Rommel, 148 Cal. 539, 83 P. 1000; Holmes v. Horn, 120 Ill. App. 359; Luke v. Koenen, 120 Iowa 103, 94 N. W. 278; Cox v. Cox, 25 Ky. L. R. 1934, 79 S. W. 220.

372-13 Ryan v. Hamilton, 205 Ill. 191, 204, 68 N. E. 781; Howard v. Adkins, 167 Ind. 184, 78 N. E. 665; Moore v. Harrison, 26 Ind. App. 408, 59 N. E. 1077; Baltes Land Co. v. Sutton, 32 Ind. App. 14, 69 N. E. 179; Strubbe v. Lewis, 25 Ky. L. R. 605, 76 S. W. 150; Scanlon v. Northwood, 147 Mich. 139, 110 N. W. 493; Noyes v. Young, 32 Mont. 226, 79 P. 1063; Nickles v. R. Co., 74 S. C. 102, 54 S. E. 225; Delta County v. Blackburn (Tex. Civ.), 90 S. W. 902.

It cannot be shown by parol that an order drawn by a contractor upon a city was given for labor or material furnished, thereby making it a preferred claim, the action being on the order. Dickerson v. Spokane, 35 Wash. 414, 77 P. 730.

373-14 Gifford v. Fox (Neb.), 95 N. W. 1066; Walker v. Haggerty, 30 Neb. 120, 46 N. W. 221.

373-15 Citizens' R. Co. v. Heath, 29 Ind. App. 395, 62 N. E. 107; Stewart v. R. Co., 141 Ind. 55, 40 N. E. 67.

373-16 Deming I. Co. v. Wallace, 73 Kan. 291, 85 P. 139.

373-17 Wells v. Gress, 118 Ga. 566, 45 S. E. 418; Aultman v. Knoll, 71 Kan. 109, 79 P. 1074 ;Burns v. Goddard, 72 S. C. 355, 51 S. E. 915; Morris v. Brown (Tex. Civ.), 85 S. W. 1015.

As between an indorsee and his immediate indorser the consideration for the endorsement is always open to oral inquiry. Peabody v. Mumson, 211 Ill. 324, 71 N. E. 1006.

Impossibility of performance of the contract entered into may be shown. German-A. S. Co. v. McCulloch, 28 Ky. L. R. 133, 89 S. W. 5.

Order of proof. — "Failure of consideration cannot be shown without first showing the consideration." Independent Assn. v. Klett, 114 Ill. App. 1.

373-18 Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N. E. 802, *cit.* Pickett v. Green, 120 Ind. 584, 22 N. E. 737.

374-19 Pennsylvania Co. v. Dolan, supra.

A release expressing that it was for the sole consideration given in it is conclusive, because evidence of an other consideration would have been in contradiction of it. Budro v. Burgess (Mass.), 83 N. E. 318.

374-22 Redmond v. Cass, 226 Ill. 120, 80 N. E. 708; Catlin C. Co. v. Lloyd, 180 Ill. 398, 54 N. E. 214.

A recital of consideration in a deed dispenses with other proof thereof if it be not challenged. Gray v. Freeman, 37 Tex. Civ. 556, 84 S. W. 1105.

374-25 Payee of consideration may be shown. Faust v. Faust, 144 N. C. 383, 57 S. E. 22.

375-26 Coppage v. Murphy, 24 Ky. L. R. 257, 68 S. W. 416.

375-27 Weiss v. Heitkamp, 127 Mo. 23, 29 S. W. 709.

376-29 Wiggington v. Minter, 28 Ky. L. R. 79, 88 S. W. 1082; Wilson v. Winsor, 24 Ky. L. R. 1343, 71 S. W. 495.

376-30 Berry v. Ewen, 27 Ky. L. R. 467, 85 S. W. 227.

376-31 Cincinnati T. W. Co. v. Matthews, 24 Ky. L. R. 2445, 74 S. W. 242.

376-32 Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781.

376-33 If the contract and complaint are in harmony as to the consideration plaintiff cannot show that it was other than as stated. Ditto v. Slaughter, 28 Ky. L. R. 1164, 92 S. W. 2.

376-34 Redmond v. Cass, 226 Ill. 120, 80 N. E. 708; Ames v. Kinnear, 42 Wash. 80, 84 P. 629.

377-36 Gaje v. Cameron, 212 Ill. 146, 72 N. E. 204; Howard v. Adkins, 167 Ind. 184, 78 N. E. 665; Burke v. Mead, 159 Ind. 252, 64 N. E. 880; Ivey v. Cotton Mills, 143 N. C. 189, 55 S. E. 613.

377-37 Linkswilter v. Hoffman, 109 La. 948, 34 S. 34.

377-38 Lefkovits v. Bank (Ala.), 44 S. 613; Cheesman v. Nicholl, 18 Colo. App. 174, 70 P. 797; Wellmaker v. Wheatley, 123 Ga. 201, 51 S. E. 436; Southern Belt T. Co. v. Smith, 129 Ga. 558, 59 S. E. 215; Ludeke v. Sutherland, 87 Ill. 481; Pennsylvania Co. v. Dolan, 6. Ind. App. 109, 32 N. E. 802; Reisterer v. Carpenter, 124 Ind. 30, 24 N. E. 371; Stolenburg v. Diereks, 117 Ia. 25, 90 N. W. 525; True v. Yoeman, 60 Kan. 742, 57 P. 955; Farquhar v. Farquhar, 194 Mass. 400, 80 N. E. 654; Sayre v. Burdick, 47 Minn. 367, 50 N. W. 245; Rogers v. Rogers (Miss.), 43 S. 434; Neville v. Hughes, 104 Mo. App. 455, 79 S. W. 735; Hilgar v. Miller, 42 Or. 552, 72 P. 319; Sutherland v. Bloomer (Or.), 93 P. 135; Kahn v. Kahn. 94 Tex. 114, 58 S. W. 825; Rapid T. R. Co. v. Smith, 98 Tex. 553, 86 S. W. 322; Jost v. Wolf, 130 Wis. 37, 110 N. W. 232; Ohlert v. Alderson, 86 Wis. 433, 57 N. W. 88.

379-39 Edison E. I. Co. v. Gibby F. Co. 194 Mass 258, 80 N. E. 479. But see Levine v. Carroll, 121 Ill. App. 105; Henderson v. Tobey, 105 Ill. App. 154; California P. Co. v. Merritt F. Co. (Cal. App.), 92 P. 509.

A recital in a mortgage that the sum named in it is the amount of the indebtedness to the mortgagee precludes parol evidence to show the contrary. Sturmdorf v. Saunders, 117 App. Div. 762, 102 N. Y. S. 1042.

379-40 Redmond v. Cass, 226 Ill. 120, 80 N. E. 708.

380-43 Abbeville Rice Mill v. Shambaugh, 115 La. 1047, 40 S. 453; Lawson v. Mullinix, 104 Md. 156, 64 A. 938; Budro v. Burgess (Mass.), 83 N. E. 318; Watkins v. Robertson, 105 Va. 269, 54 S. E. 33; Woody v. Schaaf, 106 Va. 799, 56 S. E. 807, and local cases cited.

383-47 Hirsh v. Beverly, 125 Ga. 657, 54 S. E. 678; Levine v. Carroll, 121 Ill. App. 105; Holmes v. Horn, 120 Ill. App. 359; Taft v. Myerscough, 92 Ill. App. 560; Bullen v. Morrison, 98 Ill. App. 669; Rook v. Rook, 111 Ill. App. 498; Dean v. Carpenter, 134 Ia. 275, 111 N. W. 815; Crafton v. Inge, 30 Ky. L. R. 313, 98 S. W. 325; Bracketts

v. Boreing, 28 Ky. L. R. 386, 89 S. W. 496; Continental C. Co. v. Jasper, 28 Ky. L. R. 53, 88 S. W. 1078; Blackwell v. Blackwell (Mass.), 81 N. E. 910; Yore v. Meshew, 146 Mich. 80, 109 N. W. 35; Anderman v. Meier, 91 Minn. 413, 98 N. W. 327; Langan v. Iverson, 78 Minn. 299, 80 N. W. 1051; Dilcher v. Nellany, 52 Misc. 364, 102 N. Y. S. 264; Rochester F. B. Co. v. Brown, 55 App. Div. 444, 66 N. Y. S. 867, 179 N. Y. 542, 71 N. E. 1139 (no opinion); Satterfield v. Kindley, 144 N. C. 455, 57 S. E. 145; Davis v. Evans, 142 N. C. 464, 55 S. E. 344; McPeters v. English, 141 N. C. 491, 54 S. E. 417; Forester v. Van Auken, 12 N. D. 175, 96 N. W. 301; Schwarz v. Lee Gon, 46 Or. 219, 80 P. 110; Windsor v. R. Co., 37 Wash. 156, 79 P. 613; Mueller v. Cook, 126 Wis. 504, 105 N. W. 1054; Butt v. Smith, 121 Wis. 566, 99 N. W. 328; Lathrop v. Humble, 120 Wis. 331, 97 N. W. 905; Brader v. Brader, 110 Wis. 423, 85 N. W. 681; Jost v. Wolf, 130 Wis. 37, 110 N. W. 232; Stickney v. Hughes, 12 Wyo. 397, 75 P. 945.

It may be shown that a separate price was agreed upon for each article though the stipulated price was a gross sum. Aultman & T. Co. v. Lawson, 100 Ia. 569, 69 N. W. 865; Buckeye B. Co. v. Montana Stables, 43 Wash. 49, 85 P. 1077; Field v. Austin, 131 Cal. 379, 63 P. 692; Curd v. Bowron, 32 Ky. L. R. 369, 105 S. W. 417.

Exception. — Rule does not apply to contract for purchase of separate articles for gross sum. Buckeye B. Co. v. Montana Stables, 43 Wash. 49, 85 P. 1077.

A third party may show the actual consideration paid or agreed to be paid if his rights are affected thereby; as a broker who brought about a sale of the property on commission. Yore v. Meshew, 146 Mich. 80, 109 N. W. 35; Witzel v. Zuel, 90 Minn. 340, 96 N. W. 1124.

"**The actual consideration,** the property contemplated by the agreement, may be shown by parol even in variance of that stated in the writing." Walker v. Johnson, 116 Ill. App. 145.

384-49 See v. Mallonee, 107 Mo. App. 721, 82 S. W. 557; Tipton v. Tipton (Tex. Civ.), 105 S. W. 830; Windsor v. R. Co., 37 Wash. 156, 79 P. 613.

384-51 Barnett v. Hughey, 54 Ark. 195, 15 S. W. 464; Lloyd v. Sandusky, 203 Ill. 621, 68 N. E. 154; Rook v. Rook, 111 Ill. App. 398; Deaner v. Deaner, 137 N. C. 240, 49 S. E. 113.

385-53 Way v. Greer (Mass.), 81 N. E. 1002; Medical College etc. v. University, 178 N. Y. 153, 70 N. E. 467; Schwarz v. Lee Gon, 46 Or. 219, 80 P. 110; Furst v. Galloway, 56 W. Va. 246, 49 S. E. 146.

385-55 Rook v. Rook, 111 Ill. App. 398

385-56 Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901; Jost v. Wolf, 130 Wis. 37, 110 N. W. 232; McCormick v. Herndon, 86 Wis. 449, 56 N. W. 1097.

386-57 Wade v. Bent, 24 Ky. L. R. 1294, 71 S. W. 444; Deaver v. Deaver, 137 N. C. 240, 49 S. E. 113; Scott v. Thomas, 104 Va. 330, 51 S. E. 829; Perkins v. McAuliffe, 105 Wis. 582, 81 N. W. 645.

A recital that debts were to be paid may be shown to be ineffectual by proof that none existed. Medical College etc. v. University, 178 N. Y. 153, 70 N. E. 467.

386-59 It cannot be so shown. Morse v. Wellesley, 156 Mass. 95, 30 N. E. 77; Durkin v. Cobleigh, 156 Mass. 108, 30 N. E. 474; Edison Co. v. Gibby Co., 194 Mass. 258, 80 N. E. 479.

An oral contract to discharge an incumbrance cannot be made ground of recovery in an action by the grantor for the consideration. Edison E. I. Co. v. Gibby F. Co., 194 Mass. 258, 80 N. E. 479, *mod.* Preble v. Baldwin, 6 Cush. (Mass.) 549.

387-60 Barton v. Assn., 29 Ky. L. R. 330, 93 S. W. 9.

387-61 Hendon v. Morris, 110 Ala. 106, 20 S. 27; Ladd v. Lookout D. Co., 147 Ala. 173, 40 S. 610.

387-62 Lippincott v. Lawrie, 119 Wis. 573, 97 N. W. 179.

388-67 Miles v. Waggoner, 23 Pa. Super. 432; Suderman-D. Co. v. Rogers (Tex. Civ.), 104 S. W. 193; Johnson v. Elmen, 94 Tex. 168, 59 S. W. 253, 86 Am. St. 845, 52 L. R. A. 162; Kampmann v. McCormick (Tex. Civ.), 99 S. W. 1147; Johnston v. McCart, 24 Wash. 19, 63 P. 1121.

389-69 Edwards v. Latimer, 183 Mo. 610, 82 S. W. 109; O'Day v. Conn, 131 Mo. 321, 32 S. W. 1109; Cameron v. Fraser, 94 N. Y. S. 1058; Windsor v. R. Co., 37 Wash. 156, 79 P. 613.

390-75 Martin v. Rotan Co. (Tex. Civ.), 66 S. W. 212; Moroney v. Coombes (Tex. Civ.), 81 S. W. 430.

390-76 St. Louis etc. R. Co. v. Crandell, 75 Ark. 89, 86 S. W. 855; Brooks v. R. Co., 146 Cal. 134, 79 P. 843; Booth v. Hynes, 54 Ill. 363; Harts v. Emery, 184 Ill. 560, 56 N. E. 865; Kinkead v. Peet (Ia.), 111 N. W. 48; Allen v. Rees (Ia), 110 N. W. 583; Neurenberger v. Lehenbauer, 23 Ky. L. R. 1753, 66 S. W. 15; Crafton v. Inge, 30 Ky. L. R. 313, 98 S. W. 325; Dodder v. Snyder, 110 Mich. 69, 67 N. W. 1101; Witzel v. Zuel, 90 Minn. 340, 96 N. W. 1124; Edwards v. Latimer, 183 Mo. 610, 82 S. W. 109; O'Day v. Conn, 131 Mo. 321, 32 S. W. 1109; See v. Mallonee, 107 Mo. App. 721, 82 S. W. 557; Holmes v. Seaman, 72 Neb. 300, 100 N. W. 417, 101 N. W. 1030; First Nat. Bk. v. Bower (Neb.), 98 N. W. 834; McGary v. McDermott, 207 Pa. 620, 57 A. 46; Henry v. Zurflieh, 203 Pa. 440, 53 A. 243; Willcox v. Priester, 68 S. C. 106, 46 S. E. 553; Mayer v. Wooten (Tex. Civ.), 102 S. W. 423; Applegate v. Kilgore (Tex. Civ.), 91 S. W. 238; Ellis v. Lehman (Tex. Civ.), 106 S. W. 453; Tipton v. Tipton (Tex. Civ.), 105 S. W. 830; Windsor v. R. Co., 37 Wash. 156, 79 P. 613; Ames v. Kinnear, 42 Wash. 80, 84 P. 629; Jost v. Wolf, 130 Wis. 37, 110 N. W. 232; Halvorsen v. Halvorsen (Wis.), 97 N. W. 494.

If two pieces of land are conveyed by the same deed, the consideration for each may be shown. Goette v. Sutton, 128 Ga. 179, 57 S. E. 308.

Amount paid as consideration for a conveyance may be shown as tending to establish a conspiracy between the parties for the ejection of the wife of one of them. McAllin v. McAllin, 77 Conn. 398, 59 A. 413.

391-77 Cowden v. Cowden, 7 Ohio C. C. (N. S.) 277; Latimer v. Latimer, 53 S. C. 483, 31 S. E. 304 (as to the last half of the proposition in the text).

392-79 St. Louis etc. R. Co. v. Crandell, 75 Ark. 89, 86 S. W. 855; McGary v. McDermott, 207 Pa. 620, 57 A. 46; Larkin v. Trammel (Tex. Civ.), 105 S. W. 552.

392-80 Howell v. Moores, 127 Ill. 67, 19 N. E. 863; Redmond v. Cass, 226 Ill. 120, 80 N. E. 708.

392-81 Harraway v. Harraway, 136 Ala. 499, 34 S. 836; Larkin v. Trammel, supra.

393-85 Morton v. Morton, 82 Ark. 492, 102 S. W. 213.

393-86 Aultman E. & T. Co. v. Greenlee, 134 Ia. 368, 111 N. W. 1007; Edwards v. Latimer, 183 Mo. 610, 82 S. W. 109; J. W. Scudder & Co. v. Morris, 107 Mo. App. 634, 82 S. W. 217; Miles v. Waggoner, 23 Pa. Super. 432.

394-88 Whitman v. Corley, 72 S. C. 410, 52 S. E. 49.

395-89 Barnett v. Hughey, 54 Ark. 195, 15 S. W. 464; Davis v. Jernigan, 71 Ark. 494, 76 S. W. 554, Redmond v. Cass, 226 Ill. 120, 80 N. E. 708; Stannard v. R. Co. 220 Ill. 469, 77 N. E. 254; Bobb v. Bobb, 89 Mo. 411, 4 S. W. 511; Weiss v. Heitkamp, 127 Mo. 23; 29 S. W. 709; Wishart v. Gerhart, 105 Mo. App. 112, 78 S. W. 1094; Jost v. Wolf, 130 Wis. 37, 110 N. W. 232.

395-90 Barry v. Murphy, 24 Ky. L. R. 953, 70 S. W. 276.

395-91 See Kinkead v. Peet, (Ia.), 111 N. W. 48.

396-93 Witzel v. Zuel, 90 Minn. 340, 96 N. W. 1124; Mayer v. Wooten (Tex. Civ.), 102 S. W. 423; Larkin v. Trammel (Tex. Civ.), 105 S. W. 552.

396-94 **Burden of proof** is on party who asserts existence of a consideration not stated. Harraway v. Harraway, 136 Ala. 499, 34 S. 836.

396-95 Way v. Greer (Mass.), 81 N. E. 1002; Keene v. Behan, 40 Wash. 505, 82 P. 884.

399-99 Keene v. Behan, supra.

399-1 Chinn v. Curtis, 24 Ky. L. R. 1563, 71 S. W. 923; Wilson v. Winsor, 24 Ky. L. R. 1343, 71 S. W. 495; Meyers v. Meyers, 24 Pa. Super. 603; Timms v. Timms, 54 W. Va. 414, 46 S. E. 141.

399-3 Harraway v. Harraway, 136 Ala. 499, 34 S. 836; Keene v. Behan, 40 Wash. 505, 82 P. 884; Stickney v. Hughes, 12 Wyo. 397, 75 P. 945.

399-4 Independent B. Assn. v. Klett, 114 Ill. App. 1.

A warranty deed is competent to show, prima facie, that the grantor received the price therein stated for the land conveyed at the time of its execution. Sanitary Dist. v. Pearce, 110 Ill. App. 592, *cit.* Howell v. Moores, 127 Ill. 67, 19 N. E. 863.

400-11 Wilson v. Winsor, 24 Ky. L. R. 1343, 71 S. W. 495; Allisons v. Orndorff, 28 Ky. L. R. 1321, 92 S. W. 287.

401-15 McGue v. Rommel, 148 Cal. 539, 83 P. 1000; Kiesewetter v. Kress, 24 Ky. L. R. 405, 68 S. W. 633; Power v. Hambrick, 25 Ky. L. R. 30, 74 S. W. 660; Masterson v. Heitmann Co. (Tex. Civ.), 87 S. W. 227.

Same rule applies to holder of an order for money. Bank v. Bank, 3 Cal. App. 561, 86 P. 820.

401-16 Sere v. Darby, 118 La. 619, 43 S. 255; Way v. Greer (Mass.), 81 N. E. 1002.

402-20 Lefkovits v. Bank (Ala.), 44 S. 613.

403-21 Dial v. McKay (Ala.), 43 S. 218; Johnson County Bk. v. Wootten, 118 Ga. 927, 45 S. E. 705; Aultman T. & E. Co. v. Knoll, 71 Kan. 109, 79 P. 1074; McAfee v. Bank, 31 Ky. L. R. 863, 104 S. W. 287; Hardy P. Co. v. Sprigg, 27 Ky. L. R. 133, 84 S. W. 532; Kampmann v. McCormick (Tex. Civ.), 99 S. W. 1147.

403-26 Wilson v. Winsor, 24 Ky. L. R. 1343, 71 S. W. 495.

404-30 Hathorn v. Wheelwright, 99 Me. 351, 59 A. 517.

CONSPIRACY [Vol. 3.]

407-1 Knowledge that the act proposed to be done was illegal, need not be shown. Chadwick v. U. S., 141 Fed. 225, 72 C. C. A. 343.

407-2 James v. Evans, 149 Fed. 136, 80 C. C. A. 240; Woodruff v. Hughes, 2 Ga. App. 361, 58 S. E. 551; Lasher v. Littell, 202 Ill. 551, 67 N. E. 372; Bonney v. King, 201 Ill. 47, 66 N. E. 377; Hamilton v. Smith, 39 Mich. 222; Saxton v. Sebring, 96 App. Div. 570, 89 N. Y. S. 372; Lefler v. Fox, 92 N. Y. S. 227; Kujek v. Goldman, **150 N. Y. 176, 44 N. E. 773, 55 Am. St. 670,** 34 L. R. A. 156.

Conspiracy to cause breach of contract must be shown by party alleging it "by something rising to the dignity of proof, as distinguished from mere suspicious circumstances." Napier v. Spielmann, 103 N. Y. S. 982; Lupniek v. Woytesek, 110 App. Div. 688, 97 N. Y. S. 471.

Malicious intention. — If several persons combine to advise another to break his contract with a third person, malicious intention to injure must be shown to justify a recovery. Glamorgan C. Co. v. Federation, (1903) 1 K. B. (Eng.) 118.

In prosecutions under the Sherman act the burden of proving a conspiracy and damage to the plaintiff is upon him. Loder v. Jayne, 142 Fed. 1010.

407-3 U. S. v. Cole, 153 Fed. 801; U. S. v. Richards, 149 Fed. 443.

407-4 An overt act must be shown to establish a conspiracy to hold a person in peonage. U. S. v. Cole, 153 Fed. 801. And to sustain a conviction for defrauding the government. U. S. v. Richards, 149 Fed. 443; Hyde v. Shine, 199 U. S. 62.

407-5 S. v. Loser, 132 Ia. 419, 104 N. W. 337.

An overt act is evidence of the crime within the jurisdiction where it was committed. C. v. Corlies, 8 Phila. (Pa.) 450.

408-7 Eacock v. S. (Ind.), 82 N. E. 1039.

408-8 Chadwick v. U. S., 141 Fed. 225, 72 C. C. A. 343; Olson v. U. S., 133 Fed. 849, 67 C. C. A. 21; Collins v. S., 138 Ala. 57, 34 S. 993; Chapline v. S., 77 Ark. 444, 95 S. W. 477; Butt v. S., 81 Ark. 173, 98 S. W. 723; P. v. Donnelly, 143 Cal. 394, 77 P. 177; P. v. Lawrence, 143 Cal. 148, 76 P. 893; Miller v. John, 208 Ill. 173, 70 N. E. 27; Tedford v. P., 219 Ill. 23, 76 N. E. 60; Christensen v. P., 114 Ill. App. 40; Eacock v. S. (Ind.), 82 N. E. 1039; Cook v. S. (Ind.), 82 N. E. 1047; Sanderson v. S. (Ind.), 82 N. E. 525; S. v. Caine, 134 Ia. 147, 111 N. W. 443; S. v. Walker, 124 Ia. 414, 100 N. W. 354; Lawrence v. S., 103 Md. 17, 63 A. 96; P. v.

Salsbury, 134 Mich. 537, 96 N. W. 936; S. v. Spaugh, 200 Mo. 571, 591, 98 S. W. 55; S. v. Roberts, 201 Mo. 702, 100 S. W. 484; S. v. Sykes, 191 Mo. 62, 89 S. W. 851; S. v. Darling, 199 Mo. 168, 97 S. W. 592; O'Brien v. S., 69 Neb. 691, 96 N. W. 649; Saxton v. Sebring, 96 App. Div. 570, 89 N. Y. S. 372; S. v. Ryan, 47 Or. 338, 82 P. 703, 1 L. R. A. (N. S.) 862; Ripley v. S. (Tex. Cr.), 100 S. W. 943; Patnode v. Westenhaver, 114 Wis. 460, 90 N. W. 467. See "CIRCUMSTANTIAL EVIDENCE," Vol. 3, pp. 60, 119, and that title, ante, 63-2.

The overt act may be considered in connection with other circumstances. U. S. v. Richards, 149 Fed. 443.

Failure to produce books and records of union. See Patch Mfg. Co. v. Lodge, 77 Vt. 294, 326, 60 A. 74.

Evidence withheld presumed to be unfavorable. Standard O. Co. v. S., 117 Tenn. 618, 672, 100 S. W. 705.

The value of the property sought to be obtained is a proper subject for proof. Olson v. U. S., 133 Fed. 849, 67 C. C. A. 21.

409-9 An express agreement need not be proved; it is enough to show tacit concurrence in intent to effect the common purpose. Patnode v. Westenhaver, 114 Wis. 460, 90 N. W. 467; S. v. Caine, 134 Ia. 147, 111 N. W. 443; Woodruff v. Hughes, 2 Ga. App. 361, 58 S. E. 551; Eacock v. S. (Ind.), 82 N. E. 1039; Butt v. S., 81 Ark. 173, 98 S. W. 723; P. v. Lawrence, 143 Cal. 148, 76 P. 893.

Great latitude is allowed in the reception of circumstantial evidence. S. v. Roberts, 201 Mo. 702, 728, 100 S. W. 484; U. S. v. Greene, 146 Fed. 803; Lorenz v. U. S., 24 App. D. C. 337.

409-11 Batman v. Cook, 120 Ill. App. 203; Lawrence v. S., 103 Md. 17, 63 A. 96; Patch Mfg. Co. v. Lodge, 77 Vt. 294, 60 A. 74.

Proof of motive is competent (Sullivan v. P., 108 Ill. App. 328), but not always essential. Chadwick v. U. S., 141 Fed. 225, 72 C. C. A. 343.

409-12 Loder v. Jayne, 142 Fed. 1010; U. S. v. Greene, 146 Fed. 787, 793; Chadwick v. U. S., 141 Fed. 225, 72 C. C. A. 343; S. v. Dix, 33 Wash. 405, 74 P. 570; S. v. Dilley, 44 Wash. 207, 87 P. 133.

Papers bearing the seal of a voluntary organization and purporting to have come from a committee thereof, are admissible, as are circulars bearing the names of its officers and calculated to influence people who read them to take part in a strike. Patch Mfg. Co. v. Lodge, 77 Vt. 294, 313, 60 A. 74.

The contents of a letter are not provable if there is only the signature and address to connect defendant with it. S. v. Conroy, 126 Ia. 472, 102 N. W. 417.

410-14 U. S. v. Cole, 153 Fed. 801; P. v. Zimmerman, 3 Cal. App. 84, 84 P. 446; Wilcox v. U. S. (Ind. Ter.), 103 S. W. 774; Baker v. S., 45 Tex. Cr. 392, 77 S. W. 618.

Proof of acquaintance is not entitled to great weight under some circumstances. S. v. Wheeler, 129 Ia. 100, 105 N. W. 374.

Proof of intimacy may be specially important if the duties of the parties required them to act as a check one upon the other. U. S. v. Greene, 146 Fed. 803.

410-15 Butt v. S., 81 Ark. 173, 98 S. W. 723.

411-17 S. v. Donavan, 125 Ia. 239, 101 N. W. 122.

411-19 Local notoriety of a fact may be shown to establish knowledge on the part of a party living in the vicinity. Wright v. Stewart, 130 Fed. 905.

Proof of reputation of trust. — It is not competent for the legislature to direct that the character of a trust or combination may be established by proof of its general reputation as such. Hughes v. S., 9 Ohio C. C. (N. S.) 369, 378.

411-20 Collins v. S., 138 Ala. 57, 34 S. 993; P. v. Zimmerman, 3 Cal. App. 84, 84 P. 446; S. v. Thompson, 69 Conn. 720, 38 A. 868;

412-21 Collins v. S., 138 Ala. 57, 34 S. 993; S. v. Thompson, 69 Conn. 720, 38 A. 868; P. v. Salsbury, 134 Mich. 537, 96 N. W. 936; Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075; Baker v. S., 45 Tex. Cr. 392, 77 S. W. 618.

Partner not liable for acts of copartners if ignorant thereof. U. S. v. Cohn, 128 Fed. 615.

413-22 Olson v. U. S., 133 Fed. 849, 67 C. C. A. 21; Wright v. Stewart, 130 Fed. 905, 919; Ram-

sey v. Flowers, 72 Ark. 316, 80 S. W. 147; Eacock v. S. (Ind.), 82 N. E. 1039; Sanderson v. S. (Ind.), 82 N. E. 525; S. v. Allen, 34 Mont. 403, 87 P. 177; Standard O. Co. v. S., 117 Tenn. 618, 658, 100 S. W. 705; Schultz v. S. (Wis.), 113 N. W. 428.

413-23 Van Gesner v. U. S., 153 Fed. 46; Morning J. Assn. v. Duke, 128 Fed. 657, 63 C. C. A. 459; P. v. Zimmerman, 3 Cal. App. 84, 84 P. 446; Johnson v. P., 124 Ill. App. 215, 255; S. v. Crofford, 121 Ia. 395, 96 N. W. 889; Lawrence v. S., 103 Md. 17, 63 A. 96; S. v. Sykes, 191 Mo. 62, 89 S. W. 851; C. v. Zuern, 16 Pa. Super. 588.

Illicit relations of the parties may be shown as a motive for their co-operation in destroying the result thereof. Barrow v. S., 121 Ga. 187, 48 S. E. 950. It is otherwise in a prosecution for conspiring to extort money as to the relations of the complaining witness and one of the conspirators. Eacock v. S. (Ind.), 82 N. E. 1039; Sanderson v. S. (Ind.), 82 N. E. 525.

Purpose for which received. — Testimony as to other crimes is not competent to show the conspiracy, but may be considered when its existence is otherwise established for the purpose of determining intent and motive. Eacock v. S. (Ind.), 82 N. E. 1039; Ter. v. Johnson, 16 Haw. 743, 758; C. v. Valverdi, 218 Pa. 7; Wood P. Co. v. Bickel, 14 Phila. (Pa.) 152; Wallace v. S., 41 Fla. 547, 26 S. 713; Baldwin v. S., 46 Fla. 115, 35 S. 220.

414-24 P. v. Summerfield, 48 Misc. 242, 96 N. Y. S. 502. See S. v. Loser, 132 Ia. 419, 104 N. W. 337.

If a conspiracy is formed in one federal district the court thereof has jurisdiction, though the overt acts were committed in another. Hyde v. Shine, 199 U. S. 62.

414-25 S. v. Stockford, 77 Conn. 227, 58 A. 769; Wallace v. S., 41 Fla. 547, 26 S. 713; S. v. Donavan, 125 Ia. 239, 101 N. W. 122; C. v. Spencer, 6 Pa. Super. 256, 270. See last note.

415-26 S. v. Pasnau, 118 Ia. 501, 92 N. W. 682.

415-27 The president of a union may testify of his understanding of the purpose of a strike. S. v. Stockford, 77 Conn. 227, 58 A. 769.

415-28 Rabens v. U. S., 146 Fed. 978, 77 C. C. A. 224; Johnson v. P., 124 Ill. App. 213, 238; Lowell v. P., 229 Ill. 227, 82 N. E. 226; S. v. Loser, 132 Ia. 419, 104 N. W. 337; S. v. Kennedy, 177 Mo. 98, 75 S. W. 979; C. v. Valverdi, 218 Pa. 7.

Verbal threats to blackmail must be proven as laid. Eacock v. S. (Ind.), 82 N. E. 1039.

If a bill of particulars is furnished, the proof must be confined to the specifications therein. McDonald v. P., 126 Ill. 150, 18 N. E. 817.

416-29 Grunberg v. U. S., 145 Fed. 81, 76 C. C. A. 51.

It need not be shown that all the defendants shared in the benefit of the wrongful act. Olson v. U. S., 133 Fed. 849, 67 C. C. A. 21.

Fraud on particular person. Though it be alleged that defendants conspired to defraud A., it may be shown that the intent was to defraud any person, and it is not a defense to show that they did not know A. S. v. Hillman, 42 Wash. 615, 85 P. 63; P. v. Gilman, 121 Mich. 187, 80 N. W. 4, 80 Am. St. 490, 46 L. R. A. 218; C. v. Rogers, 181 Mass. 184, 63 N. E. 421. But *compare* Rabens v. U. S., 146 Fed. 978, 77 C. C. A. 224.

416-30 Bradford v. U. S., 152 Fed. 617; P. v. McGarry, 136 Mich. 316, 99 N. W. 147.

Admissions made long after the date alleged may be shown. Lefler v. Fox, 92 N. Y. S. 227.

416-31 See Hughes v. S., 9 Ohio C. C. (N. S.) 369.

416-34 See Weil etc. Co. v. Cohn, 4 Pa. Super. 443.

417-35 Proof is sufficient in a civil action if it shows that defendants pursued by their acts the same object, using the same means, one performing one part and the other or others another part so as to attain the end in view. Batman v. Cook, 120 Ill. App. 203.

417-36 Johnson v. P., 124 Ill. App. 213; Wait v. C., 113 Ky. 821, 69 S. W. 697.

417-37 Loder v. Jayne, 142 Fed. 1010; Wright v. Stewart, 130 Fed. 905; McAllin v. McAllin, 77 Conn. 398 59 A. 413; Miller v. John, 208 Ill. 173, 70 N. E. 27; Standard Oil Co. v. Doyle, 118 Ky. 662, 82 S. W. 271; Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306, 96 N. W.

212, 98 N. W. 1075; Weil etc. Co. v. Cohn, 4 Pa. Super. 413.

Records of unions competent where a common design exists. Patch Mfg. Co. v. Lodge, 77 Vt. 294, 326, 60 A. 74.

Must be in futherance of conspiracy. Connecticut etc. Ins. Co. v. Hillmon, 107 Fed. 834, 46 C. C. A. 668.

418-40 Chapline v. S., 77 Ark. 444, 95 S. W. 477; Sanderson v. S. (Ind.), 82 N. E. 525.

418-41 U. S. v. Richards, 149 Fed. 443; Collins v. S., 138 Ala. 57, 34 S. 993; Ferguson v. S., 141 Ala. 20, 37 S. 448; Hanners v. S., 147 Ala. 27, 41 S. 973; Butt v. S., 81 Ark. 173, 98 S. W. 723; Chapline v. S., 77 Ark. 444, 95 S. W. 477; P. v. Zimmerman, 3 Cal. App. 84, 84 P. 446; Moore v. P., 31 Colo. 336, 73 P. 30; S. v. Stockford, 77 Conn. 227, 58 A. 769; S. v. Gannon, 75 Conn. 206, 216, 52 A. 727; Barrow v. S., 121 Ga. 187, 48 S. E. 950; Rawlins v. S., 124 Ga. 31, 52 S. E. 1; Graff v. P., 208 Ill. 312, 70 N. E. 299; Christensen v. P., 114 Ill. App. 40; Eacock v. S. (Ind.), 82 N. E. 1039; Sanderson v. S. (Ind.), 82 N. E. 525; S. v. Donavan, 125 Ia. 239, 101 N. W. 122; S. v. Caine, 134 Ia. 147, 111 N. W. 443; McIntosh v. C., 23 Ky. L. R. 1222, 64 S. W. 951; S. v. Bolden, 109 La. 484, 33 S. 571; Lawrence v. S., 103 Md. 17, 63 A. 96; C. v. Rogers, 181 Mass. 184, 63 N. E. 421; P. v. Mol, 137 Mich. 692, 100 N. W. 913; P. v. McGarry, 136 Mich. 316, 99 N. W. 147; S. v. Kennedy, 177 Mo. 98, 75 S. W. 979; S. v. Copeman, 186 Mo. 108, 84 S. W. 942; S. v. Allen, 34 Mont. 403, 87 P. 177; Lamb v. S., 69 Neb. 212, 95 N. W. 1050; O'Brien v. S., 69 Neb. 691, 96 N. W. 649; Ter. v. Neatherslin (N. M.), 85 P. 1044; S. v. White, 48 Or. 416, 87 P. 137; Pacific L. S. Co. v. Gentry, 38 Or. 275, 61 P. 422; S. v. Ryan, 47 Or. 338, 82 P. 703, 1 L. R. A. (N. S.) 862; C. v. Stambaugh, 22 Pa. Super. 386; C. v. Zuern, 16 Pa. Super. 588; Standard O. Co. v. S., 117 Tenn. 618, 670, 100 S. W. 705; Bowen v. S., 47 Tex. Cr. 137, 82 S. W. 520; Nelson v. S., 48 Tex. Cr. 274, 87 S. W. 143; Barnett v. S., 46 Tex. Cr. 302, 62 S. W. 765; Wallace v. S., 46 Tex. Cr. 341, 81 S W. 966; S. v. Dilley, 44 Wash. 207, 87 P. 133; S. v. Dix, 33 Wash. 405, 74 P. 570; Schutz v. S., 125 Wis. 452, 104 N. W. 90.

Guilt of accused. — It is not cause for excluding such evidence that it tends to prove the guilt of the conspirator being tried. P. v. Stokes (Cal. App.), 89 P. 997.

Only declarations in furtherance of the objects of the conspiracy may be proven, though made while it was pending. S. v. Walker, 124 Ia. 414, 100 N. W. 354; Hughes v. S., 9 Ohio C. C. (N. S.) 369; Wells v. Ter., 14 Okla. 436, 78 P. 124; P. v. Smith (Cal.), 91 P. 511; Miller v. U. S., 133 Fed. 337, 66 C. C. A. 399; Choice v. S. (Tex. Cr.), 106 S. W. 387.

Acts and statements of alleged wife competent against her husband in absence of proof of marriage. S. v. Miller, 191 Mo. 587, 90 S. W. 767.

In Texas the acts or declarations of husband or wife charged as co-conspirator are provable against the other. Smith v. S., 48 Tex. Cr. 233, 89 S. W. 817.

Incrimination of a person not on trial is not cause for excluding proof of the acts and declarations of a conspirator. S. v. Roberts, 201 Mo. 702, 729, 100 S. W. 484.

Inability of witness to fix time and place of declarations does not render testimony incompetent. S. v. Allen, 34 Mont. 403, 87 P. 177.

Knowledge of one conspirator is the knowledge of his associates. P. v. Stokes (Cal. App.), 89 P. 997. But the intent of one conspirator is not to be imputed to those associated with him later in the absence of proof that they had knowledge of it. Miller v. U. S., 133 Fed. 337, 66 C. C. A. 399.

A corporation is to be judged by acts committed by it as such, but in weighing such acts the court will consider the immediately proximate antecedent acts of the individuals now comprising and controlling the corporation. Rex v. Assn., 14 Ont. L. R. (Can.) 295.

A plea of guilty on the part of one of the conspirators may be taken in open court in the presence of the panel. Grunberg v. U. S., 145 Fed. 81, 76 C. C. A. 51.

420-43 Ter. v. Neatherlin (N. M.), 85 P. 1044. See S. v. Ruck, 194 Mo. 416, 432, 92 S. W. 706.

421-44 Bowen v. S., 47 Tex. Cr. 137, 82 S. W. 520.

421-45 Ferguson v. S., 141 Ala. 20, 37 S. 448; Rawlins v. S., 124 Ga. 31, 52 S. E. 1; S. v. Ruck, 194 Mo. 416, 433, 92 S. W. 706.

421-46 Loder v. Jayne, 142 Fed. 1010; S. v. Thompson, 69 Conn. 720, 38 A. 868; Lasher v. Littell, 202 Ill. 551, 67 N. E. 373; Graff v. P., 208 Ill. 312, 70 N. E. 299; Miller v. John, 208 Ill. 173, 70 N. E. 27; S. v. Caine, 134 Ia. 147, 111 N. W. 443; McIntosh v. C., 23 Ky. L. R. 1222, 64 S. W. 951; Chadwell v. Co., 24 Ky. L. R. 818, 69 S. W. 1082; Hall v. C., 31 Ky. L. R. 64, 101 S. W. 376; P. v. McGarry, 136 Mich. 316, 99 N. W. 147; S. v. Darling, 199 Mo. 168, 97 S. W. 592; S. v. Gatlin, 170 Mo. 354, 70 S. W. 885; S. v. Miller, 191 Mo. 587, 90 S. W. 767; S. v. Allen, 34 Mont. 403, 87 P. 177; Cohn v. Saidel, 71 N. H. 558, 53 A. 800; S. v. Ryan, 47 Or. 338, 82 P. 703, 1 L. R. A. (N. S.) 862; Smith v. S., 48 Tex. Cr. 233, 89 S. W. 817; S. v. Dix, 33 Wash. 405, 74 P. 570; S. v. Dilley, 44 Wash. 207, 87 P. 133; S. v. Grove, 61 W. Va. 697, 57 S. E. 296. But see Hughes v. S., 9 Ohio C. C. (N. S.) 369.

422-47 S. v. Ruck, 194 Mo. 416, 432, 92 S. W. 706; S. v. Kennedy, 177 Mo. 98, 75 S. W. 979; S. v. Boatright, 182 Mo. 33, 81 S. W. 450; P. v. McKane, 143 N. Y. 455, 38 N. E. 950.

422-48 **Acts and declarations** of a person not named in the indictment as a conspirator nor designated therein as unknown cannot be proved. Sullivan v. P., 108 Ill. App. 329; S. v. Carroll, 31 La. Ann. 860. **It is the better practice** to make all the conspirators parties defendant or to allege the conspiracy, the parties to it, if known, and their purpose. S. v. Kennedy, 177 Mo. 98, 118, 75 S. W. 979.

422-49 S. v. Ruck, 194 Mo. 416, 432, 92 S. W. 706; S. v. Boatright, 182 Mo. 33, 81 S. W. 450; S. v. Sykes, 191 Mo. 62, 89 S. W. 851.

422-50 Loder v. Jayne, 142 Fed. 1010; S. v. Stockford, 77 Conn. 227, 58 A. 769; Wait v. C., 113 Ky. 821, 69 S. W. 697.

422-51 Moore v. P., 31 Colo. 336; Spies v. P., 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320; Cooke v. P., 231 Ill. 9, 82 N. E. 863; Eacock v. S. (Ind.), 82 N. E. 1039; Driggers v. U. S. (Ind. Ter.), 104 S. W. 1166; S. v. Ryan, 47 Or. 338, 82 P. 703, 1 L. R. A. (N. S.) 862; Smith v. S., 46 Tex. Cr. 267, 81 S. W. 936; Patch Mfg. Co. v. Lodge, 77 Vt. 294, 318, 60 A. 74.

The party sought to be affected by what has been said and done must have knowledge and be engaged in promoting the common cause. Jayne v. Loder, 149 Fed. 21, 78 C. C. A. 653.

423-54 Knox v. S., 164 Ind. 226, 237, 73 N. E. 255; P. v. McGarry, 136 Mich. 316, 99 N. W. 147.

Writer of letter need not be identified. Ramsey v. Flowers, 72 Ark. 316, 80 S. W. 147.

The means used to secure documents in possession of a defendant do not affect their admissibility. Lawrence v. S., 103 Md. 17, 63 A. 96.

423-55 Eacock v. S. (Ind.), 82 N. E. 1039.

423-56 **Documents must be produced.** — In England one who is charged with conspiring to induce workmen to break their contracts with plaintiff must produce material documents, though they may tend to incriminate him. National Assn. v. Smithies, (1906) App. Cas. (Eng.) 434.

Deposit slips and bank books admissible to show that money was deposited to defendant's personal account. Cooke v. P., 231 Ill. 9, 82 N. E. 863.

423-57 **Threats** comprehend words or acts calculated and intended to cause an ordinary person to fear an injury to his person, business or property. S. v. Stockford, 77 Conn. 227, 58 A. 769; *cit.* S. v. Donaldson, 32 N. J. L. 151; Barr v. Council, 53 N. J. Eq. 101, 30 A. 881; Crump v. C., 84 Va. 927, 6 S. E. 620; Rogers v. Evarts, 17 N. Y. S. 264; O'Neil v. Behanna, 182 Pa. 236, 37 A. 843. See Gray v. Council, 91 Minn. 171, 97 N. W. 663.

423-58 Driggers v. U. S. (Ind. Ter.), 104 S. W. 1166; Chadwell v. C., 24 Ky. L. R. 818, 69 S. W. 1082; S. v. Gatlin, 170 Mo. 354, 70 S. W. 885; Smith v. S., 46 Tex. Cr. 267,

81 S. W. 936; Green v. S. (Tex. Cr.), 89 S. W. 838.

Threats against the life of father of deceased and an offer to pay persons to kill him may be shown, as may a peace bond given by accused at the instance of the father and an indictment for assault with intent to murder, he being the prosecutor. Rawlins v. S., 124 Ga. 31, 57, 52 S. E. 1.

424-60 Dolan v. U. S., 123 Fed. 52, 59 C. C. A. 176; Connecticut etc. Ins. Co. v. Hillmon, 107 Fed. 834, 46 C. C. A. 668; Brennan v. P., 113 Ill. App. 361; Eacock v. S. (Ind.), 82 N. E. 1039; Cook v. S. (Ind.), 82 N. E. 1047; Roberts v. Kendall, 3 Ind. App. 339, 29 N. E. 487; S. v. Walker, 124 Ia. 414, 100 N. W. 354; S. v. Crofford, 121 Ia. 395, 96 N. W. 889; S. v. Wheeler, 129 Ia. 100, 105 N. W. 374; Hines v. C., 23 Ky. L. R. 119, 62 S. W. 732; Stovall v. C., 23 Ky. L. R. 103, 62 S. W. 536; S. v. Darling, 199 Mo. 168, 97 S. W. 592; S. v. Roberts, 201 Mo. 702, 727, 100 S. W. 484; S. v. Boatright, 182 Mo. 33, 81 S. W. 450; S. v. Faulkner, 175 Mo. 546, 75 S. W. 116; S. v. Quen, 48 Or. 347, 86 P. 791; Smith v. S., 46 Tex. Cr. 267, 284, 81 S. W. 936; Wallace v. S., 48 Tex. Cr. 318, 87 S. W. 1041; Ripley v. S. (Tex. Cr.), 100 S. W. 943; Mower v. McCarthy, 79 Vt. 142, 64 A. 578; Schutz v. S., 125 Wis. 452, 104 N. W. 90; Schultz v. S. (Wis.), 113 N. W. 428.

425-62 S. v. Crofford, 121 Ia. 395, 96 N. W. 889; Standard O. Co. v. Doyle, 118 Ky. 662, 82 S. W. 271.

425-64 Collins v. S., 138 Ala. 57, 34 S. 993; Butt v. S., 81 Ark. 173, 98 S. W. 723; P. v. Donnolly, 143 Cal. 394, 77 P. 177; Lorenz v. U. S., 24 App. D. C. 337; S. v. Walker, 124 Ia. 414, 100 N. W. 354; Allen v. C., 26 Ky. L. R. 807, 82 S. W. 589; P. v. McGarry, 136 Mich. 316, 90 N. W. 147; Hutchinson v. S., 8 Ohio C. C. (N. S.) 313; C. v. Zuern, 16 Pa. Super. 588; Patch Mfg. Co. v. Lodge, 77 Vt. 294, 320, 60 A. 74; S. v. Dilley, 44 Wash. 207, 87 P. 133.

426-66 Loder v. Jayne, 142 Fed. 1010; Wright v. Stewart, 130 Fed. 905; Chapline v. S., 77 Ark. 444, 95 S. W. 477; P. v. Stokes (Cal. App.), 89 P. 997; Barrow v. S., 121 Ga. 187, 48 S. E. 950; Cook v. S. (Ind.), 82 N. E. 1047; S. v. Bolden, 109 La. 484, 33 S. 571; Lawrence v. S., 103 Md. 17, 63 A. 96; S. v. Miller, 191 Mo. 587, 90 S. W. 767; Cohn v. Saidel, 71 N. H. 558, 53 A. 800; Wells v. Ter., 14 Okla. 436, 78 P. 124; S. v. Ryan, 47 Or. 338, 82 P. 703, 1 L. R. A. (N. S.) 862; Bowen v. S., 47 Tex. Cr. 137, 82 S. W. 520; Schultz v. S. (Wis.), 113 N. W. 428.

Court must strike out declarations in absence of proof of conspiracy. Jenkins v. S., 35 Fla. 737, 18 S. 182, 48 Am. St. 267; S. v. Walker, 124 Ia. 414, 100 N. W. 354.

It is better to require proof of the conspiracy before allowing declarations to be shown. S. v. Walker, 124 Ia. 414, 100 N. W. 354.

427-68 S. v. Roberts, 201 Mo. 702, 728, 100 S. W. 484.

427-69 Rex v. Cope, 1 Str. (Eng.) 144 (stated in note to Cleland v. Anderson, 66 Neb. 252, 256, 19 N. W. 306, 96 N. W. 212, 98 N. W. 1075); Cook v. S. (Ind.), 82 N. E. 1047; S. v. Crofford, 121 Ia. 395, 96 N. W. 889; Chadwell v. C., 24 Ky. L. R. 818, 69 S. W. 1082; S. v. Gatlin, 170 Mo. 354, 70 S. W. 885; Wells v. Ter., 14 Okla. 436, 78 P. 124; C. v. Zuern, 16 Pa. Super. 588; Schultz v. S. (Wis.), 113 N. W. 428.

Quantum of evidence. — "It is sufficient if a conspiracy is established by prima facie evidence, evidence which makes a prima facie case, which fairly raises a presumption or inference of a conspiracy." Hutchinson v. S., 8 Ohio C. C. (N. S.) 313, 324.

427-70 S. v. Walker, 124 Ia. 414, 100 N. W. 354; S. v. Wheeler, 129 Ia. 100; 105 N. W. 374; S. v. Kennedy, 177 Mo. 98, 119, 75 S. W. 979; S. v. Boatright, 182 Mo. 33, 81 S. W. 450; Shields v. Bank, 138 N. C. 185, 50 S. E. 591; S. v. Marks, 70 S. C. 448, 50 S. E. 14; Wills v. Central Co. (Tex. Civ.), 88 S. W. 265.

428-72 S. v. Walker, 124 Ia. 414, 100 N. W. 354; S. v. Crofford, 121 Ia. 395, 96 N. W. 889; Chadwell v. C., 24 Ky. L. R. 818, 69 S. W. 1082; S. v. Kennedy, 177 Mo. 98, 75 S. W. 979; S. v. Darling, 199 Mo. 168, 97 S. W. 592; C. v. Zuern, 16 Pa.

Super. 588; Schultz v. S. (Wis.), 113 N. W. 428.

Court need not formally rule on sufficiency of the evidence. Schultz v. S. (Wis.), 113 N. W. 428.

428-73 Hanners v. S., 147 Ala. 27, 41 S. 973; S. v. Crofford, 121 Ia. 395, 96 N. W. 889; Hall v. C., 29 Ky. L. R. 485, 93 S. W. 904; S. v. Darling, 199 Mo. 168, 97 S. W. 592; S. v. Kennedy, 177 Mo. 98, 75 S. W. 979; C. v. Zuern, 16 Pa. Super. 588; Bowen v. S., 47 Tex. Cr. 137, 82 S. W. 520; Wallace v. S., 48 Tex. Cr. 318, 87 S. W. 1041; S. v. Dilley, 44 Wash. 207, 87 P. 133; Schultz v. S. (Wis.), 113 N. W. 428.

429-74 S. v. DeWolfe, 29 Mont. 415, 74 P. 1084; S. v. Allen, 34 Mont. 403, 87 P. 177.

430-75 S. v. Walker, 124 Ia. 414, 100 N. W. 354; S. v. Crofford, 121 Ia. 395, 96 N. W. 889; Wallace v. S., 48 Tex. Cr. 318, 87 S. W. 1041.

In Texas the rule is broader than the text states it. See Stevens v. S., 42 Tex. Cr. 154, 59 S. W. 545; Hudson v. S., 43 Tex. Cr. 420, 66 S. W. 668; Smith v. S., 21 Tex. App. 102, 17 S. W. 560; Harris v. S., 31 Tex. Cr. 411, 20 S. W. 916; Smith v. S., 48 Tex. Cr. 233, 89 S. W. 817, 826.

430-76 S. v. Allen, 34 Mont. 403, 87 P. 177. See S. v. Ryan, 47 Or. 338, 82 P. 703, 1 L. R. A. (N. S.) 862.

Declarations as to action to be taken are not provable unless the means to be used are unlawful, the object to be obtained not being so. Cranfill v. Hayden, 97 Tex. 544, 80 S. W. 609.

In Texas acts and declarations done and made prior to the conspiracy are competent to show motive, purpose and intent. Smith v. S., 46 Tex. Cr. 267, 286, 81 S. W. 936.

430-77 P. v. Smith (Cal.), 91 P. 511; Suttles v. Sewell, 117 Ga. 214, 43 S. E. 486; Lawrence v. S., 103 Md. 17, 63 A. 96; S. v. Forshee, 199 Mo. 142, 97 S. W. 933; S. v. Kennedy, 177 Mo 98, 75 S. W. 979; Lederer v. Adler, 92 N. Y. S. 827; C. v. Zuern, 16 Pa. Super. 588.

Application of rule where conspiracy to defraud is general and extends over long period. Exchange Bk. v. Moss, 149 Fed. 340, 79 C. C. A. 278.

Silence of accused when implicatory statements were made by others charged as co-conspirators is not provable, the parties being in custody. Merriweather v. C., 26 Ky. L. R. 793, 82 S. W. 592. See "ADMISSIONS," Vol. 3, p. 348, and same title, ante.

431-78 Ferguson v. S., 141 Ala. 20, 37 S. 448; Lorenz v. U. S., 24 App. D. C. 337.

A plea of guilty is within the rule. S. v. Phillips, 73 S. C. 236, 53 S. E. 370.

431-79 Smith v. P., 38 Colo. 509, 88 P. 453; Roberts v. Kendall, 3 Ind. App. 339, 29 N. E. 487; S. v. McCoy, 61 W. Va. 258, 57 S. E. 294.

If made in the presence of accused they are not competent unless assented to. S. v. Phillips, 73 S. C. 236, 53 S. E. 370.

432-80 Baldwin v. S., 46 Fla. 115, 35 S. 220; Rawlins v. S., 124 Ga. 31, 52 S. E. 1; Knox v. S., 164 Ind. 226, 73 N. E. 225.

432-81 Ter. v. Johnson, 16 Haw. 743, 755; Lamb v. S., 69 Neb. 212, 95 N. W. 1050; O'Brien v. S., 69 Neb. 691, 96 N. W. 649; C. v. Zuern, 16 Pa. Super. 588.

432-82 Schultz v. S. (Wis.), 113 N. W. 428.

432-83 U. S. v. Greene, 146 Fed. 803; Eacock v. S. (Ind.), 82 N. E. 1039; Allen v. C., 26 Ky. L. R. 807, 82 S. W. 589; P. v. Mol, 137 Mich. 692, 100 N. W. 913; S. v. Ryan, 47 Or. 338, 82 P. 703, 1 L. R. A. (N. S.) 862; S. v. Dilley, 44 Wash. 207, 87 P. 133.

In a prosecution for conducting a strike it may be shown that the union had paid counsel fees for the defense of men charged with using violence. S. v. Stockford, 77 Conn. 227, 58 A. 769.

Act of third person in inducing witness to leave state may be proven if accused was privy thereto. Eacock v. S. (Ind.), 82 N. E. 1039.

433-84 Knox v. S., 164 Ind. 226, 237, 73 N. E. 225; S. v. Ruck, 194 Mo. 416, 435, 92 S. W. 706; Kipper v. S., 45 Tex. Cr. 377, 77 S. W. 611.

434-88 Standard O. Co. v. S., 117 Tenn. 618, 662, 100 S. W. 705. See

Rex v. Plummer, (1902) 2 K. B. (Eng.) 339.

Agent and corporate principal both considered and counted in the two or more necessary to constitute a conspiracy. Standard O. Co. v. S., supra.

In Kentucky one of two conspirators may be convicted on the testimony of the other though the effect of the witness' testimony be to secure his discharge under a statute. Weber v. C., 24 Ky. L. R. 1726, 72 S. W. 30.

Discharge of one does not affect his competency to testify against the other under an Indiana statute. Williams v. S. (Ind.), 82 N. E. 790.

In a civil action a verdict and judgment may be recovered against one defendant. James v. Evans, 149 Fed. 136, 80 C. C. A. 240.

If any two conspirators are guilty the acquittal of the others is immaterial as to those guilty. C. v. Valverdi, 218 Pa. 7.

434-94 C. v. Rogers, 181 Mass. 184, 194, 63 N. E. 421.

A discredited co-conspirator should be corroborated. S. v. Messner, 43 Wash. 206, 86 P. 636.

435-97 Wong Din v. U. S., 135 Fed. 702, 68 C. C. A. 340; Benson v. U. S., 146 U. S. 325.

Testimony of accomplice. — After prima facie proof of a conspiracy sufficient to connect all the defendants therewith, one of them may testify of facts and circumstances connected with the commission of the felony, showing his own and his co-defendants' connection therewith. Hudson v. S., 137 Ala. 60, 34 S. 854; P. v. Zimmerman, 3 Cal. App. 84, 84 P. 446; Baldwin v. S., 46 Fla. 113, 35 S. 220.

The fact that one of the accused has made an involuntary confession does not disqualify him as a witness, though it may affect his credibility. Rawlins v. S., 124 Ga. 32, 52 S. E. 1.

CONTEMPT [Vol. 3.]

439-1 In re Nevitt, 117 Fed. 448, 54 C. C. A. 622; Bessette v. Conkey Co., 194 U. S. 324; U. S. v. R. Co., 142 Fed. 176; U. S. v. Richards, 1 Alaska 613; Reymert v. Smith (Cal. App.) 90 P. 470; Robinson v. P., 129 Ill. App. 527; Wells v. Given, 126 Ia. 340, 102 N. W. 106; Crites v. S., 74 Neb. 687, 105 N. W. 469; S. v. Clancy, 30 Mont. 193, 76 P. 10; Mylius v. McDonald, 61 W. Va. 405, 56 S. E. 602.

Criminal in nature so far as the rules of pleading are concerned. Back v. S., 75 Neb. 603, 106 N. W. 787. And as to venue. S. v. Court, 24 Mont. 33, 60 P. 493, 89 P. 798.

439-3 See Hake v. P., 230 Ill. 174, 82 N. E. 561, for a statement of the rule in chancery.

How papers entitled. — If instituted against one not a party to the suit the preliminary proceedings should be entitled as of that suit, and later papers, if guilt is established, as in a suit by the government. Employers Co. v. T. Council, 141 Fed. 679, *cit.* U. S. v. Wayne, 28 Fed. Cas. 16,654; Lester v. P., 150 Ill. 408, 424, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. 375. It is otherwise where the contempt was the act of a party to the cause; then it is a criminal misdemeanor and the proceeding is independent of the action in which the writ issued. Bullock Co. v. Westinghouse, 129 Fed. 105, 63 C. C. A. 607. But it is not material, in such a case, how the proceedings are entitled. Robinson v. P., 129 Ill. App. 527; Hughes v. Ter. (Ariz.), 85 P. 1058. Should be entitled in name of the people. Kanter v. Clerk, 108 Ill. App. 287.

In New York a proceeding to punish for contempt is in itself a special proceeding independent of the action or proceeding in which it may be taken. The rights of the parties and the rules of law are in all respects the same as in actions where the same issues are involved. In re Depue, 185 N. Y. 60, 77 N. E. 798.

In Wisconsin and Wyoming the proceeding is in the action in which the violated injunction issued. My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540; Ferguson v. Wheeler, 126 Ia. 111, 101 N. W. 638; Porter v. S. (Wyo.), 92 P. 385.

Separate docketing of contempt case unnecessary when one is charged with violating an injunction; if it is separately docketed the shorthand notes of testimony in

one case may be used as the "written evidence" required by statute in the other. Hatlestad v. Court (Ia.), 114 N. W. 628.

439-4 In re Fellerman, 149 Fed. 244; O'Neil v. P., 113 Ill. App. 195; S. v. Harris, 14 N. D. 501, 105 N. W. 621.

440-6 Bessette v. Conkey, 194 U. S. 324; In re Nevitt, 117 Fed. 448, 54 C. C. A. 622; Heinze v. Min. Co., 129 Fed. 274, 63 C. C. A., 388; Flannery v. P., 225 Ill. 62, 80 N. E. 60; Hake v. P., 230 Ill. 174, 82 N. E. 561; O'Brien v. P., 216 Ill. 354, 75 N. E. 108, 108 Am. St. 219; Thompson v. R. Co., 48 N. J. Eq. 105, 21 A. 182; S. v. Sieber (Or.), 88 P. 313; Patterson v. Council, 31 Pa. Super. 112; Snow v. Snow, 13 Utah 15, 43 P. 620; Davidson v. Munsey, 29 Utah 181, 80 P. 743; Geiger v. Geiger, 20 Wash. 181, 54 P. 1129.

440-7 French v. C., 30 Ky. L. R. 98, 97 S. W. 427; Emery v. S. (Neb.), 111 N. W. 374, 9 L. R. A. (N. S.) 1124.

440-8 Hammond L. Co. v. Union 149 Fed. 577; Ferriman v. P., 128 Ill. App. 230.

In Oregon an order to show cause or a warrant of arrest may be issued as the court elects. S. v. Sieber (Or.), 88 P. 313.

440-9 Oster v. P., 192 Ill. 473, 61 N. E. 469, 56 L. R. A. 462; S. v. Nicoll, 40 Wash. 517, 82 P. 895.

If contempt is indirect, the fact that contemner is in court does not affect his right to notice and a hearing, and a reasonable time to prepare his defense. Ex parte Clark, 208 Mo. 121, 106 S. W. 990.

A motion to dismiss a petition for nullifying a marriage on the ground that petitioner is in contempt is a proper way of bringing the fact to the court's attention. Lind v. Lind, 185 Mass. 361, 70 N. E. 199.

440-10 In re Johnson, 151 Fed. 207, 80 C. C. A. 259; Emery v. S. (Neb.), 111 N. W. 374, 9 L. R. A. (N. S.) 1124; S. v. Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. 568; S. v. Crum, 7 N. D 299, 74 N. W. 992.

440-11 Russell v. Judge, 136 Mich. 624, 99 N. W. 864.

440-12 S. v. Harris, 14 N. D. 501, 105 N. W. 621.

It is discretionary with the court to serve interrogatories. In re Savin, 131 U. S. 267.

A verified return to the rule will be accepted as true if not challenged. S. v. Farnum, 73 S. C. 193, 53 S. E. 85.

A formal answer may be filed if defendant so elects. Hammond L. Co. v. Union, 149 Fed. 577.

441-14 Drady v. Court, 126 Ia. 345, 102 N. W. 115.

The rule that disavowal of the imputed intent relieves the party applies only where the intention to injure constitutes the gravamen of the offense. In re Gorham, 129 N. C. 481, 40 S. E. 311. It has no application where overt acts were personally done. U. S. v. Shipp, 203 U. S. 563; Emery v. S. (Neb.), 111 N. W. 374, 9 L. R. A. (N. S.) 1124. And in Mississippi it will not purge a constructive contempt. O'Flynn v. S., 89 Miss. 850, 43 S. 82, 9 L. R. A. (N. S.) 1119. See, as favoring the rule of discharge under an affidavit, U. S. v. Carroll, 147 Fed. 947; Early v. P., 117 Ill. App. 608; Fishback v. S., 131 Ind. 304, 30 N. E. 1088; Anderson v. Forging Co., 34 Ind. App. 100, 72 N. E. 277; S. v. Henthorn, 46 Kan. 613, 26 P. 937; S. v. Vincent, 46 Kan. 618, 620, 26 P. 939; Percival v. S., 45 Neb. 741, 64 N. W. 221, 50 Am. St. 568; Rosewater v. S., 47 Neb. 630, 66 N. W. 640; Hay v. Farnum, 73 S. C. 193, 53 S. E. 85. In opposition to the above are: Sloan v. P., 115 Ill. App. 84; Drady v. Court, 126 Ia. 345, 102 N. W. 115; Marvin v. Court, 126 Ia. 355, 102 N. W. 119; Globe Newspaper Co. v. C., 188 Mass. 449, 453, 74 N. E. 682; In re Chadwick, 109 Mich. 588, 67 N. W. 1071; Ter. v. Murray, 7 Mont. 251, 15 P. 145; Mackay v. S., 60 Neb. 143, 82 N. W. 372; In re Chartz (Nev.), 85 P. 352, 5. L. R. A. (N. S.) 916; In re Young, 137 N. C. 552, 50 S. E. 220; Battle v. Lumber Co., 72 S. C. 322, 51 S. E. 873.

In Iowa the statute gives the alleged contemner the right to file an explanation before he is found guilty. S. v. Court, 124 Ia. 187, 99 N. W. 712.

441-15 Employers' T. Co. v. Council, 141 Fed. 679; O'Brien v. P., 216 Ill. 354, 75 N. E. 108, 108

Am. St. 219; Anderson v. Forging Co., 34 Ind. App. 100, 72 N. E. 277.

In a court of chancery affidavits pro and con will be heard as well as any other legal evidence that will aid in determining the question. Hake v. P., 230 Ill. 174, 82 N. E. 561. And so in a bankruptcy court. In re Fellerman, 149 Fed. 244.

441-19 See In re Johnson, 151 Fed. 207, 80 C. C. A. 259.

441-20 Matter of Depue, 185 N. Y. 60, 77 N. E. 798.

441-22 U. S. v. Carroll, 147 Fed. 947; Reymert v. Smith (Cal. App.), 90 P. 470; Drady v. Court, 126 Ia. 345, 102 N. W. 115; Fellman v. Ins. Co., 116 La. 733, 41 S. 53; Ex parte Clark, 208 Mo. 121, 106 S. W. 990; Ex parte Hedden (Nev.), 90 P. 737; In re Nejez, 54 Misc. 38, 104 N. Y. S. 505; Ex parte Terrell (Tex. Cr.), 95 S. W. 536; Mylius v. McDonald, 61 W. Va. 405, 56 S. E. 602. See McCaully v. U. S., 25 App. D. C. 404.

442-24 See Battle v. Lumb. Co., 72 S. C. 322, 51 S. E. 873.

The extent of the hearing on questions of law is within the court's discretion. S. v. Nicoll, 40 Wash. 517, 82 P. 895.

442-27 Hake v. P., 230 Ill. 174, 82 N. E. 561; Ferriman v. P., 128 Ill. App. 230; Ferguson v. Wheeler, 126 Ia. 111, 101 N. W. 638; S. v. Sieber (Or.), 88 P. 313.

443-28 Ferriman v. P., supra.

443-29 See In re Providence J. Co. (R. I.), 68 A. 428.

443-31 U. S. v. R. Co., 142 Fed. 176; Reymert v. Smith (Cal. App.), 90 P. 470; Ex parte Shortridge (Cal. App.), 90 P. 478; Kanter v. Clerk, 108 Ill. App. 287; Crites v. S., 74 Neb. 687, 105 N. W. 469.

444-32 S. v. Edwards, 15 S. D. 382, 89 N. W. 1011.

444-34 Regularity of proceedings in case of direct contempt is presumed if record is silent. Mahoney v. S., 33 Ind. App. 655, 72 N. E. 151.

444-36 Crites v. S., supra.

A statement of matters that occurred in the presence of the judge in open court imports absolute verity. Mahoney v. S., supra.

The record must set out the facts constituting the contempt; the statement of a conclusion is not enough. Crites v. S., supra; Ogden v. S. (Neb.), 93 N. W. 203.

Guilt may be shown by verified answer. Ferriman v. P., 128 Ill. App. 230.

445-37 In re Davison, 143 Fed. 673; In re Cole, 144 Fed. 392, 75 C. C. A. 330; U. S. v. Carroll, 147 Fed. 947; S. v. Court, 112 La. 182, 36 S. 315; Gordon v. S., 73 Neb. 221, 102 N. W. 458.

446-38 Lamberson v. Court (Cal.), 91 P. 100.

If the court directs that an information be filed against the contemner the trial will take the usual course, and the findings of the court will be tested by the evidence in the record. Connell v. S. (Neb.), 114 N. W. 294.

446-39 Ferriman v. P., 128 Ill. App. 230.

448-46 U. S. v. Carroll, 147 Fed. 947; Sabin v. Fogarty, 70 Fed. 482.

449-47 In re Fellerman, 149 Fed. 244; Drakeford v. Adams, 98 Ga. 722, 25 S. E. 833.

The rule of evidence applicable to civil cases applies notwithstanding an element may have entered into the act which would have rendered it indictable as a crime, such element not being alleged nor proved. Flannery v. P., 255 Ill. 62, 71, 80 N. E. 60.

450-50 In re Young, 137 N. C. 552, 50 S. E. 220.

450-51 P. v. Newburger, 98 App. Div. 92, 90 N. Y. S. 740.

450-52 U. S. v. Collins, 146 Fed. 553.

In opposition to the text, S. v. Sieber (Or.), 88 P. 313, *disappr.* Ex parte Gould, 99 Cal. 360, 33 P. 1112; S. v. Reilly, 40 Wash. 217, 82 P. 287.

450-53 Patterson v. Council, 31 Pa. Super. 112; Smith v. Smith, 77 S. C. 69, 57 S. E. 666.

450-54 See Hammond L. Co. v. Union, 149 Fed. 577.

450-55 Seastream v. New Jersey Ex. Co. (N. J. L.), 65 A. 982; P. v. Marr, 88 App. Div. 422, 84 N. Y. S. 965.

451-58 Later acts than the one charged cannot be shown. Otillio v. Otillio, 119 La. 965, 44 S. 799; S. v. Court, 112 La. 182, 36 S. 315; Ansley v. Stuart, 119 La. 1, 43 S. 892.

Other contemptuous acts cannot be

shown unless pleaded. S. v. Sieber (Or.), 88 P. 313.

451-59 **Violations of an injunction** after the attachment was issued may be shown if defendant will not be surprised. S. v. McCaxley, 74 Kan. 874, 87 P. 743.

A second violation of an injunction will be cause for increasing the fine. Westinghouse v. Christensen, 130 Fed. 735.

451-60 **Admission by silence.** Toozer v. S. (Neb.), 97 N. W. 584; Nebraska etc. Soc. v. S., 57 Neb. 765, 78 N. W. 267.

452-65 S. v. Harris, 14 N. D. 501, 105 N. W. 621.

452-69 Warner v. Martin, 124 Ga. 387, 52 S. E. 446; O'Neil v. P., 113 Ill. App. 195; Drady v. Court, 126 Ia. 345, 102 N. W. 115; Davidson v. Munsey, 29 Utah 181, 80 P. 743.

452-70 Otis v. Court, 148 Cal. 129, 82 P. 853.

452-72 **Misstatement of the** conclusions of a court is a contempt. In re Providence Co. (R. I.), 68 A. 428.

453-75 Fellman v. Ins. Co., 116 La. 723, 41 S. 49.

Under the Virginia statute the language must be specifically addressed to the judge. Yoder v. C., 107 Va. 823, 57 S. E. 581.

Matter pending in court. — It is immaterial, where the publication attacks the court or its judge, whether a case was pending at the time the matter was published. Burdett v. C., 103 Va. 838, 48 S. E. 878. To same effect are Ex parte McLeod, 120 Fed. 130; S. v. Shepherd, 177 Mo. 205, 76 S. W. 79; Ex parte Moore, 63 N. C. 397. In opposition to the foregoing cases is Ex parte Green, 46 Tex. Cr. 576, 81 S. W. 723, in which are cited: Ex parte Barry, 85 Cal. 603, 25 P. 256, 20 Am. St. 248; McClatchy v. Court, 119 Cal. 413, 51 P. 696, 39 L. R. A. 691; P. v. Stapleton, 18 Colo. 568, 33 P. 167, 23 L. R. A. 787; Stuart v. P., 4 Ill. 396; Storey v. P., 79 Ill. 45, 56 Am. Rep. 199; Ex parte Wright, 65 Ind. 504; Cheadle v. S., 110 Ind. 301, 11 N. E. 426, 56 Am. Rep. 199; S. v. Anderson, 40 Ia. 207; Ex parte Hickey, 4 Sm. & M. (Miss.), 751; Rosewater v. S., 47 Neb. 630, 66 N. W. 640; S. v. Kaiser, 20 Or. 50, 23 P. 964, 8 L. R. A. 584, S. v. Edwards, 15 S. D. 382, 89 N. W. 1011; S. v. Tugwell, 19 Wash. 234, 52 P. 1056, 43 L. R. A. 717.

454-78 **Trial** need not be in progress nor immediately to take place if an indictment has been found. Globe Co. v. C., 188 Mass. 449, 74 N. E. 682.

In England the fact that an indictment has not been found is immaterial. Rex v. Parke, (1903) 2 K. B. (Eng.) 432.

457-87 See S. v. Shepherd, 177 Mo. 205, 76 S. W. 79.

457-88 Ex parte Shortridge (Cal. App.), 90 P. 478; Christian H. v. P., 223 Ill. 244, 79 N. E. 72; Coffey v. Gamble, 117 Ia. 545, 91 N. W. 813; Junius Hart P. H. v. Ingman, 119 La. 1017, 44 S. 850; Ex parte McRae, 45 Tex. Cr. 285, 77 S. W. 11; Porter v. S. (Wyo.), 92 P. 385.

It is not a defense that the injunction plaintiff resorted to a subterfuge to ascertain whether defendant was obeying the writ. Ex parte Cash (Tex. Cr.), 99 S. W. 1118.

457-91 American L. Co. v. Corp., 134 Fed. 129; Drew v. Hogan, 26 App. D. C. 55; S. v. McGahey, 12 N. D. 535, 97 N. W. 865; S. v. Scarborough, 70 S. C. 288, 49 S. E. 860; S. v. Pendergast, 39 Wash. 132, 81 P. 324; Powhatan C. & C. Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257.

Lack of jurisdiction of the contempt proceeding is a defense, as where the petition does not allege defendant's responsibility for the act done. Otis v. Court, 148 Cal. 129, 82 P. 853. Or show that a contempt has been committed. Rogers v. Court, 145 Cal. 88, 78 P. 344; Hutton v. Court, 147 Cal. 156, 81 P. 409; Roberson v. P. (Colo.), 90 P. 79; Ex parte Hedden (Nev.), 90 P. 737; S. v. Newton (N. D.), 112 N. W. 52.

458-92 In re Johnson, 151 Fed. 207, 80 C. C. A. 259; Lewis v. Peck, 154 Fed. 273, 83 C. C. A. 211; P. v. Feenaughty, 51 Misc. 468, 101 N. Y. S. 700; Ex parte Garza (Tex. Cr.), 95 S. W. 1059; S. v. Peterson, 29 Wash. 571, 70 P. 71.

458-93 U. S. v. R. Co., 142 Fed. 176; Ex parte Robinson, 144 Fed. 835, 75 C. C. A. 663; Tebbetts v. P., 31 Colo. 461, 73 P. 869; Bachman v. Harrington, 184 N. Y. 458,

77 N. E. 657; Lindsay v. Allen, 113 Tenn. 517, 82 S. W. 648; Gulf etc. R. Co. v. Ice Co., 37 Tex. Civ. 334, 83 S. W. 1100.

458-94 In re Depue, 185 N. Y. 60, 77 N. E. 798; P. v. Warner, 51 Hun 53, 3 N. Y. S. 768, 125 N. Y. 746, 27 N. E. 407 (*aff.* on the opinion below); S. v. Pendergast, 39 Wash. 132, 81 P. 324.

458-95 McHenry v. S. (Miss.), 44 S. 831.

459-96 In re Skelly, 109 App. Div. 58, 95 N. Y. S. 1076; Jones v. Burgess, 109 App. Div. 888, 96 N. Y. S. 873.

459-97 U. S. v. Price, 1 Alaska 204; Gardiner v. Ross, 19 S. D. 497, 104 N. W. 220.

459-98 **An order** to show cause why a decree should not be modified suspends the decree and defendant therein is not in contempt for noncompliance with it. Comstock v. Comstock, 49 Misc. 599, 99 N. Y. S. 1057.

459-1 Huttig S. & D. Co. v Fuelle, 143 Fed. 363; Blake v. Nesbet, 144 Fed. 279; Rodgers v. Pitt, 89 Fed. 424; Meeks v. S. 80 Ark. 579, 98 S. W. 378; Franklin Union v. P., 220 Ill. 355, 367, 77 N. E. 176; Flannery v. P., 225 Ill. 62, 80 N. E. 60; O'Brien v. P., 216 Ill. 354, 75 N. E. 108, 108 Am. St. 219; Christian H. v. P., 223 Ill. 244, 79 N. E. 72; Butler v. Champlin, 124 Ill. App. 29; Swedish Am. T. Co. v. Fidelity Co., 208 Ill. 562, 70 N. E. 768; Kanter v. Clerk, 108 Ill. App. 287; Perry v. Pernet, 165 Ind. 67, 74 N. E. 609; Smith v. Miller, 28 Ky. L. R. 1205, 91 S. W. 1140; Miles v. S., 74 Neb. 684, 105 N. W. 301; Lawson v. Tyler, 98 App. Div. 10, 90 N. Y. S. 188; In re Spies, 92 App. Div. 175, 86 N. Y. S. 1043; Schweig v. Schweig, 107 N. Y. S. 905; Lytle v. R. Co. (Tex. Civ.), 90 S. W. 316; Ex parte Breeding (Tex. Cr.), 90 S. W. 634; Gulf etc. R. Co. v. Ice Co., 37 Tex. Civ. 334, 83 S. W. 1100; S. v. Nicoll, 40 Wash. 517, 82 P. 895; Vilter Mfg. Co. v. Humphrey (Wis.), 112 N. W. 1095.

460-2 **An order of commitment** cannot be questioned because the subpoena duces tecum may have been too broad. Hale v. Henkel, 201 U. S. 43.

460-3 Seeward v. Paterson, (1897) 1 Ch. (Eng.) 545, 66 L. J. Ch. 267; Diamond D. & M. Co. v. Kelley, 130 Fed. 893; Hutchins v. Munn, 28 App. D. C. 271; Stotts v. Jackson, 82 App. Div. 81, 81 N. Y. S. 638; P. v. Marr, 88 App. Div. 422, 84 N. Y. S. 965.

The assertion of rights under a decree makes the asserter a party to it though its terms extend only to those who were formal parties. S. v. Court, 34 Mont. 258, 86 P. 798.

460-4 Heinze v. Min. Co., 129 Fed. 274, 63 C. C. A. 388; Lowenthal v. Hodge, 105 N. Y. S. 120; Stotts v. Jackson, 82 App. Div. 81, 81 N. Y. S. 638; Lytle v. R. Co. (Tex. Civ.), 90 S. W. 316.

460-5 Allis C. Co. v. Union, 150 Fed. 155; Employers' T. Co. v. Council, 141 Fed. 679; Huttig S. & D. Co. v. Fuelle, 143 Fed. 363; O'Brien v. P. 216 Ill. 354, 75 N. E. 108, 108 Am. St. 219; Sloan v. P., 115 Ill. App. 84; Anderson v. Forging Co., 34 Ind. App. 100, 72 N. E. 277; P. v. Marr, 181 N. Y. 463, 74 N. E. 431; Vilter Mfg. Co. v. Humphrey (Wis.), 112 N. W. 1095.

Individual members of an unincorporated labor organization may be punished for a contempt committed by it. Patterson v. Council, 31 Pa. Super. 112; P. v. Marr, 181 N. Y. 463, 74 N. E. 431.

In New York because of a statute an injunction has less scope than in many jurisdictions. See Rigas v. Livingston, 178 N. Y. 20, 70 N. E. 107.

461-7 Diamond D. & M. Co. v. Kelley, 130 Fed. 893; Janney v. Pancoast, 124 Fed. 972.

An injunction against individuals does not affect them in their official capacities. Public Service Corp. v. De Grote, 70 N. J. Eq. 454, 62 A. 65.

461-8 See In re Banning, 108 App. Div. 12, 95 N. Y. S. 467.

462-9 Egilbert v. Court (Cal. App.), 91 P. 748; Bauter v. Court (Cal. App.), 91 P. 749.

462-11 In re DeForest Tel. Co., 154 Fed. 81; Young v. Rothrock, 121 Ia. 588, 96 N. W. 1105; Terry v. S. (Neb.), 110 N. W. 733.

A jailer who refuses to deliver a prisoner under advice of the judge will not be adjudged guilty though he violated an order of a court of

eo-ordinate jurisdiction with that over which the judge presided, which order was issued pursuant to a mandate of the highest state tribunal. Boone v. Riddle, 27 Ky. L. R. 828, 86 S. W. 978.

"**Contempt proceedings** are quasi criminal in their nature, and an intent to commit a forbidden act is as essential to guilt as in the case of a charge of a criminal offense." Hutton v. Court, 147 Cal. 156, 81 P. 409.

463-12 In re De Forest Wireless Co., 154 Fed. 81.

463-13 In re Seitz, 56 Misc. 616, 107 N. Y. S. 593.

463-14 Encyclopaedia B. Co. v. Assn., 130 Fed. 493; Siegert v. Eiseman, 157 Fed. 314; Watertown Paper Co. v. Place, 51 App. Div. 633, 64 N. Y. S. 673.

An injunction restraining intimidation of workmen may be violated by a casual observation. See Ideal Mfg. Co. v. Ludwig, 149 Mich. 133, 112 N. W. 723.

463-15 See U. S. v. R. Co., 142 Fed. 176.

Good faith is presumed in case of a municipality where the methods of carrying out the order granted are much at its discretion. Sponenburg v. Gloversville, 46 Misc. 290, 94 N. Y. S. 264.

464-20 "**The mandate** should be so clearly expressed, when applied to the act complained of, that the violation must appear by reasonable certainty." Saal v. R. Co., 106 N. Y. S. 996, *cit.* Ketchum v. Edwards, 153 N. Y. 534, 47 N. E. 918.

464-22 Seastream v. Exp. Co. (N. J. Eq.), 61 A. 1041.

464-24 Bowker v. Haight, 146 Fed. 256; In re Home Discount Co., 147 Fed. 538; Stolts v. Tuska, 82 App. Div. 81, 81 N. Y. S. 638; S. v. Nicoll, 40 Wash. 517, 82 P. 895.

464-25 Westinghouse etc. Co. v. Elec. Co., 128 Fed. 747; Coffey v. Gamble, 117 Ia. 545, 91 N. W. 813; Young v. Rothrock, 121 Ia. 588, 96 N. W. 1105; Stolts v. Tuska, 82 App. Div. 81, 81 N. Y. S. 638.

465-28 Meeks v. S., 80 Ark. 579, 98 S. W. 378.

465-29 Powhatan C. & C. Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257; S. v. Harness, 42 W. Va. 414, 26 S. E. 270.

466-31 Young v. Rothrock, 121 Ia. 588, 96 N. W. 1105; S. v. Nicoll, 40 Wash. 417, 82 P. 895. See Westinghouse etc. Co. v. Elec Co., 128 Fed. 747; Louisville & N. R. Co. v. C., 31 Ky. L. R. 729, 103 S. W. 269

Substantial compliance in abatement of a nuisance may be shown. Saal v. R. Co., 106 N. Y. S. 996.

466-33 Effect given a modification of the order by agreement of parties. Goodsell v. Goodsell, 94 App. Div. 443, 88 N. Y. S. 161.

466-34 American T. Co. v. Wallis, 126 Fed. 464, 16 C. C. A. 342; In re Goldfarb Bros., 131 Fed. 643; Perry v. Pernet, 165 Ind. 67, 74 N. E. 609; McHenry v. S. (Miss.), 44 S. 831; Lawson v. Tyler, 98 App. Div. 10, 90 N. Y. S. 188. See S. v. Court, 31 Mont. 511, 79 P. 13, to the effect that the only relief because of disability lies in obtaining a modification of the order.

467-35 Morrison v. Blake, 33 Pa. Super. 290.

Financial inability, arising from a refusal to work, is a defense. Webb v. Webb, 140 Ala. 262, 37 S. 96.

467-36 Metheany v. Judge, 142 Mich. 628, 106 N. W. 147; Lawson v. Tyler, 98 App. Div. 10, 90 N. Y. S. 188.

468-39 In re Johnson Co., 151 Fed. 207, 80 C. C. A. 259.

468-40 P. v. Feenaughty, 51 Misc. 468, 101 N. Y. S. 700; Kalmanowitz v. Kalmanowitz, 108 App. Div. 296, 95 N. Y. S. 627; Conklin v. Conklin, 113 App. Div. 743, 99 N. Y. S. 310; American M. Co. v. Sire, 103 App. Div. 396, 92 N. Y. S. 1082; Gerson v. Berti, 87 N. Y. S. 458; General E. Co. v. Sire, 88 App. Div. 498, 85 N. Y. S. 141; S. v. Downing, 40 Or. 309, 58 P. 863, 66 P. 917.

468-41 Grant v. Greene, 121 App. Div. 756, 106 N. Y. S. 532; P. v. Feenaughty, 51 Misc. 468, 101 N. Y. S. 700; S. v. McGahey, 12 N. D. 535, 97 N. W. 865.

Doing what is forbidden with knowledge that process has been issued and preventing its service, is a contempt. S. v. Court, 33 Mont. 359, 83 P. 641.

Ignorance of a verbal order of court may excuse an officer. Richards v. U. S., 126 Fed. 105, 61 C. C. A. 161.

Service of orders on attorney good if court has jurisdiction. Grant v. Greene, 106 N. Y. S. 532. It is otherwise if jurisdiction of the person has not been obtained. In re Depue, 185 N. Y. 60, 77 N. E. 798.

468-42 Blake v. Nesbet, 144 Fed. 279; Reiter v. Ulman, 78 Fed. 222, 24 C. C. A. 71; Seattle B. & M. Co. v. Hansen, 144 Fed. 1011; Westinghouse etc. Co. v. Christensen E. Co., 130 Fed. 735; In re Wilk, 155 Fed. 945; Anderson v. Hall, 128 Ga. 525, 58 S. E. 43; In re Coggshall, 100 Mo. App. 585, 75 S. W. 183.

A clerical error in an injunction does not excuse its violation. Ex parte Testard (Tex.), 106 S. W. 319.

468-43 S. v. Court, 29 Mont. 230, 74 P. 412.

468-44 Westinghouse etc. Co. v. Christensen E. Co., 128 Fed. 749; S. v. Court, 112 La. 182, 36 S. 315.

468-45 Informal dissolution of injunction may be shown. Coffey v. Gamble, 117 Ia. 545, 91 N. W. 813.

469-46 Unintentional error in publishing reports of court proceedings is not a defense. In re Providence J. Co. (R. I.), 68 A. 428.

470-52 "**Where the matter is abusive** or insulting, evidence that the language used was justified by the facts is not admissible as a defense." S. v. Reid, 118 La. 827, 43 S. 455.

The truth of the published matter is immaterial when it was calculated to influence the result of a pending case. Hughes v. Ter. (Ariz.), 85 P. 1058; Globe Newspaper Co. v. C., 188 Mass. 449, 74 N. E. 682.

Intent immaterial. — Globe Newspaper Co. v. C., supra; Telegram Newspaper Co. v. C., 172 Mass. 294, 52 N. E. 445.

470-53 Halfield v. King, 131 Fed. 791; Rutledge v. Waldo, 94 Fed. 265.

470-54 London G. & A. Co. v. Doyle, 134 Fed. 125; In re Strong, 111 App. Div. 281, 97 N. Y. S. 459, *aff.*, without opinion, 186 N. Y. 584, 79 N. E. 1116.

It is prima facie evidence of contempt to fail to comply with an order to pay alimony, and defendant has the burden of showing his inability. Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447.

471-55 American T. Co. v. Wallis, 126 Fed. 464, 16 C. C. A. 342; In re Goldfarb Bros., 131 Fed. 643; General E. Co. v. McLaren, 140 Fed. 876; Hollister v. P., 116 Ill. App. 338; Cornell v. S. (Neb.), 114 N. W. 294; Saal v. R. Co., 106 N. Y. S. 996.

471-56 S. v. Harris, 14 N. D. 501, 105 N. W. 621.

471-57 In re Davison, 143 Fed. 673; Wells v. Given, 126 Ia. 340, 102 N. W. 106.

Clear and conclusive. — S. v. Small (Or.), 90 P. 1110.

471-59 Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447.

472-60 A preponderance of evidence sufficient. O'Brien v. P., 216 Ill. 354, 75 N. E. 108; McBride v. P., 225 Ill. 315, 80 N. E. 306.

475-69 Crocker v. Conrey, 140 Cal. 213, 73 P. 1006.

475-72 See Ormond v. Ball, 120 Ga. 916, 48 S. E. 383.

475-73 Justice of the peace no authority to punish for disobeying a subpoena to attend for the taking of a deposition in an action pending in the superior court. Gay v. Thorpe, 1 Cal. App. 312, 82 P. 221. Nor for refusal to answer a proper question put to a deponent. Lawson v. Rowley, 185 Mass. 171, 69 N. E. 1082.

Committing magistrate is without authority. Farnham v. Colman, 19 S. D. 342, 103 N. W. 161.

Military courts martial. — See U. S. v. Praeger, 149 Fed. 474.

476-74 In re Archer, 134 Mich. 408, 96 N. W. 442; Ferriman v. P., 128 Ill. App. 230.

476-77 See Ex parte Caldwell, 138 Fed. 487, (*rev.* on another question, Carfer v. Caldwell, 200 U. S. 293.)

Legislative committee may be authorized to punish for contempt. Ex parte Parker, 74 S. C. 466, 55 S. E. 122.

477-79 Validity of statute giving power to punish, denied. S. v. Ryan, 182 Mo. 349, 81 S. W. 435.

478-80 Llewellyn's Case, 13 Pa. C. C. 126.

478-81 Ex parte Schoepf, 74 Ohio St. 1, 77 N. E. 276.

478-82 In re Butler (Neb.), 107 N. W. 572. See McIntyre v. P., 227 Ill. 26, 81 N. E. 33.

478-84 A referee in bankruptcy cannot punish for contempt. Bank v. Johnson, 143 Fed. 463, 74 C. C. A. 597.

478-85 United States commissioners have no power to punish for contempt. U. S. v. Beavers, 125 Fed. 778, *cit.* Ex parte Perkins, 29 Fed. 900; In re Perkins, 100 Fed. 950.

478-86 Ferriman v. P., 128 Ill. App. 230; S. v. Dalton, 43 Wash. 278, 86 P. 590.

Payment or tender of fees is sometimes essential to secure the attendance of witnesses. In re Boeshore, 125 Fed. 651; In re Kerber, 125 Fed. 653; Hollister v. P., 116 Ill. App. 338. It may not always be so in criminal cases. U. S. v. Durling, 4 Biss. 509, 25 Fed. Cas. 15,010. See "ATTENDANCE OF WITNESSES," Vol. 2, pp. 97, 107, and same title, ante.

479-90 McSwane v. Foreman, 167 Ind. 171, 78 N. E. 630.

Failure to appear before grand jury is a direct contempt. Ferriman v. P., 128 Ill. App. 230.

479-91 Overend v. Court, 131 Cal. 280, 63 P. 372.

479-93 Egilbert v. Court (Cal. App.), 91 P. 748; Consolidated C. Co. v. Jones, 120 Ill. App. 139.

Resignation of one who was a corporate officer is competent to show his inability to produce the corporate books. U. S. v. R. Co., 85 Fed. 955; Egilbert v. Court, supra.

Mere inconvenience to a person subpoened as a witness will not excuse his failure to attend; the facts which justify his absence must be serious and substantial and satisfactory to the court. Ferriman v. P., 128 Ill. App. 230.

480-94 In re Depue, 185 N. Y. 60, 77 N. E. 798.

481-96 **A party** is not bound to attend at his own house for examination as a witness before trial, and may lock it and leave without waiving his right to have it considered his castle. McSwane v. Foreman, 167 Ind. 171, 78 N. E. 630.

481-97 In re Fellerman, 149 Fed. 244.

485-9 Ex parte Schoepf, 74 Ohio St. 1, 77 N. E. 276.

485-10 Succession of Desina, 118 La. 278, 42 S. 936; In re Randall, 90 App. Div. 192, 85 N. Y. S. 1089; Lindsay v. Allen, 113 Tenn. 517, 82 S. W. 648.

Irrelevancy of a question does not authorize a witness to refuse to answer. Ex parte Butt, 78 Ark. 262, 93 S. W. 992.

486-11 Bowker v. Haight, 146 Fed. 256; Overend v. Court, 131 Cal. 280, 63 P. 372; In re Rogers, 129 Cal. 468, 62 P. 47; Consol. C. Co. v. Jones, 120 Ill. App. 139; Bentley v. P., 104 id. 353, 107 id. 245; Ex parte Schoepf, 74 Ohio St. 1, 77 N. E. 276; Ex parte Parker, 74 S. C. 466, 55 S. E. 122.

487-13 **It is not a good objection** that the order served is too broad. Consol. R. Co. v. S., 207 U. S. 541.

487-14 Bowker v. Haight, 146 Fed. 256; In re Johnson Co., 151 Fed. 207, 80 C. C. A. 259; U. S. v. Praeger, 149 Fed. 474; Ex parte Butt, 78 Ark. 262, 93 S. W. 992; Rogers v. Court, 145 Cal. 88, 78 P. 344; Kanter v. Clerk, 108 Ill. App. 287; Louisville etc. R. Co. v. Schwab, 31 Ky. L. R. 1313, 105 S. W. 110; In re Morse, 42 Misc. 664, 87 N. Y. S. 721; Walters v. R. Co. (Wash.), 93 P. 419.

Immunity under federal statutes. See Hale v. Henkel, 201 U. S. 43; Nelson v. U. S., 201 U. S. 92.

Corporate privilege. — See Consol. R. Co. v. S., 207 U. S. 541.

Decision of military court martial that the questions put to a civilian witness could be answered without incriminating him is not conclusive on civil courts. U. S. v. Praeger, 149 Fed. 474.

487-15 Elliott v. U. S., 23 App. D. C. 456; Ex parte Schoepf, 74 Ohio St. 1, 77 N. E. 276.

488-16 **Objection** to the relevancy or competency of the evidence sought may be made by the witness though he is not a party; if the witness undertakes to decide whether he has been lawfully ordered to answer, he does so at his peril. Ex parte Schoepf, supra.

A mere witness has no right to object to the testimony, the tendency or effect of which is no concern of his. The basis of his privilege is entirely personal. Nelson v. U. S., 201 U. S. 92, 115. But see Fenn v. R. Co., 122 Ga. 280, 50 S. E. 103.

489-17 In re Morse, 42 Misc. 664, 87 N. Y. S. 721.

As to production of corporate books. See Consolidated R. Co. v. S., 207 U. S. 541.

490-19 Ex parte Parker, 74 S. C. 466, 55 S. E. 122.

493-27 **Advice of counsel** that answer might subject witness to prosecution is excuse where liability depends upon wilful refusal to answer. U. S. v. Praeger, 149 Fed. 474.

494-31 In re Fellerman, 149 Fed. 244.

The test is said to be, in an examination concerning the property of a bankrupt, whether a reasonable man would believe the story told by him. Ex parte Lord, 16 M. & W. (Eng.) 468; In re Fellerman, supra.

494-33 **A general statement** by one called to give his deposition that, on advice of counsel, he will answer no questions does not constitute contempt, no question being put. Ex parte Green, 126 Mo. App. 309, 103 S. W. 503.

501-50 **Commitment** must be in substantial compliance with statute. P. v. Court, 147 N. Y. 290, 41 N. E. 700; In re Depue, 185 N. Y. 60, 77 N. E. 789.

503-55 In re Debs, 158 U. S. 564; Otis v. Court, 148 Cal. 129, 82 P. 853; Ex parte Clark, 208 Mo. 121, 106 S. W. 990; Seastream v. New Jersey Ex. Co. (N. J. L.), 65 A. 982; In re Young, 137 N. C. 552, 50 S. E. 220; Patterson v. Council, 31 Pa. Super. 112; Forbes v. Council, 107 Va. 853, 60 S. E. 81.

Writ of error lies to the circuit court of appeals to review a judgment of a district or circuit court adjudging a person not a party to the action in which the disobeyed order was made guilty of contempt. Bessette v. Conkey, 194 U. S. 324. And so where a fine is imposed on one who was a party. Bullock etc. Co. v. Electric Co., 129 Fed. 105, 63 C. C. A. 607. A writ of error lies in Massachusetts. Hurley v. C., 188 Mass. 443, 74 N. E. 677; Globe N. Co. v. C., 188 Mass. 449, 74 N. E. 682.

In Wisconsin an appeal lies from an order in a civil proceeding for the purpose of reviewing the judgment concerning the violation thereof. Vilter Mfg. Co. v. Humphrey (Wis.), 112 N. W. 1095.

The legality of the punishment imposed will be inquired into, but not the merits. French v. C., 30 Ky. L. R. 98, 97 S. W. 427.

503-56 For the rule in equity, see Hake v. P., 230 Ill. 174, 82 N. E. 561.

504-59 Ex parte Butt, 78 Ark. 262, 93 S. W. 992; Wells v. Given, 126 Ia. 340, 102 N. W. 106; Garrett v. Bishop, 113 Ia. 23, 84 N. W. 923; Coffey v. Gamble, 117 Ia. 545, 91 N. W. 813.

A judgment in habeas corpus proceedings does not bar a review upon certiorari. Rogers v. Court, 145 Cal. 88, 78 P. 344.

505-61 In re Ayers, 123 U. S. 443, 485; Cuyler v. R. Co., 131 Fed. 95; Ex parte Shortridge (Cal. App.), 90 P. 478; Elliott v. U. S., 23 App. D. C. 456; In re Jewett, 69 Kan. 830, 77 P. 567; Ex parte Clark, 208 Mo. 121, 106 S. W. 990.

508-65 Ex parte Brown, 3 Ariz. 411, 77 P. 489; Elliott v. U. S., 23 App. D. C. 456; Perry v. Pernet, 165 Ind. 67, 74 N. E. 609; P. v. Feenaughty, 51 Misc. 468, 101 N. Y. S. 700; Ex parte Testard (Tex.), 106 S. W. 319.

508-66 Ex parte McCown, 139 N. C. 95, 51 S. E. 957, 2 L. R. A. (N. S.) 603.

On waiving the right to take testimony recitals in the record become verities. Ex parte Clark, 208 Mo. 121, 106 S. W. 990.

The facts set out in the order of commitment cannot be controverted. Ex parte Shortridge (Cal. App.), 90 P. 478.

508-67 Carfer v. Caldwell, 200 U. S. 293.

509-70 Matter of Depue, 185 N. Y. 60, 77 N. E. 798; Mylius v. McDonald, 61 W. Va. 405, 56 S. E. 602.

509-72 Gay v. Thorpe, 1 Cal. App. 312, 82 P. 221; Powhatan C. & C. Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257.

CONTRACTS [Vol. 3.]

Quantum of evidence to show parol, 512-1; *Contract with decedent,* 512-1; *Contract over tel-*

cphone, 512-1; *Implied, by accepting services,* 512-2; *Issue as to whether contract in writing,* 512-5; *Rules of employer as affecting the making of,* 512-5; *Post-contractual declarations competent,* 521-36; *Evidence of usual price competent as to terms,* 524-44.

512-1 McCoy v. S., 124 Ga. 218, 52 S. E. 434; Heartt v. Sherman, 229 Ill. 581, 82 N. E. 417; Smith v. Richardson, 31 Ky. L. R. 1082, 104 S. W. 705; Somerset Nat. Bk. v. Brinkley, 24 Ky. L. R. 2088, 72 S. W. 1129; Bell v. Peper Co., 205 Mo. 475, 103 S. W. 1014; Blair v. Minzesheimer, 108 N. Y. S. 799; Hartford Ins. Co. v. Whitman, 75 Ohio St. 312, 79 N. E. 459; Johnson v. Wanamaker, 17 Pa. Super. 301; Mosher v. Moyer, 22 Pa. 586; Ables v. Terrell (Tex. Civ.), 85 S. W. 1010; Anderson v. Arpin Co., 131 Wis. 34, 110 N. W. 789.

The words used need not be shown to have been clearly expressed. Stobie v. Earp, 110 Mo. App. 73, 83 S. W. 1097; Zitske v. Grohn, 128 Wis. 159, 107 N. W. 20.

Quantum of evidence to show parol. Contract need not be shown to a reasonable certainty; to the reasonable satisfaction of the jury is enough. Eagle I. Co. v. Baugh, 147 Ala. 613, 41 S. 663. An oral contract to convey land must be clearly shown. Watson v. Watson, 225 Ill. 412, 80 N. E. 332; Russell v. Sharp, 192 Mo. 270, 91 S. W. 134.

Contract with decedent. — The clearest and most convincing evidence is essential to establish a parol contract with a deceased person. Rosseau v. Rouss, 180 N. Y. 116, 72 N. E. 916; Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Mahaney v. Carr, 175 N. Y. 454, 67 N. E. 903; Ide v. Brown, 178 N. Y. 26, 70 N. E. 101; Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265.

Contract over telephone. — A contract made over a telephone is not proved by the evidence of one of the parties to the conversation unless it shows recognition of the voice of the other party, it not being otherwise shown that the contract was made. Planters' Co. v. Tel. Co., 126 Ga. 621, 55 S. E. 495. See Young v. Tel. Co., 33 Wash. 225, 74 P. 375; and "Admissions," Vol. 1, pp. 348, 604, and that title, ante 604-41.

Evidence as to the need of doing what is alleged to have been contracted for is immaterial. Morris v. R. Co. (Ala.), 43 S. 483.

512-2 Cummins v. Ennis, 4 Penne. (Del.) 424, 56 A. 377; McMorrow v. Dowdell, 116 Mo. App. 289, 90 S. W. 728.

Implied, by accepting service. — An exception to the rule is recognized where services are rendered and accepted in the absence of the existence of a family relation. Fitzpatrick v. Dooley, 112 Mo. App. 165, 86 S. W. 719; McMorrow v. Dowdell, 116 Mo. App. 289, 90 S. W. 728; Bowcas v. Cooke, (1903) 2 K. B. (Eng.) 227.

It is presumed that a voluntary payment of money by a father to his child is a gift. Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597.

512-3 Boogher v. Roach, 25 App. D. C. 324.

512-4 Romero v. Min. Co., 113 La. 110, 36 S. 907; Cook v. Littlefield, 98 Me. 299, 56 A. 899; Dowagiac Mfg. Co. v. Watson, 90 Minn. 100, 95 N. W. 884; Leary v. Moore, 48 Misc. 551, 96 N. Y. S. 266; Kneipper v. Richards, 7 Ohio C. C. (N. S.) 581.

Contract by corporation may be shown by parol if records are silent. Selley v. L. Co., 119 Ia. 591, 93 N. W. 590; Nye v. Pittsburg Co., 2 Pa. Super. 384.

512-5 Brown v. Brown Co., 150 Cal. 376, 89 P. 86; General H. S. v. R. Co., 79 Conn. 581, 65 A. 1065; Slobie v. Earp, 110 Mo. App. 73, 83 S. W. 1097; Osborne v. Walley, 8 Pa. Super. 193.

Issue as to whether contract in writing. — Parol evidence is prima facie competent to sustain the contention that the contract was not put in writing; if the contrary is shown such evidence will be excluded. Kehlor v. Wilton, 99 Ill. App. 228; Blankenship v. Decker, 34 Mont. 292, 85 P. 1035.

Rules of employer as affecting the making of. — The rules of an em-

ployer concerning the course to be taken with applications for employment are immaterial so far as proof of the contract is concerned. International H. Co. v. Campbell (Tex. Civ.), 96 S. W. 93.

513-7 Metropolitan C. Co. v. Boutell (Mass.), 81 N. E. 645; North etc. Co. v. Lynch (Mass.), 81 N. E. 891.

A form of contract assented to but not signed is competent to prove an oral contract (Featherstone etc. Co. v. Criswell, 36 Ind. App. 681, 75 N. E. 30), if assent to it be shown. Holland v. Ryan, 92 N. Y. S. 242.

A written contract which imperfectly embodies the parol agreement of the parties does not bar parol proof thereof, so far as not inconsistent with the writing. Cooper v. Payne, 186 N. Y. 334, 78 N. E. 1076; Johnson v. Bank, 12 N. D. 336, 96 N. W. 588.

513-8 International H. Co. v. Campbell (Tex. Civ.), 96 S. W. 93; Zitske v. Grohn, 128 Wis. 159, 107 N. W. 20.

513-9 Cornelius v. R. Co., 74 Kan. 599, 87 P. 751.

Consent to alteration of a contract is a question of fact, and a party may testify as to giving it. Providence M. Co. v. Browning, 72 S. C. 24, 52 S. E. 117.

513-12 Idaho M. Co. v. Kalanguin, 8 Idaho 101, 66 P. 933; Smith v. Richardson, 31 Ky. L. R. 1082, 104 S. W. 705; Winans v. Bunnell, 13 Pa. Super. 445; Chilcott v. C. Co. (Wash.), 88 P. 113.

Previous relations of the parties may be shown as explanatory of their later attitude toward each other. Selley v. L. Co., 119 Ia. 591, 93 N. W. 590.

514-13 Minick v. Gring, 1 Pa. Super. 484.

514-14 Manary v. Rungon, 43 Or. 495, 73 P. 1028; Chilcott v. C. Co. (Wash.), 88 P. 113.

515-15 Subsequent admissions competent. — Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597.

A paper prepared by one of the parties, if not a self-serving statement, may be competent evidence of collateral facts. Glassberg v. Olsen, 89 Minn. 195, 94 N. W. 554.

515-16 Eagle Co. v. Baugh, 147 Ala. 613, 41 S. 663.

515-17 McNamara v. Douglas, 78 Conn. 219, 61 A. 368.

515-18 Hightower v. Ansley, 126 Ga. 8, 54 S. E. 939; Heartt v. Sherman, 229 Ill. 581, 82 N. E. 417; Leary v. Moore, 48 Misc. 551, 96 N. Y. S. 266; Morgan v. Tims (Tex. Civ.), 97 S. W. 823.

Oral admissions will sustain a finding that a contract was made. Rigdon v. More, 226 Ill. 382, 80 N. E. 901. They are at least competent. Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597; Morgan v. Tims (Tex. Civ.), 97 S. W. 832. If casually made, are not entitled to much weight. Russell v. Sharp, 192 Mo. 270, 91 S. W. 134.

Admission by silence cannot be shown unless the party was called upon to speak. Pond v. Pond, 79 Vt. 352, 65 A. 97. Such an admission may be explained. Anderson v. Arpin, 131 Wis. 34, 110 N. W. 788.

Admissions in the form of receipts are not conclusive as to the terms of a contract. Brown v. Crown Co., 150 Cal. 376, 89 P. 86.

Are written admissions competent to establish a contract required to be in writing? See Winders v. Hill, 144 N. C. 614, 617, 57 S. E. 456.

516-19 Leonard v. Gillette, 79 Conn. 664, 66 A. 502; Rogers v. Hart, 106 Ill. App. 393; Stobie v. Earp, 110 Mo. App. 73, 83 S. W. 1097; McMorrow v. Dowdell, 116 Mo. App. 289, 90 S. W. 728; Fitzpatrick v. Dooley, 112 Mo. App. 165, 85 S. W. 719; Broadwell v. Conover, 186 N. Y. 429, 79 N. E. 402; Walker v. Dickey (Tex. Civ.), 98 S. W. 658.

Payment for services may be proven to show a renewal of the contract. Fish v. Marzluff, 128 Ill. App. 549.

517-20 See Albins v. Gheens, 31 Ky. L. R. 4, 101 S. W. 297.

517-21 Idaho M. Co. v. Kalanguin, 8 Idaho 101, 66 P. 933; Ballard v. H. Co., 30 Ky. L. R. 1080, 100 S. W. 271.

518-22 Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597; Russell v. Sharp, 192 Mo. 270, 91 S. W. 134; Blair v. Minzesheimer, 108 N. Y. S. 799.

Impossibility of performance may be proven. McNamara v. Douglas, 78 Conn. 219, 61 A. 368.

519-24 International H. Co. v. Campbell (Tex. Civ.), 96 S. W. 93.

519-25 Brown v. Crown Co., 150 Cal. 376, 89 P. 86; Romero v. M. & D. Co., 113 La. 110, 36 S. 907; North P. & P. Co. v. Lynch (Mass.), 81 N. E. 891; Stitt v. Portage Co., 101 Minn. 93, 111 N. W. 948; Johnson v. Wanamaker, 17 Pa. Super. 301.

Burden of showing the terms is on the party who relies on the contract. Central E. Co. v. Sprague Co., 120 Fed. 925, 57 C. C. A. 197.

Inference. — The terms of a parol agreement, in the absence of direct evidence, are a matter of inference, and not a question of law. Lawrence & B. v. Aflalo, (1904) App. Cas. (Eng.) 17.

No presumption arises that contract is incomplete because the parties to it disagree as to its terms. Johnson v. Wanamaker, 17 Pa. Super. 301. See ante, 512-1.

A promise to repay money may be shown as tending to establish the terms of the contract sued upon. Morse v. Odell (Or.), 89 P. 139.

519-26 Featherstone etc. Co. v. Criswell, 36 Ind. App. 681, 75 N. E. 30.

Correspondence subsequent to the contract is not binding as to its terms. Leary v. Moore, 48 Misc. 551, 96 N. Y. S. 266, *cit.* Brigg v. Hilton, 99 N. Y. 517, 526, 3 N. E. 51, 52 Am. Rep. 63; Lichtenstein v. Rabolinsky, 75 App. Div. 66, 77 N. Y. S. 792.

520-29 Statements made by a witness to a third party are incompetent. Cathcart v. Webb, 144 Ala. 559, 42 S. 25.

520-30 See Anderson v. Arpin Co., 131 Wis. 34, 110 N. W. 788.

520-32 Ivey v. Cotton Mills, 143 N. C. 189, 55 S. E. 613.

521-35 Providence M. Co. v. Browning, 72 S. C. 424, 52 S. E. 117.

An incomplete contract between two of the parties and record entries showing a confession of judgment and the proceedings thereunder are admissible. Moore v. Bank, 139 Ala. 595, 609, 36 S. 777.

521-36 Anderson v. Arpin Co., 131 Wis. 34, 110 N. W. 788.

Post-contractual declarations competent. — The rule as stated in the text does not apply in case of a contract for continuous employment; in such a case declarations of the managing agent made during the course of the employment may be proven to show the terms of the contract. Brown v. Crown Co., 150 Cal. 376, 387, 89 P. 86.

521-37 Hudson v. Rodgers, 121 Mo. App. 168, 98 S. W. 778; Morgan v. Tims (Tex. Civ.), 97 S. W. 832; Chilcott v. C. Co. (Wash.), 88 P. 113.

523-41 Jost v. Wolf, 130 Wis. 37, 110 N. W. 232; Lathrop v. Humble, 120 Wis. 331, 97 N. W. 905.

523-42 Guglielino v. Cahill, 185 Mass. 375, 70 N. E. 435; Daly v. Dallmeyer, 20 Pa. Super. 366; Johnson v. Wanamaker, 17 Pa. Super. 301; Wheeler v. Buick, 23 Wash. 679, 63 P. 566; Dimmick v. Collins, 24 Wash. 78, 63 P. 1101.

The character and extent of the business of an employer may be shown on the issue as to the salary stipulated to be paid for services. McCowan v. N. S. Co., 41 Wash. 675, 84 P. 614.

524-44 Evidence of usual price competent as to terms. — Evidence as to custom of paying commissions on goods sold to parties brought to a store, admissible if uniform, notorious and reasonable. Heistand v. Bateman (Colo.), 91 P. 1111. There being a controversy as to the compensation agreed upon, evidence is competent to show what is usually paid for like services as those rendered. Standard P. E. Co. v. Brumley, 149 Fed. 184, 79 C. C. A. 132, *cit.* Campan v. Moran, 31 Mich. 280; Barney v. Fuller, 133 N. Y. 605, 30 N. E. 1007; Allison v. Horning, 22 Ohio St. 138. In Wisconsin such evidence is inadmissible unless the difference in the price is so great that the reasonable value thereof, from the standpoint of the parties when the contract was made, may reasonably discredit the evidence on the one side and corroborate that on the other. Anderson v. Arpin Co., 131 Wis. 34, 110 N. W. 788. In that state and some others evidence of

the value of services or property, the subject of the alleged contract, is admissible if the disparity in the contentions of the parties is large. Anderson v. Arpin Co., supra; Valley L. Co. v. Smith, 71 Wis. 304, 37 N. W. 412, 5 Am. St. 216; Swain v. Cheny, 41 N. H. 232; Kidder v. Smith, 34 Vt. 294; Short v. Cure, 100 Mich. 418, 59 N. W. 173; Bell v. Radford, 72 Wis. 402, 39 N. W. 482; Mygatt v. Tarbell, 85 Wis. 457, 55 N. W. 1031. See "VALUE." Silence of contract as to time for payments may be aided by proof of the time usually fixed therefor in contracts for like services. Standard etc. Co. v. Brumley, 149 Fed. 184, 79 C. C. A. 132. The admissibility of such evidence is largely within the discretion of the trial court, which discretion will not be interfered with unless clearly wrong. Anderson v. Arpin Co., supra.

524-46 Featherstone etc. Co. v. Criswell, 36 Ind. App. 681, 75 N. E. 30.

Custom of employer may be shown on issue as to term of contract for service. Arkadelphia L. Co. v. Asman (Ark.), 107 S. W. 1171.

525-49 Burden of proof. — If the contract sued upon is set out in the complaint and there is no plea of non est factum, the plaintiff is relieved of the burden of proving the execution of the contract. Garrison v. Glass, 139 Ala. 512, 36 S. 725; Cutten v. Pearsall, 146 Cal. 690, 81 P. 25.

526-60 Cave v. Hastings, L. R. 7 Q. B. D. (Eng.) 125; Dobell v. Hutchinson, 3 Ad. & El. (Eng.) 355; Nelson v. Willey, 97 Md. 373, 55 A. 527.

All writings executed by and between the parties on the same day are admissible. Kampmann v. McCormick (Tex. Civ.), 99 S. W. 1147.

If a contract is evidenced by more than one writing all the papers are to be read together and construed as one. Gould v. Metal Co., 207 Ill. 172, 69 N. E. 896.

The meaning of the term "assets," as used in an order of sale, may be shown by an itemized inventory made for and used in connection with the sale. Illinois S. Co. v. Preble Co., 219 Ill. 403, 76 N. E. 574.

526-62 Ivey v. Cotton Mills, 143 N. C. 189, 55 S. E. 613; Barton-P. Mfg. Co. v. M. Co., 18 Okla. 137, 89 P. 1128.

Making of written contract may be shown by parol when contract only collaterally involved. S. v. McKinnon, 99 Me. 166, 58 A. 1028.

527-65 Cummins v. Ennis, 4 Penne. (Del.) 424, 56 A. 377.

Conclusion of witness incompetent. McCoy v. S., 124 Ga. 218, 52 S. E. 434.

Admission in answer is conclusive. Grant v. Pratt, 87 App. Div. 490, 84 N. Y. S. 983.

528-70 Party seeking recovery on contract must show full performance, nothing being admitted in the answer, and plaintiff having put the contract in evidence. Vernon v. V. P. C. Co., 119 App. Div. 39, 103 N. Y. S. 876; Cincinnati etc. R. Co. v. Baker, 130 Ill. App. 414.

528-72 Proof must be clear and show acts and conduct which are positive, unequivocal and inconsistent with any rights under the contract. May v. Getty, 140 N. C. 310, 53 S. E. 75.

Forfeiture. — The party who excuses non-performance because the contract was wrongfully forfeited must sustain his allegation. Harley v. Dist., 226 Ill. 213, 80 N. E. 771.

CONTRADICTION OF WITNESSES [Vol. 3.]

530-2 Christian v. R. Co., 120 Ga. 314, 47 S. E. 923; Kohl v. Bradley Co., 130 Wis. 301, 110 N. W. 265.

531-3 Christian v. R. Co., supra.

531-4 Mississippi G. Co. v. Franzen, 143 Fed. 501, 74 C. C. A. 135; Santer v. Anderson, 112 Ill. App. 580; Southern R. Co. v. Goddard, 28 Ky. L. R. 523, 89 S. W. 675; C. v. Devaney, 182 Mass. 33, 64 N. E. 402; Imhoff v. McArthur, 146 Mo. 371, 48 S. W. 456; Eastern L. Co. v. Gill, 9 Pa. C. C. 630; Jeter v. S. (Tex. Cr.), 106 S. W. 371. But see Alcolm Co. v. Brenack, 96 N. Y. S. 1055.

532-5 Boles v. P., 37 Colo. 41, 86 P. 1030; Atlantic C. L. R. v. Cross-

by, 53 Fla. 400, 43 S. 318; S. v. Sweeney, 75 Kan. 265, 88 P. 1078; French v. C., 30 Ky L. R. 98, 97 S. W. 427; Feltner v. C., 23 Ky. L. R. 1110, 64 S. W. 959; Finn v. New England Co., 101 Me. 279, 64 A. 490; S. v. Valle, 196 Mo. 29, 93 S. W. 1115; S. v. Murphy, 201 Mo. 691, 100 S. W. 414; Johnston v. Spencer, 51 Neb. 198, 70 N. W. 982; S. v. Jones, 74 S. C. 456, 54 S. E. 1017; Keener v. S. (Tex. Cr.), 103 S. W. 904; Rice v. S. (Tex. Cr.), 103 S. W. 1156; Gulf etc R. Co. v. Matthews (Tex. Civ.), 89 S. W. 983; Norfolk Co. v. Carr, 106 Va. 508, 56 S. E. 276; Robinson v. Kistler (W. Va.), 59 S. E. 505; Earley v. Winn, 129 Wis. 291, 109 N. W. 633; Dunham v. Salmon, 130 Wis. 164, 109 N. W. 959; See Moody v. Peirano, 4 Cal. App. 411, 88 P. 380.

Discretion of court. — The rule is not absolute. Salem News Pub. Co. v. Caliga, 144 Fed. 965, 75 C. C. A. 673.

533-7 Choctaw R. Co. v. Newton, 140 Fed. 225, 249, 71 C. C. A. 655; Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916; Chicago R. Co. v. Gregory, 221 Ill. 591, 77 N. E. 1112.

Argument against integrity of witness is prohibited. Choctaw R. Co. v. Newton, supra, *cit.* Ashley v. Board, 83 Fed. 534, 27 C. C. A. 585; Graves v. Davenport, 50 Fed. 881; U. S. v. Budd, 144 U. S. 154.

Contradiction is not impeachment. Chicago R. Co. v. Ryan, 225 Ill. 287, 80 N. E. 116.

533-8 P. v. Cook, 148 Cal. 334, 83 P. 43; S. v. Fowler, 13 Idaho 317, 89 P. 757; Diffenderfer v. Scott, 5 Ind. App. 243, 32 N. E. 87; Dukes v. Davis, 30 Ky. L. R. 1348, 101 S. W. 390; Garrison v. C., 29 Ky. L. R. 411, 93 S. W. 594; Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958; Selover v. Bryant, 54 Minn. 434, 56 N. W. 58, 40 Am. St. 349, 21 L. R. A. 418; S. v. Sederstrom, 99 Minn. 234, 109 N. W. 113; P. v. Smtih, 113 App. Div. 396, 99 N. Y. S. 118; Gould v. Ins. Co., 114 App. Div. 312, 99 N. Y. S. 833; S. v. Jennings, 48 Or. 483, 87 P. 524, 89 P. 421; Weaver v. S., 46 Tex. Cr. 607, 81 S. W. 39; Gallegos v. S., 48 Tex. Cr. 58, 85 S. W. 1150; Dallas R. Co. v. McAllister (Tex. Civ.), 90 S. W. 933; Jeter v. S. (Tex. Cr.), 106 S. W. 371.

535-9 See Beier v. T. Co., 197 Mo. 215 94 S. W. 876.

535-10 Contradiction not allowed. Pooler v. Smith, 73 S. C. 102, 52 S. E. 967; (but *compare* S. v. Waldrop, 73 S. C. 60, 52 S. E. 793); O'Doherty v. Tel. Co., 113 App. Div. 636, 99 N. Y. S. 351, *cit.* Coulter v. E. Co., 56 N. Y. 585; Nichols v. White, 85 N. Y. 531, and *dist.* Fall Brook Co. v. Hewson, 158 N. Y. 150, 52 N. E. 1095, 70 Am. St. 466, 43 L. R. A. 676, and Hubner v. R. Co., 77 App. Div. 290, 79 N. Y. S. 153 *aff.*, without opinion, 177 N. Y. 523, 69 N. E. 1124.

The rule extends to testimony of a party's own witness given on cross-examination to the surprise of the party. Southern R. Co. v. Goddard, 28 Ky. L. R. 523, 89 S. W. 675.

Contradictory statements may be shown. — Brown v. S. 142 Ala. 287, 38 S. 268; Birmingham R. Co. v. Mason, 144 Ala. 387, 39 S. 590; Bradley v. Graham, 77 Conn, 211, 58 A. 698; Illinois R. Co. v. Wade, 206 Ill. 523, 69 N. E. 565.

Evidence competent only to contradict; not substantive evidence against party contradicted. Fuqua v. C., 24 Ky. L. R. 2204, 73 S. W. 782; Hutchins v. Murphy, 146 Mich. 621, 110 N. W. 52.

Failure to state facts supposed to be beneficial is not cause for contradicting a witness. Quinn v. S. (Tex. Cr.), 101 S. W. 248; Feltner v. C., 23 Ky. L. R. 1110, 64 S. W. 959; Ozark v. S. (Tex. Cr.), 100 S. W. 927; Willis v. S., 49 Tex. Cr. 139, 90 W. 100; P. v. Creeks, 141 Cal. 529, 75 P. 101; P. v. Cook, 148 Cal. 334, 83 P. 43. In such a case the state cannot read the testimony of a witness on a former trial and ask if it was not what he testified to and if it was not true. C. v. Bavarian B. Co., 26 Ky. L. R. 121, 80 S. W. 772.

535-11 Lowry v. C., 119 Ky. 691, 63 S. W. 977; Dunk v. S., 84 Miss. 452, 36 S. 609; Beier v. T. Co., 197 Mo. 215, 94 S. W. 876; Clancy v. T. Co., 192 Mo. 615, 91 S. W. 509; C. v. Wickett, 20 Pa. Super. 350; Gray v. Hartman, 6 Pa. Super. 195; Benson v. S. (Tex. Cr.), 103 S. W. 911.

536-12 Montgomery v. Knox, 23 Fla. 595, 3 S. 211; Diffenderfer v.

Scott, 5 Ind. App. 243, 32 N. E. 87; C. v. Wickett, 20 Pa. Super. 350.

COPIES [Vol. 3.]

539-1 See Fleet v. Hertz, 201 Ill. 594, 66 N. E. 858; Simonds v. Cash, 136 Mich, 558, 99 N. W. 754; Madera R. Co. v. Raymond G. Co. 3 Cal. App. 668. 87 P. 27.

539-2 To show alterations. — Ritter v. S., 70 Ark. 472, 69 S. W. 262. See Kimball Co. v. Piper, 111 Ill. App. 82.

539-4 See "BEST AND SECONDARY EVIDENCE," Vol. 2, p. 284, note 24. **Duplicate or triplicate** although made by carbon, admissible as original. Hopkins v. S., 52 Fla. 39, 42 S. 52; Cole v. Ellwood P. Co., 216 Pa. 283, 65 A. 678 (notice); Virginia-C. C. Co. v. Knight, 106 Va. 674, 56 S. E. 725; Chesapeake & O. R. Co. v. Stock, 104 Va. 97, 51 S. E. 161; International H. Co. v. Elfstrom, 101 Minn. 263, 112 N. W. 252 (distinguishing letter-press copies). See Harmon v. Ter., 15 Okla. 147, 79 P. 765.

Architect's blue prints. — Lincoln S. Dist. v. Fiske, 61 Neb. 3, 84 N. W. 401.

540-9 Where printed notice of reward has been posted, the best evidence of such posted reward is one that has been actually posted, not a printed copy. Palatine Co. v. Mere. Co. (N. M.), 82 P. 363.

540-11 International H. Co. v. Elfstrom, 101 Minn. 263, 112 N. W. 252; Chesapeake & O. R. Co. v. Stock, 104 Va. 97, 51 S. E. 161. See Leidigh & H. L. Co. v. Clark, 78 Ark. 539, 94 S. W. 686. *Contra*, Chesapeake & O. R. Co. v. Stock, 104 Va. 97, 51 S. E. 161 (*cit.* Hubbard v. Russell, 24 Barb. (N. Y.) 404). See also Virginia-C. C. Co. v. Knight, 106 Va. 674, 56 S. E. 725.

When letter-press book is original, as when it constitutes a weather-bureau record, it is competent primary evidence. Chicago R. Co. v. Zapp, 209 Ill. 339, 70 N. E. 623.

Letter-book competent to prove its own contents. Continental Nat. Bk. v. Moore, 83 App. Div. 419, 82 N. Y. S. 302.

542-14 Copies though furnished by the company's agents are secondary evidence. Western U. T. Co. v. Kapp, 35 Tex. Civ. 663, 80 S. W. 840.

543-21 Hartford F. Ins. Co. v. Enoch, 72 Ark. 47, 77 S. W. 899; Pape v. Ferguson, 28 Ind. App. 298, 62 N. E. 712; Peycke v. Shinn, 68 Neb. 343, 94 N. W. 135; Bower v. Cohen, 126 Ga. 35, 54 S. E. 918; Rudgear v. Leather Co., 206 Ill. 74, 69 N. E. 30. See Chicago etc. Co. v. Moran, 210 Ill. 9, 71 N. E. 38.

543-22 Proctor & G. Co. v. Blakely, 128 Ga. 606, 57 S. E. 879.

543-23 Hartford F. I. Co. v. Enoch, 72 Ark. 47, 77 S. W. 899.

Proper foundation for use of letter-press copy. Union S. & G. Co. v. Tenney, 200 Ill. 349, 65 N. E. 688.

Notice unnecessary when possession of original is denied. Kohl v. Bradley, 130 Wis. 301, 110 N. W. 265.

543-26 Proctor & G. Co. v. Blakely, 128 Ga. 606, 57 S. E. 879.

544-31 Printed blank supplemented by testimony as to what was filled into the original, is competent. Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803.

544-33 See Ruddock C. Co. v. Peyret, 113 La. 867, 37 S. 858.

546-39 Peycke v. Shinn, 68 Neb. 343, 94 N. W. 135.

547-41 Blank form. — Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803.

549-49 Kenniff v. Caulfield, supra.

COPYRIGHT [Vol. 3.]

551-2 Mifflin v. Dutton, 190 U. S. 265.

551-4 A general allegation of compliance with the statute is not enough; it must be alleged specifically that the things required were done. Ford v. Amusement Co., 148 Fed. 642.

552-7 Filing title of a magazine covers such articles in it as were written or owned by the proprietor. Ford v. Amusement Co., supra, *cit.* Bennett v. Traveler Co., 101 Fed. 445, 41 C. C. A. 445. It covers all articles. Harper Bros. v. Donohue Co., 144 Fed. 491.

553-25 Mifflin v. White Co., 190 U. S. 260. See Merriam Co. v. Dic-

tionary Co., 146 Fed. 354, 76 C. C. A. 470, as to notice of book copyrighted in England.

554-32 **In Ontario** a certified copy of the entry at Stationers' Hall is prima facie evidence of proprietorship under the statute, and it is not required to make a prima facie case to prove the facts making the statute a condition precedent to the vesting of the copyright in another than the author. Black v. Imperial Co., 8 Ont. L. R. (Can.) 9.

554-33 **It is an inference of fact** whether the publisher of an encyclopaedia who employs and pays writers for preparing articles for it, which articles they copyright and the publisher copyrights the encyclopaedia, obtains the exclusive right to produce the articles. In the absence of special circumstances the inference will be in favor of the publisher. Lawrence & B. v. Aflalo, (1904) App. Cas. (Eng.) 17. But such circumstances exist where the author of an article published in a magazine soon after publication enters it for a copyright under his name. Mifflin v. White Co., 190 U. S. 260.

555-36 **In England** the right to copyright a photograph is in the sitter, though the negative may be the property of the photographer. Boucas v. Cooke, (1903) 2 K. B. (Eng.) 227; Starckemann v. Paton, (1906), 1 Ch. (Eng.) 774.

556-45 Cadieux v. Beaucheman, 31 Can. Sup. 370.

557-54 Sampson Co. v. S. R. Co., 134 Fed. 890.

558-61 Moffatt v. Gill, 86 L. T. (Eng.) 465; Hartford Co. v. Hartford Co., 146 Fed. 332; Sampson v. S. R. Co., supra; Thompson Co. v. Law Book Co., 122 Fed. 922, 59 C. C. A. 148; Dun v. Merc. Agency, 127 Fed. 173. See Social R. Assn. v. Murphy, 128 Fed. 116.

558-62 Sampson v. S. R. Co., supra.

558-63 **An injunction** may issue on proof that three pages of complainant's book were prepared for use as copy by defendant, in the absence of clear proof of an intention not to use them as such. Chicago Co. v. U. S. Co., 122 Fed. 189.

559-67 Cadieux v. Beaucheman, 31 Can. Sup. 370; Encyclopaedia B. Co. v. Assn., 130 Fed. 460; Hubges v. Belasco, 130 Fed. 388; Hartford P. Co. v. Hartford Co., 146 Fed. 332.

559-70 Encyclopaedia B. Co. v. Assn., 130 Fed. 460.

559-72 Encyclopaedia B. Co. v. Assn., supra.

560-81 Cadieux v. Beaucheman, supra.

560-88 Encyclopaedia B. Co. v. Assn., 130 Fed. 460.

561-93 Encyclopaedia B. Co. v. Assn., supra.

561-97 George Bisel Co. v. Welsh, 131 Fed. 564.

562-98 Cadieux v. Beaucheman, supra; Hartford P. Co. v. Hartford Co., 146 Fed. 332.

562-1 Trow Directory P. & B. Co. v. U. S. D. Co., 122 Fed. 191; Chicago Co. v. U. S. Co., 122 Fed. 189.

562-2 **Coincident errors** may be explained. Gopsill v. Howe Co., 149 Fed. 905.

563-10 Hubges v. Belasco, 130 Fed. 388. See Sampson Co. v. S. R. Co., 134 Fed. 890, 906.

Rule as to directories. — One must not bodily transmit the result of another's labor from his sheets; but, having made an honest canvass, he may use such sheets to revise and check his own as a verification thereof. Hartford P. Co. v. Hartford Co., 146 Fed. 332; Moffit v. Gill, 86 L. T. (Eng.) 465; Sampson v. S. R. Co., 134 Fed. 890.

563-11 See Encyclopaedia B. Co. v. Assn., 130 Fed. 460; Wooster v. Crane Co., 147 Fed. 515, 77 C. C. A. 211.

563-14 Mifflin v. Dutton, 190 U. S. 265.

564-23 **Notice need not be inscribed** on the original painting or statuary copyrighted, but only on copies thereof. Werckmeister v. American Co., 142 Fed. 827.

564-29 Mifflin v. White Co., 190 U. S. 260; Mifflin v. Dutton, supra. **Foreign publication** of work of foreign author, with his consent, is not an abandonment of the United States copyright thereof as against non-consenting publishers here. Harper Bros. v. Donohue Co., 144 Fed. 491.

564-30 The conditions attendant upon the public exhibition of a painting may be shown on the issue as to its publication. Werckmeister v. American Co., 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591.

565-41 Harper Bros. v. Donohue Co., supra.

567-51 In case of a painting the penalty may be recovered without showing that infringing copies were found in defendant's possession. American T. Co. v. Werckmeister, 146 Fed. 377, 76 C. C. A. 649.

567-52 See as to the rule when defendant is a corporation, American T. Co. v. Werckmeister, supra.

CORONER'S INQUEST [Vol. 3.]

570-11 S. v. Coleman, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381.

570-15 Fact and cause of death. Proces verbal is competent only to prove the fact and cause of death, not the accused's connection therewith. S. v. Meyers, 120 La. 127, 44 S. 1008; S. v. Hopkins, 118 La. 99, 42 S. 660.

573-24 Knights Templars Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

573-25 Knights Templars Co. v. Crayton, supra; Variety Mfg. Co. v. Landaker, 129 Ill. App. 630; Nat. W. & C. Co. v. Smith, 108 Ill. App. 477.

A coroner's verdict must be admitted, if at all, as an entirety, although the jury may be instructed to disregard a portion thereof. O'Donnell v. R. Co., 127 Ill. App. 432.

573-26 Incompetent to prove negligence. — Cox v. R. Co., 92 Ill. App. 15.

574-27 In re Dolbeer, 149 Cal. 227, 86 P. 695; Rowe v. Such, 134 Cal. 573, 66 P. 862, 67 P. 760; Hollister v. Cordeo, 76 Cal. 649, 18 P. 855; Central R. v. Moore, 61 Ga. 151; Aetna L. Ins. Co. v. Milward, 26 Ky. L. R. 589, 82 S. W. 364, 68 L. R. A. 285; Aetna L. Ins. Co. v. Kaiser, 24 Ky. L. R. 2454, 74 S. W. 203; Wasey v. Ins. Co., 126 Mich. 119, 85 N. W. 459; Chambers v. W. O. W., 18 S. D. 173, 99 N. W. 1107; Colquit v. S., 107 Tenn. 381, 64 S. W. 713; Boehme v. W. O. W. (Tex. Civ.), 84 S. W. 422, 85 S. W. 444. See Grand Lodge A. O. U. W. v. Banister, 80 Ark. 190, 96 S. W. 742.

574-29 Knights Templars Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

575-38 Cox v. R. Co., 92 Ill. App. 15.

CORPORATIONS [Vol. 3.]

Burden on state to show non-user, 588-21; *Articles of incorporation conclusive evidence* 590-28; *Presumption as to time when organized,* 597-42; *Presumption as to assent of members of voluntary association,* 598-46; *Identity of name,* 599-53; *Effect of acceptance of Charter,* 601-62; *Presumption arising from over-valuation of property,* 617-40; *Knowledge of by-laws,* 624-76; *Release of subscriber for stock,* 624-78; *Presumption in favor of authority of officers,* 625-88; *Seal attached to forged paper,* 627-93; *Testimony of officers not an admission on re-trial,* 643-47; *Evidence of bona fides of stockholders seeking dissolution,* 658-17; *Proof of cause for dissolving,* 658-20.

584-2 Fuller v. R. T. Co., 16 Haw. 1.

585-5 S. v. W. R. I. Co., 97 Me. 559, 55 A. 495; Gorham Mfg. Co. v. R. Co., 27 R. I. 35, 60 A. 638.

585-6 Judicial notice not taken of the number of similar corporations doing business in state. S. v. R. Co. (Fla.), 40 S. 875.

585-7 Seals are not judicially noticed. Griffing B. Co. v. Winfield, 53 Fla. 589, 43 S. 687.

586-9 Mayor etc. v. R. Co. (N. J.), 57 A. 445.

586-10 New York etc. R. Co v. Offield, 78 Conn. 1, 60 A. 740; C. v. R. Co., 31 Ky. L. R. 859, 104 S. W. 290.

586-14 **Notice taken** of the divisions of the Methodist Episcopal Church, of the territory over which the branches thereof exercise jurisdiction, and of the articles of separation. Malone v. Lacroix, 144 Ala. 648, 41 S. 724; *cit.* Humphrey v. Burnside, 4 Bush (Ky.) 215; Hart v. Bodley, 3 Ky. 98; Creighton v. Bilbro, 1 Mon. (Ky.) 139.

586-15 Florsheim & Co. v. Fry, 109 Mo. App. 487, 84 S. W. 1023.

587-18 Campbell & Z. Co. v. A. S. Co., 129 Fed. 491; W. L. Wells Co. v. Mfg. Co., 198 U. S. 177; Roberts v. Lewis, 144 U. S. 653; Southern P. Co. v. Denton, 146 U. S. 202; Spreyne v. Lodge, 117 Ill. App. 253; Fish v. Dispatch, 118 Ill. App. 284; Morrison v. R. Co., 166 Ind. 511, 76 N. E. 961; Pike v. Wathen, 25 Ky. L. R. 1264, 78 S. W. 137; Louisiana Nat. Bk. v. Henderson, 116 La. 413, 40 S. 779; Goodale L. Co. v. Shaw, 41 Or. 544, 69 P. 546.

588-21 **Non-user. — Burden is on the state** to show cause for ousting a corporation of a portion of its privileges because of non-user. S. v. T. V. W. Co., 98 Me. 214, 56 A. 763. See S. v. P. T. Co., 8 R. I. 182; Atty. Gen. v. R. Co., 93 Wis. 604, 67 N. W. 1138; Heard v. Talbot, 7 Gray (Mass.) 113.

589-22 W. L. Wells Co. v. Mfg. Co., 198 U. S. 177; Elgin etc. Co. v. Loveland, 132 Fed. 41; Martin v. Deetz, 102 Cal. 55, 36 P. 368, 41 Am. St. 151; Jones v. A. H. Co., 21 Colo. 263, 40 P. 457, 52 Am. St. 220, 29 L. R. A. 143; Lovering v. McLaughlin, 161 Ill. 417, 44 N. E. 99; Edwards v. Armour Co., 190 Ill. 467, 60 N. E. 807; S. v. T. V. W. Co., 98 Me. 214, 229, 56 A. 763; Perkins v. Sanders, 56 Miss. 733; Capps v. H. P. Co., 40 Neb. 470, 58 N. W. 956, 42 Am. St. 677, 24 L. R. A. 259; Card v. Moore, 68 App. Div. 327, 74 N. Y. S. 18, *aff.*, without opinion, 173 N. Y. 598, 66 N. E. 1105; Goodale L. Co. v. Shaw, 41 Or. 544, 69 P. 546; Guckert v. Hacke, 159 Pa. 303, 28 A. 249; Lawrie v. Silsby, 76 Vt. 240, 56 A. 1106.

589-23 W. L. Wells Co. v. Mfg. Co., 198 U. S. 177.

590-25 Goodale L. Co. v. Shaw, 41 Or. 544, 69 P. 546, and cases cited in note 22, supra.

590-27 See S. v. Court (Wash.), 87 P. 40; s. c. 88 P. 332.

590-28 Smith v. R. Co. (Ind.), 81 N. E. 501; Morrison v. R. Co., 166 Ind. 511, 76 N. E. 961. See Boca & L. R. Co. v. R. Co., 2 Cal. App. 546, 84 P. 298; S. v. Court (Wash.), 85 P. 669.

Articles are conclusive evidence of existence of corporation and of bona fide intent to construct the railroad authorized thereby. In re Milwaukee S. R. Co., 124 Wis. 490, 102 N. W. 401. It is said in a dissenting opinion that the contrary is held in Hodgerson v. R. Co., 160 Ill. 430, 43 N. E. 614; R. Co. v. Petty, 57 Ark. 359, 21 S. W. 884; Chicago etc. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Atlantic & O. R. Co. v. Sullivant, 5 Ohio St. 276; Peoria etc. R. Co. v. R. Co., 105 Ill. 110; In re Metropolitan R. Co., 12 N. Y. S. 506; In re Metropolitan T. Co., 111 N. Y. 588, 19 N. E. 645.

591-29 Tulare v. Shepard, 185 U. S. 1; Lincoln Pk. v. Swatek, 105 Ill. App. 604; Lusk v. Riggs, 70 Neb. 718, 102 N. W. 88; Haas v. Bank, 41 Neb. 754, 60 N. W. 85; McCarter v. Ketcham, 72 N. J. L. 247, 62 A. 693; Leavengood v. McGee (Or.), 91 P. 453; Thomas v. Wilcox, 18 S. D. 625, 101 N. W. 1072.

Personal liability of directors and officers under the Illinois statute can only be avoided by showing that the corporation was such de jure. Butler v. Cleveland, 220 Ill. 128, 77 N. E. 99; Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; Gunderson v. Bank, 199 Ill. 422, 65 N. E. 326.

A charter duly granted by the proper officer is conclusive as to corporate existence except as against the state. First Nat. Bk. v. Rockefeller, 195 Mo. 15, 93 S. W. 761.

591-30 Tulare v. Shepard, 185 U. S. 1; Campbell v. Am. Co., 129 Fed. 491; Whipple v. Tuxworth, 81 Ark. 391, 99 S. W. 86; Martin v. Deetz, 102 Cal. 55, 36 P. 368, 41 Am. St. 151; Am. T. Co. v. R. Co., 157 Ill. 641, 42 N. E. 153; Marshall v. Keach, 227 Ill. 60, 81 N. E. 29; Standard Co. v. C., 29 Ky. L. R.

5, 91 S. W. 1128; Jones v. Hale, 32 Or. 465, 52 P. 311.

Such proof is sufficient on a plea of nul tiel corporation. Cozzens v. R. Co., 166 Ill. 213, 46 N. E. 788; Marshall v. Keach, 227 Ill. 35, 81 N. E. 29.

594-34 Lincoln P. K. v. Swatek, 105 Ill. App. 604; Eaton v. Walker, 76 Mich. 579, 43 N. W. 638.

594-35 Mears v. S., 84 Ark. 136, 104 S. W. 1095; Fields v. U. S., 27 App. D. C. 433; Standard Co. v. C., 29 Ky. L. R. 5, 91 S. W. 1128; S. v. Stevens, 16 S. D. 309, 92 N. W. 420.

Statute authorizing corporation need not have been in force when bona fide attempt to organize was made, if it was in effect and granted all powers assumed when indictment was found. S. v. Stevens, supra, *cit.* U. S. v. Amedy, 11 Wheat. (U. S.) 392; P. v. Hughes, 29 Cal. 258; P. v. Schwartz, 32 Cal. 160.

594-36 **General reputation** may be shown, and defendant's business stationery is competent. Goodman v. C., 30 Ky. L. R. 519, 99 S. W. 252.

The Illinois statute making user prima facie proof of corporate existence is not limited to domestic corporations. Graff v. P., 108 Ill. App. 168; Kincaid v. P., 139 Ill. 213, 28 N. E. 1060.

Proof of incorporation by reputation is provided for in Arkansas (Mears v. S., 84 Ark. 136, 104 S. W. 1095) and in Utah. Testimony that a corporation was organized under the laws of a certain state does not meet that requirement. S. v. Brown (Utah), 93 P. 52. Proof by reputation. Perry v. P., 38 Colo. 23, 87 P. 796.

595-37 Liverpool v. Ins. Co., 129 U. S. 397; Nashua Bk. v. Land Co., 189 U. S. 221; Valley L. Co. v. Driessel, 13 Idaho 662, 93 P. 765; Valley L. Co. v. Niekerson, 13 Idaho 682, 93 P. 24; Florsheim v. Fry, 109 Mo. App. 487, 84 S. W. 1023.

595-38 Florsheim v. Fry, 109 Mo. App. 487, 84 S. W. 1023.

Proof of English corporation laws. See Nashua Bk. v. Land Co., 189 U. S. 221.

Prima facie proof is sufficient unless an issue is made. MacMillan v. Stewart 69 N. J. L. 212, 54 A. 240.

596-39 Rogers v. McRae (Ind. Ter.), 104 S. W. 803; Standard Co. v. Jasper (Kan.), 92 P. 1094; Osborne v. Shilling, 68 Kan. 808, 74 P. 609; Scientific A. Club v. Horchitz, 128 Mo. App. 575, 106 S. W. 1117; Parlin v. Boatman, 84 Mo. App. 67; Northern Assur. Co. v. Borgelt, 67 Neb. 282, 93 N. W. 226; Portland v. Hall, 121 App. Div. 779, 106 N. Y. S. 649; South Bay v. Howey, 113 App. Div. 382, 98 N. Y. S. 969; S. v. Robb-L. Co., 14 N. D. 55, 106 N. W. 406; Kinney v. Yeoman, 15 N. D. 21, 106 N. W. 44; Hanson v. Lindstrom, 15 N. D. 584, 108 N. W. 798; West Jersey I. Co. v. Armour, 12 Pa. Super. 443; Acme M. Agency v. Rochford, 10 S. D. 203, 72 N. W. 466, 66 Am. St. 714; Kiblinger Co. v. Bank, 131 Wis. 595, 111 N. W. 709; Chickering-C. Bros. v. White, 127 Wis. 83, 106 N. W. 797.

A demurrer lies if it is affirmatively shown that a foreign corporation has unauthorizedly done business. C. v. Hayden, 60 Neb. 636, 83 N. W. 922, 83 Am. St. 545.

Payment of tax required by laws of New York is a condition subsequent and non-compliance therewith a matter of defense. Parmele Co. v. Haas, 171 N. Y. 579, 64 N. E. 440, Wood v. Ball, 190 N. Y. 217, 83 N. E. 21; Halsey v. Jewett, 190 N. Y. 231, 83 N. E. 25.

Compliance need not be shown if it appears prima facie that the corporation was engaged in interstate commerce. Zion Assn. v. Mayo, 22 Mont. 100, 55 P. 915, *cit.* Southern Pac. R. Co. v. Purcell, 77 Cal. 69, 18 P. 886; Nelms v. Edinburg, 92 Ala. 157, 9 S. 141; O'Reilly Co. v. Greene, 17 Misc. 302, 40 N. Y. S. 360; Nicoll v. Clark, 34 Id. 159.

Burden of showing that corporation has done business locally is on party so alleging. Thomas v. Paper Co., 67 Kan. 599, 73 P. 909.

In an action against an agent of a foreign corporation for embezzlement proof need not be made that it had complied with the local law. C. v. Shrober, 3 Pa. Super. 554; S. v. Tamey, 81 Ind. 559; S. v. O'Brien, 94 Tenn. 79, 28 S. W. 311. It is otherwise in an action on the agent's bond; but such neglect is not a defense to an action for money

had and received. Express Co. v. Lucas, 36 Ind. 361; Thorne v. Ins. Co., 80 Pa. 15. In some cases it seems to have been assumed that proof of corporate existence was necessary in embezzlement cases. See S. v. Pittam, 32 Wash. 137, 72 P. 1042.

596-40 Old Wayne Ins. Co. v. McDonough, 164 Ind. 321, 73 N. E. 703, *cit.* Ex parte Schollenberger, 96 U. S. 369; R. Co. v. Harris, 12 Wall. (U. S.) 65; Knapp Co. v. Ins. Co., 30 Fed. 607; Stewart v. Harmon, 98 Id. 190; Ehrman v. Ins. Co., 1 McCrary (U. S.) 123; Berry v. Knights Templars, 46 Fed. 439; Diamond Co. v. Ins. Co., 55 Id. 27; Sparks v. Masonic Assn., 100 Iowa 458, 69 N. W. 678; Miller Co. v. Ins. Co., 95 Iowa 31, 63 N. W. 565; Mutual Ins. Co. v. Hammond, 106 Ky. 386, 50 S. W. 545; Pringle v. Woolworth, 90 N. Y. 502; Franzen v. Zimmer, 90 Hun 103, 35 N. Y. S. 612. To the same effect: Lehigh Val. Co. v. Gilmore, 93 Minn. 432, 101 N. W. 796, 106 Am. St. 443; Rock Island Co. v. Peterson, 93 Minn. 356, 101 N. W. 616.

596-41 U. S. R. Co. v. Butler Bros., 132 Fed. 398; Steel Tube Co. v. Riehl, 9 Pa. Super. 220; West Jersey I. Co. v. Armour, 12 Id. 443.

In New York there are differing statutes applying to separate classes of corporations (see Portland Co. v. Hall, 121 App. Div. 779, 106 N. Y. S. 649). In an action against a foreign insurer, in which substituted service has been made, it must be shown that the statute requiring the appointment of an agent has been complied with. McKeever v. Court, 106 N. Y. S. 1041.

Presumption. — An allegation that plaintiff is a foreign corporation raises the presumption that it is of the class which requires it to obtain a license before doing business. Portland Co. v. Hall, 121 App. Div. 779, 108 N. Y. S. 821.

597-42 Presumption as to time when organized. — If date of incorporation not shown, the presumption is that corporation was organized under existing constitution. San Antonio T. Co. v. Altgelt (Tex. Civ.), 81 S. W. 106.

598-46 Presumption as to assent of members of voluntary association. It is conclusively presumed, where the law provides for changing a voluntary association into a corporation, that every person on becoming a member of the former impliedly assented that the change might be made. Spiritual & P. T. v. Vincent, 127 Wis. 93, 105 N. W. 1026.

599-50 Payment of required fee is presumed where articles recorded. S. v. Court, 42 Wash. 675, 85 P. 669.

599-52 The presumption is that the articles of incorporation and the certificate were regular as to contents. Avon Springs Co. v. Weed, 104 N. Y. S. 58.

599-53 Anglo-Cal. Bk. v. Field, 146 Cal. 644, 80 P. 1080; Cribb v. Waycross, 82 Ga. 597, 9 S. E. 426; Mattox v. S., 115 Ga. 212, 41 S. E. 709; Van Winkle v. Mathews, 2 Ga. App. 249, 58 S. E. 396; Holcomb v. Cable Co., 119 Ga. 466, 46 S. E. 671; Turner's Chapel v. L. L. Co., 121 Ga. 376, 49 S. E. 272; Georgia Assn. v. Borchardt, 123 Ga. 181, 51 S. E. 429; Perkins Co. v. Shewmake, 119 Ga. 617, 46 S. E. 832; Gonsalves v. Watson, 16 Haw. 256; Hawaii M. Co. v. Andrade, 14 Id. 500; Ohio O. Co. v. Detamore, 165 Ind. 243, 73 N. E. 906.

Identity of name raises the presumption that the plaintiff is the corporation mentioned in the writing in suit, in the absence of evidence showing that it is not the only one bearing its name. Campbell v. Am. S. Co., 129 Fed. 491.

601-62 Acceptance of charter raises the presumption of assent to the obligations to the public therein imposed. P. v. R. Co., 145 Mich. 140, 108 N. W. 772.

602-72 Sierra etc. Co. v. Bricker, 3 Cal. App. 190, 85 P. 665; Smith v. Society, 118 App. Div. 678, 103 N. Y. S. 770; Leavengood v. McGee (Or.), 91 P. 453.

Competent to show good faith, though not filed. Warren v. Syfers, 23 Ind. App. 167, 55 N. E. 103.

603-78 Western I. Wks. v. P. & P. Co., 30 Mont. 550, 77 P. 413; Montgomery v. R. Co., 73 S. C. 503, 53 S. E. 987.

603-79 A receipt showing that the party contracted in its corpo-

rate name is evidence against it. Sierra L & C. Co. v. Bricker, 3 Cal. App. 190, 85 P. 665. It is sufficient evidence in a criminal proceeding against the corporation. Standard O. Co. v. C., 29 Ky. L. R. 5, 91 S. W. 1128.

604-80 **Proof of corporate existence** should not be made by oral evidence in a criminal action based on the assumption that defendant is a corporation. S. v. Merchant (Wash.), 92 P. 890. Such evidence sufficient if admitted without objection. S. v. Pittam, 32 Wash. 137, 72 P. 1042.

In Missouri and Arkansas the existence of a corporation may be proved by general reputation in a criminal case. S. v. Knowles, 185 Mo. 141, 168, 83 S. W. 1083; Mears v. S., 84 Ark. 136, 104 S. W. 1095.

604-81 **Parol proof** as to the non-existence of records showing a corporation can only be made by the custodian of records of that character. Cobb v. Bryan, 37 Tex. Civ. 339, 83 S. W. 887, *cit.* Edwards v. Barwise, 69 Tex. 87, 6 S. W. 677.

604-83 Fields v. U. S., 27 App. D. C. 433. See note 80, supra.

Parol evidence not competent to show merger of corporations. Pattison v. G. B. Co., 116 La. 963, 41 S. 224.

604-84 Love v. Ramsey, 139 Mich. 47, 102 N. W. 279. See Card v. Moore, 68 App. Div. 327, 74 N. Y. S. 18, *aff.*, without opinion, 173 N. Y. 598, 66 N. E. 1105.

604-85 **Existence of a foreign corporation** is provable by parol, as is the fact that it is doing business in another state than that of its domicil. S. v. Pittam, 32 Wash. 137, 72 P. 1042. But see, on last point, Pattison v. G. B. Co., 116 La. 963, 41 S. 224.

604-86 Mears v. S., 84 Ark. 136, 104 S. W. 1095.

Name of corporation may be shown by proof of reputation. Mears v. S., supra.

Proof that a foreign insurer issued policies and paid losses shows its corporate existence. Graff v. P., 208 Ill. 312, 70 N. E. 299.

605-93 A charter to "The United Slavonian Benevolent Society" does not tend to prove that "Garfield Lodge No. 1 of the United Slavonian Benevolent Society" is a corporation. Spreyne v. Lodge, 117 Ill. App. 253.

605-94 Smith v. Society, 118 App. Div. 678, 103 N. Y. S. 770; Riker v. Cornwell, 113 N. Y. 115, 20 N. E. 602.

A government patent to a mining claim may establish the corporate existence of the patentee. Galbraith v. I. Co., 143 Cal. 94, 76 P. 901; Altschul v. Casey, 45 Or. 182, 76 P. 1083.

An act of the legislature donating lands to a corporation and a patent by the federal government conveying land to it and the conveyance of the same land by the corporation establish its existence, at least prima facie. Altschul v. Casey, supra.

605-96 Sierra etc. Co. v. Bricker, 3 Cal. App. 190, 85 P. 665.

606-98 The original charter, duly certified, is the best evidence. Sumter T. W. Co. v. Ins. Co., 76 S. C. 76, 56 S. E. 654.

608-2 **Failure to index articles** regularly filed is immaterial. Woodman v. L. Co., 125 Wis. 489, 103 N. W. 236, 104 N. W. 920.

609-7 Lowry Nat. Bk. v. Fickett, 122 Ga. 489, 50 S. E. 396; S. v. Court (Wash.), 87 P. 40, 88 P. 332.

610-11 **Books of a bankrupt corporation** produced by the trustee, if free from suspicion, are sufficiently identified. Lowry Nat. Bk. v. Fickett, 122 Ga. 489, 50 S. E. 396.

611-14 **Proof of user.** — In some cases it is said that there must be proof of user under the charter. U. S. Mtg. Co. v. McClure, 42 Or. 190, 70 P. 543.

612-19 **A certified copy** of a certificate designating an agent, such certificate being filed in the office of the secretary of state, and reciting that the corporation was a foreign one, is competent evidence of the fact. Anglo-C. Bk. v. Field, 146 Cal. 644, 80 P. 1080.

612-20 Campbell & Z. Co. v. A. S. Co., 129 Fed. 491; Anglo-C. Bk. v. Field, supra; Spreyne v. Lodge, 117 Ill. App. 253.

A written representation of corporate existence is sufficient evidence thereof [Marx v. Raley Co. (Cal.

App.), 92 P. 519]; as a receipt showing that a contract was made in the corporate name. Sierra etc. Co. v. Bricker, 3 Cal. App. 190, 85 P. 665.

The fact admitted is presumed to continue until the contrary is shown. Anglo-C. Bk. v. Field, 146 Cal. 644, 80 P. 1080.

Admission by defendant that he owed the account does not admit corporate existence of plaintiff. Florscheim v. Fry, 109 Mo. App. 487, 84 S. W. 1023.

613-21 Fox v. Knickerbocker E. Co., 140 Fed. 714; Simon v. Calfee, 80 Ark. 65, 95 S. W. 1011; Van Winkle etc. Wks. v. Mathews, 2 Ga. App. 249, 58 S. E. 396; Chicago & A. R. Co. v. Glenny, 175 Ill. 238, 51 N. E. 896; Pittsburg etc. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033; Ohio O. Co. v. Detamore, 165 Ind. 243, 73 N. E. 906; S. v. Glucose Co., 117 Ia. 524, 91 N. W. 794; S. v. N. C. R. Co., 95 N. C. 602; Herald v. O. P. Co., 15 Okla. 29, 79 P. 111.

Irrelevant denial is an admission—as where it was alleged that plaintiff was incorporated in A. and denied that it was incorporated in C. Herring-M. Co. v. Smith, 43 Or. 315, 72 P. 704, 73 P. 340.

614-22 Southern R. Co. v. Hundley (Ala.), 44 S. 195; Zealy v. R. & E. Co., 99 Ala. 579, 13 S. 118; Fuller v. R. T. Co., 16 Haw. 1; Montgomery v. R. Co., 73 S. C. 503, 53 S. E. 987; Faust v. R. Co., 74 S. C. 360, 54 S. E. 566; McCord-C. Co. v. Prichard, 37 Tex. Civ. 418, 84 S. W. 388.

615-25 **If there is no corporation** because of failure to comply with conditions precedent and the business as conducted could have been carried on by individuals, proof of user is of no importance. Elgin etc. Co. v. Loveland, 132 Fed. 41. The acts relied upon to show user must be unequivocal in character. Stanwood v. M. Co., 107 Ill. App. 569.

615-26 Stanwood v. M. Co., 107 Ill. App. 569; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135.

615-27 McLeod v. Lincoln M. C., 69 Neb. 550, 96 N. W. 265.

616-32 Mudgett v. Horrell, 33 Cal. 25; Merrill v. Timbrell, 123 Ia. 375, 98 N. W. 879; Somerset Nat. Bkg. Co. v. Adams, 24 Ky. L. R. 2083, 72 S. W. 1125.

616-35 **No presumption of payment** arises between a corporation and stockholder merely from the fact of making a call for an assessment. Crawford v. Roney, 126 Ga. 763, 55 S. E. 499.

Burden of showing amount of stock subscribed for is upon corporation. Ables v. Terrell (Tex. Civ.), 85 S. W. 1010.

Stockholders who are guilty of laches in informing themselves concerning corporate action are presumed to have full knowledge thereof. Hill v. R. Co., 143 N. C. 539, 566, 55 S. E. 854, and local cases cited.

616-37 **A recital in certificates** that they are fully paid is conclusive upon the corporation. Westminster Nat. Bk. v. N. E. E. Wks., 73 N. H. 465, 62 A. 971.

616-38 **It is presumed** that the person to whom stock was issued and for which he receipted was the owner. Gillett v. T. & T. Co., 230 Ill. 373, 82 N. E. 891.

617-39 **Burden is on stockholder** who has transferred stock to an insolvent, to avoid payment of assessment, to show the solvency of a second transferee. People's etc. Bk. v. Rickard, 139 Cal. 285, 73 P. 858.

617-40 McBride v. Farrington, 131 Fed. 797; Coit v. Gold A. Co., 119 U. S. 343; Whitehill v. Jacobs, 75 Wis. 474, 44 N. W. 630.

It is presumed that action in issuing stock for services was fair. Turner v. Fidelity L. C., 2 Cal. App. 122, 83 P. 62, 70.

Presumption arising from over-valuation of property. — A strong presumption of fraud arises where property of well known or easily ascertained value is taken at an exaggerated value. That presumption will be conclusive unless rebutted by satisfactory evidence explanatory of the seeming fraud. Coleman v. Howe, 154 Ill. 458, 469, 39 N. E. 725, 45 Am. St. 133; National T. v. Gilfillan, 124 N. Y. 302, 26 N. E. 538; Macbeth v. Banfield, 45 Or. 553, 78 P. 693, 697; Rumsey Mfg. Co. v. Kaine, 173 Mo. 551, 73 S. W. 470. On the other hand, if the nature of

the property and the extent of the over-valuation may have been possibly due to error in judgment, actual fraud must be shown, and regard may be had to the nature of the property, the purposes for which it was accepted, and all the conditions and circumstances attending the transaction. Macbeth v. Banfield, 45 Or. 553, 78 P. 693, *cit.* Elyton L. Co. v. B. W. & E. Co., 92 Ala. 407, 423, 9 S. 129, 25 Am. St. 65, 12 L. R. A. 307; Osgood v. King, 42 Ia. 478; Jackson v. Traer, 64 Ia. 469, 20 N. W. 764, 52 Am. Rep. 449; Van Cleve v. Berkey, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593; Boynton v. Andrews, 63 N. Y. 93; Douglass v. Ireland, 73 N. Y. 100; Lake Superior I. Co. v. Drexel, 90 N. Y. 87. To same effect, Polhemus v. Polhemus, 114 App. Div. 781, 100 N. Y. S. 263.

617-41 **The stockholder** must show that he desires to examine the books in regard to his interests as such or in connection therewith. O'Hara v. Nat. Bk., 69 N. J. L. 198, 54 A. 241.

617-42 Harrison v. R. P. Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954; Tanner v. Nichols, 25 Ky. L. R. 2191, 80 S. W. 225; S. v. Court (Wash.), 88 P. 332.

618-49 Somerset Nat. Bkg. Co. v. Adams, 24 Ky. L. R. 2083, 72 S. W. 1125; Tabler v. Assn., 17 Ky. L. R. 815, 32 S. W. 602; Clevenger v. Moore, 71 N. J. L. 148, 58 A. 88. **Parol authority** to sell stock may be shown. Somerset Nat. Bkg. Co. v. Adams, supra.

618-50 Rathbone v. Ayer, 121 App. Div. 355, 105 N. Y. S. 1041, *cit.* Phoenix W. Co. v. Badger, 67 N. Y. 294; Dayton v. Borst, 31 N. Y. 435.

618-51 **Cases reviewed.** — In Chesapeake etc. R. Co. v. R. Co., 57 W. Va. 641, 50 S. E. 890, 906, the cases on the point stated in the text are reviewed, and the statement is made that, except in a few instances, there was evidence other than the mere appearance of the defendant's name upon the stock book to show his connection with the company as a stockholder.

618-53 **Finding of incorporators** pursuant to articles, conclusive in absence of fraud. Louisiana P. E. Co. v. Kuenzel, 108 Mo. App. 105, 82 S. W. 1099, *cit.* Litchfield Bk. v. Church, 29 Conn. 137; Connecticut etc. R. Co. v. Bailey, 24 Vt. 465; Belfast etc. R. Co. v. Brooks, 60 Me. 568; Penobscot R. Co. v. White, 41 Me. 512.

Opinion of competent witness admissible under the circumstances. Louisiana P. E. Co. v. Kuenzel, 108 Mo. App. 105, 82 S. W. 1099.

620-56 Chase v. R. Co., 38 Ill. 215. See Chesapeake etc. R. Co. v. R. Co., 57 W. Va. 641, 50 S. E. 890, 906, for a review of cases on the question.

621-62 **The stock books** provided for by statute are not exclusive evidence of membership; any subscription paper is competent. Nebraska C. Co. v. Lednicky (Neb.), 113 N. W. 245; Planters' etc. P. Co. v. Webb, 144 Ala. 666, 39 S. 562.

Statute declaring one to be a stockholder whose name appears upon the books is not conclusive evidence that he is such; it means that such shall presumptively be the fact when one knowingly or voluntarily permits his name so to appear. Welch v. Gillelen, 147 Cal. 571, 82 P. 248.

622-66 Beckwith v. M. Co. (Or.), 93 P. 453.

Admissible to show a recital of payment. Cunningham v. Holley Co., 121 Fed. 720, 58 C. C. A. 140.

622-68 **Retention of stock certificate** erroneously issued, pending action upon application of holder to have it corrected, is not evidence of ratification of erroneous entry on books. Welch v. Gillelen, 147 Cal. 571, 82 P. 248.

622-71 Harrison v. R. P. Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954; Bradford v. Assn., 26 App. D. C. 268; Heartt v. Sherman, 229 Ill. 581, 82 N. E. 417; Pacific M. Co. v. Innan, 46 Or. 352, 80 P. 424.

Declarations of a decedent against interest may be shown on the issue as to the existence of a corporation, in an action by his surviving partner against alleged stockholders. Card v. Moore, 68 App. Div. 327, 74 N. Y. S. 18, *aff.*, without opinion, 173 N. Y. 598, 66 N. E. 1105.

622-72 Parol evidence competent to show agreement under which stock issued. Cunningham v. Holley, 121 Fed. 720, 58 C. C. A. 140; and capacity in which subscription therefor was made. Bean v. A. A. Co., 134 Fed. 57, 66 C. C. A. 167.

Evidence as to the understanding of parties concerning the terms on which stock subscriptions were made is of but little moment when all that remains to be done is to make settlement. Euston v. Edgar, 207 Mo. 287, 105 S. W. 773.

The financial condition of the corporation is immaterial so far as a creditor, who has agreed to take stock, is concerned. Reid v. I. P. Co., 132 Mich. 528, 94 N. W. 3.

A creditor who has agreed to take stock cannot testify as to what his course would have been if he had known of certain alleged facts. Reid v. I. P. Co., supra.

623-74 Unless directly attacked, an assessment, made either by the directors or by a court, is conclusive evidence of the necessity therefor. Great Western T. Co. v. Purdy, 162 U. S. 329; Elizabethtown G. Co. v. Green, 49 N. J. Eq. 329, 24 A. 560. See Cumberland L. Co. v. M. Co., 64 N. J. Eq. 517, 54 A. 450.

623-75 Campbell v. A. A. Co., 125 Fed. 207, 61 C. C. A. 317, Nashua S. Bk. v. Land Co., 189 U. S. 221. See Jones v. M. Co. (Utah), 91 P. 273.

Evidence of previous assessments is competent as showing the course of dealing and the meaning of the contract as construed by the parties. Moore v. Rohrbacker, 30 Pa. Super. 568.

A prima facie case for recovery of unpaid stock is made by proof of the subscription and a regular call for payment. Crawford v. Roney, 126 Ga. 763, 55 S. E. 499.

624-76 Amended articles are binding on a subscriber for stock regardless of his knowledge of them. Reid v. I. P. Co., 132 Mich. 528, 94 N. W. 3.

Knowledge of by-laws. — These are presumed to be known by the members of a corporation. Purdy v. Assn., 101 Mo. App. 91, 74 S. W. 486; Hill v. R. H. C. Co., 119 Mo. 9, 24 S. W. 223. If a prejudicial change therein is alleged to have been made the party so asserting must show the fact. United Moderns v. Rathbun, 104 Va. 736, 52 S. E. 552.

One who subscribes for capital stock, though after the corporation was formed, is bound by the terms of the certificate of incorporation. Brown v. Morton, 71 N. J. L. 26, 58 A. 95.

624-78 Merrick v. C. H. & E. Co., 111 Ill. App. 153; Stone v. V. C. & C. Co., 59 Ill. App. 536.

Release of subscriber for stock. — Though a contract of subscription for stock can be released only by the stockholders or directors, after being authorized, such "release can be proved not only by the records of the company, but also by other evidence showing that such subscription was in fact not regarded by the company as binding upon it, and that the subscriber was not regarded by himself or by the company as a stockholder thereof." Stuart v. R. Co., 32 Gratt. (Va.) 146; Elliott v. Ashby, 104 Va. 716, 52 S. E. 383.

624-82 Metropolitan etc. M. Co. v. Webster, 193 Mo. 351, 92 S. W. 79.

624-83 Bradford v. Assn., 26 App. D. C. 268; Heartt v. Sherman, 229 Ill. 581, 82 N. E. 417.

Silence may be shown. — Pacific M. v. Inman, 46 Or. 352, 80 P. 424.

625-87 Stafford Spgs. etc. R. Co. v. Mfg. Co. (Conn.), 66 A. 775.

The official relations of persons to a corporation may be shown by proving that they met in its office, transacted business there, and controlled its funds. Owyhee etc. Co. v. Tautphas, 121 Fed. 343, 57 C. C. A. 557.

625-88 In re Cullman Assn., 155 Fed. 372; Arbogast v. Bank, 125 Fed. 518, 59 C. C. A. 538; Conqueror etc. Co. v. Ashton (Colo.), 90 P. 1124; Extension etc. Co. v. Skinner, 28 Colo. 237, 64 P. 198; Victoria G. M. Co. v. Fraser, 2 Colo. App. 14, 29 P. 667; Capital City B. Co. v. Jackson, 2 Ga. App. 771, 59 S. E. 92; Blue Island B. Co. v. Fraatz, 123 Ill. App. 26; Interstate etc. Co. v. Welsh, 118 La. 676, 43 S. 274; Wagner v. Hospital, 32 Mont. 206,

79 P. 1054; Parmele v. Heenen, 75 Neb. 535, 106 N. W. 662; Trephagen v. So. Omaha, 69 Neb. 577, 96 N. W. 248; Gause v. Trust Co., 108 N. Y. S. 1080; Bradford B. Co. v. Gibson, 68 Ohio St. 442, 67 N. E. 888; American etc. Co. v. A. W. Co. (Pa.), 67 A. 861; Hurlbut v. Gainor (Tex. Civ.), 103 S. W. 409; Tres Palacios etc. Co. v. Eidman, (Tex. Civ.), 93 S. W. 698; Wheeling etc. Co. v. Connor, 61 W. Va. 111, 55 S. E. 982; Meating v. T. L. Co., 113 Wis. 379, 89 N. W. 152.

Rule not applied in case of emergency. Hasler v. O. L. & L. Co., 101 Mo. App. 136, 74 S. W. 465; Salter v. Neb. T. Co. (Neb.), 112 N. W. 600. *Compare* Harris v. V. I. C. Co., 91 N. Y. S. 317, and King v. Mfg. Co., 183 Mass. 301, 67 N. E. 330.

Agency and the agent's powers may be inferred from circumstances. Reynolds v. R. Co., 114 Mo. App. 670, 90 S. W. 100; Jack v. Bank, 17 Okla. 430, 89 P. 219; Pine Beach I. Co. v. C. A. Co., 106 Va. 810, 56 S. E. 822.

Presumption of authority indulged. Willow Spgs. I. Co. v. Wilson, 74 Neb. 269, 104 N. W. 165. This case seems to follow the rule obtaining where municipalities are the contracting parties. Thus, in favor of a third person, no proof is necessary to show that the executive officer of a corporation was authorized to transfer a note by assignment. Custom in the transaction of business of a particular corporation or of corporations generally has the force of law and raises for the protection of third persons a conclusive presumption of authority. Milwaukee T. Co. v. Van Valkenburgh (Wis.), 112 N. W. 1083; St. Clair v. Rutledge, 115 Wis. 583, 92 N. W. 234, 95 Am. St. 964.

The nature of the promissory obligation assumed in an instrument may be regarded in determining whether it was executed by the corporation or by an officer thereof in his individual capacity. Reed v. Fleming, 209 Ill. 390, 70 N. E. 667.

626-89 Donaldson v. O. C. O. Co. (Cal. App.), 92 P. 1046; Merchants Bk. v. Nichols, 223 Ill. 41, 79 N. E. 38; Karsch v. Mfg. Co., 82 App. Div. 230, 81 N. Y. S. 782; Greene v. I. H. & A. Co., 84 N. Y. S. 591; Coney Island A. R. Co. v. Boyton, 87 App. Div. 251, 84 N. Y. S. 347; New York etc. Co. v. Raub, 86 N. Y. S. 249; Bradford B. Co. v. Gibson, 68 Ohio St. 442, 67 N. E. 888; Dreeben v. Bank (Tex.), 99 S. W. 850. See General H. S. v. R. Co., 79 Conn. 581, 65 A. 1065.

An agent called to prove the contract sued upon may be cross-examined as to his power to make it. American etc. Co. v. A. W. Co. (Pa.), 67 A. 861.

Conclusions of a witness, based on knowledge of the character of the agent's duties, are not competent to show his authority. International H. Co. v. Campbell (Tex. Civ.), 96 S. W. 93.

626-90 Freyberg v. Bank, 4 Cal. App. 403, 88 P. 378; Skinner Mfg. Co. v. Douville (Fla.), 44 S. 1014; Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 S. 687; Raleigh etc. R. Co. v. Pullman Co., 122 Ga. 700, 50 S. E. 1008; Fulton etc. Assn. v. Greenlea, 103 Ga. 376, 29 S. E. 932; Louisville R. Co. v. Tift, 100 Ga. 86, 27 S. E. 765; Minnesota L. Co. v. Hobbs, 122 Ga. 20, 49 S. E. 783; Merchants' Nat. Bk. v. Nichols & Co., 223 Ill. 41, 79 N. E. 38; Lloyd & Co. v. Matthews, 119 Ill. App. 546; Chicago P. T. Co. v. Munsell, 107 Ill. App. 344; Mook v. Tarr, 127 Mo. App. 311, 105 S. W. 1054; Rosenbaum v. Gilliam, 101 Mo. App. 126, 74 S. W. 507; Smith v. Bank, 72 N. H. 4, 54 A. 385; Karsch v. Mfg. Co., 82 App. Div. 230, 81 N. Y. S. 782; Northwestern F. Co. v. Lee, 102 Wis. 426, 78 N. W. 584; Lowe v. Ring, 115 Wis. 575, 92 N. W. 238. See People's Sav. Bk. v. Hine, 131 Mich. 181, 91 N. W. 130.

Where a note is so signed that it might either be that of a corporation or of the natural persons whose signatures it bears, and they make no representations that it is their personal obligation, they may show that it was executed as a corporate obligation, without showing authority from the directors; at least where the corporation is one having general power to execute such obligations. Western G. Co. v. Lackman, 75 Kan. 34, 88 P. 527.

It is presumed that the manager of a corporation acted within his au-

thority in demanding its property. Stovell v. Albert Co., 38 Colo. 80, 87 P. 1071. (See as to authority of general manager, Raleigh etc. Co. v. Pullman Co., 122 Ga. 700, 50 S. E. 1008). It is not presumed that an officer communicated facts against interest. Woodworth v. Carroll (Minn.), 112 N. W. 1054.

Relevant facts. — As between a corporation and third persons it is competent to show the authority exercised by its officers for it and the actual or constructive knowledge and assent of the directors. Smith v. Bank, 72 N. H. 4, 54 A. 385, and cases cited.

Note of a corporation made by an officer to himself is presumptively void, but open to proof of good faith. Africa v. Duluth Co., 82 Minn. 283, 84 N. W. 1019, 83 Am. St. 424. The question in all such cases is one of fairness and good faith, whether the transaction was for the benefit, and in the interests, of the corporation. Taylor v. Mitchell, 80 Minn. 492, 83 N. W. 418; Savage v. M. F. W. Co., 98 Minn. 343, 108 N. W. 296.

627-91 In re Cullman, 155 Fed. 372; Capital City B. Co. v. Jackson, 2 Ga. App. 771, 59 S. E. 92; Wheeling etc. Co. v. Conner, 61 W. Va. 111, 55 S. E. 982.

627-92 Commercial Nat. Bk. v. Bank, 97 Tex. 536, 80 S. W. 601.

627-93 Kirkpatrick v. E. M. & E. Co., 135 Fed. 144; Graham v. Partee, 139 Ala. 310, 35 S. 1016; Collier v. Alexander, 142 Ala. 422, 38 S. 244; McKee v. Cunningham, 2 Cal. App. 684, 84 P. 260; Watkins v. Glas (Cal. App.), 89 P. 840; Bliss v. Harris, 38 Colo. 72, 87 P. 1076; Carr v. G. L. & T. Co., 108 Ga. 757, 33 S. E. 190; Nelson v. Spence, 129 Ga. 35, 58 S. E. 697; Reed v. Fleming, 209 Ill. 390, 70 N. E. 667; Springer v. Bigford, 160 Ill. 495, 43 N. E. 751; Wisconsin L. Co. v. Tel. Co., 127 Ia. 350, 101 N. W. 742; Wilson v. Neu (Neb.), 95 N. W. 502; Corder v. P. C. Co., 36 Neb. 548, 54 N. W. 830; Parker v. Mfg. Co., 49 N. J. L. 465, 9 A. 682; Jourdan v. R. Co., 115 N. Y. 380, 22 N. E. 153; Quackenboss v. Ins. Co., 177 N. Y. 71, 69 N. E. 223; Gause v. Trust Co., 108 N. Y. S. 1080, 1089; Deepwater C. v. Renick, 59 W. Va. 343, 53 S. E. 552.

Sealed certificates signed by one as president and attested by the secretary are evidence that the person so named is president of the corporation. Owyhee etc. Co. v. Tautphas, 121 Fed. 343, 57 C. C. A. 557.

Binding though seal attached by stranger. — Uvalde etc. Co. v. New York, 99 App. Div. 327, 91 N. Y. S. 131.

Actual seal of corporation must be attached. Raub v. Assn., 56 N. J. L. 262, 28 A. 384.

Presumption. — The letters "L. S." in the record of a deed sustain the presumption that the original was sealed with the corporate seal. Altschul v. Casey, 45 Or. 182, 76 P. 1083. No presumption arises where instrument signed by treasurer. Backer v. U. S. G. F. Co., 84 N. Y. S. 149.

Omission of corporate name, immaterial. Graham v. Partee, 139 Ala. 310, 35 S. 1016.

Seal attached to forged paper. — A forged certificate executed by the secretary of a corporation in due form and bearing its seal, affixed unauthorizedly, does not work an estoppel against it in favor of innocent parties who advanced money to him, which he used for his own purposes. Ruben v. G. F. C., (1906) App. Cas. (Eng.) 439, (1904) 2 K. B. 712; Rogers v. S. F. Co., 119 La. 714, 44 S. 442. *Contra,* Lucile Dreyfus M. Co. v. Willard (Wash.), 89 P. 935.

628-94 Allen v. Alston, 147 Ala. 609, 41 S. 159. *Contra,* Valente v. I. M. Co., 119 App. Div. 127, 103 N. Y. S. 966.

Absence of seal from a paper not required to be sealed is of no significance. National M. C. Co. v. S. F. M. C. Co., 14 Ont. L. R. (Can.), 22; Fourth Nat. Bk. v. C. L. Co., 142 Fed 257; Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 S. 687; Sheffield v. Bank, 2 Ga. App. 221, 58 S. E. 386; B. S. Green Co. v. Blodgett, 159 Ill. 169, 42 N. E. 176; Sieberling v. Miller, 207 Ill. 443, 69 N. E. 800; Brown v. B. A. M. Co., 86 Miss. 388, 38 S. 312; Strop v. Hughes, 123 Mo. App. 547, 101 S. W. 146; Cook v. A. T. & W. Co.

(R. I.), 65 A. 641; St. Clair v. Rutledge, 115 Wis. 583, 594, 92 N. W. 234.

An unsealed covenant is not admissible, at least if not executed by the secretary. Florida R. Co. v. Thomas (Fla.), 45 S. 720.

Abbreviation of name, as "Mfg.," immaterial. Seiberling v. Miller, 207 Ill. 443, 69 N. E. 800.

A statute making instruments admissible in evidence without proof of signature in the absence of a sworn denial applies to those executed by corporations. London & N. A. M. Co. v. Imp. Co., 84 Minn. 144, 86 N. W. 872; La Plant v. P. F. G. Co., 102 Minn. 93, 112 N. W. 889.

629-96 Kelly v. Assn., 2 Cal. App. 460, 84 P. 321; Rosehill C. Co. v. Dempster, 223 Ill. 567, 79 N. E. 276, Clarke v. Lexington S., 24 Ky. L. R. 1755, 72 S. W. 286; York v. Mathis (Me.), 68 A. 746; Cann v. Rector, 111 Mo. App. 164, 85 S. W. 994; Crossley v. St. P. W. (N. J. L.), 67 A. 27.

Acts of de facto officer binding. Brown v. Crown Co., 150 Cal. 376, 386, 89 P. 86.

630-97 Brown v. B. A. M. Co., 86 Miss. 388, 38 S. 312.

630-98 Clarke v. Lexington S., 24 Ky. L. R. 1755, 72 S. W. 286.

630-1 Horseshoe M. Co. v. M. O. S. Co., 147 Fed. 517, 77 C. C. A. 213. In re Cullmen etc. Assn., 155 Fed. 372; Postal T. Co. v. Lenoir, 107 Ala. 640, 18 S. 266; Jameson v. Simonds Co., 2 Cal. App. 562, 84 P. 289; Castner v. Rinne, 31 Colo. 256, 72 P. 1052; Dreeben v. Bank (Tex.), 99 S. W. 850. See "Admissions," Vol. 1, pp. 348, 551, and same title, ante, 357-1, 551-74.

Officer or agent may testify that he is such and his testimony may be considered in connection with other evidence on the question of his authority. Kelly v. Assn., 2 Cal. App. 460, 84 P. 321. And he may testify of his authority. Freeman v. J. B. Co., 126 Mo. App. 124, 103 S. W. 565.

Letters written by an agent are competent to show his authority. Clarke v. Lexington S., 24 Ky. L. R. 1755, 72 S. W. 286.

630-2 Choctaw etc. R. Co. v. Rolfe, 76 Ark. 220, 88 S. W. 870.

An evasive answer concerning the authority of a general manager is an admission of the allegation of the complaint. Raleigh & G. R. Co. v. Pullman Co., 122 Ga. 700, 707, 50 S. E. 1008.

631-3 Curtis v. W. A. C. Co., 89 App. Div. 61, 85 N. Y. S. 413.

631-4 Arkansas S. R. Co. v. Dickinson, 78 Ark. 483, 95 S. W. 802; Hill v. Morgan, 9 Idaho, 718, 76 P. 323; Central L. Co. v. Kelter, 201 Ill. 503, 66 N. E. 543; N. H. Martin & Co. v. Logan, 30 Ky. L. R. 799, 99 S. W. 648; Henderson v. Syndicate, 183 Mass. 443, 67 N. E. 427; Freeman v. J. B. Co., 126 Mo. App. 124, 103 S. W. 565; Culver v. P. S. W. I. Co., 206 Pa. 481, 56 A. 29; J. A. Roebling's Sons Co. v. Barre, 76 Vt. 131, 56 A. 530.

The making of similar contracts by the same agent is competent evidence on the question of his power to make the one in question. Pecos etc. R. Co. v. Latham (Tex. Civ.), 88 S. W. 392. If he was authorized to make them. Dreeben v. Bank (Tex.), 99 S. W. 850.

631-6 Egbert v. Sun Co., 126 Fed. 568; Owyhee etc. Co. v. Tautphas, 121 Fed. 343, 57 C. C. A. 557; West End v. Eaves (Ala.), 44 S. 588; Arkansas S. R. Co. v. Dickinson, 78 Ark. 483, 95 S. W. 802; Riley v. R. Co., 1 Cal. App. 488, 82 P. 686; Central L. Co. v. Kelter, 201 Ill. 503, 66 N. E. 543; Kennedy v. Lodge, 124 Ill. App. 55; J. Wolf Co. v. Bank, 107 Ill. App. 58; York v. Mathis (Me.), 68 A. 746; Conklin v. R. Co. (Mass.), 82 N. E. 23; Beacon T. Co. v. Souther, 183 Mass. 413, 67 N. E. 345; White v. R. Co., 194 Mass. 97, 80 N. E. 500, 8 L. R. A. (N. S.) 484; Cascarella v. N. G. Co. (Mich.), 114 N. W. 857; Agle v. Standard Co., 29 Mont. 111, 74 P. 135; McVity v. E. D. A. Co., 90 App. Div. 109, 86 N. Y. S. 144; Hill v. R. Co., 143 N. C. 539, 560, 55 S. E. 854; Guillaume v. Land Co., 48 Or. 400, 86 P. 883, 88 P. 586; Nickelson v. Cameron Co., 39 Wash. 569, 81 P. 1059.

Burden of showing ratification is on party alleging it. Wagner v. Hospital, 32 Mont. 206, 79 P. 1054.

As a basis for showing ratification it is competent to prove the mak-

ing of the unauthorized contract and performance under it. Peach River L. Co. v. Ayers (Tex. Civ.), 91 S. W. 387.

Stronger proof of ratification is required as between an officer and the corporation than between it and third parties. Pacific U. & P. Wks. v. Smith (Cal.), 93 P. 85.

Silence conclusive evidence if not explained. St. Louis etc. Co. v. Wanamaker, 115 Mo. App. 270, 90 S. W. 737. But it is immaterial if party knew of agent's lack of authority. Reid v. A. P. Co., 47 Or. 215, 83 P. 139.

Ratification presumed if notice of the transaction comes to the corporation while it is in progress and silence is maintained to the detriment of the party performing. St. Louis etc. Co. v. Wanamaker, 115 Mo. App. 270, 90 S. W. 737. Knowledge of president that of corporation. J. Wolf Co. v. Bank, 107 Ill. App. 58.

Board of directors need not be apprised as a body of the acts of agent; it is sufficient that the majority of them individually were informed of what had been done and took no steps to disaffirm it. Brown v. C. G. M. Co., 150 Cal. 376, 387, 89 P. 86; Scott v. S. S. O. Co., 144 Cal. 140, 77 P. 817, 103 Am. St. 72; Davis v. B. C. C. Co. (S. D.), 110 N. W. 113; Salem I. Co. v. C. I. M., 112 Fed. 239, 50 C. C. A. 213; Rowland v. Carroll Co., 44 Wash. 413, 87 P. 482.

Actual knowledge of the acts done need not be shown if they were of so open a nature as that notice of them may be presumed to have come to the corporation. Arkansas R. Co. v. Dickinson, 78 Ark. 483, 95 S. W. 802; International H. Co. v. Campbell (Tex. Civ.), 96 S. W. 93.

Acts of officer in his representative capacity may be proved if there is evidence to show assent thereto. Arkansas R. Co. v. Dickinson, 78 Ark. 483, 95 S. W. 802; St. Louis etc. R. Co. v. Bennett, 53 Ark. 208, 13 S. W. 742, 22 Am. St. 187.

631-7 Indianapolis St. R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978.

632-11 Edwards v. Assn. (N. J.), 68 A. 800; Man v. Boykin (S. C.), 60 S. E. 17.

633-12 America L. Assn. v. Cook, 20 Kan. 19; Porter v. P. G. M. Co., 29 Mont. 347, 74 P. 938; U. S. Mtg. Co. v. McClure, 42 Or. 190, 70 P. 543; Belch v. Big S. Co. (Wash.), 89 P. 174.

634-13 It **is conclusively presumed** that a local corporation knows of an express limitation on the powers of another such corporation. S. v. Bank (Ia.), 113 N. W. 500.

634-14 Blue Island B. Co. v. Fraatz, 123 Ill. App. 26.

Burden of showing that a foreign corporation is doing business in another state than that of its domicil is upon the party asserting the fact. Jameson v. Simonds Co., 2 Cal. App. 582, 84 P. 289.

635-16 Altschul v. Casey, 45 Or. 182, 76 P. 1083; Pitcher v. Lone Pine etc. Co., 39 Wash. 608, 81 P. 1047.

635-17 See Westminster Nat. Bk. v. N. E. E. Wks., 73 N. H. 465, 62 A. 971.

635-19 Porter v. P. G. M. Co., 29 Mont. 347, 74 P. 938, and cases cited. Krisch v. I.-S. F. Co., 39 Wash. 381, 81 P. 855.

635-20 Charter of another corporation, referred to in plaintiff's charter, is admissible. Southern R. Co. v. Howell (S. C.), 60 S. E. 677.

635-21 International B. Co. v. Rainy Lake Co., 97 Minn. 513, 107 N. W. 735; S. v. M. T. M. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510; Craig v. Assn., 88 Minn. 535, 93 N. W. 669. See Minneapolis etc. R. Co. v. Manitou F. S., 101 Minn. 132, 112 N. W. 13.

Articles are the sole guide in determining the character of a corporation. Kalamazoo v. Kalamazoo, 124 Mich. 74, 82 N. W. 811; Gould v. Fuller, 79 Minn. 414, 82 N. W. 673; Craig v. Assn., 88 Minn. 535, 93 N. W. 669; P. v. Society, 161 N. Y. 233, 55 N. E. 1063; Gitzhoffen v. Assn. (Utah), 88 P. 691.

Declarations of employe inadmissible to show whether corporation a charitable one or not. Bishop v. Treasurer, 37 Colo. 378, 86 P. 1021.

636-25 Hill v. R. Co., 143 N. C. 539, 55 S. E. 854.

636-27 Robinson v. Blood (Cal. App.), 91 P. 258; Bell v. Quicksilver Co., 146 Cal. 699, 81 P. 17.

636-30 Jones v. M. Co. (Utah), 91 P. 273.

637-31 Coombs v. Barker, 31 Mont. 526, 79 P. 1.

637-32 **A recital in the minutes** of a meeting that the directors were notified of it is, in the absence of anything showing otherwise, sufficient proof. Turner v. F. L. Co., 2 Cal. App. 122, 83 P. 62, 70, *cit.* Stockton etc. Wks. v. Houser, 109 Cal. 9, 41 P. 809.

638-36 Maxwell v. Assn., 104 N. Y. S. 815; Buck v. Troy Co., 76 Vt. 75, 56 A. 285; Graebner v. Post, 119 Wis. 392, 96 N. W. 783; Germania I. M. Co. v. King, 94 Wis. 439, 69 N. W. 181.

The regular adoption of by-laws materially affecting rights of members must be shown. Van Atten v. Modern B., 131 Ia. 232, 108 N. W. 313.

638-38 Weiss v. Haight, 148 Fed. 399; Bundy v. Sierra Co., 149 Cal. 772, 87 P. 622; Cable Co. v. Walker, 127 Ga. 65, 56 S. E. 108; Vincent v. Soper Co., 113 Ill. App. 463; Masonic Temple v. Langfelt, 117 Ill. App. 652; Drake v. Holbrook, 25 Ky. L. R. 1489, 78 S. W. 158; Pattison v. Gulf B. Co., 116 La. 963, 41 S. 224; Hildebrand v. Artisans (Or.), 91 P. 542; Patterson v. Artisans, 43 Or. 333, 72 P. 1095; Whigham v. Foresters, 44 Or. 543, 75 P. 1067; Southern R. Co. v. Howell (S. C.), 60 S. E. 677; Blair v. Bank, 105 Va. 762, 50 S. E. 262; Lynchburg T. Co. v. Booker, 103 Va. 594, 50 S. E. 148; White Hall Co. v. Hall, 102 Va. 284, 46 S. E. 290. See "ADMISSIONS," Vol. 1, pp. 348, 551, and that title, ante, 551-74.

Order of proof. — An agent's declarations may be shown before the fact of agency is established. General H. Soc. v. R. Co., 79 Conn. 581, 65 A. 1065.

639-39 **Express delegation** of authority need not be shown; it may be inferred from all the circumstances. Betts v. So. C. F. E., 144 Cal. 402, 77 P. 993.

640-42 Muller v. Swanton, 140 Cal. 249, 73 P. 994; Continental Ins. Co. v. Cummings, 98 Tex. 115, 81 S. W. 705.

640-43 Mussellam v. R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Southern R. Co. v. Railey, 26 Ky. L. R. 53, 80 S. W. 786; Faust v. R. Co., 74 S. C. 360, 54 S. E. 566; International etc. R. Co. v. Shuford, 36 Tex. Civ. 251, 81 S. W. 1189.

640-44 See Reason v. R. Co., 150 Mich. 50, 113 N. W. 596.

641-45 Geo. Whitechurch, Ltd. v. Cavanagh, (1902) App. Cas. (Eng.) 117; Horseshoe Min. Co. v. Miners' Co., 147 Fed. 517, 77 C. C. A. 213; Central E. Co. v. Sprague Co., 120 Fed. 925, 57 C. C. A. 197; Ferguson v. Basin C. M. (Cal.), 93 P. 867; Rosehill C. Co. v. Dempster, 223 Ill. 567, 79 N. E. 276; Black v. R. Co., 110 Mo. App. 198, 85 S. W. 96; Gen. Proprietors etc. v. Force (N. J. Eq.), 68 A. 914; Taylor v. Bank, 174 N. Y. 181, 66 N. E. 726, 95 Am. St. 564, 62 L. R. A. 783; Patterson v. White Co., 85 N. Y. S. 359; Trout v. R. Co., 107 Va. 576, 59 S. E. 394.

The acts done by an agent may be shown to establish his authority. Faust v. R. Co., 74 S. C. 360, 54 S. E. 566.

Slight evidence will show ratification where the corporation received benefit from the service rendered. Kansas City S. P. Co. v. Standard Co., 123 Mo. App. 13, 99 S. W. 765; St. Louis etc. Co. v. Wanamaker, 115 Mo App. 270, 90 S. W. 737; General H. S. v. R. Co., 79 Conn. 581, 65 A. 1065.

643-46 **An employe may testify** of his knowledge that defendant was the successor of another corporation. S. v. G. S. R. Co., 117 Ia. 524, 91 N. W. 794.

643-47 Vicksburg & M. R. v. O'Brien, 119 U. S. 99; Miller & Co. v. McKenzie, 126 Ga. 746, 55 S. E. 952; Moultrie L. Co. v. Driver Co., 122 Ga. 26, 49 S. E. 729; Columbus R. Co. v. Peddy, 120 Ga. 589, 48 S. E. 149; Helbig v. Ins. Co., 120 Ill. App. 58; Robins M. Co. v. Murdock, 69 Kan. 596, 77 P. 596; Conklin v. R. Co. (Mass.), 82 N. E. 23; Reason v. R. Co., 150 Mich. 50, 113 N. W. 596; Beunk v. V. C. D. Co., 128 Mich. 562, 87 N. W. 793; P. v. Barker, 121 App. Div. 661, 106 N. Y. S. 336; Campbell v. Emslie, 101 App. Div. 369, 91 N. Y. S. 1069 (*aff.*, without opinion, 184 N. Y. 589, 77 N. E. 1183); National Bk. v. Byrnes, 84 App. Div. 100, 82 N. Y. S. 497,

(*aff.*, without opinion, 178 N. Y. 561, 70 N. E. 1103); Wimmer v. R. Co., 92 App. Div. 258, 86 N. Y. S. 1052; Patterson v. W. S. T. Co., 85 N. Y. S. 359; Burns v. B. C. M. Co., 93 App. Div. 566, 87 N. Y. S. 883; Matteson v. R. Co., 218 Pa. 527. See "ADMISSIONS," Vol. 1, pp. 348, 552, same title, ante, 556-75.

Testimony of officers not an admission on retrial. — Statements made as witnesses not admissible on retrial. Vohs v. Shorthill, 124 Ia. 471, 100 N. W. 495. But the examination of the superintendent is in effect the examination of the corporation, and his testimony is competent as an admission though he is present at the trial. Johnson v. St. Paul Co., 126 Wis. 492, 105 N. W. 1048. It would be otherwise in case of a mere employe. Hughes v. R. Co., 122 Wis. 258, 99 N. W. 897. The Wisconsin cases were ruled under a statute providing for the examination of officers, agents, etc., before trial. The rule they apparently favor does not extend to answers to interrogatories made by an officer and agent in another case, the interrogatories being those of the corporation. "Testifying as a witness in a law suit is no part of the res gestae of the transaction involved in the litigation." Robert R. Sizer Co. v. Melton Sons, 129 Ga. 143, 58 S. E. 1055. The same rule applies to testimony given in a case in which the corporation was not a party. Arnold v. R. Co., 108 N. Y. S. 296.

644-49 Brown v. Crown Co., 150 Cal. 376, 387, 89 P. 86. See Aetna Ind. Co. v. Auto-T. Co., 147 Fed. 95, 78 C. C. A. 262.

645-50 Walker Mfg. Co. v. Knox, 136 Fed. 334, 69 C. C. A. 160.

645-51 Formal action by directors not necessary to ratify acts of promotor. Bond v. Pike, 101 Minn. 127, 111 N. W. 916.

645-54 Tabor v. Bank, 35 Colo. 1, 83 P. 1060; Cann v. Rector, 111 Mo. App. 164, 85 S. W. 994; Brinkerhoff Z. Co. v. Boyd, 192 Mo. 597, 91 S. W. 523; Wagner v. Hospital, 32 Mont. 206, 79 P. 1054; Farrell v. Min. Co., 32 Mont. 416, 80 P. 1027; Westminster Nat. Bk. v. N. E. E. Co., 73 N. H. 465, 62 A. 971; Demarest v. Spiral Co., 71 N. J. L. 14, 58 A. 161; Hill v. R. Co., 143 N. C. 539, 55 S. E. 854; Duke v. Markham, 105 N. C. 131, 10 S. E. 1017; Pinchback v. Min. Co., 137 N. C. 171, 49 S. E. 106; Guillaume v. Land Co., 48 Or. 400, 86 P. 883, 88 P. 586.

Amount of stock owned by director immaterial as to his authority. Clement v. Young Co. (N. J. L.), 67 A. 82; Allemong v. Simmons, 124 Ind. 199, 23 N. E. 768. But a director who holds majority of stock may bind corporation. Huntington F. Co. v. McIlwaine (Ind. App.), 82 N. E. 1001.

646-55 Separate assent of majority of directors will bind corporation under some circumstances. Scott v. S. S. O. Co., 144 Cal. 140, 77 P. 817; Buck v. Troy Co., 76 Vt. 75, 56 A. 285; J. A. Roebling Sons v. Barre, 76 Vt. 131, 56 A. 530.

646-58 Central E. Co. v. Sprague Co., 120 Fed. 925, 57 C. C. A. 197; Northwestern P. Co. v. Whitney (Cal. App.), 89 P. 981; Conquerer etc. Co. v. Ashton (Colo.), 90 P. 1124; National etc. Co. v. Chicago Co., 226 Ill. 28, 80 N. E. 556; Robin's Min. Co. v. Murdock, 69 Kan. 596, 77 P. 596; Cann v. Rector, 111 Mo. App. 164, 85 S. W. 994; Sword v. Ref. Cong., 29 Pa. Super. 626; Commercial Nat. Bk. v. Bank, 97 Tex. 536, 80 S. W. 601; Lewiston etc. Co. v. Brown, 42 Wash. 555, 85 P. 47.

646-59 Guarantee Co. v. Mechanics' Co., 183 U. S. 402; Dunbar etc. Co. v. Martin, 53 Misc. 312, 103 N. Y. S. 91; Valente v. I. M. Co., 119 App. Div. 127, 103 N. Y. S. 966.

646-60 Egbert v. Sun Co., 126 Fed. 568; Freyberg v. Bank, 4 Cal. App. 403, 88 P. 378; Kennedy v. Lodge, 124 Ill. App. 55; Lloyd v. Matthews, 223 Ill. 477, 79 N. E. 172; Williams v. Harris, 198 Ill. 501, 64 N. E. 988; Tevis v. Hammersmith (Ind. App.), 81 N. E. 614; W. O. Johnson Sons v. R. Co., 129 Ia. 281, 105 N. W. 509; N. H. Martin Co. v. Logan, 30 Ky. L. R. 799, 99 S. W. 648; Berlin v. Cusachs, 114 La. 744, 38 S. 539; York v. Mathis (Me.), 68 A. 746; Evans v. Min. Co., 100 Mo. App. 670, 75 S. W. 178; Rapp v. H. S. E. Co., 87 N. Y. S. 459; Mar-

shall v. R. Co., 73 S. C. 241, 53 S. E. 417; Roberts v. Hilton Co. (Wash.), 88 P. 946; Rowland v. Carroll Co., 44 Wash. 413, 87 P. 482; Meating v. Tigerton Co. 113 Wis. 379, 89 N. W. 152.

Presumption conclusive under the rule stated in the text. St. Clair v. Rutledge, 115 Wis. 583, 92 N. W. 234.

Confession of judgment binding. Gilman v. Heitman (Ia.), 113 N. W. 932; Manley v. Mayer, 68 Kan. 377, 75 P. 550; Ford v. Hill, 92 Wis. 188, 66 N. W. 115, 53 Am. St. 902.

Presumption. — If the president and general manager has long been accustomed to manage corporate affairs without interference, it will be presumed he was authorized to borrow money in its name. Cook v. A. T. W. Co. (R. I.), 65 A. 641, 650, *cit.* Martin v. Mfg. Co., 122 N. Y. 165, 25 N. E. 303, which case cites Martin v. Webb, 110 U. S. 7.

Authority of president may be shown by parol proof of usage and acquiescence of directors. Berlin v. Cusachs, 114 La. 744, 38 S. 539.

Testimony as to who was operating the business at office of corporation, competent. West v. Prather Co. (Cal. App.), 93 P. 892.

647-61 Geo. Whitechurch v. Cavanagh, (1902) App. Cas. (Eng.) 117; Longman v. Bath E. T., (1905) 1 Ch. (Eng.) 646; Ruben v. Gt. Fingal Con., (1906) App. Cas. (Eng.) 439 (*dist.* Shaw v. Pt. Philip Co., 13 Q. B. D. (Eng.) 103); Oscar Bonner O. Co. v. Oil Co., 150 Cal. 658, 89 P. 613; Farrell v. G. F. M. Co., 32 Mont. 416, 80 P. 1027; Maroney v. Cole, 52 Misc. 451, 103 N. Y. S. 560; Backer v. U. S. G. F. Co., 84 N. Y. S. 149; Bradford B. Co. v. Gibson, 68 Ohio St. 442, 67 N. E. 888; Dreeben v. Bank (Tex.), 99 S. W. 850.

"**A secretary,**" said Lord Esher, "is a mere servant. His position is that he is to do what he is told and no person can assume that he has any authority to represent anything at all." Barnett v. So. L. T. Co., 18 Q. B. D. (Eng.) 815; Geo. Whitechurch v. Cavanagh, (1902) App. Cas. (Eng.) 117, 124. See Rogers v. So. F. Co., 119 La. 714, 44 S. 442. In opposition is Lucile Dreyfus M. Co. v. Willard (Wash.), 89 P. 935, which makes a distinction between acts as secretary and as agent.

As to treasurer of a charitable corporation, see Clarkson Home v. R. Co., 182 N. Y. 47, 74 N. E. 571.

647-62 Betts v. So. Cal. F. E., 144 Cal. 402, 77 P. 993; Ring v. Long Island etc. Co., 93 App. Div. 442, 87 N. Y. S. 682.

Disregard of a charter provision by the corporation may be shown, and the secretary's act in contravention thereof held binding in favor of its creditor. Blanc v. Bank, 114 La. 739, 38 S. 537.

647-63 National M. C. Co. v. M. C. Co., 14 Ont. L. R. (Can.) 22; Issaquah C. Co. v. U. S. & G. Co., 126 Fed. 89, 61 C. C. A. 145; Arkansas R. Co. v. Dickinson, 78 Ark. 483, 95 S. W. 802; Choctaw etc. R. Co. v. Rolfe, 76 Ark. 220, 88 S. W. 870; Scott v. S. S. O. Co., 144 Cal. 140, 77 P. 817; Brown v. Crown Co., 150 Cal. 376, 89 P. 86; Riley v. R. Co., 1 Cal. App. 488, 82 P. 686; Golden Age etc. Co. v. Langridge, 39 Colo. 157, 88 P. 1070; Raleigh etc. R. Co. v. Pullman Co., 122 Ga. 700, 50 S. E. 1008; Gray L. Co. v. Harris, 127 Ga. 693, 56 S. E. 252; Metropolitan C. Co. v. Boutell Co. (Mass.), 81 N. E. 645; Henderson v. Raymond S., 183 Mass. 443, 67 N. E. 427; Southern R. Co. v. Howell (S. C.), 60 S. E. 677; Western Cottage etc. Co. v. Anderson, 97 Tex. 432, 79 S. W. 516; White Hall Co. v. Hall, 102 Va. 284, 46 S. E. 290; Lynchburg T. Co. v. Booker, 103 Va. 594, 50 S. E. 148; Batavian B. v. R. Co., 123 Wis. 389, 101 N. W. 687; Ford v. Hill, 92 Wis. 188, 66 N. W. 115, 53 Am. St. 902.

Admission by manager of two corporations, signed by one of them, competent as against the other, it having led up to a contract by it. Walnut Ridge M. Co. v. Cohn, 79 Ark. 338, 96 S. W. 431; Huse v. St. Louis etc. Co., 121 Mo. App. 89, 97 S. W. 990.

Knowledge of directors of acts of manager may be shown when assent of a majority of them is proven. Scott v. S. S. O. Co., 144 Cal. 140, 77 P. 817.

647-64 Ferguson v. Basin C. M. (Cal.), 93 P. 867; Centerville etc.

Co. v. Sanger Co., 140 Cal. 385, 73 P. 1079; Tres Palacios etc. Co. v. Eidman (Tex. Civ.), 93 S. W. 698.

The usual course of business is competent evidence as to the power of a manager. Richardson v. Devine, 193 Mass. 336, 79 N. E. 771.

647-65 See Stewart v. Wright, 147 Fed. 321, 77 C. C. A. 499.

648-67 Arkansas S. R. Co. v. Dickinson, 78 Ark. 483, 95 S. W. 802; Dunbar etc. Co. v. Martin, 53 Misc. 312, 103 N. Y. S. 91. See General H. S. v. R. Co., 79 Conn. 581, 65 A. 1065.

648-68 Circumstantial evidence is competent to show that an ambiguous obligation executed by the president of a corporation was the obligation of the latter. Dunbar etc. Co. v. Martin, 53 Misc. 312, 103 N. Y. S. 91.

648-75 Trickey v. Clark (Or.), 93 P. 457.

649-76 International etc. R. Co. v. Shuford, 36 Tex. Civ. 251, 81 S. W. 1189; Western Cottage etc. Co. v. Anderson, 97 Tex. 432, 79 S. W. 516; Cleghorn v. Barstow Co. (Tex. Civ.), 93 S. W. 1020.

649-77 Cresson etc. Co. v. Stauffer, 148 Fed. 981, 77 C. C. A. 609.

Manager may testify of solvency of corporation without first giving items on which statement is based. Campbell. v. Park, 128 Ia. 181, 101 N. W. 861.

650-80 Buffalo etc. Co. v. Troendle, 30 Ky. L. R. 740, 99 S. W. 622.

650-81 See S. v. Knowles, 185 Mo. 141, 83 S. W. 1043.

By-laws are competent to show that contract was not duly executed. North-Western P. Co. v. Whitney (Cal. App.), 89 P. 981. Not admissible against stranger to show authority of officer with whom he contracted, no notice of them being given him. Rosenbaum v. Gilliam, 101 Mo. App. 126, 74 S. W. 507.

If part of the by-laws are offered by one party, the other may offer the other part. McConnell v. Combination, 30 Mont. 239, 76 P. 194.

Constitution and by-laws published by parent society and used by local bodies and by them supplied to members are admissible without preliminary proof of adoption. Home Circle v. Shelton (Tex. Civ.), 81 S. W. 84.

650-82 Records must be identified. McConnell v. Combination, 30 Mont. 239, 76 P. 194.

It is presumed that rules of a railway company are in writing. Barschow v. R. Co., 147 Mich. 226, 110 N. W. 1057.

Admissible though record kept by a stockholder interested in suit. Morgan v. L. V. C. Co., 215 Pa. 443, 64 A. 633.

Minutes of illegal meeting will be examined in connection with record of regular meeting to ascertain intent of directors. Ismon v. Loder, 135 Mich. 345, 97 N. W. 769.

A letter written by a director present at a board meeting is competent to prove action taken thereat, the records being silent. Golden Age M. Co. v. Langridge, 39 Colo. 157, 88 P. 1070.

651-83 Authentication of copies must conform to statute. Nixon v. Goodwin, 2 Cal. App. 358, 85 P. 169.

651-84 Danvers F. E. Co. v. Johnson, 93 Minn. 323, 101 N. W. 492.

Absence of revenue stamp, immaterial if not fraudulently omitted. S. v. R. Co., 117 Ia. 524, 91 N. W. 794.

Publications generally circulated among members of a corporation and purporting to contain its by-laws are admissible as prima facie evidence thereof. Knights of America v. Weber, 101 Ill. App. 488, *cit.* Walsh v. Ins. Co., 30 Ia. 133; Mutual L. Ins. Co. v. Bratt, 55 Md. 200.

651-85 The Illinois statute making copies of papers, entries and records evidence, does not include copies of mere contracts. Chicago etc. Co. v. Moran, 210 Ill. 9, 71 N. E. 38; Chicago etc. R. Co. v. Weber, 121 Ill. App. 455.

The Indiana statute declaring that acts and proceedings of corporations may be proved by a sworn copy thereof, does not extend to books of account so as to allow their use in a manner varying from that of such books of natural persons. Coppes v. Assn. (Ind. App.), 67 N. E. 1022.

652-87 Golden Age M. Co. v. Langridge, 39 Colo. 157, 88 P. 1070; Garmany v. Lawtor 124 Ga. 876,

53 S. E. 669; Ismon v. Loder, 135 Mich. 345, 97 N. W. 769; Smith v. Bank, 72 N. H. 4, 54 A. 385; Braxmar v. Stanton, 110 App. Div. 167, 96 N. Y. S. 1096.

It is not presumed that a contract entered into by a corporation was set out verbatim in the record; if such contract has been lost its contents may be proven by parol. Ellison v. Dunlap, 25 Ky. L. R. 1495, 78 S. W. 155.

Omissions may be supplied by oral testimony if it does not contradict the record. Hotchkiss v. Assn., 229 Ill. 248, 82 N. E. 257. Lurton v. Assn., 87 Ill. App. 395.

On a collateral issue parol evidence is admissible to show that a person is an officer of a corporation. Stovell v. Min. Co., 38 Colo. 80, 87 P. 1071; Independent Assn. v. Somach, 102 N. Y. S. 495.

Intent of corporation as to the future may be testified of by its president although no formal action taken. New York etc. R. Co. v. Offield, 78 Conn. 1, 60 A. 740.

653-88 Nixon v. Goodwin, 2 Cal. App. 358, 85 P. 169.

Not conclusive. — Minutes are prima facie evidence, and parol testimony is competent to explain or supplement them. Hamill v. Council, 152 Pa. 537, 25 A. 645; Rose v. Kadisho, 215 Pa. 69, 64 A. 401.

655-94 See Louisiana etc. Co. v. Kuenzel, 108 Mo. App. 105, 114, 82 S. W. 1099.

Expert opinions as to corporation's net earnings, based on examination of books, incompetent. S. v. R. Co., 28 Nev. 186, 81 P. 99.

655-95 Central E. Co. v. Sprague Co., 120 Fed. 925, 57 C. C. A. 197; Lowry Nat. Bk. v. Fickett, 122 Ga. 489, 50 S. E. 396; Central L. Co. v. Kelter, 201 Ill. 503, 66 N. E. 543; Townsend v. Church, 6 Cush. (Mass.) 279; Chesapeake etc. R. Co. v. R. Co., 57 W. Va. 641, 50 S. E. 890.

Scope of the rule. — The rule is designed to protect, and limited to the protection of third parties and stockholders. It does not apply as against the corporation on behalf of a faithless officer. Pacific etc. Wks. v. Smith (Cal.), 93 P. 85, *cit.* First Nat. Bk. v. Drake, 29 Kan. 221, 44 Am. Rep. 646.

Books not entitled to much weight as against corporation in favor of their custodian. National etc. Co. v. Chicago Co., 226 Ill. 28, 80 N. E. 556.

Fraudulent entries not binding. Brinkerhoff Z. Co. v. Boyd, 192 Mo. 597, 613, 91 S. W. 523.

Not conclusive. — Rose v. Kadisho, 215 Pa. 69, 64 A. 401.

655-96 Moore v. Rohrbacker, 30 Pa. Super. 568 (*cit.* Diehl v. Ins. Co., 58 Pa. 443; Mitchell v. Ins. Co., 51 Pa. 402); Chesapeake etc. R. Co. v. R. Co., 57 W. Va. 641, 50 S. E. 890, 905.

Minutes competent to show intentions of corporation and stockholders in endorsing paper. Somers v. Florida Co., 50 Fla. 275, 39 S. 61. Informal record admissible if not transcribed. Chott v. Tivoli Co., 114 Ill. App. 178. Competent against officer and his surety. Pacific Lodge v. Bankers' Co. (Neb.), 113 N. W. 263. And against one who admitted previous membership to show his shares were not transferred. Plumb v. Bank, 48 Kan. 484, 29 P. 699.

656-98 Lowry Nat. Bk. v. Fickett, 122 Ga. 489, 50 S. E. 396.

656-99 Trainor v. Assn., 204 Ill. 616, 68 N. E. 650; Rudd v. Robinson, 126 N. Y. 113, 26 N. E. 1046.

Not evidence against the state in taxation proceedings. S. v. R. Co., 28 Nev. 186, 81 P. 99.

656-1 Mudgett v. Horrell, 33 Cal. 25; Coppes v. Assn. (Ind. App.), 67 N. E. 1022.

Books, other than stock subscription book, if unsupported, inadmissible. Hinsdale S. Bk. v. N. H. B. Co., 59 Kan. 716, 54 P. 1051; Girard etc. Ins. Co. v. Loving, 71 Kan. 558, 81 P. 200.

656-2 Books of account are competent evidence against the successor of the corporation whose accounts they contain, they having been in the successor's possession. Daneel v. Goodyear Co., 137 Fed. 157.

656-5 Nelson v. Spence, 129 Ga. 35, 58 S. E. 697.

656-7 Girard etc. Ins. Co. v. Loving, 71 Kan. 558, 81 P. 200;

Hinsdale S. Bk. v. N. H. B. Co., 59 Kan. 716, 54 P. 1051; Cook v. Williams, 85 N. Y. S. 1123; Eureka Hill M. Co. v. Min. Co. (Utah), 90 P. 157.

Competent on the question of the ratification of a contract. Teeple v. Hawkeye Co. (Ia.), 114 N. W. 906.

Not competent in action respecting title to property to prove performance of acts except as memoranda in connection with oral testimony based on personal knowledge, after which they are admissible to identify and prove the character and terms of instruments referred to. Chesapeake etc. R. Co. v. R. Co., 57 W. Va. 641, 50 S. E. 890, 907.

656-8 **Competent to show** that all the stock has been subscribed so as to authorize railroad company to exercise power of eminent domain. S. v. Court (Wash.), 87 P. 40, 88 P. 332.

657-9 Harrison v. R. P. Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954; Carey v. Williams, 79 Fed. 906, 25 C. C. A. 227; Foote v. Anderson, 123 Fed. 659, 61 C. C. A. 5; Sigua I. Co. v. Greene, 88 Fed. 207, 31 C. C. A. 477.

Admissions made by a party are not **incompetent** because recorded in corporation's books. Harrison v. R. P. Co., supra. Entries in book, assented to by party contracting with corporation, admissible. Rochester F. B. Co. v. Brown, 55 App. Div. 444, 66 N. Y. S. 867, *aff.*, without opinion, 179 N. Y. 542, 71 N. E. 1139.

657-14 Chesapeake etc. R. Co. v. R. Co., 57 W. Va. 641, 50 S. E. 890.

658-16 **Action taken by directors** may be explained by an agreement entered into by the corporation. Turner v. F. L. C., 2 Cal. App. 122, 83 P. 62, 70.

658-17 **Evidence of bona fides of stockholders seeking dissolution.** The bona fides of the majority of stockholders of a prosperous corporation will be inquired into on application for its dissolution after a vote in favor thereof. It may be shown that such vote was had for the purpose of enabling them to control the business and organize a new corporation to carry it on. Theis v. Spokane Co., 34 Wash. 23, 74 P. 1004.

658-18 Williard v. R. Co., 124 Fed. 796; Pinchback v. B. M. & M. Co., 137 N. C. 171, 49 S. E. 106.

658-20 **Proof of cause for dissolving.** — It is proper in a suit to dissolve a corporation for having made excessive charges to introduce the records in suits litigated between it and individuals affected by its charges; the testimony of a witness given upon the trial of such a suit is also competent. S. v. New Orleans Co., 107 La. 1, 31 S. 395.

More than a preponderance of evidence is necessary to justify the dissolution of a corporation on the ground that its purposes cannot be accomplished; it is not enough to show that the chances for its doing so are slim. Manufacturers' etc. Co. v. Cleary, 28 Ky. L. R. 359, 89 S. W. 248.

CORPUS DELICTI [Vol. 3.]

660-2 P. v. Ward, 145 Cal. 736, 79 P. 448; P. v. Frank, 2 Cal. App. 283, 83 P. 578; Hoch v. P., 219 Ill. 266, 76 N. E. 356; S. v. Henderson, 186 Mo. 473, 85 S. W. 576; S. v. Pienick (Wash.), 90 P. 645.

660-3 **Age of accused** is sometimes an element. Wistrand v. P., 213 Ill. 72, 72 N. E. 748.

660-4 S. v. Knapp, 70 Ohio St. 380, 392, 71 N. E. 705; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

660-6 Tatum v. S., 1 Ga. App. 778, 57 N. E. 956.

661-8 Ex parte Patterson (Tex. Cr.), 95 S. W. 1061.

661-9 Scott v. S., 141 Ala. 1, 37 S. 357; Johnson v. S., 142 Ala. 1, 37 S. 937; Williams v. S., 125 Ga. 741, 54 S. E. 661; Tatum v. S., 1 Ga. App. 778, 57 S. E. 956; Franklin v. S. (Ga. App.), 59 S. E. 835; S. v. Pienick (Wash.), 90 P. 645.

662-11 S. v. Kesner, 72 Kan. 87, 82 P. 720.

663-13 Scott v. S., 141 Ala. 1, 37 S. 357; Williams v. S., 123 Ga. 138, 51 S. E. 322; S. v. Alcorn, 7 Idaho 599, 64 P. 1014.

663-15 Ex parte Patterson (Tex. Cr.), 95 S. W. 1061.

663-16 Williams v. S., 125 Ga.

741, 51 S. E. 322; S. v. Westcott, 130 Ia. 1, 104 N. W. 341; S. v. Kesner, 72 Kan. 87; S. v. Knapp, 70 Ohio St. 380, 393, 71 N. E. 705; S. v. Hutchings, 30 Utah 319, 84 P. 893.

664-17 **In Texas** it is provided by statute that no person shall be convicted of any grade of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish fact of death of person charged to have been killed. See Kugadt v. S., 38 Tex. Cr. 681, 44 S. W. 989; Gay v. S., 42 Tex. Cr. 450, 60 S. W. 771; Follis v. S. (Tex. Cr.), 101 S. W. 242.

664-18 Perovich v. U. S., 205 U. S. 86; Vaughn v. S., 130 Ala. 18, 30 S. 669; Dupree v. S., 148 Ala. 620, 42 S. 1004; Davis v. S., 144 Ala. 62; P. v. Fallon, 149 Cal. 287, 86 P. 689; Campbell v. S., 124 Ga. 432, 52 S. E. 914; Ray v. S. (Ga. App.), 60 S. E. 816; Miles v. S., 129 Ga. 589, 59 S. E. 274; S. v. Keller, 8 Idaho 699, 70 P. 1051; Hoch v. P., 219 Ill. 265, 76 N. E. 356; Lipsey v. P., 227 Ill. 364, 81 N. E. 348; Sanderson v. S. (Ind.), 82 N. E. 525; S. v. Westcott, 130 Ia. 1, 104 N. W. 341; Brown v. S., 85 Miss. 27, 37 S. 497; S. v. Henderson, 186 Mo. 473, 85 S. W. 576; S. v. Barrington, 198 Mo. 23, 113, 95 S. W. 235; S. v. White, 189 Mo. 339, 87 S. W. 1188; S. v. Estes, 209 Mo. 288, 107 S. W. 1059; Stockbridge v. Ter., 15 Okla. 167, 79 P. 753; S. v. Williams, 46 Or. 287, 293, 80 P. 655; S. v. Barnes, 47 Or. 592, 85 P. 998; C. v. Sheffer (Pa.), 67 A. 761; Austin v. S. (Tex. Cr.), 101 S. W. 1162; Schwantes v. S., 127 Wis. 160, 106 N. W. 237; Curran v. S., 12 Wyo. 553, 76 P. 577.

665-19 Perovich v. U. S., 205 U. S. 86; Williams v. S., 123 Ga. 138, 51 S. E. 322; S. v. Barrington, 198 Mo. 23, 113, 95 S. W. 235; P. v. Patrick, 182 N. Y. 131, 141, 74 N. E. 843; S. v. Williams, 46 Or. 287, 297, 80 P. 655; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

665-20 Johnson v. S., 142 Ala. 1, 37 S. 937; Hubbard v. S., 77 Ark. 126, 91 S. W. 11; P. v. Ward, 145 Cal. 736, 79 P. 448; P. v. Frank, 2 Cal. App. 283, 83 P. 578; P. v. Eldridge, 3 Cal. App. 648, 86 P. 832; Boyd v. S. (Ga. App.), 60 S. E. 801; Bines v. S., 118 Ga. 320, 45 S. E. 376; Sanders v. S., 118 Ga. 329, 45 S. E. 365; Williams v. S., 125 Ga. 741, 54 S. E. 661; S. v. Keller, 8 Idaho 699, 70 P. 1051; S. v. Abrams, 131 Ia. 479, 108 N. W. 1041; C. v. Hicks, 26 Ky. L. R. 511, 82 S. W. 265; Stanley v. S., 82 Miss. 498, 34 S. 360; S. v. Marselle, 43 Wash. 273, 86 P. 586; Curran v. S., 12 Wyo. 553, 76 P. 577.

Rule not absolute as to misdemeanors, such as selling liquor contrary to law. S. v. Gilbert, 36 Vt. 145.

When age is a part of the corpus delicti it cannot be proven by the extra judicial confession of accused, nor fixed by inspection of his person. Wistrand v. P., 213 Ill. 72, 72 N. E. 748.

666-21 Flower v. U. S., 116 Fed. 241, 53 C. C. A. 271; Davis v. S., 144 Ala. 62; Ryan v. S., 100 Ala. 94, 14 S. 868; Meisenheimer v. S., 73 Ark. 407, 84 S. W. 494; Hubbard v. S., 77 Ark. 126, 91 S. W. 11; P. v. Fallon, 149 Cal. 287, 86 P. 689; Gantling v. S., 41 Fla. 587, 26 S. 737; S. v. Westcott, 130 Ia. 1, 104 N. W. 341; S. v. Coats, 174 Mo. 396, 74 S. W. 684; S. v. Knowles, 185 Mo. 141, 177, 83 S. W. 1043; S. v. Banusik (N. J. L.), 64 A. 994; S. v. Knapp, 70 Ohio St. 380, 393, 71 N. E. 705; Follis v. S. (Tex. Cr.), 101 S. W. 242; Gallegos v. S., 49 Tex. Cr. 115, 90 S. W. 492.

666-22 P. v. Moran, 144 Cal. 48, 77 P. 777.

666-24 **Plea of guilty in justice's court** or in a higher court on a former trial has been received as sufficient evidence of guilt without proof of the corpus delicti. S. v. Briggs, 68 Ia. 416, 27 N. W. 358. It has been held that it is not conclusive. C. v. Ervine, 38 Ky. 30; S. v. Abrams, 131 Ia. 479, 108 N. W. 1041. And it has also been held not to be admissible. S. v. Meyers, 99 Mo. 107, 12 S. W. 516.

Plea of guilty withdrawn and followed by plea of not guilty is inadmissible. P. v. Ryan, 82 Cal. 617, 23 P. 121.

CORROBORATION [Vol. 3.]

Discretion as to corroborating evidence, 675-27; Cannot be by

accomplice, 675-28; Evidence of complaints, 731-12; Statement in answer to question, 731-12.

672-14 Fields v. S., 2 Ga. App. 41, 58 S. E. 327.

674-20 S. v. Hicks, 6 S. D. 325, 60 N. W. 66; S. v. Mungeon (S. D.), 108 N. W. 552.

674-21 **Corroborative evidence** may also be substantive. Edwards v. Atlantic R. Co., 132 N. C. 99, 43 S. E. 585.

Corroboration by witnesses does not always strengthen; as where petty details are stated long after their occurrence in substantially the same words by the several witnesses. See Alexander v. Blackman, 26 App. D. C. 541; American B. T. Co. v. People's Co., 22 Blatchf. 531, 22 Fed. 309.

674-22 **Failure to define** not fatal if no request made. S. v. Sublett, 191 Mo. 163, 90 S. W. 374.

675-27 **Discretion as to corroborating evidence.** — "It is true, as it always has been, that when a competent witness is shown in the course of a trial to have exhibited moral turpitude of a nature ordinarily inconsistent with veracity, or to have such an interest in giving his testimony as to render the temptation to perjury peculiarly powerful, it is the right of the court in the exercise of its discretion, and may be its clear duty, to call the attention of the jury in the strongest terms to the danger of giving credit to such testimony, unconfirmed by independent evidence. And where such duty is neglected to the manifest injury of the accused such neglect may furnish sufficient ground for a new trial." S. v. Carey, 76 Conn. 342, 348, 56 A. 632.

675-28 Allis v. Hall, 76 Conn. 322, 56 A. 637; S. v. Egbert, 125 Ia. 443, 101 N. W. 191; S. v. Carpenter, 124 Ia. 5, 98 N. W. 775; McKnight v. S. (Tex. Cr.), 95 S. W. 1056; Wallace v. S., 48 Tex. Cr. 318, 87 S. W. 1041; Thompson v. S. (Tex. Cr.), 78 S. W. 691; Barnard v. S. (Tex. Cr.), 76 S. W. 475.

Cannot be by accomplice. — An accomplice cannot give testimony corroborating his co-accomplice so as to justify conviction. Wallace v. S., 48 Tex. Cr. 318, 87 S. W. 1041; Porter v. C., 22 Ky. L. R. 1157, 61 S. W. 16; Eddens v. S., 47 Tex. Cr. 529, 84 S. W. 828. The testimony of two accomplices does not dispense with corroborative evidence or lessen the weight of that to be adduced. P. v. O'Farrell, 175 N. Y. 323, 67 N. E. 588.

In North Carolina declarations of a party forming part of the res gestae may be proved as corroborating evidence. Merrell v. Dudley, 139 N. C. 57, 51 S. E. 777.

In Minnesota a writing by one of the parties has been received to corroborate him. Glassberg v. Olson, 89 Minn. 195, 94 N. W. 554.

676-29 But see S. v. Kincaid, 142 N. C. 657, 55 S. E. 647.

676-30 Seiwert v. S. (Tex. Cr.), 103 S. W. 932.

A defendant's plea of guilty to a charge of stealing other goods is not admissible to confirm his testimony in a civil action involving the title of like property. Ball B. P. Co. v. Lane, 135 Mich. 275, 97 N. W. 727.

676-31 In re Finch, 23 Ch. D. (Eng.) 267; Thompson v. Coulter, 34 Can. Sup. 261; Reynolds v. R. Co. (Tex. Civ.), 85 S. W. 323.

Corroboration as to the fact of a loan of money extends to the agreement to pay interest. Secor v. Gray, 3 Ont. L. R. (Can.) 34.

677-32 **Corroboration** as to the venue is proper. Knowles v. S., 44 Tex. Cr. 322, 72 S. W. 398.

677-33 Cook v. S., 75 Ark. 540, 87 S. W. 1176; P. v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370; P. v. Balkwell, 143 Cal. 259, 76 P. 1017; Harrell v. S., 121 Ga. 607, 49 S. E. 703; P. v. Colmey, 116 App. Div. 516, 101 N. Y. S. 1016; Hill v. Ter., 15 Okla. 212, 75 P. 757; Fisher v. Ter., 17 Okla. 455, 87 P. 301 (the last two cases apply the statute, which also expresses that the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof); Simpson v. C., 31 Ky. L. R. 769, 103 S. W. 332; P. v. O'Farrell, 175 N. Y. 323, 67

N. E. 588; Bismark v. S., 45 Tex. Cr. 54, 73 S. W. 965.

Tendency must be direct. — It is erroneous to charge that it is sufficient if the corroborative evidence tends in any way to connect the defendant with the offense. P. v. Compton, 123 Cal. 403, 56 P. 44.

Testimony of witness to be corroborated as to facts and circumstances of transaction is to be regarded in determining whether or not there is other evidence tending to connect defendant with the crime. S. v. Carpenter, 124 Ia. 5, 98 N. W. 775.

Contradiction of testimony of an accomplice in some of its details immaterial if corroboration extends to main fact. Locklin v. S. (Tex. Cr.), 75 S. W. 305.

677-34 P. v. Morton, 139 Cal. 719, 73 P. 609.

677-35 P. v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370; S. v. Jones, 115 Ia. 113, 88 N. W. 196; P. v. Finucan, 80 App. Div. 407, 80 N. Y. S. 929.

Rule same in civil cases; if the corroborative evidence covers enough of the facts to confirm the integrity and credibility of the party needing corroboration it is enough. Burnett v. Campbell Co., 1 Tenn. Ch. App. 18.

Corroborative evidence need not be strong enough to remove every reasonable doubt. Lackey v. S., 67 Ark. 416, 55 S. W. 213; Mitchell v. S., 73 Ark. 291, 83 S. W. 1050; Lasater v. S., 77 Ark. 468, 94 S. W. 59.

678-36 U. S. v. Giuliani, 147 Fed. 594; P. v. Sullivan, 144 Cal. 471, 77 P. 1000; P. v. Morton, 139 Cal. 719, 73 P. 609; S. v. Knudtson, 11 Idaho 524, 83 P. 226; S. v. Bond, 12 Idaho 424, 86 P. 43; S. v. Mungeon (S. D.), 108 N. W. 552; Wright v. S., 47 Tex. Cr. 433, 84 S. W. 593.

Evidence corroborating an accomplice is not necessarily confined to points directly connecting defendant with crime. S. v. Gallivan, 75 Conn. 326, 53 A. 731.

In a prosecution for conspiracy the corroboration, it seems, should extend to the illegality of the purpose. S. v. Messner, 43 Wash. 206, 86 P. 636.

678-39 See Dunn v. S. (Ind.), 67 N. E. 940, and "Corpus Delicti," Vol. 3, p. 659, same title ante.

678-40 Thompson v. Coulter, 34 Can. Sup. 261.

678-41 Delaney v. S., 48 Tex. Cr. 594, 90 S. W. 642.

679-42 Fields v. S., 2 Ga. App. 41, 58 S. E. 327; S. v. Ozias (Ia.), 113 N. W. 761; S. v. Norris, 122 Ia. 154, 97 N. W. 999, 127 Ia. 683, 104 N. W. 282; Best v. C., 29 Ky. L. R. 137, 92 S. W. 555; Hill v. Ter., 15 Okla. 212, 79 P. 757; S. v. Johnson, 36 Wash. 294, 78 P. 903.

679-44 Harrison v. S., 144 Ala. 20, 40 S. 568; P. v. Woods, 147 Cal. 265, 81 P. 652; P. v. Manasse (Cal.), 94 P. 92; Boles v. P., 37 Colo. 41, 86 P. 1031; S. v. Gallivan, 75 Conn. 326, 53 A. 731; Clay v. S., 122 Ga. 136, 50 S. E. 56; S. v. Jones, 115 Ia. 113, 88 N. W. 196; Best v. C., 29 Ky. L. R. 137, 92 S. W. 555; Mann v. C., 25 Ky. L. R. 1964, 79 S. W. 230; Dean v. C., 25 Ky. L. R. 1876, 78 S. W. 1112; Rogers v. S., 44 Tex. Cr. 350, 71 S. W. 18; Sexton v. S., 49 Tex. Cr. 253, 92 S. W. 37; Moore v. S., 47 Tex. Cr. 410, 83 S. W. 1117; Thomas v. S., 45 Tex. Cr. 111, 74 S. W. 36; Stiles v. S. (Tex. Cr.), 75 S. W. 511; S. v. Johnson, 36 Wash. 294, 78 P. 903; Curran v. S., 12 Wyo. 553, 76 P. 577.

Proof of circumstances may cover a wide range; evidence is not to be excluded because it is somewhat remote and fragmentary. Howard v. C., 118 Ky. 1, 80 S. W. 211, 81 S. W. 704. See "Circumstantial Evidence," Vol. 3, pp. 60, 104, and same title, ante.

Pursuit of accused by trained bloodhounds may be shown. S. v. Hunter, 143 N. C. 607, 56 S. E. 547 (*cit.* Hodges v. S., 98 Ala. 10, 13 S. 385; Simpson v. S., 111 Ala. 6, 20 S. 572; Pedigo v. C., 103 Ky. 41, 44 S. W. 143; S. v. Hall, 3 Ohio N. P. 125); Baum v. S., 6 Ohio C. C. (N. S.) 515. See "Identity," Vol. 9, pp. 910, 931, and same title, infra.

In a bastardy case the child whose paternity is in issue may be received in evidence to show a resemblance between it and defendant. Shailer v. Bullock, 78 Conn. 65, 61 A. 65. But see "Bastardy," Vol. 2, pp. 237, 253.

679-48 But see National C. Co. v. Alexander, 75 Kan. 537, 89 P. 923, stated in note 31, p. 741, post.

Inconsistent acts of a party may be shown. Fitzpatrick S. B. G. Co. (Ala.), 44 S. 1023.

Acts of third parties, pursuant to instructions from a litigant, may be proven in corroboration of his testimony. Brown v. Petersen, 25 App. D. C. 359.

680-50 P. v. Sciaroni, 4 Cal. App. 698, 89 P. 133; P. v. Koening, 99 Cal. 574, 34 P. 238; P. v. Morton, 139 Cal. 719, 73 P. 609; S. v. Egbert, 125 Ia. 443, 101 N. W. 191.

680-51 Proof of opportunity and of inquiry as to the railroad fare to another country does not constitute sufficient corroboration. P. v. Sciaroni, 4 Cal. App. 698, 89 P. 133.

680-52 Batzold v. Upper, 4 Ont. L. R. (Can.) 116; P. v. Sullivan, 144 Cal. 471, 77 P. 1000; Smith v. S., 125 Ga. 296, 54 S. E. 127; S. v. Jones, 115 Ia. 113, 88 N. W. 196; Asher v. Howard, 28 Ky. L. R. 1097, 91 S. W. 270.

682-63 S. v. Marselle, 43 Wash. 273, 86 P. 586. See "CORPUS DELICTI," Vol. 3, p. 69, and same title, supra.

684-64 See Sanders v. S., 118 Ga. 329, 45 S. E. 365; Burk v. S. (Tex. Cr.), 95 S. W. 1064.

Confession may aid proof of the corpus delicti. Gray v. S., 44 Tex. Cr. 477, 72 S. W. 858; Kugadt v. S., 38 Tex. Cr. 681, 44 S. W. 989.

684-65 Holland v. C., 26 Ky. L. R. 790, 82 S. W. 596; Burk v. S. (Tex. Cr.), 95 S. W. 1064.

Corroborative facts brought out by the confession may be proven. Whitney v. C. 24 Ky. L. R. 2524, 74 S. W. 257. See "CONFESSIONS," Vol. 3, p. 294, and same title, ante.

684-66 Curran v. S., 12 Wyo. 553, 76 P. 577. See "CORPUS DELICTI," Vol. 3, p. 661, and same title, ante.

684-67 Joiner v. S., 119 Ga. 315, 46 S. E. 412.

686-80 If the corpus delicti is otherwise proved there may be a conviction on the confession. Burk v. S. (Tex. Cr.), 95 S. W. 1064.

688-95 See Stone v. S., 118 Ga. 705, 45 S. E. 630.

Corroboration not essential. — S. v. Fahey, 3 Penne. (Del.), 594, 54 A. 690; S. v. Wigger, 196 Mo. 90, 93 S. W. 390; S. v. Register, 133 N. C. 746. 46 S. E. 21.

Accessories after the fact are not within such statutes. S. v. Phillips, 18 S. D. 1, 98 N. W. 171. See "ACCOMPLICES," Vol 1, p. 99, and same title, ante.

688-97 S. v. Stevens, 133 Ia. 684, 110 N. W. 1037.

In New York a statute provides for receiving unsworn evidence of children under twelve years, and that no conviction shall be had upon such testimony unless corroborated. P. v. Sexton, 187 N. Y. 495, 512, 80 N. E. 396.

688-1 Perjured witness should be corroborated in case of felony. S. v. Fahey, 3 Penne. (Del.) 594, 54 A. 690.

689-6 P. v. Plath, 100 N. Y. 590, 3 N. E. 592; P. v. Page, 162 N. Y. 272, 56 N. E. 750. See "ABDUCTION," Vol. 1, p. 45, and same title, ante.

689-7 C. v. Bell, 4 Pa. Super, 187; Smartt v. S., 112 Tenn. 539, 80 S. W. 586. See "ABORTION," Vol. 1, p. 61, and same title, ante.

690-8 Where the victim of an abortion is not an accomplice the fact that she is guilty of an offense may make it proper to require that she be corroborated. S. v. Carey, 76 Conn. 342, 56 A. 632.

693-23 See P. v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370, "ACCOMPLICES," Vol. 1, p. 92, and same title, ante.

694-31 Testimony of a witness who perjured himself on a former trial will not sustain a conviction for a felony. S. v. Fahey. 3 Penne. (Del.) 594, 54 A. 690.

694-32 S. v. Perry (Ia.), 105 N. W. 507.

694-33 S. v. Rennick, 127 Ia. 294, 103 N. W. 159; Schwartz v. S., 65 Neb. 196, 91 N. W. 190; Bridges v. S. (Neb.), 113 N. W. 1048.

694-35 P. v Stratton, 141 Cal. 604, 75 P. 166; Yother v. S., 120 Ga. 204, 47 S. E. 555; S. v. Mungeon (S. D.), 108 N. W. 552.

695-40 P. v. Koller, 142 Cal. 621, 76 P. 500; Bridges v. S. (Neb.), 113 N. W. 1048; S. v. Mungeon, supra.

Continuous illicit relationship may be shown. P. v. Koller, 142 Cal. 621, 76 P. 509.

Other like acts between the parties may be proven. Smith v. C., 109 Ky. 685, 60 S. W. 531.

Result of medical examination of prosecutrix may be given. P. v. Stratton, 141 Cal. 604, 75 P. 166.

696-43 S. v. Mungeon (S. D.), 108 N. W. 552.

696-44 P. v. Smith, 3 Cal. App. 68, 84 P. 452; S. v. Faulkner, 175 Mo. 546, 75 S. W. 116; S. v. Pratt (S. D.), 112 N. W. 152; Holt v. S., 48 Tex. Cr. 559, 89 S. W. 838; Grady v. S., 49 Tex. Cr. 3, 90 S. W. 38; Billingsley v. S., 49 Tex. Cr. 620, 95 S. W., 520; Cleveland v. S. (Tex. Cr.), 95 S. W. 521. Testimony on which the change is based may be proven by a single witness. Hambrighton v. S., 49 Tex. Cr. 152, 162, 91 S. W. 232.

697-48 U. S. v. Hall, 44 Fed. 864, 10 L. R. A. 324; S. v. Fahey, 3 Penne. (Del.) 594, 54 A. 690; Galloway v. S., 29 Ind. 442; Madigan v. Sturgis, 110 App. Div. 1, 96 N. Y. S. 1046; S. v. Pratt (S. D.) 112 N. W. 152; Holt v. S., 48 Tex. Cr. 559, 89 S. W. 838; Billingsley v. S., 49 Tex. Cr. 620, 95 S. W. 520; Cleveland v. S. (Tex. Cr.), 95 S. W. 521.

698-49 Stamper v. C., 30 Ky. L. R. 992, 100 S. W. 286; S. v. Faulkner, 175 Mo. 546, 75 S. W. 116; S. v. Rutledge, 37 Wash. 523, 79 P. 1123.

The rule is that the evidence must be more than sufficient to counterbalance the oath of the prisoner and the presumption of innocence. S. v. Fahey, 3 Penne. (Del.) 594, 54 A. 690.

698-50 Pratt v. S. (S. D.), 112 N. W. 152.

699-55 Boren v. U. S., 144 Fed. 801, 75 C. C. A. 531; U. S. v. Thompson, 31 Fed. 331.

Corroboration sometimes required. Evidence sufficient. P. v. Nichols, 108 App. Div. 362, 95 N. Y. S. 736.

699-57 Holt v. S., 48 Tex. Cr. 559, 89 S. W. 838; S. v. Rutledge, 37 Wash. 523, 79 P. 1123.

700-59 P. v. Smith, 3 Cal. App. 68, 84 P. 452.

701-61 Cleveland v. S. (Tex. Cr.), 95 S. W. 521; Billingsley v. S., 49 Tex. Cr. 620, 95 S. W. 520; Kelley v. S. (Tex. Cr.), 103 S. W. 189; Grady v. S., 49 Tex. Cr. 3, 90 S. W. 38.

An accomplice is not a credible witness. Conant v. S. (Tex. Cr.), 103 S. W. 897.

701-63 Proof of falsity of statement made by accused is not corroboration. The state must prove which of two statements is false, and show the statement relied on for perjury as being false by evidence independent of the contradictory statements of defendant or his sworn declaration. Billingsley v. S., 49 Tex. Cr. 620, 95 S. W. 520.

702-65 Boren v. U. S., 144 Fed. 801, 75 C. C. A. 531.

704-76 Admissions must be explicit. Grady v. S., 49 Tex. Cr. 3, 90 S. W. 38.

705-78 P. v. Ah Lung, 2 Cal. App. 278, 83 P. 296; S. v. Welch, 191 Mo. 179, 89 S. W. 945; S. v. Dilts, 191 Mo. 665, 90 S. W. 782; S. v. Jones, 32 Mont. 442, 80 P. 1095; Knowles v. S. 44 Tex. Cr. 322 72 S. W. 398; Hill v. S. (Tex. Cr.), 77 S. W. 808; S. v. Fetterly, 33 Wash. 599, 74 P. 810; Brown v. S., 127 Wis. 193, 106 N. W. 536.

707-82 See Burk v. S. (Neb.), 112 N. W. 573.

707-83 P. v. Ah Lung, 2 Cal. App. 278, 83 P. 296.

707-84 Burk v. S. (Neb.), 112 N. W. 573; Klawitter v. S. (Neb.), 107 N. W. 121; Livinghouse v. S. (Neb.), 107 N. W. 854.

In Georgia the defendant in a prosecution for rape cannot testify, and it is said that he should not be convicted on the woman's testimony alone unless she made outcry or complaint, or her clothing was torn or disarranged, or her person showed signs of violence, or there were other corroborating circumstances. Davis v. S., 120 Ga. 433, 48 S. E. 180; Vanderford v. S., 126 Ga. 753, 55 S. E. 1025.

708-85 S. v. Egbert, 125 Ia. 443, 101 N. W. 191; P. v. Haiseher, 81 App. Div. 559, 81 N. Y. S. 79.

708-87 S. v. Norris, 122 Ia. 154, 97 N. W. 999.

708-88 The corroborating evidence must tend to single out the defendant and identify him as the assailant. S. v. Egbert, supra.

The fact of the assault may be shown by testimony of prosecutrix. S. v. Bartlett, 127 Ia. 689, 104 N. W. 285.

In Georgia the court of appeals has declined to extend the ruling of the supreme court requiring corroboration in case of rape to attempts

to commit it. Fields v. S., 2 Ga. App. 41, 58 S. E. 327.

708-91 P. v. Ah Lung, 2 Cal. 278, 83 P. 296.

Insufficient corroboration. — S. v. Cowing, 99 Minn. 123, 108 N. W. 851; Klawitter v. S. (Neb.), 107 N. W. 121; Livinghouse v. S. (Neb.), 107 N. W. 854; P. v. Haischer, 81 App. Div. 559, 81 N. Y. S. 79.

709-92 P. v. Ah Lung, 2 Cal. App. 278, 83 P. 296; Peckham v. P., 32 Colo. 140, 75 P. 422; S. v. Norris, 122 Ia. 154, 97 N. W. 999; S. v. Bartlett, 127 Ia. 689, 104 N. W. 285.

Other acts of illicit intercourse may be proven as corroborative of testimony of prosecutrix under age of consent. P. v. Williams, 133 Cal. 165, 65 P. 323; P. v. Edwards, 139 Cal. 527, 73 P. 416; S. v. King, 117 Ia. 484, 91 N. W. 768; S. v. Borchert, 68 Kan. 360, 74 P. 1108; Smith v. C., 109 Ky. 685, 60 S. W. 531; Woodruff v. S., 72 Neb. 815, 101 N. W. 1114; Sykes v. S., 112 Tenn. 572, 82 S. W. 185; Taylor v. S., 22 Tex. App. 529, 3 S. W. 753, 58 Am. Rep. 656; S. v. Fetterly, 33 Wash. 599, 74 P. 810; Lanphere v. S., 114 Wis. 193, 89 N. W. 128. But proof of such acts after the alleged date is not competent to corroborate a person who may consent. P. v. Robertson, 88 App. Div. 198, 84 N. Y. S. 401.

Birth of child is not corroborative. S. v. Coffman, 112 Ia. 8, 83 N. W. 721; S. v. Blackburn (Ia.), 114 N. W. 531; P. v. Robertson, 88 App. Div. 198, 84 N. Y. S. 401. It is given little weight if it occurred much before the lapse of usual time unless shown to have been premature. Livinghouse v. S. (Neb.), 107 N. W. 854. Miscarriage may be proven. S. v. Fetterly, 33 Wash. 599, 74 P. 810.

709-93 Posey v. S., 143 Ala. 54, 38 S. 1019; S. v. Carpenter, 124 Ia. 5, 98 N. W. 775; C. v. Cleary, 172 Mass. 175, 51 N. E. 746; S. v. Stines, 138 N. C. 686, 50 S. E. 851; S. v. Werner (N. D.) 112 N. W. 60; Adams v. S. (Tex. Cr.), 105 S. W. 197; Brown v. S. (Tex. Cr.), 106 S. W. 368.

709-94 Loar v. S. (Neb.), 107 N. W. 229.

710-95 Admissions are not corroborative unless they relate to acts on the date alleged or prior thereto. P. v. Robertson, 88 App. Div. 198, 84 N. Y. S. 401.

710-96 Burk v. S. (Neb.), 112 N. W. 573.

710-97 The result of a medical examination immediately had is competent. Brown v. S. (Tex. Cr.), 106 S. W. 368. And so of examination six months after offense. P. v. Ah Lung, 2 Cal. App. 278, 83 P. 296.

Discoloration of garments may be shown. S. v. Norris, 127 Ia. 683, 104 N. W. 282.

710-98 Constant association of the parties may be given weight. S. v. Norris, 122 Ia. 154, 97 N. W. 999.

711-99 Mere opportunity alone does not furnish the corroboration required, but, if the opportunity is made by the defendant's deliberate act, and if, in connection therewith, it is shown that he did the things which usually lead to intercourse, connection with the crime is shown. S. v. Norris, supra.

Proof of exclusive opportunity sufficient. S. v. Stevens, 133 Ia. 684, 110 N. W. 1037.

711-1 Washington v. S., 124 Ga. 423, 52 S. E. 910.

711-4 Rex v. Daun, 12 Ont. L. R. (Can.) 227; Burnett v. S., 76 Ark. 295, 88 S. W. 956; Carrens v. S., 77 Ark. 16, 91 S. W. 30; Lasater v. S. (Ark.), 94 S. W. 59; S. v. Fogg, 206 Mo. 696, 105 S. W. 618; Howe v. S. (Tex. Cr.), 102 S. W. 409.

In Missouri a distinction is made between seduction and the offense of having carnal knowledge of a female under eighteen years; in prosecutions for the latter corroboration is not required. S. v. Day, 188 Mo. 359, 87 S. W. 465.

712-6 S. v. Sublett, 191 Mo. 163, 90 S. W. 374.

712-10 It is sufficient if prosecutrix's testimony as to the promise is corroborated by other than her own evidence, as by defendant's admissions, or facts and circumstances such as usually attend an engagement of marriage. S. v. Sublett, supra; S. v. Phillips, 185 Mo. 185, 83 S. W. 1080.

713-15 Burnett v. S., 76 Ark.

295, 88 S. W. 956; Rucker v. S., 77 Ark. 23, 90 S. W. 151; Carrens v. S., 77 Ark. 16, 91 S. W. 30; Lasater v. S., 77 Ark. 468, 94 S. W. 59; S. v. Fogg, 206 Mo. 696, 105 S. W. 618; Spenrath v. S. (Tex. Cr.), 48 S. W. 192.

Corroboration as to promise not essential if prosecutrix was corroborated as to either of the material facts so as to establish her credibility. Weaver v. S., 142 Ala. 33, 39 S. 341 (citing local cases); Rex v. Dunn, 12 Ont. L. R. (Can.) 227.

The corroborating testimony is not insufficient because it tends to prove an act of intercourse subsequent to the first of such acts if it was at the time of, or subsequent to, the promise. Rucker v. S., 77 Ark. 23, 90 S. W. 151.

714-16 Rex v. Burr, 13 Ont. L. R. (Can.) 485; S. v. Kincaid, 142 N. C. 657, 55 S. E. 647.

714-17 S. v. Smith, 124 Ia. 334, 100 N. W. 40; S. v. Waterman, 75 Kan. 253, 88 P. 1074; S. v. Day, 188 Mo. 359, 87 S. W. 465; S. v. Fogg, 206 Mo. 696, 105 S. W. 618.

Subsequent illicit acts may be proven. S. v. Robertson, 121 N. C. 551, 28 S. E. 59.

A subsequent promise to marry may be regarded as corroborative of the allegation as to the original promise. S. v. Waterman, 75 Kan. 253, 88 P. 1074.

714-18 Fine v. S., 45 Tex. Cr. 290, 77 S. W. 806.

In Ontario there is corroboration in some material respect by proof that, prior to the seduction under promise of marriage defendant told the brother of prosecutrix that he thought enough of her to marry her; that he and she had their photographs taken together, and that, subsequently, he said his intention had been to marry her. Rex v. Dunn, 12 Ont. L. R. (Can.) 227.

714-19 Weaver v. S., 142 Ala. 33, 39 S. 341; Lasater v. S., 77 Ark. 468, 94 S. W. 59; S. v. Reinheimer, 109 Ia. 624, 80 N. W. 669; S. v. Waterman, 75 Kan. 253, 88 P. 1074.

Continuous association of the parties for two years is a slight circumstance on which to base corroboration of their engagement. Fine v. S. 45 Tex. Cr. 290, 77 S. W. 806; Spenrath v. S. (Tex. Cr.), 48 S. W. 192.

715-20 S. v. Fogg, 206 Mo. 696, 105 S. W. 618.

Conduct of accused. — Proof that accused took improper liberties with prosecutrix, expressed his desire for intercourse and had opportunity to gratify it meets the requirement of corroboration in some material particular. King v. Burr, 13 Ont. L. R. (Can.) 485.

715-23 Weaver v. S., 142 Ala. 33, 39 S. 341; S. v. Phillips, 185 Mo. 185, 83 S. W. 1080; S. v. Sublett, 191 Mo. 163, 90 S. W. 374; S. v. Fogg, 206 Mo. 696, 105 S. W. 618.

715-24 Weaver v. S., supra; Whatley v. S., 144 Ala. 68, 39 S. 1014; Lasater v. S., 77 Ark. 468, 94 S. W. 59; Howe v. S. (Tex. Cr.), 102 S. W. 409.

A witness who has seen a letter may testify of the terms used in addressing prosecutrix though unable to state its contents, and though no predicate was laid for their parol proof. Lasater v. S., supra.

Letters must be identified or proved by other testimony than that of prosecutrix. Carrens v. S., 77 Ark. 16, 91 S. W. 30.

716-25 S. v. McGinn, 109 Ia. 641, 80 N. W. 1068; S. v. Nugent, 134 Ia. 237, 111 N. W. 927.

716-26 Date of child's birth corroborative of mother's testimony as to time of intercourse. Whatley v. S., 144 Ala. 68, 39 S. 1014.

716-27 Fine v. S., 45 Tex. Cr. 290, 77 S. W. 806.

716-28 Statements of prosecutrix to her mother concerning the engagement and seduction may be proven. S. v. Whitley, 141 N. C. 823, 53 S. E. 820.

Prosecutrix will not be compelled to submit to a physical examination to furnish corroborative evidence for defendant. Bowers v. S., 45 Tex. Cr. 185, 75 S. W. 299.

716-29 Declarations made by prosecutrix as to defendant's purpose to marry may be shown. S. v. Kincaid, 142 N. C. 657, 55 S. E. 647.

716-30 Preparation for marriage may be shown. S. v. Fogg, 206 Mo. 696, 105 S. W. 618.

718-43 Salchert v. Reinig (Wis.), 115 N. W. 132.

721-59 H. C. Jaquith Co. v. Shumway (Vt.), 69 A. 157.

723-69 **There is no rule of law** which forbids the granting of a divorce on uncorroborated evidence, though in practice corroboration is required. Curtis v. Curtis, 21 L. T. (Eng.) 676.

723-70 Chappell v. Chappell, 83 Ark. 533, 104 S. W. 203; Hayes v. Hayes, 144 Cal. 625, 78 P. 19; Avery v. Avery, 184 Cal. 239, 82 P. 967; Hutchinson v. Hutchinson, 53 Misc. 438, 104 N. Y. S. 1074.

724-71 **In Kansas** it is so provided by statute. May v. May, 71 Kan. 317, 80 P. 567.

The code of the District of Columbia has been construed to prohibit divorce or annulment of marriage upon mere statement of one of the parties without corroboration. Lenoir v. Lenoir, 24 App. D. C. 160.

725-77 Hayes v. Hayes, 144 Cal. 625, 78 P. 19; May v. May, 71 Kan. 317, 80 P. 567.

Confessions must be well established, direct and certain, free from suspicion of collusion, and corroborated by independent facts and circumstances. Michalowricz v. Michalowricz, 25 App. D. C. 484, *cit.* Johns v. Johns, 29 Ga. 718; Robbins v. Robbins 100 Mass. 150, 97 Am. Dec. 91; Kloman v. Kloman, 62 N. J. Eq. 153, 49 A. 810.

725-79 McMullin v. McMullin, 140 Cal. 112, 73 P. 808; Michalowricz v. Michalowricz, 25 App. D. C. 484; May v. May, 71 Kan. 317, 80 P. 567.

726-81 Wood v. Wood (N. J. Eq.), 62 A. 429; Lister v. Lister, 65 N. J. Eq. 109, 55 A. 1093; Cotter v. Cotter (N. J. Eq.), 58 A. 73 (the difficulty in the way of obtaining corroborative evidence is immaterial).

All the essential facts must be corroborated. Sterling v. Sterling (N. J. Eq.), 63 A. 548.

727-86 **Insufficient corroboration.** Grady v. Grady (N. J. Eq.), 64 A. 440.

Refusing to become reconciled and so declaring to third parties at the time of and subsequent to the offer of reconciliation is a sufficient confirmation of plaintiff's testimony. McMullin v. McMullin, 140 Cal. 112, 73 P. 808.

Proof of continuance of separation is not sufficient corroboration of desertion. Corder v. Corder (N. J. Eq.), 59 A. 309; Kline v. Kline (N. J. Eq.), 61 A. 1060.

Testimony concerning condonation is corroborated by proof of resumption of marital relations. Womack v. Womack, 73 Ark. 281, 83 S. W. 937, 1136.

727-87 **Anterior and subsequent** improper familiarities may be shown. Thayer v. Thayer, 101 Mass. 111; S. v. Way, 5 Neb. 283; Lanphere v. S., 114 Wis. 193, 89 N. W. 128.

The evidence of opportunity must be supplemented by proof of inclination, and the evidence as to both must be such as to lead a reasonable man to the conclusion that the adulterous act has been done. Hutchinson v. Hutchinson, 53 Misc. 438, 104 N. Y. S. 1074; Roth v. Roth, 90 App. Div. 87, 85 N. Y. S. 640, *aff.*, without opinion, 183 N. Y. 520, 76 N. E. 1107.

727-91 Avery v. Avery, 184 Cal. 239, 82 P. 967.

729-4 **It is provided** by a statute of Ontario that in any action or proceeding by or against persons claiming under a decedent an opposite or interested party shall not obtain a verdict on his own evidence in respect of any matter prior to death unless such evidence is corroborated by some other material evidence. Proof of admissions by the deceased satisfies the statute, though made by a cestui que trust. Batzold v. Upper, 4 Ont. L. R. (Can.) 116. The production of another note, said to have been signed by deceased and witnessed only by plaintiff and his oath did not satisfy such statute. But it was otherwise as to a mortgage executed by deceased and identified by plaintiff, it being also " an original part on which the registrar has indorsed a certificate of the registration thereof, and so it is to ' be received as prima facie evidence of the registration and of the due execution of the same ' " by virtue of statute. Thompson v. Thompson, 4 Ont. L. R. (Can.) 442.

730-7 **A resulting trust in** favor of a wife cannot be established by her own and husband's uncorroborated testimony as against his

creditors. Burnett v. Campbell Co., 1 Tenn. Ch. App. 18.

Extent of corroboration. — The corroborative testimony need not go to the details; if it meets some important points it will confirm the evidence of the parties and satisfy the chancellor's conscience. Burnett v. Campbell Co., supra.

730-8 A receipt given by a third party to the grantor of one of the litigants and testimony that grantor claimed the land is competent to sustain such litigants' testimony. Powers v. Hatter (Ala.), 44 S. 859.

730-9 Payment and ability to pay. — If one party alleges nonpayment and attempts to show that the other was unable to pay, the contrary may be shown in corroboration of proof of payment. Dick v. Marvin, 188 N. Y. 426, 81 N. E. 162, *cit.* Higgins v. Andrews, 121 Mass. 293; Wiggin v. Plumer, 31 N. H. 251, 269.

731-11 A mistake by witness in part of his testimony does not make corroborating evidence as to another part of it inadmissible. S. v. Easley, 118 La. 690, 43 S. 279.

731-12 Evidence of complaints made soon after the event is competent, but it must be limited to the bare fact of making them; details of the occurrence or the identity of the person accused cannot be shown thereby. Hopt v. Utah, 110 U. S. 584; Oakley v. S., 135 Ala. 15, 33 S. 23, 135 Ala. 29, 38 S. 1019; Bray v. S., 131 Ala. 46, 31 S. 107; Posey v. S., 143 Ala. 54, 38 S. 1019; S. v. Egbert, 125 Ia. 443, 101 N. W. 191; Reddick v. S., 35 Tex. Cr. 463, 34 S. W. 274, 60 Am. St. 56.

Proof of long delayed complaints inadmissible. S. v. Griffin, 43 Wash. 591, 86 P. 951. It may be shown that prosecutrix complained of accused's enforced attentions. Brown v. S. (Tex. Cr.), 106 S. W. 368.

Statement in answer to question. A statement made by a girl under the age of consent in reply to a question not of a suggestive or leading character may be shown in corroboration of her testimony. "If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first." Rex. v. Osborne, (1905) 1 K. B. (Eng.) 551. In Reg. v. Merry, 19 Cox C. C. (Eng.) 442, a statement made in answer to a question was excluded. This case is distinguished in Rex v. Osborne, supra, on the ground that it did not appear what the nature of the question was.

732-13 Strebin v. Lavengood, 163 Ind. 478, 71 N. E. 494; S. v. Constantine (Wash.), 93 P. 317.

It is a discretionary question whether reports made by an employe are so verified as to be competent corroborative evidence. Strand v. R. Co., 101 Minn. 85, 111 N. W. 958.

733-14 Louisville R. Co. v. Varner, 129 Ga. 844, 60 S. E. 162; Davis v. S., 45 Tex. Cr. 292, 77 S. W. 451; Bowen v. S., 47 Tex. Cr. 137, 82 S. W. 520.

Admission of such evidence improper, but not ground for reversal. First Nat. Bk. v. Wells, F. & Co., 127 Fed. 818, 62 C. C. A. 134.

735-15 Fitzpatrick S. B. G. Co. v. McLaney (Ala.), 44 S. 1023; Moynahan v. Perkins, 36 Colo. 481, 85 P. 1132; S. v. Mulch, 17 S. D. 321, 96 N. W. 101.

735-16 Inman Bros. v. Dudley, 146 Fed. 449, 76 C. C. A. 659; S. v. Fogg, 206 Mo. 696, 105 S. W. 618; First Nat. Bk. v. Blakeman (Okla.), 91 P. 868; Hill v. S. (Tex. Cr.), 106 S. W. 145; Green v. S., 49 Tex. Cr. 238, 90 S. W. 1115.

Manner in which attack made, immaterial. S. v. Exum, 138 N. C. 599, 612, 50 S. E. 283.

736-17 Griffin v. Boston, 188 Mass. 475, 74 N. E. 687; S. v. Werner (N. D.), 112 N. W. 60; C. v. Brown, 23 Pa. Super. 470; Glass v. Bennett, 89 Tenn. 478, 14 S. W. 1085; Graham v. McReynolds, 90 Tenn. 673, 18 S. W. 272; Anderson v. S. (Tex. Cr.), 95 S. W. 1037; Rice v. S. (Tex. Cr.), 100 S. W. 771; Craven v. S., 49 Tex. Cr. 78, 90 S. W. 311.

736-18 Sweeney v. Sweeney, 121 Ga. 293, 48 S. E. 984; Kipper v. S., 45 Tex. Cr. 377, 77 S. W. 611.

737-19 Circumstances corroborative of the testimony questioned

may be proven. Ball v. C., 27 Ky. L. R. 448, 85 S. W. 226.

737-20 Legere v. S., 111 Tenn. 368, 77 S. W. 1059; Anderson v. S. (Tex. Cr.), 95 S. W. 1037; White v. S., 42 Tex. Cr. 567, 62 S. W. 575. See Driggers v. U. S. (Ind. Ter.), 104 S. W. 1166.

Time when statements made immaterial to their competency. S. v. Exum, 138 N. C. 599, 612, 50 S. E. 283. Provable if made contemporaneously. Rice v. S. (Tex. Cr.), 100 S. W. 771.

738-22 Phillips G. & O. Co. v. Glass Co., 213 Pa. 183, 62 A. 830; Pyroleum A. Co. v. Williamsport, 169 Pa. 440, 32 A. 458.

738-23 Southern P. Co. v. Schuyler. 135 Fed. 1015, 68 C. C. A. 409; S. v. Exum, 138 N. C. 599, 611. 50 S. E. 283; Green v. S., 49 Tex. Cr. 238, 90 S. W. 1115; Hunter-E. Co. v. Lanius, 82 Tex. Civ. 82, 18 S. W. 201; Dean v. S., 47 Tex. Cr. 243, 83 S. W. 816; Hardin v. R. Co. (Tex. Civ.), 108 S. W. 490; Hill v. S. (Tex. Cr.), 106 S. W. 145; Holmes v. S. (Tex. Cr.), 106 S. W. 1160; Davis v. S., 45 Tex. Cr. 292, 77 S. W. 451.

Contradictory statements must be shown; an attempt to show the improbability of witness' statements is not an impeachment. Kesselring v. Hummer, 130 Ia. 145, 106 N. W. 501.

739-24 In re McClellan (S. D.), 111 N. W. 540 (modifying a contrary expression in a ruling in the same case); S. v. Exum, 138 N. C. 599, 50 S. E. 283; Davis v. Farwell, 80 Vt. 166, 67 A. 129.

740-27 Falkner v. S. (Ala.), 44 S. 409.

740-28 **A witness' reputation** for truth and veracity may be shown where defendant has offered proof of statements made in contradiction of his testimony. Graham v. S. (Ala.), 45 S. 580; Holley v. S., 105 Ala. 100, 17 S. 102; Brown v. S., 142 Ala. 287, 38 S. 268; Bell v. Aiken, 1 Ga. App. 36, 57 S. E. 1001; Clark v. S., 117 Ga. 254, 43 S. E. 853; Browning v. R. Co., 118 Mo. App. 449, 94 S. W. 315; Berryman v. Cox, 73 Mo. App. 67; Warfield v. R. Co., 104 Tenn. 74, 55 S. W. 304, 78 Am. St. 911; Minton v. R. Co. (Tenn.), 101 S. W. 178; Myers v. S. (Tex. Cr.), 101 S. W. 1000; Dunlap v. S. (Tex. Cr.), 98 S. W. 845; Contreras v. T. Co. (Tex. Civ.), 83 S. W. 870; Missouri R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493; Texas C. R. Co. v. Weideman (Tex. Civ.), 62 S. W. 810; Harris v. S., 49 Tex. Cr. 338, 94 S. W. 227; Chesapeake & O. R. Co. v. Fortune, 107 Va. 412, 59 S. E. 1095; Kraimer v. S., 117 Wis. 350, 93 N. W. 1097.

Some courts regard such evidence as too remote. S. v. Hoffman, 134 Ia. 587, 112 N. W. 103; S. v. Owens, 109 Ia. 1, 79 N. W. 462.

A mere difference between witnesses is not such an impeachment as makes proof of character competent. Southern R. Co. v. Hobbs (Ala.), 43 S. 844; White v. Epperson, 32 Tex. Civ. 162, 73 S. W. 851.

740-29 Birmingham R. L. Co. v. Hayes (Ala.), 44 S. 1032; Burks v. S., 78 Ark. 271, 93 S. W. 983; Peters v. S., 124 Ga. 80, 52 S. E. 147; McBride v. R. Co., 125 Ga. 515, 54 S. E. 674; Cook v. S., 124 Ga. 653, 53 S. E. 104; Chicago C. R. Co. v. Matthieson, 212 Ill. 293, 72 N. E. 443; Kesselring v. Hummer, 130 Ia. 145, 106 N. W. 501; S. v. Cato, 116 La. 195, 40 S. 633; Weitzel v. Fowler, 143 Mich. 700, 107 N. W. 451; Head v. S., 44 Miss. 731; S. v. Taylor, 134 Mo. 109, 35 S. W. 92; Kipp v. Silverman, 25 Mont. 296, 64 P. 884; Cincinnati T. Co. v. Stephens, 75 Ohio St. 171, 79 N. E. 235; McKnight v. S. (Tex. Cr.), 95 S. W. 1056; Lavigne v. Lee, 71 Vt. 167, 42 A. 1093.

Fluctuation of opinion. — It is said in Burks v. S., supra, that the courts of Missouri, New Hampshire and New York first admitted such testimony, but in later decisions excluded it. So the earlier English decisions held it admissible, but later repudiated the doctrine.

Exceptions to the rule. — Some courts which favor the rule of the text make exceptions: "If the witness is charged with a design to misrepresent, on account of his changed relation to the parties or the cause, evidence of like statements before such change of relation may be admitted; so, if it is attempted to be shown that the evidence is a recent fabrication, or when long silence concerning an injury is construed against the injured party, as in cases of indict-

ment for rape, it may be shown that the witness made similar statements soon after the transaction in question. The exceptions are sometimes said to include all cases where the record is such as to charge the witness with having given testimony under the influence of some motive which might prompt him to make false or colored statements. See Barkly v. Copeland, 74 Cal. 1, 15 P. 307, 5 Am. St. 413. It is not enough that the party tendering such evidence suspects that the other side may argue to the jury that the facts are such as to bring the case within one of these exceptional situations. The ground to take the case out of the general rule and authorize the admission of consistent statements must clearly appear in the record. Aetna I. Co. v. Eastman, 95 Tex. 34, 64 S. W. 863; Martin v. S., 119 Ala. 1, 25 S. 255." Kesselring v. Hummer, 130 Ia. 145, 106 N. W. 501. To the same effect, Chicago City R. Co. v. Matthieson, 212 Ill. 292, 72 N. E. 443; Waller v. P., 209 Ill. 284, 70 N. E. 681; Yarbrough v. S., 105 Ala. 43, 16 S. 758; Davis v. Davis (Tex. Civ.), 98 S. W. 198, *cit.* Lewy v. Fischl, 65 Tex. 311; Aetna Ins. Co. v. Eastman, 95 Tex. 34, 64 S. W. 863; Callihan v. Washington Co., 27 Wash. 154, 67 P. 697, 56 L. R. A. 772, 91 Am. St. 829 (report of conductor as to acceptance of transfers).

Letters of an agent to principal are not admissible to corroborate the former's testimony against a third person. Ins. Co. v. Guardiola, 129 U. S. 642; Inman Bros. v. Dudley, 146 Fed. 449, 76 C. C. A. 659.

741-30 New v. Young, 148 Ala. 253, 41 S. 523; Catheart v. Morgan, 144 Ala. 559, 42 S. 25; Peadon v. S., 46 Fla. 124, 35 S. 204; Zuckerman v. R. Co., 117 App. Div. 378, 102 N. Y. S. 641; Dechert v. E. L. Co., 39 App. Div. 490, 57 N. Y. S. 225; Chenault v. S., 46 Tex. Cr. 351, 81 S. W. 971; Welch v. S. (Tex. Cr.), 95 S. W. 1035; Bowen v. S., 47 Tex. Cr. 137, 82 S. W. 520; Hardin v. R. Co. (Tex. Civ.), 108 S. W. 490; Anderson v. S. (Tex. Cr.), 95 S. W. 1037; Ex parte McCoy, 47 Tex. Cr. 237, 82 S. W. 1044.

A witness cannot fortify his testimony by giving the grounds or reasons for it. Peirson v. R. Co., 191 Mass. 223, 77 N. E. 769.

Dying declarations cannot be corroborated by other statements of deceased. S. v. Hendricks, 172 Mo. 654, 73 S. W. 194.

741-31 See Brittain v. Westhall, 135 N. C. 492, 47 S. E. 616.

Declarations of a party are corroborative of his testimony if part of the res gestae. Merrell v. Dudley, 139 N. C. 57, 51 S. E. 777.

742-32 P. v. Glover, 141 Cal. 233, 74 P. 745; Spearman v. Sanders, 121 Ga. 468, 49 S. E. 296; Hirsch I. & R. Co. v. Coleman, 227 Ill. 149, 81 N. E. 21; Long v. Davis (Ia.), 114 N. W. 197; Dole v. Wooldredge, 142 Mass. 161, 7 N. E. 832; Hoggan v. Cahoon, 31 Utah 172, 87 P. 164; Bailey v. R. Co., 32 Wash. 640, 73 P. 679.

Silence may be explained where a point testified of was not included in previous declarations nor alleged in the pleading; as to the latter it may be shown that the omission was owing to counsel. Gulf etc. R. Co. v. Garren, 96 Tex. 605, 74 S. W. 897. See P. v. Glover, 141 Cal. 233, 74 P. 745.

A witness whose silence has been used to impeach his testimony may corroborate it by showing consistent claims and statements made at a time when their ultimate effect could not have been foreseen. National C. Co. v. Alexander, 75 Kan. 537, 89 P. 923, citing local cases.

Impeaching conduct may be explained. Lenfest v. Robbins, 101 Me. 176, 63 A. 729; Coleman v. Lewis, 183 Mass. 485, 67 N. E. 603.

Previous testimony may be explained by stating facts, but the witness cannot say what he meant. Couch v. Couch, 141 Ala. 361, 37 S. 405.

If part of the testimony given on a former trial is received witness may offer the other part. Casey v. S. (Tex. Cr.), 97 S. W. 496.

742-33 **Order of proof** is discretionary. P. v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370.

743-36 P. v. O'Farrell, 175 N. Y. 323, 67 N. E. 588.

COUNTERFEITING [Vol. 3.]

745-3 See S. v. Calhoun, 75 Kan. 259, 88 P. 1079.

747-5 Bryan v. U. S., 133 Fed. 495, 66 C. C. A. 369.

748-9 The mere passing of the counterfeit is not sufficient to show fraudulent intent. Gallagher v. U. S., 144 Fed. 87, 75 C. C. A. 245.

CREDIBILITY [Vol. 3.]

Exception to rule against distinguishing part of evidence, 753-3; *Power of committing magistrate,* 753-4; *Rules not applicable to administrative trials,* 753-4; *Trials before referee,* 753-4; *Province of judge in cases tried without jury,* 753-4; *Testimony in conflict with science and knowledge,* 753-5; *Inquiry as to religious faith,* 756-19; *Intoxication of witness,* 757-22; *Negative evidence not to be disregarded,* 758-28; *Testimony as to credibility,* 759-32; *Chastity,* 761-36; *Coaching of Witness,* 766-53; *Inconsistent conduct in bringing action,* 774-75; *Relevancy of statements to contradict,* 774-75; *Precautionary measures after suit,* 774-75; *Explanation of instrument used to contradict,* 775-76; *Silence of witness on a question subsequently testified of,* 778-87; *Refusal to submit to physical examination,* 779-87; *Excusing former perjury,* 779-88.

752-1 **Instruction** as to witness' demeanor must not be mandatory. Illinois C. R. Co. v. Burke, 112 Ill. App. 415.

Order in which evidence to be considered is solely for jury. No. Chicago R. Co. v. Wiswell, 68 Ill. App. 443.

The code of Georgia provides that in determining where the preponderance of evidence lies the jury may consider the number of witnesses, though the preponderance is not necessarily with the greater number. It is better to omit any reference to this provision in instructing on the credibility of witnesses in a criminal cause, though it may not be erroneous to make such reference. Dickerson v. S., 121 Ga. 136, 48 S. E. 942.

752-2 Louisville & N. R. Co. v. Perkins, 144 Ala. 325, 39 S. 305; P. v. Van Ewan, 111 Cal. 144, 43 P. 520; Lynch v. P., 33 Colo. 128, 79 P. 1015; George S. & F. R. Co. v. Wisenbacker, 120 Ga. 656, 48 S. E. 146; Tri-City R. Co. v. Gould, 217 Ill. 317, 75 N. E. 493; Illinois C. R. Co. v. Burke, 112 Ill. App. 415; S. v. Barrington, 198 Mo. 23, 126, 95 S. W. 235; Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870; St. Louis etc. R. Co. v. Sproule (Tex. Civ.), 101 S. W. 268; McCowan v. N.-E. S. Co., 41 Wash. 675, 84 P. 614. See P. v. Ryan (Cal.), 92 P. 853.

Testimony of impeached witness may be called to the jurors' attention, impeachment of no other witness being attempted. Stevens v. P., 215 Ill. 593, 74 N. E. 786.

753-3 Louisville & N. R. Co. v. Perkins, 144 Ala. 325, 39 S. 305; Cowart v. S., 120 Ga. 510, 48 S. E. 198; Atlantic C. L. R. Co. v. O'Neill, 127 Ga. 685, 56 S. E. 986; Warrick v. S., 125 Ga. 133, 53 S. E. 1027, Faulkner v. Birch, 120 Ill. App. 281; Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639.

Exception to rule against distinguishing part of evidence. — It is proper to say that if the jury, upon all the evidence, believe the testimony as to the good character of certain witnesses and that it is sufficient to overcome the impeaching testimony, their testimony should be weighed in the light of the proof of their character in connection with all the other evidence. Hammond v. S., 147 Ala. 79, 41 S. 761.

Effect of affidavit. — It is proper for the court to inform the jury that an affidavit in evidence was one not required by law. Isaac v. U. S. (Ind. Ter.), 104 S. W. 588.

753-4 Illinois C. R. Co. v. Burke, 112 Ill. App. 415; Southern R. Co. v. S. (Ind. App.), 72 N. E. 174.

A committing magistrate has the same right to judge of the credibility of witnesses as a jury; and on habeas corpus proceedings every intendment is in favor of his finding. Ex parte Vandiveer, 4 Cal. App. 650, 88 P. 993.

Rules not applicable to administrative trials. — The rules of evidence governing judicial hearings are not always fully applicable to trials held by administrative officers. Hence a commissioner before whom a policeman is on trial for drunkenness and neglect of duty may cross-examine the latter for the purpose of determining whether he had been tried for like offenses. P. v. Lewis, 111 App. Div. 375, 97 N. Y. S. 1057 (*aff.*, without opinion, 186 N. Y. 583, 79 N. E. 1113). In such a trial the commissioner must act only on the evidence. P. v. Roosevelt, 168 N. Y. 488, 61 N. E. 783.

Trials before referee. — In trials before a referee the credibility of witnesses must be passed upon by him, subject to review by the trial court; not by the court of last resort. Harris v. Smith, 144 N. C. 439, 57 S. E. 122.

Province of judge in cases tried without jury. — The credibility of witnesses in cases tried without a jury is solely for the trial judge, and his findings thereon are conclusive on appeal. In re Wickes, 139 Cal. 195, 72 P. 902; Hayes v. Candee, 75 Conn. 131, 52 A. 826. The court may receive the testimony of a person found to be incapable of managing his own affairs. Wentz's Appeal, 76 Conn. 405, 56 A. 625. And may discredit any witness or multitude of witnesses, in its discretion. Allis v. Hall, 76 Conn. 322, 342, 56 A. 637; Lewis v. Lewis, 76 Conn. 586, 57 A. 735.

753-5 Waters v. Davis, 145 Fed. 912, 76 C. C. A. 444; U. S. v. Post, 128 Fed. 950; Wilkerson v. S., 140 Ala. 165, 37 S. 265; Brown v. S., 142 Ala. 287, 38 S. 268; Hamilton v. S., 147 Ala. 110, 41 S. 940; P. v. Waysman, 1 Cal. App. 246, 81 P. 1087; Fincher V. P., 26 Colo. 169, 56 P. 902; Lynch v. P., 33 Colo. 128, 79 P. 1015; Boles v. P., 37 Colo. 41, 86 P. 1030; Bradley v. Gorham, 77 Conn. 211, 58 A. 698; S. v. Stewart (Del.), 67 A. 786; Hampton v. S., 50 Fla. 55, 49 S. 421; Peadon v. S., 46 Fla. 124, 35 S. 204; Patton v. S., 117 Ga. 230, 43 S. E. 533; Powell v. S., 120 Ga. 181, 47 S. E. 563; Sindy v. S., 120 Ga. 202, 47 S. E. 554; Robinson v. S., 128 Ga. 254, 57 S. E. 315; Powell v. S., 122 Ga. 571, 50 S. E. 369; Chandler v. S., 124 Ga. 821, 53 S. E. 91; Quigg v. P., 211 Ill. 17, 71 N. E. 886; Hauser v. P., 210 Ill. 253, 71 N. E. 416; Southern R. Co. v. S. (Ind. App.), 72 N. E. 174; Indianapolis St. R. Co. v. Johnson, 163 Ind. 518, 72 N. E. 571; Atoka C. & M. Co. v. Miller (Ind. Ter.), 104 S. W. 555; Murphy v. Hiltibridle, 132 Ia. 114, 109 N. W. 471; Peacock D. Co. v. C., 25 Ky. L. R. 1778, 78 S. W. 893; Musselam v. R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Payne v. Union L. G., 136 Mich. 416, 99 N. W. 376; S. v. Fogg, 206 Mo. 696, 105 S. W. 618; Schloemer v. Transit Co., 204 Mo. 99, 102 S. W. 565; S. v. Wigger, 196 Mo. 90, 93 S. W. 390; S. v. Lortz, 186 Mo. 122, 84 S. W. 906; Walters v. R. Co., 178 N. Y. 50, 70 N. E. 98; Williams v. R. Co., 155 N. Y. 158, 49 N. E. 672; Loeb v. Mellinger, 12 Pa. Super. 592; Kelton v. Fifer, 26 Pa. Super. 603; Thomas v. Law, 25 Pa. Super. 19; Franks v. S., 48 Tex. Cr. 211, 87 S. W. 148; Plattor v. Seattle Co., 44 Wash. 408, 87 P. 489.

Rule applies with special force to dying declarations where discrepancies may be the result of faulty recollection of what was said. C. v. Mika, 171 Pa. 273, 33 A. 65; C. v. Winkelman, 12 Pa. Super. 497, 513.

Jury not required to pass on credibility or truth of statements made by one subsequently examined as a witness and which are given in evidence merely by way of contradicting and thereby impeaching his credibility. Smith v. S., 137 Ala. 22, 34 S. 396.

Testimony in conflict with science and knowledge. — "It often happens that science and common knowledge may be invoked for the purpose of demonstrating that a particular statement in regard to some particular accident must be absolutely false; in such cases the question is for the court;" but in cases of doubt it should be left with

the jury. Walters v. R. Co., 178 N. Y. 50, 70 N. E. 98.

754-6 **Knowledge of jurors in** common with that of men generally touching matters in issue may be regarded. Denver etc. R. Co. v. Warring, 37 Colo. 122, 86 P. 305.

Not bound to discredit a witness whose general reputation has been impeached. Peadon v. S., 46 Fla. 124, 35 S. 204; Ector v. S., 120 Ga. 543, 48 S. E. 315; Sindy v. S., 120 Ga. 202, 47 S. E. 554.

754-7 In re Mayer, 156 Fed. 432; Lewis v. Lewis, 76 Conn. 586, 57 A. 735; Bradley v. Gorham, 77 Conn. 211, 58 A. 698; Alexander v. Blackman, 26 App. D. C. 541; Howard v. R. Co., 32 Ky. L. R. 309, 105 S. W. 932; Sharp v. R. Co., 184 N. Y. 100, 76 N. E. 923; Becker v. Koch, 104 N. Y. 394, 10 N. E. 701; Manhattan Co. v. Phillips, 109 N. Y. 383, 17 N. E. 129; Cross v. Cross, 108 N. Y. 628, 15 N. E. 333; Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870; Smucker v. R. Co., 6 Pa. Super. 521; Troxell v. Malin, 9 Pa. Super. 483; Missouri etc. R. Co. v. Harris (Tex. Civ.), 101 S. W. 506.

Absence of direct verbal contradiction does not make a fact undisputed. Allis v. Hall, 76 Conn. 322, 340, 56 A. 637.

754-8 Armstrong v. Ballew, 118 Ga. 168, 44 S. E. 996; Detwiler v. Cox, 120 Ga. 638, 48 S. E. 142; White v. Hatton (Ia.), 113 N. W. 830; Missouri etc. R. Co. v. Harris (Tex. Civ.), 101 S. W. 506; Ross v. R. Co. (Tex. Civ.), 103 S. W. 708; Gulf etc. R. Co. v. Baugh (Tex. Civ.), 43 S. W. 557; International etc. R. Co. v. Johnson, 23 Tex. Civ. 160, 55 S. W. 772.

755-9 Hicklin v. Ter. (Ariz.), 80 P. 340; Alexander v. Blackman, 26 App. D. C. 541; Smucker v. R. Co., 6 Pa. Super. 521.

755-11 **A confession** may be believed in part only. S. v. Powell, 5 Penne. (Del.) 24, 61 A. 966.

755-13 Hughes v. Ferriman, 119 Ill. App. 169.

755-14 White v. Hatton (Ia.), 113 N. W. 830; Kavanagh v. Wilson, 70 N. Y. 177. Unimpeached and corroborated testimony ought not to be disregarded. Johnson v. Johnson (Neb.), 115 N. W. 323.

755-15 **Testimony as to credibility, inadmissible.** — A witness cannot testify of the credibility of other witnesses. Davis v. Collins, 69 S. C. 460, 48 S. E. 469.

755-16 C. v. Winkelman, 12 Pa. Super. 497, 513; St. Louis etc. R. Co. v. Sproule (Tex. Civ.), 101 S. W. 268.

There is no presumption that a witness has testified to the truth (Hauser v. P., 210 Ill. 253, 71 N. E. 416); neither does the law presume wilful and corrupt perjury. Bleich v. P., 227 Ill. 80, 81 N. E. 36.

756-19 Starks v. Schlensky, 128 Ill. App. 1.

Inquiry as to religious faith, improper. Starks v. Schlensky, supra; Louisville & N. R. Co. v. Mayes, 26 Ky. L. R. 197, 80 S. W. 1096; Bush v. C., 80 Ky. 244; White v. C., 96 Ky. 180, 28 S. W. 340; P. v. Most, 128 N. Y. 108, 27 N. E. 970; Brink v. Stratton, 176 N. Y. 150, 68 N. E. 148; Perry v. C., 3 Gratt. (Va.) 602. In Iowa it is held otherwise; but a witness' belief must be shown by his previous voluntary statements. He cannot be required to divulge it. Searcy v. Miller, 57 Ia. 613, 10 N. W. 912. Proof that deceased was a materialist is competent to affect the weight to be given his dying declarations. S. v. Elliott, 45 Ia. 486. See "ATHEIST," Vol. 2, p. 64.

757-22 Thayer v. Boyle, 30 Me. 475; Hoitt v. Moulton, 21 N. H. 586; Coleman v. R. Co., 138 N. C. 351, 50 S. E. 690.

Intoxication of a witness on the occasion of which he testifies affects his credibility. S. v. Sejours, 113 La. 676, 37 S. 599; Armour Co. v. Skene, 153 Fed. 241; Schneider v. R. Co. (Wash.), 91 P. 565; Bliss v. Beck (Neb.), 114 N. W. 162; Willis v. S., 43 Neb. 102, 61 N. W. 254; Morris v. S. (Ala.), 39 S. 608; Miller v. P., 216 Ill. 309, 74 N. E. 743.

757-24 Williams v. U. S., 6 Ind. Ter. 1, 88 S. W. 334.

758-28 Idaho M. Co. v. Kalanquin, 8 Idaho 101, 66 P. 933.

Negative evidence not to be disregarded. — It is error to charge that positive testimony is weightier than negative if one of the parties relies almost entirely on the latter, unless it is also charged that the credibil-

ity of the witnesses be considered. Cowart v. S., 120 Ga. 510, 48 S. E. 198; Southern R. Co. v. O'Bryan, 115 Ga. 659, 42 S. E. 42; Atlantic etc. R. Co. v. O'Neill, 127 Ga. 685, 56 S. E. 986; Warrick v. S., 125 Ga. 133, 53 S. E. 1027.

759-30 **The question of** positive and negative evidence does not arise where some witnesses testify that a transaction took place and others deny it. Atlantic etc. R. Co. v. O'Neill, 127 Ga. 685, 56 S. E. 986.

759-31 Mussellam v. R. Co., 31 Ky. L. R. 908, 104 S. W. 337; Tetrick v. Kansas, 128 Mo. App. 355, 107 S. W. 418; Sexton v. S. 48 Tex. Cr. 497, 88 S. W. 348.

A witness may be asked concerning his occupation if it be a disgraceful or vicious one; but, it seems, not otherwise. Atchison etc. R. Co. v. Keller, 33 Tex. Civ. 358, 76 S. W. 801.

759-32 **Testimony as to credibility.** — The character of a witness for truth and veracity cannot be shown by his own testimony. Glass v. S., 147 Ala. 50, 41 S. 727. Neither can a witness testify to the comparative worth of his own and another witness' reputation. Newman v. C., 28 Ky. L. R. 81, 88 S. W. 1089. Nor as to whether another witness was mistaken in his testimony. Braham v. S., 143 Ala. 28, 38 S. 919. He may, on re-examination, affirm the truth of previous testimony. Smith v. S. (Tex. Cr.), 106 S. W. 1161. *Compare* Wright v. S. (Ala.), 43 S. 575.

759-33 S. v. Blackburn (Ia.), 114 N. W. 531; S. v. Caron, 118 La. 349, 42 S. 960; Finlen v. Heinze, 32 Mont. 354, 80 P. 918; P. v. Cascone, 185 N. Y. 317, 332, 78 N. E. 287; Grant v. Spokane Co. (Wash.), 91 P. 553.

General character cannot be inquired into if the witness has not been convicted of crime; the inquiry is limited to character for truth and veracity. Baker v. S., 51 Fla. 1, 40 S. 673; Dungan v. S. (Wis.), 115 N. W. 350; Missouri etc. R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493.

Inquiry as to a witness' character for veracity need not be limited to his recently acquired place of residence. Gemmill v. S., 16 Ind. App. 154, 43 N. E. 909; Craft v. Barron, 28 Ky. L. R. 98, 88 S. W. 1099. And, in the discretion of the court, it may extend to a place at which witness has not lived for several years. Lake Co. v. Lewis, 29 Ind. App. 164, 64 N. E. 35. See "CHARACTER," Vol. 3, p. 1, and same title, ante.

Bad moral character at the time of testifying tends to discredit a witness, regardless of how it was brought about. S. v. Haupt, 126 Ia. 152, 101 N. W. 739; S. v. Blackburn (Ia.), 114 N. W. 531. *Contra,* Price v. Wakeham (Tex. Civ.), 107 S. W. 132.

Under a statute requiring that a petition be supported by affidavits of credible persons, the credibility of the affiants may be ascertained by their examination in court. White v. S., 83 Ark. 36, 102 S. W. 715.

Extent of turpitude. — Not only the fact that the character of a witness is bad may be shown, but the degree of turpitude it has reached. Neace v. C., 23 Ky. L. R. 125, 62 S. W. 733.

In Missouri the reputation of accused for doing like acts as that for which he is on trial, may be shown. S. v. Oliphant, 128 Mo. App. 252, 107 S. W. 32.

Fact of being under surveillance of officers while doing business may be shown. S. v. Negaard, 124 Wis. 414, 102 N. W. 899.

The whereabouts of a witness when arrested and what he was then doing may be shown. S. v. Cornelius, 118 La. 146, 42 S. 754.

Associations of a witness cannot be proved. Miller v. Ter., 149 Fed. 330, 338, 79 C. C. A. 268; Price v. Wakeham (Tex. Civ.), 107 S. W. 132.

Inquiry as to mental condition. Proof of proceedings had as to the mental condition of a person who is a witness six years before the trial is too remote. Hicks v. S., 165 Ind. 440, 75 N. E. 641.

Reputation for violence and turbulence is not material as to credibility. S. v. Beckner, 194 Mo. 281, 91 S. W. 892; Dolan v. S., 81 Ala. 11, 1 S. 707.

760-34 Dimmick v. U. S., 135 Fed. 257, 271, 70 C. C. A. 141; Ball

v. U. S., 147 Fed. 32, 77 C. C. A. 126; Gordon v. S., 140 Ala. 29, 36 S. 1009; Boyd v. S. (Ala.), 43 S. 204; Carr v. S., 81 Ark. 589, 99 S. W. 831; Hayes v. S., 126 Ga. 95, 54 S. E. 809; O'Donnell v. P., 110 Ill. App. 250 (it is so provided by statute); Clifford v. Pioneer Co., 232 Ill. 150, 83 N. E. 448; S. v. Greenburg, 59 Kan. 404, 53 P. 61; S. v. Roupetz, 73 Kan. 663, 85 P. 778; Henderson v. C., 28 Ky. L. R. 1212, 91 S. W. 1141; S. v. Clark, 117 La. 920, 42 S. 425; S. v. Barrett, 117 La. 1086, 42 S. 513; S. v. Knowles, 98 Me. 429, 59 A. 588; Richardson v. S., 103 Md. 112, 63 A. 317; C. v. Walsh (Mass.), 82 N. E. 19; P. v. DeCamp, 146 Mich. 533, 109 N. W. 1047; Dodds v. S. (Miss.), 45 S. 863; S. v. Kennedy, 207 Mo. 528, 106 S. W. 57; S. v. Oliphant, 128 Mo. App. 252, 107 S. W. 32; S. v. Forsha, 190 Mo. 296, 326, 88 S. W. 746; S. v. Barrington, 198 Mo. 23, 80, 95 S. W. 235; S. v. Lawrence, 28 Nev. 440, 82 P. 614; S. v. Mount, 73 N. J. L. 582, 64 A. 124; S. v. Henson, 66 N. J. L. 601, 50 A. 468, 616; P. v. Cascone, 185 N. Y. 317, 334, 78 N. E. 287; Coleman v. R. Co., 138 N. C. 351, 50 S. E. 690; C. v. Barry, 8 Pa. C. C. 216; S. v. Babcock, 25 R. I. 224, 55 A. 685; Webb v. S., 47 Tex. Cr. 305, 83 S. W. 394; Sexton v. S., 48 Tex. Cr. 497, 88 S. W. 348; Sue v. S. (Tex. Cr.), 105 S. W. 804; Williams v. S. (Tex. Cr.), 102 S. W. 1134; Dungan v. S. (Wis.), 115 N. W. 350; Colbert v. S., 125 Wis. 423, 104 N. W. 61; Koch v. S., 126 Wis. 470, 106 N. W. 531.

Rule applies to accused who testifies in his own behalf. C. v. Walsh, (Mass.), 82 N. E. 19; Williams v. S., 87 Miss. 373, 39 S. 1006; S. v. Spivey, 191 Mo. 87, 90 S. W. 81; S. v. Barrington, 198 Mo. 23, 95 S. W. 235; Ferguson v. S., 72 Neb. 350, 100 N. W. 800; S. v. Lawrence, 28 Nev. 440, 82 P. 614; S. v. Mount, 73 N. J. L. 582, 64 A. 124; C. v. Barry, 8 Pa. C. C. 216; Dungan v. S. (Wis.), 115 N. W. 350.

Discretion of court. — Such evidence should rarely be admitted; though the court's discretion will not be lightly interfered with. S. v. Hill, 52 W. Va. 296, 43 S. E. 160.

Rule applies to proceedings to disbar an attorney. Lansing v. R. Co., 143 Mich. 48, 106 N. W. 692.

Particulars of offense not provable. S. v. Mount, 73 N. J. L. 582, 64 A. 124.

Several felonies. — A witness may be asked concerning all the felonies of which he has been convicted. P. v. Kelly, 146 Cal. 119, 79 P. 846.

Previous conviction of accused cannot be shown on cross-examination of his wife to affect her credibility. S. v. Eder, 36 Wash. 482, 78 P. 1023.

In the federal courts it is proper to show a conviction for a grave offense of less grade than a felony. Dimmick v. U. S., 135 Fed. 257, 271, 70 C. C. A. 141. In proceedings under federal statutes it is discretionary with the court to permit defendant to be asked if he has been confined in a state prison. Lang v. U. S., 133 Fed. 201, 66 C. C. A. 255.

In Alabama only conviction of an infamous crime can be shown. Williams v. S., 144 Ala. 14, 40 S. 405; Wilkerson v. S., 140 Ala. 165, 37 S. 265; Gordon v. S., 140 Ala. 29, 36 S. 1009. A statutory felony is included. Fuller v. S., 147 Ala. 35, 41 S. 774.

In Alaska a conviction of a misdemeanor may be shown. Ball v. U. S., 147 Fed. 32, 77 C. C. A. 126.

In California only conviction of a felony can be shown. Kennedy v. Lee, 147 Cal. 596, 82 P. 257.

In Connecticut acts shown must be limited to such as indicate a lack of veracity. Spiro v. Nitkin, 72 Conn. 202, 44 A. 13; Dore v. Babcock, 74 Conn. 425, 50 A. 1016; Smith v. Brockett, 69 Conn. 492, 38 A. 57; Shailer v. Bullock, 78 Conn. 65, 61 A. 65.

In Illinois it is only conviction of an infamous crime that may be shown —that is, of such a crime as, at common law, excluded the convicted person from being a witness. Pioneer F. P. Co. v. Clifford, 125 Ill. App. 352 (citing local cases); McLain v. Chicago, 127 Ill. App. 489.

In the late Indian Territory a witness might be asked how many larceny cases had been brought against him. McCoy v. U. S., 6 Ind. Ter. 415, 98 S. W. 144; Oxier v. U. S., 1 Ind. Ter. 85, 38 S. W. 331.

In Kentucky conviction of a felony

may be shown, but nothing less. Britton v. C., 29 Ky. L. R. 857, 96 S. W. 556; Farmer v. C., 28 Ky. L. R. 1168, 91 S. W. 682; Henderson v. C., 28 Ky. L. R. 1212, 91 S. W. 1141; Welch v. C., 110 Ky. 105, 60 S. W. 948, 64 S. W. 262; C. v. Welch, 111 Ky. 530, 63 S. W. 984.

In Maryland it is competent to prove orally the conviction of a witness for fast driving on the very occasion which caused the litigation, the evidence as to rate of speed being conflicting. Mattingly v. Montgomery (Md.), 68 A. 205; McLaughlin v. Menecke, 80 Md. 83, 30 A. 603. In criminal cases only conviction for an infamous crime may be shown. Richardson v. S., 103 Md. 112, 63 A. 317.

In Massachusetts the rule extends to any crime. C. v. Hall, 4 Allen (Mass.) 305; C. v. Ford, 146 Mass. 131, 15 N. E. 153.

In Minnesota no distinction is made between crimes and misdemeanors. S. v. Sauer, 42 Minn. 258, 44 N. W. 115.

In Mississippi the staute covers misdemeanors as well as infamous crimes. Lewis v. S., 85 Miss. 35, 37 S. 497. A witness may be asked if he had been convicted of any crime, but not whether he had been imprisoned for cutting a white man's throat. The statute limits the questions which may be put. Dodds v. S. (Miss.), 45 S. 863.

In Missouri inquiry may be made as to convictions for like misdemeanors in another state. S. v. Oliphant, 128 Mo. App. 252, 107 S. W. 32.

In Nevada the evidence must be confined to convictions which affect the veracity of the witness—a conviction for assault and battery cannot be shown. S. v. Huff, 11 Nev. 17.

In New York conviction of any crime may be proved. P. v. Burns, 33 Hun (N. Y.) 296. But not a conviction under a city ordinance. Arhart v. Stark, 27 N. Y. S. 301.

In North Carolina a conviction for forcible trespassing may be shown; but not for drunkenness. Coleman v. R. Co., 138 N. C. 351, 50 S. E. 690.

In Ohio in civil cases the credibility of a witness may not be attacked except by showing his reputation for want of veracity; and the trial court has discretion to exclude cross-examination as to his record. Smith v. Johnson, 3 Ohio N. P. (N. S.) 8.

In Oregon conviction for a misdemeanor may be shown. S. v. Bacon, 13 Or. 143, 9 P. 393, 57 Am. Rep. 8. But the fact of conviction cannot be proved on the cross examination of the witness because that is restricted to testimony given on direct examination. S. v. Bartmess, 33 Or. 110, 54 P. 167.

In South Carolina questions should be limited to testing witness' character for accuracy, veracity or credibility. Kennington v. Catoe, 68 S. C. 470, 47 S. E. 719.

In Texas proof must not go beyond charges of felonies and such misdemeanors as impute moral turpitude. Missouri etc. R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493; Hays v. S., 47 Tex. Cr. 149, 82 S. W. 511; Marks v. S. (Tex. Cr.), 78 S. W. 512; Webb v. S., 47 Tex. Cr. 305, 83 S. W. 394; Gray v. S. (Tex. Cr.), 86 S. W. 764. See Cecil v. S. (Tex. Cr.), 100 S. W. 390. Intoxication cannot be shown. Tally v. S., 48 Tex. Cr. 474, 88 S. W. 339. Nor a simple assault. Gray v. S., supra.

In Vermont a witness may be asked if he has been convicted of a misdemeanor though the statute provides that conviction of a crime involving moral turpitude may be shown. McGovern v. Smith, 75 Vt. 104, 53 A. 326.

In Wisconsin conviction for a misdemeanor may be shown, but not a conviction for violation of a municipal ordinance. Koch v. S., 127 Wis. 470, 106 N. W. 531.

761-36 Chastity. — The credibility of a female under the age of consent cannot be attacked by proof of intercourse with others than defendant. S. v. Smith, 18 S. D. 341, 100 N. W. 740; S. v. Whitesell, 142 Mo. 467, 44 S. W. 332; S. v. Ogden, 39 Or. 195, 65 P. 449; P. v. Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. 360. And so with prosecutrix over that age. S. v. Forshner, 43 N. H. 89, 80 Am. Dec. 132; Pleasant v. S., 15 Ark. 624; S. v. McDonough, 104 Ia. 6, 73 N. W. 357; S. v. Vadnais, 21 Minn. 382; C. v. Regan, 105 Mass. 593. Inquiries into the chastity of a witness, and not extending be-

yond it, are improper. Perry v. S. (Ala.), 43 S. 18, Spicer v. S., 105 Ala. 123, 16 S. 706; Rhea v. S., 100 Ala. 119, 14 S. 853; Swint v. S. (Ala.), 45 S. 901; Baker v. S., 51 Fla. 1, 40 S. 673; S. v. Boudoin, 115 La. 837, 40 S. 239. See "CROSS-EXAMINATION," Vol. 3, p. 801, and that title, infra.

762-37 Gordon v. S., 140 Ala. 29, 36 S. 1009; Smith v. S., 74 Ark. 397, 85 S. W. 1123; McLain v. Chicago, 127 Ill. App. 489 (may be shown by witness); P. v. DeCamp 146 Mich. 533, 109 N. W. 1047 (records admissible); S. v. Forsha, 190 Mo. 296, 326, 88 S. W. 746 (record admissible though witness admitted a plea of guilty to a lesser offense than he in fact pleaded to); S. v. Barrington, 198 Mo. 23, 80, 95 S. W. 235; P. v. Eldridge, 147 Cal. 782, 82 P. 442; Farmer v. C., 28 Ky. L. R. 1168, 91 S. W. 682; S. v. Kennedy, 207 Mo. 528, 106 S. W. 57; S. v. Knowles, 98 Me. 429, 57 A. 588; S. v. Babcock, 25 R. I. 224, 55 A. 685; S. v. Clark, 117 La. 920, 42 S. 425; P. v. DeCamp, 146 Mich. 533, 106 N. W. 1047; P. v. Cascone, 185 N. Y. 317, 334, 78 N. E. 287; S. v. Woodward, 191 Mo. 617, 90 S. W. 90 (must be shown by record if denies conviction); S. v. Lawrence, 28 Nev. 440, 82 P. 614.

May be shown on cross-examination, it being so provided by statute in some states. Snyder v. S., 145 Ala. 33, 40 S. 978; S. v. Bartlett, 98 Me. 429, 57 A. 588; McLaughlin v. Mencke, 80 Md. 83, 30 A. 603; Clemens v. Conrad, 19 Mich. 170; S. v. Babcock, 25 R. I. 224, 55 A. 685; McGovern v. Hays, 75 Vt. 104, 53 A. 326. See "CROSS-EXAMINATION," Vol. 3, p. 801, and that title, infra.

Record must be introduced. Hall v. Brown, 30 Conn. 551; James v. U. S. (Ind. Ter.), 104 S. W. 607; C. v. Walsh (Mass.), 82 N. E. 19; Newcomb v. Griswold, 24 N. Y. 298.

Conviction cannot be proved by evidence aliunde until denial by witness. Cook v. S., 85 Miss. 738, 38 S. 110. It may be shown by extrinsic evidence. S. v. Griggsby, 117 La. 1046, 42 S. 497.

Extra-judicial admissions of conviction cannot be shown. Fanin v. S. (Tex. Cr.), 100 S. W. 916, 10 L. R. A. (N. S.) 744. Admission conclusive. Fuller v. S., 147 Ala. 35, 41 S. 774.

Form of question should be such as statute indicates; it is not proper to ask if witness has been in penitentiary. S. v. Spivey, 191 Mo. 87, 90 S. W. 81; S. v. Bryant (Minn.), 105 N. W. 974.

Witness' denial is conclusive. Shailer v. Bullock, 78 Conn. 65, 61 A. 65; Oxier v. U. S., 1 Ind. Ter. 85, 38 S. W. 331; Coleman v. R. Co., 138 N. C. 351, 50 S. E. 690.

Proof of innocence. — A witness who has testified on cross-examination as to his imprisonment for a misdemeanor may show his innocence on redirect examination. Missouri etc. R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493.

The particular offense of which a witness has been convicted may be shown. P. v. Chin Hane, 108 Cal. 597, 41 P. 697; P. v. Putnam, 129 Cal. 258, 61 P. 961; P. v. Eldridge, 147 Cal. 782, 82 P. 442; S. v. Pike, 65 Me. 111.

Remoteness. — An indictment found more than twenty years before trial is too remote. Sue v. S. (Tex. Cr.), 105 S. W. 804; Casey v. S. (Tex. Cr.), 97 S. W. 496. Not so with one found four years before. Hull v. S. (Tex. Cr.), 100 S. W. 403. Or six years. Davis v. S. (Tex. Cr.), 108 S. W. 667. It is said that ten or fifteen years would probably have been too remote. Davis v. S., supra.

Docket entries competent to prove conviction if no extended record made. S. v. Knowles, 98 Me. 429, 57 A. 588. *Contra*, S. v. Powell, 5 Penne. (Del.) 24, 61 A. 966.

Record must show that witness was indicted (Leftridge v. U. S., 6 Ind. Ter. 305, 97 S. W. 1018); and return of indictment into court. Clifford v. Pioneer Co., 232 Ill. 150, 83 N. E. 448.

Record of federal court sitting in another state admissible. Ball v. U. S., 147 Fed. 32, 77 C. C. A. 126.

Pardon of witness may be shown. O'Donnell v. P., 110 Ill. App. 250, 276; Missouri etc. R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493.. Proof of pardon immaterial. Gallagher v. P., 211 Ill. 158, 71 N. E. 842.

Acquittal cannot be proven. P. v. Cascone, 185 N. Y. 317, 334, 78 N. E. 287.

Identity. — It is presumed, prima facie, that the name in a judgment designates a witness who bears such a name. Boyd v. S. (Ala.), 43 S. 204. If the names are the same, evidence of identity is not necessary to admission of the record on the trial of a civil action. Clifford v. Pioneer Co., 232 Ill. 150, 83 N. E. 448.

Privilege of witness may be availed of. See Oxier v. U. S., 1 Ind. Ter. 85, 38 S. W. 331; McCoy v. U. S. 6 Ind. Ter. 415, 98 S. W. 144; Ex parte Hedden (Nev.), 90 P. 737.

762-38 Glover v. U. S., 147 Fed. 426, 77 C. C. A. 520; Baltimore & O. R. Co. v. Rambo, 59 Fed. 75, 8 C. C. A. 6; Bise v. U. S., 144 Fed. 374, 74 C. C. A. 1; Miller v Ter., 149 Fed. 330, 79 C. C. A. 268; P. v. Monreal (Cal. App.), 93 P. 385; S. v. Stewart (Del), 67 A. 786; S. v. Wigger, 196 Mo. 90, 93 S. W. 390; Wade v. S., 48 Tex. Cr. 512, 90 S. W. 503.

An arrest may be shown. Goad v. S. (Tex. Cr.), 108 S. W. 680. But the fact that witness committed a crime cannot be established otherwise than by proof of official action or a confession. Goad v. S., supra.

Arrest for identical crime. — It may be shown that a witness who has sought to explain his contradictory statements was arrested for the offense of which he testified. Snyder v. S., 145 Ala. 33, 40 S. 978.

Indictment admissible. Lucas v. S., 49 Tex. Cr. 135, 90 S. W. 880; Lee v. S., 45 Tex. Cr. 51, 73 S. W. 407 (*over.* Brittain v. S., 36 Tex. Cr. 406, 37 S. W. 758, which held that the answer of witness was conclusive). It was formerly the rule in Texas that evidence of prior conviction was inadmissible. S. v. Ezell, 41 Tex. 35. That case was overruled by Lights v. S., 21 Tex. App. 308, 17 S. W. 428, which has been approved in several cases cited in Lee v. S., supra. Witness may be asked if he was indicted. Sexton v. S., 48 Tex. Cr. 497, 88 S. W. 348; Lucas v. S., 49 Tex. Cr. 135, 90 S. W. 880. In Alabama, Georgia and New Jersey the fact that an indictment was found may be shown. Wilkerson v. S., 140 Ala. 165, 37 S. 265; Hayes v. S., 126 Ga. 95, 54 S. E. 809; S. v. Rosa, 71 N. J. L. 316, 58 A. 1010. It is otherwise in some states. Stanley v. Ins. Co., 70 Ark. 107, 66 S. W. 432; Kansas City S. R. Co. v. Belknap, 80 Ark. 587, 98 S. W. 366; P. v. Cascone, 185 N. Y. 317, 334, 78 N. E. 287.

762-39 A mere accusation is not provable if an indictment has not been found. Wade v. S., 48 Tex. Cr. 512, 90 S. W. 503; Willis v. S., 49 Tex. Cr. 139, 90 S. W. 1100.

762-40 May v. U. S., 157 Fed. 1; Birmingham etc. Co. v. Mason, 144 Ala. 387, 39 S. 590; Little Rock etc. Co. v. Robinson, 75 Ark. 548, 87 S. W. 1029; Abelson v. R. Co., 84 Ark. 181, 105 S. W. 81; Brinkley etc. Co. v. Cooper, 75 Ark. 325, 87 S. W. 645; Shailer v. Bullock, 78 Conn. 65, 61 A. 65; Pittman v. S., 51 Fla. 94, 41 S. 385; Georgia etc. R. Co. v. Stanley, 1 Ga. App. 487, 57 S. E. 1042; Powell v. S., 122 Ga. 571, 50 S. E. 369; Shotts v. McKinney, 39 Ind. App. 101, 79 N. E. 219; Wilson v. U. S., 5 Ind. Ter. 610, 82 S. W. 924; Isaac v. U. S. (Ind. Ter.), 104 S. W. 588; S. v. Caron, 118 La. 349, 42 S. 960; Greer v. R. Co., 193 Mass. 246, 79 N. E. 267; Jennings v. Rooney, 183 Mass. 577, 67 N. E. 665; Burnside v. Everett, 186 Mass. 4, 71 N. E. 82; Seymour v. Bruske, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691; Mefford v. R. Co., 121 Mo. App. 647, 97 S. W. 602; Rosenbach v. Forresters, 184 N. Y. 92, 76 N. E. 1085; Carey v. R. Co., 108 N. Y. S. 1034; C. v. Ezell, 212 Pa. 293, 61 A. 930; S. v. Stukes, 73 S. C. 386, 53 S. E. 643; Cain v. R. Co., 74 S. C. 89, 54 S. E. 244; Kennington v. Catoe, 68 S. C. 470, 47 S. E. 719; S. v. Baird, 79 Vt. 257, 65 A. 101; Bertoli v. Smith, 69 Vt. 425, 38 A. 76; Williams v. R. Co., 42 Wash. 597, 84 P. 1129; Schneider v. R. Co. (Wash.), 91 P. 565; Dungan v. S. (Wis.), 115 N. W. 350; S. v. Negaard, 124 Wis. 414, 102 N. W. 899.

Great latitude is proper when it is sought to show bias. Atlanta etc. R. Co. v. McManus, 1 Ga. App. 302, 58 S. E. 258; Regester v. Regester, 104 Md. 1, 64 A. 286; Virginia etc. Co. v. Chalkley, 98 Va. 62, 34 S. E. 976; Savage v. Bowen, 103 Va. 540, 49 S. E. 668. See "Cross-Examination," Vol. 3, p. 801, and that title, infra.

The motive of a party in assault-

ing a witness, who afterwards left the jurisdiction, may be inquired into as affecting his credibility. Horsey v. Slayton Co. (Tex. Civ.), 104 S. W. 503.

Rule not applicable to cross-examination to show previous inconsistent statements as to the principal question. Robinson v. R. Co., 189 Mass. 594, 76 N. E. 190.

Innuendo. — Witness should not be discredited by. Malone v. Stephenson, 94 Minn. 222, 102 N. W. 372.

Limitations of the rule. — See S. v. Mann, 39 Wash. 144, 81 P. 561.

Method of examination. — Contradictory statements at an inquest cannot be shown without first proving that the witness was interrogated concerning the matter, or had an opportunity to state all he knew of it. Larrance v. P., 222 Ill. 155, 78 N. E. 50.

763-41 Admission of credibility. A party who uses a witness may prove that he was summoned by the adversary. Richmond etc. R. Co. v. Rubin, 102 Va. 809, 47 S. E. 834.

Unreasonable and inhuman conduct of a witness does not, per se, justify disbelief of his testimony. Louisville & N. R. Co v. Perkins, 144 Ala. 325, 39 S. 305.

764-42 Garrett v. R. Co. (Del.), 64 A. 254; Illinois C. R. Co. v. Burke, 112 Ill. App. 415; Howard v. R. Co., 32 Ky. L. R. 309, 105 S. W. 932.

Hesitancy in answering is not always to be regarded unfavorably. In re Donohue, 97 App. Div. 205, 89 N. Y. S. 871.

764-43 Posey v. S., 143 Ala. 54, 38 S. 1019; Vickery v. S., 50 Fla. 144, 38 S. 907; Saucier v. N. H. S. M., 72 N. H. 292, 56 A. 545; Palatine Ins. Co. v. R. Co. (N. M.), 82 P. 363; Blake v. Malliet, 84 N. Y. S. 161; Rosenbach v. Forresters, 184 N. Y. 92, 76 N. E. 1085; S. v. Patchen, 37 Wash. 24, 79 P. 479; Standard Mfg. Co. v. Slot, 121 Wis. 14, 98 N. W. 923.

Credit of uncontradicted witness not subject to attack. Regester v. Regester, 104 Md. 1, 64 A. 286.

764-44 Coburn v. S. (Ala.), 44 S. 58; Wiliams v. S., 144 Ala. 14, 40 S. 405; W. U. Tel. Co. v. Merrill, 144 Ala. 618, 39 S. 121; Main v. Radney (Ala.). 39 S. 981; Ont. Colo. Co. v. Mackenzie, 19 Colo. App. 298, 74 P. 791; Caven v. Bodwell Co., 99 Me. 278, 59 A. 285; Mefford v. R. Co., 121 Mo. App. 647, 97 S. W. 602; S. v. Stukes, 73 S. C. 386, 53 S. E. 643; Sexton v. S., 48 Tex. Cr. 497, 88 S. W. 348; Waggoner v. Moore (Tex. Civ.), 101 S. W. 1058; Rutherford v. S., 49 Tex. Cr. 21, 90 S. W. 172; Eureka Hill M. Co. v. Min. Co. (Utah), 90 P. 157.

Hypnotism. — A witness may be asked if her husband had not hynotized her. S. v. Exum, 138 N. C. 599, 50 S. E. 283.

Court may require reading of paper. — Testimony given by a deceased witness may be proved by any person who heard it; but if it was taken in shorthand the court may require that it be read by the reporter as a means of testing his memory and veracity. Austin v. C., 30 Ky. L. R. 295, 98 S. W. 295.

765-46 Perrin v. Carbone, 1 Cal. App. 295, 82 P. 222; Eureka Hill M. Co. v. Min. Co. (Utah), 90 P. 157.

765-47 Roche v. Baldwin, 143 Cal. 186, 76 P. 956; Iaquinto v. Bauer, 104 App. Div. 56, 93 N. Y. S. 388.

Proof of fraud and collusion in obtaining a former judgment on the identical claim in suit is competent on the issue of plaintiff's credibility, his contention resting on his unsupported testimony. Masters v. Seeley, 138 Fed. 719, 71 C. C. A. 409.

766-48 See S. v. Beckner, 194 Mo. 281, 91 S. W. 892; Edger v. Kupper, 110 Mo. App. 280; 85 S. W. 949; Lowsit v. Seattle Co., 38 Wash. 290, 80 P. 431; Iverson v. McDonnell, 36 Wash. 73, 78 P. 202.

766-49 Zane v. Onativia, 139 Cal. 328, 73 P. 856; Grimbley v. Harrold, 125 Cal. 24, 57 P. 558, 73 Am. St. 19; Patton v. S., 117 Ga. 230, 43 S. E. 533; Booth v. Beckley, 11 Haw. 518; Knapp v. S., 168 Ind. 153, 79 N. E. 1076; Miller v. S. (Miss.), 35 S. 690; Willson v. Law, 112 N. Y. 536, 20 N. E. 399; Eswein v. Hodgkinson, 108 N. Y. S. 531; Smucker v. R. Co., 6 Pa. Super 521; Shannon v. Castner, 21 Pa. Super. 294; Gulf etc. R. Co. v. Matthews

(Tex), 93 S. W. 1068; S. v. Patchen, 37 Wash. 24, 79 P. 479; McCowan v. N. E. S. Co., 41 Wash 675, 84 P. 614; Younger v. S., 12 Wyo. 24, 73 P. 551.

The silence of a witness when a member of a coroner's jury concerning a matter of which he testified may be shown. Parham v. S., 147 Ala. 57, 42 S. 1.

766-52 **Failure to assert a claim** at the proper time and place is some evidence that its assertion otherwise was an afterthought. Nichols v. New Britain, 77 Conn. 695, 60 A. 655; Chicago etc. R. Co. v. Steckman, 224 Ill. 500, 79 N. E. 602.

Incredibility. — "To declare sworn testimony of a fact incredible we must be convinced that it is so in conflict with the uniform course of nature or with fully established physical laws that no reasonably intelligent man could give it credence." Salchert v. Reinig (Wis.), 115 N. W. 132.

766-53 P. v. Waysman, 1 Cal. App. 246, 81 P. 1087; Hauser v. P., 210 Ill. 253, 71 N. E. 416; Atoka etc. Co. v. Miller (Ind. Ter.), 104 S. W. 555; Smucker v. R. Co., 6 Pa. Super. 521.

Coaching of witness may be shown; it is not material on what points the coaching was done. Heath v. Hagan (Ia.), 113 N. W. 342.

767-54 Eutaw v. Botwick (Ala.), 43 S. 739; Garrett v. R. Co. (Del.), 64 A. 254; Atoka etc. Co. v. Miller (Ind. Ter.), 104 S. W. 555; Schloemer v. Transfer Co., 204 Mo. 99, 102 S. W. 565.

768-56 Gosdin v. Williams (Ala.), 44 S. 611; Borck v. S. (Ala.), 39 S. 580; Kansas City S. R. Co. v. Belknap, 80 Ark. 587, 98 S. W. 366; Abelson v. R. Co., 84 Ark. 181, 105 S. W. 81; Toledo etc. R. Co. v. Stevenson, 122 Ill App. 654; Illinois C. R. Co. v. Burke, 112 Ill. App. 415; Atoka etc. Co. v. Miller (Ind. Ter.), 104 S. W. 555; S. v. Rutledge (Ia.), 113 N. W. 461; S. v. Craft, 117 La. 213, 41 S. 550; Robinson v. Stahl (N. H.), 67 A. 577; Page v. Hazelton (N. H.), 66 A. 1049; S. v. Stukes, 73 S. C. 386, 53 S. E. 643; Baughman v. S., 49 Tex. Cr. 33, 90 S. W. 166; Routledge v. Rambler Co. (Tex. Civ.), 95 S. W. 749; S. v. Griffin, 43 Wash. 591, 86 P. 951; S. v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

Fraternal membership. — It may be shown that one of the parties and his witnesses are members of the same labor union. Huss v. N. B. Co. (Mo.), 108 S. W. 63; P. v. Cowan, 1 Cal. App. 411, 82 P. 339.

Attempt to corrupt judge on a former trial may be shown. Finlen v. Heinze, 32 Mont. 354, 80 P. 918.

Courtship of witness and daughter of party for whom he testifies may be shown. S. v. Miles, 199 Mo. 530, 98 S. W. 25.

Declarations of prosecuting officer in another case to which witness was a party are incompetent. Harrell v. S., 121 Ga. 607, 49 S. E. 703; Thompson v. U. S., 144 Fed. 14, 75 C. C. A. 172.

Dishonesty in the transaction out of which the suit arose may be proven. Lewter v. Lindley (Tex. Civ.), 89 S. W. 784.

Accused may show that witness had made threats against him. S. v. Atkins, 77 Vt. 215, 59 A. 826.

Expectations of a witness, though not based on acts or statements binding on the state, may be shown. Stevens v. P., 215 Ill. 593, 74 N. E. 786.

769-57 Louisville etc. R. Co. v. Sherrell (Ala.), 44 S. 631; Kansas City S. R. Co. v. Belknap, 80 Ark. 587, 98 S. W. 366; Pittman v. S., 51 Fla. 94, 41 S. 385; Smith v. Hockenberry, 146 Mich. 7, 109 N. W. 23; S. v. Darling, 202 Mo. 150, 100 S. W. 631; P. v. Mallon, 116 App. Div. 425, 101 N. Y. S. 814; S. v. Malmberg, 14 N. D. 523, 105 N. W. 614; Creeping Bear v. S., 113 Tenn. 322, 87 S. W. 653; Houston etc. R. Co. v. McCarty (Tex. Civ.), 89 S. W. 805; Lincoln v. Hemenway (Vt.), 69 A. 153; Norfolk etc. R. Co. v. Birchfield, 105 Va. 809, 54 S. E. 879; Schuster v. S., 80 Wis. 107, 49 N. W. 30. See Ferguson v. S., 72 Neb. 350, 100 N. W. 800; C. v. Ezell, 212 Pa. 293, 61 A. 930.

Declarations made out of court and in the absence of one of the parties may be shown. Porch v. S. (Tex. Cr.), 99 S. W. 1122.

Letters written by witness, admissible though they contain matter in-

competent as evidence, distinction being made. P. v. Thorne, 148 Mich. 203, 111 N. W. 741.

770-58 P. v. Harper, 145 Mich. 402, 108 N. W. 689.

770-59 See S. v. Bryant, 97 Minn. 8, 105 N. W. 974.

Postoffice inspectors are not detectives. Lorenz. v. U. S., 24 App. D. C. 337.

Compensation not contingent. — It may be shown that a witness was a detective, but if his compensation does not depend upon securing convictions the amount of it need not be shown, there being nothing to indicate that the tenure of his employment would be affected. White v. S., 121 Ga. 191, 48 S. E. 941.

771-61 Provident Soc. v. King, 216 Ill. 416, 75 N. E. 166; Pecos River R. Co. v. Harrington (Tex. Civ.), 99 S. W. 1050 (contingent professional fee in both above cases); Southern R. Co. v. S. (Ind. App.), 72 N. E. 174; Shannon v. Castner, 21 Pa. Super. 294 (applying the rule to an expert witness promised compensation in excess of legal fees).

771-62 Briscoe v. R. Co., 118 Mo. App. 668, 95 S. W. 276; Brown v. R. Co., 87 N. Y. S. 461. See In re Steenworth, 97 App. Div. 116, 89 N. Y. S. 654.

Professional expert. — It may be shown that a witness frequently testifies for one of the parties in suits of like character and receives additional compensation for so doing. Chicago C. R. Co. v. Handy, 208 Ill. 81, 69 N. E. 917; Horton v. R. Co. (Tex. Civ.), 103 S. W. 467.

Immaterial whether money paid exceeded legal fees or not; witness may not have known his rights. S. v. Mulch, 17 S. D. 321, 96 N. W. 101.

771-63 Sylvester v. S., 46 Fla. 166, 35 S. 142 (witness not subpoenaed), *cit.* Alabama etc. R. Co. v. Johnston, 128 Ala. 283, 29 S. 771; Southern R. Co. v. Crowder, 130 Ala. 256, 30 S. 592; Ashlock v. S., 16 Tex. App. 13; Wabash R. Co. v. Ferris, 6 Ind. App. 30, 32 N. E. 112; S. v. Keys, 53 Kan. 674, 37 P. 167.

Witness may explain why he testified without being subpoenaed. Sylvester v. S., 46 Fla. 166, 35 S. 142.

Free transportation. — The fact that a party's witnesses were transported by it to the place of trial free of charge and their hotel bills paid tends to show bias. Alabama etc. R. Co. v. Johnston, 128 Ala. 283, 29 S. 771; Moore v. R. Co., 137 Ala. 495, 34 S. 617.

Payment of a witness' legal demands does not justify an adverse inference. Southern R. Co. v. Morris, 143 Ala. 628, 42 S. 17.

Payment of expense incurred by witness in coming from another state cannot be inquired into. Parrish v. S., 139 Ala. 16, 36 S. 1012.

Promised gratuities to witnesses may be shown to have resulted in no harm and that none was intended. Dupuis v. Tract. Co., 146 Mich. 151, 109 N. W. 413.

771-64 U. S. v. Post, 128 Fed. 950; Cook v. S. (Ala.), 44 S. 549; Gosdin v. Williams (Ala.), 44 S. 611; Cross v. S., 147 Ala. 125, 41 S. 875; Sanford v. S., 143 Ala. 78, 29 S. 370; Funderburk v. S., 145 Ala. 661, 39 S. 672; Hanners v. S., 147 Ala. 27, 41 S. 973; Ringer v. S., 74 Ark. 262, 85 S. W. 410; P. v. Ryan (Cal.), 92 P. 853; Hampton v. S., 50 Fla. 55, 39 S. 421; Eatman v. S., 48 Fla. 21, 37 S. 576; Vaughn v. S., 52 Fla. 122, 41 S. 881; Sylvester v. S., 46 Fla. 166, 35 S. 142; McDuffie v. S., 121 Ga. 580, 49 S. E. 708; Atlanta etc. R. Co. v. McManus, 1 Ga. App. 302, 58 S. E. 258; S. v. Barber, 13 Idaho 65, 88 P. 418; S. v. Crea, 10 Idaho 88, 76 P. 1013; National E. & S. Co. v. Fagan, 115 Ill. App. 590; Blair v. Blair, 125 Ill. App. 341; S. v. Koller, 129 Ia. 111, 105 N. W. 391; S. v. Rutledge (Ia.), 113 N. W. 461; S. v. Seery, 129 Ia. 259, 105 N. W. 511; Strange v. C., 23 Ky. L. R. 1234, 64 S. W. 980; Seymour v. Bruske, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691; S. v. Darling, 202 Mo. 150, 100 S. W. 631; Briscoe v. R. Co., 118 Mo. App. 668, 95 S. W. 276; Lambeck v. Stiefel, 71 N. J. L. 320, 59 A. 460; Brink v. Stratton, 176 N. Y. 150, 68 N. E. 148; Salzman v. Mandel, 98 N. Y. S. 825; P. v. Milks, 70 App. Div. 438, 74

N. Y. S. 1042; Lederer v. Lederer, 108 App. Div. 228, 95 N. Y. S. 623; Fischer v. Brady, 94 N. Y. S. 25; Carey v. R. Co., 108 N. Y. S. 1034; P. v. Wenzel, 189 N. Y. 275, 82 N. E. 130; S. v. Exum, 138 N. C. 599, 50 S. E. 283; S. v. Malmberg, 14 N. D. 523, 105 N. W. 614; C. v. Hartman, 31 Pa. Super. 364; Creeping Bear v. S., 113 Tenn. 322, 87 S. W. 653; Houston etc. R. Co. v. McCarty (Tex. Civ.), 89 S. W. 805; Missouri etc. R. Co v. Cherry (Tex. Civ.), 97 S. W. 712; Houston etc. R. Co. v. Wilson, 37 Tex. Civ. 405, 84 S. W. 274; Wooley v. Bell, 33 Tex. Civ. 399, 76 S. W. 797; Houston etc. R. Co. v. McCarty (Tex. Civ.), 89 S. W. 805; Brownlee v. S., 48 Tex. Cr. 408, 87 S. W. 1153; Sue v. S. (Tex. Cr.), 105 S. W. 804; Hathaway v. Goslant, 77 Vt. 199, 59 A. 835; S. v. Griffin, 43 Wash. 591, 86 P. 951; S. v. Dalton, 43 Wash. 278, 86 P. 590; Lowe v. Ring, 123 Wis. 107, 101 N. W. 381. See P. v. Rice, 136 Mich. 619, 99 N. W. 860; P. v. Cahoon, 88 Mich. 456, 50 N. W. 384; Coffman v. S. (Tex. Cr.), 103 S. W. 1128.

Hostility to deceased may be shown in a trial for homicide. Glass v. S., 147 Ala. 50, 41 S. 727; Morris v. S. (Ala.), 39 S. 608; Cook v. S. (Ind.), 82 N. E. 1047; Sue v. S. (Tex. Cr.), 105 S. W. 804; Porch v. S. (Tex. Cr.), 99 S. W. 102.

Hostility should be shown by direct and positive testimony. Carey v. R. Co., 108 N. Y. S. 1034; Gale v. R. Co., 76 N. Y. 594; Brink v. Stratton, 176 N. Y. 150, 68 N. E. 148.

Witness may explain the grounds of his expressed hostility to defendant. P. v. Wenzel, 189 N. Y. 275, 82 N. E. 130.

Who may show bias. — The party who called the witness may show his bias if the other party brought out his first material testimony. Fine v. R. Co., 91 N. Y. S. 43, *cit.* Fall Brook C. Co. v. Hewson, 158 N. Y. 150, 52 N. E. 1095, 70 Am. St. 466, 43 L. R. A. 676.

Nature of trouble between party and witness may be shown, but not details. Glass v. S., 147 Ala. 50, 41 S. 727. At least, if the ill-will be admitted. Wright v. Anniston (Ala.), 44 S. 151; Proctor v. Pointer, 127 Ga. 134, 56 S. E. 111; S. v. Lee, 46 Or. 40, 79 P. 577. And the rule is the same if there is no such admission. S. v. Seery, 129 Ia. 259, 105 N. W. 511; McDuffie v. S., 121 Ga. 580, 49 S. E. 708; S. v. Malmberg, 14 N. D. 523, 105 N. W. 614. Justifiableness of hostility usually immaterial. Seymour v. Bruske, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691.

Evidence of an attempt to conciliate the party against whom hostility has been shown is competent. C. v. Oakes, 187 Mass. 90, 72 N. E. 323.

Attempts to prevent others from testifying may be shown. S. v. Thornhill, 177 Mo. 691, 76 S. W. 948, S. v. Koller, 129 Ia. 111, 105 N. W. 391.

Attempts to conceal the fact that a witness knows material facts may be shown. Rice v. S. (Tex. Cr.), 103 S. W. 1156.

In Vermont if it is sought to show hostility by statements made out of court, time, place and occasion must be shown with particularity. S. v. Bardelli, 78 Vt. 102, 62 A. 44.

Limitation of rule as to unfriendliness. — It is not competent to show hostility on the part of a witness to the father of the party against whom he testifies. McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503.

Order of proof. — Ordinarily proof of bias should be deferred until testimony has been given on the issues; but that may be varied. Fine v. R. Co., 91 N. Y. S. 43. See Brink v. Stratton, 176 N. Y. 150, 68 N. E. 148.

771-65 Couch v. Couch, 141 Ala. 361, 37 S. 405; Eutaw v. Botnick (Ala.), 43 S. 739; Vindicator etc. Co. v. Firstbrook, 36 Colo. 498, 86 P. 313; Kennedy v. Murphy, 112 Ill. App. 607; Smith v. Hockenberry, 146 Mich. 7, 109 N. W. 23; Frank v. Symons, 35 Mont. 56, 88 P. 561; Schon v. Harlan, 56 Misc. 518, 107 N. Y. S. 113; Hirsch v. American Co., 92 N. Y. S. 794; Iaquinto v. Bauer, 104 App. Div. 56, 93 N. Y. S. 388; Miller v. Ter., 15 Okla. 422, 85 P. 239; St. Louis etc. R. Co. v. Sproule (Tex. Civ.), 101 S. W. 268; Chicago etc. R. Co. v. Longbottom (Tex. Civ.), 80 S. W. 542.

Party in interest. — It is not competent to show that an insurance company is defending a suit to which it is not a record party. Manigold v. B. R. T. Co., 81 App. Div. 381, 80 N. Y. S. 861; Wildrick v. Moore, 66 Hun 630, 22 N. Y. S. 1119; Iverson v. McDonnell, 36 Wash. 73, 78 P. 202; G. A. Fuller Co. v. Darragh, 101 Ill. App. 664; Cosselmon v. Dunfee, 172 N. Y. 507, 65 N. E. 494; Sawyer v. Arnold Co., 90 Me. 369, 38 A. 333. Lowsit v. Seattle Co., 38 Wash. 290, 80 P. 431.

Res inter alios actae. — Inquiry must not extend to the acts or declarations of a witness in his dealings with strangers to the action. Chicago etc. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050.

771-66 Teston v. S., 50 Fla. 137, 39 S. 787; Hampton v. S., 50 Fla. 55, 39 S. 421; Taylor v. S., 121 Ga. 348, 49 S. E. 303; Isaac v. U. S. (Ind. Ter.), 104 S. W. 588; Owens v. S. (Tex. Cr.), 96 S. W. 31; Sexton v. S., 48 Tex. Cr. 497, 88 S. W. 348; S. v. Bean, 77 Vt. 384, 60 A. 807.

Contribution of money to aid in the prosecution may be shown, as may the fact that a witness had received a retainer in the case. Miller v. Ter., 149 Fed. 330, 79 C. C. A. 268. But a mere solicitation to contribute is immaterial. Robinson v. S. (Ala.), 45 S. 916.

772-67 S. v. Stukes, 73 S. C. 386, 53 S. E. 643.

Voluntary witnesses. — It may be shown that a witness volunteered. Wabash R. Co. v. Ferris, 6 Ind. App. 30, 32 N. E. 112; Sylvester v. S., 46 Fla. 166, 35 S. 142. But it has been ruled that the testimony of a near relative who came from without the jurisdiction and testified voluntarily does not necessarily deprive his testimony of probative force. Timma v. Timma, 72 Kan. 73, 82 P. 481. See ante, 771-63.

772-69 Hammond v. S., 147 Ala. 79, 41 S. 761; Shelton v. S., 144 Ala. 106, 42 S. 30; Prior v. Ter. (Ariz.), 89 P. 412; Halderman v. Halderman, 7 Ariz. 120, 60 P. 876; P. v. Ryan (Cal.), 92 P. 853; P. v. Waysman, 1 Cal. App. 246, 81 P. 1087; S. v. Farr (R. I.), 69 A. 5; Younger v. S., 12 Wyo. 24, 73 P. 551.

772-70 S. v. Judd, 132 Ia. 296, 109 N. W. 892; Sexton v. S., 48 Tex. Cr. 497, 88 S. W. 348; Hardin v. S. (Tex. Cr.), 103 S. W. 401.

It may be shown that a witness was defendant's paramour. Perdue v. S., 126 Ga. 112, 54 S. E. 820; Brown v. S., 119 Ga. 572, 46 S. E. 833.

Relationship, how shown. — Proof that a witness is the husband of a party must be made by direct evidence; admissions of those not parties is not competent. Barton v. Bruley, 119 Wis. 326, 96 N. W. 815.

773-72 Detwiler v. Cox, 120 Ga. 638, 48 S. E. 142; Armstrong v. Ballew, 118 Ga. 168, 44 S. E. 996; Steve v. Ferry Co., 13 Idaho 384, 92 P. 363; Larsen v. Chicago Co., 131 Ill. App. 286; Goss v. Goss, 102 Minn. 346, 113 N. W. 690; Alward v. Oakes, 63 Minn. 190, 65 N. W. 270; Texas & P. R. Co. v. Dishman (Tex. Civ.), 91 S. W. 828; McCowan v. S. Co., 41 Wash. 675, 84 P. 614 (extent of interest as stockholder).

Failure to assert rights in property is a circumstance going to the credibility of a witness who subsequently testifies thereto. Armstrong v. Ballew, 118 Ga. 168, 44 S. E. 996.

Assertion of legal rights by other suits cannot be proven to show prejudice on the part of plaintiff. Texas & P. R. Co. v. Dishman (Tex. Civ.), 91 S. W. 828.

773-73 Parham v. S., 147 Ala. 57, 42 S. 1; Louisville etc. R. Co. v. Sherrell (Ala.), 44 S. 631; Birmingham etc. R. Co. v. Rutledge, 142 Ala. 195, 39 S. 338; Murray v. Llewellyn, 4 Cal. App. 41, 87 P. 202; Capital C. Co. v. Holtzman, 27 App. D. C. 125; Central etc. R. Co. v. Bagley, 121 Ga. 781, 49 S. E. 740; Chicago etc. R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; Sharp v. R. Co., 184 N. Y. 100, 76 N. E. 923; Iaquinto v. Bauer, 104 App. Div. 56, 93 N. Y. S. 388; Glenn v. T. Co., 206 Pa. 135, 55 A. 860; Cain v. R. Co., 74 S. C. 89, 54 S. E. 244; Gulf etc. R. Co. v. Hays (Tex. Civ.), 89 S. W. 29; Norfolk etc. R. Co. v. Birchfield, 105 Va. 809, 54 S. E. 879; Williams v. R. Co., 42 Wash. 597, 84 P. 1129; Stowe v. LaConner, 39 Wash. 28, 80 P. 586, 81 P. 96.

Witness' declarations may be shown

to prove that he is an employe. Louisville etc. R. Co. v. Munford, 24 Ky. L. R. 416, 68 S. W. 635. The fact that he is such being shown, inquiry as to his duty is immaterial. Parham v. S., 147 Ala. 57, 42 S. 1.

774-74 Williams v. S., 144 Ala. 14, 40 S. 405; St. Louis S. R. Co. v. Hutchinson, 79 Ark. 247, 96 S. W. 374.

Contradiction as to an immaterial fact does not affect credibility. Southern R. Co. v. Hundley (Ala.), 44 S. 195.

774-75 Brown v. S., 142 Ala. 287, 38 S. 268; Barddell v. S., 144 Ala. 54, 39 S. 975; Hammond v. S., 147 Ala. 79, 41 S. 761; Hughes v. S. (Ala.), 44 S. 694; Speakman v. Vest (Ala.), 44 S. 1021; Morris v. S. (Ala.), 39 S. 608; Giddens v. Rutledge, 146 Ala. 232, 40 S. 759; Jones v. S., 145 Ala. 51, 40 S. 947; Snyder v. S., 145 Ala. 33, 40 S. 978; Alabama etc. R. Co. v. Clarke, 145 Ala. 459, 39 S. 816; Rector v. Robins, 82 Ark. 424, 102 S. W. 209; Weaver v. S., 83 Ark. 119, 102 S. W. 713; Cage v. S., 73 Ark. 484, 84 S. W. 631; Keyes v. R. Co. (Cal.), 93 P. 88; P. v. Howard, 143 Cal. 316, 76 P. 1116; P. v. Scalamiero, 143 Cal. 343, 76 P. 1098; Colorado M. R. Co. v. McGarry (Colo.), 92 P. 915; Denver etc. R. Co. v. Mitchell (Colo.), 94 P. 289; Joyce v. Joyce, 80 Conn. 88; Grant v. U. S., 28 App. D. C. 169; Adams v. S. (Fla.), 45 S. 494; Clinton v. S., 53 Fla. 98, 43 S. 312; Tinker v. S., 125 Ga. 743, 54 S. E. 662; Georgia etc. Co. v. Andrews, 125 Ga. 85, 54 S. E. 76; Perdue v. S., 126 Ga. 112, 54 S. E. 820; Idaho P. M. Co. v. Green (Idaho), 93 P. 954; Strong v. P., 119 Ill. App. 79; Edmunds Mfg. Co. v. McFarland, 118 Ill. App. 256; Gemmill v. S., 16 Ind. App. 154, 43 N. E. 909; Robbins v. Spencer, 140 Ind. 483, 38 N. E. 522, 40 N. E. 263; Bachman v. Cooper, 20 Ind. App. 173, 50 N. E. 394; Heintz v. Mueller, 27 Ind. App. 42, 59 N. E. 414; Indianapolis etc. R. Co. v. Hubbard, 36 Ind. App. 160, 74 N. E. 535; Atoka C. & M. Co. v. Miller (Ind. Ter.), 104 S. W. 555; Davis v. Bank, 6 Ind. Ter. 124, 89 S. W. 1015; Rhomberg v. Avenarius (Ia.), 112 N. W. 548; S. v. Matheson, 130 Ia. 440, 103 N. W. 137; Gregory v. R. Co., 126 Ia. 230, 101 N. W. 761; Cincinnati etc. R. Co. v. Rodes, 31 Ky. L. R. 430, 102 S. W. 321; S. v. Mitchell, 119 La. 374, 44 S. 132; Chesapeake etc. R. Co. v. Donahue (Md.), 68 A. 507; Paquette v. Ins. Co., 193 Mass. 215, 79 N. E. 250; Robinson v. R. Co., 189 Mass. 594, 76 N. E. 190; Smith v. Hockenberry, 146 Mich. 7, 109 N. W. 23; Thompson v. Mecosta, 141 Mich. 175, 104 N. W. 694; S. v. Callahan, 100 Minn. 63, 110 N. W. 342; Rand v. Sage, 94 Minn. 344, 102 N. W. 864; Brace v. R. Co., 87 Minn. 292, 91 N. W. 1099; Sherrod v. S., 90 Miss. 856, 44 S. 813; Bowles v. S. (Miss.), 40 S. 165; Schloemer v. T. Co., 204 Mo. 99, 102 S. W. 565; S. v. Darling, 202 Mo. 150, 100 S. W. 631; S. v. Lockhart, 188 Mo. 427, 87 S. W. 457; S. v. Wertz, 191 Mo. 569, 90 S. W. 838; Villineuve v. R. Co., 73 N. H. 250, 60 A. 748; Page v. Hazelton (N. H.), 66 A. 1049; Lembeck v. Steifel, 71 N. J. L. 320, 59 A. 460; Schon v. Harlan, 56 Misc. 518, 107 N. Y. S. 113; Rosenbach v. Forresters, 184 N. Y. 92, 76 N. E. 1085; Sutton v. Wanamaker, 95 N. Y. S. 525; Kay v. R. Co., 163 N. Y. 447, 57 N. E. 751; Burke v. Borden Co., 98 App. Div. 219, 90 N. Y. S. 527; Lederer v. Lederer, 108 App. Div. 228, 95 N. Y. S. 623; Wadsworth v. Owens (N. D.), 115 N. W. 667; Cincinnati T. Co. v. Stephens, 75 Ohio St. 171, 79 N. E. 235; Tucker v. Ter., 17 Okla. 56, 87 P. 307; Baker v. Moore, 29 Pa. Super. 301; Baldi v. Ins. Co., 24 Pa. Super. 275; S. v. Sanders, 75 S. C. 409, 56 S. E. 35; Sentell v. R. Co., 70 S. C. 183, 49 S. E. 215; Holder v. S. (Tenn.), 104 S. W. 225; Lewandowski v. S., 44 Tex. Cr. 511, 72 S. W. 594; Contreras v. T. Co. (Tex. Civ.), 83 S. W. 870; Fox v. Robbins (Tex. Civ.), 70 S. W. 597; Smith v. S. (Tex. Cr.), 105 S. W. 182; Adams v. S. (Tex. Cr.), 105 S. W. 197; Larkin v. Trammel (Tex. Civ.), 105 S. W. 552; International etc. R. Co. v. Munn (Tex. Civ.), 102 S. W. 442; Hood v. S. (Tex. Cr.), 101 S. W. 229; Campos v. S. (Tex. Cr.), 97 S. W. 100; Gulf etc. R. Co. v.

Hays (Tex. Civ.), 89 S. W. 29; Thompson v. S. 48 Tex. Cr. 16, 85 S. W. 1059; Bailey v. Fly, 35 Tex. Civ. 410, 80 S. W. 675; Dallas etc. R. Co. v. McAllister (Tex. Civ.), 90 S. W. 933; Larkin v. B. Co., 30 Utah 86, 83 P. 686; McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503; Corbett v. Assn. (Wis.), 115 N. W. 365.

Rule applies to accused who testifies on his own behalf. Smith v. S., 137 Ala. 22, 34 S. 396; Smith v. S., 74 Ark. 397, 85 S. W. 1123; Clinton v. S., 53 Fla. 98, 43 S. 312.

No connection need be shown between the inconsistent statement and the res gestae. Denver etc. R. Co. v. Mitchell (Colo.), 94 P. 289; Schloemer v. T. Co., 204 Mo. 99, 102 S. W. 565; Sentell v. R. Co., 70 S. C. 183 49 S. E. 215.

Absence of party. — It is immaterial that the statements contradictory of testimony were made in the absence of the party who seeks to show them. S. v. Mulhall, 199 Mo. 202, 97 S. W. 583, 7 L. R. A. (N. S. 630.

Indirect answer. — The rule applies if witness indirectly answers question as to former statement. Chicago etc. R. Co. v. Matthieson, 212 Ill. 292, 72 N. E. 443. And so if he does not directly deny making it. Chicago etc. R. Co. v. Crose, 113 Ill. App. 547.

Weight of statements as compared with party's evidence. Severson v. Gremm, 124 Ia. 729, 100 N. W. 862.

Order of proof. — A contradictory written statement should be read when the party offering it presents rebuttal evidence; but presenting it during witness' cross-examination is not serious error. Chicago etc. R. Co. v. Matthieson, 212 Ill. 292, 72 N. E. 443.

Oral statements may in New Hampshire be proven without asking witness whether he made them; he may explain later. Villineuve v. R. Co., 73 N. H. 250, 60 A. 748.

Written instrument. — If a writing contains the contradictory statements it must be introduced before questions can be put concerning it. Villineuve v. R. Co., supra. But error in excluding a writing is harmless if statements in it are shown by parol. Chicago etc. R. Co. v. Crose, 113 Ill. App. 547.

Fact that witness did not deny a statement made in his presence as to his own opinion may be shown to affect his testimony inconsistent with such opinion. Denver etc. R. Co. v. Mitchell (Colo.), 94 P. 289.

In Michigan, because of statute, a tax statement made by a property owner is not admissible to contradict his testimony as to the value of property therein described. Williams v. Brown, 137 Mich. 569, 100 N. W. 786.

Inconsistent conduct in bringing action. — One may comply with the conditions of a policy on his property by giving notice of loss and bringing suit thereon without affecting the credibility of his testimony as to the cause of the loss of the insured property, he being without personal knowledge thereof. Blickley v. Luce, 148 Mich. 233, 111 N. W. 752. It is otherwise in an action for personal injuries. The fact that suit was brought may be shown by testimony of a witness. Reumer v. Clark, 121 App. Div. 231, 105 N. Y. S. 659.

Statements as to opinions or estimates not competent to contradict. Southern R. Co. v. McNeill, 155 Fed. 756, 781; Vanhouser v. S. (Tex. Cr.), 108 S. W. 386; Kirk v. S., 48 Tex. Cr. 624, 89 S. W. 1067. But *compare* Atlanta etc. R. Co. v. McManus, 1 Ga. App. 302, 58 S. E. 258, and S. v. Hogan, 117 La. 863, 42 S. 352. The last case holds that a non-expert witness as to sanity may be contradicted by proof of previous statements. Varying opinions expressed at different times are not necessarily inconsistent. Myers v. Manlove, 164 Ind. 128, 71 N. E. 893; Parker v. S., 46 Tex. Cr. 461, 80 S. W. 1008. An affidavit made by a party stating what he believed an absent witness would swear to is not admissible to affect his credibility. Baker v. S. (Ark.), 107 S. W. 983.

Witness must first be interrogated as to person, time and place. P. v. Mallon, 116 App. Div. 425, 101 N. Y. S. 814; McCulloch v. Dobson, 133 N. Y. 114, 30 N. E. 641 (this proposition is doubted. Goss v. Goss, 102

Minn. 346, 113 N. W. 690); Keyes v. R. Co. (Cal.), 93 P. 88 (it is so provided in the code); Clinton v. S., 53 Fla. 98, 43 S. 312 (so provided by statute); Loughlin v. Brassil, 187 N. Y. 128, 79 N. E. 854; Lerum v. Geving, 97 Minn. 269, 105 N. W. 967; P. v. Pembroke (Cal. App.), 92 P. 668; Stancliff v. U. S., 5 Ind. Ter. 486, 82 S. W. 882; Bradley v. Gorham, 77 Conn. 211, 58 A. 698. But if the witness is a party his attention need not be so directed. Ruemer v. Clark, 121 App. Div. 231, 105 N. Y. S. 659.

Silence is not a contradiction if witness was not called upon to speak. O'Connor v. Hogan, 140 Mich. 613, 104 N. W. 29.

Relevancy of statements to contradict. — Only such contradictory extrajudicial statements can be shown as are relevant to the issues. Barton v. Bruley, 119 Wis. 326, 96 N. W. 815; Dillard v. U. S. 141 Fed. 303, 72 C. C. A. 451; Lorangen v. Carpenter, 148 Mich. 549, 112 N. W. 125; Brackett v. A. G. Co., 127 Ga. 672, 56 S. E. 762; Tucker v. Ter., 17 Okla. 56, 87 P. 307; Yelton v. Black, 26 Ky. L. R. 885, 82 S. W. 634. But it has been held that declarations may be proven though they would be incompetent for other purposes. Keyes v. R. Co. (Cal.), 93 P. 88; S. v. Mitchell, 119 La. 374, 44 S. 132. In Texas contradictory testimony in another case as to a matter peculiarly within the knowledge of a witness cannot be proven if it has no relevancy to the issue. Western C. etc. Co. v. Anderson (Tex. Civ.), 101 S. W. 1061.

Precautionary measures after suit brought may be shown to affect the credibility of testimony that the same were unneccessary. Frierson v. Frazier, 142 Ala. 232, 37 S. 825; Schloemer v. T. Co., 204 Mo. 99, 102 S. W. 565. But not to contradict a witness. Loughlin v. Brassil, 187 N. Y. 128, 79 N. E. 854.

Statements of others in witness' presence cannot be shown unless he authorized them. Tucker v. Ter., 17 Okla. 56, 87 P. 307.

775-76 Charlton v. Kelly, 156 Fed. 433; Jones v. S., 145 Ala. 51, 40 S. 947; Bradley v. Gorham, 77 Conn. 211, 58 A. 698; Joyce v. Joyce, 80 Conn. 88; Reisch v. P., 229 Ill. 574, 82 N. E. 321; Raymond v. P., 226 Ill. 433, 80 N. E. 996; In re Barry, 219 Ill. 391, 76 N. E. 577; P. v. Tubbs, 147 Mich. 1, 110 N. W. 132; Bell v. S., 90 Miss. 104, 43 S. 84; Carp v. Ins. Co., 203 Mo. 295, 101 S. W. 78; S. v. Wells, 33 Mont. 291, 83 P. 476; Swain v. S., 48 Tex. Cr. 98, 86 S. W. 335; Casey v. S. (Tex. Cr.), 97 S. W. 496; Clark v. Gurley, (Tex. Civ.), 106 S. W. 394; Randell v. S., 49 Tex. Cr. 261, 90 S. W. 1012; S. v. Trail, 59 W. Va. 175, 53 S. E. 17.

Such evidence should be carefully scrutinized. Husted v. Mead, 58 Conn. 55, 19 A. 233; Bradley v. Gorham, 77 Conn. 211, 58 A. 698. See "Admissions," Vol. 1, pp. 348, 612, and same title, ante.

Unsworn interpreter. — It is immaterial that an ex parte affidavit was made through an unsworn interpreter, he being agent for both parties. Davis v. Bank, 6 Ind. Ter. 124, 89 S. W. 1015.

The party who called a witness may show inconsistent extrajudicial statements. Whitt v. C., 27 Ky. L. R. 50, 84 S. W. 340. State may show contradictory statements by witness it brought before grand jury. S. v. Brown, 128 Ia. 24, 102 N. W. 799; S. v. Waldrop, 73 S. C. 60, 52 S. E. 793.

Formerly, in Alabama, it was held proper to instruct that if any witness had made contradictory statements as to material facts the jury might consider them as raising a reasonable doubt of the truth of his testimony. Gregg v. S., 106 Ala. 44, 17 S. 321; Williams v. S., 114 Ala. 19, 21 S. 993. But these cases have been overruled. Brown v. S., 142 Ala. 287, 38 S. 268; Snyder v. S., 145 Ala. 33, 40 S. 978, qualifying Washington v. S., 58 Ala. 355.

A change of testimony by a party which meets the necessities of the case as declared by the reviewing court is a most suspicious circumstance. Czermak v. Wetzel, 109 N. Y. S. 698.

Witness may explain seeming contradictions. Brown v. McBride, 129 Ga. 92, 58 S. E. 702; Spearman v. Sanders, 121 Ga. 468, 49 S. E. 296;

Long v. Davis (Ia.), 114 N. W. 197; Hood v. S. (Tex. Cr.), 107 S. W. 848; Conner v. Thornton (Tex. Civ.), 86 S. W. 19; Harvey v. Ivory, 35 Wash. 397, 77 P. 725; Allen v. Ellis, 125 Wis. 565, 104 N. W. 739. And show that former statement was made under duress. Skeen v. S. (Tex. Cr.), 100 S. W. 770.

Explanation of instrument. — Parol evidence is competent to show what transpired at the time a witness signed a paper, introduced to impeach his credibility, for the purpose of explaining the alleged inconsistency between it and his testimony. Shreve v. Crosby, 72 N. J. L. 491, 63 A. 333; Reynolds v. R. Co. (Tex. Civ.), 85 S. W. 323; Idaho P. M. Co. v. Green (Idaho), 93 P. 954; Joyce v. Joyce, 80 Conn. 88; Villineuve v. R. Co., 73 N. H. 250, 60 A. 748. If fraud is alleged all that was said and done when the paper was signed may be shown. National E. & S. Co. v. Eagau, 115 Ill. App. 590.

Conduct inconsistent with testimony may be shown. Wefel v. Stillman (Ala.), 44 S. 203; Philadelphia v. Dobbins, 24 Pa. Super. 136.

Judge's notes not admissible to show contradiction in witness' testimony. Richards v. C., 107 Va. 881, 59 S. E. 1104.

Testimony formerly given not admissible if witness admits having given it. Dean v. S., 47 Tex. Cr. 243, 83 S. W. 816. But *compare* Stinson v. C., 29 Ky. L. R. 733, 96 S. W. 463, an affidavit being held admissible after its making had been admitted and witness examined as to its contents. See Beier v. St. Louis Co., 197 Mo. 215, 233, 94 S. W. 876. If part of such testimony is read to contradict, witness may offer the other part. Casey v. S. (Tex. Cr.), 97 S. W. 496.

Pleadings in former suits are admissible. Ackerman v. Larner, 116 La. 101, 40 S. 581; Texas etc. R. Co. v. Moers (Tex. Civ.), 97 S. W. 1064. If verified and not withdrawn. Lexington R. Co. v. Woodward, 32 Ky. L. R. 653, 106 S. W. 853. See "ADMISSIONS," Vol. 1, pp. 348, 442, and same title, ante.

Proof of contradictions of facts only affects the testimony of witnesses who are contradicted. Korter v. R. Co., 87 Miss. 482, 40 S. 258. Such proof may be rebutted by evidence of witness' reputation for truth and veracity. Swain v. S., 48 Tex. Cr. 98, 86 S. W. 335.

775-77 Berus v. R. Co., 101 N. Y. S. 748; Dick v. Marvin, 188 N. Y. 426, 81 N. E. 162; Lincoln v. Hemenway (Vt.), 69 A. 153.

Self-corroboration is not permitted. Southern P. Co. v. Schuyler, 135 Fed. 1015, 68 C. C. A. 409. See "CORROBORATION," Vol. 3, p. 667, and same title, ante.

776-78 C. v. Miller, 31 Pa. Super. 317; Hudson v. S., 49 Tex. Cr. 24, 90 S. W. 177; Casey v. S. (Tex. Cr.), 97 S. W. 496. *Contra*, Burks v. S., 78 Ark. 271, 93 S. W. 983; P. v. Turner, 1 Cal. App. 420, 82 P. 397; McBride v. R. Co., 125 Ga. 515, 54 S. E. 674; Cook v. S., 124 Ga. 653, 53 S. E. 104; Cincinnati T. Co. v. Stephens, 75 Ohio St. 171, 79 N. E. 235.

Testimony on trial may be confirmed by testimony before grand jury. Burch v. S., 49 Tex. Cr. 13, 90 S. W. 168.

The corroborating proof should be confined to the scope of the contradictory statements. Hicks v. S., 165 Ind. 440, 75 N. E. 641.

776-79 Inman Bros. v. Dudley Co. 146 Fed. 449, 76 C. C. A. 659; Holmes v. S. (Tex. Cr.), 106 S. W. 1160; Dean v. S., 47 Tex. Cr. 243, 83 S. W. 816. See "CORROBORATION," Vol. 3, p. 667, and ante.

Previous statements may be shown to rebut evidence of improper motive on the part of a witness. Sweeney v. Sweeney, 121 Ga. 293, 48 S. E. 984.

777-81 Louisville & N. R. Co. v. Perkins, 144 Ala. 325, 39 S. 305; Boles v. P., 37 Colo. 41, 86 P. 1030; Mann v. S., 124 Ga. 760, 53 S. E. 324; Daniel v. Lance, 29 Pa. Super. 454; Plattor v. Seattle Co., 44 Wash. 408, 87 P. 489.

777-83 Strehmann v. Chicago, 93 Ill. App. 206; Sedoff v. R. Co., 124 Ill. App. 609; McDonnell v. R. Co., 131 Ill. App. 227; Chicago etc. R. Co v. Kline, 220 Ill. 334, 77 N. E. 229.

777-84 Glenn v. R. Co., 121 Ga.

80, 48 S. E. 684; Georgia R. & B. Co. v. Andrews, 125 Ga. 85, 54 S. E. 76; Lincoln v. Hemenway (Vt.), 69 A. 153.

Materiality of testimony is a question of law or a mixed question of law and fact. Wilkinson v. P., 226 Ill. 135, 80 N. E. 699.

It is for the court to decide whether the rule of falsus in uno, falsus in omnibus, applies. Pumorlo v. Merrill, 125 Wis. 102, 103 N. W. 464.

Application of maxim not favored if there is a probability of mistake. Pumorlo v. Merrill, supra.

778-85 Hamilton v. S., 147 Ala. 110, 41 S. 940; Denver etc. R. Co. v. Warring, 37 Colo. 122, 86 P. 305; Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760; Godair v. Bank, 225 Ill. 572, 80 N. E. 407; Overtoom v. R. Co., 181 Ill. 323, 54 N. E. 898; Matthews v. Granger, 196 Ill. 164, 63 N. E. 658; Chicago etc. R. Co. v. Kline, 220 Ill. 334, 77 N. E. 229; Doyle v. Burns, 123 Ia. 488, 99 N. W. 195; Bell v. S., 90 Miss. 104, 43 S. 84; Pumorlo v. Merrill, 125 Wis. 102, 103 N. W. 464.

The maxim is not a mandatory rule of evidence, but rather a permissible inference that the jury may draw or not. Addis v. Rushmore (N. J. L.), 65 A. 1036; P. v. Dinser, 49 Misc. 82, 98 N. Y. S. 314. *Contra,* Alexander v. Blackman, 26 App. D. C. 541.

Credible corroborating evidence is to be regarded. Prior v. Ter. (Ariz.), 89 P. 412; Hart v. Godkin, 122 Wis. 646, 100 N. W. 1057. Whether believed or not. Chicago etc. R. Co. v. Kelly, 210 Ill. 449, 71 N. E. 355.

Part of the testimony of a witness may be believed and other parts disbelieved. Louisville & N. R. Co. v. Perkins, 144 Ala. 325, 39 S. 305; In re Vandiveer, 4 Cal. App. 650, 88 P. 993.

Instruction may be in language of code: A witness false is one part of his testimony is to be distrusted in others. P. v. Dobbins, 138 Cal. 694, 72 P. 339. But court may add that false swearing must be willful and material to the case. P. v. Plyler, 121 Cal. 160, 53 P. 553. It need not make exception as to part of evidence corroborated. Burgess v. Alcorn, 75 Kan. 735, 90 P. 239.

Some things must of necessity be either true or false; and when a fact of that character is involved the qualifying clause of the text need not be given jury. Glenn v. R. Co., 121 Ga. 80, 48 S. E. 684.

779-86 Chicago & A. R. Co. v. Kelly, 210 Ill. 449, 71 N. E. 355; Sedoff v. R. Co., 124 Ill. App. 609; John Hancock etc. Ins. Co. v. Powell, 116 Ill. App. 151, Johnson v. Johnson, 187 Ill. 86, 58 N. E. 237.

779-87 Silence of witness on a question subsequently testified of. The omission of a witness on a former occasion to refer to an important matter of which he subsequently testifies may be shown as affecting his credibility, though he testifies he was not questioned concerning it. S. v. Rosa, 71 N. J. L. 316, 58 A. 1010; Henderson v. S. (Tex. Cr.), 101 S. W. 208; S. v. Armstrong, 118 La. 480, 43 S. 57; S. v. Stines, 138 N. C. 686, 50 S. E. 851; Shirley v. S., 144 Ala. 35, 40 S. 269. Failure of accused to testify on previous trials growing out of the same transaction and to deny testimony of state's witness is properly proven on a trial after death of such witness on which accused testified. Sanders v. S. (Tex. Cr.), 105 S. W. 803. It may be shown that witnesses did not testify on a former trial of the case, and that facts have since occurred which caused them to be interested in the result of the suit. Dina v. S., 46 Tex. Cr. 402, 78 S. W. 229. Silence may be shown though witness was not bound to speak. Gulf etc. R. Co. v. Matthews (Tex.), 93 S. W. 1068. See Alabama etc. R. Co. v. Brooks, 135 Ala. 401, 33 S. 181; S. v. McKinney, 31 Kan. 570, 3 P. 356; S. v. Morton, 107 N. C. 890, 12 S. E. 112, 10 L. R. A. 527; S. v. Burton, 94 N. C. 947; S. v. McQueen, 46 N. C. 177; "Impeachment of Witnesses," Vol. 7, pp. 1, 152-155.

No inference is to be drawn from the refusal of a witness to testify at a coroner's inquest because of assertion of his privilege. Masterson v. St. Louis Co., 204 Mo. 507, 103 S. W. 48. But see C. v. Smith, 163 Mass. 411, 40 N. E. 189, which

seems to have been decided under a rule of a local character.

Silence may be explained, and a witness may be recalled for that purpose after arguments begun. Lewandowski v. S., 44 Tex. Cr. 511, 72 S. W. 594; Carwile v. S. (Ala.), 39 S. 220.

Refusal to submit to physical examination. — It may be shown that the party seeking to recover for personal injuries refused to submit to a private examination of his person; such refusal may also be explained. Cedartown v. Brooks, 2 Ga. App. 583, 59 S. E. 836; Austin & N. R. Co. v. Cluck, 97 Tex. 172, 77 S. W. 403. *Contra,* Chicago v. McNally, 227 Ill. 14, 81 N. E. 23. See "PHYSICAL EXAMINATION," Vol. 9, pp. 783, 811, and that title, infra.

779-88 Excusing former perjury. An admission of the falsity of testimony and stating the opposite of it, giving as reason for the perjury fear of conviction, may afford a moral explanation sufficient to satisfy the jury, and if it is so the later testimony may be believed with or without corroborating circumstances or confirmatory evidence. Chandler v. S., 124 Ga. 821, 53 S. E. 91, *cit.* McCoy v. S., 78 Ga. 490, 3 S. E. 768; Burns v. S., 89 Ga. 527, 15 S. E. 748; Huff v. S., 104 Ga. 521, 30 S. E. 808.

CRIMINAL CONVERSATION [Vol. 3.]

782-1 Snowman v. Mason, 99 Me. 490, 59 A. 1019; Hill v. Pomelear, 72 N. J. L. 528, 63 A. 269.

782-2 Certificate of marriage must be accompanied by proof of identity of persons, not identity of names merely. Snowman v. Mason, supra.

785-5 Dodge v. Rush, 28 App. D. C. 149. See Brunelle v. Ruell, 140 Mich. 256, 103 N. W. 602.

785-6 Measure of proof. — There is no error in instructing that the burden is upon plaintiff to establish each and every particular fact necessary to prove his cause of action by a preponderance of evidence, such as reasonably satisfies your minds. Ball v. Marquis, 122 Ia. 665, 98 N. W. 496, modifying opinion in same case, 92 N. W. 691.

786-9 Dodge v. Rush, 28 App. D. C. 149.

786-11 Husband competent only to testify to the marriage. Rust v. Oltmer (N. J. L.), 67 A. 337; Hill v. Pomelear, 72 N. J. L. 528, 63 A. 269 (made so by statute).

When wife is plaintiff she cannot disclose declarations made by husband concerning defendant. Dodge v. Rush, 28 App. D. C. 149.

787-14 Rust v. Oltmer (N. J. L.), 67 A. 337.

A confession of the wife, written in husband's absence, and being in the nature of a recital of events is not admissible in his favor. Kohlhoss v. Mobley, 102 Md. 199, 210, 62 A. 236.

In Hawaii defendant's wife may testify against her husband in a civil action. Briggs v. Mills, 4 Haw. 450.

791-25 Kohlhoss v. Mobley, 102 Md. 199, 62 A. 236.

Declarations of wife in husband's absence not competent to show his consent. Smith v. Hockenberry, 138 Mich. 129, 101 N. W. 207.

792-27 Rule the same when wife plaintiff. Dodge v. Rush, 28 App. D. C. 149.

793-31 Proof of criminal intimacy with others than defendant will not support the inference that husband connived thereat in the absence of evidence bringing knowledge of the fact to him. Smith v. Hockenberry, supra.

793-32 Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869.

793-33 Smith v. Hockenberry, supra.

795-45 Smith v. Hockenberry, supra.

Condonation is not a bar. Smith v. Hockenberry, supra.

796-48 Smith v. Hockenberry, supra.

796-49 Association of wife with women of bad repute may be shown, as may the fact that the wrongful acts charged were brought about by her under circumstances indicating that discovery was anticipated. Smith v. Hockenberry, supra.

797-52 Smith v. Hockenberry, supra.

798-66 Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869.

Resulting expense or loss of service need not be shown. Shannon v. Swanson, supra.

CROSS-EXAMINATION [Vol. 3.]

807-2 Resurrection G. M. Co. v. Fortune Co., 129 Fed. 668, 64 C. C. A. 180; Mitchell S. B. G. Co. v. Grant, 143 Ala. 194, 38 S. 855; Atlanta etc. R. Co. v. McManus, 1 Ga. App. 302, 58 S. E. 258; Idaho M. Co. v. Kalangrim, 88 Idaho 101, 66 P. 933; Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515; S. v. Foster, 14 N. D. 561, 105 N. W. 938; Montanye v. Mfg. Co., 127 Wis. 22, 105 N. W. 1043.

Constitutional right. — The right of accused to be confronted by the witnesses against him imports the right to cross-examine. Wray v. S. (Ala.), 45 S. 697, *cit.* Mattox v. U. S., 156 U. S. 237; Tate v. S., 86 Ala. 33, 5 S. 575; Howser v. C., 51 Pa. 332; S. v. Maunion, 19 Utah 505, 57 P. 542, 75 Am. St. 753, 45 L. R. A. 638. The right is as broad as the issue. Walton v. S., 87 Miss. 689, 39 S. 689. Exceptions exist as to dying declarations and to the reception of testimony given on a former trial by a witness who has died, left the jurisdiction or become incapable of testifying, the defendant having had the right to cross-examine on such trial. Wray v. S. (Ala.), 45 S. 697.

It is presumed that prejudice has resulted from the denial or unjustifiable restriction of cross-examination, though the party may call the witness or others to prove the desired facts. Resurrection G. M. Co. v. Fortune Co., 129 Fed. 668, 64 C. C. A. 180.

Cross-examination is not to be denied because the witness cannot be contradicted as to what occurred between her and her husband. Neace v. C., 23 Ky. L. R. 125, 62 S. W. 733.

The right to cross-examine a party to a proceeding in the patent office is not lost by his securing consent of the other to an adjournment beyond such time as will permit the service of subpoena on him. Lobel v. Cossey, 157 Fed. 664.

Unnecessary witness may be cross-examined. Mickelson v. Dial (Kan.), 93 P. 606.

Affiant not subject to cross-examination. — The maker of an affidavit for the introduction of a certified copy of a deed, which is positive in its terms and in conformity with the statute, cannot be cross-examined as to the truth of the affidavit, though he testified generally in the case. Glos v. Garrett, 219 Ill. 208, 76 N. E. 373.

807-3 Harris v. R. Co., 115 Mo. App. 527, 91 S. W. 1010.

Unconditional. — The right to cross-examine cannot be conditioned upon counsel's informing the court and all parties concerned as to its object. Brown v. S., 88 Miss. 166, 40 S. 737.

Right is limited to the taking of original evidence; does not extend to a summary of it filed at the close of complainant's evidence before a master. Goss P. P. Co. v. Scott, 148 Fed. 394.

808-5 The rule which prohibits proof of affirmative defenses upon cross-examination extends only to such as are pleaded by the party adverse to him who calls the witness. It never applies to a cross-examination by which the adverse party simply seeks to disprove, weaken or modify the case against him made by the witness. Resurrection G. M. Co. v. Fortune Co., 129 Fed. 668, 64 C. C. A. 180; Wendt v. R. Co., 4 S. D. 476, 57 N. W. 226.

808-8 Accused is not bound to cross-examine a witness whose health is such that to do so may imperil his life. Direct testimony given by such witness whom accused declined to cross-examine will be stricken out. Wray v. S. (Ala.), 45 S. 697.

808-9 Accused, whose testimony on a former trial has been read, may cross-examine the official reporter as to other statements therein which tended to explain, qualify, correct or enlighten concerning the matters covered by the testimony read. Miller v. P., 216 Ill. 309, 74 N. E. 743.

After actions have been consolidated and a party has testified in his own behalf and been cross-examined by the plaintiff, it is com-

petent for the court to allow another party to cross-examine defendant in its interest. Sullivan v. Fugazzi, 193 Mass. 518, 79 N. E. 775. A co-defendant whose purpose to abide its motion for direction of a verdict has been stated may be allowed to cross-examine the other defendant's witnesses. Postal Tel.-C. Co. v. Likes, 225 Ill. 249, 80 N. E. 136.

809-11 Waiver of right. — One who desires to cross-examine witnesses who had testified before he became a party to the action must move promptly or the right will be waived. Eddleman v. Fasig, 128 Ill. App. 120.

809-12 Rex v. Hadwen, (1902) 1 K. B. (Eng.) 882.

809-15 Judge may ask questions. Grant v. S., 122 Ga. 740, 50 S. E. 946.

809-17 Resurrection G. M. Co. v. Fortune Co., 129 Fed. 668, 64 C. C. A. 180; Sperry v. Moore, 42 Mich. 353, 4 N. W. 13.

Depositions sometimes admissible though deponent refused to answer questions on cross-examination. See Crossgrove v. Himmelrich, 54 Pa. 203; Shannon v. Castner, 21 Pa. Super. 294. *Compare* Stonebraker v. Short, 8 Pa. 155.

810-18 Gallagher v. Gallagher, 92 App. Div. 138, 87 N. Y. S. 343.

811-28 Mitchell S. B. Co. v. Grant, 143 Ala. 194, 38 S. 855; Southern R. Co. v. Hobbs (Ala.), 43 S. 844; Baker v. Mathew (Ia.), 115 N. W. 15.

811-29 Boles v. P., 37 Colo. 41, 86 P. 1030; Citizens' R. Co. v. Albright, 14 Ind. App. 476, 42 N. E. 238, 1028; Payne v. Goldbach, 14 Ind. App. 100, 42 N. E. 642; Dean v. C., 25 Ky. L. R. 1876, 78 S. W. 1112; Fuqua v. C., 118 Ky. 578, 81 S. W. 923; Howard v. C., 118 Ky. L. R. 1, 80 S. W. 211, 81 S. W. 704; Squier v. Barnes, 193 Mass. 21, 78 N. E. 731; Wells v. E. Co., 108 Mo. App. 607, 84 S. W. 204; S. v. Foster, 14 N. D. 561, 105 N. W. 938; Union R. Co. v. Hunton, 114 Tenn. 609, 88 S. W. 182.

811-30 Burks v. S., 72 Ark. 461, 82 S. W. 490; Richardson v. S., 80 Ark. 201, 96 S. W. 752; P. v. Linares, 142 Cal. 17, 75 P. 308; Bundy v. Sierra L. Co., 149 Cal. 772, 781, 87 P. 622; Mutchmor v. McCarty, 149 Cal. 603, 87 P. 85; San Miguel C. G. Co. v. Bonner, 33 Colo. 207, 79 P. 1025; Thomas v. S., 47 Fla. 99, 36 S. 161; Pittsburg etc. R. Co. v. Banpill, 206 Ill. 553, 69 N. E. 499; Hoover v. S., 161 Ind. 348, 68 N. E. 591; S. v. Blee, 133 Ia. 725, 111 N. W. 19; Murphy v. Hoagland, 32 Ky. L. R. 839, 107 S. W. 303; Taylor v. Schofield, 191 Mass. 1, 77 N. E. 652; Brown v. Harris, 139 Mich. 372, 102 N. W. 960; Norman v. Corbley, 32 Mont. 195, 79 P. 1059; Raynolds v. Vinier, 109 N. Y. S. 293; Beadle v. Paine, 46 Or. 424, 80 P. 903; Benson v. S. (Tex. Cr.), 103 S. W. 911; St. Louis etc. R. Co. v. Rogers (Tex. Civ.), 108 S. W. 1027; Washington v. S., 46 Tex. Cr. 184, 79 S. W. 811; Odegard v. North Wis. L. Co., 130 Wis. 659, 110 N. W. 809.

Discourtesy to witness is improper. S. v. Miller, 43 Or. 325, 74 P. 658.

Admittedly useless questioning should be stopped. Union R. Co. v. Hunton, 114 Tenn. 609, 88 S. W. 182.

812-32 Change in form of question may be suggested by court. Chandler v. S., 124 Ga. 821, 53 S. E. 91.

812-33 Abelson v. R. Co., 84 Ark. 181, 105 S. W. 81; Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515; Woods v. Dailey, 211 Ill. 495, 71 N. E. 1068; Fuqua v. C., 118 Ky. 578, 81 S. W. 923; Record v. R. Co. (N. J.), 67 A. 1040; Shanuon v. Castner, 21 Pa. Super. 294.

Trade secrets need not be exposed. The court may exercise its discretion in ruling out questions which are designed to give the business competitor of a party the benefit of disclosures concerning his business. Worrell v. Mfg. Co., 103 Va. 719, 49 S. E. 988.

Examination on admitted facts may be checked. Boles v. P., 37 Colo. 41, 86 P. 1030; Wooldridge v. S., 49 Fla. 137, 38 S. 3.

812-34 Wilson v. Hart, 129 Ill. App. 329; Prussian Ins. Co. v. Empire Co., 113 Ill. App. 67; Faulkner v. Birch, 120 Ill. App. 281; Donk Bros. v. Tetherington, 128 Ill. App. 256; Wilson v. Hart, 129 Ill. App. 329; Lanza v. Le Grand Co., 124

Ia. 659, 100 N. W. 488; Weinstein v. Mfg. Co., 121 App. Div. 708, 106 N. Y. S. 517; S. v. Patchen, 37 Wash. 24, 79 P. 479.

Withdrawal of objection does not cure error of excluding competent testimony. Edmunds Mfg. Co. v. McFarland, 118 Ill. App. 256.

812-35 Bowen v. White, 26 R. I. 68, 58 A. 252.

Postponement against objection, if witness not produced later, ground for new trial. Nichols v. Wentz, 78 Conn. 429, 62 A. 610.

812-38 The direct examination contained in a deposition is to be read before the part of it containing the cross-examination. Von Tobel v. Stetson Co., 32 Wash. 683, 73 P. 788.

813-39 Southern R. Co. v. Cotham (Ala.), 42 S. 100.

813-41 S. v. Nugent, 116 La. 99, 40 S. 581.

813-42 Van v. S., 140 Ala. 122, 37 S. 158; Burks v. S., 72 Ark. 461, 82 S. W. 490; P. v. Morton, 139 Cal. 719, 73 P. 609; Currelli v. Jackson, 77 Conn. 115, 58 A. 762; Chicago v. Didier, 131 Ill. App. 406; S. v. Boice, 114 La. 856, 38 S. 584; S. v. Williams, 111 La. 205, 35 S. 521.

A question unnecessarily complex in form and involved in meaning may be disallowed. Todd v. Crete (Neb.), 115 N. W. 307.

Assuming that an answer is untrue is not forbidden; counsel does not thereby assume the witness has testified to a fact which he has not testified to. Briggs v. P., 219 Ill. 230, 76 N. E. 499.

Reading questions from book. The effect of reading extracts from medical works and asking a medical witness whether what is read corresponds with his judgment is to place before the jury the opinions of the author, which is not allowable. Lilley v. Parkinson, 91 Cal. 655, 27 P. 1091. But if the jury is not aware that questions are so read and the questioner asserts that he makes the questions his own, the practice, though not commendable, will not work a reversal. P. v. Bowers, 1 Cal. App. 501, 82 P. 553.

813-43 Bell v. S., 48 Tex. Cr. 256, 87 S. W. 1160.

814-46 It may be assumed that answers by witness are untrue. Briggs v. P., 219 Ill. 330, 76 N. E. 499.

814-47 Burks v. S., 72 Ark. 461, 82 S. W. 490; Newman v. C., 28 Ky. L. R. 81, 88 S. W. 1089; Malone v. Stephenson, 94 Minn. 222, 102 N. W. 372.

Prejudicial questions put by the judge are condemned by a clause in the constitution forbidding comment on the facts. S. v. Pasquale, 39 Wash. 260, 81 P. 689.

Questions must not be too general. Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639.

814-48 Laucheimer v. Jacobs, 126 Ga. 261, 55 S. E. 55; Bell v. S., 48 Tex. Cr. 256, 87 S. W. 1160.

Leading questions may be put by the party who called an unwilling witness. Becker v. Koch, 104 N. Y. 394, 10 N. E. 701; P. v. Kelly, 113 N. Y. 647, 21 N. E. 122; P. v. Sexton, 187 N. Y. 495, 509, 80 N. E. 396.

816-57 Savage v. Bowen, 103 Va. 540, 49 S. E. 668.

816-58 Thomas v. S., 47 Fla. 99, 36 S. 161; Hirch & Sons v. Coleman, 227 Ill. 149, 81 N. E. 21, 128 Ill. App. 245.

816-62 See Richards v. C., 107 Va. 881, 59 S. E. 1104.

816-63 Harris v. R. Co., 115 Mo. App. 527, 91 S. W. 1010.

817-65 An agent or employe of a party cannot be called for the purpose of cross-examination unless offered as a witness. Whistler v. Cowan, 4 Ohio C. C. (N. S.) 625, affirmed by supreme court without opinion.

818-73 Detroit Nat. Bk. v. Union T. Co., 145 Mich. 656, 673, 108 N. W. 1092; Harris v. R. Co., 115 Mo. App. 527, 91 S. W. 1010; Ayers v. R. Co., 190 Mo. 228, 88 S. W. 608; Fulton Bk. v. Stafford, 2 Wend. (N. Y.) 483. See Strebin v. Lavengood, 163 Ind. 478, 493, 71 N. E. 494.

Difference in rules affects only order of proof. See Ayers v. R. Co., 190 Mo. 228, 236, 88 S. W. 608.

In Missouri the witness must give some evidence before he can be cross-examined. Harris v. R. Co., 115 Mo. App. 527, 91 S. W. 1010.

In South Carolina a witness who has been sworn becomes subject to cross-

examination though not examined in chief. Mason v. R. Co., 58 S. C. 70, 36 S. E. 440.

819-76 Ayers v. R. Co., supra.

820-78 Other reasons for the rule are given in Harris v. R. Co., supra.

820-80 Stevens v. P., 215 Ill. 593, 74 N. E. 786.

822-88 Wills v. Russell, 100 U. S. 621; Seymore v. Malcolm Co., 58 Fed. 957, 7 C. C. A. 593; Montgomery v. Ins. Co., 97 Fed. 913, 38 C. C. A. 553; O'Connell v. Pennsylvania Co., 118 Fed. 989, 55 C. C. A. 483; McKnight v. U. S., 122 Fed. 926; Resurrection G. M. Co. v. Fortune Co., 129 Fed. 668, 64 C. C. A. 180; Snedecor v. Pope, 143 Ala. 275, 39 S. 318; Western R. v. Cleghorn, 143 Ala. 392, 39 S. 133; P. v. Darr, 3 Cal. App. 50, 84 P. 457; P. v. Mathews, 139 Cal. 527; sub nom. 73 P. 416; P. v. Manasse (Cal.), 94 P. 92; P. v. Schmitz (Cal. App.), 94 P. 407; Yordi v. Yordi (Cal. App.), 91 P. 348; Donaldson v. P., 33 Colo. 333, 80 P. 906; Lewis v. S. (Fla.), 45 S. 998; Stone v. White (Fla.), 45 S. 1032; Peadon v. S., 46 Fla. 124, 35 S. 204; Fields v. S., 46 Fla. 84, 35 S. 185; Surrency v. S., 48 Fla. 59, 37 S. 575; Starke v. S., 49 Fla. 41, 37 S. 850; Hampton v. S., 50 Fla. 55, 77, 39 S. 421; Godwin v. R. Co., 120 Ga. 747, 48 S. E. 139; Piipiilani v. Houghtailing, 11 Haw. 100; Kalaukoa v. Henry, 11 Haw. 430; Booth v. Beckley, 11 Haw. 518; Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754; Chicago R. Co. v. Creech, 207 Ill. 400, 69 N. E. 919; Streator I. T. Co. v. T. C. Co., 217 Ill. 577, 75 N. E. 546; Staunton Co. v. Bub, 218 Ill. 125, 75 N. E. 770; Elgin & A. S. T. Co. v. Brown, 129 Ill. App. 62; Meyer v. Johnson, 122 Ill. App. 87; Chicago R. Co. v. Strong, 230 Ill. 58, 82 N. E. 335; Elgin T. Co. v. Brown, 129 Ill. App. 62; Citizens' L. & B. Assn. v. Weaver, 127 Ill. App. 252; Osborn v. S., 164 Ind. 262, 73 N. E. 601; Eacock v. S. (Ind.), 82 N. E. 1039; Hoover v. S., 161 Ind. 348, 68 N. E. 591; Frick v. Kabaker, 116 Ia. 494, 90 N. W. 498; S. v. Campbell, 129 Ia. 154, 105 N. W. 395; Stutsman v. Sharpless, 125 Ia. 335, 101 N. W. 105; Goldstein v. Morgan, 122 Ia. 27, 96 N. W. 897; Coon v. R. Co., 75 Kan. 282, 89 P. 682; S. v. Thompson, 116 La. 829, 41 S. 107; Baltimore R. Co. v. Deck, 102 Md. 669, 62 A. 958; Gleason v. Daly, 194 Mass. 348, 80 N. E. 486; Ross v. R. Co., 102 Minn. 249, 113 N. W. 573; Borden v. Lynch, 34 Mont. 503, 87 P. 609; Citizens' Bk. v. Emley (Neb.), 107 N. W. 1014; Nash v. McNamara (Nev.), 93 P. 405; Risley & Sons v. Ocean City (N. J. L.), 69 A. 192; S. v. Brady, 71 N. J. L. 360, 59 A. 6; Carter v. Boyle, 57 Misc. 564, 109 N. Y. S. 1102; Woods v. Faurot, 14 Okla. 171, 77 P. 346; Harrold v. Ter., 18 Okla. 395, 89 P. 202; Multnomah County v. Willamette (Or.), 89 P. 389; Morse v. Odell (Or.), 89 P. 139; Binder v. Pottstown Co., 33 Pa. Super. 411; Quigley v. Thompson, 211 Pa. 107, 60 A. 506; Weldon v. T. Co., 27 Pa. Super 257; S. v. Sconton, 20 Pa. Super. 503; Hastings v. Speer, 15 Pa. Super 115; Buchanan v. Randell (S. D.) 109 N. W. 513; Webb v. S., 47 Tex. Cr. 305, 83 S. W. 394; Hathaway v. Goslant, 77 Vt. 835, 59 A. 835; Spencer v. S., 132 Wis. 509; Dunham v. Salmon, 130 Wis. 164, 109 N. W. 959, Johnston v. Abresch, 123 Wis. 130, 101 N. W. 395; Nagle v. Hake, 123 Wis. 256, 101 N. W. 409.

Introduction of exhibits is within the rule. Kroetch v. Mill Co., 9 Idaho 277, 74 P. 868.

Rule is not strictly applied where evidence is taken by consent in one action for use in another, or where it is taken under a statutory notice. Crosby v. Wells, 73 N. J. L. 790, 67 A. 295; Hunter v. Voigt, 8 Pa. Super. 484; Story v. Nidiffer, 146 Cal. 549, 80 P. 692. It is sometimes relaxed because of necessity or convenience. Montgomery v. Ins. Co., 97 Fed. 913, 38 C. C. A. 553; Goddard v. Mills, 75 Fed. 818, 21 C. C. A. 530; Saffer v. U. S., 87 Fed. 329, 31 C. C. A. 1.

824-89 Quigley v. Thompson, 211 P 107, 60 A. 506; Woodward v. S., 42 Tex. Cr. 188, 58 S. W. 135; Stewart v. S. (Tex. Cr.), 106 S. W. 685; Weaver v. S., 46 Tex. Cr. 607, 81 S. W. 39.

Rule not absolute; it may be relaxed in discretion of court. Cate v. Fife (Vt.), 68 A. 1.

Rebuttal. — A witness who has testified in rebuttal can only be cross-examined on his rebuttal testimony. S. v. Heidelberg, 120 La. 300, 45 S. 256.

825-90 Mannel v. Flynn (Cal. App.), 90 P. 463; Peadon v. S., 46 Fla. 124, 35 S. 204; Hampton v. S., 50 Fla. 55, 39 S. 421; Eacock v. S. (Ind.), 82 N. E. 1039; Nash v. McNamara (Nev.), 93 P. 405; Woods v. Faurot, 14 Okla. 171, 77 P. 346; In re Shadle, 30 Pa. Super. 151; Field v. Schuster, 26 Pa. Super. 82.

The rule stated in the text does not apply to the wife of accused if she is not a competent witness against him. Stewart v. S. (Tex. Cr.), 106 S. W. 685. See Jones v. S., 38 Tex. Cr. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. 719.

825-91 P. v. Delbos, 146 Cal. 734, 81 P. 131; Donnelly v. R. Co., 131 Ill. App. 302.

Rule strictly applied where wife can not be required to testify against husband and has been examined in his behalf. Jones v. S. (Tex. Cr.), 101 S. W. 993, and local cases cited.

Full inquiry should be allowed as to the time, place and circumstances relating to a material transaction. Faulkner v. Birch, 120 Ill. App. 281.

825-92 Bispham v. Turner, 83 Ark. 331, 103 S. W. 1135; S. v. Branch, 151 Mo. 622, 641, 52 S. W. 390; Anderson v. R. Co., 161 Mo. 411, 61 S. W. 874; Ayers v. R. Co., 190 Mo. 228, 88 S. W. 608; Valentini v. Ins. Co., 106 App. Div. 487, 94 N. Y. S. 758; Quigley v. Thompson, 211 Pa. 107, 60 A. 506.

826-96 Establishing a defense by cross-examination of plaintiff's witness is proper if the general rule as to the limits of the inquiries is observed. Garlish v. R. Co., 131 Fed. 837, 67 C. C. A. 237; Resurrection G. M. Co. v. Fortune Co., 129 Fed. 668, 64 C. C. A. 180.

826-98 Levine v. Carroll, 121 Ill. App. 105; Gemmill v. S., 16 Ind. App. 154, 43 N. E. 909; Quigley v. Thompson, 211 Pa. 107, 60 A. 506.

830-4 The cross-examination of subscribing witnesses to a will is not limited to what occurred when it was executed. Nichols v. Wentz, 78 Conn. 429, 62 A. 610.

830-5 S. v. Teasdale, 120 Mo. App. 692, 700, 97 S. W. 995.

831-6 Booth v. Beckley, 11 Haw. 518; Chicago R. Co. v. Creech, 207 Ill. 400, 69 N. E. 919; Illinois C. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435; Prussian Nat. Ins. Co. v. Empire Co., 113 Ill. App. 67; Gleason v. Daly, 194 Mass. 348, 80 N. E. 486; Quigley v. Thompson, 211 Pa. 107, 60 A. 506; Glenn v. T. Co., 206 Pa. 135, 55 A. 860; Williams v. Norton (Vt.), 69 A. 146; Worrell v. Mfg. Co., 103 Va. 719, 49 S. E. 988; Savage v. Bowen, 103 Va. 540, 49 S. E. 668; Earley v. Winn, 129 Wis. 291, 109 N. W. 633.

831-7 Ahmi v. Waller, 15 Haw. 497.

831-9 See P. v. Schmitz (Cal. App.), 94 P. 407; Bell v. Prewitt, 62 Ill. 361; Hughs v. Westmoreland Co., 104 Pa. 207; Weldon v. T. Co., 27 Pa. Super. 257.

Error without prejudice not cause for reversal. S. v. Kyle, 177 Mo. 659, 76 S. W. 1014; Bohan v. Avoca, 154 Pa. 404, 26 A. 604; Osborne v. Walley, 8 Pa. Super. 193; Hunter v. Voigt, 8 Pa. Super. 484; Montgomery v. S., 45 Tex. Cr. 373, 77 S. W. 788.

832-11 Port Townsend v. Lewis, 34 Wash. 413, 75 P. 982.

Party cannot complain of evidence brought out by him on cross-examination. Jackson-V. D. Co. v. Moore, 22 Ky. L. R. 1749, 61 S. W. 368; Pacific Exp. Co. v. Needham (Tex. Civ.), 94 S. W. 1070.

832-12 Humboldt v. Watkins, 123 Ill. App. 62; Baltimore R. Co. v. Deck, 102 Md. 669, 62 A. 958; Hastings v. Speer, 15 Pa. Super. 115; Morotock Ins. Co. v. Fostoria Co., 94 Va. 361, 26 S. E. 850; Worrell v. Mfg. Co., 103 Va. 719, 49 S. E. 988; Norman v. Hopper, 38 Wash. 415, 80 P. 551.

Improper admission of testimony immaterial if prejudice did not result. Denny v. Kleeb, 40 Wash. 634, 82 P. 920.

832-14 Chicago etc. R. Co. v. Howell, 208 Ill. 155, 70 N. E. 15; Campbell v. Eichorst, 122 Ill. App. 609; Matteson v. R. Co., 218 Pa. 527.

834-15 P. v. Gallagher, 100 Cal. 466, 35 P. 80; P. v. Schmitz (Cal.

App.), 94 P. 407; Lanigan v. Neely, 4 Cal. App. 760, 89 P. 441; Gillespie v. Salmon, 2 Cal. App. 501, 84 P. 310; P. v. Davis, 1 Cal. App. 8, 81 P. 716, 88 P. 1101; P. v. Buckley, 143 Cal. 375, 77 P. 169; Purse v. Purcell (Colo.), 95 P. 291 (as where the value of services has been testified of, inquiry is proper as to what they were and the occasion for rendering them); Atlantic R. Co. v. Crosby, 53 Fla. 400, 43 S. 318; Levine v. Carroll, 121 Ill. App. 105; Donk Bros. v. Tetherington, 128 Ill. App. 256; Hughes v. Ferriman, 119 Ill. App. 169; Prussian Nat. Ins. Co. v. Empire Co., 113 Ill. App. 67; M. O'Connor Co. v. Gillaspy (Ind.), 83 N. E. 738 (the fact that defendant in a personal injury case was insured, he having shown payment by himself of plaintiff's medical bills); Henderson v. Henderson, 165 Ind. 666, 75 N. E. 269; Smith v. S., 165 Ind. 180, 74 N. E. 983; Osburn v. S., 164 Ind. 262, 73 N. E. 601; S. v. Harvey, 130 Ia. 394, 106 N. W. 938; S. v. Brown, 118 La. 87, 42 S. 656; Martin v. Moore, 99 Md. 41, 57 A. 671; Hickey v. Anaconda Co., 33 Mont. 46, 81 P. 806; Mahoney v. Dixon, 34 Mont. 454, 87 P. 452; Devencenzi v. Cassinelli, 28 Nev. 222, 81 P. 41; Hogan v. Klabo, 13 N. D. 319, 100 N. W. 847; Beadle v. Paine, 46 Or. 424, 80 P. 903; S. v. Miller, 43 Or. 325, 74 P. 658; Glenn v. T. Co., 206 Pa. 135, 55 A. 860; American C. F. Co. v. Alexandria Co. (Pa.), 67 A. 861; Pittsburg Co. v. Monroe (S. C.), 61 S. E. 92; McCarley v. Mfg. Co., 75 S. C. 390, 56 S. E. 1; Union R. Co. v. Hunton, 114 Tenn. 609, 88 S. W. 182; Montgomery v. S., 45 Tex. Cr. 373, 77 S. W. 788; Speliopoulos v. Schick, 129 Wis. 556, 109 N. W. 568.

Opinion may be required. — A witness who has stated what ears may be coupled without going between them may be asked his opinion as to the necessity of going between those in question. Huggins v. R. Co., 148 Ala. 153, 41 S. 856.

It is immaterial to the application of the rule that the testimony so elicited would show a violation of law. P. v. Farrell, 137 Mich. 127, 100 N. W. 264.

835-18 Fadley v. R. Co., 153 Fed. 514, 82 C. C. A. 664; Ball v. U. S., 147 Fed. 32, 78 C. C. A. 126, Burks v. S., 72 Ark. 461, 82 S. W. 490; In re Hayden, 1 Cal. App. 75, 81 P. 668; Huyck v. Rennie (Cal.), 90 P. 929; Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916; P. v. Zimmerman, 3 Cal. App. 84, 84 P. 446; Faulkner v. Birch, 120 Ill. App. 281; Osburn v. S., 164 Ind. 262, 275, 73 N. E. 601; Louisville R. Co. v. Wood, 113 Ind. 544, 557, 14 N. E. 572, 66 N. E. 197; S. v. Heidelberg, 120 La. 300, 45 S. 256; S. v. Nugent, 116 La. 99, 40 S. 581; Weinstein v. Mfg. Co., 121 App. Div. 708, 106 N. Y. S. 517; Hogen v. Klabo, 13 N. D. 319, 100 N. W. 847; S. v. Farr (R. I.), 69 A. 5; Brittain v. S., 47 Tex. Cr. 597, 85 S. W. 278.

Reasons for doing an act testified of in direct examination may be given. Hughes v. R. Co., 126 Wis. 525, 106 N. W. 526.

An exception to the rule seems to be made where a wife is led to state matters incriminative of her husband. Webb v. S., 47 Tex. Cr. 305, 83 S. W. 394.

836-19 Thompson v. U. S., 144 Fed. 14, 75 C. C. A. 172; Crosby v. Emerson, 142 Fed. 713, 74 C. C. A. 45; Drake v. S., 110 Ala. 9, 20 S. 450; Simmons v. S., 145 Ala. 61, 40 S. 660; Letcher v. S., 145 Ala. 669, 39 S. 922; Wefel v. Stillman (Ala.), 44 S. 203; Brownlee v. Reiner, 147 Cal. 641, 82 P. 324; In re Hayden, 1 Cal. App. 75, 81 P. 668; Osburn v. S., 164 Ind. 262, 73 N. E. 601; S. v. Rutledge (Ia.), 113 N. W. 461 (it is so provided by statute); Neace v. C., 23 Ky. L. R. 125, 62 S. W. 733; Herron v. C., 23 Ky. L. R. 782, 64 S. W. 432; Bess v. C., 26 Ky. L. R. 839, 82 S. W. 576; S. v. Howard, 30 Mont. 518, 77 P. 50; P. v. Bingham, 121 App. Div. 593, 106 N. Y. S. 330; Weinstein v. Mfg. Co., 121 App. Div. 708, 106 N. Y. S. 517; Glenn v. T. Co., 206 Pa. 135, 55 A. 860; Missouri etc. R. Co. v. Lindsey (Tex. Civ.), 101 S. W. 863; Lahue v. S. (Tex. Cr.), 101 S. W. 1008; Jewitt v. Buck, 78 Vt. 353, 63 A. 136; Earley v. Winn, 129 Wis. 291, 109 N. W. 633; Smith v. R. Co., 127 Wis. 253, 106 N. W. 829; Baxter v.

Krainik, 126 Wis. 421, 105 N. W. 803.

Rule applies though an affirmative defense be thus made. Resurrection G. M. Co. v. Fortune Co., 129 Fed. 668, 64 C. C. A. 180.

Declarations in favor of party may be shown on cross-examination if they were a part of the conversation brought out in chief. Wilson v. Gordon, 73 S. C. 155, 53 S. E. 79.

836-20 Braham v. S., 143 Ala. 28, 38 S. 919; Graham v. Middleby, 185 Mass. 349, 70 N. E. 416.

836-21 Thompson v. S., 84 Miss. 758, 36 S. 389; Goltra v. Penland, 45 Or. 254, 77 P. 129; Ah Doon v. Smith, 25 Or. 89, 34 P. 1093.

837-24 Miller v. P., 216 Ill. 309, 74 N. E. 743.

838-27 Lockport v. Licht, 123 Ill. App. 426; Miller v. P., supra.

838-28 Examination of court reporter not limited to questions put in chief. Lockport v. Licht, supra; Miller v. P., supra.

838-29 Northern A. R. Co. v. Mansell, 138 Ala. 548, 36 S. 459; DeYampert v. S., 139 Ala. 53, 36 S. 772; P. v. Scalamiero, 143 Cal. 343, 76 P. 1098; P. v. Davis, 1 Cal. App. 8, 81 P. 716, 88 P. 1101; Reese v. Bell, 138 Cal xix, 71 P. 87; P. v. Dowell, 141 Cal. 493, 75 P. 45; Brown v. S., 46 Fla. 159, 35 S. 82; Luin v. Chicago G. Co. (Ia.), 115 N. W. 1024; S. v. Hibner, 115 Ia. 48, 87 N. W. 741; Crosby v. Wells, 73 N. J. L. 790, 67 A. 295; Novotny v. Danforth, 9 S. D. 301, 68 N. W. 749.

838-30 Smith v. S., 142 Ala. 14, 39 S. 329; Wefel v. Stillman (Ala.), 44 S. 203; P. v. Buckley, 143 Cal. 375, 77 P. 169; P. v. Morales, 143 Cal. 550, 77 P. 470; Perrin v. Carbone, 1 Cal. App. 295, 82 P. 222; Womble v. Wilbur, 3 Cal. App. 535, 546, 86 P. 916; Brown v. Woodward, 75 Conn. 254, 53 A. 112; Norman P. S. Co. v. Ford, 77 Conn. 461, 59 A. 499; Cook v. S., 46 Fla. 20, 35 S. 665; Chicago R. Co. v. Creech, 207 Ill. 400, 69 N. E. 919; Prussian Nat. Ins. Co. v. Empire Co., 113 Ill. App. 67; Edmunds Mfg. Co. v. McFarland, 118 Ill. App. 256; Colloty v. Schuman, 73 N. J. L. 92, 62 A. 186; S. v. Hazlett, 14 N. D. 490, 105 N. W. 617; Quigley v. Thompson, 211 Pa. 107, 60 A. 506; Glenn v. T. Co., 206 Pa. 135, 55 A. 860.

839-31 Gillespie v. Salmon, 2 Cal. App. 501, 84 P. 310; Hampton v. S., 50 Fla. 55, 39 S. 421; Evans v. Scofield Co., 120 Ga. 961, 48 S. E. 358; Crosby v. Wells, 73 N. J. L. 790, 67 A. 295; Hogen v. Klabo, 13 N. D. 319, 100 N. W. 847; Weaver v. S., 46 Tex. Cr. 607, 81 S. W. 39.

The general limitation as to cross-examinations does not extend so far as to exclude questions tending to show the improbability of statements made in direct examination. Shannon v. Castner, 21 Pa. Super. 294.

840-35 Volusia County Bk. v. Bigelow, 45 Fla. 638, 33 S. 704; Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131; Pinch v. Hotaling, 142 Mich. 521, 106 N. W. 69; Nicolay v. Mallery, 62 Minn. 119, 64 N. W. 108; Kolbe v. Boyle, 99 Minn. 110, 108 N. W. 847; Crosby v. Wells, 73 N. J. L. 790, 67 A. 295; P. v. Noblett, 96 App. Div. 293, 89 N. Y. S. 181, *aff.*, no opinion, 184 N. Y. 612, 77 N. E. 1193.

841-37 Feigned injuries. — A like rule applies where it is claimed that personal injuries are feigned. Chicago U. T. Co. v. Miller, 212 Ill. 49, 72 N. E. 25.

841-38 Tetrick v. Kansas City, 128 Mo. App. 355, 107 S. W. 418.

Physical examination of party. — Plaintiff in a personal injury case cannot be asked as to his willingness to submit to a physical examination. Chicago v. McNally, 227 Ill. 14, 81 N. E. 23. In Texas it is held otherwise though the court is powerless to compel such examination. Austin R. Co. v. Cluck, 97 Tex. 172, 77 S. W. 403.

843-42 P. v. Tice, 131 N. Y. 651, 30 N. E. 494; Schwobel v. Fugina, 14 N. D. 375, 104 N. W. 848; Winn v. Itzel, 125 Wis. 19, 103 N. W. 220; Sullivan v. Collins, 107 Wis. 291, 83 N. W. 310.

A nominal party should, it seems, be classed as an ordinary witness. Winn v. Itzel, supra.

843-43 Risley & Sons v. Ocean City (N. J. L.), 69 A. 192.

The good faith of a plaintiff in bringing suit may be tested, subject to the court's discretion. Chi-

cago etc. R. Co. v. Steckman, 224 Ill. 500, 79 N. E. 602.

843-44 Borden v. Lynch, 34 Mont. 503, 87 P. 609; S. v. Schnepel, 23 Mont. 523, 59 P. 927.

843-45 Court may permit the state to cross-examine its unwilling and hostile witnesses. P. v. Sexton, 187 N. Y. 495, 80 N. E. 396; S. v. Robinson, 126 Ia. 69, 101 N. W. 634.

Exception. — It is an exception to the rule which permits a party to cross-examine his own witness. Where he proves to be hostile the extent of the examination is in the sound discretion of the court. S. v. Hamilton, 74 Kan. 461, 87 P. 363; S. v. Spidle, 42 Kan. 441, 22 P. 620.

844-47 Extent of cross-examination within court's sound discretion. S. v. Hamilton, supra.

844-48 Ball v. U. S., 147 Fed. 32, 78 C. C. A. 126; Barden v. S., 145 Ala. 1, 40 S. 948; Carothers v. S., 75 Ark. 574, 88 S. W. 585; Weaver v. S., 83 Ark. 119, 102 S. W. 713; P. v. Schmitz (Cal. App.), 94 P. 407; Wilson v. S., 47 Fla. 118, 36 S. 580; Newman v. C., 28 Ky. L. R. 81, 88 S. W. 1089; Ex parte Hedden (Nev.), 90 P. 737; S. v. Rowell, 75 S. C. 494, 56 S. E. 23; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

845-53 P. v. Buckley, 143 Cal. 375, 77 P. 169.

845-54 Newman v. C., 28 Ky. L. R. 81, 88 S. W. 1089; Morgan v. C., 24 Ky. L. R. 2117, 72 S. W. 1098, Ferguson v. S., 72 Neb. 350, 100 N. W. 800.

846-56 Kirby v. S. (Ala.), 44 S. 38; P. v. Manasse (Cal.), 94 P. 92; Day v. S. (Fla.), 44 S. 715; Fergusou v. S., 72 Neb. 350, 100 N. W. 800.

846-57 P. v. Zimmerman, 3 Cal. App. 84, 84 P. 446; Harrold v. Ter., 18 Okla. 395, 89 P. 202.

Silence of party who testifies to a previous attack upon him may be shown. Long v. S., 48 Tex. Cr. 175, 88 S. W. 203.

Scope of inquiry. — If accused denies guilt a wide latitude of cross-examination is permissible. S. v. Howard, 30 Mont. 518, 77 P. 50; S. v. Duncan, 7 Wash. 336, 35 P. 117, 38 Am. St. 888; P. v. Mullings, 83 Cal. 138, 23 P. 229, 17 Am. St. 223; P. v. Morton, 139 Cal. 719, 73 P. 609.

Attempt to break jail may be inquired about. Charba v. S., 48 Tex. Cr. 316, 87 S. W. 829.

Accused may be asked concerning knowledge of the conviction of one of his witnesses. Long v. S., 72 Ark. 427, 81 S. W. 387. And concerning facts showing that she is a prostitute. Brittain v. S., 47 Tex. Cr. 597, 85 S. W. 278.

Suppression of evidence. — Accused may be asked about efforts made to induce the prosecutrix to leave the county. Carothers v. S., 75 Ark. 574, 88 S. W. 585; Ferguson v. S., 72 Neb. 350, 100 N. W. 800.

850-62 Gosdin v. Williams (Ala.), 44 S. 611; P. v. Wong Chuey, 117 Cal. 624, 49 P. 833; Hampton v. S., 50 Fla. 55, 39 S. 421; Owens v. S. (Tex. Cr.), 96 S. W. 31; Sexton v. S., 48 Tex. Cr. 497, 88 S. W. 348.

Rule has no application where testimony is uncontradicted. Regester v. Regester, 104 Md. 1, 64 A. 286.

850-63 Hampton v. S., 50 Fla. 55, 39 S. 421.

850-64 Ringer v. S., 74 Ark. 262, 85 S. W. 410; Chicago R. Co. v. Schaefer, 121 Ill. App. 334, 347; Creeping Bear v. S., 113 Tenn. 322, 87 S. W. 653.

851-65 Birmingham etc. P. Co. v. Rutledge, 142 Ala. 195, 39 S. 338; P. v. Cowan, 1 Cal. App. 411, 82 P. 339; Shannon v. Castner, 21 Pa. Super. 294.

Statement of witness that he killed deceased may be discredited by showing that he was anxious to relieve his brother of responsibility. Hardin v. S. (Tex. Cr.), 103 S. W. 401.

851-66 Gainey v. S., 141 Ala. 72, 37 S. 355; Rowell v. Crothers, 75 Conn. 124, 52 A. 818; Blair v. Blair, 125 Ill. App. 341; S. v. Malmberg, 14 N. D. 523, 105 N. W. 615.

Particulars cannot be inquired into. Gainey v. S., 141 Ala. 72, 37 S. 355.

952-67 Hicklin v. Ter., 9 Ariz. 184, 80 P. 340; Rosenbach v. Forresters, 184 N. Y. 92, 76 N. E. 1085.

852-68 Isaac v. U. S. (Ind. Ter.), 104 S. W. 588; Seaborn v. C., 25 Ky. L. R. 2203, 80 S. W. 223; Virginia etc. W. Co. v. Chalkley, 98 Va. 62,

34 S. E. 976; Savage v. Bowen, 103 Va. 540, 49 S. E. 668.

853-69 St. Louis etc. R. Co. v. Clements, 82 Ark. 3, 99 S. W. 1106; A. B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818; Chicago T. Co. v. Ertrachter, 130 Ill. App. 602; Glenn v. T. Co., 206 Pa. 135, 55 A. 860; Stowe v. La Conner T. Co., 39 Wash. 28, 80 P. 856, 81 P. 97.

Special latitude is proper on the cross-examination of an "approver" to show that inducements have been held out to him, though they were unauthorized. Stevens v. P., 215 Ill. 593, 74 N. E. 786; P. v. Christy, 65 Hun 349, 20 N. Y. S. 278; Allen v. S., 10 Ohio St. 287; P. v. Langtree, 64 Cal. 256, 30 P. 813; S. v. Kent, 4 N. D. 577, 62 N. W. 631; P. v. Moore, 96 App. Div. 56, 89 N. Y. S. 83, *aff.*, without opinion, 181 N. Y. 524, 73 N. E. 1129; Metropolitan R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860.

Improper to show that a witness claimed a reward for arresting accused. Smith v. S., 90 Miss. 111, 43 S. 465.

854-70 Wabash S. D. Co. v. Black, 126 Fed. 721, 61 C. C. A. 639; Houston B. Co. v. Dial, 135 Ala. 168, 33 S. 268; Sylvester v. S., 46 Fla. 166, 174, 35 S. 142; Teston v. S., 39 Fla. 787, 39 S. 787; Stevens v. P., 215 Ill. 593, 74 N. E. 786; Horton v. R. Co. (Tex. Civ.), 103 S. W. 467; Denison S. R. Co. v. Powell, 35 Tex. Civ. 454, 80 S. W. 1054; Williams v. R. Co., 42 Wash. 597, 84 P. 1129.

Salary of employe may be inquired about. Cleveland etc. R. Co. v. Hadley (Ind.), 82 N. E. 1025.

854-71 Armour v. Skene, 153 Fed. 241; Nicholson v. S. (Ala.), 43 S 365 (habit as to use of profane language); Huoncker v. Merkey, 102 Pa. 462. See Woods v. Dailey, 211 Ill. 495, 71 N. E. 1068; Stevens v. P., 215 Ill. 593, 74 N. E. 786.

Knowledge of the consequences of false swearing may be inquired into. S. v. Armstrong, 118 La. 480, 43 S. 57.

854-72 Wilmoth v. Hamilton, 127 Fed. 48, 61 C. C. A. 584; Birmingham R. & E. Co. v. Mason, 144 Ala. 387, 39 S. 590; Glass v. S., 147 Ala. 50, 41 S. 727; Shirley v. S., 144 Ala. 35, 40 S. 269; Banks v. S. (Ala.), 39 S. 921; P. v. Ah Lean (Cal. App.), 95 P. 380; Perrin v. Carbone, 1 Cal. App. 295, 82 P. 222; Ontario-C. G. M. Co. v. Mackenzie, 19 Colo. App. 298, 74 P. 791; Atlanta etc. R. Co. v. McManus, 1 Ga. App. 302, 58 S. E. 258; Boyd v. Gandall, 11 Haw. 322; Chicago R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; Toledo etc. R. Co. v. Stevenson, 122 Ill. App. 654; Humboldt v. Watkins, 123 Ill. App. 62; Chicago City R. Co. v. Schaefer, 121 Ill. App. 334; Swift v. Rennard, 119 Ill. App. 173; O'Daniel v. Smith, 23 Ky. L. R. 1822, 66 S. W. 284; C. v. Middleby, 187 Mass. 342, 73 A. 208; Stowell v. Standard O. Co., 139 Mich. 18, 102 N. W. 227; Farmers & M. Bk. v. Richards, 119 Mo. App. 18, 95 S. W. 290; S. v. Rogers, 31 Mont. 1, 77 P. 293; Mahoney v. Dixon, 34 Mont. 454, 87 P. 452; Crosby v. Wells, 73 N. J. L. 790, 67 A. 295; Hitt v. Woolever (N. J. L.), 68 A. 237; Rossenbach v. Foresters, 184 N. Y. 92, 76 N. E. 1085; S. v. Hazlett, 14 N. D. 490, 105 N. W. 617; Anson v. R. Co. (Tex. Civ.), 94 S. W. 94; Hathaway v. Goslant, 77 Vt. 199, 59 A. 835.

Attempt to conceal the fact of knowledge material to the issues may be shown. Rice v. S. (Tex. Cr.), 103 S. W. 1156.

855-73 Masters v. Seeley, 138 Fed. 719, 71 C. C. A. 409 (previous recovery on same claim set aside for fraud and collusion); Parrish v. S., 139 Ala. 16, 36 S. 1012; Smiley v. Hooper, 147 Ala. 646, 41 S. 660; Zane v. De Onativia, 139 Cal. 328, 73 P. 856; P. v. Schmitz (Cal. App.), 94 P. 407; P. v. Manasse (Cal.), 94 P. 92; Lanigan v. Neely, 4 Cal. App. 760, 89 P. 441; Fields v. S., 46 Fla. 84, 35 S. 185; Prior v. Oglesby, 50 Fla. 248, 39 S. 593; Booth v. Beckley, 11 Haw. 518; McLean v. Lewiston, 8 Idaho 472, 484, 69 P. 478; S. v. Taylor, 75 Kan. 417, 89 P. 672; Malone v. Stephenson, 94 Minn. 222, 102 N. W. 372; Yeager v. Cassidy, 12 Pa. Super. 232; Germain F. Co. v. Roberts, 8 Pa. Super. 500; S. v. Mulch, 17 S. D. 321, 96 N. W. 101; Benson .v. S. (Tex. Cr.), 101 S. W. 224.

Cross-examination may properly be restricted when it affects one who

was not a witness. S. v. Peterson, 98 Minn. 210, 108 N. W. 6; Malone v. Stephenson, 94 Minn. 222, 102 N. W. 372.

The cause, nature and extent of the bias of or inducement held out to a witness may be inquired into. S. v. Malberg, 14 N. D. 523, 105 N. W. 614.

Special latitude should be allowed on the cross-examination of prosecutrix in cases involving sexual offenses. P. v. Mitchell (Cal. App.), 89 P. 853.

Predicate for such testimony not required. Alford v. S., 47 Fla. 1, 36 S. 436.

Inquiry must be confined to witness' connection with the case on trial. Chicago etc. R. Co. v. Smith, 226 Ill. 178, 80 N. E. 716; Chicago etc. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050.

857-74 S. v. Malmberg, 14 N. D. 523, 105 N. W. 614; C. v. Bell, 4 Pa. Super. 187.

Domestic relations of a witness should not be inquired about where they do not affect the credibility of his testimony. Chicago C. R. Co. v. Uhnter, 212 Ill. 174, 184, 72 N. E. 195; Malone v. Stephenson, 94 Minn. 222, 102 N. W. 372.

Inquiry into collateral matters may be stopped. S. v. High, 116 La. 79, 40 S. 538; Record v. R. Co. (N. J.), 67 A. 1040.

Court's discretion is broad. Cleveland etc. R. Co. v. Hadley (Ind.), 82 N. E. 1025, and local cases cited.

Request of prosecutor for leniency for accused is not evidence in a subsequent case in which he testifies to show unreliability. Thompson v. U. S., 144 Fed. 14, 75 C. C. A. 172.

857-75 Southern R. Co. v. Lester, 151 Fed. 573, 81 C. C. A. 53; Alabama etc. R. Co. v. Brooks, 135 Ala. 401, 33 S. 181; Smiley v. Hooper, 147 Ala. 646, 41 S. 660; Birmingham etc. R. Co. v. Moore, 148 Ala. 115, 42 S. 1024 (lack of recollection); Birmingham R. E. Co. v. Mason, 144 Ala. 387, 39 S. 590; Smith v. S., 142 Ala. 14, 39 S. 329; Posey v. S., 143 Ala. 54, 38 S. 1019; Chicago U. T. Co. v. Ertrachter, 228 Ill. 114, 81 N. E. 816; Illinois R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435; Terre Haute E. Co. v. Watson, 33 Ind. App. 124, 70 N. E. 993; S. v. Ross (Kan.), 94 P. 270; American Assn. v. Stough, 26 Ky. L. R. 1093, 83 S. W. 126; Bragg v. R. Co., 192 Mo. 331, 91 S. W. 527; Colloty v. Schuman, 73 N. J. L. 92, 62 A. 186; Reid v. Linck, 206 Pa. 109, 55 A. 849; Waggoner v. Moore (Tex. Civ.), 101 S. W. 1058; Benson v. S. (Tex. Cr.), 103 S. W. 911; O'Connell v. Story (Tex. Civ.), 105 S. W. 1174; Southern R. Co. v. Blanford, 105 Va. 373, 387, 54 S. E. 1; Virginia W. Co. v. Chalkley, 98 Va. 62, 34 S. E. 976; Coman v. Munderlich, 122 Wis. 138, 99 N. W. 612. But see Oates v. S. (Tex. Cr.), 103 S. W. 859.

A broad range of questioning should be permitted to ascertain the meaning of testimony. Hofacre v. Monticello, 128 Ia. 239, 103 N. W. 488; Nichols v. New Britain, 77 Conn. 695, 60 A. 655.

Authorities may be asked for. — A physician may be asked to name the authorities supporting a statement testified to by him. Chicago U. T. Co. v. Ertrachter, 228 Ill. 114, 81 N. E. 816.

Conversation of a witness with others as to what he would testify to may be shown; but not conversations with another concerning the latter's testimony. Ontario G. M. Co. v. Mackenzie, 19 Colo. App. 298, 74 P. 791.

Commission of another crime by defendant may be shown where that is necessary to a full cross-examination of witnesses. S. v. Patchen, 37 Wash. 24, 79 P. 479.

Value of evidence furnished by dogs. — Full inquiry is desirable as to the reliability of dogs used to trail an alleged criminal. Richardson v. S., 145 Ala. 46, 41 S. 82.

Anticipating defenses. — Under pretense of testing the accuracy of a witness' memory, a party will not be permitted to anticipate his defenses. Roche v. Baldwin, 143 Cal. 186, 76 P. 956.

858-76 Chicago U. T. Co. v. Ertrachter, 228 Ill. 114, 81 N. E. 816; Vohs v. Shorthill, 130 Ia. 538, 107 N. W. 417; Carr v. American L. Co., 26 R. I. 180, 58 A. 678; McGovern v. Smith, 75 Vt. 104, 53 A. 326.

A broad range of inquiry is proper on the cross-examination of experts. Trull v. Modern Woodmen, 12 Idaho 318, 85 P. 1081.

859-77 Parrish v. S., 139 Ala. 16, 36 S. 1012; Houston Co. v. Dial, 135 Ala. 168, 33 S. 268; Williams v. S., 45 Fla. 128, 34 S. 279; Vohs v. Shorthill, 130 Ia. 538, 107 N. W. 417.

Relevancy. — Though evidence on cross-examination may not be relevant to the fact in issue, it is competent if relevant to the facts which are relevant to the fact in issue. Zane v. De Onativia, 139 Cal. 328, 73 P. 856.

859-78 Judgment will not be reversed for excluding such a question as is stated in the text. Gregory v. S., 148 Ala. 566, 42 S. 829; Zwangizer v. Newman, 83 N. Y. S. 1071.

859-79 Experiments with beverages. — A witness who has testified to the purchase of beer from defendant, which he drank, cannot be asked upon cross-examination to drink from a bottle proffered him and then to state whether it is of the same kind purchased. S. v. Snyder, 67 Kan. 801, 74 P. 231.

860-80 Louisville etc. R. Co. v. Mayes, 26 Ky. L. R. 197, 80 S. W. 1096; White v. C., 96 Ky. 180, 28 S. W. 340.

Christian Scientist. — Where the physical and mental suffering of a party is involved, it is competent to show that he is a Christian Scientist. Ft. Worth etc. R. Co. v. Travis (Tex. Civ.), 99 S. W. 1141.

Manner of being sworn. — It is proper to ask a witness as to the manner in which he considers the administration of an oath binding. Birmingham Co. v. Mason, 137 Ala. 342, 34 S. 207.

860-82 Olson v. U. S., 133 Fed. 849, 67 C. C. A. 21; P. v. Schmitz (Cal. App.), 94 P. 407.

If the existence of a rule of an employer is relied upon as a reason for the conclusion that an event could not have happened, the violation of the rule by witnesses may be shown. Hitchner Co. v. R. Co., 158 Fed. 1011.

Effect to be given testimony as to reason. — If reasons are given for a witness' testimony in the midst of his cross-examination his subsequent testimony is to be considered in connection therewith. P. v. Easton, 148 Cal. 50, 82 P. 840.

860-83 See Ferguson v. S., 72 Neb. 350, 100 N. W. 800.

860-84 Birmingham Co. v. Mason, 144 Ala. 387, 39 S. 590; Chicago etc. R. Co. v. Steckman, 224 Ill. 500, 79 N. E. 602; Terre Haute Co. v. Watson, 33 Ind. App. 124, 70 N. E. 993; Houk v. Branson, 17 Ind. App. 119, 45 N. E. 78; Hathaway v. Goslant, 77 Vt. 199, 59 A. 835; McGovern v. Hays, 75 Vt. 104, 53 A. 328.

861-85 State may cross-examine witnesses as to reputation though it has announced that no attack would be made on defendant. P. v. Wright, 4 Cal. App. 704, 89 P. 364.

861-86 Reg. v. Wood, 5 Jur. (Eng.) 225; Harrison v. S. (Ala.), 40 S. 57; Weaver v. S., 83 Ark. 119, 102 S. W. 713; P. v. Perry, 144 Cal. 748, 78 P. 284; P. v. Moran, 144 Cal. 48, 77 P. 777; Cook v. S., 46 Fla. 20, 35 S. 665; Ozburn v. S., 87 Ga. 173, 13 S. E. 247; Baelmer v. S., 25 Ind. App. 597, 58 N. E. 741; S. v. Richards, 126 Ia. 497, 102 N. W. 439; S. v. Le Blanc, 116 La. 822, 41 S. 105; S. v. O'Kelley, 121 Mo. App. 178, 98 S. W. 804; S. v. Brown, 181 Mo. 192, 79 S. W. 1111; S. v. Doris (Or.), 94 P. 44; S. v. Ogden, 39 Or. 195, 65 P. 449; S. v. Merriman, 34 S. C. 16, 12 S. 619; Stull v. S., 47 Tex. Cr. 547, 84 S. W. 1059; McCray v. S., 38 Tex. Cr. 609, 44 S. W. 170; Hall v. S., 43 Tex. Cr. 479, 66 S. W. 783; Brittain v. S., 47 Tex. Cr. 597, 85 S. W. 278.

Details of an affair in which defendant was concerned cannot be given. S. v. Beckner, 194 Mo. 281, 91 S. W. 892.

If only the reputation of a witness is inquired about in the examination in chief, inquiry may not be made on cross-examination as to his actual character. Green v. Dodge, 79 Vt. 73, 64 A. 499.

Knowledge of rumors of specific acts may be shown. P. v. Weber, 149 Cal. 325, 86 P. 671; Leavell v. Leavell, 114 Mo. App. 24, 89 S. W. 55; S. v. Doris (Or.), 94 P. 44.

It is competent to prove that sentiment as to reputation is divided. Way v. S. (Ala.), 46 S. 273.

In Alabama cross-examination of a

witness to character must be confined to ascertaining how the person whose character is in issue is generally regarded or esteemed; hence particular acts or course of conduct cannot be inquired about. Moulton v. S., 88 Ala. 116, 6 S. 758; 6 L. R. A. 301; Thompson v. S., 100 Ala. 70, 14 S. 878; Way v. S. (Ala.), 46 S. 273.

Indictment of party whose good character has been testified of can not be asked about. "It is never competent to inquire of a witness in regard to character as to particular acts or instances of crime." Harris v. C., 25 Ky. L. R. 297, 74 S. W. 1044, but it had been previously ruled that evidence that defendant had been accused of certain misdemeanors, moral delinquencies and unneighborly conduct was competent. Barnes v. C., 24 Ky. L. R. 1143, 70 S. W. 827.

Cross-examination based on unproven facts is improper. P. v. Elliott, 163 N. Y. 11, 57 N. E. 103.

863-87 **Specific acts** of a later date than was covered by the testimony in chief cannot be shown. S. v. Wertz, 191 Mo. 569, 90 S. W. 838.

863-88 Andrews v. S., 118 Ga. 1, 43 S. E. 852.

Same rule applies to accused whose direct examination tended to show that he was peaceable, industrious and law-abiding. P. v. Buckley, 143 Cal. 375, 77 P. 169.

Distinction should be made between defendant's character as a witness and as a man. In the latter respect it cannot be put in issue except by him. See "CHARACTER," Vol. 3, p. 1, and that title, ante; S. v. Beckner, 194 Mo. 281, 91 S. W. 892.

863-89 Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515; Sanitary Dist. v. McMahon, 110 Ill. App. 510; Hengy v. R. Co. (Tex. Civ.), 109 S. W. 402.

863-90 Rogers v. Petrified B. M., 158 Fed. 799; Kahn v. Triest-R. Co., 139 Cal. 340, 73 P. 164; Rosenstein v. R. Co., 78 Conn. 29, 60 A. 1061; Chicago R. Co. v. Kelly, 221 Ill. 498, 77 N. E. 916; Eldorado etc. R. Co. v. Everett, 225 Ill. 529, 80 N. E. 281; Indianapolis T. Co. v. Shepherd, 35 Ind. App. 601, 74 N. E. 904; Lemon v. McBride, 134 Mich. 295, 96 N. W. 453; Union R. Co. v. Hunton, 114 Tenn. 609, 88 S. W. 182; Eastern Texas R. Co. v. Scurlock, 97 Tex. 305, 78 S. W. 490; Gulf etc. R. Co. v. Jackson, 99 Tex. 343, 89 S. W. 968; Panhandle & G. R. Co. v. Kirby (Tex. Civ.), 108 S. W. 498; Texas etc. R. Co. v. Newsome (Tex. Civ.), 98 S. W. 646.

Damaged property. — Owner of damaged property may be asked what he will take for it. Chicago etc. R. Co. v. Carr (Tex. Civ.), 89 S. W. 35.

866-92 **Award for other land.** A witness who was a commissioner in valuing another piece of land may be asked as to the award made therefor. St. Louis etc. R. Co. v. B. Co., 198 Mo. 698, 96 S. W. 1011.

866-93 Metropolitan R. Co. v. Walsh, 197 Mo. 392, 416, 94 S. W. 860.

866-94 O'Connor v. T. Co., 106 Mo. App. 215, 80 S. W. 304.

867-95 Burks v. S., 72 Ark. 461, 82 S. W. 490; S. v. Seigenthaler, 121 Mo. App. 510, 97 S. W. 271; P. v. Werner, 174 N. Y. 132, 66 N. E. 667; Pollok v. S. (Tex. Cr.), 101 S. W. 231.

868-97 Burks v. S., 72 Ark. 461, 82 S. W. 490; O'Connor v. T. Co., 106 Mo. App. 215, 80 S. W. 304; S. v. Carpenter, 32 Wash. 254, 73 P. 357.

Inquiry as to specific acts allowed. S. v. Abbott, 65 Kan. 139, 69 P. 160; S. v. Pugh, 75 Kan. 792, 90 P. 242; Finlen v. Heinze, 32 Mont. 354, 80 P. 918 (agency in procuring corrupt negotiations with judge on former trial).

870-98 **Specific acts** may be shown on cross-examination only. Dore v. Babcock, 74 Conn. 425, 50 A. 1016; Spiro v. Witkins, 72 Conn. 202, 44 A. 13; Shailer v. Bullock, 78 Conn. 65, 61 A. 65. They must be such as affect the witness' character for veracity. Shailer v. Bullock, supra.

In Texas it may be shown on cross-examination that a witness is a prostitute. McCray v. S., 38 Tex. Cr. 609, 44 S. W. 170; Hall v. S., 43 Tex. Cr. 479, 66 S. W. 783; Brittain v. S., 47 Tex. Cr. 597, 85 S. W. 278. But not that his moral character was bad or who he associated with. Price v. Wakeham (Tex. Civ.), 107 S. W. 132.

Full cross-examination is proper if

the disreputable conduct of a witness has been gone into on the examination in chief. S. v. Brown, 118 La. 373, 42 S. 969.

In Connecticut only such acts as affect the credibility of a witness may be shown. Shailer v. Bullock, 78 Conn. 65, 61 A. 65.

870-99 Shailer v. Bullock, supra; American W. Co. v. R. Co., 190 Mass. 152, 76 N. E. 658.

870-1 Benton v. S., 78 Ark. 284, 94 S. W. 688; S. v. Nergaard, 124 Wis. 414, 102 N. W. 899.

Arrest of witness for the crime concerning which he testifies on the trial of another may be shown. Snyder v. S., 145 Ala. 33, 40 S. 978.

Former convictions of accused connot be shown as a predicate for introducing testimony given by him on former trials. S. v. Strodemier, 40 Wash. 608, 82 P. 915.

870-2 Ball v. U. S., 147 Fed. 32, 78 C. C. A. 126.

871-3 Benton v. S., 78 Ark. 284, 94 S. W. 688; Stanley v. Ins. Co., 70 Ark. 107, 66 S. W. 432; Marks v. S. (Tex. Cr.), 78 S. W. 512.

Previous trial of accused cannot be shown solely for the purpose of bringing the fact to the attention of the jury. S. v. Thompson, 14 Wash. 285, 44 P. 533; S. v. Bokien, 14 Wash. 403, 44 P. 889; S. v. Gottfreedson, 24 Wash. 398, 64 P. 523; S. v. Carpenter, 32 Wash. 254, 73 P. 357; S. v. Eder, 36 Wash. 482, 78 P. 1023.

871-4 Kansas City R. Co. v. Belknap, 80 Ark. 587, 98 S. W. 366; P. v. Gotshall, 123 Mich. 474, 82 N. W. 274; P. v. Dowell, 136 Mich. 306, 99 N. W. 23.

871-5 Ter. v. Boyd, 16 Haw. 660.

871-6 Prior arrests cannot be shown. Stewart v. S., 37 Tex. Cr. 135, 38 S. W. 1143.

872-7 Ball v. U. S., 147 Fed. 32; 78 C. C. A. 126; P. v. Soeder, 150 Cal. 12, 87 P. 1016; P. v. Sears, 119 Cal. 267, 51 P. 325; S. v. Plamondon, 75 Kan. 853, 90 P. 254; Farmer v. C., 28 Ky. L. R. 1168, 91 S. W. 682; Henderson v. C., 28 Ky. L. R. 1212, 91 S. W. 1141; S. v. Mount, 72 N. J. L. 365, 61 A. 259; Coleman v. R. Co., 138 N. C. 351, 50 S. E. 690 (conviction of forcible trespass); Stull v. S., 47 Tex. Cr. 547, 84 S. W. 1059; Sexton v. S., 48 Tex. Cr. 497, 88 S. W. 348; Kipper v. S., 45 Tex. C. 377, 77 S. W. 611; Scoville v. S., (Tex. Cr.), 77 S. W. 792; S. v. Strodemier, 40 Wash. 608, 82 P. 915; S. v. Champoux, 33 Wash. 339, 74 P. 557.

Particular crime need not be specified in question. S. v. Fox, 70 N. J. L. 353, 57 A. 270.

872-8 Henderson v. C., 28 Ky. L. R. 1212, 91 S. W. 1141; Pace v. C., 89 Ky. 204, 12 S. W. 271; Lockard v. C., 87 Ky. 201, 8 S. W. 266; S. v. Bartlett, 98 Me. 429, 57 A. 588; S. v. Babcock, 25 R. I. 224, 55 A. 685; Elmore v. S. (Tex. Cr.), 78 S. W. 520; McGovern v. Hays, 75 Vt. 104, 53 A. 326. Such method of proof is provided for by statute in several states.

Infamous offense. — In some states only conviction of an infamous offense can be shown. S. v. Grant, 144 Mo. 256, 45 S. W. 1102; S. v. Taylor, 98 Mo. 240, 11 S. W. 570; O'Connor v. T. Co., 106 Mo. App. 215, 80 S. W. 304.

Nature of offense. — A witness who has testified that he had been in the penitentiary and then was in jail, may be asked for what offense he is now being punished. S. v. Howard, 30 Mont. 518, 77 P. 50.

872-9 Remoteness. — Question should not be unrestricted as to time. Stull v. S., 47 Tex. Cr. 547, 84 S. W. 1059.

873-11 Baltimore R. Co. v. Rambo, 59 Fed. 75, 8 C. C. A. 6; Brice v. U. S., 144 Fed. 374, 74 C. C. A. 1; Glover v. U. S., 147 Fed. 426, 77 C. C. A. 450; Hall v. Brown, 30 Conn. 551; S. v. Stockford, 77 Conn. 227, 58 A. 769; James v. U. S. (Ind. Ter.), 104 S. W. 607; Hendrickson v. C., 23 Ky. L. R. 1191, 64 S. W. 954; C. v. Walsh (Mass.), 82 N. E. 19; S. v. Howard, 30 Mont. 518, 77 P. 50; Newcomb v. Griswold, 24 N. Y. 298; Kirschner v. S., 9 Wis. 140.

Rule applies to parties as well as to witnesses not parties. C. v. Walsh, supra; S. v. Chappell, 179 Mo. 324, 78 S. W. 585.

Record of federal court in another state admissible. Indictment is part of judgment roll to prove former conviction. Ball v. U. S., 147 Fed. 32, 78 C. C. A. 126.

873-13 Lang v. U. S., 133 Fed.

201, 66 C. C. A. 255; Shailer v. Bullock, 78 Conn. 65, 61 A. 65; S. v. Nergaard, 124 Wis. 414, 102 N. W. 899.

Remoteness. — A conviction twenty years before the examination is too remote. Dyer v. S. (Tex. Cr.), 77 S. W. 456.

874-14 Fourth Nat. Bk. v. Albaugh, 188 U. S. 734; Parrish v. S., 139 Ala. 16, 36 S. 1012; Rector v. Robins, 82 Ark. 424, 102 S. W. 209; P. v. Glaze, 139 Cal. 154, 72 P. 965; P. v. Scalamiero, 143 Cal. 343, 76 P. 1098; P. v. Tubbs, 147 Mich. 1, 110 N. W. 132; Brace v. R. Co., 87 Minn. 292, 91 N. W. 1099; S. v. Beeskove, 34 Mont. 41, 85 P. 376; Lambeck v. Stiefel, 71 N. J. L. 320, 59 A. 460; Sperbeck v. R. Co. (N. J.), 64 A. 1012; P. v. Werner, 174 N. Y. 132, 66 N. E. 667; Jacoby v. Ins. Co., 10 Pa. Super. 366; Fidler v. Rehmeyer, 34 Pa. Super. 275; Weaver v. S., 46 Tex. Cr. 607, 81 S. W. 39; Jeter v. S. (Tex. Cr.), 106 S. W. 371; Larkin v. Salt Air B. Co., 30 Utah 86, 83 P. 686; S. v. Katon (Wash.), 91 P. 250; S. v. Hill (Wash.), 89 P. 160.

Form of question. — If neither time nor place are specified court may exclude question. Bradley v. Gorham, 77 Conn. 211, 58 A. 698.

Silence may be shown under circumstances which would ordinarily have induced a statement. Alabama etc. R. Co. v. Brooks, 135 Ala. 401, 33 S. 181; P. v. Manasse (Cal.), 94 P. 92.

Relevancy of contradictory statements. — "The rule seems to be universal to the effect that self contradiction of a witness can be established by direct testimony of an opposite character only when the statements to be contradicted relate to a material fact in issue in the trial of the particular case." Ferguson v. S., 72 Neb. 350, 100 N. W. 800, Trussell v. G. Co., 20 Pa. Super. 423; C. v. Sconton, 20 Pa. Super. 503.

Conduct inconsistent with a party's contention may be shown. S. v. Stockford, 77 Conn. 227, 58 A. 769; Hofacre v. Monticello, 128 Ia. 239, 103 N. W. 488.

If neither time nor place are specified the question as to contradictory statements may be excluded in the court's discretion. Bradley v. Gorham, 77 Conn. 211, 58 A. 698; Shannon v. Castner, 21 Pa. Super. 294; Cronkrite v. Trexter, 187 Pa. 100, 41 A. 22; C. v. Cowan, 4 Pa. Super. 579.

875-15 Neace v. C., 23 Ky. L. R. 125, 62 S. W. 733; Hickey v. S. (Tex. Cr.), 102 S. W. 417; McLin v. S., 48 Tex. Cr. 549, 90 S. W. 1107.

Form of question. — It is improper to ask witness if he swore before as now; his attention should be specifically called to the alleged contradictory statement. Andrews v. S., 118 Ga. 1, 43 S. E. 852.

875-16 Shirley v. S., 144 Ala. 35, 40 S. 269; Hunkins v. Kent (Mich.), 115 N. W. 410; Brown v. Brown, 110 App. Div. 913, 96 N. Y. S. 1002; Richards v. C., 107 Va. 881, 59 S. E. 1104.

Affidavit for continuance competent. Weaver v. S., 83 Ark. 119, 102 S. W. 713.

Questions may be based on a deposition not in evidence. Warth v. Loewenstein, 219 Ill. 222, 76 N. E. 379.

Method of questioning. — The cross-examiner should first show that the witness was given an opportunity to testify of the matters as to which it is sought to contradict him. Larrance v. P., 222 Ill. 155, 78 N. E. 50.

Coroner's minutes are not the only evidence of what was testified to before the jury. Briggs v. P., 219 Ill. 330, 76 N. E. 499.

Discrepancies explainable. — Jacoby v. Ins. Co., 10 Pa. Super. 366. But they may be proven without giving an opportunity to explain if the court thinks proper. Shannon v. Castner, 21 Pa. Super. 294; Weaver v. S., 46 Tex. Cr. 607, 81 S. W. 39.

876-17 Lefkowitz v. Reich, 98 N. Y. S. 695.

Pleadings which the party did not see and the contents of which he did not know are not admissible. In re Townsend, 122 Ia. 246, 97 N. W. 1108. See "ADMISSIONS," Vol. 1, p. 348, and same title, ante.

876-18 Ramsey v. Smith, 138 Ala. 333, 35 S. 325; Lanigan v. Neely, 4 Cal. App. 760, 89 P. 441; Gasquet v. Pechin, 143 Cal. 515, 77 P. 481; Chicago C. R. Co. v. Mattheison, 212 Ill. 292, 72 N. E. 443;

Beard v. R., 143 N. C. 136, 55 S. E. 505; S. v. Strodemier, 40 Wash. 608, 82 P. 915.

Witness need not be shown the paper, nor need it be introduced. Warth v. Loewenstein, 219 Ill. 222, 76 N. E. 379; P. v. Salsbury, 134 Mich. 537, 96 N. W. 936; S. v. Rowell, 75 S. C. 494, 56 S. E. 23.

When writing should be offered. — A paper containing an inconsistent statement should be presented in rebuttal, and not in cross-examination of the witness, though it will not be ground for reversal to follow the latter course. Chicago C. R. Co. v. Matthieson, 212 Ill. 292, 72 N. E. 443.

877-19 The Saranac, 132 Fed. 936; L. & N. R. Co. v. Quinn, 146 Ala. 330, 39 S. 756; Shailer v. Bullock, 78 Conn. 65, 61 A. 65; Atlantic etc. R. Co. v. Crosby, 53 Fla. 40, 43 S. 318; Feltner v. C., 23 Ky. L. R. 1110, 64 S. W. 959; Nickolizack v. S., 75 Neb. 27, 105 N. W. 895; Ferguson v. S., 72 Neb. 350, 100 N. W. 800; Coleman v. R., 138 N. C. 351, 50 S. E. 690; Lancaster v. Alden, 26 R. I. 170, 58 A. 638; Rice v. S. (Tex. Cr.), 103 S. W. 1156; Norfolk R. Co. v. Carr, 106 Va. 508, 56 S. E. 276.

878-20 S. v. Carpenter, 32 Wash. 254, 73 P. 357.

Irresponsive answers to irrelevant questions may be stricken out. In re McKenna, 143 Cal. 580, 77 P. 461. The right to have such answers stricken out is waived by allowing them to stand unobjected to and continuing the cross-examination along the same line. P. v. Myring, 144 Cal. 351, 77 P. 975.

879-22 S. v. Slockford, 77 Conn. 227, 58 A. 769.

880-25 See Matthieson A. Wks. v. Matthieson, 150 Fed. 241, 80 C. C. A. 129; Cross v. Aby (Fla.), 45 S. 820; American W. Co. v. R. Co., 190 Mass. 152, 76 N. E. 658.

883-27 If the acts of a former grantee of land are relied upon to show adverse possession, witnesses who have testified thereof may be asked if such grantee had not performed like acts on lands to which he did not claim title. Cross v. Aby, supra.

885-31 Ex parte Hedden (Nev.), 90 P. 737.

Other similar acts. — In an action for malicious prosecution growing out of the charge of removing property, plaintiff may be asked as to the previous removal of other like articles from the same place. O'Daniel v. Smith, 23 Ky. L. R. 1822, 66 S. W. 284.

887-36 P. v. Mullings, 83 Cal. 138, 23 P. 229, 17 Am. St. 223; P. v. Wells, 100 Cal. 459, 34 P. 1078; Fields v. S., 46 Fla. 84, 35 S. 185; Adkinson v. S., 48 Fla. 1, 37 S. 522; S. v. Rogers, 31 Mont. 1, 77 P. 293; Walters v. R. Co. (Wash.), 93 P. 419; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

Distinction made if witness voluntarily states he has been arrested; he may then be asked what for. Matusevitz v. Hughes, 26 Mont. 212, 66 P. 939, 68 P. 467.

888-37 Grant v. S., 122 Ga. 740, 50 S. E. 946.

891-41 Schwantes v. S., supra.

892-44 Morris v. McClellan (Ala.), 45 S. 641; Lauchheimer v. Jacobs, 126 Ga. 261, 55 S. E. 55; S. v. Bond, 12 Idaho 424, 86 P. 43; Baehner v. S., 25 Ind. App. 597, 58 N. E. 741.

893-47 South Bend v. Hardy, 98 Ind. 577; Baehner v. S., 25 Ind. App. 597, 58 N. E. 741.

894-52 If absolute statutory immunity is guaranteed a witness must testify. Ex parte Hedden (Nev.), 90 P. 737, *cit.* Brown v. Walker, 161 U. S. 591; Counselman v. Hitchcock, 142 U. S. 547.

895-55 Lauchheimer v. Jacobs, 126 Ga. 261, 55 S. E. 55.

895-56 Calhoun v. Thompson, 56 Ala. 166, 28 Am. Rep. 754; Mahanke v. Cleland, 76 Ia. 401, 41 N. W. 53; Ex parte Hedden (Nev.), 90 P. 737; Meade v. Assn., 119 App. Div. 761, 104 N. Y. S. 523.

Privilege does not extend to incriminating a corporation of which witness is an officer. Hale v. Henkel, 201 U. S. 43; Nelson v. U. S., 201 U. S. 92; Meade v. Assn., supra.

896-57 Ex parte Hedden (Nev.), 90 P. 737.

902-69 Fulton v. Sword Co., 145 Ala. 331, 40 S. 393; Perrin v. Carbone, 1 Cal. App. 295, 82 P. 222; Stanton v. Barnes, 72 Kan. 541, 544, 84 P. 116.

Silence concerning another injury.

Plaintiff in a personal injury case may be asked concerning a previous injury and his silence respecting it. Brace v. R. Co., 87 Minn. 292, 91 N. W. 1099.

The right to call a party as the witness of the adverse party does not affect the right to cross-examine a party who is a witness in his own behalf. Purse v. Purcell (Colo.), 95 P. 291.

Speculative question. — Inquiry as to what a party might have done under supposed circumstances is immaterial. Russell v. Schade Co. (Wash.), 95 P. 327.

902-70 Long v. S., 72 Ark. 427, 81 S. W. 387.

903-71 Morris v. McClellan (Ala.), 45 S. 641.

Comment may be made on refusal of party to testify. Morris v. McClellan, supra.

903-72 Taylor v. McFatter (Tex. Civ.), 109 S. W. 395; Wallen v. Wallen, 107 Va. 131, 57 S. E. 596.

903-73 Mutchmor v. McCarty, 149 Cal. 603, 87 P. 85; Lanigan v. Neely (Cal. App.), 89 P. 441; Gorman v. Fitts (Conn.), 69 A. 357; Taylor v. McFatter, supra.

Cross-examination unduly restricted. Snell v. Roach (Ala.), 43 S. 189.

904-76 Sawyer v. U. S., 202 U. S. 150; Fitzpatrick v. U. S., 178 U. S. 304; Miller v. S., 146 Ala. 686, 40 S. 342; S. v. Zdanowicz, 69 N. J. L. 619, 55 A. 743; P. v. Tice, 131 N. Y. 651, 30 N. E. 494; Harrold v. Ter., 18 Okla. 395, 89 P. 202; Bays v. S. (Tex. Cr.), 99 S. W. 561.

The disclosure of a secret process may be compelled. S. v. Hefferman, 28 R. I. 20, 65 A. 284.

Flight of accused may be shown. Untreinor v. S., 146 Ala. 26, 41 S. 285. And other conduct after commission of crime. Barden v. S., 145 Ala. 1, 40 S. 948.

Accused in a prosecution for violation of excise law may be asked if he had obtained an internal revenue license. Davis v. S., 145 Ala. 69, 40 S. 663.

Under an English act of 1898 an accused person who has testified on his own behalf cannot be asked concerning prior convictions unless the nature or conduct of the defense has cast discredit on the character of the prosecutor or his witnesses. A vigorous defense may be made without opening the door for such evidence. Rex v. Bridgwater (1905), 1 K. B. (Eng.) 131.

905-77 Barden v. S., 145 Ala. 1, 40 S. 948; Smith v. S., 137 Ala. 22, 34 S. 396; Corothers v. S., 75 Ark. 574, 88 S. W. 585 (may be asked as to efforts to silence hostile testimony); P. v. Manasse (Cal.), 94 P. 92; P. v. Craig (Cal.), 91 P. 997; P. v. Soeder, 150 Cal. 12, 87 P. 1016; P. v. Weber, 149 Cal. 325, 86 P. 671; S. v. Wasson, 126 Ia. 320, 101 N. W. 1125; S. v. Buffington, 71 Kan. 804, 81 P. 465; Stout v. C., 29 Ky. L. R. 627, 94 S. W. 15; S. v. Feazell, 116 La. 264, 40 S. 698; S. v. Heidelberg, 120 La. 300, 45 S. 256; Lawrence v. S., 103 Md. 17, 63 A. 96; Ferguson v. S., 72 Neb. 350, 100 N. W. 800; S. v. Zdanowicz, 69 N. J. L. 619, 55 A. 743; Moore v. S. (Tex. Cr.), 107 S. W. 355 (it is immaterial that the cross-examination discloses that accused was afflicted with a discreditable disease).

The ordinary rules of cross-examination apply. P. v. Tice, 131 N. Y. 651, 30 N. E. 494.

Accused may be asked concerning his knowledge of an abandoned defense. Smith v. S. (Tex. Cr.), 105 S. W. 182. And as to the number of times he had testified in the case, and whether at one of the trials his testimony was the same as at the instant one. Hickey v. S. (Tex. Cr.), 102 S. W. 417.

Accused may be cross-examined concerning his association with persons known to him to have been convicted of felony. Long v. S., 72 Ark. 427, 81 S. W. 387. And as to his motives in doing an admitted act. Eatman v. S., 139 Ala. 67, 36 S. 16.

May be asked as to anything forming part of the res gestae, though answer may tend to incriminate him in another prosecution. Pate v. S. (Ala.), 43 S. 343.

908-78 Involuntary confessions may be proven on cross-examination by way of contradiction. Smith v. S., 137 Ala. 22, 34 S. 396; Hicks v. S., 99 Ala. 169, 13 S. 375; Harrold v. Ter., 18 Okla. 395, 89 P. 202.

Expression of a purpose to continue to violate the law cannot be shown. P. v. Werner, 174 N. Y. 132, 66 N. E. 667.

908-79 Balliett, v. U. S., 129 Fed. 689, 63 C. C. A. 201; S. v. Wertz, 191 Mo. 569, 90 S. W. 838; S. v. Brown, 181 Mo. 192, 79 S. W. 1111; Nicholizack v. S., 75 Neb. 27, 105 N. W. 895.

If questions implying accusations not testified of in chief are answered in the negative, an exception to them will not be given effect. Sawyer v. U. S., 202 U. S. 150.

Rule limiting questions to examination in chief liberally applied, so as to include impeaching questions relating to matters not inquired about thereon. Harrold v. Ter., 18 Okla. 395, 89 P. 202; P. v. Tice, 131 N. Y. 651, 30 N. E. 494.

General character of accused not in issue though he is a witness, unless he has offered testimony concerning it. S. v. Beckner, 194 Mo. 281, 91 S. W. 892. See "CHARACTER," Vol. 3, p. 1, and supplemented matter, ante.

909-80 S. v. Larkin, 5 Idaho 200, 47 P. 945; S. v. Kyle, 177 Mo. 659, 76 S. W. 1014, S. v. Miller, 43 Or. 325, 74 P. 658. See P. v. Scalamiero, 143 Cal. 343, 76 P. 1098, as to the scope of the cross-examination under the code; also P. v. Morales, 143 Cal. 550, 77 P. 470; P. v. Buckley, 143 Cal. 375, 77 P. 169; P. v. Teshara, 141 Cal. 633, 75 P. 338; S. v. Miller, supra.

Such statutes as are referred to in the text do not mean that the cross-examination shall be confined to the precise sentences, names or dates mentioned in the direct examination, but contemplate a fair scope of questions to test the accuracy of the subject-matter concerning which accused testified in chief. P. v. Zimmerman, 3 Cal. App. 84, 84 P. 446, or to which he referred in his testimony in chief. S. v. Miller, 190 Mo. 449, 89 S. W. 377.

909-82 S. v. Quirk, 101 Minn. 334, 112 N. W. 409; Harrold v. Ter., 18 Okla. 395, 89 P. 202.

910-84 If pages of a book in witness' handwriting are used to refresh his memory, it is competent to ask if all the book was written by him. Bistritz v. Ins. Co., 105 N. Y. S. 116.

910-85 Cross-examination as to signature.— The ability of a witness to identify his signature is a proper matter for inquiry. He is not entitled as a right or as fair treatment to see the papers to which his signature is attached and which are used as comparison before answering as to the genuineness of the paper. Brown v. Woodward, 75 Conn. 254, 53 A. 112. But a witness who did not sign it may decline to answer unless he is allowed to examine the documents. Taylor v. Taylor, 138 Mich. 658, 101 N. W. 832.

Discretion of court. — Cross-examination as to records to show a specific mistake in them as to collateral matter is within the discretion of the court. American W. Co. v. B. R. Co., 190 Mass. 152, 76 N. E. 658.

Inquiries as to connected papers are proper. Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916.

Identification of papers may be required of witness. Hildebrand v. United Artisans (Or.), 91 P. 542.

Inspection of paper by adverse party not necessary. S. v. Rowell, 75 S. C. 494, 56 S. E. 23.

912-87 Rector v. Robins, 82 Ark. 424, 102 S. W. 209; Logan v. Freerks, 14 N. D. 127, 103 N. W. 426.

913-88 After direct examination concerning an account in defendant's book, which had been introduced, cross-examination concerning other accounts in it should be allowed. Devencenzi v. Cassinelli, 28 Nev. 222, 81 P. 41.

A paper should be produced before the questioning of witnesses as to its contents. Louisville etc R. Co. v. Taylor, 31 Ky. L. R. 1142, 104 S. W. 776.

The party who introduces a paper may be cross-examined as to its draftsman and as to his knowledge of its contents when he signed it. Ruderman v. Schwartz, 100 N. Y. S. 1017.

If a letter has been destroyed the writer may be cross-examined as to the correctness of a purported copy though proof that it was a copy had not been made. Gorman v. Fitts (Conn.), 69 A. 357.

913-89 Foley v. T. Co., 69 N. J. L. 481, 55 A. 803.

913-90 S. v. Wolfley, 75 Kan. 406, 89 P. 1046, 93 P. 337.

913-91 S. v. Wolfley, supra;

Stout v. C., 29 Ky. L. R. 627, 94 S. W. 15; Sperbeck v. R. Co. (N. J.), 64 A. 1012.

913-92 S. v. Wolfley, supra; S. v. Doris (Or.), 94 P. 44.

Explanation of testimony of first cross-examination may be made. Nichols v. New Britain, 77 Conn. 695, 60 A. 655.

CUMULATIVE EVIDENCE
[Vol. 3.]

915-1 Patterson v. R. Co., 147 Cal. 178, 81 P. 531; Bousman v. Stafford, 71 Kan. 648, 81 P. 184; Mobile & O. R. Co. v. Caldwell, 32 Ky. L. R. 447, 106 S. W. 236.

An additional entry in a book received in evidence, entries in which were introduced, is merely cumulative. Selleck v. Head, 77 Conn. 15, 58 A. 224.

916-2 **In Kentucky,** the issue being whether an engineer could have stopped a train in time to avoid doing injury, it was held that new evidence, consisting of the testimony of another engineer to the effect that he had made a test of the question with a train similar to that in use when the harm was done, and had stopped one hundred feet within the necessary distance, was cumulative. Flint v. R. Co., 29 Ky. L. R. 1149, 97 S. W. 736.

916-3 Waller v. Graves, 20 Conn. 305; Howland v. Jacobs, 2 Haw. 155; Bousman v. Stafford, 71 Kan. 648, 81 P. 184; Parker v. Hardy, 24 Pick. (Mass.) 246; In re Colbert, 31 Mont. 461, 78 P. 971, 80 P. 248; Guyot v. Butts, 4 Wend. (N. Y.) 579; In re McClellan (S. D.), 111 N. W. 540 (*mod.* opinion in s. c., 107 N. W. 681); St. Louis S. R. Co. v. Smith (Tex. Civ.), 86 S. W. 943.

If evidence bears on the question at issue in a different way it may not be cumulative—as where it tends to establish a condition at a different date from that shown by the accepted testimony on the original trial, though it corroborates that of the plaintiff concerning the condition at the time the cause of action arose. Brennan v. Seattle, 39 Wash. 640, 81 P. 1092. See McCreery R. Co. v. Bank, 104 N. Y. S. 959.

920-4 Howland v. Jacobs, 2 Haw. 155; Torian v. Terrell, 29 Ky. L. R. 306, 93 S. W. 10; Foss v. Smith, 79 Vt. 434, 65 A. 553; Anderson v. Arpin Co., 131 Wis. 34, 110 N. W. 788.

921-5 See Million v. Million, 31 Ky. L. R. 1156, 104 S. W. 768.

Admissions of like character are cumulative, though made by a living predecessor in the title of him whose declarations were proved. Stewart v. Doak, 58 W. Va. 172, 52 S. E. 95.

922-6 See Wells, F. & Co. v. Gunn, 33 Colo. 217, 79 P. 1029.

923-9 See Wells, F. & Co. v. Gunn, supra.

924-18 Ray v. Baker, 165 Ind. 74, 74 N. E. 619. See Vandeventer F. Co. v. Warren Co., 127 Mo. App. 312, 105 S. W. 653.

925-23 Moynahan v. Perkins, 36 Colo. 481, 85 P. 1132.

926-25 Dorman v. S., 48 Fla. 18, 37 S. 561; Gardner v. U. S., 5 Ind. Ter. 150, 82 S. W. 704; Leonora Nat. Bk. v. Ragland, 32 Ky. L. R. 1403, 108 S. W. 854; Riverside L. Co. v. Schmidt (Mo. App.), 109 S. W. 71; Houston etc. R. Co. v. Ollis, 37 Tex. Civ. 231, 83 S. W. 850; Benson v. Hamilton, 34 Wash. 201, 75 P. 805.

Testimony of witnesses in a criminal case is not cumulative to that of accused though of the same tenor. Gathright v. S. (Tex. Cr.), 85 S. W. 1076.

927-26 Laudermilk v. S., 47 Tex. Cr. 427, 83 S. W. 1107.

927-27 Phoenix Ins. Co. v. Wintersmith, 30 Ky. L. R. 369, 98 S. W. 987.

929-36 Moynahan v. Perkins, 36 Colo. 481, 85 P. 1132; Weeks v. R. Co., 190 Mass. 563, 77 N. E. 654; Haapa v. Ins. Co., 150 Mich. 467, 114 N. W. 380.

The right of a party to prove his case is not affected by an admission. Terre Haute E. Co. v. Kieley, 35 Ind. App. 180, 72 N. E. 658.

929-37 Hinckley v. Somerset, 145 Mass. 326, 338, 14 N. E. 166.

929-38 Higgins v. R. Co. (Cal. App.), 91 P. 344; Atlantic etc. R. Co. v. Crosby, 53 Fla. 400, 43 S. 318; Strand v. Grinnell Co. (Ia.), 113 N. W. 488; Burt-B. L. Co. v. Crawford, 27 Ky. L. R. 798, 86 S. W. 702; Johnson v. L. Co., 92 Minn. 393, 100

N. W. 225; Siegelman v. Jones, 103 Mo. App. 172, 77 S. W. 307; Rowland v. Hall, 121 App. Div. 459, 106 N. Y. S. 55; Carr v. L. Co., 26 R. I. 180, 190, 58 A. 678; Missouri etc. R. Co. v. Garrett (Tex. Civ.), 96 S. W. 53 (testimony of witness on former trial); Camp v. League (Tex. Civ.), 92 S. W. 1062.

Inquiry into collateral matters may be restricted. Leavitt v. F. Co. (Mass.), 82 N. E. 682.

929-39 Perkins v. Rice, 187 Mass. 28, 72 N. E. 323; Ogden v. Camp (Neb.), 113 N. W. 524. See Brill v. Barnett, 98 N. Y. S. 755.

930-40 Stewart v. Whittemore, 3 Cal. App. 213, 84 P. 841; Gulf etc. R. Co. v. Hays (Tex. Civ.), 89 S. W. 29.

930-41 White v. Boston, 186 Mass. 65, 71 N. E. 75 (where the specified number have been examined a party may not obtain an expert opinion on cross-examination from one not called as an expert).

In patent cases one competent expert witness witness on each side is ordinarily sufficient. American S. Co. v. Cleveland Co., 158 Fed. 978.

931-42 Swope v. Seattle, 36 Wash. 113, 78 P. 607 (three as to value of land).

932-47 Austin v. Smith (Ia.), 109 N. W. 289; J. H. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231.

A party has no cause of complaint because a large number of witnesses were permitted to testify against him. Taylor v. Security Co., 145 N. C. 383, 59 S. E. 139.

Court is not bound by its order limiting number of witnesses. Brady v. Shirley, 18 S. D. 608, 101 N. W. 886.

933-51 Must not be done in midst of trial after one party has examined three or four of the witnesses allowed on the question of damages. St. Louis etc. R. Co. v. Aubuchon, 199 Mo. 352, 97 S. W. 867, *cit.* Ward v. Dick, 45 Conn. 235; White v. Hermann, 51 Ill. 243; Green v. Ins. Co., 134 Ill. 310, 25 N. E. 583; South Danville v. Jacobs, 42 Ill. App. 533; Crane Co. v. Stammers, 83 Ill. App. 329; Cooke B. Co. v. Ryan, 98 Ill. App. 444; Perkins v. Rice, 187 Mass. 28, 72 N. E. 323; Barbyte v. Summers, 68 Mich. 341, 36 N. W. 93; Nelson v. Wallace, 57 Mo. App. 397; Markham v. Herrick, 82 Mo. App. 327; Galveston R. Co. v. Matula, 79 Tex. 577, 15 S. W. 573.

933-52 St. Louis etc. R. Co. v. Aubuchon, 199 Mo. 352, 97 S. W. 867, and cases cited, supra.

936-58 Atlantic etc. R. Co. v. Crosby, 53 Fla. 400, 43 S. 318, 334.

937-60 Southern R. Co. v. Clay (Ga.), 61 S. E. 226.

937-62 Geter v. C. Co. (Ala.), 43 S. 367; Chase v. Alaska Co., 2 Alaska 82; Long v. McDaniel, 76 Ark. 292, 88 S. W. 964; Plumlee v. R. Co. (Ark), 109 S. W. 515; Shaufelberger v. Mattix (Ark.), 107 S. W. 380; Patterson v. R. Co., 147 Cal. 178, 81 P. 531; P. v. Davis, 1 Cal. App. 8, 81 P. 716, 88 P. 1101; Kataoka v. Hanselman, 150 Cal. 673, 89 P. 1082; Wood v. Moulton, 146 Cal. 317, 80 P. 92; In re Doolittle (Cal.), 94 P. 240; Selleck v. Head, 77 Conn. 15, 58 A. 224; Georgia R. & B. Co. v. Adams, 127 Ga. 408, 56 S. E. 409; Norman v. Goode, 121 Ga. 449, 49 S. E. 268; Sparks v. Bedford (Ga. App.), 60 S. E. 809; DeVane v. R. Co. (Ga. App.), 60 S. E. 1079; Hall v. Jensen (Idaho), 93 P. 962; Indianapolis etc. R. Co. v. Edwards, 36 Ind. App. 202, 74 N. E. 533; Hanowsek v. Marshalltown, 130 Ia. 550, 107 N. W. 603; Arensehield v. R. Co., 128 Ia. 677, 105 N. W. 209; Renshaw v. Dignan, 128 Ia. 722, 105 N. W. 209; Hemmer v. Burger, 127 Ia. 614, 103 N. W. 957; Farrell v. R. Co. (Ia.), 114 N. W. 1063; Stowers v. Singer (Ky.), 67 S. W. 822; Black v. C., 24 Ky. L. R. 1974, 72 S. W. 772; Curry v. C., 25 Ky. L. R. 281, 74 S. W. 1077; Phoenix Ins. Co. v. Wintersmith, 30 Ky. L. R. 369, 98 S. W. 987; Metropolitan Ins. Co. v. Ford, 31 Ky. L. R. 513, 102 S. W. 876; Flint v. R. Co., 29 Ky. L. R. 1149, 97 S. W. 736; Dayton v. Hirth, 27 Ky. L. R. 1209, 87 S. W. 1136; Mobile & O. R. Co. v. Caldwell, 32 Ky. L. R. 447, 106 S. W. 236; Cummings v. Baker, 141 Mich. 536, 104 N. W. 979; Strand v. R. Co., 101 Minn. 85, 112 N. W. 987, 111 N. W. 958; Tew v. Webster (Minn.), 114 N. W. 647; Cheever v. Ins. Co., 86 App. Div. 331, 83 N. Y. S. 732; DiLorenzo v. DiLorenzo, 111 App. Div. 920, 97 N. Y. S. 644; Adam v. Doub, 146 N. C. 10, 59 S. E. 162; Whipple v. McCormick

(R. I.), 68 A. 428; Hahn v. Dickinson, 19 S. D. 373, 103 N. W. 642; St. Louis etc. R. Co. v. Ross (Tex. Civ.), 89 S. W. 1105; Taylor v. R. Co. (Tex. Civ.), 83 S. W. 738; Northern Texas T. Co. v. Lewis, 37 Tex. Civ. 197, 83 S. W. 894; Benson v. Hamilton, 34 Wash. 201, 75 P. 805; S. v. Underwood, 35 Wash. 558, 77 P. 863; Stewart v. Doak, 58 W. Va. 172, 52 S. E. 95.

Parol evidence. — In some courts the rule is emphasized when the newly discovered evidence is parol. Louisville & N. R. Co. v. Ueltschi, 31 Ky. L. R. 931, 104 S. W. 320.

Finding the original paper, which was supposed to be lost, and a copy of which was used, is not cause for varying the rule. Ray v. Baker, 165 Ind. 74, 74 N. E. 619.

940-63 P. v. McCullough, 210 Ill. 488, 518, 71 N. E. 602; Martinatis v. P., 223 Ill. 117, 79 N. E. 55; United B. Co. v. O'Donnell, 124 Ill. App. 24; Kuhn v. Williams, 124 Ill. App. 390; Pratt v. Davis, 118 Ill. App. 161.

941-65 Button v. Button (Conn.), 67 A. 478; Buchholtz v. Radcliffe, 129 Ia. 27, 105 N. W. 336; Owsley v. Owsley, 25 Ky. L. R. 1186, 77 S. W. 397, 25 Ky. L. R. 1194, 77 S. W. 394; Torian v. Terrell, 29 Ky. L. R. 306, 93 S. W. 10 (*compare* with Flint v. R. Co., 29 Ky. L. R. 1149, 97 S. W. 736); Crigler v. Newman, 29 Ky. L. R. 27, 91 S. W. 706; Cahill v. Mullins, 31 Ky. L. R. 72, 101 S. W. 336; Louisville v. Oberle, 26 Ky. L. R. 845, 82 S. W. 626; Million v. Million, 31 Ky. L. R. 1156, 104 S. W. 768; Louisville & N. R. Co. v. Ueltschi, 31 Ky. L. R. 931, 104 S. W. 320; Hanson v. Bailey, 96 Minn. 274, 104 N. W. 969; Devoy v. T. Co., 192 Mo. 197, 91 S. W. 140; Parkins v. R. Co. (Neb.), 113 N. W. 265; Wilson v. Keckley, 107 Va. 592, 59 S. E. 383; Rogers v. S., 77 Vt. 454, 61 A. 489.

941-66 Marks v. Shoup, 2 Alaska 66; Colorado Spgs. etc. R. Co. v. Fogelsong (Colo.), 94 P. 356; Denmord v. Hillyer, 129 Ga. 698, 59 S. E. 806; Clements v. Stapleton (Ia.), 113 N. W. 546; Louisville B. & I. Co. v. Hart, 29 Ky. L. R. 310, 92 S. W. 951; Bunker v. Foresters, 97 Minn. 361, 107 N. W. 392; Howard v. Assn., 110 Mo. App. 574, 85 S. W. 608; Vandeventer F. Co. v. Warren Co., 127 Mo. App. 312, 105 S. W. 653; Parkins v. R. Co. (Neb.), 113 N. W. 265; Kraus v. Clark (Neb.), 116 N. W. 164; Williams v. Miles, 73 Neb. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769; German Nat. Bk. v. Edwards, 63 Neb. 604, 88 N. W. 657; St. Paul H. Co. v. Faulhaber (Neb.), 109 N. W. 762; McCreery R. Co. v. Bank, 104 N. Y. S. 959; O'Hara v. R. Co., 102 App. Div. 398, 92 N. Y. S. 777; Schnitzler v. Oriental Co., 93 N. Y. S. 1119; Hagen v. R. Co., 100 App. Div. 218, 91 N. Y. S. 914; Flock v. Kaufman, 107 N. Y. S. 752; Crenshaw v. R. Co., 140 N. C. 192, 52 S. E. 731; Herndon v. R. Co., 121 N. C. 498, 28 S. E. 144; McDonald v. Lawton (R. I.), 67 A. 451; Shepard v. R. Co., 27 R. I. 135, 61 A. 42; McDonald v. R. I. Co., 26 R. I. 467, 59 A. 391; Texas etc. R. Co. v. Scarborough (Tex.), 108 S. W. 804; Shannon v. Tacoma, 41 Wash. 220, 83 P. 186; Goldsworthy v. Linden, 75 Wis. 24, 43 N. W. 656; Kennedy v. Plank, 120 Wis. 197, 97 N. W. 895; Anderson v. Arpin Co., 131 Wis. 34, 110 N. W. 788.

Regarded as true. — For the purposes of the motion for a new trial newly discovered evidence, though denied by affidavit, will be assumed to be true. In re McClellan (S. D.), 111 N. W. 540; Goldsworthy v. Linden, 75 Wis. 24, 43 N. W. 656. Conflicting affidavits present a question of fact for the trial court. Arkadelphia L. Co. v. Posey, 74 Ark. 377, 85 S. W. 1127; Wilson v. Keckley, 107 Va. 592, 59 S. E. 383.

New trial on extraordinary grounds. In Georgia the code provides for new trials on extraordinary grounds. Such motions are viewed less favorably than original motions, and will not be granted unless the newly discovered evidence will be decisive. See Norman v. Goode, 121 Ga. 449, 49 S. E. 268.

942-67 Marks v. Shoup, 2 Alaska, 66; Arkadelphia L. Co. v. Posey, 74 Ark. 377, 85 S. W. 1127; Norman v. Goode, 121 Ga. 449, 49 S. E. 268; Hall v. Jensen (Idaho), 93 P. 962; Henry v. Heldmaier, 129 Ill. App. 86; Warman-B.-C. Co. v. I. M. & F.

Co., 36 Ind. App. 259, 75 N. E. 672; Renshaw v. Dignan, 128 Ia. 722, 105 N. W. 209; S. v. Stanley (Ia.), 104 N. W. 284; Stowers v. Singer (Ky.), 67 S. W. 822; Crigler v. Newman, 29 Ky. L. R. 27, 91 S. W. 706; Emmet v. Perry, 100 Me. 139, 60 A. 872; McNeal v. Hunter, 72 Neb. 579, 101 N. W. 236; Kraus v. Clark (Neb.), 116 N. W. 164; Armstrong v. Aragon (N. M.), 79 P. 291; Hagen v. R. Co., 100 App. Div. 218, 91 N. Y. S. 914; Levy v. Hatch, 92 N. Y. S. 287; Gay v. Mitchell, 146 N. C. 509, 60 S. E. 426; El Paso S. W. R. Co. v. Barrett (Tex. Civ.), 101 S. W. 1025; St. Louis etc. R. Co. v. Ross (Tex. Civ.), 89 S. W. 1105; San Antonio F. Co. v. Drish (Tex. Civ.), 85 S. W. 440; Halbert v. Texas Co. (Tex. Civ.), 107 S. W. 592; Conwill v. R. Co., 85 Tex. 96, 19 S. W. 1017; Reynolds v. Hassam (Vt.), 68 A. 645.

943-68 St. Louis etc. R. Co. v. Wiggins (Tex. Civ.), 107 S. W. 899.

943-69 Tillar v. Liebke, 78 Ark. 324, 95 S. W. 769; St. Louis S. R. Co. v. Byrne, 73 Ark. 377, 84 S. W. 469; Whitehead v. Breckenridge, 5 Ind. Ter. 133, 82 S. W. 698; Heath v. Cook (R. I.), 68 A. 427; Gulf etc. R. Co. v. Hays (Tex. Civ.), 89 S. W. 29; Norfolk etc. R. Co. v. Spencer, 104 Va. 657, 52 S. E. 310.

943-70 Plumlee v. R. Co. (Ark.), 109 S. W. 515; Bunn v. Hargraves, 3 Ga. App. 518, 60 S. E. 223; Miller v. Thigpen, 125 Ga. 113, 54 S. E. 194; Rogers v. Daniels, 116 Ill. App. 515; Stowers v. Singer (Ky.), 67 S. W. 822; Phoenix Ins. Co. v. Wintersmith, 30 Ky. L. R. 369, 98 S. W. 987; Louisville & N. R. Co. v. Ueltschi, 31 Ky. L. R. 931, 104 S. W. 320; Libby v. Barry, 15 N. D. 286, 107 S. W. 972; Heyroch v. McKenzie, 8 N. D. 601, 80 N. W. 762; Smith v. Ins. Co. (S. D.), 113 N. W. 94; El Paso etc. R. Co. v. Murtle (Tex. Civ.), 108 S. W. 998; Flynt v. Taylor (Tex. Civ.), 91 S. W. 864; Houston L. P. Co. v. Hooper (Tex. Civ.), 102 S. W. 133; Wilson v. Keekley, 107 Va. 592, 59 S. E. 383; Seattle L. Co. v. Sweeney, 43 Wash. 1, 85 P. 677.

Exceptions are sometimes made to the rule. See Illinois C. R. Co. v. McManus, 24 Ky. L. R. 81, 67 S. W. 1000; Hanson v. Bailey, 96 Minn. 274, 104 N. W. 969.

943-71 Wells, F. & Co. v. Gunn, 33 Colo. 217, 79 P. 1029; O'Hara v. R. Co., 102 App. Div. 398, 92 N. Y. S. 777; Schnitzler v. Oriental Co., 93 N. Y. S. 1119; Brennan v. Seattle, 39 Wash. 640, 81 P. 1092.

944-72 Chapman v. R. Co., 102 App. Div. 176, 92 N. Y. S. 304; Beers v. R. Co., 101 App. Div. 308, 91 N. Y. S. 957; Hughes v. R. I. Co. (R. I.), 67 A. 450.

944-75 New trials are not favored. S. v. Bybee, 149 Mo. 632, 51 S. W. 470.

947-80 "For equity to set aside a verdict at law on account of newly discovered evidence, the evidence discovered must be decisive of the controversy." Robinson v. Veal, 79 Ga. 633, 7 S. E. 159. See Wimpy v. Gaskill, 79 Ga. 620, 7 S. E. 156; Norman v. Goode, 121 Ga. 449, 49 S. E. 268.

CUSTOMS AND USAGES [Vol. 3.]

949-1 New Roads O. & Mfg. Co. v. Kline, 154 Fed. 296; Butler v. M. Co., 1 Alaska 246; Wilmington C. R. Co. v. White (Del.), 66 A. 1009; Fleischman v. R. Co., 76 S. C. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519; S. v. Metcalf, 18 S. D. 393, 100 N. W. 923, 67 L. R. A. 331 (of political parties); F. O'Brien L. Co. v. Wilkinson, 123 Wis. 272, 101 N. W. 1050; Vogt v. Schienebeck, 122 Wis. 491, 100 N. W. 820.

950-4 Globe & R. F. Ins. Co. v. Moffat, 154 Fed. 13; Sanders v. Brown, 145 Ala. 665, 39 S. 732; Wilmington C. R. Co. v. White (Del.), 66 A. 1009; Morris v. Jamieson, 205 Ill. 87, 103, 68 N. E. 742; Schultz v. Ford, 133 Ia. 402, 109 N. W. 614; Oriental L. Co. v. Blades L. Co., 103 Va. 730, 50 S. E. 270; Columbian B. Co. v. Bowen (Wis.), 114 N. W. 451.

Water rights. — Judicial notice will be taken of the custom of appropriating water rights on the public domain. Parkersville D. Dist. v. Wattier, 48 Or. 332, 86 P. 775; Isaacs v. Barber, 10 Wash. 124, 38 P. 871, 45 Am. St. 772, 30 L. R. A. 665; Speaks v. Hamilton, 21 Or. 3,

26 P. 855; Lewis v. McClure, 8 Or. 274, is overruled by the case first cited.

951-5 Hammond v. Exp. Co. (Md.), 68 A. 497.

951-7 Commercial Bk. v. Armsby Co., 120 Ga. 74, 47 S. E. 589; Lauchheimer v. Jacobs, 126 Ga. 261, 55 S. E. 55; Watson v. Hazlehurst, 127 Ga. 298, 56 S. E. 459; Stewart v. Cook, 118 Ga. 541, 45 S. E. 398; Plover Sav. Bk. v. Moodie (Ia.), 110 N. W. 29; Rastetter v. Reynolds, 160 Ind. 133, 66 N. E. 612; Everett v. P. Co., 25 Ind. App. 287, 57 N. E. 281; Tower v. S. P. Co., 184 Mass. 472, 69 N. E. 348; Savage v. M. Co., 48 Or. 1, 85 P. 69; Pennsylvania R. Co. v. Naive, 112 Tenn. 239, 79 S. W. 124; J. O'Brien L. Co. v. Wilkinson, 123 Wis. 272, 101 N. W. 1050; Gehl v. P. Co., 105 Wis. 573, 81 N. W. 666, 116 Wis. 263, 93 N. W. 26.

Age of custom immaterial if parties had knowledge of it. Rastetter v. Reynolds, 160 Ind. 133, 66 N. E. 612. See Edelstein v. Schuler, (1902) 2 K. B. (Eng.) 144, 154.

952-8 Johnson v. Hunt, 93 L. T. (Eng.) 470, 21 T. L. R. 692; Grace v. Ins. Co., 109 U. S. 278; Kalamazoo C. Co. v. Simon, 129 Fed. 1005, 64 C. C. A. 166; De Witt v. Berry, 134 U. S. 306; Hammett v. Chase, 158 Fed. 203; The Mary S. Bradshaw, 155 Fed. 696; Carbon S. Co. v. Ennis, 114 Fed. 260, 52 C. C. A. 146; Noyes v. Marlott, 156 Fed. 753; Moore v. U. S., 196 U. S. 157; Florence W. Wks. v. Mfg. Co., 145 Ala. 677, 40 S. 49; Leonhart v. Assn. (Cal. App.), 89 P. 847; Fish v. Correll, 4 Cal. App. 521, 88 P. 489; Vardeman v. Ins. Co., 125 Ga. 117, 54 S. E. 66; Currie v. Syndicate, 104 Ill. App. 165; Whipple v. Tucker, 123 Ill. App. 223; Covington v. C. Co., 28 Ky. L. R. 636, 89 S. W. 1126; Birley v. Dodson (Md.), 68 A. 488; Hammond v. Exp. Co. (Md.), 68 A. 496; Denton v. Gill, 102 Md. 386, 62 A. 627, 3 L. R. A. (N. S.) 465; Stearns v. R. Co., 148 Mich. 271, 111 N. W. 769; J. Schlitz B. Co. v. Grimmon, 28 Nev. 235, 81 P. 43; Stovall v. Gardner (Tex. Civ.), 103 S. W. 405.

An express stipulation in a contract is not always conclusive evidence against the existence of a custom. In re Arbitration between Walkers, (1904) 2 K. B. (Eng.) 152.

953-9 Everett v. P. Co., 25 Ind. App. 287, 57 N. E. 281; Sawyer v. Deicken, 56 Misc. 634, 107 N. Y. S. 560; Bremerman v. Hayes, 9 Pa. Super. 8 (custom of physicians not to charge for attendance on members of profession).

953-10 Soper v. Tyler, 77 Conn. 104, 58 A. 699; Stern v. Simons, 77 Conn. 150, 58 A. 696; Arrington v. Fleming, 117 Ga. 449, 43 S. E. 691; Hughes v. Knott, 138 N. C. 105, 50 S. E. 586; Morris v. Supplee, 208 Pa. 253, 57 A. 566; Traders Ins. Co. v. Dobbins, 114 Tenn. 227, 86 S. W. 383; Kempner v. Patrick (Tex. Civ.), 95 S. W. 51.

954-11 Smart v. Haase, 79 Conn. 587, 65 A. 972; Steidtmann v. Lay Co., 234 Ill. 84, 84 N. E. 640; Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499; Taylor v. Bailey, 169 Ill. 181, 48 N. E. 200; Doell v. Schrier, 36 Ind. App. 253, 75 N. E. 600; Biggs v. Langhammer, 103 Md. 94, 63 A. 198; Tower v. S. P. Co., 184 Mass. 472, 69 N. E. 348; Heyworth v. G. & E. Co., 174 Mo. 171, 73 S. W. 498. See Snoqualmi R. Co. v. Moynihan, 179 Mo. 629, 78 S. W. 1014; Bixby v. Bruce, 69 Neb. 78, 95 N. W. 34.

Acceptance of usage, if one of the parties is not a member of the trade or circle in which it prevails, must be shown, either by proof of his actual knowledge or that it was so generally known in the community that his actual, individual knowledge of it may be inferred. New Roads O. & Mfg. Co. v. Kline, 154 Fed. 296.

954-12 Ennis Brown Co. v. Hurst, 1 Cal. App. 752, 82 P. 1056.

Ignorance immaterial. — The ignorance of one who indorses and negotiates a check as to the usage of banks in presenting it for payment cannot prevent the application of a statute making such usage a factor on the question of diligence. Plover Sav. Bk. v. Moodie (Ia.), 110 N. W. 29.

955-14 Guggenheim v. Hoffman, 128 Ill. App. 289; Collins v. Mechling, 1 Pa. Super. 594; Bowles v. Rice, 107 Va. 51, 57 S. E. 575.

A custom of business houses is not binding upon one who has no notice

thereof unless it is notorious. San Antonio M. & S. Co. v. Josey (Tex. Civ.), 91 S. W. 598.

956-15 Lillard v. Kentucky Co., 134 Fed. 168; 67 C. C. A. 74; Globe & R. F. Ins. Co. v. Moffat, 154 Fed. 13 (meaning of "noon" in policy); Kauffman v. Raeder, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; Ball v. Mobile Co., 146 Ala. 309, 39 S. 584; Henderson-B. L. Co. v. Cook (Ala.), 42 S. 838; Western U. T. Co. v. Bowman, 141 Ala. 175, 37 S. 493; Hiestand v. Bateman (Colo.), 91 P. 1111; Chicago etc. Co. v. Hyslop, 227 Ill. 308, 81 N. E. 379; Chisholm v. Beaman Co., 160 Ill. 101, 43 N. E. 796; Guggenheim v. Hoffman, 128 Ill. App. 289; Peet v. Peet, 229 Ill. 341, 82 N. E. 376; Chicago etc. R. Co. v. Reyman (Ind.), 73 N. E. 587; Hichhorn v. Bradley, 117 Ia. 130, 90 N. W. 592; Thayer v. C. Co., 121 Ia. 121, 96 N. W. 718; Sherwood v. Bank, 131 Ia. 528, 109 N. W. 9; Rochester G. Ins. Co. v. Ins. Co., 27 Ky. L. R. 1155, 87 S. W. 1115 (meaning of "noon" in policy); Shute v. Bills, 191 Mass. 433, 78 N. E. 96; Floyd v. Mann, 146 Mich. 356, 109 N. W. 679; Ryley-W. G. Co. v. C. Co. (Mo. App.), 108 S. W. 628; Newhall v. Appleton, 114 N. Y. 140, 21 N. E. 105; Blalock v. Clark, 137 N. C. 140, 49 S. E. 88; Gulf etc. R. Co. v. Leatherwood, 29 Tex. Civ. 507, 69 S. W. 119; Fort P. Co. v. Dissen (Tex. Civ.), 101 S. W. 477; Morgan v. Barber (Tex. Civ.), 99 S. W. 730; Consol. etc. R. Co. v. Gonzales (Tex. Civ.), 109 S. W. 946; Anderson v. Lewis (W. Va.), 61 S. E. 160.

Usage at the place of performance may be shown though the contract was entered into elsewhere. Globe & R. F. Ins. Co. v. Moffat, 154 Fed. 13; Moore v. U. S., 196 U. S. 157.

Evidence of the customary charge for services is competent on the issue as to a mistake in a written contract. Mercer v. Hickman E. Co., 32 Ky. L. R. 230, 105 S. W. 441. See "CONTRACTS," ante.

Custom of employes not binding on corporate employer unless recognized by governing officials. Southern R. Co. v. Hobbs, 118 Ga. 227, 45 S. E. 23. But proof of a uniform course tends to show that it was authorized. Leighton & H. S. Co. v. Snell, 217 Ill. 152, 75 N. E. 462. Concurrence by employer must be shown. South Chicago C. R. Co. v. Dufresne, 200 Ill. 456, 65 N. E. 1075. See No. Chicago S. R. Co. v. Kaspers, 186 Ill. 246, 57 N. E. 849. But in Texas, as between employer and employes, the former is presumed to know of the manner in which the latter have performed their duties for years. Atchison etc. R. Co. v. Sowers (Tex. Civ.), 99 S. W. 190. And a custom for the protection of workmen may acquire the force of a rule. Gulf etc. R. Co. v. Hays (Tex. Civ.), 89 S. W. 29; Gulf etc. R. Co. v. Minter (Tex. Civ.), 85 S. W. 477. The custom of employes in running a train at a rate of speed in excess of that permitted may be shown as between a stranger and the company. McKerley v. R. Co. (Tex. Civ.), 85 S. W. 499. But occasional acts of that character are not competent to show the revocation or abandonment of the company's rule. Louisville & N. R. Co. v. Scanlon, 22 Ky. L. R. 1400, 60 S. W. 643. *Compare* Kane v. R. Co., 142 Fed. 682, 73 C. C. A. 672, and Biles v. R. Co., 143 N. C. 78, 55 S. E. 512; Texas etc. R. Co. v. Conway (Tex. Civ.), 98 S. W. 1070.

In actions for negligence proof is competent to show the usual precautions taken to prevent injury or loss. Thayer v. C. Co., 121 Ia. 121, 96 N. W. 718; Crooker v. L. & M. Co., 34 Wash. 191, 75 P. 632; Rasmussen v. L. H. & P. Co. (Wis.), 113 N. W. 453; Bodie v. R. Co. 61 S. C. 468, 39 S. E. 715. A general custom of men in a certain employment as to the manner of doing work may be shown. (Leque v. G. & E. Co. (Wis.), 113 N. W. 946), if it does not contradict common knowledge nor prove a custom obviously dangerous to life and limb. Boyce v. L. Co., 119 Wis. 642, 97 N. W. 563, *over.* Colf v. R. Co., 87 Wis. 273, 58 N. W. 408. But evidence of the general custom of railway companies as to the construction, maintenance and operation of roads is not always admissible. See McDermott v. Severe, 25 App. D. C. 276; Weaver v. R. Co., 3 App. D. C. 436. And if admissible, is not controlling. Rickerd v.

R. Co., 141 Fed. 905, 73 C. C. A. 139. A workman who does not know of a custom cannot show its non-observance. Bourbonnais v. Mfg. Co., 184 Mass. 250, 68 N. E. 232. Proof of custom among workmen in the selection of appliances is immaterial; it is a question of reasonable prudence and precaution. Geldard v. Marshall, 47 Or. 271, 83 P. 867, 84 P. 803.

Custom of carrier in calling stations may be shown by passenger. Kansas C. S. R. Co. v. Belknap, 80 Ark. 587, 98 S. W. 366.

956-16 Byrd v. Beall (Ala), 43 S. 749; Gould v. C. Co., 147 Ala. 629, 41 S. 675; Bacon F. Co. v. Blessing, 122 Ga. 369, 50 S. E. 139; Bank v. Miller, 105 Ill. App. 224; Rake v. Townsend (Ia.), 102 N. W. 499; Kenyon v. Imp. Co., 135 Mich. 103, 97 N. W. 407; Moritz v. Herskovitz (Wash.), 89 P. 560.

Usage as to giving notice of arrival or making delivery of goods on holidays is chargeable to a shipper who sends goods to an agent at the place where such usage prevails. Pennsylvania R. Co. v. Naive, 112 Tenn. 239, 79 S. W. 124; Illinois C. R. Co. v. Carter, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527. See Savings Bk. v. Bank, 98 Tenn. 337, 39 S. W. 338.

It is presumed that an insurance company knows the local meaning of the term "winter season," used in a rider attached to its policy. Barker v. Ins. Co., 136 Mich. 626, 99 N. W. 866. See Soper v. Tyler, 77 Conn. 104, 58 A. 699.

Same rule applies where parties not strangers. — A trade usage by which words are given an unusual or arbitrary significance in a particular line of business generally or in the locality in which the parties reside must be shown to be of such definite character and such general acceptance that knowledge thereof by both parties may be reasonably inferred. Citizens State Bk. v. Chambers, 129 Ia. 414, 105 N. W. 692, *cit.* Irwin v. Williar, 110 U. S. 499; Van Hoesen v. Cameron, 54 Mich. 609, 20 N. W. 609; Johnson v. De Peyster, 50 N. Y. 666; Brunnell v. Hudson S. M. Co., 86 Wis. 587, 57 N. W. 364.

956-17 McCall v. Herrin, 118 Ga. 522, 45 S. E. 442; Greer v. R. Co., 193 Mass. 246, 79 N. E. 267; Sinclair v. S., 45 Tex. Cr. 487, 77 S. W. 621. An ignorant stranger's rights are not affected by a custom of a carrier. Atlantic & B. R. Co. v. Anderson, 118 Ga. 288, 45 S. E. 271.

Principals not chargeable with notice of custom of their factors (Leibhardt v. Wilson, 38 Colo. 1, 88 P. 173), or traveling salesmen (Gould v. C. Co., 147 Ala. 629, 41 S. 675), or brokers (Robbins v. Maher, 14 N. D. 228, 103 N. W. 755; Chilberg v. Lyng, 128 Fed. 899, 63 C. C. A. 451); unless it is shown that it was contemplated that the contracts should be made according to usage. Bibb v. Allen, 149 U. S. 481.

956-18 Sultan v. Oil Barrels, 16 Phila. (Pa.) 542; Russell v. Ferguson, 77 Vt. 433, 60 A. 802; Oriental L. Co. v. Blades L. Co. 103 Va. 730, 50 S. E. 270; Bowles v. Rice, 107 Va. 51, 57 S. E. 575.

956-20 Penland v. Ingle, 138 N. C. 456, 50 S. E. 850; Pratt v. Bank, 12 Phila. (Pa.) 378.

956-22 In Iowa the question is for the jury though the evidence is not clear, uncontradictory and distinct. Hichhorn v. Bradley, 117 Ia. 130, 90 N. W. 592.

956-23 Doubt must be wholly eliminated. Thompson v. Taylor, 15 Phila. (Pa.) 250.

If there is some proof the question is for the jury. Henderson B. L. Co. v. Cook (Ala.), 42 S. 838.

956-24 Elements. — "A custom to be binding must be uniform, long established and generally acquiesced in, and so well known as to induce the belief that parties contracted with reference to it." Newton R. Wks. v. Home R. Co., 100 Ill. App. 421; Currie v. Syndicate, 104 Ill. App. 165; American Ins. Co. v. France, 111 Ill. App. 310; Strange v. Carrington, 116 Ill. App. 410. Besides it must be reasonable. Penland v. Ingle, 138 N. C. 456, 50 S. E. 850. But usage need only be old enough to be well established in the trade or place. Currie v. Syndicate, supra. See Byrd v. Beall (Ala.), 43 S. 749; Wilmington C. R. Co. v. White (Del.), 66 A. 1009.

Law and fact. — The sufficiency of usage is for the court; whether the facts establish it is for the jury. Currie v. Syndicate, supra; Oriental

L. Co. v. Blades Co., 103 Va. 730, 50 S. E. 270; In re Arbitration between Walkers, (1904) 2 K. B. (Eng.) 152; Tower v. S. P. Co., 184 Mass. 472, 69 N. E. 348. Knowledge of a custom of which it is not presumed the parties had notice is for the jury. New Roads O. & Mfg. Co. v. Kline, 154 Fed. 296.

A regular usage for the inhabitants of a parish to have a churchway through the demesne of a manor within the parish is, prima facie, a parochial custom, and is not restricted to a part of the inhabitants of its parish. A regular usage of twenty years, unexplained and uncontradicted is sufficient to warrant a jury in finding the existence of an immemorial custom, and from such modern usage, unless the contrary appears, the jury ought to presume the immemorial existence of the right. Brocklebank v. Thompson, (1903) 2 Ch. (Eng.) 344. See Foster v. Council, (1906) 1 K. B. (Eng.) 648.

The declarations of a deceased predecessor in title made in a private record concerning notice caused by him to have been given respecting the use of such way is not competent to overcome the effect of such usage. Brocklebank v. Thompson, supra.

Ancient court records are good evidence that the freeholders of a manor had the right to take stone from the waste to be used on their respective tenements. Heath v. Deane, (1905) 2 Ch. (Eng.) 86.

957-25 Illinois C. R. Co., v. Panebringo, 227 Ill. 170, 81 N. E. 53; Donk Bros. Co. v. Thil, 228 Ill. 233, 81 N. E. 857; Russell v. Ferguson, 77 Vt. 433, 60 A. 802.

Inference. — Facts may be proven from which it may be inferred that a custom is in very general or common use. Chattanooga M. Co. v. Hargraves, 111 Tenn. 476, 78 S. W. 105.

957-26 Gibbon v. Pease, (1905) 1 K. B. (Eng.) 810; Devonald v. Rosser, 93 L. T. (Eng.) 274, 21 T. L. R. 595; Chilberg v. Lyng, 128 Fed. 899, 63 C. C. A. 451 (contrary to public policy); Byrd v. Beall (Ala.), 43 S. 749 (see opinion for numerous instances of unreasonableness); Heistand v. Bateman (Colo.), 91 P. 1111; Johnson v. Lee Co., 16 Haw. 693; Quin v. Herhold, 100 Ill. App. 320; Penland v. Ingle, 138 N. C. 456, 50 S. E. 850; Missouri etc. R. Co. v. Tarwater, 33 Tex. Civ. 116, 75 S. W. 937.

Reasonableness of custom is for the jury. In re Arbitration between Walkers, (1904) 2 K. B. (Eng.) 152. If a custom benefits the public it may not be unreasonable because it injures an individual. Mercer v. Denne, (1904) 2 Ch. (Eng.) 534, 74 L. J. Ch. 71, 91 L. T. 513, 53 W. R. 55.

957-27 Barnard v. Kellogg, 10 Wall. (U. S.) 383; Bridgeman v. U. S., 140 Fed. 577, 72 C. C. A. 145; Citizens B. v. Arkansas Co., 80 Ark. 601, 96 S. W. 997; Fidelity & D. Co. v. Butler (Ga.), 60 S. E. 851; Coady v. Ship Lewis, 1 Haw. 545 (maritime law); Kahinu v. Aea, 6 Haw. 68 (former custom of natives cannot affect nature of property); Turner v. Osgood Co., 223 Ill. 629, 79 N. E. 306; Delaware & H. C. Co. v. Mitchell, 113 Ill. App. 429 (to vary terms of contract); Entwhistle v. Henke, 113 Ill. App. 572; *aff.* National F. Ins. Co. v. Hanberg, 215 Ill. 378, 74 N. E. 377; *aff.* Clark v. Allaman, 71 Kan. 206, 80 P. 571; Louisville etc. R. Co. v. Woolfork, 30 Ky. L. R. 569, 99 S. W. 294; Shute v. Bills, 191 Mass. 433, 78 N. E. 96; Calvert v. Schultz, 143 Mich. 441, 106 N. W. 1123; Crockford v. S., 73 Neb. 1, 102 N. W. 70; Ollenheimer v. Foley (Tex. Civ.), 95 S. W. 688.

The custom of medical men to render services to one another without charge may be proven on the issue as to the existence of an implied contract. Bremerman v. Hayes, 9 Pa. Super. 8. As may their custom to charge fees for consultation to the patient and not to the attending physician who requested the service. Baer v. Williams (N. J.), 66 A. 961.

Proof of the practice of the legislative and executive branches of government for a long series of years may be regarded by the judiciary in construing a constitutional provision of doubtful meaning. S. v. South Norwalk, 77 Conn. 257, 58 A. 759.

A custom may be void for uncertainty. See In re Arbitration be-

tween Walkers, (1904) 2 K. B. (Eng.) 152; Kalamazoo C. Co. v. Simon, 129 Fed. 1005, 64 C. C. A. 166. But variation in the use of the privileges claimed under custom may not render it void. Mercer v. Denne, (1904) 2 Ch. (Eng.) 534, 74 L. J. 71, 91 L. T. 513, 53 W. R. 55.

Custom is not provable to excuse the non-performance of a contract. Henry v. Ins. Co. (Tex. Civ.), 103 S. W. 836. And when stipulations excusing liability are made, proof of custom to show that the party is within them must not antedate the making of the contract. Lima L. & M. Co. v. Nat. S. C. Co., 155 Fed. 77.

958-28 Schultz v. Ford, 133 Ia. 402, 109 N. W. 614; Nagle v. Hake, 123 Wis. 256, 101 N. W. 409.

Testimony should not be limited to the custom in a single county. Muren C. & I. Co. v. Howell, 107 Ill. App. 1.

958-29 Ames M. Co. v. S. S. Co., 125 Fed. 332; Burch v. Americus G. Co., 125 Ga. 153, 53 S. E. 1008; Tower v. S. P. Co., 184 Mass. 472, 69 N. E. 348; Collins v. Mechling, 1 Pa. Super. 594; Wall v. Melton (Tex. Civ.), 94 S. W. 358; San Antonio T. Co. v. Lambkin (Tex. Civ.), 99 S. W. 574; Parlett v. Dunn, 102 Va. 459, 46 S. E. 467; Richmond L. Wks. v. Ford, 94 Va. 627, 27 S. E. 509.

Testimony may be based on observations made in the locality. Crooker v. L. & M. Co., 34 Wash. 191, 75 P. 632.

A teacher of long experience may testify to the customary time of engaging teachers. Peacock v. Coltrane (Tex. Civ.), 99 S. W. 107.

An experienced private secretary to a government officer and a chief clerk in the office may testify of the usage therein. Lorenz v. U. S., 24 App. D. C. 337.

Qualified testimony as to a usage is not the expression of an opinion. Thayer v. Smoky Hollow C. Co., 121 Ia. 121, 96 N. W. 718. But *compare* Schermer v. McMahon, 108 Mo. App. 36, 82 S. W. 535.

Assuming the existence of a custom and acting on it by witnesses who have not tested it nor heard of it from others does not show the existence. Dieling v. R. Co., 66 Md. 120, 6 A. 592; Russell v. Ferguson, 77 Vt. 423, 60 A. 802.

959-30 Hawaiian A. Co. v. Norris, 12 Haw. 229; Schermer v. McMahon, 108 Mo. App. 36, 82 S. W. 535; Nagle v. Hake, 123 Wis. 256, 101 N. W. 409.

Expert evidence is competent to show the ordinary usage and proper method in dealing with dangerous agencies. Bardsley v. Gill, 218 Pa. 56; Parlett v. Dunn, 102 Va. 459, 46 S. E. 467. And the usual and customary charge for exchange, as well as the custom as to charging interest for the amount for which drafts have been drawn. Sullivan v. Owens (Tex. Civ.), 90 S. W. 690.

959-31 Horst v. Lovdal, 113 App. Div. 277, 98 N. Y. S. 996; Collins v. Mechling, 1 Pa. Super. 594; Prigg v. Preston, 28 Pa. Super. 272; Smith v. Min. Co., 38 Wash. 454, 80 P. 779 (as to duties of mine employe must be limited to the mine in question). But in Dossett v. L. Co., 40 Wash. 276, 82 P. 273, it was held competent to receive evidence of the customs or rules in force in other mills of the same kind and capacity concerning the duties of employes of the character alleged to have caused the injury sued for. Questions must not be indefinite. Cook v. T. Co. (Mass.), 83 N. E. 325.

The evidence need not cover the whole state. — It is sufficient if the custom is shown to be generally recognized and observed by those engaged in the kind of transactions to which it applies within the region where it is claimed to exist, and it is not essential that it be observed in every individual transaction. Traders Ins. Co. v. Dobbins, 114 Tenn. 227, 86 S. W. 383. But the existence of a general custom is not shown by the testimony of witnesses from a single locality. National F. Ins. Co. v. Hanberg, 215 Ill. 378, 74 N. E. 377.

959-32 Collins v. Mechling, 1 Pa. Super. 594; Prigg v. Preston, 28 Pa. Super. 272.

Remoteness. — Proof must not be remote from the occurrence in question. S. v. Hoffman, 120 La. 949, 45 S. 951.

959-33 Lauchheimer v. Jacobs, 126 Ga. 261, 55 S. E. 55; Penland v. Ingle, 138 N. C. 456, 50 S. E. 850.

960-35 Biggs v. Langhammer, 103 Md. 94, 63 A. 198.

960-36 Ennis Brown Co. v. Hurst, 1 Cal. App. 752, 82 P. 1056; Stern v. Simons, 77 Conn. 150, 58 A. 696; McKown v. Gettys, 25 Ky. L. R. 2070, 80 S. W. 169; Birely v. Dodson (Md.), 68 A. 488.

960-37 Gardner v. Hodgson Co., (1903) App. Cas. (Eng.) 229, (1901) 2 Ch. 198; Jones v. Am. L. B. Co., 109 N. Y. S. 706.

961-38 Custom of street car operators to give funeral processions right of way may be shown on the issue of negligence. Wilmington C. R. Co. v. White (Del.), 66 A. 1009.

961-39 Chicago etc. R. Co. v. Lindeman, 143 Fed. 946, 75 C. C. A. 18; Eady v. C. & L. Co., 123 Ga. 557, 51 S. E. 661, 1 L. R. A. (N. S.) 650; Peoples Sav. Bk. v. Smith, 114 Ga. 185, 39 S. E. 920; Smith v. Landa (Tex. Civ.), 101 S. W. 470.

Instances may be shown of departure from the custom (Parrott v. R., 140 N. C. 546, 53 S. E. 432; S. v. R., 58 N. H. 410), if they are not too remote. S. v. R., supra. And instances of non-observance by other employes may not be shown if the investigation would be unduly prolonged. S. v. R., supra.

If the custom relied upon is not general, residents of the locality in which it is alleged to have been established may testify that they have no knowledge of it. Prigg v. Preston, 28 Pa. Super. 272.

961-40 Sloss-S. Co. v. Smith (Ala.), 40 S. 91; McDonough v. E. Co., 111 App. Div. 585, 98 N. Y. S. 90; Texas C. R. Co. v. Waldie (Tex. Civ.), 101 S. W. 517; Parlett v. Dunn, 102 Va. 459, 46 S. E. 467; Nagle v. Hake, 123 Wis. 256, 101 N. W. 409.

Custom in particular cases. — Though it is true that no single instance may prove a custom, evidence by different witnesses, though ignorant as to the general custom, as to the custom in the particular establishments in which they are employed is proper to go to the jury as the basis for a finding as to what such general custom is. Bardsley v. Gill, 218 Pa. 56.

961-41 A notarial certificate is prima facie proof that paper was presented in accordance with local custom. Columbian B. Co. v. Bowen (Wis.), 114 N. W. 451.

The custom of an employer as to hiring men by the year may be shown. Arkadelphia L. Co. v. Asman (Ark.), 107 S. W. 1171.

Weight to be given as between connecting carriers. — The presumption that, as between connecting carriers, the last is the negligent one, is not overcome by proof that it was their custom, where freight was discharged at a joint station, not to regard it as delivered to the last carrier until a record of it was made in its books. Kansas City S. R. Co. v. Embrey, 76 Ark. 589, 90 S. W. 15.

DAMAGES [Vol. 4.]

Presumption as to liquidated damages, 8-12; *Notice of claim,* 11-19; *Quantum of proof,* 11-19; *Compensation for pain,* 11-19; *Comparative value of goods,* 11-19; *Injury to trees; scope of inquiry,* 14-32; *What facts provable as between vendor and vendee,* 16-34; *On breach of contract to locate a depot,* 16-34; *Entirety of damages,* 17-36; *Belief of plaintiff in Christian Science,* 19-41; *Expenses to lessen or prevent damages,* 20-42; *Profits resulting from contract of agency,* 22-48; *Loss of earning capacity,* 24-53; *Profits of business,* 25-54; *Contract for long time,* 25-54; *On breach of contract to convey land,* 25-54; *Breach of partnership contract,* 25-54; *Breach of contract for concessions,* 25-54; *Injury to growing crops,* 27-61.

4-1 Western U. T. Co. v. Totten, 141 Fed. 533, 72 C. C. A. 591; Grace & H. Co. v. Strong, 127 Ill. App. 336; Lampert v. D. Co., 119 Mo. App. 693, 100 S. W. 659.

There is no presumption of mental anguish on the part of a stepmother because of negligence in advising

her of the death of a stepson. Harrison v. Tel. Co., 143 N. C. 147, 55 S. E. 435.

4-2 Cothran v. Witham, 123 Ga. 190, 51 S. E. 285; Grau v. Grau, 37 Ind. App. 635, 77 N. E. 816; Clark v. Exp. Co., 130 Ia. 254, 106 N. W. 642; Green v. D. Co., 113 La. 869, 37 S. 858; Phillips v. Crosby, 70 N. J. L. 785, 59 A. 142; Coppola v. Kraushaar, 102 App. Div. 306, 92 N. Y. S. 436; Hotel Co. v. I. & F. Co., 41 Wash. 620, 84 P. 402; W. H. Kiblinger Co. v. Bank, 131 Wis. 595, 111 N. W. 709.

It is presumed that marketable property could have been sold at the market price. Floyd v. Mann, 146 Mich. 356, 109 N. W. 679. And that parties who have agreed to erect a store building and carry a stock of goods therein have contracted with reference to what is usual and customary in the locality. Iowa-M. L. Co. v. Conner (Ia.), 112 N. W. 820.

4-3 Scope of rule. — Same rule applies to personal torts. Davis v. R. Co., 117 La. 320, 41 S. 587. And in case of fraud. Thompson v. Newell, 118 Mo. App. 405, 94 S. W. 557.

Increase in value of land because of legal wrong does not prevent recovery of nominal damages. Crabtree C. M. Co. v. Hamby, 28 Ky. L. R. 687, 90 S. W. 226; 1 Sutherland on Damages (3d ed.), § 2.

It is presumed that the employment of physicians results in expense and that their help may be needed in future, the continuance of suffering being shown. Webster v. R. Co., 42 Wash. 364, 85 P. 2.

5-4 Washington T. Co. v. Downey, 26 App. D. C. 258; Dorn v. Cooper (Ia.) 117 N. W. 1; Ott v. Pub. Co., 40 Wash. 308, 82 P. 403.

6-6 Milledgeville W. Co. v. Fowler 129 Ga. 111, 58 S. E. 643; Palmer v. Ingram, 2 Ga. App. 200, 58 S. E. 362 (it is immaterial that there is neither plea nor answer); Seventh St. P. M. Co. v. Schaefer, 30 Ky. L. R. 623, 99 S. W. 341; D. O. Haynes & Co. v. Nye, 185 Mass. 507, 70 N. E. 932; Parkins v. R. Co. (Neb.), 107 N. W. 260; New York B. N. Co. v. E. & P. Co., 92 App. Div. 427, 87 N. Y. S. 200; Rau v. Weyand, 89 App. Div. 200, 85 N. Y. S. 916; Bradford v. F. Co., 115 Tenn. 610, 92 S. W. 1104; Van Alstyne v. Morrison, 33 Tex. Civ. 670, 77 S. W. 655; Davidson v. Munsey, 29 Utah 181, 80 P. 743; Hotel Co. v. I. & F. Co., 41 Wash. 620, 84 P. 402; Sproul v. Huston, 42 Wash. 106, 84 P. 631.

7-7 The Loch Trool, 150 Fed. 429; Postal Tel. Co. v. Peyton, 124 Ga. 746, 52 S. E. 803; Farr v. R. Co. (Idaho), 93 P. 957; Illinois C. R. Co. v. Trustees, 212 Ill. 406, 72 N. E. 39; Coalgate Co. v. Isherwood (Ind. Ter.), 104 S. W. 565; Freeman v. Strobehn, 122 Ia. 157, 97 N. W. 1094; Louisville & N. R. Co. v. McClain, 23 Ky. L. R. 1878, 66 S. W. 391; Nicholson v. Merritt, 23 Ky. L. R. 2281, 67 S. W. 5; Harrison v. Tel. Co., 143 N. C. 147, 55 S. E. 435; Woodhouse v. Powles, 43 Wash. 617, 86 P. 1063.

The loss or damage in money need not be shown, but facts from which the amount may be inferred. Malone v. R. Co. (Cal.), 91 P. 522; St. Louis S. R. Co. v. Acker (Tex. Civ.), 99 S. W. 121; Gulf etc. R. Co. v. Booth (Tex. Civ.), 97 S. W. 128.

Mental suffering is inferred from a severe physical injury. Galveston etc. R. Co. v. Garrett (Tex. Civ.), 98 S. W. 932, and local cases cited.

8-8 Wrongdoer need not be shown to have contemplated the effects of his act. Cowan v. T. Co., 122 Ia. 379, 98 N. W. 281.

Malice and wantonness need not be shown though alleged, it being also alleged that the act was done unlawfully. Rice F. Co. v. R. Co., 35 Wash. 535, 77 P. 839.

An admission as to damage sustained is binding. Curtis v. R. & N. Co., 36 Wash. 55, 78 P. 133. See "ADMISSIONS," Vol. 1, p. 348, and that title, ante.

Exactitude in proof is not essential to the recovery of damages exceeding a nominal sum. Baker v. Hutchinson, 147 Ala. 636, 41 S. 809. This view has special application to injuries done infants (McDermott v. Severe, 25 App. D. C. 276), and where future pain and suffering are involved as the result of physical injury, proof of which is itself sufficient. Kirkham v. W.-O. Co., 39 Wash. 415, 81 P. 869.

8-12 If the stipulation concerning damages is held to be a penalty,

damages must be proven. Coen v. Birchard, 124 Ia. 394, 100 N. W. 48.

Presumption as to liquidated damages. — It is presumed where a forfeiture is unqualifiedly specified as a penalty it was the parties' intention to provide for a penalty and not for stipulated damages. Caesar v. Robinson, 174 N. Y. 492, 67 N. E. 58; Small v. Burke, 92 App. Div. 338, 86 N. Y. S. 1066; Wilkinson v. Colley, 164 Pa. 35, 30 A. 286; Knickerbocker I. Co. v. Montgomery, 21 Pa. C. C. 409; Keck v. Bieber, 148 Pa. 645, 24 A. 170. A mere receipt for the deposit of money is presumed to evidence the payment as security. Weinberg v. Greenberger, 47 Misc. 117, 93 N. Y. S. 530; Brodfeld v. Schlanger, 104 N. Y. S. 369. If the damages resulting from the non-performance of a contract will amount to the sum named as a penalty for its breach the party claiming such sum as stipulated damages has the burden of showing the fact. Small v. Burke, 92 App. Div. 338, 86 N. Y. S. 1066. And if the stipulation purports to liquidate the damages the burden of showing that such was not the intent is upon the party so claiming. Kelly v. Fejervary, 111 Ia. 693, 83 N. W. 791; Selby v. Matson (Ia.), 114 N. W. 609.

8-13 Coghlin v. La Fonderie, 34 Can. Sup. 153; Western U. T. Co. v. Cashman, 132 Fed. 805, 65 C. C. A. 607; Prince v. Ins. Co., 77 S. C. 187, 57 S. E. 766 (breach of contract).

Malice is sometimes presumed. Nicholson v. Merritt, 23 Ky. L. R. 2281, 67 S. W. 5; Shoemaker v. Sonjn, 15 N. D. 518, 108 N. W. 42. It is not always necessary that it exist, as where a wrong is done wilfully, wantonly or recklessly. Thomasson v. R. Co., 72 S. C. 1, 51 S. E. 443. The denial of a statutory right may justify an award of punitive damages. Parks v. Cotton Mills, 75 S. C. 560, 56 S. E. 234.

Threats as to future action will not sustain the recovery of exemplary damages. Waggoner v. Snody, 98 Tex. 512, 85 S. W. 1134.

9-14 Louisville & N. R. Co. v. Mount, 31 Ky. L. R. 210, 101 S. W. 1182.

9-15 Neafie v. P. & P. Co., 72 N. J. L. 340, 62 A. 1129.

9-16 Cole v. Gray, 70 Kan. 705, 79 P. 654; Seal v. Holcomb (Tex. Civ.), 107 S. W. 916; Girard v. Moore, 86 Tex. 675, 26 S. W. 945; Lightfoot v. Murphy (Tex. Civ.), 104 S. W. 511; Malin v. McCutcheon, 33 Tex. Civ. 387, 76 S. W. 586; Rogers v. O'Barr (Tex. Civ.), 76 S. W. 593.

The money extent of the actual damage need not be found to sustain a judgment for exemplary damages. McConathy v. Deck, 34 Colo. 461, 83 P. 135. Proof of nominal damages resulting from a substantial injury will support exemplary damages. Favorite v. Cottrill, 62 Mo. App. 119; Robinson v. Goings, 63 Miss. 500. Nominal damages will support the recovery of punitive damages. Louisville & N. R. Co. v. Smith, 141 Ala. 335, 37 S. 490; Goodson v. Stewart (Ala.), 46 S. 239.

10-18 American China D. Co. v. Boyd, 148 Fed. 258; Lillard v. D. & W. Co., 134 Fed. 168, 67 C. C. A. 74; Pickles v. Ansonia, 76 Conn. 278, 56 A. 552; Baxter v. Camp, 71 Conn. 245, 41 A. 803; Ramsey v. S. & E. Co. (N. J. Eq.), 65 A. 461; Huntington E. P. Co. v. Parsons (W. Va.), 57 S. E. 253.

11-19 Western U. T. Co. v. Totten, 141 Fed. 533, 72 C. C. A. 591; Patton v. R. Co., 179 U. S. 658; Chicago etc. R. Co. v. Heil, 154 Fed. 626; Fleming v. Pullen (Tex. Civ.), 97 S. W. 109. But *compare* Bunck v. R. Co. (Ia.), 115 N. W. 1013. As to the sufficiency of evidence, see New York F. Co. v. Wynkoop, 29 App. D. C. 594; Mitchell v. L. Co., 43 Wash. 195, 86 P. 405; Harris v. Mt. Vernon, 41 Wash. 444, 83 P. 1023.

Though it may be presumed that mental suffering is connected with bodily pain, it cannot be presumed what the cause of the pain was. Houston etc. R. Co. v. Reasoner, 36 Tex. Civ. 274, 81 S. W. 329.

Notice of claim. — The party who alleges that notice of the demand for damages has not been given in accordance with the terms of the contract must show the fact. Texas & P. R. Co. v. Crowley (Tex. Civ.), 86 S. W. 342, and local cases cited.

Extent of plaintiff's interest in property owned jointly must be shown by him. Waggoner v. Snody, 98 Tex. 512, 85 S. W. 1134.

Quantum of proof. — The fact and extent of loss or injury must be shown with reasonable certainty. Lake Drummond v. T. & S. D. Co., 142 Fed. 41, 73 C. C. A. 227; Dean v. Stanifer, 37 Tex. Civ. 181, 83 S. W. 230; Calkins v. F. Co., 150 Cal. 426, 88 P. 1094. The same rule applies to prospective damages. Chicago etc. R. Co. v. DeClow, 124 Fed. 142, 61 C. C. A. 34; Chicago etc. R. Co. v. Lindeman, 143 Fed. 946, 75 C. C. A. 18; Chicago etc. R. Co. v. Newsome, 154 Fed. 665; The North Star, 151 Fed. 168; Malone v. R. Co. (Cal.), 91 P. 522; Cordiner T. Co. v. Tract. Co., 5 Cal. App. 400, 91 P. 436; Chicago etc. R. Co. v. Ullrich, 213 Ill. 170, 72 N. E. 815; Huggard v. Glucose S. R. Co., 132 Ia. 724, 109 N. W. 475; Wilkerson v. R. Co., 126 Mo. App. 613, 105 S. W. 24; Garard v. C. & C. Co., 207 Mo. 242, 105 S. W. 767; Nixon v. R. Co. (Neb.), 113 N. W. 117, and local cases cited. In Texas prospective damages may be recovered if it is shown they are reasonably probable to occur. Galveston etc. R. Co. v. Paschall (Tex. Civ.), 92 S. W. 446; Tipton v. Tipton (Tex. Civ.), 105 S. W. 830, and local cases cited; St. Louis S. R. Co. v. Garber (Tex. Civ.), 108 S. W. 742; St. Louis S. R. Co. v. Hawkins (Tex. Civ.), 108 S. W. 736.

Compensation for pain. — "It is well settled that as to mental and physical pain and humiliation it is unnecessary to submit any evidence as to the value thereof and the amount of damages to compensate therefor, but that the same is a question entirely and exclusively for the jury." Tarr v. R. Co. (Idaho), 93 P. 957, *cit.* No. Chicago S. R. Co. v. Fitzgibbons, 180 Ill. 466, 54 N. E. 483; Springfield R. Co. v. Hoeffner, 175 Ill. 634, 51 N. E. 884; Sutherland on Damages (3d. ed.), § 1243; Hughes' Inst. to Juries, §§ 652-3. The proof as to the extent of damage in tort actions need not be direct and positive. Wood v. Monteleone, 118 La. 1005, 43 S. 657.

Comparative value of goods. Where damages are sought for injury to goods the testimony as to the value of those damaged must cover a sufficient quantity to enable the jury to make an intelligent comparison between their present and previous value. Keroes v. Weaver, 27 App. D. C. 384. Proof that twenty per cent. of the goods furnished were defective and that those tested were fairly representative of all furnished, is sufficient to show that all were of that nature. Forster v. Mfg. Co., 130 Wis. 281, 110 N. W. 226. The value of missing parcels, part of a large lot of unequal value, will be assumed, as against their possessor, to be of the average value of the whole. First Nat. Bk. v. R. Co., 97 Tex. 201, 77 S. W. 410.

Testimony to show a loss of profits in the future of a business which has not been profitable must clearly show a change in conditions favorable thereto. Des Allemands L. Co. v. T. Co., 117 La. 1, 41 S. 332.

11-21 Swanson v. R. Co., 116 Ia. 304, 89 N. W. 1088; Chicago etc. R. Co. v. Mosher, 76 Kan. 599, 92 P. 554.

Proof of injury to reputation need not be very specific. Columbia Nat. Bk. v. MacKnight, 29 App. D. C. 580.

A statement of a person's condition since being injured is rather of the nature of a collective fact than of an opinion. Mobile L. & R. Co. v. Wash, 146 Ala. 295, 40 S. 560.

The value of services a party could render if he had not been injured may be testified of, reasons being given. City E. R. Co. v. Smith, 121 Ga. 663, 49 S. E. 724; § 5285 Civ. Code.

12-24 Muncie P. Co. v. Martin, 164 Ind. 30, 72 N. E. 882; Blunck v. R. Co. (Ia.), 115 N. W. 1013; Willitts v. R. Co., 88 Ia. 281, 55 N. W. 313, 21 L. R. A. 608; South Omaha v. Ruthjen, 71 Neb. 545, 99 N. W. 240; Ft. Worth etc. R. Co. v. Nat. Bk., 36 Tex. Civ. 293, 81 S. W. 1050.

The purpose for which growing trees are valuable may be shown by opinions. Union P. R. Co. v. Murphy (Neb.), 107 N. W. 757.

12-25 McCrary v. Pritchard, 119 Ga. 876, 47 S. E. 341; Owen v. R. Co., 109 Mo. App. 608, 83 S. W. 92; Raymond v. Edelbrock, 15 N. D: 231,

107 N. W. 194; Pacific L. S. Co. v. Murray, 45 Or. 103, 76 P. 1079; De Wald v. Ingle, 31 Wash. 616, 72 P. 469; Berg v. B. & R. I. Co., 38 Wash. 342, 80 P. 528.

13-26 Clark v. R. Co., 142 Cal. 614, 76 P. 507.

14-30 The Mobila, 147 Fed. 882; St. Louis etc. R. Co. v. Edwards, 78 Fed. 745, 24 C. C. A. 300; Montana R. v. Warren, 137 U. S. 348; Muncie P. Co. v. Martin, 164 Ind. 30, 72 N. E. 882; Richardson v. Sioux City (Ia.), 113 N. W. 928; McCrary v. R. Co., 109 Mo. App. 567, 83 S. W. 82; Watson v. M. & S. Co., 31 Mont. 513, 79 P. 14; Webb v. Daggett (Tex. Civ.), 87 S. W. 743 (amount of deterioration in value of improvements); St. Louis S. R. Co. v. Crabb (Tex. Civ.), 80 S. W. 408; Ingram v. B. Co., 35 Wash. 191, 77 P. 34.

Assessment of property by the proper officer, who fixed its value, is not an admission. Boyer v. R. Co., 97 Tex. 107, 76 S. W. 441. See "ADMISSIONS," Vol. 1, p. 5, and same title, ante.

14-31 Hartford D. Co. v. Calkins, 109 Ill. App. 579.

14-32 McCune v. R. Co., 154 Fed. 63; Montgomery S. R. Co. v. Hastings, 138 Ala. 432, 35 S. 412 (change in disposition of horse affecting its value); Brown v. Bannister, 14 Haw. 34; Deering v. Barzak, 227 Ill. 71, 81 N. E. 1 (loss of virility); Postal Tel. Co. v. Likes, 225 Ill. 249, 80 N. E. 136 (loss of virility); Illinois C. R. Co. v. Wilson, 31 Ky. L. R. 789, 103 S. W. 364 (mental suffering resulting from false imprisonment); Thompson v. Brotherhood (Tex. Civ.), 91 S. W. 834 (expulsion of member); McClure v. Campbell, 42 Wash. 252, 84 P. 825 (manner of tenant's eviction so as to afford a basis for recovery for mental suffering); Kelley v. C. Co., 120 Wis. 84, 97 N. W. 674.

In an action for dishonoring a check proof may be made of all subsequent checks so treated. Columbia Nat. Bk. v. MacKnight, 29 App. D. C. 580. But not of the previous dishonor of a check. Sprowl v. Bank, 27 Ky. L. R. 874, 86 S. W. 1117.

Injury to reputation is not inflicted by breach of a contract to loan money. Carsey v. Farmer, 25 Ky. L. R. 1965, 79 S. W. 245.

Injury to trees; scope of inquiry. Where trees are destroyed or injured the courts are not agreed as to the admissibility of evidence to show the effect of the wrong on the whole premises. The weight of authority seems to favor the right to do so. Louisville & N. R. Co. v. Beeler, 31 Ky. L. R. 750, 103 S. W. 300; Illinois C. R. Co. v. Riney, 21 Ky. L. R. 1056, 54 S. W. 1100; Illinois C. R. Co. v. Scheible, 24 Ky. L. R. 1708, 72 S. W. 325; Cincinnati etc. R. Co. v. Falconer, 30 Ky. L. R. 152, 97 S. W. 727; N. & W. R. Co. v. Bohannon, 85 Va. 293, 7 S. E. 236; Gilman v. Brown, 115 Wis. 1, 91 N. W. 227; Montgomery v. Locke, 72 Cal. 75, 13 P. 401; Stoner v. R. Co., 45 La. Ann. 115, 11 S. 875; Burdick v. R. Co., 87 Ia. 384, 54 N. W. 439; Fremont v. R. Co., 30 Neb. 70, 46 N. W. 217; White v. R. Co., 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824; Bailey v. R. Co., 3 S. D. 531, 54 N. W. 596, 19 L. R. A. 653; Chicago etc. R. Co. v. Mosher, 76 Kan. 599, 92 P. 554, and local cases cited; Union P. R. Co. v. Murphy (Neb.), 107 N. W. 757; Alberts v. Husenetter (Neb.), 110 N. W. 657. *Contra*, Dwight v. R. Co., 132 N. Y. 199, 30 N. E. 398, 28 Am. St. 563, 15 L. R. A. 612. In some states evidence may be given of the value of trees in place or of the diminished value of the estate. Atchison etc. R. Co. v. Geiser, 68 Kan. 281, 75 P. 68; Mogollon G. & C. Co. v. Stout (N. M.), 91 P. 724.

Unsuccessful efforts to sell damaged property for a stated price cannot be shown. Howard v. Faby (Tex. Civ.), 93 S. W. 225.

16-33 Hadley v. Baxendale, 9 Exch. (Eng.) 341; Lillard v. D. & W. Co., 134 Fed. 168, 67 C. C. A. 74; Lewis v. Holmes, 109 La. 1030, 34 S. 66 (failure to complete bridal trousseau, humiliation of bride and inability to accept social invitations); South Gardiner L. Co. v. Bradstreet, 97 Me. 165, 53 A. 1110; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718.

Price paid for property. — If property which fails to comply with the warranty under which it was sold is bought at a price less than agreed upon, evidence of the price paid is admissible on the question of dam-

ages. Petrified Bone M. Co. v. Rogers, 150 Fed. 445.

Pleadings in an injunction suit are competent to show what damages were contemplated when a supersedeas bond was issued. Waycross A. L. R. Co. v. R. Co., 119 Ga. 983, 47 S. E. 582.

16-34 Williams v. Tel. Co., 136 N. C. 82, 48 S. E. 559; Harrison v. Tel. Co., 143 N. C. 147, 55 S. E. 435.

What facts provable as between vendor and vendee. — As against one who has broken a contract to supply springs to an established manufacturer of vehicles for use the latter may show even a general knowledge by the former of the manner of conducting the business; the custom of operating the factory and the extent to which the default interfered therewith; the real effect of the default; the ordinary and usual capacity of the factory; the supply of material on hand and of available labor; sales in excess of ability to supply in consequence of the default; the inability to procure such springs in the market; the vendor's promises to supply them, thereby inducing the suspension of efforts to obtain them elsewhere, and expenses incurred in efforts made for that purpose. On the other hand, it was not proper for the manufacturer to show the money value of the time lost by employes; the profits on vehicles ordered but not sold, nor wilfulness on the vendor's part in nonfulfilling his contract. Kelley v. C. Co., 120 Wis. 84, 97 N. W. 674. *Compare* Connersville W. Co. v. C. Co., 166 Ind. 123, 76 N. E. 294.

Testimony of sureties as to the nature of the damages they understood a supersedeas bond would cover is irrelevant. Waycross A. L. R. Co. v. R. Co., 119 Ga. 983, 47 S. E. 582.

On breach of contract to locate a depot on land it may be shown what similar lands contiguous to that of plaintiff's and situated along defendant's road sold for and the advantages of the land in question for business and suburban uses, and also the value the location of the depot as agreed would have given such land. Louisville etc. R. Co. v. Whipps, 118 Ky. 121, 80 S. W. 507, 25 Ky. L. R. 2312; Paducah v. Allen, 111 Ky. 361, 23 Ky. L. R. 701, 63 S. W. 981; Watterson v. R. Co., 74 Pa. 208; Iowa-M. L. Co. v. Conner (Ia.), 112 N. W. 820 (breach of contract to build store).

Breach of marriage contract cannot be shown as result of failure to have gowns ready in time. Coppola v. Kraushaar, 102 App. Div. 306, 92 N. Y. S. 436.

17-35 **Such evidence as is indicated in the text** has been regarded as an admission of liability. See Howland v. Bartlett, 86 Ga. 669, 12 S. E. 1068; Grimes v. Keene, 52 N. H. 330; Missouri P. R. Co. v. Lehmberg, 75 Tex. 61, 12 S. W. 838; Missouri etc. R. Co. v. Kellerman (Tex. Civ.), 87 S. W. 401. But see also "ADMISSIONS," Vol. 1, p. 348, and that title, ante.

The sum paid by the consignee of property to the purchaser in settlement of a suit may be shown by the party responsible for the depreciation in its value in a suit by the consignee. St. Louis etc. R. Co. v. Grain Co. (Tex. Civ.), 87 S. W. 355.

17-36 Treat v. Hiles, 81 Wis. 280, 50 N. W. 896; Guetzkow B. Co. v. Andrews, 92 Wis. 214, 66 N. W. 119; McCall v. Icks, 107 Wis. 232, 83 N. W. 300.

Entirety of damages. — The rule that all the detriment proximately caused by a wrongful act may be recovered in a single action applies as well to special as to general damages; hence evidence concerning the effects of the wrong after action begun is competent. Shoemaker v. Sonju, 15 N. D. 518, 108 N. W. 42, 3 Sutherland on Damages (3rd ed.), §844; Hicks v. Drew, 117 Cal. 305, 49 P. 189; Chicago etc. R. Co. v. Heil, 154 Fed. 626. Where damages are assessable up to the rendition of verdict they may be proven if they are the natural and proximate consequences of the wrong complained of and do not constitute a new cause of action. Cooper v. Sillers, 30 App. D. C. 567; Wilcox v. Plummer, 4 Pet. (U. S.) 172; Fifth Nat. Bk. v. R. Co., 28 Fed. 231; Fowle v. New Haven Co., 107 Mass. 352; Cooke v. England, 27 Md. 14, 92 Am. Dec. 618.

17-37 R. Co. v. Higdon, 111 Tenn. 121, 76 S. W. 895 (abatable nuis-

ance). Jenkins v. Kirtley, 70 Kan. 801, 79 P. 671 (arrest of defendant after action begun for breach of contract).

17-38 **An agreement between indemnitor and indemnitee,** made after action brought, may be proven, though it is not binding except as fixing the maximum of recovery. Oriental L. Co. v. L. Co., 103 Va. 730, 50 S. E. 270.

18-39 **Other independent acts** cannot be shown as ground for recovering exemplary damages unless they are pleaded. Central of G. R. Co. v. B. Co., 122 Ga. 646, 50 S. E. 473 (discrimination in freight rates); Leavitt v. Cutler, 37 Wis. 46 (seduction and breach of promise).

19-41 Louisville & N. R. Co. v. Carothers, 23 Ky. L. R. 1673, 65 S. W. 833; 66 S. W. 385; Mendell v. Willyoung, 42 Misc. 210, 85 N. Y. S. 647; Pacific L. S. Co. v. Murray, 45 Or. 103, 76 P. 1079; Leachman v. Cohen (Tex. Civ.), 91 S. W. 809 (provocation in assault and battery); Texas & P. R. Co. v. Lynch (Tex. Civ.), 87 S. W. 884 (refusal of passenger to pay fare unjustly demanded); Hardin v. R. Co. (Tex. Civ.), 88 S. W. 440; Houston etc. R. Co. v. Batchler, 37 Tex. Civ. 116, 83 S. W. 902 (insult).

Benefit of property. — It may be shown that the oil well shot was one of a system of wells and that the shooting caused an increased flow of oil and added to the value of the system. Donnan v. T. Co., 26 Pa. Super. 324.

Scope of evidence must extend to all elements of the defense and tend to prove all essential facts. Huntington E. P. Co. v. Parsons (W. Va.), 57 S. E. 253.

An offer to marry plaintiff after action brought for breach of contract to do so, cannot be shown in mitigation. Heasley v. Nichols, 38 Wash. 485, 80 P. 769. See "Breach of Promise," Vol. 2, pp. 732, 757, and that title, ante.

The occurrence of a subsequent event, without fault on defendant's part, which would have destroyed the growing crop in question may be shown. In such a case there would have been nothing left as a basis on which to prove the damage done by defendant. International etc. R. Co. v. Jackson (Tex. Civ.), 103 S. W. 709.

Breach of shipping articles. — It cannot be shown by parol that a shipowner who has deviated from the voyage specified in the shipping articles gave the crew notice of what the voyage would be. Turtle v. S. Co., 154 Fed. 146.

Belief of plaintiff in Christian Science may be shown in an action to recover for physical and mental suffering. Fort Worth etc. R. Co. v. Travis (Tex. Civ.), 99 S. W. 1141.

In an action for conversion defendant may claim a forfeiture of property unlawfully carried by plaintiff without proving a judgment of conviction, it being provided that it shall become forfeited immediately upon being taken. McConathy v. Deck, 34 Colo. 461, 83 P. 135.

Evidence of good faith by trespassers on public land. See Anderson v. U. S., 152 Fed. 87.

Plaintiff's character may be shown as affecting the probable loss of earnings. Abbott v. Folliver, 71 Wis. 64, 36 N. W. 622; Carlton v. R. Co., 128 Mo. App. 451, 106 S. W. 1100. *Contra,* St. Louis etc. R. Co. v. Smith, 34 Tex. Civ. 612, 79 S. W. 340. And on the question of the indignity and humiliation that may be undergone. Boyle v. Case, 18 Fed. 880. See Kingston v. R. Co., 112 Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 131 (habits of plaintiff).

20-42 Wicker v. Hoppock, 73 U. S. 94; Warren v. Stoddard, 105 U. S. 224; Lillard v. D. & W. Co., 134 Fed. 168, 67 C. C. A. 74; U. S. v. Withers, 130 Fed. 696, 65 C. C. A. 16; Mabb v. Stewart, 147 Cal. 413, 81 P. 1073; Aikin v. Perry, 119 Ga. 263, 46 S. E. 93; Glasgow v. R. Co., 191 Mo. 347, 89 S. W. 915; Mahoney v. Kansas City, 106 Mo. App. 39, 79 S. W. 1168; Larkin v. Heckscher, 51 N. J. L. 133, 16 A. 703, 3 L. R. A. 137; Ramsey v. S. & E. Co. (N. J. Eq.), 65 A. 461; Brown v. Weir, 95 App. Div. 78, 88 N. Y. S. 479; Western U. Co. v. Johnsey (Tex. Civ.), 109 S. W. 251; Kellogg v. Malick, 125 Wis. 239, 103 N. W. 1116; Northern S. Co. v. Wangard, 123 Wis. 1, 100 N. W. 1066.

The evidence must be limited to such acts and expenditures as are reasonable. The Baltimore, 8 Wall. (U. S.) 377; The Falcon, 19 Wall. (U. S.) 75; Eisele v. Oddie, 128 Fed. 941; Sanitary Dist. v. McMahon, 110 Ill. App. 510; Brazell v. Cohn, 32 Mont. 556, 81 P. 339; Ramsey v. S. & E. Co. (N. J. Eq.), 65 A. 461; Welliver v. C. Co., 23 Pa. Super. 79; Pecos River R. Co. v. Latham (Tex. Civ.), 88 S. W. 392.

Expenses prudently incurred in an effort to lessen or prevent loss may be proved. McKenzie v. Mitchell, 123 Ga. 72, 51 S. E. 34; Atwood T. Co., 185 Mass. 557, 71 N. E. 72; Missouri etc. R. Co. v. Allen (Tex. Civ.), 87 S. W. 168; Griffith v. B. & L. Co., 55 W. Va. 604, 48 S. E. 442; Kelley v. C. Co., 120 Wis. 84, 97 N. W. 674. As may the effect of efforts looking thereto, if prudently made, though they result in adding to the damage. Chicago C. R. Co. v. Saxby, 213 Ill. 274, 72 N. E. 755, 68 L. R. A. 164; Joliet v. Le Pla, 109 Ill. App. 336; Seeton v. Dunbarton, 73 N. H. 134, 59 A. 944.

20-43 See Sun Mfg. Co. v. Egbert, 37 Tex. Civ. 512, 84 S. W. 667.

20-44 Plaintiff may absolve himself from the consequence of his neglect to lessen the damage sustained by showing reliance on defendant's promise to perform his contract. Lillard v. D. & W. Co., 134 Fed. 168, 67 C. C. A. 74; Kelley v. C. Co., 120 Wis. 84, 97 N. W. 674.

21-45 Silva v. Bair, 141 Cal. 599, 75 P. 162; Broadstreet v. Hall, 32 Ind. App. 122, 69 N. E. 415.

21-46 Hitchcock v. Anthony, 83 Fed. 779, 28 C. C. A. 80; U. S. v. Behan, 110 U. S. 338; Howard v. Mfg. Co., 139 U. S. 199; Emerson v. P. Co., 96 Minn. 1, 104 N. W. 573, 1 L. R. A. (N. S.) 445; Ramsey v. Meade, 37 Colo. 465, 86 P. 1018; New Market Co. v. Embry, 20 Ky. L. R. 1130, 48 S. W. 980; Duvall v. Ferwerda, 146 Mich. 13, 108 N. W. 1115; White v. Leatherberry, 82 Miss. 103, 34 S. 358; Chicago etc. R. Co. v. Calvert (Tex. Civ.), 91 S. W. 825; Viles v. T. & P. Co., 79 Vt. 311, 65 A. 104; Kelley v. C. Co., 120 Wis. 84, 97 N. W. 674.

Under a plea of recoupment the same damage may be shown as in an action for breach of contract. Viles v. L. & P. Co., 79 Vt. 311, 65 A. 104.

22-47 Bartow v. R. Co., 73 N. J. L. 12, 62 A. 489.

22-48 Kenney v. Knight, 127 Fed. 403; Metzer v. Brincat (Ala.), 45 S. 633; Muller v. F. & M. Wks., 49 Fla. 189, 38 S. 64; Dady v. Condit, 209 Ill. 488, 70 N. E. 1088; Brown v. Hadley, 43 Kan. 267, 23 P. 492 (anticipated profits from cows); Town Co. v. Lincoln, 56 Kan. 145, 42 P. 706 (removal of stock and business); Fredonia G. Co. v. Bailey (Kan.), 94 P. 258 (established business); Currie F. Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268; American B. Co. v. Dist. Co., 32 Ky. L. R. 873, 107 S. W. 279; Bates M. Co. v. Iron Wks., 113 Ky. 372, 68 S. W. 423; Horn v. Carroll, 28 Ky. L. R. 839, 90 S. W. 559; Janney Mfg. Co. v. Banta, 26 Ky. L. R. 1089, 83 S. W. 130; Rhodes v. L. & L. Co., 105 Mo. App. 279, 79 S. W. 1145; Beckwith v. New York, 121 App. Div. 462, 106 N. Y. S. 175; Nash v. S. Co., 123 App. Div. 148, 108 N. Y. S. 336; Leffler v. Witten, 8 Ohio C. C. (N. S.) 192 (contract for personal services; Toledo v. Libbie, 19 Ohio C. C. 704, 51 Ohio St. 562 (a like contract); Wilson v. Wernwag, 217 Pa. 82, 66 A. 242; Imperial C. Co. v. C. Co., 138 Pa. 45, 20 A. 937; Puritan C. Co. v. Clark, 204 Pa. 556, 54 A. 350; Singer Mfg. Co. v. Christian, 211 Pa. 534, 60 A. 1087; Chisholm & M. Mfg. Co. v. U. S. C. Co., 111 Tenn. 202, 77 S. W. 1062; Mudge v. Adams, 37 Tex. Civ. 186, 83 S. W. 722; Wolf v. Galbraith, 35 Tex. Civ. 505, 80 S. W. 648; Belch v. Big S. Co. (Wash.), 89 P. 174; Chase v. Smith, 35 Wash. 631, 77 P. 1069 (personal labor).

Profit resulting from contract of agency. — On the breach of a contract of sole agency for certain territory for a term of years, compensation to be by commission, the extent and volume of the business done by plaintiff and his successor may be shown. Pittsburg G. Co. v. V. Co., 184 Pa. 36, 39 A. 223; Wells v. L. Assn., 99 Fed. 222, 30 C. C. A. 476, 53 L. R. A. 33; Emerson v. P. Co., 96 Minn. 1, 104 N. W. 573, 1 L. R. A. (N. S.) 445; Wakeman v. Mfg. Co., 101 N. Y. 205; 4 N. E. 264; Mueller v. Bethesda, 88 Mich. 390, 50 N. W. 319; Russell v. Brannan, 41

Neb. 567, 59 N. W. 901. *Compare* In re English Ins. Co., L. R. 5 Ch. App. (Eng.) 737; Pellett v. Ins. Co., 104 Fed. 502, 43 C. C. A. 669; Union v. Barton, 77 Ala. 148; Howe v. Bryson, 44 Ia. 159 (*mod.* by Hichhorn v. Bradley, 117 Ia. 130, 90 N. W. 592).

23-50 Iron City T. v. Welisch, 128 Fed. 693, 63 C. C. A. 245; Central C. & C. Co. v. Hartman, 111 Fed. 96, 49 C. C. A. 244; Smith v. Curran, 138 Fed. 150; Nichols v. Rasch, 138 Ala. 372, 35 S. 409; Southern R. Co. v. Coleman (Ala.), 44 S. 837; Connersville W. Co. v. C. Co., 166 Ind. 123, 76 N. E. 294; Schillinger Bros. Co. v. Bosch-R. Co. (Ia.), 116 N. W. 132; Atchison R. Co. v. Thomas, 70 Kan. 409, 78 P. 861; Gas Co. v. Glass Co., 56 Kan. 614, 44 P. 621; Carsey v. Farmer, 117 Ky. 826, 79 S. W. 245, 25 Ky. L. R. 1965; Weick v. Dougherty, 28 Ky. L. R. 930, 90 S. W. 966; Armistead v. R. Co., 108 La. 171, 32 S. 456; Des Allemands L. Co. v. T. Co., 117 La. 1, 41 S. 332; South Gardiner L. Co. v. Bradstreet, 97 Me., 165, 53 A. 1110; Winslow E. & M. Co. v. Hoffman (Md.), 69 A. 394; Gossage v. R. Co., 101 Md. 698, 61 A. 692; First Nat. Bk. v. Carroll, 35 Mont. 302, 88 P. 1012; Benyakar v. Scherz, 103 App. Div. 192, 92 N. Y. S. 1089; Callahan v. C. O. Co., 17 Okla. 544, 87 P. 331; McNeil v. S. Co., 207 Pa. 493, 56 A. 1067.

24-51 See Chicago etc. R. Co. v. Calvert (Tex. Civ.), 91 S. W. 825.

In such a case notice of the contract must be shown to have been given defendant. Baker & L. Mfg. Co. v. Clayton (Tex. Civ.), 90 S. W. 519; Bliss v. T. Co., 131 Fed. 51, 64 C. C. A. 289; Pine Bluffs I. W. v. Boling, 75 Ark. 469, 88 S. W. 306.

24-52 Enlow v. Hawkins, 71 Kan. 633, 81 P. 189; Bowen v. King, 146 N. C. 385, 59 S. E. 1044; Johnson v. R. Co., 140 N. C. 574, 5 S. E. 362.

24-53 See Chicago C. R. Co. v. Flynn, 131 Ill. App. 502; Botkin v. Miller, 190 Mass. 411, 77 N. E. 49; Bates v. Warrick (N. J.), 69 A. 185.

Loss of profits not provable in personal injury cases. Jordan v. R. Co. 124 Ia. 177, 99 N. W. 693; Mitchell v. R. Co. (Ia.), 114 N. W. 622. *Contra*, Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800.

Acceptance of bid. — The person with whom plaintiff would have contracted but for defendant's negligence may testify that such person's bid would have been accepted if it had been received. Texas & W. T. Co. v. Mackenzie, 36 Tex. Civ. 178, 81 S. W. 581.

Earning capacity may be shown by proof of the character of the business conducted, the time given it and the returns received. Mitchell v. R. Co. (Ia.), 114 N. W. 622, 3 Sutherland on Damages (3d ed.) § 945; Wallace v. R. Co., 195 Pa. 127, 45 A. 685, 52 L. R. A. 32; Chicago etc. R. Co. v. Posten, 59 Kan. 449, 53 P. 465; New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434, 97 Am. Dec. 722; Heer v. P. Co., 118 Wis. 57, 94 N. W. 789; El Paso E. Co. v. Murphy (Tex. Civ.), 109 S. W. 489; Goodhart v. R. Co., 177 Pa. 1, 35 A. 191, 55 Am. St. 705; Simpson v. R. Co., 210 Pa. 101, 59 A. 693 (profits of business as distinguished from profits of capital).

The profits made in leased premises may be shown for the purpose of fixing the value of the lease. Hayes v. Atlanta, 1 Ga. App. 25, 57 S. E 1087; Bass v. West, 110 Ga. 698, 36 S. E. 244.

25-54 Lazier G. E. Co. v. Du Bois, 130 Fed. 834, 65 C. C. A. 172 (average profits for sixteen months sufficient basis for computing profits during remaining eight months); Chicago U. T. Co. v. Brethauer, 223 Ill. 521, 79 N. E. 287 (income derived from personal effort); Treat v. Hiles, 81 Wis. 280, 50 N. W. 896; Kelley v. C. Co., 120 Wis. 84, 97 N. W. 674; Forster v. Mfg. Co., 130 Wis. 281, 110 N. W. 226. See Diamond R. Co. v. Harryman (Colo.), 92 P. 922 (proof of commissions earned under one employer not competent to show value of lost time when working for another employer under different conditions); Chicago R. Co. v. Flynn, 131 Ill. App. 502; Haas v. R. Co., 128 Mo. App. 79, 106 S. W. 599 (previous earnings inadmissible).

The amount for which subcontractors have undertaken to do the work which plaintiff has been prevented from doing is not competent proof of his loss. Brodie v. Frost, 108

N. Y. S. 414, *cit.* Story v. R. Co., 6 N. Y. 85.

Profits of a business cannot be shown if the facts disclose such a preponderance of the business element over the personal equation, or such an admixture of the two, that the question of personal earnings cannot be safely or properly segregated from returns upon capital invested. Kronold v. New York, 186 N. Y. 40, 78 N. E. 572; Weir v. R. Co., 188 N. Y. 416, 81 N. E. 168. See Masterson v. Mt. Vernon, 58 N. Y. 391. In the first case cited and in Fraser v. Buffalo, 123 App. Div. 159, 108 N. Y. S. 127, the personal earnings so predominated over other factors as to permit the proof of lost profits.

Contract for long time. — The profits realized on a contract for two years do not afford a safe criterion on which to base profits for the next three years. Des Allemands L. Co. v. T. Co., 117 La. 1, 41 S. 332.

On breach of contract to convey land evidence of its fair market value for subdivision into building lots is competent, the expectation of a demand therefor having affected the price. It is also competent to show sales of like property in the vicinity, though some of them were not for cash and were not fully consummated. Dady v. Condit, 209 Ill. 488, 70 N. E. 1088, 104 Ill. App. 507.

A vendee who desires to recoup damages because of delay in supplying property whereby he was unable to secure rent for the premises in which it was to be used must show a contract for their lease; it is not enough to show an arrangement with the lessees. American T. Co. v. Siegel, 221 Ill. 145, 77 N. E. 588.

Rule does not apply to a person not in business when the injury was done. Fisher v. Jansen, 128 Ill. 549, 21 N. E. 598.

Breach of partnership contract. — On the breach of a contract of partnership, profits made in the business may be shown, as may the prosperity and growth of the community during the term of the partnership, and plaintiff's skill and ability. Ramsay v. Meade, 37 Colo. 465, 86 P. 1018.

Breach of contract for concessions. On the partial breach of a contract granting concessions on a line of steamers it was competent to show the profits made thereon in previous years and during the time the instant contract was in effect; the kind of people plaintiffs were, their ability to do business, the nature of the business and other circumstances. Nash v. S. Co., 123 App. Div. 148, 108 N. Y. S. 336; Wakeman v. Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676.

25-55 Currie F. Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268.

The profits derived by the infringer of a trade-mark are not necessarily proof that plaintiff's damages were that sum. Davidson v. Munsey, 29 Utah 181, 80 P. 743.

Loss of profits by others engaged in the same business in the same locality and resulting from a like cause may be shown. Metzger v. Brincat (Ala.), 45 S. 633.

26-56 Nash v. S. Co., 123 App. Div. 148, 108 N. Y. S. 336.

26-58 Enlow v. Hawkins, 71 Kan. 633, 81 P. 189; Fredonia G. Co. v. Bailey (Kan.), 94 P. 258; Brown v. Hadley, 43 Kan. 276, 23 P. 492.

Opinions as to rental value may not be based upon the profit to be made nor rest upon hearsay knowledge as to the capacity of the property. Munson v. W. M. Co., 118 App. Div. 398, 103 N. Y. S. 502.

Quantum of proof. — If loss of profits are shown with reasonable certainty, such proof will not be neutralized by evidence of remote or doubtful contingencies. Barrett v. C. & C. Co., 55 W. Va. 395, 47 S. E. 154.

A contractor may testify what his profits on a contract would have been if it had been awarded him. Texas & W. T. Co. v. Mackenzie, 36 Tex. Civ. 178, 81 S. W. 581.

26-59 Southern R. Co. v. Reeder (Ala.), 44 S. 699; St. Louis etc. R. Co. v. Saunders (Ark.), 107 S. W. 194 (loss of crops so immature as to be without market value); Wiggins v. R. Co. (Mo. App.), 108 S. W. 574; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Rogers v. Bemus, 69 Pa. 432; Pennypacker v. Jones, 106 Pa. 237; Martin v. R. Co., 70 S. C. 8, 48 S. E. 616; Acker v. Knox-

ville, 117 Tenn. 224, 96 S. W. 973.

Rental value of an entire mill may be shown unless it is made to appear that a separate part of it would be used for another purpose while the delay to furnish machinery continued. Munson v. W. M. Co., 118 App. Div. 398, 103 N. Y. S. 502. Such value may be based on the use to which the mill has been put notwithstanding defendant undertook to put in machinery to adapt it to a different use. Munson v. W. M. Co., supra.

Effect of wrong on business. — One who claims damage for an injury to his business and has testified on cross-examination to an increase thereof since the wrong may show that there has been a general increase in business in the community. Boyer v. R. Co., 97 Tex. 107, 79 S. W. 441.

The value of the use of property employed in an established business may be shown where the business has been interrupted by failure to supply material according to contract. Kelley v. C. Co., 120 Wis. 84, 97 N. W. 674. But see Callahan v. C. O. Co., 17 Okla. 544, 87 P. 331.

27-60 Chicago v. Pulcyn, 129 Ill. App. 179, Crabtree C. M. Co. v. Hamby, 28 Ky. L. R. 687, 90 S. W. 226; Texas S. L. R. Co. v. Clifford (Tex. Civ.), 94 S. W. 168; Magee v. R. Co. (Tex. Civ.), 95 S. W. 1092.

27-61 Tubbs v. Roberts, 40 Colo. 498, 92 P. 220; Palmer v. Ingram, 2 Ga. App. 200, 58 S. E. 362; Blunck v. R. Co. (Ia.), 115 N. W. 1013; Carter v. R. Co., 128 Mo. App. 57, 106 S. W. 611; Hunt v. R. Co., 126 Mo. App. 261, 103 S. W. 133; Anderson v. R. Co. (Mo. App.), 108 S. W. 605; Fleming v. Pullen (Tex. Civ.), 97 S. W. 109; Dunlap v. C. & M. Co. (Tex. Civ.), 95 S. W. 43.

Injury to growing crops. — The damage caused by destroying part of a field of growing corn may be shown by proving the amount and value of the crop raised on the other part, less the cost of harvesting and marketing, the two parts of the field being alike. Hunt v. R. Co., 126 Mo. App. 261, 103 S. W. 133, *cit.* Colorado etc. Co. v. Hartman, 5 Colo. App. 150, 38 P. 62; R. Co. v. Lyman, 57 Ark. 512, 22 S. W. 170; R. Co. v. Ward, 16 Ill. 521; Chicago etc. Co. v. Schaffer, 26 Ill. App. 280; Economy etc. Co. v. Cutting, 49 Ill. App. 422; Adams v. Stadler, 78 Ill. App. 432; Seanland v. Musgrove, 91 Ill. App. 184; Galveston etc. R. Co. v. Borsky, 2 Tex. Civ. 545, 21 S. W. 1011; Gulf etc. R. Co. v. McGowan, 73 Tex. 355, 11 S. W. 336; International R. Co. v. Pape, 73 Tex. 501, 11 S. W. 526; Seamans v. Smith, 46 Barb. (N. Y.) 320; Sanderlin v. Shaw, 51 N. C. 225; Payne v. R. Co. 38 La. Ann. 164, 58 Am. Rep. 174; Rice v. Whitmore, 74 Cal. 619, 16 P. 501, 5 Am. St. 479; Phillips v. Terry, 5 Abb. Pr. (N. S.) 327. These are referred to in the opinion as opposed: Horres v. Chem. Co., 57 S. C. 189, 35 S. E. 500, 52 L. R. A. 36; Lampley v. R. Co., 63 S. C. 462, 41 S. E. 517; Gresham v. Taylor, 51 Ala. 505.

27-62 **Proof of rental value** is to be made of land as of the time the wrong was done and in the condition it then was, as if it had a matured crop on it. Blunck v. R. Co. (Ia.), 115 N. W. 1013.

27-63 Western U. T. Co. v. Cashman, 132 Fed. 805, 65 C. C. A. 607; National B. Co. v. Nolan, 138 Fed. 6, 70 C. C. A. 436; Davis v. Kornman, 141 Ala. 479; 37 S. 789; Washington T. Co. v. Downey, 26 App. D. C. 258, 266; Chicago etc. R. Co. v. Spence, 213 Ill. 220, 72 N. E. 796 (plaintiff's salary years prior to injury in another employment).

In Missouri evidence of plaintiff's financial condition may be given if he is entitled to recover punitive damages. Beck v. Dowell, 111 Mo. 506, 20 S. W. 209, 33 Am. St. 547; Baxter v. Magill, 127 Mo. App. 392, 105 S. W. 679.

27-64 **Same rule applies** to tort actions. Bowe v. Bowe, 26 Ohio C. C. 409, s. c. 5 Ohio C. C. (N. S.) 233.

28-66 Greeneberg v. Assn., 140 Cal. 357, 73 P. 1050; White v. White, 76 Kan. 82, 90 P. 1087; King v. Hanson, 13 N. D. 85, 99 N. W. 1085; Hiers v. R. Co. (S. C.), 60 S. E. 1110.

28-68 Baxter v. Magill, 127 Mo. App. 392, 105 S. W. 679; Willet v. Johnson, 13 Okla. 563, 76 P. 174.

28-70 Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320.

Wealth of one of several defendants not provable. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320.

29-77 Death of plaintiff's parents may be shown as affecting her mental suffering as the result of a libel. Washington T. Co. v. Downey, 26 App. D. C. 258.

The number of children one has and cares for is competent on the question of capacity to work. Lord v. R. Co. (N. H.), 67 A. 639.

In an action for breach of promise plaintiff may show that her home surroundings were disagreeable and that defendant knew the fact when engagement was made, and this independently of the question of punitive damages. Heasley v. Nichols, 38 Wash. 485, 80 P. 769.

29-79 Professional standing of plaintiff in an action for assault and battery, false arrest and malicious prosecution may be shown, as well as the nature and extent of his practice before and after the injury. Conklin v. R. Co. (Mass.), 82 N. E. 23, and local cases cited; Phillips v. R. Co., 4 Q. B. D. (Eng.) 406, 5 Q. B. D. 78, 42 L. T. R. 6 (net earnings of plaintiff for three years shown, including large fees from individuals).

30-80 Smith v. Curran, 138 Fed. 150; Von Berg v. Goodman (Ark.), 109 S. W. 1006; McKenzie v. Mitchell, 123 Ga. 72, 51 S. E. 34; Claudius v. A. Co., 109 Mo. App. 346, 84 S. W. 354; Beckwith v. New York, 121 App. Div. 462, 106 N. Y. S. 175; Martin v. R. Co., 70 S. C. 8, 48 S. E. 616; Chicago etc. R. Co. v. Calvert (Tex. Civ.), 91 S. W. 825.

30-81 Murphy v. R. Co., 108 N. Y. S. 1021; Kaniuk v. Dry Dock Co., 96 N. Y. S. 129; Reid v. R. Co., 93 N. Y. S. 533; Eastern R. Co. v. Tuteur, 127 Wis. 382, 105 N. W. 1067 (payments made after breach of contract or for Sunday labor not recoverable).

The sum charged must be shown to be reasonable. Goodson v. R. Co., 94 N. Y. S. 10.

The amount paid by the vendee for property which the vendor failed to deliver is not competent evidence of the difference in its market value at the contract price and the market price when delivery should have been made. Pierce v. Waller (Tex. Civ.), 102 S. W. 1173.

31-84 Keats v. G. Co., 29 Pa. Super. 480 (estimate made two years after injury and based on plaintiff's description of it).

31-85 Southern R. Co. v. Reeder (Ala.), 44 S. 699; Pickles v. Ansonia, 76 Conn. 278, 56 A. 552; Berry v. Campbell, 118 Ill. App. 646; Richardson v. Webster City, 111 Ia. 427, 82 N. W. 920; Richardson v. Sioux City (Ia.), 113 N. W. 928; Smith v. R. Co., 127 Mo. App. 160, 105 S. W. 10; Cunningham v. Dickerson, 104 Mo. App. 410, 79 S. W. 492; Rogers v. R. Co., 84 N. Y. S. 974; McPhillips v. Fitzgerald, 76 App. Div. 15, 78 N. Y. S. 631, 177 N. Y. 543, 69 N. E. 1126 (no opinion); Brown v. Blaine, 41 Wash. 287, 83 P. 310.

Rule applies to personal torts (Shoemaker v. Sonju, 15 N. D. 518, 108 N. W. 42) if expenditures shown to be reasonable. Metropolitan S. R. Co. v. Wishert (Tex. Civ.), 89 S. W. 460; Dallas S. R. Co. v. McAllister (Tex. Civ.), 90 S. W. 933; St. Louis S. R. Co. v. Haynes (Tex. Civ.), 86 S. W. 934; Dallas S. R. Co. v. Ison, 37 Tex. Civ. 219, 83 S. W. 408.

The price for which animals sold a month after they were injured, and after being fitted for market, is not competent evidence of their value immediately after they reached their destination in an injured condition. Cleveland etc. R. Co. v. Patton, 203 Ill. 376, 67 N. E. 804.

32-86 Keats v. G. Co., 29 Pa. Super. 480; Donnan v. T. Co., 26 Pa. Super. 324.

Expense must have been actually incurred and must be definitely shown. Harndon v. Stultz, 124 Ia. 734, 100 N. W. 851.

Testimony based on personal knowledge need not be supplemented by vouchers. Drews v. Burton, 76 S. C. 362, 57 S. E. 176.

Depreciation in the value of land may be shown where the injury is permanent, and the inquiry may be directed to its comparative value for the purpose to which it has been put. Texas & P. R. Co. v. Prude (Tex. Civ.), 86 S. W. 1046; Gulf etc. R. Co. v. Blue (Tex. Civ.), 102 S. W. 128; Nuckolls v. Powell (Tex. Civ.), 90 S. W. 933; Wiggins v. R. Co.

(Mo. App.), 108 S. W. 574. It is otherwise if the injury is temporary only. Gulf etc. R. Co. v. Roberts (Tex. Civ.), 86 S. W. 1052. Injury to the contents of a residence may be shown to prove depreciation. Texas S. L. R. Co. v. Clifford (Tex. Civ.), 94 S. W. 168.

The question of depreciation in value is determinable by existing conditions; opinions as to what the future may bring are immaterial. Dennis v. R. Co. (Tex. Civ.), 94 S. W. 1092. But depreciation in the value of land is not limited to the uses to which it has been put if it is available for others. McGroarty v. C. Co., 212 Pa. 53, 61 A. 570.

Loss of property. — The cost of property may be shown but is not proof of value at the time it was lost. The Mobile, 147 Fed. 882.

In admiralty if the repairs made to a vessel restore her strength and usefulness to her owners, evidence that her market value is less than before the collision is inadmissible. The Loch Trool, 150 Fed. 429; Sawyer v. Oakman, 7 Blatch. 290, 21 Fed. Cas. 12, 402.

Expenses of litigation are not recoverable for breach of contract unless bad faith or fraud is shown. McKenzie v. Mitchell, 123 Ga. 72, 51 S. E. 34.

32-87 Duff v. Read, 74 Kan. 730, 88 P. 263.

If punitive damages are recoverable, expenses of the action may be considered though not proved. Titus v. Corkins, 21 Kan. 519.

One who seeks to be reimbursed for expenditures must show clearly and explicitly the occasion and amount thereof. San Fernando etc. R. Co. v. Humphrey, 130 Fed. 298, 64 C. C. A. 544.

32-88 Motive immaterial in an action for breach of contract. Baumgarten v. Assn. Co., 159 Fed. 275; Ford v. Fargason, 120 Ga. 708, 48 S. E. 180; Kelley v. C. Co., 120 Wis. 84, 97 N. W. 674. *Contra*, if a fraudulent act is proved. Welborn v. Dixon, 70 S. C. 108, 49 S. E. 232; Prince v. Ins. Co., 77 S. C. 187, 57 S. E. 766.

32-89 Magnolia M. Co. v. Gale, 189 Mass. 124, 75 N. E. 219; O'Neal v. Weisman (Tex. Civ.), 88 S. W. 290; Woodhouse v. Powles, 43 Wash. 617, 86 P. 1063.

34-94 Brown v. Bannister, 14 Haw. 34 (breach of promise to marry); Texas M. R. Co. v. Dean, 98 Tex. 517, 85 S. W. 1135 (unlawful arrest, — damages sought for shame and humiliation).

Particular acts of misconduct committed after the cause of action arose are not provable. Columbia Nat. Bk. v. MacKnight, 29 App. D. C. 580.

General reputation of wife for unchastity at time of marriage is not provable in an action for alienation of husband's affections if it had nothing to do in causing their separation. White v. White, 76 Kan. 82, 90 P. 1087.

34-95 Nashville etc. R. Co. v. Miller, 120 Ga. 453, 47 S. E. 959; Illinois C. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435, 109 Ill. App. 468; Citizens' etc. Co. v. Whipple, 32 Ind. App. 203, 69 N. E. 557; Louisville & N. R. Co. v. Carothers, 23 Ky. L. R. 1673, 65 S. W. 833, 66 S. W. 385; Illinois C. R. Co. v. Porter, 117 Tenn. 13, 94 S. W. 666; Gulf etc. R. Co. v. Wittnebert (Tex. Civ.), 104 S. W. 424; Missouri etc. R. Co. v. Flood, 35 Tex. Civ. 197, 79 S. W. 1106.

Defendant's insurance against loss is immaterial. Prewitt-S. Mfg. Co. v. Woodall, 115 Tenn. 605, 90 S. W. 623.

35-1 Oklahoma C. & T. R. Co. v. Scarborough (Tex. Civ.), 95 S. W. 1089; Coleman v. Lytle (Tex. Civ.), 107 S. W. 562.

DEATH AND SURVIVORSHIP
[Vol. 4.]

40-1 Chicago etc. R. Co. v. Young, 67 Neb. 568, 93 N. W. 922; Rosenblum v. Eisenberg, 108 N. Y. S. 350; Grier v. Canada (Tenn.), 107 S. W. 970. *Compare* In re Aldersey (1905), 74 L. J. Ch. 548, 2 Ch. 181, 92 L. T. 826.

40-2 Heagany v. Union, 143 Mich. 186, 106 N. W. 700; In re Truman, 27 R. I. 209, 61 A. 598.

40-3 Iberia C. Co. v. Thorgeson, 116 La. 218, 40 S. 682. See Sterrett v. Samuel, 108 La. 346, 32 S. 428.

41-4 Presumption of continued life of man of twenty-three, two years

after his disappearance, not sufficiently strong to render a title free from reasonable doubt. Van Williams v. Elias, 106 App. Div. 288, 94 N. Y. S. 611.

Absence for forty-three years of a man over thirty years of age, of dissipated habits, — presumption of continued life ends. McNulty v. Mitchell, 41 Misc. 293, 84 N. Y. S. 89.

41-6 In re Aldersey (1905), 74 L. J. Ch. 548, 2 Ch. 181, 92 L. T. 826; Policemen's B. Assn. v. Ryee, 115 Ill. App. 95, *aff.* 213 Ill. 9, 72 N. E. 764, 104 Am. St. 199 (monographic note); Ironton B. Co. v. Tucker, 26 Ky. L. R. 532, 82 S. W. 241; Chew v. Tome, 93 Md. 244, 48 A. 701; George v. Clark, 186 Mass. 426, 71 N. E. 809; Spahr v. Ins. Co., 98 Minn. 471, 108 N. W. 4; Gilroy v. Brady, 195 Mo. 205, 93 S. W. 279; Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924; S. v. Lagoni, 30 Mont. 472, 76 P. 1044; Holdrege v. Livingston (Neb.), 112 N. W. 341; Spiltoir v. Spiltoir (N. J. Eq.), 64 A. 96; In re Sanford, 100 App. Div. 479, 91 N. Y. S. 706; In re Losee, 46 Misc. 363, 94 N. Y. S. 1082; In re McCausland, 213 Pa. 189, 62 A. 780, 110 Am. St. 540; In re Rhodes, 10 Pa. C. C. 386; In re Truman, 27 R. I. 209, 61 A. 598; In re Hackett, 27 R. I. 587, 65 A. 268.

43-7 Spahr v. Ins. Co., 98 Minn. 471, 108 N. W. 4; In re McCann, 31 Pa. C. C. 537.

43-10 In re McNeil, 12 Ont. L. R. (Can.) 208; Heagany v. Union, 143 Mich. 186, 106 N. W. 700; Holdrege v. Livingstone (Neb.), 112 N. W. 341.

43-11 Donovan v. Twist, 105 App. Div. 171, 93 N. Y. S. 990. See Ironton B. Co. v. Tucker, 26 Ky. L. R. 532, 82 S. W. 241.

44-12 Renard v. Bennett, 76 Kan. 848, 93 P. 261. Removal from one state to another not enough. Gorham v. Settegast (Tex. Civ.), 98 S. W. 665.

44-13 Wills v. Palmer, 53 W. R. (Eng.) 169 (death presumed after seven years, although reasons existed for concealment); Modern Woodmen v. Gerdom, 72 Kan. 391, 82 P. 1100, 2 L. R. A. (N. S.) 809; Iberia C. Co. v. Thorgeson, 116 La. 218, 40 S. 682; In re Bd. of Education, 173 N. Y. 321, 66 N. E. 11; In re Wolff, 16 Phila. (Pa.) 213 (absence due to flight to escape punishment for crime, insufficient).

44-14 Policemen's B. Assn. v. Ryee, 115 Ill. App. 95, *aff.* 213 Ill. 9, 72 N. E. 764, 104 Am. St. 199 (monographic note); Holdrege v. Livingstone (Neb.), 112 N. W. 341; Spiltoir v. Spiltoir (N. J. Eq.), 64 A. 96; Gorham v. Settegast (Tex. Civ.), 98 S. W. 665.

44-15 In re Ross, 140 Cal. 282, 73 P. 976; Modern Woodmen v. Graber, 128 Ill. App. 585; Renard v. Bennett, 76 Kan. 848, 93 P. 261; Hackett's Appeal, 27 R. I. 587, 65 A. 268. *Compare* In re Harrington, 140 Cal. 244, 294, 73 P. 1000, 74 P. 136 (no inquiry necessary by wife where husband has been absent ten years); Modern Woodmen v. Gerdom, 72 Kan. 391, 82 P. 1100, 2 L. R. A. (N. S.) 809 (circumstances of the case determine the amount of diligence required).

45-16 Renard v. Bennett, 76 Kan. 848, 93 P. 261.

45-17 Modern Woodmen v. Graber, 128 Ill. App. 585.

46-18 See In re Harrington, 140 Cal. 244, 73 P. 1000.

46-20 The San Rafael, 141 Fed. 270, 72 C. C. A. 388. See Spiltoir v. Spiltoir (N. J. Eq.), 64 A. 96. Death allowed to be shown three years after disappearance. In re Matthews (1898), 67 L. J. P. 11, 77 L. T. (N. S.) 630.

47-22 In re Sanford, 100 App. Div. 479, 91 N. Y. S. 706.

47-23 Policemen's B. Assn. v. Ryee, 213 Ill. 9, 72 N. E. 764, 104 Am. St. 199 (monographic note); Spahr v. Ins. Co., 98 Minn. 471, 108 N. W. 4; Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924; In re Losee, 46 Misc. 363, 94 N. Y. S. 1082 (time of death ordinarily reckoned from decree adjudging the party dead).

Presumption of legitimacy raises the further presumption that remarriage of a woman after the disappearance of her husband was not before the death of her first husband. In re McCausland, 213 Pa. 189, 62 A. 780, 110 Am. St. 540.

48-25 Spahr v. Ins. Co., 98 Minn. 471, 108 N. W. 4.

50-28 The San Rafael, 141 Fed. 270, 72 C. C. A. 388; Supreme Council v. Boyle, 10 Ind. App. 301, 37 N. E. 1105; McNulty v. Mitchell, 41 Misc. 293, 84 N. Y. S. 89; Travelers' Ins. Co. v. Rosch, 13-23 Ohio C. C. 491. *Compare* S. v. Lagoni, 30 Mont. 472, 76 P. 1044.

Unsigned death certificate not competent evidence. Lucas v. Land Co., 186 Mo. 448, 85 S. W. 359.

Coroner's proces-verbal. — Admissible to prove fact and cause of death, only. S. v. Meyers, 120 La. 127, 44 S. 1008.

50-29 **General repute,** to the knowledge of the family, is competent. Welch v. R. Co., 182 Mass. 84, 64 N. E. 695.

50-31 *Compare* Iberia C. Co. v. Thorgeson, 116 La. 218, 40 S. 682; Lynch v. R. Co., 208 Mo. 1, 106 S. W. 68.

50-32 Sims v. Boynton, 32 Ala. 353; Peterkin v. Inloes, 4 Md. 175; Munro v. Merchant, 26 Barb. (N. Y.) 383; McElroy v. Soc., 2 Pa. C. C. 643. *Contra* Marks v. Bank, 107 N. Y. S. 491.

51-33 Banton v. Crosby, 95 Me. 429, 50 A. 86; Harris v. Bank, 49 Misc. 458, 97 N. Y. S. 1044 (declarations of administrator, insufficient); Donovan v. Twist, 105 App. Div. 171, 93 N. Y. S. 990 (under the facts, held insufficient).

52-40 Policemen's B. Assn. v. Ryee, 213 Ill. 9, 72 N. E. 764, 104 Am. St. 199 (monographic note); St. John v. Institute, 191 N. Y. 254, 83 N. E. 981. See s. c. 117 App. Div. 698, 102 N. Y. S. 808.

52-41 St. John v. Institute, 117 App. Div. 698, 102 N. Y. S. 808, s. c. 191 N. Y. 254, 83 N. E. 981.

52-43 In re Phillips, 12 Ont. L. R. (Can.) 48; St. John v. Institute, supra; In re Gerdes, 50 Misc. 88, 100 N. Y. S. 440, *rev.* on the facts; In re McInnes, 119 App. Div. 440, 104 N. Y. S. 147. See Farrelly v. Bank, 92 App. Div. 529, 87 N. Y. S. 54.

53-48 St. John v. Institute, supra; In re McInnes, supra, *rev.* on the facts, In re Gerdes, 50 Misc. 88, 100 N. Y. S. 440.

62-23 Foster v. P., 121 Ill. App. 165.

62-24 **Defendant** may show any fact bearing upon the question of what the work done was reasonably worth, as if the action had been covenant broken or assumpsit. Seretto v. R. Co., 101 Me. 140, 63 A. 651.

67-52 **More than mere** preponderance of the evidence, necessary in an action to recover a statutory penalty. Atchison R. Co. v. P., 227 Ill. 270, 81 N. E. 342.

DECLARATIONS [Vol. 4.]

71-2 **Not limited.** — Such evidence is receivable for all purposes, independently of its value. Taylor v. Williams, 3 Ch. D. (Eng.) 605. The only difference in respect to oral, as against written declarations, is in the weight to which they are severally entitled. Reg. v. Overseers, 1 B. & S. 763, 101 E. C. L. 761.

Origin of rule in favor of admissibility. — See Smith v. Moore, 142 N. C. 277, 286, 55 S. E. 275, 7 L. R. A. (N. S.) 684.

71-5 Taylor v. Williams, 3 Ch. D. (Eng.) 605; Massee F. L. Co. v. Sirmans, 122 Ga. 297, 50 S. E. 92; McBrayer v. Walker, 122 Ga. 245, 50 S. E. 95; Randall v. Claflin, 194 Mass. 560, 80 N. E. 594; Hall v. Reinharz, 192 Mass. 52, 77 N. E. 880; O'Driscoll v. R. Co., 180 Mass. 187, 62 N. E. 3; Taylor v. A. O. U. W., 101 Minn. 72, 111 N. W. 919; Keystone Mills v. B. Co. (Tex. Civ.), 96 S. W. 64 (surveyor's field notes).

73-6 Donnelly v. Rees, 141 Cal. 56, 74 P. 433.

73-7 Locklayer v. Locklayer, 139 Ala. 354, 35 S. 1008; Wilson v. Gordon, 73 S. C. 155, 53 S. E. 79.

73-11 McIntosh v. Fisher, 125 Ill. App. 511.

73-12 Goyette v. Keenan (Mass.), 82 N. E. 427; White v. Poole, 74 N. H. 71, 65 A. 255.

Inadmissible, though made on the ground at the time of its conveyance, to identify an easement. Peck v. Clark, 142 Mass. 436, 8 N. E. 335.

74-13 Powers v. Silsby, 41 Vt.

288, *mod.* Wood v. Willard, 37 Vt. 377, 86 Am. Dec. 716.

Declarations concerning title may be shown though not made on the land. Knight v. Hunter (Ala.), 46 S. 235.

74-15 See Massee-F. L. Co. v. Sirmans, 122 Ga. 297, 50 S. E. 92.

74-17 Higham v. Ridgeway, 10 East (Eng.) 109, 3 Sm. L. Cas. (9th Am. ed.) 1; Smith v. Moore, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684; Williams v. Mower, 29 S. C. 332, 7 S. E. 505; Griffin v. Forrester (S. C.), 61 S. E. 389; Wilson v. Gordon, 73 S. C. 155, 53 S. E. 79.

Written declaration admissible though it contains irrelevant matter. Randell v. Claflin, 194 Mass. 560, 80 N. E. 594.

75-20 Succession of Zacharie, 119 La. 150, 43 S. 988.

Proof of declarations is specially distrusted when used to establish a contract with deceedent. Rosenwald v. Middlebrook, 188 Mo. 58, 86 S. W. 200; Reed v. Morgan, 100 Mo. App. 13, 73 S. W. 38; Curd v. Brown, 148 Mo. 82, 49 S. W. 990.

75-21 Expressions favorable to such evidence are to be found. See Smith v. Moore, 142 N. C. 277, 287, 55 S. E. 275, 7 L. R. A. (N. S.) 684.

75-23 Sasser v. Herring, 14 N. C. 340; Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782.

76-26 Succession of Zacharie, 19 La. 150, 43 S. 988, (contemporaneous of memoranda and aetion conformatory of declaration); Taylor v. A. O. U. W., 101 Minn. 72, 111 N. W. 919.

76-27 Donnelly v. Rees, 141 Cal. 56, 74 P. 433.

76-29 Peck v. Clark, 142 Mass. 436, 8 N. E. 335.

77-31 Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782. But *compare* the text with statement under 84-62, infra, and Hathaway v. Goslant, 77 Vt. 199, 59 A. 835.

77-33 The rule admitting proof of declarations is not to be extended. Hartford v. Maslen, 76 Conn. 599, 615.

78-34 Fincannon v. Sudderth, 144 N. C. 587, 592, 57 S. E. 337; Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782; Warner v. Sapp (Tex. Civ.), 97 S. W. 125; Russell v. Hunnieutt, 70 Tex. 657, 8 S. W. 500; Keystone Mills Co. v. L. Co. (Tex. Civ.), 96 S. W. 64; Hathaway v. Goslant, 77 Vt. 199, 59 A. 835.

81-25 Hartford v. Maslen, 76 Conn. 599, 615 (or supposed to be dead, or who are not available as witnesses); Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782.

81-46 Hartford v. Maslen, supra.

84-61 Yow v. Hamilton, supra.

84-62 Necessity of proof. — In at least one ease it is said that a necessity for such evidenee must exist in the absence of proof in the ordinary way by living witnesses. Hartford v. Maslen, supra.

84-63 Hathaway v. Goslant, 77 Vt. 199, 59 A. 835. But see Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782. It is sometimes said that the declarant must have been aged as well as disinterested. Smith v. Headrick, 93 N. C. 210.

84-64 Declarant need not have been wholly disinterested in the matter. Child v. Kingsbury, 46 Vt. 47; Turner-Falls Co. v. Burns, 71 Vt. 354, 45 A. 896; Hathaway v. Goslant, 77 Vt. 199, 59 A. 835.

Must be consistent. — The declarations of a surveyor which state that an object was found by him in two places are valueless. Keystone Mills Co. v. L. Co. (Tex. Civ.), 96 S. W. 64.

87-75 Locklayer v. Locklayer, 139 Ala. 354, 35 S. 1008 (declaration as to race); Stoddard v. Newhall, 1 Cal. App. 111, 81 P. 666; Turner v. Turner, 123 Ga. 5, 50 S. E. 969; American S. Co. v. Wood, 2 Ga. App. 641, 58 S. E. 1116; Hueni v. Freehill, 125 Ill. App. 345; Keesling v. Powell, 149 Ind. 372, 49 N. E. 265 (declaration of deputy county treasurer as to payment of taxes on the lot in question); Dean v. Wilkerson, 126 Ind. 338, 26 S. E. 55; Taylor v. A. O. U. W., 101 Minn. 72, 111 N. W. 919.

89-76 Gen. St. of Connecticut, 1902, § 705. Under that act the declarations of a decedent are not provable unless the action is against his representatives. Mooney v. Mooney (Conn.), 68 A. 985.

In Massachusetts the statute provides that the declaration shall have been made in good faith. Dickinson v. Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664; Dixon v. R., 179 Mass. 242, 60 N. E. 581;

Glidden v. F. & G. Co. (Mass.), 84 N. E. 143. A declaration concerning the state of an employe's accounts can not be assumed to have been so made unless it was actually known to be true. Glidden v. F. & G. Co., supra.

89-77 Hall v. Reinherz, 192 Mass. 52, 77 N. E. 880.

89-79 **A memorandum** not made in the course of declarant's business or duty is not admissible. Tome Inst. v. Davis, 87 Md. 591, 41 A. 166.

89-80 **Declarations of deceased agent** competent against his principal. Turner v. Turner, 123 Ga. 5, 50 S. E. 969.

90-83 Knight v. Hunter (Ala.), 46 S. 235; Stoddard v. Newhall, 1 Cal. App. 111, 81 P. 666; Gross v. Smith, 132 N. C. 604, 44 S. E. 111; Wonsetler v. Wonsetler, 23 Pa. Super. 321.

91-84 Drawdy v. Hesters (Ga.), 60 S. E. 451; Knight v. Knight, 178 Ill. 553, 53 N. E. 306; Vannice v. Dungan (Ind. App.), 83 N. E. 250; McDaneld v. McDaneld, 136 Ind. 603, 36 N. E. 286; Johnson v. Cole, 178 N. Y. 364, 70 N. E. 873.

91-85 Cross v. Iler, 103 Md. 592, 64 A. 33; Taylor v. A. O. U. W., 101 Minn. 72, 111 N. W. 919.

Inadmissible in action by widow to recover for death of declarant, if not a part of the res gestae. Jacksonville E. Co. v. Sloan, 52 Fla. 257, 42 S. 516. And so in an action by a father to recover for death of son. Bradford v. Downs, 126 Pa. 622, 17 A. 884; Pennsylvania Co. v. Long, 94 Ind. 250.

91-86 Georgia v. Fitzgerald, 108 Ga. 507, 34 S. E. 316; Dickinson v. Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664; Chaput v. R. Co., 194 Mass. 218, 80 N. E. 597; Dixon v. Ironworks, 90 Minn. 492, 97 N. W. 375; Witner v. L. & P. Co., 112 App. Div. 698, 98 N. Y. S. 781; Smith v. R. Co., 34 Tex. Civ. 209, 78 S. W. 556. If admissible, not conclusive. Camden A. R. Co. v. Williams, 61 N. J. L. 646, 40 A. 634.

91-87 Mooney v. Mooney (Conn.), 68 A. 985; McIntosh v. Fisher, 125 Ill. App. 511; Caldwell v. Caldwell, 24 Pa. Super. 230.

Declarations as to intentions are inadmissible. Barnum v. Reed, 136 Ill. 388, 26 N. E. 572. But if there has been an actual delivery of the thing given under circumstances which may or may not constitute a gift, then declarations prior and subsequent to the delivery may be proven to determine declarant's intention. McIntosh v. Fisher, 125 Ill. App. 511.

91-88 McDonald v. McDonald, 86 Mo. App. 122; Nelson v. Nelson, 90 Mo. 460, 2 S. W. 413; Gunn v. Thruston, 130 Mo. 339, 32 S. W. 654; Strode v. Beall, 105 Mo. App. 495, 79 S. W. 1019; Hicks v. Hicks, 9 Ohio C. C. (N. S.) 413, (*aff.*, no opinion, 81 N. E. 1187).

It is not competent in New York, in an action for partition, to prove declarations of decedent that transfers made by him were gifts. Johnson v. Cole, 178 N. Y. 364, 70 N. E. 873.

92-89 McClellan v. Grant, 83 App. Div. 599, 82 N. Y. S. 208, 181 N. Y. 581, 74 N. E. 1119 (no opinion); Leary v. Covin, 63 App. Div. 151, 71 N. Y. S. 335.

92-91 Massee-F. L. Co. v. Sirmans, 122 Ga. 297, 50 S. E. 92; Schell v. Weaver, 225 Ill. 159, 80 N. E. 95.

It is not presumed that there is better evidence of the existence of a debt than the declarations of a debtor, no contention being made to that effect. Schell v. Weaver, supra.

Declaration of indebtedness not provable against declarant's wife who has mortgaged her separate estate to secure his debt. McGowan v. Davenport, 134 N. C. 526, 47 S. E. 27.

93-95 **Declarations as to the execution of a deed** are not inadmissible because what was in fact such was represented to be a will, nor because the declarant's estate was for life only. Smith v. Moore, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684.

93-97 Walnut Ridge Co. v. Cohn, 79 Ark. 338, 96 S. W. 413; Goyette v. Keenan (Mass.), 82 N. E. 427; Smith v. Moore, supra.

93-98 A statement to the contrary is made in Walnut Ridge Co. v. Cohn, supra.

94-8 Putnam v. Harris, 193 Mass. 58, 78 N. E. 747; Smith v. Moore, supra.

Duty of declarant to know the facts

stated is sometimes said to be sufficient to permit proof of them. Massee-F. L. Co. v. Sirmans, 122 Ga. 297, 50 S. E. 92; Turner v. Turner, 123 Ga. 5, 50 S. E. 969.

95-14 Yordi v. Yordi (Cal. App.), 91 P. 348; Rulofson v. Billings, 140 Cal. 452, 74 P. 35; Bollinger v. Wright, 143 Cal. 292, 76 P. 1108; Drawdy v. Hesters (Ga.), 60 S. E. 451; Massee-F. L. Co. v. Sirmans, 122 Ga. 297, 50 S. E. 92; Oswald v. Nehls, 233 Ill. 438, 84 N. E. 619; Drefahl v. Bank, 132 Ia. 563, 107 N. W. 179; Landy v. Moritz (Ky.), 109 S. W. 897; Howard v. Maxwell, 30 Ky. L. R. 448, 98 S. W. 1013; Coleman v. McGowan, 149 Mich. 624, 113 N. W. 17; White v. Poole, 74 N. H. 71, 65 A. 255; Griffin v. Forrester (S. C.), 61 S. E. 389.

97-15 Halvorsen v. L. Co., 87 Minn. 18, 91 N. W. 28.

98-16 Lyon v. Ricker, 141 N. Y. 225, 36 N. E. 189; Smith v. Moore, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684.

101-24 Nutter v. O'Donnell, 6 Colo. 253, Wilson v. Patrick, 34 Ia. 362; Harrison v. Harrison (Neb.), 113 N. W. 1042; Wonsetler v. Wonsetler, 23 Pa. Super. 321 (if made in the absence of the person in whose favor the disserving declaration was). *Compare* with Foster v. Nowlin, 4 Mo. 18, stated in the Encyclopedia on the page and in the note number given. Turner v. Belden, 9 Mo. 797, which disapproves the former.

Admissibility determined by preponderance of statement. — Statements should be balanced, and if those in favor of interest are equal to or preponderate over those against interest proof of the declaration should not be made (Freeman v. Brewster, 93 Ga. 648, 21 S. E. 165; Hollis v. Sales, 103 Ga. 75, 29 S. E. 482); it is otherwise of those against interest preponderate over those in favor of it. Massee-F. L. Co. v. Sirmans, 122 Ga. 297, 50 S. E. 92.

101-26 Jones v. C. Co., 29 Ky. L. R. 623, 96 S. W. 6; Johnson v. Burks, 103 Mo. App. 221, 77 S. W. 133.

102-32 In Minnesota it is said that upon principle and authority the true test is not whether the declarations were made ante litem motam, but whether they were made under circumstances justifying the conclusion that there was no probable motive to falsify the facts. Halvorsen v. L. Co., 87 Minn. 18, 91 N. W. 28. The same theory appears to be recognized in Smith v. Moore, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684.

102-33 Turner v. Turner, 123 Ga. 5, 50 S. E. 969.

May be proven if made after giving statutory notice of injury, the action not being formally begun until process issued. Dickinson v. Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664.

104-43 Goyette v. Keenan (Mass.), 82 N. E. 427; White v. Poole, 74 N. H. 71, 65 A. 255; Hentzler v. Weniger, 32 Pa. Super. 164.

105-45 **It is to be inferred** from admission of the evidence in the absence of the exceptions, that the preliminary conditions have been met. Dixon v. R. Co., 179 Mass. 242, 60 N. E. 581; Dickinson v. Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664.

105-46 **Slight evidence** of declarant's death is admissible. Wren v. Howland, 33 Tex. Civ. 87, 75 S. W. 894.

105-49 **The order** in which evidence shall be received is within the court's discretion. If the proposed foundation is not subsequently laid failure to call attention to the fact will waive the right to relief. Putnam v. Harris, 193 Mass. 58, 78 N. E. 747.

106-52 **Circumstances** may afford, in case of written declarations, sufficient proof of identity of name, residence, and of the person for whose benefit the instruments were designed. Taylor v. A. O. U. W., 101 Minn. 72, 111 N. W. 919.

106-60 McBrayer v. Walker, 122 Ga. 245, 50 S. E. 95; Randall v. Claflin, 194 Mass. 560, 80 N. E. 594; Taylor v. A. O. U. W., supra.

Death of one of the parties who heard the declaration does not affect the right to prove it by the other. Hueni v. Freehill, 125 Ill. App. 345.

108-68 McGowan v. Davenport,

134 N. C. 526, 47 S. E. 27; Bryant v. Morris, 69 N. C. 444.

Interest does not disqualify a witness from testifying to declarations. Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782.

DEDICATION [Vol. 4.]

Revocation of offer of dedication, 131-48.

110-1 German Bk. v. Brose, 32 Ind. App. 77, 69 N. E. 300; Riverside T. v. R. Co. (N. J. L.), 66 A. 433; Milliken v. Denny, 141 N. C. 224, 53 S. E. 867; Waters v. Phila., 208 Pa. 189, 57 A. 523; DeGeorge v. Goosby, 33 Tex. Civ. 187, 76 S. W. 66.

111-2 **Intent** must be clearly established. Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111; Stacy v. Glen Spr. Co., 223 Ill. 546, 79 N. E. 133; City of Alexandria v. Thigpen, 120 La. 293, 45 S. 253; Klug v. Jeffers, 88 App. Div. 246, 85 N. Y. S. 423; Cincinnati etc. R. Co. v. Roseville, 76 Ohio St. 108, 81 N. E. 178; Webber v. Toledo, Vol. 13-23 Ohio C. C. 237; International etc. R. Co. v. Cuneo (Tex. Civ.), 108 S. W. 714; West Point v. Bland, 106 Va. 792, 56 S. E. 802.

111-3 Mann v. Bergmann, 203 Ill. 406, 67 N. E. 814; West Point v. Bland, supra.

Dedication of easement may be by parol. Halley v. Court, 25 Ky. L. R. 1471, 78 S. W. 149.

111-4 Quick v. Cotman, 124 Ia. 102, 99 N. W. 301.

Testimony of owner as to his intent admissible, but will not prevail against his acts or declarations. Lovington T. v. Adkins, 232 Ill. 510, 83 N. E. 1043; Seidschlag v. Antioch, 207 Ill. 280, 69 N. E. 949; Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111 (owner may testify as to his intent, but may be contradicted by his declarations); West Point v. Bland, 106 Va. 792, 56 S. E. 802 (entries on corporation's books, insufficient).

112-6 Edwards & W. Co. v. Jasper County, 117 Ia. 365, 90 N. W. 1006 (parol evidence admissible); Miller v. Comrs., 125 Ill. App. 431; Raymond v. Wichita, 70 Kan. 523, 79 P. 323; Naylor v. Harrisonville, 207 Mo. 341, 105 S. W. 1074; Bosque Co. v. Alexander (Tex. Civ.), 93 S. W. 238; Lynchburg Co. v. Guill, 107 Va. 86, 57 S. E. 644.

113-7 Cochrane v. Purser (Ala.), 44 S. 579; Larkin v. Ryan, 25 Ky. L. R. 613, 76 S. W. 168; Burrier v. Rice, 25 Ky. L. R. 661, 76 S. W. 169; Magruder v. Potter, 25 Ky. L. R. 1336, 77 S. W. 919; Wathen v. Howard, 27 Ky. L. R. 7, 84 S. W. 303; Brandt v. Olson (Neb.), 113 N. W. 151; Dover Twp. v. Brackenridge (N. J.), 67 A. 689. See Heiminek v. Edmonton, 28 Can. Sup. 501; Bothwell v. Denver S. Co. (Colo.), 9 P. 1127 (presumption is in favor of the regularity of an alleged statutory dedication); City of Georgetown v. Hambrick, 31 Ky. L. R. 1276, 104 S. W. 997 (presumption that highway was dedicated to be used in the usual way).

Dedication of cul de sac as public highway, not presumed from mere user without expenditures. Atty. Gen. v. Antrobus (1905), 2 Ch. D. (Eng.) 188; Whitehouse v. Hugh (1906), 1 Ch. D. (Eng.) 253.

114-9 Palmer v. N. P. R. Co., 11 Idaho 583, 83 P. 947; Culmer v. Salt Lake, 27 Utah 252, 75 P. 620.

115-10 See Newton v. Dunkirk, 112 App. Div. 296, 106 N. Y. S. 125.

115-11 Wilson v. L. Co. (Ala.), 39 S. 303.

115-13 German Bk. v. Brose, 32 Ind. App. 77, 69 N. E. 300 (not conclusive).

116-14 City of West End v. Eaves (Ala.), 44 S. 588; City of Mobile v. Fowler, 147 Ala. 403, 41 S. 468; Wilson v. L. Co., supra; Town of Mt. Vernon v. Young, 124 Ia. 517, 100 N. W. 694.

Burden on complainant to show that public user for more than twenty years, was not inconsistent with private ownership. Canton Co. v. Baltimore, 104 Md. 582, 65 A. 324.

117-18 Dougan v. Greenwich, 77 Conn. 444, 59 A. 505 (title in a town in its corporate capacity, need not be shown); Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914.

118-19 **Exceptions in deeds** need not be expressly stated to be for the benefit of the public. Dougan v. Greenwich, supra. Recitals in deeds

as evidence against dedication. City of San Antonio v. Rowley (Tex. Civ.), 106 S. W. 753; Davies v. Epstein, 77 Ark. 221, 92 S. W. 19.

118-20 Grand T. R. Co. v. City of Toronto, 37 Can. Sup. 210; Dougan v. Greenwich, 77 Conn. 444, 59 A. 505; Board of Comrs. v. R. Co. (N. J. L.), 65 A. 1035; Palmer v. Gas Co., 115 App. Div. 677, 101 N. Y. S. 347; C. v. Llewellyn 14 Pa. Super. 214 (deeds not conclusive).

120-21 McGregor v. Watford, 13 Ont. L. R. (Can.) 10; Weiss v. Taylor, 144 Ala. 440, 39 S. 519; City of Mobile v. Fowler, 147 Ala. 403, 41 S. 468; Jackson v. Birmingham (Ala.), 45 S. 660; Thorpe v. Clanton (Ariz.), 85 P. 1061; Davies v. Epstein, 77 Ark. 221, 92 S. W. 19; Myers v. Kenyon (Cal. App.), 93 P. 888; S. v. Southard (Del.), 66 A. 372; Mann v. Bergmann, 203 Ill. 406, 67 N. E. 814; Ingraham v. Brown, 231 Ill. 256, 83 N. E. 156; Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914; Strunk v. Pritchett, 27 Ind. App. 582, 61 N. E. 973; Flournoy v. Breard, 116 La. 224, 40 S. 684; Milliken v. Denny, 146 N. C. 224, 53 S. E. 867; Oregon City v. R. Co., 44 Or. 165, 74 P. 924; City of San Antonio v. Rowley (Tex. Civ.), 106 S. W. 753; City of Tyler v. Boyette (Tex. Civ.), 96 S. W. 935; Lins v. Seefeld, 126 Wis. 610, 105 N. W. 917.

No dedication where the owner makes a map showing a street on a neighbor's land. Klug v. Jeffers, 88 App. Div. 246, 85 N. Y. S. 423.

Owner estopped from denying representations of a plat. King v. Dugan, 150 Cal. 258, 88 P. 925; Harmison v. Prestonburg, 32 Ky. L. R. 864, 107 S. W. 337.

121-22 McGourin v. DeFuniak Spgs., 51 Fla. 502, 41 S. 541; Comrs. v. R. Co. (N. J. L.), 65 A. 1035; Wright v. Oberlin, Vol. 13-23 Ohio C. C. 509; Finucan v. Ramsden, 95 App. Div. 626, 88 N. Y. S. 430; Heard v. Connor (Tex. Civ.), 84 S. W. 605; City of Houston v. Finnigan (Tex. Civ.), 85 S. W. 470; Weidemeyer v. Reitch (Tex. Civ.), 108 S. W. 167 (map not conclusive evidence of a dedication).

122-24 City of Alexandria v. Thigpen, 120 La. 293, 45 S. 253.

122-25 Town of Mt. Vernon v. Young, 124 Ia. 517, 100 N. W. 694; Columbia etc. R. Co. v. Seattle, 33 Wash. 513, 74 P. 670 (plat to be construed in connection with the statutory requirements).

123-27 Gordon County v. Calhoun, 128 Ga. 781, 58 S. E. 360; Edwards Co. v. Jasper County, 117 Ia. 365, 90 N. W. 1006 (public square); Kansas City etc. R. Co. v. Baker, 183 Mo. 312, 82 S. W. 85 (reserved for depot grounds); Sanborn v. City (Tex. Civ.), 93 S. W. 473 (park).

124-29 Schneider v. Sulzer, 212 Ill. 87, 72 N. E. 19 (acts and declarations cannot be shown where they contradict a plat); Halley v. Court, 25 Ky. L. R. 1471, 78 S. W. 149; Newton v. Dunkirk, 112 App. Div. 296, 106 N. Y. S. 125; Tise v. Whitaker-H. Co., 146 N. C. 374, 59 S. E. 1012.

124-30 S. v. Southard (Del.), 66 A. 372; Cassidy v. Sullivan, 75 Neb. 847, 106 N. W. 1027.

125-31 Michigan etc. R. Co. v. R. Co. (Ind. App.), 83 N. E. 650; Larson v. R. Co., 19 S. D. 284, 103 N. W. 35.

125-32 **Permanent character** of obstructions in old highway in the form of improvements, admissible to show a dedication of a new road. Davis v. R. Co., 31 Utah 307, 88 P. 2.

125-33 City of West End v. Eaves (Ala.), 44 S. 588 (express common law dedication may rest in parol). Davies v. Epstein, 77 Ark. 221, 92 S. W. 19.

126-34 Gillespie v. Duling (Ind. App.), 83 N. E. 728; Waters v. Phila., 208 Pa. 189, 57 A. 523.

126-35 Southern P. Co. v. Pomona, 144 Cal. 339, 77 P. 929; P. v. Myring, 144 Cal. 351, 77 P. 975; Hartley v. Vermillion, 141 Cal. 339, 74 P. 987; Dover Twp. v. Brackenridge (N. J.), 67 A. 689.

127-36 **After long user,** burden of proof is on the defendant to show that the use was only permissive. Magruder v. Potter, 25 Ky. L. R. 1336, 77 S. W. 919; Chenault v. Gravitt, 27 Ky. L. R. 403, 85 S. W. 184; Smoot v. Wainscott, 28 Ky. L. R. 233, 89 S. W. 176.

127-37 Lieber v. P., 33 Colo. 493, 81 P. 270.

128-38 Wilson v. Lake V. Co. (Ala.), 39 S. 303; Cincinnati etc. R. Co. v. Roseville, 76 Ohio St. 108, 81 N. E. 178.

128-39 Burks v. Feurriell, 26 Ky. L. R. 35, 80 S. W. 483; Canton Co. v. Baltimore, 104 Md. 582, 65 A. 324; Williams v. Hudson, 130 Wis. 297, 110 N. W. 239. *Compare*, International etc. R. Co. v. Cuneo (Tex. Civ.), 108 S. W. 714.

Estoppel from long user. — Ray v. Nally, 28 Ky. L. R. 421, 89 S. W. 486.

Adverse user for twenty years, conclusive evidence of a dedication. Riverside Twp. v. R. Co. (N. J. L.), 66 A. 433.

128-40 Healey v. Atlanta, 125 Ga. 736, 54 S. E. 749; Chapman v. Sault Ste. M., 146 Mich. 23, 109 N. W. 53.

Grading of street and putting up sign posts, insufficient to prove acquiescence of the owners. Mitchell v. Denver, 33 Colo. 37, 78 P. 686.

128-41 Lieber v. P., 33 Colo. 493, 81 P. 270.

129-42 Town of Bethel v. Pruett, 215 Ill. 162, 74 N. E. 111; Gillespie v. Duling (Ind. App.), 83 N. E. 728 (slight variations immaterial).

130-44 Cincinnati etc. R. Co. v. Roseville, 76 Ohio 108, 81 N. E. 178; Columbia etc. R. Co. v. Seattle, 33 Wash. 513, 74 P. 670.

130-45 Sioux City v. R. Co., 129 Ia. 694, 106 N. W. 183.

Revocation of offer of dedication may be shown by acts inconsistent with the use for which it is claimed the land was dedicated. Myers v. Oceanside (Cal. App.), 93 P. 686.

131-49 Myers v. Oceanside, supra; Vorhes v. Ackley, 127 Ia. 658, 103 N. W. 998 (presumption that acceptance is of all the land tendered); Riley v. Buchanan, 116 Ky. 625, 76 S. W. 527, 63 L. R. A. 242; Darling v. Mayor (N. J. Eq.), 67 A. 709 (burden of proving acceptance is upon the city alleging it); Chapman v. Sault Ste. M., 146 Mich. 23, 109 N. W. 53.

131-50 Stacy v. Glen Ellyn Co., 223 Ill. 546, 79 N. E. 133.

132-51 Grand Trunk R. Co. v. Toronto, 37 Can. Sup. 210; Delaware etc. R. Co. v. Syracuse, 157 Fed. 700; Healey v. Atlanta, 125 Ga. 736, 54 S. E. 749; Gillespie v. Duling (Ind. App.), 83 N. E. 728; Pittsburg etc. R. Co. v. Warrum (Ind. App.), 82 N. E. 934; German Bk. v. Brose, 32 Ind. App. 77, 69 N. E. 300; Eldridge v. Collins, 75 Neb. 65, 105 N. W. 1085; Brandt v. Olson (Neb.), 113 N. W. 151 (improvements need not always be shown); Comrs. v. R. Co. (N. J. L.), 65 A. 1035; Oregon City v. R. Co., 44 Or. 165, 74 P. 924; C. v. Llewellyn, 14 Pa. Super. 214.

132-52 Miller v. Comrs., 125 Ill. App. 431; Strunk v. Pritchett, 27 Ind. App. 582, 61 N. E. 973; Riley v. Buchanan, 116 Ky. 625, 76 S. W. 527, 63 L. R. A. 242; Cassidy v. Sullivan, 75 Neb. 847, 106 N. W. 1027; Sanborn v. Armarillo (Tex. Civ.), 93 S. W. 473 (acceptance by public evidenced by individuals acting upon the offer).

Common law method of acceptance sufficient, where statutory requirements are not complied with. Arnold v. Orange (N. J. Eq.), 66 A. 1052.

133-53 Mayor etc. v. Johnson, 2 Ga. App. 378, 58 S. E. 518; Raymond v. Wichita, 70 Kan. 523, 79 P. 323; Burks v. Ferriell, 26 Ky. L. R. 35, 80 S. W. 483; Gleason v. Stonehouse (Mich.), 113 N. W. 315; St. Louis etc. R. Co. v. R. Co., 190 Mo. 246, 88 S. W. 634; Arnold v. Orange (N. J. Eq.), 66 A. 1052.

Only such acts as tend to show an acceptance for the purpose indicated, can be considered. Myers v. Oceanside (Cal. App.), 93 P. 686.

133-54 Acceptance of some of the streets tendered is evidence of intention to accept others as needed. Parriott v. Hampton, 134 Ia. 157, 111 N. W. 440.

134-55 City of Venice v. Ferry Co., 216 Ill. 345, 75 N. E. 105; Darling v. Jersey City (N. J. Eq.), 67 A. 709; Finucan v. Ramsden, 95 App. Div. 626, 88 N. Y. S. 430; Palmer v. Gas Co., 115 App. Div. 677, 101 N. Y. S. 347; City of Houston v. Finnigan (Tex. Civ.), 85 S. W. 470.

134-56 Burroughs v. City, 134 Ia. 429, 109 N. W. 876; Cassidy v. Sullivan, 75 Neb. 847, 106 N. W. 1027 (acceptance need not be by public authorities, but may be by the public itself); Palmer v. Gas Co., 101 N. Y. S. 347; City of Richmond v. Mills

Co., 102 Va. 165, 45 S. E. 877. *Compare.* — Cincinnati C. Co. v. Roseville, 76 Ohio 108, 81 N. E. 178 (acceptance by a city must be shown by acts of its proper officers and not by public user); Lynchburg Co. v. Guill, 107 Va. 86, 57 S. E. 644 (acceptance of country roads must appear of record).

135-57 **Pleadings** in an action do not operate as an acceptance of a tender of dedication. Darling v. Mayor (N. J. Eq.), 67 A. 709.

135-58 Pitcairn v. Chester, 135 Fed. 587; McKenzie v. Haines, 123 Wis. 557, 102 N. W. 33. *Compare* Sanborn v. Amarillo (Tex. Civ.), 93 S. W. 473.

DEEDS [Vol. 4.]

145-2 See Hill v. Nelms, 86 Ala. 442, 5 S. 796; Farrior v. Security Co., 88 Ala. 275, 7 S. 200; Einstein's Sons v. Shouse, 24 Fla. 490, 5 S. 380; Watkins v. Nugen, 118 Ga. 372, 45 S. E. 262; Stuart v. Dutton, 39 Ill. 91; Collins v. Cornwell, 131 Ind. 20, 30 N. E. 796; Smith v. James, 131 Ind. 131, 30 N. E. 902; S. v. Young, 23 Minn. 551; Smith v. Williams, 38 Miss. 48; Wells v. Lamb, 19 Neb. 355, 27 N. W. 229; Brown v. Westerfield, 47 Neb. 399, 66 N. W. 439, 53 Am. St. 532; Keenan v. Keenan, 58 Hun 605, 12 N. Y. S. 747; Gaskill v. King, 34 N. C. 211, 221; Koppelmann v. Koppelmann, 94 Tex. 40, 57 S. W. 570.

Execution as used in a statute making acknowledgment prima facie evidence of execution, includes both signing and delivery. Tucker v. Helgrin, 102 Minn. 382, 113 N. W. 912. See Little v. Dodge, 32 Ark. 453; Clark v. Childs, 66 Cal. 87, 4 P. 1058. *Compare* Young v. Clarendon, 132 U. S. 340. But see Nielson v. Schuckman, 53 Wis. 638, 11 N. W. 44.

145-3 Buffington v. Thompson, 98 Ga. 416, 25 S. E. 516; Stallings v. Newton, 110 Ga. 875, 36 S. E. 227. See Tiernan v. Fenimore, 17 Ohio 545; Solt v. Anderson, 67 Neb. 103, 93 N. W. 205.

146-4 See Landt v. McCullough, 130 Ill. App. 515 (verified denial necessary); Tucker v. Helgren, 102 Minn. 382, 113 N. W. 912; Burk v. Pence, 206 Mo. 315, 104 S. W. 23.

147-16 **Vagueness or uncertainty in description** of property conveyed does not render deed inadmissible unless identification of the land is impossible. Walker v. Lee, 51 Fla. 360, 40 S. 881. But where location of the land is impossible the deed is inadmissible even as color of title. Whitehead v. Pitts, 127 Ga. 774, 56 S. E. 1004.

151-29 Bentley v. McCall, 119 Ga. 530, 46 S. E. 645; Williamson v. Work, 33 Tex. Civ. 369, 77 S. W. 266 (affidavit held sufficient). See Gann v. Roberts, 32 Tex. Civ. 561, 74 S. W. 950. But see Elliott v. Sheppard, 179 Mo. 382, 78 S. W. 627, and "ACKNOWLEDGMENT."

151-30 **Reputation as forger** of land titles may be shown as evidence of the alleged forgery of a deed. Loving v. Jackson (Tex. Civ.), 95 S. W. 19. But see "CHARACTER."

152-33 **But where a deed must be witnessed,** the grantor's declarations are not competent primary evidence although the statute provides that execution may be proved by the "testimony" of the grantor without producing or accounting for the subscribing witnesses. Sledge v. Singley, 139 Ala. 346, 37 S. 98.

152-36 Ayer v. Dillard, 45 Fla. 179, 33 S. 714 (deed by governor and secretary of state).

152-41 **Guardian's deed** presumptive evidence (under statute) of the regularity of the sale but not of the existence of all prerequisites to a valid sale. Teague v. Swasey (Tex. Civ.), 102 S. W. 458.

152-42 Winn v. Coggins, 53 Fla. 327, 42 S. 897 (*cit.* Simmons v. Spratt, 20 Fla. 495; McGehee v. Wilkins, 31 Fla. 83, 12 S. 288); Castleman v. Phillipsburg Co., 1 Tenn. Ch. App. 9.

153-43 Kimmel v. Meier, 106 Ill. App. 251 (sheriff's deed prima facie evidence). See "TITLE."

Tax deed. — Mitchell v. Denver, 33 Colo. 37, 78 P. 686.

154-49 **Presumption after long lapse of time.** — Tarvin v. Walker, 25 Ky. L. R. 2246, 80 S. W. 504.

155-57 Brannan v. Henry, 142 Ala. 698, 39 S. 92.

156-61 See "CANCELLATION OF INSTRUMENTS."

156-62 See "IDENTITY."

156-63 **But the son's giving a mortgage** to the father on the premises described by the deed sufficiently rebuts the presumption. Hess v. Stockard, 99 Minn. 504, 109 N. W. 1113.

157-67 See Bernheim v. Heyman, 31 Ky. L. R. 984, 104 S. W. 388.

A deed in chain of title signed by one Chrast and "Fannie" Chrast, certified in the acknowledgment to be his wife, is admissible as the deed of his wife "Frances" Chrast without first showing the identity of "Fannie" with "Frances." Chrast v. O'Connor, 41 Wash. 360, 83 P. 238.

158-73 See McCune v. Goodville, 204 Mo. 306, 102 S. W. 997.

158-74 Morrison v. Fletcher, 119 Ky. 488, 84 S. W. 548; Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. 874. See Sheehy v. Scott, 128 Ia. 551, 104 N. W. 1139.

158-75 Morton v. Morton, 82 Ark. 492, 102 S. W. 213; Drinkwater v. Hollar (Cal App.), 91 P. 664; Central Tr. Co. v. Stoddard, 4 Cal. App. 647, 88 P. 806; Kaaihue v. Crabbe, 3 Haw. 768; Nowlen v. Nowlen, 122 Ia. 541, 98 N. W. 383; Hild v. Hild, 129 Ia. 649, 106 N. W. 159; Wilbur v. Grover, 140 Mich. 187, 103 N. W. 583; Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308; Pierson v. Fisher, 48 Or. 223, 85 P. 621; Chase v. Woodruff (Wis.), 113 N. W. 973; Tucker v. Helgren, 102 Minn. 382, 113 N. W. 912. See Hild v. Hild, 129 Ia. 649, 106 N. W. 159.

159-78 Pierson v. Fisher, 48 Or. 223, 85 P. 621.

160-81 Drinkwater v. Hollar (Cal. App.), 91 P. 664; Elliott v. Murry, 225 Ill. 107, 80 N. E. 77.

160-82 Central Tr. Co. v. Stoddard, 4 Cal. App. 647, 88 P. 802 (when rights of third persons have intervened); Blake v. Ogden, 223 Ill. 204, 79 N. E. 68. See Konser v. Konser, 219 Ill. 466, 76 N. E. 846 (evidence held sufficient to rebut presumption); Hild v. Hild, 129 Ia. 649, 106 N. W. 159; Cameron v. Gray, 202 Pa. 566, 52 A. 132 (evidence held sufficient to rebut presumption).

In absence of claim of fraud the evidence, while it should be clear and satisfactory, need not establish absolute non-delivery beyond all reasonable controversy. Chase v. Woodruff (Wis.), 113 N. W. 973.

161-84 But see Henry v. Henry, 215 Ill. 205, 74 N. E. 126; and infra, 166-99 and 168-1.

Not conclusive. — Cribbs v. Walker, 74 Ark. 104, 85 S. W. 244.

Deed found amongst dead grantor's papers presumed not to have been delivered. Shelter v. Stewart, 133 Ia. 320, 107 N. W. 310, 110 N. W. 582.

162-85 Cribbs v. Walker, 74 Ark. 104, 85 S. W. 244.

164-91 Russell v. May, 77 Ark. 89, 90 S. W. 617; Abrams v. Beale, 224 Ill. 496, 79 N. E. 671; Blake v. Ogden, 233 Ill. 204, 79 N. E. 68; Calkins v. Calkins, 220 Ill. 111, 77 N. E. 102; Fireman's Ins. Co. v. Dunn, 22 Ind. App. 332, 53 N. E. 251; Webb v. Webb, 130 Ia. 457, 104 N. W. 438; Davis v. Hall, 128 Ia. 647, 105 N. W. 122; McCrum v. McCrum, 127 Ia. 540, 103 N. W. 771; Collings v. Collings, 29 Ky. L. R. 51, 92 S. W. 577; Morrison v. Fletcher, 119 Ky. 488, 84 S. W. 548; Hartman v. Thompson, 104 Md. 389, 65 A. 117; McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997; Peters v. Berkemeier, 184 Mo. 393, 83 S. W. 747 (if recorded at instance of grantor); Smithwick v. Moore, 145 N. C. 110, 58 S. E. 908; Wetherington v. Williams, 134 N. C. 276, 46 S. E. 728; Dayton v. Stewart, 99 Md. 643, 59 A. 281; Smith v. Smith, 116 Wis. 570, 93 N. W. 452. See Hildebrand v. Willig, 64 N. J. Eq. 249, 54 A. 153.

Rebuttable. — Clark v. Harper, 215 Ill. 24, 74 N. E. 61; Wilenon v. Handlon, 207 Ill. 104, 69 N. E. 892.

165-92 Davis v. Hall, 128 Ia. 647, 105 N. W. 122. But see Firemans F. Ins. Co. v. Dunn, 22 Ind. App. 332, 53 N. E. 251; Cameron v. Gray, 202 Pa. 566, 52 A. 132; Smith v. Smith, 116 Wis. 570, 93 N. W. 452.

Continuance in possession tends to rebut presumption. Wilenon v. Handlon, 207 Ill. 104, 69 N. E. 892.

166-93 Abrams v. Beale, 224 Ill. 496, 79 N. E. 671; Baker v. Hall, 214 Ill. 364, 73 N. E. 351.

166-96 Creighton v. Roe, 218 Ill. 619, 75 N. E. 1073. But see

Abrams v. Beale, 224 Ill. 496, 79 N. E. 671; Konser v. Konser, 219 Ill. 466, 76 N. E. 846.

167-98 Abrams v. Beale, supra; Creighton v. Roe, supra.

167-99 Coleman v. Coleman, 216 Ill. 261, 74 N. E. 701. See Wilenon v. Handlon, 207 Ill. 104, 69 N. E. 892.

Voluntary grant. — Presumptions stronger. — Where the deed is a voluntary conveyance the presumptions of delivery are much stronger than in case of a bargain and sale, even though the grantee be an adult. Henry v. Heurg, 215 Ill. 205, 74 N. E. 126. See also Baker v. Hall, 214 Ill. 364, 73 N. E. 351; Kirkwood v. Smith, 212 Ill. 395, 72 N. E. 427.

168-1 Abrams v. Beale, 224 Ill. 496, 79 N. E. 671.

168-3 See Chastek v. Souba, 93 Minn. 418, 101 N. W. 618.

169-5 Napier v. Elliott (Ala.), 44 S. 552.

169-6 Napier v. Elliott, supra.

170-11 Secret intent. — But he can not testify to a secret intent not to deliver, at variance with his acts. Wilbur v. Grover, 140 Mich. 187, 103 N. W. 583.

170-14 Cribbs v. Walker, 74 Ark. 104, 85 S. W. 244.

171-17 See Wilbur v. Grover, supra; Roup v. Roup, 136 Mich. 385, 99 N. W. 389.

172-20 Statements of grantee. Verbal acts. — In an action between the grantee and grantor, on the issue of delivery, the former may prove his statements when the deed was handed to him although the grantor was not present. They are verbal acts admissible as part of the res gestae. Renshaw v. Dignan, 128 Ia. 722, 105 N. W. 209.

172-21 Chew v. Jackson (Tex. Civ.), 102 S. W. 427. See Russell v. Mitchell, 223 Ill. 438, 79 N. E. 141.

Denial of delivery. — But a witness may deny delivery where he has the burden of establishing such negative fact. Renshaw v. Dignan, supra. ("If there were an issue regarding delivery, and the vendor had the affirmative of showing that one had been made, the case would present a different aspect. In that case such a fact would be the conclusion of the witness from other facts and would undoubtedly be inadmissible"). See also Brooks v. Sioux City, 114 Ia. 641, 87 N. W. 682.

172-22 Scarborough v. Holder, 127 Ga. 256, 56 S. E. 293.

Such evidence, however, is only admissible where the question of delivery is a doubtful or debatable one. Merki v. Merki, 113 Ill. App. 518.

An alleged delivery may be rebutted by evidence that on the day of the grantor's death the alleged grantee was seen to take a bundle of papers from decedent's trunk. Napier v. Elliott (Ala.), 44 S. 552.

173-25 Daneri v. Gazzola, 2 Cal. App. 351, 83 P. 455; McBrayer v. Walker, 122 Ga. 245, 50 S. E. 95; Redmond v. Cass, 226 Ill. 120, 80 N. E. 708; Crabtree v. Crabtree (Ia.), 113 N. W. 923; Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308; Oehler v. Walsh, 7 Ohio C. C. (N. S.) 572. But see Wheelock v. Harding, 4 Pa. Super. 21.

174-28 Daneri v. Gazzola, 2 Cal. App. 351, 83 P. 455; Wheelock v. Hardiug, 4 Pa. Super 21.

175-29 Ewers v. Smith, 98 App. Div. 289, 90 N. Y. S. 575.

175-30 Crabtree v. Crabtree (Ia.), 113 N. W. 923 (*cit.* Encyc. of Ev.)

Two acknowledgments different dates. — Circumstances held to show delivery on date of first acknowledgment. Bogart v. Moody, 35 Tex. Civ. 1, 79 S. W. 633.

177-37 No presumption of delivery. — Thomas v. Sullivan, 138 Mich. 265, 101 N. W. 528 (*cit.* Trask v. Trask, 90 Ia. 318, 57 N. W. 841; Mitchell v. Ryan, 3 Ohio St. 377).

Presumption in favor of bona fide purchaser from grantee. — Where a regularly executed deed has been delivered in escrow and afterwards given to the grantee there is a presumption in favor of a subsequent purchaser for value that the instrument is what it purports to be, a fully executed and delivered deed, and that all conditions have been complied with. Dempwolf v. Greybill, 213 Pa. 63, 62 A. 645; Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478.

177-42 Akers v. Shoemaker, 31 Ky. L. R. 482, 102 S. W. 842. See

Marshall v. Hartzfelt, 98 Mo. App. 178, 71 S. W. 1061.

178-47 Russell v. May, 77 Ark. 89, 90 S. W. 617; White v. Watts, 118 Ia. 549, 92 N. W. 660; Dunlap v. Dunlap, 94 Mich. 11, 53 N. W. 788; Parsons v. McCumber, 14 N. D. 213, 103 N. W. 626; Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. 874; Whiting v. Hoglund, 127 Wis. 135, 106 N. W. 391. See Morrison v. Fletcher, 119 Ky. 488, 84 S. W. 548.

178-48 **Voluntary settlement.** — Knowledge by grantee unnecessary. Baker v. Hall, 214 Ill. 364, 73 N. E. 351.

179-49 Russell v. May, 77 Ark. 89, 90 S. W. 617; White v. Watts, 118 Ia. 549, 92 N. W. 660 (especially where the deed imposes no burden on grantee); Dunlap v. Dunlap, 94 Mich. 11, 53 N. W. 788; Parsons v. McCumber, 14 N. D. 213, 103 N. W. 626.

180-51 See Russell v. May, 77 Ark. 89, 90 S. W. 617.

181-54 Russell v. May, supra; Collings v. Collings, 29 Ky. L. R. 51, 92 S. W. 577; Morrison v. Fletcher, 119 Ky. 488, 84 S. W. 548 (if the grant is beneficial); Hartman v. Thompson, 104 Md. 389, 65 A. 117; McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997; Peters v. Berkemeier, 184 Mo. 393, 83 S. W. 747. See Kaaihue v. Crabbe, 3 Haw. 768; Wood v. Howk, 25 Ky. L. R. 2109, 79 S. W. 1184.

182-60 Swainson v. Scott, 111 Tenn. 140, 76 S. W. 909. See Dennis Bros. v. Strunk, 32 Ky. L. R. 1230, 108 S. W. 957.

Recital of heirship. — Lanier v. Hebard, 123 Ga. 626, 51 S. E. 632; Lohse v. Burch, 42 Wash. 156, 84 P. 722; Mace v. Duffy, 39 Wash. 597, 81 P. 1053.

As evidence of pedigree. — See "PEDIGREE."

183-62 **Provision for evidential effect.** — The instrument creating the power of sale may provide that recitals in the deed shall be evidence. Ward v. Forrester, 35 Tex. Civ. 319, 80 S. W. 127.

184-71 **Receiver's deed.** — Recital of authority not evidence against stranger to deed. Hogan v. Holderby (W. Va.), 57 S. E. 289.

Statute. — Kelley v. L. Dist., 74 Ark. 202, 85 S. W. 249, 87 S. W. 638.

185-75 **Recital in ancient deed competent.** Gunn v. Turner, 13 Ont. L. R. (Can.) 158.

187-92 Hickory v. R. Co., 137 N. C. 189, 49 S. E. 202; Rankin v. Moore (Tex. Civ.), 101 S. W. 1049.

187-95 See "ANCIENT DOCUMENTS," and Gunn v. Turner, 13 Ont. L. R. (Can.) 158 (by statute); Mist v. Kapiolani, 13 Haw. 523; Boagni v. Pacific Co., 111 La. 1063, 36 S. 129; Sparhawk v. Bullard, 1 Mete. (Mass.) 95; Morris v. Callanan, 105 Mass. 129; Norris v. Hall, 124 Mich. 170, 82 N. W. 832; Young v. Schulenberg, 165 N. Y. 385, 59 N. E. 135; Dorff v. Schmunk, 197 Pa. 298, 47 A. 113; Webb v. Ritter, 60 W. Va. 193, 54 S. E. 484 (of heirship). *Contra*, Lanier v. Hebard, 123 Ga. 626, 51 S. E. 632. See Sims v. Meacham, 2 Bail. (S. C.) 101; Watkins v. Smith, 91 Tex. 589, 45 S. W. 560.

As evidence of pedigree. — See "PEDIGREE."

188-97 See Schreyer v. Schreyer, 43 Misc. 520, 89 N. Y. S. 508. But see Gardiner v. Gardiner, 134 Mich. 90, 95 N. W. 973.

188-99 Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515. See Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201.

190-12 Morton v. Morton, 82 Ark. 492, 102 S. W. 213; St. Louis etc. R. Co. v. Crandell, 75 Ark. 89, 86 S. W. 855; Crafton v. Inge, 30 Ky. L. R. 313, 98 S. W. 325; Curd v. Bowron, 32 Ky. 369, 105 S. W. 417; Faust v. Faust, 144 N. C. 383, 57 S. E. 22; Forester v. Van Auken, 12 N. D. 175, 96 N. W. 301; Jost v. Wolf, 130 Wis. 37, 110 N. W. 232; Mueller v. Cook, 126 Wis. 504, 105 N. W. 1054.

193-19 Fowlkes v. Lea, 84 Miss. 509, 36 S. 1036.

194-23 Redmond v. Cass, 226 Ill. 120, 80 N. E. 708. See Gougenheims v. Ermann, 118 La. 577, 43 S. 170; Jost v. Wolf, 130 Wis. 37, 110 N. W. 232.

196-28 But see Forester v. Van Auken, 12 N. D. 175, 96 N. W. 301.

202-56 St. Louis etc. R. Co. v. Crandell, 75 Ark. 89, 86 S. W. 855 (contract to erect depot on right of way granted).

203-58 Whitman v. Corley, 72 S. C. 410, 52 S. E. 49.
204-62 Whitman v. Corley, supra.
206-80 Denny v. Bank, 118 Ga. 221, 44 S. E. 982; Reeder v. Wilbur, 18 S. D. 426, 100 N. W. 1099.
207-82 See Kenniff v. Canfield, 140 Cal. 34, 73 P. 803.
207-87 See infra, 212-27; 218-57 et seq.
207-88 Kapuniai v. Kekupu, 3 Haw. 560; Capell v. Fagan, 30 Mont. 507, 77 P. 55; Poland v. Porter (Tex. Civ.), 98 S. W. 214; Davis v. Ragland (Tex. Civ.), 93 S. W. 1099. See Sellars v. Farmer (Ala.), 43 S. 967.
207-90 Poland v. Porter (Tex. Civ.), 98 S. W. 214.
207-91 Bentley v. McCall, 119 Ga. 530, 46 S. E. 645; Jante v. Culbreth (Tex. Civ.), 101 S. W. 279 (execution and delivery).
209-6 Texas L. & C. Co. v. Walker (Tex. Civ.), 105 S. W. 545.
210-9 Texas L. & C. Co. v. Walker (Tex. Civ.), 105 S. W. 545.
210-14 Bower v. Cohen, 126 Ga. 35, 54 S. E. 918; Interstate Co. v. Bailey, 29 Ky. L. R. 468, 93 S. W. 578; Davis v. Ragland (Tex. Civ.), 93 S. W. 1099.
210-17 Cox v. McDonald, 118 Ga. 414, 45 S. E. 401.
But secondary evidence of previous deeds in chain of title is not admissible where no inquiry has been made of immediate predecessor in title of party offering the evidence. Bower v. Cohen, 126 Ga. 35, 54 S. E. 918.
211-18 Sellers v. Farmer (Ala.), 43 S. 967.
211-21 See Bower v. Cohen, supra.
211-22 A curative deed given by a trustee in place of a lost deed is competent circumstantial evidence of the latter's existence. Simmons v. Hewitt (Tex. Civ.), 87 S. W. 188.
212-26 Veatch v. Gray (Tex. Civ.), 91 S. W. 324. See "Records," Vol. 10, p. 757, note 85, and p. 933, notes 6 and 7.
212-27 Lancaster v. Lee, 71 S. C. 280, 51 S. E. 139; Shifflet v. Morelle, 68 Tex. 382, 4 S. W. 843.
213-32 *Compare* Dennis Bros v. Strunk, 32 Ky. L. R. 1230, 108 S. W. 957. *Contra,* Swainson v. Scott, 111 Tenn. 140, 76 S. W. 909 (recitals of previous grant in old deeds, properly admitted in evidence as links in chain of title, are not competent evidence of the grant recited as against strangers to the deeds).
Possession unnecessary. — Recital of previous deed held competent circumstantial evidence of alleged lost deed in connection with undisputed claim of ownership although possession of property conveyed had never been taken by either grantor or grantee. Brewer v. Cochran (Tex. Civ.), 99 S. W. 1033.
213-34 Capell v. Fagan, 30 Mont. 507, 77 P. 55.
215-47 Evidence must be clear and conclusive. — Carter v. Wood, 103 Va. 68, 48 S. E. 553.
Where fraud is alleged the evidence of the execution and loss of the original should be clear and satisfactory. Lancaster v. Lee, 71 S. C. 280, 51 S. E. 139.
216-51 Capell v. Fagan, supra (consideration, if recited, must be proved). See Kapuniai v. Kekupu, 3 Haw. 560.
219-59 See Jenkins v. McMichael, 21 Pa. Super. 161; Poland v. Porter (Tex. Civ.), 98 S. W. 214.
Actual possession not essential. Brewer v. Cochran (Tex. Civ.), 99 S. W. 1033 (*cit.* Garner v. Lasker, 71 Tex. 431, 9 S. W. 332; Baldwin v. Goldfrank, 88 Tex. 249, 31 S. W. 1064).
220-60 Jenkins v. McMichael, supra; Poland v. Porter, supra.
222-66 See Brewer v. Cochran (Tex. Civ.), 99 S. W. 1033.
223-69 But see Capell v. Fagan, 30 Mont. 507, 77 P. 55.
223-70 But where the grantor has testified that he did not execute an alleged deed, his previous contrary statements introduced to impeach him are not sufficient to show execution of the deed. Hutchins v. Murphy, 146 Mich. 621, 110 N. W. 52.
227-81 Except where the covenantor had notice and opportunity to defend the action resulting in eviction. McMullen v. Butler, 117 Ga. 845, 45 S. E. 258.
229-99 See Anthony v. Rockefeller, 102 Mo. App. 326, 76 S. W. 491.

231-10 See Lloyd v. Sandusky, 203 Ill. 621, 68 N. E. 154.
234-23 Lloyd v. Sandusky, supra.
234-24 Redmond v. Cass, 226 Ill. 120, 80 N. E. 708.
235-30 See Lloyd v. Sandusky, supra (*quot.* from Rawle on "Covenants for Title," 4th ed. p. 258).
238-39 Sachse v. Loeb (Tex. Civ.), 101 S. W. 450. See Baumgarten v. Chipman, 30 Utah 466, 86 P. 411.
Judgment establishing dower. McCrillis v. Thomas, 110 Mo. App. 699, 85 S. W. 673.
238-40 Sachse v. Loeb, supra. See Baumgarten v. Chipman, 30 Utah, 466, 86 P. 411.
239-42 Browning v. Stillwell, 42 Misc. 346, 86 N. Y. S. 707.
241-52 Olmstead v. Rawson, 188 N. Y. 517, 81 N. E. 456.

DELIVERY [Vol. 4.]

Book accounts, 262-67.

245-1 Sarasohn v. Kamaiky, 120 App. Div. 110, 105 N. Y. S. 53; Sears v. Daly, 43 Or. 346, 73 P. 5.
246-8 Towne v. Towne (Cal. App.), 92 P. 1050 (strong evidence required); Pierson v. Fisher, 48 Or. 223, 85 P. 621.
247-9 Wilbur v. Grover, 140 Mich. 187, 103 N. W. 583 (manual delivery presumed to be a legal delivery).
Presumption of delivery as of time of its date. Ewers v. Smith, 98 App. Div. 289, 90 N. Y. S. 575; Ranken v. Donovan, 115 App. Div. 651, 100 N. Y. S. 1049.
247-10 See Sheehy v. Scott, 128 Ia. 551, 104 N. W. 1139.
247-11 Cribbs v. Walker, 74 Ark. 104, 85 S. W. 244; Barber v. Fence Co., 129 Ill. App. 45; Dodsworth v. Sullivan, 95 Minn. 39, 103 N. W. 719; Coulson v. Coulson, 180 Mo. 709, 79 S. W. 473; Sappingfield v. King (Or.), 89 P. 142, 8 L. R. A. (N. S.) 1066.
249-12 Russell v. May, 77 Ark. 89, 90 S. W. 617; Waite v. Grubbe, 43 Or. 406, 73 P. 206.
249-14 *Compare* Ward v. Ward, 144 Fed. 308.
249-15 Acknowledgment of delivery of copy of a mortgage, makes a prima facie case of delivery. Cable Co. v. Rathgeber (S. D.), 113 N. W. 88.
249-17 Daneri v. Gazzola, 2 Cal. App. 351, 83 P. 455.
250-18 Cribbs v. Walker, 74 Ark. 104, 85 S. W. 244. See Bisard v. Sparke, 133 Mich. 587, 95 N. W. 728.
250-20 Cribbs v. Walker, supra (interest reserved by grantor in the property).
250-21 See Chew v. Jackson (Tex. Civ.), 102 S. W. 427.
250-22 Coulson v. Coulson, 180 Mo. 709, 79 S. W. 473.
250-23 Morton v. Morton, 82 Ark. 492, 102 S. W. 213; Towne v. Towne (Cal. App.), 92 P. 1050; Blake v. Ogden, 223 Ill. 204, 79 N. E. 68; Wilbur v. Grover, 140 Mich. 187, 103 N. W. 583; Preston v. Albee, 120 App. Div. 89, 105 N. Y. S. 33; Pierson v. Fisher, 48 Or. 223, 85 P. 621.
252-24 Crabtree v. Crabtree (Ia.), 113 N. W. 923; Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308 (presumption of delivery on date of the deed).
252-25 Nowlen v. Nowlen, 122 Ia. 541, 98 N. W. 383.
253-29 Dodd v. Kemintz, 74 Neb. 634, 104 N. W. 1069.
254-32 Central T. Co. v. Stoddard, 4 Cal. App. 647, 88 P. 806; Hild v. Hild, 129 Ia. 649, 106 N. W. 159.
254-33 Henry v. Henry, 215 Ill. 205, 74 N. E. 126; Benton L. Co. v. Zeitler, 182 Mo. 251, 81 S. W. 193 (dealing with property conveyed as owner is evidence of a delivery of the deed).
255-37 Russell v. May, 77 Ark. 89, 90 S. W. 617; Konser v. Konser, 219 Ill. 466, 76 N. E. 846; Blake v. Ogden, 223 Ill. 204, 79 N. E. 68; Dewitt v. Shea, 203 Ill. 393, 67 N. E. 761; Webb v. Webb, 130 Ia. 457, 104 N. W. 438; Luckhart v. Luckhart, 120 Ia. 248, 94 N. W. 461; McCrum v. McCrum, 127 Ia. 540, 103 N. W. 771; Collings v. Collings, 29 Ky. L. R. 51, 92 S. W. 577; Morrison v. Fletcher, 119 Ky. 488, 84 S. W. 548; Hartman v. Thompson, 104 Md. 389, 65 A. 117; Peters v. Berkemeier, 184 Mo. 393, 83 S. W. 747; Whitaker v. Whitaker, 175 Mo. 1,

74 S. W. 1029; Preston v. Albee, 120 App. Div. 89, 105 N. Y. S. 33; Van Gaasbeck v. Staples, 85 App. Div. 271, 83 N. Y. S. 225, *aff.* 177 N. Y. 524, 69 N. E. 1132; Smithwick v. Moore, 145 N. C. 110, 58 S. E. 908; Ford v. Boone, 32 Tex. Civ. 550, 75 S. W. 353; Whiting v. Hoglund, 127 Wis. 135, 106 N. W. 391.

256-40 Napier v. Elliott, 146 Ala. 213, 40 S. 752; Creighton v. Roe, 218 Ill. 619, 75 N. E. 1073; Wilenow v. Handlon, 207 Ill. 104, 69 N. E. 892; Clark v. Harper, 215 Ill. 24, 74 N. E. 61; Davis v. Hall, 128 Ia. 647, 105 N. W. 122 (clear proof necessary); Coppage v. Murphy, 24 Ky. L. R. 257, 68 S. W. 416; Morrison v. Fletcher, 119 Ky. 488, 84 S. W. 548; McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997; Hildebrand v. Willig, 64 N. J. Eq. 249, 53 A. 1035; Wetherington v. Williams, 134 N. C. 276, 46 S. E. 728; Johnson v. Johnson (Tex. Civ.), 85 S. W. 1023.

258-46 Luckhart v. Luckhart, 120 Ia. 248, 94 N. W. 461 (recital of consideration as evidence of delivery); Schreyer v. Schreyer, 43 Misc. 520, 89 N. Y. S. 508. See Gardiner v. Gardiner, 134 Mich. 90, 95 N. W. 973.

258-47 Ward v. Ward, 144 Fed. 308. *Compare* Lange v. Cullinan, 205 Ill. 365, 68 N. E. 934.

259-48 Wilenow v. Handlon, 207 Ill. 104, 69 N. E. 892; Abrams v. Beale, 224 Ill. 496, 79 N. E. 671 (presumption does not arise where grantee is an adult, not under mental disability).

259-49 Baker v. Hall, 214 Ill. 364, 73 N. E. 351; Henry v. Henry, 215 Ill. 205, 74 N. E. 126; Thompson v. Calhoun, 216 Ill. 161, 74 N. E. 775; Kirkwood v. Smith, 212 Ill. 395, 72 N. E. 427; Chapin v. Mott, 203 Ill. 341, 67 N. E. 833.

259-51 Collings v. Collings, 29 Ky. L. R. 51, 92 S. W. 77; Benton Co. v. Zeitler, 182 Mo. 251, 81 S. W. 193.

259-55 Third Nat. Bk. v. Hays (Tenn.), 108 S. W. 1060 (delivery of bill of lading is symbolic delivery of the property represented).

260-56 Davidson S. S. Co. v. U. S., 142 Fed. 315, 73 C. C. A. 425; Armstrong v. Ins. Co., 121 Ia. 362, 96 N. W. 954 (deposit of insurance policy in mail, a delivery); Long Bell L. Co. v. Nyman, 145 Mich. 477, 108 N. W. 1019; Opet v. Denzer (Tex. Civ.), 93 S. W. 527. See "PRESUMPTIONS."

260-61 Central T. Co. v. Stoddard, 4 Cal. App. 647, 88 P. 806; Simons v. Daly, 9 Idaho 87, 72 P. 507; Emmons v. Harding, 162 Ind. 154, 70 N. E. 142; Chastek v. Souba, 93 Minn. 418, 101 N. W. 618.

260-62 Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; Ebel v. Piehl, 134 Mich. 64, 95 N. W. 1004; Jante v. Culbreth (Tex. Civ.), 101 S. W. 279. See Van der Aa v. Van Drunen, 208 Ill. 108, 70 N. E. 33; Carson v. Produce Co. (Wis.), 113 N. W. 393 (circumstances may outweigh direct evidence).

Books of account admissible to prove delivery. Pettey v. Benoit, 193 Mass. 233, 79 N. E. 245.

261-63 De Laval Co. v. Steadman (Cal. App.), 92 P. 877; Gress Co. v. Berry, 2 Ga. App. 207, 58 S. E. 384; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576 (parol evidence admissible to prove non-delivery).

261-64 Napier v. Elliott, 146 Ala. 213, 40 S. 752; Renshaw v. Dignan, 128 Iowa 722, 105 N. W. 209 (declarations of deliveree admissible).

261-65 Cribbs v. Walker, 74 Ark. 104, 85 S. W. 244 (declarations against interest, admissible); Chew v. Jackson (Tex. Civ.), 102 S. W. 427.

262-67 **Book accounts.** — Delivery may be proved by entries in books of account. Bloomington M. Co. v. Ice Co., 171 N. Y. 673, 64 N. E. 1118; In re Groff, 14 Phila. (Pa.) 306.

262-69 Dodd v. Kemnitz, 74 Neb. 634, 104 N. W. 1069; Blair v. Bank, 103 Va. 762, 50 S. E. 262. See Hendry v. Cartwright (N. M.), 89 P. 309.

DEMAND [Vol. 4.]

265-3 Smokeless F. Co. v. Seaton, 105 Va. 170, 52 S. E. 829.

265-4 Schlimbach v. McLean, 83 App. Div. 157, 82 N. Y. S. 516, *aff.* 70 N. E. 1108.

266-7 **Letter** referring to a previous demand, not a demand, and incompetent as a self-serving declaration. Hightower v. Ansley, 126 Ga. 8, 54 S. E. 939.
266-8 Sherrod v. Ins. Co., 139 N. C. 167, 51 S. E. 910.
266-9 Hopkins v. Lumb. Co., 33 Wash. 181, 73 P. 1113.

DEMONSTRATIVE EVIDENCE
[Vol. 4.]

Phonograph, 279-54; *Animals,* 279-55; *Sameness of condition,* 292-25.

272-2 See Clark v. R. Co., 177 N. Y. 359, 69 N. E. 647.
273-9 Bloch v. Ins. Co. (Wis.), 112 N. W. 45.
Shoe may be used in describing tracks. S. v. Langford, 74 S. C. 460, 55 S. E. 120.
Skeleton may be used by a physician to illustrate his testimony. Chicago & A. R. Co. v. Walker, 217 Ill. 605, 75 N. E. 520.
273-11 **Bloody clothing** inadmissible where there is no question as to the location of wounds, their effect, or character. Melton v. S., 47 Tex. Cr. 451, 83 S. W. 822; Cole v. S., 45 Tex. Cr. 225, 75 S. W. 527; Christian v. S., 46 Tex. Cr. 47, 79 S. W. 562; Lucas v. S. (Tex. Cr.), 95 S. W. 1055.
274-12 Garvik v. R. Co., 124 Ia. 691, 100 N. W. 498.
274-17 Pittsburgh etc. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033; S. v. Danforth, 73 N. H. 215, 60 A. 839. *Compare* Wistrand v. P., 213 Ill. 72, 72 N. E. 748.
275-20 **Private examination** of person of defendant by the jury improper, since the plaintiff was entitled to be present during the entire trial. Garvik v. R. Co., 124 Ia. 691, 100 N. W. 498.
275-21 Missouri etc. R. Co. v. Lynch (Tex. Civ.), 90 S. W. 511.
275-22 Cirello v. Exp. Co., 88 N. Y. S. 932; Campbell v. S., 111 Wis. 152, 86 N. W. 855. See Clark v. R. Co., 177 N. Y. 359, 69 N. E. 647 (plaintiff not allowed to perform acts, while a witness, to show the effects of a nervous disease alleged to have been caused by the injury complained of); Adams v. S. (Tex. Cr.), 93 S. W. 116.
276-25 S. v. Aspara, 113 La. 940, 37 S. 883; P. v. Van Wormer, 175 N. Y. 188, 67 N. E. 299; P. v. Adams, 176 N. Y. 351, 68 N. E. 636; Roszczyniala v. S., 125 Wis. 414, 104 N. W. 113; Thornton v. S., 117 Wis. 338, 93 N. W. 1107, 98 Am. St. 924.
276-26 C. v. Tucker, 189 Mass. 457, 76 N. E. 127; Younger v. S. (Neb.), 114 N. W. 170. *Contra,* Sherman v. S., 2 Ga. App. 148, 58 S. E. 393, 1122; Hammond v. S., 2 Ga. App. 384, 58 S. E. 509.
276-27 S. v. Fuller, 34 Mont. 12, 85 P. 369.
276-28 Paulson v. S., 118 Wis. 89, 94 N. W. 771.
Chain by which deceased was tied to a tree. Young v. S., 49 Tex. Cr. 207, 92 S. W. 841.
277-29 S. v. Giroux, 75 Kan. 695, 90 P. 249.
277-36 Lyon v. C., 29 Ky. L. R. 1020, 96 S. W. 857; Fletcher v. C., 29 Ky. L. R. 955, 96 S. W. 855; Turner v. S., 48 Tex. Cr. 585, 89 S. W. 975.
277-37 Hill v. S., 146 Ala. 51, 41 S. 621; D. C. v. Duryee, 29 App. Cas. (D. C.) 327 (hitching post); Warren v. R. Co., 141 Mich. 298, 104 N. W. 613 (defective electric insulators); Lamb v. S., 69 Neb. 212, 95 N. W. 1050 (hides of animals).
277-39 Moss v. S. (Ala.), 44 S. 598; P. v. Weber, 149 Cal. 325, 86 P. 671; S. v. Sherouk, 78 Conn. 718, 61 A. 897; Roberts v. S., 123 Ga. 146, 51 S. E. 374 (curtain pole); P. v. Flanigan, 174 N. Y. 356, 66 N. E. 988 (iron bar and rope used in an attempted escape resulting in homicide); Hickey v. S. (Tex. Cr.), 102 S. W. 417; Alarcon v. S. (Tex. Cr.), 90 S. W. 179; Jackson v. S., 48 Tex. Cr. 648, 90 S. W. 34.
Weapons admissible, although the indictment charges the use of other instruments. S. v. Romano, 41 Wash. 241, 83 P. 1.
277-40 Osburn v. S., 164 Ind. 262, 73 N. E. 601.
278-41 Watson v. S. (Tex. Cr.), 105 S. W. 509.
278-42 Pate v. S. (Ala.), 43 S. 343; S. v. Craft, 118 La. 117, 42 S.

718; Venters v. S., 47 Tex. Cr. 280, 83 S. W. 832.

278-46 No. Alabama R. Co. v. Mansell, 138 Ala. 548, 36 S. 459; S. v. Brannan, 206 Mo. 636, 105 S. W. 602; Keen v. R. Co. (Mo. App.), 108 S. W. 1125; Weber v. R. Co., 107 N. Y. S. 965.

278-47 S. v. Sherouk, 78 Conn. 718, 61 A. 897; S. v. Aspara, 113 La. 940, 37 S. 883; S. v. Vey (S. D.), 114 N. W. 719; S. v. Landers (S. D.), 114 N. W. 717; Boyd v. S. (Tex. Cr.), 94 S. W. 1053; Roszczyniala v. S., 125 Wis. 414, 104 N. W. 113.

279-48 S. v. Bailey, 79 Conn. 589, 65 A. 951 (skull); P. v. Way, 119 App. Div. 344, 104 N. Y. S. 277 (jaw bone of decedent); P. v. Gillette, 191 N. Y. 107, 83 N. E. 680 (foetus removed at autopsy); Campbell v. S., 111 Wis. 152, 86 N. W. 855 (skull).

279-49 Anderson v. Seropian, 147 Cal. 201, 81 P. 521 (amputated hand); St. Louis etc. R. Co. v. Mathis (Tex.), 107 S. W. 530 (fragments of bone from plaintiff's head).

279-50 Muncie P. Co. v. Martin, 164 Ind. 30, 72 N. E. 882.

279-52 Village of Gardner v. Paulson, 117 Ill. App. 17.

279-54 P. v. Maughs, 149 Cal. 253, 86 P. 187; Lush v. Parkersburg, 127 Ia. 701, 104 N. W. 336; Coolidge v. New York, 99 App. Div. 175, 90 N. Y. S. 1078; Parks v. Miller, 185 N. Y. 529, 77 N. E. 1192; Geist v. Rapp, 206 Pa. 411, 55 A. 1063.

Phonograph. — Reproduction of noise made by train, by means of a phonograph, allowed. Boyne City etc. R. Co. v. Anderson, 146 Mich. 328, 109 N. W. 429.

279-55 **Animals.** — Greenwell v. Gouveria, 14 Haw. 636 (heifer); Bender v. Appelbaum, 108 N. Y. S. 318 (horse is admissible); Richardson v. S., 49 Tex. Cr. 391, 94 S. W. 1016 (profert of a jennet, in an action for sodomy, will not be received).

279-57 Houston v. R. Co., 118 Mo. App. 464, 94 S. W. 560; Alarcon v. S. (Tex. Cr.), 90 S. W. 179; Mayes v. S. (Tex. Cr.), 100 S. W. 386 (scar in the back).

280-60 McIlwain v. Gaebe, 128 Ill. App. 209; Missouri etc. R. Co. v. Moody, 35 Tex. Cr. 46, 79 S. W. 856.

280-63 Pittsburgh etc. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033.

280-65 Ford v. Coal Co., 30 Ky. L. R. 698, 99 S. W. 609; Chicago etc R. Co. v. Krayenbuhl, 70 Neb. 766, 98 N. W. 44.

280-66 Garvick v. R. Co., 124 Ia. 691, 100 N. W. 498; S. v. Stevens, 133 Ia. 684, 110 N. W. 1037.

280-68 D. C. v. Duryee, 29 App. Cas. (D. C.) 327 (upon the issue of the condition and appearance of a hitching post, the post itself is admissible); Lamb v. S., 69 Neb. 212, 95 N. W. 1050 (hides of stolen steers to show the fact of their death and the place of their sale); Gulf etc. R. Co. v. Boyce (Tex. Civ.), 87 S. W. 395 (parts of railroad ties are admissible to show that the ties were rotten, on an issue of negligence); Adams v. S., 48 Tex. Cr. 452, 93 S. W. 116 (bloody clothes admissible to show the size of the knife blade which did the cutting); Moore v. S. (Tex. Cr.), 103 S. W. 188 (shoes are admissible to show that certain footprints were made by the defendant).

281-69 Block v. Ins. Co. (Wis.), 112 N. W. 45.

281-71 S. v. Craft, 118 La. 117, 42 S. 718; Keen v. R. Co. (Mo. App.), 108 S. W. 1125; P. v. Way, 119 App. Div. 344, 104 N. Y. S. 277; Thomas v. S., 45 Tex. Cr. 111, 74 S. W. 36.

281-72 Pate v. S. (Ala.), 43 S. 343; Village of Gardner v. Paulson, 117 Ill. App. 17; Missouri etc. R. Co. v. Lynch (Tex. Cr.), 90 S. W. 511; Clark v. S. (Tex. Cr.), 102 S. W. 1136; St. Louis etc. R. Co. v. Mathis (Tex.), 107 S. W. 530.

281-74 No. Alabama R. Co. v. Mansell, 138 Ala. 548, 36 S. 459; Anderson v. Seropian, 147 Cal. 201, 81 P. 521; Herron v. C., 23 Ky. L. R. 782, 64 S. W. 432; S. v. Aspara, 113 La. 940, 37 S. 883; Alarcon v. S. (Tex. Cr.), 90 S. W. 179; Sue v. S. (Tex. Cr.), 105 S. W. 804.

281-75 Turner v. C., 28 Ky. L. R. 487, 89 S. W. 482.

282-79 Spurlock v. Shreveport Co., 118 La. 1, 42 S. 575 (in cases where demonstrative evidence is peculiarly valuable, it ought to be produced); Lucas v. S. (Tex. Cr.), 95 S. W. 1055.

282-80 S. v. Barrington, 198 Mo. 23, 95 S. W. 235; Krens v. S., 75 Neb. 294, 106 N. W. 27; P. v. Way, 119 App. Div. 344, 104 N. Y. S. 277; Bender v. Appelbaum, 108 N. Y. S. 318; Boyd v. S. (Tex. Cr.), 94 S. W. 1053.

282-84 S. v. Danforth, 73 N. H. 215, 60 A. 839 (discussion of authorities).

284-85 Benson v. Raymond, 142 Mich. 357, 105 N. W. 870, 108 N. W. 660 (admissible to prove mental capacity of grantor of deed).

284-87 Keen v. R. Co. (Mo. App.), 108 S. W. 1125.

284-88 Moss v. S. (Ala.), 44 S. 598; Ewald v. R. Co., 107 Ill. App. 294 (exhibition of injured legs a matter within the discretion of the court); Chicago Tel. S. Co. v. Marne Co., 134 Ia. 252, 111 N. W. 935; Withey v. R. Co., 141 Mich. 412, 104 N. W. 773.

284-89 See S. v. Stevens, 133 Ia. 684, 110 N. W. 1037.

284-92 See Aspy v. Botkins, 160 Ind. 170, 66 N. E. 462.

285-93 McFarland v. S., 83 Ark. 98, 103 S. W. 169.

285-95 Doubt expressed as to whether a skull might be exhumed and produced. Moss v. S. (Ala.), 44 S. 598.

285-97 S. v. Height, 117 Ia. 650, 91 N. W. 935 (full discussion of authorities).

286-99 McFarland v. S., 83 Ark. 98, 103 S. W. 169; Aspy v. Botkins, 160 Ind. 170, 66 N. E. 462.

286-5 Clefford v. P., 229 Ill. 633, 82 N. E. 343.

Formal finding of connection, unnecessary. S. v. Sherouk, 78 Conn. 718, 61 A. 897.

287-7 Colorado M. R. Co. v. McGarry (Colo.), 92 P. 915; P. v. Bonier, 189 N. Y. 108, 81 N. E. 949; S. v. Landers (S. D.), 114 N. W. 717; Venters v. S., 47 Tex. Cr. 280, 83 S. W. 832; Roszczyniala v. S., 125 Wis. 414, 104 N. W. 113. See Ozark v. S. (Tex. Cr.), 100 S. W. 927.

288-8 See Hein v. Mildebrandt (Wis.), 115 N. W. 121.

288-10 Clark v. S. (Tex. Cr.), 102 S. W. 1136.

289-12 Rent in garment must be shown to have been in the same condition immediately after the transaction. Chicago T. Co. v. Korando, 129 Ill. App. 620.

All the bones in controversy should be produced. Staloch v. Holm, 100 Minn. 276, 111 N. W. 264.

289-13 S. v. Craft, 118 La. 117, 42 S. 718.

289-14 S. v. Craft, 118 La. 117, 42 S. 718 (delay in production of clothing of deceased goes to its weight and not to its admissibility); S. v. Brannan, 206 Mo. 636, 105 S. W. 602 (clothes that have been washed admissible); P. v. Flanigan, 174 N. Y. 356, 66 N. E. 988 (slight change immaterial); Hickey v. S. (Tex. Cr.), 102 S. W. 417 (bullet found 100 days after the killing, admissible).

289-15 S. v. Cook, 13 Idaho 45, 88 P. 240, *cit.* Encyc. of Ev.; Self v. S., 90 Miss. 58, 43 S. 945 (skull two years after death, inadmissible).

290-17 Mayor of Madison v. Thomas (Ga.), 60 S. E. 461; Lush v. Town, 127 Ia. 701, 104 N. W. 336. See Parker v. S. (Tex. Cr.), 75 S. W. 30; Wilson v. S., 49 Tex. Cr. 50, 90 S. W. 312 (stick alleged to be similar to one with which an assault was committed, the original being lost, is admissible).

291-19 Whaley v. Vannatta, 77 Ark. 238, 91 S. W. 191 (object offered must be identified as a sample, satisfactorily); Muncie P. Co. v. Martin, 164 Ind. 30, 72 N. E. 882.

291-21 Question as to the accuracy of a model goes to its weight as evidence and not to its admissibility. Coolidge v. New York, 99 App. Div. 175, 90 N. Y. S. 1078; *aff.* Parks v. Miller, 185 N. Y. 529, 77 N. E. 1192.

292-25 Sameness of condition. See Garvick v. R. Co., 124 Ia. 691, 100 N. W. 498.

294-40 Chicago & A. R. Co. v. Walker, 217 Ill. 605, 75 N. E. 520 (physician may use a skeleton to explain his testimony).

294-41 Chicago etc R. Co. v. Walker, 217 Ill. 605, 75 N. E. 520 (physician may use skeleton to explain an injury); Houston v. R. Co., 118 Mo. App. 464, 94 S. W. 560; Stephens v. Elliott (Mont.), 92 P. 45; Missouri etc. R. Co. v. Lynch Tex. Civ.), 90 S. W. 511.

295-42 P. v. Weber, 149 Cal.

325, 86 P. 671; D. C. v. Duryee, 29 App. Cas. (D. C.) 327.

295-44 S. v. Wallace, 78 Conn. 677, 63 A. 448 (magnifying photograph); Cotton v. R. Co., 191 Mass. 103, 77 N. E. 698 (use of microscope discretionary). See Flora v. Powrie, 23 App. Cas. (D. C.) 195.

295-45 Missouri etc. R. Co. v. Moody (Tex. Civ.), 79 S. W. 856. See Ford v. Coal Co., 30 Ky. L. R. 698, 99 S. W. 609.

295-47 Schulenberg v. S. (Neb.), 112 N. W. 304.

296-49 Parker v. S. (Tex. Cr.), 75 S. W. 30 (same rule exists in Texas).

296-51 Garvick v. R. Co., 124 Ia. 691, 100 N. W. 498 (private examination of person of defendant, improper).

296-52 See S. v. Graham, 116 La. 779, 41 S. 90.

297-54 Rose v. Harllee, 69 S. C. 523, 48 S. E. 541 (the paper itself is sufficient evidence that a description of property was in writing and not printed).

297-57 Wistrand v. P., 213 Ill. 72, 72 N. E. 748.

297-58 See P. v. Weber, 149 Cal. 325, 86 P. 671; Missouri etc. R. Co. v. Moody (Tex. Cr.), 79 S. W. 856 (comparison of an injured limb with an uninjured one, proper).

297-59 S. v. Danforth, 73 N. H. 215, 60 A. 839.

298-61 See S. v. Giroux, 75 Kan. 695, 90 P. 249.

DEPOSITIONS [Vol. 4.]

Rules of court requiring deposition at hearing on motions, 314-18; *Availability of other testimony,* 334-80; *When testimony is incompetent, irrelevant or privileged,* 342-4; *Mistake in putting interrogatories,* 417-87; *Compulsion by auxiliary court,* 420-96; *Filing after submission,* 477-14; *Withdrawing for amendment,* 481-33; *Adoption of former testimony,* 526-17; *Express waiver confined to action where made,* 558-42.

307-1 Crenshaw v. Miller, 11 Fed. 450; U. S. v. Clark, 25 Fed. Cas. 14,803; The Sallie P. Linderman, 22 Fed. 557; Broyles v. Buck, 37 Fed. 137; Stimpson v. Brooks, 23 Fed. Cas. 13,454; Indianapolis W. Co. v. Am. S. Co., 65 Fed. 534; Mattingly v. Nichols, 133 Cal. 332, 65 P. 748; P. v. Robles, 117 Cal. 681, 49 P. 1042; Baker v. Magrath, 106 Ga. 419, 32 S. E. 370; Woods v. S., 134 Ind 35, 33 N. E. 901; Fuller v. Hogdon, 25 Me. 243; In re Liter, 19 Mont. 474, 48 P. 753; S. v. Dayton, 23 N. J. L. 49, 53 Am. Dec. 270; Hughes v. R. Co., 122 Wis. 258, 99 N. W. 897.

311-6 Clark v. Callahan (Md.), 66 A. 618, 10 L. R. A. (N. S.) 616 (statute authorizing taking testimony of non-residents applies to equity suits as well as law actions).

313-15 A deposition taken in accordance with a special statute in terms applying only to county courts may be used in circuit court. In re Arrowsmith, 206 Ill. 352, 69 N. E. 77, *dist.* In re Noble, 124 Ill. 266, 15 N. E. 850.

314-16 In re Wogan, 103 Mo. App. 146, 77 S. W. 490. See Midland Co. v. Bank, 34 Ind. App. 107, 72 N. E. 290; In re Lee, 41 Misc. 642, 85 N. Y. S. 224.

314-18 On Motion for new trial. Davis v. Realty Co., 53 Misc. 1, 102 N. Y. S. 868.

Rules of court requiring deposition at hearing on motions. — A rule of the federal circuit court for eastern district of Pennsylvania requiring all testimony at hearings of motions and rules to show cause to be by deposition (in harmony with the local state practice) is a lawful rule. The law governing the taking of depositions for use at trials does not apply to hearings on motions and rules to show cause. Importers' Bk. v. Lyons, 134 Fed. 510, *foll.* in Despeaux v. R. Co., 147 Fed. 926.

In supreme court of New York. Statute authorizing depositions extends to actions for claims against estates as well as to those begun by summons. Deery v. Byrne, 120 App. Div. 6, 104 N. Y. S. 836.

Proceedings under Chinese exclusion act are not criminal, and defendant

is entitled to take deposition de bene esse under U. S. Rev. St. § 863 (Comp. St. 1901, p. 661). In re Lam Jung Sing, 150 Fed. 608 (*dist.* and *disappr.* U. S. v. Hom Hing, 48 Fed. 635).

Disbarment proceedings. — S. v. Mosher, 128 Ia. 82, 103 N. W. 105 (depositions properly admitted); *dist.* In re Attorney, 83 N. Y. 164, and *foll.* In re Wellcome, 23 Mont. 259, 58 P. 711. Such proceedings are not criminal and depositions are therefore admissible. S. v. McRae, 49 Fla. 389, 38 S. 605; In re Burnette, 73 Kan. 609, 85 P. 575.

Contempt proceedings for violation of injunction not criminal, and depositions are admissible. Davidson v. Munsey, 29 Utah 181, 80 P. 743.

Orphans' court. — Statute providing for taking depositions in any cause "in any of the civil courts of record" held to include orphans' court. In re Irvine's Estate, 209 Pa. 321, 58 A. 617.

316-20 See S. v. Jackson, 111 La. 343, 35 S. 593. But see Rex v. Brooks, 11 Ont. L. R. (Can.) 525; S. v. Woods, 71 Kan. 658, 81 P. 184; S. v. Tomblin, 57 Kan. 841, 48 P. 144.

Grand jury. — See P. v. Dundon, 113 App. Div. 369, 98 N. Y. S. 1048.

Testimony on preliminary examination. — Use as deposition, see "FORMER TESTIMONY," Vol. 5, p. 883.

318-24 Temporarily in jurisdiction. — Blood v. Morrin, 140 Fed. 918.

320-32 Magone v. Min. Co., 135 Fed. 846.

Judicial notice of distance. — Blood v. Morrin, supra (that Buffalo and St. Louis are more than 100 miles apart).

321-35 Showing necessary. — A party desiring issuance of dedimus potestatem must show a well-grounded apprehension of failure or delay of justice. Magone v. Min. Co., 135 Fed. 846. See Zych v. Car Co., 127 Fed. 723.

321-36 Smith v. Merc. Co., 154 Fed. 786; Hartman v. Feenaughty, 139 Fed. 887; Zych v. Car Co., supra.

According to state practice. — Depositions in federal courts may be taken according to the practice of the state where the court is sitting. Magone v. Min. Co., 135 Fed. 846, and cases supra.

321-38 See Smith v. Park (Ky.), 84 S. W. 1167; In re Tweedie Co., 105 App. Div. 426, 94 N. Y. S. 167; Hebron v. Work, 101 App. Div. 463, 92 N. Y. S. 149; Willeford v. Bailey, 132 N. C. 402, 43 S. E. 928 (witness unable to talk or to remain in court).

323-47 Doherty v. Healy, 36 Colo. 460, 86 P. 323 (statute providing for taking deposition when a witness is a party or out of the state applies to parties out of the state as well as other witnesses). See Ordway v. Radigan, 114 App. Div. 538, 100 N. Y. S. 121.

Non-resident parties. — Clark v. Callahan (Md.), 66 A. 618, 10 L. R. A. (N. S.) 616.

325-48 Blood v. Morrin, 140 Fed. 918; Hartman v. Feenaughty, 139 Fed. 887.

Examination of party before trial according to state statutes cannot be had in federal courts unless it is a proper case for taking a deposition. Hanks v. Crown Co., 194 U. S. 303; Blood v. Morrin, supra. See Zych v. Car Co., 127 Fed. 723.

326-52 Jacobs v. Sugar Co., 45 Misc. 56, 90 N. Y. S. 824.

327-53 State v. Naud, 73 N. H. 531, 63 A. 673 (defendant bound over to await action of grand jury cannot take deposition of prosecuting witness).

327-54 See Union v. Sonnefield, 113 La. 436, 37 S. 20; Jacobs v. Sugar Co., 45 Misc. 56, 90 N. Y. S. 824.

328-56 The moving party need not show that the action was at issue as to all the defendants. Boyes v. Bossard, 87 App. Div. 605, 84 N. Y. S. 563. Under a statute allowing the taking of a deposition after answer filed, the fact that it was taken before the answer was verified does not justify suppression. Weisiger v. Mills, 28 Ky. L. R. 1208, 91 S. W. 689.

For comtemplated motion. — Under statute authorizing issuance of open commission for deposition to be used on issues of fact "joined," a commission will not issue for testimony to be used on a merely contemplated motion to punish for contempt. Gardner v. Rovercrofters,

103 N. Y. S. 637. *Contra,* Hallenborg v. Greene, 120 App. Div. 813, 105 N. Y. S. 664 (by statute); Mercantile Bk. v. Sire, 100 App. Div. 450, 91 N. Y. S. 418; In re Dolbeer, 149 Cal. 227, 86 P. 695 (under statute authorizing taking of deposition "when the witness is about to leave the county where the case is to be tried and will probably continue absent when the testimony is required," held, that deposition taken during trial was properly admitted after proof that witness was absent from state). See Hebron v. Work, 101 App. Div. 463, 92 N. Y. S. 149 (party).

330-66 Lyle v. Sarvey, 104 Va. 229, 51 S. E. 228.

332-73 Shibley v. Ashton, 130 Ia. 195, 106 N. W. 618.

333-76 **Laches.** — See infra, 336-86.

334-79 Clearwater Merc. Co. v. Roberts, 51 Fla. 176, 40 S. 436.

Mandamus to compel issuance by clerk is proper remedy where all steps preliminary to issuance have been taken, since it is merely a ministerial act. S. v. McRae, 49 Fla. 389, 38 S. 605.

334-80 Ferguson v. Mullican, 11 Ont. L. R. (Can.) 35 (a strong showing must be made by a plaintiff desiring to take his own deposition, and same in case of defendant who leaves jurisdiction pending the action); S. v. Wetter, 11 Idaho 433, 83 P. 341. See Collector of Customs v. Judge, 12 Haw. 99. But see Oakes v. Riter, 118 App. Div. 772, 103 N. Y. S. 849.

Application in support of motion for new trial is properly refused where it appears that the alleged facts do not exist or that witness has no knowledge of them. Davis v. R. Co., 53 Misc. 1, 102 N. Y. S. 868. See also Mercantile Tr. Co. v. Calvet-R., 46 Misc. 16, 20, 93 N. Y. S. 238, 241.

Availability of other testimony on same points does not justify denial of application especially where the testimony sought would be more complete and reliable. Boyes v. Bossard, 87 App. Div. 605, 84 N. Y. S. 563.

Privileged testimony. — Fact that testimony desired may be privileged does not justify denial of application since the determination of possible objections on that ground must be left to another proceeding. Cullinan v. Dwight, 51 Misc. 221, 100 N. Y. S. 896.

335-82 See In re Sentell, 53 Misc. 165, 104 N. Y. S. 477 (infra, 337-88).

336-84 Ferguson v. Mullican, 11 Ont. L. R. (Can.) 35.

336-86 **Delay in making application** does not warrant its denial where non-prejudicial. Tirpak v. Hoe, 53 Misc. 529, 103 N. Y. S. 798. But see Valentine v. Rose, 45 Misc. 342, 90 N. Y. S. 389; Wilcox v. Stern, 89 App. Div. 14, 85 N. Y. S. 159. No laches where facts though known to party were not disclosed to attorney because their importance was not appreciated. Davis v. Realty Co., 53 Misc. 1, 102 N. Y. S. 868. Nor where party was compelled to go abroad to gain information as to the knowledge possessed by the witness. Roth v. Mantner, 115 App. Div. 148, 100 N. Y. S. 707.

In criminal case defendant should make application when he is arraigned; he cannot await his pleasure. Clearwater M. Co. v. Roberts, 51 Fla. 176, 40 S. 436.

337-88 Although an order has been made for issuance of an open commission at instance of proponent of will, if the latter resists an allowance from the estate to the special guardian of an infant contestant to defray expense of securing a representation at the taking in a foreign jurisdiction, the court may change the commission to one on written interrogatories. In re Sentell, 53 Misc. 165, 104 N. Y. S. 477.

Costs. — Deery v. Byrne, 120 App. Div. 6, 104 N. Y. S. 836 (payment in advance of reasonable expense of adverse party where witnesses out of state); Gowans v. Jobbins, 91 N. Y. S. 842 (open commission for deposition out of state ordered on condition of depositing or giving security for same to cover actual expenses of attorney per diem not to exceed twenty dollars, with alternative of written interrogatories).

337-89 P. v. Goodman, 43 Misc. 508, 89 N. Y. S. 522. *Compare* Wilcox v. Stern, 89 App. Div. 14, 85 N. Y. S. 159.

338-92 Davis v. Realty Co., 53 Misc. 1, 102 N. Y. S. 868; Meres v. Emmons, 103 App. Div. 381, 92 N. Y. S. 1099; Hebron v. Work, 101 App. Div. 463, 92 N. Y. S. 149.

339-95 Tirpak v. Hoe, 53 Misc. 529, 103 N. Y. S. 798 (but must show why not made by party); Fox v. Peacock, 97 App. Div. 500, 90 N. Y. S. 137 (same).

Information and belief. — Roth v. Mantner, 115 App. Div. 148, 100 N. Y. S. 707. But see Ordway v. Padigan, 114 App. Div. 538, 100 N. Y. 121; Vincent v. Kilmer, 107 App. Div. 499, 95 N. Y. S. 343.

339-96 See Davis v. Realty Co., 53 Misc. 1, 102 N. Y. S. 868 (refusal of third person to make affidavit).

339-98 Pergoli v. Lyman, 92 N. Y. S. 788 (facts not conclusions must be stated); Davis Mach. Co. v. Robinson, 42 Misc. 52, 85 N. Y. S. 574.

Information and belief. — Affidavit made on information and belief must show sources thereof and reason why affidavit of one personally familiar with facts is not made. Tirpak v. Hoe, 53 Misc. 529, 103 N. Y. S. 798; Vincent v. Kilmer, 107 App. Div. 499, 95 N. Y. S. 343; Fox v. Peacock, 97 App. Div. 500, 90 N. Y. S. 137. *Compare* Moriata v. Raymond, 54 Misc. 271, 105 N. Y. S. 973.

Oral cross-examination. — Special circumstances justifying must appear in the record by affidavit. Woodward v. Skinner, 92 N. Y. S. 259.

340-99 The exact residence of the alleged non-resident witness need not be stated especially if unknown. Dambmann v. R. Co., 110 App. Div. 165, 97 N. Y. S. 91. The street and number need not be stated. Tirpak v. Hoe, 53 Misc. 529, 103 N. Y. S. 798.

341-1 Wertheimer v. Favalora, 116 La. 490, 40 S. 848 (not required in city court of New Orleans, since practice in such court is same as in justice court).

Unnecessary to state that testimony is to be used on the trial; it is sufficient that this fact inferentially appears. Jacobs v. R. Co., 45 Misc. 56, 90 N. Y. S. 824.

342-4 Moriata v. Raymond, 34 Misc. 271, 105 N. Y. S. 973 (affidavit held sufficient).

When testimony is incompetent, irrelevant or privileged the application will be denied. (P. v. Goodman, 43 Misc. 508, 89 N. Y. S. 522); but not merely because it may be privileged (see supra 334-80).

343-10 Wright v. Sparks, 127 Ga. 365, 56 S. E. 442; Pergoli v. Lyman, 92 N. Y. S. 788.

Twenty-four hours notice held sufficient in absence of prejudice where non-resident witness was only temporarily in jurisdiction. In re Tweedie Tr. Co., 94 App. Div. 169, 94 N. Y. S. 167.

By copy of notice and interrogations. — Statute requiring clerk to make copies of notice and interrogations and deliver them to sheriff for service on adverse party does not require copies to be certified. El Paso etc. R. Co. v. Vizard (Tex. Civ.), 88 S. W. 457.

345-16 Hebron v. Work, 101 App. Div. 463, 92 N. Y. S. 149.

346-22 Ordway v. Radigan, 114 App. Div. 538, 100 N. Y. S. 121 (and if the commission is to be an open one the order should so state, as well as whether it is to be on oral or written interrogation).

346-25 Sparr & Sons v. Empire S. Co., 117 App. Div. 816, 102 N. Y. S. 1065.

346-27 Osborn v. Barber, 105 App. Div. 236, 93 N. Y. S. 833 (order must show reason for shortening notice).

348-38 See In re Morgan, 103 Mo. App. 146, 77 S. W. 490. See In re Lee, 41 Misc. 642, 85 N. Y. S. 224 (enforcing New Jersey practice in this respect).

348-39 Manning v. S., 46 Tex. Cr. 326, 81 S. W. 957.

348-40 Endorsements. — Where the style of the case appears in body of commission which is attested by the clerk with his seal, the fact that it is not endorsed with the number and style of the case and marked "issued" followed by the official signature of issuing officer is not such defect as requires quashing. St. Louis etc. R. Co. v. Kennedy (Tex. Civ.), 96 S. W. 653.

351-51 But see Indiana B. Pub. Co. v. Ayer, 34 Ind. App. 284, 72 N. E. 151.

357-73 Order unnecessary. Clerk issues commission without order after notice of filing of interrogatories. St. Louis R. Co. v. Smith (Tex. Civ.), 86 S. W. 943.

358-74 See Haish v. Dreyfus, 111 Ill. App. 44.

358-79 Forms. — Shannon Mfg. Co. v. McCaulley Co. (Del.), 56 A. 367 (form of letters rogatory and order for issuance of commission).

359-80 See Post v. Schooner "Lady Jane," 1 Haw. 286.

360-84 Oral examination abroad. Cross examination at trial. — Where an open commission without interrogatories was granted for taking of deposition in a remote jurisdiction, counsel for adverse party were permitted to give notice of their election not to attend, in which case they were to have the right to make objection and prepare cross interrogatories after the direct testimony should have been returned; witnesses to be produced for cross-examination on reasonable notice. Maryland Tr. Co. v. Lumb. Co., 149 Fed. 443.

360-86 Oral examination by commissioner. — Where statute authorizes issuance of commission directing commissioner to examine witness touching his knowledge of anything relating to matter in controversy, interrogatories need not be attached. Hendricks v. Trans. Co., 124 Mo. App. 675, 101 S. W. 675.

360-87 Collector of Customs v. Judge, 12 Haw. 99.

360-88 Issuance of commission for oral examination outside state, discretionary, dependent on adequacy of written interrogatories to disclose the facts. Deery v. Byrne, 120 App. Div. 6, 104 N. Y. S. 836. Must be supported by strong showing of necessity for oral examination. Depue v. Depue, 115 App. Div. 466, 101 N. Y. S. 412.

362-91 Texas etc. R. Co. v. Daugherty, 23 Tex. Civ. 267, 76 S. W. 605 (answer held not to be hearsay).

Writing in foreign language. — By statute interrogatories may be written in English and foreign languages where witness is ignorant of English. Roth v. Mantner, 114 App. Div. 904, 100 N. Y. S. 1140.

362-92 S. v. Taylor, 57 W. Va. 228, 50 S. E. 247.

363-93 An interrogatory is not necessarily leading because it admits of a direct affirmative or negative answer. It must also suggest the desired answer. Missouri etc. R. Co. v. Baker, 35 Tex. Civ. 542, 81 S. W. 67. Although the question contains the words "whether or not" it may be leading. S. v. Taylor, 57 W. Va. 228, 50 S. E. 247.

363-97 Gulf etc. R. Co. v. Hall, 34 Tex. Civ. 535, 80 S. W. 133.

Greater liberality as to the form of the interrogatories should be allowed than where the witness testifies orally. Phinazee v. Bunn, 123 Ga. 230, 51 S. E. 300.

363-98 General and final interrogatory, such as "state fully how this contract arose, giving all the details of the transaction," is not permissible where neither it nor the preceding question indicate the character of the testimony to be elicited so that cross interrogatories may be framed. Taylor v. Refin. Co., 127 Ga. 138, 56 S. E. 292.

364-2 Extent of cross examination—Oral examination on notice. Where a deposition is taken pursuant to a statute requiring merely notice of the time and place and permitting the adverse party to put interrogatories if he sees fit, the examination by the latter is not governed by strict rules of cross-examination. Crosby v. Wells (N. J. L.), 67 A. 295.

Effect of agreement to use in other actions. — Where it is agreed that a deposition taken by oral examination at instance of one party may be used in other actions, such depositions when introduced by the adverse party become his evidence in chief and his cross-examination is not objectionable because it violates the strict rule confining cross-examination to matters brought out in the examination in chief. Crosby v. Wells (N. J. L.), 67 A. 295.

366-10 Haish v. Dreyfus, 111 Ill. App. 44.

366-14 Edwards v. Edwards, 142 Ala. 267, 39 S. 82.

367-16 But see Toronto Assn. v. Houston, 9 Ont. L. R. (Can.) 527.

368-17 The justice settling interrogatories has no power to pass upon

objections to them. Spurr & Sons v. Empire Co., 106 N. Y. S. 1009. But cross-interrogatories which are a gross abuse of the right will be disallowed. Treadwell v. Greene, 89 App. Div. 60, 85 N. Y. S. 318.

371-28 Olmsted v. Edson, 71 Neb. 17, 98 N. W. 415.

371-35 **Notary public of another state** is authorized by statute to take depositions, although not competent for that purpose by laws of his own state. Midland S. Co. v. Bank, 34 Ind. App. 107, 72 N. E. 290. At common law a notary public has no authority to administer oaths or take depositions, and presumptively this is the law of another state. Midland S. Co. v. Bank, supra.

371-36 Ownings v. Turner, 48 Or. 462, 87 P. 160 (special reference in equity).

372-39 Bledsoe v. Jones, 145 Ala. 685, 40 S. 111.

374-42 Knickerbocker Ice Co. v. Gray, 165 Ind. 140, 72 N. E. 869.

375-47 **Order unnecessary.** — The fact that the commissioner of the federal district court, to which the letters rogatory were directed, took the deposition without any order of the court was held not such an irregularity as to require suppression. Post v. Schooner "Lady Jane," 1 Haw. 486.

376-57 De Renzes v. De Renzes, 115 La. 675, 39 S. 805 (commission addressed to "any judge, justice of the peace, or Louisiana commissioner" cannot be executed by a notary public); German Ins. Co. v. Gibbs (Tex. Civ.), 92 S. W. 1068. (commission addressed to any notary of C. parish cannot be executed by a notary of N. parish); Kroell v. S., 139 Ala. 1, 36 S. 1025.

378-60 New v. Young, 144 Ala. 420, 39 S. 201.

379-63 De Renzes v. De Renzes, 115 La. 675, 39 S. 805.

380-67 Hosch Lumb. Co. v. Weeks, 123 Ga. 336, 51 S. E. 439; S. v. Elev. Co. (Neb.), 110 N. W. 874.

Order as substitute for notice. — S. v. Mosher, 128 Ia. 82, 103 N. W. 105.

Two depositions noticed for same time at different places. — Party notified may attend at one and disregard the other. Ivey v. Mills, 143 N. C. 189, 55 S. E. 613.

382-69 *Contra.* — Hosch Lumb. Co. v. Weeks, 123 Ga. 336, 51 S. E. 439.

382-70 Babcock v. Ormsby, 18 S. D. 358, 100 N. W. 759.

382-71 Johnson v. Porterfield (Ala.), 43 S. 228 (nor can he question legality of notice).

382-72 **Nature of the evidence** which is to be given or called for need not be shown by the notice. McPhelemy v. McPhelemy, 78 Conn. 180, 61 A. 477.

383-77 Chase v. Watson, 75 Vt. 385, 56 A. 10.

384-80 Thibodeaux v. Thibodeaux, 112 La. 406, 36 S. 800; Ex parte Green, 126 Mo. App. 309, 103 S. W. 503.

385-84 Thibodeaux v. Thibodeaux, supra.

387-89 **The notice must state** the day and between what hours of the day depositions will be taken, and that if not completed on that day the taking will continue at the same place and between the same hours from day to day until completed. Ex parte Green, supra.

387-90 Hartman v. Thompson, 104 Md. 389, 65 A. 117.

387-91 Hartman v. Thompson, supra.

387-92 Babcock v. Ormsby, 18 S. D. 358, 100 N. W. 759 (since proper preparation might not otherwise be possible).

387-95 Edwards v. Edwards, 142 Ala. 267, 39 S. 82.

387-96 **Non-residence and materiality.** — The non-residence of witness and materiality of his testimony need not be stated where not required to be by statute. Ferguson v. R. Co. (N. J. L.), 67 A. 602.

389-3 But see Indiana Pub. Co. v. Ayer, 34 Ind. App. 284, 72 N. E. 151.

389-4 **Waiver of objection** to failure to name witness by appearing and taking part in examination. Babcock v. Ormsby, 18 S. D. 358, 100 N. W. 759.

390-6 **The law of the state** where the action is pending governs length of notice. In re Wogan, 103 Mo. App. 146, 77 S. W. 490.

391-7 McCall v. Jacobson, 139 Mich. 455, 102 N. W. 969.

What circumstances considered. The fact that witness is about to leave jurisdiction; that the insufficiency was called to attention of opposing counsel; time required for and conveniences of travel. McCall v. Jacobson, supra.

398-8 Four days held sufficient where twenty-four hours was ample time to go to place of taking. McCall v. Jacobson, supra (reversing ruling of trial court).

395-9 But see In re Wogan, 103 Mo. App. 146, 77 S. W. 490.

395-11 McCall Co. v. Jacobson, supra (reviewable if all the facts and circumstances known to trial court are equally known to appellate court).

396-14 Judicial notice of time required for railroad travel. See infra, "JUDICIAL NOTICE."

397-20 But one party properly notified and subpoenaed cannot object to giving his deposition on ground that his co-parties were not notified. In re Shawmut Co., 94 App. Div. 156, 87 N. Y. S. 1059.

On opposite party — When no attorney of record. — On a will contest service of notice by contestant on principal beneficiary under the will was held sufficient, under the statute requiring service on "opposite party," there being no attorney of record and the record not showing who was the proponent. In re Jones, 130 Ia. 177, 106 N. W. 610.

398-23 Co-parties not affected by deposition need not be notified. Louisville Rock Co. v. Cain, 26 Ky. L. R. 849, 82 S. W. 619.

399-25 Swink v. Anthony, 107 Mo. App. 601, 81 S. W. 915 (construing the word "where" used in the statute to mean "if" and not as showing the place of service).

399-26 Miles v. Caraker, 82 Ark. 198, 101 S. W. 174 (in case of resident parties only); Webb v. Ritter, 60 W. Va. 193, 54 S. E. 484 (same). See Hunt v. Crane, 33 Miss. 669, 69 Am. Dec. 381; Cahill v. Pintony, 4 Munf. (Va.) 371.

Failure of attorney to object not a waiver binding client. Webb v. Ritter, supra. But see *contra*, Hunt v. Crane, supra.

400-27 Swink v. Anthony, 107 Mo. App. 601, 81 S. W. 915 (of resident party); Diederichs v. Diederichs, 68 Neb. 534, 94 N. W. 536 (even though the party never received notice and is unrepresented at taking).

401-28 Miles v. Caraker, 82 Ark. 198, 101 S. W. 174 (but not when the party notified is a resident); Webb v. Ritter, 60 W. Va. 193, 54 S. E. 484 (same).

404-46 Service by mail. — Proof necessary to support. See Stokes v. Hardy, 71 N. J. L. 116, 58 A. 650.

405-49 Indiana Pub. Co. v. Ayer, 34 Ind. App. 284, 72 N. E. 151.

Non-resident witness. — The fact that a non-resident witness is temporarily within the jurisdiction does not prevent the taking of his deposition de bene esse. Blood v. Morrin, 140 Fed. 918 (holding that in a case pending in St. Louis the deposition of a party residing in Buffalo but temporarily in St. Louis, could be taken in the latter place where he had been served with a subpoena).

408-54 But see Ex parte Green, 126 Mo. App. 309, 103 S. W. 503.

408-56 Waiver of objection. See infra, 547-89.

408-57 Record of officer. — The officer should keep a record showing the cause and necessity of an adjournment. Ex parte Green, 126 Mo. App. 309, 103 S. W. 503.

Notice. — Deposition taken after continuance without notice to adverse party, suppressed. Bauer v. S., 144 Cal. 740, 78 P. 280.

409-58 See Ex parte Green, 126 Mo. App. 309, 103 S. W. 503.

409-62 To secure presence of counsel. — A notary may continue the taking of a sufficient number of days to enable the counsel of the party whose deposition is being taken to attend. In re Wogan, 103 Mo. App. 146, 77 S. W. 490.

410-70 In re Butler (Neb.), 107 N. W. 572.

Compelling attendance of non-resident. — Where a non-resident temporarily in the state has been served with a subpoena to appear before a superior judge for the taking of his deposition in a case in the federal courts, upon his return home, and failure to appear, the superior judge has no jurisdiction to issue an at-

tachment to compel the witness' attendance. S. v. Kennan, 33 Wash. 247, 74 P. 381.

410-71 On removal to federal court a special commissioner appointed to take depositions for which notice had been previously given has the authority given by the state law to enforce attendance by attachment. Zych v. American Co., 127 Fed. 723.

410-72 See infra, 420-97.

A statute providing for striking out the answer of defendant who refuses to appear for the taking of his deposition is unconstitutional. Summerville v. Kelliher, 144 Cal. 155, 77 P. 889.

A justice of the peace has no power to punish for contempt, where he is merely the officer before whom a deposition is to be taken for use in the superior court. Gay v. Thorpe, 1 Cal. App. 312, 82 P. 221.

Subpoena duces tecum—Issuance by clerk or notary. — On order of court clerk may issue such subpoena in proceeding to take deposition de bene esse. Crocker-W. Co. v. Bullock, 134 Fed. 241. But an order is necessary, and to obtain it a showing of the competency and materiality of the issuance must be made. Dancel v. Goodyear Co., 128 Fed. 753. A notary public cannot issue such subpoena. Dancel v. Goodyear Co., supra. Compelling production of books, see "DISCOVERY" and "DOCUMENTARY EVIDENCE."

412-73 Subpoena may, upon application of witness, be vacated or modified. In re Waterman, 113 App. Div. 910, 99 N. Y. S. 1150 (modifying subpoena requiring production of books); In re Great N. Const. Co., 50 Misc. 467, 100 N. Y. S. 564 (quashed for lack of jurisdiction).

412-75 See In re Arrowsmith, 206 Ill. 352, 69 N. E. 352.

413-76 See Gulf etc. R. Co. v. Luther (Tex. Civ.), 90 S. W. 44 (presence of party and counsel and suggestions by latter to witness held not sufficiently prejudicial to require suppression). Tarlton v. Orr (Tex. Civ.), 90 S. W. 534.

In absence of statute or rule providing otherwise the presence of counsel is not objectionable. In re Arrowsmith, 206 Ill. 352, 69 N. E. 352 (holding that the general statute regulating depositions and forbidding the presence of counsel did not apply to the case of the depositions of subscribing witness to will governed by a special statute containing no such provision).

414-79 See Tarlton v. Orr (Tex. Civ.), 90 S. W. 534.

415-82 *Contra.* — Tarlton v. Orr, supra.

Absence of notary when testimony was taken down by stenographer held to be waived by failure to object before trial. Abbott v. Min. Co., 112 Mo. App. 550, 87 S. W. 110.

417-87 Additional interrogatories. Where deposition is taken on ex parte interrogatories as provided by statute, additional questions cannot properly be propounded at the taking, and answers thereto will be excluded at trial. Sparks v. Taylor (Tex. Civ.), 87 S. W. 740.

Mistake in putting interrogatories. An interrogatory as written was whether witness had received from defendant a letter "dated May 28, 1904, or thereabouts," relating to termination of a lease; in putting the question the commissioner changed the date to "May 24." Motion to strike out the interrogatory and answer held properly denied since the words "or thereabouts" and the reference in the interrogatory to subject-matter of letter sufficiently identified it to make answer admissible. Crawford v. Kline (N. J.), 65 A. 441.

418-88 Effect of failure of moving party to appear. — See supra, 382-69.

418-89 Woodward v. Skinner, 92 N. Y. S. 259 (proper when special circumstances justifying are shown).

419-90 Cross-examination at trial. See supra, 360-84.

420-92 But see Ex parte Schoepf, 74 Ohio St. 1, 77 N. E. 276 (witness may refuse, subject to contempt and habeas corpus proceedings to determine the matter).

Production of documents. — Same rules as in case of examination at trial. Ex parte Schoepf, supra.

420-93 Whether a question is irrelevant and immaterial is for the notary to determine. Ex parte Gfeller, 178 Mo. 248, 77 S. W. 552. See

also In re Randall, 90 App. Div. 192, 85 N. Y. S. 1089.

420-95 Ex parte Schoepf, 74 Ohio St. 1, 77 N. E. 276.

Privileged testimony. — Superintendent of street railway company need not produce reports of accident made by conductor and motorman, nor need he disclose the names of such employes. Ex parte Schoepf, supra, *rev.* 6 Ohio C. C. 590. But see Petition of Bradley, 71 N. H. 54, 51 A. 264 (infra, 421-99).

Claim of privilege must be properly made. Ex parte Gfeller, 178 Mo. 248, 77 S. W. 552.

420-96 Ex parte Gfeller, supra; Olmstead v. Edson, 71 Neb. 17, 98 N. W. 415; Ex parte Schoepf, 74 Ohio St., 1, 77 N. E. 276.

Witness must be questioned before he can be put in contempt for refusal to answer. His preliminary statement that he will refuse to answer any questions, on advice of counsel, is not sufficient. Ex parte Green, 126 Mo. App. 309, 103 S. W. 503. But see "CONTEMPT," Vol. 3, p. 494 et seq.

Compulsion by auxiliary court. Where deposition is taken in a jurisdiction other than that of the pending action the courts of the former will compel the witness to answer in a proper case. In re Wogan, 103 Mo. App. 146, 77 S. W. 490. Except where a claim of privilege is made such auxiliary courts will not inquire into the competency, relevancy or materiality of the matter called for, but will compel its production unless it clearly and affirmatively appears that such matter cannot possibly be competent or relevant. Dowagiac Mfg. Co. v. Lochren, 143 Fed. 211, 74 C. C. A. 341. All the testimony must be produced so that it may be before the primary or a higher tribunal. Butte & B. C. Co. v. Ore Co., 139 Fed. 843; Perry v. Rubber T. Co., 138 Fed. 836; In re Randall, 90 App. Div. 192, 85 N. Y. S. 1089, *aff.* in 177 N. Y. 400, 69 N. E. 721.

420-97 Lawson v. Rowley, 185 Mass. 171, 69 N. E. 1082 (justice of peace). Witness justifying his refusal to testify or produce documents on ground of privilege is entitled to hearing by the court before being compelled to answer or produce. Crocker-W. Co. v. Bullock, 134 Fed. 241.

Deposition before judge. — Where a deposition is taken before the judge of the superior court he has jurisdiction to punish for contempt in refusing to answer, and may be compelled by mandamus to summarily exercise that power without further proceedings. Crocker v. Conrey, 140 Cal. 213, 73 P. 1006.

421-98 See Crocker-W. Co. v. Bullock, 134 Fed. 241; Dancel v. Goodyear S. Co., 128 Fed. 753 (showing of materiality necessary); Fenn v. R. Co., 122 Ga. 280, 50 S. E. 103 (witness will not be punished for contempt for refusing to answer illegal and impertinent questions).

421-99 Fishing for evidence. See Ex Parte Schoepf, 74 Ohio St. 1, 77 N. E. 276; also "DISCOVERY;" "EXAMINATION OF PARTIES BEFORE TRIAL."

A corporation party's servants and agents whose duty is to procure and report in writing the names of witnesses to an accident, cannot refuse to disclose the information so obtained although the statute protects a "party" from compulsory disclosure of the names of his witnesses nor the manner in which he proposes to prove his case. Petition of Bradley, 71 N. H. 54, 51 A. 264. But see "DISCOVERY," "EXAMINATION OF PARTIES BEFORE TRIAL," "PRIVILEGED COMMUNICATIONS," and supra, 420-95.

422-3 Morris Co. v. Shoe Co. (Tex. Civ.), 99 S. W. 178; Garner v. Risinger, 35 Tex. Civ. 378, 81 S. W. 343 (answers to cross interrogatory held sufficient).

424-6 Refusal to answer unless excused must be taken as a confession of the interrogatory. Locust v. Randle (Tex. Civ.), 102 S. W. 946. But see Davis v. Davis (Tex. Civ.), 98 S. W. 198.

427-19 Keckler v. Brotherhood (Neb.), 109 N. W. 157.

428-26 Western U. T. Co. v. Corso, 28 Ky. L. R. 290, 89 S. W. 212; Cushman v. Wooster, 45 N. H. 410.

428-27 See Hendricks v. Trans. Co., 124 Mo. App. 675, 101 S. W. 675.

429-30 Keckler v. Brotherhood (Neb.), 109 N. W. 157.

429-31 Keckler v. Brotherhood, supra.

Stipulation for reduction to writing by witness personally is sufficiently complied with where witness dictated his answers directly to one who wrote them on a typewriter, the manuscript being then read to and signed by the witness. Glenn v. Zenovitch, 128 Ga. 596, 58 S. E. 26.

429-33 Ebersole v. Assn., 147 Ala. 177, 41 S. 150. May be written by any disinterested person in presence of officer. Keckler v. Brotherhood (Neb.), 109 N. W. 157.

Employing stenographer. — Western U. T. Co. v. Corso, 28 Ky. L. R. 290, 89 S. W. 212 (an act done under immediate supervision of officer is done by him); Gallagher v. Cotton (N. H.), 64 A. 583 (rule of court).

Clerk or stenographer of attorney of party taking deposition is not a disinterested person. Knickerbocker I. Co. v. Gray, 165 Ind. 140, 72 N. E. 869.

431-43 Auman v. Cunfer, 31 Pa. C. C. 6.

432-46 Auman v. Cunfer, supra.

Alteration after signing, fatal. Chicago R. Co. v. Schaefer, 121 Ill. App. 334.

433-47 See Potomac B. Wks. v. Barber, 103 Md. 509, 63 A. 1068 (absence of statute).

434-52 **Several depositions.** Signatures of all witnesses at end following separate certificate by each to truth of testimony, held sufficient signing. Potomac B. Wks. v. Barber, supra.

436-64 **The fact** that the form of the oath is dictated by one of the parties is immaterial where the notary actually administers it. Breeden v. Martens (S. D.), 112 N. W. 960.

436-68 Southern B. Assn. v. Ins. Co., 23 Pa. Super. 88.

Notes or books used to refresh recollection. — When a witness refreshes his recollection from copies of his transcribed stenographic notes of proceedings of which he has no independent recollection, the proper procedure, is not to annex the copies but for the witness to incorporate in his answers the facts shown by the notes. In re Tifft, 115 App. Div. 915, 101 N. Y. S. 1072. See In re Waterman, 110 App. Div. 115, 97 N. Y. S. 169 (books produced by witness); In re Lee, 41 Misc. 642, 85 N. Y. S. 224 (same); In re Randall, 90 App. Div. 192, 85 N. Y. S. 1089.

437-72 **Statute mandatory.** Statute requiring exhibits proved or referred to by deponent to be inclosed, sealed up and directed to clerk is mandatory. Crane Co. v. Neel, 104 Mo. App. 177, 77 S. W. 766.

438-73 **Although the record** on appeal contains no copy of documents referred to in the deposition as filed, it will be presumed that they were filed. Speer v. Duff, 27 Ky. L. R. 292, 84 S. W. 1140.

438-75 **Exhibits.** — Failure to attach to deposition not fatal where they are identified by notary over his signature and by other witnesses present at taking. Black v. Webber, 1 Neb. 468, 96 N. W. 606.

441-84 Manders' Com. v. Hospital, 27 Ky. L. R. 254, 84 S. W. 761 (aiding certificate by caption). See Columbus R. Co. v. Patterson, 143 Fed. 245, 73 C. C. A. 603.

442-87 Baird v. Smith, 124 Ga. 251, 52 S. E. 655 (naming wrong county in preamble or heading of answers), *cit.* Mathis v. Colbert, 24 Ga. 384.

442-88 *Compare.* — St. Louis etc. R. Co. v. Kennedy (Tex. Civ.), 96 S. W. 653.

445-97 **Where caption gives correct style** and number of case, and both interrogatories and commission show the court where such case was pending, and certificate shows that the deposition was taken in answer to the interrogatories, this is sufficient. McFaddin v. Sims (Tex. Civ.), 97 S. W. 335.

447-4 Rouse v. Sarratt, 74 S. C. 575, 54 S. E. 757.

448-6 Keckler v. Brotherhood (Neb.), 109 N. W. 157 (that it was taken at time and place named in notice).

452-18 Haggin v. Rogers, 29 Ky. L. R. 1263, 97 S. W. 362 (which, if either, party was present); Gallagher v. Cotton (N. H.), 64 A. 583.

453-19 **Error in name** held not fatal when aided by caption and where both parties were present and

participated. Columbus R. Co. v. Patterson, 143 Fed. 245, 73 C. C. A. 603.

454-22 See Temby v. Brunt Co., 229 Ill. 540, 82 N. E. 336.

Sufficiently shown by caption alone. Manders' Com. v. Hospital, 27 Ky. L. R. 254, 84 S. W. 761.

457-33 See Knickerbocker Ice Co. v. Gray, 165 Ind. 140, 72 N. E. 869.

Typewritten deposition is not inadmissible because there is nothing to show that it was written by the officer or the witness in his presence or was read over to witness. Edgefield Mfg. Co. v. Maryland Co., 78 S. C. 73, 58 S. E. 969.

457-34 Keckler v. Brotherhood (Neb.), 109 N. W. 157.

458-36 Keckler v. Brotherhood, supra. See Knickerbrocker Ice Co. v. Gray, 165 Ind. 140, 72 N. E. 869.

458-37 Edgefield Mfg. Co. v. Maryland Co., 78 S. C. 73, 58 S. E. 969.

459-38 A certificate that the deposition after being read to witness was "by him corrected" satisfies a statute providing that the deposition must be corrected by deponent "in any particular if desired." Short v. Frink (Cal.), 90 P. 200.

459-41 In Texas the certificate must show that answers were signed and sworn to before the commissioner. McFaddin v. Sims (Tex. Civ.), 97 S. W. 335.

460-44 But see Riser v. R. Co., 67 S. C. 419, 46 S. E. 47.

460-46 Knickerbocker Ice Co. v. Gray, 165 Ind. 140, 72 N. E. 869.

460-47 Knickerbocker Ice Co. v. Gray, supra (that deposition was written by disinterested person).

464-68 In official capacity. — Although the signature to the certificate does not recite the official capacity of the officer this may sufficiently appear from the signature on another page of the deposition. Kinkade v. Howard, 18 S. D. 60, 99 N. W. 91.

465-70 Seal unnecessary by statute although deposition is taken without commission. Hanley v. R. Co., 59 W. Va. 419, 53 S. E. 625.

Notary presumed to have a seal. Gharst v. Transit Co., 115 Mo. App. 403, 91 S. W. 453.

Seal improperly placed. — Kinkade v. Howard (S. D.), 99 N. W. 91 (sufficient though below jurat on preceding page).

465-71 Gharst v. Transit Co., 115 Mo. App. 403, 91 S. W. 453 (absence of foreign notary's seal not fatal where clerk of court certifies to the genuineness of his signature and his official capacity), *foll.* Pape v. Wright, 116 Ind. 502, 19 N. E. 459.

465-72 Temby v. Brunt Co., 229 Ill. 540, 82 N. E. 336 (even though the commission describes him as a notary public of another state). North Am. Ins. Co. v. Williamson, 118 Ill. App. 670.

466-75 North Am. Ins. Co. v. Williamson, supra.

Certificate need not be attached, but may be produced at the trial. Bishop v. Hillard, 227 Ill. 382, 81 N. E. 403.

Presumption of identity of officer taking disposition with one named in certificate of official character. Bishop v. Hillard, supra.

468-79 Notary public of another state. Midland S. Co. v. Bank, 34 Ind. App. 107, 72 N. E. 290.

468-82 See Hanley v. R. Co., 59 W. Va. 419, 53 S. E. 625 (statute).

469-84 Enclosing exhibits. Statute requiring is mandatory. Crane Co. v. Neel, 104 Mo. App. 177, 77 S. W. 766.

469-86 Riser v. R. Co., 67 S. C. 419, 46 S. E. 47; Hagins v. Ins. Co., 72 S. C. 216, 51 S. E. 683 (failure to seal and endorse justifies suppression).

Writing name across seal. — Texas R. Co. v. Felker (Tex. Civ.), 90 S. W. 530.

Envelope broken in transmission ground for continuance for retaking. Order of Com. T. v. Barnes, 72 Kan. 293, 309, 80 P. 1020, 82 P. 1099.

473-97-98 The Saranac, 132 Fed. 936 (deposition not delivered by officer personally nor sealed and mailed to him, but brought into court during trial is properly excluded).

474-1 See Riser v. R. Co., 67 S. C. 419, 46 S. E. 47.

Private conveyance. — Forwarding by express is proper under statute authorizing delivery by private conveyance and requiring affidavit by the person by whom the depositions were sent that they were not opened by himself or any one else in tran-

sit. Standard O. Co. v. Doyle, 118 Ky. 662, 82 S. W. 271, in which the sender made affidavit as to the agent to whom he delivered the package, and the latter and all other agents of the company through whose hands the package passed made the required affidavits.

474-2 White v. R. Co., 123 Ga. 353, 51 S. E. 411; Texas R. Co. v. Felker (Tex. Civ.), 90 S. W. 530.

Extraneous evidence. — Where the receipt endorsed on envelope was not full and stamp on letter was partially blurred, held that motion to suppress on this ground raised a question of fact on which evidence outside of deposition and envelope could be received. St. Louis etc. R. Co. v. Harkey (Tex. Civ.), 88 S. W. 506.

476-9 Kane v. Sholars (Tex. Civ.), 90 S. W. 937 (statute providing for return "without delay" held directory, and, in absence of prejudice, suppression properly denied).

476-11 Refusal to order filing. The officer taking the deposition may be compelled to file the same upon payment of his fees. But where no showing of the value or relevancy of the contents of a deposition is made the refusal to order its filing is not error. Little & H. Inv. Co. v. Pigg, 29 Ky. L. R. 809, 96 S. W. 455.

Re-filing is essential prerequisite to use of deposition which has been withdrawn. Peycke v. Shinn, 68 Neb. 343, 94 N. W. 135.

477-14 McCall v. Jacobson, 139 Mich. 455, 102 N. W. 969 (statute providing time within which objections must be made does not limit time for filing).

Statute providing that deposition shall remain with clerk ten days before trial or hearing does not require filing within that time, but merely entitles adverse party to continuance, and voluntarily going to trial is waiver. Clark v. Callahan (Md.), 66 A. 618.

Filing after submission of case but two months before decision, where not objected to does not justify court in refusing to consider deposition. Helm v. Bank, 106 Va. 603, 56 S. E. 598.

Before final hearing. — A statute providing that a deposition taken and returned before a final hearing "may be" read does not give absolute right to have read a deposition taken just before a hearing. Fulmer Coal Co. v. R. Co., 57 W. Va. 470, 50 S. E. 606.

479-21 Although the statute requires filing within thirty days after taking, a failure in this respect does not require the exclusion of the deposition where a continuance has been ordered on account of it and no injury has resulted as appears from counsel's own statement. Ferguson v. Lederer, 128 Ia. 286, 103 N. W. 794.

479-22 Endorsement. — A deposition duly taken, returned and placed among the papers of the case is not objectionable because not marked "filed." Fire Assn. v. Masterson (Tex. Civ.), 83 S. W. 49. See also McKie v. S., 74 Kan. 21, 85 P. 827; Manning v. S., 46 Tex. Cr. 326, 81 S. W. 957.

480-31 See White v. R. Co., 123 Ga. 353, 51 S. E. 411.

481-33 Withdrawal for amendment. — See infra, 484-49 et seq.

484-43 Worth v. Loewenstein, 121 Ill. App. 71 (after suppression).

484-47 White v. R. Co., 123 Ga. 353, 51 S. E. 411.

484-49 Risley v. Harlow, 48 Misc. 277, 96 N. Y. S. 728 *cit.* Brown v. Clark, 41 N. H. 242; Wallace v. Byers, 14 Tex. Civ. 574, 38 S. W. 228.

Amendment after publication — Return to officer. — Where the amendment is not made in court it should be done so as to guard against alteration of the deposition. Hence, removal from files by a party, though under order of court, and return by private communication to the officer is not proper and justifies suppression. Chicago R. Co. v. Schaefer, 121 Ill. App. 334. See also Borders v. Barber, 81 Mo. 636.

To attach an exhibit proved by deponent. Crane Co. v. Neel, 104 Mo. App. 177, 77 S. W. 766. See White v. R. Co., 123 Ga. 353, 51 S. E. 411.

485-56 Adding certificate and signature. — Risley v. Harlow, 48 Misc. 277, 96 N. Y. S. 728.

486-59 Haggin v. Rogers, 29 Ky.

L. R. 1263, 97 S. W. 362; Gallagher v. Cotton (N. H.), 64 A. 583.

488-79 Laches. — Party desiring should act promptly both in asking permission and in actually retaking before trial after getting an order therefor. Louisville R. Co. v. Cain, 26 Ky. L. R. 849, 82 S. W. 619.

488-80 See Louisville R. Co. v. Cain, supra.

490-90 See In re Tifft, 115 App. Div. 915, 101 N. Y. S. 1072.

490-91 Leave of court for taking a second deposition of a witness is unnecessary in the absence of statute requiring it. Peycke v. Shinn, 68 Neb. 343, 94 N. W. 135.

491-94 Pennsylvania R. Co. v. Anda Co., 131 Ill. App. 426; Bartlett v. Slusher, 117 Ill. App. 138; St. Bernard Co. v. Southard, 25 Ky. L. R. 638, 76 S. W. 167 (except where deponent is incompetent for one party); Chesapeake S. Co. v. Fossett, 30 Ky. L. R. 1175, 100 S. W. 825; McDonald v. Smith, 139 Mich. 211, 102 N. W. 668; Keller v. R. Co. (Neb.), 111 N. W. 384; Wallace & Co. v. Leber, 69 N. J. L. 312, 55 A. 475; Cudlip v. Pub. Co., 180 N. Y. 85, 72 N. E. 925 (*aff.* 87 App. Div. 633, 84 N. Y. S. 1122); Providence M. Co. v. Browning, 70 S. C. 148, 49 S. E. 325; Continental Bk. v. Bank, 1 Tenn. Ch. 449, 499.

494-98 See First Nat. Bk. v. Edwards (Tex. Civ.), 81 S. W. 541; Everett v. Kemp (Tex. Civ.), 80 S. W. 534.

494-1 Von Tobel v. Mill Co., 32 Wash. 683, 73 P. 788.

Allowing a party to introduce part of a deposition covering merely his cross-examination of the deponent as his cross-examination of the same witness who had testified orally was held non-prejudicial error. McDonald v. Smith, 139 Mich. 211, 102 N. W. 668.

If one party uses the other's deposition or part of it he is bound by the evidence, and the adverse party may make the same objections that he could had his opponent taken the deposition, even to impeaching the witness. Pennsylvania R. Co. v. Anda Co., 131 Ill. App. 426 (holding that the party taking a deposition had omitted to read a portion thereof, hearsay in character, such portion could not be read by the adverse party).

Right of party offering to object. The party offering the deposition taken by the adverse party is not estopped to object to a question calling for the mere conclusion of the witness, although statute provides that the evidence is that of the party offering the deposition. Madera R. Co. v Raymond G. Co., 3 Cal. App. 668, 87 P. 27.

494-2 Cudlip v. Pub. Co., 180 N. Y. 85, 72 N. E. 925. See also Kramer v. Kramer, 80 App. Div. 20, 80 N. Y. S. 184; Von Tobel v. Mill Co., 32 Wash. 683, 73 P. 788. A party cannot object to the answers to his own questions except in so far as they are incompetent. First Nat. Bk. v. Edwards (Tex. Civ.), 81 S. W. 541.

Contra. — A party who has called for copies of books and records, which have been attached to and made a part of the deposition can not, when the deposition is introduced by the adverse party, object that the originals are the best evidence. Madera R. Co. v. Raymond G. Co., 3 Cal. App. 668, 87 P. 27.

495-4 Bloomington v. Osterle, 139 Ill. 120, 28 N. E. 1068; Chesapeake S. Co. v. Fossett, 30 Ky. L. R. 1175, 100 S. W. 825.

497-22 In re Arrowsmith, 206 Ill. 352, 69 N. E. 352.

497-23 Miller v. Lumb. & Mfg. Co., 121 Ill. App. 56.

498-29 Against interpleader or intervener. — One who interpleads is charged with knowledge of state of the record, and depositions previously on file cannot be objected to by him merely because he was not notified of the taking. Miller v. Campbell, 13 Okla. 75, 74 P. 507. But although an intervener adopts the pleadings in an action filed in his name but without his authority, depositions taken before he became a party are not competent against him. Rogers v. Tompkins (Tex. Civ.), 88 S. W. 379.

498-30 Against privy subsequently made a party, competent. See Union I. & F. Co. v. Sonnefield, 113 La. 436, 37 S. 20; Owens v. Owens, 84 Miss. 673, 37 S. 149.

499-34 Edwards v. R. Co. (S. D.),

110 N. W. 832 ("many other actions proceeding upon the same matter, between the same parties"). See Andricus v. Coal Co., 28 Ky. L. R. 704, 90 S. W. 233.

Consolidation of actions. — Deposition taken in one case before consolidation competent against party to the other who had filed cross-interrogatories. Kothman v. Foseler (Tex. Civ.), 84 S. W. 390.

502-36 St. Louis etc. R. Co. v. Hengst, 36 Tex. Civ. 217, 81 S. W. 832, *dist.* and interpreting People's Nat. Bk. v. Mulkey, 94 Tex. 395, 60 S. W. 753.

502-39 Central Bk. v. Thayer, 184 Mo. 61, 82 S. W. 142; Reed v. Gold, 102 Va. 37, 45 S. E. 868.

503-40 **Same subject matter.** See Neyworth v. Miller Co., 174 Mo. 171, 73 S. W. 498; Miller v. Gillespie, 54 W. Va. 450, 46 S. E. 451.

503-42 See Miller v. Gillespie, supra.

504-43 In re Edgerly, 92 Minn. 263, 99 N. W. 896; Central Bk. v. Thayer, 184 Mo. 61, 82 S. W. 142; Roberts v. Powell, 210 Pa. 594, 60 A. 258; Edwards v. R. Co. (S. D.), 110 N. W. 832; Parlin & O. Co. v. Vawter (Tex. Civ.), 88 S. W. 407; Miller v. Gillespie, 54 W. Va. 450, 46 S. E. 451 (deposition taken by defendant in action by one creditor to set aside conveyance cannot be used by same defendant in similar action by another creditor).

Who is party. — One who though not nominally a party hires attorneys to represent him in and conducts the defense to an action is a party thereto, and depositions introduced therein are competent against him in another action. Brownlee v. Bunnell, 31 Ky. L. R. 669, 103 S. W. 284.

Deposition of witness since deceased. In Morris v. Parry, 110 Mo. App. 675, 85 S. W. 620, a bill was filed to perpetuate as the testimony of one then deceased his deposition given in another action in which the issues were similar but the parties different. The overruling of a demurrer to the bill was held error. The complainant, though conceding the proceeding to be novel, relied upon the general power inherent in equity to provide a remedy where one is lacking for the protection of a right.

505-44 Hammatt v. Emerson, 27 Mo. 308, 46 Am. Dec. 598; Southern Bk. v. Nichols, 202 Mo. 309, 100 S. W. 613; Profile & F. Co. v. Bickford, 72 N. H. 73, 54 A. 699. See Central Bk. v. Thayer, 184 Mo. 61, 82 S. W. 142.

506-46 See "Pedigree."

506-51 See Andricus v. Coal Co., 28 Ky. L. R. 704, 90 S. W. 233; Central Bk. v. Thayer, 184 Mo. 61, 82 S. W. 142.

In absence of surprise or prejudice occasioned thereby, failure to file is immaterial. Edwards v. R. Co. (S. D.), 110 N. W. 832, *foll.* Adams v. Raijner, 69 Mo. 363.

506-52 **A stipulation in a former action, between same parties and** involving same subject-matter for taking depositions and dispensing with the formalities in general by law, does not extend to the subsequent action and authorize the introduction of the deposition. Armeny v. Madson Co., 111 Ill. App. 621.

509-62 Handy Co. v. Smith, 77 Conn. 165, 58 A. 694; Flannery v. Brew. Co., 70 N. J. L. 715, 59 A. 157; Anderson v. Brass Co., 127 Wis. 273, 106 N. W. 1077; Hughes v. R. Co., 122 Wis. 258, 99 N. W. 897 (examination of employe of corporation party) *dist.* Meier v. Paulus, 70 Wis. 165, 35 N. W. 301 (holding examination of party before trial admissible notwithstanding his presence at trial).

Discretionary with court whether to admit or exclude deposition of witness who has been sworn and put under the rule. Fire Assn. v. Masterson (Tex. Civ.), 83 S. W. 49.

Party-officer of corporation. — The deposition of an officer of a corporation party is not admissible if he is present at trial notwithstanding parties are expressly excepted from the provisions of the statute requiring proof of absence and inability of witness to attend. Miners' & M. Bk. v. Ardsley Co., 113 App. Div. 194, 99 N. Y. S. 98.

511-64 **Admission discretionary** with court. Wilson v. Wilson, 35 Tex. Civ. 192, 79 S. W. 839.

511-65 Flannery v. Brew. Co., 70 N. J. L. 715, 59 A. 157 (motion to

strike out in such case must be promptly made, and showing of surprise at ability of witness to appear).

511-66 Providence Mach. Co. v. Browning, 70 S. C. 148, 49 S. E. 325.

Deposition of adverse party. — A defendant whose interests are hostile to his co-defendant is an adverse party and his deposition may be read by such co-defendant notwithstanding deponent's presence at the trial. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154.

512-70 Supplementing deposition with oral examination. — Where the party taking a deposition failed to read it, permitting the adverse party to read it and then supplement it by an oral examination of the deponent was held not improper. Continental Bk. v. Bank, 1 Tenn. Ch. 449, 497.

512-73 Where the witness is cross-examined as to his statements in deposition he may introduce the portions of the deposition containing such statements. Wilson v. Wilson, 35 Tex. Civ. 192, 79 S. W. 839.

512-77 Columbus R. Co. v. Patterson, 143 Fed. 245, 73 C. C. A. 603.

516-84 Use before grand jury. Absence of deponent may be proved to the grand jury and not the justice. P. v. Dundon, 113 App. Div. 369, 98 N. Y. S. 1048.

518-88 In re Dolbeer, 149 Cal. 227, 86 P. 695.

"Other Cause"—Physician. — Affidavit stating that witness residing in another county is a physician of large practice extending over large scope of territory and therefore likely to be unable to attend the trial does not justify taking his deposition under statute authorizing taking depositions of witness who by reason of age, sickness, or "other cause" shall be unable or likely to be unable to attend court. American Exp. Co. v. Bradford, 82 Miss. 130, 33 S. 843.

519-89 See In re Dolbeer, 149 Cal. 227, 86 P. 695 (only in case of depositions taken within the state); Stone v. Victor Co., 36 Colo. 370, 85 P. 327 (same).

A statutory presumption that things proved to exist are presumed to continue to exist does not dispense with the proof of continuance of age and infirmity required by another statute. Carter v. Wakeman, 45 Or. 427, 78 P. 362.

Stipulation that a copy may be used in place of the original is not a waiver of necessity of proving continuance of deponent's disability. Carter v. Wakeman, supra.

520-90 In re Dolbeer, 149 Cal. 227, 86 P. 695.

Absence at time of trial need not be shown (Talcott v. Freedman, 140 Mich. 32, 103 N. W. 535, *dist.* Emlaw v. Emlaw, 20 Mich. 11, on ground of change in statute), especially where the deposition shows that the witness was a non-resident when his testimony was taken. Chicago etc. R. Co. v. Krayenbuhl, 70 Neb. 766, 98 N. W. 44; Hanley v. R. Co., 59 W. Va. 419, 53 S. E. 625. See Hayes v. Brandt, 80 Ark. 592, 98 S. W. 368.

521-91 Taylor v. Taylor, 138 Mich. 658, 101 N. W. 832 (where deposition shows deponent eighty years old and unable to travel, it cannot be presumed that the cause for taking has been removed).

521-93 See In re Dolbeer, 149 Cal. 227, 86 P. 695; Stone v. Victor Co., 36 Colo. 370, 85 P. 327; Carter v. Wakeman, 45 Or. 427, 78 P. 362.

522-2 Statute providing that the facts authorizing reading of deposition may be established by testimony of deponent or officer who took it. Doyle v. Trans. Co., 124 Mo. App. 504, 101 S. W. 598.

525-15 The fact that several deponents give substantially the same answers to the same questions does not authorize the suppression of the depositions on the ground that such fact shows the witnesses are not testifying from their own knowledge. St. Louis etc. R. Co. v. White (Tex. Civ.), 103 S. W. 673.

526-17 Adoption of former testimony; annexed copy. — Although the witness is shown what purports to be a copy of his testimony in another proceeding, says the same is true and adopts it as part of his testimony, such annexed copy is hearsay and cannot be considered as evidence. Bonnie Co. v. Perry, 25 Ky. L. R. 1560, 78 S. W. 208.

526-18 Irresponsive answers should be excluded. Central T. G. Co. v. Globe T. Co. (Tex. Civ.), 99 S. W. 1144 (uncalled for explanation of letters attached to deposition).

527-21 Dambmann v. R. Co., 55 Misc. 60, 106 N. Y. S. 221.

Motion to suppress a deposition is properly denied where part of it is admissible. Griggs v. Corson, 71 Kan. 884, 81 P. 471.

530-33 Rogers v. Tompkins (Tex. Civ.), 88 S. W. 379. See "TRANSACTIONS WITH DECEASED PERSONS."

530-36 Pennsylvania R. Co. v. Anda Co., 131 Ill. App. 426.

531-37 **When used as admission.** Deposition taken from files of another action to be read as an admission must be introduced as an entirety. Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598.

531-38 **Mere isolated excerpts** can not be read even by the cross-examining party. Gussner v. Hawks, 13 N. D. 453, 101 S. W. 898, *foll.* First Nat. Bk. v. Elec. Co., 11 N. D. 280, 91 N. W. 436 (holding that trial court may in its discretion require whole deposition or only particular portions thereof to be read).

531-40 See McDonald v. Smith, 139 Mich. 211, 102 N. W. 668.

531-41 McDonald v. Smith, supra. But see Pennsylvania R. Co. v. Anda Co., 131 Ill. App. 426.

533-44 Madera R. Co. v. Raymond G. Co., 3 Cal. App. 668, 87 P. 27 (inadmissible conclusion).

533-47 **Giving deposition to jury** discretionary with court. Smith v. S., 142 Ala. 14, 39 S. 329 (refusal to give to jury is proper where only part is admissible).

536-55 See supra, 360-84 note.

536-58 Mississippi Lumb. Co. v. Smith Co. (Ala.), 44 S. 475 (where interrogatories have been filed, objections must be made before trial); Tri-City R. Co. v. Brennan, 108 Ill. App. 471; Louisville etc. Co. v. Leaf (Ind. App.), 89 N. E. 1066 (by statute motion to suppress must be made before trial; Andrieus v. Coal Co., 28 Ky. L. R. 704, 90 S. W. 233 (objections going to the exclusion of deposition); Robertson v. Sebastian, 30 Ky. L. R. 883, 99 S. W. 933 (objections to form and manner of taking); Abbott v. Min. Co., 112 Mo. App. 550, 87 S. W. 110 (objection to absence of notary when stenographer took the answers held waived by failing to object before trial, although no rule of court provided when motions to suppress should be filed); Wormak v. Gross, 135 N. C. 378, 47 S. E. 464. See El Paso R. Co. v. Barrett (Tex. Civ.), 101 S. W. 1025. In Seamster v. S., 74 Ark. 579, 86 S. W. 434, the predecessor of the prosecuting attorney had stipulated that defendant might take a deposition before any notary. The deposition was, however, taken before a justice of the peace and filed six days before trial. Failure to object until the trial was held a waiver irrespective of whether the statute governing time for objecting to depositions had any application to criminal cases. "The court in the interest of justice, and to prevent surprise, should refuse to entertain objections to testimony not made in apt time." But see dissent.

Where statute requires filing before trial has commenced, motion to suppress too late when filed with clerk after trial court has ordered jury called although no names have been drawn or called. Walters v. Rock (N. D.) 115 N. W. 511.

Objections to form and manner of taking must be made before the trial if deposition has been filed one day previous thereto. This includes any objections based on a failure to comply with the statutory requirements in the filing of interrogatories, the issuance of commission, the taking and return of the answers, form of the answer and failure to answer; in fact, all objections except such as question the admissibility of the evidence because of its intrinsic character or the incompetency of the witness. Ellis v. Lewis (Tex. Civ.), 100 S. W. 189 (*dist.* Sparks v. Taylor (Tex. Civ.), 87 S. W. 740); St. Louis R. Co. v. Harkey (Tex. Civ.), 88 S. W. 506. Objection to questions not part of the interrogatories and to the answers thereto unlawfully appended to the deposition is not to form or manner of taking. Sparks v. Taylor (Tex. Civ.), 87 S. W. 740. Want of service of notice of interrogatories goes to manner and form of taking. Texas R. Co. v.

Murtishaw, 34 Tex. Civ. 447, 78 S. W. 953.

538-59 Casley v. Mitchell, 121 Ia. 96, 96 N. W. 725. See Gress Co. v. Berry, 2 Ga. App. 207, 58 S. E. 384.

Before or during first term of court after filing. Borden v. Merc. Co. (Tex. Civ.), 99 S. W. 128; Western U. T. Co. v. Corso, 28 Ky. L. R. 290, 89 S. W. 212 (court sitting continuously — term held to be sixty days).

Waiver. — Simmons v. Cash, 136 Mich. 558, 99 N. W. 754 (failure of deposition to show notice of taking and failure of officer to attach exhibits waived by non-compliance with statute requiring objections to be filed three days after notice of filing).

Application to criminal cases. — See Seamster v. S., 74 Ark. 579, 86 S. W. 434, supra, 536-58.

539-63 Palatine Ins. Co. v. Merc. Co. (N. M.), 82 P. 363; Wormack v. Gross, 135 N. C. 378, 47 S. E. 464 (name of commissioner omitted); Willeford v. Bailey, 132 N. C. 402, 43 S. E. 928.

539-64 *Contra.* — Bishop v. Hilliard, 227 Ill. 382, 81 N. E. 403; Sheibley v. Ashton, 130 Ia. 195, 106 N. W. 618. See also Willeford v. Bailey, 132 N. C. 402, 43 S. E. 928.

541-71 New v. Young, 144 Ala. 420, 39 S. 201 (by cross-examination). *Contra,* Knickerbocker I. Co. v. Gray (Ind.), 72 N. E. 869.

Knowledge of disqualification essential to waiver or estoppel and cannot be presumed even though the commissioner was a member of a firm which appeared as attorneys of record. Bledsoe v. Jones, 145 Ala. 685, 40 S. 111.

541-72 Bledsoe v. Jones, supra (ignorance of grounds for suppression excuses failure to move promptly); Louisville etc. Co. v. Leaf (Ind. App.), 79 N. E. 1066.

542-75 Kelly v. Assn., 2 Cal. App. 460, 84 P. 321; Read Estate T. Co. v. Union T. Co., 102 Md. 41, 61 A. 228 (by statute); Ivey v. Cotton Mills, 143 N. C. 189, 55 S. E. 613; Babcock v. Ormsby, 18 S. D. 358, 100 N. W. 759 (failure to name witness waived).

543-81 Kelly v. Assn., 2 Cal. App. 460, 84 P. 321; El Paso R. Co. v. Barrett (Tex. Civ.), 101 S. W. 1025.

545-85 Toronto I. E. Assn. v. Houston, 9 Ont. L. R. (Can.) 527 (master has no power to strike out or modify interrogatories).

545-86 Williamson v. Brown, 195 Mo. 313, 93 S. W. 791.

546-88 Illinois R. Co. v. Panebiango, 227 Ill. 170, 81 N. E. 53.

547-89 Sheibley v. Ashton, 130 Ia. 195, 106 N. W. 618 (that it was taken during term time).

Objection to postponement waived where five days' notice of taking has been given, and an agent of party notified who was present made no objection. Missouri etc. R. Co. v. Williams (Tex. Civ.), 96 S. W. 1087.

547-90 Breeder v. Martens (S. D.), 112 N. W. 960.

547-92 **Narrative form.** — Attendance at taking and failure to object is waiver. Paterson v. R. Co., 95 Minn. 57, 103 N. W. 621.

547-96 McIlwain v. Gaebe, 128 Ill. App. 209 (attaching exhibit after close of deposition); Oliver v. Sugar Co., 45 Or. 77, 76 P. 1086.

550-10 Columbus R. Co. v. Patterson, 143 Fed. 245, 73 C. C. A. 603 (too late on appeal).

Objection is waived when not interposed till after reading of deposition (Schlag v. Gooding, 98 Minn. 261, 108 N. W. 11); or when not sufficiently specific. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154.

551-14 Bentley v. Bentley, 72 Neb. 803, 101 N. W. 976.

Testimony taken on cross examination after proper objection to competency of deponent is not competent even on behalf of the cross examining party where examination in chief is excluded. Bentley v. Bentley, supra.

552-18 Robertson v. Sebastian, 30 Ky. L. R. 883, 99 S. W. 933.

553-21 Mississippi Lumb. Co. v. Smith (Ala.), 44 S. 475.

554-26 Mississippi Lumb. Co. v. Smith, supra; Williams v. Pub. Co., 126 Ill. App. 109.

554-28 Love v. McElroy, 106 Ill. App. 294; Illinois R. Co. v. Panebiango, 227 Ill. 170, 81 N. E. 53; Robertson v. Sebastian, 30 Ky. L. R. 883, 99 S. W. 933; Raymond v.

Edelbrock, 15 N. D. 231, 107 N. W. 194. But where after notice an order is obtained for a deposition and the production of a letter, which order is complied with without appeal, the introduction of the letter cannot be objected to on the hearing as privileged. Bankers' Assn. v. Nachod, 120 App. Div. 732, 105 N. Y. S. 773.

After reading. — Objection to a responsive answer must be made before it is read in evidence. Arellanes v. Arellanes (Cal.), 90 P. 1059. It will not afterwards be stricken out on motion because an answer to the cross-interrogatories shows it to be based on hearsay. Kirby L. Co. v. Chambers (Tex. Civ.), 95 S. W. 607. *Compare* Norman P. S. Co. v. Ford, 77 Conn. 461, 59 A. 499.

Objection by party offering. — See supra, 494-1.

557-35 **Reserving ruling.** — It is proper practice for the court to overrule a motion to suppress made after jury has been sworn, and reserve its ruling on the evidence until the deposition was offered. Hilt v. Griffin (Kan.), 90 P. 808.

557-36 See Norman P. S. Co. v. Ford, 77 Conn. 461, 59 A. 499.

557-37 Ivey v. Cotton Mills, 143 N. C. 189, 55 S. E. 613.

558-39 Williamson v. Brown, 195 Mo. 313, 93 S. W. 791 (objections made at taking must be renewed at the trial).

558-42 **Express waiver confined to action where made.** — An express waiver of irregularity in the taking of a deposition is confined to the action in which it was made. Reed v. Gold, 102 Va. 37, 45 S. E. 868 (express waiver, in chancery suit, of objection to taking of deposition before answer filed does not extend to subsequent action at law). But see "Former Testimony," Vol. 5, p. 941.

559-44 **In criminal case** the failure of defendant's counsel to object at the trial to introduction of depositions not included within stipulation held not a waiver of ground of objection. Rex v. Brooks, 11 Ont. L. R. (Can.) 525. But see "Objections."

561-46 Abbott v. Min. Co., 112 Mo. App. 550, 87 S. W. 110; Oliver v. Sugar Co., 45 Or. 77, 76 P. 1086; Babcock v. Ormsby, 18 S. D. 358, 100 N. W. 759; (for defect in notice); Hord v. R. Co., 33 Tex. Civ. 163, 76 S. W. 227 (irregularity in taking and return).

Mistake in reducing to writing is objected to by motion to suppress and by introducing deponent at trial to correct the statements in the deposition. Hord v. R. Co., 33 Tex. Civ. 163, 76 S. W. 227.

562-49 West Pub. Co. v. Edward T. Co., 152 Fed. 1019; Short v. Frink (Cal.), 90 P. 200 (rule is same as where witness testifies viva voce); S. v. Simmons, 74 Kan. 799, 88 P. 57 (particular objectionable portion must be pointed out); Louisville & C. P. Co. v. Bottorff, 25 Ky. L. R. 1324, 77 S. W. 920; Weland v. Dealy, 11 N. D. 529, 89 N. W. 325; Ward v. Cameron, 97 Tex. 466, 80 S. W. 69.

563-55 Oliver v. Sugar Co., 45 Or. 77, 76 P. 1086.

564-58 S. v. Jackson, 111 La. 343, 35 S. 593.

564-62 Potomac B. Wks. v. Barber, 103 Md. 509, 63 A. 1068.

564-63 Texas R. Co. v. Coutourie, 135 Fed. 465, 68 C. C. A. 177.

566-65 See Louisville C. P. Co. v. Bottorff, 25 Ky. L. R. 1324, 77 S. W. 920.

567-69 **Time of filing.** — See supra, 536-58 and 538-59; White v. R. Co., 123 Ga. 353, 51 S. E. 411 (compliance with this requirement held waived where counsel admitted at trial the irregularities); Ostenson v. Severson, 126 Ia. 197, 101 N. W. 789; (objections not filed are waived); Robertson v. Sebastian, 30 Ky. L. R. 883, 99 S. W. 933 (all objections to form and manner of taking); Andrieus v. Coal Co., 28 Ky. L. R. 704, 90 S. W. 233; Western U. T. Co. v. Corso, 28 Ky. L. R. 290, 89 S. W. 212; Willeford v. Bailey, 132 N. C. 402, 43 S. E. 928; Borden v. Mere. Co. (Tex. Civ.), 99 S. W. 128 (in writing).

567-70 Andrieus v. Coal Co., supra; Western U. T. Co. v. Corso, supra.

567-72 White v. R. Co., 123 Ga. 353, 51 S. E. 411.

DESCENT AND DISTRIBUTION
[Vol. 4.]

Recitals in deed, 577-6; *Recognition in will,* 578-8; *Pretermitted child,* 579-18.

576-1 See Ironton F. B. Co. v. Tucker, 26 Ky L. R. 532, 82 S. W. 241.

576-2 Gayheart v. Sibley, 23 Ky. L. R. 2307, 66 S. W. 1041. See Kosmerl v. Mueller, 91 Minn. 196, 97 N. W. 660.

Widow claiming property must prove her marriage to the decedent. In re Davis, 204 Pa. 602, 54 A. 475.

576-3 See Houston v. McKinney (Fla.), 45 S. 480.

576-4 McKernan v. Brew. Co., 86 N. Y. S. 191.

Brothers and children of deceased brothers are not, prima facie, heirs. Sorenson v. Sorenson, 68 Neb. 483, 94 N. W. 540, 89 N. W. 837, 100 N. W. 930, 103 N. W. 455.

577-5 See Howard v. Evans, 24 App. Cas. (D. C.) 127; Gayheart v. Sibley, 23 Ky. L. R. 2307, 66 S. W. 1041.

577-6 Ford v. Ford, 177 Ill. App. 502. See Mace v. Duffy, 39 Wash. 597, 81 P. 1053.

Recitals in deed are incompetent to prove heirship, against a person holding adversely to the grantee. Mace v. Duffy, supra; Lohse v. Burck, 42 Wash. 156, 84 P. 722.

578-8 Recognition in will of a person as the son of the testator whose legitimacy is questioned, is not sufficient proof of the relationship. In re Wharton, 218 Pa. 296, 67 A. 414.

578-10 After lapse of a long period, no claim having been made by any person, it will be presumed that a decedent died without issue. Barson v. Mulligan, 191 N. Y. 306, 84 N. E. 75, *rev.* 120 App. Div. 879, 105 N. Y. S. 1106; McNulty v. Mitchell, 41 Misc. 293, 84 N. Y. S. 89.

Presumption of regularity exists as to judicial proceedings taken for the adoption of a person as heir. In re Marchant, 121 Wis. 526, 99 N. W. 320.

578-13 Barson v. Mulligan, 191 N. Y. 306, 84 N. E. 75, *rev.* 120 App. Div. 879, 105 N. Y. S. 1106; Ferry v. Sampson, 112 N. Y. 415, 20 N. E. 387; Chase v. Woodruff (Wis.), 113 N. W. 973. See Johnson v. Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748.

578-14 Claim of relationship repudiated by the decedent during her life time, must be established by clear evidence. In re Dundas, 213 Pa. 628, 63 A. 45.

579-18 Pretermitted child. Burden of proof is on a pretermitted child to show that his omission from the will was not intentional. Brown v. Brown (Neb.), 108 N. W. 180.

581-28 In a collateral attack, there is a presumption in favor of the validity of proceeding of the probate court. Berryman v. Biddle (Tex. Civ.), 107 S. W. 922.

582-31 See Nelson v. Nelson, 29 Ky. L. R. 885, 96 S. W. 794; Rylie v. Stammire (Tex. Civ.), 77 S. W. 626.

583-35 Failure to deny under oath the execution of an administrator's deed does not admit the validity of the court proceedings upon which it is based. O'Keefe v. Behrens, 73 Kan. 469, 85 P. 555.

585-44 Appeal of Melony, 78 Conn. 334, 62 A. 151; Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412; Baum v. Palmer, 165 Ind. 513, 76 N. E. 108; In re Reinoehl, 212 Pa. 359, 61 A. 943.

585-45 Elliott v. Leslie, 30 Ky. L. R. 743, 99 S. W. 619.

587-51 Ex parte Griffin, 142 N. C. 116, 54 S. E. 1007; Morrison v. Morrison (Tex. Civ.), 96 S. W. 100.

588-53 McCabe v. Brosenne (Md.), 69 A. 259; Strode v. Beall, 105 Mo. App. 495, 79 S. W. 1019; In re Robinson, 45 Misc. 551, 92 N. Y. S. 967; Ex parte Griffin, 142 N. C. 116, 54 S. E. 1007; Heyward, v. Middleton, 65 S. C. 493, 43 S. E. 956; Morrison v. Morrison (Tex. Civ.), 96 S. W. 100.

As a basis for this presumption, it must be shown that the child received the money for its own use. Stephens v. Smith, 127 Mo. App. 18, 106 S. W. 533.

589-55 McCabe v. Brosenne (Md.), 69 A. 259.

Conveyance to both son-in-law and

daughter, presumed to be an advancement. Crafton v. Inge, 30 Ky. L. R. 313, 98 S. W. 325.

590-60 See In re Hessler, (Neb.), 113 N. W. 147.

590-63 *Contra.* — Hill v. Hill, 29 Ky. L. R. 201, 92 S. W. 924.

591-65 Baum v. Palmer, 165 Ind. 513, 76 N. E. 108; Lodge v. Fitch, 72 Neb. 652, 101 N. W. 338. See Schmidt v. Schmidt, 123 Wis. 295, 101 N. W. 678.

592-66 See Baum v. Palmer, supra.

592-67 Hicks v. Hicks, 9 Ohio C. C. (N. S.) 413.

594-70 **Recital that Payment** is made as an advancement is not conclusive. Schwertzer v. Schwertzer, 26 Ky. L. R. 888, 82 S. W. 625.

594-71 Schlicher v. Keeler, (N. J.), 62 A. 4; Seed v. Jennings, 47 Or. 464, 83 P. 872.

594-72 *Compare* Cowden v. Cowden, 7 Ohio C. C. (N. S.) 277.

594-76 White v. White (W. Va.), 60 S. E. 885.

595-77 Crafton v. Inge, 30 Ky. L. R. 313, 98 S. W. 325.

595-78 Ex parte Griffin, 142 N. C. 116, 54 S. E. 1007.

598-89 Smith v. Smith, 144 Ill. 299, 33 N. E. 35; Dorman v. Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. 210; Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412 (same rule applies where the mother pays the purchase price and the land is conveyed to a daughter); Moore v. Scruggs, 131 Ia. 692, 109 N. W. 205 (presumption does not arise where title is taken by the child without the parents' knowledge); Nelson v. Nelson, 29 Ky. L. R. 885, 96 S. W. 794.

600-96 Brennamann v. Schell, supra.

601-98 McCabe v. Brosenne (Md.), 69 A. 259.

601-2 **Subsequent transfer** to the parent, destroys the presumption. Stark v. Burke, 131 Ia. 684, 109 N. W. 206.

604-9 **Antecedent or contemporaneous** acts or facts, or those occurring so soon after the purchase as to be fairly considered parts of the transaction are admissible. Brennamann v. Schell, 212 Ill. 356, 72 N. E. 412.

604-12 Hill v. Hill, 29 Ky. L. R. 201, 92 S. W. 924.

606-16 **Note given by son-in-law** has been held to be a receipt of an advancement to the decedent's daughter. Strode v. Beall, 105 Mo. App. 495, 79 S. W. 1019.

608-23 See Lodge v. Fitch, 72 Neb. 652, 101 N. W. 338.

608-24 **Charge upon decedent's book**, in the form of loan, insufficient to show an advancement. Ludington v. Patton, 121 Wis. 649, 99 N. W. 614.

609-26 Schmidt v. Schmidt, 123 Wis 295, 101 N. W. 678.

610-31 McCabe v. Brosenne (Md.), 69 A. 259; In re Reinoehl, 212 Pa. 359, 61 A. 943.

612-33 Strode v. Beall, 105 Mo. App. 495, 79 S. W. 1019; Hicks v. Hicks, 9 Ohio C. C. (N. S.) 413.

613-38 Johnson v. Cole, 178 N. Y. 364, 70 N. E. 873.

613-39 Appeal of Melony, 78 Conn. 334, 62 A. 151 (inadmissible to show a change of a loan into an advancement); Hill v. Hill, 29 Ky. L. R. 201, 92 S. W. 924.

615-46 McCabe v. Brosenne (Md.), 69 A. 259.

616-48 Stephens v. Smith, 127 Mo. App. 18, 106 S. W. 533; In re Reinoehl, 212 Pa. 359, 61 A. 943; Heyward v. Middleton, 65 S. C. 493, 43 S. E. 956.

617-51 Schlicher v. Keeler (N. J.), 62 A. 4 (an attempt by intestate to dispose of the residue of his property, though ineffective, is admissible to show that a prior gift to a child was intended to be an advancement); White v. White (W. Va.), 60 S. E. 885.

617-52 **Proof of circumstances** is admissible to show a change from a debt to an advancement. Hickey v. Davidson, 129 Ia. 384, 105 N. W. 678.

620-59 **Under the Maine statute** an agreement of the parties as to the value expressed in writing, is conclusive upon the question of the value of the advancement. Hilton v. Hilton (Me.), 68 A. 595.

620-61 **By statute,** in Iowa, the value of an advancement is to be estimated as of the time of the death of the decedent. Eastwood v. Crane, 125 Ia. 707, 101 N. W. 481.

Value is to be computed as at the time the advancement was made.

Ward v. Johnson, 30 Ky. L. R. 240, 417, 97 S. W. 1110.

Recital that a certain donation is made to equalize the portions of the children, is conclusive upon the question of equalization. Darby v. Darby, 118 La. 328, 42 S. 953.

Parent's statement and opinion as to the equality of advancements, while of some weight, is not conclusive. Boblett v. Barlow, 26 Ky. L. R. 1076, 83 S. W. 145.

621-64 See In re Park, 4 Pa. C. C. 560.

622-65 Cowden v. Cowden, 7 Ohio C. C. (N. S.) 277.

622-66 Stephens v. Smith, 127 Mo. App. 18, 106 S. W. 533.

622-67 Dorman v. Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. 210.

622-70 Lodge v. Fitch, 72 Neb. 652, 101 N. W. 338.

623-72 Boden v. Mier, 71 Neb. 191, 98 N. W. 701; Schmidt v. Schmidt, 123 Wis. 295, 101 N. W. 678; Ludington v. Patton, 121 Wis. 649, 99 N. W. 614.

DETECTIVES AND INFORMERS [Vol. 4.]

626-1 Post office inspectors are not detectives, and in a criminal case depending in part upon their testimony it is not error to refuse to give instructions cautioning the jury against the testimony of detectives. Lorenz v. S., 24 App. D. C. 337.

626-3 Where compensation of the detective is not dependent upon a conviction it is not error to refuse to allow cross-examination as to the amount thereof. White v. S., 121 Ga. 191, 48 S. E. 941.

630-19 S. v. O'Brien, 35 Mont. 482, 90 P. 514; Marmer v. S., 47 Tex. Cr. 424, 84 S. W. 830; Terry v. S., 46 Tex. Cr. 75, 79 S. W. 320.

631-25 P. v. Bunkers, 2 Cal. App. 197, 84 P. 364 (bribery).

DIAGRAMS [Vol. 4.]

635-2 Hisler v. S., 52 Fla. 30, 42 S. 692.

635-3 Garrison v. Glass, 139 Ala. 512, 36 S. 725; White v. R. Co. (Del.), 63 A. 931; Austin v. Whitcher (Ia.), 110 N. W. 910.

635-6 Koon v. R. Co., 69 S. C. 101, 48 S. E. 86 (drawing representing a pile driver).

635-7 Atlanta R. Co. v. R. Co., 125 Ga. 529, 54 S. E. 736 (blue print plat admissible).

635-8 Ragland v. S., 71 Ark. 65, 70 S. W. 1039; S. v. Cummings, 189 Mo. 626, 88 S. W. 706; Marcy v. Parker, 78 Vt. 73, 62 A. 19.

635-11 Ter. v. Emilio (N. M.), 89 P. 239; S. v. Remington (Or.), 91 P. 473. See Corning v. Dollmeyer, 123 Ill. App. 188.

636-15 Chicago etc. R. Co. v. Pettit, 111 Ill. App. 172; S. v. Remington, supra.

Recitals on a diagram which the jury might regard as evidence render it inadmissible. Corning v. Dollmeyer, supra.

636-20 Spokane v. Patterson (Wash.), 89 P. 402; Franklin v. Engel, 34 Wash. 480, 76 P. 84.

637-24 See Ter. v. Emilio (N. M.), 89 P. 239.

638-30 See West v. S., 53 Fla. 77, 43 S. 445.

638-33 Ragland v. S., 71 Ark. 65, 70 S. W. 1039; West v. S., supra; Seidshlag v. Antioch, 109 Ill. App. 291; Lenoir v. Bank, 87 Miss. 559, 40 S. 5; Ruppert v. R. Co., 25 Pa. Super. 613.

639-34 S. v. Cummings, 189 Mo. 626, 88 S. W. 706.

639-35 Marcy v. Parker, 78 Vt. 73, 62 A. 19.

639-36 Hisler v. S., 52 Fla. 30, 42 S. 692; Ter. v. Price (N. M.), 91 P. 733.

639-40 Jarvis v. S., 138 Ala. 17, 34 S. 1025.

Diagram need not be made by the witness testifying with regard to it. Koon v. R. Co., 69 S. C. 101, 48 S. E. 86. If made by a disinterested person, at the direction of the district attorney, it is admissible. S. v. Remington (Or.), 91 P. 473.

Plat not offered as the official survey, need not be made by the official surveyor. Garrison v. Glass, 139 Ala. 512, 36 S. 725.

Map is admissible though made after the suit was brought. Ruppert v. R. Co., 25 Pa. Super. 613.

639-42 Map drawn after and based upon an actual survey of the

locality, admissible. Hisler v. S., 52 Fla. 30, 42 S. 692.

640-47 **Failure to object** to introduction of a plat is an admission of its correctness. Schneider v. Sulzer, 212 Ill. 87, 72 N. E. 19.

640-48 Williamson v. R. Co., 115 Mo. App. 72, 90 S. W. 401; Koon v. R. Co., 69 S. C. 101, 48 S. E. 86. See Ragland v. S., 71 Ark. 65, 70 S. W. 1039; City of Peru v. Bartels, 214 Ill. 515; Cowles v. Lovin, 135 N. C. 488, 47 S. E. 610.

640-49 Haberer v. Walzer, 109 Ill. App. 371.

Minor inaccuracies affect the weight but not the admissibility of a diagram. Ter. v. Price (N. M., 91 P. 733.

Diagram of a room where murder was committed, admissible where the room was shown to be in substantially the same condition as at the time of the crime. S. v. Cummings, 189 Mo. 626, 88 S. W. 706.

Diagram made from actual measurements, admissible. Seidschlag v. Antioch, 109 Ill. App. 291.

But a plat representing horizontal and vertical distances by a different scale is inadmissible. White v. R. Co. (Del.), 63 A. 931; C. v. R. Co., 23 Pa. Super. 235.

640-50 Marcy v. Parker, 78 Vt. 73, 62 A. 19 (omission of immaterial objects).

641-56 Franklin v. Engel, 34 Wash. 480, 76 P. 84. See Atlanta etc. R. Co. v. R. Co., 125 Ga. 529, 54 S. E. 736; Ter. v. Emilio (N. M.), 89 P. 239 (correctness of diagram may be sufficiently shown by cross-examination of the witness who made it).

Correctness of diagram need not be shown prior to its admission; it is enough if it is subsequently established. Jarvis v. S., 138 Ala. 17, 34 S. 1025.

641-57 West v. S., 53 Fla. 77, 43 S. 445.

641-59 S. v. Remington (Or.), 91 P. 473.

642-62 Crawford v. S., 117 Ga. 247, 43 S. E. 762 (need not have been introduced in evidence).

642-63 Rabberman v. Comrs., 116 Ill. App. 26.

Inspection by a juror of a diagram previously admitted in evidence will not be presumed to be prejudicial. P. v. Antony, 146 Cal. 124, 79 P. 858.

Juror may himself make a diagram, while the jury is deliberating, in order to explain his own opinions, provided it is based upon the evidence in the case and not upon his own knowledge. P. v. Gallaner, 3 Cal. App. 431, 86 P. 814.

Diagram admitted to illustrate testimony is not in evidence, and court may refuse to allow it to go to the jury. Carman v. R. Co., 32 Mont. 137, 79 P. 690.

642-65 See C. v. R. Co., 23 Pa. Super. 235.

642-66 West v. S., 53 Fla. 77, 43 S. 445.

642-67 Ter. v. Price (N. M.), 91 P. 733.

DIRECT EVIDENCE [Vol. 4.]

644-1 U. S. v. Greene, 146 Fed. 803, 824; P. v. Chadwick, 4 Cal. App. 63, 87 P. 384.

644-2 McKinney v. S., 48 Tex. Cr. 402, 88 S. W. 1012.

644-4 U. S. v. Greene, 146 Fed. 803, 824; Haywood v. S., 90 Miss. 461, 43 S. 614.

645-9 Slack v. Harris, 200 Ill. 96, 65 N. E. 669; S. v. Thompson, 127 Ia. 440, 103 N. W. 377; Atchison etc. R. Co. v. Colliati, 75 Kan. 56, 88 P. 534; S. v. Coleman, 17 S. D. 594, 98 N. W. 175. See "CIRCUMSTANTIAL EVIDENCE."

No legal distinction so far as weight and effect is concerned, between direct and circumstantial evidence. S. v. Foster, 14 N. D. 561, 105 N. W. 938.

Direct testimony which is contradictory of and in opposition to conceded and undisputed physical facts must be disregarded. Rattan v. R. Co., 120 Mo. App. 270, 96 S. W. 735.

646-10 P. v. Chadwick, 4 Cal. App. 63, 87 P. 384, 389; Cook v. U. S., 26 App. Cas. (D. C.) 427; Nance v. S., 126 Ga. 95, 54 S. E. 932; Sweat v. C., 29 Ky. L. R. 1067, 96 S. W. 843; S. v. Rutledge, 37 Wash. 523, 79 P. 1123.

Rule does not apply to an action for subornation of perjury. Boren v. U. S., 144 Fed. 801, 75 C. C. A. 531.

646-11 See P. v. Chadwick, 4

Cal. App. 63, 87 P. 384, 389, *cit.* § 1968 Code of Civ. Proc.

646-12 Proof that prosecutrix in an action for rape, was not wife of defendant, should be made by direct evidence. Smith v. S., 44 Tex. Cr. 137, 68 S. W. 995.

DIRECT EXAMINATION [Vol. 4.]

Argumentative question, 654-17; Leading questions to expert witness, 659-29; Vague and indefinite questions, 673-68; Hypothesizing incompetent matters, 674-71; Irresponsiveness; who may object, 679-87.

652-8 Items of account. — A witness testifying in support of an account may in the court's discretion be permitted to testify as to the items in response to a general question. Separate questions for each item are not necessary. Kincaid v. Cavanagh (Mass.), 84 N. E. 307.

652-10 P. v. Davis (Cal. App.), 91 P. 810; Horton v. S., 123 Ga. 145, 51 S. E. 287 (the practice is to be commended rather than condemned); Dean v. C., 25 Ky. L. R. 1876, 78 S. W. 1112. But see Wallach v. R. Co., 111 App. Div. 273, 97 N. Y. S. 716 (counsel has the right to have testimony elicited by question and answer so that he may object rather than move to strike out).

653-13 Questions not susceptible of definite answers are properly excluded. Birmingham etc. R. Co. v. Hayes (Ala.), 44 S. 1032.

Ambiguous, uncertain and indefinite question is properly disallowed. Schmoe v. Cotton, 167 Ind. 364, 79 N. E. 184.

654-17 Bell v. S., 48 Tex. Cr. 256, 87 S. W. 1160.

Argumentative question is improper. See Stone v. Stone, 191 Mass. 371, 77 N. E. 845.

654-19 Fulgham v. Carter, 142 Ala. 227, 37 S. 932; Gordon v. S., 140 Ala. 29, 36 S. 1009; Bradbury v. S. Norwalk (Conn.), 63 A. 321; Sylvester v. S., 46 Fla. 166, 35 S. 142; Prather v. R. Co., 221 Ill. 190, 77 N. E. 430; Chicago C. R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139; Indianapolis etc. R. Co. v. Bennett, 39 Ind. App. 141, 79 N. E. 389; Huntington v. Lusch (Ind. App.), 70 N. E. 402; Collins v. Coal Co. (Ia.), 115 N. W. 497; Luckenbach v. Sciple, 72 N. J. 476, 63 A. 244; Busch v. Robinson, 46 Or. 539, 81 P. 237; Cleveland v. Taylor (Tex. Civ.), 108 S. W. 1037; Godsoe v. S. (Tex. Cr.), 108 S. W. 388; Garrett v. S. (Tex. Cr.), 106 S. W. 389; Seago v. White (Tex. Civ.), 100 S. W. 1015; St. Louis etc. R. Co. v. Conrad (Tex. Civ.), 99 S. W. 209; Ft. Worth etc. R. Co. v. Jones (Tex. Civ.), 85 S. W. 37; Dallas E. Co. v. Mitchell, 33 Tex. Civ. 424, 76 S. W. 935; Hein v. Mildebrandt (Wis.), 115 N. W. 121. See Bingham v. Davidson, 141 Ala. 551, 37 S. 738; Mabry v. Randolph (Cal. App.), 94 P. 403; Emanuel v. Cas. Co., 47 Misc. 378, 94 N. Y. S. 36; Brand v. Milk Co., 95 App. Div. 64, 88 N. Y. S. 460; Ft. Worth etc. R. Co. v. Walker (Tex. Civ.), 106 S. W. 400; St. Louis etc. R. Co. v. Hall (Tex. Civ.), 106 S. W. 194; Hickey v. S. (Tex. Cr.), 102 S. W. 417; Moore v. S., 49 Tex. Cr. 499, 96 S. W. 321; Gulf etc. R. Co. v. Tullis (Tex. Civ.), 91 S. W. 317; Coons v. S. (Tex. Cr.), 91 S. W. 1085; St. Louis etc. R. Co. v. Hall (Tex. Civ.), 81 S. W. 571; Brock v. United Mod., 36 Tex. Civ. 12, 81 S. W. 340; Denison etc. R. Co. v. Powell, 35 Tex. Civ. 454, 80 S. W. 1054; Galveston etc. R. Co. v. Walker (Tex. Civ.), 76 S. W. 228.

655-20 P. v. Hodge, 141 Mich. 312, 104 N. W. 599.

Where an affirmative answer is not more strongly suggested than a negative the question is not leading. U. S. Gypsum Co. v. Shields (Tex. Civ.), 106 S. W. 724.

Whether or not question propounded in this form may or may not be leading, see Hunter v. Malone (Tex. Civ.), 108 S. W. 709; Bryan P. Co. v. R. Co. (Tex. Civ.), 110 S. W. 99; Missouri etc. R. Co. v. Hendricks (Tex. Civ.), 108 S. W. 745; El Paso E. R. Co. v. Ruckman (Tex. Civ.), 107 S. W. 1158; Gibson v. S., 47 Tex. Cr. 489, 83 S. W. 1119. See also "DEPOSITIONS."

Answered by yes or no not necessarily leading. Baltimore & O.

R. Co. v. S. (Md.), 69 A. 439; Woodruff v. S., 72 Neb. 815, 101 N. W. 1114; International etc. R. Co. v. Drought (Tex. Civ.), 100 S. W. 1011; St. Louis etc. R. Co. v. Lowe (Tex. Civ.), 97 S. W. 1087. See St. Louis etc. R. Co. v. Conrad (Tex. Civ.), 99 S. W. 209.

659-27 Bolton v. S., 146 Ala. 691, 40 S. 409; Woodruff v. S., 72 Neb. 815, 101 N. W. 1114.

659-29 Anniston Mfg. Co. v. R. Co., 145 Ala. 351, 40 S. 965; Wester v. S., 142 Ala. 56, 38 S. 1010; Taylor v. S., 82 Ark. 540, 102 S. W. 367; Heinrich v. Heinrich, 2 Cal. App. 479, 84 P. 326; Engelking v. R. Co., 187 Mo. 158, 86 S. W. 89; St. Louis R. Co. v. Crabb (Tex. Civ.), 80 S. W. 408; Lyon v. Grand Rapids, 121 Wis. 609, 99 N. W. 311. See Seeley v. Seeley, 64 N. J. Eq. 1, 53 A. 387.

Leading questions to expert witness. "It is ordinarily permissible to ask an expert witness a leading question when his opinion is sought upon a matter about which by reason of his professional knowledge and skill he has peculiar information." Galveston etc. Co. v. Powers (Tex. Civ.), 101 S. W. 250.

660-30 Sylvester v. S., 46 Fla. 166, 35 S. 142.

660-32 Galveston etc. R. Co. v. Alberti (Tex. Civ.), 103 S. W. 699. But see Vanderbilt v. R. Co., 71 N. J. L. 67, 58 A. 91, holding that the mischief done by a leading question could not be repaired by substituting a proper question after objection, and therefore granting a new trial. *Compare* Ft. Worth etc. R. Co. v. Jones (Tex. Civ.), 85 S. W. 37.

660-33 S. v. Walker, 133 Ia. 489, 110 N. W. 925 (paramour of one charged with homicide); Hackney v. R. B. C. Co., 75 Neb. 793, 106 N. W. 1016 (bankrupt).

Though the witness claims to be friendly to a party, if his conduct shows the contrary it is not error to allow leading questions. Missouri etc. R. Co. v. McAnaney, 36 Tex. Civ. 76, 80 S. W. 1062.

A co-party who is in reality adverse to the party calling may be cross-examined if necessary to elicit the facts. North Am. etc. House v. McElliglot, 227 Ill. 367, 81 N. E. 388.

661-34 Taylor v. S., 82 Ark. 540, 102 S. W. 367; Chicago & A. R. Co. v. Walker, 118 Ill. App. 397; Zilver v. Graves Co., 106 App. Div. 582, 94 N. Y. S. 714.

Cross-examination of a hostile and reluctant witness is permissible. P. v. Sexton, 187 N. Y. 495, 80 N. E. 396.

662-37 Wickham v. P. (Colo.), 93 P. 478; Barker v. S., 1 Ga. App. 286, 57 S. E. 989; S. v. Cambron (S. D.), 105 N. W. 241 (not error for court to state, in presence of jury, that leading questions are allowed because witness is unwilling); Littler v. Dielmann (Tex. Civ.), 106 S. W. 1137; Burch v. S., 49 Tex. Cr. 13, 90 S. W. 168; Hill v. S. (Tex. Cr.), 77 S. W. 808; S. v. Dalton, 43 Wash. 278, 86 P. 590.

Prosecutrix in rape case. — S. v. Fowler, 13 Idaho 317, 89 P. 757; S. v. Waters, 132 Ia. 481, 109 N. W. 1013; S. v. Newman, 93 Minn. 393, 101 N. W. 499; S. v. Bateman, 198 Mo. 212, 94 S. W. 843; Blair v. S., 72 Neb. 501, 101 N. W. 17; Woodruff v. S., 72 Neb. 815, 101 N. W. 1114; Ham v. S. (Tex. Cr.), 78 S. W. 929; Hill v. S. (Tex. Cr.), 77 S. W. 808.

663-40 S. v. Fowler, 13 Idaho 317, 89 P. 757; Campion v. Lattimer, 70 Neb. 245, 97 N. W. 290.

Feeble minded witness. — S. v. Simes, 12 Idaho 310, 85 P. 914.

663-41 S. v. Fowler, supra; McCann v. P., 226 Ill. 562, 80 N. E. 1061; Christensen v. Thompson, 123 Ia. 717, 99 N. W. 591.

Where witness is sufficiently familiar with the English language to answer questions intelligently, leading questions are improper. Craddick v. S., 48 Tex. Cr. 385, 88 S. W. 347.

663-43 See S. v. Megorden (Or.), 88 P. 306.

Youth and inexperience of witnesses for state in rape case held to justify considerable latitude in the form of the questions. S. v. Sheets, 127 Ia. 73, 102 N. W. 415. See also McCann v. P., 226 Ill. 562, 80 N. E. 1061; Ham v. S. (Tex. Cr.), 78 S. W. 929.

664-44 Gray v. Kelley, 190 Mass. 184, 76 N. E. 724.

665-49 **Merely preliminary** questions may be leading. Hefferlin v. Karlman, 29 Mont. 139, 74 P. 201.

666-50 Woodruff v. S., 72 Neb. 815, 101 N. W. 1114.

668-52 But see Briggs v. P., 219 Ill. 330, 76 N. E. 499 (leading question by state's attorney to make the witness emphasize his previous testimony held improper).

668-53 **Reference to former testimony** by the witness is proper in the discretion of the court, where witness is reluctant or his memory is clouded. Ashby v. Road Co., 111 Mo. App. 79, 85 S. W. 957. But see C. v. Brew Co., 26 Ky. L. R. 121, 80 S. W. 772, and "REFRESHING MEMORY."

669-56 S. v. Waters, 132 Ia. 481, 109 N. W. 1013; Missouri etc. R. Co. v. McCutcheon, 33 Tex. Civ. 557, 77 S. W. 232.

Bastardy action. — Johnson v. S. (Wis.), 113 N. W. 674.

670-60 Barlow v. Hamilton (Ala.), 44 S. 657; Western U. T. Co. v. Westmoreland (Ala.), 43 S. 790; Ward v. S. (Ark.), 107 S. W. 677; Taylor v. S., 82 Ark. 540, 102 S. W. 367; P. v. Weber, 149 Cal. 325, 86 P. 671; P. v. Nunley, 142 Cal. 441, 76 P. 45; Shaffer v. U. S., 24 App. D. C. 417; Teston v. S., 50 Fla. 138, 39 S. 787; Lyles v. S. (Ga.), 60 S. E. 578; Barker v. S., 1 Ga. App. 286, 57 S. E. 989; Holmes v. Clisby, 121 Ga. 241, 48 S. E. 934; Chicago C. R. Co. v. Benson, 108 Ill. App. 193; Purcell etc. Mills v. Bell (Ind. Ter.), 104 S. W. 944; Breiner v. Nugent (Ia.), 111 N. W. 446; S. v. Drake, 128 Ia. 539, 105 N. W. 54; S. v. Bateman, 198 Mo. 212, 94 S. W. 843; S. v. Woodward, 191 Mo. 617, 90 S. W. 90; S. v. Knost, 207 Mo. 18, 105 S. W. 616; Woodruff v. S., 72 Neb. 815, 101 N. W. 1114; Ter. v. Meredith (N. M.), 91 P. 731; P. v. Way, 119 App. Div. 344, 104 N. Y. S. 277; S. v. Williams, 76 S. C. 135, 56 S. E. 783; Koon v. R. Co., 69 S. C. 101, 48 S. E. 86; Von Tobel v. Mill Co., 32 Wash. 683, 73 P. 788.

Striking out a leading question after it has been answered without objection is a proper method of exercising the discretion. Luckenbach v. Sciple, 72 N. J. L. 476, 63 A. 244.

671-62 Teston v. S., 50 Fla. 138, 39 S. 787; Reyes v. S. 49 Fla. 17, 38 S. 257; Luckenbach v. Sciple, supra. See Hefferlin v. Karlman, 29 Mont. 139, 74 P. 201.

672-64 Barker v. S., 1 Ga. App. 286, 57 S. E. 989 (only in extreme cases if at all); McBride v. R. & E. Co., 125 Ga. 515, 54 S. E. 674; Chicago & A. R. Co. v. Walker, 118 Ill. App. 397; Maguire v. P., 219 Ill. 16, 76 N. E. 67; Breiner v. Nugent (Ia.), 111 N. W. 446 (in rare instances only will a case be reversed because of leading questions); S. v. Drake, 128 Ia. 539, 105 N. W. 54; S. v. Bateman, 198 Mo. 212, 94 S. W. 843; Woodruff v. S., 72 Neb. 815, 101 N. W. 1114.

An abuse of discretion appears where the testimony of prosecutrix in a rape case, apparently a willing witness, was all elicited by very leading questions. S. v. Hazlett, 14 N. D. 490, 105 N. W. 617.

673-68 **Vague and indefinite questions.** — It is not error to exclude questions which are too vague and indefinite as to time, place or circumstance to show their materiality and relevancy. Strickland land v. S. (Ala.), 44 S. 90; Parham v. S., 147 Ala. 57, 42 S. 1; Crew v. Heard, 146 Ala. 463, 40 S. 337; Sanford v. S., 143 Ala. 78, 39 S. 370; Roche v. Baldwin, 143 Cal. 186, 76 P. 956; East Coast L. Co. v. Ellis-Y. Co. (Fla.), 45 S. 826; Strand v. Garage Co. (Ia.), 113 N. W. 488; S. v. Woodward, 132 Ia. 675, 108 N. W. 753. See Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69 and "DEPOSITIONS." But see Birmingham etc. Co. v. Martin, 148 Ala. 8, 42 S. 618.

674-71 Mutual L. Ins. Co. v. Allen, 212 Ill. 134, 72 N. E. 200.

Hypothesizing incompetent matters. Questions are improper which hypothesize the existence of facts, evidence of which is excluded by the policy of the law. Taylor v. S., 49 Fla. 69, 38 S. 380. But a question may properly hypothesize facts competent in themselves but as to which the witness himself would be incompetent to testify. Cowdery v. McChesney, 124 Cal. 363, 57 P. 221. See "TRANSACTIONS WITH DECEASED PERSONS," Vol. 12, p. 879, n. 61.

674-73 Fleming v. S. (Ala.), 43 S. 219; Alabama Lumb. Co. v. Cross (Ala.), 44 S. 563; Brannan v. Henry, 142 Ala. 698, 39 S. 92; Currelli v. Jackson, 77 Conn. 115, 58 A. 762;

Bernstein v. Lester, 84 N. Y. S. 496; Nelson v. Hunter, 140 N. C. 598, 53 S. E. 439; Dewey v. Kornar (S. D.), 110 N. W. 90; S. v. Winslow, 30 Utah 403, 85 P. 433.

Privileged matters. — The existence of supposed facts into which the policy of the law permits no inquiry cannot be assumed. Taylor v. S., 49 Fla. 69, 38 S. 380.

674-74 Fallon v. Rapid City, 17 S. D. 570, 97 N. W. 1009.

675-78 General questions permitting of either legal or illegal answers are improper. Beall Bros. v. Johnstone, 140 Ala. 339, 37 S. 297; Ross v. S., 139 Ala. 144, 36 S. 718. See Mathieson v. Mathieson, 150 Fed. 241, 80 C. C. A. 129; Braham v. S., 143 Ala. 28, 38 S. 919.

675-79 Cate v. Fife (Vt.), 68 A. 1.

Inadmissible conclusions. — Cooper, W. & B. Co. v. Barut, 123 Ia. 32, 98 N. W. 356.

Question must call for knowledge of witness unless his opinion would be proper. Vernon v. Wedgeworth, 148 Ala. 490, 42 S. 749.

Characterizing certain acts of accused by prosecuting attorney and witness, as "cruel conduct," held improper. S. v. Blydenburg (Ia.), 112 N. W. 634. *Compare* S. v. Rutledge (Ia.), 113 N. W. 461.

677-84 Fleming v. S. (Ala.), 43 S. 219; Continental Ins. Co. v. Cummings (Tex. Civ.), 95 S. W. 48. See Texas & P. R. Co. v. Coutourie, 135 Fed. 465, 68 C. C. A. 177; Arkadelphia L. Co. v. Asman (Ark.), 107 S. W. 1171; Riddle v. Gibson, 29 App. D. C. 237; Morello v. P., 226 Ill. 388, 80 N. E. 903; Hammond etc. R. Co. v. Antonia (Ind. App.), 83 N. E. 766; Travelers' P. A. v. Roth (Tex. Civ.), 108 S. W. 1039; Moore v. Woodson (Tex. Civ.), 99 S. W. 116; Smith v. S. (Tex. Cr.), 99 S. W. 100; Walker v. Dickey (Tex. Civ.), 98 S. W. 658; Sherman Oil & C. Co. v. Oil & R. Co. (Tex. Civ.), 77 S. W. 961.

An answer is not inadmissible merely because irresponsive if it is relevant for any purpose. Reagan v. R. Co., 72 N. H. 298, 56 A. 314. See also Massuco v. Tomasi (Vt.), 67 A. 551.

An improper answer to a proper question if made by a party is reversible error, but not if made by a third person without fault of the court or examining party. Holman v. Edson (Vt.), 69 A. 143.

678-85 Birmingham etc. Co. v. King (Ala.), 42 S. 612; Gilliland etc. S. v. Martin (Ala.), 42 S. 7; Ramsey v. Smith, 138 Ala. 333, 35 S. 325; Cooper W. & B. Co. v. Barut, 123 Ia. 32, 98 N. W. 356; Seivert v. Galvin (Wis.), 113 N. W. 680.

678-86 Aurora v. Plummer, 122 Ill. App. 143; La Rosa v. Wilner, 51 Misc. 580, 101 N. Y. S. 193.

Where the question is argumentative and calculated to provoke an answer not wholly responsive, the party propounding it cannot complain of such a result. Hoffman v. Lemm (Tex. Civ.), 106 S. W. 712.

679-87 Irresponsiveness; who may object. — Only the examining party can object to an answer as irresponsive. If the matter adduced be competent and material he may adopt it. In re Dunahugh, 130 Ia. 692, 107 N. W. 925; S. v. Rutledge (Ia.), 113 N. W. 461; Christensen v. Thompson, 123 Ia. 717, 99 N. W. 591. But see Ramsey v. Smith, 138 Ala. 333, 35 S. 325.

679-88 P. v. Robertson (Cal.), 92 P. 498.

679-93 P. v. Ryan (Cal.), 92 P. 853 (refusal to allow recall not error); Chicago C. R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; United Brew Co. v. O'Donnell, 124 Ill. App. 24; Stout v. C., 29 Ky. L. R. 627, 94 S. W. 15; McQueen v. C., 28 Ky. L. R. 20, 88 S. W. 1047 (allowing state to recall defendant); S. v. Johnson, 116 La. 30, 40 S. 521; Piehl v. Piehl, 138 Mich. 515, 101 N. W. 628 (to explain his testimony); In re Abee (N. C.), 59 S. E. 700 (exercise of discretion not reviewable); Benson v. S. (Tex. Cr.), 103 S. W. 911; Reyes v. S. (Tex. Cr.), 102 S. W. 1156; Upton v. S., 48 Tex. Cr. 289, 88 S. W. 212.

Although there is a dispute between counsel as to the testimony of a witness, the failure of the court to recall the witness is not error where the jury do not indicate any desire for such action. Scott v. S. (Tex. Cr.), 81 S. W. 47.

Recalling to administer oath, proper. Southern R. Co. v. Ellis, 123 Ga. 614, 51 S. E. 594.

To lay foundation for impeachment

the court may in its discretion permit the state to recall a witness for defendant, and the state by so doing does not make witness its own. Hammond v. S., 147 Ala. 79, 41 S. 761. See also Thomas v. S., 47 Fla. 99, 36 S. 161. But see Hauser v. P., 210 Ill. 253, 71 N. E. 416.

680-94 Nashville etc. R. v. Moore, 148 Ala. 63, 41 S. 984; Parrish v. S., 139 Ala. 16, 36 S. 1012; Braham v. S., 143 Ala. 28, 38 S. 919; Lanigan v. Neely, 4 Cal. App. 760, 89 P. 441; Powley v. Swenson, 146 Cal. 471, 80 P. 722; Spinks v. Clark, 147 Cal. 439, 82 P. 45; P. v. Linares, 142 Cal. 17, 75 P. 308; Thomas v. S., 47 Fla. 99, 36 S. 161; American C. & F. Co. v. Hill, 226 Ill. 227, 80 N. E. 784; Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515; S. v. Castigno, 71 Kan. 851, 80 P. 630; Reis v. Transit Co., 179 Mo. 1, 77 S. W. 734; Deitch v. Feder, 86 N. Y. S. 802; Tucker v. Cotton Mills, 76 S. C. 539, 57 S. E. 626; Watson v. S. (Tex. Cr.), 105 S. W. 509; Williams v. S. (Tex. Cr.), 102 S. W. 1134.

680-99 Austin v. Smith (Ia.), 109 N. W. 289; Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231 (patent case).

The number of experts examined should be limited. American S. Co. v. Foundry Co., 158 Fed. 978 (patent case).

Effect. — Where the number of experts has been limited to seven, a party cannot evade the order by extracting on cross-examination an opinion from his opponent's witness not called as an expert. White v. Boston, 186 Mass. 65, 71 N. E. 75.

An arbitrary limitation in a damage suit, on the number of witnesses upon the main issue of damages, held unreasonable and improper. St. Louis etc. R. Co. v. Aubuchon, 199 Mo. 352, 97 S. W. 867.

DISCOVERY [Vol. 4.]

685-3 Bill cannot now be maintained for discovery, alone, in some jurisdictions. Brown v. Corey, 191 Mass. 189, 77 N. E. 838; DeBevoise v. H. & W. Co., 67 N. J. Eq. 472, 58 A. 91.

685-4 Balfour v. Bank, 156 Fed. 500.

686-8 Brown v. Pegram, 149 Fed. 515; Coleman & D. v. Elliott, 147 Ala. 689, 40 S. 666; Bowdish v. Metzger, 71 Kan. 753, 81 P. 484.

Discovery may be had on a supplemental bill. Napier v. Westerhoff, 153 Fed. 985.

688-17 See U. S. v. Bitter Root Co., 133 Fed. 274, 6 C. C. A. 652. § 724 Rev. St. (U. S. Comp St. 1901, p. 583) authorizing courts of law to compel production of books and papers, does not authorize the production of inanimate objects. Mut. L. Ins. Co. v. Griesa, 156 Fed. 398.

689-18 Brown v. McDonald, 133 Fed. 897, 67 C. C. A. 59 (*over.* s. c. 130 Fed. 964; reconsidered and approved in Kurtz v. Brown, 152 Fed. 372); M'Mullen Lumb. Co. v. Strother, 136 Fed. 295, 69 C. C. A. 433.

State laws concerning discovery are inapplicable to federal courts within the state. Smith v. Merc. Co., 154 Fed. 786.

690-20 S. v. Mfg. Co. (Mo. App.), 107 S. W. 1112. See Wright v. Court, 139 Cal. 469, 73 P. 145.

690-21 Nixon v. Lumb. Co. (Ala.), 43 S. 805 (full discussion of this principle).

690-22 Union Col. Co. v. Court, 149 Cal. 790, 87 P. 1035; Garden City L. Co. v. P., 118 Ill. App. 372.

693-27 See Beem v. Farrell (Ia.), 113 N. W. 509.

696-32 See Zimmel's Case, 13 Pa. C. C. 460.

Exhumation and inspection of human body may be ordered in aid of an action at law. Mut. Ins. Co. v. Griesa, 156 Fed. 398.

696-33 Mut. Ins. Co. v. Griesa, supra.

696-36 Brown v. McDonald, 133 Fed. 897, 67 C. C. A. 59 (*over.* s. c. 130 Fed. 964; reconsidered and approved in Kurtz v. Brown, 152 Fed. 372); Brown v. Magee, 146 Fed. 765; Noyes v. Thorpe, 73 N. H. 481, 62 A. 787· (citing authorities pro and con); Hurricane Tel. Co. v. Mohler, 51 W. Va. 1, 41 S. E. 421.

697-38 U. S. v. Bitter Root, 133 Fed. 274, 66 C. C. A. 652; Garden City L. Co. v. P., 118 Ill. App. 372.

698-41 Brown v. Palmer, 157

Fed. 797 (partner is not a stranger to the action).

698-43 See Brown v. M'Donald, 130 Fed. 964.

699-44 Munson v. Ins. Co., 55 W. Va. 423, 47 S. E. 160.

700-48 **Complainant** need not state what the officer knows. Nixon v. Lumb. Co. (Ala.), 43 S. 805.

701-53 Pollak v. Claflin Co., 138 Ala. 644, 35 S. 645; Bowdish v. Metzger, 71 Kan. 753, 81 P. 484; Raymond v. Blaneross (Mont.), 93 P. 648; Larkey v. Gardner, 105 Va. 718, 54 S. E. 886.

Discovery granted where by fraud or deceit facts are in the possession of a defendant. M'Mullen L. Co. v. Strother, 136 Fed. 295, 69 C. C. A. 433.

Where there is confusion and uncertainty as to liability between defendants, brought about by their own acts, discovery readily granted. Mississippi C. Co. v. Levy, 83 Miss. 774, 36 S. 281.

702-54 Larkey v. Gardner, 105 Va. 718, 54 S. E. 886.

703-58 Utah C. Co. v. R. Co., 145 Fed. 981; Pollak v. Claflin Co., 138 Ala. 644, 35 S. 645; Union C. Co. v. Court, 149 Cal. 790, 87 P. 1035 (whereabouts of known defendants held immaterial to the issues, although service of process was impossible.

705-61 In re Romine, 138 Fed. 837; Ex parte Schoepf, 75 Ohio St. 1, 77 N. E. 276; Graham v. Tel. Co., 2 Ohio N. P. (N. S.) 612; Shaffer v. Kinkelin, 1 Phila. (Pa.) 465.

707-63 **Bill must show** a recoverable case to call for discovery. Munson v. Ins. Co., 55 W. Va. 423, 47 S. E. 160.

707-65 **Where** reference to the action at law is insufficient the bill may be amended. Noyes v. Thorpe, 73 N. H. 481, 62 A. 787.

709-72 Noyes v. Thorpe, 73 N. H. 481, 62 A. 787.

711-85 **Verification** by attorney proper where complainant is absent from the state. Kinney v. Reeves, 142 Ala. 604, 39 S. 29.

Direct and positive averments in bill raise a presumption that an affidavit made by the attorney was made upon knowledge of the facts, and not upon information and belief. Kinney v. Reeves, supra.

712-91 **In a bill seeking an accounting and discovery,** discovery is prima facie merely incidental to the account, and if the right to an account is not disclosed the bill will be held bad on demurrer. Elk Brew. Co. v. Neubert, 213 Pa. 171, 62 A. 782; Holland v. Hallahan, 211 Pa. 223, 60 A. 735.

716-3 See Horner v. Bell, 102 Md. 435, 62 A. 736.

717-9 **Answers on information** and belief not required where such answers would require a tedious and expensive investigation. J. D. Park & Sons v. Bruen, 147 Fed. 884.

717-10 See Victor Bloede Co. v. Carter, 148 Fed. 127.

720-25 McFarland v. Bank, 132 Fed. 399; Victor Bloede Co. v. Carter, supra.

720-26 Utah C. Co. v. R. Co., 145 Fed. 981; Millard v. Millard, 123 Ill. App. 264, *aff.* 221 Ill. 86, 77 N. E. 595.

DISORDERLY HOUSE [Vol. 4.]

724-1 Mossman v. Ft. Collins, 40 Colo. 270, 90 P. 605; Wilder v. S., 3 Ga. App. 443, 60 S. E. 112; Arenz v. C. 31 Ky. L. R. 321, 102 S. W. 238.

Unlawfully selling liquors is not, by itself, the keeping of a disorderly house under the New Jersey statute. S. v. Goff (N. J.), 65 A. 854.

Place maintained for taking usurious interest, a disorderly house. S. v. Diamant, 73 N. J. L. 131, 62 A. 286.

Lack of disturbance of neighbors, no defense. S. v. Porter, 130 Ia. 690, 107 N. W. 923 (keeping for gain not necessary); Walker v. C., 117 Ky. 727, 79 S. W. 191; S. v. Ireton, 89 Minn. 340, 94 N. W. 1078.

726-3 Ramsey v. Smith, 138 Ala. 333, 35 S. 325; Jones v. S., 2 Ga. App. 433, 58 S. E. 559; Mimbs v. S., 2 Ga. App. 387, 58 S. E. 499; S. v. Shaw, 125 Ia. 422, 101 N. W. 109; S. v. Steen, 125 Ia. 307, 101 N. W. 96; S. v. Harris, 14 N. D. 501, 105 N. W. 621; C. v. Murr, 7 Pa. Super. 389; C. v. Sarves, 17 Pa. Super. 407; C. v. Bunnell, 20 Pa. Super. 51; Owens v. S. (Tex. Cr.), 108 S. W. 379; Wimberly v. S. (Tex. Cr.), 108 S. W. 384.

Common fame not sufficient proof of the character of the house. Botts

v. U. S., 155 Fed. 50; Hall v. U. S., 155 Fed. 52; McConnell v. S., 2 Ga. App. 443, 58 S. E. 546; Jones v. S., 2 Ga. App. 433, 58 S. E. 559.

Reputation prior to time stated in indictment, admissible if connected with the time laid. P. v. Wheeler, 142 Mich. 212, 105 N. W. 607; Frazier v. S., 47 Tex. Cr. 24, 81 S. W. 532.

Statute allowing evidence of reputation is not exclusive of other evidence. S. v. Cambron (S. D.), 105 N. W. 241.

Statute allowing proof of reputation not unconstitutional. S. v. Wilson, 124 Ia. 264, 99 N. W. 1060.

727-4 McConnell v. S. 2 Ga. App. 443, 58 S. E. 546; Winslow v. S., 5 Ind. App. 306, 32 N. E. 98; Walker v. C., 117 Ky. 727, 79 S. W. 191; S. v. Price, 115 Mo. App. 656, 92 S. W. 174; C. v. Murr, 7 Pa. Super. 391; C. v. Sarves, 17 Pa. Super. 407; C. v. Bunnell, 20 Pa. Super. 51; S. v. Cambron (S. D.), 105 N. W. 241; Stone v. S., 47 Tex. Cr. 575, 85 S. W. 808; Wimberly v. S. (Tex. Cr.), 108 S. W. 384.

Circumstantial evidence may be used to establish the character of a house. Botts v. U. S., 155 Fed. 50; S. v. Porter, 130 Ia. 690, 107 N. W. 923.

729-5 Owens v. S. (Tex. Cr.), 108 S. W. 379. *Contra*, Mimbs v. S., 2 Ga. App. 387, 58 S. E. 499; S. v. Price, 115 Mo. App. 656, 92 S. W. 174.

729-6 Rosencranz v. U. S., 155 Fed. 38; Jones v. S., 2 Ga. App. 433, 58 S. E. 559; S. v. Cambron (S. D.), 105 N. W. 241; Frazier v. S., 47 Tex. Cr. 24, 81 S. W. 532; Stone v. S., 47 Tex. Cr. 575, 85 S. W. 808. See Bates v. S., 45 Tex. Cr. 420, 76 S. W. 462; Wimberly v. S. (Tex. Cr.), 108 S. W. 384.

Harboring prostitutes who are plying their trade, is proof of the keeping. S. v. Wilson, 124 Ia. 264, 99 N. W. 1060.

Declaration of conspirator admissible. Raymond v. P., 226 Ill. 433, 80 N. E. 996.

Circumstantial evidence may be used to show who is the keeper of a disorderly house. Mash v. P., 220 Ill. 86, 77 N. E. 92.

730-7 Proof of reputation admissible to establish defendant's knowledge that the house was disorderly. S. v. Homaki, 40 Wash. 629, 82 P. 873.

730-8 S. v. Steen, 125 Ia. 307, 101 N. W. 96; S. v. Emblem, 59 W. Va. 678, 49 S. E. 554.

Husband living off proceeds of disorderly house kept by his wife, is guilty. Hunter v. S., 14 Ind. App. 683, 43 N. E. 452.

730-9 Meadows v. C., 31 Ky L. R. 1159, 104 S. W. 954; P. v. Jones (N. Y.), 84 N. E. 61. See Majors v. P., 38 Colo. 437, 88 P. 636.

DISTURBING OF PUBLIC ASSEMBLAGES [Vol. 4.]

731-1 Disturbance of public school. See S. v. Packenham, 40 Wash. 403, 82 P. 597.

732-5 Taylor v. S., 1 Ga. App. 539, 57 S. E. 1049; S. v. Dahlstrom, 90 Minn. 72, 95 N. W. 580.

732-6 Stafford v. S. (Ala.), 45 S. 673; S. v. Jones, 77 S. C. 385, 58 S. E. 8.

733-8 Continuance of the riotous acts, after the dispersal of the congregation may be shown. S. v. Jones, supra.

Declaration by participant, competent. S. v. Jones, supra.

733-9 Testimony of witness that he ceased to attend the Sunday school because of the acts of the defendant, is inadmissible. Deskin v. S., 49 Tex. Cr. 439, 93 S. W. 742.

733-10 Evidence held sufficient. Shirley v. S., 1 Ga. App. 143, 57 S. E. 912.

734-11 Folds v. S., 123 Ga. 167, 51 S. E. 305; Tanner v. S., 126 Ga. 77, 54 S. E. 914; Taylor v. S., 1 Ga. App. 539, 57 S. E. 1049.

734-12 Stafford v. S. (Ala.), 45 S. 673; Clark v. S. (Tex. Cr.), 78 S. W. 1078.

734-13 See Denny v. S. (Tex. Cr.), 105 S. W. 798.

734-15 Christmas celebration comes within the statutory protection given to religious meetings. Stafford v. S. (Ala.), 45 S. 673.

735-18 Folds v. S., 123 Ga. 165, 51 S. E. 305.

735-19 Tanner v. S., 126 Ga. 77, 54 S. E. 914. *Compare* C. v. Underkoffer, 11 Pa. C. C. 589.

735-20 Stafford v. S., supra.

737-24 S. v. Dahlstrom, 90 Minn. 72, 95 N. W. 580.

DIVORCE [Vol. 4.]

Effect of statutory presumption of death from unexplained absence, 767-9.

744-1 **The court may elicit evidence** tending to defeat the divorce although no answer has been made, and may require plaintiff to subpoena the defendant. Grenzeback v. Grenzeback, 118 Mo. App. 280, 94 S. W. 567 (holding that although plaintiff's testimony on its face showed sufficient grounds. the unexplained failure to produce the defendant after repeated continuances for that purpose justified a denial of the decree).

744-2 **The general rules** relating to the introduction of evidence and the weight to be given it, applicable to all civil suits, govern divorce suits. Reed v. Reed, 101 Mo. App. 176.

744-3 See Roth v. Roth, 90 App. Div. 87, 85 N. Y. S. 640; Taft v. Taft, 80 Vt. 256 (weighing presumption of innocence in favor of accused).

745-4 See Tillis v. Tillis, 55 W. Va. 198, 46 S. E. 926.

747-10 Hayes v. Hayes, 144 Cal. 625, 78 P. 19; Michalowicz v. Michalowicz, 25 App. D. C. 484; May v. May, 71 Kan. 317, 80 P. 567; Graves v. Graves, 88 Miss. 677, 41 S. 384.

747-11 **A statute** providing that the bill shall not be taken as confessed but that the "cause shall be heard independently of the admissions of either party in the pleadings or otherwise," render admissions wholly inadmissible. Trough v. Trough, 59 W. Va. 464, 53 S. E. 630. See also Hampton v. Hampton, 87 Va. 148, 12 S. E. 340. But see *contra*, Michalowicz v. Michalowicz, 25 App. D. C. 484. Such evidence, however, is competent to defeat a divorce. Tillis v. Tillis, 55 W. Va. 198, 46 S. E. 926; Cralle v. Cralle, 79 Va. 182.

747-12 Hayes v. Hayes, 144 Cal. 625, 78 P. 19; Michalowicz v. Michalowicz, supra; May v. May, 71 Kan. 317, 80 P. 567; Rosecrance v. Rosecrance, 127 Mich. 322, 86 N. W. 800; Diederichs v. Diederichs, 44 Misc. 591, 90 N. Y. S. 131. See De LaRama v. De LaRama, 201 U. S. 303; Clark v. Clark, 86 Minn. 249, 90 N. W. 390; Feinberg v. Feinberg, 70 N. J. Eq. 420, 62 A. 562.

748-14 **A party** is bound by his admission in the pleadings in divorce suits the same as in other actions. Doeme v. Doeme, 96 App. Div. 284, 89 N. Y. S. 215 (admission of residence).

749-17 See Percival v. Percival, 106 App. Div. 111, 94 N. Y. S. 909, and "DOMICIL."

749-18 See infra, 794-37, and Heer v. Heer (N. J.), 65 A. 1013; Lyon v. Lyon, 30 Pa. C. C. 342; Austin v. Austin, 4 Pa. C. C. 368. But see Clopton v. Clopton, 11 N. D. 212, 91 N. W. 46.

Prompt application — Presumption. Hunter v. Hunter, 64 N. J. Eq. 277, 53 A. 221.

Resident freeholders. — West v. West, 38 Ind. App. 659, 78 N. E. 987; Rosniakowski v. Rosniakowski, 34 Ind. App. 128, 72 N. E. 485; Cummins v. Cummins, 30 Ind. App. 671, 66 N. E. 915.

750-19 Casley v. Mitchell, 121 Ia. 96, 96 N. W. 725.

750-20 **Testimony** of one witness sufficient. Overing v. Provensal, 117 La. 653, 42 S. 211.

750-21 **Plaintiff's testimony** sufficient where allegation of marriage is admitted by the answer. The statute requiring corroboration does not apply in such case. Clopton v. Clopton, 11 N. D. 212, 91 N. W. 46.

751-23 See Wilkerson v. Wilkerson, 3 Cal. App. 204, 84 P. 784.

752-31 Heyman v. Heyman, 210 Ill. 524, 71 N. E. 591; McClune v. McClune, 31 Pa. Super. 248; Taft v. Taft, 80 Vt. 256. See Jones v. Jones, 124 Ill. App. 201.

752-32 Taft v. Taft, supra.

752-33 See Roth v. Roth, 90 App. Div. 87, 85 N. Y. S. 640.

753-34 Keville v. Keville, 106 N. Y. S. 993.

754-37 See Heyman v. Heyman, 210 Ill. 524, 71 N. E. 591; Zumbiel v. Zumbiel, 24 Ky. L. R. 590, 69 S. W. 708; Hutchinson v. Hutchinson, 53 Misc. 438, 104 N. Y. S. 1074; Taft v. Taft, 80 Vt. 256.

754-38 See Rasch v. Rasch (Md.), 66 A. 499.

755-41 Hall v. Hall, 43 Or. 619, 75 P. 141.

756-45 But see Hutchinson v. Hutchinson, supra.

756-46 Farrow v. Farrow, 70 N. J. Eq. 777, 60 A. 1103 (opportunity without proof of inclination is insufficient); Farrier v. Farrier (N. J.), 58 A. 1079 (same).

757-53 See Brown v. Brown, 62 N. J. Eq. 29, 49 A. 589.

759-67 Spurlock v. Spurlock, 80 Ark. 37, 96 S. W. 753 (since filing suit); Roth v. Roth, 90 App. Div. 87, 85 N. Y. S. 640; Taft v. Taft, 80 Vt. 256.

759-68 Erratum. — This note number is placed before the wrong subject-matter in the original notes. It should be inserted before the case of Carter v. Carter in the reading note headed "Contrary Expressions."

760-70 The character of the defendant is not in issue merely because he is charged with adultery, and evidence of good character is therefore inadmissible. Van Horn v. Van Horn (Cal. App.), 91 P. 260; Talley v. Talley, 215 Pa. 281, 64 A. 523; s. c. 29 Pa. Super. 535. *Compare* infra, 788-10.

760-73 Such letters must, however, be properly proved. Donnelly v. Donnelly, 25 Ky. L. R. 1543, 78 S. W. 182.

Letters found in possession of defendant are not admissible unless shown to be part of a correspondence or to have been sanctioned in some way. Jones v. Jones, 124 Ill. App. 201.

762-80 See Heyman v. Heyman, 210 Ill. 524, 71 N. E. 591.

762-81 See "BASTARDY" and "ILLEGITIMACY."

Proof of non-access must be very strong and conclusive. Wallace v. Wallace (N. J.), 67 A. 612 (reserving the questions whether a husband is competent to prove non-access and whether public policy permits objection to such testimony to be waived).

763-84 See Baker v. Baker, 195 Pa. 407, 46 A. 96.

763-86 See Davis v. Davis (Cal.), 91 P. 485.

764-91 See Matthews v. Matthews (N. J.), 58 A. 1047.

765-2 Criminal conduct of defendant not connected with the alleged desertion cannot be shown. Wheeler v. Wheeler, 101 Md. 427 (embezzlement).

766-6 Burden of proof is on complainant to establish desertion. Tillis v. Tillis, 55 W. Va. 198, 46 S. E. 926; Hayes v. Hayes, 144 Cal. 625, 78 P. 19 (persistent refusal of intercourse); Carey v. Carey, 25 Pa. Super. 223 (for the statutory period); Trimmer v. Trimmer, 215 Ill. 121, 74 N. E. 96; and that he was not at fault in the matter. Adair v. Adair, 31 Ky. L. R. 956, 104 S. W. 365.

When living in the same house the parties are presumptively living as husband and wife, and it requires very clear and convincing evidence to overcome such presumption. Womack v. Womack, 73 Ark. 281, 83 S. W. 937.

766-8 Living in adultery for several years after a separation by mutual agreement is evidence of husband's intent to desert, but not conclusive. Clark v. Clement, 71 N. H. 5, 51 A. 256.

767-9 Effect of statutory presumption of death from unexplained absence. — A statute providing that a person absenting or concealing himself for seven years shall in the absence of contrary proof be presumed to be dead in any action in which his death comes in question, has no application to a divorce suit where an absconding party has been absent and not heard from for seven years. Spiltoir v. Spiltoir (N. J.), 64 A. 96, *dist.* and *disappr.* so far as contrary, Burkhardt v. Burkhardt, 63 N. J. Eq. 479, 52 A. 296. See "MARRIAGE."

767-12 Visiting and corresponding with a husband after knowledge of his continued adultery is evidence of the wife's consent to a continuation of a separation begun by agreement. Clark v. Clement, 71 N. H. 5, 51 A. 256.

769-18 Record of conviction of husband for desertion is persuasive though not conclusive evidence in favor of the wife. Carey v. Carey, 25 Pa. Super. 223.

769-19 But see Smith v. Smith, 119 Ga. 239, 46 S. E. 106.

Whatever directly tends to show a course of treatment which rendered the condition of the complainant intolerable and life burdensome is

admissible, and the whole conduct of the defendant toward complainant during the period of alleged mistreatment should be considered. Schulze v. Schulze, 33 Pa. Super. 325; Fay v. Fay, 27 Pa. Super. 328.

Evidence that the parties had had trouble over the complainant's conduct with other men was held competent as showing the conduct and manner of life of the parties and as explanatory of the defendant's conduct. Haver v. Haver, 102 Minn. 235, 113 N. W. 382.

But where the defendant has not pleaded the misconduct of the plaintiff she cannot show the latter's general mistreatment of her without regard to the time or occasion of it. Avery v. Avery, 148 Cal. 239, 82 P. 967.

Where crime committed by the defendant is alleged as cruelty, it is unnecessary to prove all the elements of the crime. Galigher v. Galigher (Or.), 89 P. 146 (theft).

770-21 But see Smith v. Smith, 119 Ga. 239, 46 S. E. 106 (abusive and slanderous statements excluded because not constituting cruel conduct endangering life or health).

770-22 But see Smith v. Smith, supra (excluding evidence that defendant was an habitual user of morphine and almost constantly under its influence, because not alone amounting to cruelty).

771-26 Previous to period alleged, inadmissible. Shoup v. Shoup, 106 Ill. App. 167.

773-31 See Harrison v. Harrison, 115 La. 817, 40 S. 232.

775-39 See Haver v. Haver, 102 Minn. 235, 113 N. W. 382.

775-43 See Page v. Page, 43 Wash. 293, 86 P. 582.

Occasional intoxication insufficient. Rapp v. Rapp, 149 Mich. 218, 112 N. W. 709.

Habitual use of intoxicants is insufficient unless accompanied by intoxication. Schaab v. Schaab, 117 La. 727, 42 S. 249.

780-69 Where adultery is charged, defendant may prove complainant's adultery to defeat the action. Talley v. Talley, 29 Pa. Super. 535.

780-70 De Marco v. De Marco, 116 App. Div. 304, 101 N. Y. S. 600 (adultery).

784-86 Heyman v. Heyman, 119 App. Div. 182, 104 N. Y. S. 227.

785-91 See Schireman v. Schireman, 7 Pa. C. C. 110 (affidavit in denial of affidavits by husband are unnecessary).

785-94 See Schireman v. Schireman, supra.

786-96 See Schireman v. Schireman, supra.

786-1 Schneider v. Kohn, 24 Ky. L. R. 924, 70 S. W. 287 (court must hear evidence).

787-2 See Schireman v. Schireman, supra.

787-4 See Cottrell v. Cottrell, 24 Ky. L. R. 2417, 74 S. W. 227 (husband's resources and physical condition considered); Edleman v. Edleman, 125 Wis. 270, 104 N. W. 56 (same).

The court should consider the condition, situation and standing of the parties, financially and otherwise, the duration of their marriage, the amount and value of the husband's estate, the source from which it came, and how far, if at all, the wife contributed thereto. Metcalf v. Metcalf, 73 Neb. 79, 102 N. W. 79.

788-10 See Van Horn v. Van Horn (Cal. App.), 91 P. 260; Crabtree v. Crabtree, 27 Ky. L. R. 435, 85 S. W. 211; Masterson v. Masterson, 24 Ky. L. R. 1352, 71 S. W. 490.

General reputation for morality cannot be proved until attacked. Breedlove v. Breedlove, 27 Ind. App. 560, 61 N. E. 797. *Contra*, Brown v. Brown, 71 Kan. 868, 81 P. 199 (bad reputation for chastity may be shown).

The character of the relatives with whom the parties would be compelled to live and into whose society and custody the children would be brought is a relevant circumstance. Bush v. Bush (Tex. Civ.), 103 S. W. 217.

788-12 See Given v. Given, 25 Pa. Super. 467; Uecker v. Thiedt (Wis.), 113 N. W. 447.

789-17 See Harrison v. Harrison, 115 La. 817, 40 S. 232; Schaab v. Schaab, 66 N. J. Eq. 334, 57 A. 1090; Castilow v. Castilow, 60 W. Va. 586, 55 S. E. 592.

790-18 See E. W. M. v. J. C. M., 2 Tenn. Ch. 463.

790-20 See May v. May, 71 Kan.

317, 80 P. 567; Wood v. Wood (N. J. Eq.), 62 A. 429; Schaab v. Schaab, 66 N. J. Eq. 334, 57 A. 1090; Lyon v. Lyon, 30 Pa. C. C. 342 (incompetent when defendant has not been personally served or does not appear and defend).

791-21 But see E. W. M. v. J. C. M., 2 Tenn. Ch. 463.

The necessity of admitting the spouse's testimony as to privileged communications has been held sufficient to justify breaking the rule in some cases. Schweikert v. Schweikert, 108 Mo. App. 477, 83 S. W. 1095. See "PRIVILEGED COMMUNICATIONS."

791-22 E. W. M. v. J. C. M., supra.

791-24 See Lenoir v. Lenoir, 24 App. D. C. 160.

792-28 See Suffin v. Suffin, 104 N. Y. S. 839.

792-31 But see Schaab v. Schaab, 66 N. J. Eq. 334, 57 A. 1090.

793-34 Chappell v. Chappell, 83 Ark. 533, 104 S. W. 203; Berry v. Berry, 145 Cal. 784, 79 P. 531; Lenoir v. Lenoir, 24 App. D. C. 160; Haines v. Haines (Neb.), 113 N. W. 125. See Olson v. Olson, 27 Pa. Super. 128.

Desertion. — Corroboration necessary. Foote v. Foote (N. J.), 65 A. 205; Heer v. Heer (N. J.), 65 A. 1013; Grady v. Grady (N. J.), 64 A. 440 (constructive desertion by forcing spouse to leave home); Sharp v. Sharp (N. J.), 64 A. 985; Sterling v. Sterling (N. J.), 63 A. 548; Wood v. Wood (N. J. Eq.), 62 A. 429; Snedaker v. Snedaker (N. J.), 62 A. 942; Kline v. Kline (N. J. Eq.), 61 A. 1060 (corroboration merely as to continuance of the desertion is not sufficient); Corder v. Corder (N. J.), 59 A. 309 (same); Hunt v. Hunt (N. J.), 59 A. 642 (same); Sabin v. Sabin (N. J.), 59 A. 627; Farrier v. Farrier (N. J.), 58 A. 1079; Lister v. Lister, 68 N. J. Eq. 109, 55 A. 1093, *aff.* in 66 N. J. Eq. 429, 57 A. 1132 (constructive desertion); Currier v. Currier, 68 N. J. Eq. 7, 64 A. 1133; Seeley v. Seeley, 64 N. J. Eq. 1, 53 A. 387.

Difficulty or impossibility of corroboration in the particular case does not justify relaxation of the rule. Kline v. Kline (N. J.), 61 A. 1060; Cotter v. Cotter (N. J.), 58 A. 73; Lenoir v. Lenoir, 24 App. D. C. 160.

793-35 Murphy v. Murphy, 150 Mich. 97, 113 N. W. 583 (*foll.* Rosecrance v. Rosecrance, 127 Mich. 322, 86 N. W. 800, which holds that the statute forbidding a decree solely on the declarations of the parties does not refer to their testimony); Krug v. Krug, 22 Pa. Super. 572; Baker v. Baker, 195 Pa. 407, 46 A. 96; Christman v. Christman, 7 Pa. C. C. 595 (impotency); Barrow v. Barrow (Tex. Civ.), 97 S. W. 120.

793-36 May v. May, 71 Kan. 317, 80 P. 567; Clopton v. Clopton, 11 N. D. 212, 91 N. W. 46.

794-37 **Residence.** — Sabin v. Sabin (N. J.), 59 A. 627; Hunter v. Hunter, 64 N. J. Eq. 277, 53 A. 221.

794-38 Foote v. Foote (N. J.), 65 A. 205. See Hall v. Hall, 43 Or. 619, 75 P. 141.

795-40 See Richardson v. Richardson, 50 Vt. 119.

795-42 Kline v. Kline (N. J.), 61 A. 1060 (corroboration merely as to continuance of the desertion is not sufficient); Corder v. Corder (N. J.), 59 A. 309 (same).

When element of collusion is excluded, corroboration need not be as extensive, since the purpose of the statutory requirement was to avoid danger of collusion. Clopton v. Clopton, 11 N. D. 212, 91 N. W. 46 (*foll.* California cases, and holding a physician's testimony as to having treated plaintiff sufficient corroboration of cruel conduct).

795-43 Avery v. Avery, 148 Cal. 239, 82 P. 967 (corroboration in every particular not required); Andrews v. Andrews, 120 Cal. 184, 52 P. 298 (same).

No other or different rule is applied to divorce cases than applies to any other class of cases in which corroboration is required. Clark v. Clark, 86 Minn. 249, 90 N. W. 390. See "CORROBORATION."

795-45 Hall v. Hall, 43 Or. 619, 75 P. 141 (husband's testimony as to adultery, corroborated by circumstances, held sufficient to overcome denial by wife and paramour).

796-46 See Delaney v. Delaney, 69 N. J. Eq. 602, 61 A. 266.

Corroboration by paramour. — Matthews v. Matthews (N. J.), 58 A. 1047; Brown v. Brown, 62 N. J. Eq. 29, 49 A. 589.

796-48 Million v. Million, 106 Mo. App. 680, 80 S. W. 290; Baker v. Baker, 195 Pa. 407, 46 A. 96.

796-50 The rule does not apply where the witness is not shown to be a common prostitute or person of loose character. Delaney v. Delaney, 69 N. J. Eq. 602, 61 A. 266; Storms v. Storms (N. J.). 64 A. 700. But see Jewell v. Jewell, 96 App. Div. 633, 89 N. Y. S. 166.

797-51 But see McCune v. McCune, 31 Pa. Super. 248.

798-56 The correct rule is that such testimony is to be weighed and considered like other testimony and tried by the same tests, and the fact that a person is a hired witness should be considered by the triers. Taft v. Taft, 80 Vt. 256.

798-58 Farrow v. Farrow, 70 N. J. Eq. 777, 60 A. 1103 (held to be unworthy of credit in view of its nature and the other evidence).

DOCUMENTARY EVIDENCE
[Vol. 4.]

Production for inspection under statutes. 820-1.

804-10 S. v. Mfg. Co. (Mo. App.), 107 S. W. 1112.

805-13 See "RECORDS."

807-21 S. v. Mfg. Co., supra; Hub C. Co. v. Club (N. H.), 67 A. 574 (inspection by creditor).

807-27 Where creditor has an absolute right to inspect corporation books, his purpose is immaterial. Hub C. Co. v. Club, supra.

807-29 See "RECORDS."

808-36 Alabama G. I. School v. Reynolds, 143 Ala. 579, 42 S. 114.

808-37 Cohn v. Hessel, 95 App. Div. 548, 88 N. Y. S. 1057.

Where employes' remuneration is based upon the net profits, inspection allowed as a matter of right. Thomas v. Waite Co., 113 App. Div. 494, 99 N. Y. S. 297. See Sivins v. Mooney, 54 Misc. 66, 104 N. Y. S. 503.

Action by state for the regulation of monopolies is governed by the same rules. P. v. Ice Co., 54 Misc. 67, 105 N. Y. S. 650.

809-38 See "ATTENDANCE OF WITNESSES;" U. S. v. Assn., 148 Fed. 486; Dancel v. Mach. Co., 128 Fed. 753.

809-39 See "ATTENDANCE OF WITNESSES;" Banks v. R. Co., 79 Conn. 116, 64 A. 14. Omnibus subpoena discountenanced. Miller v. Assn., 139 Fed. 864. Order for examination of party before trial may be accompanied by a subpoena duces tecum. Crompton v. Dobbs, 119 App. Div. 331, 104 N. Y. S. 698.

809-40 Banks v. R. Co., 79 Conn. 116, 64 A. 14; Moore v. Encyc. Co., 43 Misc. 618, 88 N. Y. S. 133; Dunn v. Edison Co., 46 Misc. 602, 92 N. Y. S. 787; P. v. Ice Co., 54 Misc. 67, 105 N. Y. S. 650; Whitten v. Tel. Co., 141 N. C. 361, 54 S. E. 289.

Documentary evidence in possession of a party at the trial will ordinarily be ordered to be produced instanter. Moore v. R. Co., 1 Ga. App. 514, 58 S. E. 63.

Order for production of corporate books is served upon the corporation itself, while a subpoena duces tecum would have to be served upon some officer. In re Consol. R. Co. (Vt.), 66 A. 790, *aff.* 207 U. S. 541.

810-41 Parker v. Wells, 84 Ark. 172, 105 S. W. 75. See Ferguson v. Bien, 49 Misc. 450, 97 N. Y. S. 986 (application for inspection denied for laches); Caldwell v. Ins. Co., 114 App. Div. 377, 99 N. Y. S. 984.

810-42 See Dorris v. Coal Co., 215 Pa. 638, 64 A. 855.

810-43 Star L. Assn. v. Moore, 4 Penne. (Del.) 308, 55 A. 946.

Notice to produce documents does not require production of certified copies, where the originals have been destroyed. Wells W. Co. v. Ins. Co., 209 Pa. 488, 58 A. 894.

810-44 Landt v. McCullough, 206 Ill. 214, 60 N. E. 107. *Compare* Jacobs v. Ref. Co., 112 App. Div. 655, 98 N. Y. S. 541. See "BEST AND SECONDARY EVIDENCE."

811-46 Maffi v. Stephens (Tex. Civ.), 93 S. W. 158. See "BEST AND SECONDARY EVIDENCE."

811-50 In New York, upon an examination of a party before trial, production and inspection of documents is obtained by virtue of subpoena duces tecum and not under the original order. Knickerbocker T. Co. v. Schroeder, 109 N. Y. S. 1024; Gee v. Pendas, 87 App. Div.

157, 84 N. Y. S. 32; Coin Nov. Co. v. Lindenborn, 106 N. Y. S. 508.

811-51 **Inspection** may be ordered against a foreign corporation. National Dist. Co. v. Van Emden, 120 App. Div. 746, 105 N. Y. S. 657.

Officers of a corporation are not "parties" to an action against the corporation and need not produce documents for inspection. Cassatt v. Coal & C. Co., 150 Fed. 32.

Corporation itself, as distinguished from its officers, may be ordered to produce documents. In re Consol. R. Co. (Vt.), 66 A. 790, *aff.* 207 U. S. 541.

812-52 Dorris v. Coal Co., 215 Pa. 638, 64 A. 855; Muller v. Philadelphia, 104 N. Y. S. 781.

812-56 Beck v. Bohm, 95 App. Div. 273, 88 N. Y. S. 584 (production for inspection and photographing allowed).

Production for inspection of corporate books, not allowed, under § 872, N. Y. Code Civ. Proc., except as a basis for refreshing memory of the witness. Hart v. Cotton Co., 41 Misc. 436, 84 N. Y. S. 1065; In re Thompson, 95 App. Div. 542, 89 N. Y. S. 4; In re Sands, 98 App. Div. 148, 90 N. Y. S. 749; Boyle v. Gas Co., 46 Misc. 191, 94 N. Y. S. 27; Bruen v. Whitman Co., 106 App. Div. 248, 94 N. Y. S. 304; Ryan v. R. Co., 108 N. Y. S. 371.

Where inspection appears to be for the benefit of the court, as well as for the applicant, it should be ordered. Edmonds v. Pub. Co., 117 App. Div. 486, 102 N. Y. S. 636.

813-58 Harbaugh v. Securities Co., 110 App. Div. 633, 97 N. Y. S. 350; Ex parte Schoepf, 74 Ohio St. 1, 77 N. E. 276; Dorris v. Coal Co., 215 Pa. 638, 64 A. 855.

813-59 Wynn v. Taylor, 109 Ill. App. 603.

813-63 Twp. of Elmsley v. Miller, 10 Ont. L. R. (Can.) 343.

813-64 DeKoven v. Ziegfeld, 52 Misc. 93, 101 N. Y. S. 586.

814-67 See American B. Co. v. Fruit Co., 153 Fed. 943; International C. M. Co. v. R. Co., 152 Fed. 557; Blum v. S., 94 Md. 375, 51 A. 26.

Document must be produced; claim of privilege is personal to the witness and can only be made under oath, at the hearing. In re Consol. R. Co. (Vt.), 66 A. 790, *aff.* 207 U. S. 541; U. S. v. Collins, 146 Fed. 553.

814-68 See Utah Const. Co. v. R. Co., 145 Fed. 981; Netter v. Stoeckle, 4 Penne. (Del.) 345, 56 A. 604.

814-70 Lee v. Winans, 99 App. Div. 297, 90 N. Y. S. 960; Hirschfield v. Rosenthal, 99 N. Y. S. 912.

814-71 Carrington v. Brooks, 121 Ga. 250, 48 S. E. 970.

815-73 Dun v. Merc. Co., 133 Fed. 1004.

816-78 Dancel v. Mach. Co., 128 Fed. 753; Columbian B. & L. Assn. v. Leeds, 128 Ill. App. 195; Wagner v. Haight & F. Co., 89 N. Y. S. 323.

816-79 Cent. of Ga. R. Co. v. Lewis, 2 Ga. App. 428, 58 S. E. 674.

817-82 American B. Co. v. Fruit Co., 153 Fed. 943; Martin v. Asphalt Co., 87 App. Div. 472, 84 N. Y. S. 711.

Where the contract sued upon expressly gives the right to an inspection, it will be ordered although the necessity is not shown to exist. Fidelity & C. Co. v. Seagrist, 79 App. Div. 614, 80 N. Y. S. 277; Ballenberg v. Wahn, 103 App. Div. 34, 92 N. Y. S. 830. See U. S. C. Co. v. Robins Co., 108 App. Div. 361, 95 N. Y. S. 726.

In New York, authority to combine in one order, a requirement for the examination of a party and the production of books, applies only to a case where a corporation is to be examined; in other cases a subpoena duces tecum should be obtained. Gee v. Pendas, 87 App. Div. 157, 84 N. Y. S. 32; Coin Nov. Co. v. Lindenborn, 106 N. Y. S. 508.

Production for inspection will not be ordered in Michigan, where the documents could be obtained by subpoena duces tecum (Preston Nat. Bk. v. Judge, 137 Mich. 152, 100 N. W. 393; Ashley v. Judge, 138 Mich. 44, 100 N. W. 1005), unless a trust relation exists, giving the right to a discovery (Eddy v. Judge, 72 Mich. 668, 72 N. W. 890; Anti-K. Co. v. Judge, 120 Mich. 250, 79 N. W. 186), or the contract sued upon expressly gives the right. London G. Co. v. Rohnert (Mich.), 109 N. W. 1049.

817-84 Ridgely v. Richard, 130 Fed. 387.

817-85 Wynn v. Taylor, 109 Ill. App. 603.

818-86 Ridgely v. Richard, 130 Fed. 387; Netter v. Stoeckle, 4 Penne. (Del.) 345, 56 A. 604. See Dancel v. Mach. Co., 128 Fed. 753; Memphis T. Assn. v. Smathers, 114 App. Div. 376, 99 N. Y. S. 1057.

818-88 U. S. v. Assn., 154 Fed. 268; In re Consol. R. Co. (Vt.), 66 A. 790, *aff.* 207 U. S. 541. See Home Ins. Co. v. Overturf, 31 Ind. App. 361, 74 N. E. 47.

818-89 Branan v. R. Co., 119 Ga. 738, 46 S. E. 882; Snyder v. Tel. Co., 113 App. Div. 840, 99 N. Y. S. 644.

818-90 Santa Fe P. R. Co. v. Davidson, 149 Fed. 603; Snyder v. Tel. Co., 113 App. Div. 840, 99 N. Y. S. 677. See P. v. Ice Co., 104 N. Y. S. 858, 105 N. Y. S. 650.

818-91 Dancel v. Mach. Co., 128 Fed. 753; Utah Const. Co. v. R. Co., 145 Fed. 981; Cameron L. Co. v. Droney, 132 Fed. 304; U. S. v. Assn., 154 Fed. 268; Kamber v. Transit Co., 52 Misc. 640, 102 N. Y. S. 804; Peck v. Peck, 107 N. Y. S. 925; Dorris v. Coal Co., 215 Pa. 638, 64 A. 855 (diary); Nat. Exch. Bk. v. Lubrano (R. I.), 68 A. 944.

819-92 U. S. v. Assn., 148 Fed. 486.

819-93 Cameron L. Co. v. Droney, 132 Fed. 304; S. v. Court, 29 Mont. 363, 74 P. 1078: S. v. Court, 30 Mont. 206, 76 P. 206 (need not show that the information could not be obtained from other sources); Martin v. Asphalt Co., 87 App. Div. 472, 84 N. Y. S. 711; Dannenberg v. Heller, 88 App. Div. 548, 85 N. Y. S. 90; Snyder v. Tel. Co., 113 App. Div. 840, 99 N. Y. S. 644; Swins v. Mooney, 104 N. Y. S. 502.

819-94 American B. Co. v. Fruit Co., 153 Fed. 943; Romero v. New Iberia Co., 113 La. 110, 36 S. 907; Schlesinger v. Ellinger (Wis.), 114 N. W. 825.

819-96 U. S. v. Assn., 148 Fed. 486; Cent. of Ga. R. Co. v. Lewis, 2 Ga. App. 428, 58 S. E. 674.

819-97 See Nat. Exch. Bk. v. Lubrano (R. I.), 68 A. 944.

Production of deed for inspection and photographing not required to be at the photographer's place of business, but at the clerk's office. Beck v. Bohm, 95 App. Div. 273, 88 N. Y. S. 584.

820-1 **Production for inspection** before trial authorized by statute in most states. Schaefer v. Power Co., 157 Fed. 896; American B. Co. v. Fruit Co., 153 Fed. 943; Cameron L. Co. v. Droney, 132 Fed. 304 (*contra*, Cassatt v. Coal & C. Co., 150 Fed. 32); Swedish-A. Co. v. Fidelity Co., 208 Ill. 562, 70 N. E. 768; Harris v. Richardson, 92 Minn. 353, 100 N. W. 92; S. v. Court, 29 Mont. 363, 74 P. 1078; Mills v. Lumb. Co., 139 N. C. 524, 52 S. E. 200; Ex parte Schoepf, 74 Ohio St. 1, 77 N. E. 276; Lawson v. Min. Co., 44 Wash. 26, 86 P. 1120; Roberts v. Francis, 123 Wis. 78, 100 N. W. 1076.

820-2 *Compare* Cameron L. Co. v. Droney, 132 Fed. 304; Mills v. Lumb. Co., 139 N. C. 524, 52 S. E. 206.

820-3 Banks v. R. Co., 79 Conn. 116, 64 A. 14; Netter v. Stoeckle, 4 Penne. (Del.) 345, 56 A. 604; Beck v. Bohm, 95 App. Div. 273, 88 N. Y. S. 584. *Compare* Caldwell v. Ins. Co., 114 App. Div. 377, 99 N. Y. S. 984.

820-4 **Order** against foreign corporation may provide for the furnishing of copies of its books, and the inspection of its books at its home office. Nat. Dist. Co. v. Van Emden, 120 App. Div. 746, 105 N. Y. S. 657.

Applicant entitled to take copies of the documents produced. Ormerod, G. & Co. v. Iron Wks., (1905) 1 Ch. (Eng.) 505.

820-8 Swedish-A. Co. v. Fidelity Co., 208 Ill. 562, 70 N. E. 768; Dunn v. Edison Co., 46 Misc. 602, 92 N. Y. S. 787; In re Consol. R. Co. (Vt.), 66 A. 790, *aff.* 207 U. S. 541. *Compare* Consol. Coal Co. v. Jones & A. Co., 120 Ill. App. 139.

Failure to produce corporate books for inspection, a contempt. Pray v. Blanchard, 95 App. Div. 423, 88 N. Y. S. 650.

821-10 Lawson v. Min. Co., 44 Wash. 26, 86 P. 1120.

821-11 Carter & Co. v. R. Co., 3 Ga. App. 34, 59 S. E. 209.

821-12 See Roberts v. Francis, 123 Wis. 78, 100 N. W. 1076.

822-17 Avery v. Lee, 117 App. Div. 244, 102 N. Y. S. 12 (writings showing extent of authority of attorney employed merely as an attorney in fact are not privileged); Ex parte Schoepf, 74 Ohio St. 1.

77 N. E. 276 (reports made in anticipation of suit and in possession of counsel, are privileged).

822-18 **Production and inspection** of other articles of personal property than "books, documents, or other papers," cannot be compelled. Pina Maya-S. Co. v. Mfg. Co., 55 Misc. 325, 105 N. Y. S. 482. See Mut. L. Ins. Co. v. Griesa, 156 Fed. 398.

Picture not a "book, document or other paper," although to the extent that a signature upon it comes in question, it may be so considered. Wilson v. Collins, 57 Misc. 363, 109 N. Y. S. 660.

822-22 **Vermont statute** requires production of corporate records before "any court, grand jury, tribunal or commission, acting under the authority of this state." In re Consol. R. Co. (Vt.), 66 A. 790, *aff.* 207 U. S. 541.

Notary public has no power to issue subpoena duces tecum in connection with the taking of a deposition de bene esse. Dancel v. Mach. Co., 128 Fed. 753.

824-38 Muldoon v. R. Co., 98 App. Div. 169, 91 N. Y. S. 65.

827-54 Wood v. Holah, 79 Conn. 215, 64 A. 220; Hill v. Exp. Co. (N. J.), 68 A. 94.

827-55 Lancaster v. Ames (Me.), 68 A. 533 (reply letter admissible); Peycke v. Shinn (Neb.), 107 N. W. 386 (Id.); Western U. Tel. Co. v. O'Fiel (Tex. Civ.), 104 S. W. 406 (railroad time card).

827-56 Vizard v. Moody, 119 Ga. 918, 47 S. E. 348; Kauffman v. Baillie, 46 Wash. 248, 89 P. 548.

827-58 Waterbury Nat. Bk. v. Reed, 231 Ill. 246, 83 N. E. 188.

827-59 Glos v. Holmes, 228 Ill. 436, 81 N. E. 1064; Bruce v. Wanzer (S. D.), 105 N. W. 282; Smithers v. Lowrance (Tex. Civ.), 93 S. W. 1064. See Glos v. Stern, 213 Ill. 325, 72 N. E. 1057; Glos v. Dyche, 214 Ill. 417, 73 N. E. 757; Chicago etc. R. Co. v. Grantham, 165 Ind. 279, 75 N. E. 265; Craw v. Abrams (Neb.), 97 N. W. 296. See "RECORDS."

828-60 Murphy v. Cady, 145 Mich. 33, 108 N. W. 493; Lamar v. S., 49 Tex. Cr. 563, 95 S. W. 509; Slaughter v. Cooper (Tex. Civ.), 107 S. W. 897; Chrast v. O'Connor, 41 Wash. 360, 83 P. 238.

828-61 Glos v. Holmes, 228 Ill. 436, 81 N. E. 1064; S. v. Schaeffer, 74 Kan. 390, 86 P. 477; Carp v. Ins. Co., 203 Mo. 295, 101 S. W. 78; Smithers v. Lowrance, 35 Tex. Civ. 25, 79 S. W. 1088. See Star L. Assn. v. Moore, 4 Penne. (Del.) 308, 55 A. 946.

Ordinance purporting to be published in a pamphlet by authority of the proper officers is admissible. Illinois C. R. Co. v. Warriner, 229 Ill. 91, 82 N. E. 246; Southern R. Co. v. Weatherlow (Ala.), 44 S. 1019; Ft. Worth etc. R. Co. v. Hawes (Tex. Civ.), 107 S. W. 556; St. Louis etc. R. Co. v. Garber (Tex. Civ.), 108 S. W. 742.

829-64 Pirrung v. Council, 104 App. Div. 571, 93 N. Y. S. 575.

829-65 Equitable Mfg. Co. v. Davis Co. (Ga.), 60 S. E. 262; Succession of Sallier, 115 La. 97, 38 S. 929; DiGiorgio Co. v. R. Co., 104 Md. 693, 65 A. 425.

Execution of written instrument introduced to prove a collateral fact need not be formally proved. S. v. Waldrop, 73 S. C. 60, 52 S. E. 793.

Execution of deed introduced to show color of title need not be proved. Brannan v. Henry, 142 Ala. 698, 39 S. 92.

Recognition and use of book containing by-laws, sufficient proof of authentication. Star L. Assn. v. Moore, 4 Penne. (Del.) 308, 55 A. 946. See "WRITTEN INSTRUMENTS."

829-66 See Richards v. Shoe Co., 145 Ala. 657, 39 S. 615; Lefkovits v. Bank (Ala.), 44 S. 613; S. v. Matlack, 5 Penne. (Del.) 401, 64 A. 259.

Circumstantial evidence may establish the execution of a writing. International Harv. Co. v. Campbell (Tex. Civ.), 96 S. W. 93.

Illinois statute (Hurd's Rev. St. 1903, ch. 51, par. 15) provides for proof of corporate papers by copies thereof certified by the secretary. Chicago etc. R. Co. v. Weber, 219 Ill. 372, 76 N. E. 489.

829-67 Tucker v. Helgren, 102 Minn. 382, 113 N. W. 912.

829-69 See Lewis v. Glass (Ala.), 39 S. 771; Bale v. Todd, 123 Ga. 99, 50 S. E. 990; Vickers v. Hawkins, 128 Ga. 794, 58 S. E. 44.

829-70 Boswell v. Bank (Wyo.), 92 P. 624. *Contra*, Ballow v. Col-

lins, 139 Ala. 543, 36 S. 712; Lewis v. Glass (Ala.), 39 S. 771; Mississippi L. Co. v. Kelly, 19 S. D. 577, 104 N. W. 265.

830-74 Terry v. Broadhurst, 127 Ga. 212, 56 S. E. 282.

831-78 Campbell v. Bates, 143 Ala. 338, 39 S. 144; In re Butrick, 185 Mass. 107, 69 N. E. 1044; Dickinson v. Smith (Wis.), 114 N. W. 133. See "ANCIENT DOCUMENTS."

831-80 **Freight receipt.** — Southern Exp. Co. v. Hill, 81 Ark. 1, 98 S. W. 371; Bell Bros. v. R. Co., 125 Ga. 510, 54 S. E. 532.

Letters. — Allen, McI. & Co. v. Bank, 129 Ga. 748, 59 S. E. 813; Ex parte Denning (Tex. Cr.), 100 S. W. 401.

Tax Receipt. — Chastang v. Chastang, 141 Ala. 451, 37 S. 799.

Chattel mortgage. — Becker v. Bowen (Tex. Civ.), 79 S. W. 45.

Minutes of proceedings of an association. General Prop. v. Force (N. J.), 68 A. 914.

Bill of sale. — Jaquith Co. v. Shumway (Vt.), 69 A. 157.

Indorsements on mortgage. Hodge v. Hudson, 139 N. C. 358, 51 S. E. 954.

Promissory note. — Patton v. Bank, 124 Ga. 965, 53 S. E. 664.

Record of marriage. — Murphy v. P., 213 Ill. 154, 72 N. E. 779.

Hospital records. — Cashin v. R. Co., 185 Mass. 543, 70 N. E. 930.

Marriage certificate. — Broadrick v. Broadrick, 25 Pa. Super. 225.

833-81 Patton v. Bank, 124 Ga. 965, 53 S. E. 664.

833-84 See "BEST AND SECONDARY EVIDENCE."

834-92 Western Cottage etc. Co. v. Anderson (Tex. Civ.), 101 S. W. 1061.

835-4 Lanier v. Hebard, 123 Ga. 626, 51 S. E. 632; Frugia v. Trueheart (Tex. Civ.), 106 S. W. 736.

All of a document must ordinarily be offered in evidence. Wallace v. Dorris (Pa.), 67 A. 858. See Closson v. Bligh (Ind. App.), 83 N. E. 263.

839-16 See Patterson v. Drake, 126 Ga. 478, 55 S. E. 175; In re Acker, 70 N. J. Eq. 669, 62 A. 556.

839-17 See Hagan v. Holderby (W. Va.), 57 S. E. 289.

839-18 See Strecker v. Railson (N. D.), 111 N. W. 612.

840-19 See Crawford v. Roney, 126 Ga. 763, 55 S. E. 499.

840-22 See Gabriel v. Bank, 145 Cal. 266, 78 P. 736.

Mutilated book excites suspicion. Crane v. Brewer (N. J.), 68 A. 78.

841-23 See Lanier v. Hebard, 123 Ga. 626, 51 S. E. 632; Tifft v. Greene, 211 Ill. 389, 71 N. E. 1030; Koch v. Streuter, 232 Ill. 594, 83 N. E. 1072; Cockrell v. Schmitt (Okla.), 94 P. 521; Webb v. Ritter, 60 W. Va. 193, 54 S. E. 484.

Recitals in judgment not evidence against third persons. Parlin & O. Co. v. Vawter (Tex. Civ.), 88 S. W. 407. See Swainson v. Scott, 111 Tenn. 140, 76 S. W. 909.

842-28 Russell v. Scofield (Wis.), 113 N. W. 1094.

Sworn copies of records cannot be impeached by parol evidence. Glos v. Holmes, 228 Ill. 436, 81 N. E. 1064.

DOMICIL [Vol. 4.]

Weight of presumption of domicil, 855-24.

846-1 Erwin v. Benton, 120 Ky. 536, 87 S. W. 291.

846-2 Succession of Simmons, 109 La. 1095, 34 S. 101; Gaddie v. Mann, 147 Fed. 955.

847-3 Gaddie v. Mann, supra; P. v. Noir, 207 Ill. 180, 69 N. E. 905; Schmoll v. Schenck (Ind. App.), 82 N. E. 805; Shirk v. Twp. (Ia.), 114 N. W. 884; In re Colton, 129 Ia. 542, 105 N. W. 1008; In re Titterington, 130 Ia. 356, 106 N. W. 761; Cover v. Hatten (Ia.), 113 N. W. 470; Ballard v. Puleston, 113 La. 235, 36 S. 952; Whately v. Hatfield (Mass.), 82 N. E. 48; Watkinson v. Watkinson, 68 N. J. Eq. 632, 60 A. 931, 69 L. R. A. 397; Pickering v. Winch, 48 Or. 500, 87 P. 763.

848-4 See Redfearn v. Hines, 123 Ga. 391, 51 S. E. 407; Donaldson v. S. 167 Ind. 553, 78 N. E. 182.

848-5 Eisele v. Oddie, 128 Fed. 941; S. v. Wurderman (Mo. App.), 108 S. W. 144 (*cit.* Mo. Rev. St. 1899, par. 4160, ch. 17, place where a person's family resides deemed the residence); In re Lowry, 18 Pa.

C. C. 591 (place of residence of little weight).

Presumption that appellant is a resident of the county in which suit was brought. Traders' Ins. Co. v. Humphrey, 207 Ill. 540, 69 N. E. 875.

850-6 In re Bremme, 13 Pa. C. C. 177.

850-7 *Compare* Winans v. Atty. Gen., (1904) App. Gas. (Eng.) 287 (Lord Macnaghten's opinion); Donaldson v. S., 167 Ind. 553, 78 N. E. 182; Hibbert v. Hibbert (N. J.), 65 A. 1028.

850-8 Whately v. Hatfield (Mass.), 82 N. E. 48.

850-9 See Whately v. Hatfield, supra.

850-10 In re Titterington, 130 Ia. 356, 106 N. W. 761.

850-11 Sailor in actual service does not lose his legal residence. Radford v. Radford, 26 Ky. L. R. 652, 82 S. W. 391.

851-13 Boyle v. Griffin, 84 Miss. 41, 36 S. 141.

Last domicil of an infant's deceased father, fixes the domicil of the infant. Nunn v. Robertson, 80 Ark. 350, 97 S. W. 293; Young v. Hiner, 72 Ark. 299, 79 S. W. 1062; In re Bunting, 30 Utah 251, 84 P. 109.

Domicil of parent is not necessarily the domicil of a minor child. Wirsig v. Scott (Neb.), 112 N. W. 655; *Compare* Beekman v. Beekman, 53 Fla. 858, 43 S. 923; In re Bunting, supra.

851-14 Child awarded to the custody of the mother, in divorce proceedings, takes the domicil of the mother. Toledo Trac. Co. v. Cameron, 137 Fed. 48, 69 C. C. A. 28.

852-15 Nunn v. Robertson, 80 Ark. 350, 97 S. W. 293.

852-17 Smith v. Smith, 35 Ind. App. 610, 74 N. E. 1008.

853-18 Gordon v. Yost, 140 Fed. 79; Wilcox v. Nixon, 115 La. 47, 38 S. 890.

After a valid decree of separation there is no presumption that the wife's domicil follows that of the husband. Percival v. Percival, 106 App. Div. 111, 94 N. Y. S. 909, *aff.* 186 N. Y. 587, 79 N. E. 1114.

Domicil of matrimony continues to be the domicil of a deserted wife until she acquires another. Hibbert v. Hibbert (N. J.), 65 A. 1028.

854-20 Gaddie v. Mann, 147 Fed. 955. See Forlaw v. Stores Co., 124 Ga. 261, 52 S. E. 898; Barfield v. Coker, 73 S. C. 181, 53 S. E. 170; McCord v. Rosene, 39 Wash. 1, 80 P. 793.

855-24 Weight of presumptions of domicil. — Presumptions as to domicil are mere inferences, or presumptions of fact, and not legal on conclusive presumptions. Donaldson v. S., 167 Ind. 553, 78 N. E. 182.

856-25 P. v. Moir, 207 Ill. 180, 69 N. E. 905; Bechtel v. Bechtel, 101 Minn. 511, 112 N. W. 883; Pickering v. Winch, 48 Or. 500, 87 P. 763.

Question of domicil is a mixed question of law and fact. Quinn v. Nevills (Cal. App.), 93 P. 1055; Forlaw v. Stores Co., 124 Ga. 261, 52 S. E. 898; Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469.

856-26 See Schmoll v. Schenck (Ind. App.), 82 N. E. 805; Loeser v. Jorgensen, 137 Mich. 220, 100 N. W. 450.

856-27 Gaddie v. Mann, 147 Fed. 955; Quinn v. Nevills (Cal. App.), 93 P. 1055; In re Titterington, 130 Ia. 356, 106 N. W. 761; Mandeville v. Huston, 15 La. Ann. 281; Loeser v. Jorgensen, supra. See McCord v. Rosene, 39 Wash. 1, 80 P. 792.

857-29 See Watkinson v. Watkinson, 68 N. J. Eq. 632, 60 A. 931, 69 L. R. A. 397.

Conviction of crime in a county is not prima facie evidence that the person was a resident of the county. Thomas v. Macon County, 175 Mo. 68, 74 S. W. 999.

857-31 German S. & L. Soc. v. Dormitzer, 192 U. S. 125; Winans v. Atty. Gen., (1904) App. Cas. (Eng.) 287.

857-33 Kelson v. R. Co., 146 Mich. 563, 109 N. W. 1057; In re White, 116 App. Div. 183, 101 N. Y. S. 551; Pickering v. Winch, 48 Or. 500, 87 P. 763.

858-36 Winans v. Atty. Gen., supra.

858-37 Eisele v. Oddie, 128 Fed. 941; Gaddie v. Mann, 147 Fed. 955. See McMakin v. C., 25 Ky. L. R. 2195, 80 S. W. 188.

858-38 S. v. Snyder, 182 Mo. 462, 82 S. W. 12; Barfield v. Coker, 73 S. C. 181, 53 S. E. 170.

858-40 P. v. Moir, 207 Ill. 180,

69 N. E. 905; Schmoll v. Schenck, (Ind. App.), 82 N. E. 805; In re Dalrymples, 215 Pa. 367, 64 A. 554.

860-45 In re Titterington, 130 Ia. 356, 106 N. W. 761; Knox v. Montville, 98 Me. 493, 57 A. 792.

860-48 Canadian P. R. Co. v. Wenham, 146 Fed. 207.

860-50 Sheehan v. Scott, 145 Cal. 684, 79 P. 350.

862-57 See In re Dalrymples, 215 Pa. 367, 64 A. 554.

Letters admissible. — Thorn v. Thorn, 28 App. D. C. 120.

863-58 Winans v. Atty. Gen., (1904) App. Cas. (Eng.) 287; Eisele v. Oddie, 128 Fed. 941; Gaddie v. Mann, 147 Fed. 955; P. v. Moir, 207 Ill. 180, 69 N. E. 905; Cover v. Hatten (Ia.), 113 N. W. 470; Succession of Simmons, 109 La. 1095, 34 S. 101; Pickering v. Winch, 48 Or. 500, 87 P. 763; In re Lowry, 18 Pa. C. C. 591.

863-59 See Ginn v. Cannon, 119 Ga. 475, 46 S. E. 631 (transient under Ga. Civ. Code 1895, par. 1825).

DOWER [Vol. 4.]

865-1 Dower claim in property conveyed by the husband during his lifetime must be clearly established. Saunders v. Hamilton, 26 Ky. L. R. 851, 82 S. W. 630.

866-6 Frampton v. Stevens, L. R. 21 Ch. (Eng.) 164; Barrett v. Failing, 111 U. S. 523. See Starbuck v. Starbuck, 173 N. Y. 503, 66 N. E. 193.

866-8 Record evidence of marriage not necessary. Casley v. Mitchell, 121 Ia. 96, 96 N. W. 725; McFadden v. McFadden, 32 Pa. Super. 534.

867-14 Dixon v. Harris, 32 Ky. L. R. 275, 105 S. W. 451.

869-16 Plaintiff seeking dower need not show title further back than a conveyance in fee to her deceased husband. McFadden v. McFadden, supra.

871-22 See Putney v. Vinton, 145 Mich. 219, 108 N. W. 655.

871-23 Widow not entitled to dower as against a purchase money mortgage. Lohmeyer v. Durbin, 206 Ill. 574, 69 N. E. 523.

872-35 King v. King, 184 Mo. 99, 82 S. W. 101.

872-39 King v. King, supra.

873-42 King v. King, supra.

873-44 Cowdrey v. Cowdrey (N. J.), 67 A. 111.

874-45 Cowdrey v. Cowdrey, supra.

874-50 Release of dower, in articles of separation, is void where no provision is made for maintenance of the wife. In re Taylor, 5 Ind. Ter. 219, 82 S. W. 727.

875-51 See Grober v. Clements, 71 Ark. 565, 76 S. W. 555; In re Taylor, supra.

875-52 Divorce granted to wife gives her same interest in husband's property as she would have in case of his death. Linse v. Linse, 98 Minn. 243, 108 N. W. 8. *Compare* Voke v. Platt, 48 Misc. 273, 96 N. Y. S. 725.

876-56 Rieger v. Schaible (Neb.), 115 N. W. 560.

876-58 Colbert v. Rings, 231 Ill. 404, 83 N. E. 274.

876-59 Rieger v. Schaible, supra; Cummings v. Cummings, 25 R. I. 528, 57 A. 302.

877-60 Conveyance need not be expressly made in lieu of dower to take effect as such. Morgan v. Sparks, 32 Ky. L. R. 1196, 108 S. W. 233.

878-64 See Carling v. Peebles, 215 Ill. 96, 74 N. E. 87; Hanna v. Gay, 117 Ky. 695, 78 S. W. 915; Bush v. Piersol, 183 Mo. 500, 81 S. W. 1224.

879-70 Release may be subject to conditions subsequent. Brown v. Tilley, 25 R. I. 579, 57 A. 380.

879-71 Fowler v. Chadima, 134 Ia. 210, 111 N. W. 808.

879-73 *Compare* Dooley v. Greening, 201 Mo. 343, 108 S. W. 43.

880-80 In re Taylor, 5 Ind. Ter. 219, 82 S. W. 727; Bechtel v. Barton, 147 Mich. 318, 110 N. W. 935.

Post nuptial agreement or contract with her husband by which a wife releases her dower, is valid. Merki v. Merki, 212 Ill. 121, 72 N. E. 9, *aff.* 113 Ill. App. 518; Carling v. Peebles, 215 Ill. 96, 74 N. E. 87; In re Fennell, 207 Pa. 309, 56 A. 875.

882-95 Assignment for benefit of creditors does not bar dower rights

unless the wife joins. McFadden v. McFadden, 32 Pa. Super. 534.

882-96 Britt v. Gordon, 132 Ia. 431, 108 N. W. 319; Jenkins v. Rhodes, 106 Va. 564, 56 S. E. 332.

883-97 Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86; Wallace v. Wallace (Ia.), 114 N. W. 913; Collings v. Collings, 29 Ky. L. R. 51, 92 S. W. 577; Goff v. Goff, 60 W. Va. 9, 53 S. E. 769.

883-99 Rankin v. Rankin, 111 Ill. App. 403; Hyatt v. O'Connell, 130 Ia. 567, 107 N. W. 599; Harris v. Langford, 26 Ky. L. R. 1096, 83 S. W. 566; Delaney v. Manshum, 146 Mich. 525, 109 N. W. 1051.

884-11 Re S., 14 Ont. L. R. (Can.) 536; Grober v. Clements, 71 Ark. 565, 76 S. W. 555; In re Taylor, 5 Ind. Ter. 219, 82 S. W. 727 (full discussion), *rev.* in 145 Fed. 169, 75 C. C. A. 139, under name, Daniels v. Taylor.

885-12 Hicks v. Hicks, 142 N. C. 231, 55 S. E. 106.

886-14 See Fowler v. Chadima, 134 Ia. 210, 111 N. W. 808.

Estoppel may arise from verbal representations. Morgan v. Sparks 32 Ky. L. R. 1196, 108 S. W. 233. And see Hyatt v. O'Connell, 130 Ia. 567, 107 N. W. 599.

886-17 Lucas v. Whitaere, 121 Ia. 251, 96 N. W. 776.

Adverse possession bars dower of a non-resident wife under Mich. Comp. Laws 1897, par. 8938. Putney v. Vinton, 145 Mich. 219, 108 N. W. 655.

Possession which is in fact adverse will bar dower rights. Butcher v. Butcher, 137 Mich. 390, 100 N. W. 604.

887-18 Grober v. Clements, 71 Ark. 565, 76 S. W. 555; Lucas v. Whitaere, 121 Ia. 251, 96 N. W. 776; Wallace v. Wallace (Ia.), 114 N. W. 913; Britt v. Gordon, 132 Ia. 431, 108 N. W. 319.

887-21 Arnold v. R. Co., 32 Pa. Super. 452.

887-23 Arnold v. R. Co., supra.

888-29 **Purchaser under a lien** prior to dower is liable to satisfy a dower claim in any surplus. Bassell v. Caywood, 54 W. Va. 241, 46 S. E. 159.

Mistake or fraud may be shown in including lands in a decree for sale. Lohmeyer v. Durbin, 206 Ill. 574, 69 N. E. 523.

DURESS [Vol. 4.]

Burden of proof and sufficiency of evidence, 909-49.

892-1 Wakley v. King, 112 App. Div. 765, 98 N. Y. S. 957.

893-3 Williamson-H. Co. v. Ackerman (Kan.), 94 P. 807; Nebraska Mut. B. Assn. v. Klee, 70 Neb. 383, 97 N. W. 476; Gray v. Freeman, 37 Tex. Civ. 556, 84 S. W. 1105.

894-4 **Purchaser** from mortgagor can obtain cancellation of the mortgage for duress exercised upon the mortgagor. Gray v. Freeman, supra.

894-6 Medearis v. Granberry (Tex. Civ.), 84 S. W. 1070.

895-10 Royal v. Goss (Ala.), 45 S. 231.

896-13 Hintz v. Hintz, 222 Ill. 248, 78 N. E. 565; Anderson v. Anderson (N. D.), 115 N. W. 836.

Threat to turn off water supply is proof of duress. City of Chicago v. Ins. Co., 218 Ill. 40, 75 N. E. 803.

897-14 Lilienthal v. Brew. Co., 118 App. Div. 205, 102 N. Y. S. 1051; Batavian Bk. v. North, 114 Wis. 637, 90 N. W. 1016; Bond v. Kidd, 122 Ga. 812, 50 S. E. 934; Paulson v. Barger, 132 Ia. 547, 109 N. W. 1081.

898-15 Bond v. Kidd, 1 Ga. App. 798, 57 S. E. 944; James v. Dalbey, 107 Ia. 463, 78 N. W. 51; Bollinger v. Gettysborough, 6 Pa. C. C. 369.

Threat to institute criminal proceedings amounts to duress where the crime committed was not to the injury of the threatener. Thompson v. Hicks (Tex. Civ.), 100 S. W. 357.

899-16 Henry v. Bank, 131 Ia. 97, 107 N. W. 1034. See Deshong v. New York, 74 App. Div. 234, 77 N. Y. S. 563, *aff.* 176 N. Y. 475, 68 N. E. 880.

900-20 Blankenmiester v. Blankenmiester, 106 Mo. App. 390, 80 S. W. 706.

900-21 Bailey v. Devine, 123 Ga. 653, 51 S. E. 603.

901-22 Bailey v. Devine, supra.

902-25 Gray v. Freeman, 37 Tex. Civ. 556, 84 S. W. 1105; Bond Assn. v. Klee, 70 Neb. 383, 97 N. W. 476; Detwiler v. G. L. Co., 17 Phila. (Pa.) 300.

902-26 **Threatened** illegal destruc-

tion or loss or withholding of property is duress. Harlan v. Gladding (Cal. App.), 93 P. 400; Whitt v. Blount, 124 Ga. 671, 53 S. E. 205; Foote v. De Poy, 126 Ia. 366, 102 N. W. 112; Tandy v. Elmore, 113 Mo. App. 409, 87 S. W. 614. See Rowland v. Watson, 4 Cal. App. 476, 88 P. 495; Dawson v. Ins. Co., 6 Pa. C. C. 214; Sanborn v. Bush (Tex. Civ.), 91 S. W. 883.

903-27 Delta County Bk. v. McGranahan, 37 Wash. 307, 79 P. 796.

903-28 Bailey v. Devine, 123 Ga. 653, 51 S. E. 603; Henry v. Bank, 131 Ia. 97, 107 N. W. 1034 (threats against a brother); Williamson-Halsell Co. v. Ackerman (Kan.), 94 P. 807; Nebraska Mut. B. Assn. v. Klee, 70 Neb. 383, 97 N. W. 476 (threats against son-in-law); Gray v. Freeman, 37 Tex. Civ. 556, 84 S. W. 1105; Medearis v. Granberry (Tex. Civ.), 84 S. W. 1070.

904-29 Puff v. Puff, 31 Ky. L. R. 939, 104 S. W. 332; Avakian v. Avakian, 69 N. J. Eq. 89, 60 A. 521.

905-30 Hintz v. Hintz, 222 Ill. 248, 78 N. E. 565; Anderson v. Anderson (N. D.), 115 N. W. 836.

905-32 Bryan v. Hobbs, 72 Ark. 635, 83 S. W. 341; Buck v. Houghtaling, 110 App. Div. 52, 96 N. Y. S. 1034. See Lilienthal v. Brew. Co., 118 App. Div. 205, 102 N. Y. S. 1051.

906-37 On an issue of duress the value of the interests of the parties and the consideration paid is immaterial. Bartek v. Kolacek (Tex. Civ.), 99 S. W. 114.

906-38 Bond v. Kidd, 122 Ga. 812, 50 S. E. 934, 1 Ga. App. 798, 57 S. E. 944.

907-39 England v. Fawbush, 204 Ill. 384, 68 N. E. 526.

909-48 Anderson v. Anderson (N. D.), 115 N. W. 836.

909-49 **Burden of proof.** — The burden of proof is upon the party alleging duress, and evidence of the clearest and most satisfactory character is required to establish it. Anderson v. Anderson (N. D.), 115 N. W. 836; Claxton v. Lovett, 129 Ga. 300, 58 S. E. 830; Buck v. Houghtaling, 110 App. Div. 52, 96 N. Y. S. 1034.

DYING DECLARATIONS [Vol. 4.]

Evidence in chief, 953-75; *Compulsory production at preliminary hearing,* 1013-27; *Weight as evidence,* 1017-42.

915-1 Nordgren v. P., 211 Ill. 425, 71 N. E. 1042; P. v. Buettner, 233 Ill. 272, 84 N. E. 218; S. v. Harris, 112 La. 937, 36 S. 810.

915-2 Nordan v. S., 143 Ala. 13, 39 S. 406.

916-3 Zipperian v. P., 33 Colo. 134, 79 P. 1018; Brom v. P., 216 Ill. 148, 74 N. E. 790; Coyle v. C., 29 Ky. L. R. 340, 93 S. W. 584.

916-4 Gardner v. S. (Fla.), 45 S. 1028.

917-5 Nordgren v. P., 211 Ill. 425, 71 N. E. 1042; Brom v. P., supra; S. v. Monich (N. J.), 64 A. 1016; C. v. Spahr, 211 Pa. 542, 60 A. 1084.

918-7 McEwen v. S. (Ala.), 44 S. 619; Prov. Gov't. v. Hering, 9 Haw. 181; Brom v. P., 216 Ill. 148, 74 N. E. 790; S. v. Knoll, 69 Kan. 767, 77 P. 580; Coyle v. C., 29 Ky. L. R., 340, 93 S. W. 584; P. v. Brecht, 120 App. Div. 769, 105 N. Y. S. 436.

919-8 Jones v. S. (Ga.), 60 S. E. 840; Prov. Gov't. v. Hering, supra; P. v. Winkelman, 12 Pa. Super. 497; Payne v. S., 45 Tex. Cr. 564, 78 S. W. 934.

922-14 Findley v. S., 125 Ga. 579, 54 S. E. 106; S. v. Daniels, 115 La. 59, 38 S. 894; S. v. McCoomer (S. C.), 60 S. E. 237.

923-15 Park v. S., 126 Ga. 575, 55 S. E. 489; Lee v. S., 2 Ga. App. 481, 58 S. E. 676.

924-17 Harper v. S., 129 Ga. 770, 59 S. E. 792; S. v. Brown, 111 La. 696, 35 S. 818.

925-18 Edwards v. S. (Neb.), 112 N. W. 611.

925-19 McEwen v. S. (Ala.), 44 S. 619 (3 days); Newton v. S., 51 Fla. 82, 41 S. 19 (5 days); Burton v. C., 24 Ky. L. R. 1162, 70 S. W. 831 (11 days).

925-20 Walker v. S., 139 Ala. 56, 35 S. 1011; Wilson v. S., 140 Ala. 43, 37 S. 93; Scott v. S., 75 Ark. 142, 86 S. W. 1004; Fogg v. S., 81 Ark. 417, 99 S. W. 537; P. v. Glover, 141 Cal. 233, 74 P. 745; Brennan v. P., 37 Colo. 256, 86 P. 79; S. v. Fleetwood (Del.), 65 A. 772; S. v. Uzzo (Del.), 65 A. 775; Gardner v. S. (Fla.), 45 S. 1028; Sutherland v. S., 121 Ga. 190 48 S. E. 915· P. v.

Buettner, 233 Ill. 272, 84 N. E. 218; Williams v. S., 168 Ind. 87, 79 N. E. 1079; S. v. Knoll, 69 Kan. 767, 77 P. 580; Farmer v. C., 28 Ky. L. R. 1168, 91 S. W. 682; Keith v. C., 29 Ky. L. R. 158, 92 S. W. 599; Bricker v. C., 31 Ky. L. R. 596, 102 S. W. 1175; Johnson v. C., 32 Ky. L. R. 1117, 107 S. W. 768; S. v. Daniels, 115 La. 59, 38 S. 894; Hawkins v. S., 98 Md. 355, 57 A. 27; Ashley v. S. (Miss.), 37 S. 960; S. v. Monich (N. J.), 64 A. 1016; P. v. Brecht, 120 App. Div. 769, 105 N. Y. S. 436; S. v. Teachey, 138 N. C. 587, 50 S. E. 232; Wade v. S., 2 Ohio C. C. (N. S.) 189; S. v. Gray, 43 Or. 446, 74 P. 927; S. v. Gallman (S. C.), 60 S. E. 682; Lyles v. S., 48 Tex. Cr. 119, 86 S. W. 763; Craven v. S., 49 Tex. Cr. 78, 90 S. W. 311; Wilson v. S., 49 Tex. Cr. 50, 90 S. W. 312; Bowles v. C., 103 Va. 816, 48 S. E. 527.

928-21 Sims v. S., 139 Ala. 74, 36 S. 138.

928-22 Sims v. S., supra. See Wilson v. S., supra.

929-25 See S. v. McCoomer (S. C.), 60 S. E. 237.

929-26 Brom v. P., 216 Ill. 148, 74 N. E. 790; Brown v. C., 26 Ky. L. R. 1269, 83 S. W. 645; S. v. Craig, 190 Mo. 332, 88 S. W. 641.

929-27 Brom v. P., supra; Coyle v. C., 29 Ky. L. R. 340, 93 S. W. 584; S. v. Gianfala 113 La. 463, 37 S. 30; P. v. Brecht, 120 App. Div. 769, 105 N. Y. S. 436; Craven v. S., 49 Tex. Cr. 78, 90 S. W. 311; Phillips v. S. (Tex. Cr.), 94 S. W. 1051. See S. v. Roberts, 28 Nev. 350, 82 P. 100; S. v. Thomson (Or.), 88 P. 583.

930-30 S. v. Knoll, 69 Kan. 767, 77 P. 580.

930-31 P. v. Buettner, 233 Ill. 272, 84 N. E. 218; Thomas v. S., 49 Tex. Cr. 633, 95 S. W. 1069.

931-32 Rose v. S., 144 Ala. 114, 42 S. 21; S. v. Knoll, 69 Kan. 767, 77 P. 580.

931-34 Sims v. S., 139 Ala. 74, 36 S. 138; Brom v. P., 216 Ill. 148, 74 N. E. 790 (written declaration).

933-35 Willis v. S., 49 Tex. Cr. 139, 90 S. W. 1100; Jones v. S. (Tex. Cr.), 106 S. W. 345.

933-36 C. v. Reed, 5 Phila. (Pa.) 528.

933-37 Craven v. S., 49 Tex. Cr. 78, 90 S. W. 311.

933-38 **Non-expert** witness can testify as to the mental capacity of the declarant. Lyles v. S., 48 Tex. Cr. 119, 86 S. W. 763.

934-40 Keith v. C., 29 Ky. L. R. 158, 92 S. W. 599. See Anderson v. S., 122 Ga. 161, 50 S. E. 46; S. v. Roberts, 28 Nev. 350, 82 P. 100.

935-41 Walker v. S., 139 Ala. 56, 35 S. 1011; Edwards v. S. (Neb.), 112 N. W. 611; Roberts v. S., 48 Tex. Cr. 378, 88 S. W. 221. See Phillips v. S. (Tex. Cr.), 98 S. W. 868.

935-43 C. v. Spahr, 211 Pa. 542, 60 A. 1084.

935-44 **Want of religious belief** of declarant no ground for exclusion. S. v. Hood (W. Va.), 59 S. E. 971. And see S. v. Zorn, 202 Mo. 12, 100 S. W. 591.

937-47 Lyles v. S., 48 Tex. Cr. 119, 86 S. W. 763.

938-49 S. v. Uzzo (Del.), 65 A. 775; Green v. S., 89 Miss. 331, 42 S. 797.

939-51 Craven v. S., 49 Tex. Cr. 78, 90 S. W. 311.

941-54 Friedman v. R. Co., 7 Phila. (Pa.) 203.

941-55 P. v. Schiavi, 96 App. Div. 479, 89 N. Y. S. 564; C. v. Reed, 5 Phila. (Pa.), 528.

Dying declaration inadmissible on a prosecution for incest. P. v. Stison, 140 Mich. 216, 103 N. W. 542.

942-57 **On prosecution for manslaughter** a dying declaration could not be used as evidence to establish an assault, though the defendant could be convicted of the lesser crime. P. v. Schiavi, supra.

942-58 *Compare* Edwards v. S. (Neb.), 112 N. W. 611 (full discussion).

Pennsylvania statute, Act June 26, 1895, P. L. 387, makes dying declarations admissible in cases of criminal abortion, although such crime is not felonious homicide. C. v. Keene, 7 Pa. Super. 293; C. v. Winkelman, 12 Pa. Super. 497.

943-59 **Abortion cases.** — S. v. Fleetwood (Del.), 65 A. 772; P. v. Buettner, 233 Ill. 272, 84 N. E. 218; Seifert v. S., 160 Ind. 464, 67 N. E. 100; Hawkins v. S., 98 Md. 355, 57 A. 27; S. v. Barnes (N. J.), 68 A. 145.

945-62 Taylor v. S., 120 Ga. 857, 48 S. E. 361.

945-63 Moody v. S., 1 Ga. App. 772, 58 S. E. 262; S. v. Horn, 204 Mo. 528, 103 S. W. 69; Rice v. S. (Tex. Cr.), 103 S. W. 1156.

In Georgia, the rule of caution is said to apply to the jury more particularly than to the court. Carter v. S., 2 Ga. App. 254, 58 S. E. 532.

946-64 Gardner v. S. (Fla.), 45 S. 1028.

947-65 Fogg v. S., 99 Ark. 417, 99 S. W. 537; P. v. Thomson, 145 Cal. 717, 79 P. 435; Brennan v. P., 37 Colo. 256, 86 P. 79; Gipe v. S., 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419; Williams v. S., 168 Ind. 87, 79 N. E. 1079; Coyle v. C., 29 Ky. L. R. 340, 93 S. W. 584; S. v. Zorn, 202 Mo. 12, 100 S. W. 591; S. v. Crone, 209 Mo. 316, 108 S. W. 555; P. v. Stacy, 119 App. Div. 743, 104 N. Y. S. 615; P. v. Brecht, 120 App. Div. 769, 105 N. Y. S. 436; Willoughby v. Ter., 16 Okla. 577, 86 P. 56; S. v. Doris (Or.), 94 P. 44 (*cit.* 4 Ency. of Ev. p. 947); C. v. Winkelman, 12 Pa. Super. 497; S. v. McCoomer (S. C.), 60 S. E. 237; S. v. Franklin (S. C.), 60 S. E. 953; Bateson v. S., 46 Tex. Cr. 34, 80 S. W. 88.

Whether deceased actually made alleged declaration is a question for jury. C. v. Lawson, 25 Ky. L. R. 2187, 80 S. W. 206.

949-66 S. v. Monich (N. J.), 64 A. 1016.

949-67 Anderson v. S., 122 Ga. 161, 50 S. E. 46; Findley v. S., 125 Ga. 579, 54 S. E. 106; Bird v. S., 128 Ga. 253, 57 S. E. 320; McMillan v. S., 128 Ga. 25, 57 S. E. 309; Moody v. S., 1 Ga. App. 772, 58 S. E. 262; Carter v. S., 2 Ga. App. 254, 58 S. E. 532; Jones v. S. (Ga.), 60 S. E. 840; Robinson v. S. (Ga.), 60 S. E. 1005. See Willoughby v. Ter., 16 Okla. 577, 86 P. 56.

950-68 P. v. Thomson, 145 Cal. 717, 79 P. 435; S. v. Howells (Ia.), 109 N. W. 1016; Coyle v. C., 29 Ky. L. R. 340, 93 S. W. 584; S. v. Doris (Or.), 94 P. 44; C. v. Sullivan, 13 Phila. (Pa.) 410.

951-69 Willoughby v. Ter., 16 Okla. 577, 86 P. 56; Hinton v. S. (Tex. Cr.), 100 S. W. 772. *Contra,* S. v. Zorn, 202 Mo. 12, 100 S. W. 591.

951-70 Coyle v. C., 29 Ky. L. R. 340, 93 S. W. 584.

951-71 S. v. Zorn, 202 Mo. 12, 100 S. W. 591.

952-72 S. v. Minor, 193 Mo. 597, 92 S. W. 466.

953-75 Evidence in chief. — A dying declaration is evidence in chief. Wagner v. C., 32 Ky. L. R. 1185, 108 S. W. 318.

954-77 S. v. Gallman (S. C.), 60 S. E. 682. See S. v. Zorn, 202 Mo. 12, 100 S. W. 591.

954-78 S. v. Daniels, 115 La. 59, 38 S. 894; C. v. Winkelman, 12 Pa. Super. 497.

955-80 Heningburg v. S. (Ala.), 45 S. 246.

955-81 Delaney v. S., 148 Ala. 586, 42 S. 815. *Compare* Davis v. S., 120 Ga. 843, 48 S. E. 305; S. v. Franklin (S. C.), 60 S. E. 953.

956-83 Ward v. S. (Ark.), 107 S. W. 677; Jones v. S. (Ga.), 60 S. E. 840; Prov. Gov't. v. Hering, 9 Haw. 181; Brom v. P., 216 Ill. 148, 74 N. E. 790; Arnett v. C., 114 Ky. 593, 71 S. W. 635; C. v. Hargis, 30 Ky. L. R. 510, 99 S. W. 348; Kennedy v. C., 30 Ky. L R. 1063, 100 S. W. 242; Pennington v. C., 24 Ky. L. R. 321, 68 S. W. 451; Burton v. C., 24 Ky. L. R. 1162, 70 S. W. 831; S. v. Roberts, 28 Nev. 350, 82 P. 100; S. v. Hennessy (Nev.), 90 P. 221; S. v. Gray, 43 Or. 446, 74 P. 927; C. v. Winkelman, 12 Pa. Super. 497; Connell v. S., 46 Tex. Cr. 259, 81 S. W. 746.

959-88 S. v. Daniels, 115 La. 59, 38 S. 894.

960-90 Gregory v. S., 140 Ala. 16, 37 S. 259; Starks v. S., 137 Ala. 9, 34 S. 687; Smith v. S., 145 Ala. 17, 40 S. 957; Walker v. S., 146 Ala. 45, 41 S. 878; Gregory v. S., 148 Ala. 566, 42 S. 829; Logan v. S. (Ala.), 43 S. 10; Brown v. S. (Ala.), 43 S. 194; Pate v. S. (Ala.), 43 S. 343; Zipperian v. P., 33 Colo. 134, 79 P. 1018; McMillan v. S., 128 Ga. 25, 57 S. E. 309; Harper v. S., 129 Ga. 770, 59 S. E. 792; Grant v. S., 118 Ga. 804, 45 S. E. 603; Williams v. S., 168 Ind. 87, 79 N. E. 1079; S. v. Bonar, 71 Kan. 800, 81 P. 484; Asher v. C. 28 Ky. L. R. 1342, 91 S. W. 662; S. v. Gianfala, 113 La. 463, 37 S. 30; Hawkins v. S., 98 Md. 355, 57 A. 27; Pryor v. S. (Miss.), 39 S. 1012; S. v. Brown, 188 Mo. 451, 87 S. W. 519; S. v. Kelleher, 201 Mo. 614, 100 S. W. 470; S. v. Hennessy

(Nev.), 90 P. 221; S. v. Monich (N. J.), 64 A. 1016; S. v. Biango (N. J.), 68 A. 125; S. v. Barnes (N. J.), 68 A. 145; S. v. Teachey, 138 N. C. 587, 50 S. E. 232; S. v. Boggan, 133 N. C. 761, 46 S. E. 111; C. v. Rhoads, 23 Pa. Super. 512; S. v. McCoomer (S. C.), 60 S. E. 237; Lewis v. S., 48 Tex. Cr. 614, 89 S. W. 1073; Rice v. S., 49 Tex. Cr. 569, 94 S. W. 1024; Patterson v. S., 49 Tex. Cr. 613, 95 S. W. 129.

961-91 Rex v. Abbott, 67 J. P. (Eng.) 151 [see digest of this case in Am. Digest 1904 B., Col. 2203]; S. v. Knoll, 69 Kan. 767, 77 P. 580; Coyle v. C., 29 Ky. L. R. 340, 93 S. W. 584; S. v. Gianfala, 113 La. 463, 37 S. 30.

Lapse of considerable time after an expression of expectation of death and the making of the declaration, weakens the weight to be given to such expression. Craven v. S., 49 Tex. Cr. 78, 90 S. W. 311.

963-93 C. v. Hargis, 30 Ky. L. R. 510, 99 S. W. 348; S. v. Bordelon, 113 La. 690, 37 S. 603.

963-94 Heninburg v. S. (Ala.), 43 S. 959; McEwen v. S. (Ala.), 44 S. 619.

964-95 Rowsey v. C., 25 Ky. L. R. 841, 76 S. W. 409.

964-96 S. v. Bohanon, 142 N. C. 695, 55 S. E. 797 ("I don't know what my wife and children will do!"); Long v. S., 48 Tex. Cr. 175, 88 S. W. 203 (this is mighty bad).

965-97 See Kennedy v. C., 30 Ky. L. R. 1063, 100 S. W. 242.

967-3 P. v. Brecht, 120 App. Div. 769, 105 N. Y. S. 436.

968-4 Jarvis v. S., 138 Ala. 17, 34 S. 1025; Stevens v. S., 138 Ala. 71, 35 S. 122; P. v. Buettner, 233 Ill. 272, 84 N. E. 218; S. v. Craig, 190 Mo. 332, 88 S. W. 641; S. v. Barnes (N. J.), 68 A. 145; S. v. Gray, 43 Or. 446, 74 P. 927; S. v. Thompson (Or.), 88 P. 583; C. v. Rhoads, 23 Pa. Super. 512; S. v. Mayo, 42 Wash. 540, 85 P. 251.

969-5 Pitts v. S., 140 Ala. 70, 37 S. 101; S. v. Monich (N. J.), 64 A. 1016; P. v. Stacy, 119 App. Div. 743, 104 N. Y. S. 615.

970-6 Newton v. S., 51 Fla. 82, 41 S. 19.

971-8 McEwen v. S. (Ala.), 44 S. 619; Brennan v. P., 37 Colo. 256, 86 P. 79; Anderson v. S., 122 Ga. 161, 50 S. E. 46; Oliver v. S., 129 Ga. 777, 59 S. E. 900; Harper v. S., 129 Ga. 770, 59 S. E. 792; Jones v. S. (Ga.), 60 S. E. 840; Robinson v. S. (Ga.), 60 S. E. 1005; Gipe v. S., 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419; Williams v. S., 168 Ind. 87, 79 N. E. 1079; Rowsey v. C., 25 Ky. L. R. 841, 76 S. W. 409; Fuqua v. C., 118 Ky. 578, 81 S. W. 923; Arnett v. C., 114 Ky. 593, 71 S. W. 635; S. v. Brown, 188 Mo. 451, 87 S. W. 519; S. v. Kelleher, 201 Mo. 614, 100 S. W. 470; S. v. Roberts, 28 Nev. 350, 82 P. 100; S. v. Barnes (N. J.), 68 A. 145; S. v. Gray, 43 Or. 446, 74 P. 927.

972-9 Asher v. C., 28 Ky. L. R. 1342, 91 S. W. 662.

973-11 **Sending for doctor** to relieve pain does not affect the admissibility of the declaration where it appears that declarant had given up hope of recovery. Pitts v. S., 140 Ala. 70, 37 S. 101. See S. v. Gianfala, 113 La. 463, 37 S. 30; S. v. Bordelon, 113 La. 690, 37 S. 603; S. v. Howard, 120 La. 311, 45 S. 260; Mathedy v. C., 14 Ky. L. R. 182, 19 S. W. 977.

Expression of relief from pain does not imply that he expected to recover. S. v. Roberts, 28 Nev. 350, 82 P. 100.

Submitting to operation, as a last chance for recovery, does not prevent the use of declarations. S. v. Thompson (Or.), 88 P. 583.

974-14 *Compare* S. v. Daniels, 115 La. 59, 38 S. 894.

974-15 P. v. Stacy, 119 App. Div. 743, 104 N. Y. S. 615.

975-19 See S. v. Daniels, supra; Ward v. S. (Ark.), 107 S. W. 677.

976-21 S. v. Kelleher, 201 Mo. 614, 100 S. W. 470. See S. v. Zorn, 202 Mo. 12, 100 S. W. 591.

976-22 P. v. Buettner, 233 Ill. 272, 84 N. E. 218, *cit.* Hammil v. S., 90 Ala. 577, 8 S. 380; P. v. Lee, 17 Cal. 76; S. v. O'Brien, 81 Ia. 88, 46 N. W. 752; S. v. Wilson, 24 Kan. 189, 36 Am. Rep. 257; S. v. Trivas, 32 La. Ann. 1086, 36 Am. Rep. 393; S. v. Cantieny, 34 Minn. 1, 24 N. W. 458; P. v. Stacy, 119 App. Div. 743, 104 N. Y. S. 615; Cook v. S., 22 Tex. App. 511, 3 S. W. 749.

976-23 S. v. Howells (Ia.), 109 N. W. 1016; S. v. Brown, 188 Mo.

451, 87 S. W. 519; S. v. Craig, 190 Mo. 332, 88 S. W. 641; S. v. Monich (N. J.), 64 A. 1016; P. v. Stacy, 119 App. Div. 743, 104 N. Y. S. 615.

976-24 Cleveland v. C., 31 Ky. L. R. 115, 101 S. W. 931.

976-25 P. v. Buettner, 233 Ill. 272, 84 N. E. 218; S. v. Craig, 190 Mo. 332, 88 S. W. 641.

977-26 S. v. Biango (N. J.), 68 A. 125.

978-28 S. v. Howells (Ia.), 109 N. W. 1016; P. v. Brecht, 120 App. Div. 769, 105 N. Y. S. 436.

978-29 Oliver v. S., 129 Ga. 777, 59 S. E. 900.

978-30 Moore v. S., 146 Ala. 687, 40 S. 345 (testimony of two witnesses sufficient).

979-32 Gardner v. S. (Fla.), 45 S. 1028.

980-33 McEwen v. S. (Ala.), 44 S. 619; Gardner v. S. (Fla.), 45 S. 1028; Gipe v. S., 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419; Williams v. S., 168 Ind. 87, 79 N. E. 1079; Martin v. C., 25 Ky. L. R. 1928, 78 S. W. 1104; S. v. Monich (N. J.), 64 A. 1016; S. v. McCoomer (S. C.), 60 S. E. 237.

981-34 S. v. Brown, 188 Mo. 451, 87 S. W. 519.

981-35 S. v. Harris, 112 La. 937, 36 S. 810 ("that's all right; Bill Harris is my friend, and I don't want nothing done to him," inadmissible since it is not a narrative statement).

982-36 See Williams v. S., 168 Ind. 87, 79 N. E. 1079.

982-41 Zipperian v. P., 33 Colo. 134, 79 P. 1018.

982-42 Gipe v. P., 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419. See S. v. Roberts, 28 Nev. 350, 82 P. 100.

983-44 Park v. S., 126 Ga. 575, 55 S. E. 489. See S. v. Fleetwood (Del.), 65 A. 772; S. v. Uzzo (Del.), 65 A. 775; Hawkins v. S., 98 Md. 355, 57 A. 27.

983-45 Gipe v. S., 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419; Phillips v. S. (Tex. Cr.), 98 S. W. 868; Rice v. S. (Tex. Cr.), 103 S. W. 1156. *Compare* Craven v. S., 49 Tex. Cr. 78, 90 S. W. 311.

984-47 See S. v. Williams, 28 Nev. 395, 82 P. 353.

984-48 Pate v. S. (Ala.), 43 S. 343; Harper v. S., 129 Ga. 770, 59 S. E. 792; S. v. Gianfala, 113 La. 463, 37 S. 30.

985-51 **Interruption** is unimportant where the declaration was subsequently finished. Park v. S., 126 Ga. 575, 55 S. E. 489.

987-54 Kirby v. S. (Ala.), 44 S. 38; Cleveland v. C., 31 Ky. L. R. 115, 101 S. W. 931; Hendrickson v. C., 24 Ky. L. R. 2173, 73 S. W. 764.

987-55 Heningburg v. S. (Ala.), 45 S. 246; S. v. Biango (N. J.), 68 A. 125; Bennett v. S., 47 Tex. Cr. 52, 81 S. W. 30.

987-57 Kirby v. S. (Ala.), 44 S. 38.

988-58 **Dying declaration** may be in the form of an affidavit. S. v. Bonar, 71 Kan. 800, 81 P. 484.

That a statement by deceased taken down by a justice was used by him as a criminal complaint does not prevent its use as a dying declaration also. Zipperian v. P., 33 Colo. 134, 79 P. 1018.

988-59 Fuqua v. C., 118 Ky. 578, 81 S. W. 923; Sailsberry v. C., 32 Ky. L. R. 1085, 107 S. W. 774; Cooper v. S., 89 Miss. 351, 42 S. 666.

990-63 Sailsberry v. C., supra. See Heningburg v. S. (Ala.), 45 S. 246; Gardner v. S. (Fla.), 45 S. 1028; Fuqua v. C., 118 Ky. 578, 81 S. W. 923.

990-64 See Kirby v. S. (Ala.), 44 S. 38; S. v. Doris (Or.), 94 P. 44 (*cit.* 4 Encyc. of Ev. 1005).

Signing unnecessary where the declarations were read over and approved by declarant. Zipperian v. P., 33 Colo. 134, 79 P. 1018.

991-65 See Sailsberry v. C., 32 Ky. L. R. 1085, 107 S. W. 774; C. v. Rhoads, 23 Pa. Super. 512.

991-67 Gardner v. S. (Fla.), 45 S. 1028; Cleveland v. C., 31 Ky. L. R. 115, 101 S. W. 931; Bateson v. S., 46 Tex. Cr. 34, 80 S. W. 88; Connell v. S., 46 Tex. Cr. 259, 81 S. W. 746; S. v. Hood (W. Va.), 59 S. E. 971.

991-68 Boyd v. S., 84 Miss. 414, 36 S. 525; C. v. Spahr, 211 Pa. 542, 60 A. 1084; Hinton v. S. (Tex. Cr.), 100 S. W. 772.

992-70 Pitts v. S., 140 Ala. 70, 37 S. 101; Walker v. S., 147 Ala. 699, 41 S. 878.

992-72 S. v. Horn, 204 Mo. 528,

103 S. W. 69; S. v. Hood (W. Va.), 59 S. E. 971.

993-73 See Baker v. S. (Ark.), 107 S. W. 983 (remark "I would not have done my fellow-man that way," inadmissible); Johnson v. C., 32 Ky. L. R. 1117, 107 S. W. 768; Walton v. S., 87 Miss. 296, 39 S. 689 (opinion of declarant as to why defendant shot her); S. v. Minor, 193 Mo. 597, 92 S. W. 466 (intent of defendant to rob deceased).

994-75 S. v. Uzzo (Del.), 65 A. 775.

995-81 **Identification** of several persons as those connected with the shooting by the declarant pointing them out and saying "You shot me," is admissible as a dying declaration. S. v. Roberts, 28 Nev. 350, 82 P. 100.

996-82 See P. v. Moran, 144 Cal. 48, 77 P. 777.

998-85 Rice v. S., 49 Tex. Cr. 569, 94 S. W. 1024.

998-86 *Compare* Gardner v. S. (Fla.), 45 S. 1028.

999-87 See Rose v. S., 144 Ala. 114, 42 S. 21; Pennington v. C., 24 Ky. L. R. 321, 68 S. W. 451.

999-88 Jones v. S. (Ga.), 60 S. E. 840.

1000-89 McMillan v. S., 128 Ga. 25, 57 S. E. 309; Johnson v. C., 32 Ky. L. R. 1117, 107 S. W. 768; S. v. Gianfala, 113 La. 463, 37 S. 30; Wilson v. S., 49 Tex. Cr. 50, 90 S. W. 312. *Compare* Wagner v. C., 32 Ky. L. R. 1185, 108 S. W. 318.

1000-90 Burroughs v. U. S., 6 Ind. Ter. 164, 90 S. W. 8; S. v. Kelleher, 201 Mo. 614, 100 S. W. 470; C. v. Spahr, 211 Pa. 542, 60 A. 1084; Craven v. S., 49 Tex. Cr. 78, 90 S. W. 311; Wakefield v. S. (Tex. Cr.), 94 S. W. 1046; Richards v. C., 107 Va. 881, 59 S. E. 1104. *Compare* Bateson v. S., 46 Tex. Cr. 34, 80 S. W. 88; Connell v. S., 46 Tex. Cr. 259, 81 S. W. 746.

1002-96 Richards v. C., 107 Va. 881, 59 S. E. 1104. *Compare* Edwards v. S. (Neb.), 112 N. W. 611; Boyd v. S., 84 Miss. 414, 36 S. 525 (declaration impliedly contradicting the theory of suicide); S. v. Mayo, 42 Wash. 540, 85 P. 251 (need not identify the assailant; it is sufficient if it adds a link in the chain of evidence). And see Walker v. S., 139 Ala. 56, 35 S. 1011.

1004-2 S. v. Horn, 204 Mo. 528, 103 S. W. 69 (statement that declarant fired in self-defense inadmissible).

1005-4 S. v. Spivey, 191 Mo. 87, 90 S. W. 81.

1005-6 S. v. Doris (Or.), 94 P. 44 (*cit.* 4 Encyc. of Ev. 1005). See S. v. Mills, 79 S. C. 187, 60 S. E. 664; Rice v. S. (Tex. Cr.), 103 S. W. 1156.

1005-7 Nordgren v. P., 211 Ill. 425, 71 N. E. 1042; S. v. Doris (Or.), 94 P. 44 (*cit.* 4 Encyc. of Ev. 1005).

1006-9 Smith v. S., 145 Ala. 47, 40 S. 957; Walker v. S., 146 Ala. 45, 41 S. 878; Starks v. S., 137 Ala. 9, 34 S. 687; P. v. Glover, 141 Cal. 233, 74 P. 745; Seifert v. S., 160 Ind. 464, 67 N. E. 100; Burroughs v. U. S., 6 Ind. Ter. 164, 90 S. W. 8; Rowsey v. C., 25 Ky. L. R. 841, 76 S. W. 409; S. v. Brown, 188 Mo. 451, 87 S. W. 519; S. v. Bohanon, 142 N. C. 695, 55 S. E. 797.

1010-16 **Discrepancy** in testimony of witness between his statement upon the preliminary investigation and when he is testifying before the jury, affects his credibility but not the admissibility of his testimony. Carter v. S., 2 Ga. App. 254, 58 S. E. 532.

1010-19 Gardner v. S. (Fla.), 45 S. 1028; Cleveland v. C., 31 Ky. L. R. 115, 101 S. W. 931; Long v. S., 48 Tex. Cr. 175, 88 S. W. 203.

Typewritten declaration signed by declarant is primary evidence as compared with the notes taken by the one preparing the declaration. Hendrickson v. C., 24 Ky. L. R 2173, 73 S. W. 764.

1011-20 Sims v. S., 139 Ala. 74, 36 S. 138; Jarvis v. S., 138 Ala. 17, 34 S. 1025; Mitchell v. S., 82 Ark. 324, 101 S. W. 763; Sailsberry v. C., 23 Ky. L. R. 1085, 107 S. W. 774; Fuqua v. C., 118 Ky. 578, 81 S. W. 923.

1011-21 S. v. Barnes (N. J.), 68 A. 145.

1012-24 Park v. S., 126 Ga. 575, 55 S. E. 489.

1012-25 Kirby v. S. (Ala.), 44 S. 38; Jarvis v. S., 138 Ala. 17, 34 S. 1025.

1012-26 Pate v. S. (Ala.), 43 S. 343; Zipperian v. P., 33 Colo. 134, 79 P. 1018; S. v. Gianfala, 113 La. 463, 37 S. 30; S. v. Doris (Or.), 94

P. 44 (*cit.* 4 Encyc. of Ev. 1005); Long v. S., 48 Tex. Cr. 175, 88 S. W. 203.

Written declaration should not be taken to the jury box, where an oral declaration is also introduced, since the jury might then attach undue weight to the former. S. v. Doris, supra.

1013-27 Gardner v. S. (Fla.), 45 S. 1028; Cleveland v. C., 31 Ky. L. R. 115, 101 S. W. 931; S. v. Doris, supra. *Compare* C. v. Spahr, 211 Pa. 542, 60 A. 1084; Arnwine v. S. (Tex. Cr.), 96 S. W. 4.

Compulsory production at preliminary hearing. — An accused person cannot, by mandamus, compel a committing magistrate to order the production of a written dying declaration, in the hands of the prosecuting attorney, by subpoena duces tecum. The right of the accused to meet the witnesses face to face, to have compulsory process to obtain witnesses in his behalf, and to produce his witnesses after the examination of the state's witnesses is closed, is not thereby impaired. Farnham v. Colman, 19 S. D. 342, 103 N. W. 161.

1013-28 Nordgren v. P., 211 Ill. 425, 71 N. E. 1042; C. v. Lawson, 25 Ky. L. R. 2187, 80 S. W. 206.

1014-31 Nordgren v. P., supra.

1015-34 See Hall v. S., 124 Ga. 649, 52 S. E. 891; Nordgren v. P., supra. *Contra*, S. v. Tomasi (N. J.), 69 A. 214 (bad character for truth and veracity admissible, but not general bad character).

Declaration may be impeached by showing a conviction of declarant for felony — but not for a misdemeanor — and a pardon from such conviction cannot be shown. Martin v. C., 25 Ky. L. R. 1928, 78 S. W. 1104.

1015-35 Gregory v. S., 140 Ala. 16, 37 S. 259; McCorquodale v. S. (Tex. Cr.), 98 S. W. 879. See S. v. Fleetwood (Del.), 65 A. 772; Coyle v. C., 29 Ky. L. R. 340, 93 S. W. 584.

Contradictory statements need not be introduced after the manner of impeaching evidence, but the witness may be asked to state directly what statements the declarant made. S. v. Mayo, 42 Wash. 540, 85 P. 251.

1015-36 S. v. Charles, 111 La. 933, 36 S. 29.

Contradictory statements made by the decedent at about the same time are admissible. S. v. Uzzo (Del.), 65 A. 775.

1015-37 Nordgren v. P., 211 Ill. 425, 71 N. E. 1042; S. v. Charles, 111 La. 933, 36 S. 29. *Contra*, S. v. Mills, 79 S. C. 187, 60 S. E. 664.

1017-42 Weight as evidence. The same weight is to be given a dying declaration, admitted in evidence, as the jury would give to declarant's testimony rendered in court and under oath. S. v. Fleetwood (Del.), 65 A. 772; S. v. Adams (Del.), 65 A. 510. See Solomon v. S., 2 Ga. App. 92, 58 S. E. 381. *Contra*, Nordgren v. P., 211 Ill. 425, 71 N. E. 1042 (dying declarations are in their nature secondary evidence, and it is reversible error to instruct that they are to be given the same weight as if the declarant had been a witness in court); S. v. Doris (Or.), 94 P. 44 (*cit.* 4 Encyc. of Ev. 947).

Same weight should be given dying declarations whether they favor the state or the defendant. S. v. Uzzo (Del.), 65 A. 775.

Instruction that dying declaration should be carefully weighed because there was no cross-examination, held proper. S. v. Davis, 134 N. C. 633, 46 S. E. 722. See Zipperian v. P., 33 Colo. 134, 79 P. 1018; S. v. Crone, 209 Mo. 316, 108 S. W. 555, S. v. Hendricks, 172 Mo. 654, 73 S. W. 194; C. v. Keene, 7 Pa. Super. 293; S. v. Mayo, 42 Wash. 540, 85 P. 251.

Weight as evidence is solely a question for the jury. Fogg v. S., 81 Ark. 417, 99 S. W. 537; C. v. Lawson, 25 Ky. L. R. 2187, 80 S. W. 206; Coyle v. C., 29 Ky. L. R. 340, 93 S. W. 584; S. v. Davis, 134 N. C. 633, 46 S. E. 722; C. v. Winkelman, 12 Pa. Super. 497.

Dying declarations have been held to be "testimony and to be considered with all the other testimony in the case." Findley v. S., 125 Ga. 579, 54 S. E. 106.

Instruction that a dying declaration had the "sanctity of truth," reversible error. Robinson v. S. (Ga.), 60 S. E. 1005.

Jury may rely upon part of a dying

declaration, and disregard the rest. Rose v. S.. 144 Ala. 114, 42 S. 21.

Where part of a dying declaration is proved to be false, the jury should distrust the rest of it. P. v. Thomson, 145 Cal. 717, 79 P. 435.

Corroboration is necessary to warrant a conviction where a dying declaration is given in evidence on a prosecution for criminal abortion, under the Pennsylvania statute. C. v. Keene, 7 Pa. Super. 293.

EJECTMENT [Vol. 5.]

Admissibility of evidence showing location, 29-86.

4-1 Hudson v. Vaughn, 147 Ala. 690, 40 S. 757; Collier v. Alexander, 142 Ala. 422, 38 S. 244; Carpenter v. Jones, 76 Ark. 163, 88 S. W. 871; Dowdle v. Wheeler, 76 Ark. 529, 89 S. W. 1002; Mallory v. Brademyer, 76 Ark. 538, 89 S. W. 551; Thomas v. Young, 79 Conn. 493, 65 A. 955; Nevin v. Disharoon (Del.), 66 A. 362; Ropes v. Minshew, 51 Fla. 299, 41 S. 538; Hamilton v. Rogers, 126 Ga. 27, 54 S. E. 926; Krause v. Nolte, 217 Ill. 298, 75 N. E. 362; Phelps v. Nazworthy, 226 Ill. 254, 80 N. E. 756; Young v. Duggin, 30 Ky. L. R. 634, 99 S. W. 655; Mullins v. Southwood, 32 Ky. L. R. 1246, 108 S. W. 324; Hough v. Fuel Co., 127 Mo. App. 570, 106 S. W. 547; Link v. Campbell, 72 Neb. 307, 100 N. W. 409, 104 N. W. 939; Harrison v. Gallegos (N. M.), 79 P. 300; Finch v. Finch, 131 N. C. 271, 42 S. E. 615; Harper v. Anderson, 132 N. C. 89, 43 N. E. 588; Bivings v. Gosnell, 133 N. C. 574, 45 S. E. 942; Mitchell v. Garrett, 140 N. C. 397, 53 S. E. 226; McCollum v. Chisholm, 146 N. C. 18, 59 S. E. 160; McCaskill v. Walker (N. C.), 61 S. E. 46; Perkiomen R. Co. v. Kremer (Pa.), 67 A. 913; Crist v. Boust, 26 Pa. Super. 543; Baxter v. Brown, 26 R. I. 381, 59 A. 73; Love v. Turner, 71 S. C. 322, 51 S. E. 101; Sutton v. Whetstone (S. D.), 112 N. W. 850; McMurray v. Dixon, 105 Va. 605, 54 S. E. 481; Carter v. Wood, 103 Va. 68, 48 S. E. 553; Bugg v. Seay, 107 Va. 648, 60 S. E. 89; Helm v. Johnson, 40 Wash. 420, 82 P. 402; Bryant Lumb. Co. v. Steel Wks. (Wash.), 94 P. 110; Meyers v. R. Co. (Wis.), 112 N. W. 673. See also Sinclair v. Huntley, 131 N. C. 243, 42 S. E. 605.

Even against a trespasser, plaintiff to recover must prove a prima facie title. De Land v. Dixon Co., 225 Ill. 212, 80 N. E. 125.

Burden not affected by defendant's pleadings. See Adams v. Child, 28 Nev. 169, 88 P. 1087.

5-3 Mobile D. Co. v. Mobile, 146 Ala. 198, 40 S. 205.

Degree of proof. — Plaintiff's case must be established by a preponderance of the evidence. Rittmaster v. Brisbane, 19 Colo. 371, 35 P. 736; Nevin v Disharoon (Del.), 66 A. 362; Robinson v. Nail, 2 Ind. Ter. 509, 52 S. W. 49; Thorn v. Lister, 129 Ia. 223, 105 N. W. 434; Patterson v. Hansel, 4 Bush (Ky.) 654; Page v. Simpson, 188 Pa. 393, 41 A. 638. And it has been held that he must prove it beyond a reasonable doubt. Doe v. Jones, 7 U. C. Q. B. 385; Goodin v. Goodin, 172 Mo. 40, 72 S. W. 502; Jackson v. Etz, 5 Cow. (N. Y.) 314.

The burden is not shifted by showing a prima facie title, but this merely imposes upon defendant the duty of "going forward" with the evidence. Moore v. McClain, 141 N. C. 473, 54 S. E. 382, *cit.* Meredith v. R. Co., 137 N. C. 478, 50 S. E. 1; Board v. Makely, 139 N. C. 31, 51 S. E. 784. *Compare* Warrior R. Co. v. Land Co. (Ala.), 45 S. 53, holding that where plaintiff shows a prima facie right to recover defendant must prove a better title to defeat it.

7-7 Hudson v. Vaughn, 147 Ala. 690, 40 S. 757.

8-11 Unnecessary to show connection when plaintiff's evidence shows that either he or a prior grantor was once in possession. Krause v. Notle, 217 Ill. 298, 75 N. E. 326.

9-15 Krause v. Notle, supra.

9-16 Coppock v. Austin, 34 Ind. App. 319, 72 N. E. 657, *cit.* Rowe v. Beckett, 30 Ind. 154, 95 Am. Dec. 676; Groves v. Marks, 32 Ind. 319; Hunt v. Campbell, 83 Ind. 48; Hersey v. Lambert, 50 Minn. 373, 52 N. W. 963.

10-18 Common grantor in general. Brinkley v. Bell, 126 Ga. 480, 55 S. E. 187; Gaulbaugh v. Rouse, 31

Ky. L. R. 1195, 104 S. W. 959; Carter v Wood, 103 Va. 68, 48 S. E. 553; Marbach v. Holmes, 105 Va. 178, 52 S. E. 828.

A prima facie case is made by introducing a deed describing the land and a plat thereof, by identifying the property and proving possession generally in himself under the deed. Cottrell v. Pickering, 32 Utah 62, 88 P. 696.

Presumption that a deed produced on notice from the custody of one of the grantees of a common grantor is the one under which such grantee claims title. Brinkley v. Bell, 126 Ga. 480, 55 S. E. 187.

11-22 Gaulbaugh v. Rouse, 31 Ky. L. R. 1195, 104 S. W. 959; Steadman v. Steadman, 143 N. C. 345, 55 S. E. 784.

12-24 Carter v. Smith, 142 Ala. 414, 38 S. 184.

14-34 Koons v. Hartman, 7 Watts (Pa.) 20.

A judgment must have been rendered in such suit either on a verdict or non-suit to make the record admissible. Umlauff v. Bowers, 20 Pa. C. C. 430; Velott v. Lewis, 102 Pa. 326. A record of a prior ejectment in which there was a verdict but no judgment entered is inadmissible. Velott v. Lewis, supra. A record of a pending ejectment which had proceeded no further than a plea filed is a fortiori inadmissible. Umlauff v. Bowers, 20 Pa. C. C. 430; Houseman v. Nav. Co., 214 Pa. 552, 64 A. 379.

16-42 Patent admissible (Stoner v. Royar, 200 Mo. 444, 98 S. W. 601), even though defective in description, if it contains enough to identify the land in controversy (Fenwick v. Gill, 38 Mo. 510), or dated after demise laid. McCraven v. Doe, 23 Miss. 100.

Certified copy of a patent held admissible though an entry in the margin of the record shows that the original patent had been vacated. Maxwell v. Lloyd, 1 Har. & M. (Md.) 212. But a patent and patent certificate issued after the commencement of the action are inadmissible. Laurissini v. Doe, 25 Miss. 177, 57 Am. Dec. 200. In an action by A against B, a patent certificate to A's legal representatives without other evidence cannot be received and such certificate is no evidence of title in A. Mattingly v. Hayden, 1 Mo. 439.

16-45 Demars v. Hickey, 13 Wyo. 371, 80 P. 521.

17-47 But the usual duplicate receipt of a receiver of the United States Land Office, in full force and unimpeached, is sufficient evidence of title except as against one having a patent to the same land or some person or persons claiming under him. Oldfather v. Ericsson (Neb.), 112 N. W. 356.

18-50 Cottrell v. Pickering, 32 Utah 62, 88 P. 696; Wood v. Earls, 39 Wash. 21, 80 P. 837. See also Swainson v. Scott, 111 Tenn. 140, 76 S. W. 909.

18-51 Runkle v. Welty (Neb.), 113 N. W. 160, *aff.* 111 N. W. 463; Baxter v. Brown, 26 R. I. 381, 59 A. 73. See also Swainson v. Scott, 111 Tenn. 140, 76 S. W. 909.

A claim of title by adverse possession must be supported by proof of every element necessary to constitute a title under the statute of limitations. Crist v. Boust, 26 Pa. Super. 543.

Even when title is derived from common source plaintiff must show a better one than that of defendant, or an actual prior possession. Harrison v. Gallegos (N. M.), 79 P. 300, *cit.* Railway Co. v. Loring, 51 Fed. 932, 2 C. C. A. 546; Bldg. Assn. v. Schall, 107 Ala. 531, 18 S. 108; L'Engle v. Reed, 27 Fla. 345, 9 S. 213; Simmons v. Spratt, 20 Fla. 495; Smith v. Bryan, 74 Ind. 515; Peck v. R. Co., 101 Ind. 366; Hall v. Gittings, 2 Har. & J. (Md.) 112; Miller v. R. Co., 71 N. Y. 380.

18-53 Moss v. Chappell, 126 Ga. 196, 54 S. E. 968; Jackson v. Strickland, 127 Ga. 106, 56 S. E. 107; Glanz v. Ziabek, 233 Ill. 22, 84 N. E. 36; Terhune v. Porter, 212 Ill. 595, 72 N. E. 820; Chicago T. R. Co. v. Winslow, 216 Ill. 166, 74 N. E. 815.

19-54 Whitehead v. Pitts, 127 Ga. 774, 56 S. E. 1004; Closuit v. Lumb. Co., 130 Wis. 258, 110 N. W. 222.

19-55 But where title is proved, possession need not be shown in the absence of a showing of adverse possession. Keamalu v. Luhan, 7 Haw. 324; Rose v. Smith, 5 Haw. 377.

19-56 Dondero v. O'Hara, 3 Cal. App. 633, 86 P. 985; Moss v. Chappell, 126 Ga. 196, 54 S. E. 968 (*cit.* Watkins v. Nugen, 118 Ga. 375, 45 S. E. 260); Caffrey v. McFarland, 1 Phila. (Pa.) 555; Dieze v. Tackler, 7 Phila. (Pa.) 220; Cottrell v. Pickering, 32 Utah 62, 88 P. 696; McMurray v. Dixon, 105 Va. 605, 54 S. E. 481. **And in such cases** plaintiff's right to recovery can only be resisted by a showing that defendant had title in himself or authority to enter under plaintiff's title. McMurray v. Dixon, 105 Va. 605, 54 S. E. 481, *cit.* Tapscott v. Cobbs, 11 Gratt. (Va.) 172, 178.

Possession of ancestor sufficient where such possession was continued by a tenant of the heirs until title by adverse possession was perfected. Beam v. Gardner, 18 Pa. Super. 245.

21-59 Walling v. Eggers, 25 Ky. L. R. 1563, 78 S. W. 428; Crain v. Peterman, 200 Mo. 295, 98 S. W. 600; Cottrell v. Pickering, 32 Utah 62, 88 P. 696; Angell v. Fletcher, 76 Vt. 359, 57 A. 964.

21-60 Ely v. Pace, 139 Ala. 293, 35 S. 877.

Possession not put in issue by plea of not guilty and so plaintiff need not show possession. Glos v. Spitzer, 226 Ill. 82, 80 N. E. 743.

No presumption as to defendant's possession merely from fact that he appeared at the trial. Kreamer v. Voneida, 213 Pa. 74, 62 A. 518.

23-63 Zerres v. Vanina, 134 Fed. 610; Bridenbaugh v. Bryant (Neb.), 112 N. W. 571.

Actual possession of defendant or dispossession of plaintiff must be shown where plea of disclaimer is interposed. Ely v. Pace, 139 Ala. 293, 35 S. 877.

Burden where plea of not guilty is interposed is limited to plaintiff's proof of title and right of possession in one of the alleged lessors. Collier v. Doe, 142 Ala. 422, 38 S. 244.

27-81 Maxwell L. G. Co. v. Dawson, 151 U. S. 586, *aff.* s. c. 7 N. M. 133, 34 P. 191; Chastang v. Chastang, 141 Ala. 451, 37 S. 799; Stoffelo v. Molina, 8 Ariz. 211, 71 P. 912; Pace v. Crandall, 74 Ark. 417, 86 S. W. 812; Phelps v. Nazworthy, 226 Ill. 254, 80 N. E. 756; Crouch v. Wainscott, 28 Ky. L. R. 1026, 91 S. W. 289 (processioners report prima facie evidence as to boundaries); Heiney v. Nolan (N. J.), 67 A. 1008; Brown v. King, 107 N. C. 313, 12 S. E. 137; Harper v. Anderson, 132 N. C. 89, 43 S. E. 588; Tellico Mfg. Co. v. Mitchell (Tenn.), 1 S. W. 514; Ronk v. Higginbotham, 54 W. Va. 137, 46 S. E. 128.

27-83 Fuller v. Keesee, 31 Ky. L. R. 1099, 104 S. W. 700; Kentucky etc. Co. v. C. (Ky.), 108 S. W. 931; Bernhardt v. Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. 725; Virginia etc. Co. v. Coal Co., 101 Va. 723, 45 S. E. 291.

28-84 Dorlan v. Mesterwitch, 140 Ala. 283, 37 S. 382, 103 Am. St. 35; Bridewell v. Brown, 48 Ga. 179; Conrad v. Sackett, 8 Kan. App. 635, 56 P. 507; Lenoir v. Bank, 87 Miss. 559, 40 S. 5.

28-85 Pace v. Crandall, 74 Ark. 417, 86 S. W. 812.

29-86 Admissibility of evidence showing location. — Plats, locations and surveys are admissible to establish the true location and boundaries. Driver v. King, 145 Ala. 585, 40 S. 315.

Surveyor's notes and returns are admissible for the same purpose. Lanning v. Case, 4 Wash. (C. C.) 169, 14 Fed. Cas. 8072; Galbraith v. Elder, 8 Watts (Pa.) 81; Rapley v. Klugh, 40 S. C. 134, 18 S. E. 680.

Unofficial survey not admissible to apply a patent to lands not described therein without proving the original location of the warrant. Payne v. Howard, 107 Pa. 579.

Survey made by court's order in another suit between other parties is not admissible. Surget v. Little, 5 Sm. & M. (Miss.) 319.

Surveyor general's report to the commissioner of the general land office, detailing the history of his operations in making surveys, not admissible. Clark v. Hammerle, 36 Mo. 620.

To determine location of water front. In San Francisco a map purporting to have been made by order of harbor commissioners, but not shown to have been adopted, held inadmissible; but the county surveyor's unofficial diagram was admissible to show what the party offering it claimed to be the true location of

the water front P. v. Klumpke, 41 Cal. 263.

To show location of object not indicated on a map, plat or survey, evidence not admissible. Carroll v. Norwood, 1 Har. & J. (Md.) 167; Neal v. Hopkins, 87 Md. 19, 39 A. 322.

Documentary evidence in general, including tax receipts, abstracts of grants, copies of plans to show the general location, levies, entries, bonds for title, etc., are admissible in actions of ejectment for the purpose of determining the identity of or to describe or as an aid in describing property in controversy. St. Louis Pub. Schools v. Risley, 40 Mo. 356; Chapman v. Doe, 2 Leigh (Va.) 329; Sanscrainte v. Torongo, 87 Mich. 69, 49 N. W. 497 (tax receipts); McLenan v. Chisholm, 64 N. C. 323 (abstracts or grants); Frazee v. Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. 391 (copies of plans to show general locations); Beeson v. Hutchinson, 4 Watts (Pa.) 442 (levies); Camden v. Haskill, 3 Rand. (Va.) 462 (entries); Newman v. Virginia etc. Steel Co., 80 Fed. 228, 25 C. C. A. 382 (bonds for title); Virginia Sulphur Mines Co. v. Thompson, 93 Va. 293, 25 S. E. 232 (extracts from land books in connection with tax receipts).

But documents which fail to describe the land in controversy or which fail to accurately describe such land are inadmissible. Morring v. Tipton, 126 Ala. 350, 28 S. 562; Barron v. Barron, 122 Ala. 194, 25 S. 55; Hart v. Williams, 189 Pa. 31, 41 A. 983. See Hammond v. Norris, 2 Har. & J. (Md.) 130; Burke v. Jackson, 57 Hun 320, 10 N. Y. S. 577, 11 N. Y. S. 2.

Extrinsic evidence to establish identity, etc. — Extrinsic evidence is admissible to establish the identity or to aid in arriving at the true description of property involved in an ejectment suit. McElrath v. Haley, 48 Ga. 641; Neal v. Hopkins, 87 Md. 19, 39 A. 322; Crooks v. Whitford, 47 Mich. 283, 11 N. W. 159; Kron v. Daugherty, 9 Pa. Super. 163.

Extraneous evidence not admissible to show surveyor's failure to comply with instructions. Gittings v. Hall, 1 Har. & J. (Md.) 14, 2 Am. Dec. 502.

29-87 Defendant may be relieved by plaintiff's proof. McCreary v. Lumb. Co., 148 Ala. 247, 41 S. 822.

29-88 See Sonnemann v. Mertz, 221 Ill. 362, 77 N. E. 550.

29-89 Findblom v. Rocks, 146 Fed. 660; Ely v. Pace, 139 Ala. 293, 35 S. 877; Nevin v. Disharoon (Del.), 66 A. 362; Sonnemann v. Mertz, 221 Ill. 362, 77 N. E. 550; Young v. Duggin, 30 Ky. L. R. 634, 99 S. W. 655; Altschul v. Casey, 45 Or. 182, 76 P. 1083; McMurray v. Dixon, 105 Va. 605, 54 S. E. 481; Russell v. Gay, 33 Wash. 83, 73 P. 795; Wood v. Earls, 39 Wash. 21, 80 P. 837.

30-90 South Grand Rapids Imp. Co. v. R. Co., 142 Mich. 620, 105 N. W. 1121; Wood v. Praul, 217 Pa. 293, 66 A. 528. See Loyd v. Oates, 143 Ala. 231, 38 S. 1022.

31-92 Adverse possession a defense. Brannon v. Henry, 142 Ala. 698, 39 S. 92; Krause v. Nolte, 217 Ill. 298, 75 N. E. 326.

32-93 Wiencke v. Deputy, 31 Ind. App. 621, 68 N. E. 921.

Equitable defense must be accompanied with offer to do equity. Union etc. Bank v. Day (Neb.), 113 N. W. 530.

33-97 Equitable defense must be distinctly proved. Bolen v. Hoven (Ala.), 43 S. 736; McCauley v. Fulton, 44 Cal. 355; Williams v. Milligan, 183 Pa. 386, 38 A. 1015.

34-4 Rule in Kansas. — McBride v. Steinmeden, 72 Kan. 508, 83 P. 822. See also Duffey v. Rafferty, 15 Kan. 9; Hollenbeck v. Ess, 31 Kan. 87, 1 P. 275.

36-13 Brinkley v. Bell, 126 Ga. 480, 55 S. E. 187.

39-20 Where deceased landlord's personal representative brings suit, defendant is not precluded from offering evidence disputing intestate's title by leases taken by him from intestate's widow and heirs. Thomas v. Young, 79 Conn. 493, 65 A. 955.

ELECTIONS [Vol. 5.]

How votes were counted, 73-22; *Existence of person impersonated,* 132-70.

46-8 Scholl v. Bell, 31 Ky. L. R. 335, 102 S. W. 248; O'Neal v. Barth, 31 Ky. L. R. 363, 102 S. W. 263.

47-9 Merkley v. Trainor, 142 Cal. 262, 75 P. 656; Galloway v. Bradburn, 119 Ky. 49, 82 S. W. 1013; McEuen v. Cary, 29 Ky. L. R. 931, 96 S. W. 850; Stafford v. Board, 57 W. Va. 84, 50 S. E. 1016.

47-10 Lucas v. Avis, 28 Ky. L. R. 182, 89 S. W. 1; Galloway v. Bradburn, 119 Ky. 49, 82 S. W. 1013 (certificate of election officers best evidence to show how vote was cast when it appears that ballots have been tampered with).

49-19 Scholl v. Bell, 31 Ky. L. R., 335, 102 S. W. 248; O'Neal v. Barth, 31 Ky. L. R. 363, 102 S. W. 263; Browning v. Lovett, 29 Ky. L. R. 692, 94 S. W. 661. See Eldredge v. Nickerson (Mass.), 78 N. E. 461 (town election—recount not allowed after recordation of result and adjournment—with certain exceptions).

50-21 Averyt v. Williams, 8 Ariz. 355, 76 P. 463; Merkley v. Trainor, 142 Cal. 265, 75 P. 656; Garms v. P., 108 Ill. App. 631; Lucas v. Avis, 28 Ky. L. R. 182, 89 S. W. 1; McEuen v. Cary, 29 Ky. L. R. 931, 96 S. W. 850; Scholl v. Bell, 31 Ky. L. R. 335, 102 S. W. 248; O'Neal v. Barth, 31 Ky. L. R. 363, 102 S. W. 263; Edwards v. Logan, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257; (ballots made primary evidence by statute); Lester v. Fogarty, 30 Ky. L. R. 759, 99 S. W. 910; Lane v. Bailey, 29 Mont. 548, 75 P. 191 (identified ballot best evidence of result); Stafford v. Board, 57 W. Va. 84, 50 S. E. 1016. See McCardle v. Barstow, 145 Cal. 135, 78 P. 371.

50-22 Chatham v. Mansfield, 1 Cal. App. 298, 82 P. 343; Browning v. Lovett, 29 Ky. L. R. 692, 94 S. W. 661; Williamson v. Musick, 60 W. Va. 59, 53 S. E. 706.

50-23 Statute mandatory, and ballots are inadmissible if the formalities required have not been complied with. Neely v. Rice, 29 Ky. L. R. 1142, 97 S. W. 737.

52-28 Doak v. Briggs (Ia.), 116 N. W. 114; Stafford v. Board, 57 W. Va. 84, 50 S. E. 1016.

52-29 Chatham v. Mansfield, 1 Cal. App. 298, 82 P. 343; Garms v. P., 108 Ill. App. 631; Choisser v. York, 211 Ill. 56, 71 N. E. 940; Doak v. Briggs (Ia.), 116 N. W. 114; Browning v. Lovett, 29 Ky. L. R. 692, 94 S. W. 661.

53-31 Garms v. P., 108 Ill. App. 631.

53-32 Choisser v. York, supra; Murphy v. Lentz, 131 Ia. 328, 108 N. W. 530.

53-33 Choisser v. York, supra (ballots accessible to unauthorized persons); Murphy v. Lentz, supra.

54-34 Huston v. Anderson, 145 Cal. 320, 78 P. 626; Choisser v. York, supra (seals upon packages containing ballots broken — ballots disfigured and removed from wires upon which strung); Murphy v. Lentz, 131 Ia. 328, 108 N. W. 530; Lester v. Fogarty, 30 Ky. L. R. 759, 99 S. W. 910; Galloway v. Bradburn, 26 Ky. L. R. 977, 82 S. W. 1013; McEuen v. Cary, 29 Ky. L. R. 931, 96 S. W. 850; Hamilton v. Young, 26 Ky. L. R. 447, 81 S. W. 682; Browning v. Lovett, 29 Ky. L. R. 692, 94 S. W. 661. See Moorhead v. Arnold, 73 Kan. 132, 84 P. 742; Stafford v. Board, 57 W. Va. 84, 50 S. E. 1016; Williamson v. Musick, 60 W. Va. 59, 53 S. E. 706.

54-35 Garms v. P., 108 Ill. App. 631; Murphy v. Lentz, 131 Ia. 328, 108 N. W. 530; Galloway v. Bradburn, 26 Ky. L. R. 977, 82 S. W. 1013; Stafford v. Board, supra.

55-38 Hamilton v. Young, 26 Ky. L. R. 447, 81 S. W. 682.

55-40 Murphy v. Lentz, supra; McEuen v. Cary, 29 Ky. L. R. 931, 96 S. W. 850; Lester v. Fogarty, 30 Ky. L. R. 759, 99 S. W. 910.

55-41 O'Neal v. Barth, 31 Ky. L. R. 363, 102 S. W. 263; Scholl v. Bell, 31 Ky. L. R. 335, 102 S. W. 248, *cit.* Hamilton v. Young, 26 Ky. L. R. 447, 81 S. W. 682; Edwards v. Logan, 24 Ky. L. R. 1099, 70 S. W. 852, 75 S. W. 257; Browning v. Lovett, 29 Ky. L. R. 692, 94 S. W. 661; Neely v. Rice, 29 Ky. L. R. 1142, 97 S. W. 737; Galloway v. Bradburn, 26 Ky. L. R. 977, 82 S. W. 1013; Childress v. Pinson, 30 Ky. L. R. 767, 100 S. W. 278.

56-43 Huston v. Anderson, 145 Cal. 320, 78 P. 626; Murphy v. Lentz, 131 Ia. 328, 108 N. W. 530;

McEuen v. Cary, 29 Ky. L. R. 931, 96 S. W. 850. See Ogg v. Glover, 72 Kan. 247, 83 P. 1039.

57-46 Murphy v. Lentz, supra.

57-47 Averyt v. Williams, 8 Ariz. 355, 76 P. 463; Huston v. Anderson, 145 Cal. 320, 78 P. 626; Murphy v. Lentz, supra; McEuen v. Cary, 29 Ky. L. R. 931, 96 S. W. 850.

58-50 P. v. Wintermute, 106 N. Y. S. 1076 (vote made with voting machine).

58-51 P. v. Wintermute, supra (ballot as indicated by voting machine).

59-53 P. v. Wintermute, supra.

69-98 City of Thomasville v. Elec. L. Co., 122 Ga. 399, 50 S. E. 169.

70-7 Glover v. Morris, 122 Ga. 768, 50 S. E. 956.

But parol proof is ordinarily incompetent to establish the result of an election. Scholl v. Bell, 31 Ky. L. R. 335, 102 S. W. 248; O'Neal v. Barth, 31 Ky. L. R. 362, 102 S. W. 263.

70-8 P. v. Davidson, 2 Cal. App. 100, 83 P. 161; Strebin v. Lavengood, 163 Ind. 478, 71 N. E. 494; S. v. Markley, 9 Ohio C. C. (N. S.) 561 (contents of destroyed ballots may be proved by parol). But see Scholl v. Bell, 31 Ky. L. R. 335, 102 S. W. 248 (a lost or destroyed ballot cannot be supplied); O'Neal v. Barth, 31 Ky. L. R. 362, 102 S. W. 263. See S. v. Songer, 76 Ark. 169, 88 S. W. 903.

71-12 To deduct illegal votes from one party's vote it must be shown that the votes were in fact cast and counted for such party. Scholl v. Bell, 31 Ky. L. R. 335, 102 S. W. 248. See also Duff v. Crawford, 30 Ky. L. R. 323, 97 S. W. 1124; O'Neal v. Barth, 31 Ky. L. R. 363, 102 S. W. 263. And the burden of showing such facts is upon the contesting party. Combs v. Combs, 30 Ky. L. R. 161, 97 S. W. 1127.

72-18 Strebin v. Lavengood, 163 Ind. 478, 71 N. E. 494; Lane v. Bailey, 29 Mont. 548, 75 P. 191; P. v. Wintermute, 106 N. Y. S. 1076; S. v. Markley, 9 Ohio C. C. (N. S.) 561.

73-21 Montgomery v. Dormer, 181 Mo. 5, 79 S. W. 913; Frazier v. Yardley, 181 Mo. 18, 79 S. W. 1195 (question as to compelling voter to testify discussed but not decided); S. v. Markley, 9 Ohio C. C. (N. S.) 561 (if a witness discloses that he did vote and it is shown clearly to be an illegal vote, then he may be compelled to answer as to whom he voted for).

Secret illegal ballots. — Impossible to show for whom such were cast where voter exercises privilege of self-incrimination. Scholl v. Bell, 31 Ky. L. R. 335, 102 S. W. 248; O'Neal v. Barth, 31 Ky. L. R. 363, 102 S. W. 263.

73-22 Lane v. Bailey, 29 Mont. 548, 75 P. 191.

How votes were counted. — Election judges may testify as to how illegal votes were counted. Montgomery v. Dormer, 181 Mo. 5, 79 S. W. 913.

74-24 Widmayer v. Davis, 231 Ill. 42, 83 N. E. 87; Welch v. Shumway, 232 Ill. 54, 83 N. E. 549; Scholl v. Bell, 31 Ky. L. R. 335, 102 S. W. 248 (direct or circumstantial evidence admissible).

81-75 S. v. Keating, 202 Mo. 197, 100 S. W. 648.

81-81 Testimony of non-resident searchers hearsay. S. v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

81-82 See Lane v. Bailey, 29 Mont. 548, 75 P. 191.

83-97 Bigham v. Clubb (Tex. Civ.), 95 S. W. 675.

84-8 Tinkle v. Wallace, 167 Ind. 382, 79 N. E. 355.

84-9 S. v. Bunnell, 131 Wis. 198, 110 N. W. 177.

84-11 Tinkle v. Wallace, 167 Ind. 382, 79 N. E. 355.

86-29 Vigil v. Garcia 36 Colo. 430, 87 P. 543.

87-32 Vigil v. Garcia, supra.

Use of intoxicants by election officers. See infra, 104-16.

88-37 Vigil v. Garcia, supra.

89-40 Board v. Buckley, 85 Miss. 713, 38 S. 104.

92-59 See Vigil v. Garcia, supra.

101-95 Williamson v. Musick, 60 W. Va. 59, 53 S. E. 706.

101-97 Williamson v. Musick, supra.

104-16 But the weight otherwise attaching to the result of election officers' labors is materially lessened by their illegal use of liquor. McEuen v. Cary, 29 Ky. L. R. 931, 96 S. W. 850.

105-22 See Vigil v. Garcia, 36 Colo. 430, 87 P. 543.

107-35 See Vigil v. Garcia, supra.

110-48 S. v. Rosenthal, 123 Wis. 442, 102 N. W. 49; S. v. Conness, 106 Wis. 425, 82 N. W. 288, *appr.* S. v. Olin, 23 Wis. 309.

110-54 S. v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

111-59 Lucas v. Avis, 28 Ky. L. R. 184, 89 S. W. 1; Rodwell v. Rowland, 137 N. C. 617, 50 S. E. 319.

112-63 P. v. Davidson, 2 Cal. App. 100, 83 P. 161; Galloway v. Bradburn, 26 Ky. L. R. 977, 82 S. W. 1013; Lucas v. Avis, 28 Ky. L. R. 184, 89 S. W. 1.

113-67 Combs v. Combs, 30 Ky. L. R. 161, 97 S. W. 1127; Scholl v. Bell, 31 Ky. L. R. 335, 102 S. W. 248; O'Neal v. Barth, 31 Ky. L. R. 363, 102 S. W. 263; Rodwell v. Rowland, 137 N. C. 617, 50 S. E. 319 (that no notice of the election was given).

113-68 Welch v. Shumway, 232 Ill. 54, 83 N. E. 549.

113-69 Welch v. Shumway, supra.

113-71 See Scholl v. Bell, 31 Ky. L. R. 335, 102 S. W. 248; O'Neal v. Barth, 31 Ky. L. R. 363, 102 S. W. 263.

114-78 Voting machines. — The presumption being based on the provisions as to stealing and custody of the ballots does not apply when voting machines are used, there being no similar provisions as to their custody and care. Trumbull v. Board, 140 Mich. 529, 103 N. W. 993.

115-79 Averyt v. Williams, 8 Ariz. 355, 76 P. 463; Huston v. Anderson, 145 Cal. 320, 78 P. 626.

115-80 Huston v. Anderson, supra.

116-84 Bates v. Crumbaugh, 114 Ky. 447, 24 Ky. L. R. 1205, 71 S. W. 75.

116-86 No presumption that a student in a college town is entitled to vote therein; he must show such right, mere presence not sufficient proof. Welch v. Shumway, 232 Ill. 54, 83 N. E. 549.

120-7 Bates v. Crumbaugh, 114 Ky. 447, 71 S. W. 75 (same rule applicable as in contests over property rights).

120-8 Where voting machines were used it is proper to prove that by their failure to carry out and express the intent of the voters the relator was deprived of more than enough votes to change the result of the election. P. v. Wintermute, 106 N. Y. S. 1076.

121-11 Tinkle v. Wallace, 167 Ind. 382, 79 N. E. 355.

124-28 Where certificates are issued to two persons for the same office the rule does not apply. P. v. Davidson, 2 Cal. App. 100, 83 P. 161.

126-37 McEuen v. Cary, 29 Ky. L. R. 931, 96 S. W. 850.

126-40 *Contra.*— Browning v. Lovett, 29 Ky. L. R. 692, 94 S. W. 661.

126-41 Buckley v. McDonald, 33 Mont. 483, 84 P. 1114. See Hoy v. S., 168 Ind. 506, 81 N. E. 509; Breeden v. Martens (S. D.), 112 N. W. 960.

128-46 S. v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

128-48 S. v. McElhinney, 199 Mo. 67, 97 S. W. 159; Buckley v. McDonald, 33 Mont. 483, 84 P. 1114 (alienage of contestee); P. v. Wintermute, 106 N. Y. S. 1076.

129-49 Montgomery v. Chelf, 26 Ky. L. R. 638, 82 S. W. 388; Browning v. Lovett, 29 Ky. L. R. 692, 94 S. W. 661; Combs v. Combs, 30 Ky. L. R. 161, 97 S. W. 1127; S. v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

Promises as constituting bribery. — Burden on relator to show that voter was thereby induced to vote for other candidate. S. v. Bunnell, 131 Wis. 198, 110 Wis. 177. See Hoy v. S., 168 Ind. 506, 81 N. E. 509.

129-50 S. v. Rosenthal, 123 Wis. 442, 102 N. W. 49.

130-53 Committee's failure to take oath. — The failure of a governing committee of a political party to be sworn before calling an election is not sufficient evidence of irregularity. Montgomery v. Chelf, 26 Ky. L. R. 638, 82 S. W. 388.

131-59 S. v. Matlack, 5 Penne. (Del.) 401, 64 A. 259 (copy of oath admissible, witness testifying that he had administered such oath, but

that the original could not be found).

131-62 S. v. Savre, 129 Ia. 122, 105 N. W. 387 (illegal voting).

132-70 **Existence of person impersonated** in prosecution for impersonating another at an election is presumed from fact that his name appears in registration book. S. v. Fielder (Mo.), 109 S. W. 580.

132-72 S. v. Walsh, 203 Mo. 605, 102 S. W. 513 (prosecution for illegal registration — fraudulent intent must be shown).

132-73 But see S v. Matlack, 5 Penne (Del.) 401, 64 A. 259, holding that in a prosecution against election officers a witness was competent to testify that he voted at the election, as against an objection that the registration book was the best evidence.

133-75 See S. v. Armstrong, 203 Mo. 554, 102 S. W. 503.

EMBEZZLEMENT [Vol. 5.]

135-2 Leach v. S., 46 Tex. Cr. 507, 81 S. W. 733; Bowden v. S., 46 Tex. Cr. 69, 79 S. W. 539. See S. v. Buchanan, 43 Wash. 400, 86 P. 650.

135-3 Garner v. S. (Tex. Cr.), 105 S. W. 187.

136-5 Brock v. U. S., 149 Fed. 173, 78 C. C. A. 121.

136-6 Higbee v. S., 74 Neb. 331, 104 N. W. 748.

136-7 *Contra.* — Rex v. Swinton, 1 Haw. 92 (mere deficiency in accounts without proof of conversion or deceit is not sufficient).

136-8 Bowden v. S., 46 Tex. Cr. 69, 79 S. W. 539; McCrary v. S. (Tex. Cr.), 103 S. W. 926; Wilkinson v. S., 49 Tex. Cr. 304, 91 S. W. 589.

137-10 S. v. Shour, 196 Mo. 202, 95 S. W. 405; S. v. Wise, 186 Mo. 42, 84 S. W. 954; S. v. Moyer, 58 W. Va. 146, 52 S. E. 30.

138-12 Sherrick v. S., 167 Ind. 345, 79 N. E. 193; S. v. Meeker, 72 N. J. L. 210, 61 A. 381; Secor v. S., 118 Wis. 621, 95 N. W. 942; (general shortage in accused's accounts).

138-13 S. v. Meeker, supra; Manowitch v. S. (Tex. Cr.), 96 S. W. 1; Robinson v. C., 104 Va. 888, 52 S. E. 690; S. v. Moyer, 58 W. Va. 146, 52 S. E. 30.

Under a statute permitting general allegation of embezzlement, proof of more than one act is permissible. P. v. Messer, 148 Mich. 168, 111 N. W. 854.

138-14 S. v. Laughlin, 180 Mo. 342, 79 S. W. 401; S. v. Shour, 196 Mo. 202, 95 S. W. 405; S. v. Blackley, 138 N. C. 620, 50 S. E. 310; C. v. Smith, 4 Pa. Super. 1; Busby v. S. (Tex. Cr.), 103 S. W. 638; Manowitch v. S. (Tex. Cr.), 96 S. W. 1; Burk v. S. (Tex. Cr.), 95 S. W. 1064. See S. v. Buchanan, 43 Wash. 400, 86 P. 650.

Burden of proof. — After receipt of funds by public officer has been shown the burden is upon him to show payment to the state. Busby v. S. (Tex Cr.), 103 S. W. 638.

139-15 Secor v. S., 118 Wis. 621, 95 N. W. 942.

139-17 Teston v. S., 50 Fla. 137, 39 S. 787.

140-22 S. v. Blackley, 138 N. C. 620, 50 S. E. 310 (demand not necessary under the statute); S. v. Moyer, 58 W. Va. 146, 52 S. E. 30.

140-23 S. v. Moyer, supra.

141-25 Ter. v. Wright, 16 Haw. 123.

142-26 Ter. v Wright, supra.

142-27 Bode v. S. (Neb.), 113 N. W. 996. See S. v. Shour, 196 Mo. 202, 95 S. W. 405.

142-28 Rex v. Swinton, 1 Haw. 92; Taylor v. C., 119 Ky. 731, 75 S. W. 244; S. v. Dunn, 138 N. C. 672, 50 S. E. 772; S. v. Summers, 141 N. C. 841, 53 S. E. 856; S. v. McDonald, 133 N. C. 680, 45 S. E. 582; Busby v. S. (Tex. Cr.), 103 S. W. 638; Robinson v. C., 104 Va. 888, 52 S. E. 690; S. v. Moyer, 58 W. Va. 146, 52 S. E. 30. See S. v. Pingel, 128 Ia. 515, 105 N. W. 58.

143-29 Eatman v. S., 48 Fla. 21, 37 S. 576; Rex v. Swinton, 1 Haw. 92; Taylor v. S. (Tex. Cr.), 97 S. W. 473.

Evidence showing bona fides. Taylor v. C., 119 Ky. 731, 75 S. W. 244; S. v. Moyer, 58 W. Va. 146, 52 S. E. 30.

143-30 Ter. v. Wright, 16 Haw. 123; McCracken v. P., 209 Ill. 215, 70 N. E. 749; Zuckerman v. P., 213 Ill. 114, 72 N. E. 741; Taylor v. C. 119 Ky. 731, 75 S. W. 244; Leach v.

S., 46 Tex. Cr. 507, 81 S. W. 733; S. v. Moyer, 58 W. Va. 146, 52 S. E. 30. See P. v. Messer, 148 Mich. 168, 111 N. W. 854; S. v. Shour, 196 Mo. 202, 95 S. W. 405.

144-31 S. v. Laughlin, 180 Mo. 342, 79 S. W. 401; S. v. Lentz, 184 Mo. 223, 83 S. W. 970; S. v. Merkel, 189 Mo. 315, 87 S. W. 1186; S. v. Moyer, 58 W. Va. 146, 52 S. E. 30.

145-33 Storms v. S., 81 Ark. 25, 98 S. W. 678; Gassenheimer v. U. S., 26 App. D. C. 432; Leach v. S., 46 Tex. Cr. 507, 81 S. W. 733.

The criminal character of such other similar acts must appear before they are admissible, as that they were done with criminal or fraudulent intent. S. v. Disbrow, 130 Ia. 19, 106 N. W. 263. See also Gassenheimer v. U. S., 26 App. D. C. 432; C. v. House, 6 Pa. Super. 92.

145-34 Tipton v. S., 53 Fla. 69, 43 S. 684; S. v. Laughlin, 180 Mo. 342, 79 S. W. 401. See DeLeon v. Ter., 9 Ariz. 161, 80 P. 348.

146-35 S. v. Fellows, 98 Minn. 179, 107 N. W. 542, 108 N. W. 825; S. v. Dunn, 138 N. C. 672, 50 S. E. 772; *cit.* S. v. Culver (Neb.), 97 N. W. 1015. See P. v. West, 146 Mich. 537, 109 N. W. 1041.

147-40 See S. v. Dunn, 138 N. C. 672, 50 S. E. 772.

148-45 S. v. Fellows, 98 Minn. 179, 108 N. W. 825.

149-46 See S. v. Jones, 114 Mo. App. 343, 89 S. W. 366 (such evidence admissible to remove prejudicial inference).

149-48 S. v. Lentz, 184 Mo. 223, 83 S. W. 970; S. v. Summers, 141 N. C. 841, 53 S. E. 856. See S. v. Merkel, 189 Mo. 315, 87 S. W. 1186.

149-49 S. v. Lentz, supra; S. v. Summers, 141 N. C. 841, 53 S. E. 856; Busby v. S. (Tex. Cr.), 103 S. W. 638; Robinson v. C., 104 Va. 888, 52 S. E. 690. See S. v. Pingee, 128 Ia. 515, 105 N. W. 58; S. v. Merkel, 189 Mo. 315, 87 S. W. 1186.

EMINENT DOMAIN [Vol. 5.]

159-9 Richland School Tp. v. Overmyer, 164 Ind. 382, 73 N. E. 811.

159-10 City of Grafton v. R. Co. (N. D.), 113 N. W. 598.

160-11 City of Grafton v. R. Co., supra.

162-16 Kansas City etc. R. v. Davis, 197 Mo. 669, 95 S. W. 881.

163-18 Burden on defendant. Caretta R. Co. v. Coal Co. (W. Va.), 57 S. E. 401.

166-26 Cumberland Tel. Co. v. R. Co., 117 La. 199, 41 S. 492.

Patent of incorporation made conclusive evidence of corporation's existence. In re Milwaukee, etc. R. Co., 124 Wis. 490, 102 N. W. 401.

168-35 That a large number of people will use a proposed highway need not be shown to establish its public utility, nor is it material that a few will be benefited more than others. Heath v. Sheetz, 164 Ind. 665, 74 N. E. 505. See also S. v. Court, 42 Wash. 675, 85 P. 669.

169-36 Smith v. Dist., 229 Ill. 155, 82 N. E. 278.

169-37 Madera R. Co. v. Granite Co., 3 Cal. App. 668, 87 P. 27; Heath v. Sheetz, 164 Ind. 665, 74 N. E. 505. See Caretta R. Co. v. Coal Co. (W. Va.), 57 S. E. 401. But see Deemer v. R. Co., 212 Pa. 491, 61 A. 1014, holding the burden to be on plaintiff, in a proceeding under the statute to restrain a railroad from taking private property for a private use, to show that the proposed use will be private.

169-38 In re 21st. St. (Mo.), 96 S. W. 201 (evidence admissible to show use not to be of public character).

Recital in ordinance that the use is public, not conclusive. Oral or documentary evidence is admissible to show real purpose. Kansas City v. Hyde, 196 Mo. 498, 96 S. W. 201.

Previous adjudication of public character of use is conclusive. Sultan etc. Co. v. Timber Co., 31 Wash. 558, 72 P. 114.

170-39 See Laguna Dist. v. Martin Co. (Cal. App.), 89 P. 993 (determination by trustees of drainage district as to necessity for drainage, made conclusive by statute).

170-42 City of Rome v. Waterworks Co., 113 App. Div. 547, 100 N. Y. S. 357; S. v. Centralia Co., 42 Wash. 632, 85 P. 344.

171-44 Laguna Dist. v. Martin

Co. (Cal. App.), 89 P. 993; City of Grafton v. R. Co. (N. D.), 113 N. W. 598. See City of Grand Rapids v. Coit, 149 Mich. 668, 113 N. W. 362.

172-45 Louisiana etc. Co. v. Realty, 115 La. 328, 39 S. 1.

Where prior adjudication is relied upon by defendant to defeat the condemnation he has the burden of showing that there are no new facts or circumstances existing which warrant the taking. Laguna Dist. v. Martin Co. (Cal. App.), 89 P. 993.

172-46 North Coast R. Co. v. R. Co. (Wash.), 94 P. 112; S. v. Court, 44 Wash. 476, 87 P. 521. See S. v. Court (Wash.), 91 P. 637.

174-50 *Contra.*—Richland Twp. v. Overmeyer, 164 Ind. 382, 73 N. E. 811.

174-51 See S. v. Court, supra.

175-57 Richland School Twp. v. Overmeyer, supra; Board v. Jackson, 113 La. 124, 36 S. 912 (but defendant may show that plaintiffs seek to expropriate too large an area of land and may plead and prove every prejudicial error about to be committed. This must be sustained by a very decided preponderance of evidence).

177-59 Smith v. Tenn. Dist., 229 Ill. 155, 82 N. E. 278; Stafford etc. R. Co. v. Mfg. Co. (Conn.), 66 A. 775.

178-63 Carolina etc. R. Co. v. Lumb. Co., 132 N. C. 644, 44 S. E. 358.

180-67 Southern Ill. etc. Co. v. Stone, 194 Mo. 175, 92 S. W. 475.

183-79 Lindner v. R. Co., 116 La. 262, 40 S. 697.

There is a presumption of payment of the damages when action therefor is not begun until twenty years after the taking. Carter v. Tpk. Co., 208 Pa. 565, 57 A. 988.

196-14 Central etc. R. Co. v. Feldman (Cal.), 92 P. 849; Calor etc. Gas Co. v. Franzell (Ky.), 109 S. W. 328; In re Gas Co., 119 App. Div. 350; 104 N. Y. S. 239; Cleveland etc. R. v. Gorsuch, 8 Ohio C. C. (N. S.) 297; Port Townsend etc. R. Co. v. Barbare (Wash.), 89 P. 710; Guyandot etc. R. Co. v. Buskirk, 57 W. Va. 417, 50 S. E. 521.

Amount paid to others per acre not competent when the tracts are not similarly situated and consequential damage not the same. Simons v. R. Co., 128 Ia. 139, 103 N. W. 129.

196-15 Hartshorn v. R. Co., 216 Ill. 392, 75 N. E. 122; Sargent v. Merrimac (Mass.), 81 N. E. 970; Conan v. Ely, 91 Minn. 127, 97 N. W. 737; Board v. Lee, 85 Miss. 508, 37 S. 747; Creighton v. Comrs., 143 N. C. 171, 55 S. E. 511; Cox v. R. Co., 215 Pa. 506, 64 A. 729; Keim v. City, 32 Pa. Super. 613; Chicago etc. R. Co. v. Alexander (Wash.), 91 P. 626.

197-16 St. Louis etc. R. Co. v. R. E. C. Co., 204 Mo. 565, 103 S. W. 519.

Where buildings are concerned, rule not applicable. Cleveland etc. R. v. Gorsuch, 8 Ohio C. C. (N. S.) 297 (value of the building and the land separate from each other may be shown and the aggregate value should be taken. But see *contra*, In re Board, 109 N. Y. S. 1036; In re Blackwell's Isl. Bridge, 108 N. Y. S. 366, *cit.* Blackwell's I. Bridge, 118 App. Div. 272, 103 N. Y. S. 441; Village etc. v. Smith, 184 N. Y. 341, 77 N. E. 617, 5 L. R. A. (N. S.) 922. See also In re New York, 56 Misc. 311, 106 N. Y. S. 1003.

197-19 U. S. v. Plant Co., 122 Fed. 581; 58 C. C. A. 279; Central etc. R. Co. v. Feldman (Cal.), 92 P. 849; West Chicago P. Comrs. v. Boal, 232 Ill. 248, 83 N. E. 824. See Calor etc. Gas Co. v. Franzell (Ky.), 109 S. W. 328. In re Gas. Co., 119 App. Div. 350, 104 N. Y. S. 239.

197-20 See Sargent v. Merrimac (Mass.), 81 N. E. 970.

199-22 **Where part of railway** right of way is appropriated for telegraphic purposes measure of damages consists of decrease in value for railway purposes. Cleveland etc. R. Co. v. Cable Co., 68 Ohio St. 306, 67 N. E. 890; Creighton v. Comrs., 143 N. C. 171, 55 S. E. 511 (where it was sought to impose an easement upon property by a party already holding an easement of less degree it was held that the measure of damage was the difference between the former and the latter burden).

201-30 Yellowstone P. R. Co. v. Coal Co., 34 Mont. 545, 87 P. 963; Railroad v. Land Co., 137 N. C. 330,

49 S. E. 350; St. Louis etc. R. Co. v. Oliver, 17 Okla. 589, 87 P. 423; Galbraith v. Phila. Co., 2 Pa. Super. 359; Watkins v. County (Tex. Civ.), 72 S. W. 872; S. v. Court, 44 Wash. 108, 87 P. 40.

202-32 Prather v. C. R. Co., 221 Ill. 190, 77 N. E. 430; Louisiana etc. Co. v. Realty, 115 La. 328, 39 S. 1.

203-34 Birmingham R. Co. v. Oden, 146 Ala. 495, 41 S. 129; Chicago, etc. R. Co. v. Kelly, 221 Ill. 498, 77 N. E. 916 (*cit.* Chicago etc. R. Co. v. Bowman, 122 Ill. 595, 13 N. E. 814; Illinois etc. R. Co. v. Turner, 194 Ill. 575, 62 N. E. 798; Chicago etc. R. Co. v. Mawman, 206 Ill. 182, 69 N. E. 66); Hartshorn v. R. Co., 216 Ill. 392, 75 N. E. 122; Richardson v. Centerville (Ia.), 114 N. W. 1071; Watkins v. R. Co. (Ia.), 113 N. W. 924; Sallden v. Little Falls, 102 Minn. 358, 113 N. W. 884; In re Board etc., 109 N. Y. S. 1036; St. Louis etc. R. Co. v. Oliver, 17 Okla. 589, 87 P. 423; Galbraith v. Phila. Co., 2 Pa. Super. 359; Hope v. Phila. etc. R. Co., 211 Pa. 401, 60 A. 996; Cox v. Phila. etc. R. Co., 215 Pa. 506, 64 A. 729; Moudy Mfg. Co. v. R. Co., 215 Pa. 110, 64 A. 373; Boyer & L. v. R. Co., 97 Tex. 107, 76 S. W. 441; Texas etc. R. Co. v. Clifford (Tex. Civ.), 94 S. W. 168; Pochila v. R. Co., 31 Tex. Civ. 398, 72 S. W. 255.

206-40 Chicago etc. R. Co. v. Kelly, 221 Ill. 498, 77 N. E. 916; Galbraith v. Phila. Co., 2 Pa. Super. 359.

207-43 Galbraith v. R. Co., 2 Pa. Super. 359; Friday v. R. Co., 204 Pa. 405, 54 A. 339; Leiby v. Water Co., 205 Pa. 634, 55 A. 782; Hope v. R. Co., 211 Pa. 401, 60 A. 996; Myers v. R. Co., 19 Phila. (Pa.) 468; Taber v. R. Co. (R. I.), 67 A. 9; Wray v. R. Co., 113 Tenn. 544, 82 S. W. 471.

211-47 Evidence to show improper basis. — Where it appears that the opinions of the land owner's witnesses were based mainly if not exclusively on two sales of property in the vicinity, the defendant may show that such sales were made under special circumstances and that the prices realized were greatly in excess of the market value. Henkel v. R. Co., 213 Pa. 485, 62 A. 1085. See Hope v. R. Co., 211 Pa. 401, 60 A. 996.

212-49 Widman Inv. Co. v. City, 191 Mo. 459, 90 S. W. 763.

213-53 Galbraith v. R. Co., 2 Pa. Super. 359.

214-55 See Southern etc. Co. v. Stone, 194 Mo. 175, 92 S. W. 475.

215-58 Madera R. Co. v. Granite Co., 3 Cal. App. 668, 87 P. 27; Dennis v. R. Co. (Tex.), 94 S. W. 1092.

216-60 McMillan v. R. Co., 1 Pa. Super. 648; Galbraith v. R. Co., 2 Pa. Super. 359 (testimony admissible as to ridges and depressions left on property in construction of pipe line).

218-70 Myers v. R. Co., 19 Phila. (Pa.) 468; Cox v. R. Co., 215 Pa. 506, 64 A. 729; (map shown to be incorrect not admissible); Gorgas v. R. Co., 215 Pa. 501, 64 A. 680 (map inadmissible which does not include all the land as to which damages are to be assessed).

222-79 Boston v. Boston (Mass.), 81 N. E. 244; Galbraith v. R. Co., 2 Pa. Super. 359; Cox v. R. Co., 215 Pa. 506, 64 A. 729; Moudy Mfg. Co. v. R. Co., 215 Pa. 110, 64 A. 373.

223-80 Sexton v. Transit Co., 200 Ill. 244, 65 N. E. 638; Cox v. R. Co., 215 Pa. 506, 64 A. 729; Moudy Mfg. Co. v. R. Co., 215 Pa. 110, 64 A. 373; Dennis v. R. Co. (Tex.), 94 S. W. 1092.

223-81 Choctaw etc. R. Co. v. True, 35 Tex. Civ. 309, 80 S. W. 120 (damages to wind-mill).

224-84 Mayor etc. v. Steam. Co., 104 Md. 485, 65 A. 353; Cincinnati Iron S. Co. v. R. Co., 9 Ohio C. C. (N. S.) 103, *cit.* R. Co. v. R. Co., 30 Ohio St. 604.

225-85 Watkins v. County (Tex. Civ.), 72 S. W. 872.

225-86 Prior right of way though of less width than avenue proposed may be shown, such evidence to be considered in connection with defendant's evidence of necessary expenses. Chicago etc. R. Co. v. Chicago, 217 Ill. 343, 75 N. E. 499.

226-92 Lewis v. R. Co., 223 Ill. 223, 79 N. E. 44; Caldwell v. R. Co., 111 App. Div. 164, 97 N. Y. S. 588; Union R. Co. v. Hunton, 114 Tenn. 609, 88 S. W. 182; Texas etc. R. Co.

v. Clifford (Tex. Civ.), 94 S. W. 168; Magee v. R. Co. (Tex. Civ.), 95 S. W. 1092.

227-98 That crossings had been put over a railway by the injured party may be shown by a railway. Cincinnati R. Co. v. Miller, 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001.

227-99 City of Chicago v. Pulcyn, 129 Ill. App. 179.

227-1 Atlantic etc. R. Co. v. McKnight, 125 Ga. 328, 54 S. E. 148; City of Chicago v. Pulcyn, supra; Cotton v. R. Co., 191 Mass. 103, 77 N. E. 698; Pierson v. R. Co., 191 Mass. 223, 77 N. E. 769; Boyne City etc. R. Co. v. Anderson, 146 Mich. 328, 109 N. W. 429 (phonographic reproductions of noises made by railway trains admitted); Texas etc. R. Co. v. Clifford (Tex. Civ.), 94 S. W. 168. But see Smith v. R. Co., 39 Wash. 355, 81 P. 840, holding that the injurious effects must be of a physical nature and that injuries arising from noise, the emission of fumes, smoke or odors necessarily incident to the operation of trains, not resulting from negligence, are damnum absque injuria.

228-2 Smith v. R. Co., 39 Wash. 355, 81 P. 840.

228-3 Richardson v. Centerville (Ia.), 114 N. W. 1071.

228-9 New Jersey etc. R. Co. v. Tutt, 168 Ind. 205, 80 N. E. 420.

229-12 Choctaw etc. R. Co. v. True, 35 Tex. Civ. 309, 80 S. W. 120 (obstruction of view by embankment).

229-14 St. Louis etc. R. Co. v. Oliver, 17 Okla. 589, 87 P. 423. *Compare* Yazoo etc. R. Co. v. Jennings, 90 Miss. 93, 43 S. 469.

229-15 Chicago S. R. Co. v. Nolin, 221 Ill. 367, 77 N. E. 435; St. Louis etc. R. Co. v. Oliver, 17 Okla. 589, 87 P. 423. *Compare* Yazoo etc. R. Co. v. Jennings, supra.

230-17 Chicago S. R. Co. v. Nolin, supra; St. Louis etc. R. Co v. Brick Co., 198 Mo. 698, 96 S. W. 1011; St. Louis etc. R. Co. v. Oliver, supra.

231-21 See Boyne City R. Co. v. Anderson, 146 Mich. 328, 109 N. W. 429.

231-22 Chicago S. R. Co. v. Nolin, supra; St. Louis etc. R. Co. v. Oliver, supra.

232-23 New Jersey etc. R. Co. v. Tutt, 168 Ind. 205, 80 N. E. 420.

233-28 St. Louis etc. R. Co. v. Vaughan, 71 Ark. 643, 72 S. W. 575; Mayor etc. v. Steam Co., 104 Md. 485, 65 A. 353; Swenson v. Board, 95 Minn. 161, 103 N. W. 895.

235-33 Southern etc. Co. v. Stone, 194 Mo. 175, 92 S. W. 475; Cox v. R. Co., 215 Pa. 506, 64 A. 729; Taber v. R. Co. (R. I.), 67 A. 9. Enhanced value for warehouse purposes due to the construction of the railroad cannot be shown where the property had never been used for such purposes. Romano v. R. Co., 87 Miss. 721, 40 S. 150.

235-34 Watkins v. R. Co. (Ia.), 113 N. W. 924. See Seattle etc. R. Co. v. Roeder, 30 Wash. 244, 70 P. 498.

237-36 Swenson v. Board, 95 Minn. 161, 103 N. W. 895; Guyandot etc. R. Co. v. Buskirk, 57 W. Va. 417, 50 S. E. 521. See St. Louis etc. R. Co. v. Stewart, 201 Mo. 491, 100 S. W. 583.

238-37 Hartshorn v. R. Co., 216 Ill. 392, 75 N. E. 122.

238-38 Swenson v. Board, supra; Railroad v. Land Co., 137 N. C. 330, 49 S. E. 350.

242-51 Metropolitan R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860. *Contra*, Louisiana R. Co. v. Morere, 116 La. 997, 41 S. 236.

243-59 Martin v. R. Co., 220 Ill. 97, 77 N. E. 86; Seattle etc. R. Co. v. Roeder, 30 Wash. 244, 70 P. 498.

244-60 Guinn v. R. Co., 131 Ia. 680, 109 N. W. 209.

248-73 See In re East River Gas Co., 119 App. Div. 350, 104 N. Y. S. 239; In re Summit, 84 App. Div. 455, 82 N. Y. S. 1027; In re Guilford, 85 App. Div. 207, 83 N. Y. S. 312; Chicago etc. R. Co. v. Liebel, 27 Ky. L. R. 716, 86 S. W. 549 (burden on party excepting to report).

ENTRIES IN REGULAR COURSE OF BUSINESS [Vol. 5.]

256-3 Remington Mach. Co. v. Candy Co. (Del.), 66 A. 465; Bouldin v. Ricemills Co. (Tex. Civ.), 86 S. W. 795.

257-5 Louisville etc. R. Co. v. Daniel, 28 Ky. L. R. 1146, 91 S. W. 691; Firemen's Ins. Co. v. R. Co., 138 N. C. 42, 50 S. E. 452.

258-7 Swedish-Am. Bk. v. R. Co., 96 Minn. 436, 105 N. W. 69; Strand v. R. Co., 101 Minn. 85, 111 N. W. 958, 112 N. W. 987 (whether entry is sufficiently verified is for the determination of the court).

Preliminary showing.—Entries must be authenticated. St. Louis etc. R. Co. v. Mach. Co., 78 Ark. 1, 93 S. W. 58; Dorr Cattle Co. v. R. Co., 128 Ia. 359, 103 N. W. 1003; S. v. Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171; Strand v. R. Co., 101 Minn. 85, 111 N. W. 958, 112 N. W. 987; Einstein v. L. & L. Co., 118 Mo. App. 184, 94 S. W. 296; Bouldin v. Ricemills Co. (Tex. Civ.), 86 S. W. 795; Atchison etc. R. Co. v. Williams (Tex. Civ.), 86 S. W. 38; Jackson v. S., 49 Tex. Cr. 248, 91 S. W. 574. Correctness of entries must be established. Hastie v. Burrage, 69 Kan. 560, 77 P. 268; Hoogewerff v. Flack, 101 Md. 371, 61 A. 184; Jackson v. S., 49 Tex. Cr. 248, 91 S. W. 574; Missouri etc. R. Co. v. Morrison (Tex. Civ.), 94 S. W. 173. Entries made by various employes must be shown to be correct by each of such persons, unless they are dead or beyond the jurisdiction of the court. State Bank v. Brown, 96 App. Div. 441, 89 N. Y. S. 381, 86 S. W. 891; Layton v. Kraft, 111 App. Div. 842, 98 N. Y. S. 72.

258-12 Hastie v. Burrage, 69 Kan. 560, 77 P. 268; Wright v. R. Co., 118 Mo. App. 392, 94 S. W. 555. See First B. Church v. Harper, 191 Mass. 196, 77 N. E. 778 (entry by clerk of unincorporated religious society in his account book, admissible in behalf of the society); Texas etc. R. Co. v. Birdwell (Tex. Civ), 86 S. W. 1067.

259-13 Collins v. Assn., 112 Mo. App. 209, 86 S. W. 891; Wallabout Bk. v. Peyton, 108 N. Y. S. 42; Fruit Dispatch Co. v. Sturges, 7 Ohio C. C. (N. S.) 445.

259-14 Big Thompson etc. Co. v. Mayne (Colo.), 91 P. 44; Metropolitan Ins. Co. v. Moravec, 116 Ill. App. 271; Fruit Dispatch Co. v. Sturges, supra; C. v. Berney, 28 Pa. Super. 61.

260-15 Louisville etc. R. Co. v. Daniel, 28 Ky. L. R. 1146, 91 S. W. 691; Union etc. Ins. Co. v. Prigge, 90 Minn. 370, 96 N. W. 917; Firemen's Ins. Co. v. R. Co., 138 N. C. 42, 50 S. E. 452. *Compare* Layton v. Kraft, 111 App. Div. 842, 98 N. Y. S. 72 (entries of baptisms by clerk of religious corporation composed of several congregations in charge of different pastors, admissible although no rule of the church requiring such records to be kept was shown).

260-16 Matko v. Daley (Ariz.), 85 P. 721; Gould v. Hartley, 187 Mass. 561, 73 N. E. 656; Collins v. Carlin, 106 App. Div. 204, 94 N. Y. S. 317; Manchester Assur. Co. v. R. & N. Co., 46 Or. 162, 79 P. 60; C. v. Berney, 28 Pa. Super. 61.

Person making the report to the enterer need not be produced, since "it is practically impossible in mercantile conditions to trace and procure every one of the many individuals who reported the transaction." Firemen's Ins. Co. v. R. Co., 138 N. C. 42, 50 S. E. 452; Atchison etc. R. Co. v. Williams (Tex. Civ.), 86 S. W. 38; Louisville etc. R. Co. v. Daniel, 28 Ky. L. R. 1146, 91 S. W. 691; St. Louis etc. R. Co. v. Mach. Co., 78 Ark. 1, 93 S. W. 58; S. v. Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171; Louisville B. Co. v. R. Co., 116 Ky. 258, 75 S. W. 285; Drumm-Flato Co. v. Bank, 107 Mo. App. 426, 81 S. W. 503; Wells Co. v. Ins. Co., 209 Pa. 488, 58 A. 894. See Grunberg v. U. S., 145 Fed. 81, 97, 76 C. C. A. 51; International etc. R. Co. v. Startz (Tex. Civ.), 94 S. W. 207.

"If element of personal knowledge is present, it can make no difference on principle that the bookkeeper himself is dead or otherwise absent." Pelican Lumb. Co. v. Johnson (Tex. Civ.), 98 S. W. 207.

261-18 Monarch Mfg. Co. v. R. Co., 127 Ia. 511, 103 N. W. 493; Louisville etc. R. Co. v. Daniel, 28 Ky. L. R. 1146, 91 S. W. 691; Bouldin v. Ricemills Co. (Tex.

Civ.), 86 S. W. 795. See Casley v. Mitchell, 121 Ia. 96, 96 N. W. 725; Dorr Cattle Co. v. R. Co., 128 Ia. 359, 103 N. W. 1003.

262-19 Mellor v. Walmesley, (1905) 2 Ch. D. (Eng.) 164; Mercer v. Denne, (1905) 2 Ch. D. (Eng.) 538, 558.

262-20 *Compare* Big Thompson etc. Co. v. Mayne (Colo.), 91 P. 44; S. v. Hall, 16 S. D. 6, 91 N. W. 325 (record of advices received and money orders drawn, kept by postmaster, admissible though not required to be kept by law).

262-21 Mercer v. Denne, (1905) 2 Ch. D. (Eng.) 538, 558; U. S. v. Greene, 146 Fed. 793; Hastie v. Burrage, 69 Kan. 560, 77 P. 268; Missouri etc. R. Co. v. Morrison (Tex. Civ.), 94 S. W. 173; Bouldin v. Ricemills Co. (Tex. Civ.), 86 S. W. 795.

263-22 Norman Co. v. Ford, 77 Conn. 461, 59 A. 499; Schnellbacher v. Plumb. Co., 108 Ill. App. 486.

263-27 U. S. v. Greene, 146 Fed. 793. See Remington Mach. Co. v. Candy Co. (Del.), 66 A. 465; Collins v. Assn., 112 Mo. App. 209, 86 S. W. 891.

264-28 Fruit Dispatch Co. v. Sturges, 7 Ohio C. C. (N. S.) 445.

264-31 Haas v. Chubb, 67 Kan. 787, 74 P. 230.

265-32 Godfry v. Rowland, 17 Haw. 577.

266-36 U. S. v. Greene, 146 Fed. 793; Madunkeunk etc. Co. v. Clothing Co., 102 Me. 257, 66 A. 537; C. v. Berney, 28 Pa. Super. 61.

Modern rule. — "We think that the extension of the exception to such regular entries, in the life-time of the entrant, if verified and adopted by him, is sustained by principle and the weight of authority." Remington Mach. Co. v. Candy Co. (Del.), 66 A. 465. See the following cases, in which entries were admitted although the enterer was neither dead nor inaccessible. S. v. Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171; State Bk. v. Brown, 96 App. Div. 441, 89 N. Y. S. 381; Fruit Dispatch Co. v. Sturges, 7 Ohio C. C. (N. S.) 445; Franklin v. R. Co., 74 S. C. 332, 54 S. E. 578.

267-37 Haas v. Chubb, 67 Kan. 787, 74 P. 230; Hoogewerff v. Flack, 101 Md. 371, 61 A. 184.

Books in which weights as shown on slips were entered, were held to be the original entries rather than the slips themselves. Atchison etc. R. Co. v. Williams (Tex. Civ.), 86 S. W. 38; Wright v. R. Co., 118 Mo. App. 392, 94 S. W. 555; S. v. Stephenson, 69 Kan. 405, 76 P. 905, 105 Am. St. 171.

267-38 *Compare* Linden v. Thieriot, 96 App. Div. 256, 89 N. Y. S. 273.

268-39 See U. S. v. Greene, 146 Fed. 793; C. v. Berney, 28 Pa. Super. 61.

268-41 Hill v. Hill, 29 Ky. L. R. 201, 92 S. W. 924.

269-46 Attorney's diaries, admissible in favor of his executrix, as evidence of services rendered. Burke v. Baker, 111 App. Div. 422, 97 N. Y. S. 768.

270-47 See Lester-W. Shoe Co. v. Oliver Co., 1 Ga. App. 244, 58 S. E. 212.

270-53 Discount register of bank kept by its employes competent evidence as between the bank and a third person. Wallabout Bk. v. Peyton, 108 N. Y. S. 42.

271-56 See Haas v. Chubb, 67 Kan. 787, 74 P. 230.

Car record of a carrier competent to show non-delivery to the defendant carrier. Swedish-Am. Bk. v. R. Co., 96 Minn. 436, 105 N. W. 69.

272-62 Godfrey v. Rowland, 17 Haw. 577; Collins v. Assn., 112 Mo. App. 209, 86 S. W. 891; Layton v. Kraft, 111 App. Div. 842, 98 N. Y. S. 72. See Hancock v. Legion, 67 N. J. L. 614, 52 Atl. 301.

272-63 Casley v. Mitchell, 121 Ia. 96, 96 N. W. 725.

273-66 Metropolitan Ins. Co. v. Moravec, 116 Ill. App. 271; Franklin v. R. Co., 74 S. C. 332, 54 S. E. 578. *Compare* Kemp v. R. Co., 94 App. Div. 322, 88 N. Y. S. 1; Griebel v. R. Co., 95 App. Div. 214, 88 N. Y. S. 767.

273-68 **School register.** — Register kept by a school teacher of names and ages of pupils, under provisions of law, is competent evidence. Levels v. R. Co., 196 Mo. 606, 94 S. W. 275.

274-69 C. v. Berney, 28 Pa. Su-

per, 61. *Compare* Strand v. R. Co., 101 Minn. 85, 111 N. W. 958, 112 N. W. 987; Manchester Assur. Co. v. R. & N. Co., 46 Or. 162, 79 P. 60.

275-75 Log books. — Ordinarily a ship's log book is not competent in support of the party who makes the entries unless first called for and used by the adverse party. The Kentucky, 148 Fed. 500; Cobb v. Makee, 1 Haw. 85.

Lodge records, regularly kept, by order of the lodge are competent evidence in an action between the lodge and its members and their privies. Union P. Lodge v. Surety Co. (Neb.), 113 N. W. 263.

275-76 Hagerty v. Webber, 100 Me. 305, 61 A. 685; Madunkeunk etc. Co. v. Clothing Co., 102 Me. 257, 66 A. 537.

276-81 Nature of disease for which a patient was treated, may be shown by entries in a deceased physician's book. Knapp v. Trust Co., 199 Mo. 640, 98 S. W. 70.

276-82 State Bk. v. Brown, 96 App. Div. 441, 89 N. Y. S. 381.

Books kept by employe of the principal are competent against the surety of an agent. Union C. L. Ins. Co. v. Prigge, 90 Minn. 370, 96 N. W. 917.

277-87 Mellor v. Walmesley, (1905) 2 Ch. D. (Eng.) 164.

278-90 Jonesboro etc. R. Co. v. Iron Wks., 117 Mo. App. 153, 94 S. W. 726; Collins v. Carlin, 106 App. Div. 204, 94 N. Y. S. 317. See Schnellbacher v. Plumb. Co., 108 Ill. App. 486.

Entries in time-book of third person incompetent to establish fact that at that time the enterer could not have been working for the plaintiff. Matko v. Daley (Ariz.), 85 P. 721.

278-92 Louisville etc. R. Co. v. Daniel, 28 Ky. L. R. 1146, 91 S. W. 691; Louisville etc. R. Co. v. Hall, 29 Ky. L. R. 584, 94 S. W. 26; Firemen's Ins. Co. v. R. Co., 138 N. C. 42, 50 S. E. 452.

279-94 Weather records voluntarily kept are incompetent. Monarch Mfg. Co. v. R. Co., 127 Ia. 511, 103 N. W. 493. But records of Weather Bureau, required by law to be kept, are competent. Scott v. R. Co., 43 Or. 26, 72 P. 594; S. v. Hall, 16 S. D. 6, 91 N. W. 325 (record of money orders drawn by postmaster).

ESCAPE [Vol. 5.]

282-2 C. v. Filburn, 119 Mass. 297; Jenkins v. S., 49 Tex. Cr. 470, 93 S. W. 554; Vaughan v. S., 9 Tex. App. 563.

283-5 See Saylor v. C., 29 Ky. L. R. 337, 93 S. W. 48.

Person convicted for violation of municipal ordinances, and confined, is guilty of a misdemeanor if he escapes from such confinement, under Ga. Pen. Code, 1895, § 314. Collins v. S., 120 Ga. 849, 48 S. E. 312.

283-7 See S. v. King, 71 Kan. 827, 80 P. 606.

Person "lawfully detained for felony," although not yet tried and convicted, under Iowa Code, § 4894, is a person, the aiding of whom to escape is punishable under such section. S. v. Johnson (Ia.), 113 N. W. 832.

285-13 Confession competent to prove an attempt to escape. Bradford v. S., 146 Ala. 150, 41 S. 471, s. c. 146 Ala. 150, 42 S. 960. See Johnson v. S., 122 Ga. 172, 50 S. E. 65.

Acquiescence or co-operation of the prisoner need not be shown on a prosecution for conveying to a prisoner materials to aid him in his escape. Maxey v. S., 76 Ark. 276, 88 S. W. 1009. See C. v. Rodman, 34 Pa. Super. 607.

Convicts working on highways are within the custody of the jailer as much as if they were actually in jail. Saylor v. C., 29 Ky. L. R. 337, 93 S. W. 48.

Attempt to escape is punishable under the Alabama statute. Bradford v. S., 146 Ala. 150, 41 S. 471, s. c. 146 Ala. 150, 42 S. 990. But the offense is not established by proof that a prisoner obtained the necessary tools, this being mere preparation. S. v. Hurley, 79 Vt. 28, 64 A. 78.

"Trusty," voluntarily leaving custody, is guilty of an escape. Johnson v. S., 122 Ga. 172, 50 S. E. 65.

287-25 Regularity of papers and orders of court on their face is a defense to an action against a sher-

iff as for an escape. Levy v. Melody, 50 Misc. 509, 99 N. Y. S. 153.

287-26 Maxey v. S., 76 Ark. 276, 88 S. W. 1009; S. v. Johnson (Ia.), 113 N. W. 832.

Avoidance of unmerited punishment is no defense for a prisoner's leaving the chain gang. Johnson v. S., 122 Ga. 172, 50 S. E. 65.

Alternative sentence and subsequent payment of fine is no defense to a prosecution for an escape. Johnson v. S., 122 Ga. 172, 50 S. E. 65.

ESCHEAT [Vol. 5.]

290-1 S. v. Heirs, 113 Tenn. 298, 86 S. W. 717.

Failure of claimants to appear is sufficient proof of an allegation that there are no heirs, to start the running of statute of limitations as against such non-appearing heirs. S. v. Mizis, 48 Or. 165, 85 P. 611, 86 P. 361.

290-2 See S. v. Simmons, 46 Or. 159, 79 P. 498 (escheat proceedings should not be adjudicated until the administration of the estate has been concluded, debts settled, and costs of administration paid).

291-5 See In re Miner, 143 Cal. 194, 76 P. 968; Louisville Board v. King, 32 Ky. L. R. 687, 107 S. W. 247.

Inquest of office unnecessary where the deceased was an alien. Richardson v. Amsdon, 85 N. Y. S. 342.

292-6 See S. v. Knott (Fla.), 44 S. 744.

294-16 See Seitz v. Messerschmidt, 117 App. Div. 401, 102 N. Y. S. 732; In re Sullivan (Wash.), 94 P. 483.

296-22 Louisville Board v. King, 32 Ky. L. R. 687, 107 S. W. 247 (burden on commonwealth to show that real estate of a corporation was not necessary to its business and hence subject to escheat); S. v. Heirs, 113 Tenn. 298, 86 S. W. 717.

296-23 Richardson v. Amsdon, 85 N. Y. S. 342 (burden on claimant to show that he is heir of a resident alien).

296-25 Declarant must have been a member of the family of the deceased. Lowenfeld v. Ditchett, 114 App. Div. 56, 99 N. Y. S. 724.

EVIDENCE [Vol. 5.]

299-1 See Kring v. S., 107 U. S. 221; Hubbell v. U. S., 15 Ct. Cl. 546, 606 (dissenting opinion); U. S. v. Lee Huen, 118 Fed. 442; P. v. Bowers (Cal.), 18 P. 660; Brightwood R. Co. v. O'Neal, 10 App. D. C. 205; Hotchkiss v. Newton, 10 Ga. 560; Tift v. Jones, 77 Ga. 181, 3 S. E. 399; Nelson v. Johnson, 18 Ind. 329; Roberts v. S. 25 Ind. App. 366, 58 N. E. 203; S. v. Thomas, 50 La. Ann. 148, 23 S. 250; Auditor Gen. v. Supervisors, 89 Mich. 552, 51 N. W. 483; O'Brien v. S., 69 Neb. 691, 96 N. W. 649; Cook v. New Durham, 64 N. H. 419, 13 A. 650; Page v. Hazelton (N. H.), 66 A. 1049; Lapham v. Marshall, 51 Hun 36, 3 N. Y. S. 601; Wheeler v. Court, 21 R. I. 49, 41 A. 574; Holland v. Ingram, 6 Rich. L. (S. C.) 50; S. v. Ward, 61 Vt. 153, 17 A. 483; Wyoming L. & G. Co. v. Holliday Co., 3 Wyo. 386, 24 P. 193.

As used in an instruction (McWilliams v. Rodgers, 56 Ala. 87; Lamb v. S., 69 Neb. 212, 95 N. W. 1050), or request for an instruction. Appeal of Crandall, 63 Conn. 365, 28 A. 531, 38 Am. St. 375.

A comparison by the jury of the handwriting in two documents, one admitted to be genuine, is a "means sanctioned by law for ascertaining the truth" respecting a question of fact, to-wit, the genuineness of the other. Castor v. Bernstein, 2 Cal. App. 703, 84 P. 244.

300-2 McWilliams v. Rodgers, 56 Ala. 87. See Doctor Jack v. Ter., 2 Wash. Ter. 101, 3 P. 832.

302-7 See Mann v. Higgins, 83 Cal. 66, 23 P. 206; Oliveros v. S., 120 Ga. 237, 47 S. E. 627; Carroll v. Baucker, 43 La. Ann. 1078, 1194 10 S. 187; Noyes v. Pugin, 2 Wash. 653, 27 P. 548; Ex parte Brenner, 3 Wyo. 412, 26 P. 993.

Term "testimony" in bill of exceptions. — Gazette P. Co. v. Morss, 60 Ind. 153; Central Tel. Co. v. S., 110 Ind. 203, 10 N. E. 922, 12 N. E. 136; Kleyla v. S., 112 Ind. 146, 13 N. E. 255; Knapp v. Scherck, 2 Ohio, C. C. (N. S.) 589.

303-8 Prima facie evidence is such as in judgment of the law is sufficient to establish the fact, and if not rebutted remains sufficient

for the purpose. Tift v. R. Co., 138 Fed. 753, *foll.* Kelly v. Jackson, 6 Pet. (U. S.) 622 (per Story, J.); Thomas v. Williamson, 51 Fla. 332, 40 S. 831.

EXAMINATION BEFORE COMMITTING MAGISTRATE [Vol. 5.]

Impeachment of evidence given at preliminary hearing, 324-81; *Weight of evidence given at hearing,* 326-3; *Presumption of regularity,* 326-3.

306-1 Van Buren v. S., 65 Neb. 223, 91 N. W. 201; S. v. Beaverstead, 12 N. D. 527, 97 N. W. 548. See Carson v. S. (Neb.), 114 N. W. 938.

Object of a commitment is to detain the accused or place him under bond, to insure his presence when the case is called. Mitchell v. S., 126 Ga. 84, 54 S. E. 931; S. v. Jeffries (Mo.), 109 S. W. 614.

307-3 Porch v. S. (Tex. Cr.), 99 S. W. 1122.

307-5 Van Buren v. S., 65 Neb. 223, 91 N. W. 201; Harris v. Rolette (N. D.), 112 N. W. 971 (preliminary examination not a trial).

307-6 See S. v. McLain, 13 N. D. 368, 102 N. W. 407.

308-7 Depositions of witnesses preliminary to issue of warrant may be taken in secret. P. v. Wyatt, 99 N. Y. S. 114.

308-9 In re Mitchell, 1 Cal. App. 396, 82 P. 347; In re Stilts, 74 Kan. 805, 87 P. 1134; Jahnke v. S., 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; In re Kelly, 28 Nev. 491, 83 P. 223. See S. v. Beaverstad, 12 N. D. 527, 97 N. W. 548; Ex parte Patterson (Tex. Cr.), 95 S. W. 1061; Ex parte Richards, 44 Tex. Cr. 561, 72 S. W. 838.

Report of coroner's jury may be sufficient. In re Joerns, 51 Misc. 395, 100 N. Y. S. 503.

Crime barred by statute of limitations cannot furnish grounds for holding a person at a preliminary hearing. Ex parte Vice (Cal. App.), 89 P. 983.

Uncorroborated testimony of an accomplice is insufficient to show probable cause to believe that a felony has been committed and that the party charged is guilty thereof. S. v. Smith, 138 Ala. 111, 35 S. 42.

Fugitive from justice, on being arrested, is given a sufficient examination where his identity is established as the person called for in the warrant of arrest. S. v. Aucoin, 111 La. 51, 35 S. 381.

308-10 Ex parte Squires, 13 Idaho 624, 92 P. 754 (guilt of accused need not be established beyond a reasonable doubt); S. v. Beaverstad, 12 N. D. 527, 97 N. W. 548.

Burden of proof is on the state. Ex parte Patterson (Tex. Cr.), 95 S. W. 1061.

308-11 Pereles v. Weil, 157 Fed. 419; S. v. Beaverstad, supra.

309-12 Jahnke v. S., 68 Neb. 154, 94 N. W. 158, 104 N. W. 154 (plea of abatement that no sufficient preliminary examination was had); S. v. Beaverstad, 12 N. D. 527, 97 N. W. 548; Ex parte Patterson (Tex. Cr.), 95 S. W. 1061.

310-15 In re Sly, 9 Idaho 779, 76 P. 766; Ex parte Squires, 13 Idaho 624, 92 P. 754. See S. v. Jeffries (Mo.), 109 S. W. 614; Montgomery v. S., 128 Wis. 183, 107 N. W. 14.

310-19 S. v. Beaverstad, 12 N. D. 527, 97 N. W. 548 (§ 7960 Rev. Codes 1895).

311-21 S. v. McLain, 13 N. D. 368, 102 N. W. 407 (waiver by voluntary absence); S. v. Rabens (S. C.), 60 S. E. 442 (waiver of preliminary examination by failure of accused to appear in person).

311-22 Farnham v. Colman, 19 S. D. 342, 103 N. W. 161, 1 L. R. A. (N. S.) 1135.

311-23 Farnham v. Colman, supra (dying declaration need not be produced by the prosecution).

312-25 Testimony given at preliminary hearing is competent at the trial although the accused was not represented by counsel. Butler v. S., 83 Ark. 272, 103 S. W. 382.

313-27 Lake v. C., 31 Ky. L. R. 1232, 104 S. W. 1003; Dowd v. S. (Tex. Cr.), 108 S. W. 389.

314-28 Porch v. S. (Tex. Cr.), 99 S. W. 1122.

314-30 Mere presence of accused, not represented by counsel and not informed of his right to cross-exam-

ine, is not a compliance with the requirement that he be given the right to cross-examine witnesses. C. v. Lenousky, 206 Pa. 277, 55 A. 977.

314-31 **Cases cited** are overruled in Porch v. S. (Tex. Cr.), 99 S. W. 1122.

315-32 Wilson v. S., 140 Ala. 43, 37 S. 93; Shirley v. S., 144 Ala. 35, 40 S. 269; Petty v. S., 76 Ark. 515, 89 S. W. 465; Butler v. S., 83 Ark. 272, 103 S. W. 382; P. v. Buckley, 143 Cal. 375, 77 P. 169; P. v. Pembroke (Cal. App.), 92 P. 668; S. v. Bollero, 112 La. 850, 36 S. 754; P. v. Gilhooley, 108 App. Div. 234, 95 N. Y. S. 636, *aff.* 187 N. Y. 551, 80 N. E. 1116; Nixon v. S. (Tex. Cr.), 109 S. W. 931. See C. v. Lenousky, 206 Pa. 277, 55 A. 977.

Rule in California. — P. v. Sierp, 116 Cal. 249, 48 P. 88; P. v. Clark (Cal.), 90 P. 549; P. v. Parker, 144 Cal. 705, 78 P. 266.

315-35 S. v. Harmon, 70 Kan. 476, 78 P. 805; S. v. Banks, 111 La. 22, 35 S. 370; P. v. Gilhooley, 108 App. Div. 234, 95 N. Y. S. 636, *aff.* 187 N. Y. 551, 80 N. E. 1116.

316-37 Mitchell v. S., 114 Ala. 1, 22 S. 71; Borden v. S., 143 Ala. 74, 38 S. 833; S. v. Banks, 111 La. 22, 35 S. 370; S. v. Asparo, 113 La. 940, 37 S. 883; S. v. Sojours, 113 La. 676, 37 S. 599.

316-40 Wray v. S. (Ala.), 45 S. 697 (where witness was so sick that he was allowed to answer but one question, defendant refusing to cross-examine, there was no confrontation of the witness); S. v. Wheat, 111 La. 860, 35 S. 955 (evidence inadmissible where a continuance would probably result in obtaining the presence of the witness); Spencer v. S. (Wis.), 112 N. W. 462 (sickness must appear to be permanent — full discussion of authorities).

317-43 **Deposition** although declared to be false by the witness is not admissible at the trial as substantive evidence but solely for the purpose of contradicting the witness. P. v. Miner, 138 Mich. 290, 101 N. W. 536.

317-44 **Clear proof necessary.** Dorman v. S., 48 Fla. 18, 37 S. 561; Nixon v. S. (Tex. Cr.), 109 S. W. 931. See Allen v. S., 84 Ark. 178, 105 S. W. 70.

Failure to put a witness, who intends to leave the state under bonds is not proof that due diligence was not used to obtain his presence. P. v. Flannery, 3 Cal. App. 41, 84 P. 461.

Order of proof. — The court may, in its discretion, allow the deposition of an absent witness to be read before the entire predicate for its admission has been laid. P. v. Grill (Cal.), 91 P. 515.

318-45 P. v. Witty, 138 Cal. 576, 72 P. 177; P. v. Lewandowski, 143 Cal. 574, 77 P. 467; P. v. Melandrez, 4 Cal. App. 396, 88 P. 372; S. v. Sejours, 113 La. 676, 37 S. 599. *Compare* Bordon v. S., 143 Ala. 74, 38 S. 833.

318-46 P. v. Barker, 144 Cal. 702, 78 P. 266; P. v. Grill (Cal.), 91 P. 515; S. v. Aspara, 113 La. 940, 37 S. 883; S. v. Bollero, 112 La. 850, 36 S. 754.

318-49 Degg v. S (Ala), 43 S. 484 (presence of jury not necessary); P. v. Lewandowski, 143 Cal. 574, 77 P. 467.

318-50 P. v. Melandrez, 4 Cal. App. 396, 88 P. 372; Dorman v. S., 48 Fla. 18, 37 S. 561.

319-51 See S. v. Aspara, 113 La. 940, 37 S. 883.

319-52 See P. v. Gilhooley, 108 App. Div. 234, 95 N. Y. S. 636, *aff.* 187 N. Y. 551, 80 N. E. 1116.

319-56 Petty v. S., 76 Ark. 515, 89 S. W. 465; Butler v. S., 83 Ark. 272, 103 S. W. 382; Snelling v. S., 49 Fla. 34, 37 S. 917 (testimony of stenographer given after refreshing her memory from a transcript made from her notes); S. v. Harmon, 70 Kan. 476, 78 P. 805 (by attorney who represented the state at the hearing); Spencer v. S. (Wis.), 112 N. W. 462 (by testimony of examining magistrate).

319-57 See S. v. Harmon, 70 Kan. 476, 78 P. 805.

320-58 S. v. Harmon, supra.

321-65 S. v. Aspara, 113 La. 940, 37 S. 883; S. v. Legg, 59 W. Va. 315, 53 S. E. 545; Spencer v. S. (Wis.), 112 N. W. 462.

Transcript made from stenographic notes is admissible. Lake v. C., 31 Ky. L. R. 1232, 104 S. W. 1003. See Petty v. S., 76 Ark. 515, 89 S. W. 465.

321-66 See Wilson v. S., 140 Ala. 43, 37 S. 93.

322-68 Sanford v. S., 143 Ala. 78, 39 S. 370.

Oral testimony not excluded although a written record exists. Bennett v. S., 84 Ark. 97, 104 S. W. 928.

Statute requiring a "general statement" to be made by the magistrate, in writing, does not make the testimony of witnesses as to what was the testimony at the hearing, secondary evidence. Willis v. U. S., 6 Ind. Ter. 424, 98 S. W. 147.

323-72 Descriptive interpolations by the reporter must be omitted in reading the deposition. P. v. Witty, 138 Cal. 576, 72 P. 177. And see P. v. Lewandowski, 143 Cal. 574, 77 P. 467 (statutory deposition cannot usually be added to by the testimony of witnesses).

323-76 Falkner v. S. (Ala.), 44 S. 409; Angling v. S., 137 Ala. 17, 34 S. 846; P. v. Miner, 138 Mich. 290, 101 N. W. 536.

323-77 *Compare* P. v. Smith, 114 App. Div. 513, 100 N. Y. S. 259.

On cross-examination the witness is entitled to see the written record of the evidence or have it read to him. Moss v. S. (Ala.), 44 S. 598.

324-79 Examining magistrate may read from his memorandum, the evidence taken at the preliminary examination, although his memory is not thereby refreshed. Bell v. S., 90 Miss. 104, 43 S. 84.

324-81 Impeachment of evidence given at preliminary hearing. Deposition of a witness cannot be impeached by contradictory statements in an affidavit subsequently made, or by statements made to third persons, unless the customary foundation is laid, and this rule is not changed by the fact of the absence of the witness. P. v. Witty, 138 Cal. 576, 72 P. 177; P. v. Compton, 132 Cal. 484, 64 P. 849; P. v. Pembroke (Cal. App.), 92 P. 668.

In corroboration of an impeached witness, the written and verified statements of the witness made at the hearing is admissible in so far as it relates to the controverted point. Falkner v. S. (Ala.), 44 S. 409.

324-82 P. v. Warner, 147 Cal. 546, 82 P. 196; P. v. Buckley, 143 Cal. 375, 77 P. 169.

Stenographer need not be the official reporter of any court; his qualifications need not affirmatively appear; fact that he is an employe of the district attorney does not render him incompetent. P. v. Nunley, 142 Cal. 441, 76 P. 45.

325-84 Signature, at a time subsequent to the examination, of testimony transcribed from stenographic notes, does not, without the testimony of the stenographer as to the correctness of his work, justify the reception of such evidence. Degg v. S. (Ala.), 43 S. 484.

325-88 S. v. Morgan, 27 Utah 103, 74 P. 526 (failure to file not ground for a continuance).

325-90 P. v. Buckley, 143 Cal. 375, 77 P. 169.

325-91 See Dowd v. S. (Tex. Cr.), 108 S. W. 389.

325-93 Where the part of the transcript containing the testimony in issue was correctly certified, it is immaterial that another portion of the transcript was defective. P. v. Pembroke (Cal. App.), 92 P. 668.

326-94 Lake v. C., 31 Ky. L. R. 1232, 104 S. W. 1003. See Butler v. S., 83 Ark. 272, 103 S. W. 382; Petty v. S., 76 Ark. 515, 89 S. W. 465; Dowd v. S. (Tex. Cr.), 108 S. W. 389.

326-95 Sole method of proof of the deposition is by the certificate of the reporter. P. v. Buckley, 143 Cal. 375, 77 P. 169.

326-97 *Compare* P. v. Lewandowsky, 143 Cal. 574, 77 P. 467 (explaining cases cited in text).

326-3 Weight of evidence given at hearing. — Such evidence, when used at the trial is secondary in character and it is error to instruct the jury that they should consider the evidence as though the witness was present in person and testifying. Degg v. S. (Ala.), 43 S. 484.

Presumption of regularity. — See P. v. Warner, 147 Cal. 546, 82 P. 196 (presumption that proceedings leading up to the commitment were regularly conducted); P. v. Witty, 138 Cal. 576, 72 P. 177 (presumption that official stenographer properly transcribed the evidence); P. v. Clark (Cal.), 90 P. 549; P. v.

Buckley, 143 Cal. 375, 77 P. 169.

327-4 Jones v. S., 137 Ala. 12, 34 S. 681; Freeman v. C., 31 Ky. 639, 103 S. W. 274; S. v. Blay, 77 Vt. 56, 58 A. 794; S. v. Carpenter, 32 Wash. 254, 73 P. 357; S. v. Washing, 36 Wash. 485, 78 P. 1019.

327-6 Angling v. S., 137 Ala. 17, 34 S. 846 (testimony of defendant at preliminary hearing admissible as being in the nature of a judicial confession).

327-8 S. v. Finch, 71 Kan. 793, 81 P. 494. *Contra*, Tuttle v. P., 33 Colo. 243, 79 P. 1035. *Compare* S. v. May, 62 W. Va. 129, 57 S. E. 366 (coroner's inquest is a legal proceeding within § 20, ch. 152, Code 1906 (W. Va.) which says: "In a criminal prosecution . . . evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination"). And see S. v. Legg, 59 W. Va. 315, 53 S. E. 545.

328-12 S. v. Finch, 71 Kan. 793, 81 P. 494 (full discussion of authorities). *Contra*, Tuttle v. P., 33 Colo. 243, 79 P. 1035 (full discussion of authorities).

329-16 S. v. Parker, 132 N. C. 1014, 43 S. E. 830.

329-18 Miller v. S. (Tex. Cr.), 91 S. W. 582; S. v. Blay, 77 Vt. 56, 58 A. 794. *Compare* Henderson v. S. (Tex. Cr.), 95 S. W. 131.

329-19 McNish v. S., 45 Fla. 83, 34 S. 219.

EXAMINATION OF PARTIES BEFORE TRIAL [Vol. 5.]

State statutes not applicable to federal courts, 335-1; *Examination during trial,* 361-18.

335-1 State statutes not applicable to federal courts. — United States statutes do not provide for the examination of a party before trial, and the provisions of the state statutes are not applicable to the federal courts. Ex parte Fisk, 113 U. S. 713; National C. R. Co. v. Leland, 77 Fed. 242, 94 Fed. 502; Hanks Dental Assn. v. Crown Co., 194 U. S. 303; Blood v. Morrin, 140 Fed. 918.

335-2 See Beem v. Farrell (Ia.), 113 N. W. 509; Brown v. Corey, 191 Mass. 189, 77 N. E. 838; Ellinger v. Society, 125 Wis. 643, 104 N. W. 811.

336-5 Ellinger v. Society, 125 Wis. 643, 104 N. W. 811.

336-6 New York courts have in recent years committed themselves to an exceedingly liberal interpretation of their code provisions. See Goldmark v. U. S. E. G. Co., 111 App. Div. 526, 97 N. Y. S. 1078; McKeand v. Locke, 115 App. Div. 174, 100 N. Y. S. 707.

337-8 Turck v. Chisholm, 53 Misc. 110, 103 N. Y. S. 1095.

337-9 Tanenbaum v. Lippmann, 89 App. Div. 17, 85 N. Y. S. 122; Turck v. Chisholm, 53 Misc. 110, 103 N. Y. S. 1095; Bender v. Bork, 52 Misc. 295, 102 N. Y. S. 152; Wagner v. Haight & F. Co., 89 N. Y. S. 323.

Fact that bill of particulars could have been obtained will not defeat an application for examination before trial. Tirpak v. Hoe, 53 Misc. 532, 103 N. Y. S. 795. See Goldmark v. U. S. E. G. Co., 111 App. Div. 526, 97 N. Y. S. 1078; McKeand v. Locke, 115 App. Div. 174, 100 N. Y. S. 704; Hill v. McKane, 115 App. Div. 537, 101 N. Y. S. 411.

Fact that plaintiff could subpoena the defendant to attend the trial, no reason for denying the examination. Grant v. Greene, 118 App. Div. 850, 103 N. Y. S. 674; McKeand v. Locke, supra; Goldmark v. U. S. E. G. Co., supra.

That a trial of the issues prior to an interlocutory judgment is necessary and will disclose all the facts, is no reason for denying an examination. Griffin v. Davis, 99 App. Div. 65, 90 N. Y. S. 491.

337-10 *Compare* Phipps v. R. Co. (Wis.), 113 N. W. 456 (statute giving right to examine former employe of corporation, but not the former employe of an individual, unconstitutional).

337-12 In re Sands, 112 App. Div. 649, 98 N. Y. S. 459.

Attempted examination of a party at his own house, held a violation of the United States constitution, and the Bill of Rights of Indiana. McSwane v. Foreman, 167 Ind. 171, 78 N. E. 630.

338-13 Standard Trad. Co. v. Seybold, 7 Ont. L. R. (Can.) 39.

338-14 Phipps v. R. Co. (Wis.), 113 N. W. 456.

338-17 Wagner v. Haight & F. Co., 89 N. Y. S. 323.

339-18 Bender v. Bork, 52 Misc. 295, 102 N. Y. S. 152.

339-20 Tirpak v. Hoe, 53 Misc. 532, 103 N. Y. S. 795; Shonts v. Thomas, 102 N. Y. S. 324.

340-24 **Cause of action** must prima facie exist to entitle a plaintiff to an examination before trial. Schultz v. Strauss, 127 Wis. 325, 106 N. W. 1066.

340-25 See Louda v. Revillon, 99 App. Div. 431, 91 N. Y. S. 194.

340-27 Nashville etc. R. Co. v. Karthaus (Ala.), 43 S. 791; Koplin v. Hoe, 108 N. Y. S. 602.

As to defendant's right to an examination of plaintiff in an action to recover for injuries to the person, see Wood v. Flagg, 121 App. Div. 636, 106 N. Y. S. 308.

341-30 Closson v. Bligh (Ind. App.), 83 N. E. 263.

Wisconsin statute provides for examination of the adverse party, "his agent or employe." Eastern R. Co. v. Tuteur, 127 Wis. 382, 105 N. W. 1067.

Examination can be had by defendant against co-defendants adversely interested. Weidenfeld v. Hollins, 41 Misc. 616, 85 N. Y. S. 217.

342-33 See Moffat v. Leonard, 8 Ont. L. R. (Can.) 519; Garland v. Clarkson, 9 Ont. L. R. (Can.) 281.

342-34 Vano v. Mills Co., 13 Ont. L. R. (Can.) 421.

342-36 **Under the Ontario practice** a non-resident officer of a foreign corporation cannot be examined. Perrins, Ltd. v. Algoma Wks., 8 Ont. L. R. (Can.) 634.

343-39 *Contra.* — Harbaugh v. Securities Co., 110 App. Div. 633, 97 N. Y. S. 350; Johnson v. Coal Co., 126 Wis. 492, 105 N. W. 1048; Hughes v. R. Co., 122 Wis. 258, 99 N. W. 897.

Examination of officer of a corporation, as such, apart from the examination of the corporation, not authorized. Meade v. Assn., 119 App. Div. 761, 104 N. Y. S. 523; Jacobs v. Refining Co., 112 App. Div. 657, 98 N. Y. S. 542; Shumaker v. Doubleday, 116 App. Div. 302, 101 N. Y. S. 587.

Director may be examined, though he has severed his connection with the corporation since the alleged transaction. Societe Generale v. Farina Co., (1904) 1 K. B. (Eng.) 794; Kirchoffer v. Loan Co., 7 Ont. L. R. (Can.) 295. *Contra,* Cantin v. Pub. Co., 8 Ont. L. R. (Can.) 531.

Directors of corporation who become such subsequent to the alleged transactions cannot be examined. Hart v. Cotton Co., 41 Misc. 436, 84 N. Y. S. 1065; In re Thompson, 95 App. Div. 542, 89 N. Y. S. 4 (president).

343-40 *Contra.* — Hughes v. R. Co., 122 Wis. 258, 99 N. W. 897 (Wisconsin statute).

343-43 Davies v. Bank, 12 Ont. L. R. (Can.) 557.

344-48 In re Cohen, 53 Misc. 400, 104 N. Y. S. 1027.

Examination of intended party can only be had for purpose of perpetuating testimony, and not to enable plaintiff to frame a complaint. In re Schlotterer, 105 App. Div. 115, 93 N. Y. S. 895.

345-49 See Boyle v. Gas Co., 46 Misc. 192, 94 N. Y. S. 27.

Examination not denied because it may incidentally disclose a cause of action against another person. In re Sands, 112 App. Div. 649, 98 N. Y. S. 459.

Examination of a defendant not allowed, to determine upon whom a summons can be served to obtain jurisdiction over another defendant. Grant v. Copper Co., 118 App. Div. 853, 103 N. Y. S. 676.

Interrogatories may be propounded when the matter in controversy is presented by an answer in abatement. Paul v. R. Co., 33 Ind. App. 157, 69 N. E. 1024.

345-51 **Examination before trial** is considered a provisional remedy. Phipps v. R. Co. (Wis.), 113 N. W. 456.

345-53 Koppel v. Hatch, 50 Misc. 626, 98 N. Y. S. 619; Ellinger v. Society, 125 Wis. 643, 104 N. W. 811 (examination allowed in aid of a "claim" urged in defense of a proceeding).

347-57 Knight v. Morgenroth, 93 App. Div. 424, 87 N. Y. S. 693. *Compare* Istok v. Senderling, 118 App. Div. 162, 103 N. Y. S. 13 (examination allowed, although plaintiff had personal knowledge of the facts, since otherwise there would be

a possibility that plaintiff would be unable to subpoena the defendant).

347-58 F. Garia & Bro. v. Salomon, 84 N. Y. S. 508; Richardson & B. Co. v. Schiff, 93 App. Div. 368, 87 N. Y. S. 672; Grant v. Greene, 118 App. Div. 850, 103 N. Y. S. 674. See McCormack v. Coddington, 98 App. Div. 13, 90 N. Y. S. 218; Griffin v. Davis, 99 App. Div. 65, 90 N. Y. S. 491; Wagner v. Haight & F. Co., 89 N. Y. S. 323.

"Necessary" and "material" not synonymous terms. Koplin v. Hoe, 108 N. Y. S. 602.

347-59 Positive allegations, in the complaint, not construed as showing that the facts are within the knowledge of the plaintiff. Istok v. Senderling, 118 App. Div. 162, 103 N. Y. S. 13.

348-61 Tanenbaum v. Lippmann, 89 App. Div. 17, 85 N. Y. S. 122.

Under the modern rule, fact that the evidence could be procured from other persons is no reason for refusing the examination. Grant v. Greene, 118 App. Div. 850, 103 N. Y. S. 674; Turck v. Chisholm, 53 Misc. 110, 103 N. Y. S. 1095; McKeand v. Locke, 115 App. Div. 174, 100 N. Y. S. 704; Goldmark v. U. S. E. G. Co., 111 App. Div. 526, 97 N. Y. S. 1078.

Necessity does not depend upon whether there are other witnesses to the fact. Cherbuliez v. Parsons, 108 N. Y. S. 321.

348-62 Gee v. Alvarez, 87 App. Div. 157, 84 N. Y. S. 32; Watt v Feltmann, 111 App. Div. 314, 97 N. Y. S. 737.

Under the New York Code of Civ. Proc., an order for the examination of a party cannot embrace an order for the production of books and papers, except in the single case of corporate books, which may be used to refresh the memory. Gee v. Alvarez, 87 App. Div. 157, 84 N. Y. S. 32; Hart v. Cotton Co., 111 Misc. 436, 84 N. Y. S. 1065; Knickerbocker Tr. Co. v. Schroeder, 109 N. Y. S. 1024; Coin Novelty Co. v. Lindenborn, 106 N. Y. S. 508; In re Thompson, 95 App. Div. 542, 89 N. Y. S. 4. See Shumaker v. Doubleday Co., 116 App. Div. 302, 101 N. Y. S. 587; Harbaugh v. Securities Co., 110 App. Div. 633, 97 N. Y. S. 350; Boyle v. Gas Co., 46 Misc. 191, 94 N. Y. S. 27; Bruen v. Whitman Co., 106 App. Div. 248, 94 N. Y S. 304.

349-66 Grant v. Copper Co., 118 App. Div. 853, 103 .N. Y. S. 676. See Edmondson v. Birch & Co., (1905) 2 K. B. (Eng.) 523; Plymouth Mut. Soc. v. Assn., (1906) 1 K. B. (Eng.) 403.

Interrogatories may be used to elicit answers on which to strike out a pleading of the opposite party as sham. Paul v. R. Co., 33 Ind. App. 157, 69 N. E. 1024.

349-67 Waitzfelder v. Moses Co., 120 App. Div. 144, 104 N. Y. S. 796; Whitney v. Rudd, 100 App. Div. 492, 91 N. Y. S. 429.

350-69 Ehrick v. Winter Co., 52 Misc. 641, 103 N. Y. S. 1023; McCormack v. Coddington, 98 App. Div. 13, 90 N. Y. S. 218.

350-71 No examination necessary to frame complaint for an accounting. Pierce v. Real Estate Co., 121 App. Div. 501, 106 N. Y. S. 28; Boskowitz v. Sulzbacher, 121 App. Div. 878, 106 N. Y. S. 865.

351-72 In re Gardner, 109 N. Y. S. 95.

351-75 In re Cohen, 53 Misc. 400, 104 N. Y. S. 1027. *Compare* Hill v. McKane, 115 App. Div. 537, 101 N. Y. S. 411.

353-78 Ellett v. Young, 95 App. Div. 417, 88 N. Y. S. 661 (examination of agent to discover the principal, not allowed); In re Cohen, supra.

353-79 White & Co. v. Assn., (1905) 1 K. B. (Eng.) 653; Plymouth Mut. Soc. v. Assn., (1906) 1 K. B. (Eng.) 403; Massey-H. Co. v. De Laval Co., 11 Ont. L. R. (Can.) 227, 591; Union Collection Co. v. Court, 149 Cal. 790, 87 P. 1035; Minihan v. R. Co. (Mass.), 83 N. E. 871; Graham v. Tel. Co., 2 Ohio N. P. (N. S.) 612.

354-81 Knight v. Land Co. (Fla.), 45 S. 1025.

354-82 Gavin v. Contract Co., 107 N. Y. S. 272; Hart v. Cotton Co., 41 Misc. 436, 84 N. Y. S. 1065. See McDonald v. Morse, 96 App. Div. 406, 89 N. Y. S. 176.

Examination not allowed as to matters alleged in the answer which set up a new cause of action, as proof of such matters would not be allow-

ed at the trial. Weidenfeld v. Hollins, 41 Misc. 616, 85 N. Y. S. 217; Oakes v. Star Co., 119 App. Div. 358, 104 N. Y. S. 244 (incompetent evidence canno be considered to be material); Tirpak v. Hoe, 53 Misc. 532, 103 N. Y. S. 795 (examination as to manner in which injuries were received, their nature and extent, proper). See Potter v. Village, 112 App. Div. 91, 98 N. Y. S. 186; Muldoon v. R. Co., 98 App. Div. 169, 91 N. Y. S. 65 (examination to determine whether the train which killed deceased was operated by defendant, proper).

355-84 Knight v. Land Co. (Fla.), 45 S. 1025; Cully v. R. Co., 35 Wash. 241, 77 P. 202.

Under Massachusetts statute (Rev. L. Ch. 173, par. 63) a report to the defendant by its employe containing the names of witnesses of the accident, etc., need not be disclosed to the plaintiff, where the oath required by the statute was made. Spinney v. R. Co., 188 Mass. 30, 73 N. E. 1021.

355-85 Wood v. Hoffman, 121 App. Div. 636, 106 N. Y. S. 308; Knight v. Morgenroth, 93 App. Div. 424, 87 N. Y. S. 693; Merrill & B. v. Woolworth, 53 Misc. 253, 103 N. Y. S. 57; Jones v. Goode, 7 Ohio C. C. (N. S.) 589. See M'Kenna v. Tully, 109 App. Div. 598, 96 N. Y. S. 561; Ehrich v. Root, 107 N. Y. S. 846; Hartog etc. Candy Co. v. Cedar Wks., 109 N. Y. S. 113 (items and details going to make up damages are not necessary to plaintiff's case). *Compare* Edelstein v. Goldfield, 92 N. Y. S. 243; Lewis v. Buffalo, 115 App. Div. 735, 100 N. Y. S. 1052 (result of investigation as to the cause of action made by defendant, not necessary to plaintiff's case). Wood v. Iron Wks., 114 App. Div. 108, 99 N. Y. S. 677 (extent of authority of agent a necessary fact); Reed v. Smith, 107 N. Y. S. 893 (examination to identify letters and telegrams which are the basis of an action is proper).

Examination not allowed to discover the name of a witness. Nocito v. Acierno, 106 N. Y. S. 785; Gavin v. Contract Co., 107 N. Y. S. 272.

355-86 Graham v. Tel. Co., 2 Ohio N. P. (N. S.) 612.

355-87 McCormack v. Coddington, 98 App. Div. 13, 90 N. Y. S. 218.

356-89 *Compare* Cherburliez v. Parsons, 108 N. Y. S. 321.

356-92 See McKergow v. Comstock, 11 Ont. L. R. (Can.) 637.

357-95 F. Garia etc. Co. v. Salomon, 84 N. Y. S. 508.

358-97 Cherbuliez v. Parsons, 108 N. Y. S. 321; Waitzfelder v. Moses Co., 120 App. Div. 144, 104 N. Y. S. 796.

358-1 Boskowitz v. Sulzbacher, 121 App. Div. 878, 106 N. Y. S. 865; Boskowitz v. Ulmann, 121 App. Div. 887, 106 N. Y. S. 870; Grant v. Greene, 118 App. Div. 850, 103 N. Y. S. 674; Mitchell v. Mines Co., 108 N. Y. S. 953.

359-5 Where plaintiff is non-resident, affidavit may be made by attorney. Reed v. Smith, 107 N. Y. S. 893.

359-6 Affidavit must state that no previous application has been made. Mitchell v. Greene, 121 App. Div. 677, 106 N. Y. S. 449; Hirshfield v. Rosenthal Co., 51 Misc. 644, 99 N. Y. S. 912 (affidavit must be addressed to the judge and not the court).

359-7 Mitchell v. Mines Co., 108 N. Y. S. 953. See Meade v. Assn., 119 App. Div. 761, 104 N. Y. S. 523.

360-10 In re Cohen, 53 Misc. 400, 104 N. Y. S. 1027. See Knight v. Land Co. (Fla.), 45 S. 1025.

360-11 Donaldson v. R. Co., 119 App. Div. 513, 104 N. Y. S. 178.

360-16 Examination of non-resident party must be by a commission; he cannot be ordered to attend within the state. Gilroy v. L.-Met. Co., 55 Misc. 32, 106 N. Y. S. 171.

361-17 Interrogatories may be annexed to the petition or answer, subsequently to their filing, in the discretion of the court. Free v. Tel. Co. (Wis.), 110 N. W. 143.

Right to an examination is not affected by any question of laches of the applicant. Goldmark v. U. S. E. G. Co., 111 App. Div. 526, 97 N. Y. S. 1078; Boyle v. Gas Co., 46 Misc. 192, 94 N. Y. S. 27. *Compare* Whitney v. Rudd, 100 App. Div. 492, 91 N. Y. S. 429.

361-18 Knight v. Land Co. (Fla.), 45 S. 1025.

Examination in New York must be at least five days after service of notice upon the party, unless special circumstances exist and are recited in the order. Miller v. Nevins, 115 App. Div. 139, 100 N. Y. S. 703; Osborne v. Barber, 105 App. Div. 236, 93 N. Y. S. 833.

Examination during trial. — An examination of a party during trial, and out of court, is expressly provided for under Laws 1904, p. 1693, ch. 696, of New York, but it has been held that such an examination will not be allowed for a cause existing and known to the other party before the trial commenced. Hebron v. Work, 101 App. Div. 463, 92 N. Y. S. 149.

361-21 Gavin v. Contract. Co., 107 N. Y. S. 272.

362-22 **Authority of defendant** to operate a railroad must be proved by the documentary evidence prescribed by law. Muldoon v. R. Co., 98 App. Div. 169, 91 N. Y. S. 65.

362-23 **Court should select** those questions which may properly be answered. Gavin v. Contract Co., 107 N. Y. S. 272.

362-25 Chappell v. Chappell, 116 App. Div. 573, 101 N. Y. S. 846. See Chambers v. Jaffray, 12 Ont. L. R. (Can.) 377 (party must answer incriminatory questions, — another law prohibiting the use of such answer against him).

Statements to judicial prosecuting officers, privileged. Schultz v. Strauss, 127 Wis. 325, 106 N. W. 1066.

Trade secrets may be privileged. Jones v. Goode, 7 Ohio C. C. (N. S.) 589.

Privilege of a witness does not operate to excuse him from incriminating a corporation of which he is an officer. Meade v. Assn., 119 App. Div. 761, 104 N. Y. S. 523; Nelson v. U. S., 201 U. S. 92.

363-27 See Jones v. Goode, 7 Ohio C. C. (N. S.) 589.

363-28 See Nat. Assn. v. Smithies, (1906) App. Cas. (Eng.) 434.

363-29 Meade v. Assn., 109 App. Div. 761, 104 N. Y. S. 523. *Compare* Ely v. Perkins, 57 Misc. 361, 108 N. Y. S. 613.

364-32 **Duty of corporation,** in answering interrogatories, to select an agent familiar with the facts. Cleveland etc. R. Co. v. Miller, 165 Ind. 381, 74 N. E. 509; Clarkson v. Bank, 9 Ont. L. R. (Can.) 317.

364-33 Cleveland etc. R. Co. v. Miller, supra.

365-35 **Large number of interrogatories** may be grouped according to the point at issue, and a single answer made to each group. Pearce v. Min. Co. (Wash.), 92 P. 773.

366-40 See Central Texas Co. v. Tobacco Co. (Tex. Civ.), 99 S. W. 1144 (case of a third person witness).

367-41 City Deposit Bk. v Green (Ia.), 115 N. W. 893; Sparks v. Taylor, 99 Tex. 411, 90 S. W. 485 (notice of intention to state new matter need not be given previous to the examination).

367-44 **Self-serving** and unresponsive statements are properly stricken out of an answer. Garrison v. Glass, 139 Ala. 512, 36 S. 725.

367-45 McWilliams v. Dickson Co., 10 Ont. L. R. (Can.) 639; McSwane v. Foremau, 167 Ind. 171, 78 N. E. 630; Free v. Tel. Co. (Ia.), 110 N. W. 143; Eastern R. Co. v. Tuteur, 127 Wis. 382, 105 N. W. 1067. See Knapp v. Order, 36 Wash. 601, 79 P. 209.

370-59 Locust v. Randle (Tex. Civ.), 102 S. W. 946.

371-62 See Cusachs v. Dugue, 113 La. 261, 36 S. 960.

Amended answer, though filed without leave, containing facts sought to be elicited by interrogatories, will prevent a judgment by default for failure to answer such interrogatories. Free v. Tel. Co. (Ia.), 110 N. W. 143.

Where the deposition of a party refusing to answer interrogatories is subsequently taken, touching the same matters, the matters will not be taken as confessed. Huntsberry v. Smith, 28 Ky. L. R. 877, 90 S. W. 601.

371-63 Free v. Tel. Co. (Ia.), 110 N. W. 143; Donaldson v. Dobbs, 35 Tex. Civ. 439, 80 S. W. 1084; Sanborn v. Bush (Tex. Civ.), 91 S. W. 883; Baldwin v. Richardson (Tex. Civ.), 87 S. W. 746.

372-66 City Deposit Bk. v. Green (Ia.), 115 N. W. 893.

Leave to file further answers or further time in which to answer, discretionary with the court. Spin-

ney v. R. Co., 188 Mass. 30, 73 N. E. 1021.

373-70 Beem v. Farrell (Ia.), 113 N. W. 509.

375-79 Johnson v. Coal Co., 126 Wis. 492, 105 N. W. 1048 (examination of officer of a corporation is in effect the examination of a party).

Party answering interrogatories cannot use them at the trial primarily; since as to him they are depositions and are rendered needless by his presence at the trial. Beem v. Farrell (Ia.), 113 N. W. 509.

Deposition of corporation agent or employe. — Since a party's deposition is admissible notwithstanding his presence at the trial, because in the nature of an admission, the rule does not apply to the deposition of an agent or employe of a corporation party. Hughes v. R. Co., 122 Wis. 258, 99 N. W. 897 (*dist.* Meier v. Paulus, 70 Wis. 165, 35 N. W. 301).

376-84 Answers to interrogatories may be used in a second suit in another forum, where the same subject-matter is involved between the same parties. Allen, McI. Co. v. Bank, 129 Ga. 748, 59 S. E. 813.

377-87 Sackstaeder v. Kast, 31 Ky. L. R. 1304, 105 S. W. 435. See Minihan v. R. Co. (Mass.), 83 N. E. 871.

EXAMINATION OF WITNESSES

[Vol. 5.]

Examination by juror, 381-10.

380-1 Fugua v. C., 118 Ky. 578, 81 S. W. 923. See Dean v. C., 25 Ky. L. R. 1876, 78 S. W. 1112 (allowing witness to make narrative statement before counsel were permitted to propound questions held no error).

Several counsel. — Limiting examination of each witness to one counsel proper in the discretion of court. S. v. Nugent, 116 La. 99, 40 S. 581.

Explaining testimony. — The witness may be permitted to explain his testimony. Swygart v. Willard, 166 Ind. 25, 76 N. E. 755; Pacific E. Lumb. Co. v. Lumb. Co., 46 Or. 194, 80 P. 105; Hawaii v. Kopea, 11 Haw. 293. And counsel may question him for this purpose. Texas M. R. v. Ritchey (Tex. Civ.), 108 S. W. 732.

Collateral matters. — Extent of examination into collateral matters is discretionary with court. Carey v. R. Co., 108 N. Y. S. 1034.

380-2 Nashville etc. R. Co. v. Moore, 148 Ala. 63, 41 S. 984; Parrish v. S., 139 Ala. 16, 36 S. 1012; Thomas v. S., 47 Fla. 99, 36 S. 161; American C. Co. v. Hill, 226 Ill. 227, 80 N. E. 784; Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515; S. v. Caron, 118 La. 349, 42 S. 960 (repeating previous testimony); Tucker v. Cotton Mills, 76 S. C. 539, 57 S. E. 626. But see Carnes v. C., 27 Ky. L. R. 1205, 87 S. W. 1123 (improper to compel defendant in criminal case to repeat several times answers from which jury may draw erroneous conclusions).

381-8 Stroh v. R. Co., 25 Ky. L. R. 1868, 78 S. W. 1120. See Benson v. S. (Tex. Cr.), 103 S. W. 911.

381-10 Arkansas C. R. Co. v. Craig, 76 Ark. 258, 88 S. W. 878; S. v. Caron, 118 La. 349, 42 S. 960 (without regard to objections); Dreyfus v. R. Co., 124 Mo. App. 585, 102 S. W. 53; S. v. Knowles, 185 Mo. 141, 83 S. W. 1083; P. v. Dinser, 49 Misc. 82, 98 N. Y. S. 314; Miller v. Ter., 15 Okla. 422, 85 P. 239; Howard v. Ter., 15 Okla. 199, 79 P. 773; Washington v. S., 46 Tex. Cr. 184, 79 S. W. 811 (interruption of cross-examination by asking witness if she understood a certain word); Komp v. S., 129 Wis. 20, 108 N. W. 46.

The detrimental effect of the testimony elicited by the judge does not render his action error. Johnson v. Leffler, 122 Ga. 670, 50 S. E. 488.

It is improper for the court in a criminal case to catechise a witness at length as to whether he was sure of facts testified to positively and to suggest that he might be mistaken and that he could correct his testimony if he were. Glover v. U. S., 147 Fed. 426, 77 C. C. A. 450.

Examination by juror. — The court may in its discretion permit a juror in a criminal case to ask a witness

questions. S. v. Kendall, 143 N. C. 650, 57 S. E. 340, *cit.* Schaefer v. R. Co., 128 Mo. 64, 30 S. W. 331.

382-11 Komp v. S., 129 Wis. 20, 108 N. W. 46 (right should be carefully exercised and the questions should not betray bias or prejudice nor indicate to the jury, judge's opinion on the facts); S. v. Hazlett, 14 N. D. 490, 105 N. W. 617 (same). And see Grant v. S., 122 Ga. 740, 50 S. E. 946.

382-12 Consol. C. Co. v. Shepherd, 112 Ill. App. 458.

382-13 Rowland v. Gregg, 122 Ga. 819, 50 S. E. 949; Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318 (error to question an expert so as to show that he regarded the testimony as improbable or erroneous); Dreyfus v. R. Co., 124 Mo. App. 585, 102 S. W. 53 (should be careful to conceal his opinion as to credibility of witness or merits of case). See Isaacs v. U. S. (Ind. Ter.), 104 S. W. 588; Miller v. Ter., 15 Okla. 422, 85 P. 239; Howard v. Ter., 15 Okla. 199, 79 P. 773.

382-17 Seeley v. Seeley, 64 N. J. Eq. 1, 53 A. 387 (master to whom divorce suit is referred).

383-18 **Private examination of witnesses** by the court pursuant to agreement of the parties cannot be objected to. Dawson v. Dawson, 40 Wash. 656, 82 P. 937.

EXECUTORS AND ADMINISTRATORS [Vol. 5.]

Possession of realty by administrator; appointment prima facie evidence of right, 399-46.

390-5 See Sayles v. Court, 27 R. I. 563, 65 A. 272 (evidence as to number of counsel petitioner had had held irrelevant against her).

A release of inheritable interest by the petitioner may be shown to defeat his application. In re Davis, 106 Cal. 453, 39 P. 756.

Application by creditor. — Einstein v. Latimer, 46 Ga. 315.

391-13 Rogers v. Tompkins (Tex. Civ.), 87 S. W. 379.

392-19 Sharpe v. Hodges, 121 Ga. 798, 49 S. E. 775; Shaw v. R. Co., 101 App. Div. 246, 91 N. Y. S. 746.

393-22 Fischer v. Giddings (Tex. Civ.), 95 S. W. 33; Rogers v. Tompkins (Tex. Civ.), 87 S. W. 379.

A copy of the pleadings and judgment in the proceedings appointing the representative need not accompany the copy of the letters, and the latter is admissible though filed after the institution of the action by the representative. Taylor v. McKee, 121 Ga. 223, 48 S. E. 943.

395-29 See Shaw v. R. Co., 101 App. Div. 246, 91 N. Y. S. 746.

396-32 McKenna v. Cosgrove, 41 Wash. 332, 83 P. 240.

396-33 Sharpe v. Hodges, 121 Ga. 798, 49 S. E. 775; Lee v. Allen, 100 Md. 7, 59 A. 184; Rogers v. Tompkins (Tex. Civ.), 87 S. W. 379.

Letters as evidence of death. — See "DEATH."

397-35 **It is presumed** in support of an appointment that there were assets in the jurisdiction although the contrary may be shown, this being a jurisdictional fact. Vance v. R. Co., 138 N. C. 460, 50 S. E. 860.

397-38 Decker v. Fahrenholtz (Md.), 68 A. 1048.

398-41 See Collier v. Kilcrease, 27 Ark. 10; Hassey v. Keller, 1 Dem. Sur. (N. Y.) 577; In re Luce, 3 Pa. Super. 289 (sufficiency of proof of petitioner's marriage); Wilson v. Hoss, 3 Humph. (Tenn.) 142.

Contra. — Where revocation of letters granted to strangers was sought by a sister of decedent who left surviving a widow, mother, sisters and minor children, under the issues as found the burden of proving the legality of their appointment was held to be upon defendants. Slay v. Beck (Md.), 68 A. 573.

398-42 **Existence of will not presumed.** In re Cameron, 47 App. Div. 120, 62 N. Y. S. 187, *aff.* 166 N. Y. 610, 59 N. E. 1120.

Removal of administrator. — Evidence showing bad faith admitted. Scott v. Smith (Ind. App.), 82 N. E. 556.

398-44 See Stewin v. Thrift, 30 Wash. 36, 70 P. 116 (minor child). *Contra,* In re O'Neill, 11 Pa. C. C. 491 (widow's exemption. And see In re Guyger, 8 Pa. C. C. 308 (evi-

dence as to marriage being conflicting the presumption of innocence and legitimacy operated in favor of widow).

The value of the estate may be shown as it is the controlling factor, so may the situation in life of the widow and children and their previous manner of living. In re Strauch, 95 Minn. 304, 104 N. W. 535. See In re Pugsley, 27 Utah 489, 76 P. 560; In re Drasdo, 36 Wash. 478, 78 P. 1022.

399-45 See Brown v. Cresap, 61 W. Va. 315, 56 S. E. 603.

399-46 Little v. Marx, 145 Ala. 620, 39 S. 517.

Possession of realty by administrator; appointment prima facie evidence of right. — Under a statute giving to both executors and administrators the right to the possession of the estate realty pending the time of settlement, the appointment of the administrator is prima facie evidence of his right to possession, the burden being upon the heir to show that such possession is unnecessary for the purposes of administration. Kern v. Cooper, 91 Minn. 121, 97 N. W. 648, 97 Minn. 509, 106 N. W. 962.

400-48 Depositions of disinterested witnesses unnecessary to prove debts. Hunt v. Curtis (Ala.), 44 S. 54. But they are necessary to show the insufficiency of the personal estate. Little v. Marx, 145 Ala. 620, 39 S. 517.

400-49 The allowance of a claim by the court is prima facie evidence of its validity on an application to sell realty. Milburn v. East, 128 Ia. 101, 102 N. W. 1116.

400-52 Opinion evidence that the personal property is insufficient to pay debts is not admissible. Hunt v. Curtis, supra.

400-53 Odell v. House, 144 N. C. 647, 57 S. E. 395 (private sale).

401-56 Hughes v. Wright (Tex. Civ.), 97 S. W. 525.

401-57 Recital in deed as evidence of order of sale. See Cruse v. O'Gwin (Tex. Civ.), 106 S. W. 757.

402-62 See Cruse v. O'Gwin, supra.

404-68 See McKenna v. Cosgrove, 41 Wash. 332, 83 P. 240.

405-70 See Cruse v. O'Gwin, supra.

409-88 Miller v. McDowell, 69 Kan. 453, 77 P. 101.

410-91 Unreceipted bills for the services in question found among decedent's papers are not competent as admissions. In re McFarland, 18 Pa. C. C. 596.

411-97 See In re Duke, 57 Misc. 541, 109 N. Y. S. 1087; Roberge v. Bonner, 94 App. Div. 342, 88 N. Y. S. 91; In re Seybert, 5 Pa. C. C. 35.

412-98 In re Rhoades, 29 Pa. C. C. 512.

412-2 See "Books of Account;" "Entries in Regular Course of Business."

413-4 Decedent's books showing partial payments on the claim are competent for claimant. Greenwood v. Judson, 109 App. Div. 398, 96 N. Y. S. 147.

Claimant's books, exhibited to and approved by decedent, are competent. Britain v. Fender, 116 Mo. App. 93, 92 S. W. 179.

413-8 In re O'Mara, 31 Pa. C. C. 469.

414-14 Vitty v. Peaslee, 76 Vt. 402, 57 A. 967.

415-18 See In re McPherran, 212 Pa. 425, 61 A. 954.

418-36 Bowen v. O'Hair, 29 Ind. App. 466, 64 N. E. 672; Schele v. Wagner, 163 Ind. 20, 71 N. E. 127; Cottrell v. Barnes, 28 Ky. L. R. 1014, 90 S. W. 1048; Brown v. Cresap, 61 W. Va. 315, 56 S. E. 603. But see In re Brown, 210 Pa. 499, 60 A. 149, holding the burden to be upon the representative to prove that money shown to have been received by decedent shortly before his death as a loan or for investment, had been repaid or accounted for.

On a claim for services the claimant must show the rendition and value of the services and an express or implied contract by decedent to pay. The circumstances and relations of the parties may be such as to raise an implied contract or they may be such as to negative the existence of any contract, express or implied. Hunt v. Osborn (Ind. App.), 82 N. E. 933. See also McMorrow v. Dowdell, 116 Mo. App. 289, 90 S. W. 728; Dunn v. Currie, 141 N. C. 123, 53 S. E. 533.

Note in decedent's possession. Where a note executed by decedent to claimant was found among de-

cedent's papers after his death and contained indorsements of payments, its delivery was sufficiently shown although claimant had no previous knowledge of its existence, the decedent having acted for many years as claimant's general agent without any detailed accounting. Indiana Ter. Co. v. Byram, 36 Ind. App. 6, 72 N. E. 670, 73 N. E. 1094.

Consideration for a note executed by decedent is presumed. In re Royer, 217 Pa. 626, 66 A. 854. *Compare* Farnsworth v. Fraser, 137 Mich. 296, 100 N. W. 400. See also Chicago T. & T. Co. v. Ward, 113 Ill. App. 327; Kiesewetter v. Kress, 24 Ky. L. R. 1239, 70 S. W. 1065. As to the effect on this presumption of additional evidence as to consideration, see In re Pinkerton, 49 Misc. 363, 99 N. Y. S. 492, and "BILLS AND NOTES."

A promise to pay for services unless implied from their acceptance must be proved, and it is error to charge that the representative has the burden of proving that the services were gratuitous. Hunt v. Osborn (Ind. App.), 82 N. E. 933.

The general rule that execution need not be proved where not denied under oath, applies to a claim against an estate based on a promissory note. De Clerque v. Campbell, 231 Ill. 442, 83 N. E. 224.

Funeral expenses are presumed to have been incurred on the credit of the estate. Rice v. R. Co. (Mass.), 81 N. E. 285.

418-37 Proof unnecessary when presentation and disallowance are admitted by answer. Harrington v. Min. Co., 35 Mont. 530, 90 P. 748.

419-42 Kornegay v. Mayer, 135 Ala. 141, 33 S. 36.

419-46 The date of filing the claim, where filing was deferred till the last day, may be shown as evidence that claimant regarded his claim as stale. Gandy v. Bissell (Neb.), 115 N. W. 571.

420-51 Bossi v. Baehr (Wis.), 113 N. W. 433.

Payments made by decedent to claimant from time to time for services rendered presumptively amount to full payment, and claimant has the burden of showing the contrary by the clearest and most convincing evidence. His own testimony must be corroborated by disinterested witnesses. Rose v. Lask, 109 N. Y. S. 484. See also Lucas v. Boss, 110 App. Div. 220, 97 N. Y. S. 112; In re Rorer, 5 Pa. C. C. 73; In re Panick, 28 Pa. C. C. 71.

Payment for only a part of the services rendered, at the usual rate, raises no presumption that such payments were intended to cover other services. Fry v. Fry, 119 Mo. App. 476, 94 S. W. 990.

421-57 See Simpson v. Schuetz, 31 Ind. App. 151, 67 N. E. 457; Stafford v. Brown, 120 App. Div. 156, 104 N. Y. S. 801; Lucas v. Boss, 110 App. Div. 220, 97 N. Y. S. 112; Linden v. Thieriot, 105 App. Div. 405, 94 N. Y. S. 246; Schultz v. Carrard, 94 N. Y. S. 740; In re Goss, 98 App. Div. 489, 90 N. Y. S. 769; In re Seybert, 5 Pa. C. C. 35.

Corroboration of claimant's testimony required by statute. See Thompson v. Coulter, 34 Can. Sup. 261; Bull v. Payne, 47 Or. 580, 84 P. 697. But this rule applies only to the merits of the claim and not to preliminary questions of presentation and disallowance. And a statute requiring some other "competent or satisfactory" evidence does not mean evidence which alone would be sufficient. Goltra v. Penland, 45 Or. 254, 77 P. 129. See also Thompson v. Coulter, supra. Corroboration may be by circumstances. Thompson v. Coulter, supra; and see "CORROBORATION."

A suspicious claim will be rejected unless supported by very strong proof. Richards v. McLain, 118 La. 424, 43 S. 38. See also Barrow v. Grant, 116 La. 952, 41 S. 220.

Single disinterested witness. — The ordinary rule that a fact testified to by a disinterested witness, who is not discredited, and where such testimony does not conflict with other evidence in the case, is to be taken as legally established has no application to claims against an estate. Walbaum v. Heaney, 104 App. Div. 412, 93 N. Y. S. 640, *cit.* Hughes v. Davenport, 1 App. Div. 182, 37 N. Y. S. 243. *Contra,* In re Banes, 4 Pa. C. C. 495.

Conclusive evidence is not required since only a preponderance of evidence is necessary. Roberge v.

Bonner, 185 N. Y. 265, 77 N. E. 1023 (distinguishing "clear and convincing" from "conclusive" evidence).

Contracts to be enforced after death, must be established by strong and convincing evidence. Hamlin v. Stevens, 177 N. Y. 39, 69 N. E. 118; Roberge v. Bonner, 94 App. Div. 342, 88 N. Y. S. 91.

Proof by deposition only is necessary on the final trial when the claim is controverted. Cottrell v. Barnes, 28 Ky. L. R. 1014, 90 S. W. 1048.

A deed made by decedent for the alleged purpose of avoiding the claim and the fact that it was not recorded until after the grantor's death may be shown. Gandy v. Bissell (Neb.), 115 N. W. 571.

A subsequent agreement by decedent to pay is admissible to show a recognition of liability. Bull v. Payne, 47 Or. 580, 84 P. 697.

Previous amended pleadings showing the claim as first made to be much smaller, are admissible where the claim is resisted as excessive. Hoyt v. Hoyt (Ia.), 115 N. W. 222. But see "ADMISSIONS." *Compare* Pollitz v. Wickersham, 150 Cal. 238, 88 P. 911.

Conduct of the claimant inconsistent with his claim may be shown (Tripp v. Macomber, 187 Mass. 109, 72 N. E. 361), as that he failed to include the claim in a bill rendered for other services subsequently performed. Place v. Place, 106 N. Y. S. 781. See also In re Brown, 6 Pa. C. C. 428.

421-58 Schou v. Blum, 119 App. Div. 825, 104 N. Y. S. 887.

Uncorroborated testimony of interested witnesses is not sufficient to prove parol contract. Rousseau v. Rouss, 180 N. Y. 116, 72 N. E. 916.

421-59 See In re Duke, 57 Misc. 541, 109 N. Y. S. 1087; Maisenhelder v. Crispell, 105 App. Div. 219, 94 N. Y. S. 707.

422-61 See Taylor v. Coriell, 66 N. J. Eq. 262, 57 A. 810.

423-64 Cottrell v. Barnes, 28 Ky. L. R. 1014, 90 S. W. 1048 (the affidavit simply makes a prima facie case where the claim is not controverted). See in re Goss, 98 App. Div. 489, 90 N. Y. S. 769.

423-65 See Leonard v. Gillette, 79 Conn. 664, 66 A. 502; Henderson v. Henderson, 165 Ind. 666, 75 N. E. 269; Tripp v. Macomber, 187 Mass. 109, 72 N. E. 361; Page v. Hazelton (N. H.), 66 A. 1049.

Decedent's bank account. — To rebut a claim for money alleged to have been furnished decedent, evidence that the latter's bank account showed no deposit of such a sum is admissible. Wright v. Davis, 72 N. H. 448, 57 A. 335. See Tripp v. Macomber, supra.

424-67 But see Zimmerman v. Beatson, 39 Ind. App. 664, 80 N. E. 165, 79 N. E. 518.

Punctuality in payment. — Decedent's reputation as a man who paid his debts promptly is not admissible to show payment. Hammer v. Crawford (Mo. App.), 93 S. W. 348.

Meretricious relations will not be presumed where deceased was an old man with no family and claimant was his housekeeper for many years. In re Royer, 217 Pa. 626, 66 A. 854 (where such illicit relation was alleged as the consideration for the note in suit).

That decedent was methodical and accurate in his business habits and accustomed to making written evidence of everything he did is not admissible to negative an alleged loan to him but of which there was no written evidence. Kinney v. McFaul, 122 Ia. 452, 98 N. W. 276.

The general relation of the claimant and decedent may be shown as preliminary. Kinney v. McFaul, supra.

Claimant's note to decedent, though not relied on as a counter claim or set-off, is admissible as a circumstance tending to negative the claim. Leask v. Dew, 102 App. Div. 529, 92 N. Y. S. 891.

425-70 Decedent's declarations of an intention or his attempt to add a codicil to the will giving claimant a certain sum, held inadmissible to show value of services. Luizzi v. Brady, 140 Mich. 73, 103 N. W. 574.

425-73 A check from decedent is not of itself evidence of a loan to the payee, the presumption being that it was payment of an amount due the payee. Kilner v. Quackenbush, 109 N. Y. S. 444.

425-74 Checks of decedent prior

to his making the note in suit are not evidence of payment. In re Royer, 217 Pa. 626, 66 A. 854.

425-75 A verified claim is not a pleading and is therefore admissible against the claimant where his action is based on a different claim subsequently filed. The rule as to amended pleadings does not apply. Pollitz v. Wickersham, 150 Cal. 238, 88 P. 911.

Statements to third persons before presenting his claim, as to the amount thereof are admissible against him. Sanguinetti v. Pellegrini, 2 Cal. App. 294, 83 P. 293.

425-76 Verified claim of claimant's husband for services of same character is not admissible. Ellis v. Baird, 31 Ind. App. 295, 67 N. E. 960.

426-80 In re Duke, 57 Misc. 541, 109 N. Y. S. 1087; In re Voldemar, 4 Pa. C. C. 577; In re Koecker, 9 Pa. C. C. 238; In re Conaughton, 12 Pa. C. C. 590; In re Coulston, 14 Pa. C. C. 243; In re Black, 29 Pa. C. C. 174; In re McQuinn, 18 Phila. (Pa.) 78. See In re Sayers, 8 Pa. C. C. 32.

The law implies both a request and a promise to pay for services which have been accepted, unless the circumstances are such as to raise the presumption that they were gratuitous. Hunt v. Osborn (Ind. App.), 82 N. E. 933. See also Dunn v. Currie, 141 N. C. 123, 53 S. E. 533.

Testimony of a single interested witness, held insufficient. Austin v. Kuehn, 211 Ill. 113, 71 N. E. 841.

Claimant's unsupported testimony insufficient. Mulhern v. Carrard, 94 N. Y. S. 741.

Extra compensation. — Claim for compensation for extra services must be proved by evidence of the most indubitable character. Grossman v. Thunder, 212 Pa. 274, 61 A. 904.

A stenographer's claim for services does not require a higher degree of proof than ordinary cases because of the confidential relation and the consequent control she might have over papers and evidence, where there is nothing to connect the claim with such confidences. In re Brown, 210 Pa. 499, 60 A. 149.

Admissions of claimant competent against him. Ellis v. Baird, 31 Ind. App. 295, 67 N. E. 960.

Decedent's attempt to make claimant the beneficiary of his insurance policy prior to the alleged employment is irrelevant. Schou v. Blum, 119 App. Div. 825, 104 N. Y. S. 887.

426-81 Schou v. Blum, supra. See Kane v. Smith, 109 App. Div. 163, 95 N. Y. S. 818.

Must be corroborated by disinterested witnesses. Butcher v. Geissenhainer, 109 N. Y. S. 159.

426-82 In re Taylor (Wis.), 111 N. W. 229. See Luizzi v. Brady, 140 Mich, 73, 103 N. W. 574, and infra, 429-1.

426-83 The character and extent of the services may be shown. Elwell v. Roper, 72 N. H. 585, 58 A. 507 (that decedent wore silk gowns requiring frequent laundering).

The value of the estate has no bearing on the value of the service not connected with the estate. McGrew v. O'Donnell, 28 Ky. L. R. 1366, 92 S. W. 301.

427-84 Statements of decedent as to the property which he was going to give to claimant are admissible to show that the services were not gratuitous but not to prove their value. McGrew v. O'Donnell, supra.

The valuation placed by the parties upon the services may be considered although not constituting a contract. Chandler v. Baker, 191 Mass. 579, 78 N. E. 387.

427-85 What was paid to others for attending decedent during his last illness held irrelevant. Gillespie v. Campbell (Ala.), 43 S. 28.

427-87 Fry v. Fry, 119 Mo. App. 476, 94 S. W. 990. See McMorrow v. Dowdell, 116 Mo. App. 289, 90 S. W. 728.

Entry in book of account held not to amount to an admission or recognition of a claim for board. Heinz v. Jacobi (N. J.), 68 A. 1069.

Inadmissible for representative when made after termination of the employment. Elwell v. Roper, 72 N. H. 585, 58 A. 507.

Self-serving declarations of decedent competent by statute, against claimant. Tripp v. Macomber, 187 Mass. 109, 72 N. E. 361. See "TRANSACTIONS WITH DECEASED

PERSONS,'' Vol. 12, p. 702, note 5. But generally they are incompetent (Coleman v. McGowan, 149 Mich. 624, 113 N. W. 17), unless made in the presence of the claimant. Dean v. Carpenter, 134 Ia. 275, 111 N. W. 815.

427-88 **Inadmissible in support** of express contract to pay during life. Schou v. Blum, 119 App. Div. 825, 104 N. Y. S. 887. See also In re Duke, 57 Misc. 541, 109 N. Y. S. 1087.

427-89 See Rousseau v. Rouss, 180 N. Y. 116, 72 N. E. 916; In re Riemensberger, 29 Pa. Super. 596, and supra, 409 et seq.

427-91 See In re Dailey, 43 Misc. 552, 89 N. Y. S. 538; In re Murphey, 26 Pa. C. C. 256.

427-92 In re Robinson, 5 Pa. C. C. 578. See Rose v. Leask, 109 N. Y. S. 484; Koebel v. Beetson, 112 App. Div. 639, 98 N. Y. S. 408.

428-93 See Patteson v. Carter, 147 Ala. 522, 41 S. 133.

428-94 Longwell v. Mierow, 130 Wis. 208, 109 N. W. 943.

428-95 Patteson v. Carter, 147 Ala. 522, 41 S. 133; Williams v. Walden, 82 Ark. 136, 100 S. W. 898; Hoskins v. Saunders (Conn.), 66 A. 785; Wallace v. Denny, 28 Ky. L. R. 978, 90 S. W. 1046; Foley v. Dillon, 32 Ky. L. R. 222, 105 S. W. 461; Birch v. Birch, 112 Mo. App. 157, 86 S. W. 1106; McMorrow v. Dowdell, 116 Mo. App. 289, 90 S. W. 728; Conway v. Cooney, 111 App. Div. 864, 98 N. Y. S. 171; In re Milligan, 112 App. Div. 373, 98 N. Y. S. 480; In re Dailey, 43 Misc. 552, 89 N. Y. S. 538; In re Taylor (Wis.), 111 N. W. 229 (adopted son). See McGrew v. O'Donnell, 28 Ky. L. R. 1366, 92 S. W. 301; In re Trinick, 22 Pa. C. C. 282. But see Dance v. Magruder, 26 Ky. L. R. 220, 80 S. W. 1120.

Demand for payment, although refused on the ground of poverty and although the services were notwithstanding continued, rebuts the presumption. In re Cridland, 8 Pa. C. C. 6.

428-96 See Bosley v. Monahan (Ia.), 112 N. W. 1102; McMorrow v. Dowdell, 116 Mo. App. 289, 90 S. W. 728; Birch v. Birch, 112 Mo. App. 157, 86 S. W. 1106; Koebel v. Beetson, 112 App. Div. 639, 98 N. Y. S. 408. But see McClure v. Lenz (Ind. App.), 80 N. E. 988.

Relationship alone is not sufficient to rebut the implied contract to pay for services accepted. In re Michael, 5 Pa. C. C. 321; In re Brown, 6 Pa. C. C. 428. And where a sister in failing health and precarious condition goes to a brother's house, of necessity and at her request and not at his invitation, there is no presumption that his services were gratuitous since she does not thus become a member of his family. In re Lillich, 9 Pa. C. C. 25.

428-97 See Patteson v. Carter, 147 Ala. 522, 41 S. 133; In re Rorer, 5 Pa. C. C. 73; Hodge v. Hodge (Wash.), 91 P. 764.

429-99 See In re McGlinchey, 27 Pa. C. C. 469.

429-1 Patteson v. Carter, supra; Dance v. Magruder, 26 Ky. L. R. 220, 80 S. W. 1120; Fry v. Fry, 119 Mo. App. 476, 94 S. W. 990. See Story v. McCormick, 70 Kan. 323, 78 P. 819. But see Ramsey v. Keith, 25 Ky. L. R. 582, 76 S. W. 142.

An express contract may be proved to rebut the presumption that services were gratuitous, although the action is based on an implied contract. Hoskins v. Saunders (Conn.), 66 A. 785. *Compare* Leonard v. Gillette, 79 Conn. 664, 66 A. 502, and supra, 426-82.

429-2 **A direct and positive contract** need not be proved; it is sufficient to show words, acts and conduct of the parties and circumstances from which an understanding that the services were to be paid for may be inferred. Hodge v. Hodge (Wash.), 91 P. 764. See also Griffith v. Robertson, 73 Kan. 666, 85 P. 748.

429-4 Koebel v. Beetson, 112 App. Div. 639, 98 N. Y. S. 408; In re Dailey, 43 Misc. 552, 89 N. Y. S. 538. See In re Lafferty, 13 Pa. C. C. 82.

A moral obligation to support decedent arising from conveyances by the latter's husband to claimant, if relevant to show a probability that the services were intended to be gratuitous, is so remote as to make the exclusion of the evidence discretionary with the court. Hoskins v. Saunders (Conn.), 66 A. 785.

Claimant's expectation of payment may be shown by his own direct

testimony. Story v. McCormick, 70 Kan. 323, 78 P. 819.

430-7 See In re Flaacke (N. J.), 64 A. 1020; In re Cozine, 113 App. Div. 22, 98 N. Y. S. 1041; In re McCann, 28 Pa. C. C. 46.

430-9 Smythe v. Evans, 209 Ill. 376, 70 N. E. 906.

431-14 See Wood v. Farwell (Mass.), 81 N. E. 294.

431-17 See In re Ollschlager (Or.), 89 P. 1049.

432-19 See Kirby v. Moore, 30 Ky. L. R. 1020, 99 S. W. 1156; Moseley v. Johnson, 144 N. C. 257, 274, 56 S. E. 922.

Where property has been inventoried as belonging to decedent the burden is on the representative, as against other beneficiaries of the estate, to prove that the property does not belong to the estate. In re Bayley (N. J.), 59 A. 215.

Representative's knowledge of condition and amount of estate prior to decedent's death, held a competent circumstance against him on the issue of his alleged conversion of a portion thereof. Morawick v. Martineck, 32 Ky. L. R. 971, 107 S. W. 759.

432-23 In re Hough, 119 La. 435, 44 S. 190.

432-24 The burden of proving the existence of a debt due the estate from the representative is upon the party alleging it, but the burden of showing payment or that the amount due has been accounted for is upon the representative. In re Mall (Neb.), 114 N. W. 156.

433-26 Moseley v. Johnson, 144 N. C. 257, 274, 56 S. E. 922.

433-27 Any debts due the estate may be shown by the beneficiaries and the burden is then on the representative to show that they are non-collectable or that the proceeds have been accounted for. Mann v. Baker, 142 N. C. 235, 55 S. E. 102.

435-33 In re Frey (N. J.), 67 A. 192 (payment); In re Douglass, 25 Pa. C. C. 566. See In re Wiley (N. J.), 65 A. 212; Wood v. Farwell (Mass.), 81 N. E. 294.

Disbursements made before appointment will not be approved upon the testimony of the representative, especially when such evidence and the assignment as his voucher show that on the face of the record the legal claim or right is in another whose rights are not foreclosed. In re Heeney, 3 Cal. App. 548, 86 P. 842.

The claimant's affidavit cannot be used by the representative to prove the claim. In re Goss, 98 App. Div. 489, 90 N. Y. S. 769.

435-35 In re Dittrich, 120 App. Div. 504, 105 N. Y. S. 303; In re Milligan, 112 App. Div. 373, 98 N. Y. S. 480; In re Cozine, 104 App. Div. 182, 93 N. Y. S. 557.

Where he has paid his own claim the burden is on the representative to prove its validity. In re Cozine, 113 App. Div. 22, 98 N. Y. S. 1041.

436-38 See Milburn v. East, 128 Ia. 101, 102 N. W. 1116; Herndon v. McDowell, 28 Ky. L. R. 512, 89 S. W. 539. *Compare* Brown v. Cresap, 61 W. Va. 315, 56 S. E. 603.

436-41 In re Roach (Or.), 92 P. 118.

437-47 In re Davis, 35 Mont. 273, 88 P. 957.

437-50 See Clarke v. Garrison, 25 Ky. L. R. 1999, 79 S. W. 240.

438-51 Rice v. Tilton, 14 Wyo. 101, 82 P. 577 (returned checks of the administrator are sufficient vouchers if received as such without objection).

439-57 Rice v. Tilton, supra.

440-64 The affidavit of the representative attached to his account is not sufficient evidence to sustain its allowance by the court. Succession of Le Sage, 112 La. 857, 36 S. 757.

The representative is competent to prove the payment of a claim for which he claims credit, and his testimony in the absence of contradiction is sufficient. In re Frey (N. J.), 67 A. 192.

441-67 The presumption is that the representative has performed his duty. McCreery v. Bank, 55 W. Va. 663, 47 S. E. 890. See "PRESUMPTIONS," Vol. 9, p. 920, note 69.

441-68 But see In re Roach (Or), 92 P. 118.

442-71 See In re Roach, supra (opinion as to adequacy of security taken for loan, competent).

That other prudent business men were making similar investments is not admissible to disprove negligence and mismanagement of the representative in attempting to develop and subdivide a tract of land

in a distant state. Brigham v. Morgan, 185 Mass. 27, 69 N. E. 418.

443-75 See In re Silkman, 121 App. Div. 202, 105 N. Y. S. 872.

444-81 In re Mall (Neb.), 114 N. W. 156.

444-82 In re Fleming, 25 Pa. C. C. 269.

446-92 See In re Eichhorn, 7 Pa. C. C. 433.

447-93 In re New Jersey Tr. Co. (N. J.), 68 A. 811. But see In re Ward (Mich.), 116 N. W. 23.

451-18 Werborn v. Austin, 82 Ala. 498, 8 S. 280. See Greenlees v. Greenlees, 62 Ala. 330; McGehee v. McGehee, 41 La. Ann. 657, 6 S. 253; Donaldson v. Raborg, 28 Md. 34; Norris' Appeal, 71 Pa. 106; In re Hedderly, 28 Pa. C. C. 64. But see Fuller v. Cushman, 170 Mass. 286, 49 N. E. 631; Glen v. Kimbrough, 58 N. C. 173; Blackwell v. Blackwell, 86 Tex. 207, 24 S. W. 389; Main v. Brown, 72 Tex. 505, 10 S. W. 571, 13 Am. St. 823.

Lapse of twenty years raises presumption of settlement and distribution of estate, though not conclusive. Hodges v. Lumb. Co., 128 Ga. 733, 58 S. E. 354.

Payment of legacy not presumed until twenty years from accrual of the right to it. Paterson etc. Assn. v. Blauvelt (N. J.), 66 A. 1055. Nor in favor of third person against the legatee. Outlaw v. Garner, 139 N. C. 190, 51 S. E. 925.

452-22 See Briggs v. Manning, 80 Ark. 304, 97 S. W. 289; Rice v. Tilton, 14 Wyo. 101, 82 P. 577.

453-26 Where the administrator administers the realty as well as the personalty, a judgment in suit by him concerning the estate realty binds the heirs. Gunn v. James, 120 Ga. 482, 48 S. E. 148.

453-28 Park v. Mullins, 124 Ga. 1072, 53 S. E. 568. See Brock v. Kirkpatrick, 72 S. C. 491, 52 S. E. 592.

454-29 See James v. Gibson, 73 Ark. 440, 84 S. W. 485.

455-39 *Compare* Beuker v. Meyer, 154 Fed. 290.

456-41 *Contra*, Brown v. Fletcher, 146 Mich. 401, 109 N. W. 686.

456-43 There is no presumption that an administrator, shown to have converted a given amount, has not converted or did not receive other assets, where no accounting was ever rendered by him or his representatives. In re McCauley, 49 Misc. 209, 99 N. Y. S. 238.

456-46 The record of the administration is competent evidence as to the manner and result of such administration in an action against the sureties. Wiemann v. Mainegra, 112 La. 305, 36 S. 358.

457-61 Wiemann v. Mainegra, supra (not conclusive).

A devastavit by the representative is prima facie established by the record of a judgment against him in his representative capacity and entries on the execution issued thereon showing no property of the estate on which to levy. Worthy v. Battle, 125 Ga. 415, 54 S. E. 667.

457-62 Briggs v. Manning, 80 Ark. 304, 97 S. W. 289; S. v. Goggin, 191 Mo. 482, 90 S. W. 379 (who have had notice).

EXHIBITS [Vol. 5.]

Consent of counsel as a basis, 462-5.

461-1 Farmers etc. Bk. v. Whinfield, 24 Wend. (N. Y.) 419.

461-3 Palmer v. Smith, 76 Conn. 210, 56 A. 516 (only such papers should be allowed to go to the jury as may properly serve to enlighten them); Chicago etc. R. Co. v. Spence, 115 Ill. App. 465; Chicago etc. R. Co. v. Spence, 213 Ill. 220, 72 N. E. 796 (photographs and skiagraphs are within a statute authorizing "papers read in evidence other than depositions" to go to the jury); S. v. Young, 134 Ia. 505, 110 N. W. 292; S. v. Olson, 95 Minn. 104, 103 N. W. 727 (bottle of alleged liquor); Carman v. R. Co., 32 Mont. 137, 79 P. 690 (map used at the trial but not put in evidence may not be taken to the jury room); Johnson v. C., 102 Va. 927, 46 S. E. 789; S. v. Champoux, 33 Wash. 339, 74 P. 557.

462-4 Toledo Tract. Co. v. Cameron, 137 Fed. 48, 69 C. C. A. 28; Tridell v. Munhall, 124 Fed. 802 (declaring the Pennsylvania practice); Carty v. Boeseke Co., 2 Cal. App. 646, 84 P. 267; Powley v.

Swenson, 146 Cal. 471, 80 P. 722; Taylor v. C., 28 Ky. L. R. 1348, 92 S. W. 292; Stone Mill. Co. v. McWilliams, 121 Mo. App. 319, 98 S. W. 828; C. v. R. Co., 23 Pa. Super. 235; Church v. Elliot, 65 S. C. 251, 43 S. E. 674.

Court may of its own motion and must at the request of either party, submit exhibits to the jury. S. v. Young, 134 Ia. 505, 110 N. W. 292; German etc. Bk. v. Bank, 101 Ia. 530, 70 N. W. 769, 63 Am. St. 399.

462-5 **Consent of counsel as a basis.** — Under § 425, Code of Crim. Proc. (N. Y.) exhibits can be taken into the jury room only upon the consent of the defendant and counsel for the people. P. v. Dolan, 186 N. Y. 4, 78 N. E. 569.

463-7 Smith v. S., 142 Ala. 14, 39 S. 329 (a criminal case); Shedden v. Stiles, 121 Ga. 637, 49 S. E. 719 (answers to interrogatories); Fottori v. Vesella, 27 R. I. 177, 61 A. 143.

463-12 **Written evidence** of an absent witness, given at the preliminary hearing, may in the discretion of the court, be taken by the jury. Shirley v. S., 144 Ala. 35, 40 S. 269.

463-13 Fottori v. Vesella, 27 R. I. 177, 61 A. 143.

464-18 Tridell v. Munhall, 124 Fed. 802; Rickeman v. Ins. Co., 120 Wis. 655, 98 N. W. 960. See Welliver v. Canal Co., 23 Pa. Super. 79.

Court in its discretion may refuse a request to allow each party to submit to the jury, for them to take with them, a statement of the respective amounts claimed. Adrians v. Reilly, 27 App. Cas. (D. C.) 165.

464-20 **Volume of state reports** containing mortality and annuity tables may be taken by the jury where they are cautioned not to use the book for any other purpose. Atlantic etc. R. Co. v. Taylor, 125 Ga. 454, 54 S. E. 622.

Examination of code by juror is ground for reversal. Henson v. S., 110 Tenn. 47, 72 S. W. 960.

465-21 *Contra.* — S. v. Crea, 10 Idaho 88, 76 P. 1013 (statute interpreted as allowing only papers to be taken out by the jury).

Clothing of deceased may be taken to the jury room, but its use should be confined to the very purpose for which it was introduced. Puryear v. S. (Tex. Cr.), 98 S. W. 258.

Photograph of building. — And the jury may examine such photograph through a magnifying glass. S. v. Wallace, 78 Conn. 677, 63 A. 448.

465-23 **Practice** of permitting the pleadings in civil actions to be taken out by the jury is not to be commended. Mattson v. R. Co., 98 Minn. 296, 108 N. W. 517; Powley v. Swenson, 146 Cal. 471, 80 P. 722; Elgin etc. R. Co. v. Wilson, 217 Ill. 47, 75 N. E. 436. See Hanchett v. Haas, 125 Ill. App. 111, *aff.* 219 Ill. 546, 76 N. E. 845; Willoughby v. Willoughby, 70 S. C. 516, 50 S. E. 208; Franklin v. R. Co., 74 S. C. 332, 54 S. E. 578.

Writings should be delivered to the jury in the presence of the defendant and his counsel so that objections may be made at that time. Bowles v. C., 103 Va. 816, 48 S. E. 527.

466-24 Birmingham Co. v. Mason, 144 Ala. 387, 39 S. 590; Palmer v. Smith, 76 Conn. 210, 56 A. 516; Warth v. Loewenstein, 121 Ill. App. 71 (exhibit with an immaterial memorandum which has been previously excluded); West Chicago R. Co. v. Buckley, 200 Ill. 260, 65 N. E. 708 (declaration, one count of which has been withdrawn in the presence of the jury); Elgin etc. T. Co. v. Wilson, 217 Ill. 47, 75 N. E. 436 (counts of declaration to which demurrers have been sustained. See Trumbull v. Trumbull, 71 Neb. 186, 98 N. W. 683); P. v. Dolan, 186 N. Y. 4, 78 N. E. 569; Lewis v. Crane, 78 Vt. 216, 62 A. 60.

467-26 Alaska Co. v. Dinkelspiel, 121 Fed. 318, 56 C. C. A. 14; P. v. Chin Non, 146 Cal. 561, 80 P. 681 (jurors reading newspapers relating to the trial); Shedden v. Stiles, 121 Ga. 637, 49 S. E. 719; Rich v. Hayes, 97 Me. 293, 54 A. 724.

467-28 P. v. Dolan, 186 N. Y. 4, 78 N. E. 569.

469-33 S. v. Wallace, 78 Conn. 677, 63 A. 448; Crawford v. S., 117 Ga. 247, 43 S. E. 762 (plot not introduced in evidence may be used. But *compare* Nobles v. S., 127 Ga. 212, 56 S. E. 125, where a map not in evidence was not allowed to be used); Carroll v. C., 26 Ky. L. R.

1083, 83 S. W. 552; S. v. Knapp, 70 Ohio St. 380, 71 N. E. 705 (written confession may be used).

469-34 Terry v. Williams, 148 Ala. 468, 41 S. 804.

469-35 Alaska Co. v. Dinkelspiel, 121 Fed. 318, 56 C. C. A. 14; Van Lenven v. Van Lenven, 3 Cal. App. 409, 85 P. 860.

470-36 Nobles v. S., 127 Ga. 212, 56 S. E. 125; Carman v. R. Co., 32 Mont. 137, 79 P. 690.

470-39 **Exhibits in a foreign language** and not translated, are admissible. Squadrille v. Ciervo, 101 N. Y. S. 661; Brummer v. Van Cleve, 105 N. Y. S. 3.

Exhibits should not be offered en masse. Dowie v. Priddle, 116 Ill. App. 184.

Preserving exhibits in the bill of exceptions. — See Porter v. Terrell, 2 Ga. App. 269, 58 S. E. 493; Pledge v. Griffith, 33 Mont. 191, 83 P. 392; Huron Dock Co. v. Swart, 2 Ohio C. C. (N. S.) 457; Young v. Young, 7 Ohio C. C. (N. S.) 419.

Exhibits referred to by a person whose deposition is being taken must be inclosed, sealed up and direeted to the clerk of the court. § 2903 Mo. Rev. St. 1899; Crane Co. v. Neel, 104 Mo. App. 177, 77 S. W. 766.

In patent cases the court is especially entitled to have exhibits placed before it to which the testimony of experts may be referred. Gray v. Grinbery, 159 Fed. 138.

EXPERIMENTS [Vol. 5.]

Impossibility of derailment, 488-49; *Possibility of seeing,* 489-51.

473-2 Spires v. S., 50 Fla. 121, 39 S. 181; Augusta R. & E. Co. v. Arthur, 3 Ga. App. 513, 60 S. E. 213; De Loach etc. Co. v. Coal Co., 2 Ga. App. 493, 58 S. E. 790; Atlanta etc. R. Co. v. Hudson, 2 Ga. App. 350, 58 S. E. 500; Chicago Tel. Co. v. Tel Co., 134 Ia. 252, 111 N. W. 935; Huggard v. Ref. Co., 132 Ia. 724, 109 N. W. 475; Dow v. Bullfinch, 192 Mass. 281, 78 N. E. 416; Lillie v. S., 72 Neb. 228, 100 N. W. 316; Carr v. Locomotive Co., 26 R. I. 180, 58 A. 678; Halverson v. Elec. Co., 35 Wash. 600, 77 P. 1058. See Thiel v. Kennedy, 82 Minn. 142, 84 N. W. 657; Wilson v. R. Co. (Wis.), 114 N. W. 462.

Experimental evidence may be the very best that can be resorted to. Tackman v. B. of Am., 132 Ia. 64, 106 N. W. 350. See also Hooker v. S., 98 Md. 145, 56 A. 390. But see Spires v. S., 50 Fla. 121, 39 S. 181.

Use of magnifying glass. — See S. v. Wallace, 78 Conn. 677, 63 A. 448; Flora v. Powrie, 23 App. D. C. 195; Cotton v. R., 191 Mass. 103, 77 N. E. 698; and "DEMONSTRATIVE EVIDENCE," 295-44.

474-3 See Spires v. S., 50 Fla. 121, 39 S. 181; De Loach etc. Co. v. Coal Co., 2 Ga. App. 493, 58 S. E. 790; Chicago Tel. Co. v. Tel Co., 134 Ia. 252, 111 N. W. 935; Dow v. Bullfinch, 192 Mass. 281, 78 N. E. 416; Healey v. Bartlett, 73 N. H. 110, 59 A. 617.

474-6 **Where the evidence is admitted** the conditions must have justified it or the action of the court will be reversed on appeal. Hisler v. S., 52 Fla. 30, 42 S. 692.

475-7 See Spires v. S., 50 Fla. 121, 39 S. 181; Hisler v. S., supra.

Although relevant to the issues the admissibility of an experiment depends upon whether it will tend to aid rather than to confuse the jury. Healey v. Bartlett, 73 N. H. 110, 59 A. 617.

476-11 See Carr v. Locomotive Co., 26 R. I. 180, 58 A. 678.

476-12 Spurlock v. Tract. Co., 118 La. 1, 42 S. 575. *Compare* Richardson v. S., 49 Tex. Cr. 391, 94 S. W. 1016.

477-13 P. v. Morrigan, 29 Mich. 4. See Rasmussen v. Power Co. (Wis.), 113 N. W. 453.

478-14 See Saucier v. Spin. Mills, 72 N. H. 292, 56 A. 545; Carr v. Locomotive Co., 26 R. I. 180, 58 A. 678.

Operation of Telephone. — Chicago Tel. Co. v. Tel. Co., 134 Ia. 252, 111 N. W. 935.

478-16 Chicago Tel. Co. v. Tel. Co., supra; Thiel v. Kennedy, 82 Minn. 142, 84 N. W. 657; Saucier v. Spin. Mills, supra.

479-18 See Birmingham etc. Co. v. Rutledge, 142 Ala. 195, 39 S. 338; Minden v. Vedene, 72 Neb. 657, 101 N. W. 330.

A dramatic exhibition should not be permitted. Felsch v. Babb, 72 Neb. 736, 101 N. W. 1011.

479-19 A medical expert may demonstrate, before the jury, the condition of plaintiff's legs by sticking pins in them, and may take away his crutches to show his inability to stand. Missouri R. Co. v. Lynch (Tex. Civ.), 90 S. W. 511.

480-22 But see Felsch v. Babb, 72 Neb. 736, 101 N. W. 1011.

481-23 Test of strength. Where a father indicted for killing his baby contended that his three year old son accidentally discharged the pistol, evidence that the son was given the pistol and could neither cock it nor discharge it when cocked was held admissible. S. v. Woodrow, 58 W. Va. 527, 52 S. E. 545.

483-31 See Tackman v. B. of Am., 132 Ia. 64, 106 N. W. 350 (*cit.* Encyc. of Ev.); Roberts v. Dover, 72 N. H. 147, 55 A. 895.

483-32 La Porte Car Co. v. Sullender (Ind. App.), 71 N. E. 922; Cheetham v. R. Co., 26 R. I. 279, 58 A. 881; Krueger v. Mfg. Co. (Tex. Civ.), 85 S. W. 1156 (that rip-saw threw timber in opposite direction from that claimed by injured person). See De Loach etc. Co. v. Coal Co., 2 Ga. App. 493, 58 S. E. 790; S. v. Nowells (Ia.), 109 N. W. 1016; Davis v. Chemical Co., 121 App. Div. 243, 105 N. Y. S. 693; Zimmer v. R. Co., 123 Wis. 643, 101 N. W. 1099 (where plaintiff fell from crowded car as it went around curve, an experiment with car that was not crowded held inadmissible).

483-33 Tackman v. B. of Am., 132 Ia. 64, 106 N. W. 350 (*cit.* Encyc. of Ev.). "To render the experiment of any probative value, however, the conditions must be such that they may be found to have been not only possible, but reasonably probable."

484-34 P. v. Solani (Cal. App.), 91 P. 654; Spires v. S., 50 Fla. 121, 39 S. 181; Histler v. S., 52 Fla. 30, 42 S. 692; De Loach etc. Co. v. Coal Co., 2 Ga. App. 493, 58 S. E. 790; Chicago etc. Co. v. Schallawitz, 118 Ill. App. 9; Merchants L. & T. Co. v. Boucher, 115 Ill. App. 101; Chicago etc. R. Co. v. Crose, 113 Ill. App. 547; Chicago C. R. Co. v. Brecher, 112 Ill. App. 106; Elgin etc. Co. v. Wilson, 120 Ill. App. 371; La Porte Car Co. v. Sullender (Ind. App.), 71 N. E. 922; Huggard v. Ref. Co., 132 Ia. 724, 109 N. W. 475; Louisville R. Co. v. Hoskins, 28 Ky. L. R. 124, 88 S. W. 1087; Mitchell v. Sayles (R. I.), 66 A. 574 (pressure required to burst a steampipe); Kreuger v. Mfg. Co. (Tex. Civ.), 85 S. W. 1156; Houston etc. R. Co. v. Ramsey (Tex. Civ.), 97 S. W. 1067; Richardson v. S., 49 Tex. Cr. 391, 94 S. W. 1016; Richards v. C., 107 Va. 881, 59 S. E. 1104 (making tracks for purpose of comparison); Wilson v. R. Co. (Wis.), 114 N. W. 462; Zimmer v. R. Co., 123 Wis. 643, 101 N. W. 1099.

That the dissimilarity of conditions was favorable to the objecting party does not require the court to admit the experiment. Halverson v. Elec. Co., 35 Wash. 600, 77 P. 1058.

485-35 Atlanta etc. R. Co. v. Hudson, 2 Ga. App. 352, 58 S. E. 500; Elgin etc. Co. v. Wilson, 120 Ill. App. 37; La Porte Car Co. v. Sullender (Ind. App.), 71 N. E. 922; Zimmer v. R. Co., 123 Wis. 643, 101 N. W. 1099.

485-37 Atlantic etc. R. Co. v. Hudson, supra (*cit.* Encyc. of Ev.); Hauser v. P., 210 Ill. 253, 71 N. E. 416; S. v. Nowells (Ia.), 109 N. W. 1016.

488-44 Street car.—Evidence excluded on ground that conditions were not shown to be same. Wilson v. R. Co. (Wis.), 114 N. W. 462. See Omaha R. Co. v. Larson, 70 Neb. 591, 97 N. W. 824.

488-46 But see Louisville R. Co. v. Hoskins, 28 Ky. L. R. 124, 88 S. W. 1087.

488-47 See Elgin etc. Co. v. Wilson, 120 Ill. App. 371.

488-48 Atlanta etc. R. Co. v. Hudson, 2 Ga. App. 350, 58 S. E. 500; Houston etc. R. Co. v. Ramsey (Tex. Civ.), 97 S. W. 1067. See Elgin etc. T. Co. v. Wilson, 217 Ill. 47, 75 N. E. 436.

488-49 See Chicago etc. R. Co. v. Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. 135.

Where a switchman was injured by leaping from a switch engine to avoid a collision with an approaching road engine, on the question

how far plaintiff could have seen the approaching engine by the light of switch engine's headlight, an experiment with a different sort of headlight was held inconclusive.

Impossibility of derailment of car when turning corner may be shown by experiments with similar cars going at highest rate of speed. Cheetham v. R. Co., 26 R. I. 279, 58 A. 881. *Compare* Halverson v. Elec. Co., 35 Wash. 600, 77 P. 1058.

489-50 S. v. Bean, 77 Vt. 384, 60 A. 867.

Identification by flash of gun. — Refusal to permit experiment before jury in a dark room held no error. Spires v. S., 50 Fla. 121, 39 S. 181.

Possibility of seeing persons and things under given conditions may be shown by experiments made under like conditions. Healey v. Bartlett, 73 N. H. 110, 59 A. 617 (of testator's seeing and hearing attesting witnesses from the bed where he lay); Hauser v. P., 210 Ill. 253, 71 N. E. 416. The conditions, however, must be the same. Chicago, etc. R. Co. v. Crose, 214 Ill. 602, 73 N. E. 865, 105 Am. St. 135 (possibility of injured person seeing train because of intervening car).

490-52 Possibility of testator seeing and hearing witnesses attesting his will. Healey v. Bartlett, 73 N. H. 110, 59 A. 617.

Hearing sounds through walls and floor of adjoining rooms. Dow v. Bullfinch, 192 Mass. 281, 78 N. E. 416 (refusal to allow evidence of experiment held no error).

491-57 Krens v. S., 75 Neb. 294, 106 N. W. 27.

491-59 See S. v. Graham, 116 La. 779, 41 S. 90; S. v. Williams, 120 La. 175, 45 S. 94.

492-60 P. v. Weber, 149 Cal. 325, 86 P. 671 (evidence admitted as to firing bullets from pistol claimed to have been used by defendant).

Scattering of shot. — See S. v. Ronk, 91 Minn. 419, 98 N. W. 334.

492-61 S. v. Nowells (Ia.), 109 N. W. 1016 (with piece of decedent's shirt). See Hisler v. S., 52 Fla. 30, 42 S. 692; Lillie v. S., 72 Neb. 228, 100 N. W. 316.

492-63 See Hisler v. S., supra; P. v. Solani (Cal. App.), 91 P. 654.

Where the caliber and make was unknown but the weapon was shown to be an ordinary revolver, experiments with different calibers and makes and with different kinds of powder were held properly admitted. Lillie v. S., 72 Neb. 228, 100 N. W. 316.

492-64 See P. v. Solani (Cal. App.), 91 P. 654; Hisler v. S., 52 Fla. 30, 42 S. 692.

Cartridges of same kind need not be used where same pistol and cloth are used. S. v. Nowells (Ia.), 109 N. W. 1016; and see Lillie v. S., supra.

493-65 See Lillie v. S., supra.

493-67 See P. v. Solani (Cal. App.), 91 P. 654.

494-72 But see Louisville R. Co. v. Hoskins, 28 Ky. L. R. 124, 88 S. W. 1087 (experiment with a horse, other than the one used in a collision, to show time required to reach and cross the track, excluded); O'Dea v. R. Co., 142 Mich. 265, 105 N. W. 746 (time used by engineer to oil his engine—experiment excluded).

495-73 Child's ability to discharge pistol. See supra, 481-23.

495-74 See Boyd v. S., 84 Miss. 414, 36 S. 525; Davis v. Chemical Co., 121 App. Div. 242, 105 N. Y. S. 693.

Impregnation of water with a certain chemical may be shown by testing before the jury a sample of such water with litmus paper. Crabtree C. Min. Co. v. Hamby, 28 Ky. L. R. 687, 90 S. W. 226.

495-75 Cheetham v. R. Co., 26 R. I. 279, 58 A. 881. But see C. v. Tucker, 189 Mass. 457, 76 N. E. 127.

496-79 Hooker v. S., 98 Md. 145, 56 A. 390; Boyd v. S., 84 Miss. 414, 36 S. 525.

497-81 See Cheetham v. R. Co. 26 R. I. 279, 58 A. 881.

501-1 *Contra.* — Experiments made out of court are not admissible. S. v. Ronk, 91 Minn. 419, 98 N. W. 334. See Thiel v. Kennedy, 82 Minn. 142, 84 N. W. 657.

502-2 Wheeling etc. R. Co. v. Parker, 29 Ohio C. C. 1, 9 Ohio C. C. (N. S.) 28.

502-4 See Wheeling etc. R. Co. v. Parker, supra.

504-11 See Omaha St. R. Co. v. Larson, 70 Neb. 591, 97 N. W. 824.

But a non-expert may state the result of an experiment seen by him where the expert performing it shows the similarity of conditions. Krueger v. Mfg. Co. (Tex. Civ.), 85 S. W. 1156.

EXPERT AND OPINION EVIDENCE [Vol. 5.]

Professional ability, 520-12; *Calculating interest,* 553-13; *Infringement of copyright,* 602-90; *Experiments and tests,* 607-15; *Compelling witness to qualify himself,* 611-24; *Redirect examination,* 621-53; *Knowledge,* 701-11.

517-6 **An expert** is one possessing in regard to a particular subject or department of human activity knowledge not acquired by ordinary persons. Yates v. Garrett (Okla.), 92 P. 142.

520-12 See Crosby v. Wells, 73 N. J. L. 790, 67 A. 295.

Professional ability. — Elocutionist. A father is prima facie competent to express an opinion as to the elocutionary ability of his daughter. Cleveland etc. R. Co. v. Hadley (Ind. App.), 82 N. E. 1025.

521-14 Allen v. Field, 130 Fed. 641, 64 C. C. A. 19.

522-17 See Willet v. Johnson, 13 Okla. 563, 76 P. 174 (to connect physical condition with injuries alleged to be the cause thereof).

Malpractice. — In an action for failing to properly treat a fracture it has been held that there can be no recovery without the testimony of medical experts tending to show the lack of the requisite skill and care. Sheldon v. Wright (Vt.), 67 A. 807.

523-24 Allison v. Wall, 121 Ga. 822, 49 S. E. 831.

525-32 Meehan v. R. Co., 13 N. D. 432, 101 N. W. 183.

526-35 Nat. Bis. Co. v. Nolan, 138 Fed. 6, 70 C. C. A. 436; Mallory v. Brademyer, 76 Ark. 538, 89 S. W. 55; Denver etc. R. Co. v. Vitello, 34 Colo. 50, 81 P. 766; Smith v. Stevens, 33 Colo. 427, 81 P. 35; Star B. Co. v. Hauck, 222 Ill. 348, 78 N. E. 827; Riley v. Am. S. & W. Co., 129 Ill. App. 123; Star B. Co. v. Houck, 126 Ill. App. 608; S. v. Pack Co., 124 Ia. 323, 100 N. W. 59 (whether certain butter substitute bore the yellow color of true butter); Whalen v. Rosnosky (Mass.), 81 N. E. 282; Wolf v. Cordage Co., 189 Mass. 591, 76 N. E. 222; Meehan v. R. Co., 186 Mass. 511, 72 N. E. 61; Wilkerson v. R. Co., 126 Mo. App. 613, 105 S. W. 24; Dakan v. Merc. Co., 197 Mo. 238, 94 S. W. 944; P. v. Brown, 110 App. Div. 490, 96 N. Y. S. 957; Winters v. Naughton, 91 App. Div. 80, 86 N. Y. S. 439; Trickey v. Clark (Or.), 93 P. 457; Lee v. Salt Lake, 30 Utah 35, 83 P. 562; Va. Iron C. & C. Co. v. Tomlinson, 104 Va. 249, 51 S. E. 362; Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777 (dangerousness of chipping cast iron from a building with a cold chisel). But see Miera v. Ter. (N. M.), 81 P. 586, *quot.* from Taylor v. Monroe, 43 Conn. 36, as follows: "The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, . . . but whether the witnesses offered as experts have any peculiar knowledge or experience not common to the world, which renders their opinions . . . any aid to the court or jury."

526-36 Commissioners v. S. (Md.), 68 A. 602; Baltimore R. Co. v. Sattler, 100 Md. 306, 59 A. 652. See Kesselring v. Hummer, 130 Ia. 145, 106 N. W. 501; Kirby v. Tel. Co., 77 S. C. 404, 58 S. E. 10. *Contra,* The scope of expert evidence is not restricted to matters of science, art or skill, but extends to any subject in respect to which one may derive by experience special and peculiar knowledge. Zarnik v. Coal Co. (Wis.), 113 N. W. 752; Schwantes v. S., 127 Wis. 160, 106 N. W. 237. See also, Northern S. Co. v. Wangard, 123 Wis. 1, 100 N. W. 1066.

527-37 Chicago U. T. Co. v. Roberts, 229 Ill. 481, 82 N. E. 401; Goddard v. Enzler, 222 Ill. 462, 78 N. E. 805.

527-38 Denver etc. R. Co. v. Vitello, 34 Colo. 50, 81 P. 766; Chicago v. France, 124 Ill. App. 648; Chicago v. O'Donnell, 124 Ill. App.

78; Goddard v. Enzler, 123 Ill. App. 108; Martin v. Light Co., 131 Ia. 724, 106 N. W. 359; Tighe v. R. Co. (Mo. App.), 107 S. W. 1034; Roscoe v. R. Co., 202 Mo. 576, 101 S. W. 32; Central City v. Marquis, 75 Neb. 233, 106 N. W. 221; Winters v. Naughton, 91 App. Div. 80, 86 N. Y. S. 439 (that a trench was not a safe place to work and that the sheathing or bracing was not properly constructed); Burns v. Crow, 107 N. Y. S. 944 (safety of scaffold); Carron v. Refg. Co., 106 N. Y. S. 723 (dangerousness of running more than one board through saw); O'Dogherty v. Cable Co., 113 App. Div. 636, 99 N. Y. S. 351 (that boiler explosion was due to failure to repair); Dolan v. Safe Co., 105 App. Div. 366, 94 N. Y. S. 241; Lane v. R. Co., 93 App. Div. 40, 86 N. Y. S. 947; St. Louis etc. R. Co. v. Gunter (Tex. Civ.), 99 S. W. 152; Jesse v. S., 46 Tex. Cr. 444, 80 S. W. 999 (person's capacity to do certain work on the roads—on prosecution for failure to respond to a summons); Metropolitan Ins. Co. v. Wagner (Tex. Civ.), 109 S. W. 1120; Houston etc. R. Co. v. McHale (Tex. Civ.), 105 S. W. 1149; Smith v. R. Co., 33 Utah 129, 93 P. 185; Hamann v. Bridge Co., 127 Wis. 550, 106 N. W. 1081; Johnson v. Highland, 124 Wis. 597, 102 N. W. 1085; Lounsbury v. Davis, 124 Wis. 432, 102 N. W. 941. See Richardson v. S., 145 Ala. 46, 41 S. 82; Carty v. Boeseke, 2 Cal. App. 646, 84 P. 267; Chicago v. McNally, 227 Ill. 14, 81 N. E. 23; Illinois C. R. Co. v. Smith, 208 Ill. 608, 70 N. E. 628.

Which of two causes produced a given result—opinions of experts not admissible where the conditions necessary for the operation of the causes can be so described that jury can understand them and intelligently form an opinion. Meehan v. R. Co., 13 N. D. 432, 101 N. W. 183. See also, Castner etc. Co. v. Davies, 154 Fed. 938.

Whether physical condition was result of given cause, where this is the issue, cannot be asked an expert—question must ask whether it could or might be the result. Lutz v. R. Co., 123 Mo. App. 499, 100 S. W. 46; Smart v. Kan. City, 208 Mo. 162, 105 S. W. 709; Thomas v. R. Co., 125 Mo. App. 131, 100 S. W. 1121; Spaulding v. Edina, 122 Mo. App. 65, 97 S. W. 545; Mayes v. R. Co., 121 Mo. App. 614, 97 S. W. 612; Glasgow v. R. Co., 191 Mo. 347, 89 S. W. 915; Elgin etc. Co. v. Wilcox, 132 Ill. App. 446; Centralia v. Ayres, 133 Ill. App. 290. But see Redmon v. R. Co., 185 Mo. 1, 84 S. W. 26; Wood v. R. Co., 181 Mo. 433, 81 S. W. 152. *Compare* Kehoe v. R. Co., 56 Misc. 138, 106 N. Y. S. 196; Chicago C. R. Co. v. Foster, 128 Ill. App. 571. *Contra,* Chicago v. Didier, 227 Ill. 571, 81 N. E. 698 (it is unnecessary to ask whether the condition "might" have been caused by the injuries). See "INJURIES TO PERSON," Vol. 7, p. 370, and Sullivan v. R. Co., 185 Mass. 602, 71 N. E. 90; Ahern v. R. Co., 102 Minn. 435, 113 N. W. 1019. But see Smart v. Kan. City, 208 Mo. 162, 105 S. W. 709.

Whether machinery should have been guarded. — Opinion incompetent. Marks v. Mills, 135 N. C. 287, 47 S. E. 432. *Compare* Bennett v. Mfg. Co. (N. C.), 61 S. E. 463; Carlin v. Kennedy, 97 Minn. 141, 106 N. W. 340; Nat. Bis. Co. v. Nolan, 138 Fed. 6, 70 C. C. A. 436. See also Morgan v. Mfg. Co., 120 Mo. App. 598, 97 S. W. 638 (sufficiency of guard).

Competency of employe, in an action for injuries due to his alleged negligence—opinion inadmissible. Purkey v. C. & T. Co., 57 W. Va. 595, 50 S. E. 755. See also Cherokee etc. Co. v. Dickson, 55 Kan. 62, 39 P. 691; Stoll v. Min. Co., 19 Utah 271, 57 P. 295. But see First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S. 822 (whether elevator-boy was wide-awake and attentive—competent); Lake etc. R. Co. v. Fitzgerald, 112 Ill. App. 312 (opinions of experts who had previously examined men to determine fitness for promotion, competent); El Paso etc. R. Co. v. Smith (Tex. Civ.), 108 S. W. 988; Kansas City etc. R. Co. v. Taylor (Tex. Civ.), 107 S. W. 889 (that he was a careless, ignorant fellow, slow, unsatisfactory and unreliable, competent); United O. & R. Co. v. Grey (Tex. Civ.), 102 S. W. 934 (competency of agent or servant in action for wrongful discharge); Consumer's C. Oil Co. v. Jonte, 36

Tex. Civ. 18, 80 S. W. 847 (opinion of foreman that servant causing the injury was "reliable," admissible).

What is reasonable time for performance of an act, when this the question in issue. Allison v. Wall, 121 Ga. 822, 49 S. E. 831. See infra, 711-43. But see Texas etc. R. Co. v. Walker (Tex. Civ.), 95 S. W. 743.

Mental capacity to contract. — When this is the issue the witness cannot give his opinion that person had sufficient capacity, though he may state his opinion of the person's sanity after detailing the facts on which the opinion is based. Nashville etc. R. Co. v. Brundige, 114 Tenn. 31, 84 S. W. 805. See "INSANITY," and Denver etc. R. Co. v. Scott, 34 Colo. 99, 81 P. 763.

529-39 See Central etc. R. Co. v. McClifford, 120 Ga. 90, 47 S. E. 590; Wood v. R. Co., 181 Mo. 433, 81 S. W. 152.

The mere fact that the answer of an expert may decide the very question at issue is no ground of objection. Galveston etc. R. Co. v. Henefy (Tex. Civ.), 99 S. W. 884.

When based upon undisputed facts or assumed facts warranted by the record, opinions may be given as to the very point the jury are to decide. Zarnik v. Coal Co. (Wis.), 113 N. W. 752. See also Hamann v. Bridge Co., supra.

529-40 U. S. v. Greene, 146 Fed. 801 (construction of contract); Wright v. R. Co., 130 Fed. 843, 65 C. C. A. 327.

530-45 Expert capacity is wholly relative to the subject of the particular question. Conley v. Gaslight Co., 99 Me. 57, 58 A. 61.

530-46 Conley v. Gaslight Co., supra.

530-47 McAllister-C. Co. v. Matthews (Ala.), 43 S. 747; Matthews v. Farrell, 140 Ala. 298, 37 S. 325; Schlessinger & M. v. Scheunemann, 114 Ill. App. 459; Riley v. R. Co., 70 N. J. L. 289, 57 A. 445 (qualifications must appear from the evidence when objection on this ground); Epstein v. Trans. Co., 101 N. Y. S. 793; Dolan v. Safe Co., 105 App. Div. 366, 94 N. Y. S. 241; Gulf etc. R. Co. v. Harrison (Tex. Civ.), 104 S. W. 399.

532-48 When witness need not be an expert. — A non-expert may testify to facts known to or observed by him where no special knowledge or skill is required for the intelligent statement or observation of such facts. Gunkel v. Seiberth, 27 Ky. L. R. 455, 85 S. W. 733; Beier v. Trans. Co., 197 Mo. 215, 94 S. W. 876; Davis v. S., 141 Ala. 62, 37 S. 676; Fletcher v. Prestwood, 143 Ala. 174, 38 S. 847 (capacity of saw mill); Thomas v. S., 139 Ala. 80, 36 S. 734; P. v. Weber, 149 Cal. 325, 86 P. 671; Chess & W. Co. v. Gohagan, 32 Ky. L. R. 372, 105 S. W. 890; S. v. Lyons, 113 La. 959, 37 S. 890; Wells v. Ter., 14 Okla. 436, 78 P. 124 (description of wounds examined by witness); M. K. & T. R. Co. v. Hollan (Tex. Civ.), 107 S. W. 642; Park v. R. Co. (Wash.), 93 P. 442 (effect of fumes and smoke on plant life may be testified to although witness cannot give scientific explanation thereof). *Compare* Wenchell v. Stevens, 30 Pa. Super. 527. And this rule applies even though the facts testified to relate to or form part of other matters or occurrences which require expert knowledge to qualify a witness to testify concerning them. Krueger v. Mfg. Co. (Tex. Civ.), 85 S. W. 1156.

532-49 But mere casual observation, superficial reading, or slight oral instruction is not sufficient. Conley v. Gaslight Co., 99 Me. 57, 58 A. 61.

533-50 Gilmore v. Am. T. & S. Co., 79 Conn. 498, 66 A. 4 (expert on presses, incompetent on belt lacings).

533-51 Consol. G. Co. v. Mayor (Md.), 65 A. 628.

533-53 Hupfer v. Dist. Co., 127 Wis. 306, 106 N. W. 831.

535-59 Rice v. S., 49 Tex. Cr. 569, 94 S. W. 1024 (medical expert —opinion that death was caused by strychnine poison), *cit.* "Encyc. of Ev." See Consol. G. Co. v. Mayor, supra (experts on taxation). But see Kath v. R. Co., 121 Wis. 503, 99 N. W. 217 (medical expert cannot state what he learns entirely from medical works unsupported by practical experience of his own); Richmond etc. R. Co. v. Rubin, 102 Va. 800, 47 S. E. 834.

That knowledge was acquired from laboratory experiments only and not

from actual experience goes merely to the credibility of the expert. Koshinski v. Steel Co., 231 Ill. 198, 83 N. E. 149.

Hypnotism as an anaesthetic. Surgeon held competent to testify that hypnotism could be used as an anaesthetic, though they had had no actual experience or practice in the matter. S. v. Donovan, 128 Ia. 44, 102 N. W. 791.

535-60 Williamson I. Co. v. McQueen, 144 Ala. 265, 40 S. 306; Rice v. County, 46 Or. 574, 81 P. 358; Bardsley v. Gill & Co. (Pa.), 66 A. 1112; McDonald v. Sundstrom, 31 Pa. Super 241.

536-61 Yates v. H. & H. Co., (Ala.), 39 S. 647. But see Port H. Mach. Co. v. Bragg (Neb.), 109 N. W. 398.

One instance or experience is not sufficient basis for an opinion as to the general rule or result in such cases. Gulf etc. R. Co. v. Kimble (Tex. Civ.), 109 S. W. 234; Currelli v. Jackson, 77 Conn. 115, 58 A. 762 (frozen dynamite).

538-66 Blasting. — Witness familiar with blasting in city street but not in stone quarries is incompetent as to possibility of protecting persons while blasting in stone quarries. McMahon v. Bangs 5 Penne. (Del.) 178, 62 A. 1098.

539-70 See Ireland v. White, 102 Me. 233, 66 A. 477; Spaulding v. Edina, 122 Mo. App. 65, 97 S. W. 545; McConnell v. S. (Neb.), 110 N. W. 666; Walters v. Rock (N. D.), 115 N. W. 511; Hildebrand v. Artisans (Or.), 91 P. 542; S. v. Megorden (Or.), 88 P. 306; Taylor v. Woodmen, 42 Wash. 304, 84 P. 867; Bowers v. S., 122 Wis. 163, 99 N. W. 447. But see Kath v. R. Co., 121 Wis. 503, 99 N. W. 217.

Experience with the particular kind of a case in question is not necessary. Flaherty v. Gas Co., 30 Pa. Super. 446 (physicians of long practice and high standing competent to express opinion that death was result of inhalation of gas, although they have never before treated or specially observed such a case).

As affected by school of medicine. See Grainger v. Still, 187 Mo. 197, 85 S. W. 1114 (osteopath); Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655 (regular physician or surgeon competent as to propriety and effect of treatment given by magnetic healer consisting of manipulations of the patient's body); and "PHYSICIANS AND SURGEONS," Vol. 9, p. 848.

540-71 An undertaker of twenty years' experience, who had seen and examined wounds on dead men, held competent to testify from his examination of certain wounds, that they were fatal. Cecil v. Smith (Tex. Cr.), 100 S. W. 390.

541-74 Macon R. & L. Co. v. Mason (Ga.), 51 S. E. 569.

A medical student who has merely attended lectures on mental diseases is not competent as an expert on insanity. Hamilton v. U. S., 26 App. D. C. 382.

541-75 Contra by statute. — S. v. Howard, 120 La. 311, 45 S. 260. But such statute does disqualify the physician from testifying as a non-expert. Hocking v. Spring Co., 131 Wis. 532, 111 N. W. 685.

An osteopath, graduated from a school whose curriculum embraces courses on physiology and anatomy and who has since gained a practical knowledge of nervous diseases, may testify as an expert as to the nature and probable duration of nervous disorders alleged to be due to personal injuries, although he is not licensed to administer drugs. Macon R. & L. Co. v. Mason, 123 Ga. 773, 51 S. E. 569.

542-76 A mere license alone is insufficient to qualify a witness to testify whether gunshot wound caused death, where he is not a graduate of any school of medicine, has read no books on surgery, and is not at all familiar with gunshot wounds. Smith v. S. (Tex. Cr.), 99 S. W. 100.

542-77 Schley v. S., 48 Fla. 53, 37 S. 518; Rice v. S., 49 Tex. Cr. 569, 94 S. W. 1024 (*dist.* Burt v. S., 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305); Soquet v. S., 72 Wis. 659, 40 N. W. 391.

543-81 See Woodstock I. Wks. v. Kline (Ala.), 43 S. 362; St. Louis etc. R. Co. v. Plumlee, 78 Ark. 147, 95 S. W. 442 (improper construction of handcar—section hand of one and a half years' experience held competent); Atlantic etc. R. Co. v. Crosby, 53 Fla. 400, 43 S. 318; Gulf etc. R. Co. v. Wynne (Tex. Civ.),

91 S. W. 823 (civil engineer); Gulf etc. R. Co. v. Tullis (Tex. Civ.), 91 S. W. 317 (stationary engineer held competent as to certain matters relating to locomotive engine).

547-90 See Wordan v. S., 143 Ala. 13, 39 S. 406 (witness may state extent of his experience); Salmon v. Rathjens (Cal.), 92 P. 733 (party producing an expert is entitled to question him not only to show his competency, but also the value of his testimony—as by showing his peculiar or unusual experience in the matters in issue).

548-93 See Groff v. Groff, 209 Pa. 603, 59 A. 65.

548-94 Glover v. S., 129 Ga. 717, 59 S. E. 816; Yates v. Garrett (Okla.), 92 P. 142.

Although a physician denies that he is an expert, his opinion is competent where he shows himself to be very familiar with the matter in controversy. S. v. Daly (Mo.), 109 N. W. 53. See Spaulding v. Edina, 122 Mo. App. 65, 97 S. W. 545.

549-98 Rice v. County, 46 Or. 574, 81 P. 358. But see Dolan v. Safe Co., 105 App. Div. 366, 94 N. Y. S. 241.

549-1 Gila Val. etc. R. Co. v. Lyon, 9 Ariz. 218, 80 P. 337; Mabry v. Randolph (Cal. App.), 94 P. 403; Ft. Collins D. R. Co. v. France (Colo.), 92 P. 953; Atlantic etc. R. Co. v. Crosby, 53 Fla. 400, 43 S. 318; Schley v. S., 48 Fla. 53, 37 S. 518; Glover v. S., 129 Ga. 717, 59 S. E. 816; LaPorte Car Co. v. Sullender (Ind. App.), 71 N. E. 922; S. v. Daly (Mo.), 109 S. W. 53; Spaulding v. Edina, 122 Mo. App. 65, 97 S. W. 545; Schrodt v. St. Joseph, 109 Mo. App. 627, 83 S. W. 543; Hope v. R. Co., 211 Pa. 401, 60 A. 996; Commerce M. & G. Co. v. Gowan (Tex. Civ.), 104 S. W. 916; El Paso etc. R. Co. v. Smith (Tex. Civ.), 108 S. W. 988; Place v. R. Co. (Vt.), 67 A. 545; Schwantes v. S., 127 Wis. 160, 106 N. W. 237 (both the qualifications of witness and question whether subject is proper one for expert testimony).

When determined. — The competency of the witness need not be determined until the question is asked, since expert capacity is a matter wholly relative to the subject of the particular question. Conley v. Gaslight Co., 99 Me. 57, 58 A. 61.

550-3 Corse Co. v. Grain Co., 94 Minn. 331, 102 N. W. 728; Multnomah County v. Tow. Co. (Or.), 89 P. 389. See Texas & P. R. Co. v. Warner (Tex. Civ.), 93 S. W. 489.

551-4 Dallas etc. R. Co. v. English (Tex. Civ.), 93 S. W. 1096 (although the evidence is such that an opposite ruling would be sustained, it does not necessarily show abuse of discretion); Ft. Collins D. R. Co. v. France (Colo.), 92 P. 953; Atlantic etc. R. Co. v. Crosby, 53 Fla. 400, 43 S. 318; Schley v. S., 48 Fla. 53, 37 S. 518; Burns v. Tel. Co., 70 N. J. L. 745, 59 A. 220, 592; Horne v. L. & P. Co., 144 N. C. 375, 57 S. E. 19; Multnomah County v. Tow. Co. (Or.), 89 P. 389; Place v. R. Co. (Vt.), 67 A. 545; Va. Iron C. & C. Co. v. Tomlinson, 104 Va. 249, 51 S. E. 362; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

553-13 See Bode v. S. (Neb.), 113 N. W. 996; Kannow v. Assn. (Neb.), 107 N. W. 563.

While an expert accountant may show the results of complicated calculations or the footings of columns of figures, he cannot state his conclusion from an examination of books that the profits were a certain amount. Smythe v. Evans, 209 Ill. 376, 70 N. E. 906. See Crawford v. Roney, 126 Ga. 763, 55 S. E. 499; Brown v. U. S., 142 Fed. 1, 73 C. C. A. 187 (competent as to general results shown by books of account).

What an inspection would show. Inadmissible conclusion. McKone v. Ins. Co., 131 Wis. 243, 110 N. W. 472. See also Morgan v. Barber (Tex. Civ.), 99 S. W. 730.

Calculating interest. — The jury are as capable of computing interest as an expert accountant, hence his testimony as to amount of interest due on certain payments is properly excluded. Clements v. Mutersbaugh, 27 App. D. C. 165.

553-14 Marketable quality of hay. — Eaton v. Blackburn (Or.), 88 P. 303. So a fruit expert may testify that apples merchantable when sold, could not have reached the condition in which they were shown to have been five days later. Jones v. Emerson, 41 Wash. 33, 82 P. 1017.

554-20 *Contra.* — Trammel v. Turner (Tex. Civ.), 82 S. W. 325 (sufficiency of fence to turn cattle of ordinary breaching disposition—expert opinion admissible).

555-21 See Myers v. City (N. C.), 59 S. E. 674 (farmers who have examined land but have had no previous acquaintance therewith, are competent as to what it will yield after the construction of a sewer which causes water to stand on it); Chicago etc. R. Co. v. Longbottom (Tex. Civ.), 80 S. W. 542 (what yield would have been but for overflow). *Compare* Dennis v. L. & W. Co. (Cal. App.), 91 P. 425.

555-22 Barker v. Cotney, 142 Ala. 566, 38 S. 131 (experienced cotton farmer competent to estimate yield of cotton on land seen by him).

Whether there was a good stand of melons in a crop which he saw growing—opinion of experienced farmer competent although he had never grown melons. Colo. F. etc. Co. v. York, 38 Colo. 239, 88 P. 181.

556-24 Estimate of loss in weight of cattle caused by change in feed from shocked corn to straw, cane and like fodder, competent. Enlow v. Hawkins, 71 Kan. 633, 81 P. 189. *Compare* Atchison etc. R. Co. v. Watson, 71 Kan. 696, 81 P. 499.

Pedigree of foal. — Opinions competent as to whether foal was offspring of certain mare and stallion, or of another mare and stallion of different breeds. Brady v. Shirley, 18 S. D. 608, 101 N. W. 886. *Compare* Miller v. Ter. (Ariz.), 80 P. 321 (experienced stockmen who have observed a mare and a colt following her, may testify that colt belonged to the mare).

556-27 Walters v. Stacey, 122 Ill. App. 658 (of boars in same enclosure to fight).

557-30 Ft. Worth etc. R. Co. v. Hagler (Tex. Civ.), 84 S. W. 692 (witness held qualified to testify that cattle when shipped were afflicted with "dry murrain").

Proper treatment for sick horse—veterinarian competent. Welch v. Fransioli, 46 Wash. 530, 90 P. 644.

Texas fever — Medical testimony unnecessary. — A farmer and cattle raiser who has had experience with cattle infected with Texas fever is enough of an expert to give an opinion that cattle died from this disease. Yates v. Garrett (Okla.), 92 P. 142.

557-31 See Walters v. Stacey, 122 Ill. App. 658 (whether wounds on a boar might or could have been inflicted by another boar); Keyes-M. etc. Co. v. R. Co., 105 Mo. App. 556, 80 S. W. 53.

558-34 Estimate of weight and shrinkage of cattle shipped on railroad. St. Louis etc. R. Co. v. Dodson (Tex. Civ.), 97 S. W. 523.

559-35 Kennon v. S., 46 Tex. Cr. 350, 82 S. W. 518 (that fast driving makes cattle scour frequently).

559-36 International etc. R. Co. v. Nowaski (Tex. Civ.), 106 S. W. 437; St. Louis etc. R. Co. v. Rogers (Tex. Civ.), 108 S. W. 1027; St. Louis etc. R. Co. v. Boshear (Tex. Civ.), 108 S. W. 1032; St. Louis etc. R. Co. v. Dodson (Tex. Civ.), 97 S. W. 523; Texas etc. R. Co. v. Walker (Tex. Civ.), 95 S. W. 743. See Farmers' Bk. v. R. Co., 119 Mo. App. 1, 95 S. W. 286; Texas & P. R. Co. v. Stewart (Tex. Civ.), 96 S. W. 106. But see Texas & P. R. Co. v. Slator (Tex. Civ.), 102 S. W. 156; St. Louis etc. R. Co. v. Gunter (Tex. Civ.), 99 S. W. 152 (whether shipment was as rapid as possible, inadmissible).

That the cause of bad condition of cattle was improper transportation and handling, too great delay, and being jerked and switched about improperly—opinion inadmissible. Texas & P. R. Co. v. Felker (Tex. Civ.), 90 S. W. 530.

Ordinary loss of weight caused by shipment of cattle. Atchison etc. R. Co. v. Watson, 71 Kan. 696, 81 P. 499. *Compare* Enlow v. Hawkins, supra, 556-24.

Reasonable time for shipment. — See infra, 711-43.

Reasonable delay. — Expert testimony that two hours' delay at a junction point for making up trains, getting orders and clearing tracks was reasonable, is competent. Chicago etc. Co. v. Kapp, 37 Tex. Civ. 203, 83 S. W. 233. See also Chicago etc. R. Co. v. Carroll 36 Tex. Civ. 359, 81 S. W. 1020.

559-37 See Tuttle v. Moody (Tex. Civ.), 94 S. W. 134.

559-40 Farrell v. Sturtevant Co., 194 Mass. 431, 80 N. E. 469 (method of moving derrick); Levy v. Tiger,

90 N. Y. S. 366 (whether it was necessary to do any shoring up in the reconstruction of a particular building); Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69 (unusual length of span). See Fraternal Const. Co. v. Mach. Co., 28 Ky. L. R. 383, 89 S. W. 265.

Carpenter. — Cause of breaking of plate glass window. — Carpenter of some experience in setting broken plate glass may give his opinion. Drouin v. Wilson (Vt.), 67 A. 825.

Cost of building. — Opinion or estimate inadmissible where actual cost can be determined. Israels v. McDonald, 107 N. Y. S. 826.

That constant use of a maple floor makes it smooth and slippery may be testified to by witnesses familiar with such floors. Aeme H. Co. v. Chittick, 230 Ill. 558, 82 N. E. 647.

Safety of block and hook used by painter. Anderson v. Fielding, 92 Minn. 42, 99 N. W. 357.

Safety of scaffold, where it is the issue before the jury, cannot be directly testified to by an expert, though he may state the strength and character of materials used and the proper method of construction. Burns v. Crow, 107 N. Y. S. 944.

Quality of building stone. — Witness who has for years been in business of building, and selling building stone may testify as to its quality. Keim v. City, 32 Pa. Super. 613.

560-42 See Bowen v. Lumb. Co., 3 Cal. App. 312, 84 P. 1010; Rice v. County, 46 Or. 574, 81 P. 358.

561-43 Sullivan & Co. v. Owens (Tex. Civ.), 90 S. W. 690 (customary rate of exchange).

Adequacy of security for loan. Whether prudent business man would loan given amount on a certain security, — opinion of money lender competent. In re Roach (Or.), 92 P. 118.

562-49 See infra, 595-56. But see Central v. Marquis, 75 Neb. 233, 106 N. W. 221 (bridge).

Proper manner of constructing a trestle for a logging railroad. Bundy v. Lumb. Co., 149 Cal. 772, 87 P. 622. See also Bowen v. Lumb. Co., 3 Cal. App. 312, 84 P. 1010.

Improper construction of support for bridge-engineering expert competent to testify thereto. Dutton v. R. Co., 32 Pa. Super. 630.

Dangerous character of pavement. Whether a pavement of material not in common use was laid at such a pitch as to be dangerous is a proper matter for the opinion of a witness of many years of experience in laying that kind of pavement. Garberg v. Samuels, 27 R. I. 359, 62 A. 211.

562-50 Life of bridge timber. See supra, 560-42, and Rice v. County, 46 Or. 574, 81 P. 358 (witness of many years' experience held competent).

562-51 Effect of unsound timber in a trestle is matter of common knowledge and not proper subject of expert testimony. Bowen v. Lumb. Co., 3 Cal. App. 312, 84 P. 1010.

563-53 Nussbaumer v. S. (Fla.), 44 S. 712; Stowell v. Oil Co., 139 Mich. 18, 102 N. W. 227.

Effect of bichloride of mercury on the human face. Cooks v. Drug Co., 13 Haw. 681.

Identity of compounds may be shown, in patent infringement suit, by chemists who have made analysis. Badische A. & S. F. v. Klipstein, 125 Fed. 543.

564-58 *Compare.* — St. Louis etc. R. Co. v. Morris, 76 Ark. 542, 89 S. W. 846; Elliott v. Ferguson, 37 Tex. Civ. 40, 83 S. W. 56.

564-60 Denver C. Elec. Co. v. Walters, 39 Colo. 301, 89 P. 815 (sufficiency of insulation); Jacksonville Elec. Co. v. Sloan, 52 Fla. 257, 42 S. 516 (whether precautions were necessary in repairing broken electric wire); Goddard v. Enzler, 222 Ill. 462, 78 N. E. 805; Warren v. R. Co., 141 Mich. 298, 104 N. W. 613 (effectiveness of particular kind of insulator and tendency to cease using them in places where formerly used); Berneer v. Gas Light Co., 92 Minn. 214, 99 N. W. 778 (how long defect in insulation of wires had existed), North Amhert etc. Tel. Co. v. Jackson, 4 Ohio C. C. (N. S.) 386 (safety of insulator); Citizens' Tel. Co. v. Thomas (Tex. Civ.), 99 S. W. 879. See Quincy Co. v. Schmitt, 123 Ill. App. 647; Martin v. Light Co. (Ia.), 106 N. W. 359; Meehan v. R. Co., 186 Mass. 511, 72 N. E. 61.

Proper construction — hypothetical question as to whether certain con-

struction of electrical wires was proper. German-Am. Ins. Co. v. N. Y. etc. Co., 103 App. Div. 310, 93 N. Y. S. 46.

564-61 N. J. etc. R. Co. v. Tutt, 168 Ind. 205, 80 N. E. 420 (sufficiency of tile to carry water under railroad embankment); Risley & Sons v. Devel. Co. (N. J. L.), 69 A. 192 (whether bulkhead would better resist storms with or without filling of sand); Dutton v. R. Co., 32 Pa. Super. 630.

Conformity of work to specifications. — Engineer may testify whether a portion of construction work was within the specifications for that portion, but not whether it was authorized by the contract as a whole, since this would be construing the contract, which is for the court. U. S. v. Greene, 146 Fed. 801.

565-62 But see U. S. v. Hung Chang, 126 Fed. 400, holding a Chinese inspector, who had not made a study of the racial characteristics of the Chinese, incompetent as to whether one charged with being unlawfully in the U. S. was of Chinese descent, and ruling the same as to one calling himself a Chinaman, but acknowledging his inability to distinguish between Chinese, Japanese, or Koreans, except by the language and arrangement of the hair.

565-63 Currelli v. Jackson, 77 Conn. 115, 58 A. 762 (frozen dynamite); Remsberg v. Cement Co., 73 Kan. 66, 84 P. 548 (effect of explosion of dynamite on persons and buildings within certain radius).

Explosive oils. — Bardsley v. Gill & Co. (Pa.), 66 A. 1112; Stowell v. Oil Co., 139 Mich. 18, 102 N. W. 227 (kerosene); Waters-P. Oil Co. v. Snell (Tex. Civ.), 106 S. W. 170.

Cause of explosion of gasoline — opinion competent. Block v. Ins. Co. (Wis.), 112 N. W. 45.

566-65 See Sun Ins. Off. v. Mill Co., 72 Kan. 41, 82 P. 513; Dakan v. Merc. Co., 197 Mo. 238, 94 S. W. 944.

566-66 Effect of fire on trees and hedges — opinion of expert competent. Chicago etc. R. Co. v. Mosher (Kan.), 92 P. 554.

567-68 Substitute for butter. But see S. v. Pack. Co., 124 Ia. 323, 100 N. W. 59.

567-70 But see White v. Ins. Co., 120 App. Div. 260, 105 N. Y. S. 87.

567-71 See S. v. Remington (Or.), 91 P. 473 (whether certain caliber bullet would make hole the size of one in picket shown witness, although the picket and the mashed bullet were before the jury).

Experience with firearms is necessary before witness can testify to size and caliber of ball used in a homicide. Ripley v. S. (Tex. Cr.), 100 S. W. 943.

Character of weapon. — Opinion based solely on the report heard by the witness. S. v. Graham, 116 La. 779, 41 S. 90.

567-74 Brunelle v. Elec. L. Corp., 194 Mass. 407, 80 N. E. 466 (construction of ordinance). See infra, 699-7.

Opinion on mixed question of law and fact is inadmissible. Gulf etc. R. Co. v. Kimble (Tex. Civ.), 109 S. W. 234; Houston etc. R. Co. v. Davis (Tex. Civ.), 109 S. W. 422.

568-75 Walters v. Mitchell (Cal. App.), 92 P. 315 (marketable title); Hirsch v. Beverly, 125 Ga. 657, 54 S. E. 678.

569-77 Crane & Co. v. Fry, 126 Fed. 278, 61 C. C. A. 260 (proper conduct and management of log boom and what is practicable to be done in its operation); Dell v. McGrath, 92 Minn. 187, 99 N. W. 629 (that certain number of men were necessary to do certain work with safety); Ives v. Lumb. Co. (N. C.), 61 S. E. 70 (sufficiency of rafting gear); Wall v. Melton (Tex. Civ.), 94 S. W. 358 (that method described by another witness was not a correct method for estimating amount of timber cut). See Louisville & N. R. Co. v. Morton, 28 Ky. L. R. 355, 89 S. W. 243, and supra, 562-49.

But a non-expert who has actually measured the timber on a piece of land can testify to the result of his estimate. Park v. S. & R. Co. (Wash.), 92 P. 442.

570-78 See Yates v. H. & H. Co. (Ala.), 39 S. 647; Espenlaub v. Ellis, 34 Ind. App. 163, 72 N. E. 527; German Ins. Co. v. R. Co., 128 Ia. 386, 104 N. W. 361 (fire arresting appliances on engines); Kernan v

Crook, 100 Md. 210, 59 A. 753; Carr v. Locomotive Co., 26 R. I. 180, 58 A. 678; Delmar Oil Co. v. Bartlett (W. Va.), 59 S. E. 634. But see Gomes v. Cord. Co., 187 Mass. 124, 72 N. E. 840; Hamann v. Bridge Co., 127 Wis. 550, 106 N. W. 1081.

Customary methods. — Redhead v. Dredg. Co., 116 App. Div. 34, 101 N. Y. S. 301. Customary use of oil pans and drains to prevent floor from becoming oily. Knickerbocker Ice Co. v. Gray (Ind.), 84 N. E. 341. That it was not customary to put inexperienced men at work on machines like those in question, and the reasons why. Gammel-S. Pub. Co. v. Monfort (Tex. Civ.), 81 S. W. 1029.

Dangerousness of machine to boy of certain age operating same is question for jury and not for experts. Anderson v. Brass Co., 127 Wis. 273, 106 N. W. 1077. See also Coe v. Van Why, 33 Colo. 315, 80 P. 894; Vollman etc. Co. v. Spry, 26 Ky. L. R. 228, 80 S. W. 1092 (that boy of sixteen would not appreciate danger of operating a joiner with the safety board removed); Va. Iron etc. Co. v. Tomlinson, 104 Va. 249, 51 S. E. 362. *Contra*, Punkowski v. Leather Co., 4 Penne. (Del.) 544, 57 A. 559. See also Gammel-S. Pub. Co. v. Monfort (Tex. Civ.), 81 S. W. 1029; Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777, and infra, 683-53.

Possibility of equipping machinery with guards. — Carlin v. Kennedy, 97 Minn. 141, 106 N. W. 340; McGinnis v. Print. Co., 122 Mo. App. 227, 99 S. W. 4 (practicability). See also Ford v. Coal Co., 30 Ky. L. R. 698, 99 S. W. 609; Morgan v. Mfg. Co., 120 Mo. App. 590, 97 S. W. 638. *Compare* Bennett v. Mfg. Co. (N. C.), 61 S. E. 463, holding injured person could properly testify that the shield, which had been on the machine, but which had been taken away, would have prevented the injury.

Typewriting machine. — As bearing on the question whether certain typewritten documents were made on a certain machine, an expert may testify as to the correspondence between peculiarities of such machine, and the writings, and the improbability that any two machines would have the same peculiarities. S. v. Freshwater, 30 Utah 442, 85 P. 447.

570-79 See Hammer v. Janowitz, 131 Ia. 20, 108 N. W. 109 (proper method of constructing crane); Chicago etc. R. Co. v. Denton (Tex. Civ.), 101 S. W. 452.

Steam-pipe. — Whether use of cast iron pipe was dangerous under the circumstances and whether the bursting resulted from use of such pipe. Erickson v. Am. etc. Co., 193 Mass. 119, 78 N. E. 761.

Necessity of spark arrester on traction engine. Underwood v. Stevens, 149 Mich. 39, 112 N. W. 487.

Safety of appliances used on pile driver. Koon v. R. Co., 69 S. C. 101, 48 S. E. 86 (whether pulley like one in question was safe or unsafe for the purpose for which used); Wabash S. D. Co. v. Black, 126 Fed. 721, 61 C. C. A. 639. But see Trickey v. Clark (Or.), 93 P. 457.

570-80 U. S. Heater Co. v. Jenss, 128 Wis. 162, 107 N. W. 293 (rated capacity of heater boiler); Odegard v. Lumber Co., 130 Wis. 659, 110 N. W. 809 (sawmill machinery).

571-82 Siegel Cooper & Co. v. Treka, 218 Ill. 559, 75 N. E. 1053; Obermeyer v. Mfg. Co., 120 Mo. App. 59, 96 S. W. 673. See Starer v. Stern, 100 App. Div. 393, 91 N. Y. S. 821.

571-83 Williamson I. Co. v. McQueen, 144 Ala. 265, 40 S. 306 (furnace). See Starer v. Stern, 100 App. Div. 393, 91 N. Y. S. 821. But see Lounsbury v. Davis, 124 Wis. 432, 102 N. W. 941.

572-84 Punkowski v. Leather Co., 4 Penne. (Del.) 544, 57 A. 559 (proper method of operation); Scarlotta v. Ash, 95 Minn. 240, 103 N. W. 1025 (that machinery was working properly); Wofford v. Mills, 72 S. C. 346, 51 S. E. 918 (what one would have to do to get his hands caught in a machine in a certain manner); Hocking v. Spring Co., 131 Wis. 532, 111 N. W. 685 (that die was improperly set). See Vollman etc. Co. v. Spry, 26 Ky. L. R. 228, 80 S. W. 1092 (constructon of a joiner and effect of attempting to operate it without a safety board); Gammel-S. Pub. Co. v. Monfort (Tex. Civ.), 81 S. W. 1029; Thomson v. Shingle Co., 43 Wash. 253, 86 P. 588 (experienced sawyer may

testify as to customary manner of guarding saw, as may also a millwright and contractor); Johnson v. Highland, 124 Wis. 597, 102 N. W. 1085.

Dangerousness of method of operating a machine. Swarts v. Mfg. Co., 115 App. Div. 739, 100 N. Y. S. 1054 (that it would have been less dangerous for spindles, on which plaintiff was injured while working, to revolve outwardly instead of inwardly). *Contra,* Carron v. Refrig. Co., 106 N. Y. S. 723 (dangerousness of method of operating, when a question in issue, is not proper matter for expert testimony).

572-86 But see Sloss-S. etc. Co. v. Hutchinson, 144 Ala. 221, 40 S. 114.

572-87 But see Castner etc. Co. v. Davies, 154 Fed. 938, holding that while experts could properly state the various things which might cause the explosion and the bearing which given facts might have on the question, they could not testify directly which cause produced the explosion, this being the final question for the jury. See also O'Doherty v. Cable Co., 113 App. Div. 636, 99 N. Y. S. 351; Chicago v. O'Donnell, 124 Ill. App. 78.

573-89 Frederick Mfg. Co. v. Devlin, 127 Fed. 71, 62 C. C. A. 53, (breaking of castings); Crankshaw v. Mfg. Co., 1 Ga. App. 363, 58 S. E. 222 (working of doors to show cases); Vohs v. Shorthill, 124 Ia. 471, 100 N. W. 495; Fraternal Const. Co. v. Mach. Co., 28 Ky. L. R. 383, 89 S. W. 265; McDonald v. Lundstrom, 31 Pa. 241; Boop v. Lumb. Co., 212 Pa. 523, 61 A. 1021 (that broken fly wheel should not be repaired and used); Lewis v. Crane, 78 Vt. 216, 62 A. 60 (painter accustomed to swinging stages may state weight which hook would support); Smith v. Dow, 43 Wash. 407, 86 P. 555 (proper method of hoisting lumber); Estey Organ Co. v. Lehman (Wis.), 111 N. W. 1097 (what the regulation of a certain organ indicated — as to the care taken of it); Hocking v. Spring Co., 131 Wis. 532, 111 N. W. 685 (opinion that steel splinter came from crevice in a die — based on examination and comparative tests as to hardness, grain, etc.). But see Epstein v. Trans. Co., 101 N. Y. S. 793 (expert plumber not competent to give opinion whether sinking of elevator railway pillar caused break in drain pipe below it); Dolan v. Safe Co., 105 App. Div. 366, 94 N. Y. S. 241 (iron worker of eighteen years' experience is not competent, after five or six weeks' experience in building steel vaults, as to necessity for using set screws to hold plates in place during construction).

574-90 Wordan v. S., 143 Ala. 13, 39 S. 406; Swygart v. Willard, 166 Ind. 25, 76 N. E. 755; Hickey v. R. Co. (Tex. Civ.), 95 S. W. 763; Nelson v. R. Co., 130 Wis. 214, 109 N. W. 933; Faber v. Coal Co., 124 Wis. 554, 102 N. W. 1049. See Elliott v. Ferguson, 37 Tex. Civ. 40, 83 S. W. 56.

Personal injuries. — See "INJURIES TO PERSON."

Cause of physical condition of person examined. S. v. White, 48 Or. 416, 87 P. 137. But see Rayner v. R. Co., 106 App. Div. 449, 94 N. Y. S. 632; Newton v. R. Co., 106 App. Div. 415, 94 N. Y. S. 825, and "INJURIES TO PERSON," Vol. 7.

Nature and extent of injuries which would have been inflicted, had engine been going at certain rate — opinion inadmissible. Southern R. Co. v. Weatherlow (Ala.), 44 S. 1019.

Effect of injuries on ability to use members affected. Lewes v. Crane, 78 Vt. 216, 62 A. 60. See also Chicago C. R. Co. v. Lowitz, 218 Ill. 24, 75 N. E. 755.

Pain. — That certain given conditions would produce pain. Western U. T. Co. v. Stubbs (Tex. Civ.), 94 S. W. 1083.

In explanation of X-ray photograph of fractured bone. Sheldon v. Wright (Vt.), 67 A. 807.

Duties of midwife. — C. v. Porn (Mass.), 81 N. E. 305.

Seriousness of injury. — Monize v. Begaso, 190 Mass. 87, 76 N. E. 460.

574-91 See Chicago v. McNally, 128 Ill. App. 375.

Physician's prognosis made as result of an examination immediately after an injury is admissible as tending to corroborate or disprove the result of subsequent examinations dependent partly upon statements of the patient. Fletcher v. Dixon (Md.), 68 A. 875.

575-94 Impeachment by use of books. See infra, 650-65.

575-95 Means by which offense was committed. — Opinion as to kind of instrument and manner of using which would produce the condition found. C. v. Sinclair (Mass.), 80 N. E. 799.

576-96 Hildebrand v. Artisans (Or.), 91 P. 542 (when rigor mortis sets in).

576-97 Burkett v. S. (Ala.), 45 S. 682; Sims v. S., 139 Ala. 74, 36 S. 138, 101 Am. St. 17; Foley v. Mfg. Co., 144 Ala. 178, 40 S. 273; Birmingham etc. Co. v. Enslen, 144 Ala. 343, 39 S. 74; Horst v. Lewis, 98 Neb. 1046, 103 N. W. 460, 98 N. W. 1046; Fay v. S. (Tex. Cr.), 107 S. W. 55; Metropolitan Ins. Co. v. Wagner (Tex. Civ.), 109 S. W. 1120 (surgeon may testify that decedent's wounds were or could have been caused with knife found beside his bed). See Dunn v. R. Co., 130 Ia. 580, 107 N. W. 616. *Compare* Martin v. Light Co., 131 Ia. 724, 106 N. W. 359.

What was cause of death. — Houston etc. R. Co. v. Rutland (Tex. Civ.), 101 S. W. 529. *Compare* Kelly v. Wills, 116 App. Div. 758, 102, N. Y. S. 223.

Whether death was self-inflicted. See infra, 590-36.

Presence at time of death is unnecessary to enable attending physician who saw decedent daily up to time of his death, to state cause thereof. Chadwick v. Assn., 143 Mich. 481, 106 N. W. 1122.

The facts upon which the opinion as to cause of death is based must be in evidence. Kinney v. Brotherhood, 15 N. D. 21, 106 N. W. 44. *Compare* Hunter v. Ithaca, 141 Mich. 539, 105 N. W. 9. But not in case of a physician basing his opinion on his examination alone. Boehin v. Detroit, 141 Mich. 277, 104 N. W. 626; Morrow v. Assn. 126 Ia. 633, 101 N. W. 468.

577-99 *Compare* Chicago v. Didier, 227 Ill. 571, 81 N. E. 698, and see supra, 527-38.

578-7 Facts disclosed by dissection may be stated by physician who saw the results thereof, although he did not take part in or see the actual dissecting. Steinacker v. Hills Bros., 91 App. Div. 521, 87 N. Y. S. 33.

580-13 Hufford v. R. Co. (Mo. App.), 109 S. W. 1062 (that only a portion of certain bodily infirmities could have been caused by the injury complained of); McCaffery v. R. Co., 192 Mo. 144, 90 S. W. 816. See Dixon v. S., 139 Ala. 104, 36 S. 784 (whether person suffering certain ailment could have performed certain act in view of his subsequent condition); Indianapolis & E. R. Co. v. Bennett, 39 Ind. App. 141, 79 N. E. 389; Struth v. Decker, 100 Md. 368, 59 A. 727; Wood v. R. Co., 181 Mo. 433, 81 S. W. 152; Lyon v. Grand Rapids, 121 Wis. 609, 99 N. W. 311, and "INJURIES TO PERSON", Vol. 7. But see Mackey v. R. Co., 115 App. Div. 467, 101 N. Y. S. 439; Higgins v. Tract Co., 96 App. Div. 69, 89 N. Y. S. 76.

582-19 Malpractice case. Sheldon v. Wright (Vt.), 67 A. 807. See "PHYSICIANS AND SURGEONS", Vol 9.

583-20 Probable duration or recurrence of malady resulting from personal injuries. Ellis v. R. Co. (R. I.), 67 A. 428. See also Kansas City R. Co. v. Butler, 143 Ala. 262, 38 S. 1024 (permanence of injuries); Cumberland T. & T. Co. v. Overfield, 32 Ky. L. R. 421, 106 S. W. 242; Garard v. Coal Co., 207 Mo. 242, 105 S. W. 767; Rosenblatt v. Wrecking Co., 91 App. Div. 413, 86 N. Y. S. 801; Graham v. Bauland, 97 App. Div. 141, 89 N. Y. S. 595; Citizens etc. Co. v. Bell, 5 Ohio C. C. (N. S.) 321; Simone v. R. I. Co. (R. I.), 66 A. 202; Klingaman v. Fish, 19 S. D. 139, 102 N. W. 601; Missouri etc. R. Co. v. Lynch (Tex. Civ.), 90 S. W. 511; Hallum v. Omro, 122 Wis. 337, 99 N. W. 1051; Faber v. Coal Co., 124 Wis. 554, 102 N. W. 1049. But see Leahy v. G. & E. Co., 117 App. Div. 316, 102 N. Y. S. 78; Kavnaugh v. Transp. Co., 95 N. Y. S. 567.

583-21 P. v. Koerner, 117 App. Div. 40, 102 N. Y. S. 93 (whether accused after the homicide, was shamming unconsciousness, but not what the symptoms of shamming are).

584-22 Swygart v. Willard, 166 Ind. 25, 76 N. E. 755.

Intoxication. — See "INTOXICATION", and "INTOXICATING LIQUORS".

585-23 Kesselring v. Hummer, 130 Ia. 145, 106 N. W. 501 (whether pregnancy would be likely to result from first act of intercourse).

585-24 **Premature birth of child.** Mother of children who states that she knows the difference between a full grown and premature child, held competent. Bessemer etc. Co. v. Doak (Ala.), 44 S. 627; also professional nurse. Souchek v. Karr (Neb.), 111 N. W. 150.

Period of gestation — whether it could have extended over period claimed. S. v. Blackburn (Ia.), 114 N. W. 531. See also Kesselring v. Hummer, 130 Ia. 145, 106 N. W. 501.

585-25 S. v. Winslow, 30 Utah 403, 85 P. 433 (that there had been a forcible penetration). See "RAPE".

Possibility of committing rape in given position — physician may give his opinion. Miera v. Ter. (N. M.), 81 P. 586, *cit.* McMurrin v. Rigby, 80 Ia. 322, 45 N. W. 877 (on winding stairway); P. v. Clark, 33 Mich. 112 (in buggy); S. v. Perry, 41 W. Va. 641, 24 S. E. 634 (woman seated in rocking chair). *Compare* Richardson v. S., 49 Tex. Cr. 391, 94 S. W. 1016, infra, 671-17.

586-26 Sims v. S., 139 Ala. 74, 36 S. 138 (that wound was fatal); Hampton v. S., 50 Fla. 55, 39 S. 421 (probable date of infliction); Harper v. S., 129 Ga. 770, 59 S. E. 792; Stovall v. S. (Tex. Cr.), 108 S. W. 699; Fay v. S. (Tex. Cr.), 107 S. W. 55. *Compare* P. v. Weber, 149 Cal. 325, 86 P. 671.

Hypothetical question unnecessary. Expert who has examined wound may be questioned as to its effect without resorting to hypothetical question. S. v. Megorden (Or.), 88 P. 306.

586-27 Clemons v. S., 48 Fla. 9, 37 S. 647 (whether fracture could have been caused by blow from fist); Wilson v. U. S., 5 Ind. Ter. 610, 82 S. W. 924; S. v. Voorhees, 115 La. 200, 38 S. 964; C. v. Campbell, 31 Pa. Super. 9; Metropolitan L. Ins. Co. v. Wagner (Tex. Civ.), 109 S. W. 1120; Ozark v. S. (Tex. Cr.), 100 S. W. 927; Tune v. S., 49 Tex. Cr. 445, 94 S. W. 231; Bowers v. S., 122 Wis. 163, 99 N. W. 447. But see McFeat v. R. Co., 5 Penne. (Del.) 52, 62 A. 898.

588-29 See Patton v. S. (Tex. Cr.), 80 S. W. 86 (person who testifies that he is familiar with gunshot wounds may state that wound in question was from a gunshot).

588-31 *Contra.* — Miera v. Ter. (N. M.), 81 P. 586 (that deceased was sitting down). See also Wells v. Ter., 14 Okla. 436, 78 P. 124.

Position of arm when bullet entered it—surgeon's opinion inadmissible, being a matter for jury. Wilson v. U. S., 5 Ind. Ter. 610, 82 S. W. 924.

589-32 See S. v. Voorhees, 115 La. 200, 38 S. 964.

589-34 S. v. Voorhees, supra.

590-36 Knights etc. Co. v. Crayton, 110 Ill. App. 648; Metropolitan L. Ins. Co. v. Wagner (Tex. Civ.), 109 S. W. 1120. *Contra,* Miera v. Ter. (N. M.), 81 P. 586.

590-37 See C. v. Leach, 156 Mass. 99, 30 N. E. 163; Miera v. Ter. (N. M.), 81 P. 586.

590-39 Sun Ins. Off. v. Mill Co., 72 Kan. 41, 82 P. 513 (wool-merchants and manufacturers of many years' experience, may testify as to possibility of spontaneous combustion in wool). See Allen v. Field, 130 Fed. 641, 64 C. C. A. 19; Keim v. City, 32 Pa. Super. 613.

Damage to goods shipped on steamships—whether caused by fresh or salt water. Houston etc. R. Co. v. Bath (Tex. Civ.), 90 S. W. 55.

That dampness will injure dry goods and damage their sale, and that it was not safe or practical to put a stock of goods in certain premises for that reason. Meyer Bros. D. Co. v. Madden (Tex. Civ.), 99 S. W. 723.

591-40 See Trickey v. Clark (Or.), 93 P. 457.

Proper method of stacking sacks of flour. Commerce M. & G. Co. v. Gowan (Tex. Civ.), 104 S. W. 917.

591-41 Tutwiler etc. Co. v. Farrington, 144 Ala. 157, 39 S. 898 (as to timbering); Kellyville C. Co. v. Strine, 217 Ill. 516, 75 N. E. 375 (same); Bolen-D. Coal Co. v. Williams (Ind. Ter.), 104 S. W. 867 (capabilities of sprinkling machine used in mine); Spencer v. Bruner, 126 Mo. App. 94, 103 S. W. 578; Rogers v. Rundell, 128 Mo. App. 10, 106 S. W. 1096; Consolidated etc.

Co. v. Gonzales (Tex. Civ.), 109 S. W. 946 (percentage of copper in certain ore). See Kellyville C. Co. v. Moreland, 121 Ill. App. 410; Delmar Oil Co. v. Bartlett (W. Va.), 59 S. E. 634.

What conditions make timbering necessary. Bird v. Min. Co., 2 Cal. App. 674, 84 P. 256.

Marketable value of claim. — Whether vein was of sufficient value or promise to justify working or development (Noyes v. Clifford (Mont.), 94 P. 842); or whether ground was worth locating as a placer claim. Anderson v. U. S., 152 Fed. 87. But see Lynch v. U. S., 138 Fed. 535, 71 C. C. A. 59.

Relative safety of methods used in hoisting cars up and down a mine shaft, in a personal injury action based on negligence in this respect, is question for jury and not experts. Johnson v. Coal Co., 28 Utah 46, 76 P. 1089.

That shale is a "mineral." McCombs v. Stephenson (Ala.), 44 S. 867.

Cost of drilling gas-well. — Witnesses experienced in drilling in same neighborhood and where conditions seemed to be the same may give opinions. Fredonia Gas Co. v. Bailey (Kan.), 94 P. 258.

592-42 But the rule is contrary when the competency of such person is the question in issue, as in an action for injuries due to his alleged negligence. Purkey v. C. & T. Co., 57 W. Va. 595, 50 S. E. 755. And see supra, 527-38.

592-44 That miscalculation of distance on the sea is more likely to occur than on land. Lampahoehoe Sug. Co. v. Steamship Co., 11 Haw. 261.

593-46 Possibility of averting collision — opinion competent. Lambert v. T. & T. Co., 37 Wash. 1132, 79 P. 608.

Cause of collision. — Where a vessel collided with a drawbridge while passing through, the testimony of an expert observer that the vessel was proceeding safely until an order for full speed was given, and would have avoided the collision but for such order, held admissible. Multnomah Co. v. Tow. Co. (Or.), 89 P. 389.

593-47 See Ter. v. Cotton, 17 Haw. 618.

594-54 An expert in photography may testify as to what the plate of the camera showed regarding an overlapping signature and scroll, while he was taking an enlarged photograph, although he is not a handwriting expert. Wenchell v. Stevens, 30 Pa. Super. 527.

Where camera was placed when picture was taken—not proper subject for opinion. McFeat v. R. Co., 5 Penne. (Del.) 52, 62 A. 898.

594-55 That damage to shipment was caused by improper storing or packing of goods in car. Tex. & P. R. Co. v. Warner (Tex. Civ.), 93 S. W. 489.

Method of loading logs on a car. Louisville & N. R. Co. v. Morton, 28 Ky. L. R. 355, 89 S. W. 243.

595-56 See Gunn v. R. Co., 125 Ia. 301, 101 N. W. 94 (whether cutting certain ditches was necessary for construction of roadbed); Smith v. Fordyce, 190 Mo. 1, 88 S. W. 679 (purpose of derailing-switch, and where it should be placed); Wilson v. R. Co. (R. I.), 69 A. 364 (safety of customary method of placing posts); Gulf etc. R. Co. v. Harbison (Tex. Civ.), 88 S. W. 452; Mo. K. & T. R. Co. v. Huddleston (Tex. Civ.), 81 S. W. 64 (capacity of culvert—witness must have knowledge of its dimensions).

That track was defective and unsafe. — Northern Ala. R. Co. v. Shea, 142 Ala. 119, 37 S. 796.

Construction of switch — proper method. — Witnesses of several years' experience in track department of railroad, competent. Buckalew v. R. Co., 107 Mo. App. 575, 81 S. W. 1176.

Switch frogs. — Whether they are dangerous when unblocked and whether blocked switch frogs are common safety devices. Schroeder v. R. Co., 128 Ia. 365, 103 N. W. 985.

Comparative life and strength of timbers used in a trestle. Bowen v. Lumb. Co., 3 Cal. App. 312, 84 P. 1010. *Compare* supra, 560-42 and 562-50.

That the effect of vibrations caused by running trains over a trestle is to loosen nails, is proper matter for expert testimony. Bowen v. Lumb. Co., 3 Cal. App. 312, 84 P. 1010.

Feasibility of proposed change in the location and curvature of rail-

road tracks, as affected by the safety and convenience of the public and the cost and safety of operating the railroad, held proper subject for opinions of experts. Atlantic & B. R. Co. v. Mayor, 128 Ga. 293, 57 S. E. 493.

595-61 See supra, 564-61.

595-62 **That the condition of a crossing** was reasonably necessary for the improvement of the road and that the usefulness of the highway was not unnecessarily impaired, are mere conclusions, which cannot be testified to by roadmaster of the railroad. Illinois S. R. Co. v. Hayer, 225 Ill. 613, 80 N. E. 316.

Whether railway street crossing is dangerous, opinion inadmissible. Tiffin v. R. Co., 78 Ark. 55, 93 S. W. 564.

596-65 See Bonn v. R. Co. (Tex. Civ.), 82 S. W. 808 (that employe could not gain knowledge of rails like the one in question, by working around railroad shops, inadmissible conclusion).

Physical qualifications of fireman—whether certain injuries rendered person not acceptable according to standard of the company—physician employed by company and familiar with requirements, held competent. Chicago etc. R. Co. v. Hiltibrand (Tex. Civ.), 99 S. W. 707.

Duties of employe. — See infra. 699-7.

Rules. — Necessity for rules to prevent accidents to men engaged in particular duties—opinions of experts are incompetent where this is the issue for the jury. Lane v. R. Co., 93 App. Div. 40, 86 N. Y. S. 947; McLaughlin v. R. Co., 111 App. Div. 254, 97 N. Y. S. 719. But a person with years of experience in switch yards may testify as to the reasonableness of a rule, relating to switching used in some yards. Freemont v. R. Co., 111 App. Div. 831, 98 N. Y. S. 179.

598-68 Jackson Lumb. Co. v. Cunningham, 141 Ala. 206, 37 S. 445 (weight of locomotive); St. Louis etc. R. Co. v. Noland, 75 Kan. 691, 90 P. 273 (whether properly equipped locomotive would set fires); Morgan & Bros. v. R. Co. (Tex. Civ.), 110 S. W. 978 (emission of sparks, best method of preventing).

Sparks and spark arrester. — St. Louis etc. R. Co. v. Parks (Tex. Civ.), 90 S. W. 343 (sufficiency of spark arrester). Experts may testify as to the condition of sparks thrown a specified distance, and whether live or burning sparks would have been carried such distance if engine was in proper order. Babbett v. R. Co., 108 App. Div. 74, 95 N. Y. S. 429.

598-69 See Hitchner W. P. Co. v. R. Co., 158 Fed. 1011.

The relative merits of tell-tales cannot be directly testified to, although the witness may state what kinds were in general use. Whitehead v. R. Co. (Minn.), 114 N. W. 254. But expert may state what good railroading required as to the placing of tell-tales before overhead bridges. Pittsburg etc. R. Co. v. Lamphere, 137 Fed. 20, 69 C. C. A. 542.

599-70 Pittsburg R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522; Mitchell v. R. Co. (Ia.), 114 N. W. 622; Stewart v. R. Co., 141 N. C. 253, 53 S. E. 877 (what constitutes a train crew generally, and what is proper crew for light engine); Galveston etc. R. Co. v. Mitchell (Tex. Civ.), 107 S. W. 374 (whether necessary and customary to use steam in starting locomotive under certain circumstances); St. Louis etc. R. Co. v. Rogers (Tex. Civ.), 108 S. W. 1027 (whether lumber properly loaded would shift during certain trip); Gulf etc. R. Co. v. Minter (Tex. Civ.), 85 S. W. 477 (that the curve in question was not such as to require that approaching trains be flagged by the section foreman working near by). See Meehan v. R. Co., 13 N. D. 432, 101 N. W. 183; Chicago etc., R. Co. v. Cain, 37 Tex. Civ. 531, 84 S. W. 682. But see Denver etc. R. Co. v. Vitello, 34 Colo. 50, 81 P. 766; Gulf etc. R. Co. v. Hays (Tex. Civ.), 89 S. W. 29.

Whether injury could have occurred had certain appliances been on the car. Atlantic etc. R. Co. v. Crosby, 53 Fla. 400, 43 S. 318.

Whether engine was handled properly — engineer's opinion inadmissible — question for jury. Birmingham etc. Co. v. Martin, 148 Ala. 8, 42 S. 618. See also Bryan P. Co. v. R. Co. (Tex. Civ.), 110 S. W. 99. But an experienced engineer may

testify to the proper method of handling an engine when passing combustible material. St. Louis etc. R. Co. v. Dawson, 77 Ark. 434, 92 S. W. 27.

How far headlight could be seen. Southern R. Co. v. Bonner, 141 Ala. 517, 37 S. 702. *Compare* St. Louis etc. R. Co. v. Shannon, 76 Ark. 166, 88 S. W. 851.

599-73 **Wreck** — Expert may state condition but not cause thereof. Nickles v. R., 74 S. C. 102, 54 S. E. 255. But he may testify that he examined the wreck and could find no cause therefor. So. Kan. R. Co. v. Sage (Tex. Civ.), 94 S. W. 1074.

599-74 See Woodstock I. Wks. v. Kline (Ala.), 43 S. 362.

600-75 **Coupling.** — Huggins v. R. Co., 148 Ala. 153, 41 S. 856. Switchmen of twelve years' experience competent to state that the force used in coupling cars was not unusual. Mullen v. R. Co. (Tex. Civ.), 92 S. W. 1000.

600-76 See Southern etc. R. Co. v. Swinney (Ala.), 42 S. 808; Goodwyn v. R. Co., 2 Ga. App. 470, 58 S. E. 688; St. Louis etc. R. Co. v. Smith (Tex. Civ.), 90 S. W. 926.

Effect of split switch on car passing over — opinion of expert admissible. Place v. R. Co. (Vt.), 67 A. 545.

600-77 *Compare* infra, 708-31.

But witnesses who did not see the train cannot give an opinion based merely upon the appearance of the wreck. Cook v. Mill Co., 41 Wash. 314, 83 P. 419.

600-78 Baltimore & O. R. Co. v. Connell, 137 Fed. 8, 69 C. C. A. 570; Northern A. R. Co. v. Shea, 142 Ala. 119, 37 S. 796 (that certain speed was dangerous at a certain place); Halverson v. Elec. Co., 35 Wash. 600, 77 P. 1058 (experienced motorman familiar with route may state what is a safe speed at a particular curve). *Contra*, Ford v. R., 30 Ky. L. R. 644, 99 S. W. 355 (what would be reasonably safe rate of speed for car under given conditions).

600-79 Birmingham etc. R. Co. v. Randle (Ala.), 43 S. 355; Wallace v. Trac. Co., 145 Ala. 682, 40 S. 89 (street car); Central etc. R. Co. v. McClifford, 120 Ga. 90, 47 S. E. 590; Indianapolis St. R. Co. v. Seerley, 35 Ind. App. 467, 72 N. E. 169, 1034 (street car); So. Covington etc. R. Co. v. Weber, 26 Ky. L. R. 822, 82 S. W. 986; Lynch v. R. Co., 208 Mo. 1, 106 S. W. 68; Impkamp v. Trans. Co., 108 Mo. App. 655, 84 S. W. 119; Meng v. R. Co., 108 Mo. App. 553, 84 S. W. 213; Galveston etc. R. Co. v. Murray (Tex. Civ.), 99 S. W. 144; Northern Tex. Tr. Co. v. Caldwell (Tex. Civ.), 99 S. W. 869 (whether street car can stop in much shorter distance than locomotive or train of cars); Wise Term. Co. v. McCormick, 107 Va. 376, 58 S. E. 584. See Western R. v. Stone, 145 Ala. 663, 39 S. 723 (whether engineer had time to make an effort to stop — mere conclusion); Dallas etc. R. Co. v. English (Tex. Civ.), 93 S. W. 1096.

Whether car was stopped as soon as possible may not be asked of the motorman. He should be asked what he did to stop it and then whether what he did was all that could have been done. Birmingham etc. Co. v. Randle (Ala.), 43 S. 355. But see Macon etc. R. Co. v. Stewart, 125 Ga. 88, 54 S. E. 197, holding inadmissible as a conclusion the statement of an engineer that he could have done no more than he did to stop the train. And to same effect, Central etc. R. Co. v. Bagley, 121 Ga. 781, 49 S. E. 780; Johnson v. Center, 4 Cal. App. 616, 88 P. 727 (conductor cannot state whether engineer took every possible precaution to stop train and prevent accident). *Compare* 670-15 and 16.

That the most effective means were used, — testimony of motorman competent. Birmingham etc. Co. v. Hayes (Ala.), 44 S. 1032. See also infra, 640-34.

A non-expert is incompetent to express an opinion on this question. Boring v. R. Co., 194 Mo. 541, 92 S. W. 655.

Form of hypothetical question. Should embrace all important facts — thus, the time and space within which a car like one in question under the given conditions could have been stopped by reasonably skillful motorman, after he discovered, or might have with reasonable care discovered, the injured person, with due regard to the safety of the pas-

sengers. Heinzle v. R. Co., 182 Mo. 528, 81 S. W. 848.

601-80 Houston etc. R. Co. v. Schuttee (Tex. Civ.), 91 S. W. 806. *Compare* San Antonio etc. R. Co. v. Jackson (Tex. Civ.), 85 S. W. 445 (non-expert incompetent). *Contra*, Seaboard etc. R. Co. v. Bradley, 125 Ga. 193, 54 S. E. 69.

601-81 **Distance** within which a particular car could be stopped,— expert must have had experience with cars of similar equipment. Columbus R. Co. v. Connor, 6 Ohio C. C. (N. S.) 361. But see supra, 600-79.

Car-brakes. — See Regan v. R. Co., 115 App. Div. 705, 101 N. Y. S. 213.

601-82 Regan v. R. Co., supra.

Necessity of assisting passenger to alight — opinion of conductor inadmissible. San Antonio Tr. Co. v. Flory (Tex. Civ.), 100 S. W. 200.

Riding on inner car-step, — whether safe position for passenger is question for jury and not an expert, where facts are all before the jury. Allen v. Trans. Co., 183 Mo. 411, 81 S. W. 1142.

601-84 See Goodson v. Fitzgerald (Tex. Civ.), 90 S. W. 898; Camp v. League (Tex. Civ.), 92 S. W. 1062 (whether property described by field notes is embraced within metes and bounds given in a deed examined by witness, — opinion admissible).

True location of lands and boundaries, — testimony of surveyors admissible. Chappell v. Roberts (Ala.), 43 S. 489. Where an engineer has made the necessary measurements, his testimony as to the location of boundary line is a statement of fact and not opinion. Brundred v. McLaughlin, 213 Pa. 115, 62 A. 565.

602-87 But see Clarke v. Case, 144 Mich. 148, 107 N. W. 893.

602-90 **Infringement of copyright.** — Comparisons by expert witnesses are admissible, but only as aids to the court. Encyc. Brit. Co. v. Assn., 130 Fed. 460.

603-92 See Gulf etc. Co. v. Harbison (Tex. Civ.), 88 S. W. 452.

603-93 But see Mallory v. Brademyer, 76 Ark. 538, 89 S. W. 551.

603-95 **Character of soil** — as permitting percolation of water, — civil engineer held competent. Flint v. Water Co., 73 N. H. 483, 62 A. 788.

603-98 *Compare* Laupahoehoe Sug. Co. v. S. S. Co., 11 Haw. 261.

Translating. — In John II Estate v. Judd, 13 Haw. 319, an expert in the Hawaiian language was permitted to translate words used in a will written in that language.

Railroad rules couched in ordinary language — explanation by expert, improper. Stewart v. R. Co., 141 N. C. 253, 53 S. E. 877.

604-99 McCombs v. Stephenson (Ala.), 44 S. 867 (term "minerals" used in conveyance); Henderson-B. Lumb. Co. v. Cook (Ala.), 42 S. 838 ("surfacing" in railroad construction).

Telegraphic code. — Meaning of cipher code may be explained. Allen M. & C. Co. v. Bank, 129 Ga. 748, 59 S. E. 813.

Indictment. — Testimony of expert admissible to explain meaning of terms of art used in indictment. S. v. Meyers, 120 La. 127, 44 S. 1008.

604-3 See National F. Ins. Co. v. Hauberg, 215 Ill. 378, 74 N. E. 377.

605-4 **An opinion** may be based upon personal knowledge or a hypothetical case. Hanley v. R. Co., 59 W. Va. 419, 53 S. E. 625.

605-5 **Where facts not embraced** in the hypothetical question are considered by the witness, his answer should be stricken out. Cobb v. U. E. & C. Co., 191 N. Y. 475, 84 N. E. 395.

606-8 See Colo. F. etc. Co. v. York, 38 Colo. 239, 88 P. 181; Chicago U. T. Co. v. Giese, 229 Ill. 260, 83 N. E. 232; Federal B. Co. v. Reeves, 73 Kan. 107, 84 P. 560; Cobb v. U. E. & C. Co., 191 N. Y. 475, 84 N. E. 395; Houston etc. R. Co. v. Tisdale (Tex. Civ.), 109 S. W. 413; S. v. Rutledge, 37 Wash. 523, 79 P. 1123.

Hypothetical question based on hearsay. See infra, 621-53.

606-9 **The testimony of other experts** as to the symptoms is a proper basis for an opinion as to the cause. Louisville R. Co. v. Oppenheimer, 31 Ky. L. R. 1141, 104 S. W. 720.

607-14 Parrish v. S., 139 Ala. 16, 36 S. 1012. See also Lancaster v. Exr., 27 Ky. L. R. 1127, 87 S. W. 1137. But see Kelly v. Wills,

116 App. Div. 758, 102 N. Y. S. 223.

607-15 See Yates v. S., 125 Ga. 813, 56 S. E. 1017; Chicago L. R. Co. v. Shreve, 226 Ill. 530, 80 N. E. 1049.

Experiments and tests are proper bases for expert testimony. See "EXPERIMENTS," Vol. 5, p. 495, and Hocking v. Spring Co., 131 Wis. 532, 111 N. W. 685; C. v. Tucker, 189 Mass. 457, 76 N. E. 127.

608-17 Chicago v. Didier, 131 Ill. App. 406; Chicago v. Saldman, 129 Ill. App. 282 (on hypothetical statement of facts alone); Boehm v. Detroit, 141 Mich. 277, 104 N. W. 626 (on examination alone). See Elgin etc. Co. v. Wilson, 217 Ill. 47, 75 N. E. 436; Chicago U. T. v. Hampe, 130 Ill. App. 596; Chicago & A. R. Co. v. Johnson, 128 Ill. App. 20; Travelers' Ins. Co. v. Bingham, 32 Ky. L. R. 233, 105 S. W. 894; Louisville R. Co. v. Oppenheimer, 31 Ky. L. R. 1141, 104 S. W. 720; Gasink v. New Ulm, 92 Minn. 52, 99 N. W. 624; Holden v. R. Co., 108 Mo. App. 665, 84 S. W. 133; Goken v. Dallugge, 72 Neb. 16, 99 N. W. 818; Bach v. R. Co., 109 App. Div. 654, 96 N. Y. S. 321; Hildebrand v. Artisans (Or.), 91 P. 542; Houston etc. R. Co. v. Rutland (Tex. Civ.), 101 S. W. 529. But see Ottawa v. Green, 72 Kan. 214, 83 P. 616; Leahy v. G. & E. Co., 117 App. Div. 316, 102 N. Y. S. 78.

608-18 Elgin etc. Co. v. Wilson, 217 Ill. 47, 75 N. E. 436; Indianapolis etc. Co. v. Reeder, 37 Ind. App. 262, 76 N. E. 816; C. v. Sinclair (Mass.), 80 N. E. 799; Walters v. Rock (N. D.), 115 N. W. 511. See Detrich v. R. Co., 125 Mo. App. 608, 102 S. W. 1044.

An opinion based on hearsay statements of injured person is incompetent. Chicago U. T. Co. v. Giese, 229 Ill. 260, 82 N. E. 232; Ill. C. R. Co. v. McCollum, 130 Ill. App. 267; Bates Mach. Co. v. Crowley, 115 Ill. App. 540; Federal B. Co. v. Reeves, 73 Kan. 107, 84 P. 560 (opinion cannot be based partly on examination and partly on statements of patient which do not come within the rule admitting declarations of existing pain and physical condition); Gibler v. R. Co. (Mo. App.), 107 S. W. 1021. But see Eckels v. Muttschall, 230 Ill. 462, 82 N. E. 872; Chicago v. McNally, 227 Ill. 14, 81 N. E. 23; Chicago C. R. Co. v. Shreve, 226 Ill. 530, 80 N. E. 1049; Stevens v. P., 215 Ill. 593, 74 N. E. 786; Travelers' Ins. Co. v. Bingham, 32 Ky. L. R. 233, 105 S. W. 894. An opinion based on statements of the patient as to his past symptoms is inadmissible. Schissler v. S., 122 Wis. 365, 99 N. W. 593; Holloway v. Kan. City, 184 Mo. 19, 82 S. W. 89.

609-20 See Chicago v. McNally, 227 Ill. 14, 81 N. E. 23; Chicago C. R. Co. v. Manger, 128 Ill. App. 512 (opinion must be based on objective and not subjective symptoms); Chicago C. R. Co. v. Shreve, 128 Ill. App. 462; Kath v. R. Co., 121 Wis. 503, 99 N. W. 217.

Flinching. — Where examination was merely for purpose of getting testimony, the physician cannot state that the injured person flinched when touched in certain spots. Comstock v. Twp., 137 Mich. 541, 100 N. W. 788.

609-21 C. v. Sinclair (Mass.), 80 N. E. 799.

610-23 Bryan P. Co. v. R. Co. (Tex. Civ.), 110 S. W. 99.

611-24 Explanation of opinion may be made in discretion of court. C. v. Parsons (Mass.), 81 N. E. 291.

Compelling witness to qualify himself. — A witness cannot be compelled to qualify himself to give an opinion, but if after so doing he reduces his opinion to writing, he can be compelled to refresh his recollection by referring to the same. Stevens v. Worcester (Mass), 81 N. E. 907. See Barrus v. Phaneuf, 166 Mass. 123, 44 N. E. 141, 32 L. R. A. 619; Schofield v. Little, 2 Ga. App. 286, 58 S. E. 666; C. v. Cochran, 31 Pa. C. C. 344.

612-27 See Chicago C. R. Co. v. Sugar, 117 Ill. App. 578.

612-30 See Cobb v. U. E. & C. Co., 191 N. Y. 475, 84 N. E. 395.

613-32 See Hampton v. S., 50 Fla. 55, 39 S. 421; Chicago C. R. Co. v. Sugar, 117 Ill. App. 578; St. Louis etc. R. Co. v. Lowe (Tex. Civ.), 97 S. W. 1087; Gulf etc. R. Co. v. Tullis (Tex. Civ.), 91 S. W. 317. But see Antonio etc.

R. Co. v. Trigo (Tex. Civ.), 101 S. W. 254.

613-33 See Edwards v. Burke, 36 Wash. 107, 78 P. 610.

613-35 Salmon v. Rathjens (Cal.), 92 P. 733; Quincy etc. Co. v. Schmitt, 123 Ill. App. 647; N. J. etc. R. Co. v. Tutt, 168 Ind. 205, 80 N. E. 420; Baltimore etc. R. Co. v. Sattler, 102 Md. 595, 62 A. 1125; Logan v. El. R. Co., 188 Mass. 414, 74 N. E. 663.

Matters incompetent as substantive evidence cannot be introduced to fortify an opinion though offered under the guise of reasons therefor, even though on cross-examination they would be competent to test and diminish the weight of the opinion. Pierson v. El. R. Co., 191 Mass. 223, 77 N. E. 769.

Experiments. — Details of experiments on which opinion is based may be excluded in court's discretion. C. v. Tucker, 189 Mass. 457, 76 N. E. 127.

614-36 See Salmon v. Rathjens (Cal.), 92 P. 733.

615-39 See Mitchell Sq. etc. Co. v. Grant, 143 Ala. 194, 38 S. 855; Tighe v. R. Co. (Mo. App.), 107 S. W. 1035; Burns v. Crow, 123 App. Div. 251, 107 N. Y. S. 944; McGinness v. R. Co., 104 App. Div. 342, 93 N. Y. S. 787.

May be based on facts the same as those of the case on trial. Central etc. R. Co. v. McClifford, 120 Ga. 90, 47 S. E. 590.

The truth or falsity of the facts hypothesized is never a matter to be considered by the expert, hence it is improper in a hypothetical question to a physician as to permanency of plaintiff's injuries, to ask him to consider the fact that plaintiff is suing for damages. International etc. R. Co. v. Goswick, 98 Tex. 477, 85 S. W. 785, *aff.* (Tex. Civ.), 83 S. W. 423.

617-42 Hunter v. Ithaca, 141 Mich. 539, 105 N. W. 9 (that the question calls for possibility rather than probability, goes to weight and not to competency of answer). See Mayes v. R. Co., 121 Mo. App. 614, 97 S. W. 612; Kehoe v. R. Co., 56 Misc. 138, 106 N. Y. S. 196; Newton v. R. Co., 106 App. Div. 415, 94 N. Y. S. 825; Rosenblatt v. Wrecking Co., 91 App. Div. 413, 86 N. Y. S. 801.

Opinion as to probable permanence of injury or disease is proper. Hallum v. Omro, 122 Wis. 337, 99 N. W. 1051; Faber v. Coal Co., 124 Wis. 554, 102 N. W. 1049 (whether injuries were "likely" or "apt" to result in recurrent troubles). See also Klingaman v. Fish, 19 S. D. 139, 102 N. W. 601; Graham v. Banland Co., 97 App. Div. 141, 89 N. Y. S. 595 (use of "likely" instead of "probable" is not improper). But see Leahy v. G. & E. Co., 117 App. Div. 316, 102 N. Y. S. 78; Kavanaugh v. Transp. Co., 95 N. Y. S. 567, and "INJURIES TO PERSON," Vol. 7.

618-44 Masteller v. R. Co. (Minn.), 114 N. W. 757.

618-46 See Smart v. Kan. City, 208 Mo. 162, 105 S. W. 709.

618-47 Tighe v. R. Co. (Mo. App.), 107 S. W. 1035; Walters v. Rock (N. D.), 115 N. W. 511. See Burnside v. Everett, 186 Mass. 4, 71 N. E. 82; Burns v. Crow (App. Div.), 107 N. Y. S. 944.

Asking an expert to assume the truth of a certain witness' testimony is not requiring him to weigh the evidence. Duthey v. S., 131 Wis. 178, 111 N. W. 222.

Failure to include the facts on which the question is based justifies its exclusion though the witness has heard evidence. Barker v. Transfer Co., 79 Conn. 342, 65 A. 143 (*cit.* Barber's Appeal., 63 Conn. 393, 408, 27 A. 973, 22 L. R. A. 90); Shoemaker v. Elmer, 70 N. J. L. 710, 58 A. 940.

619-48 Chicago U. T. Co. v. Roberts, 229 Ill. 481, 82 N. E. 401; Burnside v. Everett, 186 Mass. 4, 71 N. E. 82; Masteller v. R. Co. (Minn.), 114 N. W. 757; Tighe v. R. Co. (Mo. App.), 107 S. W. 1035; Walters v. Rock (N. D.), 115 N. W. 511. See Ahern v. St. R. Co., 102 Minn. 435, 113 N. W. 1019. *Contra,* Shoemaker v. Elmer, 70 N. J. L. 710, 58 A. 940 (*disapp.* Twombly v. Leach, 11 Cush. (Mass.) 397).

620-50 Illinois C. R. Co. v. McCollum, 130 Ill. App. 267.

620-51 Chicago v. Didier, 227 Ill. 571, 81 N. E. 698; St. Louis etc. R. Co. v. Hall (Tex. Civ.), 81 S. W. 571. See Smart v. Kan. City, 208

Mo. 162, 105 S. W. 709. *Compare* Leahy v. G. & E. Co., 117 App. Div. 316, 102 N. Y. S. 78.

Testimony of single witness is proper basis for hypothetical question. Hanchett v. Haas, 125 Ill. App. 111.

621-52 *Contra.* — Shoemaker v. Elmer, 70 N. J. L. 710, 58 A. 940.

621-53 Elba v. Bullard (Ala.), 44 S. 412; Roche v. Baldwin, 143 Cal. 186, 76 P. 956; Butler v. Phillips, 38 Colo. 378, 88 P. 480; Sanford v. Hoge, 118 Ill. App. 609; Botwinis v. Allgood, 113 Ill. App. 188; S. v. Usher (Ia.), 111 N. W. 811; S. v. Hunter, 124 Ia. 569, 100 N. W. 510; Bennett v. Mt. Vernon, 124 Ia. 537, 100 N. W. 349; Baker v. Mathew (Ia.), 115 N. W. 15; Robinson v. Jones (Md.), 65 A. 814; United Elec. & P. Co. v. S., 100 Md. 634, 60 A. 248; Arnold v. Cutlery Co., 189 Mass. 547, 76 N. E. 194; Root v. R. Co., 195 Mo. 348, 92 S. W. 621; S. v. Brown, 181 Mo. 192, 79 S. W. 1111; Carman v. R. Co., 32 Mont. 137, 79 P. 690; Goken v. Dallugge, 72 Neb. 16, 99 N. W. 818; P. v. Patrick, 182 N. Y. 131, 74 N. E. 843; Fitzpatrick v. R. Co., 92 N. Y. S. 248; Davis v. Maxwell, 108 App. Div. 128, 96 N. Y. S. 45; Gulf etc. R. Co. v. Craft (Tex. Civ.), 102 S. W. 170; Texas M. R. v. Ritchey (Tex. Civ.), 108 S. W. 732. See Parham v. S., 147 Ala. 57, 42 S. 1; Lanigan v. Neely, 4 Cal. App. 760, 89 P. 441; LaLonde v. Traction Co., 145 Mich. 77, 108 N. W. 365; Herbeck v. Germain, 144 Mich. 157, 107 N. W. 901.

There must be credible evidence of the fact assumed. Smith v. R. Co., 48 Misc. 393, 95 N. Y. S. 529. But where there is some evidence to establish the assumed facts, the answer cannot be excluded. Becker v. Ins. Co., 99 App. Div. 5, 90 N. Y. S. 1007.

Based upon hearsay and facts of which there is no evidence, incompetent. Kelly v. Kelly, 103 Md. 548, 63 A. 1082.

On redirect examination, hypothetical questions cannot be based upon assumed facts of which there is no evidence. Thomas v. Casualty Co. (Md.), 67 A. 259. Nor can an expert be re-examined on matters not touched upon in the cross-examination. In re B. I. Bridge, 118 App. Div. 272, 103 N. Y. S. 441. See Finley v. R. Co., 91 N. Y. S. 759.

623-59 See Bower v. Self, 68 Kan. 825, 75 P. 1021.

623-60 Pittsburg etc. R. Co. v. Moore, 110 Ill. App. 304; McDonald v. R. I. Co., 26 R. I. 467, 59 A. 391. See Pittsburg etc. R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522, 73 N. E. 195, 74 N. E. 626.

623-61 McDonald v. R. I. Co., 26 R. I. 467, 59 A. 391.

624-64 Woodward v. R. Co., 122 Fed. 66, 58 C. C. A. 402; Parrish v. S. 139 Ala. 16, 36 S. 1012; Ince v. S., 77 Ark., 426, 93 S. W. 65; St. Louis etc. R. Co. v. Hook, 83 Ark. 584, 104 S. W. 217; P. v. James (Cal. App.), 90 P. 561; Botwinis v. Allgood, 113 Ill. App. 188; Netcher v. Bernstein, 110 Ill. App. 484; Chicago C. R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28; Indianapolis etc. Co. v. Formis (Ind. App.), 80 N. E. 872; Order of U. C. T. v. Barnes, 75 Kan. 720, 90 P. 293; C. v. Tucker, 189 Mass. 451, 76 N. E. 127; Holton v. Cochran, 208 Mo. 314, 106 S. W. 1035; Rosier v. R. Co., 125 Mo. App. 159, 101 S. W. 1111; Hamblin v. S. (Neb.), 115 N. W. 850; Daggett v. R. Co., (N. J. L.) 68 A. 179; Coles v. R. Co., 49 Misc. 246, 97 N. Y. S. 289; El Paso Elec. R. Co. v. Bolgiano (Tex. Civ.), 109 S. W. 388; Betts v. S., 48 Tex. Cr. 522, 89 S. W. 413; Hunstad v. R. Co., 44 Wash. 505, 87 P. 832; S. v. Underwood, 35 Wash. 558, 77 P. 863. See P. v. Weick, 123 App. Div. 328, 107 N. Y. S. 968; Nelson v. R. Co., 130 Wis. 214, 109 N. W. 933; Schissler v. S., 122 Wis. 365, 99 N. W. 593.

626-65 See Order of U. C. T. v. Barnes, 75 Kan. 720, 90 P. 293.

626-66 Collins v. Chipman (Tex. Civ.), 95 S. W. 666.

627-69 All material facts on which there is evidence may be included. Fowler v. Land Co., 18 Ia. 131, 99 N. W. 1095.

627-74 See Impkamp v. Trans. Co., 108 Mo. App. 655, 84 S. W. 119; Heinzle v. R. Co., 182 Mo. 528, 81 S. W. 848; Chicago etc. R. Co. v. Cain, 37 Tex. Civ. 531, 84 S. W. 682. But see St. Louis etc. R. Co. v. Hook, 83 Ark. 584, 104 S. W. 217; Ince v. S., 77 Ark. 426, 93 S. W. 65.

The question must not omit facts whose inclusion is necessary to

render the answer of any value to the jury. El Paso Elec. R. Co. v. Bolgiano (Tex. Civ.), 109 S. W. 388; Baltimore etc. R. Co. v. Trader (Md.), 68 A. 12 (vital and essential fact must not be omitted); Fuchs v. Tone, 218 Ill. 445, 75 N. E. 1014. See Chicago v. O'Donnell, 124 Ill. App. 78; Earp v. S. (Miss.), 38 S. 288.

628-76 Ince v. S., 77 Ark. 426, 93 S. W. 65; Order of U. C. T. v. Barnes, 75 Kan. 720, 90 P. 293.

629-83 See S. v. Blackburn (Ia.), 114 N. W. 531. But see P. v. Bowers, 1 Cal. App. 501, 82 P. 553. *Contra*, Medical books admissible as substantive evidence. Birmingham etc. Co. v. Moore, 148 Ala. 115, 42 S. 1024.

629-85 Curtice v. Dixon (N. H.), 68 A. 587.

629-88 See Kasjeta v. Mfg. Co., 73 N. H. 22, 58 A. 874; Chicago etc. R. Co. v. Harton (Tex. Civ.), 88 S. W. 857.

630-91 Morgan v. Hendricks (Vt.), 67 A. 702. See also Trull v. Woodmen, 12 Idaho 318, 85 P. 1081.

631-95 See Hyde v. Fall River (Mass.), 83 N. E. 323.

631-96 Aeolian Co. v. S.-C. Co., 157 Fed. 320; Maurer v. Gould (N. J.), 59 A. 28. But see Chicago v. Rosenbaum, 126 Ill. App. 93.

632-98 Chicago etc. R. Co. v. Harton (Tex. Civ.), 88 S. W. 857.

632-1 Collins v. Chipman (Tex. Civ.), 95 S. W. 666.

632-2 Parrish v. S., 139 Ala. 16, 36 S. 1012; Thomas v. Casualty Co. (Md.), 67 A. 259.

632-3 Thomas v. Casualty Co. supra.

633-4 See West etc. Comrs. v. Boal, 232 Ill. 248, 83 N. E. 824.

633-5 But see Chicago etc. R. Co. v. Schmetz, 211 Ill. 446, 71 N. E. 1050.

634-9 But see Rowe v. R. & L. Co., 44 Wash. 658, 87 P. 921.

634-11 Carr v. Locomotive Co., 26 R. I. 180, 58 A. 678.

Mistakes in other cases. — An expert cannot be asked on cross-examination as to whether the results in other cases were not adverse to the opinions given by him in such cases. Watts v. S., 99 Md. 30, 57 A. 542. But see C. v. Tucker, 189 Mass. 451, 76 N. E. 127 (discretionary with court). *Compare* Chicago etc. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050.

635-14 Chicago U. T. Co. v. Ertrachter, 228 Ill. 114, 81 N. E. 816; Howard v. Creech, 31 Ky. L. R. 201, 101 S. W. 974. See West etc. Comrs. v. Boal, 232 Ill. 248, 83 N. E. 824.

635-15 See Butcher v. Geisserhainer, 109 N. Y. S. 159; Panhandle & G. R. Co. v. Kirby (Tex. Civ.), 94 S. W. 173.

Whether a test applied by witness to determine curvature of spine was a fair one, may be asked on cross-examination. Rowe v. R. & L. Co., 44 Wash. 658, 87 P. 921.

635-16 See S. v. Blackburn (Ia.), 110 N. W. 275. But see Mitchell v. Leech, 69 S. C. 413, 48 S. E. 290.

Whether the authorities do not lay down a different doctrine may be asked on cross-examination. Chicago U. T. Co. v. Ertrachter, 228 Ill. 114, 81 N. E. 816.

636-17 S. v. Blackburn (Ia.), 114 N. W. 531. See S. v. Thompson, 127 Ia. 440, 103 N. W. 377; Lilley v. Parkinson, 91 Cal. 655, 27 P. 1091; P. v. Bowers, 1 Cal. App. 501, 82 P. 553. Nor can such books be gotten in evidence by assuming their supposed teachings. S. v. Blackburn, supra.

636-18 Beadle v. Paine, 46 Or. 424, 80 P. 903. But see P. v. Bowers, 1 Cal. App. 501, 82 P. 553.

637-21 In re Anderson, 79 Conn. 535, 66 A. 7; Shaffer v. U. S., 24 App. D. C. 417; S. v. Blackburn (Ia.), 114 N. W. 531; S. v. Daly (Mo.), 109 S. W. 53; Byrne v. Byrne, 109 App. Div. 476, 96 N. Y. S. 375. See Dean v. St. L. W. Wks., 106 Mo. App. 167, 80 S. W. 292; Sheldon v. Wright (Vt.), 67 A. 807.

640-29 **The test of consistency** and reasonableness, having reference to other corroborative or contradictory evidence, should be applied. In re Am. Board of Comrs., 102 Me. 72, 66 A. 215.

640-32 S. v. Kelly, 77 Conn. 266, 58 A. 705 (must be weighed and tested by same rules applicable to other testimony); S. v. Briscoe (Del.), 67 A. 154; King v. Gilson, 191 Mo. 307, 90 S. W. 367; S. v. Wertz, 191 Mo. 569, 90 S. W. 838;

Turner v. S., 48 Tex. Cr. 585, 89 S. W. 975. See Atkins v. S. (Tenn.), 105 S. W. 353.

640-34 Suefferle v. MacFarland, 28 App. D. C. 94; Jennings v. Stripling, 127 Ga. 778, 56 S. E. 1026 (value of services); Atlantic & B. R. Co. v. Supply Co., 125 Ga. 470, 54 S. E. 530 (value); Helm v. Ins. Co., 132 Ia. 177, 109 N. W. 605 (value); Sackman v. Freeman (Mo. App.), 109 S. W. 818 (must consider but are not bound by expert testimony as to reasonable value of brokerage services); Widman Ins. Co. v. City, 191 Mo. 459, 90 S. W. 763; Pritchard v. Hooker, 114 Mo. App. 605, 90 S. W. 415 (value); Galveston etc. R. Co. v. Gillespie (Tex. Civ.), 106 S. W. 707; Southern K. R. Co. v. West (Tex. Civ.), 102 S. W. 1174; Sheldon v. Wright (Vt.), 67 A. 807. See U. S. v. Chisholm, 153 Fed. 808.

Merely advisory. — The opinions of experts are merely advisory and not binding on the jury, and the jury should accord them such weight as they believe, from all the facts and circumstances in evidence, such opinions are entitled to receive. Markey v. R. Co., 185 Mo. 348, 84 S. W. 61. See also Guyon v. R. Co., 49 Misc. 514, 97 N. Y. S. 1038 (value of medical services).

When unreasonable, the opinions of experts are not binding on the jury. Restetsky v. R. Co., 106 Mo. App. 382, 85 S. W. 665.

Conclusiveness on court. — Expert testimony as to value of attorney's fees is not conclusive on the court, since it is capable of forming and exercising an independent judgment. Lee v. Lomax, 219 Ill. 218, 76 N. E. 377; Dinkelspiel v. Pons, 119 La. 236, 43 S. 1018; Brooklyn Heights R. Co. v. R. Co., 109 N. Y. S. 31. See also Am. Stove Co. v. Foundry Co., 158 Fed. 978; Cochran v. Lee, 28 Ky. L. R. 344, 89 S. W. 145.

Court has no judicial knowledge sufficient to rebut opinions of experts that the air brake is more efficacious alone than in conjunction with reversal of engine. Harris v. R. (Ala.), 44 S. 962, *over.* Central etc. R. Co. v. Foshee, 125 Ala. 199, 27 S. 1006. But see dissent.

641-35 Denison v. Min. Co., 135 Fed. 864. But see Ball v. Skinner, 134 Ia. 298, 111 N. W. 1022.

"While juries may exercise their knowledge, judgment and experience in weighing conflicting opinion testimony, . . . and perhaps may come to a conclusion not in exact accord with the opinion of any witness, there are instances in which it is improper for the jury to transcend the limits of expert evidence, if there is nothing to discredit either the fairness of the experts or the reasonableness of their testimony. This is so when the nature of the case is such that the experience, knowledge and common sense of the jurors cannot aid them in the determination of the issue." Kerwin v. Friedman, 127 Mo. App. 519, 105 S. W. 1102. See Restetsky v. R. Co., 106 Mo. App. 382, 85 S. W. 665.

Where a view by the jury has been had they are not bound to base their verdict entirely upon opinions of experts as to value, although there is no other evidence. West etc. Comrs. v. Boal, 232 Ill. 248, 83 N. E. 824. But such opinions cannot be wholly disregarded. DuPont v. Sanitary Dist., 203 Ill. 170, 67 N. E. 815.

642-36 S. v. Collins, 5 Penne. (Del.) 263, 62 A. 224; Sayre v. Trustees, 192 Mo. 95, 90 S. W. 787.

642-38 S. v. Collins, supra.

643-43 In re Anderson, 79 Conn. 535, 66 A. 7. See Robinson v. Jones (Md.), 65 A. 814 (opinions on testamentary capacity); Shoemaker v. Elmer, 70 N. J. L. 710, 58 A. 940.

643-44 Illinois C. R. Co. v. Emerson (Miss.), 44 S. 928 (testimony of eye witness to the facts); Louisville etc. R. Co. v. Admx., 28 Ky. L. R. 989, 90 S. W. 977. See Johnston v. Turnbull, 130 Fed. 769, 65 C. C. A. 157.

The testimony of an injured person as to the extent of his injury and suffering may be accepted by the jury in preference to the contrary testimony of "a whole college of physicians." Southern R. Co. v. Tankersley, 3 Ga. App. 548, 60 S. E. 297. See also Payne v. R. & L. Co. (Wash.), 91 P. 1084.

The nature of the issue upon which the testimony is given largely determines the weight which should be given to expert testimony which

conflicts with direct testimony, since it may be such that only experts can speak upon it with clearness and certainty. Ball v. Skinner, 134 Ia. 298, 111 N. W. 1022.

Relative weight of conflicting expert and non-expert opinions. See In re Peterson, 136 N. C. 13, 48 S. E. 561; Moore v. Caldwell, 6 Ohio C. C. (N. S.) 484. *Compare* McMullen v. City, 104 App. Div. 337, 93 N. Y. S. 772; Harvey v. Fargo, 99 App. Div. 599, 91 N. Y. S. 84.

645-47 **Where corroborated by circumstances,** expert testimony that the signature on a note was not genuine was held sufficient to warrant a jury in disregarding positive direct testimony to the contrary. Simpson v. Schutz, 31 Ind. App. 151, 67 N. E. 457. See Modern S. Co. v. County, 126 Ia. 606, 102 N. W. 536.

645-48 See S. v. Wertz, 191 Mo. 569, 90 S. W. 838. But the satisfactory or unsatisfactory character of the proof of the facts hypothesized is not material. Kesselring v. Hummer, 130 Ia. 145, 106 N. W. 501.

648-58 Chicago U. T. Co. v. Roberts, 229 Ill. 481, 82 N. E. 401; Kaufman v. Abrams, 90 N. Y. S. 1068 (qualifications). See fully "OBJECTIONS."

Form of objection to hypothetical questions. — See P. v. James (Cal. App.), 90 P. 561; Illinois C. R. Co. v. Becker, 119 Ill. App. 221; Botwinis v. Allgood, 113 Ill. App. 188; Riverton C. Co. v. Shepherd, 111 Ill. App. 294; Frigstad v. R. Co., 101 Minn. 40, 111 N. W. 838; Bragg v. R. Co., 192 Mo. 331, 91 S. W. 527; Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655 (must point out defect in question); S. v. Megorden (Or.), 88 P. 306.

649-63 Bolen-D. Coal Co. v. Williams (Ind. Ter.), 104 S. W. 867; Gulf etc. R. Co. v. Boyce (Tex. Civ.), 87 S. W. 395.

651-67 Kernan v. Crook, 100 Md. 210, 59 A. 753.

652-68 Carwile v. S. (Ala.), 39 S. 220; Osborn v. S., 140 Ala. 84, 37 S. 105; Henderson v. Brunson, 141 Ala. 674, 37 S. 549; Hunt v. Curtis (Ala.), 44 S. 54 (sufficiency of estate personalty to pay debts); Shuler v. S., 126 Ga. 630, 56 S. E. 496; Upper Alton v. Green, 112 Ill. App. 439; Grand Trunk etc. R. Co. v. S. (Ind. App.), 82 N. E. 1017; Indianapolis etc. Co. v. Kidd, 167 Ind. 402, 79 N. E. 347; Beery v. Driver, 167 Ind. 127, 76 N. E. 967; See v. R. Co., 123 Ia. 443, 99 N. W. 106; Jenkins v. Beachy, 71 Kan. 857, 80 P. 947; South Covington etc. R. Co. v. Core, 29 Ky. L. R. 836, 96 S. W. 562; Baltimore & O. R. Co. v. S. (Md.), 69 A. 439; Masterson v. Trans. Co., 204 Mo. 507, 98 S. W. 504, 103 S. W. 48; Schermer v. McMahon, 108 Mo. App. 36, 82 S. W. 535; Hendley v. Refinery Co., 106 Mo. App. 20, 79 S. W. 1163; Marino v. Collis, 54 Misc. 581, 104 N. Y. S. 747; Leonard v. R. Co., 98 App. Div. 204, 90 N. Y. S. 574; Lunansky v. Pack. Co., 94 N. Y. S. 557; Slater v. R. Co., 94 N. Y. S. 395; Bisto & S. Co. v. Skapple (N. D.), 115 N. W. 841; Chicago etc. R. Co. v. Stibbs, 17 Okla. 97, 87 P. 293; Taylor v. Brown (Or.), 90 P. 673; S. v. Boyles (S. C.), 60 S. E. 233; Norris v. Assn., 19 S. D. 114, 102 N. W. 306 (that loss covered by insurance had been "settled"); Oakes v. Prather (Tex. Civ.), 81 S. W. 557; Franklin v. Boone (Tex. Civ.), 88 S. W. 262; Sue v. S. (Tex. Cr.), 105 S. W. 804; Gulf etc. R. Co. v. Wittenbert (Tex. Civ.), 104 S. W. 424; Dupree & M. v. R. Co. (Tex. Civ.), 96 S. W. 647; Willis v. S., 49 Tex. Cr. 139, 90 S. W. 1100; Deskin v. S., 49 Tex. Cr. 439, 93 S. W. 742; Metropolitan L. Ins. Co. v. Hall, 104 Va. 572, 52 S. E. 345.

Whether another person owned or had borrowed a pistol may or may not be a mere conclusion of the witness, depending upon whether he had actual knowledge of the facts. Waggoner v. S. (Tex. Cr.), 98 S. W. 255.

Claims by third person. — A witness may testify how long a third person was in possession of land claiming under another (Henry v. Frohlichstein (Ala.), 43 S. 126); or "who, if anyone, claimed" land after a certain time. Field v. Field (Tex. Civ.), 87 S. W. 726.

What witness would have done under given circumstances is, when relevant, a fact which he may state, and is not his mere conclusion. International etc. R. Co. v. Davis (Tex. Civ.), 84 S. W. 669.

Ready, willing and able. — Testimony of a broker that he had purchasers "ready, willing and able to buy" is an inadmissible conclusion. Northwestern P. Co. v. Whitney (Cal. App.), 89 P. 981. But see "CONTRACTS."

653-70 See S. v. Nowells (Ia.), 109 N. W. 1016.

654-73 See S. v. Nowells, supra; Barker v. City, 146 Mich. 257, 109 N. W. 427.

654-74 Kroell v. S., 139 Ala. 1, 36 S. 1025; Nichols v. Wentz, 78 Conn. 429, 62 A. 610; Brunswick etc. R. Co. v. Hoodenpyle, 129 Ga. 174, 58 S. E. 705; Robinson v. S., 128 Ga. 254, 57 S. E. 315; Delaware etc. R. Co. v. Fisk (Ind. App.), 81 N. E. 1100; Rothrock v. Cedar Rapids, 128 Ia. 252, 103 N. W. 475; Baker v. Oughton, 130 Ia. 35, 106 N. W. 272 (that certain clothing was needed by persons to whom furnished); Beverly v. El. R. Co., 194 Mass. 450, 80 N. E. 507 (whether unloading of three cars would make fair-sized crowd on platform); Partelow v. R. Co. (Mass.), 81 N. E. 894; Standley v. R. Co., 121 Mo. App. 537, 97 S. W. 244; McCloskey v. Pub. Co., 107 Mo. App. 260, 80 S. W. 723 (whether certain bills for clothing constituted a liberal provision by father for his sons); Crosby v. Wells, 73 N. J. L. 790, 67 A. 295; S. v. Laster, 71 N. J. L. 586, 60 A. 361; Taylor v. S. L. & A. Co., 145 N. C. 383, 59 S. E. 139; C. v. Karamakovic (Pa.), 67 A. 650; McKim v. City, 217 Pa. 243, 66 A. 340; C. v. Eyler, 217 Pa. 512, 66 A. 746; Machen v. W. U. T. Co., 72 S. C. 256, 51 S. E. 697; Smith v. R. Co. (Tex. Civ.), 99 S. W. 564; Metropolitan L. Ins. Co. v. Wagner (Tex. Civ.), 109 S. W. 1120; McCabe v. Trac. Co. (Tex. Civ.), 88 S. W. 387 (cause of a fall—that the person slipped on a board and fell); Richards v. C., 107 Va. 881, 59 S. E. 1104; Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777 (*cit.* Encyc. of Ev.). See Smith v. R. & P. Co., 147 Ala. 702, 41 S. 307.

657-76 See First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S. 822; Bain v. S., 46 Tex. Cr. 96, 79 S. W. 814.

657-78 Southern R. Co. v. Weatherlow (Ala.), 44 S. 1019 (whether "many" or few people used a crossing). See Reiter-C. Mfg. Co. v. Hamlin, 144 Ala. 192, 40 S. 280; Lander v. Sheehan, 32 Mont. 25, 79 P. 406.

Possession. — See infra, 699-7.

Ownership. — See "OWNERSHIP," and Hawley v. Bond (S. D.), 105 N. W. 464.

Title. — See "TITLE."

Purchase. — See Driver v. King, 145 Ala. 585, 40 S. 315.

Ability to work since receiving an injury. Southern R. Co. v. Dean, 128 Ga. 366, 57 S. E. 702. See more fully infra, 696-93.

Indebtedness. — Denial of indebtedness is not a conclusion, but testimony to a collective fact. Owen v. McDermott, 148 Ala. 699, 41 S. 730. See LeClair Co. v. Rogers-R. Co., 124 Wis. 44, 102 N. W. 346. So is a direct statement of the fact of indebtedness. Richards v. Shoe Co., 145 Ala. 657, 39 S. 615.

Correctness of photograph. — Hebbe v. Maple Creek, 121 Wis. 668, 99 N. W. 442.

658-82 **Whether witness' income** is necessary for support of family. Torrey v. Kraus (Ala.), 43 S. 184.

Hard-working person. — That plaintiff was a hard-working woman is statement of fact and not conclusion. St. Louis etc. R. Co. v. Smith, 34 Tex. Civ. 612, 79 S. W. 340.

659-86 St. Louis etc. R. Co. v. Demsey (Tex. Civ.), 89 S. W. 786. See Richards v. C., 107 Va. 881, 59 S. E. 1104.

662-96 Dupree v. S., 148 Ala. 620, 42 S. 1004; Huachuca Wat. Co. v. Swain, 4 Ariz. 113, 77 P. 619 (whether prudent person could fail to see an excavation at night); Plumlee v. R. Co. (Ark.), 109 S. W. 515; Continental Cas. Co. v. Todd, 82 Ark. 214, 101 S. W. 168; St. Louis etc. R. Co. v. Morris, 76 Ark. 542, 89 S. W. 846; Shafter E. Co. v. Alvord, 2 Cal. App. 602, 84 P. 279; Nickles v. S., 48 Fla. 46, 37 S. 312; Thomas v. S., 122 Ga. 151, 50 S. E. 64; Mayor v. Humphries, 122 Ga. 800, 50 S. E. 986; Central etc. R. Co. v. Goodwin, 120 Ga. 83, 47 S. E. 641; Chicago etc. R. Co. v. O'Donnell, 213 Ill. 545, 72 N. E. 1133 (whether car was over-crowded); Cleveland etc. R. Co. v. Osgood, 36 Ind. App. 34, 73 N. E. 285;

Aetna P. Co. v. Earlandson, 33 Ind. App. 251, 71 N. E. 185; Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; Comstock v. Twp., 137 Mich. 541, 100 N. W. 788; McDonald v. Duluth, 93 Minn. 206, 100 N. W. 1102; Ames v. Ames, 75 Neb. 473, 106 N. W. 584 (ability to converse intelligently is a conclusion to be drawn by jury where conversations are shown); Powell v. R. Co., 28 Nev. 40, 78 P. 978 (necessity of sounding steam whistle at hours of beginning and quitting work); S. v. Hunskor (N. D.), 114 N. W. 996; Citizens' R. Co. v. Robertson (Tex. Civ.), 91 S. W. 609; Texas S. R. Co. v. Long, 35 Tex. Civ. 339, 80 S. W. 114; Hart v. Hart (Tex. Civ.), 110 S. W. 91; Meyers v. Min. Co., 28 Utah 96, 77 P. 347 (whether place where plaintiff was working was sufficiently lighted); Zitske v. Grohn, 128 Wis. 159, 107 N. W. 20.

Matter in issue. — The opinion of the witness upon the very matter in issue is not proper. Kendrick v. Furman (Neb.), 115 N. W. 541; Leatherman v. S., 49 Tex. Cr. 485, 95 S. W. 504; Curtis v. Pav. Co., 44 Wash. 334, 87 P. 345 (contributory negligence); Detroit S. R. Co. v. Lambert, 150 Fed. 555, 80 C. C. A. 357. *Compare* 527-38.

Unnecessary force—opinion inadmissible. Hubbard v. R. Co., 32 Ky. L. R. 1337, 108 S. W. 331.

Whether death was self-inflicted, where this is in issue. Metropolitan L. Ins. Co. v. Wagner (Tex. Civ.), 109 S. W. 1120.

What is a public place. — O'Neill Mfg. Co. v. Harris, 127 Ga. 640, 56 S. E. 739.

Necessity of taking land by eminent domain, opinion incompetent. Grand Rapids v. Coit, 149 Mich. 668, 113 N. W. 362.

That footprints were made by a particular person — witness should describe points of similarity and leave the conclusion to the jury. Heidelbaugh v. S. (Neb.), 113 N. W. 145; DuBose v. S., 148 Ala. 560, 42 S. 862. But see S. v. Hopper, 114 La. 557, 38 S. 452, and *contra*, Alford v. S., 47 Fla. 1, 36 S. 436; Tankersley v. S. (Tex. Cr.), 101 S. W. 234 (but witness must have made some comparative measurement or there must be some common peculiarity). *Compare* Porch v. S. (Tex. Cr.), 99 S. W. 102; Turner v. S., 48 Tex. Cr. 585, 89 S. W. 975.

Unfitness of mother for custody of child. Moore v. Dozier, 128 Ga. 90, 57 S. E. 110.

664-97 Gracy v. R. Co., 53 Fla. 350, 42 S. 903.

665-99 Granite Bldg. C. v. Greene, 25 R. I. 586, 57 A. 649. See Kasower v. Sandler, 96 N. Y. S. 734 (construction of contract).

665-2 Clemons v. S., 48 Fla. 9, 37 S. 647; Wood v. Praul, 217 Pa. 293, 66 A. 528; Houston etc. R. Co. v. Patrick (Tex. Civ.), 109 S. W. 1097; Chenault v. S., 46 Tex. Cr. 351, 81 S. W. 971.

665-3 See Haines v. Goodlander, 73 Kan. 183, 84 P. 986; Dean Co. v. Standifer, 37 Tex. Civ. 181, 83 S. W. 230.

666-4 Pecos etc. R. Co. v. Evans Co. (Tex. Civ.), 93 S. W. 1024. See long v. S., 76 Ark. 493, 89 S. W. 93, 91 S. W. 26 (whether person, from his reputation, would be likely to carry out a threat).

666-5 Green v. S., 49 Tex. Cr. 238, 90 S. W. 1115. But see Gilliland v. Board, 141 N. C. 482, 54 S. E. 413.

Understanding. — Love v. Scatcherd, 146 Fed. 1, 77 C. C. A. 1; Gentry v. Singleton, 128 Fed. 679, 63 C. C. A. 231. But an affiant's "understanding" of the contract is not objectionable as a mere conclusion where it appears to be his recollection of its substance in lieu of a statement of its exact language. Leath v. Hinson, 117 Ga. 589, 43 S. E. 985. See also Whitfield v. Diffie (Tex. Civ.), 105 S. W. 324.

666-6 Williams v. S. (Ala.), 43 S. 720 (best judgment); Gilliland v. Board, 141 N. C. 482, 54 S. E. 413. See Southern R. Co. v. Howell (S. C.), 60 S. E. 677; Berge v. Kittleson (Wis.), 114 N. W. 125. But see Hammond v. S. (Ala.), 45 S. 654; Pool v. S., 48 Tex. Cr. 478, 88 S. W. 350.

667-7 Birmingham etc. Co. v. Ryan, 148 Ala. 69, 41 S. 616; Mimbs v. S., 2 Ga. App. 387, 58 S. E. 499; S. v. Richards, 126 Ia. 497, 102 N. W. 439.

667-8 *Contra.* — Lamb v. Mayor, 121 Ga. 345, 49 S. E. 275.

668-9 Hammond v. S. (Ala.), 45 S. 654; Griffin v. S., 2 Ga. App. 534, 58 S. E. 781 (that persons "seemed" to be engaged in a game of cards); Howell v. Gro. Co., 121 Ga. 461, 49 S. E. 299; Elliston v. S. (Tex. Cr.), 99 S. W. 999; Wade v. S., 48 Tex. Cr. 512, 90 S. W. 503.

668-10 Sexton etc. Co. v. Sexton (Tex. Civ.), 106 S. W. 728; Green v. S., 49 Tex. Cr. 238, 90 S. W. 1115.

668-11 Atlantic etc. R. Co. v. Crosby, 53 Fla. 400, 43 S. 318 (railway conductor).

669-12 See C. v. Eyler, 217 Pa. 512, 66 A. 746.

670-14 See Nichols v. Wentz, 78 Conn. 429, 62 A. 610; Scott v. S., 49 Tex. Cr. 386, 93 S. W. 112. But see San Antonio Tr. Co. v. Kumpf (Tex. Civ.), 99 S. W. 863 (that motorman tried to stop car, inadmissible).

670-15 Birmingham etc. Co. v. Randle (Ala.), 43 S. 355 (that motorman seemed to try to stop the car as quick as he could); Western U. T. Co. v. Merrill, 144 Ala. 618, 39 S. 121 (sending of telegram). *Compare* 600-79.

670-16 **Possibility of avoiding injury.** — Atlantic I. & C. Co. v. Mixon, 126 Ga. 457, 55 S. E. 237. See also Southern R. Co. v. McGowan (Ala.), 43 S. E. 378. *Compare* Atlantic etc. R. Co. v. Crosby, 53 Fla. 400, 43 S. 318.

671-17 Reiter-C. Mfg. Co. v. Hamlin, 144 Ala. 192, 40 S. 280; Dix v. Ice Co. (N. J.), 68 A. 1101 (whether hot water vat in ice plant could be covered without interfering with operation of plant); Richardson v. S., 49 Tex. Cr. 391, 94 S. W. 1016 (prosecution for sodomy with a jennet, — opinion of witness familiar with size and height of both accused and the animal, that copulation was impossible with accused standing on the ground, held erroneously excluded). See Beaumont Tr. Co. v. Dilworth (Tex. Civ.), 94 S. W. 352.

673-25 S. v. Blydenberg (Ia.), 112 N. W. 634. See also Decker v. S. (Ark.), 107 S. W. 182. *Compare* S. v. Rutledge (Ia.), 113 N. W. 461.

Excessive force. — Hubbard v. R. Co., 32 Ky. L. R. 1337, 108 S. W. 331.

673-26 See Kansas etc. R. Co. v. Taylor (Tex. Civ.), 107 S. W. 889.

Whether habits have grown or become more pronounced — opinion of an acquaintance of many years held competent. Swygart v. Willard, 166 Ind. 25, 76 N. E. 755.

673-27 Taylor v. S. L. & A. Co., 145 N. C. 383, 59 S. E. 139.

674-28 See Conway v. Murphy (Ia.), 112 N. W. 764 (carefulness and caution in spending money).

674-29 Barlow v. Hamilton (Ala.), 44 S. 657 (whether a person looked as though his feelings had been hurt); Nichols v. Wentz, 78 Conn. 429, 62 A. 610 (whether there was any act or statement by one person indicating coercion or attempt to influence another); Appeal of Spencer, 77 Conn. 638, 60 A. 289 (that "person spoke affectionately"); Hawaii v. Awai, 12 Haw. 174; Vannest v. Murphy (Ia.), 112 N. W. 236 (acted childish); Kuhlman v. Weiben, 129 Ia. 188, 105 N. W. 445 (acted drunk); White v. White, 76 Kan. 82, 90 P. 1087 (gesticulating "like he was mad," or was standing with his head down "as if he was crying"); C. v. Snell, 189 Mass. 12, 75 N. E. 75 (what a person at a distance appeared to be doing); Earles v. S. (Tex. Cr.), 106 S. W. 138 (peaceable); Stanley v. S. (Tex. Cr.), 95 S. W. 1076 (demeanor while testifying); Jones v. S., 47 Tex. Cr. 515, 85 S. W. 5 (Cool and collected); Bain v. S., 46 Tex. Cr. 96, 79 S. W. 814 (that accused when arrested trembled badly and seemed about to fall; was pale and scarcely able to stand); Till v. S. (Wis.), 111 N. W. 1109 (was "worried", "acted stupid" and as if "something was wrong with"). But see Ball v. U. S., 147 Fed. 32 (that certain persons all rushed onto property of another as if by arrangement, inadmissible conclusion); Bell v. S., 140 Ala. 57, 37 S. 281; Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113 (that a person "did not speak very friendly", inadmissible conclusion).

Previous acquaintance is not necessary. Watson v. S. (Tex. Cr.), 105 S. W. 509.

"Acted like lovers." — Inadmissible conclusion — the acts and conversations should be shown. Kesselring v. Hummer, 130 Ia. 145, 106 N. W. 501.

Rationality of conduct. — A witness may state whether conduct seen by him impressed him as rational or irrational, although his opinion as to rationality of the actor is incompetent. P. v. Pekarz, 185 N. Y. 470, 78 N. E. 294. See also Hodge v. Rambow (Ala.), 45 S. 678; Arellanes v. Arellanes (Cal.), 90 P. 1059 (appeared to be rational); In re Small, 118 App. Div. 502, 103 N. Y. S. 705; Schoenberg & Co. v. Surety Co., 52 Misc. 104, 101 N. Y. S. 798, and "INSANITY."

Negligent conduct. — See "NEGLIGENCE."

Cause of conduct. — See "CAUSE"; also "SEDUCTION" (that person seduced yielded because of promises of marriage), and S. v. Bennett (Ia.), 110 N. W. 150.

Feigning. — Opinion admissible. McCormick v. R. Co., 141 Mich. 17, 104 N. W. 390. *Compare* P. v. Koerner, 117 App. Div. 40, 102 N. Y. S. 93.

Tone of voice, — whether angry or otherwise. Campos v. S. (Tex. Cr.), 97 S. W. 100.

675-30 But see Henry v. Frohlichstein (Ala.), 43 S. 126; Lord v. St. R. (N. H.), 67 A. 639 (that a person looked frightened and was about to jump from car, admissible); Nichols v. Wentz, 78 Conn. 429 62 A. 610; Scott v. S., 49 Tex. Cr. 386, 93 S. W. 112.

675-31 *Compare* Pittforth v. S., 46 Tex. Cr. 424, 80 S. W. 628.

675-33 See Ward v. Meredith, 220 Ill. 66, 77 N. E. 118 (horse was or appeared to be frightened); Schmitt v. Dubuque Co. (Ia.), 113 N. W. 820 (that other horses had been frightened at same object); Mikesell v. R. Co., 134 Ia. 736, 112 N. W. 201; Foster v. Lumb. Co., 141 Mich. 316, 104 N. W. 617; St. Louis etc. R. Co. v. Hall (Tex. Civ.), 106 S. W. 194.

What caused a mule to turn from the track in a mine, — inadmissible conclusion. Madden v. Coal Co., 133 Ia. 699, 111 N. W. 57. But what frightened horses may be a fact within the knowledge of the witness. Dublin G. & E. Co. v. Frazier (Tex. Civ.), 103 S. W. 197.

676-35 Blackwood C. & C. Co. v. James (Va.), 60 S. E. 90.

Whether a horse was fit for a lady to drive — inadmissible conclusion. Fletcher v. Dixon (Md.), 68 A. 875.

Experienced horsemen may state that a steam shovel is calculated to frighten horses of ordinary gentleness. Heinmiller v. Winston, 131 Ia. 32, 107 N. W. 1102.

676-36 Louisville & N. R. Co. v. Brown, 28 Ky. L. R. 772, 90 S. W. 567 (liveryman of ten years' experience competent to testify that mare had fever and was sick, but not that she had lung fever). *Compare* supra, 557-30.

That certain injuries could have caused death of horse, inadmissible. Southern R. Co. v. Taylor, 148 Ala. 52, 42 S. 625.

Physical condition. — Statements that cattle were "in bad condition," were "hard lookers," "in very bad shape," and "in very hard condition," are not conclusions or opinions, but statements of fact, descriptive of condition. Gulf etc. R. Co. v. Kimble (Tex. Civ.), 109 S. W. 234. So is testimony that cattle were in "good condition." Texas & P. R. Co. v. White, 35 Tex. Civ. 521, 80 S. W. 641.

677-37 First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S. 822 (wide-awake and attentive); Southern R. Co. v. Hobbs (Ala.), 43 S. 844 (seemed to suffer); U. S. Health & Ins. Co. v. Clark (Ind. App.), 83 N. E. 760; Vannest v. Murphy (Ia.), 112 N. W. 236; S. v. Nowells (Ia.), 109 N. W. 1016; Federal Bet. Co. v. Reeves (Kan.), 93 P. 627; S. v. Matthews, 119 La. 665, 44 S. 336 (excited appearance of accused); S. v. Hopper, 114 La. 557, 38 S. 452 (appearance of accused in presence of victim); Fulton v. R. Co., 125 Mo. App. 239, 102 S. W. 47; Lord v. R. Co. (N. H.), 67 A. 639 (frightened); Owen v. S. (Tex. Cr.), 105 S. W. 513 (*cit.* Encyc. of Ev.); St. Louis etc. R. Co. v. Boyer (Tex. Civ.), 97 S. W. 1070 (that person's appearance and actions did not indicate that he was hurt or injured); Ferguson v. S. (Tex. Cr.), 95 S. W. 111 (apparent age); Mullen v. R. Co. (Tex. Civ.), 92 S. W. 1000; Gulf etc. R. Co. v. Miller (Tex. Civ.), 79 S. W. 1109 (that a person seemed to be looking at another person). See Cole v. S. (Tex. Cr.), 101 S. W.

218. But see S. v. Baudoin, 115 La. 837, 40 S. 239.

677-39 Negative statement of appearance is proper—as that person did not show anger or surprise. Tagert v. S., 143 Ala. 88, 39 S. 293.

677-41 Walker v. S. (Ala.), 45 S. 640 (clothes—washed-out blood-stains); Dillard v. S. (Ala.), 39 S. 584 (that what a person had looked like a bottle of wine); Illinois C. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435 (whether cracks in bolts appeared new or old); Damren v. Trask (Me.), 68 A. 818 (clapboards); International etc. R. Co. v. Drought (Tex. Civ.), 100 S. W. 1011; International etc. R. Co. v. Gready, 36 Tex. Civ. 536, 82 S. W. 1061 (that handhold on car had pulled out of the wood); Williams v. Norton (Vt.), 69 A. 146 (that wire rope seemed to have been broken by use). But see Gress Lumb. Co. v. Shingle Co., 120 Ga. 751, 48 S. E. 115 (that lost writing bore indications of being genuine, inadmissible).

Evidence of a comparison between things which cannot be exhibited to the jury is proper. S. v. Miller, 71 N. J. L. 527, 60 A. 202.

Unusual appearance. — Whether there was anything unusual about a mail crane, inadmissible. Western R. v. Cleghorn, 143 Ala. 392, 39 S. 133.

677-42 Rothrock v. Cedar Rapids, 128 Ia. 252, 103 N. W. 475 (that snow looked as though some one had fallen and left print of his body. See Louisville & N. R. Co. v. Pearce, 142 Ala. 680, 39 S. 74 (how far something had been dragged—from appearance of ground); Hickey v. S. (Tex. Cr.), 102 S. W. 417; Porch v. S. (Tex. Cr.), 99 S. W. 102. But see Cleveland etc. R. Co. v. Alfred, 113 Ill. App. 236 (that an impression in the dust "looked just like some man had hit in the dust," inadmissible).

678-43 Beers v. R. Co., 101 App. Div. 308, 91 N. Y. S. 957 (witness familiar with the noise and motion of cars running on particular track may state that the noise and motion at a certain point on a particular occasion were not of the usual kind). Richards v. C., 107 Va. 881, 59 S. E. 1104 (that certain substance was oil and that mustache worn by certain person was false).

That ground was too hard to permit tracks to be followed. S. v. Sanders, 75 S. C. 409, 56 S. E. 35.

Genuineness. — Witnesses familiar with the taste, smell and color of a certain patent medicine may testify that a medicine sold under the same name was only an imitation. Hostetter Co. v. Gallagher, 142 Fed. 208.

679-44 Plumlee v. R. Co. (Ark.), 109 S. W. 515 (condition of a car). See Chicago etc. R. Co. v. O'Donnell, 114 Ill. App. 345 (whether there was room in a car for more people—calls for inadmissible conclusion. Question should be whether there was any vacant space).

679-45 Williams v. Lansing (Mich.), 115 N. W. 961 (opinion of experienced witness that stringers of sidewalk when taken up six months after the accident had not been suitable to hold a nail for a year or more, held admissible, *cit.* Blank v. Tp. of L., 79 Mich. 1, 44 N. W. 157).

679-46 See Virginia-C. Chem. Co. v. Knight, 106 Va. 674, 56 S. E. 725. But see Standley v. R. Co., 121 Mo. App. 537, 97 S. W. 244.

Waiting room. — Whether suitable and convenient—opinion inadmissible. Illinois C. R. Co. v. C., 28 Ky. L. R. 802, 90 S. W. 602.

681-48 Anniston v. Ivey (Ala.), 44 S. 48 (dangerous and impassable condition of street); Comstock v. Twp., 137 Mich. 541, 100 N. W. 788; McDonald v. Duluth, 93 Minn. 206, 100 N. W. 1102; Thompson v. City, 124 Mo. App. 439, 101 S. W. 709.

Condition of sidewalk. — Policeman familiar with sidewalk may state whether it was in reasonably safe condition for public travel. Campbell v. New Haven, 78 Conn. 394, 62 A. 665. *Compare* Harrison v. Ayshire, 123 Ia. 528, 99 N. W. 132. *Contra,* Spaulding v. Edina, 122 Mo. App. 65, 97 S. W. 545; Miller v. Canton, 112 Mo. App. 322, 87 S. W. 96.

682-50 See Virginia C. Chem. Co. v. Knight, 106 Va. 674, 56 S. E. 725.

683-51 Louisville & N. R. Co. v. Admx., 28 Ky. L. R. 1113, 91 S. W. 685.

683-52 See Cain v. R. Co., 74 S. C. 89, 54 S. E. 244; Thompson v. R. Co. (Tex. Civ.), 106 S. W. 910. But see Standley v. R. Co., 121 Mo. App. 537, 97 S. W. 244.

But where the witness knows the condition of a semaphore his testimony as to such condition is not opinion evidence. Chicago etc. R. Co. v. Vipond, 112 Ill. App. 558.

Dangerous condition of platform. McFeat v. R. Co., 5 Penne. (Del.) 52, 62 A. 898.

683-53 Evans v. Mills, 124 Ga. 318, 52 S. E. 538 (that machine was dangerous); Civetti v. Am. etc. Corp. (App. Div.), 108 N. Y. S. 663; McKim v. City, 217 Pa. 243, 66 A. 340; Cain v. R. Co., 74 S. C. 89, 54 S. E. 244 (safety of embankment); Thompson v. R. Co. (Tex. Civ.), 106 S. W. 910. See Taylor v S., 49 Fla. 69, 38 S. 380; Charlton v. R. Co., 200 Mo. 413, 98 S. W. 529; Virginia-C. Chem. Co., v. Knight, 106 Va. 674, 56 S. E. 725, and infra, 570-78. *Compare* Detroit S. R. Co. v. Lambert, 150 Fed. 555, 80 C. C. A. 357; Morgan v. Mfg. Co., 120 Mo. App. 590, 97 S. W. 638; Houston etc. R. Co. v. McHale (Tex. Civ.), 105 S. W. 1149.

Comparative danger of crossing railroad at different places. Savannah etc. R. Co. v. Evans, 121 Ga. 391, 49 S. E. 308.

Deadliness of weapon. — McDuffie v. S., 121 Ga. 580, 49 S. E. 708; Moran v. S., 120 Ga. 846, 48 S. E. 324. See more fully "HOMICIDE," Vol. 6.

Expert opinion. — See supra, 562-49.

685-56 Richardson v. S. (Tex. Cr.), 94 S. W. 1016.

686-64 Cross v. Pack. Co., 123 Ga. 817, 51 S. E. 704; McCrary v. Pritchard, 119 Ga. 876, 47 S. E. 341; Huntington v. Stemeth (Ind. App.), 77 N. E. 407; Harriman v. New etc. Co., 132 Ia. 616, 110 N. W. 33; Western U. T. Co. v. Ring, 102 Md. 677, 62 A. 801; Wiggins v. R. Co., 119 Mo. App. 492, 95 S. W. 311; Raymond v. Edelbrock, 15 N. D. 231, 107 N. W. 194; Montgomery v. Somer (Or.), 90 P. 674; Byrne v. R. Co. (Pa.), 68 A. 672; Maulden v. R. Co., 73 S. C. 9, 52 S. E. 677; Bell County v. Flint (Tex. Civ.), 91 S. W. 329. *Compare* Nash v. Steamboat Co., 123 App. Div. 148, 108 N. Y. S. 336. *Contra*, Jackson v. R. Co. 73 S. C. 557, 54 S. E. 231 (from personal injuries); Roundtree v. R. Co., 72 S. C. 474, 52 S. E. 231.

Fact of damage. — A witness cannot testify that land was damaged, this being a conclusion for the jury to draw (Gosdin v. Williams (Ala.), 44 S. 611; Baltimore etc. R. Co. v. Sattler, 102 Md. 595, 62 A. 1125; Central etc. R. Co. v. Keyton, 148 Ala. 675, 41 S. 918); nor that he sustained damages by reason of a certain act. Richmond v. Brandt, 118 Ill. App. 624.

Cause of damage to goods shipped on railway. — Statement that from their general appearance the damage was due to improper storing or packing in the car; held statement of fact and not opinion. Texas & P. R. Co. v. Warner (Tex. Civ.), 93 S. W. 489.

688-70 The Umbria, 148 Fed. 283 (damage to vessel); St. Louis etc. R. Co. v. Brooksher (Ark.), 109 S. W. 1169; Peoria etc. Co. v. Vance, 234 Ill. 36, 84 N. E. 607; Withey v. R. Co., 141 Mich. 412, 104 N. W. 773 (damage to wearing apparel); Watson v. Min. & S. Co., 31 Mont. 513, 79 P. 14; International etc. R. Co. v. Aten (Tex. Civ.), 81 S. W. 346. See also Auckland v. Lawrence, 20 Colo. App. 364, 78 P. 1035; Parrott v. R. Co., 127 Ia. 419, 103 N. W. 352. *Contra*, Central etc. R. Co. v. Barnett (Ala.), 44 S. 392; Baltimore etc. R. Co. v. Sattler, 102 Md. 595, 62 A. 1125, 64 A. 507; McCook v. McAdams (Neb.), 106 N. W. 988. See Ft. Collins D. R. Co. v. France (Colo.), 92 P. 953.

Damage to cattle. — Ft. Worth etc. R. Co. v. Bank, 36 Tex. Civ. 293, 81 S. W. 1050, *dist.* Gulf etc. R. Co. v. Wright, 1 Tex. Civ. 402, 21 S. W. 80, where the evidence did not show that the witness considered only legitimate elements of damage.

689-71 Fowler v. S. (Ala.), 45 S. 913 (bruised).

That wounds appeared to have been made with a penknife found beside the body and that from appearances an effort had been made to tie up the wounds with cloth cut from decedent's skirt. Metropolitan L. Ins. Co. v. Wagner (Tex. Civ.), 109 S. W. 1120 (*cit.* Encyc. of Ev.).

Cause of death. — Non-expert competent where the cause was one

which was evident to an ordinary person. S. v. Caron, 118 La. 349, 42 S. 960. See also, S. v. Lyons, 113 La. 959, 37 S. 890. But otherwise incompetent. Ala. Consol. C. & I. Co. v. Heald (Ala.), 45 S. 686 (that deceased looked as if he had been smothered).

690-74 S. v. Laster, 71 N. J. L. 586, 60 A. 361; Miller v. City, 104 App. Div. 33, 93 N. Y. S. 227 (depth of hole).

691-77 See City Elec. R. Co. v. Smith, 121 Ga. 663, 49 S. E. 724; Beers v. R. Co., 101 App. Div. 308, 91 N. Y. S. 957.

Conclusion from flashes and reports that shots could not have been fired by one person, competent. Kroell v. S., 139 Ala. 1, 36 S. 1025.

691-78 Bruchman v. U. S. (Ariz.), 89 P. 413.

691-79 Central etc. R. Co. v. Hyatt (Ala.), 43 S. 867 (witnesses may state whether or not a person could have seen a thing); Arkansas & L. R Co. v. Sanders, 81 Ark. 604, 99 S. W. 1109 (distance at which engineer could have seen animal on track); St. Louis etc. R. Co. v. Shannon, 76 Ark. 166, 88 S. W. 851 (how far a common headlight would light up the track); Chicago C. R. Co. v. Hagenback, 228 Ill. 290, 81 N. E. 1014; Chicago C. R. Co. v. Rohe, 118 Ill. App. 322; Rietveld v. R. Co., 129 Ia. 249, 105 N. W. 515; Missouri etc. R. Co. v. Steele (Tex. Civ.), 110 S. W. 171; Stone v. R. Co., 32 Utah 185, 89 P. 715 (engineer may testify whether escaping steam obscured his view). But see Hammond v. S., 147 Ala. 79, 41 S. 761; Morrow v. Mfg. Co., 70 S. C. 242, 49 S. E. 573. *Compare* Doyle v. Eschen (Cal. App.), 89 P. 836.

Brightness of electric light. — Witness cannot characterize the brightness of an electric light where an accident occurred as, "so bright he could have read a newspaper there" and that "he thought it (the light) was pretty near as bright as day." Chicago v. Loebel, 130 Ill. App. 487.

Sufficiency of light at night to permit person on sidewalk to see an excavation in the street. Huachuca W. Co. v. Swain, 4 Ariz. 113, 77 P. 619.

692-80 See Southern I. R. Co. v. Osborn, 39 Ind. App. 333, 78 N. E. 248, 79 N. E. 1067; Mitchell v. R. Co. (Ia.), 114 N. W. 622 (How far and under what circumstances an engineer could have seen standing cars). But see Chicago etc. R. Co., v. Steckman, 224 Ill. 500, 79 N. E. 602; Chicago C. R. Co. v. Lowitz, 218 Ill. 24, 75 N. E. 755 (incompetent as mere conclusion).

Unless based on experiment or experience, testimony that under given conditions a person standing a certain distance from a given point could have seen a small object on the track at such point, is an inadmissible conclusion. Ayers v. R. Co., 190 Mo. 228, 88 S. W. 608.

693-82 Hill v. S., 146 Ala. 691, 40 S. 387.

Identification by sound. — See "Identity."

693-83 St. Louis etc. R. Co. v. Knowles (Tex. Civ.), 99 S. W. 867.

694-84 Northern Tex. Tr. Co. v. Caldwell (Tex. Civ.), 99 S. W. 869. *Contra*, El Paso Elec. R. Co. v. Loer (Tex. Civ.), 108 S. W. 199.

694-87 Testimony that a third person had no financial responsibility is not a conclusion. Harrison Gr. Co. v. R. Co., 145 Mich. 712, 108 N. W. 1081.

Possession of property. — See Arnold v. Harris, 142 Mich. 275, 105 N. W. 744.

695-90 Fleming & S. v. Pullen (Tex. Civ.), 97 S. W. 109.

Other possible cause than locomotive — opinion incompetent. Norfolk & W. R. Co. v. Briggs, 103 Va. 105, 48 S. E. 521.

696-91 *Compare* Dunn v. Newberry (Tex. Civ.), 86 S. W. 626.

696-93 Mobile L. & R. Co. v. Walsh, 146 Ala. 295, 40 S. 560 (that person was unable to do anything); Kline v. R. Co., 150 Cal. 741, 90 P. 125; Pioneer R. Assn. v. Jones, 111 Ill. App. 156; Supreme Lodge v. Jones, 113 Ill. App. 241; Chicago C. R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28 (nervous condition of injured person); Federal Bet. Co. v. Reeves (Kan.), 93 P. 627; Fulton v. R. Co., 125 Mo. App. 239, 102 S. W. 47; Cole v. S. (Tex. Cr.), 101 S. W. 218; Houston etc. R. Co. v. O'Donnell (Tex. Civ.), 90 S. W. 886 (impairment of witness' own hear-

ing); Cunningham v. Neal (Tex. Civ.), 109 S. W. 455; Davis v. R. Co., 31 Utah 307, 88 P. 2. But see Young v. Beveridge (Neb.), 115 N. W. 766; Kirby v. Tel. Co., 77 S. C. 404, 58 S. E. 10.

A description of the outward manifestations of a person's physical or mental condition and health does not involve an opinion. Cunningham v. Neal (Tex. Civ.), 109 S. W. 455. See also Jacobs v. S., 146 Ala. 103, 42 S. 70.

Nature and effect of physical injuries. — See Hill v. S., 146 Ala. 51, 41 S. 621; Mo. K. & T. R. Co. v. Hibbitts (Tex. Civ.), 109 S. W. 228. That, after examination, witness thought person was seriously hurt and knocked senseless. Hyland v. Tel. Co., 70 S. C. 315, 49 S. E. 879. The physical appearance of an injury or of an injured limb may be described by a non-expert. McIlwain v. Goebe, 128 Ill. App. 209. A party may testify that he has been a nervous wreck ever since an injury. Chicago etc. R. Co. v. Patton, 122 Ill. App. 174. But see Kozlowski v. City, 113 Ill. App. 513.

Physical capacity to labor or to do a full day's work—opinion of non-expert, competent. Young v. Beveridge (Neb.), 115 N. W. 766. See also Semet-S. Co. v. Wilcox, 143 Fed. 839, 74 C. C. A. 635 (person competent to testify that he was able to do the work called for in contract of employment); Federal Bet. Co. v. Reeves (Kan), 93 P. 627; Lindsay v. Kan. City, 195 Mo. 166, 93 S. W. 273, and supra, 657-78; Southern Kan. R. Co. v. Sage (Tex. Civ.), 80 S. W. 1038 (testimony by locomotive engineer that he was disabled by the injuries in question from following his calling is not an opinion or conclusion). But see St. Louis etc. R. Co. v. Demsey (Tex. Civ.), 89 S. W. 786; Jesse v. S., 46 Tex. Cr. 444, 80 S. W. 999. Witness may state the effect which attempts to work had on an injured person. Chicago etc. R. Co. v. Jones (Tex. Civ.), 88 S. W. 445. That after an injury a person could not lift anything, was crippled up, was always suffering pain, and could not walk far without resting—competent. San Antonio Tr. Co. v. Flory (Tex. Civ.), 100 S. W. 200. But see Wells, F. & Co. v. Boyle (Tex. Civ.), 87 S. W. 164. That he did not appear to be half as good a man as before the injury. St. Louis etc. R. Co. v. Smith (Tex. Civ.), 90 S. W. 926.

Whether injury appeared recent and may describe it. Robinson v. Halley, 124 Ia. 443, 100 N. W. 328.

Effect of medical treatment may be stated by one who has observed both the treatment and its effects. Cleveland etc. R. Co. v. Hadley (Ind. App.), 82 N. E. 1025.

Delirium. — Non-expert incompetent. S. v. Nowells (Ia.), 109 N. W. 1016. See "MENTAL AND PHYSICAL STATES;" "INSANITY."

697-96 Duerler Mfg. Co. v. Eichhorn (Tex. Civ.), 99 S. W. 715; St. Louis etc. R. Co. v. Boyer (Tex. Civ.), 97 S. W. 1070 (that a person was "ill"). But see Illinois L. Ins. Co. v. DeLang, 30 Ky. L. R. 753, 99 S. W 616.

697-97 Cleveland etc. R. Co. v. Hadley (Ind. App.), 82 N. E. 1025; Duerler Mfg. Co. v. Eichhorn (Tex. Civ.), 99 S. W. 715.

698-98 *Contra.* — Valentine v. Ins. Co., 106 App. Div. 487, 94 N. Y. S. 758.

698-1 Macon R. & L. Co. v. Mason, 123 Ga. 773, 51 S. E. 569; Bardstown v. County, 28 Ky. L. R. 710, 90 S. W. 246 (smallpox—incompetent).

That a person died of consumption may be testified by a non-expert. Krapp v. Ins. Co., 143 Mich. 369, 106 N. W. 1107, *foll.* Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668, and *disappr.* Grattan v. Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617.

Cough, lung or female trouble—question whether witness' wife had any of these troubles before her injury, calls for fact and not opinion. St. Louis etc. R. Co. v. Lowe (Tex. Civ.), 97 S. W. 1087.

The symptoms which he has observed may be stated by a non-expert, but not the nature of the disease. Illinois L. Ins. Co. v. De Lang, 30 Ky. L. R. 753, 99 S. W. 616. Thus, a question whether witness saw any conduct or action by another indicating that he had piles, is inadmissible. Taylor v. Woodmen, 42 Wash. 304, 84 P. 867.

698-2 But see Hubbard v. Perlie, 25 App. D. C. 477.

698-4 Indianapolis etc. R. Co. v. Reeder, 37 Ind. App. 262, 76 N. E. 816; Texas & N. O. R. Co. v. Clippenger (Tex. Civ.), 106 S. W. 155; St. Louis etc. R. Co. v. Schuler (Tex. Civ.), 102 S. W. 155. See Chicago & A. R. Co. v. Johnson, 128 Ill. App. 20; Fulton v. R. Co., 125 Mo. App. 239, 102 S. W. 47; San Antonio Tr. Co. v. Flory (Tex. Civ.), 100 S. W. 200.

Manifestations of pain. — Gardner v. Paulson, 117 Ill. App. 17.

699-7 Foster v. Murphy, 135 Fed. 47, 67 C. C. A. 521; Wilson v. Coal Co., 134 Ia. 594, 112 N. W. 89 (abandonment); Wells & M. Council v. Littleton, 100 Md. 416, 60 A. 22; Luce v. Parsons, 192 Mass. 8, 77 N. E. 1032; Rice v. James, 193 Mass. 458, 79 N. E. 807; Calvert v. Schultz, 143 Mich. 441, 106 N. W. 1123; Swing v. Rose, 75 Ohio St. 355, 79 N. E. 757; Buchanan v. Randall (S. D.), 109 N. W. 513 (purchase); Donner v. Graap (Wis.), 115 N. W. 125 (duty). See Hendrickson v. Dwyer, 70 N. J. L. 223, 57 A. 420. But see Owen v. McDermott, 148 Ala. 669, 41 S. 730 (indebtedness—denial of, competent); Forbes v. Davidson, 147 Ala. 702, 41 S. 312 (whether a certain person had control over assistant—testimony of witness knowing the fact, competent); Gatt v. Shive (Tex. Civ.), 82 S. W. 303 (that papers in bank were under control of depositor, competent as a fact); LeClair Co. v. Rogers-R. Co., 124 Wis. 44, 102 N. W. 346 (indebtedness—denial of, competent).

Contract. — Existence of contract of employment. International H. Co. v. Campbell (Tex. Civ.), 96 S. W. 93. Construction by or understanding of witness, improper (Bowen v. Ins. Co., 19 S. D. 459, 104 N. W. 1040; Montgomery County v. Bean, 26 Ky. L. R. 568, 82 S. W. 240; Hillock v. Grape, 111 App. Div. 720, 97 N. Y. S. 823); but witness' "understanding" of contract is proper when it means "recollection." Leath v. Hinson, 117 Ga. 589, 43 S. E. 985 (see supra, 666-5). A witness cannot state that everything required by a contract had been done (Taylor v. McFatter (Tex. Civ.), 109 S. W. 395. *Compare* Providence Mach. Co. v. Browning, 72 S. C. 424, 52 S. E. 117); or that a contract had been sold or transferred to him. Mardowitz v. Goldberg, 87 N. Y. S. 234.

Duties of servant or employe. Testimony by one who knows the facts is not a conclusion. Kirby L. Co. v. Chambers (Tex. Civ.), 95 S. W. 607; Pullman Co. v. Norton (Tex. Civ.), 91 S. W. 841; Long v. R. Co. (Tex. Civ.), 85 S. W. 1048 (conductor may testify as to duties of brakeman); St. Louis etc. R. Co. v. Rea (Tex. Civ.), 84 S. W. 428.

Partnership. — Existence of (Hubbard v. Mulligan, 34 Colo. 236, 82 P. 783); authority of partner to sign firm checks (Mich. Shoe Co. v. Paul, 149 Mich. 695, 113 N. W. 310). But see Clark v. Hoffman, 128 Ill. App. 422 (on the question whether a concern was a corporation or partnership, old employes held competent to state that it was a partnership).

Agency. — Western U. T. Co. v. Heathcoat (Ala.), 43 S. 118; Am. Tel. & T. Co. v. Green, 164 Ind. 349, 73 N. E. 707 (authority of agent). See also Aughey v. Windrem (Ia.), 114 N. W. 1047; McCormack v. Herboth, 115 Mo. App. 193, 91 S. W. 164; Carr v. Ins. Co., 115 App. Div. 755, 101 N. Y. S. 158. *Contra*, Fritz v. Elev. Co. (Ia.), 114 N. W. 193 ("agency is a condition of which anyone having knowledge of it may testify, subject, however, to the test of cross-examination"). See also Gould v. Chair Co., 147 Ala. 629, 41 S. 675 (limitations on salesman's authority), *cit.* Bernsberg v. Harris, 46 Mo. App. 404; Daugherty v. S. (Tex. Cr.), 80 S. W. 624.

Possession is a fact which may be testified to directly when the term is used in its popular sense as distinguished from "seisin." Iler v. Miller (Neb.), 111 N. W. 589; Wright v. S., 136 Ala. 139, 34 S. 233; Nathan v. Dierssen, 146 Cal. 63, 79 P. 739; Child v. Kingsbury, 46 Vt. 47. But it is not proper for witness to characterize possession as "open and notorious." Driver v. King, 145 Ala. 585, 40 S. 315.

Delivery and acceptance of deed. Direct denial of receipt or acceptance not a conclusion, the affirma-

tive testimony that deed was delivered and accepted would be inadmissible. Renshaw v. Dignan, 128 Ia. 722, 105 N. W. 209. See also Brooks v. Sioux City, 114 Ia. 641, 87 N. W. 682. But see Chew v. Jackson (Tex. Civ.), 102 S. W. 427.

Lack of consideration. — Testimony by a wife that deed to her by husband was executed without consideration is admissible and not equivalent to allowing the witness to testify that she did not hold the land under an implied trust. Yordi v. Yordi (Cal. App.), 91 P. 348, *foll.* Hardison v. Davis, 131 Cal. 635, 63 P. 1005.

Abandonment of an easement— conclusion of witness, inadmissible. Gaston v. R. Co., 120 Ga. 516, 48 S. E. 188. See "ABANDONMENT."

Sale. — Testimony of a witness that she "sold" a particular chattel is incompetent as a conclusion. Rea v. Schow Bros. (Tex. Civ.), 93 S. W. 706 (in which, however, this fact was the principal issue). See also Mardowitz v. Goldberg, 87 N. Y. S. 234.

701-11 Ex parte McCoy, 47 Tex. Cr. 237, 82 S. W. 1044 (temper). But see Compher v. Browning, 219 Ill. 429, 76 N. E. 678, holding testimony that testatrix was a woman easily influenced and susceptible to flattery, to be a mere conclusion.

Knowledge. — Generally speaking one person cannot testify whether another knows or knew a certain fact. West Pratt C. Co. v. Andrews (Ala.), 43 S. 348. See "KNOWLEDGE."

701-14 Tagert v. S., 143 Ala. 88, 39 S. 293 (that person did not show anger); S. v. Rutledge (Ia.), 113 N. W. 461 (whether witness heard defendant use a single cross word to deceased or any word that sounded in a quarrelsome tone); Owen v. S. (Tex. Cr.), 105 S. W. 513; (*quot.* Encyc. of Ev.); Campos v. S. (Tex. Cr.), 97 S. W. 100.

The cause of apparent displeasure cannot be stated by the witness. Fleckinger v. Taffee, 149 Mich. 678, 113 N. W. 311.

Malice. — Testimony that any injury was done "maliciously" is a mere conclusion. Doty v. R. Co. (Ia.), 114 N. W. 522; Vandiver & Co. v. Waller, 143 Ala. 411, 39 S. 136.

703-16 *Compare* supra, 675-33.

703-17 S. v. Turner, 134 N. C. 641, 57 S. E. 158; Gabler v. S., 49 Tex. Cr. 623, 95 S. W. 521. But see Parham v. S., 147 Ala. 57, 42 S. 1 (that deceased was afraid to go about at night, inadmissible).

703-18 Hamilton v. Brew. Co., 129 Ia. 172, 105 N. W. 438. See fully "INTENT," Vol. 7. But see Waggoner v. S. (Tex. Cr.), 98 S. W. 255.

Understanding. — One party to a contract may testify as to what was the understanding between himself and the other party regarding a certain matter, although he cannot recall the conversations. Whitfield v. Diffie (Tex. Civ.), 105 S. W. 324. See supra, 666-5.

705-21 Southern R. Co. v. Hobbs (Ala.), 43 S. 844 (whether a person seemed to suffer after an injury).

705-22 Tagert v. S., 143 Ala. 88, 39 S. 293 (that person did not show surprise).

706-26 Jones v. Elec. Co., 99 Md. 620, 57 A. 620 (that noise was loud enough to be heard by any one on car with witness); Kohr v. R. Co., 117 Mo. App. 302, 92 S. W. 1145 (that a bell heard by witness was the starting bell and gripman's gong).

Description of sound. — That noise heard by witness sounded like collision of two street cars, not inadmissible. Binsbacher v. St. Louis T. Co., 108 Mo. App. 1, 82 S. W. 546.

That train was making less noise than usual is a statement of fact and not a conclusion. International etc. R. Co. v. Villareal, 36 Tex. Civ. 532, 82 S. W. 1063.

The difference in sound between the reports of pistols heard by the witness involves no conclusion or opinion, but a mere statement of fact. West v. S., 53 Fla. 77, 43 S. 445.

706-27 P. v. Helm (Cal.), 93 P. 99 (width of bicycle tracks).

708-31 Colorado & S. R. Co. v. Webb, 36 Colo. 224, 85 P. 683; Seaboard etc. R. Co. v. Smith, 53 Fla. 375, 43 S. 235; Louisville & N. R. Co. v. Jones, 50 Fla. 225, 39 S. 485; Gregory v. R. Co., 126 Ia. 230, 101 N. W. 761; Atchison etc. R. Co. v.

Holloway, 71 Kan. 1, 80 P. 31; Garren v. R. Co., 144 Mich. 26, 107 N. W. 284; Line v. R. Co., 143 Mich. 163, 106 N. W. 719; Tinkle v. R. Co. (Mo.), 110 S. W. 1086; Donaldson v. R. Co., 128 Mo. App. 245, 107 S. W. 36; Lynch v. R. Co., 208 Mo. 1, 106 S. W. 68; Stotler v. R. Co., 200 Mo. 107, 98 S. W. 509; Sluder v. Transit Co., 189 Mo. 107, 88 S. W. 648; Aston v. Trans. Co., 105 Mo. App. 226, 79 S. W. 999. See Little Rock etc. Co. v. Hicks, 79 Ark. 248, 96 S. W. 385.

Question for court. — Qualifications of witness. Borneman v. R. Co., 19 S. D. 459, 104 N. W. 208.

Speed of automobile. — An ordinary witness who has observed moving objects is competent. Porter v. Buckley, 147 Fed. 140, 78 C. C. A. 138. See Wright v. Crane, 142 Mich. 508, 106 N. W. 71.

709-32 Augusta R. & E. Co. v. Arthur, 3 Ga. App. 513, 60 S. E. 213; Chicago C. R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28 (speed with which car was started); Chicago C. R. Co. v. Rohe, 118 Ill. App. 322; Chicago C. R. Co. v. Hyndshaw, 116 Ill. App. 367; Hall v. R. Co., 124 Mo. App. 661, 101 S. W. 1137; Coffey v. R. Co. (Neb.), 112 N. W. 589.

Extraordinary speed. — Witness unfamiliar with the ordinary speed of a certain line of cars cannot testify that one of such cars was running at an extraordinary rate of speed. Verrone v. R. Co., 27 R. I. 370, 62 A. 512.

A passenger on the car is not thereby disqualified from giving his opinion. Goodes v. Traction Co., 150 Mich. 494, 114 N. W. 338; Tinkle v. R. Co. (Mo.), 110 S. W. 1086.

709-33 *Compare* supra, 600-77. See Wright v. Crane, 142 Mich. 508, 106 N. W. 71 (speed of automobile). But see Eckels v. Muttschall, 230 Ill. 462, 82 N. E. 872.

710-39 Montgomery St. R. Co. v. Shanks, 139 Ala. 489, 37 S. 166 (looked very fast). See Harvey v. R. Co., 114 La. 1065, 38 S. 859. But see Birmingham etc. Co. v. Rutledge, 142 Ala. 195, 39 S. 338.

Full speed. — Testimony that horse car was going at full speed, admissible. Beaumont Tr. Co. v. Dilworth (Tex. Civ.), 94 S. W. 352.

Usual rate. — Southern R. Co. v. Bonner, 141 Ala. 517, 37 S. 702; Little Rock etc. Co. v. Green, 78 Ark. 129, 93 S. W. 752.

710-40 Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

Date of sale of ticket. — Question whether there is any way that the witness from his own knowledge and from the ticket can tell or estimate the time it was sold, does not call for an opinion. P. v. Lowrie, 4 Cal. App. 137, 87 P. 253.

711-42 Allison v. Wall, 121 Ga. 822, 49 S. E. 831. See Sexton etc. Co. v. Sexton (Tex. Civ.), 106 S. W. 728.

711-43 San Antonio etc. R. Co. v. Jackson (Tex. Civ.), 85 S. W. 445 (whether train stopped long enough to allow passenger to alight, incompetent).

What is a reasonable time for the performance of a special work is proper subject of opinion where all the elements and data for making calculation could not be detailed to jury or presented in such way that they could make the calculation, unless it is the very matter in issue, and therefore for the jury. Allison v. Wall, 121 Ga. 822, 49 S. E. 831. Thus, the opinion of messenger boy as to what is reasonable time for delivery of telegram in a particular case, is admissible in discretion of court. Kirby v. Tel. Co., 77 S. C. 404, 58 S. E. 10. So a cattle shipper familiar with route and distance between two places may state what is a reasonable time for shipment between them. St. Louis etc. R. Co. v. Rogers (Tex. Civ.), 108 S. W. 1027. Texas etc. R. Co. v. Walker (Tex. Civ.), 95 S. W. 743; Texas & P. R. Co. v. Ellerd (Tex. Civ.), 87 S. W. 362; International etc. R. Co. v. McGehee (Tex. Civ.), 81 S. W. 804. See also St. Louis etc. R. Co. v. Boshear (Tex. Civ.), 108 S. W. 1032.

712-44 But see Julian v. Star Co., 209 Mo. 35, 107 S. W. 496.

712-45 **Effect of words** on bystanders — inadmissible conclusion. Shuler v. S., 126 Ga. 630, 55 S. E. 496.

714-52 See In re Wharton, 132 Ia. 714, 109 N. W. 492; Hawk v. R. Co. (Mo. App.), 108 S. W. 1119.

715-59 S. v. Hogan, 117 La. 863, 42 S. 352.

EXTORTION [Vol. 5.]

716-1 Hanley v. S., 125 Wis. 396, 104 N. W. 57.
719-9 Rex v. Gilham, 1 Esp. (Eng.) 285.
719-11 *Contra.* — Hanley v. S., supra.

EXTRADITION [Vol. 5.]

Presumption arising from warrant as to fact of flight, 724-9; *Presumption that indictment was authenticated by proper party,* 731-44; *Sufficiency of record of conviction to sustain proceeding,* 731-50.

724-6 A presumption of the identity of a fugitive arises from the identity of the name of the relator in habeas corpus proceedings with the name in the warrant and requisition papers. S. v. Bates, 101 Minn. 303, 112 N. W. 260.
724-7 Depoilly v. Palmer, 28 App. D. C. 324.
724-9 Presumption arising from warrant as to fact of flight. — A presumption arises from the fact that a governor issued a warrant that he found that the accused was a fugitive from justice. Dennison v. Christian, 72 Neb. 703, 101 N. W. 1045; Pettibone v. Nichols, 203 U. S. 192; Ex parte Edwards (Miss.), 44 S. 827.
725-13 See In re Harsha, 11 Ont. L. R. (Can.) 494.
725-14 In re Harsha, supra.
726-17 See Farrell v. Hawley, 78 Conn. 150, 61 A. 502; In re Fairman, 3 Ohio N. P. (N. S.) 485 (facts constituting crime must be shown unless application is based on an indictment).
727-21 In re McCarthy, 5 Haw. 573 (production of indictment sufficient presumption of guilt).
728-31 In re Muller, 5 Phila. (Pa.) 289.
730-41 A governor's warrant is presumptive evidence that all essential legal prerequisites have been observed; and if the proceedings, when produced, appear to be regular, such presumption becomes conclusive evidence of the right to extradite the person charged with the offense (P. v. Comr., 91 N. Y. S. 760; In re Davis, 122 Mass. 324); and that the governor was in possession of all the facts giving the legal basis of his action, and if he was not, the burden is on the person arrested to show it (Ex parte Edwards (Miss.), 44 S. 827; In re Gillis, 38 Wash. 156, 80 P. 300; Dennison v. Christian, 72 Neb. 703, 101 N. W. 1045, judgment *aff.* 196 U. S. 637); and is sufficient evidence to justify a removal. Munsey v. Clough, 196 U. S. 364, *cit.* Roberts v. Reilly, 116 U. S. 80; Hyatt v. P., 188 U. S. 691 (s. c. 172 N. Y. 176, 64 N. E. 825). See also Pettibone v. Nichols, 203 U. S. 192.
731-44 Presumption that indictment was authenticated by proper party. — When an indictment, made a part of requisition papers, was authenticated, the presumption is that it was so authenticated by one who was at least acting governor of the demanding state. Kemper v. Metzger (Ind.), 81 N. E. 663.
731-50 Sufficiency of record of conviction to sustain proceedings. A record of conviction is sufficient evidence to sustain proceedings for interstate extradition. Hughes v. Pflanz, 138 Fed. 980, 71 C. C. A. 234.

FALSE IMPRISONMENT [Vol. 5.]

Not necessary to prove damage, 733-4.

733-3 Black v. Marsh, 31 Ind. App. 53, 67 N. E. 201; Vara v. Const. Co., 114 La. 261, 38 S. 162; Barfield v. Coker, 73 S. C. 181, 53 S. E. 170.
733-4 Blocker v. Clark, 126 Ga. 484, 54 S. E. 1022, 7 L. R. A. (N. S.) 268. *Contra,* Oates v. McGlaun, 145 Ala. 656, 39 S. 607; Steinberger v. Miller, 29 Ky. L. R. 1132, 96 S. W. 1101. *Compare* Sundmaker v. Gaudet, 113 La. 887, 37 S. 865, holding that in a suit for false imprisonment and malicious prosecution, plaintiff must show malice and want of probable cause. And see Western U. T. Co. v. Thompson, 144 Fed. 578, 75 C. C. A. 334; Sanders v. Davis (Ala.), 44 S. 979, holding that where malice and

want of probable cause are alleged they must be proved.

Not necessary to prove damage. Roberts v. Brown (Tex. Civ.), 94 S. W. 388.

734-5 Black v. Marsh, 31 Ind. App. 53, 67 N. E. 201; Tubbs v. Haessig, 149 Mich. 185, 112 N. W. 750; Tracy v. Coffey, 8 Ohio C. C. (N. S.) 88; McAleer v. Good, 216 Pa. 473, 65 A. 934; Mann v. Cowan, 8 Pa. Super. 30.

736-9 Schultz v. Cemetery, 190 N. Y. 276, 83 N. E. 41.

737-13 Kroeger v. Passmore (Mont.), 93 P. 805 (defendant must show compliance with the law which warranted imprisonment); Schultz v. Cemetery, supra.

FALSE PERSONATION [Vol. 5.]

739-3 Butts v. S., 47 Tex. Cr. 494, 84 S. W. 586 (even though the allegation is an unnecessary one).

FALSE PRETENSES [Vol. 5.]

744-1 S. v. Briscoe (Del.), 67 A. 154; Goddard v. S., 2 Ga. App. 154, 58 S. E. 304; Carlisle v. S., 1 Ga. App. 651, 58 S. E. 1068; S. v. Dines, 206 Mo. 649, 105 S. W. 722. See Ager v. S., 2 Ga. App. 158, 58 S. E. 374.

744-2 *Compare* S. v. Sparks (Neb.), 113 N. W. 154.

745-4 S. v. Briscoe (Del.), 67 A. 154 (proof of fraudulent intent may be made by either direct or circumstantial evidence).

746-8 Lawrence v. S., 103 Md. 17, 63 A. 96; S. v. Roberts, 201 Mo. 702, 100 S. W. 484.

746-9 Lawrence v. S., supra; S. v. Roberts, supra.

747-14 Rex v. Wyatt, (1904) L. R. 1 K. B. 188; Reg. v. Roebuck, 7 Cox C. C. 126, Dears. & B. 24, 2 Jur. (N. S.) 597, 25 L. J. M. C. 101, 4 W. R. 514; Rex v. Whitehead, 1 Car. & P. 67, 12 E. C. L. 49; Reg. v. Francis, L. R. 2 C. C. 128, 12 Cox C. C. 612, 43 L. J. M. C. 97, 30 L. T. R. (N. S.) 503, 22 W. R. 633; Reg. v. Cooper, 1 Q. B. D. 19, 13 Cox C. C. 123, 45 L. J. M. C. 15, 33 L. T. R. (N. S.) 754, 24 W. R. 279; Rex v. Roberts, 1 Campb. 399, 2 Leach C. C. 987 note; Reg. v. Stenson, 12 Cox C. C. 111, 25 L. T. R. (N. S.) 666; Reg. v. Hope, 17 Ont. (Can.) 463 (*foll.* Reg. v. Francis L. R. 2 C. C. 128, 12 Cox C. C. 612, 43 L. J. M. C. 97, 30 L. T. R. (N. S.) 503, 22 W. R. 663); Wood v. U. S., 41 U. S. 342; Wright v. U. S., 1 Hayw. & H. 201, 30 Fed. Cas. 18,097; Farmer v. S., 100 Ga. 41, 28 S. E. 26; Dubois v. P., 200 Ill. 157, 65 N. E. 658, 93 Am. St. 183; Crum v. S., 148 Ind. 401, 47 N. E. 833 (*over.* Strong v. S., 86 Ind. 208, 44 Am. Rep. 292); S. v. Long, 103 Ind. 481, 3 N. E. 169; S. v. Carter, 112 Ia. 15, 83 N. W. 715; S. v. Brady, 100 Ia. 191, 69 N. W. 290, 62 Am. St. 560, 36 L. R. A. 693; S. v. Gibson, 132 Ia. 53, 106 N. W. 270; S. v. Briggs, 74 Kan. 377, 86 P. 447; Carnell v. S., 85 Md. 1, 36 A. 117; C. v. Tuckerman, 10 Gray (Mass.) 173; C. v. Coe, 115 Mass. 481; P. v. Hoffman, 142 Mich. 531, 105 N. W. 838; P. v. Shelters, 99 Mich. 333, 99 N. W. 362; P. v. Wakely, 62 Mich. 297, 28 N. W. 871; P. v. Schweitzer, 23 Mich. 301; S. v. Southall, 77 Minn. 296, 79 N. W. 1007; S. Turly, 142 Mo. 403, 44 S. W. 267; S. v. Jackson, 112 Mo. 585, 20 S. W. 674; S. v. Beaucleigh, 92 Mo. 490, 4 S. W. 666; S. v. Cooper, 85 Mo. 256; S. v. Roberts, 201 Mo. 702, 100 S. W. 484; S. v. Sparks (Neb.), 113 N. W. 154; Morgan v. S., 56 Neb. 696, 77 N. W. 64 (evidence admissible to show knowledge but not intent); S. v. Call, 48 N. H. 126; Cunningham v. S., 61 N. J. L. 67, 38 A. 847, *aff.* 61 N. J. L. 666, 40 A. 696; P. v. Peckens, 153 N. Y. 576, 47 N. E. 883; P. v. Everhardt, 104 N. Y. 591, 11 N. E. 62; Shippley v. P., 86 N. Y. 375, 40 Am. Rep. 551; P. v. Levin, 119 App. Div. 233, 104 N. Y. S. 647; Mayer v. P., 80 N. Y. 364; P. v. Putnam, 90 App. Div. 125, 85 N. Y. S. 1056; P. v. Jeffrey, 82 Hun 409, 31 N. Y. S. 267; P. v. Reavey, 38 Hun (N. Y.) 418, 39 Hun 364; Copperman v. P., 3 Thomp. & C. (N. Y.) 199; P. v. Spielman, 20 Alb. L. J. (N. Y.), 96 (evidence admissible to show intent but not knowledge, since knowledge must be shown before intent, is material); Tarbox v. S., 39 Ohio St. 581; Rafferty v. S., 91 Tenn. 655, 16 S. W. 728; Britt v. S., 9

Humph. (Tenn.) 31; Davison v. S., 12 Tex. App. 214; Baker v. S., 120 Wis. 135, 97 N. W. 566.

748-15 Reg. v. Holt, Bell. C. C. 280, 8 Cox C. C. 411, 6 Jur. (N. S.) 1121, 30 L. J. M. C. 11, 3 L. T. R. (N. S.) 310, 9 W. R. 74; Reg. v. Fuidge, 9 Cox C. C. 430, 10 Jur (N. S.) 160, L. & C. 390, 33 L. J. M. C. 74, 9 L. T. R. (N. S.) 777, 12 W. R. 351; Cowan v. S., 22 Neb. 519, 35 N. W. 405; S. v. Letourneau, 24 R. I. 3, 51 A. 1048, 96 Am. St. 696; S. v. Oppenheimer, 41 Wash. 630, 84 P. 588.

749-16 S. v. Sparks (Neb.), 113 N. W. 154; S. v. Marshall, 77 Vt. 262, 59 A. 916.

749-19 Swift v. S., 126 Ga. 590, 55 S. E. 478. See also Fairy v. S. (Tex. Cr.), 97 S. W. 700.

750-20 P. v. Ward (Cal. App.), 89 P. 874; P. v. Smith, 3 Cal. App. 62, 84 P. 449 (*cit.* P. v. Gibbs, 98 Cal. 661, 33 P. 630); S. v. Keyes, 196 Mo. 136, 93 S. W. 801. See C. v. Lundberg, 18 Phila. (Pa.) 482.

750-21 P. v. Ward (Cal. App.), 89 P. 874; S. v. Adams, 10 Idaho 591, 79 P. 398; S. v. Wilson, 73 Kan. 334, 80 P. 639, 84 P. 737; Lawrence v. S., 103 Md. 17, 63 A. 96; C. v. Clancy, 187 Mass. 191, 72 N. E. 842; P. v. Hoffman, 142 Mich. 531, 105 N. W. 838; S. v. Keyes, 196 Mo. 136, 93 S. W. 801, 6 L. R. A. (N. S.) 369; Moline v. S., 72 Neb. 361, 100 N. W. 810; P. v. Reiss, 114 App. Div. 431, 99 N. Y. S. 1002.

Generally any evidence is admissible to show the falsity of the pretenses. P. v. Langley, 114 App. Div. 427, 100 N. Y. S. 123; P. v. Reiss, 114 App. Div. 431, 99 N. Y. S. 1002.

753-29 C. v. Balph, 18 Pa. C. C. 242.

FIXTURES [Vol. 5.]

756-1 Trustees v. Grubb, 5 Phila. (Pa.) 41.

757-3 First C. & S. Bk. v. Milling Co., 144 Mich. 188, 107 N. W. 1107; Security Tr. Co. v. Temple Co., 67 N. J. Eq. 514, 67 A. 865; Lynn v. Waldron, 38 Wash. 82, 80 P. 292; E. M. Fish Co. v. Young, 127 Wis. 149, 106 N. W. 795.

757-4 Equitable G. & T. Co. v. Knowles, 8 Del. Ch. 106, 67 A. 961; City of Portland v. T. & T. Co. (Me.), 68 A. 1040; Filley v. Christopher, 39 Wash. 22, 80 P. 834.

760-6 Jacob v. Kellogg, 56 Misc. 661, 107 N. Y. S. 713 (presumption of intention not to attach trade fixtures permanently to realty).

762-8 **As between lessee and mortgagee** such facts may also be shown. Gordon v. Miller, 28 Ind. App. 612, 63 N. E. 774.

766-23 See Parker v. Blount Co., 148 Ala. 275, 41 S. 923.

767-24 State Security Bk. v. Hoskins, 130 Ia. 339, 106 N. W. 764.

770-31 Barnes v. Hosmer (Mass.), 82 N. E. 27 (an original agreement of reservation may be shown by inference from a subsequent recognition of rights).

FORCIBLE ENTRY AND DETAINER [Vol. 5.]

Declarations against interest, 781-10; *Entry under parol contract to rent,* 802-72; *Other actions pending injunctions,* 805-86.

775-1 Bailey v. Blacksher, 142 Ala. 254, 37 S. 827; Barnewell v. Stephens, 142 Ala. 609, 38 S. 662; Brown v. French, 148 Ala. 272, 42 S. 409; Amos v. Cohn (Cal. App.), 94 P. 590; Rockhold v. Doering, 122 Ill. App. 194; Taylor v. Orlansky (Miss.), 46 S. 50, 136; Redman v. Perkins, 122 Mo. App. 164, 98 S. W. 1097; Metz v. Schneider, 120 Mo. App. 453, 97 S. W. 187; Anderson v. R. Co., 128 Mo. App. 175, 107 S. W. 456.

One who was in peaceable possession may recover such possession although he makes no claim to right or title. McDaniel v. Directors, 125 Ill. App. 332.

Property described in the complaint must be shown to be that upon which the alleged entry was made. Montijo v. Sherer (Cal. App.), 92 P. 512.

777-2 **Easement.** — Right to a way cannot be recovered in an action of forcible entry and detainer, since the plaintiff cannot show the necessary possession—a way being

incorporeal. Moye v. Thurber, 146 Ala. 180, 40 S. 822.

Licensee of city to maintain a stand, the location of which is not specifically designated, cannot recover in an action of forcible entry. Becher v. New York, 102 App. Div. 269, 92 N. Y. S. 460.

777-3 Oyster Bay v. Jacobs, 109 App. Div. 613, 96 N. Y. S. 620.

778-4 McCormick v. McDowell, 28 Ky. L. R. 854, 90 S. W. 541; Brumfield v. Reynolds, 4 Bibb (Ky.) 388; C. v. Johnson, 3 Pa. C. C. 641.

779-5 Lorah v. Emmerson (Ala.), 45 S. 228 (goods left in a shop and occasional visits made to it sufficient).

Cutting timber and grazing stock on land is not sufficient evidence of possession since the user is not shown to be continuous and uninterrupted. Stockley v. Cissna (Tenn.), 104 S. W. 792.

779-6 Knowles v. Crocker, 149 Cal. 278, 86 P. 715.

Inclosure of land not necessary. Geoghegan v. Turner, 26 Ky. L. R. 537, 82 S. W. 244.

780-7 Bailey v. Blacksher, 142 Ala. 254, 37 S. 827; Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. S. 620; Stockley v. Cissna (Tenn.), 104 S. W. 792; Mansfield v. Northcut, 112 Tenn. 536, 80 S. W. 437. See Hendrickson v. Linville, 31 Ky. L. R. 967, 104 S. W. 688.

780-8 Watson v. Scarborough, 147 Ala. 689, 40 S. 672 (possession must be "actual, exclusive, and peaceable"); Childers v. Hieronymus, 32 Ky. L. R. 394, 105 S. W. 979.

But possession for any definite length of time need not be shown. Highland Park Oil Co. v. Minerals Co., 1 Cal. App. 340, 82 P. 228.

781-10 Declarations against interest by an authorized agent of the claimant are admissible to show that he was not in possession under a claim of adverse possession. Bailey v. Blacksher, 142 Ala. 254, 37 S. 827.

781-11 McCormick v. McDowell, 28 Ky. L. R. 854, 90 S. W. 541.

781-13 *Contra.* — Taylor v. Orlansky (Miss.), 46 S. 50, 136.

782-14 See Moye v. Thurber, 146 Ala. 180, 40 S. 822; Fisk v. Arnold (Ind. Ter.), 104 S. W. 824.

Prima facie case made out by lessee showing that he has the right to possession and defendant then has the burden of disproving this. Floersheim v. Baude, 110 Ill. App. 536.

Burden of proof to show legal right to recover possession is upon the plaintiff. Fisk v. Arnold, supra.

Right of plaintiff must affirmatively appear and judgment cannot be taken by default. Smith v. Finger, 15 Okla. 120, 79 P. 759.

782-15 Clark v. Langenbach, 130 Fed. 755, 65 C. C. A. 181. See Floersheim v. Baude, 110 Ill. App. 536.

Tenant cannot bring the action against his landlord. Washington v. Moore, 84 Ark. 220, 105 S. W. 253.

782-16 Redman v. Perkins, 122 Mo. App. 164, 98 S. W. 1097.

782-18 Montijo v. Sherer (Cal. App.), 92 P. 512; Rockhold v. Doering, 122 Ill. App. 194; Merki v. Merki, 212 Ill. 121, 72 N. E. 9; Spellman v. Rhode, 33 Mont. 21, 81 P. 395; Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. S. 620.

783-19 Rockhold v. Doering, 122 Ill. App. 194; Dineen v. Olson, 73 Kan. 379, 85 P. 538 (justice of peace may receive evidence of title when necessary to determine the question of possession); Moore v. Shoup, 123 Mo. App. 409, 100 S. W. 53 (declarations of defendant as to his title, admissible).

784-20 Barnewell v. Stephens, 142 Ala. 609, 38 S. 662; Bailey v. Blacksher, 142 Ala. 254, 37 S. 827; Johnson v. Assn., 126 Ill. App. 592.

Surveys and proof of occupation admissible only to show the location of the land and that the land occupied was not that, the possession of which is claimed. Paden v. Gibbs, 88 Miss. 274, 40 S. 871.

784-21 Clark v. Langenbach, 130 Fed. 755, 65 C. C. A. 181.

787-29 See Highland Park O. Co. v. Minerals Co., 1 Cal. App. 340, 82 P. 228 (admission harmless); Folsom v. Hunter, 6 Ind. Ter. 453, 98 S. W. 156; Moore v. Girten, 5 Ind. Ter. 384, 82 S. W. 848; Childers v. Hieronymus, 32 Ky. L. R. 394, 105 S. W. 979.

787-30 Amos v. Cohn (Cal. App.), 94 P. 590; Good v. Heckler, 19 Colo. App. 479, 76 P. 542.

Wrongful intent is not a necessary element in an action for forcible

entry and detainer. School Dist. v. Holt, 126 Mo. App. 571, 105 S. W. 32.

788-31 Wilson v. Campbell, 75 Kan. 159, 88 P. 548; Spellman v. Rhode, 33 Mont. 21, 81 P. 395.

Tearing down fence, sufficient. Brown v. French, 148 Ala. 272, 42 S. 409; Fowler v. Ohnick (Wash.), 87 P. 1050.

Chiseling away portion of a brick wall is a forcible entry. Holzhausen v. Hoskins, 115 Mo. App. 261, 91 S. W. 410.

Mere opening of a gate is insufficient. Fowler v. Prichard, 148 Ala. 261, 41 S. 667.

789-32 Knowles v. Crocker, 149 Cal. 278, 86 P. 715; Highland Park O. Co. v. Minerals Co., 1 Cal. App. 340, 82 P. 228; Good v. Heckler, 19 Colo. App. 479, 76 P. 542; Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. S. 620.

789-33 Clark v. Langenbach, 130 Fed. 755, 65 C. C. A. 181.

792-38 Winchester v. Becker, 4 Cal. App. 382, 88 P. 296 (false key).

792-39 Ehrlick v. C., 31 Ky. L. R. 401, 102 S. W. 289; Paden v. Gibbs, 88 Miss. 274, 40 S. 871; Redman v. Perkins, 122 Mo. App. 164, 98 S. W. 1097 (action of unlawful detainer).

In Alabama it does not matter how the defendant went into possession. Lorah v. Emmerson (Ala.), 45 S. 228; Sprouse v. Story (Ala.), 42 S. 23 (but where the entry was not forcible, the withholding must be shown to be unlawful).

793-41 Preston v. Davis, 112 Ill. App. 636; Thull v. Allen, 72 Neb. 760, 101 N. W. 1024.

That the entry was by consent must be shown to sustain a count for an unlawful detainer. Bailey v. Blacksher, 142 Ala. 254, 37 S. 827.

794-43 *Compare* Stahl Brew. Co. v. Van Buren (Wash.), 88 P. 837.

In Tennessee the action lies only against one who entered by contract and as lessee or under a lessee. Shepperson v. Burnette, 116 Tenn. 117, 92 S. W. 762.

In Missouri the grantee of the landlord is expressly authorized to maintain an action of unlawful detainer. Doner v. Ingram, 119 Mo. App. 156, 95 S. W. 983.

795-44 See Smith v. Finger, 15 Okla. 120, 79 P. 759; Columbus R. Co. v. Moss, 44 Wash. 589, 87 P. 951.

795-46 Demand unnecessary where the right of possession has terminated by limitation. Henion v. Vavrik, 126 Ill. App. 292.

795-47 See Fowler v. Prichard, 148 Ala. 261, 41 S. 66.

796-52 Barnewell v. Stephens, 142 Ala. 609, 38 S. 662.

797-56 Notice must clearly show who claims to be entitled to the possession of the premises and who makes the demand therefor, as well as a description of the property. Best v. Frazier, 16 Okla. 523, 85 P. 1119.

Authority of agent to make demand must be shown by affirmative proof, and subsequent ratification by the landlord of unauthorized acts can not relate back so as to affect the tenant's rights. Barnewell v. Stephens, 142 Ala. 609, 38 S. 662.

797-57 Iler v. Miller (Neb.), 111 N. W. 590; Heller v. Beal, Vol. 13-23 Ohio C. C. 540; Gardner v. Kime (Okla.), 95 P. 242; Smith v. Finger, 15 Okla. 120, 79 P. 759; Martin v. Hartshorne, 17 Okla. 586, 87 P. 854.

Demand on day before filing of complaint sufficient in absence of a statutory provision. Beauchamp v. Runnels, 35 Tex. Civ. 212, 79 S. W. 1105.

798-59 Peddicord v. Berk, 74 Kan. 236, 86 P. 465.

798-60 Smith v. Travel (Okla.), 94 P. 529 (affidavit of service by officer insufficient).

799-63 Whether damages can be recovered for the detention of the property, is undecided. Montgomery v. Fuel Co., 61 W. Va. 620, 57 S. E. 137. But see Fisk v. Arnold (Ind. Ter.), 104 S. W. 824; Osteen v. Stovall, 5 Ind. Ter. 170, 82 S. W. 710.

799-64 Winchester v. Becker, 4 Cal. App. 382, 88 P. 296.

801-70 West v. Comeaux, 73 Kan. 271, 85 P. 138 (bond for a deed admissible to show the character of defendant's entry and detention).

801-71 Burden on defendant, where the contract is within the statute of frauds, to show that he entered into possession of the land under the contract to purchase. Marks v. McGookin, 127 Ia. 716, 104 N. W. 373.

802-72 **Entry under parol contract** to rent may be shown in order to establish good faith and to prevent the assessment of punitive damages. Newell v. Taylor, 74 S. C. 8, 54 S. E. 212. And see Dominick v. Kane, 4 Ohio N. P. (N. S.) 583.

803-75 **Abandonment** subsequent to the entry, no defense. Spellman v. Rhode, 33 Mont. 21, 81 P. 395.

803-81 Hord v. Sartain, 27 Ky. L. R. 796, 86 S. W. 692.

Burden of proof is on plaintiff to show an entry within two years, since in this action such fact must exist to give the court jurisdiction. Karnes v. Johnston, 58 W. Va. 595, 52 S. E. 658.

804-84 McCormick v. McDowell, 28 Ky. L. R. 854, 90 S. W. 541; Robinson v. Marshall, 25 Ky. L. R. 1785, 78 S. W. 904; Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. S. 620.

805-85 **Other actions pending injunction.** — Pendency of an action for an injunction, brought by the plaintiff, is a defense to an action of forcible entry and detainer. Lowry v. Mitchell, 14 Okla. 241, 78 P. 379. But see Howe v. Parker, 18 Okla. 282, 90 P. 15.

Contest before land department. Appeal taken to the Secretary of Interior from a decision of the land department, is no defense to an action of forcible detainer brought by the successful contestant. Smith v. Finger, 15 Okla. 120, 79 P. 759.

Counterclaim for damages is not allowable. Spellman v. Rhode, 33 Mont. 21, 81 P. 395.

FOREIGN LAWS [Vol. 5.]

808-3 U. S. v. Matterhorn, 128 Fed. 863, 63 C. C. A. 331; McFadden v. Michell, 61 Cal. 148; Wickersham v. Johnston, 104 Cal. 407, 38 P. 89, 43 Am. St. 118, Board v. Estrella, 5 Haw. 211; Clark v. R. Co., 115 Ill. App. 150.

808-4 Southern Ex. Co. v. Owens, 146 Ala. 412, 41 S. 752; Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178; Clark v. Realization Co., supra; Baltimore etc. R. Co. v. McDonald, 112 Ill. App. 391; Crane v. Blackman, 126 Ill. App. 631; Leathe v. Thomas, 218 Ill. 246, 75 N. E. 810; Baltimore etc. R. Co. v. Ryan, 31 Ind. App 597, 68 N. E. 923; Varner v. Exch. (Ia.), 115 N. W. 111; Loyal etc. Legion v. Brewer, 75 Kan. 729; Ferd. Heim Brew. Co. v. Gimber, 67 Kan. 834, 72 P. 859 (neither the statutes or decisions of a sister state are judicially noticed except for purpose of construing laws of forum and determining what they are); Cumberland T. & T. Co. v. R. Co., 117 La. 199, 41 S. 492; Snuffer v. Karr, 197 Mo. 182, 94 S. W. 983; Smith v. Aultman, 120 Mo. App. 462, 96 S. W. 1034; McKnight v. R. Co., 33 Mont. 40, 82 P. 661; Lassiter v. R. Co., 136 N. C. 89, 48 S. E. 642; Hall v. R. Co, 146 N. C. 345, 59 S. E. 879; Whiting Mfg. Co. v. Bank, 15 Pa. Super. 419; El Paso etc. R. Co. v. Smith (Tex. Civ.), 108 S. W. 988; White v. Richeson (Tex. Civ.), 94 S. W. 202; Hunt v. Monroe, 32 Utah 428, 91 P. 269; App v. App, 106 Va. 253, 55 S. E. 672.

810-6 Hale v. Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Anderson v. May, 57 Tenn. 84; Hobbs v. R. Co., 56 Tenn. 873. See Missouri etc. Ins. Co. v. Lovelace, 1 Ga. App. 446, 58 S. E. 93; also Orient Ins. Co. v. Rudolph, 69 N. J. Eq. 570, 61 A. 26.

810-7 F. E. Creelman etc. Co. v. Lesh & Co., 73 Ark. 16, 83 S. W. 320.

811-10 Perry v. Morris (Ind. Ter.), 104 S. W. 571; El Paso etc. R. Co. v. Smith (Tex. Civ.), 108 S. W. 988 (judicial notice taken of an act of Congress organizing a territory).

811-15 Moore v. Pywell, 29 App. D. C. 312; Evans v. R. Co., 5 Phila. (Pa.) 512.

812-18 Elliott v. Garvin (Ind. Ter.), 104 S. W. 878.

813-19 Wood v. Mystic Circle, 212 Ill. 532, 72 N. E. 783.

813-20 Murphy v. Murphy, 145 Cal. 482, 78 P. 1053; Vazakas v. Vazakas, 109 N. Y. S. 568. But see Sokel v. P., 212 Ill. 238, 72 N. E. 382, holding that there is no presumption that a foreign country has adopted the statute law of the forum concerning lawful marriageable age.

814-21 Cavallaro v. R. Co., 110 Cal. 348, 42 P. 918, 52 Am. St. 94; In re Harrington, 140 Cal. 244, 73 P. 1000, s. c. 140 Cal. 294, 74 P. 136; Flood v. Dumphy, 147 Cal. 95, 81 P.

315; Howard v. R. Co., 11 App. D. C. 300; News Pub. Co. v. Assn. Press, 114 Ill. App. 241; Clark v. Jackson, 222 Ill. 13, 78 N. E. 6 (similar statutes presumed to have received the same construction); Hogue v. Steel, 207 Ill. 340, 69 N. E. 931; Baltimore etc. R. Co. v. Freeze (Ind.), 82 N. E. 761; Wilhite v. Skelton, 5 Ind. Ter. 621, 82 S. W. 932; Campbell v. Campbell, 129 Ia. 317, 105 N. W. 583; Bank v. Nordstrom, 70 Kan. 485, 87 P. 804; St. Louis etc. R. Co. v. Johnson, 74 Kan. 83, 86 P. 156 (common law); Arnett v. Pinson (Ky.), 108 S. W. 852; C. v. Stevens (Mass.), 82 N. E. 33; Attorney-Gen. v. Council (Mass.), 81 N. E. 966; Farmers etc. Bank v. Venner, 192 Mass. 531, 78 N. E. 307; Callender etc. Co. v. Flint, 187 Mass. 104, 72 N. E. 345; Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456; Hodgkins v. Bowser (Mass.), 80 N. E. 796; McManus v. R. Co., 118 Mo. App. 152, 94 S. W. 743; Fallon v. Mertz, 110 App. Div. 755, 97 N. Y. S. 417; Spencer v. Busch, 50 Misc. 284, 98 N. Y. S. 690 (law of sister state presumed to be same as common law of forum); Hall v. R. Co., 146 N. C. 345, 59 S. E. 879; Harn v. Cole (Okla.), 95 P. 415; Betz v. Wilson, 17 Okla. 383, 87 P. 844; Linton v. Moorhead, 209 Pa. 646, 59 A. 264; Braintium v. Overseers, 10 Pa. C. C. 250; Iowa L. & T. Co. v. Schnose, 19 S. D. 248, 103 N. W. 22; El Paso etc. R. Co. v. Smith (Tex. Civ.), 108 S. W. 988; National Bk. v. Kenney, 98 Tex. 293, 83 S. W. 368, *rev.* judgment 80 S. W. 555; Southern etc. R. Co. v. Curtis Bros. (Tex. Civ.), 99 S. W. 566; Southern etc. R. Co. v. Burgess Co. (Tex. Civ.), 90 S. W. 189; Missouri etc. R. Co. v. Wise, (Tex. Civ.), 106 S. W. 465 (construction placed on law by sister state presumed to be the same as that placed upon it by the courts of the forum); Moreland v. Moreland (Va.), 60 S. E. 730; Norfolk etc. R. Co. v. Denny, 106 Va. 383, 56 S. E. 321; Clark v. Eltenge, 38 Wash. 376, 80 P. 556; Mantle v. Dabney, 44 Wash. 193, 87 P. 122; Edleman v. Edleman, 125 Wis. 270, 104 N. W. 56; Howe v. Ballard, 113 Wis. 375, 89 N. W. 136 (judicial construction of laws of sister state presumed to be same as those of forum).

816-23 See Gross v. Haisley, 2 Ind. App. 23, 28 N. E. 123.

816-25 Tunnicliff v. Fox, 68 Neb. 811, 94 N. W. 1032.

816-26 Samuel Westheimer v. Habinck, 131 Ia. 643, 109 N. W. 189. *Compare* Betz v. Wilson, 17 Okla. 383, 87 P. 844; Edleman v. Edleman, 125 Wis. 270, 104 N. W. 56.

817-27 Kraus v. Torry, 146 Ala. 548, 40 S. 956.

817-31 Thomas v. Clarkson, 125 Ga. 72, 54 S. E. 77; Bailey v. Devine, 123 Ga. 653, 51 S. E. 603; Ellington v. Harris, 127 Ga. 85, 56 S. E. 134; Forsyth v. Barnes, 131 Ill. App. 467; Scholten v. Barber, 217 Ill. 148, 75 N. E. 460; Crane v. Blackman, 126 Ill. App. 631; Penn etc. Ins. Co. v. Norcross, 163 Ind. 379, 72 N. E. 132; Southern R. Co. v. Elliott (Ind.), 82 N. E. 1051 (transferred from appellate court, 81 N. E. 1180); Arnett v. Pinson (Ky.), 108 S. W. 852; National Bank v. R. Co., 99 Md. 661, 59 A. 134; Demelman v. Brazier, 193 Mass. 588, 79 N. E. 812; Stevenson v. Smith, 189 Mo. 447, 88 S. W. 86; Hubbard v. R. Co., 112 Mo. App. 459, 87 S. W. 52; Jordan v. Penn, 123 Mo. App. 321, 100 S. W. 529; Cook v. R. Co. (Neb.), 110 N. W. 718; Robb v. College, 185 N. Y. 485, 78 N. E. 359; Jonesville Mfg. Co. v. R. Co., 77 S. C. 480, 58 S. E. 422; N. Frank & Sons v. Gump, 104 Va. 306, 51 S. E. 358; Midland Steel Co. v. Bank, 34 Ind. App. 107, 72 N. E. 290.

Presumption as to construction. Presumption that a construction placed on the common law by the supreme court of a territory is the same as a construction by the United States Supreme Court. El Paso etc. R. Co. v. Smith (Tex. Civ.), 108 S. W. 988. See Fallon v. Mertz, 110 App. Div. 755, 97 N. Y. S. 417.

819-34 *Contra.* — Atty.-Gen. v. Council (Mass.), 81 N. E. 966.

819-35 *Contra.* — St. Louis etc. R. Co. v. Johnson, 74 Kan. 83, 86 P. 156.

819-36 **Idaho is** a part of territory which was never subject to the laws of England. It therefore cannot be presumed that the common law was ever there in force. McManus v. R. Co., 118 Mo. App. 152, 94 S. W. 743.

Florida never recognized the common law as the source of its jurisprudence. Watford v. Lumb. Co. (Ala.), 44 S. 567.

820-44 Bierhaus v. Tel. Co., 8 Ind. App. 246, 34 N. E. 581; P. J. Bowlin etc. Co. v. Brandenburg, 130 Ia. 220, 106 N. W. 497; Bannard v. Duncan (Neb.), 112 N. W. 353; Windhorst v. Bergendahl (S. D.), 111 N. W. 544; Star etc. Mfg. Co. v. Nordeman, 118 Tenn. 384, 100 S. W. 93; Ex parte Latham, 47 Tex. Cr. 208, 82 S. W. 1046; Mantle v. Dabney, 44 Wash. 193, 87 P. 122. *Contra,* Arnett v. Pinson (Ky.), 103 S. W. 852; Demelman v. Brazier, 193 Mass. 588, 79 N. E. 812; Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456; C. v. Stevens (Mass.), 82 N. E. 33; Olds v. Trust Co., 185 Mass. 500, 70 N. E. 1022 (no presumption that statutes of New York give power to any court in New York to dissolve a corporation); Wilcox v. Bergman, 96 Minn. 219, 104 N. W. 955; Eckles v. R. Co., 112 Mo. App. 240, 87 S. W. 99; Waters v. Spencer, 44 Misc. 15, 89 N. Y. S. 693; Robb v. College, 185 N. Y. 485, 78 N. E. 359.

821-45 Thomas v. Clarkson, 125 Ga. 72, 54 S. E. 77.

821-47 Ala. Code 1896 § 1821; Cochran v. Ward, 5 Ind. App. 89, 29 N. E. 795; s. c. 31 N. E. 581; Traders Nat. Bk. v. Jones, 104 App. Div. 433, 93 N. Y. S. 768; Home v. Ballard, 113 Wis. 375, 89 N. W. 136.

822-48 Compton v. S. (Ala.), 44 S. 685; McCraney v. Glos, 222 Ill. 628, 78 N. E. 921; Christiansen v. Tank Wks. 223 Ill. 142, 79 N. E. 97; Summit v. Ins. Co., 123 Ia. 681, 99 N. W. 563 (copy admissible as presumptive evidence); Dimpfel v. Wilson (Md.), 68 A. 561; Braintuin v. Overseers, 10 Pa. C. C. 250.

822-49 Cook v. R. Co. (Neb.), 110 N. W. 718; Traders Nat. Bank v. Jones, 104 App. Div. 433, 93 N. Y. S. 768.

827-60 But see Massucco v. Tomassi, 78 Vt. 188, 62 A. 57 (an Italian priest allowed to testify that a marriage by religious ceremony alone did not constitute a legal marriage in Italy at the time in question).

828-64 Dimpfel v. Wilson (Md.), 68 A. 561.

828-65 Nashua Sav. Bk. v. Agency Co., 48 C. C. A. 15, 108 Fed. 764.

830-67 Beckley v. Loan Co., 147 Ala. 195, 40 S. 665; Christiansen v. Tank Wks, 223 Ill. 142, 79 N. E. 79.

830-68 See Dimpfel v. Wilson, supra.

831-69 Banco De Sonora v. Casualty Co., 124 Ia. 576, 100 N. W. 532.

831-70 Dimpfel v. Wilson, supra, *crit.* Gardner v. Lewis, 7 Gill (Md.) 377.

832-71 Banco De Sonora v. Casualty Co., supra.

FORFEITURES [Vol. 5.]

Forfeiture of concealed weapons, 847-36.

836-3 *Compare* U. S. v. Supply Co., 156 Fed. 219.

836-5 U. S. v. Chain, 139 Fed. 513, 71 C. C. A. 500.

839-10 **Intent** need not be proved under act Cong. June 10, 1890, ch. 407, § 29, 26 Stat. 141 [U. S. Comp. St. 1901, p. 1897]. Six Parcels etc. v. U. S., 8 Ariz. 389, 76 P. 473. So also under § 3082 Rev. St. [U. S. Comp. St. 1901, p. 2014]. U. S. v. Fifty Waltham Watch Movements, 139 Fed. 291. So also under § 2802, Rev. St. [U. S. Comp. St. 1901, p. 1873]. Dodge v. U. S., 131 Fed. 849, 65 C. C. A. 603. So also under § 3449 Rev. St. [U. S. Comp. St. 1901, p. 2277]. U. S. v. Supply Co., 156 Fed. 219. But intent must be proved, under § 9, act June 10, 1890, ch. 407, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895]. U. S. v. Ninety-nine Diamonds, 132 Fed. 579; U. S. v. One Silk Rug, 158 Fed. 974.

839-11 **Fraudulent intent** on the part of the shipper is insufficient where there is an absence of such intent on the part of the enterer. U. S. v. One Silk Rug, 158 Fed. 974.

840-12 U. S. v. Tobacco, 147 Fed. 127, 77 C. C. A. 353.

843-19 **That the entire conduct** of the parties has been free from deception may be shown. U. S. v. Tobacco, supra.

843-22 See U. S. v. Tobacco, supra.

846-34 See White v. S., 80 Ark. 598, 98 S. W. 377.

Burden is on respondent in an action to forfeit a liquor tax certificate for sales contrary to law, to show that he is within the protection of an exception in the statute. In re Cullinan, 45 Misc. 497, 92 N. Y. S. 802.
Some evidence must be presented to a municipal council to justify them in forfeiting a liquor license for cause. Carr v. Counsel, 124 Ga. 116, 52 S. E. 300.
Forfeiture of lease for selling liquor on Sunday occurs eo instante upon the sale, and may be established in a court of civil jurisdiction by the amount of proof requisite in such a tribunal. Moser v. Stebel, 9 Ohio C. C. (N. S.) 217.
846-35 *Compare* Osborne v. S., 77 Ark. 439, 92 S. W. 406.
847-36 **After abatement** of an action by death of the defendant, forfeiture of liquors can not be decreed. S. v. McMaster, 13 N. D. 58, 99 N. W. 58.
Forfeiture of concealed weapon. Where a statute makes the occurrence of the facts constituting its violation work a forfeiture, such forfeiture is not dependent upon a conviction but title is immediately divested from the former owner. McConathy v. Deck, 34 Colo. 461, 83 P. 135.
848-42 Purdy v. Assn., 101 Mo. App. 91, 74 S. W. 486.
848-44 Purdy v. Assn., supra.
848-45 See Central R. Co. v. Johnson, 30 N. H. 390.

FORGERY [Vol. 5.]

Circumstantial evidence; subsequent possession of money, 866-62.

852-2 S. v. Murray, 72 S. C. 508, 52 S. E. 189.
852-3 See Crayton v. S., 47 Tex. Cr. 88, 80 S. W. 839.
853-5 Wooldridge v. S., 49 Fla. 137, 38 S. 3 (failure to carry out his official duty of posting warrants in a registry book. And see P. v. Curtiss, 118 App. Div. 259, 103 N. Y. S. 395); Spears v. P., 220 Ill. 72, 77 N. E. 112 (intent to defraud shown by testimony of accused that by the forgery he intended to defer payment, for his own accomodation).
That the document forged would establish a link in defendant's title is evidence tending to establish his criminal intent. Snow v. S. (Ark.), 107 S. W. 980.
853-6 See Russell v. S., 51 Fla. 124, 40 S. 625.
853-8 See C. v. Hall, 24 Pa. Super. 558.
853-9 **Undisputed evidence** may establish forgery as a matter of law. Greenwald v. Ford (S. D.), 109 N. W. 516.
853-10 Russell v. S., 51 Fla. 124, 40 S. 625; McLean v. S., 3 Ga. App. 660, 60 S. E. 332.
854-11 See Richard v. S., 127 Ga. 42, 55 S. E. 1044.
855-12 See Baird v. S. (Tex. Cr.), 101 S. W. 991.
855-16 Loring v. Jackson (Tex. Cr.), 95 S. W. 19.
855-17 See P. v. Tollefson, 145 Mich. 449, 108 N. W. 751; Spicer v. S. (Tex. Cr.), 105 S. W. 813 (comparison of handwriting is by itself insufficient to convict); Johnson v. S. (Tex. Cr.), 102 S. W. 1133 (sample of writing written at the request of officers, admissible). See "HANDWRITING."
856-19 See Abel v. S. (Tex. Cr.), 97 S. W. 1055.
856-21 S. v. Spiker, 131 Ia. 194, 108 N. W. 233; Taylor v. C., 28 Ky. L. R. 1348, 92 S. W. 292 (letter containing admission of guilt not inadmissible because it also contains an admission of another forgery). See P. v. Tollefson, 145 Mich. 449, 108 N. W. 751.
857-23 S. v. Farr (R. I.), 69 A. 5.
Flight. — Bolton v. S., 146 Ala. 691, 40 S. 409; Wooldridge v. S., 49 Fla. 137, 38 S. 3; P. v. Curtiss, 118 App. Div. 259, 103 N. Y. S. 395.
Circumstantial evidence tending to connect accused with the alleged crime is admissible, though inconclusive. Pittman v. S., 51 Fla. 94, 41 S. 385.
Proof of nonpayment and protest of a check admissible as one of the circumstances of the transaction. P. v. Tollefson, 145 Mich. 449, 108 N. W. 751.
Motive may be shown by the purpose for which the money was used. P. v. Gaffey, 182 N. Y. 257, 74 N. E. 836, *rev.* 98 App. Div. 461, 90 N. Y. S. 706.

857-24 **Figures**, tending to show that defendant had been practicing are admissible. C. v. Cowan, 4 Pa. Super. 579. And see Lauer v. Posey, 15 Pa. Super. 543.

857-26 P. v. Parker, 67 Mich. 222, 34 N. W. 720.

858-27 See Spicer v. S. (Tex. Cr.), 105 S. W. 813.

858-28 S. v. Waterbury, 133 Ia. 135, 110 N. W. 328.

859-31 Goodman v. P., 228 Ill. 154, 81 N. E. 830.

859-32 **Testimony of accomplice** must be corroborated. S. v. Kelliher (Or.), 88 P. 867; Hinson v. S. (Tex. Cr.), 109 S. W. 174.

859-33 Edwards v. S. (Tex. Cr.), 108 S. W. 673.

860-34 Crossland v. S., 77 Ark. 537, 544, 92 S. W. 776 (evidence that defendant had been authorized on previous occasion to sign another's name, is admissible on the issue of intent and to show the relation of the parties); S. v. Pine, 56 W. Va. 1, 48 S. E. 206.

Lack of authority established prima facie by proof that defendant personated the titleholder. P. v. Browne, 118 App. Div. 793, 103 N. Y. S. 903, *aff.* 189 N. Y. 528, 82 N. E. 1130.

860-35 See Abel v. S. (Tex. Cr.), 97 S. W. 1055.

860-36 See Spicer v. S. (Tex. Cr.), 105 S. W. 813.

860-37 S. v. Mitten (Mont.), 92 P. 969 (alteration must be material); C. v. Pioso, 17 Pa. Super. 45; S. v. Lotono (W. Va.), 58 S. E. 621.

861-39 Gaut v. S., 49 Tex. Cr. 493, 94 S. W. 1034; Spicer v. S. (Tex. Cr.), 105 S. W. 813.

861-40 P. v. Browne, 118 App. Div. 793, 103 N. Y. S. 903, *aff.* 189 N. Y. 528, 82 N. E. 1130.

861-41 **Return of subpoenas** showing that the persons could not be found is not evidence that such persons are fictitious. Taylor v. S. (Tex. Cr.), 97 S. W. 474.

862-46 Spears v. P., 220 Ill. 72, 77 N. E. 112.

862-47 Wooldridge v. S., 49 Fla. 137, 38 S. 3.

863-48 Murphy v. S., 49 Tex. Cr. 488, 93 S. W. 543; Edwards v. S. (Tex. Cr.), 108 S. W. 673.

863-49 Abel v. S. (Tex. Cr.), 97 S. W. 1055.

864-54 P. v. Browne, 118 App. Div. 793, 103 N. Y. S. 903, *aff.* 189 N. Y. 528, 82 N. E. 1130.

865-57 S. v. Fisk (Ind.), 83 N. E. 995; C. v. Bond, 188 Mass. 91, 74 N. E. 293; S. v. Stark, 202 Mo. 210, 100 S. W. 642 (having forged deed in one's possession with intent to utter).

865-59 C. v. Bond, 188 Mass. 91, 74 N. E. 293.

Uncorroborated confession insufficient, since other proof of the corpus delicti is necessary. C. v. Burgess, 28 Ky. L. R. 1128, 91 S. W. 266; Blacker v. S., 74 Neb. 671, 105 N. W. 302.

866-61 Walker v. S., 127 Ga. 48, 56 S. E. 113; C. v. Bond, 188 Mass. 91, 74 N. E. 293.

866-62 **Circumstantial evidence.** Subsequent possession of money is evidence of forging and uttering. Walker v. S., 127 Ga. 48, 56 S. E. 113. And see Hinson v. S. (Tex. Cr.), 109 S. W. 174 (evidence sufficient to convict one as an accomplice).

866-63 Snow v. S. (Ark.), 107 S. W. 980.

867-64 See P. v. McPherson (Cal. App.), 91 P. 1098.

867-66 P. v. Colmey, 116 App. Div. 516, 101 N. Y. S. 1016; C. v. Hall, 24 Pa. Super. 558; S. v. Murray, 72 S. C. 508, 52 S. E. 189.

867-67 Snow v. S. (Ark.), 107 S. W. 980; P. v. Dolan, 111 App. Div. 600, 97 N. Y. S. 929; P. v. Browne, 118 App. Div. 793, 103 N. Y. S. 903, *aff.* 189 N. Y. 528, 82 N. E. 1130.

Illiteracy is insufficient to prove want of knowledge. S. v. Stark, 202 Mo. 210, 100 S. W. 642.

Uncorroborated testimony of accomplice insufficient. P. v. Colmey, 116 App. Div. 516, 101 N. Y. S. 1016.

867-68 S. v. Waterbury, 133 Ia. 135, 110 N. W. 328 (possession of forged instrument payable to a third person does not raise a presumption of knowledge); S. v. Mitten (Mont.), 92 P. 969.

Knowingly passing as genuine a forged instrument is conclusive of the intent to defraud. Jordan v. S., 127 Ga. 278, 56 S. E. 422.

868-71 Pirscher v. U. S., 133 Fed. 526, 67 C. C. A. 660; Dillard v. U. S., 141 Fed. 303, 72 C. C. A. 451;

Wright v. S., 138 Ala. 69, 34 S. 1009; Wooldridge v. S., 49 Fla. 137, 38 S. 3; Pittman v. S., 5 Fla. 94, 41 S. 385 (fact that defendant is under indictment for the other forgeries is immaterial); S. v. Stark, 202 Mo. 210, 100 S. W. 642 (a case of having possession of forged paper with intent to utter); P. v. Dolan, 186 N. Y. 4, 78 N. E. 569, *rev.* 111 App. Div. 600, 97 N. Y. S. 929; S. v. Murphy (N. D.), 115 N. W. 84 (admissible solely on question of intent).

Common plan and identity of method may be shown by evidence of other and similar forgeries. P. v. Dolan, 186 N. Y. 4, 78 N. E. 569; S. v. Newman, 34 Mont. 434, 87 P. 462; Taylor v. S., 47 Tex. Cr. 101, 81 S. W. 933; P. v. Harben (Cal. App.), 91 P. 398.

Defendant's connection with similar forgeries must by shown before they are admissible. S. v. Kelliher (Or.), 88 P. 867.

Other forgery of the same party's name but by another person, inadmissible. Laudermilk v. S., 47 Tex. Cr. 427, 83 S. W. 1107.

To rebut a claim of authority to sign a note, evidence of other forgeries of the same person's name is admissible. Usher v. S., 47 Tex. Cr. 93, 81 S. W. 309.

869-72 Taylor v. S. (Tex. Cr.), 97 S. W. 474. See Laner v. Posey, 15 Pa. Super. 543.

FORMER CONVICTION [Vol. 5.]

871-1 See S. v. Smith, 129 Ia. 709, 106 N. W. 187; S. v. Boyd, 178 Mo. 2, 76 S. W. 979.

Former conviction as affecting the credibility of defendant as a witness can only be proved by record evidence. C. v. Walsh (Mass.), 82 N. E. 19.

871-2 Evidence of a former conviction is inadmissible in the absence of an allegation in the complaint in regard to it. Paetz v. S., 129 Wis. 174, 107 N. W. 1090.

872-4 S. v. Smith, 129 Ia. 709, 106 N. W. 187.

Admissions of accused competent to identify him as the person to whom the former judgment applied. S. v. Boyd, 178 Mo. 2, 76 S. W. 979.

FORMER JEOPARDY [Vol. 5.]

873-2 Plea of former acquittal is not of a criminal nature but is a collateral civil inquiry and the verdict may be set aside by the court in its discretion, or if against the weight of the evidence. S. v. White, 146 N. C. 608, 60 S. E. 505.

874-3 Steinkuhler v. S. (Neb.), 109 N. W. 395; Peterson v. S. (Neb.), 112 N. W. 306.

Entry of judgment in the first cause must be proved in North Carolina. S. v. Hankins, 136 N. C. 621, 48 S. E. 593. See Feagin v. S., 139 Ala. 107, 36 S. 18.

Some evidence must have been introduced in order to furnish a predicate. Hall v. S. (Tex. Cr.), 86 S. W. 765.

874-5 Price v. U. S., 156 Fed. 950; S. v. Day, 5 Penne. (Del.), 101, 58 A. 946; (crime necessarily included); Few v. S., 1 Ga. App. 122, 58 S. E. 64; S. v. Gapen, 17 Ind. App. 524, 45 N. E. 678, 47 N. E. 25 (no former jeopardy where the same facts constitute two offenses whereiu the lesser is not necessarily involved in the former); S. v. Reed, 168 Ind. 588, 81 N. E. 571; Watson v. S. (Md.), 66 A. 635; Warren v. S. (Neb.), 113 N. W. 143; S. v. Rosa, 72 N. J. L. 462, 62 A. 695 (same identical act); S. v. Hankins, 136 N. C. 621, 48 S. E. 593; S. v. Virgo, 14 N. D. 293, 103 N. W. 610; Kellett v. S. (Tex. Cr.), 103 S. W. 882; Clement v. S. (Tex. Cr.), 86 S. W. 1016.

875-7 Barber v. S. (Ala.), 43 S. 808; S. v. White, 146 N. C. 608, 60 S. E. 505; Kilcoyne v. S. (Tex. Cr.), 92 S. W. 36; Benton v. S. (Tex. Cr.), 107 S. W. 837; Clement v. S. (Tex. Cr.), 86 S. W. 1016; S. v. Williams, 43 Wash. 505, 86 P. 847.

875-9 S. v. Day, 5 Penne. (Del.) 101, 58 A. 946 (defendant not entitled to the benefit of a reasonable doubt. But *compare* Walker v. S. (Tex. Cr.), 97 S. W. 1043); Benton v. S. (Tex. Cr.), 107 S. W. 837.

876-14 S. v. Wells, 69 Kan. 792, 77 P. 547; S. v. Ireland, 89 Miss. 763, 42 S. 797; Benson v. S. (Tex. Cr.), 109 S. W. 166.

876-16 See C. v. Schoener, 216 Pa. 71, 64 A. 890.

876-19 McNish v. S., 47 Fla. 69, 36 S. 176; See Ex parte Vickery,

51 Fla. 141, 40 S. 77; S. v. White, 71 Kan. 356, 80 P. 589; Horner v. S., 8 Ohio C. C. (N. S.) 441; Riggs v. S. (Tex. Cr.), 96 S. W. 25.

878-27 S. v. White, 146 N. C. 608, 60 S. E. 505; C. v. Dotterer, 30 Pa. C. C. 364.

878-30 **Dismissed over objection** is equivalent to acquittal. Allen v. S., 51 Fla. 1, 41 S. 593; S. v. Reed, 168 Ind. 588, 81 N. E. 571; Vela v. S., 49 Tex. Cr. 588, 95 S. W. 529.

879-32 S. v. White, 146 N. C. 608, 60 S. E. 505 (defendant may himself testify and since it is a civil issue he cannot then be compelled to testify on the criminal issue).

880-35 S. v. Pianfetti, 79 Vt. 236, 65 A. 84.

880-37 S. v. Dewees, 76 S. C. 72, 56 S. E. 674.

881-40 S. v. Foley, 114 La. 412, 38 S. 402; Watson v. S., 105 Md. 650, 66 A. 635; S. v. Potter, 125 Mo. App. 465, 102 S. W. 668; S. v. Rosa, 72 N. J. L. 462, 62 A. 696 (court decides the issue of former jeopardy where it is raised by demurrer); Horner v. S., 8 Ohio C. C. (N. S.) 441; S. v. Dewees, 76 S. C. 72, 56 S. E. 674.

881-41 S. v. Day, 5 Penne. (Del.) 101, 58 A. 946; S. v. Irwin, 17 S. D. 380, 97 N. W. 7.

FORMER TESTIMONY [Vol. 5.]

Part of former testimony that is available, 961-11.

887-2 In re Durant, 80 Conn. 140, 67 A. 497.

888-6 Missouri etc. R. Co. v. Nesbit (Tex. Civ.), 97 S. W. 825.

888-7 Salt Lake v. Smith, 104 Fed. 457, 42 C. C. A. 637 (*compare* Diamond Coal Co. v. Allen, 137 Fed. 705, 71 C. C. A. 107; Citizen's Bk. v. Boswell, 31 Ky. L. R. 1259, 104 S. W. 1014; Dambmann v. R. Co., 55 Misc. 60, 106 N. Y. S. 221; S. v. Callahan, 18 S. D. 145, 99 N. W. 1099.

888-8 Williams v. Wolff, 3 Ga. App. 737, 60 S. E. 357; Watkins v. Clough, 119 App. Div. 527, 103 N. Y. S. 270; Evans v. S., 12 Tex. App. 370.

889-10 Lanza v. Quarry Co., 124 Ia. 659, 100 N. W. 488; Beavers v. Bowen, 26 Ky. L. R. 291, 80 S. W. 1165; S. v. Coleman, 199 Mo. 112, 97 S. W. 574.

889-12 See "DEPOSITIONS."

890-14 See Crosby v. Wells, 73 N. J. L. 790, 67 A. 295.

892-27 **Former testimony** admitted by stipulation and without objection, waives the objection that accused is entitled to confront the witnesses. S. v. Williford, 111 Mo. App. 668, 86 S. W. 570.

894-39 See Willsen v. R. Co., 95 App. Div. 388, 88 N. Y. S. 597.

894-40 See Keim v. Reading, 32 Pa. Super. 613.

895-45 Fuqua v. C., 118 Ky. 578, 81 S. W. 923 (§ 4643 Ky. St. 1903, making former testimony inadmissible in criminal cases does not apply where the witness is dead); S. v. Milam, 65 S. C. 321, 43 S. E. 677 (admissible in behalf of one co-defendant, formerly tried alone, over the objection of his co-defendant). See "EXAMINATION BEFORE COMMITTING MAGISTRATE."

896-48 Porch v. S., 41 Tex. Cr. 7, 99 S. W. 1122 (overruling cases cited in text).

896-49 U. S. v. Greene, 146 Fed. 796; Nome Beach L. & T. Co. v. Ins. Co., 156 Fed. 484; Meyer v. Foster, 147 Cal. 166, 81 P. 402; Jones v. S., 128 Ga. 23, 57 S. E. 313; Sievers-C. Co. v. Curd, 24 Ky. L. R. 1317, 71 S. W. 506; Fuqua v. C., 118 Ky. 578, 81 S. W. 923; Austin v. C., 124 Ky. 55, 30 Ky. L. R. 295, 98 S. W. 295; S. v. Herlihy, 102 Me. 310, 66 A. 643; McGivern v. Steele (Mass), 83 N. E. 405; Willsen v. R. Co., 95 App. Div. 388, 88 N. Y. S. 597; Keim v. Reading, 32 Pa. Super. 613; Pratt v. S. (Tex. Cr.), 109 S. W. 138.

898-51 Temple v. Phelps, 193 Mass. 297, 79 N. E. 482.

901-63 See Greenlee v. Mosnat (Ia.), 111 N. W. 996.

904-67 *Compare* Fitch v. Tract. Co., 124 Ia. 665, 100 N. W. 618 (by virtue of Iowa statute making testimony of a witness a deposition, mere absence of the witness warrants the use of such deposition).

Testimony of practicing attorney or physician engaged in the discharge of his professional duty at the time of the trial, given at a former trial, may be introduced under § 2904, ch. 18 Rev. St. Mo. 1899 (Anno. St.

196, p. 1669). Doyle v. Transit Co., 124 Mo. App. 504, 101 S. W. 598.

904-69 Cuff v. Storage Co., 14 Ont. L. R. (Can.) 263; Toledo Tract. Co. v. Cameron, 137 Fed. 48, 69 C. C. A. 28 (witness resident more than 100 miles from the court—full discussion of authorities); Ross-Lewin v. Ins. Co., 20 Colo. 262, 78 P. 305; Dolph v. R. Co., 149 Mich. 278, 112 N. W. 981; Kolodrianski v. Locomotive Co. (R. I.), 69 A. 505; Ozark v. S. (Tex. Cr.), 100 S. W. 927. *Compare* Diamond Coal Co. v. Allen, 137 Fed. 705, 71 C. C. A. 107.

Testimony given by defendant's witness may be used at a subsequent trial, by the plaintiff. Hudson v. Roos, 76 Mich. 173, 42 N. W. 1099.

905-73 *Compare* Fitch v. Tract. Co., 124 Ia. 665, 100 N. W. 618.

906-76 Kirkland v. S., 141 Ala. 45, 37 S. 352; Southern R. Co. v. Bonner, 141 Ala. 517, 37 S. 702.

906-77 Southern R. Co. v. Bonner, supra; P. v. Ballard, 1 Cal. App. 222, 81 P. 1040; Taylor v. S., 126 Ga. 557, 55 S. E. 474; Boyd v. R. Co. (Tex.), 108 S. W. 813; Wise Term. Co. v. McCormick, 107 Va. 584, 58 S. E. 584.

906-78 Fitch v. Tract. Co., 124 Ia. 665, 100 N. W. 618. *Compare* Delahunt v. Tel. Co., 215 Pa. 241, 64 A. 515.

906-79 See El Paso R. Co. v. Kitt (Tex. Civ.), 99 S. W. 587; Wise Term. Co. v. McCormick, 107 Va. 584, 58 S. E. 584.

907-80 Ross-Lewin v. Ins. Co., 20 Colo. 262, 78 P. 305; Kolodrianski v. Locomotive Co. (R. I.), 69 A. 505.

908-85 Ozark v. S. (Tex. Cr.), 100 S. W. 927.

908-87 Cuff v. Storage Co., 14 Ont. L. R. (Can.) 263; Robinson v. S., 128 Ga. 254, 57 S. E. 315; Greeman v. Eggeling, 30 Pa. Super. 253 (inability to subpoena); Boyd v. R. Co. (Tex.), 108 S. W. 813.

909-89 In re Durant (Conn.), 67 A. 497 (death); Rogers v. Rogers (Del.), 66 A. 374 (death). See "Depositions."

910-93 In re Durant, 80 Conn. 140, 67 A. 497; S. v. Herlihy, 102 Me. 310, 66 A. 643; Willsen v. R. Co., 95 App. Div. 388, 88 N. Y. S. 597; Kolodrianski v. Locomotive Co. (R. I.), 69 A. 505; Pratt v. S. (Tex. Cr.), 109 S. W. 138.

913-99 U. S. v. Greene, 146 Fed. 796 (proceedings before circuit court commissioner for removal of a prisoner to another district); Kirkland v. S., 141 Ala. 45, 37 S. 352 (habeas corpus hearing); Rogers v. Rogers (Del.), 66 A. 374 (testimony before examiner in court of chancery); Packham v. Ludwig (Md.), 63 A. 1048 (testimony before sheriff's jury in lunacy proceeding); Keim v. Reading, 32 Pa. Super. 613 (road jury).

914-3 Taft v. Little, 178 N. Y. 127, 70 N. E. 211.

916-11 Levine v. Carroll, 121 Ill. App. 105; Leggat v. Carroll, 30 Mont. 384, 76 P. 805. See Beamer v. Morrison, 210 Ill. 443, 71 N. E. 402; In re Park, 29 Utah 257, 81 P. 83.

Testimony given in a former action may be admissible to impeach as a witness the party at whose instance it was given, although neither the parties nor the issues are identical. Becker v. Philadelphia, 217 Pa. 344, 66 A. 564.

918-13 Nordan v. S., 143 Ala. 13, 39 S. 406. See City of Spokane v. Costello, 42 Wash. 182, 84 P. 652.

918-16 Nordan v. S., supra; In re Durant, 80 Conn. 140, 67 A. 497.

919-18 In re Durant, supra.

921-20 Hunter v. Court, 126 Ia. 357, 102 N. W. 156; Leggat v. Carroll, 30 Mont. 384, 76 P. 805.

Where defendant in disbarment proceedings had cross-examined a witness, through the courtesy of the court at a former action brought by a wife to obtain maintenance from her husband, knowing that the testimony of such witness would furnish grounds for his disbarment, identity of parties was not required, the court declaring that "the requirement of identity of parties is only a means to an end. This end was attained when the defendant availed himself of the unrestricted opportunity to cross-examine" the witness. In re Durant, 80 Conn. 140, 67 A. 497. And see Brownlee v. Bunnell, 31 Ky. L. R. 669, 103 S. W. 284.

923-23 Rumford C. Wks. v. Chem. Co., 148 Fed. 862, s. c. 154 Fed. 65, 159 Fed. 436; Shaw v. R. Co., 187 N. Y. 186, 79 N. E. 984,

aff. 110 App. Div. 892, 96 N. Y. S. 1145.

926-35 Martin v. Ragsdale, 71 S. C. 67, 50 S. E. 671.

930-51 Fuqua v. C., 118 Ky. 578, 81 P. 923; S. v. Herlihy, 102 Me. 310, 66 A. 643. *Compare* S. v. Woods, 71 Kan. 658, 81 P. 184; Smith v. S. 48 Tex. Cr. 65, 85 S. W. 1153 (*over.* by Porch v. S., 41 Tex. Cr. 7, 99 S. W. 1122).

932-53 Rogers v. Rogers (Del.), 66 A. 374.

933-62 McGivern v. Steele (Mass), 83 N. E. 405 (not inadmissible as being a statement made by the witness subsequent to the bringing of the suit).

933-65 Objection that the party could waive the questions asked upon the former trial in cross-examination, does not prevent all of the testimony given by the witness, both on direct and cross-examination, being produced at the second trial. Pratt v. S. (Tex. Cr.), 109 S. W. 138.

935-74 See Smith v. S., 48 Tex. Cr. 65, 85 S. W. 1153.

935-79 See Harris v. R. Co., 124 Mo. App. 45, 101 S. W. 601.

938-98 Woodstock Iron Wks. v. Kline, 149 Ala. 391, 43 S. 362. *Compare* Smith v. S., 48 Tex. Cr. 65, 85 S. W. 1153.

939-3 Kirkland v. S., 141 Ala. 45, 37 S. 352; Taylor v. S., 126 Ga. 557, 55 S. E. 474.

939-5 Letters written by the absent witness and postmarked and dated without the state, are evidence to prove a removal from the state. Kirkland v. S., 141 Ala. 45, 37 S. 352.

Statement by a witness that the absent witness told him he was living in another state is insufficient. Southern R. Co. v. Bonner, 141 Ala. 517, 37 S. 702.

Oath of some person as to the absence of the witness has been held necessary. Smith v. S., 48 Tex. Cr. 65, 85 S. W. 1153.

939-6 Woodstock I. Wks. v. Kline, 149 Ala. 391, 43 S. 362; Wise Term. Co. v. McCormick (Va.), 58 S. E. 584. *Compare* Smith v. S., 48 Tex. Cr. 65, 85 S. W. 1153.

Inability to find may be proved by the answers to inquiries made, which are not hearsay, though they would be if the ground alleged for the admission of the former testimony was absence from the jurisdiction. Cuff v. Storage Co., 14 Ont. L. R. (Can.) 263.

940-10 Postea of former trial not a necessary prerequisite to the admission of the record. Taft v. Little, 178 N. Y. 127, 70 N. E. 211.

941-17 See McGivern v. Steele (Mass.), 83 N. E. 405.

941-19 Meekins v. R. Co., 136 N. C. 1, 48 S. E. 501. *Compare* Wallach v. R. Co., 105 App. Div. 422, 94 N. Y. S. 574 (party failing to object to an expert witness on the ground that he was not qualified cannot make the objection at a second trial after his decease).

942-25 S. v. Herlihy, 102 Me. 310, 66 A. 643; Keim v. Reading, 32 Pa. Super. 613.

946-36 Meyer v. Foster, 147 Cal. 166, 81 P. 402; Studebaker v. Faylor (Ind.), 83 N. E. 747, *rev.* s. c. (Ind. App.), 80 N. E. 861; Packham v. Ludwig (Md.), 63 A. 1048.

Witness cannot prove the testimony of a deceased witness by testifying that the record of the former case is correct, and then placing in the record of the case at bar as much of such testimony as is desired. Rumford C. Wks. v. Chem. Co., 148 Fed. 862.

947-40 Meyer v. Foster, 147 Cal. 166, 81 P. 402; Studebaker v. Taylor (Ind.), 83 N. E. 747, *rev.* s. c. (Ind. App.) 80 N. E. 861; Austin v. C., 30 Ky. L. R. 295, 98 S. W. 295; Weinhandler v. Brew. Co., 46 Misc. 584, 92 N. Y. S. 792.

948-47 See Austin v. C., 30 Ky. L. R. 295, 98 S. W. 295.

949-54 El Paso R. Co. v. Kitt (Tex. Civ.), 99 S. W. 587.

951-62 Fuqua v. C., 118 Ky. 578, 81 S. W. 923; Austin v. C., 124 Ky. 55, 30 Ky. L. R. 295, 98 S. W. 295; Temple v. Phelps, 193 Mass. 297, 79 N. E. 482. See Hutchinson v. S., 8 Ohio C. C. (N. S.) 313.

Requirement of certification is not satisfied by oral testimony of the stenographer that he made a correct copy of the proceedings. Wells v. Chase, 126 Wis. 202, 105 N. W. 799.

Authentication in some manner is essential. Williams v. Min. Co., 37 Colo. 62, 86 P. 337, and so where the stenographer has died and no

one could be found to read his notes or speak as to their correctness, the transcript was inadmissible. Pew v. Johnson, 35 Mont. 173, 88 P. 770.

951-63 See Lanza v. Quarry Co., 124 Ia. 659, 100 N. W. 488; Fitch v. Tract. Co., 124 Ia. 665, 100 N. W. 618; In re Wiltsey, 135 Ia. 430, 109 N. W. 776.

951-67 See U. S. v. Greene, 146 Fed. 796; Barksdale v. Ins. Co., 120 Ga. 388, 47 S. E. 943; Jones v. S., 128 Ga. 23, 57 S. E. 313; Levine v. Carroll, 121 Ill. App. 105; El Paso R. Co. v. Kitt (Tex. Civ.), 99 S. W. 587.

952-68 *Compare* Meyer v. Foster, 147 Cal. 166, 81 P. 402.

952-73 Ross-Lewin v. Ins. Co., 20 Colo. 262, 78 P. 305; Howard v. Lumb. Co., 129 Wis. 98, 108 N. W. 48 (bill of exceptions the best evidence, as compared with certified stenographic transcript. But omitted points may be supplied).

954-79 Packham v. Ludwig, 103 Md. 416, 63 A. 1048.

955-80 Studebaker v. Faylor (Ind. App.), 80 N. E. 861.

956-82 Packham v. Ludwig, supra.

956-85 S. v. Herlihy, 102 Me. 310, 66 A. 643; Keim v. Reading, 32 Pa. Super. 613 (a party).

960-8 Robinson v. S., 128 Ga. 254, 57 S. E. 315; Delahunt v. Tel. Co., 215 Pa. 241, 64 A. 515.

Conflict or doubt as to the accuracy of the predicate should be submitted to the jury. Ozark v. S. (Tex. Cr.), 100 S. W. 927.

960-9 P. v. Ballard, 1 Cal. App. 222, 81 P. 1040.

960-10 **Clear proof** of the necessity for the admission of former testimony is necessary. Southern R. Co. v. Bonner, 141 Ala. 517, 37 S. 702.

961-11 **Part of former testimony that is available.** — The fact that a party could at the second trial have waived cross-examination of a witness, does not prevent all the testimony of such deceased witness, given at the former trial, being introduced. Whether it was given on direct or cross-examination is immaterial, as it does not matter by whom or under whose direction or examination the testimony was elicited. Pratt v. S. (Tex. Cr.), 109 S. W. 138.

962-20 Lerum v. Geving, 97 Minn. 269, 105 N. W. 967; Omaha R. Co. v. Boesen, 74 Neb. 764, 105 N. W. 303.

963-24 See Garvik v. R. Co., 131 Ia. 415, 108 N. W. 327.

964-30 Temple v. Phelps, 193 Mass. 297, 79 N. E. 482.

964-31 P. v. Ballard, 1 Cal. App. 222, 81 P. 1040.

FORNICATION [Vol. 5.]

967-1 Seats v. S., 122 Ga. 47, 50 S. E. 65; Lightner v. S., 126 Ga. 563, 55 S. E. 471; Hofer v. S., 130 Wis. 576, 110 N. W. 391.

Mere proof of opportunity for intercourse is insufficient. Sadler v. S. (Tex. Cr.), 107 S. W. 352; Quinn v. S. (Tex. Cr.), 101 S. W. 248.

967-2 Turney v. S., 60 Ark. 259, 29 S. W. 893; S. v. Williams, 94 Minn. 319, 102 N. W. 722; S. v. Chandler, 132 Mo. 155, 33 S. W. 797. See S. v. Sauls, 70 S. C. 393, 50 S. E. 17.

Habitual intercourse is not shown by proof of four or five instances. Collins v. S., 46 Tex. Cr. 550, 80 S. W. 372; Hilton v. S., 41 Tex. Cr. 190, 53 S. W. 113.

Living together is not established within the meaning of the statute by showing that the persons occupied the same house. Boswell v. S., 48 Tex. Cr. 47, 85 S. W. 1076 (man and his servant). But see Lenert v. S. (Tex. Cr.), 63 S. W. 563 (priest and his housekeeper).

968-3 See S. v. Cannon, 72 N. J. L. 46, 60 A. 177.

969-8 **Corroboration** of the woman's testimony necessary where it bears upon its face evidence of unreliability. Hofer v. S., 130 Wis. 576, 110 N. W. 391.

969-10 **Illness** at the time may be shown. C. v. Pearl, 29 Pa. Super. 307.

FRAUD [Vol. 6.]

Making of representation, 57-11; *Value as evidence of damage,* 76-98.

6-2 Smith v. Berz, 125 Ill. App. 122; Adams v. Pease, 113 Ill. App. 356; Nesmith v. Platt (Ia.), 114 N. W. 1053; Chowning v. Howser, 24 Ky. L. R. 1951, 72 S. W. 748; Horn v. Carroll, 25 Ky. L. R. 2305, 80 S. W. 518; Breaux v. Broussard, 116 La. 215, 40 S. 639; Barron v. Trust Co., 184 Mass. 440, 68 N. E. 831; Jobert v. Wagner, 147 Mich. 409, 110 N. W. 942; New England L. & T. Co. v. Browne, 177 Mo. 412, 76 S. W. 954; Hefferman v. Ragsdale, 109 Mo. 375, 97 S. W. 890; So. Missouri Lumb. Co. v. Crommer, 202 Mo. 504, 101 S. W. 22; First Nat. Bk. v. Lesser, 10 N. M. 700, 65 P. 179; Cassidy v. Uhlmann, 170 N. Y. 505, 63 N. E. 554; In re Simon, 20 Pa. Super. 450; Collins v. Kelsey (Tex. Civ.), 97 S. W. 122. See McBride v. Farrington, 131 Fed. 797; Gipe v. R. Co. (Ind. App.), 82 N. E. 471; Baker v. Mathew (Ia.), 115 N. W. 15; Western Mfg. Co. v. Cotton, 31 Ky. L. R. 1130, 104 S. W. 758; McNaughton v. Smith, 136 Mich. 368, 99 N. W. 382; Raymond v. McKenna, 110 Mich. 35, 110 N. W. 121; Bellettiere v. Lawlor, 47 Misc. 161, 93 N. Y. S. 471; Tuttle v. Tuttle, 146 N. C. 484, 59 S. E. 1008; Collins v. Chipman, 41 Tex. Civ. 563, 95 S. W. 666; Western Cottage etc. Co. v. Anderson (Tex. Civ.), 101 S. W. 1061; Colston v. Bean, 78 Vt. 283, 62 A. 1015; Redwood v. Rogers, 105 Va. 155, 53 S. E. 6; Virginia Ins. Co. v. Hogue, 105 Va. 355, 54 S. E. 8; Miles v. Min. Co., 124 Wis. 278, 102 N. W. 555; Devereux v. Peterson, 126 Wis. 558, 106 N. W. 249.

No presumption of fraud in a claim where in an action on a fire insurance policy the recovery is less than the claim and the face of the policy. Goldstein v. Ins. Co., 124 Ia. 143, 99 N. W. 696.

8-3 **Where a fact was proved** from which two inferences could be drawn—one of innocence, the other of fraud,—it was not error for the judge to call the jury's attention to the probability of innocence. Mead v. Darling, 159 Fed. 684.

8-5 Hutchason v. Spinks, 3 Cal. App. 291, 85 P. 132. See Standard Mfg. Co. v. Brons, 118 Ill. App. 632.

Agency of the person who perpetrated the fraud must be proved by the plaintiff, in order to hold the principal. O'Day v. Bennett, 26 Ky. L. R. 702, 82 S. W. 442. But plaintiff need not prove that both the principal and his agent made false representations. First Nat. Bk. v. Baldwin (Tex. Civ.), 102 S. W. 786.

8-8 Weil v. Fineran, 78 Ark. 87, 93 S. W. 568; Chowning v. Howser, 24 Ky. L. R. 1951, 72 S. W. 748.

10-13 "Such cases rest on the view that the circumstances themselves prove the fraud, unless its existence be negatived by other evidence." Miles v. Min. Co., 124 Wis. 278, 102 N. W. 555.

10-14 Schneider v. Schneider, 125 Ia. 1, 98 N. W. 159; Dolan v. Cummings, 116 App. Div. 787, 102 N. Y. S. 91 (brother and sister).

10-15 Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682; Bingham v. Sheldon, 101 App. Div. 48, 91 N. Y. S. 917; Landis v. Wintermute, 40 Wash. 673, 82 P. 1000.

10-18 Smith v. Moore, 142 N. C. 277, 55 S. E. 275; Hanna v. Haynes, 42 Wash. 284, 84 P. 861.

10-23 Eighing v. Brock, 126 Ia. 535, 102 N. W. 444 (stepfather and stepdaughter).

11-24 Jordan v. Cathcart, 126 Ia. 600, 102 N. W. 510 (minor child and husband of her cousin).

11-29 Stewart v. Harris, 69 Kan. 498, 77 P. 277.

11-32 Bingham v. Sheldon, 101 App. Div. 48, 91 N. Y. S. 917.

12-33 Barry v. Murphy, 24 Ky. L. R. 953, 70 S. W. 276; Bingham v. Sheldon, supra.

Presumption of fraud where the transaction is with a person non compos mentis. Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666.

12-37 **Family relationship** not of itself sufficient to justify a presumption of fraud, though it is a persuasive circumstance. Schneider v. Schneider, 125 Ia. 1, 98 N. W. 159; Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257 (brothers—burden of proving the fiduciary relation rests on the person alleging it). And see Jenkins v. Rhodes, 106 Va. 564, 56 S. E. 332.

15-40 See "BILLS AND NOTES;" State Bank v. Cook, 125 Ia. 111, 100 N. W. 72; Rochford v. Barrett (S. D.), 115 N. W. 522.

16-42 Sacks v. Schimmel, 3 Pa. Super 426.

16-43 **Rule of estoppel** by deed does not apply where the deed was obtained by fraud. Goodwin v. Fall, 102 Me. 353, 66 A. 727.

16-44 Supreme Council v. Beggs, 110 Ill. App. 139; Hinkley v. Oil Co., 132 Ia. 396, 107 N. W. 629; Folkes v. Pratt, 86 Miss. 254, 38 S. 224; Sawyer v. Walker, 204 Mo. 133, 102 S. W. 544; Sathre v. Rolfe, 31 Mont. 85, 77 P. 431; Rochford v. Barrett (S. D.), 115 N. W. 522; Butler v. Anderson (Tex. Civ.), 107 S. W. 656; Lilienthal v. Herren, 42 Wash. 209, 84 P. 829.

17-45 Deming v. Wallace, 73 Kan. 291, 85 P. 139; Western Mfg. Co. v. Cotton, 31 Ky. L. R. 1130, 104 S. W. 758.

17-47 Barrow v. Grant, 116 La. 952, 41 S. 220 (but parol evidence is not admissible to show that in a sale of real estate the vendee named was not the real vendee, since that is not the kind of fraud that causes error).

18-55 Rogers v. Rogers (Del.), 66 A. 374; Board of Comrs. v. Wolff, 166 Ind. 325, 76 N. E. 247; Ayers v. Farwell, 196 Mass. 349, 82 N. E. 35; Raymond v. McKenna, 147 Mich. 35, 110 N. W. 121; Bellettiere v. Lawlor, 47 Misc. 161, 93 N. Y. S. 471; Buchal v. Higgins, 109 App. Div. 607, 96 N. Y. S. 241; Pocono Ice Co. v. Ice Co., 214 Pa. 640, 64 A. 398; Barber v. Benner, 17 Pa. C. C. 376.

20-58 Rogers v. Rogers (Del.), 66 A. 374; Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131; Tyler v. Davis, 37 Ind. App. 557, 75 N. E. 3; First Cong. Church v. Terry, 130 Ia. 513, 107 N. W. 305; McNaughton v. Smith, 136 Mich. 368, 99 N. W. 382; Mosby v. Comm. Co., 91 Mo. App. 500; Kilpatrick v. Wiley, 197 Mo. 123, 159, 95 S. W. 213; Buchanan v. Buchanan (N. J. Eq.), 68 A. 780; Crosby v. Wells, 73 N. J. L. 790, 67 A. 295; Tuttle v. Tuttle, 146 N. C. 484, 59 S. E. 1008; Williamson v. Lumb. Co., 42 Or. 153, 70 P. 387, 532; Quirk v. Ins. Co., 12 Pa Super. 250; Rochford v. Barrett (S. D.), 115 N. W. 522; Redwood v. Rogers, 105 Va. 155, 53 S. E. 6; Deepwater Council v. Renick, 59 W. Va. 343, 53 S. E. 552.

22-62 Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131; Weigand v. Cannon, 118 Ill. App. 635; Brakefield v. Shelton, 76 Kan. 451, 92 P. 709; McKibbin v. Day, 74 Neb. 424, 104 N. W. 752; Troxell v. Malin, 9 Pa. Super. 483; Schoneman & Co. v. Weill, 3 Pa. Super. 119; Dantzler v. Cox, 55 S. C. 334, 55 S. E. 774.

23-64 See Stuke v. Glaser, 223 Ill. 316, 79 N. E. 105 (any competent evidence admissible to show fraud in a will).

Written order for goods alleged to have been fraudulently sold, is admissible. Louisiana Co. v. Grocery Co., 73 Ark. 542, 84 S. W. 1047.

Correspondence between defendant and a third person, relating to the subject-matter, is admissible. Sawyer v. Walker, 204 Mo. 133, 102 S. W. 544.

Contract for purchase of land may, in court's discretion, be excluded where its execution is admitted and the only issue is as to actionable deceit. Lunscheon v. Wocknitz (S. D.), 111 N. W. 632.

Failure of a party to take the stand and testify is a circumstance to be considered. Dantzler v. Cox, 55 S. C. 334, 55 S. E. 774.

23-65 Barnsdall v. O'Day, 134 Fed. 828, 67 C. C. A. 278; Walker v. U. S., 152 Fed. 111; Kilpatrick v. Wiley, 197 Mo. 123, 159, 95 S. W. 213; Farmers Bank v. Yenney, 73 Neb. 338, 102 N. W. 617; Collins v. Chipman, 41 Tex. Civ. 563, 95 S. W. 666.

24-67 Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131. See Chicago & A. R. R. Co. v. Jennings, 217 Ill. 494, 75 N. E. 560; Kempe v. Bennett, 134 Ia. 247, 111 N. W. 926; Walsh v. Taitt, 142 Mich. 127, 105 N. W. 544.

Mental weakness of the person alleged to have been defrauded may be shown, as being a fact tending to throw light on the manner in which the artifice was perpetrated. Bloomer v. Gray, 10 Ind. App. 326, 37 N. E. 819.

Promise to employ plaintiff as an officer in the new corporation may be shown. McDonald v. Smith, 139 Mich. 211, 102 N. W. 668.

25-71 **Declaration** as res gestae.

Bolds v. Wood, 9 Ind. App. 657, 36 N. E. 933.

26-73 See Western Cottage etc. Co. v. Anderson (Tex. Civ.), 101 S. W. 1061.

Statements made to other creditors at about the same time are admissible. Storms v. Horton, 77 Conn. 334, 59 A. 421.

26-74 Tooker v. Alston, 159 Fed. 599 (similar statements made to other persons); McDonald v. Smith, 139 Mich. 211, 102 N. W. 668 (declarations of co-conspirator); Weil Bros. v. Cohn, 4 Pa. Super. 443.

28-82 See Donnelly v. T. & G. Co., 102 Md. 1, 61 A. 301; Hines v. Royce, 127 Mo. App. 718, 106 S. W. 1091; Keeler v. Seaman, 47 Misc. 292, 95 N. Y. S. 920.

29-84 Edward Mally Co. v. Button, 77 Conn. 571, 60 A. 125; Hartford L. Ins. Co. v. Hope (Ind. App.), 81 N. E. 595.

31-90 Colston v. Miller, 55 W. Va. 490, 47 S. E. 268.

33-11 Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131; Standard Mfg. Co. v. Brons, 118 Ill. App. 632; Hartford L. Ins. Co. v. Hope, supra; Cahill v. Applegarth, 98 Md. 493, 56 A. 794; Crosby v. Wells, 73 N. J. L. 90, 67 A. 295; Ettlinger v. Weil, 94 App. Div. 291, 87 N. Y. S. 1049, *rev.* on other points, 184 N. Y. 179, 77 N. E. 31; S. v. Talley, 77 S. C. 99, 57 S. E. 618.

35-14 Murray v. Moore, 104 Va. 707, 52 S. E. 381. See Saveland v. Connors, 121 Wis. 28, 98 N. W. 933.

Fraud of other persons practised upon the same plaintiff is incompetent. Obst v. Unnerstall, 184 Mo. 383, 83 S. W. 450.

Incompetent for the purpose of corroborating plaintiff or to prove a guilty knowledge in the defendant of the frauds of its agents. Buckley v. Food Co., 113 Ill. App. 210.

35-15 See Hobbs v. Boatright, 195 Mo. 693, 93 S. W. 934.

35-17 Stewart v. Wright, 147 Fed. 321; 77 C. C. A. 499.

36-19 Edward Malley Co. v. Button, 77 Conn. 571, 60 A. 125.

38-27 *Compare* Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131.

40-34 Mills v. Brill, 105 App. Div. 389, 94 N. Y. S. 163; Katzenstein v. Reid, M. & Co., 41 Tex. Civ. 106, 91 S. W. 360.

40-40 Mills v. Brill, supra.

41-42 Hot Springs R. Co. v. McMillan, 76 Ark. 88, 88 S. W. 846.

42-46 See Thompson v. Randall, 28 Ky. L. R. 716, 90 S. W. 251; Hibbetts v. Threlkeld (Ia.), 114 N. W. 1045.

42-47 See Lindley v. Kemp, 38 Ind. App. 355, 76 N. E. 798; New England L. & T. Co. v. Browne, 177 Mo. 412, 76 S. W. 954.

42-48 See Mattauch v. Walsh (Ia.), 113 N. W. 818 (members of same church).

42-50 See Capital F. Ins. Co. v. Montgomery, 81 Ark. 508, 99 S. W. 687; Prater v. Peters, 31 Ky. L. R. 1311, 105 S. W. 102; Bilafsky v. Ins. Co., 192 Mass. 504, 78 N. E. 534 (relevant solely on issue of reliance); Obst v. Unnerstall, 184 Mo. 383, 83 S. W. 450.

43-56 Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131; Hines v. Royce, 127 Mo. App. 718, 106 S. W. 1091.

44-59 **Insolvency** at time of receipt of goods ordered several months previously is not evidence of fraud. Ayers v. Farwell, 196 Mass. 349, 82 N. E. 35.

45-60 Mills v. Brill, 105 App. Div. 389, 94 N. Y. S. 163 (testimony of witnesses that they would have lent the defendant money is incompetent).

45-62 Turner v. Washburn, 25 Ky. L. R. 2198, 80 S. W. 460. See City of Covington v. Shinkle, 25 Ky. L. R. 73, 74 S. W. 652; Odd Fellows Assn. v. Dayton, 25 Ky. L. R. 665, 76 S. W. 181.

45-63 Stevens v. Ozburn, 1 Tenn. Ch. App. 213.

45-65 Deepwater Council v. Reniek, 59 W. Va. 343, 53 S. E. 552.

48-73 Drake v. Holbrook, 25 Ky. L. R. 1489, 78 S. W. 158.

50-80 Tuttle v. Tuttle, 146 N. C. 464, 59 S. E. 1008.

50-81 Chicago C. R. Co. v. Uhler, 212 Ill. 174, 72 N. E. 195; Tyler v. Davis, 37 Ind. App. 557, 75 N. E. 3; Gipe v. R. Co. (Ind. App.), 82 N. E. 471; Hawley v. Wicker, 117 App. Div. 638, 102 N. Y. S. 711; Kabat v. Moore, 48 Or. 191, 85 P. 506; Fry v. Glass Co., 219 Pa. 514, 69 A. 56.

General question whether a settlement was or was not obtained by fraud should not be submitted to

the jury, but rather whether the specific acts alleged to constitute the fraud were not perpetrated by defendant. Pace v. R. & L. Co., 28 Ky. L. R. 278, 89 S. W. 105.

What are or are not material inducements is a question for the jury. Kehl v. Abram, 210 Ill. 218, 71 N. E. 347.

50-82 Scott v. Burnight, 131 Ia. 507, 107 N. W. 422; Mattauch v. Walsh (Ia.), 113 N. W. 818; Mosby v. Comm. Co., 91 Mo. App. 500 (slight circumstances warrant its submission).

51-83 McNaughton v. Smith, 136 Mich. 368, 99 N. W. 382; Hubbard v. McLean, 122 Wis. 75, 99 N. W. 465.

51-84 Sebring v. Brickley, 7 Pa. Super. 198; Deepwater Council v. Renick, 59 W. Va. 343, 53 S. E. 552; Samson v. Wolford, 60 W. Va. 380, 55 S. E. 1020; Hubbard v. McLean, 122 Wis. 75, 99 N. W. 465; Dohmen Co. v. Ins. Co., 96 Wis. 38, 71 N. W. 69; Miles v. Min. Co., 124 Wis. 278, 102 N. W. 556.

52-85 American H. & D. Co. v. Hall, 110 Ill. App. 463; Baker v. Mathew (Ia.), 115 N. W. 15; Long v. Davis (Ia.), 114 N. W. 197; Gehlert v. Quinn, 35 Mont. 451, 90 P. 168; Tuttle v. Tuttle, 146 N. C. 464, 59 S. E. 1008; Virginia Ins. Co. v. Hogue, 105 Va. 355, 54 S. E. 8.

52-86 State Bk. v. Emge (Ia.), 108 N. W. 530. See Duryea v. Zimmerman, 121 App. Div. 560, 106 N. Y. S. 237.

53-87 Redwood v. Rogers, 105 Va. 155, 53 S. E. 6; Griffin v. Lumb. Co., 140 N. C. 514, 53 S. E. 307.

"Clear and convincing proof" means proof sufficient to overcome the presumption of innocence of fraud. Virginia Ins. Co. v. Hogue, 105 Va. 355, 54 S. E. 8.

53-88 Bowe v. Gage, 127 Wis. 245, 106 N. W. 1074.

53-90 Direct testimony of plaintiff sufficient. Bilafsky v. Ins. Co., 192 Mass. 504, 81 N. E. 534.

54-94 Gehlert v. Quinn, 35 Mont. 451, 90 P. 168 (clear and distinct).

55-97 American H. & D. Co. v. Hall, 110 Ill. App. 463; McNaughton v. Smith, 136 Mich. 368, 99 N. W. 382; Walsh v. Taitt, 142 Mich. 127, 105 N. W. 544. *Compare* Bowe v. Gage, 127 Wis. 245, 106 N. W. 1074.

55-1 Wann v. Scullin, 210 Mo. 429, 109 S. W. 688.

Presumptive evidence may establish fraud. Buchanan v. Buchanan, (N. J.), 68 A. 780.

Strong evidence of a convincing nature, necessary. Western Mfg. Co. v. Cotton, 31 Ky. L. R. 1130, 104 S. W. 758.

Plaintiff's uncorroborated evidence may be sufficient. See Ellis v. Ellis, 1 Tenn. Ch. 198.

56-2 Tuttle v. Tuttle, 146 N. C. 464, 59 S. E. 1008; Virginia Ins. Co. v. Hogue, 105 Va. 355, 54 S. E. 8.

57-11 Making of representation; slight value of the property. — Evidence of the slight value of the property competent to prove that the alleged representation was not made. Aldrich v. Scribner, 146 Mich. 609, 109 N. W. 1121. But under the statute of frauds, oral evidence is inadmissible to prove the making of a false representation as to the character, conduct or credit of a third person. Knight v. Rawlings, 205 Mo. 412, 104 S. W. 38. See "STATUTE OF FRAUDS;" Getchell v. Dusenbury, 145 Mich. 197, 108 N. W. 723. But where the corporation whose credit was misrepresented was only an instrument in the scheme to defraud, parol evidence is admissible. McDonald v. Smith, 139 Mich. 211, 102 N. W. 668.

Admitted by the pleadings. — The making of the alleged representation may be sufficiently proved by admissions in the pleadings. Crandall v. Parks (Cal.), 93 P. 1018.

57-12 Intent must always be proved except in equity actions for rescission, etc. Hartford L. Ins. Co. v. Hope (Ind.. App.), 81 N. E. 595.

58-13 Spead v. Tomlinson, 73 N. H. 46, 59 A. 376; Buchal v. Higgins, 109 App. Div. 607, 96 N. Y. S. 241; Duryea v. Zimmerman, 121 App. Div. 560, 106 N. Y. S. 237.

58-14 Kimber v. Young, 137 Fed. 744, 70 C. C. A. 178; Serrano v. Comm. Co., 117 Mo. App. 185, 93 S. W. 810; Lambert v. Elmendorf, 109 N. Y. S. 574; Dutton v. Pyle, 7 Pa. Super. 126; Curtley v. Society, 46 Wash. 50, 89 P. 180.

59-15 *Contra*, where the representation is made as of the maker's own knowledge concerning a matter susceptible of personal knowledge.

Spead v. Tomlinson, 73 N. H. 46, 59 A. 376.

Falsity of statement will justify an inference of knowledge. Farmer v. Lynch (R. I.), 67 A. 449.

61-25 Adams v. Collins, 196 Mass. 422, 82 N. E. 498 (where no actual bad faith is claimed).

63-30 Walker v. U. S., 152 Fed. 111; Upchurch v. Mizell, 50 Fla. 456, 40 S. 29; Rochford v. Barrett (S. D.), 115 N. W. 522.

63-31 Boddy v. Henry, 126 Ia. 31, 101 N. W. 447; Mills v. Brill, 105 App. Div. 389, 94 N. Y. S. 163.

Dishonest mental state must be shown and is proved by showing "that a false representation has been made (1) by knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false." Derry v. Peek, 14 App. Cas. (Eng.) 337; Shackett v. Bickford, 74 N. H. 57, 65 A. 252; Lambert v. Elmendorf, 109 N. Y. S. 574; Hansen v. Kline (Ia.), 113 N. W. 504; Serrano v. Comm. Co., 117 Mo. App. 185, 93 S. W. 810; Kimber v. Young, 137 Fed. 744, 70 C. C. A. 178; People's Bk. v. Trust Co., 179 Mo. 648, 78 S. W. 618.

Fraudulent intent may be presumed where a representation made is false and is made as of the maker's own knowledge, concerning a matter susceptible of personal knowledge. But a representation as to a fact not susceptible of personal knowledge can be regarded only as an opinion, and fraud cannot be inferred. Spead v. Tomlinson, 73 N. H. 46, 59 A. 376; Atlas Shoe Co. v. Bechard, 102 Me. 197, 66 A. 390; Goodwin v. Fall, 102 Me. 353, 66 A. 727; Adams v. Collins, 196 Mass. 422, 82 N. E. 498; Leach v. Bond, 129 Mo. App. 315, 108 S. W. 596; Connell v. Min. Co., 33 Colo. 30, 78 P. 677.

64-34 Boddy v. Henry, 126 Ia. 31, 101 N. W. 447.

64-36 Farmer v. Lynch (R. I.), 67 A. 449.

65-41 James Clark Co. v. Colton, 91 Md. 195, 46 A. 386; Collins v. Chipman, 41 Tex. Civ. 563, 95 S. W. 666. See Cahill v. Applegarth, 98 Md. 493, 56 A. 794; Cassidy v. Uhlmann, 170 N. Y. 505, 63 N. E. 554; *Compare* Baker v. Mathew (Ia.), 115 N. W. 15 (opportunity of a director to know should be considered as one element).

66-43 Boddy v. Henry, 126 Ia. 31, 101 N. W. 447 (tax receipts admissible to show knowledge of amount of land in a tract).

Equal latitude is permitted in establishing good faith and absence of fraud. Connelly v. Brown, 73 N. H. 193, 60 A. 750.

67-50 Krause v. Cook, 144 Mich. 365, 108 N. W. 81 (testimony of defendant sufficient).

69-62 Collins v. Chipman, 41 Tex. Civ. 563, 95 S. W. 666.

70-63 Long v. Davis (Ia.), 114 N. W. 197; Bilafsky v. Ins. Co., 192 Mass. 504, 78 N. E. 534; Sinclair v. Higgins, 46 Misc. 136, 93 N. Y. S. 194. See Hutchason v. Spinks, 3 Cal. App. 291, 85 P. 132; Youle v. Fosha, 76 Kan. 20, 90 P. 1090; Wann v. Scullin, 210 Mo. 429, 109 S. W. 688; George v. Hesse (Tex. Civ.), 94 S. W. 1122.

71-72 Kincaid v. Price, 82 Ark. 20, 100 S. W. 76; Morrow v. Laverty (Neb.), 109 N. W. 150. See Grinrod v. Bond Co., 34 Mont. 169, 85 P. 891. *Contra,* Tooker v. Alston, 159 Fed. 599.

72-79 Haldeman v. Schuh, 109 Ill. App. 259; Boulden v. Stillwell, 100 Md. 543, 60 A. 609; Pinch v. Hotaling, 142 Mich. 521, 106 N. W. 69 (plaintiff cannot state why he acted as he did). See Leicher v. Keeney, 110 Mo. App. 292, 85 S. W. 920; Collins v. Chipman, 41 Tex. Civ. 563, 95 S. W. 666.

73-83 Bilafsky v. Ins. Co., 192 Mass. 504, 78 N. E. 534 (illiteracy of plaintiff relative to issue). See McDonough v. Williams, 77 Ark. 261, 92 S. W. 783.

74-87 That actual value was very slight is competent evidence upon the issue of plaintiff's reliance. Aldrich v. Scribner, 146 Mich. 609, 109 N. W. 1121; Hibbets v. Threlkeld (Ia.), 114 N. W. 1045.

74-89 But plaintiff need not show that he relied solely upon the defendant's representations. Baker v. Mathew (Ia.), 115 N. W. 15.

74-91 See Keeler v. Seaman, 47 Misc. 292, 95 N. Y. S. 920.

Representation must have been made to the plaintiff, or for the purpose of coming to his knowledge, or to the knowledge of a class of

persons to whom he belongs; so statements made in the articles of incorporation of a corporation cannot justify a reliance upon them. Webb v. Rockefeller, 195 Mo. 57, 93 S. W. 772.

75-95 **Test of misrepresentations** is whether they in fact deceived the party involved, and not whether they were sufficient to influence the conduct of a person of ordinary intelligence. Bowe v. Gage, 127 Wis. 245, 106 N. W. 1074.

75-97 Ettlinger v. Weil, 184 N. Y. 179, 77 N. E. 31, *rev.* 94 App. Div. 291, 87 N. Y. S. 1049. See Hartford Ins. Co. v. Hope (Ind. App.), 81 N. E. 595 (all damages awarded will be remitted except those expressly proven); Bellettiere v. Lawlor, 47 Misc. 161, 93 N. Y. S. 471; Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026.

Declaration by defendant as to the amount of timber on certain land not admissible on the question of damages in an action of deceit for misrepresentations as to ownership of a part of the land. Jewett v. Buck, 78 Vt. 353, 63 A. 136.

"**In actions of fraud** it is not necessary to allege or prove actual damages". Blumenfeld v. Stine, 42 Misc. 411, 87 N. Y. S. 81.

76-98 Marshall-McC. Co. v. Halloran, 15 N. D. 71, 106 N. W. 293.

Value as evidence of damage. — Evidence of the value of the property at the time of the sale is admissible since if it was worth no more than the price received the plaintiff was not damaged. McDonough v. Williams, 77 Ark. 261, 92 S. W. 783.

76-99 Walker v. Parry, 51 Fla. 344, 40 S. 69.

Cannot be shown unless specially pleaded. Pickett v. Gleed, 39 Tex. Civ. 70, 86 S. W. 946.

76-3 White v. White (Tex. Civ.), 95 S. W. 733.

Relevant acts can be proved though not alleged. McDonald v. Smith, 139 Mich. 211, 102 N. W. 668.

Action for constructive fraud cannot be sustained by proof of actual fraud. Sinclair v. Higgins, 46 Misc. 136, 93 N. Y. S. 195.

77-5 Cahill v. Applegarth, 98 Md. 493, 56 A. 794.

Although a conspiracy is alleged, recovery may be had against a single defendant. Gurney v. Tenney (Mass.), 84 N. E. 428. And see Miller v. John, 111 Ill. App. 56.

78-6 Edward Malley Co. v. Button, 77 Conn. 571, 60 A. 125; Long v. Davis (Ia.), 114 N. W. 197; Pinch v. Hotaling, 142 Mich. 521, 106 N. W. 69; Niebels v. Howland, 97 Minn. 209, 106 N. W. 367; Collins v. Chipman, 41 Tex. Civ. 563, 95 S. W. 666.

78-7 Murray v. Davies (Kan.), 94 P. 283; Blumenfeld v. Stine, 42 Misc. 411, 87 N. Y. S. 81.

79-14 McDonough v. Williams, 77 Ark. 261, 92 S. W. 783. See Grinrod v. Bond Co., 34 Mont. 169, 85 P. 891 (acts constituting an estoppel); Emerson-N. Co. v. Cupps, 15 N. D. 606, 108 N. W. 796.

Bringing an action against his agent to recover commissions secretly paid by the vendor does not bar an action against the vendor, by the principal, for deceit. Barnsdall v. O'Day, 134 Fed. 828, 67 C. C. A. 278.

Recovery in an action against a corporation for breach of contract bars a subsequent proceeding in deceit for false representations as to corporate existence. Rossow v. Burke, 52 Misc. 118, 101 N. Y. S. 608.

FRAUDULENT CONVEYANCES [Vol. 6.]

Right of grantee to attack a judgment debt.—Burden of proof, 86-4; *Non-compliance with statutory provisions,* 119-6; *Spendthrift trust,* 129-42; *Judgment in attachment proceedings,* 129-42; *Inferred from position of the party,* 129-42; *When grantor is incompetent as a witness,* 133-55; *Unsatisfactory showing as to where the grantee obtained his money,* 143-81; *Secrecy in the transaction,* 143-81.

86-3 Irish v. Daniels, 100 Minn. 189, 110 N. W. 968.

86-4 **Right of grantee to attack a judgment debt. — Burden of proof.** The burden of proof is upon the

grantee to establish such an equity as will give him a right to attack the validity of a claim upon which the creditor has obtained a judgment. LeHerisse v. Hess (N. J.), 57 A. 808.

86-5 See Metz v. Patton (W. Va.), 60 S. E. 399.

Creditor of deceased insolvent debtor having claim of over $100.00 need not first obtain a judgment under the New York statute. Mertens v. Mertens, 48 Misc. 235, 96 N. Y. S. 785. See Aigeltinger v. Einstein, 143 Cal. 609, 77 P. 669; Crary v. Kurtz, 132 Ia. 105, 105 N. W. 590, 109 N. W. 452; Grunsfeld Bros. v. Browneli, 12 N. M. 192, 76 P. 310.

87-9 C. Bank v. Kearns, 100 Md. 202, 59 A. 1010; Borden v. Lynch, 34 Mont. 503, 87 P. 609.

88-11 Snellgrove v. Evans, 145 Ala. 600, 40 S. 567; Ledbetter v. Davenport (Ala.), 45 S. 467; Morimura v. Samoha, 25 App. D. C. 189.

90-18 **Assignment** of a chose in action, even without consideration, is not presumptively fraudulent as against a subsequent creditor. Weckerly v. Taylor, 74 Neb. 84, 103 N. W. 1065.

92-26 Stubling v. Wilson (Or.), 90 P. 1011.

93-30 Southern Lumb. Co. v. Verdier, 51 Fla. 570, 40 S. 676 (clearer proof required than is necessary between strangers); Bennett v. Boshold, 123 Ill. App. 311; Wigginton v. Minter, 28 Ky. L. R. 79, 88 S. W. 1082; Parker v. Fenwick (N. C.), 61 S. E. 378; Walker v. Harold, 44 Or. 205, 74 P. 705.

Burden of proving that the consideration for the conveyance was derived from a source other than the husband, is upon the wife. Lewis v. Palmer, 106 Va. 522, 56 S. E. 341; Rankin v. Goodwin, 103 Va. 81, 48 S. E. 521; Richardson v. Pierce, 105 Va. 628, 54 S. E. 480.

95-35 Vashon v. Barrett, 105 Va. 490, 54 S. E. 705.

96-36 Rice v. Allen, 69 Neb. 349, 95 N. W. 704.

96-37 John Silvey & Co. v. Vernon (Ala.), 45 S. 68.

102-53 See Parks v. Worthington (Tex.), 109 S. W. 909.

102-54 Thompson v. Williams, 100 Md. 195, 60 A. 26; Coombs v. Aborn (R. I.), 68 A. 817.

Recital of $1 and "other valuable considerations" cannot be relied upon to show want of consideration. Wadleigh v. Wadleigh, 111 App. Div. 367, 97 N. Y. S. 1063, s. c. 109 N. Y. S. 633.

105-65 Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131; Wigginton v. Minter, 28 Ky. L. R. 79, 88 S. W. 1082.

106-66 Allen v. Riddle, 141 Ala. 621, 37 S. 680; Nixon v. Goodwin, 3 Cal. App. 358, 85 P. 169; S. v. Martin, 77 Conn. 142, 58 A. 745; Jackson v. Trust Co., 53 Fla. 265, 44 S. 416; German-Am. Bk. v. Hoffman, 120 Ill. App. 363; American H. & D. Co. v. Hall, 208 Ill. 597, 70 N. E. 581; Stark v. Lamb, 167 Ind. 642, 78 N. E. 668, 79 N. E. 895; Hamrick v. Hoover (Ind. App.), 84 N. E. 28; Klay v. McKellar, 122 Ia. 163, 97 N. W. 1091; Clark Bros. v. Ford, 126 Ia. 460, 102 N. W. 421; Atkinson v. McNider, 130 Ia. 281, 105 N. W. 504; Campbell v. Campbell, 129 Ia. 317, 105 N. W. 583; Willett v. Froelich, 28 Ky. L. R. 798, 90 S. W. 572; Thompson v. Williams, 100 Md. 195, 60 A 26; Holmes Bros. v. Dry-Goods Co., 86 Miss. 782, 39 S. 70; Southern Bk. v. Nichols, 202 Mo. 309, 100 S. W. 613; Vreeland v. Rogers (N. J.), 61 A. 486; Riker v. Gwynne, 109 N. Y. S. 570; Courtney Shoe Co. v. Polley (Tex. Civ.), 95 S. W. 7; Wheby v. Moir, 102 Va. 875, 47 S. E. 1005.

107-67 Brunson v. Rosenheim & Son, 149 Ala. 112, 43 S. 31; Wick v. Hickey (Ia.), 103 N. W. 469; Crary v. Kurtz, 132 Ia. 105, 105 N. W. 590, 109 N. W. 452; Commonwealth Bk. v. Kearns, 100 Md. 202, 59 A. 1010. See Metz v. Patton (W. Va.), 60 S. E. 399 (ejectment).

107-69 See Ketner v. Donten, 15 Pa. Super. 604.

109-72 Cannon v. Castelman, 164 Ind. 343, 73 N. E. 689; Holmes Bros. v. Dry G. Co., 86 Miss. 782, 39 S. 70.

Grantor's insolvency at time of conveyance need not be proved. Crary v. Kurtz, 132 Ia. 105, 105 N. W. 590, 109 N. W. 452.

109-74 Smyth v. Hall, 126 Ia. 627, 102 N. W. 520; Atkinson v.

McNider, 130 Ia. 281, 105 N. W. 504; Gage Bros. v. Burns (Neb.), 111 N. W. 791; Coombs v. Aborn (R. I.), 68 A. 817.

109-75 Wigginton v. Minter, 28 Ky. L. R. 79, 88 S. W. 1082.

110-77 American H. & D. Co. v. Hall, 208 Ill. 597, 70 N. E. 581.

110-78 **Presumption of honesty** is not to be used to determine issues the subject of conflicting evidence nor to overweigh the most reasonable and probable conclusion to be drawn from all the evidence. White v. Million, 114 Mo. App. 70, 89 S. W. 599.

110-79 Allen v. Riddle, 141 Ala. 621, 37 S. 680; Lemp Brewing Co. v. Guion, 17 Okla. 131, 87 P. 584; Harrisonburg H. Co. v. Furniture Co., 106 Va. 302, 55 S. E. 679.

111-81 Ledbetter v. Davenport (Ala.), 45 S. 467; Allen v. Riddle, 141 Ala. 621, 37 S. 680; First Nat. Bk. v. Follett, 20 Colo. App. 372, 80 P. 147; Morimura v. Samoha, 25 App. D. C. 189; New Orleans Co. v. Guillory, 117 La. 821, 42 S. 329; Rownd v. Davidson, 113 La. 1047, 37 S. 965; McCauley v. Shocky, 105 Md. 641, 66 A. 625; Southern Bk. v. Nichols, 202 Mo. 309, 100 S. W. 613; Hall v. Frith, 51 Misc. 600, 101 N. Y. S. 31; Wheby v. Moir, 102 Va. 875, 47 S. E. 1005; Joseph Speidel G. Co. v. Stark (W. Va.), 59 S. E. 498.

Some courts hold that the grantee's participation in the fraudulent intent of the grantor must be proved. Atkinson v. McNider, 130 Ia. 281, 105 N. W. 504; Smyth v. Hall, 126 Ia. 627, 102 N. W. 520; Rike v. Ryan, 147 Ala. 497, 41 S. 959 (subsequent creditor); Livesley v. Heise, 48 Or. 147, 85 P. 509; German-A. Bk. v. Hoffman, 120 Ill. App. 363.

In New York it has been held that when a fraudulent intent on the part of the grantor has been proved the burden is on the grantee to prove lack of knowledge. Bailey v. Fransioli, 101 App. Div. 140, 91 N. Y. S. 852. So also where the grantor's insolvency is shown. Wadleigh v. Wadleigh, 111 App. Div. 367, 97 N. Y. S. 1063, s. c. 109 N. Y. S. 633; Lawrence Bros. v. Heylman, 111 App. Div. 848, 98 N. Y. S. 121, *aff.* 189 N. Y. 573, 82 N. E. 1128.

But proof of the fraudulent intent of the grantor which will cast the burden on the grantee must be supplied by evidence competent as against such grantee. Wadleigh v. Wadleigh, 111 App. Div. 367, 97 N. Y. S. 1063, s. c. 109 N. Y. S. 633.

113-83 **State of facts** may exist which will negative the presumption of innocence and cast upon the grantee the burden of proving his good faith and non-participation in the scheme. McCauley v. Shockey, 105 Md. 641, 66 A. 625.

114-90 Sellers v. Hayes, 163 Ind. App. 422, 72 N. E. 119. See Jackson v. Trust Co., 53 Fla. 265, 44 S. 516.

115-91 Rike v. Ryan, 147 Ala. 497, 41 S. 959; Allen v. Caldwell, 149 Ala. 293, 42 S. 855; State Bk. v. Chatten, 69 Kan. 435, 77 P. 96; Richardson v. Pierce, 105 Va. 628, 54 S. E. 480 (rule applies to a conveyance by husband to wife when he is not insolvent at the time).

No presumption of fraud as to a subsequent creditor from the mere incurring of debts. Searcy v. Gwaltney, 36 Tex. Civ. 158, 81 S. W. 576.

115-92 Collings v. Collings, 29 Ky. L. R. 51, 92 S. W. 577. *Contra*, Hemenway v. Thaxter, 150 Cal. 737, 90 P. 116, *cit.* Horn v. Water Co., 13 Cal. 62, 73 Am. Dec. 569.

116-97 Wilson v. Parke, 119 Mo. App. 25, 96 S. W. 244.

119-6 In re Knopf, 144 Fed. 245; Allen v. McMannes, 156 Fed. 615; Dokken v. Page, 147 Fed. 438, 77 C. C. A. 674; Marimura v. Samoha, 25 App. D. C. 189.

Non-compliance with statutory provisions. — In many states statutes have been passed regulating the transfer of goods and merchandise and a non-compliance with their terms raises a presumption of fraud. Thorpe v. Merc. Co., 99 Minn. 22, 108 N. W. 940; Gilbert v. Gonyea, 103 Minn. 459, 115 N. W. 640 (failure to secure an inventory, the burden of proof is on vendee to rebut such presumption); Parham & Co. v. Liquor Co., 127 Ga. 303, 56 S. E. 460; Williams v. Bank, 15 Okla. 477, 82 P. 496; Kohn v. Fishback, 36 Wash. 69, 78 P. 199; Plass v. Morgan, 36 Wash. 160, 78 P. 784; Calkins v. Howard, 2 Cal. App. 233, 83 P. 280 (conclusive presumption);

Fisher v. Herrmann, 118 Wis. 424, 95 N. W. 392.

119-7 Mowen v. Nitsch, 103 Md. 685, 62 A. 582.

119-8 White v. Million, 114 Mo. App. 70, 89 S. W. 599.

120-10 Standifer v. Baker, 31 Ky. L. R. 42, 101 S. W. 365; Seed v. Jennings, 47 Or. 464, 83 P. 872; Lawrence Bros. v. Heylman, 111 App. Div. 848, 98 N. Y. S. 121, *aff.* 189 N. Y. 573, 82 N. E. 1128.

120-11 *Contra.* — Bull v. Bray, 89 Cal. 286, 26 P. 873 (fraudulent intent must be proved in all cases); Emmons v. Barton, 109 Cal. 662, 42 P. 303.

121-12 **Presumption of fraud** from inadequacy of consideration will not be indulged in the absence of proof that the grantor had no other property sufficient to pay his debts. Pearsall v. Stewart, 112 App. Div. 467, 98 N. Y. S. 467.

121-13 Long v. Inv. Co., 135 Ia. 398, 112 N. W. 550; American Nat. Bk. v. Thornburrow, 109 Mo. App. 639, 83 S. W. 771; Vandeventer v. Goss, 116 Mo. App. 316, 91 S. W. 958; Scharff v. McGaugh, 205 Mo. 344, 103 S. W. 550.

122-18 Crary v. Kurtz, 132 Ia. 105, 105 N. W. 590, 109 N. W. 452; Scharff v. McGaugh, 205 Mo. 344, 103 S. W. 550.

122-19 Borror v. Carrier, 34 Ind. App. 353, 73 N. E. 123; Richardson v. Richardson, 134 Ia. 242, 111 N. W. 934.

123-21 Joy v. Helbing (Cal.), 94 P. 863 (conveyance from husband to wife); Hunt v. Nance, 122 Ky. 274, 28 Ky. L. R. 1188, 92 S. W. 6; Standifer v. Baker, 31 Ky. L. R. 42, 101 S. W. 365; Seed v. Jennings, 47 Or. 464, 83 P. 872.

123-22 **Burden of proof** is upon the creditor to show that his debt arose three years after his debtor obtained possession of bailed property, under the Alabama statute vesting title in the bailee after such period. Matthis v. Thurman, 143 Ala. 558, 39 S. 360.

123-23 See Helgert v. Stewart, 20 Colo. App. 202, 77 P. 1091; Farmer v. Hughes, 38 Colo. 318, 88 P. 191; Rapple v. Hughes, 10 Idaho 338, 77 P. 722; Johnson v. Emery, 31 Utah 126, 86 P. 869.

123-24 Hiser v. Walbaum, 129 Ill. App. 82; Williams v. Brown, 137 Mich. 569, 100 N. W. 786 (presumption applies in favor of both prior and subsequent creditors); Wilson v. Walrath, 103 Minn. 413, 115 N. W. 203; Stam v. Smith, 183 Mo. 461, 81 S. W. 1217; Neeley v. Trautwein (Neb.), 113 N. W. 141; Hill v. Page, 108 App. Div. 71, 95 N. Y. S. 465; Tuttle v. Hayes, 107 N. Y. S. 22; Kendig v. Binkley, 10 Pa. Super. 463; Joseph Speidel G. Co. v. Stark (W. Va.), 59 S. E. 498; Seivert v. Galvin, 133 Wis. 391, 113 N. W. 680.

125-27 Seivert v. Galvin, 133 Wis. 397, 113 N. W. 680 (a question of fact for the jury). See Rosenberg Bros. v. Ross, 6 Cal. App. 755, 93 P. 284; Israel v. Day (Colo.), 92 P. 698; Rapple v. Hughes, 10 Idaho 338, 77 P. 722; Reynolds v. Beck, 108 Mo. App. 188, 83 S. W. 292; Webster v. Sherman, 33 Mont. 448, 84 P. 878; Kendig v. Binkley, 10 Pa. Super. 463.

125-28 *Compare* Joseph Speidel G. Co. v. Stark (W. Va.), 59 S. E. 498.

125-30 Wilson v. Walrath, 103 Minn. 413, 115 N. W. 203; Colston v. Miller, 55 W. Va. 490, 47 S. E. 268.

126-33 Griswold v. Nichols, 126 Wis. 401, 105 N. W. 815.

126-34 Lowe v. Matson, 140 Ill. 108, 29 N. E. 1036.

126-35 Horney-G. Co. v. Miller, 147 Fed. 295; Wilks v. Vaughan, 73 Ark. 174, 83 S. W. 913; Gage Bros. v. Burns (Neb.), 111 N. W. 791; Stubbling v. Wilson (Or.), 90 P. 1011 (brothers); Livesley v. Heise, 48 Or. 147, 85 P. 509.

Presumption is rebuttable by positive evidence of the unfriendly relations of the parties. White v. Glover, 23 App. D. C. 389.

127-36 American H. & D. Co. v. Hall, 208 Ill. 597, 70 N. E. 581; Mueller v. Renkes, 31 Mont. 100, 77 P. 512; Johnson v. Lucas, 103 Va. 36, 48 S. E. 497; Colston v. Miller, 55 W. Va. 490, 47 S. E. 268.

127-37 Russell v. Phillips, 145 Mich. 268, 108 N. W. 718; Long v. Inv. Co., 135 Ia. 398, 110 N. W. 26 (here the creditors were not shown to be prior creditors). See Campbell v. Campbell, 129 Ia. 317, 105 N. W. 583; Smyth v. Hall, 126 Ia. 627,

102 N. W. 520; Lehman v. Gunn (Ala.), 45 S. 620. *Contra,* Dorwin v. Patton, 101 Minn. 344, 112 N. W. 266 (not conclusive); Seeley v. Ritchey (Neb.), 107 N. W. 769, *rev.* on rehearing (Neb.), 110 N. W. 1105; Flint v. Chaloupka (Neb.), 111 N. W. 465; Hulen v. Chilcoat (Neb.), 113 N. W. 122.

Many courts, however, go to the extent of saying that transactions between members of a family are to be closely scrutinized. Bailey v. Fransioli, 101 App. Div. 140, 91 N. Y. S. 852; Penn v. Trompen, 72 Neb. 273, 100 N. W. 312; Lawrence Bros. v. Heylman, 111 App. Div. 848, 98 N. Y. S. 121, *aff.* 189 N. Y. 573, 82 N. E. 1128.

127-38 See Clark Bros. v. Ford, 126 Ia. 460, 102 N. W. 421; Berry v. Ewen, 27 Ky. L. R. 467, 85 S. W. 227 (fraud not presumed where it appears that the wife had property of her own equal to the consideration paid for the conveyance). Wadleigh v. Wadleigh, 111 App. Div. 367, 97 N. Y. S. 1063.

128-39 Waters v. Pants Co., 76 Ark. 252, 88 S. W. 879 (uncorroborated testimony of wife insufficient); Helm v. Brewster (Colo.), 93 P. 1101; Torrey v. Dickinson, 213 Ill. 36, 72 N. E. 703; Harvey v. Godding (Neb.), 109 N. W. 220; Walker v. Harold, 44 Or. 205, 74 P. 705; Rankin v. Goodwin, 103 Va. 81, 48 S. E. 521; Kline v. Kline, 103 Va. 263, 48 S. E. 882. See Knickerbocker T. Co. v. Carhart (N. J. Eq.), 64 A. 756.

But where the husband is not indebted at the time of the conveyance no presumption of fraud arises and the burden of proof is upon a subsequent creditor. Richardson v. Pierce, 105 Va. 628, 54 S. E. 480.

129-42 See Standifer v. Baker, 31 Ky. L. R. 42, 101 S. W. 365.

Judgment in attachment proceedings is important evidence as to the debtor's intent. Smith v. Birge, 126 Ill. App. 596.

Inferred from position of the party. Knowledge on the part of a grantee may sometimes be inferred from the mere position of the parties. Nelson v. Spence, 129 Ga. 35, 58 S. E. 697 (grantee president of grantor corporation).

Spendthrift trust. — A spendthrift who puts his entire estate in the hands of a trustee will be presumed to do so with a fraudulent intent as to subsequent creditors. Ward v. Marie (N. J. Eq.), 68 A. 1084. *Compare* Newton v. Jay, 107 App. Div. 457, 95 N. Y. S. 413 (a deed of trust made by a woman in contemplation of a foreign marriage, not fraudulent).

130-47 Cohen v. Goldberg, 65 Minn. 473, 67 N. W. 1149; Hill v. Page, 95 N. Y. S. 465.

131-48 Allen v. Knutson, 96 Minn. 340, 104 N. W. 963.

133-55 When grantor is incompetent as a witness. — The grantor is a party interested in the event so as to be rendered incompetent under some statutes to testify as to transactions with a deceased grantee. Roberts v. Mack, 98 App. Div. 485, 90 N. Y. S. 526.

But where the grantor is deceased the grantee is not thereby rendered incompetent. Stam v. Smith, 183 Mo. 464, 81 S. W. 1217.

133-57 Hill v. Page, 108 App. Div. 71, 95 N. Y. S. 465.

133-58 Testimony of grantor is competent upon the issue of the grantee's knowledge. Townes v. Stultz, 78 S. C. 366, 59 S. E. 983.

135-60 Helm v. Brewster (Colo.), 93 P. 1101; De Ruiter v. De Ruiter, 28 Ind. App. 9, 62 N. E. 100; Riker v. Gwynne, 109 N. Y. S. 570.

135-61 Allen v. Caldwell, 149 Ala. 293, 42 S. 855; Smith v. Goodrich, 75 Ark. 603, 87 S. W. 125; Dallas Brewery v. Holzner, 116 La. 719, 41 S. 48 (failure of both grantor and grantee as witnesses, to deny fraud or affirm their good faith); Thompson v. Williams, 100 Md. 195, 60 A. 26; Klauber v. Schloss, 198 Mo. 502, 95 S. W. 930; Southern Bk. v. Nichols, 202 Mo. 309, 100 S. W. 613; St. Francis Mfg. Co. v. Sugg, 206 Mo. 148, 104 S. W. 45; Phillips & Co. v. Rule, 124 Mo. App. 525, 102 S. W. 32 (sale of large stock of goods, in bulk, without inventory or appraisement and in haste); New York M. Co. v. West, 107 Mo. App. 254, 80 S. W. 923 (sending checks to creditors though no funds were on deposit); Lawrence Bros. v. Heylman, 111 App. Div. 848, 98 N. Y. S. 121, *aff.* 189 N. Y. 573, 82 N. E. 1128.

Statement in conveyance that it was not given to defraud creditors is not evidence of fraud. Strop v. Hughes, 123 Mo. App. 547, 101 S. W. 146.

False recital of the consideration is not necessarily evidence of fraud. Strop v. Hughes, supra.

136-62 California Min. Co. v. Manley, 10 Idaho 786, 81 P. 50; Wigginton v. Minter, 28 Ky. L. R. 79, 88 S. W. 1082; Colston v. Miller, 55 W. Va. 490, 47 S. E. 268; Moore v. Tearney (W. Va.), 57 S. E. 263.

137-63 Nixon v. Goodwin, 3 Cal. App. 358, 85 P. 169.

138-64 **Payment of creditors** with the proceeds of the sale, is relevant. Van Sylck v. Woodruff, 118 App. Div. 47, 103 N. Y. S. 139.

138-65 Rusho v. Richardson (Neb.), 109 N. W. 394; Bailey v. Fransioli, 101 App. Div. 140, 91 N. Y. S. 852; Townes v. Stultz, 78 S. C. 366, 59 S. E. 983; Berge v. Kittelson, 133 Wis. 664, 114 N. W. 125 (payment of other creditors by vendee).

139-66 Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131; King v. Grannis, 29 Pa. Super. 367.

142-71 Joy v. Helbing (Cal.), 94 P. 863; Tabor v. Armstrong, 30 Ky. L. R. 938, 99 S. W. 957; Moore v. Tearney (W. Va.), 57 S. E. 263. *Compare* Allen v. Caldwell, 149 Ala. 293, 42 S. 855; Atkinson v. McNider, 130 Ia. 281, 105 N. W. 504; Thompson v. Williams, 100 Md. 195, 60 A. 26; Johnston v. Bk., 85 Miss. 234, 38 S. 100; Joues v. Levering, 116 Mo. App. 377, 91 S. W. 980.

142-72 Bishop v. Dry G. Co., 30 Ky. L. R. 725, 99 S. W. 644; Thompson v. Williams, 100 Md. 195, 60 A. 26 (child need not expel her father from the home); Colston v. Miller, 55 W. Va. 490, 47 S. E. 268; Seivert v. Galvin, 133 Wis. 391, 113 N. W. 680.

Reconveyance to the wife of the grantor debtor and management of the property by him, are facts to be considered. Bodkin v. Kerr, 97 Minn. 301, 107 N. W. 137.

142-74 Gage v. Mears, 107 Mo. App. 140, 80 S. W. 712 (fraud cannot be inferred from mere fact of insolvency).

143-76 **Proximity** in time of the conveyance and the judgment, is of slight importance. Thompson v. Williams, 100 Md. 195, 60 A. 26.

143-78 Mercantile Exch. Bk. v. Taylor, 51 Fla. 473, 41 S. 22 (not conclusive).

143-79 McCuin v. Groc. Co., 78 Ark. 63, 93 S. W. 563; Urdangen & G. Co. v. Doner, 122 Ia. 533, 98 N. W. 317; Morgan v. Boulton, 25 Ky. L. R. 572, 85 S. W. 747; Willett v. Froelich, 28 Ky. L. R. 798, 90 S. W. 572; Bishop v. Dry G. Co., 30 Ky. L. R. 725, 99 S. W. 644; Mueller v. Renkes, 31 Mont. 100, 77 P. 512; Lawrence Bros. v. Heylman, 111 App. Div. 848, 98 N. Y. S. 121; *aff.* 189 N. Y. 573, 82 N. E. 1128; Wahlheimer v. Truslow, 106 App. Div. 73, 94 N. Y. S. 137; Ketner v. Donten, 15 Pa. Super. 604.

Want of consideration is merely an evidentiary fact and not conclusive of a fraudulent intent. Stevens v. Myers, 14 N. D. 398, 104 N. W. 529.

143-80 Bekins v. Dieterle, 5 Cal. App. 690, 91 P. 173; Southern Bk. v. Nichols, 202 Mo. 309, 100 S. W. 613; Parks v. Worthington (Tex.), 109 S. W. 909.

143-81 Nelson v. Spence, 129 Ga. 35, 58 S. E. 697; Clark v. Harper, 215 Ill. 24, 74 N. E. 61; Morgan v. Boulton, 25 Ky. L. R. 572, 85 S. W. 747; Brite v. Guy, 28 Ky. L. R. 57, 88 S. W. 1069; Willett v. Froelich, 28 Ky. L. R. 798, 90 S. W. 572; New Orleans Co. v. Guillory, 117 La. 821, 42 S. 329; McCauley v. Shocky, 105 Md. 641, 66 A. 625 (relevant to issue of guilty knowledge of grantee); Martin v. Shears (Neb.), 110 N. W. 1010; Coombs v. Aborn (R. I.), 68 A. 817; Adams v. Dempsey, 35 Wash. 80, 76 P. 538; Colston v. Miller, 55 W. Va. 490, 47 S. E. 268; Moore v. Tearney (W. Va.), 57 S. E. 263.

Unsatisfactory showing as to where the grantee obtained his money, is a suspicious circumstance. McCuin v. Groc. Co., 78 Ark. 63, 93 S. W. 563; Morimura v. Samaha, 25 App. D. C. 189.

Secrecy in the transaction — existence of a secret trust is a badge of fraud. Thompson v. Williams, 100 Md. 195, 60 A. 26.

144-82 **Evidence** that grantee was a first-class business man is irrelevant. Arnold v. Harris, 142 Mich. 275, 105 N. W. 744.

144-84 Clark v. Harper, 215 Ill. 24, 74 N. E. 61; Crary v. Kurtz, 132 Ia. 105, 105 N. W. 590, 109 N. W. 452; Stevens v. Myers, 14 N. D. 398, 104 N. W. 529. See Smith v. Birge, 126 Ill. App. 596.

Fact that grantor was solvent is an important item of evidence but not conclusive. Quinn v. Mach. Co., 102 Minn. 256, 113 N. W. 689.

144-85 Transactions by which debtors strip themselves of all their property raise a presumption that they have a fraudulent intent in so doing. McCauley v. Shocky, 105 Md. 641, 66 A. 625; Bailey v. Fransioli, 101 App. Div. 180, 91 N. Y. S. 852; Blahnik v. Barta, 130 Wis. 121, 109 N. W. 980. See Hemenwray v. Thaxter, 150 Cal. 737, 90 P. 116; Bekins v. Dieterle, 5 Cal. App. 690, 91 P. 173; Morgan v. Boulton, 25 Ky. L. R. 572, 85 S. W. 747; Jones v. Lossiter, 29 Ky. L. R. 514, 93 S. W. 657; Brewery v. Holzner, 116 La. 719, 41 S. 48.

Where debtor strips himself but uses all of his property to pay certain creditors, a fraudulent intent is disproved. Scott v. Thomas, 104 Va. 330, 51 S. E. 829.

Presumption arises that a grantor had no property left after a voluntary conveyance when an execution is returned by the sheriff unsatisfied, at a subsequent time. Campbell v. Campbell, 129 Ia. 317, 105 N. W. 583.

146-91 See Brewery v. Holzner, 116 La. 719, 41 S. 48.

146-95 Doxsee v. Waddick, 122 Ia. 599, 98 N. W. 483; Horstman v. Little (Tex. Civ.), 88 S. W. 286.

148-97 Fabian v. Traeger, 215 Ill. 220, 74 N. E. 131 (purchases by grantee from defendant and from a corporation the president of which was defendant's wife, made on the same day, may be shown, although only one sale is attacked for fraud).

148-2 Thompson v. Newland, 144 Mich. 595, 108 N. W. 93.

149-4 Doxsee v. Waddick, 122 Ia. 599, 98 N. W. 483.

149-5 Perry v. Pore, 28 Ky. L. R. 897, 90 S. W. 952.

And offers to sell made by the grantor to others are inadmissible in favor of the grantee unless a part of the res gestae. McCuin v. Groc. Co., 78 Ark. 63, 93 S. W. 563.

149-8 Excessive effort to give a transaction a look of fairness is to be considered. Colston v. Miller, 55 W. Va. 490, 47 S. E. 268.

150-12 Parker v. Fenwick (N. C.), 61 S. E. 378.

151-13 Goldstein v. Morgan, 122 Ia. 27, 96 N. W. 897; Borden v. Lynch, 34 Mont. 503, 87 P. 609; Colston v. Miller, 55 W. Va. 490, 47 S. E. 268.

152-15 Statements made by grantor upon supplementary proceedings are admissible. Lawrence Bros. v. Heylman, 111 App. Div. 848, 98 N. Y. S. 121, *aff.* 189 N. Y. 573, 82 N. E. 1128.

153-20 See Smith v. Birge, 126 Ill. App. 596.

153-21 Skelley v. Vail, 27 Ind. App. 87, 60 N. E. 961; Stam v. Smith, 183 Mo. 464, 81 S. W. 1217, 111 App. Div. 367; Beeler v. Perry, 128 Mo. App. 234, 107 S. W. 1008; Wadleigh v. Wadleigh, 97 N. Y. S. 1063, s. c. 109 N. Y. S. 633; Parker v. Fenwick (N. C.), 61 S. E. 378; Maffi v. Stephens (Tex. Civ.), 93 S. W. 158; Colston v. Miller, 55 W. Va. 490, 47 S. E. 268.

154-22 Perry v. Pore, 28 Ky. L. R. 897, 90 S. W. 952.

154-23 Hargus v. Hayes, 83 Ark. 186, 103 S. W. 163; Borden v. Lynch, 34 Mont. 503, 87 P. 609; Maffi v. Stephens, supra.

155-28 Skelley v. Vail, 27 Ind. App. 87, 60 N. E. 961; Walker v. Harold, 44 Or. 205, 74 P. 705.

156-30 Boyer v. Weimer, 204 Pa. 295, 54 A. 21.

156-33 Banks v. McCandless, 119 Ga. 793, 47 S. E. 332; Moore v. Tearney (W. Va.), 57 S. E. 263.

157-35 Emmons v. Barton, 109 Cal. 662, 42 P. 303.

159-46 White v. Million, 114 Mo. App. 70, 89 S. W. 599; Tuttle v. Hayes, 107 N. Y. S. 22; Stevens v. Myers, 14 N. D. 398, 104 N. W. 529.

Where on its face the legal effect of an instrument is to hinder creditors the question of fraudulent intent is a question of law. Wood v. Eldredge, 147 Mich. 554, 111 N. W. 168.

Facts being ascertained and determined by the trial court, the existence of constructive fraud and of a valuable consideration is a question

of law, on appeal. Clark v. Block, 78 Conn. 467, 62 A. 757.

While what constitutes a fraudulent intention is by statute a question of fact, the findings of a referee are not controlling on appeal. Tanner v. Eckhardt, 107 App. Div. 79, 94 N. Y. S. 1013, though the finding of a jury is conclusive. Hill v. Page, 108 App. Div. 71, 95 N. Y. S. 465.

GAMING [Vol. 6.]

Character of house may be shown by gambling paraphernalia, 198-43.

163-1 Hooper v. Nuckles (Ala.), 39 S. 711; Beidler Lumb. Co. v. Com. Co., 13 N. D. 639, 102 N. W. 880.

Mutuality of intent. — In re Baxter & Co., 152 Fed. 137; Hooper v. Nuckles, supra; Farnum v. Whitman, 187 Mass. 383, 73 N. E. 473. See Zeller v. Leiter, 114 App. Div. 148, 99 N. Y. S. 624, judgment *rev.* 189 N. Y. 361, 82 N. E. 158.

166-2 Hooper v. Nuckles, supra; King v. Zell, 105 Md. 435, 66 A. 279; J. Miller Co. v. Klovstad, 14 N. D. 435, 105 N. W. 164.

166-3 Hooper v. Nuckles, supra; King v. Zell, supra; Miller v. Klovstad, supra; Thompson v. Williamson, 67 N. J. Eq. 212, 58 A. 602; Smith v. Bowen (Tex. Civ.), 100 S. W. 796.

169-10 Bartlett v. Slusher, 215 Ill. 348, 74 N. E. 370.

170-13 Smith v. Bowen, supra.

184-55 Allwright v. Skillings, 188 Mass. 538, 74 N. E. 944.

185-58 Evidence showing legal nature of transactions with other customers inadmissible on defendant's behalf. Anderson v. Exc., 191 Mass. 117, 77 N. E. 706.

186-68 See Clark v. Slaughter, 129 Wis. 642, 109 N. W. 556.

187-75 Moore v. S., 49 Tex. Cr. 378, 92 S. W. 1083.

188-76 *Contra.* — Fields v. S., 4 Ohio N. P. (N. S.) 401.

189-83 S. v. Behan, 113 La. 754, 37 S. 714.

But evidence showing conviction for same offense admissible. Taylor v. S., 50 Tex. Cr. 288, 98 S. W. 839.

190-84 City v. Harris, 115 Mo. App. 707, 92 S. W. 505. See S. v. Behan, supra.

190-88 See Davis v. S., 123 Ga. 502, 51 S. E. 501.

190-90 Barker v. S., 127 Ga. 276, 56 S. E. 419.

But in Texas in a prosecution for playing cards in a public place it is unnecessary to show that any money or property was wagered on the game. Penal Code 1906 art. 380. See also Inman v. S., 47 Tex. Cr. 609, 85 S. W. 796; Mapes v. S. (Tex. Cr.), 85 S. W. 797; Scales v. S., 46 Tex. Cr. 296, 81 S. W. 947.

190-91 Griffin v. S., 2 Ga. App. 534, 58 S. E. 781. See Goslin v. C., 121 Ky. 698, 28 Ky. L. R. 683, 90 S. W. 223.

191-95 See Jacobs v. P., 117 Ill. App. 195.

192-1 Under Texas penal code See supra 190-90.

192-2 Bradford v. S., 147 Ala. 118, 41 S. 1024 (burden on state to prove beyond reasonable doubt that the place was a public one); Winston v. S., 145 Ala. 91, 41 S. 174 (where a building was not per se a public place proof of the games played therein was admissible to show that it was in fact a public place).

194-14 Courtney v. S., 5 Ind. App. 356, 32 N. E. 335.

195-18 C. v. Charlie Joe, 193 Mass. 383, 79 N. E. 737 (not necessary to show that the whole of the premises controlled by defendant were used for purposes of unlawful gaming).

195-19 Handy v. S., 49 Tex. Cr. 381, 92 S. W. 848; Spencer v. S., 49 Tex. Cr. 382, 92 S. W. 847.

195-21 C. v. Charlie Joe, 193 Mass. 383, 79 N. E. 737.

195-22 C. v. Charlie Joe, supra.

195-24 No necessity of showing a wager. Carroll v. S. (Tex. Cr.), 81 S. W. 294. See Miller v. C., 117 Ky. 80, 77 S. W. 682, 79 S. W. 250 (evidence admissible to show nature of game of faro); S. v. Behan, 113 La. 701, 37 S. 607.

196-25 Bashinski v. S., 123 Ga. 509, 51 S. 499 (testimony that defendant was lessee of the premises during the period within which it was alleged gaming was carried on in the house was admissible as showing he had control over the

premises); Brown v. S., 49 Tex. Cr. 419, 93 S. W. 723; Berry v. S., 49 Tex. Cr. 376, 92 S. W. 1081.

196-26 See S. v. Cronin, 189 Mo. 663, 88 S. W. 604.

196-28 See Moore v. S., 49 Tex. Cr. 378, 92 S. W. 1083.

196-29 Church v. Ter. (N. M.), 91 P. 720.

Prima facie proof of permission is sometimes made, under a statute, by showing the mere exhibition of a gambling table. Jarboe v. C., 32 Ky. L. R. 755, 107 S. W. 227.

197-30 Nelson v. U. S., 28 App. D. C. 32; Howard v. S. 49 Tex. Cr. 327, 91 S. W. 785.

198-41 Floeckinger v. S., 45 Tex. Cr. 199, 75 S. W. 303.

198-42 Miller v. C., 117 Ky. 80, 77 S. W. 682, 79 S. W. 250; S. v. Behan, 113 La. 701, 37 S. 607 (evidence admissible showing that defendant participated in the dealing of faro in the same place within two weeks immediately preceding the date charged in the information, since such evidence tends to show the character of the house); Stetter v. S. (Neb.), 110 N. W. 761; Herrin v. S., 50 Tex. Cr. 351, 97 S. W. 88.

198-43 Character of house may be shown by gambling paraphernalia. S. v. Hoyle, 98 Minn. 254, 107 N. W. 1130.

199-44 S. v. Behan, 113 La. 701, 37 S. 607 (evidence showing that defendant dealt faro in the same place within two weeks immediately preceding the date charged in the information admissible to show his guilty knowledge).

199-46 See Ford v. S., 86 Miss. 123, 38 S. 229; Crippen v. S., 46 Tex. Cr. 455, 80 S. W. 372 (evidence that defendant's name appeared on a building over which a gambling house was conducted admissible to show that the building was under his control).

200-51 Flynn v. P., 123 Ill. App. 591 (necessary to show beyond reasonable doubt fact of actual knowledge on part of defendant).

200-54 Bashinski v. S., 122 Ga. 164, 50 S. E. 54.

200-55 Bashinski v. S supra.

GIFTS [Vol. 6.]

204-1 Collins v. Maude, 144 Cal. 289, 77 P. 945; Bevington v. Bevington, 133 Ia. 351, 110 N. W. 840 (clear and unequivocal evidence necessary to establish a parol gift of land); Wedding v. Wedding, 27 Ky. L. R. 943, 87 S. W. 313; Poppleton v. Poppleton, 143 Mich. 208, 106 N. W. 703; Merriman v. Merriman, 75 Neb. 222, 106 N. W. 174; Taylor v. Coriell, 66 N. J. Eq. 262, 57 A. 810; Schippers v. Kempkes (N. J. Eq.), 67 A. 1042; Baur v. Cron (N. J. L.), 66 A. 585; In re Bayley, 67 N. J. Eq. 566, 59 A. 215; Liebert v. Hoffman, 53 Misc. 108, 105 N. Y. S. 337; In re Schroder, 99 N. Y. S. 176; Bowron v. Deselding, 105 App. Div. 500, 94 N. Y. S. 292; Andrews v. Nichols, 116 App. Div. 645, 101 N. Y. S. 977 (a gift inter vivos may be established on the unsupported testimony of the donee's wife, in the absence of suspicious circumstances); Combest v. Wall (Tex. Civ.), 102 S. W. 147; Walker v. Hargear, 36 Wash. 672, 79 P. 472. See Gick v. Stumff, 53 Misc. 83, 103 N. Y. S. 1109.

204-2 McCord v. McCord (Ia.), 113 N. W. 552.

204-3 Succ. of Zacharie, 119 La. 150, 43 S. 988.

205-5 Oliver v. Perry, 131 Ia. 654, 109 N. W. 183.

206-7 Wilson v. Edwards, 79 Ark. 69, 94 S. W. 927 (mere possession insufficient).

206-8 Thomas v. Tilley, 147 Ala. 189, 41 S. 854. See Supple v. Bank (Mass.), 84 N. E. 432; McMahon v. Lawler, 190 Mass. 343, 77 N. E. 489.

206-9 Thomas v. Tilley, 147 Ala. 189, 41 S. 854; In re Wright, 121 App. Div. 581, 106 N. Y. S. 369.

207-10 Thomas v. Tilley, 147 Ala. 189, 41 S. 854; Nogga v. Bank, 79 Conn. 425, 65 A. 129; Merchants L. & T. Co. v. Egan, 222 Ill. 494, 78 N. E. 800; Merritt v. Bush, 122 Ill. App. 189.

207-11 Tucker v. Tucker (Ia.), 116 N. W. 119 (evidence as to extent of donor's estate admissible as showing his intention); Succ. of Zacharie, 119 La. 150, 43 S. 988.

207-13 McCoy v. McCoy, 31 Ky. L. R. 1189, 104 S. W. 1031.

208-17 Fisher v. Ludwig, 6 Cal.

App. 144, 91 P. 658; Day v. Richards (Mass.), 83 N. E. 324 (evidence insufficient to show delivery).

210-22 Goelz v. Bank, 31 Ind. App. 107, 67 N. E. 232; Hulet v. Gates, 14 N. D. 209, 103 N. W. 628; Thompson v. Griggs, 31 Pa. Super. 608.

210-23 Mahoney v. Martin, 72 Kan. 406, 83 P. 982.

211-27 McIntosh v. Fisher, 125 Ill. App. 511; Caldwell v. Caldwell, 24 Pa. Super. 230; Shannon v. Marchbanks, 35 Tex. Civ. 615, 80 S. W. 860; Hammond v. Hammond (Tex. Civ.), 94 S. W. 1067.

219-42 Hutcheson v. Bibb, 142 Ala. 586, 38 S. 754; Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121.

220-44 Hutcheson v. Bibb, supra; Rickman v. Meier, supra; Liebert v. Hoffman, 53 Misc. 108, 105 N. Y. S. 337; Cole v. Sweet, 112 App. Div. 777, 98 N. Y. S. 625; Bowron v. De Selding, 105 App. Div. 500, 94 N. Y. S. 292.

Rule not applicable where conveyance is made by way of gift by a father to his foster child. Sears v. Vaughan, 230 Ill. 572, 82 N. E. 881.

222-48 Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412.

Conveyance to fiancee. — Where a man purchases real estate and has the same conveyed to a woman whom he has agreed to marry, no presumption of a gift arises. Lufkin v. Jakeman, 188 Mass. 528, 74 N. E. 933.

224-53 Burden of proof is on husband. Buckel v. Smith, 26 Ky. L. R. 494, 82 S. W. 235.

224-54 Wyatt v. Scott, 84 Ark. 355, 105 S. W. 871.

225-55 Wyatt v. Scott, supra (use of wife's property by husband held to rebut statutory presumption of trusteeship or agency arising by reason of husband's possession).

226-59 Owsley v. Owsley, 25 Ky. L. R. 1194, 77 S. W. 394 (but such presumption cannot be indulged in the face of the wife's positive testimony and the trustee's admission to the contrary).

226-62 Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597; Hill v. Escort, 38 Tex. Civ. 487, 86 S. W. 367 (gift of bank deposit may be proved by parol).

227-64 Jenning v. Rohde 99 Minn. 335, 109 N. W. 597. See Davis v. Kuck, 93 Minn. 262, 101 N. W. 165.

Burden not on donee to show the fairness of the transaction unless there is evidence of undue influence. Vaughn v. Vaughn, 217 Pa. 496, 66 A. 745.

But age and feebleness of the parent may raise a presumption against the gift. Reed v. Reed, 101 Md. 138, 60 A. 621; Slack v. Rees, 66 N. J. Eq. 447, 59 A. 466.

228-66 Possession not sufficient evidence of gift. Holsberry v. Harris, 56 W. Va. 320, 49 S. E. 404.

228-68 McCabe v. Brosenne (Md.), 69 A. 259.

229-74 Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412.

230-75 See also Hulet v. Gates, 14 N. D. 209, 103 N. W. 628.

230-76 Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412. See White v. White (W. Va.), 60 S. E. 885.

230-80 Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412.

230-81 Caldwell v. Caldwell, 24 Pa. Super. 230; Menrin v. Kopplin (Tex. Civ.), 100 S. W. 984. See Young v. Crawford, 82 Ark. 33, 100 S. W. 87. Schmidt v. Schmidt, 94 Minn. 414, 103 N. W. 214 (evidence held sufficient); Field v. Field, 39 Tex. Civ. 1, 87 S. W. 726 (preponderance of evidence sufficient coupled with acts of possession and improvements).

231-82 Holsberry v. Harris, 56 W. Va. 320, 49 S. E. 404; White v. White (W. Va.), 60 S. E. 885.

234-93 Platt v. Elias, 186 N. Y. 374, 79 N. E. 1 (presumption one of fact, not of law).

234-94 Kimball v. Green, 148 Mich. 298, 111 N. W. 761; In re Bayley, 67 N. J. Eq. 566, 59 A. 215; In re Bailey, 111 App. Div. 909, 98 N. Y. S. 725; Davis v. Davis, 104 N. Y. S. 824; Schuyler v. Stephens (R. I.), 68 A. 311. See Parker v. Copland, 70 N. J. Eq. 685, 64 A. 129; Conaghan v. Bank, 54 Misc. 582, 104 N. Y. S. 829. Le Brun v. Le Brun, 49 Or. 368, 90 P. 584; (evidence held sufficient); Davie v. Davie, 47 Wash. 231, 91 P. 950 (evidence held sufficient).

236-99 Burden of showing fraud, undue influence or mental infirmity, thereby to set aside the gift, is upon the party seeking to accom-

plish such purpose. Philpot v. Bk. Co., 3 Ga. App. 742, 60 S. E. 480.
237-1 O'Brien v. Bank, 99 App. Div. 76, 91 N. Y. S. 364.
239-9 Hecht v. Shaffer, 15 Wyo. 34, 85 P. 1056 (evidence must show delivery accompanied by act or declaration of donor indicating an intention to make a gift causa mortis).
240-13 Hecht v. Shaffer, supra.
241-19 Varley v. Sims, 100 Minn. 331, 111 N. W. 269, *cit.* Ammon v. Martin, 59 Ark. 191, 26 S. W. 826; De Levillain v. Evans, 39 Cal. 120; Forbes v. Jason, 6 Ill. App. 395; In re Podhajsky (Ia.), 115 N. W. 590 (acceptance presumed through action of trustee); Barnard v. Thurston, 86 Minn. 343, 90 N. W. 574.
241-20 Dawson v. Waggaman, 23 App. D. C. 428.
Subsequent declarations of donor. Declarations of a donor causa mortis of personalty, made after the gift are incompetent and ineffective for the purpose of defeating the claim of the donee. Scheps v. Bank, 97 App. Div. 434, 90 N. Y. S. 26.

GRAND JURY [Vol. 6.]

Presence of interpreter, 249-22.

245-6 But see P. v. Sexton, 187 N. Y. 495, 80 N. E. 396, *aff.* 42 Misc. 312, 86 N. Y. S. 517, holding that under a statutory provision the unsworn testimony of children may be received.
247-13 P. v. Sexton, supra.
248-18 S. v. Sullivan, 110 Mo. App. 75, 84 S. W. 105.
248-19 Jones v. S., 149 Ala. 63, 43 S. 179.
249-21 S. v. Sullivan, 110 Mo. App. 75, 84 S. W. 105.
249-22 **Presence of interpreter.** A sworn interpreter may be present and express what a witness testifies. Fletcher v. C., 123 Ky. 571, 96 S. W. 855; Lyon v. C., 29 Ky. L. R. 1020, 96 S. W. 857.
254-33 See Tong Kai v. Ter., 15 Haw. 612.
257-48 Taylor v. S., 49 Fla. 69, 38 S. 380 (Taylor and Hocker J. J. dissenting).
258-50 C. v. Kulp, 17 Pa. C. C. 561.
260-59 Havenor v. S., 124 Wis. 444, 104 N. W. 116.
260-60 Gaines v. S., 146 Ala. 16, 41 S. 865 (no inspection on ground of admission of inadmissible evidence, there being no claim as to the insufficiency thereof); Havenor v. S., 124 Wis. 444, 104 N. W. 116.
260-61 P. v. Klaw, 53 Misc. 158, 104 N. Y. S. 482; P. v. Steinhardt, 47 Misc. 252, 93 N. Y. S. 1026 (inspection not allowed except to enable accused to move to set aside indictment — not entitled to inspection in order to enable him to prepare for trial).
261-62 S. v. Campbell, 73 Kan. 688, 85 P. 784; Cramer v. Harmon, 126 Mo. App. 54, 103 S. W. 1086; Murphy v. S., 124 Wis. 635, 102 N. W. 1087. *Contra,* S. v. Faulkner, 185 Mo. 673, 84 S. W. 967.
261-63 S. v. Johnson, 73 N. J. L. 199, 63 A. 12.
262-64 Murphy v. S., 124 Wis. 635, 102 N. W. 1087.
262-67 Havenor v. S., 124 Wis. 444, 104 N. W. 116 (counsel for accused may inspect, but such inspection is limited to such portions of the record as are actually used in the evidence and in such manner and at such times during the progress of the trial as the court may direct).
262-68 S. v. Taylor, 202 Mo. 1, 100 S. W. 41.
262-69 See Cramer v. Harmon, 126 Mo. App. 54, 103 S. W. 1086.
263-72 S. v. Hoffman, 134 Ia. 587, 112 N. W. 103; Cramer v. Harmon, 126 Mo. App. 54, S. W.
264-73 Havenor v. S., 125 Wis. 444, 104 N. W. 116.

GUARANTY [Vol. 6.]

Execution provable by parol, 271-12; *Burden of proving execution,* 286-50.

267-5 See Carter v. Schmaele, 2 Phila (Pa.), 351.
271-12 Klosterman v. Elec. Co., 101 Md. 29, 60 A. 251.
Execution provable by parol. — The fact of execution may be proved by parol. Lefkovits v. Bank (Ala.), 44 S. 613.

271-13 Burt v. Flynn, 24 Pa. C. C. 451.
278-30 Burt v. Flynn, supra.
279-32 Klosterman v. L. & P. Co., 101 Md. 29, 60 A. 251.
286-50 **Burden of proving execution** is on plaintiff where defendant files general issue verified. Blue I. Brew Co. v. Fraatz, 123 Ill. App. 27.
287-52 National Bk. v. Garn, 3 Ohio C. C. (N. S.) 428.
288-57 White v. Bank, 119 Ill. App. 354.
289-59 American etc. Co. v. Ward, 113 App. Div 319, 99 N. Y. S. 717.
294-71 Providence Mach. Co. v. Browning, 72 S. C. 424, 52 S. E. 117; United States H. Co. v. Jenss, 128 Wis. 162, 107 N. W. 293.
296-81 **Evidence of principal's indebtedness** unknown to guarantor irrelevant in the absence of fraud. J. A. Tolman Co. v. Butt, 116 Wis. 597, 93 N. W. 548.
301-2 Fleck v. Feldman, 54 Misc. 228, 104 N. Y. S. 366, *cit.* Smith v. Niver, 2 Barb. (N. Y.) 180.
302-3 American R. Co. v. Hoffman, 26 Pa. Super. 177 (evidence showing mere delay in guarantee's performance not sufficient).

GUARDIAN AND WARD [Vol. 6.]

Choice of new guardian, 305-2; *Legal incapacity of ward,* 316-53; *Care, prudence and fidelity of guardian,* 332-9; *Fairness of settlements,* 336-39; *Actions on guardian's bonds—defenses,* 339-55.

305-2 **Choice of new guardian.** Where a ward makes a prima facie showing that he has attained an age, at which under a statute, he is entitled to choose a new guardian, thereupon the burden shifts to those opposing the change. In re Crawford, 4 Pa. C. C. 507.
309-22 Norton v. Bank, 17 Okla. 295, 87 P. 847 (presumption of authority to lease ward's land and as to legality of proceedings connected therewith — burden on party attacking).
309-26 Alcon v. Koons (Ind. App.), 82 N. E. 92; Stevens v. Meserve, 73 N. H. 293, 61 A. 420.
312-39 **The presumption** that services were voluntary arising from relationship between guardian and ward has never been carried beyond the case of an uncle and nephew. In re Quinn, 16 Phila. (Pa.) 223.
313-42 See also Love v. Love, 72 Kan. 658, 83 P. 201.
314-47 In re Propst, 144 N. C. 562, 57 S. E. 342.
314-49 But see Beachy v. Shomber, 73 Kan. 62, 84 P. 547, (holding that there is no presumption of a notice of sale having been given from the fact of confirmation). Wood v. Frickie, 120 La. 180, 45 S. 96 (presumption as to recordation of a lost bond given by a tutrix).
316-53 **Legal incapacity of ward.** Where a guardian seeks to set aside a conveyance made by his ward on the ground of the latter's incapacity, the burden is upon him to show such fact. Reese v. Shutti, 133 Ia. 681, 108 N. W. 525.
317-54 Baum v. Hartmann, 226 Ill. 160, 80 N. E. 711.
319-62 Robb v. Robb, 134 Ia. 195, 111 N. W. 803.
No presumption as to complete settlement of guardianship affairs from fact that a certain conveyance was made to a ward after attaining her majority. Rouse v. Whitney, 102 N. Y. S. 899.
324-76 U. S. Co. v. Davis, 2 Ga. App. 525, 58 S. E. 777.
327-84 Fidelity Co. v. Schelper, 37 Tex. Civ. 393, 83 S. W. 871 (incumbent upon plaintiff to show guardian's failure to account to the extent and in the manner pointed out in his obligation, the surety is bound to that extent and no further).
327-88 **Burden of proving breach of condition** not met by showing that funds were not paid to the ward where such payments are forbidden by statute. Fidelity Co. v. Schelper, 37 Tex. Civ. 393, 83 S. W. 871.
328-89 U. S. Co. v. Davis, 2 Ga. App. 525, 58 S. E. 777.
328-90 See Hanrahan v. Sears, 72 N. H. 71, 54 A. 702.
330-99 Russner v. McMillan, 37 Wash. 416, 79 P. 988 (evidence inadmissible to show arrest of one of

applicant's daughters for vagrancy, it appearing that applicant had never had her custody).

332-9 Care, prudence and fidelity of guardian in investments sufficiently appears where securities were taken similar to those invested in by bank officials. Stevens v. Meserve, 73 N. H. 293, 61 A. 420.

334-26 Brookhouse v. Co., 73 N. H. 368, 62 A. 219 (evidence showing use for private purposes competent upon question of intentions to appropriate).

336-39 Fairness of settlements. Proof of a ward's knowledge that she was giving her estate to her guardian is not sufficient to show the fairness of the transaction without further proof of lack of undue influence. Baum v. Hartman, 226 Ill. 160, 80 N. E. 711.

338-45 Merrit v. Wallace, 76 Ark. 217, 88 S. W. 876 (a guardian must introduce evidence to sustain his account where challenged, otherwise it will be rejected).

339-55 Actions on guardian's bonds—defenses. — Whatever credits a guardian is entitled to, can be shown as a defense to an action on the guardian's bonds. Fidelity Co. v. Schelper, 37 Tex. Civ. 393, 83 S. W. 871. Rouse v. Whitney, 102 N. Y. S. 899 (unsatisfied return of an execution admissible as showing that ward had exhausted his remedies against guardian).

HABEAS CORPUS. [Vol. 6.]

Burden of proving violation of conditional pardon, 350-29.

343-7 In re Phillips, 5 Penne. (Del.) 133, 59 A. 47 (municipal judge conclusively presumed to have found sufficient facts to warrant him in committing and to have followed the law).

345-10 Hyde v. Shim, 199 U. S. 62.

347-17 In re Wright, 74 Kan. 406, 89 P. 678, 86 P. 460. But see In re Lowe, 3 Ohio N. P. (N. S.) 641, holding that where one brings habeas corpus having been committed as a contumacious witness, the burden is upon the sheriff to show the legality of the commitment.

348-18 In re Gip Ah Chan, 6 Haw. 25.

As to a military judgment the burden is upon respondent to show that it was based on some provision of positive law. Hamilton v. McClaughry, 136 Fed. 445.

349-21 Depoilly v. Palmer, 28 App. D. C. 324. See Munsey v. Clough, 196 U. S. 364; Compton v. S. (Ala.), 44 S. 685.

No crime charged in indictment or affidavit. — Prisoner may show that the indictment or affidavit which is the basis of the extradition charges no crime under the laws of the demanding state. Barriere v. S., 142 Ala. 72, 39 S. 55. See also Singleton v. S., 144 Ala. 104, 42 S. 23; Compton v. S. (Ala.), 44 S. 685.

349-23 Barriere v. S., 142 Ala. 72, 39 S. 55; Singleton v. S., 144 Ala. 104, 42 S. 23; Dennison v. Christian, 72 Neb. 703, 101 N. W. 136 (the fact of the issuing of a warrant is sufficient to justify presumption that the governor found that the accused was a fugitive from justice); Poor v. Cudihee, 37 Wash. 609, 79 P. 1105.

349-24 Harris v. S., 148 Ala. 659, 41 S. 416.

A presumption as to identity arises from the identity of the name of the accused with the name in the warrant and requisition papers. S. v. Bates, 101 Minn. 303, 112 N. W. 260.

350-26 Farrell v. Hawley, 78 Conn. 150, 61 A. 502 (presumption that governor had grounds for believing that prisoner was present in demanding state when crime was committed); Blackwell v. Jennings, 128 Ga. 264, 57 S. E. 484; Kemper v. Metzger (Ind.), 81 N. E. 663 (for note see "EXTRADITION," 731-44 new); S. v. Schlachter (S. D.), 111 N. W. 566.

350-29 Burden of proving violation of conditional pardon rests upon the state in habeas corpus brought by a prisoner claiming to have been pardoned. Spencer v. Kees, 47 Wash. 276, 91 P. 963.

354-48 Singleton v. S., 144 Ala. 104, 42 S. 23.

HANDWRITING [Vol. 6.]

Qualifications, 386-93; *Compari-*

son of seals, 440-33; *Typewritten documents,* 440-33.

360-2 Groff v. Groff, 209 Pa. 603, 59 A. 65.

360-3 Tarnofker v. Grissler, 108 N. Y. S. 696. See S. v. Branton, 49 Or. 86, 87 P. 535.

360-5 See Jacobs v. R. Co., 188 Mass. 245, 74 N. E. 349; S. v. Goldstein, 72 N. J. L. 336, 62 A. 1006; *aff.* 65 A. 1119; Mississippi L. & C. Co. v. Kelly, 19 S. D. 577, 104 N. W. 265.

Testimony of writer not of higher grade than that of one who knows his signature. Washington v. S., 143 Ala. 62, 39 S. 388.

Under California Civil Code proof of handwriting by comparison is of equal force as proof by a subscribing witness. Castor v. Bernstein, 2 Cal. App. 703, 84 P. 244.

361-7 Campbell v. Collins, 133 Ia. 152, 110 N. W. 435.

362-10 *Compare* Brown v. Woodward, 75 Conn. 254, 53 A. 112.

362-12 Shaffer v. U. S., 24 App. Cas. (D. C.) 417.

No presumption from the fact that the body of a will is in decedent's own handwriting that he signed the will. In re Burtis, 43 Misc. 437, 89 N. Y. S. 441.

363-15 In re Burtis, supra.

364-18 S. v. Goldstein, 72 N. J. L. 336, 62 A. 1006, *aff.* 74 N. J. L. 598, 65 A. 1119.

366-25 S. v. Barrett, 5 Penne. (Del.) 147, 59 A. 45.

367-27 Hoag v. Wright, 174 N. Y. 36, 66 N. E. 579.

368-28 Ware v. Burch, 148 Ala. 529, 42 S. 562. See Neely v. Carter, 96 Ga. 197, 23 S. E. 313.

369-32 See Hopkins v. S., 51 Fla. 39, 42 S. 52.

370-36 Rinker v. U. S., 151 Fed. 755; Pittman v. S., 51 Fla. 94, 41 S. 385; Hopkins v. S., 51 Fla. 39, 42 S. 52; Campbell v. Conner, 43 Ind. App. 453, 42 N. E. 688; Frank v. Berry, 128 Ia., 223, 103 N. W. 358; Yelton v. Black, 26 Ky. L. R. 885, 82 S. W. 634; Tarnofker v. Grissler, 108 N. Y. S. 696; Greenwald v. Ford (S. D.), 109 N. W. 516. See S. v Barrett, 5 Penne. (Del.) 147, 59 A. 45.

371-37 Shaffer v. U. S., 24 App. Cas. (D. C.) 417.

371-38 Washington v. S., 143 Ala. 62, 39 S. 388 (partner may testify); Ware v. Burch, 148 Ala. 529, 42 S. 562; Wooldridge v. S., 49 Fla. 137, 38 S. 3; Kelly v. Fallon, 108 Ill. App. 108; Gentner v. Ulmer, 15 Phila. (Pa.) 233.

373-41 Gress Lumb. Co. v. Shingle Co., 120 Ga. 751, 48 S. E. 115 (*cit.* Bruce v. Crews, 39 Ga. 544, 99 Am. Dec. 467); In re Burbank, 104 App. Div. 312, 93 N. Y. S. 866.

373-42 S. v. Goldstein, 72 N. J. L. 336, 62 A. 1006, *aff.* 74 N. J. L. 598, 65 A. 1119; S. v. Barrett, 5 Penne. (Del.) 147, 59 A. 45. See Griffin v. Assn. (Ala.), 44 S. 605.

374-43 S. v. McBride, 30 Utah 422, 85 P. 440.

374-44 Morris & Co. v. Shoe Co. (Tex. Civ.), 99 S. W. 178. See Carr v. Carr, 138 Mich. 396, 101 N. W. 550.

377-53 C. v. Hutchison, 4 Pa. C. C. 18.

378-56 S. v. McBride, 30 Utah 422, 85 P. 440.

378-57 See S. v. Howard, 30 Mont. 518, 77 P. 50.

378-58 S. v. Barrett, 5 Penne. (Del.) 147, 59 A. 45.

378-59 Rinker v. U. S., 151 Fed. 755; Brown v. McBride, 129 Ga. 92, 58 S. E. 702.

379-61 Bias of witness. — A defendant may testify that letters are in the handwriting of the prosecutrix. S. v. Barrett, 5 Penne. (Del.) 147, 59 A. 45.

379-64 Wooldridge v. S., 49 Fla. 137, 38 S. 3.

380-66 S. v. Bond, 12 Idaho 424, 86 P. 43; Frank v. Berry, 128 Ia. 223, 103 N. W. 358; Bess v. C., 118 Ky. 858, 26 Ky. L. R. 839, 82 S. W. 576; Broadrick v. Broadrick, 25 Pa. Super. 225; S. v. Freshwater, 30 Utah 442, 85 P. 447.

382-73 *Contra.* — Carmical v. Carmical, 32 Ky. L. R. 171, 104 S. W. 1037 (witness incompetent who was familiar with the handwriting of the alleged author at the time of the trial, but not at the time of the execution of the will ten years before).

383-75 Ray v. Hunter, 122 Ill. App. 466.

385-83 McGarry v. Healey, 78 Conn. 365, 62 A. 671 (expert may state that peculiarities mark the

handwriting of an individual even in the presence of attempts at disguise).

385-85 Dolan v. Meehan (Tex. Civ.), 80 S. W. 99 (whether an alleged signature is a traced signature); Colbert v. S., 125 Wis. 423, 104 N. W. 61 (whether writing is in the normal handwriting of a person, but not the cause of its being abuormal).

Experts cannot testify as to whether mere marks over a signature were made by the person who wrote the signature. In re Hopkins, 65 N. E. 173, 172 N. Y. 360.

385-89 Kind of ink. — Expert witnesses may state whether the body of a will, its signature, and the signature of one subscribing witness, were written in the same ink as the signature of another subscribing witness, and which was the older writing. Savage v. Bowen, 103 Va. 540, 49 S. E. 668.

386-91 McGarry v. Healey, 78 Conn. 365, 62 A. 671; Rinker v. U. S., 151 Fed. 755 (expert may state that there has been an apparent attempt to disguise.

386-93 Time to compare and study may be given an expert, in the discretion of the court. Colbert v. S., 125 Wis. 423, 104 N. W. 61.

Qualifications. — Acquaintance with the handwriting of the purported author is unnecessary in order to qualify an expert witness. Dolan v. Meehan (Tex. Civ.), 80 S. W. 99.

386-95 See in re Burbank, 104 App. Div. 312, 93 N. Y. S. 866.

387-98 Withaup v. U. S., 127 Fed. 530, 62 C. C. A. 328; Vizard v. Moody, 119 Ga. 918, 47 S. E. 348; Shannon v. Castner, 21 Pa. Super. 294; Gentner v. Ulmer, 15 Phila. (Pa.) 233; Mahon v. S., 46 Tex. Cr. 234, 79 S. W. 28; Wade v. R. Co. (Tex. Civ.), 110 S. W. 84. See Griffin v. Assn. (Ala.), 44 S. 605; Groff v. Groff, 209 Pa. 603, 59 A. 65.

Such comparison is limited; thus where a plaintiff wrote his name and address at the request of counsel, only the name and address on the disputed writing could be submitted to the jury for comparison, the body of the instrument being excluded. Jacobs v. R. Co., 188 Mass. 245, 74 N. E. 349.

Counsel in their argument to the jury may call attention to peculiarities existing in both genuine writings and exemplars. P. v. Hutchins, 137 Mich. 527, 100 N. W. 753.

In a will contest it was held error for the propounder in his argument to show to the jury revocatory words on the margin of a will and comment on differences in the letters of the signature there and to the will proper. In re Shelton, 143 N. C. 218, 55 S. E. 705.

Comparison by jury is proper whether or not an expert has testified. Castor v. Bernstein, 2 Cal. App. 703, 84 P. 244. *Compare* Leslie v. Heald, 15 Leg. Int. 53, 3 Phila. (Pa.) 55.

388-99 Castor v. Bernstein, 2 Cal. App. 703, 84 P. 244; Howard v. Creech, 31 Ky. L. R. 201, 101 S. W. 974; S. v. Branton, 49 Or. 86, 87 P. 535.

388-4 See Castor v. Bernstein, 2 Cal. App. 703, 84 P. 244.

389-9 Gentner v. Ulmer, 15 Phila. (Pa.) 233.

No comparison is allowed in Alabama. Campbell v. Bates, 143 Ala. 338, 39 S. 144 (*cit.* Gibson v. Furn. Co., 96 Ala. 357, 11 S. 365). But see Washington v. S., 143 Ala. 62, 39 S. 388. And in Ware v. Burch, 148 Ala. 529, 42 S. 562, and Griffin v. Assn. (Ala.), 44 S. 605, a distinction is made between experts and non-experts, the former only being allowed to make comparisons.

389-10 Disguised writing. Comparison is proper although the writing in issue appears to be disguised. McGarry v. Healy, 78 Conn. 365, 62 A. 671.

391-14 Howard v. Creech, 31 Ky. L. R. 201, 101 S. W. 974; Shannon v. Castner, 21 Pa. Super. 294; Whitaker v. Thayer, 38 Tex. Civ. 537, 86 S. W. 364.

Texas statute requires in a criminal case corroboration of evidence by comparison. Spicer v. S. (Tex. Cr.), 105 S. W. 813.

Florida statute held to apply to criminal as well as civil cases. Wooldridge v. S., 49 Fla. 137, 38 S. 3.

394-22 Ware v. Burch, 148 Ala. 529, 42 S. 562; Griffin v. Assn. (Ala.), 44 S. 605; Groff v. Groff, 209 Pa. 603, 59 A. 65; Jordt v. S.

50 Tex. Cr. 2, 95 S. W. 514. See Withaup v. U. S., 127 Fed. 530, 62 C. C. A. 328.

Only an expert can qualify himself to give evidence in a particular case, by preparation and study. In re Burbank, 104 App. Div. 312, 93 N. Y. S. 866.

395-24 Municipal Court v. Kirby (R. I.), 67 A. 8.

397-30 *Compare* Withaup v. U. S., 127 Fed. 530, 62 C. C. A. 328.

398-31 Expert may be required to state the reasons for his opinion. Howard v. Creech, 31 Ky. L. R. 201, 101 S. W. 974.

Expert's opinion is valuable only as accompanied by his reasons therefor. In re Burtis, 43 Misc. 437, 89 N. Y. S. 441.

398-32 S. v. Ryno, 68 Kan. 348, 74 P. 1114.

399-34 But a comparison of a simulated genuine signature with a simulation of the disputed signature, written upon a blackboard by an expert is unwarranted. Groff v. Groff, 209 Pa. 603, 59 A. 65.

399-35 Griffin v. Assn. (Ala.), 44 S. 605; Bivings v. Gosnell, 141 N. C. 341, 53 S. E. 861.

400-37 Councilman v. Bank, 103 Md. 469, 64 A. 358 (technical study not necessary).

401-39 Abernethy v. Yount, 138 N. C. 337, 50 S. E. 696; Whitaker v. Thayer, 38 Tex. Civ. 537, 86 S. W. 364 (deputy county clerk).

402-41 Councilman v. Bank, 103 Md. 469, 64 A. 358; S. v. Burns, 27 Nev. 289, 74 P. 983; Savage v. Bowen, 103 Va. 540, 49 S. E. 668.

404-47 Griffin v. Assn. (Ala.), 44 S. 605; Municipal Court v. Kirby (R. I.), 67 A. 8; Savage v. Bowen, 103 Va. 540, 49 S. E. 668.

Clear proof of the expert's competency is necessary. Groff v. Groff, 209 Pa. 603, 59 A. 65.

404-51 Municipal Court v. Kirby (R. I.), 67 A. 8 (not of controling weight).

Expert evidence considered of much importance. In re Burtis, 43 Misc. 437, 89 N. Y. S. 441.

406-53 Withaup v. U. S., 127 Fed. 530, 62 C. C. A. 328; Griffin v. Assn. (Ala.), 44 S. 605; Castor v. Bernstein, 2 Cal. App. 703, 84 P. 244; P. v. Hutchins, 137 Mich. 527, 100 N. W. 753. See S. v. Coleman, 17 S. D. 594, 98 N. W. 175.

408-57 Withaup v. U. S., 127 Fed. 530, 62 C. C. A. 328.

Signature to an application for process to secure witnesses admissible over the objection that the defendant was entitled to such process, he having been warned that it could be used against him. Mahon v. S., 46 Tex. Cr. 234, 79 S. W. 28.

Judicial notice cannot be taken of the genuineness of the alleged signature of the defendant to papers in another action. Withaup v. U. S., 127 Fed. 530, 62 C. C. A. 328.

409-58 Frank v. Berry, 128 Ia. 223, 103 N. W. 358; Mississippi L. & C. Co. v. Kelly, 19 S. D. 577, 104 N. W. 265.

409-59 Vizard v. Moody, 119 Ga. 918, 47 S. E. 348; Brown v. Evans, 149 Mich. 429, 112 N. W. 1079. *Compare* Daniel v. Lance, 29 Pa. Super. 454.

410-63 Withaup v. U. S., 127 Fed. 530, 62 C. C. A. 328; Washington v. S., 143 Ala. 62, 39 S. 388; Bolton v. S., 146 Ala. 691, 40 S. 409; Griffin v. Assn. (Ala.), 44 S. 605; S. v. Seymour, 10 Idaho 699, 79 P. 825 (certain exceptions recognized); P. v. Tollefson, 145 Mich. 449, 108 N. W. 751 (objection must be made when the writing is offered); Wade v. R. Co. (Tex. Civ.), 110 S. W. 84.

413-66 Griffin v. Assn. (Ala.), 44 S. 605; Wilmington Bk. v. Waste, 76 Vt. 331, 57 A. 241.

414-67 North American Ins. Co. v. Throop, 22 Mich. 146, 7 Am. Rep. 638; Taylor v. Taylor, 138 Mich. 658, 101 N. W. 832 (witness entitled to see the document); Groff v. Groff, 209 Pa. 603, 59 A. 65.

A qualified non-expert witness, who has testified to the genuineness of a signature seen through a slit in an envelope, cannot be impeached by the testimony of an expert, who was inferentially the author of it, such testimony being based upon an examination of the signature and paper to which it was attached, after removal from the envelope, as this would be unfair. P. v. Patrick, 182 N. Y. 131, 74 N. E. 843.

414-68 Wilmington Bk. v. Waste, 76 Vt. 331, 57 A. 241.

415-70 S. v. Ryno, 68 Kan. 348, 74 P. 1114.

417-75 Municipal Court v. Kirby (R. I.), 67 A. 8. See Pulliam v. Sells, 124 Ky. 310, 30 Ky. L. R. 456, 99 S. W. 289; Councilman v. Bank, 103 Md. 469, 64 A. 358; S. v. Stark, 202 Mo. 210, 100 S. W. 642; Farrell v. R. Co., 83 App. Div. 393, 82 N. Y. S. 334, *aff.* 178 N. Y. 596, 70 N. E. 1098; S. v. Branton, 49 Or. 86, 87 P. 535.

419-76 McCreary v. Coggeshall, 74 S. C. 42, 53 S. E. 978; Woodward v. Keck (Tex. Civ.), 97 S. W. 852.

419-78 McCreary v. Coggeshall, supra. See Bivings v. Gosnell, 141 N. C. 341, 53 S. E. 861.

420-79 Campbell v. Bates, 143 Ala. 338, 39 S. 144. *Compare* Creswell v. Jackson, 2 F. & F. (Eng.) 24; Wooldridge v. S., 49 Fla. 137, 38 S. 3; St. Louis Bk. v. Hoffman, 74 Mo. App. 203; Johnson v. S. (Tex. Cr.), 102 S. W. 1133 (genuine writings of alleged forger are admissible).

421-81 See Bolton v. S., 146 Ala. 691, 40 S. 409; Daniel v. Lance, 29 Pa. Super. 454.

Writing executed by defendant accused of forgery, after his arrest and after being warned, is admissible as a standard on behalf of the state. Johnson v. S. (Tex. Cr.), 102 S. W. 1133.

422-83 Greenwald v. Ford (S. D.), 109 N. W. 516, *cit.* 6 Encyc. of Ev. 422.

422-84 Wade v. R. Co. (Tex. Civ.), 110 S. W. 84.

424-86 Jacobs v. R. Co., 188 Mass. 245, 74 N. E. 349.

426-87 Mississippi L. & C. Co. v. Kelly, 19 S. D. 577, 104 N. W. 265.

Lead pencil signature may be a proper exemplar. Groff v. Groff, 209 Pa. 603, 59 A. 65.

Burden of proof is upon the party presenting the writing. S. v. Ryder (Vt.), 68 A. 652.

427-90 C. v. Tucker, 189 Mass. 457, 76 N. E. 127; Schmuck v. Hill (Neb.), 96 N. W. 158 (duress or fraud may then be shown to affect their weight); C. v. Coleman, 17 S. D. 594, 98 N. W. 175 (admission of counsel). See Griffin v. Assn. (Ala.), 44 S. 605; Castor v. Bernstein, 2 Cal. App. 703, 84 P. 244; Vizard v. Moody, 119 Ga. 918, 47 S. E. 348; Pulliam v. Sells, 124 Ky. 310, 30 Ky. L. R. 456, 99 S. W. 289; S. v. Branton, 49 Or. 86, 87 P. 535.

Of course documents valid as against a party merely because written at his request, can not be treated as standard for comparison. S. v. Branton, 49 Or. 86, 87 P. 535.

Where the writer is not a party to the action, his admission of the genuineness of certain signatures offered as standards of comparison is not conclusive and the plaintiff is entitled to have the jury pass upon the question under proper instructions, although the testimony came from his own witness. Stark v. Burke, 131 Ia. 684, 109 N. W. 206.

427-91 Wade v. R. Co. (Tex. Civ.), 110 S. W. 84. *Compare* S. v. Ryno, 68 Kan. 348, 74 P. 1114.

428-93 See S. v. Seymour, 10 Idaho 699, 79 P. 825.

429-98 C. v. Tucker, 189 Mass. 457, 76 N. E. 127. *Compare* S. v. Coleman, 17 S. D. 594, 98 N. W. 175.

430-99 S. v. Ryder (Vt.), 68 A. 652 (*cit.* Rowell v. Fuller, 59 Vt. 688, 10 A. 853).

Circumstantial evidence may establish the genuineness of a writing under the rule requiring "direct proof of the signature or other equivalent evidence." C. v. Tucker, 189 Mass. 457, 76 N. E. 127.

Test. — Writings admitted or proved to be genuine may be used as standards of comparison. S. v. Ryno, 68 Kan. 348, 74 P. 1114.

431-4 S. v. McBride, 30 Utah 422, 85 P. 440. See P. v. Tollefson, 145 Mich. 449, 108 N. W. 751 (hotel register admitted); S. v. Ryder (Vt.), 68 A. 652.

432-6 *Contra.* — S. v. Branton, 39 Or. 86, 87 P. 535.

Warning should be given the defendant in a criminal action that his signature to a writing could be used against him as a standard of comparison. Johnson v. S. (Tex. Cr.), 102 S. W. 1133; Mahon v. S., 46 Tex. Cr. 234, 79 S. W. 28.

433-8 Farrell v. R. Co., 83 App. Div. 393, 82 N. Y. S. 334, *aff.* 178 N. Y. 596, 70 N. E. 1098; Shannon v. Castner, 21 Pa. Super. 294.

434-13 S. v. Ryno, 68 Kan. 348, 74 P. 1114; C. v. Tucker, 189 Mass.

457, 77 N. E. 127. See S. v. Ryder (Vt.), 68 A. 652.

435-17 In re Burtis, 43 Misc. 437, 89 N. Y. S. 441 (a chart made by an expert from a comparison of 1400 genuine signatures was admitted in evidence).

436-21 *Contra.* — Carbon copy is admissible as a standard for comparison. Wade v. R. Co. (Tex. Civ.), 110 S. W. 84.

436-23 *Compare* In re McClellan, 20 S. D. 498, 107 N. W. 681.

439-28 Ballow v. Collins, 139 Ala. 543, 36 S. 712.

440-32 Expert may testify that different typewritten documents were written on the same machine. S. v. Freshwater, 30 Utah 442, 85 P. 447.

440-33 **Comparison** of seals is proper upon the issue of the genuineness of a seal in question. Loring v. Jackson (Tex. Civ.), 95 S. W. 19.

Typewritten documents. — Peculiarities in the manner of writing or in the character of the letters of the typewriter may exist so as to authorize a witness who has received several of them to testify that they came from the same source. Huber Mfg. Co. v. Clandel, 71 Kan. 441, 80 P. 960.

HEARSAY [Vol. 6.]

443-2 King v. Bynum, 137 N. C. 491, 49 S. E. 955.

443-3 Donner v. S., 69 Neb. 56, 95 N. W. 40; Vagts v. Utman, 125 Wis. 265, 104 N. W. 88.

Admission of hearsay presumed to be prejudicial. Topolewski v. S., 130 Wis. 244, 109 N. W. 1037.

444-5 Donner v. S., 69 Neb. 56, 95 N. W. 40.

444-6 Morris v. Parry, 110 Mo. App. 675, 85 S. W. 620.

446-10 Fireman's Ins. Co. v. R., 138 N. C. 42, 50 S. E. 452.

446-12 See Parke & L. Co. v. Bridge Co., 145 Cal. 534, 78 P. 1065, 79 P. 71; Wyandotte Co. v. Bruner, 147 Mich. 400, 110 N. W. 949; Western U. Tel. Co. v. Hirsch (Tex. Civ.), 84 S. W. 394; St. Louis etc. R. Co. v. Grain Co. (Tex. Civ.), 95 S. W. 656.

446-13 Ferguson v. Boyd (Ind.), 81 N. E. 71; Connelly v. Brown, 73 N. H. 193, 60 A. 750.

446-14 See St. Louis etc. R. Co. v. Demsey, 40 Tex. Civ. 398, 89 S. W. 786.

447-29 Castner v. R. Co., 126 Ia. 581, 102 N. W. 499.

448-31 See Stewart v. Doak, 58 W. Va. 172, 52 S. E. 95.

448-32 In re Jones, 130 Ia. 177, 106 N. W. 610.

Massachusetts statute provides that a declaration of a deceased person shall not be inadmissible as hearsay if made in good faith before the commencement of the action, and on personal knowledge. Putnam v. Harris, 193 Mass. 58, 78 N. E. 747; Hall v. Reinherz, 192 Mass. 52, 77 N. E. 880; Randall v. Claflin, 194 Mass. 560, 80 N. E. 594; Chaput v. R. Co., 194 Mass. 218, 80 N. E. 597 (declarations of decedent for whose death the action was brought).

448-33 See Dixon v. R. Co., 37 Wash. 310, 79 P. 943.

448-34 Mattingly v. Shortell, 120 Ky. 52, 27 Ky. L. R. 426, 85 S. W. 215; Kanfhold v. Roth, 74 N. J. L. 61, 64 A. 1057 (postal card inadmissible).

448-35 Knights Templar v. Crayton, 209 Ill. 550, 70 N. E. 1066 (depositions taken at coroner's inquest, inadmissible).

449-38 *Compare* St. Louis etc. R. Co. v. Gunter, 39 Tex. Civ. 129, 86 S. W. 938 (witness can testify as to the market value of cattle as given in a newspaper market report).

449-39 Wood v. Praul, 217 Pa. 293, 66 A. 528 (neighborhood gossip).

449-42 Cleaver v. R. Co., 30 Ky. L. R. 1059, 100 S. W. 223; Kirby L. Co. v. Cummings, 39 Tex. Civ. 220, 87 S. W. 231; Western U. Tel. Co. v. Bradford, 41 Tex. Civ. 281, 91 S. W. 818. See Rosenthal v. M'Graw, 138 Fed. 721, 71 C. C. A. 277; Little Rock etc. R. Co. v. Cross, 78 Ark. 220, 93 S. W. 981; P. v. Smith, 3 Cal. App. 62, 84 P. 449; Provident etc. Soc. v. Whayne, 29 Ky. L. R. 160, 93 S. W. 1049; Brusseau v. Brick Co., 133 Ia. 245, 110 N. W. 577; Texas etc. R. Co. v. Leggett (Tex. Civ.), 99 S. W. 176.

Hearsay evidence incompetent to establish any specific fact which is, in its nature, susceptible of being

proved by witnesses who speak of their own knowledge. Hirschberg v. Robinson Co. (N. J.), 66 A. 925; Chicago etc. R. Co. v. Jennings, 217 Ill. 494, 75 N. E. 560. But where a witness testifies that he has truly stated to a third person, and of his own knowledge facts which he has since forgotten, such person is competent to testify as to what the statement was. Hart v. R. Co., 144 N. C. 91, 56 S. E. 559. Testimony based upon knowledge derived from official time card of railroad is not hearsay. Western U. Tel. Co. v. O'Fiel (Tex. Civ.), 104 S. W. 406.

Telephone conversations. — Witness may testify to a conversation over a telephone, although he has no personal knowledge as to the identity of the other party, or that there was another party or that such party heard what was said to him. McCarty v. Peach, 186 Mass. 67, 70 N. E. 1029. See St. Louis etc. R. Co. v. Kennedy (Tex. Civ.), 96 S. W. 653; Edge v. R. Co., 206 Mo. 471, 104 S. W. 90. But statement of a person to the witness as to what the person at the other end of the line said, is hearsay. Texas etc. R. Co. v. Felker (Tex. Civ.), 99 S. W. 439.

450-43 Davis v. Arnold, 143 Ala. 228, 39 S. 141; Colorado Co. v. York, 38 Colo. 239, 88 P. 180.

451-49 Dryden v. Barnes, 101 Md. 346, 61 A. 342; Donner v. S., 69 Neb. 56, 95 N. W. 40. See Remington Mach. Co. v. Candy Co. (Del.), 66 A. 465; Texas etc. R. Co. v. Leggett (Tex. Civ.), 86 S. W. 1066.

451-50 Equitable Mtg. Co. v. Watson, 119 Ga. 280, 46 S. E. 440.

451-53 King v. Bynum, 137 N. C. 491, 49 S. E. 955; O'Neal v. S. (Tex. Cr.), 100 S. W. 919.

452-58 **Burden of proof** is upon the objector to show that testimony given by a witness in answer to a question as to her knowledge, is hearsay. Rouss v. King, 74 S. C. 251, 54 S. E. 615; Sloan v. Hunter, 56 S. C. 385, 34 S. E. 658, 76 Am. St. 551.

452-59 Norman Supply Co. v. Ford, 77 Conn. 461, 59 A. 499.

452-60 Davis v. Arnold, 143 Ala. 228, 39 S. 141; Lambert v. Hamlin, 73 N. H. 138, 59 A. 941; Kirby Lumb. Co. v. Cummings, 39 Tex. Civ. 220, 87 S. W. 231. See Norman Supply Co. v. Ford, 77 Conn. 461, 59 A. 499.

453-61 Sylvester v. Ammons, 126 Ia. 140, 101 N. W. 782.

453-63 Ellis v. Lewis (Tex. Civ.), 81 S. W. 1034. See Western Tel. Co. v. Westmoreland (Ala.), 43 S. 790; P. v. Jailles, 146 Cal. 301, 79 P. 965; Norman Supply Co. v. Ford, 77 Conn 461, 59 A. 499.

Statement of one having apparent knowledge is admissible. Downey Co. v. R. Co. (Pa.), 67 A. 916; Quinn v. Rhode Island Co. (R. I.), 67 A. 364.

Witness may know a fact both from personal knowledge and hearsay, in which case it is admissible. Atlanta etc. R. Co. v. McManus, 1 Ga. App. 302, 58 S. E. 258.

455-68 Equitable Mtg. Co. v. Watson, 119 Ga. 280, 46 S. E. 440; Moultrie Lumb. Co. v. Lumb. Co., 122 Ga. 26, 49 S. E. 729.

455-69 Struth v. Decker, 100 Md. 368, 59 A. 727; Western U. Tel. Co. v. Hirsch (Tex. Civ.), 84 S. W. 394.

Striking out of hearsay admitted without objection and brought out in detail on cross-examination is within the discretion of the court. McWilliams v. R. Co., 146 Mich. 216, 109 N. W. 272.

HIGHWAYS [Vol. 6.]

Presumption of legality of proceedings subsequent to acquiring jurisdiction, 461-8; *Obstructing highways; special injury,* 472-67.

460-1 Heath v. Sheetz, 164 Ind. 665, 74 N. E. 505.

461-8 **Presumption of jurisdiction** arising from selectmen's return, original petition having been lost and use of way having been acquiesced in many years. Cushing v. Webb, 102 Me. 157, 66 A. 719.

Presumption of legality of proceedings subsequent to acquiring jurisdiction arises after jurisdiction has been shown. Biglow v. Ritter, 131 Ia. 213, 108 N. W. 218.

461-11 **Order of court** may presumptively show as against collateral attacks that petitioners were free-

holders as required by statute. Brumley v. S., 83 Ark. 236, 103 S. W. 615.

461-13 Young v. Milan, 73 N. H. 552, 64 A. 16 (evidence sufficient to show waiver of notice).

The selectmen's return is prima facie evidence of the fact that notice was given on a petition. Cushing v. Webb, 102 Me. 157, 66 A. 719.

Order of court establishing a public highway, reciting that notice had been given, sufficiently shows service of notice, as against collateral attack. Brumley v. S., 83 Ark. 236, 103 S. W. 615.

462-17 Van Wanning v. Decter (Neb.) 112 N. W. 902, *aff.* s. c. 110 N. W. 703, *foll.* Henry v. Ward, 49 Neb. 392, 68 N. W. 518 (action to restrain a road overseer from removing plaintiff's fences from land claimed by such overseer to be a highway, plaintiff alleging that no highway existed); Wright v. Fanning (Tex. Civ.), 86 S. W. 786; Evans v. Scott, 37 Tex. Civ. 373, 83 S. W. 874.

Grant—presumption. — A grant of a tract of land will be presumed when it is proved that the public has had the exclusive possession and use thereof for a period of time which would bar an action for the recovery of real estate. Meade v. Topeka, 75 Kan. 61, 88 P. 574. *Compare* Heacock v. Sullivan, 70 Kan. 750, 79 P. 659. Where an injunction suit was brought against public authorities to restrain them from opening a highway, defendants claiming that there was a legal highway previously laid out, it was held that the burden was on plaintiff to show the non-existence of the road. For a similar case see Smith v. Jarris (Tex. Civ.), 105 S. W. 1168.

462-18 Dickerman v. Marion, 122 Ill. App. 154; C. v. Slagel, 33 Pa. Super. 514.

463-22 Village v. Coyer, 223 Ill. 96, 79 N. E. 54; Council Grove v. Bowman, 76 Kan. 563, 92 P. 550 (evidence held sufficient to show prima facie the existence of a highway).

463-24 *Compare* Paulsen v. Wilton, 78 Conn. 58, 61 A. 61, holding that when a defendant suffers a default and denies that the place in question was a public highway, the burden is upon the defendant on a hearing in damages to prove the denial.

465-29 Lovington v. Adkins, 232 Ill. 510, 83 N. E. 1043.

465-31 Quinn v. Baage (Ia.), 114 N. W. 205. See Biglow v. Ritter, 131 Ia. 213, 108 N. W. 218.

467-40 Todd v. Crail, 167 Ind. 48, 77 N. E. 402.

468-41 Todd v. Crail, supra.

468-46 Village v. R. Co., 224 Ill. 101, 79 N. E. 678; Crigler v. Newman, 29 Ky. L. R. 27, 91 S. W. 706; Dow v. R. Co., 116 Mo. App. 555, 92 S. W. 744; Harriman v. Moore, 74 N. H. 277, 67 A. 225. *Compare* Haan v. Meester, 132 Ia. 709, 109 N. W. 211, holding that evidence of use alone is not sufficient to establish a highway. See also Gordin v. Williams (Ala.), 44 S. 611.

469-47 Dow v. R. Co., 116 Mo. 555, 92 S. W. 744.

470-48 Harriman v. Moore, 74 N. H. 277, 67 A. 225.

470-52 Paulsen v. Wilton, 78 Conn. 58, 61 A. 61; Parkey v. Galloway, 147 Mich. 693, 111 N. W. 348.

470-54 See Paulsen v. Wilton, supra.

471-58 Haan v. Meester, 132 Ia. 709, 109 N. W. 211. See St. Louis etc. R. Co. v. R. Co., 190 Mo. 246, 88 S. W. 634.

472-64 **Admissions of plaintiff** in an action to restrain obstruction that the land in question was defendant's are admissible as showing that plaintiff's use was with recognition of defendant's dominion. Evans v. Scott, 37 Tex. Civ. 373, 83 S. W. 874.

472-65 See Isham v. S., 49 Tex. Cr. 324, 92 S. W. 808.

472-67 **Obstructing highways; special injury.** — When it is sought to restrain the obstruction of a highway, plaintiff must show special injury to himself. Evans v. Scott (Tex. Civ.), 97 S. W. 116.

473-69 See Town v. Pruett, 215 Ill. 162, 74 N. E. 111.

473-70 S. v. Cipra, 71 Kan. 714, 81 P. 488.

474-73 Isham v. S., 49 Tex. Cr. 324, 92 S. W. 808.

477-86 Briggs v. Tp., 150 Mich. 381, 114 N. W. 221.

477-87 Orr v. Oldtown, 99 Me. 190, 58 A. 914; Whitman v. Fish-

er, 98 Me. 575, 57 A. 895; Briggs v. Tp., 150 Mich. 381, 114 N. W. 221.

477-89 Smith v. Gilreath, 69 S. C. 353, 48 S. E. 262.

479-94 See also Lynch v. Kineth, 36 Wash. 368, 78 P. 923.

479-95 Cutting v. Shelburne, 193 Mass. 1, 78 N. E. 752 (proof of knowledge alone not conclusive proof of contributory negligence); Dralle v. Reedsburg, 130 Wis. 347, 110 N. W. 210.

492-40 See also Strand v. Garage (Ia.), 113 N. W. 488.

493-47 Harford v. Hause, 106 Md. 439, 67 A. 273.

499-71 Garske v. Ridgeville, 123 Wis. 503, 102 N. W. 22.

500-72 *Contra.* — Gould v. Hutchins, 73 N. H. 69, 58 A. 1046 (such evidence admissible if not too remote.

Collisions on highways — plaintiff must show ordinary care. — Where plaintiff was hauling on a highway with a horse and wagon and defendant in an automobile attempted to pass, whereupon plaintiff's horse became frightened, throwing plaintiff from the wagon and injuring her, held that it was incumbent upon plaintiff to show that she used ordinary care to avoid being injured. Nadeau v. Sawyer, 73 N. H. 70, 59 A. 369. See also Kierman v. Cashin, 92 N. Y. S. 255.

Burden of proving negligence. Proximate cause. — Where a pedestrian seeks to recover for an injury sustained by being struck by an automobile, the burden of proof is upon him to show negligence on the part of the defendant and that such negligence constituted the proximate cause of the injury. Simeons v. Lindsay (Del.), 65 A. 778.

Burden does not shift when plaintiff is a child. — Where a bicycle rider collided with a pedestrian, and the pedestrian brought action for damages, the fact that the plaintiff was a child and defendant a man does not shift the burden of proof from plaintiff to defendant, to show which, if either, of them was to blame for the accident. Lee v. Jones, 181 Mo. 291, 79 S. W. 927.

Burden of proving contributory negligence. — In an action by a traveler on a highway for an injury received from a collision with a vehicle of another, the burden is upon defendant to show plaintiff's contributory negligence. Standard O. Co. v. Hartman, 102 Md. 563, 62 A. 805.

Condition of highway remote from place of accident. — Where a plaintiff was injured by reason of the fact that his horse was frightened by a passing automobile, evidence was inadmissible as to the condition of the highway, three hundred feet from where defendant's witness saw the automobile and some distance from where the accident occurred, such distance being too remote. Strand v. Garage Co. (Ia.), 113 N. W. 488.

Testimony as to noise of automobile. Where an action was brought for injuries resulting from plaintiff's horse becoming frightened on a highway by defendant's automobile, testimony was admissible showing that the machine made more noise than any other that witness had heard. Fletcher v. Dixon (Md.), 68 A. 875.

HOMESTEADS AND EXEMPTIONS [Vol. 6.]

Removal presumptively permanent, 542-40; *Presumption of ownership of personalty stored on homestead,* 558-16.

512-2 Smith v. Spafford (N. D.), 112 N. W. 965.

Dwelling may be on adjoining land. Mann Bros. v. Jenkins (Ky), 110 S. W. 387. Gibbs v. Adams, 76 Ark. 575, 89 S. W. 1008 (separation of land from dwelling house by a street not conclusive against right to claim it as a part of a homestead exemption).

513-3 U. S. v. Richards, 149 Fed. 443.

514-8 U. S. v. Richards, supra; Zollinger v. Dunnaway, 105 Mo. App. 36, 78 S. W. 666.

515-12 Steele v. Robertson, 75 Ark. 228, 87 S. W. 117; Gibbs v. Adams, 76 Ark. 575, 89 S. W. 1008.

526-57 Sheehy v. Scott, 128 Ia. 551, 104 N. W. 1139; Fox v. Bank, 126 Ia. 481, 102 N. W. 424.

533-99 Victor v. Grimmer, 118 Mo. App. 592, 95 S. W. 274; Drought

& Co. v. Stallworth (Tex. Civ.), 100 S. W. 188.

533-1 Gebhart v. Merchant, 84 Ark. 359, 105 S. W. 1034.

534-2 Drought & Co. v. Stallworth (Tex. Civ.), 100 S. W. 188.

534-4 National Bk. v. Chamberlain, 72 Neb. 469, 100 N. W. 943.

535-8 Elliott v. Parlin, 71 Kan. 665, 81 S. W. 500; Gaar, S. & Co. v. Burge (Tex. Civ.), 110 S. W. 181; Drought & Co. v. Stallworth (Tex. Civ.), 100 S. W. 188 (presumption as to continuance).

537-15 Collins v. Bounds, 82 Miss. 447, 34 S. 355; Victor v. Grimmer, 118 Mo. App. 592, 95 S. W. 274; Meyer Bros. D. Co. v. Bybee, 179 Mo. 354, 78 S. W. 579.

540-31 Smith v. Spafford (N. D.), 112 N. W. 965.

542-37 Swift v. Kleckner, 146 Mich. 91, 109 N. W. 34; Ungers v. Chapman, 146 Mich. 643, 109 N. W. 1124; Smith v. Spafford (N. D.), 112 N. W. 965; Gaar, S. & Co. v. Burge (Tex. Civ.), 110 S. W. 181.

542-38 McGregor v. Kellum, 50 Fla. 581, 39 S. 697; Lutz v. Ristine (Ia.), 112 N. W. 818; Withers v. Love, 72 Kan. 140, 83 S. W. 204 (claimant confined in an insane asylum); Swift v. Kleckner, 146 Mich. 91, 109 N. W. 34; Allen v. Holt County (Neb.), 115 N. W. 775; Weatherington v. Smith (Neb.), 109 N. W. 381, *foll.* and *appr.* Blumer v. Albright, 64 Neb. 249, 89 N. W. 809; Curry v. Wilson, 45 Wash. 19, 87 P. 1065.

Absence for benefit of health. — Weatherington v. Smith (Neb.), 109 N. W. 381, *foll.* and *appr.* Blumer v. Albright, 64 Neb. 249, 89 N. W. 809; Gaar, S. & Co. v. Burge (Tex. Civ.), 110 S. W. 181; In re Murphy, 46 Wash. 574, 90 P. 916 (wife driven from her homestead by cruel conduct of husband); Bartle v. Bartle, 132 Wis. 392, 112 N. W. 471.

542-39 McGregor v. Kellum, 50 Fla. 581, 39 S. 697.

542-40 Removal presumptively permanent. — A removal, unexplained at the time, is presumptively permanent. Smith v. Spafford (N. D.), 112 N. W. 965; Allen v. Co. (Neb.), 115 N. W. 775.

543-44 Gaar, S. & Co. v. Burge (Tex. Civ.), 110 S. W. 181.

545-50 McGregor v. Kellum, 50 Fla. 581, 39 S. 697.

545-51 See McGregor v. Kellum, supra.

545-53 McGregor v. Kellum, supra.

547-59 Lawson v. Hammond, 119 Mo. App. 480, 94 S. W. 313.

547-61 Victor v. Grimmer, 118 Mo. App. 592, 95 S. W. 274; Lawson v. Hammond, supra.

548-68 Ungers v. Chapman, 146 Mich. 643, 109 S. W. 1124.

548-70 Gaar, S. & Co. v. Burge (Tex. Civ.), 110 S. W. 181.

549-74 Drought & Co. v. Stallworth (Tex. Civ.), 100 S. W. 188 (temporary renting of a part, no segregation being made, does not show divestiture).

552-93 Elliott v. Parlin, 71 Kan. 665, 81 S. W. 500; Gaar, S. & Co. v. Burge (Tex. Civ.), 110 S. W. 181.

558-16 Presumption of ownership of personalty stored on homestead. — A wife owning and occupying a homestead is presumptively in possession of crops stored thereon, and one seeking to subject the same to the husband's debt must show his ownership. Foreman v. Bank, 128 Ia. 661, 105 N. W. 163.

HOMICIDE [Vol. 6.]

Premeditation — use of deadly weapon, 593-65; *Burden of proof of alibi,* 600-94; *Method of proof of other crimes,* 682-11; *Handprints,* 707-68; *Trailing by bloodhounds,* 707-68; *Killing during execution of process — previous threats by defendant,* 731-33; *Preliminary showing necessary to proof of physical condition,* 738-84; *Position of body as evidence of suicide,* 748-60; *Prior assaults by third person as evidence of apprehension,* 761-36; *Rebuttal of evidence of prior difficulties,* 780-33; *Manner of proof of threats,* 795-94; *Explanatory evidence as to threats,* 797-11.

580-1 Reversible error to refuse to so charge. Fowler v. S. (Ala.), 45 S. 913.

580-2 Strickland v. S. (Ala.), 44 S. 90; S. v. Johns (Del.), 65 A. 763; Watkins v. C., 29 Ky. L. R. 1273, 97 S. W. 740; P. v. Dinser, 94 Misc. 82, 98 N. Y. S. 314; Adams v. S., 47 Tex. Cr. 347, 84 S. W. 231.

581-9 Chelsey v. S., 121 Ga. 340, 49 S. E. 258 (intent to kill implied where poison intended for one person was eaten by another). See Munday v. S., 5 Ohio C. C. (N. S.) 656.

Presumption "can only be applied where the assault which resulted in death has been committed with a murderous weapon, or has otherwise been of such a nature that its probable and natural result would be to produce death." P. v. Dinser, 106 N. Y. S. 495 (where death of a child resulted from striking with the hand).

Violent assault upon deceased, whom accused knew to have heart disease, if followed by death will be presumed to have been done with intent to kill. S. v. Baldes, 133 Ia. 158, 110 N. W. 440.

581-12 Wilson v. S., 140 Ala. 43, 37 S. 93; S. v. Di Guglielmo, 4 Penne. (Del.) 336, 55 A. 350; S. v. Mills (Del.), 69 A. 841; S. v. Underhill (Del.), 69 A. 880; McLeod v. S., 128 Ga. 17, 58 S. E. 83; Nelson v. S. (Ga. App.), 60 S. E. 1072.

581-13 See Coolman v. S., 163 Ind. 503, 72 N. E. 568.

581-14 Hardin v. S. (Tex. Cr.), 103 S. W. 401 (may be considered by the jury).

582-17 Wright v. S., 148 Ala. 596, 42 S. 745; Adams v. S., 124 Ga. 11, 53 S. E. 804. See Brown v. S., 142 Ala. 287, 38 S. 268.

582-18 Ullman v. S., 124 Wis. 602, 103 N. W. 6.

Use of deadly weapon, in connection with other circumstances may establish the specific intent. Jackson v. S., 48 Tex. Cr. 648, 90 S. W. 34. And see S. v. Ruck, 194 Mo. 416, 92 S. W. 706; Wright v. S., 48 Tex. Cr. 613, 90 S. W. 36.

583-25 Brown v. S., 142 Ala. 287, 38 S. 268; Ray v. S., 147 Ala. 5, 41 S. 519; Howard v. S., 2 Ga. App. 830, 59 S. E. 89; Starr v. S., 160 Ind. 661, 67 N. E. 527; S. v. Bennett, 128 Ia. 713, 105 N. W. 324.

584-27 S. v. Bailey, 79 Conn. 589, 65 A. 951; S. v. Di Guglielmo, 4 Penne. (Del.) 336, 55 A. 350; S. v. Brinte, 4 Penne. (Del.) 551, 58 A. 258; S. v. Emory, 5 Penne. (Del.) 126, 58 A. 1036; S. v. Harman, 4 Penne. (Del.) 580, 60 A. 866; S. v. Collins, 5 Penne. (Del.) 263, 62 A. 224; Bradley v. S., 128 Ga. 20, 57 S. E. 237; Robinson v. S., 130 Ga. 361, 58 S. E. 842; Burley v. S., 130 Ga. 343, 60 S. E. 1006; Williford v. S., 121 Ga. 173, 48 S. E. 962; Campbell v. S., 124 Ga. 432, 52 S. E. 914 (presumption applies although the evidence is entirely circumstantial); Smith v. S., 124 Ga. 213, 52 S. E. 329; Tolbirt v. S., 124 Ga. 767, 53 S. E. 327; Mann v. S., 124 Ga. 760, 53 S. E. 324; Taylor v. S., 82 Ark. 540, 102 S. W. 367. See Nathan v. S. (Ga.), 61 S. E. 994; S. v. Henderson, 74 S. C. 477, 55 S. E. 117.

Homicide committed deliberately or without adequate cause is presumed to have been done maliciously. S. v. Brown, 5 Penne. (Del.) 339, 61 A. 1077; S. v. Bell, 5 Penne. (Del.) 192, 62 A. 147; S. v. Tilghman (Del.), 63 A. 772; S. v. Johns (Del.), 65 A. 763; S. v. Honey (Del.), 65 A. 764; S. v. Underhill (Del.), 69 A. 880.

584-29 S. v. Prolow, 98 Minn. 873, 108 N. W. 873.

585-32 Kennison v. S. (Neb.), 115 N. W. 289; Lucas v. S. (Neb.), 111 N. W. 145; S. v. Rochester, 72 S. C. 194, 51 S. E. 685.

Admission of the killing coupled with statements showing justification prevents the presumption from arising. Perkins v. S., 124 Ga. 6, 52 S. E. 17. See Green v. S., 124 Ga. 343, 52 S. E. 431.

587-35 S. v. McDowell, 145 N. C. 563, 59 S. E. 690.

Act naturally calculated to produce death, raises the presumption. Cupps v. S., 120 Wis. 504, 97 N. W. 210, 98 N. W. 546.

587-36 Brown v. S., 142 Ala. 287, 38 S. 268; Kennedy v. S., 147 Ala. 687, 40 S. 658; Allen v. S., 148 Ala. 588, 42 S. 1006; Burkett v. S. (Ala.), 45 S. 682; S. v. Powell, 5 Penne. (Del.) 24, 61 A. 966; S. v. Brown, 5 Penne. (Del.) 339, 61 A.

1077; S. v. Tilghman (Del.), 63 A. 772; S. v. Johns (Del.), 65 A. 763; S. v. Honey (Del.), 65 A. 764; S. v. Uzzo (Del.), 65 A. 775; S. v. Cephus (Del.), 67 A. 150; S. v. Hayden, 131 Ia. 1, 107 N. W. 929; S. v. Prolow, 98 Minn. 459, 108 N. W. 873; S. v. Cole, 132 N. C. 1069, 44 S. E. 391; S. v. Walker, 145 N. C. 567, 59 S. E. 878; C. v. Gibson, 211 Pa. 546, 60 A. 1086; S. v. Byrd, 72 S. C. 104, 51 S. E. 542; Taylor v. S., 82 Ark. 540, 102 S. W. 367; Anderson v. S., 133 Wis. 601, 114 N. W. 112.

588-37 Ter. v. Gutierez (N. M.), 79 P. 716.

589-39 Coolman, 163 Ind. 503, 72 N. E. 568.

589-40 Paschal v. S., 125 Ga. 279, 54 S. E. 172.

589-42 McLin v. S., 48 Tex. Cr. 549, 90 S. W. 1107 (judge may charge that a pistol is a deadly weapon).

589-43 Allen v. S., 148 Ala. 588, 42 S. 1006 (piece of timber). **Judicial notice** cannot be taken that an ax is a deadly weapon. Bush v. S. (Tex. Cr.), 107 S. W. 348. **Weapon** not ordinarily deadly may be so when used upon a child or old person. Little v. S., 3 Ga. App. 441, 60 S. E. 113.

589-44 Clemons v. S., 48 Fla. 9, 37 S. 647 (metallic knucks); Nelson v. S. (Ga. App.), 60 S. E. 1072 (knife); S. v. Ruck, 194 Mo. 416, 92 S. W. 706 (heavy quart beer bottle).

590-49 See Paschal v. S., 125 Ga. 279, 54 S. E. 172.

591-52 Taylor v. S., 49 Fla. 69, 38 S. 380; Nelson v. S. (Ga. App.), 60 S. E. 1072; McDuffie v. S., 121 Ga. 580, 49 S. E. 708 (where the weapon is before the jury, opinion evidence as to its character is unnecessary); S. v. Spaugh, 199 Mo. 147, 97 S. W. 901; Hardin v. S. (Tex. Cr.), 103 S. W. 401 (doctor); Earles v. S. (Tex. Cr.), 106 S. W. 138.

591-56 Coolman v. S., 163 Ind. 503, 72 N. E. 568.

592-64 As to homicides committed by "lying in wait, poisoning, starvation, imprisonment, or torture" in which premeditation is shown or admitted — the common law presumption of murder in the first degree applies. S. v. Matthews, 142 N. C. 621, 55 S. E. 342.

593-65 S. v. Prolow, 98 Minn. 459, 108 N. W. 873. **Use of deadly weapon** will not raise a presumption of premeditation and deliberation. S. v. Cole, 132 N. C. 1069, 44 S. E. 391.

593-66 S. v. Brinte, 4 Penne. (Del.) 551, 58 A. 258; S. v. Adams (Del.), 65 A. 510; S. v. Samuels (Del.), 67 A. 164; Blanton v. S., 52 Fla. 12, 41 S. 789; S. v. Pressler (Wyo.), 92 P. 806.

595-71 S. v. Trail, 59 W. Va. 175, 53 S. E. 17.

595-73 S. v. Teachy, 138 N. C. 587, 50 S. E. 232; S. v. Trail, 59 W. Va. 175, 53 S. E. 17.

595-74 Daniel v. S., 126 Ga. 541, 55 S. E. 472.

595-75 See Sartain v. S. (Tex. Cr.), 103 S. W. 875.

595-76 Parsons v. P., 218 Ill. 386, 75 N. E. 993; S. v. Walker, 145 N. C. 567, 59 S. E. 878; Litton v. C., 101 Va. 833, 44 S. E. 923.

596-77 Petty v. S., 76 Ark. 515, 89 S. W. 465; P. v. Grill, 151 Cal. 592, 91 P. 515; Burley v. S. (Ga.), 60 S. E. 1006; S. v. Hazlett (N. D.), 113 N. W. 374.

598-80 Robinson v. S. (Ala.), 45 S. 916; S. v. Bailey, 79 Conn. 589, 65 A. 951; S. v. Powell, 5 Penne. (Del.) 24, 61 A. 966; S. v. Brown, 5 Penne. (Del.) 339, 61 A. 1077; S. v. Honey (Del.), 65 A. 764; S. v. Cephus (Del.), 67 A. 150; S. v. Walker, 145 N. C. 567, 59 S. E. 878; S. v. Byrd, 72 S. C. 104, 51 S. E. 542; S. v. Reeder, 72 S. C. 223, 51 S. E. 702; S. v. Moss, 77 S. C. 391, 57 S. E. 1098 (evidence of the state may establish the defense, however); S. v. Hibler (S. C.), 60 S. E. 438; S. v. Dillard, 59 W. Va. 197, 53 S. E. 117.

598-81 Lawson v. S. (Ind.), 84 N. E. 974 (*cit.* Encyc. of Ev.); S. v. Usher, 126 Ia. 287, 102 N. W. 101; S. v. Yates, 132 Ia. 475, 109 N. W. 1005; Turley v. S., 74 Neb. 471, 104 N. W. 934.

598-82 Where state relies almost entirely upon admissions of defendant, the burden is upon it to prove the falsity of further statements that he acted in self defense. Pratt v. S., 50 Tex. Cr. 227, 96 S. W. 8.

598-83 McCurley v. S. (Ala.), 39 S. 1022; Kennedy v. S., 147 Ala. 687, 40 S. 658; Allen v. S., 148 Ala. 588, 42 S. 1006.

598-84 Bluett v. S. (Ala.), 44 S. 84; S. v. Andrews, 73 S. C. 257, 53 S. E. 423; S. v. Thrailkill, 71 S. C. 136, 50 S. E. 551 (by preponderance of evidence).

599-85 See Wright v. S., 148 Ala. 596, 42 S. 745.

599-86 Green v. S., 143 Ala. 2, 39 S. 362. See McBryde v. S. (Ala.), 47 S. 302.

599-87 P. v. Suesser, 142 Cal. 354, 75 P. 1093; Allams v. S., 123 Ga. 500, 51 S. E. 506; S. v. Lyons, 113 La. 959, 37 S. 890; S. v. Quigley, 26 R. I. 263, 58 A. 905. *Compare* Mathley v. C., 27 Ky. L. R. 785, 86 S. W. 988.

Burden is on the state where the accused is shown to have been previously and chronicly insane, by virtue of the presumption of the continuance of such a condition. Allams v. S., 122 Ga. 500, 51 S. E. 506.

599-88 S. v. Pressler (Wyo.), 92 P. 806.

600-90 P. v. Grill, 151 Cal. 592, 91 P. 515 (applying Pen. Code § 1105).

600-91 S. v. Hazlett (N. D.), 113 N. W. 374.

600-92 Gater v. S., 141 Ala. 10, 37 S. 692; S. v. Yates, 132 Ia. 475, 109 N. W. 1005.

600-94 **Alibi.** — Burden of proving an alibi is upon the defendant. Parkham v. S., 147 Ala. 57, 42 S. 1.

602-99 Mann v. S., 124 Ga. 760, 53 S. E. 324; Bradley v. S., 128 Ga. 20, 57 S. E. 237; S. v. Kendall, 143 N. C. 659, 57 S. E. 340.

604-5 S. v. Reeder, 72 S. C. 223, 51 S. E. 702.

604-6 S. v. Hibler (S. C.), 60 S. E. 438.

604-8 P. v. Suesser, 142 Cal. 354, 75 P. 1093; Allams v. S., 123 Ga. 500, 51 S. E. 506; S. v. Lyons, 113 La. 959, 37 S. 890; S. v. Quigley, 26 R. I. 263, 58 A. 905; Sartin v. S., 51 Tex. Cr. 571, 103 S. W. 875.

605-9 S. v. Pressler (Wyo.), 92 P. 806.

605-12 S. v. Thomas, 135 Ia. 717, 109 N. W. 900.

606-14 S. v. Yates, 132 Ia. 475, 109 N. W. 1005.

607-29 Haywood v. S., 90 Miss. 461, 43 S. 614.

That a carnival was in progress may be shown as it helps to fix dates and circumstances. Nelson v. S., 51 Tex. Cr. 349, 101 S. W. 1012.

Manner and appearance of deceased during a conversation between several parties may be testified to by a witness who had never seen the deceased before. Watson v. S. (Tex. Cr.), 105 S. W. 509.

Request of defendant for a private talk with deceased may be shown. Vaughn v. S., 51 Tex. Cr. 180, 101 S. W. 445.

Instantaneousness of death may be shown. Bluett v. S. (Ala.), 44 S. 84.

In a poisoning case the nature and character of the suffering of deceased and the manner of her death may be material matters. Nordan v. S., 143 Ala. 13, 39 S. 406.

608-31 Hill v. S., 146 Ala. 51, 41 S. 621; Jacobs v. S., 146 Ala. 103, 42 S. 70 (condition of prosecutor in an action for assault with intent to kill); Fowler v. S. (Ala.), 45 S. 913; Cole v. S., 48 Tex. Cr. 439, 88 S. W. 341.

Bruises on the body may be shown on the issue whether poison was taken voluntarily or administered by force. Green v. S., 125 Ga. 742, 54 S. E. 724.

Photograph of body admissible, although defendant admits the location and character of the wounds. S. v. Powell, 5 Penne. (Del.) 24, 61 A. 966. And see Young v. S., 49 Tex. Cr. 207, 92 S. W. 841; S. v. Roberts, 28 Nev. 350, 82 P. 100 (photographs of wounds).

608-32 **View of scene** may be taken and evidence taken during such view. Underwood v. C., 27 Ky. L. R. 8, 84 S. W. 310.

Hearsay inadmissible. — Patterson v. S. (Ala.), 47 S. 52.

608-35 Starr v. S., 160 Ind. 661, 67 N. E. 527; Cole v. S., 48 Tex. Cr. 439, 88 S. W. 341 (blood on the ground).

Hats found at place of homicide as res gestae. C. v. Karamarkovic, 218 Pa. 405, 67 A. 650.

Empty shells found the next day. Nickles v. S., 48 Fla. 46, 37 S. 312. But see Tinsley v. S. (Tex. Cr.), 106 S. W. 347.

608-36 P. v. Grill, 151 Cal. 592,

91 P. 515; S. v. Roger, 129 Ia. 229, 105 N. W. 455; Newcomb v. S., 49 Tex. Cr. 550, 95 S. W. 1048; Gibson v. S. (Tex. Cr.), 110 S. W. 41.

608-37 P. v. Antony, 146 Cal. 124, 79 P. 858; S. v. Cummings, 189 Mo. 627, 88 S. W. 706; Ter. v. Price (N. M.), 91 P. 733 (minor inaccuracies no objection); P. v. Sexton, 187 N. Y. 495, 80 N. E. 396 (map with red line designating path followed by defendant in going from his house to the scene of the homicide); S. v. Remington (Or.), 91 P. 473 (map by competent surveyor admissible though made at the direction of the district attorney to illustrate his theory).

609-40 P. v. Mahatch, 148 Cal. 200, 82 P. 779 (objects correctly placed by witnesses to represent the conditions at the time of the homicide).

610-42 Martin v. C., 30 Ky. L. R. 1196, 100 S. W. 872 (that deceased sold liquor, irrelevant); S. v. Barrington, 198 Mo. 23, 95 S. W. 235 (evidence as to the business of deceased and that it made him many enemies, held irrelevant). See S. v. Cummings, 189 Mo. 626, 88 S. W. 706 (business of deceased when witness first knew him, immaterial).

610-45 Habit of deceased to carry bill-book in his pocket may be testified to by a witness. Carwile v. S., 148 Ala. 576, 39 S. 220.

610-46 Richardson v. S., 145 Ala. 46, 41 S. 82 (presence about a mile from the scene of homicide); Rose v. S., 144 Ala. 114, 42 S. 21 (admissible though the evidence showing the killing by defendant is direct); Reed v. S. (Ga.), 60 S. E. 191 (fact that accused was last person seen with deceased is important); S. v. Miller, 71 N. J. L. 527, 60 A. 202 (absence of defendant from accustomed place).

610-48 Glass v. S., 147 Ala. 50, 41 S. 727; Morris v. S., 146 Ala. 66, 41 S. 274 (acts occurring on the same day and leading up to the homicide); Stallworth v. S., 146 Ala. 8, 41 S. 184; Williams v. S., 147 Ala. 10, 41 S. 992; Way v. S. (Ala.), 46 S. 273; Fonseca v. S., 48 Tex. Cr. 28, 85 S. W. 1069; Waggoner v. S., 49 Tex. Cr. 260, 98 S. W. 255; Moore v. S. (Tex. Cr.), 107 S. W. 541.

611-49 Ter. v. Price (N. M.), 91 P. 733; Hardison v. S. (Tex. Cr.), 85 S. W. 1071.

612-50 P. v. Woods, 147 Cal. 265, 81 P. 652 (robbery of third person which was the occasion of the deceased officer's interference); Smith v. C., 29 Ky. L. R. 231, 92 S. W. 610 (difficulty with children of deceased); S. v. Thrailkill, 71 S. C. 136, 50 S. E. 551, s. c. 73 S. C. 314, 53 S. E. 482; McKinney v. S., 49 Tex. Cr. 591, 96 S. W. 48; Moore v. S. (Tex. Cr.), 107 S. W. 541.

612-52 Pate v. S. (Ala.), 43 S. 343; S. v. Rutledge, 135 Ia. 581, 113 N. W. 461 (surrender to constable); Powers v. C., 26 Ky. L. R. 277, 92 S. W. 975.

613-53 Hammond v. S., 147 Ala. 79, 41 S. 761; Pate v. S. (Ala.), 43 S. 343; Helton v. C., 27 Ky. L. R. 137, 84 S. W. 574; Menefee v. S., 50 Tex. Cr. 249, 97 S. W. 486; Nelson v. S., 51 Tex. Cr. 349, 101 S. W. 1012; Fay v. S. (Tex. Cr.), 107 S. W. 55. See S. v. Shockley (Utah), 80 P. 865.

613-54 Untreinor v. S., 146 Ala. 26, 41 S. 285; McCoy v. S. (Miss.), 44 S. 814; S. v. Baker, 209 Mo. 444, 108 S. W. 6 (nature of wound received, declarations and acts of the third person are all admissible); S. v. Woodward, 191 Mo. 617, 90 S. W. 90.

Scar on a third person received in the same fight is part of the res gestae. Alarcon v. S., 47 Tex. Cr. 415, 90 S. W. 179.

614-58 Presumption on appeal is that declarations admitted in evidence were part of the res gestae, if they might have been such, since the burden of showing error is on appellant. Manning v. S., 51 Tex. Cr. 211, 98 S. W. 251.

615-64 Mitchell v. S., 82 Ark. 324, 101 S. W. 763; S. v. Uzzo (Del.), 65 A. 775.

615-65 P. v. Smith, 151 Cal. 619, 91 P. 511; Warrick v. S., 125 Ga. 133, 53 S. E. 1027.

616-68 Simmons v. S., 145 Ala. 61, 40 S. 660.

617-70 Grant v. U. S., 28 App. Cas. (D. C.) 169; Goodman v. S., 122 Ga. 111, 49 S. E. 923; S. v. Lewis (Ia.), 116 N. W. 606; C. v. Hargis, 124 Ky. 356, 30 Ky. L. R. 510, 99 S. W. 348; Rice v. S., 49

Tex. Cr. 569, 94 S. W. 1024 (accusatory statement addressed to defendant); Moore v. S., 49 Tex. Cr. 499, 96 S. W. 321; Bowles v. C., 103 Va. 816, 48 S. E. 527.

617-72 S. v. Birks, 199 Mo. 263, 97 S. W. 578 (statement made one-half hour after the shooting, inadmissible).

617-73 Tinsley v. S. (Tex. Cr.), 106 S. W. 347 (statement as to who shot him made ten minutes after the shooting, admissible); Stovall v. S. (Tex. Cr.), 108 S. W. 699 (statement made fifteen minutes after).

Declaration made twenty minutes after taking a powder, claimed to have been poison and while suffering, admissible. Nordan v. S., 143 Ala. 13, 39 S. 406.

619-74 S. v. Kelleher, 201 Mo. 614, 100 S. W. 470.

619-75 Wilson v. S., 49 Tex. Cr. 50, 90 S. W. 312. See McMahon v. S., 46 Tex. Cr. 540, 81 S. W. 296 (conversation between defendant and his co-actor as to cause, admissible).

619-76 Exculpating statement not admissible if it is not a part of the res gestae. Cole v. S., 125 Ga. 276, 53 S. E. 958.

620-77 S. v. Rutledge (Ia.), 113 N. W. 461; P. v. Quimby, 134 Mich. 625, 96 N. W. 1061.

620-80 Fleming v. S. (Ala.), 43 S. 219.

620-81 Pitts v. S., 140 Ala. 70, 37 S. 101 (declarations made after walking a quarter of a mile, inadmissible); Ferguson v. S., 141 Ala. 20, 37 S. 448; Williams v. S., 147 Ala. 10, 41 S. 992; Warrick v. S., 125 Ga. 133, 53 S. E. 1027 (narrative statement inadmissible); Cole v. S., 125 Ga. 276, 53 S. E. 958; Park v. S., 126 Ga. 575, 55 S. E. 489; Long v. S., 48 Tex. Cr. 175, 88 S. W. 203; Craven v. S., 49 Tex. Cr. 78, 90 S. W. 311; Pratt v. S., 50 Tex. Cr. 227, 96 S. W. 8.

622-82 Shirley v. S., 144 Ala. 35, 40 S. 269; Kennedy v. C., 30 Ky. L. R. 1063, 100 S. W. 242; Baysinger v. Ter., 15 Okla. 386, 82 P. 728; Hull v. S., 50 Tex. Cr. 607, 100 S. W. 403. See S. v. Howard, 120 La. 311, 45 S. 260.

622-83 *Compare* Rains v. C., 29 Ky. L. R. 66, 92 S. W. 276 (admissible when made to defendant).

Cries of "police, murder" inadmissible since they do not tend to elucidate the transaction but tend to prejudice the accused. Benjamin v. S., 148 Ala. 671, 41 S. 739.

623-84 Harbour v. S., 140 Ala. 103, 37 S. 330.

623-85 Stacy v. S. (Tex. Cr.), 110 S. W. 901.

623-87 Wells v. Ter., 14 Okla. 436, 78 P. 124 (expert).

624-91 Williams v. S., 147 Ala. 10, 41 S. 992; Poe v. S. (Ala.), 46 S. 521; Wells v. Ter., 14 Okla. 436, 78 P. 124 (non-expert). See Ball v. C., 31 Ky. L. R. 188, 101 S. W. 956.

625-97 Patterson v. S. (Ala.), 47 S. 52; Gibbs v. S. (Ala.), 47 S. 65.

625-98 S. v. Rowell, 75 S. C. 494, 56 S. E. 23 (intoxication may be shown).

Incompetent in the face of undisputed evidence of premeditation. Handy v. S., 101 Md. 39, 60 A. 452.

625-99 S. v. Brinte, 4 Penne. (Del.) 551, 58 A. 258; S. v. Adams (Del.), 65 A. 510; P. v. Ferone, 120 App. Div. 323, 105 N. Y. S. 448.

Bunching of tracks is evidence tending to show a lying in wait. Harrison v. S. (Ala.), 40 S. 57.

625-2 Wright v. S., 148 Ala. 596, 42 S. 745; S. v. Spaugh, 199 Mo. 147, 97 S. W. 901; S. v. Remington (Or.), 91 P. 473.

626-4 Brown v. S., 142 Ala. 287, 38 S. 268; S. v. Weisenberger, 42 Wash. 426, 85 P. 20.

626-10 P. v. Hill, 1 Cal. App. 414, 82 P. 398 (evidence that defendant, armed with a deadly weapon, knew he did not give deceased street car conductor a $5 gold piece, as he claimed he did, admissible).

627-11 Warning given by defendant to the only person having right of access to a trunk, in which he had set a spring gun, is admissible. S. v. Marfaudille (Wash.), 92 P. 939.

627-12 Warford v. P., 41 Colo. 203, 92 P. 24.

627-14 S. v. Bamusik (N. J. L.), 64 A. 994 (orders given barkeeper to serve him water when he drank with deceased).

628-20 Subsequent friendship of the parties may be shown. Early v. S., 51 Tex. Cr. 382, 103 S. W. 868.

629-22 S. v. Clark, 119 La. 733,

44 S. 449; Holder v. S. (Tenn.), 104 S. W. 225.

629-23 Jahnke v. S., 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; Miera v. Ter. (N. M.), 81 P. 586; S. v. Bean, 77 Vt. 384, 60 A. 807.

Erratum. — "Previous attempts" should appear on page 628 as catch line under IV., 7 D, b, (1.).

629-24 Pitts v. S., 140 Ala. 70, 37 S. 101; Shirley v. S., 144 Ala. 35, 40 S. 269 (length of time of existence may be shown); Spencer v. C., 32 Ky. L. R. 880, 107 S. W. 342; Wells v. Ter., 14 Okla. 436, 78 P. 124; S. v. Brooks (S. C.), 60 S. E. 518 (quarrel over custody of a child).

629-25 P. v. Dinser, 49 Misc. 82, 98 N. Y. S. 314.

630-27 Pitts v. S., 140 Ala. 70, 37 S. 101; Sanford v. S., 143 Ala. 78, 39 S. 370; Stallworth v. S., 146 Ala. 8, 41 S. 184; Patterson v. S., 146 Ala. 39, 41 S. 157; Logan v. S., 149 Ala. 11, 43 S. 10; Fleming v. S. (Ala.), 43 S. 219; Bluett v. S. (Ala.), 44 S. 84; Robinson v. S. (Ala.), 45 S. 916; Patterson v. S. (Ala.), 47 S. 52; Poe v. S. (Ala.), 46 S. 521; S. v. Birks, 199 Mo. 263, 97 S. W. 578; Jay v. S. (Tex. Cr.), 109 S. W. 131. See McCoy v. S. (Miss.), 44 S. 814 (details of previous difficulty between defendant's brother and deceased, inadmissible).

Main attending circumstances should be admitted. White v. C., 31 Ky. L. R. 271, 102 S. W. 298.

630-28 *Compare* S. v. Baudoin, 115 La. 837, 40 S. 239.

631-32 S. v. Fielding, 135 Ia. 255, 112 N. W. 539.

631-34 Roberts v. S., 123 Ga. 146, 51 S. E. 374; Campbell v. S., 123 Ga. 533, 51 S. E. 644; Green v. S., 125 Ga. 742, 54 S. E. 724; Owen v. S. (Tex. Cr.), 105 S. W. 513.

631-36 S. v. Schuyler (N. J. L.), 68 A. 56 (ten years).

633-42 P. v. Woods, 147 Cal. 265, 81 P. 652 (preparations to kill if necessary in connection with a proposed burglary); S. v. West, 120 La. 747, 45 S. 594; C. v. Snell, 189 Mass. 12, 75 N. E. 75.

Presence of defendant and his brother near the place of the homicide, the day before, as well as upon the day of the homicide may be shown. S. v. Howard, 120 La. 311, 45 S. 260.

633-45 Glass v. S., 147 Ala. 50, 41 S. 727; Poe v. S. (Ala.), 46 S. 521; P. v. Haxer, 144 Mich. 575, 108 N. W. 90; McKinney v. S., 49 Tex. Cr. 591, 96 S. W. 48.

633-46 Ferguson v. S., 141 Ala. 20, 37 S. 448; Litton v. C., 101 Va. 833, 44 S. E. 923 (possession of shells prepared and loaded).

634-51 S. v. Hough, 138 N. C. 663, 50 S. E. 709.

Construction of a "blind" to enable him to get possession of his little boy and not to allow him to lie in wait for deceased. Mathison v. S., 87 Miss. 739, 40 S. 801.

Threats made by deceased may be shown to rebut evidence of malice in borrowing a gun, and no foundation need be laid. S. v. Stockett, 115 La. 743, 39 S. 1000. And see S. v. Clifford, 59 W. Va. 1, 52 S. E. 981.

How defendant became possessed of the weapon is immaterial where the evidence shows a previously formed design to take decedent's life. Johnson v. C., 29 Ky. L. R. 442, 93 S. W. 581.

635-52 S. v. Doris (Or.), 94 P. 44; Brundige v. S., 49 Tex. Cr. 596, 95 S. W. 527.

635-57 P. v. Haxer, 144 Mich. 575, 108 N. W. 90 (resistance to arrest); Cook v. S., 85 Miss. 738, 38 S. 110 (subsequent boasting). See Borden v. S., 145 Ala. 1, 40 S. 948.

635-58 Hancock v. S., 47 Tex. Cr. 3, 83 S. W. 696 (pursuit and second attack on deceased).

636-61 Ferguson v. S., 141 Ala. 20, 37 S. 448; Glass v. S., 147 Ala. 50, 41 S. 727; Morris v. S., 50 Tex. Cr. 515, 98 S. W. 873; Sue v. S. (Tex. Cr.), 105 S. W. 804.

Admissible although witness heard only part of the conversation in which they were made. Woodward v. S., 50 Tex. Cr. 294, 97 S. W. 499.

636-62 Miller v. S., 146 Ala. 686, 40 S. 342; Morris v. S., 146 Ala. 66, 41 S. 274; Graham v. S., 125 Ga. 48, 53 S. E. 816; S. v. Bailey, 190 Mo. 257, 88 S. W. 733.

637-65 Pitts v. S., 140 Ala. 70, 37 S. 101; Tipton v. S., 140 Ala. 39, 37 S. 231; Franklin v. S., 145 Ala. 669, 39 S. 979; Parham v. S., 147 Ala. 57, 42 S. 1; Thomas v. S. (Ala.), 43 S. 371; Heningburgh v. S. (Ala.), 43 S. 959; Bluett v. S. (Ala.), 44 S. 84; Poe v. S. (Ala.), 46 S. 521; S.

v. Thompson, 127 Ia. 440, 103 N. W. 377; Esterline v. S., 105 Md. 629, 66 A. 269; S. v. Cummings, 189 Mo. 627, 88 S. W. 706; S. v. King, 203 Mo. 560, 102 S. W. 515; S. v. Exum, 136 N. C. 599, 50 S. E. 283; S. v. Brooks (S. C.), 60 S. E. 518.

Uncommunicated threat admissible. Graham v. S., 125 Ga. 48, 53 S. E. 816.

Hearsay evidence is inadmissible to prove the threat. Cole v. S., 48 Tex. Cr. 439, 88 S. W. 341.

Preliminary showing. — The corpus delicti should first be established or evidence adduced from which the jury can infer it. Parham v. S., 147 Ala. 57, 42 S. 1.

638-66 **Letter** containing expressions of ill-will, admissible. S. v. Exum, 136 N.C. 599, 50 S. E. 283.

638-68 **Past intent.** — Statement, "If you had let me alone I would have killed all of them," was admitted as a threat. McKinney v. S., 49 Tex. Cr. 591, 96 S. W. 48. But see *contra*. Early v. S., 51 Tex. Cr. 382, 102 S. W. 868.

639-69 Owen v. S. (Tex. Cr.), 105 S. W. 513.

639-70 *Compare* Wright v. S., 148 Ala. 596, 42 S. 745 (statement that there was going to be trouble some day, not a threat).

639-72 Golatt v. S. (Ga.), 60 S. E. 107.

640-74 George v. S., 145 Ala. 41, 40 S. 961; McMahon v. S., 46 Tex. Cr. 540, 81 S. W. 296; Melton v. S., 47 Tex. Cr. 451, 83 S. W. 822; Barbee v. S., 50 Tex. Cr. 426, 97 S. W. 1058; Garrett v. S. (Tex. Cr.), 106 S. W. 389.

640-76 Long v. S., 48 Tex. Cr. 175, 88 S. W. 203; Hall v. S. (Tex. Cr.), 88 S. W. 244; McKinney v. S., 49 Tex. Cr. 591, 96 S. W. 48; Manning v. S., 51 Tex. Cr. 211, 98 S. W. 251; Armstrong v. S., 50 Tex. Cr. 26, 98 S. W. 844.

641-78 Hixon v. S. (Ga.), 61 S. E. 14; Starr v. S., 160 Ind. 661, 67 N. E. 527; S. v. Rosa, 72 N. J. L. 462, 62 A. 695.

643-83 S. v. Teachy, 138 N. C. 599, 50 S. E. 232. See also Williams v. S., 147 Ala. 10, 41 S. 992. But see Earles v. S., infra, 734-54.

645-90 Jay v. S. (Tex. Cr.), 109 S. W. 131.

645-93 S. v. Exum, 136 N. C. 599, 50 S. E. 283.

646-98 Young v. S., 49 Tex. Cr. 207, 92 S. W. 841.

646-99 See Ripley v. S., 51 Tex. Cr. 126, 100 S. W. 943.

646-3 Hixon v. S. (Ga.), 61 S. E. 14; S. v. Coleman, 186 Mo. 151, 84 S. W. 978; S. v. Rosa, 72 N. J. L. 462, 62 A. 695; P. v. Johnson, 185 N. Y. 219, 77 N. E. 1164.

647-6 P. v. Johnson, supra.

648-8 **But whole conversation** in the course of which the threat was communicated to defendant by the witness, is inadmissible. Simpson v. S., 48 Tex. Cr. 328, 87 S. W. 826.

649-16 Pratt v. S., 50 Tex. Cr. 227, 96 S. W. 8 (defendant may testify that threats were not made seriously).

649-19 Seaborn v. C., 25 Ky. L. R. 2203, 80 S. W. 223.

650-21 Heninburg v. S. (Ala.), 43 S. 959; S. v. Hogan, 117 La. 863, 42 S. 352.

651-26 **"Intoxication** which does not amount to or produce temporary insanity is not admissible in evidence, even for the purpose of determining the degree of murder," under the Texas statute. Young v. S. (Tex. Cr.), 110 S. W. 445.

651-31 S. v. Bailey, 190 Mo. 257, 88 S. W. 733 (hostility to non-union men).

Hostility to "Spotters" admissible only where deceased was, or was believed to be, member of such class. Harrison v. S., 47 Tex. Cr. 393, 83 S. W. 699.

652-38 P. v. Suesser, 142 Cal. 354, 75 P. 1093 (where deceased was killed in an endeavor to prevent the accomplishment by defendant of his intent to kill another).

653-42 S. v. Brown, 188 Mo. 451, 87 S. W. 519; S. v. Feeley, 194 Mo. 300, 92 S. W. 663.

653-43 S. v. Miller, 73 S. C. 277, 53 S. E. 426; S. v. Smalls, 73 S. C. 516, 53 S. E. 976; S. v. Thrailkill, 73 S. C. 314, 53 S. E. 482; *aff.* 50 S. E. 551; McLin v. S., 48 Tex. Cr. 549, 90 S. W. 1107.

Setting spring gun in a trunk, is such evidence of an intent to kill any one interfering with the trunk, that the defendant can not show he did not intend to kill the decedent.

S. v. Marfaudille (Wash.), 92 P. 939.

653-44 But see P. v. Wright, 144 Cal. 161, 77 P. 877 (apparently contra).

654-50 **Deliberation** may be negatived by such evidence. S. v. Speyer, 207 Mo. 540, 106 S. W. 505.

654-51 **Circumstances** may outweigh defendant's positive testimony as to his intent. Rosemond v. S. (Ark.), 110 S. W. 229.

654-52 See Satterwhite v. S., 82 Ark. 64, 100 S. W. 70; S. v. Ruck, 194 Mo. 416, 92 S. W. 706.

655-58 P. v. Mahatch, 148 Cal. 200, 82 P. 779.

656-60 S. v. Thrailkill, 73 S. C. 314, 53 S. E. 482.

656-62 Kennedy v. S., 140 Ala. 1, 37 S. 90, s. c. 147 Ala. 687, 40 S. 658.

Peaceful mission of decedent and previous permission given by accused, may be shown. Boudman v. S., 145 Ala. 680, 40 S. 85.

656-64 Brownlee v. S., 48 Tex. Cr. 408, 87 S. W. 1153 (conduct of deceased).

656-65 Rumsey v. S., 55 Ga. 419, 55 S. E. 167 (that deceased went to house of accused to visit a lewd woman, known to the accused to be such).

657-67 S. v. Cather, 121 Ia. 106, 96 N. W. 722; S. v. Rutledge, 135 Ia. 581, 113 N. W. 461 (on issue of self defense); P. v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718.

Remoteness. — Character of accused many years before, in the community from which he came, admissible, its remoteness going only to its weight. P. v. Van Gaasbeck, 118 App. Div. 511, 913, 103 N. Y. S. 249.

Negative evidence of character is competent. Way v. S. (Ala.), 46 S. 273; Sinclair v. S., 87 Miss. 330, 39 S. 522; Johnson v. S. (Miss.), 40 S. 324; Mitchell v. S., 51 Tex. Cr. 71, 100 S. W. 930 (character of deceased); S. v. Cremeans (W. Va.), 57 S. E. 405.

657-69 S. v. Simmons, 74 Kan. 799, 88 P. 57.

657-71 **Defendant** "not limited to proving what people may have said of him as to his being or not being a quiet and peacable man, but is entitled to inquire as to his character from those acquainted with him and they are authorized to speak from his general peacable and quiet conduct and from not having known or heard anything to the contrary." S. v. Dickerson, 77 Ohio St. 34, 82 N. E. 969. See S. v. Cather, 121 Ia. 106, 96 N. W. 722.

Honesty and industry can not be shown. S. v. Griggsby, 117 La. 1046, 42 S. 497.

That he was never arrested before, inadmissible. S. v. Marfaudille (Wash.), 92 P. 939.

657-73 Weaver v. S., 83 Ark. 119, 102 S. W. 713.

657-75 S. v. Thompson, 127 Ia. 440, 103 N. W. 377; Newman v. S., 28 Ky. L. R. 81, 88 S. W. 1089.

657-78 Harrison v. S. (Ala.), 40 S. 57; S. v. Le Blanc, 116 La. 822, 41 S. 105. See P. v. Wright, 144 Cal. 161, 89 P. 364; (extent of witness's knowledge may be inquired into); S. v. Dickerson, 77 Ohio St. 34, 82 N. E. 969.

658-85 Wells v. Ter., 14 Okla. 436, 78 P. 124; P. v. Van Gaasbeck, 118 App. Div. 511, 913, 103 N. Y. S. 249.

659-87 S. v. Wilson, 5 Penne. (Del.) 77, 62 A. 227; S. v. Johns (Del.), 65 A. 763; S. v. Maupin, 93 Mo. 164, 93 S. W. 379.

659-89 Kirby v. S. (Ala.), 44 S. 38; Weaver v. S., 83 Ark. 119, 102 S. W. 713; Woods v. S., 90 Miss. 245, 43 S. 433; S. v. Woodward, 191 Mo. 617, 90 S. W. 90; Melton v. S., 47 Tex. Cr. 451, 83 S. W. 822; Keith v. S., 50 Tex. Cr. 63, 94 S. W. 1044; Puryear v. S., 50 Tex. Cr. 454, 98 S. W. 258; Bays v. S., 50 Tex. Cr. 548, 99 S. W. 561.

659-90 Littlejohn v. S., 76 Ark. 481, 89 S. W. 463; Taylor v. S., 121 Ga. 348, 49 S. E. 303; Williams v. S., 123 Ga. 138, 51 S. E. 322; S. v. Mitchell, 130 Ia. 697, 107 N. W. 804; Cole v. S., 51 Tex. Cr. 89, 101 S. W. 218; Redman v. S. (Tex. Cr.), 108 S. W. 365; Jay v. S. (Tex. Cr.), 109 S. W. 131. *Compare* Wakefield v. S., 50 Tex. Cr. 124, 94 S. W. 1046.

660-95 Johnson v. S., 47 Tex. Cr. 523, 84 S. W. 824; Gregory v. S., 50 Tex. Cr. 73, 94 S. W. 1041 (must be made before arrest or their voluntary character must be established); Manning v. S., 51 Tex. Cr. 211, 98 S. W. 251 (admissible though deceased was not present).

Declarations made at time of surrender admissible as res gestae of the surrender. Gregory v. S., 50 Tex. Cr. 73, 94 S. W. 1041.

660-96 Carwile v. S., 148 Ala. 576, 39 S. 220; Morris v. S. 146 Ala. 66, 41 S. 274.

660-97 P. v. Weber, 149 Cal. 325, 86 P. 671. See Shelton v. S. (Ala.), 42 S. 30.

661-99 S. v. Bean, 77 Vt. 384, 60 A. 807.

662-5 S. v. Barber, 13 Idaho 65, 88 P. 418; S. v. Trail, 59 W. Va. 175, 53 S. E. 17.

Implied admissions. — Ante mortem statements by deceased made in presence of defendant to be admissible as implied admissions of defendant must be such as would naturally call for a denial. S. v. Baruth, 47 Wash. 283, 91 P. 977 (full discussion of the principles).

When defendant is under arrest, declarations of deceased are inadmissible though made in presence of defendant. S. v. Kelleher, 201 Mo. 614, 100 S. W. 470.

Woman dying as result of defendant's effort to produce a miscarriage may have been so far a conspirator in the crime as to render her declarations subsequent to but closely connected with the act admissible. Johnson v. P., 33 Colo. 224, 80 P. 133.

662-7 Gregory v. S., 148 Ala. 566, 42 S. 829; George v. S., 145 Ala. 41, 40 S. 961 (statement "I am cut" admissible); S. v. Blydenburg 135 Ia. 264, 112 N. W. 634.

665-17 See S. v. Roberts, 28 Nev. 350, 82 P. 100.

665-20 McMahon v. S., 46 Tex. Cr. 540, 81 S. W. 296; Johnson v. S., 47 Tex. Cr. 523, 84 S. W. 824.

666-23 In Missouri, apparently, the statement must have been made directly to defendant. S. v. Ethridge, 188 Mo. 352, 87 S. W. 495.

668-31 S. v. Ethridge, supra.

669-37 P. v. Morales, 143 Cal. 550, 77 P. 470; Young v. S., 49 Tex. Cr. 207, 92 S. W. 841 (chain by which deceased was tied to a tree).

Scar on a third person — the wound having been received in the same fight. Alarcon v. S., 47 Tex. Cr. 415, 90 S. W. 179. And in a prosecution for assault with intent to murder, the scar left by the wound inflicted on the prosecutor may be exhibited. Mayes v. S. (Tex. Cr.), 100 S. W. 386.

Section of wall bearing imprint of bloody hand. S. v. Miller, 71 N. J. L. 527, 60 A. 202.

669-38 P. v. Weber, 149 Cal. 325, 86 P. 671 (bullets may be arranged in a particular order when submitted to the jury).

669-39 S. v. McAnarney, 70 Kan. 679, 79 P. 137.

670-44 Roberts v. S., 123 Ga. 146, 51 S. E. 374 (curtain pole); S. v. Seery, 129 Ia. 259, 105 N. W. 511 (iron rod); S. v. Aspara, 113 La. 940, 37 S. 883; P. v. Bonier, 189 N. Y. 108, 81 N. E. 949 (blood-stained hammer); C. v. Karamakovic, 218 Pa. 405, 67 A. 650 (knife).

670-45 S. v. Walker, 133 Ia. 489, 110 N. W. 925.

Empty shells bearing same marks as other shells found on the person accused. Fuller v. S., 147 Ala. 35, 41 S. 774.

671-48 Turner v. S., 48 Tex. Cr. 585, 89 S. W. 975; S. v. Romano, 41 Wash. 241, 83 P. 1 (shells and gun allowed in evidence where the prosecutor was shot as well as cut, although the indictment was for the cutting only).

Box in which deceased kept his pistol, alleged to have been used by accused, admissible to identify the pistol. Shelton v. S., 144 Ala. 106, 42 S. 30.

671-50 S. v. Miller, 71 N. J. L. 527, 60 A. 202.

671-51 P. v. Antony, 146 Cal. 124, 79 P. 858 (bloody clothes found in trunk belonging jointly to defendant and his wife).

671-53 S. v. Aspara, 113 La. 940, 37 S. 883; S. v. Jeffries, 210 Mo. 302, 109 S. W. 614 (shoes of accused).

672-54 Pate v. S. (Ala.), 43 S. 343; Long v. S., 48 Tex. Cr. 175, 88 S. W. 203; Adams v. S., 48 Tex. Cr. 452, 93 S W. 116 (to show size of knife used); Sue v. S. (Tex. Cr.), 105 S. W. 804 (to show that the clothing was set on fire); Tinsley v. S. (Tex. Cr.), 106 S. W. 347 (admission harmless, where although there was no dispute as to the location of the wound, the clothing had been washed and no attempt to inflame the minds of the jury was made).

But the best evidence rule does not

apply and witnesses may testify to the holes without producing the garments. Underwood v. C., 27 Ky. L. R. 8, 84 S. W. 310.

May be taken to jury room but can only be used for the purpose for which introduced. Puryear v. S., 50 Tex. Cr. 454, 98 S. W. 258.

672-55 Venters v. S., 47 Tex. Cr. 280, 83 S. W. 832.

672-56 S. v. Gallman (S. C.), 60 S. E. 682.

673-58 Milton v. S., 47 Tex. Cr. 451, 83 S. W. 822.

Exposure of scar of a wound will not be permitted where there is no dispute as to the location of the wound. Simpson v. S., 48 Tex. Cr. 328, 87 S. W. 826.

673-61 S. v. Bailey, 79 Conn. 589, 65 A. 951 (skull and photograph of it, to show its condition and the injury); S. v. Lewis (Ia.), 116 N. W. 606.

Exhuming of decedent's skull, discretionary with the court. Moss v. S. (Ala.), 44 S. 598.

674-67 Moss v. S. (Ala.), 44 S. 598; P. v. Morales, 143 Cal. 550, 77 P. 470; S. v. Aspara, 113 La. 940, 37 S. 883; Long v. S., 48 Tex. Cr. 175, 88 S. W. 203.

Bullet found in the ground near the homicide though found one hundred days later. Hickey v. S., 51 Tex. Cr. 230, 102 S. W. 417.

674-68 S. v. Crea, 10 Idaho 88, 76 P. 1013; Clefford v. P., 229 Ill. 633, 82 N. E. 343; S. v. Lewis (Ia.), 116 N. W. 606; P. v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116; Long v. S., 48 Tex. Cr. 175, 88 S. W. 203; Alarcon v. S., 47 Tex. Cr. 415, 90 S. W. 179; Jackson v. S., 48 Tex. Cr. 648, 90 S. W. 34; Hickey v. S., 51 Tex. Cr. 230, 102 S. W. 417.

674-69 Watson v. S., 50 Tex. Cr. 171, 105 S. W. 509.

675-70 S. v. Gallman (S. C.), 60 S. E. 682.

Stick may be shown to be similar to one alleged to have been used by deceased, which has been lost. Wilson v. S., 49 Tex. Cr. 50, 90 S. W. 312.

675-71 S. v. Hazlett (N. D.), 113 N. W. 374.

676-75 P. v. Cook, 148 Cal. 334, 83 P. 43; Sanderson v. S. (Ind.), 82 N. E. 525; Welch v. C. (Ky.), 108 S. W. 863; S. v. Spaugh, 199 Mo. 147, 98 S. W. 55; S. v. Dickerson, 77 Ohio St. 34, 82 N. E. 969; S. v. Martin, 47 Or. 282, 83 P. 849.

Appearance bonds, given to appear and answer a charge of shooting at deceased, admissible. S. v. Goodson, 116 La. 388, 40 S. 771.

676-77 Clark v. P., 224 Ill. 554, 79 N. E. 941; S. v. High, 116 La. 79, 40 S. 538; P. v. Hodge, 141 Mich. 312, 104 N. W. 599; Clark v. S. (Neb.), 113 N. W. 211.

677-79 **Attempts** to commit other crimes and statements of an intention to commit them, come within the same principle. C. v. Snell, 189 Mass. 12, 75 N. E. 75.

677-81 S. v. Bailey, 190 Mo. 257, 88 S. W. 733; S. v. Roberts, 28 Nev. 350, 82 P. 100.

677-82 C. v. Snell, 189 Mass. 12, 75 N. E. 75.

677-83 S. v. Bailey, 190 Mo. 257, 88 S. W. 733.

678-85 S. v. Adams, 138 N. C. 688, 50 S. E. 765.

679-87 S. v. Miller, 73 S. C. 277, 53 S. E. 426; S. v. Smalls, 73 S. C. 516, 53 S. E. 976.

680-96 P. v. Woods, 147 Cal. 265, 81 P. 652.

681-5 P. v. Hodge, 141 Mich. 312, 104 N. W. 599.

681-7 P. v. Cook, 148 Cal. 334, 83 P. 43; Burge v. U. S., 26 App. Cas. (D. C.) 524.

682-9 Burge v. U. S., supra.

682-11 **Method of proof.** — Record of trial for another crime should be produced, as it is the best evidence, and hearsay is inadmissible. S. v. Andrews, 53 S. C. 257, 53 S. E. 423.

682-12 Green v. S., 125 Ga. 742, 54 S. E. 724.

682-13 Harrison v. S., 144 Ala. 20, 40 S. 57; Williams v. S., 147 Ala. 10, 41 S. 992 (non-expert may testify that wound was penetrating); Stovall v. S. (Tex. Cr.), 108 S. W. 699 (doctor may testify that wound ranged backward and upward).

Place of entrance and exit of bullet may be shown by direct testimony as a physical fact. P. v. Weber, 149 Cal. 325, 86 P. 671.

682-14 Hill v. S., 146 Ala. 51, 41 S. 621; S. v. Rutledge (Ia.), 113 N. W. 461.

683-15 Burkett v. S. (Ala.), 45

S. 682; Fay v. S. (Tex. Cr.), 107 S. W. 55 (that the wounds produced death).

683-16 Clemons v. S., 48 Fla. 9, 37 S. 647 (whether wounds could have been produced by naked fists).

683-19 P. v. Olsen, 1 Cal. App. 17, 81 P. 676.

684-22 Humphrey v. S., 74 Ark. 554, 86 S. W. 431.

684-23 Experienced graduates of medical schools may give their opinion though they had never had an actual case similar to the one at issue. Rice v. S., 49 Tex. Cr. 569, 94 S. W. 1024.

684-24 S. v. Robinson, 126 Ia. 69, 101 N. W. 634.

684-26 Morris v. C., 27 Ky. L. R. 145, 84 S. W. 560 (that a specified wound hastened death).

Place of entrance of bullet that caused death. Williams v. S., 147 Ala. 10, 41 S. 992.

685-28 Chemical examination of a third person's body admissible when such person was killed in the same way and as part of the same transaction, to prove the cause of death of the party whose death is in issue. P. v. Quimby, 134 Mich. 625, 96 N. W. 1061.

But it has been held that the result of such an examination of third person's body is inadmissible where its purpose is merely to show that the poison was kept by the accused and accessible to her some months before the death of the person with whose murder she is charged. P. v. Collins, 144 Mich. 121, 107 N. W. 1114.

685-31 Sufficient quantity of poison to cause death need not be proved to have been found in the body, before a jury can find that it was the actual cause of death; and the amount of arsenic found some time after death is not evidence of the amount in the body at the time of death. C. v. Danz, 211 Pa. 507, 60 A. 1070.

685-33 P. v. Quimby, 134 Mich. 625, 96 N. W. 1061.

686-35 Presumption that body and viscera remained in the care of keeper of the morgue where the autopsy was held until delivered to the undertaker. S. v. Daly, 210 Mo. 664, 109 S. W. 53.

686-36 See Nordan v. S., 143 Ala. 13, 39 S. 406.

687-42 Arsenical poisoning. Evidence that clothing and bed linen were soiled by vomiting and purging admissible, it appearing that these were symptoms of such poisoning. P. v. Bowers, 1 Cal. App. 501, 82 P. 553.

687-43 But the fact that with proper and immediate medical treatment deceased's life might have been saved is immaterial where no physician could be procured. Bonner v. S., 125 Ga. 237, 54 S. E. 143.

687-44 S. v. Baruth, 47 Wash. 283, 91 P. 977.

687-45 Daniel v. S., 126 Ga. 541, 55 S. E. 472.

Precise means by which death was caused need not be established. Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

Under Texas Pen. Code, 1895 art. 651, it must be shown that the alleged act of defendant was the complete cause of death. Armsworthy v. S., 48 Tex. Cr. 413, 88 S. W. 215.

689-52 S. v. O'Neall (S. C.), 60 S. E. 1121.

689-53 Heubner v. S., 131 Wis. 162, 111 N. W. 63. See McCowan v. S., 51 Tex. Cr. 205, 100 S. W. 1157; Berryman v. S., 51 Tex. Cr. 192, 101 S. W. 225; Hardin v. S. (Tex. Cr.), 106 S. W. 352.

690-55 P. v. Patrick, 182 N. Y. 131, 74 N. E. 843. See P. v. Staples, 149 Cal. 405, 86 P. 886; S. v. Blydenburg, 135 Ia. 264, 112 N. W. 634.

691-62 False statement admissible. S. v. Aspara, 113 La. 940, 37 S. 883.

Denial of identity. — Franklin v. S., 145 Ala. 669, 39 S. 979.

691-63 See Holder v. S. (Tenn.), 104 S. W. 225.

692-65 P. v. Soeder, 150 Cal. 12, 87 P. 1016 (evidence tending to show motive).

692-67 Ter. v. Price (N. M.), 91 P. 733 (explanatory evidence admissible).

692-71 Testimony as to wounds disclosed on an examination of accused after arrest, is not compelling him to be a witness against his will. S. v. Miller, 71 N. J. L. 527, 60 A. 202.

Comparison of spots on clothing of accused with spots which had been cut off and chemically examined, proper. S. v. Miller, supra.

693-74 P. v. Wood, 145 Cal. 659, 79 P. 367; S. v. Jeffries, 210 Mo. 302, 109 S. W. 614; C. v. Kovovic, 209 Pa. 465, 58 A. 857 (ownership of weapon).

693-75 **Testimony** concerning articles of bloody clothing, found a mile from the homicide and not shown to be connected with the accused is inadmissible. C. v. Johnson, 213 Pa. 607, 63 A. 134.

693-76 **Possession of poison may** be shown where death was caused by poison. S. v. Woodward, 132 Ia. 675, 108 N. W. 753.

694-77 Strieklan v. S. (Ala.), 44 S. 90 (handcuffs which deceased was trying to put on defendant at the time of the homicide); P. v. Jackson, 182 N. Y. 66, 74 N. E. 565; C. v. Kovovic, 209 Pa. 465, 58 A. 857.

694-78 Braham v. S., 143 Ala. 28, 38 S. 919.

694-79 **Possession by** defendant's wife, he having made a claim of ownership, may be shown. P. v. Antony, 146 Cal. 124, 79 P. 858.

694-82 S. v. Barnes, 47 Or. 592, 85 P. 998 (ring found in defendant's possession when arrested six weeks after the homicide); Morris v. S., 30 Tex. App. 95, 16 S. W. 757 (several months later).

695-86 S. v. Myers, 198 Mo. 225, 94 S. W. 242 (failure to attend funeral).

695-87 **Attempt to manufacture** evidence, suspicious. White v. S., 74 Ark. 491, 86 S. W. 296.

696-88 Hixon v. S. (Ga.), 61 S. E. 14 (expression of desire to flee); S. v. High, 116 La. 79, 40 S. 538 (desperateness of resistance to arrest with all the surrounding circumstances). P. v. Haxer, 144 Mich. 575, 108 N. W. 90 (resisting arrest); S. v. Finley, 193 Mo. 202, 91 S. W. 942; S. v. Spaugh, 199 Mo. 147, 98 S. W. 55 (shooting at a pursuer).

696-94 See S. v. Bailey, 190 Mo. 257, 88 S. W. 733.

696-95 C. v. Hargis, 124 Ky. 356, 30 Ky. L. R. 510, 99 S. W. 348. See Brown v. S., 142 Ala. 287, 38 S. 268; Ward v. C., 26 Ky. L. R. 1256, 83 S. W. 649.

697-98 Nordan v. S., 143 Ala. 13, 39 S. 406.

698-1 P. v. Weber, 149 Cal. 325, 86 P. 671; Roberts v. S., 123 Ga. 146, 51 S. E. 374; S. v. Hogan, 117 La. 863, 42 S. 352; S. v. Daly, 210 Mo. 664, 109 S. W. 53; P. v. Koerner, 117 App. Div. 40, 102 N. Y. S. 93 (inquiry as to whether defendant was shamming unconsciousness); Gray v. S., 47 Tex. Cr. 375, 83 S. W. 705.

698-5 Glass v. S., 147 Ala. 50, 41 S. 727; P. v. Haxer, 144 Mich. 575, 108 N. W. 90 (resistance to arrest).

698-7 Chancellor v. S., 76 Ark. 215, 88 S. W. 880 (when confronted with the weapon used); Boles v. P., 37 Colo. 41, 86 P. 1030.

699-16 Pate v. S. (Ala.), 43 S. 343 (voluntary surrender inadmissible); Sneed v. Ter. 16 Okla. 641, 86 P. 70; Upton v. S., 48 Tex. Cr. 289, 88 S. W. 212 (voluntary surrender inadmissible).

700-19 S. v. Aspara, 113 La. 940, 37 S. 883 (pistol of same caliber); Morgan v. Ter. 16 Okla. 530, 85 P. 718; Tinsley v. S. (Tex. Cr.), 106 S. W. 347.

Possession by defendant of the rifle by which deceased was shot, a few minutes before, may be shown. Medley v. S. (Ala.), 47 S. 218.

700-20 S. v. Green, 115 La. 1041, 40 S. 451 (pistol found on accused when he was arrested six months later); P. v. Weick, 123 App. Div. 328, 107 N. Y. S. 968 (abortion instruments).

700-23 S. v. Jeffries, 210 Mo. 302, 109 S. W. 614 (weapon found near scene of homicide which formerly belonged to defendant and which was traced to possession of alleged accomplice).

That a weapon owned by deceased is missing and was similar to the one found in the possession of the accused may be shown. Shelton v. S., 144 Ala. 106, 42 S. 30.

701-27 Benjamin v. S., 148 Ala. 671, 41 S. 739; P. v. Easton, 148 Cal. 50, 82 P. 840 (admissible where defense is insanity). C. v. Kovovic, 209 Pa. 465, 58 A. 857. See Franklin v. S., 145 Ala. 669, 39 S. 979.

701-28 Charba v. S., 48 Tex. Cr. 316, 87 S. W. 829.

702-32 S. v. White, 189 Mo. 339, 87 S. W. 1188.
702-36 S. v. Spaugh, 199 Mo. 147, 98 S. W. 55.
703-38 See Rose v. S., 144 Ala. 114, 42 S. 21 (cannot testify why he left the state).
703-39 Brown v. S., 88 Miss. 166, 40 S. 737. See P. v. Easton, 148 Cal. 50, 82 P. 840.
704-46 *Compare* S. v. Baker, 110 Mo. 7, 19 S. W. 222, 33 Am. St. 414.
704-47 P. v. Easton, 148 Cal. 50, 82 P. 840.
704-51 Moss v. S. (Ala.), 44 S. 598.
704-52 S. v. Jeffries, 210 Mo. 302, 109 S. W. 614 (there should be some other evidence tending to connect the defendant with the crime). **Evidence** identifying the shoe used to compare the tracks is admissible. Du Bose v. S., 148 Ala. 560, 42 S. 862.
705-57 S. v. Sanders, 75 S. C. 409, 56 S. E. 35.
705-60 See S. v. Jeffries, 210 Mo. 302, 109 S. W. 614.
706-64 Du Bose v. S., 148 Ala. 560, 42 S. 862.
Opinion of witness that tracks coming and going were made by the same person, admissible. Porch v. S., 50 Tex. Cr. 335, 99 S. W. 102. And he may state the direction in which tracks appeared to be going. Hickey v. S., 51 Tex. Cr. 230, 102 S. W. 417.
706-65 Witness may testify that certain shoes would make the same kind of track as certain tracks that were shown to exist at a place where the defendant had been seen. Turner v. S., 48 Tex. Cr. 585, 89 S. W. 975.
707-68 Peculiar marks need not be shown. S. v. Adams, 138 N. C. 688, 50 S. E. 765.
Handprints. — Where accused voluntarily placed his hand over a bloody handprint on the wall, testimony as to the comparison is competent. S. v. Miller, 71 N. J. L. 527, 60 A. 202, and where an impression and photograph of defendant's hand had been taken with his consent and after warning him, there may be a comparison made with hand prints of the scene of the homicide. Powell v. S., 50 Tex. Cr. 592, 99 S. W. 1005.
Trailing by bloodhounds. — Evidence of the result of trailing by bloodhounds is admissible where the training and reliability of the dogs is shown and they are started from a point at which the guilty party appears to have been. S. v. Dickerson, 77 Ohio St. 34, 82 N. E. 969; Richardson v. S., 145 Ala. 46, 41 S. 82 (full cross-examination allowed as to the breeding and training of the dogs and the details of the hunt). See infra, "Identity," 931-97 et seq.
Actions of hounds in smelling around defendant and making demonstrations, irrelevant. Wallace v. S., 48 Tex. Cr. 318, 87 S. W. 1041. See "Identity."
707-69 Anderson v. S. (Tex. Cr.), 110 S. W. 54 (prior purchase of shells similar to those found at the scene).
707-71 *Compare* Gregory v. S., 140 Ala. 16, 37 S. 259 (defendant may not in Alabama testify as to his reasons for having a weapon).
709-87 P. v. Gillette, 191 N. Y. 107, 83 N. E. 680.
709-88 McCorquodale v. S. (Tex. Cr.), 98 S. W. 879.
710-91 S. v. Daly, 210 Mo. 664, 109 S. W. 53.
710-92 S. v. Guthrie, 145 N. C. 492, 59 S. E. 652.
711-99 See Rawlins v. S., 124 Ga. 31, 52 S. E. 1.
712-9 Declarations of defendant of affection for deceased are hearsay and self-serving and inadmissible to rebut testimony as to threats. S. v. Baudoin, 115 La. 837, 40 S. 239.
713-11 Johnson v. S., 142 Ala. 1, 37 S. 937; Walls v. S., 126 Ga. 86, 54 S. E. 815.
But the fact that the prosecution has made out a prima facie case against defendant does not prevent its adding proof of a motive in its case in chief. P. v. Cook, 148 Cal. 334, 83 P. 43.
714-16 Tipton v. S., 140 Ala. 39, 37 S. 231; Ward v. C., 29 Ky. L. R. 62, 91 S. W. 700; Powers v. C., 29 Ky. L. R. 277, 92 S. W. 975 (statement of dislike); S. v. Teachey, 138 N. C. 599, 50 S. E. 232.
715-21 Shirley v. S., 144 Ala. 35, 40 S. 269; Sylvester v. S., 46 Fla. 166, 35 S. 142 (merits of controversy inadmissible).

715-22 Kennedy v. S., 140 Ala. 37 S. 90; Clemens v. S. (Miss.), 45 S. 834 (fact that accused attributed the killing of his friend by a third person, to the influence of deceased); Moore v. S., 49 Tex. Cr. 499, 96 S. W. 321 (indictment against deceased for assault on defendant admissible).

Objections of deceased to defendant's intimacy with her sister may be shown. Gallegos v. S., 48 Tex. Cr. 58, 85 S. W. 1150.

Confession of his wife to defendant of illicit relations with deceased. Shipp v. C., 124 Ky. 643, 30 Ky. L. R. 904, 99 S. W. 945.

Note from defendant warning deceased to keep his cattle off his land, admissible. Long v. S., 48 Tex. Cr. 175, 88 S. W. 203.

Religious views—difference in may be shown. Long v. S., supra.

715-23 Spencer v. C., 32 Ky. 880, 107 S. W. 342; S. v. Clark, 119 La. 733, 44 S. 449.

715-26 Sanderson v. S. (Ind.), 82 N. E. 525.

717-35 Burley v. S., 130 Ga. 343, 60 S. E. 1006; S. v. Andrews, 73 S. C. 257, 53 S. E. 423.

717-37 P. v. Easton, 148 Cal. 50, 82 P. 840; Mathley v. C., 120 Ky. 389, 27 Ky. L. R. 785, 86 S. W. 988; McCorquodale v. S. (Tex. Cr.), 98 S. W. 879; S. v. Bean, 77 Vt. 384, 60 A. 809.

717-38 **Jealousy** may be shown. S. v. Guthrie, 145 N. C. 492, 59 S. E. 652; Reeves v. S., 47 Tex. Cr. 340, 83 S. W. 803.

718-41 **Fact that bastardy proceedings** had been instituted before the marriage of the parties and that seduction proceedings were pending, is admissible. Nordan v. S., 143 Ala. 13, 39 S. 406.

718-46 Fowler v. S. (Ala.), 45 S. 913.

719-49 Green v. S., 125 Ga. 742, 54 S. E. 724.

719-50 **Fact of criminal intimacy** of deceased with another man, must have been communicated to defendant. Groce v. Ter. (Ariz.), 94 P. 1108.

719-52 Lawson v. S. (Ind.), 84 N. E. 974; Rice v. S., 49 Tex. Cr. 569, 94 S. W. 1024.

720-53 P. v. Bowers, 1 Cal. App. 501, 82 P. 553; S. v. Legg, 59 W. Va. 315, 53 S. E. 545.

720-55 See Sasser v. S., 129 Ga. 541, 59 S. E. 255 (*cit.* Encyc. of Ev.).

721-60 Littlejohn v. S., 76 Ark. 481, 89 S. W. 463; P. v. Feld, 149 Cal. 464, 86 P. 1100; P. v. Dinser, 49 Misc. 82, 98 N. Y. S. 314; Fay v. S. (Tex. Cr.), 107 S. W. 55.

Illicit relations with sister of deceased (Gallegos v. S., 48 Tex. Cr. 58, 85 S. W. 1150), or daughter. S. v. Martin, 47 Or. 282, 83 P. 849.

721-61 S. v. Page (Mo.), 110 S. W. 1057; Menefee v. S., 50 Tex. Cr. 249, 97 S. W. 486; Anderson v. S. (Tex. Cr.), 110 S. W. 54.

721-62 S. v. Page, supra (telegram sent to deceased's wife informing her of the homicide).

721-67 **Family feud** may be shown (Rawlins v. S., 124 Ga. 31, 52 S. E. 1); but the connection of defendant with the difficulties must first be shown. Jones v. C., 32 Ky. 598, 106 S. W. 802.

722-69 Johnson v. S., 128 Ga. 71, 57 S. E. 84.

722-70 Bowen v. S., 140 Ala. 65, 37 S. 233 (that a watch which deceased had won from accused by gambling had disappeared).

722-71 P. v. Antony, 146 Cal. 124, 79 P. 858; S. v. Bailey, 79 Conn. 589, 65 A. 951; Thurman v. C., 107 Va. 912, 60 S. E. 99 (receipt given by deceased tending to show his possession of money, admissible).

723-73 P. v. Soeder, 150 Cal. 12, 87 P. 1016 (desire to get married); Turner v. S., 48 Tex. Cr. 585, 89 S. W. 975 (payment of mortgage).

It may be shown that defendant had sold property upon which deceased already had a mortgage. Carwile v. S., 148 Ala. 576, 39 S. 220.

725-87 P. v. Weber, 149 Cal. 325, 86 P. 671.

725-88 P. v. Soeder, 150 Cal. 12, 87 P. 1016; Johnson v. S., 130 Ga. 22, 60 S. E. 158; S. v. Woodward, 132 Ia. 675, 108 N. W. 753.

726-95 P. v. Cook, 148 Cal. 334, 83 P. 43.

726-99 Maloy v. S., 52 Fla. 101, 41 S. 791 (personal bad feeling in connection with the litigation need not be shown); Ball v. C., 31 Ky. L. R. 188, 101 S. W. 956.

726-1 Zipperian v. P., 33 Colo. 134, 79 P. 1018; Smith v. S., 48 Fla. 307, 37 S. 573; Ball v. C., 31 Ky. L. R. 188, 101 S. W. 956.

727-4 Hayes v. S., 126 Ga. 95, 54 S. E. 809; Porch v. S., 50 Tex. Cr. 335, 99 S. W. 102.

728-9 Hayes v. S., 126 Ga. 95, 54 S. E. 809; Ball v. C., 31 Ky. L. R. 188, 101 S. W. 956.

728-12 **Motive immaterial.** — No motive for the crime need be shown, and it is immaterial what was the existing motive, except as bearing upon the questions of intent, malice, etc. Clifford v. P., 229 Ill. 633, 82 N. E. 343; Cupps v. S., 120 Wis. 504, 97 N. W. 210, 98 N. W. 546; S. v. Adams, 138 N. C. 688, 50 S. E. 765; Campbell v. S., 124 Ga. 432, 52 S. E. 914 (proof of motive unnecessary to support the presumption of malice from unlawful killing); S. v. Thrailkill, 73 S. C. 314, 53 S. E. 482; Ward v. S. (Ala.), 45 S. 221; S. v. Feeley, 194 Mo. 300, 92 S. W. 663; Rains v. C., 29 Ky. L. R. 66, 92 S. W. 276; S. v. Barrington, 198 Mo. 23, 95 S. W. 235; Holder v. S. (Tenn.), 104 S. W. 225.

Failure to prove motive has been said to tend to prove innocence. S. v. Francis, 199 Mo. 561, 98 S. W. 11.

Testimony should be reasonably substantial before jury will be justified in concluding that the alleged motive induced the commission of the act. S. v. Gordon, 199 Mo. 561, 98 S. W. 39.

Erratum. — "**Weight and sufficiency**" should appear on page 729 as main subhead, j, under IV, 14, Y.

728-13 S. v. Levy, 9 Idaho 483, 75 P. 227; Allen v. S., 88 Miss. 159, 40 S. 744 (absence of motive very important where the evidence is circumstantial).

Motive by itself, insufficient to sustain a conviction. P. v. Staples, 149 Cal. 405, 86 P. 886.

729-15 See Drane v. S. (Miss.), 45 S. 149; S. v. Kelleher, 201 Mo. 614, 100 S. W. 470; S. v. Williams, 28 Nev. 395, 82 P. 353.

Comment improper. — S. v. Ruck, 194 Mo. 416, 92 S. W. 706; Wallace v. S., 46 Tex. Cr. 341, 81 S. W. 966.

729-17 Porch v. S., 50 Tex. Cr. 335, 99 S. W. 102.

729-20 Rains v. S., 29 Ky. L. R. 66, 92 S. W. 276; S. v. Gillis, 73 S. C. 318, 53 S. E. 487.

Premeditated design may be established by circumstantial evidence. Pugh v. S. (Fla.), 45 S. 1023.

730-22 Bowen v. S., 140 Ala. 65, 37 S. 233; Young v. S., 121 Ga. 334, 49 S. E. 256; Campbell v. S., 123 Ga. 533, 51 S. E. 644; S. v. Levy, 9 Idaho 483, 75 P. 227; S. v. Francis, 199 Mo. 671, 98 S. W. 11.

730-27 See Johnson v. S., 128 Ga. 71, 57 S. E. 84.

731-28 S. v. Blydenburg, 135 Ia. 264, 112 N. W. 634; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

731-32 **Writ of possession,** under which deceased was assisting an officer in evicting defendant, is admissible without direct evidence that lands described were those from which defendant was sought to be evicted. Williams v. S., 147 Ala. 10, 41 S. 992.

731-33 Smith v. S. (Tex. Cr.), 105 S. W. 182.

Previous threats by defendant that he would resist ejection by killing are admissible. Williams v. S., 147 Ala. 10, 41 S. 992.

732-43 Coile v. S., 8 Ohio C. C. (N. S.) 596 (illegality of warrant immaterial where premeditation is shown).

732-45 Yates v. S., 127 Ga. 813, 56 S. E. 1017; Cortez v. S., 47 Tex. Cr. 10, 83 S. W. 812.

733-47 **Card** containing offer of reward for arrest of defendant, admissible. Harper v. S., 129 Ga. 770, 59 S. E. 792.

733-51 See Hull v. S., 50 Tex. Cr. 607, 100 S. W. 403.

734-54 **Threat to kill** any officer attempting to arrest defendant is inadmissible where defendant had reference to another and entirely distinct matter of controversy. Earles v. S., 47 Tex. Cr. 559, 85 S. W. 1.

734-57 P. v. Woods, 147 Cal. 265, 81 P. 652 (fact that defendant and his companions were armed with burglars tools and were returning from an unsuccessful attempt at burglary).

735-58 **Facts tending to show** that defendant was a fugitive from justice, are admissible. Harper v. S., 129 Ga. 770, 59 S. E. 792.

735-59 S. v. Spaugh, 200 Mo.

571, 98 S. W. 55; Earles v. S. (Tex. Cr.), 106 S. W. 138 (instructions to arrest).

Ordinances giving a police officer power to arrest without a warant, are admissible. Earles v. S. (Tex. Cr.), 106 S. W. 138.

735-61 In Kentucky, a justice of the peace cannot appoint a special bailiff to execute a warrant of arrest and such a warrant is therefore not evidence of official capacity. Neeley v. C., 123 Ky. 1, 29 Ky. L. R. 408, 93 S. W. 596.

735-63 **Threats** by deceased may be shown. Hammond v. S., 147 Ala. 79, 41 S. 761.

Ordinances of city for violation of which an arrest was being made. See S. v. Coleman, 186 Mo. 151, 84 S. W. 978.

Peace warrant and what was done under it may be considered only to throw light on the situation of the parties and the motives prompting their conduct. Neely v. C., 123 Ky. 1, 29 Ky. L. R. 408, 93 S. W. 596.

736-65 **Dangerous character** of deceased may be shown (Hammond v. S., 147 Ala. 79, 41 S. 761), but not his reputation among peace officers especially. Stevens v. C., 124 Ky. 32, 30 Ky. L. R. 290, 98 S. W. 284.

736-66 See Warford v. P., 41 Colo. 203, 92 P. 24 (case where decedent was shot in a fracas after refusing to obey an officer).

736-67 **Defendant** limited to proof of the charges against deceased for violation of ordinances; details of his acts and conduct are inadmissible. Hammond v. S., 147 Ala. 79, 41 S. 761.

736-72 See Turley v. S., 74 Neb. 471, 104 N. W. 934 (decedent's peaceable and rightful possession may be shown by lease to him).

737-76 **Where the difficulty** was precipitated by the threat of deceased to take possession of a hog on the premises of defendant, claimed by deceased, evidence that deceased had the general reputation of not being able to distinguish his own hogs from others is irrelevant. Maloy v. S., 52 Fla. 101, 41 S. 791.

737-77 S. v. McGinnis, 12 Idaho 336, 85 P. 1089 (negligent shooting on highway); Westrup v. C., 123 Ky. 95, 29 Ky. L. R. 519. 93 S. W. 646 (evidence insufficient to show negligence in providing medical attendance).

Statement by defendant of surprise and grief on being told that the deceased was shot, inadmissible. Saye v. S., 50 Tex. Cr. 569, 99 S. W. 551.

Greater speed in driving than an ordinance authorized, is evidence of negligence. S. v. Moore, 129 Ia. 514, 106 N. W. 16.

Character of defendant as a cautious and prudent officer may be shown. Saye v. S., 50 Tex. Cr. 569, 99 S. W. 551.

737-78 Creech v. C., 32 Ky. L. R. 808, 107 S. W. 212. See also supra, 652-38.

738-82 See Brundige v. S., 49 Tex. Cr. 596, 95 S. W. 527.

738-84 P. v. Smith, 151 Cal. 619, 91 P. 511; Pratt v. S., 50 Tex. Cr. 227, 96 S. W. 8 (physical and mental degeneration as bearing upon the mental status).

Subsequent insanity irrelevant upon the issue of adequate cause. Sartin v. S., 51 Tex. Cr. 571, 103 S. W. 875.

Preliminary showing of self-defense must be made. Dunn v. S., 143 Ala. 67, 39 S. 147; Robinson v. S. (Ala.), 45 S. 916.

741-3 S. v. Hazlett (N. D.), 113 N. W. 374; Hancock v. S., 47 Tex. Cr. 3, 83 S. W. 696.

742-5 Mitchell v. S., 51 Tex. Cr. 71, 96 S. W. 929; Roch v. S. (Tex. Cr.), 105 S. W. 202 (that prosecutor was violating an express agreement).

Attack by prosecutor on defendant five days before could not be a justification and evidence of it was immaterial. Roper v. U. S. (Ind. Ter.), 104 S. W. 584.

742-6 Sanders v. S., 50 Tex. Cr. 430, 83 S. W. 712. See Rice v. S., 51 Tex. Cr. 255, 103 S. W. 1156.

Threats made a week before, by deceased, inadmissible. S. v. Edwards, 203 Mo. 528, 102 S. W. 520.

742-8 S. v. Spivey, 191 Mo. 87, 90 S. W. 81 (threats to whip defendant).

742-10 Bays v. S., 50 Tex. Cr. 548, 99 S. W. 561; Redman v. S. (Tex. Cr.), 108 S. W. 365 (sudden transport of passion necessary). See Stewart v. S. (Tex. Cr.), 106 S. W. 685.

743-13 See S. v. Harmon (S. C.), 60 S. E. 230.

Homicide immediately after discovery of the parties in adultery, reduces the crime to manslaughter. Logan v. S. (Ala.), 46 S. 480.

743-15 Killing must have been on first meeting after acquiring knowledge to be justification. Orange v. S., 47 Tex. Cr. 337, 83 S. W. 385.

743-17 See Thomas v. S. (Ala.), 43 S. 371.

743-20 Orange v. S., 47 Tex. Cr. 337, 83 S. W. 385.

Admissible where defense is insulting conduct to defendant's wife. Venters v. S., 47 Tex. Cr. 280, 83 S. W. 832 (fact that other men had obtained divorces for deceased's intimate relations with their wives is incompetent, however).

Rebuttal evidence of good character for chastity can only be given after evidence of his bad character has been given by direct evidence; it is insufficient that some characteristic of deceased has been incidentally brought out. Gregory v. S., 50 Tex. Cr. 73, 94 S. W. 1041.

744-30 Gossett v. S., 123 Ga. 431, 51 S. E. 394. But see Jones v. S., 51 Tex. Cr. 472, 101 S. W. 993 (prior acts inadmissible to prove the "general character" of the female relative, but, apparently, such acts known to defendant would be admissible).

745-35 Shipp v. C., 30 Ky. L. R. 904, 99 S. W. 945; Sturgeon v. C., 31 Ky. L. R. 536, 102 S. W. 812.

745-37 Hill v. S. (Tex. Cr.), 106 S. W. 685.

745-38 Truth or falsity immaterial. Melton v. S., 47 Tex. Cr. 451, 83 S. W. 822; Bays v. S., 50 Tex. Cr. 548, 99 S. W. 561; Stewart v. S. (Tex. Cr.), 106 S. W. 685; Hill v. S. (Tex. Cr.), 106 S. W. 145.

745-41 Redman v. S. (Tex. Cr.), 108 S. W. 365.

747-54 S. v. Nowells, 135 Ia. 53, 109 N. W. 1016 (to show whether powder stains would necessarily exist).

748-56 Nordan v. S., 143 Ala. 13, 39 S. 406 (defendant may testify to a threat of deceased to take her own life).

Erratum. — For the word "and" substitute "an act".

748-60 Miera v. Ter. (N. M.), 8 P. 586 (full discussion).

Position of body is sometimes of considerable importance upon the question of suicide. S. v. Lucas, 122 Ia. 141, 97 N. W. 1003.

748-61 Invitation to another to spend the night with him is inadmissible as a self-serving declaration. Sasser v. S., 129 Ga. 541, 59 S. E. 255.

749-64 Any evidence which would be competent if the third person were being tried is competent in behalf of the defendant. Harrison v. S., 47 Tex. Cr. 393, 83 S. W. 699.

750-70 Porch v. S., 50 Tex. Cr. 335, 99 S. W. 102.

751-74 S. v. Cremeans (W. Va.), 57 S. E. 405.

Affray. — Where the killing was in an affray and the defense is self-defense, evidence of the threats of a third person, a party to the affray, is admissible. S. v. Gaylord, 70 S. C. 415, 50 S. E. 20.

752-75 S. v. Bandoin, 115 La. 837, 40 S. 239; Porch v. S., supra.

Threats by deceased to kill a third person, inadmissible, unless such person is otherwise connected with the homicide. McCorquodale v. S. (Tex. Cr.), 98 S. W. 879.

Fact that deceased had certain enemies and was apprehensive of harm from them, is too remote. Wallace v. S., 46 Tex. Cr. 341, 81 S. W. 966.

752-76 Johnson v. S., 48 Tex. Cr. 423, 88 S. W. 223 (where alleged motive was robbery, possession of money by a third person who would not naturally have had it, may be shown by defendant).

754-87 P. v. Williamson, 6 Cal. App. 336, 92 P. 313.

754-88 Casteel v. S., 73 Ark. 152, 83 S. W. 953.

754-89 Prior disagreements may be shown. Parsons v. P., 218 Ill. 386, 75 N. E. 993.

754-91 See S. v. Botha, 27 Utah 289, 75 P. 731.

756-5 Degree of intoxication of deceased may be shown, after proof of overt act by deceased. Neilson v. S., 146 Ala. 683, 40 S. 221.

757-10 Ellzey v. S. (Miss.), 37 S. 837 (that defendant's shirt was cut).

757-12 P. v. Wright, 144 Cal. 161, 89 P. 364 (defendant may explain how it happened that deceased was shot in the back of the neck).

758-14 S. v. Cather, 121 Ia. 106, 96 N. W. 722 (a club).

758-15 Cole v. S., 51 Tex. Cr. 89, 101 S. W. 218.

Defendant may testify that he saw a pistol on decedent the day prior to the homicide. Kennedy v. C., 31 Ky. L. R. 546, 102 S. W. 863.

758-17 **Irrelevant** in the absence of any testimony showing justification. Gibbs v. S. (Ala.), 47 S. 65.

758-19 See Lee v. S., 78 Ark. 77, 93 S. W. 754.

State may show that deceased when searched immediately after the shooting had no weapon. Jackson v. S., 147 Ala. 699, 41 S. 178, or only a pocket knife, found closed and in his pocket. Baysinger v. Ter., 15 Okla. 386, 82 P. 728.

Weapon of deceased not loaded can not be shown. Roberts v. S., 48 Tex. Cr. 378, 88 S. W. 221.

759-23 P. v. Wright, 144 Cal. 161, 77 P. 877.

760-28 P. v. Taylor, 177 N. Y. 237, 69 N. E. 534.

Belief of defendant that deceased was jealous of him on account of his supposed friendship for the wife of the decedent is admissible. P. v. Ryan (Cal.), 92 P. 853.

760-29 See S. v. Emerson, 78 S. C. 974, 58 S. E. 974.

761-34 See S. v. Kennedy, 207 Mo. 528, 106 S. W. 57.

Inadmissible where unknown to defendant. Pratt v. S. (Tex. Cr.), 109 S. W. 138.

761-40 C. v. Thomas, 31 Ky. L. R. 899, 104 S. W. 326.

762-41 Humber v. C., 31 Ky. L. R. 606, 102 S. W. 1179; S. v. Rochester, 72 S. C. 194, 51 S. E. 685.

764-51 **Application of defendant** to have deceased put under bond to keep the peace is inadmissible, being a mere self-serving declaration. S. v. Atchley, 186 Mo. 174, 84 S. W. 984.

764-55 **Fact** that defendant left deceased in order to avoid trouble, but was followed by him, is competent. Moseley v. S., 89 Miss. 802, 41 S. 384.

765-58 S. v. Blee, 133 Ia. 725, 111 N. W. 19 (evidence as to who was the aggressor in a former affray).

Details of a previous difficulty are admissible to determine who was the aggressor in the instant case, proof of an overt act by the deceased having been made. Brown v. S., 88 Miss. 166, 40 S. 737; Brown v. S., 87 Miss. 800, 40 S. 1009. But see infra, 780-34.

Defendant's refusal to assent to immediate marriage of the deceased with his daughter, admissible. Kennedy v. S., 140 Ala. 1, 37 S. 90.

765-59 Morris v. S., 146 Ala. 66, 41 S. 274.

766-61 **Aggravated trespasses** by defendant tend to show that he was the aggressor. S. v. Crump, 116 La. 978, 41 S. 229.

766-62 **Details** of previous quarrels, admissible. Pratt v. S. (Tex. Cr.), 109 S. W. 138. But see infra, 780-34.

766-64 Shields v. S., 87 Miss. 429, 39 S. 1010; Moseley v. S., 89 Miss. 802, 41 S. 384.

767-67 Brooks v. S. (Ark.), 108 S. W. 205; Burroughs v. U. S., 6 Ind. Ter. 164, 90 S. W. 8; S. v. Rideau, 116 La. 245, 40 S. 691; S. v. Atchley, 186 Mo. 174, 84 S. W. 985; Bethune v. S., 49 Tex. Cr. 166, 90 S. W. 1014.

Uncommunicated threats. — S. v. Powell, 5 Penne. (Del.) 24, 61 A. 966; S. v. Blee, 133 Ia. 725, 111 N. W. 19; Newton v. C., 31 Ky. L. R. 327, 102 S. W. 264; Sinclair v. S., 87 Miss. 330, 39 S. 522; Wheeler v. C., 120 Ky. 697, 27 Ky. L. R. 1090, 87 S. W. 1106; S. v. Birks, 199 Mo. 263, 97 S. W. 578; S. v. Kelleher, 201 Mo. 614, 100 S. W. 470; S. v. Edwards, 203 Mo. 528, 102 S. W. 520; S. v. Jackman (Nev.), 91 P. 143; S. v. Scaduto, 74 N. J. L. 279, 65 A. 908; S. v. Doris (Or.), 94 P. 44 (*cit.* Encyc. of Ev.). See infra, 788-73.

Inadmissible where there is no claim that the defendant was not the aggressor (Martin v. S., 144 Ala. 8, 40 S. 275; Fleming v. S. (Ala.), 43 S. 219; Oates v. S. (Ala.), 47 S. 74; S. v. Peace, 121 La. —, 47 S. 28); or, on the other hand, where it is admitted that the deceased was the aggressor. Brooks v. S. (Ark.), 108 S. W. 205.

Direct evidence. — Existence of it renders uncommunicated threats inadmissible upon the issue of who was the aggressor. S. v. Barber, 13 Idaho 65, 88 P. 418.

Such threats need not be actually

directed against the defendant. C. v. Thomas, 31 Ky. L. R. 899, 104 S. W. 326.

Threats made merely introductory to the shooting are inadmissible, as "words, however opprobrious they may be, do not justify an assault." Scott v. S., 75 Ark. 142, 86 S. W. 1004.

Threats against a third person may be shown where the defense is a killing in defence of such person. S. v. Hennessy (Nev.), 90 P. 221.

767-68 P. v. Smith, 151 Cal. 619, 91 P. 511; S. v. Rutledge (Ia.), 113 N. W. 461 (that defendant was a large robust man who would use weapons when angry); Humber v. C., 31 Ky. L. R. 606, 102 S. W. 1179; Bryant v. S. (Tex. Cr.), 100 S. W. 371; Newcomb v. S., 49 Tex. Cr. 550, 95 S. W. 1048. See S. v. Hough, 138 N. C. 663, 50 S. E. 709; S. v. Doris (Or.), 94 P. 44 (*cit.* Encyc. of Ev.).

Disparity in size and weight having been shown by defendant, state may show the health and physical condition of deceased. S. v. Beckner, 194 Mo. 281, 91 S. W. 892.

Fact that both feet of deceased had been amputated, and that he could stand erect only by holding on to something. Hill v. S., 146 Ala. 51, 41 S. 621.

768-69 Bearden v. S., 47 Tex. Cr. 271, 83 S. W. 808.

768-71 Stubs worn by deceased whose feet had been amputated are admissible. Hill v. S., 146 Ala. 51, 41 S. 621.

768-74 S. v. Barber, 13 Idaho 65, 88 P. 418 (conclusion of witness inadmissible).

768-75 Non-expert may state that deceased was not a robust and stout looking man. Cole v. S., 51 Tex. Cr. 89, 101 S. W. 218.

768-77 See S. v. Usher (Ia.), 111 N. W. 811.

769-78 Robinson v. S. (Ala.), 45 S. 916.

769-79 Addiction to use of cocaine and its effect. Moseley v. S., 89 Miss. 802, 41 S. 384.

769-82 Admissible only (a) where there is evidence tending to show self-defense and (b) where the evidence is wholly circumstantial and the character of the transaction is in doubt. S. v. Exum., 138 N. C. 599, 50 S. E. 283.

769-83 See Kennedy v. C., 31 Ky. L. R. 546, 102 S. W. 863 (proved by reputation).

770-85 Rogers v. S., 144 Ala. 32, 40 S. 572; Jackson v. S., 147 Ala. 699; 41 S. 178; Bluett v. S. (Ala.), 44 S. 84; Warrick v. S., 125 Ga. 133, 53 S. E. 1027.

771-90 Green v. S., 143 Ala. 12, 39 S. 362; S. v. Coleman, 119 La. 669, 44 S. 338. See S. v. Stukes, 73 S. C. 386, 53 S. E. 643.

771-91 Kipley v. P., 215 Ill. 358, 74 N. E. 379; C. v. Tircinski, 189 Mass. 257, 75 N. E. 261; S. v. Zorn, 202 Mo. 12, 100 S. W. 591; S. v. Roderick, 77 Ohio St. 301, 82 N. E. 1082; S. v. Thompson, 49 Or. 46, 88 P. 583 (to characterize the nature of the assault).

771-92 S. v. Rideau, 116 La. 245, 40 S. 691; S. v. Thompson, 49 Or. 46, 88 P. 583.

772-95 Serna v. S. (Tex. Cr.), 105 S. W. 795 (fact that deceased had committed rape, inadmissible).

Question limited to character of deceased for "peace and quiet" held improper; it should embrace the questions whether he was a "violent, dangerous, turbulent, and bloodthirsty man." Tribble v. S., 145 Ala. 23, 40 S. 938.

On cross-examination of witness who has testified to quarrelsome character of deceased, details of a personal difficulty with him are inadmissible. St. Clair v. S., 49 Tex. Cr. 479, 92 S. W. 1095.

772-96 Desperate character when drinking. Crow v. S., 48 Tex. Cr. 419, 88 S. W. 814; P. v. Lamar, 148 Cal. 564, 83 P. 993. See U. S. v. Densmore, 12 N. M. 99, 75 P. 31.

773-98 Jame v. Ter. (Ariz.), 94 P. 1092; S. v. Barber, 13 Idaho 65, 88 P. 418. *Compare* S. v. Feeley, 194 Mo. 300, 92 S. W. 663.

773-99 S. v. Thompson, 49 Or. 46, 88 P. 583.

774-3 See P. v. Lamar, 148 Cal. 564, 83 P. 993.

774-4 Green v. S., 143 Ala. 2, 39 S. 362; S. v. Zorn, 212 Mo. 12, 100 S. W. 591.

Same rule applies in case of assault with intent to kill. Roch v. S. (Tex. Cr.), 105 S. W. 202.

774-7 Osborn v. S., 164 Ind. 262, 73 N. E. 601.

777-15 Jackson v. S., 147 Ala. 699, 41 S. 178; Warrick v. S., 125 Ga. 133, 53 S. E. 1027; McCoy v. S. (Miss.), 44 S. 814; S. v. Roderick, 77 Ohio St. 301, 82 N. E. 1082; S. v. Thrailkill, 71 S. C. 136, 50 S. E. 551.

Specific acts may be considered by the jury where admitted by agreement of counsel. Long v. S., 127 Ga. 350, 56 S. E. 444.

"**Did you hear** people generally say that Scott Davenport had the reputation of shooting people," an improper question. Bluett v. S. (Ala.), 44 S. 84.

Reputation as a dangerous person cannot be established by proof of reputation of going armed with a razor, as one presumption cannot be based upon another. Vaughn v. S., 51 Tex. Cr. 180, 101 S. W. 445.

Character evidence must be confined to the community in which deceased lived and to some reasonable time previous to the homicide. Lynch v. P., 33 Colo. 128, 79 P. 1015. *Compare* P. v. Van Gaasbeck, 118 App. Div. 511, 913, 103 N. Y. S. 249.

778-16 See Hughes v. S. (Ala.), 44 S. 694.

Comparison of decedent with other men, improper. Patterson v. S. (Ala.), 47 S. 52.

778-18 Powers v. S., 117 Tenn. 363, 97 S. W. 815.

778-20 Sneed v. Ter., 16 Okla. 641, 86 P. 70; Crow v. S., 48 Tex. Cr. 419, 88 S. W. 814; Cole v. S., 48 Tex. Cr. 439, 88 S. W. 341.

778-21 Kelly v. P., 229 Ill. 81, 82 N. E. 198 (fact that accused offers evidence of his own good reputation, immaterial).

778-23 **After evidence** by defendant that deceased was quarrelsome and dangerous when drinking, the state may prove deceased's general reputation when not drinking, since traits of character cannot be separated. S. v. Feeley, 194 Mo. 300, 92 S. W. 663.

778-24 **Texas statute** allows proof of character by state after proof of a communicated threat has been made. Arnwine v. S., 50 Tex. Cr. 254, 477, 96 S. W. 4, 99 S. W. 97; Menefee v. S., 50 Tex. Cr. 249, 97 S. W. 486. See Moore v. S., 49 Tex. Cr. 499, 96 S. W. 321. No distinction is made where the threat was made directly to the defendant. Jirou v. S. (Tex. Cr.), 108 S. W. 655; and the same rule applies to an uncommunicated threat. Jirou v. S. (Tex. Cr.), 108 S. W. 655 (semble).

778-25 *Compare* Wakefield v. S., 50 Tex. Cr. 124, 94 S. W. 1046; Gregory v. S., 50 Tex. Cr. 73, 94 S. W. 1041.

Answer to question, "was he not a shootist?" opens the door for rebuttal. S. v. Lejeune, 116 La. 193, 40 S. 632.

779-28 **Overt act** by deceased must be shown to the satisfaction of the court. S. v. Golden, 113 La. 791, 37 S. 757.

779-29 McHugh v. Ter., 17 Okla. 1, 86 P. 433 (exhaustive opinion); Brown v. S., 88 Miss. 166, 40 S. 737.

Rebuttal. — Subsequent friendship may be shown by the state. Watson v. S. (Tex. Cr.), 105 S. W. 509.

Abuse of defendant by deceased who had arrested him earlier in the day. Humber v. C., 31 Ky. L. R. 606, 102 S. W. 1179.

780-34 Dunn v. S., 143 Ala. 67, 39 S. 147; S. v. Blee, 133 Ia. 725, 111 N. W. 19; Hughes v. S. (Miss.), 38 S. 33.

780-35 Pratt v. S. (Tex. Cr.), 109 S. W. 138 (where the evidence is circumstantial); Brown v. S., 88 Miss. 166, 40 S. 737.

781-36 Smith v. S., 142 Ala. 14, 39 S. 329. *Compare* Crow v. S., 48 Tex. Cr. 419, 88 S. W. 814.

Declarations of bystanders at the altercation of deceased and a third person, defendant not being present, are inadmissible. Gray v. S., 47 Tex. Cr. 375, 83 S. W. 705.

781-38 Sneed v. Ter., 16 Okla. 641, 86 P. 70 (to show knowledge of deceased's violent and uncertain temper).

Particular acts, admissible when so connected in point of time or occasion with the fatal meeting as to produce reasonable apprehension of grievous bodily harm. S. v. Andrews, 73 S. C. 257, 53 S. E. 423.

783-46 *Contra.* — Prior assaults by third persons are competent to prove that defendant acted under an apprehension of danger and to

explain his possession of a weapon. *Compare* 635-52.

783-48 Gilmore v. S., 141 Ala. 51, 37 S. 359.

784-49 S. v. Clifford, 59 W. Va. 1, 52 S. E. 981. See Burton v. S., 82 Ark. 595, 102 S. W. 362 ("circumstantial facts which are part of the res gestae").

784-51 Newton v. C., 31 Ky. L. R. 327, 102 S. W. 264.

Language need not amount to an express threat. — Bethune v. S., 49 Tex. Cr. 166, 90 S. W. 1014.

784-53 Pitts v. S., 140 Ala. 70, 37 S. 101; Harbour v. S., 140 Ala. 103, 37 S. 330; Bell v. S., 84 Ark. 128, 104 S. W. 1108; P. v. Quimby (Cal.), 92 P. 593.

785-56 S. v. Beckner, 194 Mo. 281, 91 S. W. 892.

Incompetent otherwise. — Harbour v. S., 140 Ala. 103, 37 S. 330.

785-58 Threats against those associated with defendant, admissible. Wheeler v. C., 120 Ky. 697, 27 Ky. L. R. 1090, 87 S. W. 1106.

785-59 Hellard v. C., 119 Ky. 445, 27 Ky. L. R. 115, 84 S. W. 329.

786-61 Warford v. P., 41 Colo. 203, 92 P. 24; S. v. King, 203 Mo. 560, 102 S. W. 515; S. v. Birks, 199 Mo. 263, 97 S. W. 578; Brooks v. S. (Ark.), 108 S. W. 205; Fielding v. S., 48 Tex. Cr. 334, 87 S. W. 1044; Burton v. S., 82 Ark. 595, 102 S. W. 362.

786-63 Martin v. S., 144 Ala. 8, 40 S. 275; Oates v. S. (Ala.), 47 S. 74; S. v. Coleman, 119 La. 669, 44 S. 338; Glover v. S. (Tex. Cr.), 107 S. W. 854.

Instruction requiring proof that deceased was a dangerous man in addition to proof of acts indicating an intention to execute threats, erroneous. St. Clair v. S., 49 Tex. Cr. 479, 92 S. W. 1095.

Possession of weapon by defendant cannot be explained as being due to threats of deceased in the absence of a showing of some overt act. S. v. Kennedy, 207 Mo. 528, 106 S. W. 57.

786-64 Dunn v. S., 143 Ala. 67, 39 S. 147; Fleming v. S. (Ala.), 43 S. 219.

Inadmissible where defendant is not entitled to invoke the defense of self-defense. Skipper v. S., 144 Ala. 100, 42 S. 43. Or where undisputed evidence shows defendant the aggressor. Black v. S., 84 Ark. 121, 104 S. W. 1104.

787-66 Jay v. S. (Tex. Cr.), 109 S. W. 131; Burton v. S., 82 Ark. 595, 102 S. W. 362.

787-67 Details of conversation in which the threats were communicated to defendant, inadmissible. Bluett v. S. (Ala.), 44 S. 84.

788-73 See supra, 767-67, "Uncommunicated Threats;" Wilson v. S., 140 Ala. 43, 37 S. 93; Warrick v. S., 125 Ga. 133, 53 S. E. 1027 (full discussion of question of uncommunicated threats); Neathery v. P., 227 Ill. 110, 81 N. E. 16; Wheeler v. C., 27 Ky. L. R. 1090, 87 S. W. 1106 (against defendant's associates in killing).

788-74 S. v. Blee, 133 Ia. 725, 111 N. W. 19.

789-75 Wilson v. S., 140 Ala. 43, 37 S. 93; Warford v. P., 41 Colo. 203, 92 P. 24.

789-76 Sue v. S. (Tex. Cr.), 105 S. W. 804.

790-78 Black v. S., 84 Ark. 121, 104 S. W. 1104. And see Martin v. S., 144 Ala. 8, 40 S. 275; Fleming v. S. (Ala.), 43 S. 219; Oates v. S. (Ala.), 47 S. 74; S. v. Peace, 121 La. —, 47 S. 28; Brooks v. S. (Ark.), 108 S. W. 205.

790-79 Guy v. S., 37 Ind. App. 691, 77 N. E. 855; S. v. Scaduto, 74 N. J. L. 289, 65 A. 908.

792-82 S. v. Robichaux, 121 La. ——, 46 S. 888.

792-84 Sinclair v. S., 87 Miss. 330, 39 S. 522. See supra 767-67.

795-92 S. v. High, 116 La. 79, 40 S. 538.

795-94 Manner of proof. — Any witness who heard them is competent to testify to such threats; the fact that the witness is a prostitute goes merely to the weight of her testimony. S. v. Jackman (Nev.), 91 P. 143.

796-96 See Lynch v. P., 33 Colo. 128, 79 P. 1015.

796-1 Threats by the prosecutor may be rebutted by showing that defendant had been entertained at his home and well treated, and this in turn may be shown to be untrue. Cunningham v. S., 89 Miss. 356, 42 S. 172. *Compare* Watson v. S. (Tex. Cr.), 105 S. W. 509.

796-3 Taylor v. S., 121 Ga. 303, 49 S. E. 303.

797-9 Stafford v. S., 50 Fla. 134, 39 S. 106 (other and more recent threats having been already admitted).

797-11 **Explanatory evidence.** The nature of the threat and its inducing cause may be shown, and the whole of the conversation in which it was made is admissible. Adams v. S., 47 Tex. Cr. 347, 84 S. W. 231.

798-12 **Threats** by third person are admissible where they constitute a part of the series of events leading up to the killing of deceased. S. v. Clifford. 59 W. Va. 1, 52 S. E. 981.

798-13 **Admissible** when the third person is killed in the same transaction. See Newton v. C., 31 Ky. L. R. 327, 102 S. W. 264.

798-15 Tetterton v. C., 28 Ky. L. R. 146, 89 S. W. 8.

798-16 S. v. Hennessy (Nev.), 90 P. 221.

798-17 **Where the third person** was the aggressor, the defendant cannot justify the killing, and evidence of defense of such third person is incompetent. See Adams v. S., 48 S. W. 452, 93 S. W. 116.

Particulars of original difficulty with the third person, immediately preceding the killing, admissible. Sanford v. S., 143 Ala. 78, 39 S. 370.

798-18 **Threats** against the third person are competent. S. v. Hennessy (Nev.), 90 P. 221; Wheeler v. C., 27 Ky. L. R. 1090, 87 S. W. 1106.

HUSBAND AND WIFE [Vol. 6.]

Extent of agency, 808-6; *Defense,* 815-27; *Estoppel to claim ownership,* 825-55; *Exceptions to rule,* 899-3.

807-1 Rheam v. Martin, 26 App. D. C. 181; Larson v. Carter (Idaho), 94 P. 825; McNemar v. Cohn, 115 Ill. App. 31; Lindsley v. Smith, 150 Mich. 543, 114 N. W. 340; Cox v. R. Co., 111 Mo. App. 394, 85 S. W. 989; Black v. McQuaid (N. J. L.), 68 A. 102; Francis v. Reeves, 137 N. C. 269, 49 S. E. 213. See also Porter v. Terrell. 2 Ga. App. 269, 58 S. E. 493; Gulliford v. McQuillen, 75 Kan. 454, 89 P. 927.

No presumption that husband of stockholder is authorized to represent her at meeting. Steele v. Min. Co. (Colo.), 95 P. 349.

807-4 Sanders v. Brown, 145 Ala. 665, 39 S. 732; Dussoulas v. Thomas (Del.), 65 A. 590. And see Thompson v. Brown, 121 Ga. 814, 49 S. E. 740.

Where all consideration of debt reaches wife as accession to her separate estate, and she retains and enjoys it, only slight evidence of her husband's agency in contracting debt is necessary. Pinkston v. Cedar etc. Co., 123 Ga. 302, 51 S. E. 387. *Compare* Cornelia etc. Co. v. Wilcox, 129 Ga. 522, 59 S. E. 223.

808-5 Larson v. Carter (Idaho), 94 P. 825. *Contra,* under Arkansas statute, but presumption of agency may be overcome by proof of gift. Wyatt v. Scott, 84 Ark. 355, 105 S. W. 871.

Though agency on part of husband may be presumed from fact of his taking charge of wife's property, there is no presumption that he acted as such in buying other property. Du Bose v. Gladden, 75 S. C. 78, 55 S. E. 152.

808-6 **Extent of agency.** — If husband absents himself from home, keeping his whereabouts unknown and leaving his property wholly in wife's care, her implied authority (ex necessitate) extends to those things customarily delegated to wife having such charge; but not under any circumstance to selling or conveying his real estate. Evans v. Crawford Co., 130 Wis. 189, 109 N. W. 952.

809-7 Fenier v. Boynton, 73 N. J. L. 136, 62 A. 420; Valois v. Gardner, 106 N. Y. S. 808; Ruhl v. Heintze, 97 App. Div. 442, 89 N. Y. S. 1031. See Ponder v. Morris (Ala.), 44 S. 651.

809-9 **"Stoddard's Lectures"** not necessaries and no implied authority to pledge husband's credit for their purchase. Shuman v. Steinel, 129 Wis. 422, 109 N. W. 74.

810-11 Cox v. R. Co., 111 Mo. App. 394, 85 S. W. 989.

Wife's declared intention of building house, payment by her on account of materials furnished, and

the fact that they were sold on her credit, are circumstances of significance. Lindsley v. Smith, 150 Mich. 543, 114 N. W. 340.

810-12 Acts and words of wife showing previous authorization or subsequent ratification, sufficient. Black v. McQuaid (N. J. L.), 68 A. 102.

810-13 *Compare* Ham v. Brown, 2 Ga. App. 71, 58 S. E. 316.

811-14 McNemar v. Cohn, 115 Ill. App. 31; Lindsley v. Smith, 150 Mich. 543, 114 N. W. 340. See also Ham v. Brown, 2 Ga. App. 71, 58 S. E. 316.

812-17 Yordi v. Yordi, 6 Cal. App. 20, 91 P. 348.

813-18 Murdock v. Murdock, 121 Ill. App. 429; Colbert v. Rings, 231 Ill. 404, 83 N. E. 274 (recognizing doctrine, but holding that agreement was not so unreasonable and unfair as to warrant any presumption against its validity); Rieger v. Schaible (Neb.), 115 N. W. 560 (holding, however, that the interest reserved did not appear to be so disportionate or unreasonable as to raise the presumption of disguised concealment by husband). *Compare* Nesmith v. Platt (Ia.), 114 N. W. 1053.

813-21 Perkins v. Morgan, 36 Colo. 360, 85 P. 640; Oatman v. Watrous, 120 App. Div. 66, 105 N. Y. S. 174.

Question of agency is one of fact, and not a conclusion of law to be drawn alone from marital relation. Wanamaker v. Weaver, 176 N. Y. 75, 68 N. E. 135, 65 L. R. A. 529, 98 Am. St. 621.

Liability of husband married since 1877, for goods purchased by wife, may rest upon either an express promise to pay therefor, a breach of his duty to provide necessaries, as at common law, or obligation imposed by statute. Fitzmaurice v. Buck, 77 Conn. 390, 59 A. 415.

Wife requesting medical treatment for infant, presumption that she was acting as husband's agent. Howell v. Blesh (Okla.), 91 P. 893.

813-22 Fenier v. Boynton, 73 N. J. L. 136, 62 A 420; Pickhardt v. Pratt, 55 Misc. 231, 105 N. Y. S. 236; McClelland v. Lynch, 98 N. Y. S. 640. *Compare* Edminston v. Smith, 13 Idaho 645, 92 P. 842.

814-23 McKee v. Cunningham, 2 Cal. App. 684, 84 P. 260; Steinfield v. Girrard (Me.), 68 A. 630; Pickhardt v. Pratt, 55 Misc. 231, 105 N. Y. S. 236; Levison v. Davis, 212 Pa. 148, 61 A. 819. *Compare* Moore v. Rose, 130 Mo. App. 668, 108 S. W. 1105 (holding refusal to charge jury to effect stated in text was correct, because cause was tried on theory that obligation was same whether parties lived apart or together).

Where there is no overt separation and the wife continues to reside in the home provided for her, presumption of agency to pledge her husband's credit for necessaries exists. Ball v. Lovett, 98 N. Y. S. 815.

Expenses incurred by wife in prosecuting divorce suit, no implied authority to pledge husband's credit therefor. Zent v. Sullivan, 47 Wash. 315, 91 P. 1088, citing numerous authorities.

814-24 Morgenroth v. Spencer, 124 Wis. 564, 102 N. W. 1086.

Wife insane, no implied liability of husband for board and care while in asylum. Richardson v. Stuesser, 125 Wis. 66, 103 N. W. 261.

814-25 See also Baker v. Oughton, 130 Ia. 35, 106 N. W. 272.

Wife living separate from husband as result of his wrongful desertion, law implies agency in her to purchase necessaries on his credit, but burden is on plaintiff to prove desertion. Clothier v. Sigle, 73 N. J. L. 419, 63 A. 865.

814-26 Demand for payment upon husband is a circumstance proper to be cousidered in determining to whom credit was given. Blendermann v. Mann-Wray, 108 N. Y. S. 700 (action against wife).

815-27 Mellanson v. Mellanson, 113 Ill. App. 81; Bartlow v. Bartlow, 114 Ill. App. 604; Kurz v. Kurz, 119 Mo. App. 53, 96 S. W. 242; Chapman v. Chapman, 74 Neb. 388, 104 N. W. 880; Bond v. Bond, 45 Wash. 511, 88 P. 943 (evidence held sufficient). See Faller v. Faller, 146 Mich. 84, 109 N. W. 47.

Neglect to provide support must be shown to maintain action under Connecticut statute. Lathrop v. Lathrop, 78 Conn. 650, 63 A. 514.

To defeat wife's claim for support on the ground of voluntary abandonment of husband's domicile, fact

of abandonment must be shown by cogent proof. Price v. Price, 75 Neb. 552, 106 N. W. 65.

Defense. — Upon prosecution for wife abandonment the defendant may show by way of defense that they had entered into an agreement, without coercion or fraud, to live separate and apart. Virtue v. P., 122 Ill. App. 223. See also Clark v. Clement, 71 N. H. 5, 51 A. 256.

815-28 Taylor v. Taylor (Md.), 69 A. 632. See Cuthbertson v. S., 72 Neb. 727, 101 N. W. 1031.

816-29 *Compare* Eckerson v. Mitchell (N. J.), 68 A. 81; Goetting v. Normoyle, 191 N. Y. 368, 84 N. E. 287.

817-34 Emmons v. Stevane, 73 N. J. L. 349, 64 A. 1014. *Compare* Schuler v. Henry (Colo.), 94 P. 360.

817-35 S. v. Harvey, 130 Ia. 394, 106 N. W. 938; C. v. Adams, 186 Mass. 101, 71 N. E. 78.

822-49 Sample v. Guyer, 143 Ala. 613, 42 S. 106; Gibson v. Wallace, 147 Ala. 322, 41 S. 960; Mohr v. Griffin, 137 Ala. 456, 34 S. 378. See Creighton v. Crane, 73 Neb. 650, 103 N. W. 284. *Compare* Ludlow v. Colt (Ind. App.), 83 N. E. 643. See also Indianapolis B. Co. v. Behuke (Ind. App.), 81 N. E. 119; Field v. Campbell, 164 Ind. 389, 72 N. E. 260.

823-50 Sibley v. Robertson, 212 Pa. 24, 61 A. 426.

Burden of proving that benefit of consideration inured to wife is upon party seeking to enforce contract. Field v. Campbell, 164 Ind. 389, 72 N. E. 260, citing numerous cases.

823-52 Gibson v. Wallace, 147 Ala. 322, 41 S. 960; Black v. McCarley, 31 Ky. L. R. 1198, 104 S. W. 987. See Third Nat. Bk. v. Tierney (Ky.), 110 S. W. 293.

823-53 *Compare* Small v. Pryor, 69 N. J. Eq. 606, 61 A. 564.

825-55 Ownership of land by wife carries with it presumption of ownership of crops grown thereon. Webster v. Sherman, 33 Mont. 448, 84 P. 878. See also Foreman v. Bank, 128 Ia. 661, 105 N. W. 163.

Under Kentucky Married Woman's Act, wife claiming interest in husband's property because of payment by her on his behalf has not burden of showing that payment was made from her separate estate. Eberhardt v. Wahl, 124 Ky. 223, 98 S. W. 994.

Estoppel to claim ownership. — See McCormick Mach. Co. v. Perkins, 135 Ia. 64, 110 N. W. 15; Moore v. Rawlings (Ia.), 114 N. W. 1040; Magerstadt v. Schaefer, 213 Ill. 351, 72 N. E. 1063; Kershaw v. Merritt, 194 Mass. 113, 80 N. E. 213.

826-59 Davidson v. Woodward, 156 Fed. 915; Reade v. DeLea (N. M.), 95 P. 131; Wade v. Wade (Tex. Civ.), 106 S. W. 188; Parks v. Worthington (Tex. Civ.), 104 S. W. 921; Stein v. Mentz (Tex. Civ.), 94 S. W. 447; Henry v. Vaughan (Tex. Civ.), 103 S. W. 192; Smith v. Smith (Tex. Civ.), 91 S. W. 815; Letot v. Peacock (Tex. Civ.), 94 S. W. 1121; Hoopes v. Mathis, 40 Tex. Civ. 121, 89 S. W. 36; York v. Hilger (Tex. Civ.), 84 S. W. 1117; Ballard v. Slyfield, 47 Wash. 174, 91 P. 642.

California rule. — Bekins v. Dieterle, 5 Cal. App. 690, 91 P. 173.

Property held by husband and wife at date of his death presumed to be community property. Cope v. Blount, 38 Tex. Civ. 516, 91 S. W. 615.

In the absence of any evidence as to the manner in which the property was acquired, there is no presumption that it was community property, or the separate property of either spouse, rather than that it was held by them as joint tenants or as tenants in common. Harlow v. Imp. Co., 145 Cal. 477, 78 P. 1045.

Even where married woman engages in trade it is presumed to be with funds of the community, and the burden of proof is on the person asserting the property to be her separate property. Bashore v. Parker, 146 Cal. 525, 80 P. 707, *cit.* Manning v. Burk, 107 La. 456, 31 S. 862; Jacobs v. Scott, 53 Cal. 74; Chaffee v. Brown, 109 Cal. 211, 41 P. 1028.

827-60 Ballard v. Slyfield, 47 Wash. 174, 91 P. 642.

828-62 Reade v. DeLea (N. M.), 95 P. 131 (presumption may be overcome by clear and conclusive proof to the contrary); Neher v. Armijo, 9 N. M. 325, 54 P. 236; Letot v. Peacock (Tex. Civ.), 94 S. W. 1121.

828-63 York v. Hilger (Tex. Civ.), 84 S. W. 1117; Ballard v. Slyfield, 47 Wash. 174, 91 P. 642.

830-72 Farrow v. Farrow (N. J.

Eq.), 65 A. 1009. See also Smith v. Sheppard, 2 Ga. App. 144, 58 S. E. 303. *Compare* Naler v. Ballew, 81 Ark. 328, 99 S. W. 72.

Purchase notes for sale of wife's separate estate made payable to husband and wife, no presumption of gift to husband. Tison v. Gass (Tex. Civ.), 102 S. W. 751.

Bank deposit in name of husband and wife, husband presumed to have intended to benefit the wife to the extent at least of conferring upon her the right of survivorship. West v. McCullough, 108 N. Y. S. 493. But see dissenting opinion.

830-74 **New Jersey statute.** Small v. Pryor, 69 N. J. Eq. 606, 61 A. 564.

831-76 In re Foss, 147 Fed. 790; Jackson v. Williams, 129 Ga. 716, 59 S. E. 776; Denter v. Denter, 214 Ill. 308, 73 N. E. 453; Oliver v. Sample, 72 Kan. 582, 84 P. 148; Siling v. Hendrickson, 193 Mo. 365, 92 S. W. 105; Van Etten v. Bank (Neb.), 113 N. W. 163; Lahey v. Broderick, 72 N. H. 180, 55 A. 354; Tison v. Gass (Tex. Civ.), 102 S. W. 751.

Property paid for with joint earnings, presumption of gift as to husband's share. Jentzsch v. Jentzsch, 84 Ark. 322, 105 S. W. 572.

832-78 Lahey v. Broderick, 72 N. H. 180, 55 A. 354.

833-83 **Bank deposit** in husband's name, not conclusive of his ownership, it appearing that both drew checks thereon as desired. Leonard v. Piggott (Mich.), 116 N. W. 366.

835-87 Title etc. Co. v. Ingersoll (Cal.), 94 P. 94.

Husband taking title to property on exchange for wife's property, without her consent, is implied trustee for her and her heirs. Siling v. Hendrickson, 193 Mo. 365, 92 S. W. 105.

837-92 See also Ahlering v. Speckman, 30 Ky. L. R. 940, 99 S. W. 973.

843-15 Bank of Commerce v. Baldwin (Idaho), 93 P. 504.

Nebraska doctrine reaffirmed. Northwall Co. v. Osgood (Neb.), 115 N. W. 308.

844-16 Farmers & T. Bk. v. Eubanks, 2 Ga. App. 839, 59 S. E. 193. See Wilson v. Fitzgerald, 25 Pa. Super. 633; Children's Aid Society v. Benford, 26 Pa. Super. 555. *Compare* Bentley v. Bentley, 72 Neb. 803, 101 N. W. 976 (where the alleged debt consisted of items of various accounts); Gilbert v. Brown, 123 Ky. 703, 29 Ky. L. R. 1248, 97 S. W. 40.

847-26 Sayler v. Walter, 30 Pa. Super. 370.

Wife of brother of accused, competent to testify that her husband committed crime. Hardin v. S. (Tex. Cr.), 103 S. W. 401.

849-36 See Hannaford v. Dowdle, 75 Ark. 127, 86 S. W. 818.

Michigan statute prohibiting husband or wife to testify for or against the other without consent does not disqualify widow suing for money loaned in husband's lifetime from testifying to ownership; that management of property was turned over to her by husband; that she managed it, and that proceeds were hers. Leonard v. Piggott (Mich.), 116 N. W. 366.

849-38 Larson v. Carter (Idaho), 94 P. 825.

851-43 Miller v. Stebbins, 77 Vt. 183, 59 A. 844. See Gemkow v. Link, 225 Ill. 21, 80 N. E. 47.

852-45 **South Dakota statute.** Guillaume v. Flannery (S. D.), 108 N. W. 255.

Vermont Statute. — Mead v. Owen, 80 Vt. 273, 67 A. 722.

Husband who is subscribing witness to will in which his wife is named as legatee, is competent to testify on proceeding to probate will. Lanning v. Gay, 70 Kan. 353, 78 P. 810.

Action by husband as administrator to recover for wrongful death of son, wife competent witness for plaintiff. Mitchell v. Brady, 124 Ky. 411, 30 Ky. L. R. 258, 99 S. W. 266.

853-48 **Husband suing** as next friend for son to recover for personal injuries, wife is competent witness on his behalf. Illinois C. R. Co. v. Becker, 119 Ill. App. 221.

854-50 Stoutenborough v. Rammel, 123 Ill. App. 487; Weckerly v. Taylor, 74 Neb. 772, 105 N. W. 254. See Payne v. Payne, 129 Wis. 450, 109 N. W. 105.

Action by husband for divorce for desertion, wife asking for temporary alimony; husband not competent to testify to adultery of wife.

Bishop v. Bishop, 124 Ga. 293, 52 S. E. 743.

858-56 Porter v. U. S. (Ind. Ter.), 104 S. W. 855 (where the wife was a common law wife); Young v. S., 49 Tex. Cr. 207, 92 S. W. 841.

858-57 *Compare* Lara v. S., 48 Tex. Cr. 568, 89 S. W. 840.

858-58 S. v. Hancock, 28 Nev. 300, 82 P. 95, citing numerous authorities.

859-62 **Bigamous marriage** being void, woman is not legal wife, and is competent witness against her supposed husband on his trial for murder. Hock v. P., 219 Ill. 265, 76 N. E. 356; Young v. S., 49 Tex. Cr. 207, 92 S. W. 841; Lara v. S., 48 Tex. Cr. 568, 89 S. W. 840; S. v. Rocker, 130 Ia. 239, 106 N. W. 645.

Second wife of bigamist competent witness against supposed husband. Murphy v. S., 122 Ga. 149, 50 S. E. 48.

860-63 See Williams v. S., 149 Ala. 4, 43 S. 720. *Compare* S. v. Luper (Or.), 95 P. 811.

860-65 S. v. Leasia, 45 Or. 410, 78 P. 328.

860-67 Mahoney v. Roberts (Ark.), 110 S. W. 225 (holding that under Arkansas statute wife, when party, can be compelled to testify, but not against her husband); Strode v. Frommeyer, 115 Mo. App. 220, 91 S. W. 167.

862-72 **Statute in District of Columbia,** to same effect. Dawson v. Waggaman, 23 App. D. C. 428. See also Heintz v. Dennis, 216 Ill. 487, 75 N. E. 192. And for full discussion of this question see "TRANSACTIONS WITH DECEASED PERSONS," Vol. 12, p. 828, et seq.

Alabama. — Spouse of plaintiff in action against administrator competent on behalf of other spouse. Meyers v. Meyers, 141 Ala. 343, 37 S. 451; Henderson v. Bronnson, 141 Ala. 674, 37 S. 549.

California statute. — Kaltschmidt v. Weber, 145 Cal. 596, 79 P. 272.

To same effect in Michigan. Ayres v. Short, 142 Mich. 501, 105 N. W. 1115.

Iowa statute. — Lucas v. McDonald, 126 Ia. 678, 102 N. W. 532.

Rule under Kentucky statute is the same. Black v. McCarley, 31 Ky. L. R. 1198, 104 S. W. 987; Bright v. Bright, 30 Ky. L. R. 834, 99 S. W. 901; Doty v. Dickey, 29 Ky. L. R. 900, 96 S. W. 544; Barter v. Edmonds, 29 Ky. L. R. 872, 96 S. W. 535; Hollingsworth v. Barrett, 28 Ky. L. R. 280, 89 S. W. 107.

Texas statute. — Whitfield v. Diffie (Tex. Civ.), 105 S. W. 324; Edelstein v. Brown (Tex. Civ.), 95 S. W. 1126.

Wife of claimant against estate of deceased person, competent under Colorado statute. Butler v. Phillips, 38 Colo. 378, 88 P. 480.

Husband's interest in wife's property does not disqualify him as witness in her favor, as against administrator, even though he is a party; but he is not competent on his own behalf. White v. Poole, 74 N. H. 71, 65 A. 255, citing numerous cases.

863-80 Wood v. Wood (N. J. Eq.), 62 A. 429; E. W. M. v. J. C. M., 2 Tenn. Ch. App. 463.

Under New York code of civil procedure (§ 831) husband is competent to prove marriage in action for divorce for adultery of wife. Suffin v. Suffin, 119 App. Div. 852, 104 N. Y. S. 839.

Under Pennsylvania statute, husband or wife suing for divorce, is not competent where personal service of process is not had. Penny v. Penny, 34 Pa. Super. 88.

864-81 **Action by divorced wife** against husband concerning property claimed by husband as gift from wife, neither party competent. Johnson v. Johnson, 28 Ky. L. R. 937, 90 S. W. 964.

864-82 **Illinois statute** makes wife competent to testify for or against husband "in all matters of business transactions where the transaction was had and conducted by" her as agent for husband. Donk etc. Co. v. Stroetter, 229 Ill. 134, 82 N. E. 250; Thornton v. Muns, 120 Ill. App. 422; Lumbard v. Holdiman, 115 Ill. App. 458.

864-83 Monahan v. Schwartz, 32 Ky. L. R. 1285, 108 S. W. 285; Leigh v. Bank, 31 Ky. L. R. 251, 102 S. W. 233; Joplin v. Freeman, 125 Mo. App. 717, 103 S. W. 130; Schwantes v. S., 127 Wis. 160, 106 N. W. 237; Block v. Ins. Co., 132 Wis. 150, 112 N. W. 45. See also Shepherd v. Scho-

maker, 115 La. 542, 39 S. 554. *Compare* Boyce v. Bolster, 79 Vt. 40, 64 A. 79.

Action against husband for necessaries furnished wife, wife competent. Morgenroth v. Spencer, 124 Wis. 564, 102 N. W. 1086.

Missouri statute. — Gardner v. R. Co., 124 Mo. App. 461, 101 S. W. 684. See also Moore v. Rose (Mo. App.), 108 S. W. 1105.

Husband may testify for wife as to any business transacted by him for her as agent. Smith v. Travel (Okla.), 94 P. 529.

Husband, acting as wife's agent, may testify to facts occurring when she was not present, though she also testifies on trial of cause. Miller v. Jones, 32 Ky. L. R. 1078, 107 S. W. 783.

866-87 Donk etc. Co. v. Stroetter, 229 Ill. 134, 82 N. E. 250.

868-90 See Shepherd v. Schomaker, 115 La. 542, 39 S. 554. And see Trawick v. Trussill, 122 Ga. 320, 50 S. E. 86.

Husband competent to testify that he acted as wife's agent. Smith v. Travel (Okla.), 94 P. 529, *foll.* Am. Exp. Co. v. Lankford, 2 Ind. Ter. 18, 46 S. W. 183, *aff.* 93 Fed. 380, 35 C. C. A. 353.

868-91 St. Louis etc. R. Co. v. Courtney, 77 Ark. 431, 92 S. W. 251; Joplin v. Freeman, 125 Mo. App. 717, 103 S. W. 130.

869-94 Illinois statute. — Linkemann v. Knepper, 226 Ill. 473, 80 N. E. 1009; Levine v. Carroll, 121 Ill. App. 105; Ames v. Thren, 125 Ill. App. 312.

Pennsylvania statute. — Heckman v. Heckman, 215 Pa. 203, 64 A. 425.

Action by wife to establish ownership of property held in trust by administrator of husband's mother, husband competent, having no direct interest adverse to administrator. Bentley v. Jun (Neb.), 107 N. W. 865.

870-95 Rhode Island statute. Hartley v. Hartley, 27 R. I. 176, 61 A. 144.

871-98 Contra in Louisiana. Bianchi v. Del Valle, 117 La. 587, 42 S. 148; Martin v. Derenbecker, 116 La. 495, 40 S. 849.

Husband suing for injuries to wife and children, wife competent to prove fact of employment of nurse for children. Louisville & N. R. Co. v. Quinn, 145 Ala. 657, 39 S. 616.

872-99 See also Roberts v. Bartlett, 190 Mo. 680, 89 S. W. 858. *Compare* Bentley v. Jun (Neb.), 107 N. W. 865; Hiskett v. Bozarth, 75 Neb. 70, 105 N. W. 990.

872-1 Ditto v. Slaughter, 28 Ky. 1164, 92 S. W. 2; Floore v. Green, 26 Ky. L. R. 1073, 83 S. W. 133; Taylor v. Johnson, 30 Ky. L. R. 656, 99 S. W. 320.

876-17 Rust v. Oltmer (N. J. L.), 67 A. 337.

876-18 Crim. con. — Husband competent to prove marriage only. Hill v. Pomelear, 72 N. J. L. 528, 63 A. 269.

876-22 Rust v. Oltmer (N. J. L.), 67 A. 337 (where the declaration contained a count for crim. con., and one for alienating affections; held as to first count neither spouse competent except to prove marriage; but as to second count, competent for all purposes).

Michigan statute. — Knickerbocker v. Worthing, 138 Mich. 224, 101 N. W. 540.

877-24 *Compare* Evans v. S., 165 Ind. 369, 75 N. E. 651 (holding that under the Indiana statute a married woman prosecuting a bastardly proceeding is competent to testify, even to fact of non-access).

878-27 Elmore v. S., 140 Ala. 184, 37 S. 156; Joseph v. C., 30 Ky. L. R. 638, 99 S. W. 311 (deposition of defendant's wife held properly excluded). See Grabowski v. S., 126 Wis. 447, 105 N. W. 805.

On issue as to sanity of husband charged with crime, wife is not competent on his behalf. C. v. Wollfel, 28 Ky. L. R. 16, 88 S. W. 1061.

880-38 Woodward v. S., 84 Ark. 119, 104 S. W. 1109, *cit.* 6 Encyc. of Ev. 880.

880-39 Wife of one defendant who has pleaded guilty may testify in corroboration of her husband. Graff v. P., 208 Ill. 312, 108 N. E. 299, *aff.* 108 Ill. App. 168.

Prosecution for adultery. — Husband of woman with whom defendant is charged with having committed crime competent witness for state. Pruett v. S., 141 Ala. 69, 37 S. 343.

881-41 Spencer v. S. (Tex. Cr.), 106 S. W. 386.

881-43 Lara v. S., 48 Tex. Cr.

568, 89 S. W. 840. See Grabowski v. S., 126 Wis. 447, 105 N. W. 805.

Statements by wife to third person in presence of husband cannot be testified to by such third person against husband, wife herself not being competent. S. v. Richardson, 194 Mo. 326, 92 S. W. 649.

882-44 Under Massachusetts statute. — C. v. Barker, 185 Mass. 324, 70 N. E. 203.

884-47 Williams v. S. (Ala.), 43 S. 720; Miller v. S. (Neb.), 111 N. W. 637; Murray v. S., 48 Tex. Cr. 141, 86 S. W. 1024; S. v. Woodrow, 58 W. Va. 527, 52 S. E. 545.

Wife competent to testify to crime (attempted murder) committed by husband, and to all facts relating thereto, though tending to convict him of another and different crime committed at same time and in same transaction. Miller v. S. (Neb.), 111 N. W. 637.

884-51 Murder of child. — Wife not competent on prosecution of husband for murder of infant child, though same pistol ball killed the child and wounded wife, while child in her arms. S. v. Woodrow, 58 W. Va. 507, 52 S. E. 545. But see dissenting opinion.

885-54 Prosecution for wife abandonment, wife is competent witness against husband. Wester v. S., 142 Ala. 56, 38 S. 1010.

886-59 Wife divorced as result of adultery for which husband on trial, competent witness against him. S. v. Nelson, 39 Wash. 221, 81 P. 721.

888-65 Williams v. S. (Ala.), 43 S. 720; Purdy v. S., 50 Tex. Cr. 318, 97 S. W. 480. See S. v. Woodrow, 58 W. Va. 507, 52 S. E. 545.

Prosecution of husband for threatening to kill wife, wife is competent witness against him. Murray v. S., 48 Tex. Cr. 141, 86 S. W. 1024.

889-67 S. v. Kniffen, 44 Wash. 485, 87 P. 837, discussing conflict in authorities and citing numerous cases.

889-69 Richardson v. S., 103 Md. 112, 63 A. 317.

891-75 S. v. Luper (Or.), 95 P. 811 (former wife competent to testify against husband on prosecution for perjury committed in divorce suit).

891-76 Prosecution of husband for attempted rape upon wife, while living separate, wife is not a competent witness against him. Frazier v. S., 48 Tex. Cr. 142, 86 S. W. 754.

892-83 *Compare* Bishop v. Bishop, 124 Ga. 293, 52 S. E. 743.

893-88 S. v. Showse, 188 Mo. 473, 87 S. W. 480.

894-91 Action for alienation of husband's affections, and for crim. con., wife not competent to testify to declarations by husband to her relating to defendant or her conduct. Dodge v. Rush, 28 App. D. C. 149.

895-93 Humphrey v. Pope, 1 Cal. App. 374, 82 P. 223; Trometer v. D. C., 24 App. D. C. 242; S. v. Luper (Or.), 95 P. 811; Lurty v. Lurty, 107 Va. 466, 59 S. E. 405. See also Klein v. Klein, 31 Ky. L. R. 28, 101 S. W. 382.

Action for alienating husband's affections, wife competent to testify to acts, statements and declarations by husband to her, showing affection and subsequent loss thereof. Sexton v. Sexton, 129 Ia. 487, 105 N. W. 314.

Fact of being joint parties and jointly interested in action, does not take case out of rule. Marshall v. Marshall, 71 Kan. 313, 80 P. 629.

897-97 S. v. Luper (Or.), 95 P. 811.

897-99 See also Greib v. Stahl (Tex.), 107 S. W. 41.

898-2 Wicks v. Walden, 228 Ill. 56, 81 N. E. 798; German-A. Ins. Co. v. Paul, 5 Ind. Ter. 703, 83 S. W. 60.

899-3 Exceptions to rule. — Rule rendering incompetent evidence of communications between husband and wife is subject to some exceptions dictated by natural justice, amongst which is that when it becomes necessary to disclose them in order to protect the personal rights or liberty of the party to whom they were made, the rule of secrecy does not apply. S. v. Luper, 49 Or. 605, 91 P. 444. See also Shepherd v. C., 27 Ky. L. R. 376, 85 S. W. 191.

900-7 White v. White, 101 Minn. 451, 112 N. W. 627 (holding, however, the reception of the evidence not prejudicial).

901-9 Confessions of wife, who committed crime jointly with husband, not within rule of exclusion. S. v. Mann, 39 Wash. 144, 81 P. 561.

901-10 Leyner v. Leyner, 123 Ia.

185, 98 N. W. 628; S. v. Luper (Or.), 95 P. 811. See Shepherd v. C. 27 Ky. L. R. 376, 85 S. W. 191.

902-11 Bankers' F. Union v. Donahue (Ky.), 109 S. W. 878 (action on life insurance policy).

903-12 But see C. v. Cronin, 185 Mass. 96, 69 N. E. 1065.

Mental condition of husband as to sanity at time of suicide, wife competent to testify to circumstances surrounding his death in action on life insurance policy. Metropolitan L. Ins. Co. v. Thomas, 32 Ky. L. R. 770, 106 S. W. 1175.

903-13 Macon etc. Co. v. Mason, 123 Ga. 773, 51 S. E. 569; Chicago C. R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28; Supreme Lodge v. Jones, 113 Ill. App. 241; Illinois L. Ins. Co. v. De Lang, 30 Ky. L. R. 753, 99 S. W. 616; Missouri etc. R. Co. v. Hibbitts (Tex. Civ.), 109 S. W. 228.

904-16 Lurty v. Lurty, 107 Va. 466, 59 S. E. 405.

To show that certain property was homestead. — Steves v. Smith (Tex. Civ.), 107 S. W. 141.

905-19 *Compare* Marshall v. Marshall, 71 Kan. 313, 80 P. 629.

905-21 *Compare* Johnson v. Johnson, 28 Ky. L. R. 937, 90 S. W. 964.

905-24 **In action by trustee** in bankruptcy to set aside gifts to bankrupt's wife she may be compelled to testify in relation thereto. Wiley v. McBride, 74 Ark. 34, 85 S. W. 84.

906-26 P. v. Chadwick, 4 Cal. App. 63, 87 P. 384, 389; Mueller v. Batcheler, 131 Ia. 650, 109 N. W. 186; C. v. Everson, 29 Ky. L. R. 760, 96 S. W. 460. See also Connella v. Ter., 16 Okla. 365, 86 P. 72; Cole v. S., 48 Tex. Cr. 439, 88 S. W. 341.

Conversation between husband, wife and father not privileged within Texas statute, and may be testified to by wife on prosecution of husband for murder of father. Cole v. S., 51 Tex. Cr. 89, 101 S. W. 218.

907-30 Hearne v. S., 50 Tex. Cr. 431, 97 S. W. 1050. See Lurty v. Lurty, 107 Va. 466, 59 S. E. 405. *Compare* E. W. M. v. J. C. M., 2 Tenn. Ch. App. 463.

907-31 Caldwell v. S., 146 Ala. 141, 41 S. 473; Connella v. Ter., 16 Okla. 365, 86 P. 72.

908-32 S. v. Nelson, 39 Wash. 221, 81 P. 721 (letter produced by prosecution).

Letter by accused to wife while in jail, intercepted and never delivered, is not privileged. Hammons v. S., 73 Ark. 495, 84 S. W. 718.

908-33 **Letter by accused to wife** written while in jail under known rule requiring opening and examination by jailer is not privileged. De Leon v. Ter. (Ariz.), 80 P. 348. *Compare* Ward v. S., 70 Ark. 204, 66 S. W. 926, where the letter was taken from the wife forcibly and against her will and it was held that the letter was privileged.

IDENTITY [Vol. 6.]

Opinion as to possibility of identification, 912-3; *Identity of names of places,* 913-6; *Identity of house,* 927-74.

912-3 Williams v. S. (Ala.), 43 S. 720; Jordan v. S., 50 Fla. 94, 39 S. 155; S. v. Richards, 126 Ia. 497, 102 N. W. 439; Coffman v. S., 51 Tex. Cr. 478, 103 S. W. 1128; Roszczyniala v. S., 125 Wis. 414, 104 N. W. 113.

But opinion incompetent after witness has testified that it was too dark to distinguish the person seen. Pool v. S., 48 Tex. Cr. 478, 88 S. W. 350.

An opinion as to the possibility of identifying assailant at a certain time and place, inadmissible where not shown that the assault took place under the circumstances set forth in the question, or that witness had ascertained by experiment the possibility of such identification under like conditions. Keyser v. S., 95 Md. 96, 51 A. 1057.

913-6 Snyder v. Fidler, 125 Ia. 378, 101 N. W. 130.

Identity of names of places alone is always some evidence of their identity. Western U. Tel. Co. v. Hankins (Tex. Civ.), 110 S. W. 539.

Identification by assumed name. — A person may acquire an assumed name by which he may be identified as certainly as by his true name. Stallworth v. S., 146 Ala. 8, 41 S. 184.

913-7 Atwood v. Power Co., 148

Mich. 224, 111 N. W. 747 (*cit.* Encyc. of Ev.).

The statutory presumption of identity of person from identity of name is a disputable one. P. v. Mullen (Cal. App.), 94 P. 867.

914-8 Where circumstances show nothing to the contrary, identity of names on indictment and record is presumptive evidence of identity of person. Nelson v. S. (Ala.), 43 S. 966.

Where same name appears twice in a list of witnesses, there is no presumption of identity, but rather that there were two persons of the same name. Shaffer v. U. S., 24 App. D. C. 417.

914-9 No presumption because of identity of name that the notary who attested the affidavit was the same person who subsequently, as solicitor of the city court, joined with the prosecutor in signing the accusation. Shuler v. S., 125 Ga. 778, 54 S. E. 689.

915-11 See Lucas v. Land Co., 186 Mo. 448, 85 S. W. 359.

916-13 Presumption can be invoked only in a case where such name is to be applied to a particular person involved. P. v. Wong Sang Lung, 3 Cal. App. 221, 84 P. 843.

916-14 P. v. Wong Sang Lung, 3 Cal. App. 221, 84 P. 843.

917-23 S. v. Loser, 132 Ia. 419, 104 N. W. 337; Colbert v. S., 125 Wis. 423, 104 N. W. 61.

Mere identity of names is not sufficient to identify defendant with record of previous conviction so as to apply statute increasing penalty because of such former conviction. S. v. Smith, 129 Ia. 709, 106 N. W. 187 (Deemer dissenting).

917-24 When witness is sought to be impeached by the use of such record of prior conviction, identity of names makes a prima facie showing of identity of person and the question of identity becomes one for the jury. S. v. Loser, 132 Ia. 419, 104 N. W. 337; Boyd v. S. (Ala.), 43 S. 204; Clifford v. Pioneer etc. Co., 232 Ill. 150, 83 N. E. 448. But see Byrd v. S., 51 Tex. Cr. 539, 103 S. W. 863.

920-36 Illinois R. Co. v. Hasenwinkle, 232 Ill. 224, 83 N. E. 815.

920-38 See Illinois C. R. Co. v. Hasenwinkle, 232 Ill. 224, 83 N. E. 815 (variance therein immaterial in giving condemnation notice); S. v. Loser, 132 Ia. 419, 104 N. W. 337 (middle initial no part of name); Lucas v. Land Co., 186 Mo. 448, 85 S. W. 359; Morrison v. Turnbaugh, 92 Mo. 427, 91 S. W. 152 (not important in identifying the person sued for taxes); State Finance Co. v. Halstenson (N. D.), 114 N. W. 724 (*dist.* from Ambs v. R. Co., 44 Minn. 266, 46 N. W. 321, where initials were changed). But see Taulbee v. Buckner, 28 Ky. L. R. 1246, 91 S. W. 734, holding that omission of middle initial will not raise presumption of difference of identity in tracing chain of title to land.

921-40 S. v. Loser, 132 Ia. 419, 104 N. W. 337; State Finance Co. v. Halstenson (N. D.), 114 N. W. 724. But see Cleveland etc. R. Co. v. Pierce, 34 Ind. App. 188, 72 N. E. 604, holding that though unnecessary to give middle name or initial, a mistake therein is fatal.

921-42 Hess v. Stockard, 99 Minn. 504, 109 N. W. 1113.

924-57 Recognition of voice over telephone is competent to show identity. S. v. Usher (Ia.), 111 N. W. 811; Holzhauer v. Sheeny, 31 Ky. L. R. 1238, 104 S. W. 1034.

Knowledge of voice required. Dunham v. McMichael, 214 Pa. 485, 63 A. 1007. See Way v. S. (Ala.), 46 S. 273; Mack v. S. (Fla.), 44 S. 706 (cases collected and discussed); Waggoner v. S., 49 Tex. Cr. 260, 98 S. W. 255 (holding statement that "it went mighty like J. W.'s voice," admissible).

924-59 Where only a few hours' previous acquaintance is shown, and no peculiarities, identification by voice and size of person seen in the dark is insufficient. Walker v. S., 50 Tex. Cr. 221, 96 S. W. 35 (*cit.* Encyc. of Ev.).

924-60 P. v. Castile, 3 Cal. App. 487, 86 P. 746.

925-62 P. v. Way, 119 App. Div. 344, 104 N. Y. S. 277 (a jawbone fractured by a bullet may be introduced to identify deceased as the person assaulted).

925-63 Denver etc. R. Co. v. Gunning, 33 Colo. 280, 80 P. 727.

926-66 Gulf etc. R. Co. v. Matthews, 99 Tex. 160, 88 S. W. 192.

927-72 Brady v. Shirley, 18 S. D. 608, 101 N. W. 886.
Familiarity with gallop of horses is sufficient upon which to base an opinion as to their identity. Holder v. S. (Tenn.), 104 S. W. 225.
927-73 **Unrecorded brand** raises no presumption of ownership, but may be used as a means of identification. S. v. Dunn, 13 Idaho 9, 88 P. 235; Hurst v. Ter., 16 Okla. 600, 86 P. 280.
927-74 Minor v. S. (Fla.), 46 S. 297; Lingerfelt v. S., 125 Ga. 4, 53 S. E. 803; S. v. Hopper, 114 La. 557, 38 S. 452; S. v. James, 194 Mo. 268, 92 S. W. 679; S. v. Barrington, 198 Mo. 23, 95 S. W. 235; Richards v. C., 107 Va. 881, 59 S. E. 1104 (as to whether substance found on grass was oil).
Witness who has felt an object in the pocket of accused may give his opinion that it was a pistol. Way v. S. (Ala.), 46 S. 273.
Identity of house presumed from identity of number, name of street and city. P. v. Price, 143 Cal. 351, 77 P. 73.
929-83 Krens v. S., 75 Neb. 294, 106 N. W. 27.
929-84 Moore v. S., 51 Tex. Cr. 468, 103 S. W. 188.
930-87 S. v. Jeffries, 210 Mo. 373, 109 S. W. 614.
Opinion as to the correspondence of two sets of tracks, admissible. Porch v. S., 50 Tex. Cr. 335, 99 S. W. 102.
930-88 Heidelbaugh v. S. (Neb.), 113 N. W 145.
930-89 Alford v. S., 47 Fla. 1, 36 S. 436 (where witness has had opportunity to become acquainted with the footprints of such person).
931-93 See Boyd v. S., 50 Tex. Cr. 138, 94 S. W. 1053 (but a defendant negro is not entitled to be escorted into court by four other negroes to test the ability of prosecutrix to identify him).
931-95 Shaffer v. U. S., 24 App. D. C. 417; Powell v. S., 50 Tex. Cr. 592, 99 S. W. 1005.
931-97 S. v. Hunter, 143 N. C. 607, 56 S. 547.
931-98 Davis v. S. 46 Fla. 137, 35 S. 76, *appr.* in Davis v. S., 47 Fla. 26, 36 S. 170; Denham v. C., 27 Ky. L. R. 171, 84 S. W. 538; S. v. Freeman, 146 N. C. 615, 60 S. E. 986; S. v. Dickerson, 77 Ohio St. 34, 82 N. E. 969 (cases on subject collected and discussed).
Must be shown that they were trained to track human beings and could do so with a degree of accuracy. Little v. S., 145 Ala. 662, 39 S. 674.
Defendant should have fullest opportunity to inquire into the breeding and testing of the dogs and the circumstances of the hunt. Richardson v. S., 145 Ala. 46, 41 S. 82.
An opinion by the trainer of the dogs as to why they left the trail, is incompetent. Richardson v. S., 145 Ala. 46, 41 S. 82.
934-4 P. v. Gray, 148 Cal. 507, 83 P. 707; S. v. Rutledge 37 Wash. 523, 79 P. 1123.
Must be based on acquaintance with or knowledge of person to be identified. Alford v. S. 47 Fla. 1, 36 S. 436.
Statement by party answering phone call that it was the defendant company, is hearsay evidence of identity, and is incompetent to establish defendant's receipt of message. Planter's Oil Co. v. Tel. Co., 126 Ga. 621, 55 S. E. 495.
Common reputation in family may be sufficient identification where no superior proof is obtainable. Arnold v. Ins. Co., 20 Pa. Super. 61.

IMPEACHMENT OF WITNESSES
[Vol. 7.]

15-13 P. v. Wright, 4 Cal. App. 704, 89 P. 364.
15-14 Bringgold v. Bringgold, 40 Wash. 121, 82 P. 179.
16-16 Pereira v. S. Co. (Or.), 94 P. 835.
17-23 P. v. Tubbs, 147 Mich. 1, 110 N. W. 138.
The manner in which witnesses may be impeached is regulated by statutes in some states. Welch v. C. (Ky.), 108 S. W. 863.
19-27 S. v. Anderson, 120 La. 331, 45 S. 267; S. v. Spencer, 45 La. Ann. 1, 12 S. 135.
19-28 In re Johnson (Cal.), 93 P. 1015.
20-30 In re Johnson, supra.
21-31 U. S. v. Budd, 144 U. S. 154; Ashley v. Board, 83 Fed. 534, 27 C. C. A. 585; Choctaw etc. R. Co.

v. Newton, 140 Fed. 225, 250, 71 C. C. A. 655; S. v. Gallo, 115 La. 746, 39 S. 1001; Reyes v. S., 48 Tex. Cr. 346, 88 S. W. 245.

Under some statutes a party may call, in a civil action, the officers or managing agent of a corporation which is a party without being barred of the privilege of impeaching their testimony. Corbett v. Assn. (Wis.), 115 N. W. 365.

23-33 S. v. Gallo, 115 La. 746, 39 S. 1001.

23-36 Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916 (rehearing denied by supreme court); Chicago City R. Co. v. Gregory, 221 Ill. 591, 77 N. E. 1112; Baltimore & O. R. Co. v. S. (Md.), 69 A. 439; P. v. Dixon, 118 App. Div. 593, 103 N. Y. S. 86; O'Doherty v. T. Co., 113 App. Div. 636, 99 N. Y. S. 351; Compagnie Des Metaux U. v. Mfg. Co. (Tex. Civ.), 107 S. W. 651; Scott v. S. (Tex. Cr.), 105 S. W. 796; Ozark v. S., 51 Tex. Cr. 106, 100 S. W. 927); Benson v. S., 51 Tex. Cr. 367, 103 S. W. 911; Franklin v. S. (Tex. Cr.), 88 S. W. 357.

25-37 Chicago etc R. Co. v. Roberts, 35 Colo. 498, 84 P. 68; Barber v. S., 3 Ga. App. 598, 60 S. E. 285; Alexander v. S., 1 Ga. App. 289, 57 S. E. 996 (unless entrapped); Quinn v. S., 51 Tex. Cr. 155, 101 S. W. 248 (failure to testify as expected).

25-38 See Reyes v. S., 48 Tex. Cr. 346, 88 S. W. 245.

25-39 Willis v. S. 49 Tex. Cr. 139, 90 S. W. 1100. But see Barber v. S., 3 Ga. App. 598, 60 S. E. 285; Alexander v. S., 1 Ga. App. 289, 57 S. E. 996; Benson v. S., 51 Tex. Cr. 367, 103 S. W. 911 (may be impeached where affirmative fact is testified to and party is surprised thereby); Franklin v. S. (Tex. Cr.), 88 S. W. 357.

25-40 Rule applies though witness subsequently called by adverse party and foundation laid for impeachment upon cross-examination. Baltimore etc. R. Co. v. S. (Md.), 69 A. 439.

25-42 Variant statements are not admissible to contradict a witness called by the party though he was afterward called by the other party and made his witness and gave the variant testimony in that capacity. O'Doherty v. T. C. Co., 113 App. Div. 636, 99 N. Y. S. 351, *dist.* Hubner v. R. Co., 77 App. Div. 290, 79 N. Y. S. 153, cited in the corresponding note of the Encyclopaedia, which case was affirmed, without opinion, 177 N. Y. 523, 69 N. E. 1124.

The opinion in the principal case treats the question as settled by Coulter v. Ex. Co., 56 N. Y. 585, in which it was held that a party cannot impeach his own witness, although subsequently called as a witness for the adverse party, either by general evidence or by proof of contradictory statements out of court. To the same effect is Nichols v. White, 85 N. Y. 531. But see P. v. Smith, 113 App. Div. 396, 99 N. Y. S. 118. In Kansas the rule is the same as is stated in the latest New York case, supra; at least in the absence of special circumstances. S. v. Keefe, 54 Kan. 197, 38 P. 302; Johnston v. Marriage, 74 Kan. 208, 86 P. 461, 87 P. 74.

26-43 Chicago C. R. Co. v. Gregory, 221 Ill. 591, 77 N. E. 1112; Lindquist v. Dickson, 89 Minn. 369, 107 N. W. 958; S. v. Johnson, 73 N. J. L. 199, 63 A. 12; P. v. Smith, 113 App. Div. 396, 99 N. Y. S. 118; S. v. Waldrop, 73 S. C. 60, 52 S. E. 793; Dallas etc. R. Co. v. McAllister, 41 Tex. Civ. 131, 90 S. W. 933.

26-44 Thomasson v. S., 80 Ark. 364, 97 S. W. 297.

27-45 Chicago C. R. Co. v. Gregory, 221 Ill. 591, 77 N. E. 1112.

27-47 Lindquist v. Dickson, 89 Minn. 369, 107 N. W. 958; Beier v. T. Co., 197 Mo. 215, 94 S. W. 876; S. v. Johnson, 73 N. J. L. 199, 63 A. 12; Dallas etc. R. Co. v. McAllister, 41 Tex. Civ. 131, 90 S. W. 933.

Use of diligence to prevent surprise. See Beier v. T. Co., supra.

27-48 Chicago C. R. Co. v. Gregory, 221 Ill. 591, 77 N. E. 1112.

27-49 Thomasson v. S., 80 Ark. 364, 97 S. W. 297; Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958; Selover v. Bryant, 54 Minn. 434, 56 N W. 58, 40 Am. St. 349, 21 L. R. A. 418; S. v. Johnson, 73 N. J. L. 199, 63 A. 12; S. v. Waldrop, 73 S. C. 60, 52 S. E. 793.

28-50 Chicago C. R. Co. v. Greg-

ory, 221 Ill. 591, 77 N. E. 1112.
In Texas such statements may be proved. Coal & I. Co. v. Rohr, 15 Tex. Civ. 404, 39 S. W. 1017; Hord v. R. Co. 33 Tex. Civ. 163, 76 S. W. 227; Dallas etc. R. Co. v. McAllister, 41 Tex. Civ. 131, 90 S. W. 933.
28-51 Lynch v. Bronson (Conn.), 69 A. 538; S. v. Corcoran, 7 Idaho 220, 61 P. 1034; S. v. Fowler, 13 Idaho 317, 89 P. 757; Dukes v. Davis, 30 Ky. L. R. 1348, 101 S. W. 390, ruled under § 596 Code Civ. Prac.; Garrison v. C., 29 Ky. L. R. 411, 93 S. W. 594; S. v. Sederstrom, 99 Minn. 234, 109 N. W. 113; Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958; S. v. Jennings, 48 Or. 483, 87 P. 524, 89 P. 421; Southworth v. S. (Tex. Cr.), 109 S. W. 133; McMahan v. S., 50 Tex. Cr. 244, 96 S. W. 17; Corbett v. Assn. (Wis.), 115 N. W. 365.
Abuse of right must not be indulged by asking concerning matters, the truth of which counsel is not prepared to prove. S. v. Fowler, 13 Idaho 317, 89 P. 757.
31-53 And in several other states. — S. v. Fowler, 13 Idaho 317, 89 P. 757; Blackburn v. C., 75 Ky. 181; Garrison v. C., 29 Ky. L. R. 411, 93 S. W. 594; P. v. Elco, 131 Mich. 519, 91 N. W. 755, 94 N. W. 1069; S. v. Sederstrom, 99 Minn. 234, 109 N. W. 113; Hurley v. S., 46 Ohio St. 320, 21 N. E. 645, 4 L. R. A. 161; Ozark v. S., 51 Tex. Cr. 106, 100 S. W. 927.
31-54 S. v. Sederstrom, supra.
31-57 Garrison v. C., 29 Ky. L. R. 411, 93 S. W. 594; Clancy v. T. Co., 192 Mo. 615, 91 S. W. 509.
32-58 Testimony need not be particularly hurtful. Southworth v. S. (Tex. Cr.), 109 S. W. 133.
34-61 Beier v. T. Co., 197 Mo. 215, 94 S. W. 876; Clancy v. T. Co., 192 Mo. 615, 91 S. W. 509.
34-62 Clancy v. T. Co., 192 Mo. 615, 91 S. W. 509.
If notice is given the party that testimony before the grand jury was given under a mistake and that the witness will correct it on the trial it is reversible error to prove that testimony. Ware v. S., 49 Tex. Cr. 413, 92 S. W. 1093.
35-63 Threlkeld v. Bond, 29 Ky. L. R. 177, 92 S. W. 606; Ware v. S., supra; Willis v. S., 49 Tex. Cr. 139, 90 S. W. 1100.
35-64 Southworth v. S. (Tex. Cr.), 109 S. W. 133.
36-71 Southworth v. S., supra.
37-76 Beier v. S. Co., 197 Mo. 215, 94 S. W. 876.
38-81 Hammond v. S., 147 Ala. 79, 41 S. 761; Schultz v. Reed, 122 Ill. App. 420; Guffey P. Co. v. Hamill (Tex. Civ.), 94 S. W. 458.
40-92 King v. Ins. Co., 195 Mo. 290, 92 S. W. 892.
40-93 Campagnie etc. Co. v. Mfg. Co. (Tex. Civ.), 107 S. W. 651.
41-1 S. v. Caron, 118 La. 349, 42 S. 960.
41-3 P. v. Creeks, 141 Cal. 529, 75 P. 101; In re Kennedy, 104 Cal. 429, 38 P. 93; In re Johnson (Cal.), 93 P. 1015 (negative testimony).
42-5 Beier v. T. Co., 197 Mo. 215, 94 S. W. 876.
42-9 Benton v. S., 78 Ark. 284, 94 S. W. 688.
43-16 P. v. Oliver (Cal. App.), 95 P. 172; P. v. Soeder, 150 Cal. 12, 87 P. 1016; Clinton v. S. 53 Fla. 98, 43 S. 312; Maloy v. S., 52 Fla. 101, 41 S. 791; McCoy v. U. S., 6 Ind. Ter. 415, 98 S. W. 144; Ochsner v. C. (Ky.), 109 S. W. 326; S. v. Callahan, 100 Minn. 63, 110 N. W. 342; S. v. Baker, 209 Mo. 444, 108 S. W. 6; S. v. Beckner, 194 Mo. 281, 91 S. W. 892, 3 L. R. A. (N. S.) 535; S. v. Barnett, 203 Mo. 640, 102 S. W. 506; S. v. Mills (S. C.), 60 S. E. 664 (as to credibility only); Hays v. S. (Tex. Cr.), 100 S. W. 926; Dungan v. S. (Wis.), 115 N. W. 350.
43-17 Ball v. U. S., 147 Fed. 32, 78 C. C. A. 126; Carr v. S., 81 Ark. 589, 99 S. W. 831; P. v. Weber, 149 Cal. 325, 86 P. 671; Henderson v. C., 28 Ky. L. R. 1212, 91 S. W. 1141; S. v. Griggsby, 117 La. 1046, 42 S. 497; S. v. Oliphant, 128 Mo. App. 252, 107 S. W. 32; Powers v. S., 117 Tenn. 363, 97 S. W. 815; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.
44-21 The general character of an accused person cannot be assailed unless he has put it in issue. Clinton v. S., 53 Fla. 98, 43 S. 312; S. v. Grove, 61 W. Va. 697, 57 S. E. 296; nor can his reputation as a dangerous and turbulent person be proved. S. v. Richardson, 194 Mo. 326, 92 S. W. 649. See "CHARACTER," Vol. 3, p. 1, and that title, ante.

44-23 Haddix v. S., 76 Neb. 369, 107 N. W. 781.

44-24 P. v. Soeder, 150 Cal. 12, 87 P. 1016; McCann v. P., 226 Ill. 562, 80 N. E. 1061; S. v. Wertz, 191 Mo. 569, 90 S. W. 838; S. v. Jennings, 48 Or. 483, 87 P. 524, 89 P. 421.

45-26 Carr v. S., 81 Ark. 589, 99 S. W. 831; Henderson v. C., 28 Ky. L. R. 1212, 91 S. W. 1141; P. v. Ryder (Mich.), 114 N. W. 1021; S. v. Smith, 125 Mo. 2, 28 S. W. 181; S. v. Weeden, 133 Mo. 70, 34 S. W. 473; S. v. Dyer, 139 Mo. 199, 40 S. W. 768; S. v. Baker, 209 Mo. 444, 108 S. W. 6; S. v. Oliphant, 128 Mo. App. 252, 107 S. W. 32; S. v. Barnett, 203 Mo. 640, 102 S. W. 506 (general reputation for morality); S. v. Richardson, 194 Mo. 326, 92 S. W. 649; S. v. Woodward, 191 Mo. 617, 90 S. W. 90; Powers v. S., 117 Tenn. 363, 97 S. W. 815; Dungan v. S. (Wis.), 115 N. W. 350.

46-30 Mitchell v. S., 148 Ala. 618, 42 S. 1014; Byers v. S., 105 Ala. 31, 16 S. 716; Crawford v. S., 112 Ala. 1, 21 S. 214; Newman v. C., 28 Ky. L. R. 81, 88 S. W. 1089; S. v. Griggsby, 117 La. 1046, 42 S. 497; S. v. Mills (S. C.), 60 S. E. 664.

47-33 S. v. Barrington, 198 Mo. 23, 95 S. W. 235; Cecil v. S. (Tex. Cr.), 100 S. W. 390; Turman v. S., 50 Tex. Cr. 7, 95 S. W. 533; Lucas v. S. 49 Tex. Cr. 135, 90 S. W. 880; Sexton v. S., 48 Tex. Cr. 497, 88 S. W. 348 (number of times witness indicted may be shown). *Contra*, S. v. Barrett, 117 La. 1086, 42 S. 513, disapproving earlier cases.

47-34 Cecil v. S. (Tex. Cr.), 100 S. W. 390.

48-37 *Contra.* — S. v. Barrett, 117 La. 1086, 42 S. 513, *disappr.* S. v. Murphy, 45 La. Ann. 958, 13 S. 229.

The number of larceny cases brought against a witness may be inquired of, and the nature of the property involved in them. McCoy v. U. S., 6 Ind. Ter. 415, 98 S. W. 144.

48-38 Ball v. U. S., 147 Fed. 32, 78 C. C. A. 126; Fuller v. S., 147 Ala. 35, 41 S. 774; P. v. Soeder, 150 Cal. 12, 87 P. 1016; P. v. Oliver (Cal. App.), 95 P. 172; S. v. Hayden, 131 Ia. 1, 107 N. W. 929; Ochsner v. C. (Ky.), 109 S. W. 326; Henderson v. C., 28 Ky. L. R. 1212, 91 S. W. 1141; Farmer v. C., 28 Ky. L. R. 1168, 91 S. W. 682; S. v. Barrett, 117 La. 1086, 42 S. 513; S. v. Clark, 117 La. 920, 42 S. 425; S. v. Griggsby, 117 La. 1046, 42 S. 497; P. v. DeCamp, 146 Mich. 533, 109 N. W. 1047; Starling v. S., 89 Miss. 328, 42 S. 798 (the statute provides for proof of "conviction"); Williams v. S., 87 Miss. 373, 39 S. 1006; S. v. Oliphant, 128 Mo. App. 252, 107 S. W. 32 (conviction in another state for a like offense); S. v. Brooks, 202 Mo. 106, 100 S. W. 416; S. v. Woodward, 191 Mo. 617, 90 S. W. 90; S. v. Spivey, 191 Mo. 87, 90 S. W. 81; S. v. Hensack, 189 Mo. 295, 88 S. W. 21 (conviction in another state); S. v. Lawrence, 28 Nev. 440, 82 P. 614; S. v. Mount, 73 N. J. L. 582, 64 A. 124; P. v. Cascone, 185 N. Y. 317, 78 N. E. 287; Hull v. S., 50 Tex. Cr. 607, 100 S. W. 403.

Guilt without conviction may be shown, but not a trial resulting in acquittal. P. v. Cascone, 185 N. Y. 317, 78 N. E. 287.

Particulars of transaction on which conviction was based may be inquired into. Ochsner v. C. (Ky.), 109 S. W. 326. Defendant may be asked if he was not convicted under another name and why he assumed such name. S. v. Clark, 117 La. 920, 42 S. 425; Ball v. U. S., 147 Fed. 32, 78 C. C. A. 126. Circumstances affecting the punishment inflicted may be shown. P. v. De Camp, 146 Mich. 533, 109 N. W. 1047.

49-40 Accused's statement to another that he had been imprisoned is not competent. Fanin v. S., 51 Tex. Cr. 41, 100 S. W. 916, 10 L. R. A. (N. S.) 744.

49-41 A plea of nolo contendre is equivalent to a plea of guilty, and the record of conviction is admissible though it does not recite the party's guilt. S. v. Herlihy, 102 Me. 310, 66 A. 643.

50-47 Welch v. C. (Ky.), 108 S. W. 863; Powers v. S., 117 Tenn. 363, 97 S. W. 815.

51-49 S. v. Blackburn (Ia.), 114

N. W. 531; S. v. Hazlett, 14 N. D. 490, 105 N. W. 617.

52-52 S. v. Sanders, 75 S. C. 409, 56 S. E. 35.

53-58 An admission that an absent witness would, if present, testify to matters stated in an affidavit, is a waiver of the right to impeach him by a method which requires a foundation therefor. Helbig v. Ins. Co., 120 Ill. App. 58; Chicago & A. R. Co. v. Lammert, 19 Ill. App. 135.

54-60 Hughes v. S. (Ala.), 44 S. 694; Speakman v. Vest (Ala.), 44 S. 1021; Giddens v. Rutledge, 146 Ala. 232, 40 S. 759; Jones v. S., 145 Ala. 51, 40 S. 947; Morris v. S., 146 Ala. 66, 41 S. 274; Rector v. Robins, 82 Ark. 424, 102 S. W. 209; Duckworth v. S., 83 Ark. 192, 103 S. W. 601; Keyes v. R. Co. (Cal.), 93 P. 88, § 2052 Code Civ. Proc.; Bowen v. L. Co., 3 Cal. App. 312, 84 P. 1010; Denver etc. R. Co. v. Mitchell (Colo.), 94 P. 289; Grant v. U. S., 28 App. D. C. 169; Clinton v. S., 53 Fla. 98, 43 S. 312; Adams v. S. (Fla.), 45 S. 494; Ham v. Brown, 2 Ga. App. 71, 58 S. E. 316; Jones v. Harrell, 110 Ga. 381, 35 S. E. 690; Georgia R. & B. Co. v. Andrews, 125 Ga. 85, 54 S. E. 76; Cox v. S., 124 Ga. 95, 52 S. E. 150; Hirsch etc. R. Co. v. Coleman, 227 Ill. 149, 81 N. E. 21; McCann v. P., 226 Ill. 562, 80 N. E. 1061; Atoka C. & M. Co. v. Miller (Ind. Ter.), 104 S. W. 555; Hicks v. S., 165 Ind. 440, 75 N. E. 641; Stark v. Burke, 131 Ia. 684, 109 N. W. 206; Owensboro City R. Co. v. Allen, 32 Ky. L. R. 1353, 108 S. W. 357; Cincinnati etc. R. Co. v. Rodes, 31 Ky. L. R. 430, 102 S. W. 321; S. v. Mitchell, 119 La. 374, 44 S. 132; Robinson v. R. Co., 189 Mass. 594, 76 N. E. 190; P. v. Tubbs, 147 Mich. 1, 110 N. W. 132; Carey v. Nissle, 145 Mich. 383, 108 N. W. 733; S. v. Kennedy, 207 Mo. 528, 106 S. W. 57; Carp v. Ins. Co. 202 Mo. 295, 101 S. W. 78; S. v. Mulhall, 199 Mo. 202, 97 S. W. 583; Bragg v. R. Co., 192 Mo. 331, 91 S. W. 527; S. v. Forsha, 190 Mo. 296, 88 S. W. 746; Sperbeck v. R. Co. (N. J.), 64 A. 1012; P. v. Mallon, 116 App. Div. 425, 101 N. Y. S. 814; Ruemer v. Clark, 121 App. Div. 231, 105 N. Y. S. 659; Hanlon v. Ehrich, 178 N. Y. 474, 71 N. E. 12; P. v. Murphy, 113 App. Div. 363, 99 N. Y. S. 110; Rossenbach v. Foresters. 184 N. Y. 92, 76 N. E. 1085; Johnson v. R. Co., 140 N. C. 574, 53 S. E. 362; S. v. Hazlett, 14 N. D. 490, 105 N. W. 617; Dillard v. M. Co. (Or.), 94 P. 966; Pereira v. S. Co. (Or.), 94 P. 835; Baker v. Moore, 29 Pa. Super 301; Norris v. S. (Tex. Cr.), 106 S. W. 136; Adams v. S. (Tex. Cr.), 105 S. W. 197; Hood v. S. (Tex. Cr.), 101 S. W. 229; International etc. R. Co. v. Munn (Tex. Civ.), 102 S. W. 442; Maxey v. Fairbanks (Tex. Civ.), 95 S. W. 632; McIntyre v. S., 50 Tex. Cr. 83, 94 S. W. 1048; Gulf etc. R. Co. v. Hays, 40 Tex. Civ. 162, 89 S. W. 29; Lewter v. Lindley (Tex. Civ.), 89 S. W. 784; Larkin v. B. Co., 30 Utah 86, 83 P. 686; McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503; Richards v. C., 107 Va. 881, 59 S. E. 1104.

Court has no discretion as to admission of proof of variant statements relating to the main issue. Robinson v. R. C., 189 Mass. 594, 76 N. E. 190.

56-61 Atlanta etc. R. Co. v. McManus, 1 Ga. App. 302, 58 S. E. 258; Reisch v. P., 229 Ill. 574, 82 N. E. 321.

57-62 In re Barry, 219 Ill. 391, 76 N. E. 577.

57-65 S. v. Jennings, 48 Or. 483, 87 P. 524, 89 P. 421; Corpus v. S. (Tex. Cr.), 102 S. W. 1152.

57-66 S. v. Johnson, 73 N. J. L. 199, 63 A. 12.

58-67 Wright v. Nostrand, 94 N. Y. 31.

58-68 Clark v. Gurley (Tex. Civ.), 106 S. W. 394 (deposition not admissible, but proof of its contents proper); Hudkins v. Crim (W. Va.), 61 S. E. 166.

58-69 Joyce v. Joyce (Conn.), 67 A. 374; Clancey v. T. Co., 192 Mo. 615, 91 S. W. 509; Hudkins v. Crim, supra.

58-71 Warth v. Loewenstein, 219 Ill. 222, 76 N. E. 379; Clancey v. T. Co., 192 Mo. 615, 91 S. W. 509.

59-72 Charlton v. Kelly, 159 Fed. 433; Lanigan v. Neely, 4 Cal. App. 760. 89 P. 441; Carp v. Ins. Co., 202 Mo. 295, 101 S. W. 78, 94.

Unsigned deposition not admissible; proof of its contents proper. Clark v. Gurley (Tex. Civ.), 106 S. W. 394.

59-74 White River M. & N. Co. v. Langston, 76 Ark. 420, 88 S. W. 971; Chicago C. R. Co. v. Mauger, 128 Ill. App. 512; Davis v. Bank, 6 Ind. Ter. 124, 89 S. W. 1015 (taken through an unsworn interpreter, agent for both parties); Beier v. T. Co., 197 Mo. 215, 94 S. W. 876 (affidavit for continuance); Lederer v. Lederer, 108 App. Div. 228, 95 N. Y. S. 623; Randell v. S., 49 Tex. Cr. 261, 90 S. W. 1012.

60-78 Fox v. Erbe, 100 App. Div. 343, 91 N. Y. S. 832, *aff.* no opinion, 184 N. Y. 542, 76 N. E. 1095; Hoskins v. Bank (Tex. Civ.), 107 S. W. 598; Texas etc. R. Co. v. Moers (Tex. Civ.), 97 S. W. 1064; Hudkins v. Crim (W. Va.), 61 S. E. 166.

A general objection to the admissibility of a judgment roll in an action against several will not be ground for excluding it if admissible as against one of them to impeach his testimony. Fox v. Erbe, supra.

An answer in chancery by one defendant is not competent against another unless their interests were joint. Hudkins v. Crim (W. Va.), 61 S. E. 166.

The record in a chancery suit is not admissible to impeach the testimony of a witness who was a party thereto in favor of another person who was not a party nor a privy to such suit. Murray v. Moore, 104 Va. 707, 52 S. E. 381.

60-80 Browder v. R. Co., 107 Va. 10, 57 S. E. 572 (pleading filed by witness' authority and upon information he supplied).

Where allegations are made on information and belief in an original petition as to the members composing a partnership and an amended petition, containing like allegations, names different persons as members, the court may decline to submit either pleading to the jury. Daniel v. Lance, 29 Pa. Super. 454.

60-81 Weaver v. S., 83 Ark. 119, 102 S. W. 713 (affidavit for continuanace in conflict with accused's testimony); Galveston etc. R. Co. v. Harris (Tex. Civ.), 107 S. W. 108 (writ of error denied by supreme court); Hudkins v. Crim (W. Va.), 61 S. E. 166.

60-82 The Ocracoke, 159 Fed. 552; Giddens v. Rutledge, 146 Ala. 232, 40 S. 759; Rector v. Robins, 82 Ark. 424, 102 S. W. 209; Keyes v. R. Co. (Cal.), 93 P. 88; Leonard v. Gillette, 79 Conn. 664, 66 A. 502; Grant v. U. S., 28 App. D. C. 169; Perdue v. S., 126 Ga. 112, 54 S. E. 820; Swygart v. Willard, 166 Ind. 25, 76 N. E. 755; Rhomberg v. Avenarius (Ia.), 112 N. W. 548; Carey v. Nissle, 145 Mich. 383, 108 N. W. 733; Bowles v. S. (Miss.), 40 S. 165; Schloemer v. T. Co., 204 Mo. 99, 102 S. W. 565; S. v. Mulhall, 199 Mo. 202, 97 S. W. 583; Mullin v. T. Co., 196 Mo. 572, 94 S. W. 288; Dillard v. M. Co. (Or.), 94 P. 966; Hood v. S. (Tex. Cr.), 101 S. W. 229; Maxey v. Fairbanks (Tex. Civ.), 95 S. W. 632.

60-83 Alabama etc. R. Co. v. Clark, 145 Ala. 459, 39 S. 816; Rector v. Robins, 82 Ark. 424, 102 S. W. 209 (a mortgage and note); Miller v. R. Co., 144 Mich. 1, 107 N. W. 714; Norris v. S. (Tex. Cr.), 106 S. W. 136; San Antonio T. Co. v. Parks (Tex. Civ.), 93 S. W. 130 (application for life insurance competent to meet testimony of examining physician).

60-84 Davis v. Bank, 6 Ind. Ter. 124, 89 S. W. 1015.

61-86 Davis v. Bank, supra.

61-87 Hursch etc. R. Co. v. Coleman, 227 Ill. 149, 81 N. E. 21; McCann v. P., 226 Ill. 562, 80 N. E. 1061; Edmunds Mfg. Co. v. McFarland, 118 Ill. App. 256; Illinois C. R. Co. v. Wade, 206 Ill. 523, 69 N. E. 565; Hanlon v. Ehrich, 80 App. Div. 359, 80 N. Y. S. 692.

61-89 **A statement in a newspaper** has been received. Hoskins v. Bank (Tex. Civ.), 107 S. W. 598.

61-92 Sperbeck v. R. Co. (N. J.), 64 A. 1012.

62-95 **Letter-heads** containing the names of members of a partnership are competent against the person who ordered them on the issue of his membership. Rector v. Robins, 82 Ark. 424, 102 S. W. 209.

62-97 Denver etc. R. Co. v. Mitchell (Colo.), 94 P. 289; Berry v. C., 28 Ky. L. R. 1025, 90 S. W. 1072 (statement made after arrest); S. v. Callahan, 100 Minn. 63, 110 N. W. 342 (expression of purpose as to future action); Lederer

v. Lederer, 108 App. Div. 228, 95 N. Y. S. 623.

63-5 S. v. Mulhall, 199 Mo. 202, 97 S. W. 583.

63-8 S. v. Hogan, 117 La. 863, 42 S. 352.

64-10 See Larkin v. B. Co., 30 Utah 86, 83 P. 686.

65-13 Baker v. S. (Ark.), 107 S. W. 983 (affidavit for continuance stating what it was believed absent witness would testify to); Vanhouser v. S. (Tex. Cr.), 108 S. W. 386; Watson v. S., 50 Tex. Cr. 171, 95 S. W. 115; Scott v. S., 49 Tex. Cr. 386, 93 S. W. 112; Kirk v. S., 48 Tex. Cr. 624, 89 S. W. 1067.

66-14 Lewter v. Lindley (Tex. Civ.), 89 S. W. 784.

67-17 Hughes v. S. (Ala.), 44 S. 694; Jones v. S., 145 Ala. 51, 40 S. 947; Atlanta etc. R. Co. v. McManus, 1 Ga. App. 302, 58 S. E. 258; Robinson v. R. Co., 189 Mass. 594, 76 N. E. 190; P. v. Tubbs, 147 Mich. 1, 110 N. W. 132; Schloemer v. T. Co., 204 Mo. 99, 102 S. W. 565; Sperbeck v. R. Co. (N. J.), 64 A. 1012; Hood v. S. (Tex. Cr.), 101 S. W. 229; Larkin v. B. Co., 30 Utah 86, 83 P. 686.

68-18 Strong v. P., 119 Ill. App. 79. See Bragg v. R. Co., 192 Mo. 331, 91 S. W. 527.

69-26 Atlanta etc. R. Co. v. McManus, 1 Ga. App. 302, 58 S. E. 258.

70-32 Hanlon v. Ehrich, 178 N. Y. 474, 71 N. E. 12.

71-33 Duckworth v. S., 83 Ark. 192, 103 S. W. 601; Robinson v. R. Co. 189, Mass. 594, 76 N. E. 190; Schloemer v. T. Co., 204 Mo. 99, 102 S. W. 565; Mullin v. T. Co., 196 Mo. 572, 94 S. W. 288; Sperbeck v. R. Co. (N. J.), 64 A. 1012; Hanlon v. Ehrich, 178 N. Y. 474, 71 N. E. 12.

72-34 Hughes v. S. (Ala.), 44 S. 694; Jones v. S., 145 Ala. 51, 40 S. 947; Strong v. P., 119 Ill. App. 79; Hicks v. S., 165 Ind. 440, 75 N. E. 641; Carey v. Nissle, 145 Mich. 383, 108 N. W. 733; Myers v. S. (Tex. Cr.), 101 S. W. 1000; Larkin v. B. Co., 30 Utah 86, 83 P. 686.

What was said or done by a witness cannot be proven where the question is whether he was present when an offense was committed. Hicks v. S., 165 Ind. 440, 75 N. E. 641.

72-35 Bice v. S., 51 Tex. Cr. 133, 100 S. W. 949; Campos v. S., 50 Tex. Cr. 289, 97 S. W. 100.

74-40 Raines v. S., 147 Ala. 691, 40 S. 932; S. v. Hummer, 72 N. J. L. 328, 62 A. 388; Hanlon v. Ehrich, 178 N. Y. 474, 71 N. E. 12, S. v. Jennings, 48 Or. 483, 87 P. 524, 89 P. 421; Bice v. S., 51 Tex. Cr. 133, 100 S. W. 949; Woodward v. S., 50 Tex. Cr. 294, 97 S. W. 499.

74-42 See S. v. Barnett, 203 Mo. 640, 654, 102 S. W. 506.

75-45 Reisch v. P., 229 Ill. 574, 82 N. W. 321.

76-50 S. v. Mitchell, 119 La. 374, 44 S. 132; S. v. High, 116 La. 79, 40 S. 538.

77-59 Skeen v. S., 51 Tex. Cr. 39, 100 S. W. 770.

78-60 Dillard v. U. S., 141 Fed. 303, 72 C. C. A. 451; Southern R. Co. v. Hobbs (Ala.), 43 S. 844; Hinson v. S., 76 Ark. 366, 88 S. W. 947; P. v. Gray, 148 Cal. 507, 83 P. 707; Brackett v. G. Co., 127 Ga. 672, 56 S. E. 762; Cook v. Lynch, 128 Ill. App. 117; Owensboro City R. Co. v. Allen, 32 Ky. L. R. 1353, 108 S. W. 357; French v. C., 30 Ky. L. R. 98, 97 S. W. 427; Gorham v. Moor (Mass.), 84 N. E. 436; Loranger v. Carpenter, 148 Mich. 549, 112 N. W. 125; Bialy v. Krause, 142 Mich. 158, 105 N. W. 149; Scott v. S. (Miss.), 39 S. 1012; S. v. Murphy, 201 Mo. 691, 100 S. W. 414; Walker v. Walker (R. I.), 67 A. 519; Western Cottage etc. Co. v. Anderson (Tex. Civ.), 101 S. W. 1061 (writ of error denied by supreme court); Prewitt v. T. & T. Co. (Tex. Civ.), 101 S. W. 812; Sue v. S. (Tex. Cr.), 105 S. W. 804; Moody v. Rowland (Tex. Civ.), 102 S. W. 911; Barbee v. S., 50 Tex. Cr. 426, 97 S. W. 1058; Honeycutt v. S., 49 Tex. Cr. 300, 92 S. W. 421; Earley v. Winn, 129 Wis. 291, 109 N. W. 633; Barton v. Bruley, 119 Wis. 326, 96 N. W. 815.

Rule applies to accused who has testified on his own behalf. Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

80-61 Southern R. Co. v. Hobbs (Ala.), 43 S. 845; Funderburk v. S., 145 Ala. 661, 39 S. 672; Adams v. S. (Fla.), 45 S. 494; Atlantic etc. Co. v. Crosby, 53 Fla. 400, 43 S. 318; Nickolizack v. S., 75 Neb. 27, 105 N. W. 895; Keener v. S. (Tex. Cr.), 103 S. W. 904; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

81-62 Kelly v. R. Co., 148 Ala. 143, 41 S. 870; Hot Springs R. Co. v. Bodeman, 76 Ark. 302, 88 S. W. 960; French v. C., 30 Ky. L. R. 98, 97 S. W. 427; Nickolizack v. S., 75 Neb. 27, 105 N. W. 895; Alcolm Co. v. Brenack, 96 N. Y. S. 1055; Keener v. S. (Tex. Cr.), 103 S. W. 904; Brundige v. S., 49 Tex. Cr. 596, 95 S. W. 527.

In some jurisdictions the court may permit contradiction on irrelevant matters brought out on cross-examination. Bennett v. Susser, 191 Mass. 329, 77 N. E. 884; Salem News Pub. Co. v. Cailiga, 144 Fed. 965, 75 C. C. A. 673.

85-78 Gulf etc. R. Co. v. Matthews, 63 Tex. 100, 93 S. W. 1068, sustains most of the propositions stated in the text.

85-80 Birmingham R. & E. Co. v. Mason, 144 Ala. 387, 39 S. 590.

86-82 Swygart v. Willard, 166 Ind. 25, 76 N. E. 755; Robinson v. R. Co., 189 Mass. 594, 76 N. E. 190; Mullin v. T. Co., 196 Mo. 572, 94 S. W. 288; Rossenbach v. Foresters, 184 N. Y. 92, 76 N. E. 1085; S. v. Kenny, 77 S. C. 236, 57 S. E. 859; Gulf etc. R. Co. v. Matthews, 63 Tex. 100, 93 S. W. 1068; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

86-83 Nickolizack v. S., 75 Neb. 27, 105 N. W. 895.

86-84 Willis v. S., 49 Tex. Cr. 139, 90 S. W. 1100.

86-85 S. v. Malmberg, 14 N. D. 523, 105 N. W. 614.

87-88 P. v. Brown, 110 App. Div. 490, 96 N. Y. S. 957, 188 N. Y. 554, 80 N. E. 1115 (no opinion).

87-89 The rule as to relevancy is not always strictly applied. S. v. Callahan, 100 Minn. 63, 110 N. W. 342, *cit.* Philips v. Mo, 91 Minn. 311, 97 N. W. 969.

87-90 Swygart v. Willard, 166 Ind. 25, 76 N. E. 755.

88-91 Louisville etc. R. Co. v. Quinn, 146 Ala. 330, 39 S. 756; Houston etc. R. Co. v. Adams (Tex. Civ.), 98 S. W. 222; Cooper v. S., 48 Tex. Cr. 608, 89 S. W. 816.

88-93 Masterson v. T., 204 Mo. 507, 103 S. W. 48.

89-94 C. v. Smith, 163 Mass. 411, 40 N. E. 189.

90-5 See Thompson v. Mecosta, 141 Mich. 175, 104 N. W. 694, approving and distinguishing S. v. McGaffin, cited in the corresponding note of the Encyclopaedia.

Unauthorized statements by third parties in the presence of a witness are not admissible. Tucker v. Ter., 17 Okla. 56, 87 P. 307.

92-11 Myers v. Manlove (Ind. App.), 71 N. E. 893; Seibert v. Ins. Co., 132 Ia. 58, 106 N. W. 507; Thompson v. Mecosta, 141 Mich. 175, 104 N. W. 694; International etc. R. Co. v. Boykin, 99 Tex. 259, 89 S. W. 639; Franklin v. S. (Tex. Cr.), 88 S. W. 357.

96-23 Strickland v. S. (Ala.), 44 S. 90; Coker v. S., 144 Ala. 28, 40 S 516; Keyes v. R. Co. (Cal.), 93 P. 88; Clark v. Dalziel, 3 Cal. App. 121, 84 P. 429; P. v. Gray, 148 Cal. 507, 83 P. 707; Clinton v. S., 53 Fla. 98, 43 S. 312; Whitney v. Cleveland, 13 Idaho 558, 91 P. 176; Hirsch etc. R. Co. v. Coleman, 227 Ill. 149, 81 N. E. 21; New York etc. R. Co. v. Flynn (Ind. App.), 81 N. E. 741; Clay v. Goldstein, 31 Ky. L. R. 390, 102 S. W. 319 (applying § 598 Civ. Code of Proc.); S. v. Meyers, 120 La. 127, 44 S. 1008; Lerum v. Geving, 97 Minn. 269, 105 N. W. 967; P. v. Mallon, 116 App. Div. 425, 101 N. Y. S. 814; Hanlon v. Ehrich, 178 N. Y. 474, 71 N. E. 12; S. v. Hampton (S. C.), 60 S. E. 669; Opet v. Denzer (Tex. Civ.), 93 S. W. 527; International etc. R. Co. v. Boykin, 99 Tex. 259, 89 S. W. 639; S. v. Bardilli, 78 Vt. 102, 62 A. 44; Larsen v. Sedro-W. (Wash.), 94 P. 938; Earley v. Winn, 129 Wis. 291, 109 N. W. 633.

99-26 Foundation need not be laid when proof of variant statement is brought out on cross-examination of another witness and the party whose witness has been contradicted may recall him and secure explanation of the contradiction. The usual practice, however, is preferable. Newell v. Taylor, 74 S. C. 8, 54 S. E. 212.

100-32 Pruitt v. S., 92 Ala. 41, 9 S. 406; New York etc. R. Co. v. Flynn (Ind. App.), 81 N. E. 741; Jenkins v. Lutz, 26 Ind. App. 150, 59 N. E. 288.

104-42 S. v. Hampton (S. C.), 60 S. E. 669.

105-45 Stinson v. C., 29 Ky. L. R. 733, 96 S. W. 463.
105-50 Clay v. Goldstein, 31 Ky. L. R. 390, 102 S. W. 319.
106-51 Omaha R. Co. v. Bresen, 74 Neb. 764, 105 N. W. 303.
106-52 Lerum v. Geving, 97 Minn. 269, 105 N. W. 967; Omaha R. Co. v. Boesen, 74 Neb. 764, 105 N. W. 303.
107-59 Lerum v. Geving, 97 Minn. 269, 105 N. W. 967.
108-61 Lerum v. Geving, supra.
109-67 Hirsch etc. R. Co. v. Coleman, 227 Ill. 149, 81 N. E. 21; S. v. Hampton (S. C.), 60 S. E. 669.
110-74 S. v. Hampton, supra.
111-75 **The exact words** which it is claimed the witness used should be incorporated in the question. Haddix v. S., 76 Neb. 369, 107 N. W. 781.
111-77 Loughlin v. Brassil, 187 N. Y. 128, 79 N. E. 854.
114-85 **A predicate for proof of** conviction of murder will not sustain proof of conviction of shooting a man. Murph v. S. (Ala.), 45 S. 208.
115-87 See Evans v. Barnett (Del.), 63 A. 770.
116-95 Coffey v. R. Co. (Neb.), 112 N. W. 589.
Foundation unnecessary where witness has testified concerning the subject matter of the variant statements by denying that he made them. Maxey v. Fairbanks (Tex. Civ.), 95 S. W. 632.
117-96 P. v. Yee Foo, 4 Cal. App. 730, 89 P. 450; Clinton v. S., 53 Fla. 98, 43 S. 312; Coffey v. R. Co. (Neb.), 112 N. W. 589; P. v. Murphy, 113 App. Div. 363, 99 N. Y. S. 110.
117-99 Stinson v. C., 29 Ky. L. R. 733, 96 S. W. 463.
Transcript of testimony need not be shown witness while preliminary questions are being put. P. v. Hart (Cal.), 94 P. 1042.
117-1 Washington v. S., 124 Ga. 423, 52 N. E. 910 (rule not applicable to statement made under judicial oath); Hanlon v. Ehrich, 178 N. Y. 474, 71 N. E. 12.
118-3 S. v. Woodward, 132 Ia. 675, 108 N. W. 753; Stinson v. C., 29 Ky. L. R. 733, 96 S. W. 463.
118-7 **In Texas** it seems to be enough to ask the witness if he made the particular statement alleged. Lloyd v. Kerley (Tex. Civ.), 106 S. W. 696.
119-15 Haddix v. S., 76 Neb. 369, 107 N. W. 781.
120-20 **The testimony must not go beyond** the predicate. Red v. S., 39 Tex. Cr. 414, 46 S. W. 408; Messer v. S., 43 Tex. Cr. 97, 63 S. W. 643; St. Clair v. S., 49 Tex. Cr. 479, 92 S. W. 1095.
121-23 Hays v. S., 51 Tex. Cr. 111, 100 S. W. 926.
121-24 Pitman v. S., 148 Ala. 612, 42 S. 993; Vann v. S., 140 Ala. 122, 37 S. 158 (court's discretion not subject to review); Hammond v. S. 147 Ala. 79, 41 S. 761 (discretion irrevisable); Hirsch etc. R. Co. v. Coleman, 227 Ill. 149, 81 N. E. 21; Guffy P. Co. v. Hamill (Tex. Civ.), 94 S. W. 458.
122-33 Williams v. S., 147 Ala. 10, 41 S. 992.
124-35 **The question should be in the precise words** put to the principal witness. Hanselman v. Broad, 113 App. Div. 447, 99 N. Y. S. 404; Sloan v. R. Co., 45 N. Y. 125.
128-60 **Only the testimony** of the witness sought to be impeached should be introduced. Scott v. S. (Miss.), 46 S. 251.
129-62 Reiter-C. Mfg. Co. v. Hamlin, 144 Ala. 192, 40 S. 280.
Witness cannot be asked what he said until proof that he made the statement has been received. Cathcart v. Webb (Ala.), 42 S. 25.
129-65 Alabama etc. R. Co. v. Clark, 145 Ala. 459, 39 S. 816.
130-67 Chicago C. R. Co. v. Mauger, 128 Ill. App. 512.
130-68 See McCann v. P., 226 Ill. 562, 80 N. E. 1061.
131-69 **It is a matter of right** to prove variant statements after the witness' attention has been called to them. Rhomberg v. Avenarius (Ia.), 112 N. W. 548.
132-74 Joyce v. Joyce (Conn.), 67 A. 374; S. v. Jennings, 48 Or. 483, 87 P. 524, 89 P. 421.
132-76 **A signed statement,** admitted to contain only what witness said is not inadmissible because it does not contain all he said. S. v. Jennings, 48 Or. 483, 87 P. 524, 89 P. 421.
132-77 S. v. Jennings, supra;

S. v. Sanders, 75 S. C. 409, 56 S. E. 35.

134-83 Baum v. S., 6 Ohio C. C. (N. S.), 515 (stenographer, after testifying that he knew, when he took the notes, they were accurate, may read them, although not able, by using them to refresh his memory, to testify without them). See Davis v. Bank, 6 Ind. Ter. 124, 89 S. W. 1015; C. v. Vose, 157 Mass. 393, 32 N. E. 355, 17 L. R. A. 813.

134-91 Presumption on appeal is, the record being silent, that proof of the contradictory statements was made. S. v. Jennings, 48 Or. 483, 87 P. 524, 89 P. 421.

136-98 That which a witness has said ordinarily can be much better proved by an examination of the person by whom it was said. S. v. Caron, 118 La. 349, 42 S. 960.

137-1 S. v. Phillips, 118 Ia. 660, 92 N. W. 876; S. v. Hoffman, 134 Ia. 587, 112 N. W. 103; Stinson v. C., 29 Ky. L. R. 733, 96 S. W. 463; Hendricks v. C., 23 Ky. L. R. 1191, 64 S. W. 954; S. v. Wells, 33 Mont. 291, 83 P. 476 (notwithstanding witness' denial that he made the statement).

A letter is admissible only when the witness has denied making the statements in it. Dooley v. Miller, 2 Tex. Civ. 132, 21 S. W. 157; Lloyd v. Kerley (Tex. Civ.), 106 S. W. 696.

Only so much of a deposition as directly relates to the variant testimony need be read. Charlton v. Kelly, 156 Fed. 433.

139-8 In Iowa the rule has been changed by statute. S. v. Hoffman, 134 Ia. 587, 112 N. W. 103.

140-10 Richards v. C., 107 Va. 881, 59 S. E. 1104.

140-11 The transcript of a justice is incompetent unless he is required to reduce testimony taken before him to writing. Scott v. S. (Miss.), 46 S. 251.

141-15 Casey v. S., 50 Tex. Cr. 393, 97 S. W. 496 (accuracy of notes testified to).

141-16 Not admissible though verified by official stenographer (Prewitt v. T. & T. Co. (Tex. Civ.), 101 S. W. 812), or if stenographer declines to say that all the testimony is given. S. v. Martin, 47 Or. 282, 83 P. 849. Unverified minutes of stenographer inadmissible. Jaffe v. R. Co., 49 Misc. 520, 97 N. Y. S. 1037.

142-18 Snyder v. S., 145 Ala. 33, 40 S. 978; Brown v. McBride, 129 Ga. 92, 58 S. E. 702; Hirsch etc. R. Co. v. Coleman, 227 Ill. 149, 81 N. E. 21; Baum v. S., 6 Ohio C. C. (N. S.) 515.

143-21 Murray v. Moore, 104 Va. 707, 52 S. E. 381.

143-24 Allen v. Ellis, 125 Wis. 565, 104 N. W. 739.

145-32 Joyce v. Joyce, 80 Conn. 88, 67 A. 374; Shreve v. Crosby, 72 N. J. L. 491, 63 A. 333 (it is immaterial that the variant statements are in writing).

145-33 Chandler v. S., 124 Ga. 821, 53 S. E. 91; Hoggan v. Cahoon, 31 Utah 172, 87 P. 164.

145-34 Faulkner v. S. (Tex. Cr.), 109 S. W. 199.

145-36 Ignorance of technical words in a paper may be shown. Brown v. McBride, 129 Ga. 92, 58 S. E. 702.

146-38 Hood v. S. (Tex. Cr.), 107 S. W. 848 (by virtue of statute providing for admission of whole conversation if part of it proved); Corpus v. S. (Tex. Cr.), 102 S. W. 1152 (portions of testimony on inquest).

146-39 Falkner v. S. (Ala.), 44 S. 409; Casey v. S., 50 Tex. Cr. 393, 97 S. W. 496.

Variance in testimony as compared with that previously given may be explained by showing that only the substance of the latter was written. S. v. Hampton (S. C.), 60 S. E. 669.

147-43 Chandler v. S., 124 Ga. 821, 53 S. E. 91.

148-45 South Covington etc. R. Co. v. Core, 29 Ky. L. R. 836, 96 S. W. 562. See Murray v. Moore, 104 Va. 707, 52 S. E. 381.

149-50 Wefel v. Stillman (Ala.), 44 S. 203; S. v. Goodson, 116 La. 388, 40 S. 771 (contradiction of witness' statement that he could not speak English).

Precautionary acts taken to preserve legal rights and not based on personal knowledge of the facts are not provable to affect credibility. Blickley v. Luce, 148 Mich. 233, 111 N. W. 752.

149-51 Ruemer v. Clark, 121 App. Div. 231, 105 N. Y. S. 659.

150-52 One may avail himself of

the constitutional right to remain silent without incurring hostile criticism by impeachment. Masterson v. T. Co., 204 Mo. 507, 524, 103 S. W. 48, *dist.* and *disappr.* C. v. Smith, 163 Mass. 411, 40 N. E. 189.

150-53 Schloemer v. T. Co., 204 Mo. 99, 102 S. W. 565. But *compare* Loughlin v. Brassil, 187 N. Y. 128, 79 N. E. 854.

150-54 Crosby v. Wells, 73 N. J. L. 790, 67 A. 295; Bluestein v. Collins (Tex. Civ.), 103 S. W. 687.

The credibility of an excuse for dereliction of duty may be tested by proof of previous trials for like neglect. P. v. Lewis, 111 App. Div. 375, 97 N. Y. S. 1057, 186 N. Y. 583, 79 N. E. 1113 (no opinion). The opinion of the supreme court cites P. v. Dorthy, 156 N. Y. 237, 50 N. E. 800; Shepard v. Parker, 36 N. Y. 517, as applicable to like cases; and P. v. Casey, 72 N. Y. 393; P. v. Noelke, 94 N. Y. 137, 46 Am. Rep. 128; P. v. Irving, 95 N. Y. 541; P. v. Giblin, 115 N. Y. 196, 21 N. E. 1062, 4 L. R. A. 757, and P. v. Webster, 139 N. Y. 73, 34 N. E. 730, as applying the principle on criminal trials.

Previous omission of witness to perform a like duty to that, the performance of which he has testified of, may be shown on cross-examination. Southern R. Co. v. Blanford, 105 Va. 373, 54 S. E. 1, *cit.* Oxier v. U. S., 1 Ind. Ter. 85, 38 S. W. 331, S. v. Smith, 190 Mo. 706, 90 S. W. 440; P. v. Jackson, 3 Park. Cr. (N. Y.) 391.

Testimony as to the sobriety of a deceased person may be tested by asking the witness if he had ever seen such person in the penitentiary and if he had ever talked with another person about having a complaint made against deceased for intoxication. Rossenbach v. Foresters, 184 N. Y. 92, 76 N. E. 1085.

151-55 Southern R. Co. v. Blanford, 105 Va. 373, 54 S. E. 1.

151-56 Sotebier v. T. Co., 203 Mo. 702, 102 S. W. 651; Ruemer v. Clark, 121 App. Div. 231, 105 N. Y. S. 659.

152-58 Verbal proof of a previous judicial complaint is admissible. Ruemer v. Clark, supra.

152-59 Ross v. S. (Tex. Cr.), 109 S. W. 152.

152-61 Predicate need not be laid where witness is a party. Ruemer v. Clark, supra.

153-66 Larrance v. P., 222 Ill. 155, 78 N. E. 50; Ranken v. Donovan, 115 App. Div. 651, 100 N. Y. S. 1049; Huebner v. Roosevelt, 7 Daly (N. Y.) 111.

154-67 Lanigan v. Neely, 4 Cal. App. 760, 89 P. 441; S. v. Armstrong, 118 La. 480, 43 S. 57; Henderson v. S., 50 Tex. Cr. 604, 101 S. W. 208; Gulf etc. R. Co. v. Matthews, 100 Tex. 63, 93 S. W. 1068 (an important case).

Other circumstances than the silence of the witness may be shown to give emphasis to the significance of his silence. Gulf etc. R. Co. v. Matthews, supra.

155-68 Barbee v. S., 50 Tex. Cr. 426, 97 S. W. 1058.

155-69 Parham v. S., 147 Ala. 57, 42 S. 1 (silence of witness as grand juror); Cramer v. Harmon, 126 Mo. App. 54, 103 S. W. 1086.

Silence of accused on former trials may be shown on a third trial. Sanders v. S. (Tex. Cr.), 105 S. W. 803.

156-70 Larrance v. P., 222 Ill. 155, 78 N. E. 50; Chicago C. R. Co. v. Rohe, 118 Ill. App. 322 (it is immaterial that plaintiff was not called upon to testify in a suit by another party arising out of the same act of negligence); Newman v. C., 28 Ky. L. R. 81, 88 S. W. 1089 (silence on application for bail); Thompson v. Mecosta, 141 Mich. 175, 104 N. W. 694.

156-71 Gulf etc. R. Co. v. Matthews, 100 Tex. 63, 93 S. W. 1068.

156-72 Crossland v. S., 77 Ark. 544, 92 S. W. 776; Cramer v. Harmon, 126 Mo. App. 54, 103 S. W. 1086.

156-73 Henderson v. S., 50 Tex. Cr. 604, 101 S. W. 208; Gulf etc. R. Co. v. Matthews, 100 Tex. 63, 93 S. W. 1068.

157-82 Wyman v. R. Co., 158 Fed. 957; Carwile v. S., 148 Ala. 576, 39 S. 220; Williams v. S., 123 Ala. 39, 26 S. 521.

The rule that a witness may not testify of his intent, reason or motive is set aside when impeachment is attempted by proof of his contradictory acts, statements and con-

duct. Carwile v. S.; Williams v. S., supra.

158-83 **Corroboration may be by proof** of previous consistent claims and statements made before their effect could be anticipated. National C. Co. v. Alexander, 75 Kan. 537, 89 P. 923; Stirn v. Nelson, 65 Kan. 419, 70 P. 355.

158-87 San Antonio v. Wildenstein (Tex. Civ.), 109 S. W. 231.

158-90 S. v. Hayden, 131 Ia. 1, 107 N. W. 929; Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639; Craft v. Barron, 121 Ky. 129, 28 Ky. L. R. 98, 88 S. W. 1099.

159-91 Alexander v. Hill, 32 Ky. L. R. 1147, 108 S. W. 225.

159-94 **Reputation of the accused** cannot be proven by what was said of him subsequently to the commission of the offense. Powers v. S., 117 Tenn. 363, 97 S. W. 815.

159-95 Craft v. Barron, 121 Ky. 129, 28 Ky. L. R. 98, 88 S. W. 1099; S. v. Bryant, 97 Minn. 8, 105 N. W. 974.

There is no presumption as to change of character. Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639.

160-97 Cline v. Waters, 28 Ky. L. R. 679, 90 S. W. 231 (inquiry as to immoral conduct fifteen or twenty years before properly excluded); Warren v. C., 99 Ky. 370, 18 Ky. L. R. 141, 35 S. W. 1028.

163-4 Craft v. Barron, 121 Ky. 129, 28 Ky. L. R. 98, 88 S. W. 1099; P. v. Mix, 149 Mich. 260, 112 N. W. 907; Norwood v. Andrews, 71 Miss. 641, 16 S. 262.

164-7 S. v. Bryant, 97 Minn. 8, 105 N. W. 974.

164-8 Hull v. S., 50 Tex. Cr. 607, 100 S. W. 403 (four years not too remote); Ware v. S., 49 Tex. Cr. 413; 92 S. W. 1093 (twenty years too remote).

165-11 S. v. Pugh, 75 Kan. 792, 90 P. 242; S. v. Abbott, 65 Kan. 139, 69 P. 160.

165-13 S. v. Darling, 202 Mo. 150, 100 S. W. 631; Rice v. S., 51 Tex. Cr. 255, 103 S. W. 1156 (effort to conceal materiality of testimony); P. v. Yee Foo, 4 Cal. App. 730, 89 P. 450; S. v. Koller, 129 Ia. 111, 105 N. W. 391. See Rice v. S., 51 Tex. Cr. 255, 103 S. W. 1156, holding that the question of bribery is collateral to the issue, defendant not being connected with it.

166-14 Routledge v. A. Co. (Tex. Civ.), 95 S. W. 749.

167-18 Clancy v. T. Co., 192 Mo. 615, 91 S. W. 509.

167-20 **A witness who has explained** his variant testimony may be shown to have been arrested on a charge of being the guilty party in the case. Snyder v. S., 145 Ala. 33, 40 S. 978.

Proof that a witness predicted the commission of the offense is not competent to impeach him. Woodward v. S., 50 Tex. Cr. 294, 97 S. W. 499.

167-21 S. v. Darling, 202 Mo. 150, 100 S. W. 631; Rice v. S., 51 Tex. Cr. 255, 103 S. W. 1156.

168-22 P. v. Yee Foo, 4 Cal. App. 730, 89 P. 450; S. v. Darling, 202 Mo. 150, 100 S. W. 631; Schuster v. S., 80 Wis. 107, 49 N. W. 30.

168-26 St. Louis S. R. Co. v. Bryson, 41 Tex. Civ. 245, 91 S. W. 829.

169-27 Miller v. Ter., 149 Fed. 330, 79 C. C. A. 268; Sholts v. McKinney, 39 Ind. App. 101, 79 N. E. 219; S. v. Howard, 120 La. 311, 45 S. 260; S. v. Grubb, 201 Mo. 585, 99 S. W. 1083 (it may not be shown by express testimony that a witness is a dead beat); S. v. Richardson, 194 Mo. 326, 92 S. W. 649.

170-28 Miller v. Ter., 149 Fed. 330, 79 C. C. A. 268; S. v. Barnett, 203 Mo. 640, 102 S. W. 506.

170-29 In re Durant, 80 Conn. 140, 67 A. 497; Sue v. S. (Tex. Cr.), 105 S. W. 804; S. v. Grove, 61 W. Va. 697, 57 S. E. 296.

170-30 **In Texas witnesses in civil cases** cannot be asked concerning discreditable acts having no material bearing upon the issues. Moody v. Rowland (Tex. Civ.), 102 S. W. 911. It may be shown that a witness who has assumed responsibility for a crime has fabricated his testimony as a defense for accused. Carnes v. S. (Tex. Cr.), 103 S. W. 403. There have been conflicting decisions on the point stated in the text. Recently the supreme court has declared the rule originally favored—that the inquiry should be confined to the witness' general reputation for truth and should not extend to his general moral character. Missouri

etc. R. Co. v. Creason (Tex.), 107 S. W. 527. A witness cannot be asked if he is a deserter. Gulf etc. R. Co. v. Johnson, 83 Tex. 628, 19 S. W. 151.

Cross-examination of a wife who has testified in favor of her husband must be limited to matters of which she testified on her examination in chief. Though she testified that the man whom he is alleged to have killed committed rape upon her she cannot be required to testify to other unlawful acts on his and her part. Jones v. S., 51 Tex. Cr. 472, 101 S. W. 993.

171-31 S. v. Pugh, 75 Kan. 792, 90 P. 242; Newton v. C., 31 Ky. L. R. 327, 102 S. W. 264; S. v. Oliphant, 128 Mo. App. 252, 107 S. W. 32.

173-34 Sitton v. Grand Lodge, 84 Mo. App. 208; S. v. Sibley, 132 Mo. 102, 33 S. W. 167, 53 Am. St. 477; York v. Everton, 121 Mo. App. 640, 97 S. W. 604; P. v. Fiori, 123 App. Div. 174, 108 N. Y. S. 416.

173-35 Swint v. S. (Ala.), 45 S. 901.

177-38 Miller v. Ter., 149 Fed. 330, 79 C. C. A. 268 (question as to possession of stolen property); Perry v. S. (Ala.), 43 S. 18; Baker v. S., 51 Fla. 1, 40 S. 673; Mercer v. S., 40 Fla. 216, 24 S. 154, 74 Am. St. 135; Adkinson v. S., 48 Fla. 1, 37 S. 522; S. v. Baudoin, 115 La. 837, 40 S. 239; S. v. Romero, 117 La. 1003, 42 S. 482; Richardson v. S., 103 Md. 112, 63 A. 317; Davis v. S., 87 Miss. 337, 39 S. 522; S. v. Arnold, 146 N. C. 602, 60 S. E. 504; S. v. Hairston, 121 N. C. 579, 28 S. E. 492; S. v. Bullard, 100 N. C. 486, 6 S. E. 191; Nixon v. McKinney, 105 N. C. 23, 11 S. E. 154; S. v. White, 48 Or. 416, 87 P. 137 (applying § 852 stats.); San Antonio v. Wildenstein (Tex. Civ.), 109 S. W. 231, S. v. Stimpson, 78 Vt. 124, 62 A. 14, 1 L. R. A. (N. S.) 1153; Bringgold v. Bringgold, 40 Wash. 121, 82 P. 179.

177-39 Hensley v. C., 31 Ky. L. R. 386, 102 S. W. 268 (the code provides that a witness cannot be impeached by particular wrongful acts, except that it may be shown he has been convicted of a felony); Britton v. C., 123 Ky. 411, 29 Ky. L. R. 857, 96 S. W. 556 (killing in another state from which witness fled to avoid arrest).

177-40 **It is not proper** to ask a witness concerning his associates. Miller v. Ter., 149 Fed. 330, 79 C. C. A. 268.

177-41 Shotts v. McKinney, 39 Ind. App. 101, 79 N. E. 219; S. v. Caron, 118 La. 349, 42 S. 960 (course of conduct); P. v. Cascone, 185 N. Y. 317, 78 N. E. 287.

178-42 Benton v. S., 78 Ark. 284, 94 S. W. 688 (proper to permit defendant to be asked if he had not been married to a negress); Shotts v. McKinney, 39 Ind. App. 101, 79 N. E. 219; Greer v. R. Co., 193 Mass. 246, 79 N. E. 267; Robinson v. R. Co., 189 Mass 594, 76 N. E. 190.

Discretion reviewable. — P. v. Fiori, 123 App. Div. 174, 108 N. Y. S. 416; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

180-47 Powers v. S., 117 Tenn. 363, 97 S. W. 815; Jones v. S., 51 Tex. Cr. 472, 101 S. W. 993.

181-52 S. v. Hasty, 76 S. C. 105, 56 S. E. 669; City of Greenville v. Spencer, 77 S. C. 50, 57 S. E. 638; Wallen v. Wallen, 107 Va. 131, 57 S. E. 596.

182-54 **The disposition** of a criminal charge by a court or grand jury, in the absence of an admission, is not competent against the officer who made the arrest to impeach his testimony in respect to the guilt of the party he arrested. P. v. Way, 119 App. Div. 344, 104 N. Y. S. 277.

183-58 P. v. Ryder (Mich.), 114 N. W. 1021; Douglass v. S. (Tex. Cr.), 98 S. W. 840; Griffin v. S., 26 Tex. App. 157, 9 S. W. 459, 8 Am. St. 460; Stockholm v. S., 24 Tex. App. 598, 7 S. W. 338.

The question must not be put so as to call for the witness' opinion of the truth of the testimony given at the trial by the person whom it is sought to impeach. Maloy v. S., 52 Fla. 101, 41 S. 791.

185-62 Hughes v. S. (Ala.), 44 S. 694; Holmes v. S., 88 Ala. 26, 7 S. 193, 16 Am. St. 17; Mitchell v. S., 148 Ala. 618, 42 S. 1014; Douglass v. S. (Tex. Cr.), 98 S. W. 840, and cases cited, 183-58, ante.

186-63 Hughes v. S. (Ala.), 44 S. 694; Holmes v. S., 88 Ala. 29, 7 S. 193, 16 Am. St. 17; Carter v. S.,

145 Ala. 679, 40 S. 82; S. v. Rester, 116 La. 985, 41 S. 231; Wolff v. T. Co. (Tex. Civ.), 94 S. W. 1062; McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503.

Knowledge of sustaining witness concerning character of assailed witness may be tested by asking if he had heard of accusations against latter inconsistent with the testimony concerning him. Williams v. S., 144 Ala. 14, 40 S. 405; P. v. Weber, 149 Cal. 325, 86 P. 671.

The form of the question must not be such as to prejudice the assailed witness. P. v. Weber, supra.

186-65 S. v. Blackburn (Ia.), 110 N. W. 275; S. v. Rester, 116 La. 985, 41 S. 231; Carp v. Ins. Co., 201 Mo. 295, 101 S. W. 78, 94.

187-66 Spotswood v. Spotswood, 4 Cal. App. 711, 89 P. 362 (testimony based on personal knowledge).

187-67 Reports heard of defendant after commission of the alleged offense cannot be shown. Powers v. S., 117 Tenn. 363, 97 S. W. 815.

190-75 S. v. Blackburn (Ia.), 110 N. W. 275; S. v. Haupt, 126 Ia. 152, 101 N. W. 739.

193-81 S. v. Beckner, 194 Mo. 281, 91 S. W. 892 (reviewing local cases); Powers v. S., 117 Tenn. 363, 97 S. W. 815; Dungan v. S. (Wis.), 115 N. W. 350.

206-18 Guilt cannot be inquired into of itself. — Goad v. S. (Tex. Cr.), 108 S. W. 680.

206-19 In Texas it is not competent to show that a witness has partially served a sentence of imprisonment. Missouri etc. R. Co. v. Dumas (Tex. Civ.), 96 S. W. 493.

206-21 Smith v. S., 79 Ark. 25, 94 S. W. 918; Goad v. S. (Tex. Cr.), 108 S. W. 680; Sue v. S. (Tex. Cr.), 105 S. W. 804; Turman v. S., 50 Tex. Cr. 7, 95 S. W. 533; Childress v. S., 48 Tex. Cr. 617, 90 S. W. 30. *Contra*, S. v. Barrett, 117 La. 1086, 42 S. 513, disapproving earlier cases.

Indictment against a witness by the same grand jury which indicted defendant is admissible against former on trial of latter for the identical offense. Hayes v. S., 126 Ga. 95, 54 S. E. 809.

207-22 Goad v. S. (Tex. Cr.), 108 S. W. 680; Willis v. S., 49 Tex. Cr. 139, 90 S. W. 1100.

Informal accusation is not provable. Wade v. S., 48 Tex. Cr. 512, 90 S. W. 503.

207-23 Glover v. U. S., 147 Fed. 426, 77 C. C. A. 450; Kincaid v. Price, 82 Ark. 20, 100 S. W. 76; Kansas City S. R. Co. v. Belknap, 80 Ark. 587, 98 S. W. 366; Stanley v. Ins. Co., 70 Ark. 107, 66 S. W. 432; Benton v. S., 78 Ark. 284, 94 S. W. 688; S. v. Barrett, 117 La. 1086, 42 S. 513; Starling v. S., 89 Miss. 328, 42 S. 798 (the statute provides for a proof of "conviction"); S. v. Wigger, 196 Mo. 90, 93 S. W. 390 (statute provides for proof of conviction only); P. v. Cascone, 185 N. Y. 317, 78 N. E. 287.

208-24 Conviction and arrest may be included in same question. Koch v. S., 126 Wis. 470, 106 N. W. 531. No error is committed by asking as to an arrest if inquiry as to conviction immediately follows. Thornton v. S., 117 Wis. 338, 93 N. W. 1107.

209-25 Ball v. U. S., 147 Fed. 32, 78 C. C. A. 126 (Alaska); S. v. Barrett, 117 La. 1086, 42 S. 513; S. v. Herlihy, 102 Me. 310, 66 A. 643; P. v. Tubbs, 147 Mich. 1, 110 N. W. 132 (assault and battery); Williams v. S., 87 Miss. 373, 39 S. 1006; S. v. Kennedy, 207 Mo. 528, 106 S. W. 57; S. v. Barrington, 198 Mo. 23, 95 S. W. 235; S. v. Heusack, 189 Mo. 295, 88 S. W. 21; Koch v. S., 126 Wis. 470, 106 N. W. 531 ("criminal offense" includes a misdemeanor, but not violation of a municipal ordinance).

A question as to conviction for drunkenness, not being limited as to locality, will be regarded as having reference to a place in which there was no municipal ordinance on the subject and where the general law was operative. Koch v. S., 126 Wis. 470, 106 N. W. 531.

210-26 Wheeler v. S. (Ga. App.), 61 S. E. 409; Sue v. S. (Tex. Cr.), 105 S. W. 804; Pallok v. S. (Tex. Cr.), 101 S. W. 231; Williams v. S., 51 Tex. Cr. 361, 102 S. W. 1134; Turman v. S., 50 Tex. Cr. 7, 95 S. W. 533; Missouri etc. R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493 (indictment in two counts dismissed

as to the felony, conviction of misdemeanor).

211-27 P. v. Eldridge, 147 Cal. 782, 82 P. 442; Kennedy v. Lee, 147 Cal. 596, 82 P. 257 (foreign judgment inadmissible unless it shows conviction of a felony); P. v. Gray, 148 Cal. 507, 83 P. 707; Landy v. Moritz (Ky.), 109 S. W. 897; Wells v. C. 30 Ky. L. R. 504, 99 S. W. 218; Pennington v. C., 21 Ky L. R. 542, 51 S. W. 818; Hensley v. C., 25 Ky. L. R. 48, 74 S. W. 677; Ball v. C., 30 Ky. L. R. 600, 99 S. W. 326; S. v. Lawrence, 28 Nev. 440, 82 P. 614.

The name of the felony may be proven by the witness. P. v. Eldridge, 147 Cal. 782, 82 P. 442.

211-28 Mitchell v. S., 148 Ala. 618, 42 S. 1014; Smith v. S., 129 Ala. 89, 29 S. 699, 87 Am. St. 47; Williams v. S., 144 Ala. 14, 40 S. 405 (inquiry as to conviction in a certain court too general); Fuller v. S., 147 Ala. 35, 41 S. 774 (statutory felony not a common law crime); Pioneer F.-P. Co. v. Clifford, 125 Ill. App. 352; Daxenbecklar v. P., 93 Ill. App. 553.

Record showing disbarment of witness as an attorney is competent, the charges of criminal conduct and the findings being specific. Whipple v. R. Co., 143 Mich. 47, 106 N. W. 692. It is otherwise where charge was not specific, though misconduct was admitted and license to practice was surrendered. Dickinson v. Dustin, 21 Mich. 561.

213-29 Missouri etc. R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493.

214-33 Casey v. S., 51 Tex. Cr. 433, 97 S. W. 496 (indictment dismissed).

214-35 Commission of crime cannot be inquired about, but if witness answers in negative no harm results. S. v. Long, 201 Mo. 664, 100 S. W. 587.

An accusation of guilt cannot be proven. Bain v. S., 38 Tex. Cr. 635, 44 S. W. 518; Caldwell v. S. (Tex. Cr.), 106 S. W. 343.

215-38 S. v. Herlihy, 102 Me. 310, 66 A. 643.

215-39 A witness who admits that he pleaded guilty to one crime may be shown to have so pleaded to another. S. v. Forsha, 190 Mo. 296, 88 S. W. 746.

216-45 S. v. Heusack, 189 Mo. 295, 88 S. W. 21.

216-46 Ball v. U. S., 147 Fed. 32, 78 C. C. A. 126 (record of federal court sitting in another state competent); Wheeler v. S. (Ga. App.), 61 S. E. 409; S. v. Herlihy, 102 Me. 310, 66 A. 643 (it is immaterial that there is no formal judgment of conviction where the plea is nolo contendre); P. v. De Camp, 146 Mich. 533, 109 N. W. 1047; S. v. Kennedy, 207 Mo. 528, 106 S. W. 57; S. v. Brooks, 202 Mo. 106, 100 S. W. 416; Gulf etc. R. Co. v. Gibson (Tex. Civ.), 93 S. W. 469 (writ of error denied by supreme court).

217-48 Boyd v. S. (Ala.), 43 S. 204.

Identity of name establishes, prima facie, identity of person notwithstanding defendant's denial. Colbert v. S., 125 Wis. 423, 104 N. W. 61. See supra, "Indentity."

217-49 S. v. Blitz, 171 Mo. 530, 71 S. W. 1027; S. v. Thornhill, 174 Mo. 364, 74 S. W. 832; S. v. Spivey, 191 Mo. 87, 90 S. W. 81; S. v. Woodward, 191 Mo. 617, 90 S. W. 90.

218-50 Objection to parol proof of conviction must be specific or failure to produce record will be waived. O'Donnell v. P., 224 Ill. 218, 79 N. E. 639.

218-53 P. v. Oliver (Cal. App.), 95 P. 172; P. v. Eldridge, 147 Cal. 782, 82 P. 442; Farmer v. C., 28 Ky. L. R. 1168, 91 S. W. 682; Henderson v. C., 122 Ky. 296, 28 Ky. L. R. 1212, 91 S. W. 1141; Britton v. C., 29 Ky. L. R. 857, 96 S. W. 556; Williams v. S., 87 Miss. 373, 39 S. 1006.

222-58 S. v. Powell, 5 Penne. (Del.) 24, 61 A. 966 (docket entries inadmissible); Green v. S., 125 Ga. 742, 54 S. E. 724.

222-59 In Louisiana a conviction may be proved by extrinsic evidence. S. v. Griggsby, 117 La. 1046, 42 S. 497.

222-64 Missouri etc. R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493.

223-65 Admission of conviction conclusive. Fuller v. S., 147 Ala. 35, 41 S. 774.

223-67 Under some statutes the

proof must be limited to conviction. Dodds v. S. (Miss.), 45 S. 863.

224-76 **Indictment.** — In some states a witness may not be asked if he has been indicted. Ross v. S., 139 Ala. 144, 36 S. 718; Watson v. S. (Ala.), 46 S. 232; Howard v. C., 110 Ky. 356, 61 S. W. 756; Pennington v. C., 21 Ky. L. R. 542, 51 S. W. 818; Missouri etc. R. Co. v. Creason (Tex.), 107 S. W. 527, *over.* Carroll v. S., 32 Tex. Cr. 431, 24 S. W. 100, 40 Am. St. 786.

225-84 *Contra.* — S. v. Bryant, 97 Minn. 8, 105 N. W. 974, § 6841 Gen. Stats. 1894.

226-87 Peters v. S., 124 Ga. 80, 52 S. E. 147.

A witness in a criminal case cannot testify of his own character for truth and veracity. Glass v. S., 147 Ala. 50, 41 S. 727.

226-89 Dunlap v. S., 50 Tex. Cr. 504, 98 S. W. 845 (character for truth or honesty).

Where grand jurors may be required to disclose the testimony of witnesses before the jury one juror may, in contradiction of the testimony of another, testify that the testimony given in court corresponded with that before the jury. Kennedy v. C. (Ky.), 109 S. W. 313.

226-90 Carter v. S., 145 Ala. 679, 40 S. 82; Title Ins. & T. Co. v. Ingersoll (Cal.), 94 P. 94; S. v. Cato, 116 La. 195, 40 S. 633; Weitzel v. Fowler, 143 Mich 700, 107 N. W. 451; Pratt v. S. (Tex. Cr.), 109 S. W. 138; Smith v. S. (Tex. Cr.), 100 S. W. 924; Casey v. S., 50 Tex. Cr. 392, 97 S. W. 496; McKnight v. S., 50 Tex. Cr. 252, 95 S. W. 1056; Green v. S., 49 Tex. Cr. 238, 90 S. W. 1115.

227-91 **The competency of the assailing evidence is immaterial** so far as the right to offer sustaining evidence is concerned. The party assailed is not bound to move that such evidence be stricken out or ask that its purpose and effect be limited. S. v. Speritus, 191 Mo. 24, 90 S. W. 459.

Attack may be anticipated where a predicate has been laid and sustaining evidence offered before impeaching witnesses have testified. Harris v. S., 49 Tex. Cr. 338, 94 S. W. 227.

228-94 Inman v. L. Co., 146 Fed. 449, 76 C. C. A. 659; Southern R. Co. v. Hobbs (Ala.), 43 S. 844; Birmingham etc. R. Co. v. Ellard, 135 Ala. 433, 33 S. 276; Title Ins. & T. Co. v. Ingersoll (Cal.), 94 P. 94.

A deponent who has admitted in a second deposition the making of a mistake in a prior one may not be sustained by proof of statements corroborative of the later deposition. Breeden v. Martens (S. D.), 112 N. W. 960.

228-95 Brown v. S. (Tex. Cr.), 106 S. W. 368 (variance in testimony of witness); Myers v. S. (Tex. Cr.), 101 S. W. 1000; Chesapeake & O. R. Co. v. Fortune, 107 Va. 412, 59 S. E. 1095.

228-96 Warren v. S., 51 Tex. Cr. 598, 103 S. W. 888.

229-97 Harris v. S., 49 Tex. Cr. 338, 94 S. W. 227; Warren v. S., 51 Tex. Cr. 598, 103 S. W. 888.

Wherever contradictory or apparently contradictory statements of a witness are proved his reputation for truth and veracity may be shown. Dunlap v. S., 50 Tex. Cr. 504, 98 S. W. 845.

229-98 Harris v. S., supra.

229-99 Corpus v. S., 51 Tex. Cr. 315, 102 S. W. 1152.

230-5 Kennedy v. C. (Ky.), 109 S. W. 313; Harris v. S., supra.

231-14 Hicks v. S., 165 Ind. 440, 75 N. E. 641; Hinshaw v. S., 147 Ind. 334, 372, 47 N. E. 157; Rice v. S., 51 Tex. Cr. 255, 100 S. W. 771; Casey v. S., 50 Tex. Cr. 392, 97 S. W. 496; Davis v. Davis (Tex. Civ.), 98 S. W. 198; Aetna Ins. Co. v. Eastman, 95 Tex. 34, 64 S. W. 863; St. Louis S. R. Co. v. Irvine (Tex. Civ.), 89 S. W. 428; Craven v. S., 49 Tex. Cr. 78, 90 S. W. 311; Franklin v. S. (Tex. Cr.), 88 S. W. 357.

Only so much of the prior statements as have been contradicted are admissible, and they are so only for the purpose of affecting the witness' credibility. Hicks v. S., 165 Ind. 440, 75 N. E. 641.

232-16 Craven v. S., 49 Tex. Cr. 78, 90 S. W. 311; Hudson v. S., 49 Tex. Cr. 24, 90 S. W. 177; Burch v. S., 49 Tex. Cr. 13, 90 S. W. 168.

233-20 P. v. Wright, 4 Cal. App. 704, 89 P. 364; P. v. Turner, 1 Cal. App. 420, 82 P. 397; Cook v. S., 124 Ga. 653, 53 S. E. 104; Atlanta etc. R. Co. v. Strickland, 116 Ga.

439, 42 S. E. 864; McBride v. R. & E. Co., 125 Ga. 515, 54 S. E. 674; C. v. Tucker, 189 Mass. 457, 76 N. E. 127; Zuckerman v. R. Co., 117 App. Div. 378, 102 N. Y. S. 641; Cincinnati T. Co. v. Stephens, 75 Ohio St. 171, 79 N. E. 235.

234-23 Zuckerman v. R. Co., 117 App. Div. 378, 102 N. Y. S. 641.

235-25 **Extension of rule not favored.** — C. v. Tucker, 189 Mass. 457, 76 N. E. 127.

235-26 **Rule recognized, but extension of it opposed.** — C. v. Tucker, supra.

237-32 Corpus v. S., 51 Tex. Cr. 315, 102 S. W. 1152.

238-37 Watson v. S. (Ala.), 46 S. 232; Graham v. S. (Ala.), 45 S. 580; Bell v. Aiken, 1 Ga. App. 36, 57 S. E. 1001, (applying § 5292 Civ. Code); Browning v. R. Co., 118 Mo. App. 449, 94 S. W. 315; Warfield v. R. Co., 104 Tenn. 74, 55 S. W. 304, 78 Am. St. 911; La Follette etc. Co. v. Minton, 117 Tenn. 415, 101 S. W. 178, 11 L. R. A. (N. S.) 478; Missouri etc. R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493; Harris v. S., 49 Tex. Cr. 338, 94 S. W. 227.

239-42 **The inquiry must be as to "general character", and not to "character merely".** Southern R. Co. v. Hobbs (Ala.), 43 S. 844.

240-44 **A letter from a third party** which was shown defendant at the time plaintiff made the alleged variant statement, is admissible to show the improbability of his making such statement in contradiction of the terms of the letter. Davis v. Farwell, 80 Vt. 166, 67 A. 129.

240-45 S. v. Speritus, 191 Mo. 24, 90 S. W. 459.

243-54 Missouri etc. R. Co. v. Dumas (Tex. Civ.), 93 S. W. 493.

243-57 Southern R. Co. v. Hobbs (Ala.), 43 S. 844 (what a witness "thought" about another's character is immaterial); S. v. Stewart (Del.), 67 A. 786; Lee v. Andrews (Mich.), 114 N. W. 673; P. v. Turney, 124 Mich. 542, 83 N. W. 273.

244-59 **Negative testimony is competent** by a witness who has known the assailed witness for a long time. It is presumed that acquaintances would have heard of assaults upon his reputation if they had been made. Spencer v. S., 132 Wis. 509, 112 N. W. 462, 3 Jones on Ev. § 868.

244-61 P. v. Wright, 4 Cal App. 704, 89 P. 364 (cross-examination proper though state has announced it would not attack defendant's character).

244-62 **In Texas** a statute authorizes in court's discretion the introduction of sustaining evidence at any time before argument is closed. Neill v. S., 49 Tex. Cr. 219, 91 S. W. 791.

245-63 Strickland v. S. (Ala.), 44 S. 90; Maloy v. S., 52 Fla. 101, 41 S. 791; Sebree v. Rogers, 31 Ky. L. R. 476, 102 S. W. 841.

246-64 Jones v. S., 145 Ala. 51, 40 S. 947; Benjamin v. S., 148 Ala. 671, 41 S. 739; St. Louis S. R. Co. v. Hutchinson, 79 Ark. 247, 96 S. W. 374; Georgia R. & B. Co. v. Andrews, 125 Ga. 85, 54 S. E. 76; Godair v. Bank, 225 Ill. 572, 80 N. E. 407; Chicago & A. R. Co. v. Jennings, 217 Ill. 494, 75 N. E. 560; Bennett v. Susser, 191 Mass. 329, 77 N. E. 884; S. v. Trail, 59 W. Va. 175, 53 S. E. 17.

247-69 Chandler v. S., 124 Ga. 821, 63 S. E. 91; S. v. Wells, 33 Mont. 291, 83 P. 476.

248-71 Hardwick v. Hardwick, 130 Ia. 230, 106 N. W. 639 (error to instruct that evidence of character is entitled to weight in proportion to its nearness to the time in question).

248-72 The Ocracoke, 159 Fed. 552.

248-73 Godair v. Bank, 225 Ill. 572, 80 N. E. 407; Chicago City R. Co. v. Ryan, 225 Ill. 287, 80 N. E. 116; Fields v. R. Co., 113 Mo. App. 642, 88 S. W. 134.

249-74 **The jury need not believe beyond a reasonable doubt** that a witness has testified falsely. Colbert v. S., 125 Wis. 423, 104 N. W. 61.

249-75 J. Hancock Mut. L. Ins. Co. v. Powell, 116 Ill. App. 151; Allen v. Ellis, 125 Wis. 565, 104 N. W. 739.

249-76 Godair v. Bank, 225 Ill. 572, 80 N. E. 407 (testimony of witnesses for one party must not be singled out).

249-77 Hutchins v. Murphy, 146 Mich. 621, 110 N. W. 52; Franklin

v. S. (Tex. Cr.), 88 S. W. 357.

251-81 Thornton v. S., 117 Wis. 338, 93 N. W. 1107.

252-87 Stark v. Burke, 131 Ia. 684, 109 N. W. 206; Bluestein v. Collins (Tex. Civ.), 103 S. W. 687.

252-88 Harris v. S. 49 Tex. Cr. 338, 94 S. W. 227; Franklin v. S. (Tex. Cr.), 88 S. W. 357.

252-91 S. v. Hayden, 131 Ia. 1, 107 N. W. 929; Ochsner v. C. (Ky.), 109 S. W. 326; Fueston v. C., 91 Ky. 230, 15 S. W. 177; Collins v. C., 15 Ky. L. R. 691, 25 S. W. 743; Jones v. C., 22 Ky. L. R. 388, 57 S. W. 472; Ashcraft v. C., 24 Ky. L. R. 488, 68 S. W. 847; Dungan v. S. (Wis.), 115 N. W. 350; Thornton v. S., 117 Wis., 338, 93 N. W. 1107 (it is immaterial what was the character of the previous offense).

If the record is silent it will be assumed that the proper caution was given. Farmer v. C., 28 Ky. L. R. 1168, 91 S. W. 682.

253-94 Gulf etc. R. Co. v. Hays, 40 Tex. Civ. 162, 89 S. W. 29; Norfolk & W. R. Co. v. Spencer, 104 Va. 657, 52 S. E. 310.

Exceptions to the rule are recognized. Hanson v. Bailey, 96 Minn. 274, 104 N. W. 969; Cairns v. Keith, 50 Minn. 32, 52 N. W. 267.

INCEST [Vol. 7.]

255-6 S. v. Burt, 17 S. D. 7, 94 N. W. 409 (ruled under a statute forbidding wife to testify against husband without consent, except when a crime has been committed by him against her).

255-8 **It is not a conclusion** for prosecutrix to testify that accused had "sexual intercourse" with her. The details may be elicited on cross-examination. Straub v. S., 5 Ohio C. C. (N. S.), 529.

Consent of female or lack of it is immaterial to the State. McCaskill v. S. (Fla.), 45 S. 843; S. v. Freddy, 117 La. 121, 41 S. 436; Straub v. S., 5 Ohio C. C. (N. S.) 529; S. v. Winslow, 30 Utah 403, 85 P. 433.

A conspiracy on the part of prosecutrix and others to bring about the commission of the offense cannot be shown. S. v. Rennick, 127 Ia. 294, 103 N. W. 159.

Completion of the sexual act obviates proof of emission. The former may be inferred from circumstances. S. v. Judd, 132 Ia. 296, 109 N. W. 892.

Dying declarations of woman inadmissible. — P. v. Stison, 140 Mich. 216, 103 N. W. 542.

255-9 Pate v. S. (Tex. Cr.), 93 S. W. 556 (is an accomplice, though consent given unwillingly).

Complaints made by prosecutrix, though not a part of the res gestae, may be shown; the proof should not include the name of the other party. S. v. Winslow, 30 Utah 403, 85 P. 433.

Sufficiency of corroborative evidence. — S. v. Brown, 209 Mo. 413, 107 S. W. 1068; Smothers v. S. (Neb.), 116 N. W. 152.

256-10 Straub v. S., 5 Ohio C. C. (N. S.) 529.

256-11 S. v. Rennick, 127 Ia. 294, 103 N. W. 159 (absence of consent); Schwartz v. S., 65 Neb. 196, 91 N. W. 190; Bridges v. S. (Neb.), 113 N. W. 1048.

256-12 Adams v. S., 78 Ark. 16, 92 S. W. 1123 (such evidence shows the probability of guilt and sustains the evidence showing the offense); S. v. Judd, 132 Ia. 296, 109 N. W. 892 (also of undue intimacy); S. v. Pruitt, 202 Mo. 49; 100 S. W. 431 (acts of lascivious familiarity not amounting to the offense may be shown); S. v. Brown, 209 Mo. 413, 107 S. W. 1068 (testimony need not be specific as to time, unless objection is pointed); Smothers v. S. (Neb.), 116 N. W. 152.

257-17 P. v. Stison, 140 Mich. 216, 103 N. W. 542 (pregnancy); S. v. Winslow, 30 Utah 403, 85 P. 433 (expert testimony based on examination made five or six days after the offense).

Birth of child to prosecutrix may be proved, though she was married at time of its birth. Smothers v. S. (Neb.), 116 N. W. 152.

258-18 P. v. Stison, 140 Mich. 216, 103 N. W. 542.

Confession of defendant may be shown as substantive evidence, though he denied making it. P. v. Block, 120 App. Div. 364, 105 N. Y. S. 275.

258-19 **Knowledge of the relationship** is not an element of the

crime. S. v. Judd, 132 Ia. 296, 109 N. W. 892; S. v. Rennick, 127 Ia. 294, 103 N. W. 159. It is otherwise under some statutes. S. v. Winslow, 30 Utah 403, 85 P. 433.

258-21 S. v. Judd, 132 Ia. 296, 109 N. W. 892.

259-22 The relationship of a daughter may be inferred from long residence with another whom she habitually addressed as mother, and that of uncle from frequent reference to him as such by accused, and of the mother in her presence as brother. S. v. Judd, 132 Ia. 296, 109 N. W. 892.

INFANTS [Vol. 7.]

Judicial notice of infancy, 262-1; *Physical capacity to commit sexual crime,* 265-14.

262-1 Judicial notice of the fact that a party to an action is an infant may be taken by the court which appointed a guardian ad litem for the infant in the pending action. Reynolds v. Alderman, 54 Misc. 73, 103 N. Y. S. 863.

It is presumed that a girl of fourteen is a child within the intent of a statute concerning cruelty to children. Stone v. S., 1 Ga. App. 292, 57 S. E. 992.

263-5 See Bryant v. McKinney, 29 Ky. L. R. 951, 96 S. W. 809; Brook v. Kalfon, 108 N. Y. S. 1102.

Proof of infancy under the law of Mexico. See Banco DeSonora v. Casualty Co., 124 Ia. 576, 100 N. W. 532.

263-6 It is not presumed in favor of one who has dealt with an infant in violation of law, that the latter was an agent. P. v. McGuire, 131 App. Div. 631, 99 N. Y. S. 91.

263-7 S. v. Fisk, 15 N. D. 589, 108 N. W. 485.

264-9 In New York the presumption of innocence continues until a child is twelve. P. v. Domenico, 45 Misc. 309, 92 N. Y. S. 390.

264-11 Reynolds v. S. (Ala.), 45 S. 894; S. v. Fisk, 15 N. D. 589, 108 N. W. 485.

265-14 Reynolds v. S. (Ala.), 45 S. 894; Singleton v. S., 124 Ga. 136, 52 S. E. 156; P. v. Squazza, 40 Misc. 71, 81 N. Y. S. 254; P. v. Domenico, 45 Misc. 309, 92 N. Y. S. 390; S. v. Fisk, 15 N. D. 589, 108 N. W. 485.

Physical capacity of a boy under fourteen to commit rape must be shown as an independent fact, and the rule applies to a prosecution for assault with intent to commit rape. S. v. Fisk, 15 N. D. 589, 108 N. W. 485. See "Rape," Vol. 10, p. 579, and that title, infra.

A plea of guilty by a child under twelve does not overcome the presumption of innocence. P. v. Domenico, 45 Misc. 309, 92 N. Y. S. 390.

267-16 State must show that defendant under thirteen understood nature and illegality of particular act done. Simmons v. S. (Tex. Cr.), 97 S. W. 1052. Mere proof that he knew right from wrong will not sustain a conviction. Price v. S., 50 Tex. Cr. 71, 94 S. W. 901.

267-17 A child over fourteen is presumed, prima facie, to be sui juris. Fortune v. Hall, 122 App. Div. 250, 106 N. Y. S. 787.

268-19 Singleton v. S., 124 Ga. 136, 52 S. E. 156.

It is for the jury to determine the question of capacity. — Singleton v. S., 124 Ga. 136, 52 S. E. 156.

269-20 McAllister v. Gatlin, 3 Ga. App. 731, 60 S. E. 355; Mauldin v. University, 126 Ga. 681, 55 S. E. 922.

Statutes do not affect proof of declarations of infants under the age at which they may testify, their declarations being part of the res gestae. Beal-D. D. G. Co. v. Carr, 85 Ark. 479, 108 S. W. 1053.

269-22 The plaintiff must show the state, degree and condition in life of the infant, and that his parents failed or refused to furnish the alleged necessary. Mauldin v. University, 126 Ga. 681, 55 S. E. 922.

270-23 International T. B. Co. v. Doran (Conn.), 68 A. 255.

270-25 Grotjan v. Rice, 124 Wis. 253, 102 N. W. 551. See Farrar v. Wheeler, 145 Fed. 482, 75 C. C. A. 386.

Statements of the infant's father to third persons as to his and his son's relations, in the absence of parties to the suit, are not competent on the question of emancipation. Grotjan v. Rice, 124 Wis. 253, 102 N. W. 551.

That an infant is receiving the

proceeds of his labor does not alone show permission for him to engage in the business from which the proceeds flow. Southern C. O. Co. v. Dukes, 121 Ga. 787, 49 S. E. 788.

271-28 **Admission of existing liability** must be shown; not enough to prove admission of existence of account. Louden Mfg. Co. v. Milmine, 14 Ont. L. R. (Can.) 532.

271-30 **Ratification of a contract** by retaining possession of the proceeds after majority must be shown by the party alleging the fact. Southern C. O. Co. v. Dukes, 121 Ga. 787, 49 S. E. 788.

271-31 Freasier v. S (Tex. Cr.), 84 S. W. 360. The rule has been changed by statute. Moore v. S., 49 Tex. Cr. 449, 96 S. W. 327.

272-34 S. v. Meyer (Ia.), 113 N. W. 322 (child of six competent); S. v. Tolla, 72 N. J. L. 515, 62 A. 675.

272-35 Landthrift v. S., 140 Ala. 114, 37 S. 287; McLain v. Chicago, 127 Ill. App. 489; Sokel v. P., 212 Ill. 238. 72 N. E. 382; S. v. Meyer (Ia.), 113 N. W. 322; S. v. King, 117 Ia. 484, 91 N. W. 768; Bright v. C., 120 Ky. 298, 86 S. W. 527; S. v. Tolla, 72 N. J. L. 515, 62 A. 675; C. v. Furman, 211 Pa. 549, 60 A. 1089; Freasier v. S. (Tex. Cr.), 84 S. W. 360; Moore v. S., 49 Tex. Cr. 449, 96 S. W. 327; North Tex. C. Co. v. Bostwick (Tex. Civ.), 80 S. W. 109.

274-36 Olson v. Olson, 130 Ia. 353, 106 N. W. 758.

275-37 Gordon v. S., 147 Ala. 42, 41 S. 847; S. v. Meyer (Ia.), 113 N. W. 322 (inability to define "oath" and "testimony" is not determinative of capacity); Bright v. C., 120 Ky. 298, 86 S. W. 527; Gabler v. S., 49 Tex. Cr. 623, 95 S. W. 521.

Age at time of event testified of and memory of it are matters which affect only the weight of a child's testimony. Gordon v. S., supra.

275-38 *Contra.* — Freasier v. S. (Tex. Cr.), 84 S. W. 360.

275-39 North Texas C. Co. v. Bostick (Tex. Civ.), 80 S. W. 109.

275-41 S. v. King, 117 Ia. 484, 91 N. W. 768.

276-45 Jones v. S., 145 Ala. 51, 40 S. 947.

Knowledge of the nature of an oath is more significant than general intelligence. Young v. S., 122 Ga. 725, 50 S. E. 996. In Castleberry v. S., 135 Ala. 24, 33 S. 431, a witness of eight years who stated that she was made by God, and that if she lied she would go to hell, was held competent. And see Walker v. S., 134 Ala. 86, 32 S. 703; Eatman v. S., 139 Ala. 67, 36 S. 16; Landthrift v. S., 140 Ala. 114, 37 S. 287; Trim v. S. (Miss.), 33 S. 718; North Tex. C. Co. v. Bostick (Tex. Civ.), 80 S. W. 109; Freasier v. S. (Tex. Cr.), 84 S. W. 360.

277-46 Clinton v. S., 53 Fla. 98, 43 S. 312; Bright v. C., 120 Ky. 298, 86 S. W. 527; C. v. Furman, 211 Pa. 549, 60 A. 1089; Sanceda v. S. (Tex. Cr.), 69 S. W. 142. See Gabler v. S., 49 Tex. Cr. 623, 95 S. W. 521.

277-48 See S. v. Smith, 203 Mo. 695, 102 S. W. 526.

278-50 Freasier v. S. (Tex. Cr.), 84 S. W. 360.

279-51 Clinton v. S., 53 Fla. 98, 43 S. 312; S. v. Meyer (Ia.), 113 N. W. 322; S. v. Tolla, 72 N. J. L. 515, 62 A. 675; C. v. Furman, 211 Pa. 549, 60 A. 1089; Freasier v. S. (Tex. Cr.), 84 S. W. 360; Moore v S., 49 Tex. Cr. 449, 96 S. W. 327; Gabler v. S., 49 Tex. Cr. 623, 95 S W. 521.

In Georgia it is reversible error for the court to refuse to examine or permit counsel to examine a child as to competency, though he may have testified on a previous trial of the case. Young v. S., 122 Ga. 725, 50 S. E. 996.

279-52 Clinton v. S., 53 Fla. 98, 43 S. 312.

280-55 Young v. S., 122 Ga. 725, 50 S. E. 996.

281-60 Clinton v. S., supra.

282-66 **Admissions in pleadings** by guardians ad litem do not bind infants; neither do the admissions of co-defendants though their interests are joint. Stephenson v. Collins, 57 W. Va. 351, 50 S. E. 439. See "ADMISSIONS," Vol. 1, p. 348, and that title, ante.

INJUNCTION **Vol. 7.**

Presumption in favor of paten-

tee who has obtained judgment, 288-1.

288-1 Sanders v. Brown, 145 Ala. 665, 39 S. 732; Everett v. Tabor, 119 Ga. 128, 46 S. E. 72; Dowdell v. Society, 114 La. 49, 38 S. 16; Carswell v. Swindell, 102 Md. 636, 62 A. 956; Ter. v. Whitehall, 13 Okla. 534, 76 P. 148.

The evidence must sustain the case made by the bill. Sanders v. Brown, 145 Ala. 665, 39 S. 732.

A patentee who has established his right to priority of invention has a strong presumption in his favor and is, prima facie, entitled to an injunction. The defendant must, in the face of the judgment, satisfy the court beyond a reasonable doubt. Laas v. Scott, 145 Fed. 195. The presumption in favor of complainant, arising from a judgment sustaining the validity of his patent, is not overcome by ex parte affidavits relating to long-past events. American G. Co. v. R. Co., 155 Fed. 427; Richards v. Meissner, 158 Fed. 109 (the evidence must carry thorough conviction).

288-2 Sharp v. Bellinger, 155 Fed. 139; Johns-P. Co. v. S. Co., 155 Fed. 129; Weir v. Winnett, 155 Fed. 824; Robertson v. Lewie, 77 Conn. 345, 59 A. 409; Godwin v. Phifer, 51 Fla. 441, 41 S. 597; Savage v. R. Co. (N. J. Eq.), 67 A. 436; Wolfer v. Hurst (Or.), 91 P. 366; Pence v. Carney, 58 W. Va. 296, 52 S. E. 702.

289-3 McCarthy v. M. & C. Co., 147 Fed. 981; Hall S. Co. v. S. Co., 153 Fed. 907; Indian L. & T. Co. v. Shoenfelt, 135 Fed. 484, 68 C. C. A. 196; Metcalf v. Martin (Fla.), 45 S. 463; White v. Assn., 233 Ill. 526, 84 N. E. 658; Owen County Soc. v. Brumback, 32 Ky. L. R. 916, 107 S. W. 710; Devon v. Pence, 32 Ky. L. R. 697, 106 S. W. 874; Carswell v. Swindell, 102 Md. 636, 62 A. 956; Savage v. R. Co. (N. J. Eq.), 67 A. 436; Bracken v. Stone (Okla.), 95 P. 236; Marshall v. Homier, 13 Okla. 264, 74 P. 368; South & W. R. Co. v. R. Co., 104 Va. 323, 51 S. E. 843; Grantham v. Gibson, 41 Wash. 125, 83 P. 14.

289-4 Williams v. Harper, 127 Ill. App. 619; Gannett v. T. Co., 55 Misc. 555, 106 N. Y. S. 3; Berkey v. M. Co., 220 Pa. 65, 69 A. 329.

289-5 Weir v. Winnett, 155 Fed. 824.

290-8 Bracken v. Stone (Okla.), 95 P. 236.

290-9 Louisville & N. R. Co. v. Comm., 157 Fed. 944; Hurd v. R. Co., 73 Kan. 83, 84 P. 553; S. v. R. Co., 145 N. C. 495, 59 S. E. 570.

290-10 Delaware etc. R. Co. v. Union, 158 Fed. 541; Spurgeon v. Rhodes, 167 Ind. 1, 78 N. E. 288; Russell v. Union, 57 Misc. 96, 107 N. Y. S. 303.

291-12 Hall S. Co. v. S. Co., 153 Fed. 907 (reasonable certainty); Mathews G. C. Co. v. Lister, 154 Fed. 490; Marconi W. T. Co. v. W. T. Co., 154 Fed. 74; McCarthy v. Min. Co., 147 Fed. 981; Star Co. v. Colver P. House, 141 Fed. 129; Paul Steam System Co. v. Paul, 129 Fed. 757 (the rule is especially strict in the circuit court for Massachusetts); Godwin v. Phifer, 51 Fla. 441, 41 S. 597 (especially if the application is made without notice); Williams v. Harper, 127 Ill. App. 619 (if granted without notice); Spurgeon v. Rhodes, 167 Ind. 1, 78 N. E. 288; School Dist. v. DeLong (Neb.), 114 N. W. 934; Savage v. R. Co. (N. J. Eq.), 67 A. 436; Lanham v. Canal Co. (Wash.), 93 P. 522 (mandatory writ).

For the preservation of possible rights temporary injunctions may be granted upon testimony which is not convincing, but a permanent injunction will be granted only upon the clear establishment of the necessary facts. McCarthy v. M. & C. Co., 147 Fed. 981. See Goldfield C. M. Co. v. Union No. 220, 159 Fed. 500.

The showing need not be so strong where it is merely sought to maintain the status quo, and the denial of the writ would practically be a decision against complainant on the merits. Jones v. Dimes, 130 Fed. 638; Gring v. Canal Co., 129 Fed. 996.

293-14 Jones v. Dimes, 130 Fed. 638; Lehman v. Graham, 135 Fed. 39, 67 C. C. A. 513; Kerr v. New Orleans, 126 Fed. 920, 61 C. C. A. 450; Steadman v. Pine Co., 119 Ga. 616, 46 S. E. 838; Everett v. Tabor, 119 Ga. 128, 46 S. E. 72; McCon-

nell v. Jones Co., 125 Ga. 376, 54 S. E. 117.

293-15 Taylor v. R. Co. (Fla.), 45 S. 574.

293-16 Russell v. Union, 57 Misc. 96, 107 N. Y. S. 303; Angelo Co. v. Holding Co., 55 Misc. 328, 105 N. Y. S. 590; Tise v. Whitaker Co., 144 N. C. 507, 57 S. E. 210.

294-17 Ford v. Taylor, 140 Fed. 356; Goldfield C. Min. Co. v. Union M. 220, 159 Fed. 500; Seaboard A. L. R. Co. v. Comm., 155 Fed. 792; Richards v. Meissner, 158 Fed. 109; Colorado Eastern R. Co. v. R. Co., 141 Fed. 898, 73 C. C. A. 132; Enright v. Boyd, 122 App. Div. 885, 106 N. Y. S. 493.

295-18 Spokane S. Wks. v. Ridpath (Wash.), 93 P. 533.

297-22 Alderman v. Wilson, 69 S. C. 156, 48 S. E. 85.

297-24 S. v. Parsons (Kan.), 95 P. 391; School Dist. v. DeLong (Neb.), 114 N. W. 934.

298-25 Camp No. 6 v. Arrington (Md.), 68 A. 548 (answers by merely formal parties not essential).

298-26 White v. Ryan, 15 Pa. C. C. 170.

298-28 Baker v. McKinney (Fla.), 44 S. 944; Godwin v. Phifer, 51 Fla. 441, 41 S. 597; Reed v. Bank, 230 Ill. 50, 82 N. E. 341; Shulman v. Realty Co., 113 App. Div. 759, 99 N. Y. S. 419; Blackwell's D. T. Co. v. T. Co., 145 N. C. 367, 59 S. E. 123; Harvey v. Ryan, 59 W. Va. 134, 53 S. E. 7.

299-30 Weeks v. L. Co., 53 Fla. 793, 44 S. 173.

299-32 Greenwood v. Trigg (Ala.), 46 S. 227; Bishop v. Owens, 5 Cal. App. 83, 89 P. 844 (allegations as to multiplicity of suits and legal rights which may result from the wrongful acts); Baker v. McKinney (Fla.), 44 S. 944; Hall v. Horne, 52 Fla. 510, 42 S. 383; Goodwin v. Phifer, 51 Fla. 441, 41 S. 597; Reed v. Bank, 230 Ill. 50, 82 N. E. 341; Builders' P. & D. Co. v. Building Trades, 116 Ill. App. 264; S. v. Parsons (Kan.), 95 P. 391; Jordan v. Greenville (S. C.), 60 S. E. 973; Clark v. Peck, 79 Vt. 275, 65 A. 14.

301-34 Richards v. Meissner, 158 Fed. 109; Ashburn v. Graves, 149 Fed. 968, 79 C. C. A. 478; Indian L. & T. Co. v. Shoenfelt, 135 Fed. 484, 68 C. C. A. 196; Montgomery etc. Co. v. Citizens etc. Co., 142 Ala. 462, 38 S. 1026; Bishop v. Owens, 5 Cal. App. 83, 89 P. 844; Merced Falls G. & E. Co. v. Turner, 2 Cal. App. 720, 84 P. 239; Metcalf v. Martin (Fla.), 45 S. 463; Consolidated etc. R. Co. v. R. Co. (Md.), 69 A. 518; Casswell v. Swindell, 102 Md. 636, 62 A. 956; Ehrich v. Grant, 111 App. Div. 196, 97 N. Y. S. 600; South & W. R. Co. v. R. Co., 104 Va. 323, 51 S. E. 843; Pence v. Carney, 58 W. Va. 296, 52 S. E. 702.

An allegation that the damage amounted to a sum named or other large sum does not negative the idea that the injury done and threatened was irreparable. Roberts v. Heinshon, 123 Ga. 685, 51 S. E. 589.

If the allegations show irreparable injury proof of defendant's insolvency is immaterial. McConnell v. Jones Co., 125 Ga. 376, 54 S. E. 117.

302-38 Godwin v. Phifer, 51 Fla. 441, 41 S. 597; McLauchlin v. McLauchlin, 128 Ga. 653, 58 S. E. 156.

A verification is sufficient in form if signed by plaintiff and the fact is certified to by a proper officer. Chancey v. Allison (Tex. Civ.), 107 S. W. 605.

In the federal courts the verification must be made before an officer within § 1778 R. S. Stationary E. Pub. Co. v. Comerford, 155 Fed. 667.

303-40 My Maryland Lodge v. Adt, 100 Md. 238, 59 A. 721; Baltimore B. H. v. St. Clair, 58 W. Va. 565, 52 S. E. 660.

Affidavit by attorney must state reasons why he made it, unless made on his knowledge, and, if not so made, must show why it was not made by the person who had knowledge. Wiles v. Min. Co., 13 Idaho 326, 89 P. 1053; Terry v. Green, 53 Misc. 10, 103 N. Y. S. 1014.

303-42 Seaboard A. L. R. Co. v. Inv. Co., 53 Fla. 832, 44 S. 351 (solicitor); First Baptist Soc. v. Dexter, 193 Mass. 187, 79 N. E. 342 (verification by treasurer of religious corporation, who was plaintiff); Southern R. Co. v. R. Co., 102 Va. 483, 46 S. E. 784 (president).

303-45 McLauchlin v. McLauchlin, 128 Ga. 653, 58 S. E. 156.

303-48 Allegations made on understanding and belief. no state-

ment being made as to the source or grounds thereof, is not helped by affidavits of others stating in effect that the allegations are true. Gillette v. Noyes, 92 App. Div. 313, 86 N. Y. S. 1062.

306-54 Under a statute providing that a writ shall not be awarded unless the judge be satisfied of the plaintiff's equity, and that an affidavit is sufficient if affiant swears he believes it to be true, it is enough to state that the affiant is president of a corporation, that he has read the bill, that the allegations in it of which he has knowledge are true and, as to the other matters, he believes them to be true. Southern R. Co. v. R. Co., 102 Va. 483, 46 S. 784.

306-55 The rule is varied though the bill is verified only upon information and belief after a rule to show cause has been issued and no return made to it, and especially after a demurrer has been interposed. Niles v. Trust Co., 22 App. D. C. 225.

308-60 Familiarity of affiant with the facts alleged must be stated. Empire G. Co. v. F. Co. (Ala.), 45 S. 657.

309-62 Christian Hospital v. P., 223 Ill. 244, 79 N. E. 72; Leeds v. Institute, 122 Ill. App. 650.

311-66 See Spurgeon v. Rhodes, 167 Ind. 1, 78 N. E. 288.

311-67 Godwin v. Phifer, 51 Fla. 441, 41 S. 597.

If notice is given of the application and there is no denial of the averments of the bill allegations therein on information and belief will be sufficient. Spurgeon v. Rhodes, 167 Ind. 1, 78 N. E. 288.

313-74 Stationary E. P. Co. v. Comerford, 155 Fed. 667; McLauchlin v. McLauchlin, 128 Ga. 653, 58 S. E. 156 (amendment made after order nisi issued).

313-79 Pocahontas V. Co. v. C. & C. Co., 60 W. Va. 508, 56 S. E. 264.

Conclusions are not admitted; only facts well pleaded. White v. Assn., 233 Ill. 526, 84 N. E. 658.

313-80 White v. Assn., 233 Ill. 526, 84 N. E. 658.

314-81 If contradictory or inconsistent allegations are made the bill will be tested by the weaker ones. Durham v. Edwards, 50 Fla. 495, 38 S. 926; Barco v. Doyle, 50 Fla. 488, 39 S. 103; Godwin v. Phifer, 51 Fla. 441, 41 S. 597.

315-89 Brookshire O. Co. v. Oil & D. Co., 151 Cal. 577, 91 P. 383.

319-3 Brookshire O. Co. v. Oil & D. Co., supra.

319-4 Goodson v. Stewart, 149 Ala. 106, 42 S. 1019.

320-5 Deere & W. Co. v. Mfg. Co., 153 Fed. 177; Ford v. Taylor, 140 Fed. 356.

322-8 Ford v. Taylor, supra.

323-12 Deere & W. Co. v. Mfg. Co., 153 Fed. 177.

324-14 Schiefer v. Freygang, 109 N. Y. S. 848.

329-30 Sacramento v. S. P. Co., 155 Fed. 1022; Webster v. Debardelaben, 147 Ala. 280, 41 S. 831; Montgomery etc. Co. v. Citizens Co., 142 Ala. 462, 38 S. 1026; Western T. & T. Co. v. Newport L. Co., 75 Ark. 286, 87 S. W. 432; Godwin v. Phifer, 51 Fla. 441, 41 S. 597; Wall v. Clayton, 130 Ga. 428, 60 S. E. 1047.

330-31 Johnson v. Howze (Ala.), 45 S. 653; Mobile & W. R. Co. v. L. Co. (Ala.), 44 S. 471; Shaw v. Palmer (Fla.), 44 S. 953; Robbins v. White, 52 Fla. 613, 42 S. 841; Wallace v. Salisbury (N. C.), 60 S. E. 713; Lewis v. Hall (W. Va.), 61 S. E. 317; Meyer v. Meyer, 60 W. Va. 473, 56 S. E. 209.

Affidavits are given the same effect as a formal answer under the practice in same states. Gossard Co. v. Crosby, 132 Ia. 155, 109 N. W. 483.

330-32 Ford v. Taylor, 140 Fed. 356; Mobile & W. R. Co. v. L. Co. (Ala.), 44 S. 471; Everett v. Tabor, 119 Ga. 128, 46 S. E. 72. See Masonic F. T. Assn. v. Chicago, 131 Ill. App. 1.

Verified answer not conclusive upon the merits, independent of special circumstances. Spar Con. Min. Co. v. Caserleigh, 34 Colo. 454, 83 P. 1058.

331-33 Pere Marquette R. Co. v. Bradford, 149 Fed. 492; Johnson v. Howze (Ala.), 45 S. 653; Meyer v. Meyer, 60 W. Va. 473, 56 S. E. 209.

Denials may be disregarded if the right to commit the acts sought to be enjoined is not asserted. Herzog v. Fitzgerald, 74 App. Div. 110, 77 N. Y. S. 366; P. v. Tool, 35 Colo. 225, 86 P. 224, 229, 239.

334-38 See Mobile & W. R. Co. v. L. Co. (Ala.), 44 S. 471.

335-39 Lehman v. Graham, 135 Fed. 39, 67 C. C. A. 513; Seaboard A. L. R. Co. v. Comm., 155 Fed. 792; Mountain C. Co. v. U. S., 142 Fed. 625, 73 C. C. A. 621; Pere Marquette R. Co. v. Bradford, 149 Fed. 492; McCarthy v. Min. Co., 147 Fed. 981; Gring v. Canal Co., 129 Fed. 996; Sampson & M. Co. v. R. Co., 129 Fed. 761; Williams v. R. Co., 150 Cal. 592, 89 P. 330; P. v. Tool, 35 Colo. 225, 86 P. 224, 229, 231; Everett v. Tabor, 119 Ga. 128, 46 S. E. 72; My Maryland Lodge v. Adt, 100 Md. 238, 59 A. 721; Martin v. McFall, 65 N. J. Eq. 91, 55 A. 465; Berkey v. Mo. Co., 220 Pa. 65, 69 A. 329; Meyer v. Meyer, 60 W. Va. 473, 56 S. E. 209; Eau Claire etc. Co. v. Eau Claire (Wis.), 115 N. W. 155.

336-40 American L. & R. Co. v. Godfrey, 158 Fed. 225; Sullivan v. S. Co., 208 Pa. 540, 57 A. 1065, 66 L. R. A. 712, *over.* Huckenstine's App., 70 Pa. 102, 10 Am. Rep. 669 (the opinion in the principal case reviews numerous authorities); Garth L. & S. Co. v. Johnson (Mich.), 115 N. W. 52.

Doctrine has no application to decrees after a hearing on plenary proofs. U. S. v. Luce, 141 Fed. 385, 416.

337-42 Pere Marquette R. Co. v. Bradford, 149 Fed. 492.

338-44 McGourin v. Springs, 51 Fla. 502, 41 S. 541.

340-51 New Decatur v. Scharfenberg, 147 Ala. 367, 41 S. 1025.

342-54 Pere Marquette R. Co. v. Bradford, supra; McGourin v. Springs, supra.

342-58 The denials of the answer must not be less positive than those of the petition in order that the writ may be dissolved on the pleadings. Collins v. Stanley, 15 Wyo., 88 P. 620.

343-59 Empire G. Co. v. F. Co. (Ala.), 45 S. 657.

A verified answer, the oath thereto being waived, is entitled only to the evidential weight of an ex parte affidavit. Pere Marquette R. Co. v. Bradford, 149 Fed. 492.

Defective verification of the bill does not remedy an answer defectively verified. Empire G. Co. v. F. Co. (Ala.), 45 S. 657.

346-70 The right to cross-examine an affiant is sometimes provided for by rule of court, and when the examination has been had the testimony may be used by either party though the other announces that he will not use it. Campbell v. Hough (N. J. Eq.), 68 A. 759.

Affidavits are inadmissible if not entitled in the cause and court in which they are to be used unless they otherwise show the necessary facts. Hicks v. Portwood, 129 Ga. 307, 58 S. E. 837; Horton v. Fulton, 130 Ga. 466, 60 S. E. 1059; Johnson v. Tanner, 126 Ga. 718, 56 S. E. 80.

346-72 Affidavits not admissible after arguments are closed and court has announced purpose to grant restraining order. Green v. Freeman, 126 Ga. 274, 55 S. E. 45.

346-73 Affidavits are competent only to support the allegations of the bill and petition; they cannot serve as amendments of either, or to introduce new grounds for relief. Montgomery W. P. Co. v. Chapman, 128 Fed. 197.

A deposition is not inadmissible because after it was taken and before the hearing there was a substitution of parties, the issues not being thereby affected. Munger v. Yeiser (Neb.), 114 N. W. 166, ruled under a statute.

347-74 Ford v. Taylor, 140 Fed. 356.

348-76 Roman v. T. & T. Co., 147 Ala. 389, 41 S. 292.

349-77 Timely notice of the purpose to support a bill by extrinsic evidence must be given the opposing party where such evidence is admissible. Roman v. T. & T. Co., 147 Ala. 389, 41 S. 292.

349-81 Webster v. Debardelaben, 147 Ala. 280, 41 S. 831.

355-96 Bracken v. Stone (Okla.), 95 P. 236.

356-1 Collins v. Weigselbaum, 126 Ill. App. 158.

356-2 On full denials by affidavit of all the material allegations of the bill the latter will be dissolved, though no answer filed. Collins v. Weigselbaum, supra.

357-6 Service of notice necessary. — Roman v. Tel. Co., 147 Ala. 389, 41 S. 292. In an action against

a municipality there must be clear proof of urgency to authorize the issuance of a writ without notice. Chicago v. Farson, 118 Ill. App. 291.

Affiant's conclusion as to the consequences which will result from giving notice of his application for an injunction is not cause for issuing it without notice under an exception in the statute. Christian Hospital v. P., 223 Ill. 244, 79 N. E. 72; Godwin v. Phifer, 51 Fla. 441, 41 S. 597; Chicago v. Farson, 118 Ill. App. 291; South Park Comrs. v. Farson, 119 Ill. App. 337.

Affidavits not served as prescribed by a rule of court may be excluded, and the court may refuse to hear parol testimony of affiants as to matters contained in the affidavits. Hester v. Exley (Ga.), 60 S. E. 1053.

Service of notice may be dispensed with for sufficient cause. Seaboard A. L. R. v. Inv. Co., 53 Fla. 832, 44 S. 351.

358-7 **All of complainant's evidence** need not be presented on the application for a preliminary writ. New York C. I. Wks. Co. v. Brennan, 105 N. Y. S. 865.

359-9 Clark v. Wall, 32 Mont. 219, 79 P. 1052.

Testimony given by defendant's president as a witness in a suit between other parties is inadmissible. Arnold v. R. Co., 123 App. Div. 659, 108 N. Y. S. 296.

359-10 Marshall v. Homier, 13 Okla. 264, 74 P. 368.

360-13 Walker v. Brosius (Tex. Civ.), 90 S. W. 655 (negotiations preliminary to a written contract incompetent).

360-14 **Parol evidence of ownership and possession** of realty has been received. American S. & R. Co. v. Godfrey, 158 Fed. 225.

360-15 Wilson v. Wilson, 128 Ga. 177, 57 S. E. 310 (deeds admissible in suit to restrain trespass); Mossman v. Thorson, 118 Ill. App. 574; Todd v. Crail, 167 Ind. 48, 77 N. E. 1012.

A deed to the common grantor of both parties is immaterial. Corker v. Stafford, 125 Ga. 428, 54 S. E. 92.

361-17 Laas v. Scott, 145 Fed. 195 (the judgment casts upon the party resisting the injunction the burden of satisfying the court beyond a reasonable doubt).

An ex parte order granting a preliminary restraining order is not to be given much weight on the question of continuing the injunction. Richards v. Meissner, 158 Fed. 109.

362-19 **Evidence incompetent** in support of an application for a perpetual injunction may be received upon the hearing of a motion for a preliminary writ. My Maryland Lodge v. Adt, 100 Md. 238, 59 A. 721.

Malice on defendant's part may be shown; complainant should be allowed to show everything relevant under his pleadings reasonably tending to show him entitled to the writ. Whittaker v. Stangvick, 100 Minn. 386, 111 N. W. 295, 10 L. R. A. (N. S.) 921.

362-20 Remberg v. C. Co., 73 Kan. 66, 84 P. 548.

363-24 Reed v. Bank, 230 Ill. 50, 82 N. E. 341.

364-26 Babcock v. Reeves (Ala.), 43 S. 21.

365-28 Brown v. Peterson, 117 Ill. App. 401.

365-29 Mica Co. v. Mica Co., 157 Fed. 92; Littleton v. Burgess (Wyo.), 91 P. 832 (the jurisdiction of the court which issued the writ cannot be inquired into).

366-32 Cimiotti Co. v. American F. R. Co., 158 Fed. 171.

If the bond is broader than the statute the latter controls. Quinn v. C. Co., 19 Colo. App. 497, 76 P. 552.

366-33 Fidelity & D. Co. v. Yinsley, 30 Ky. L. R. 1095, 100 S. W. 272; McLennon v. Fenner, 19 S. D. 492, 104 N. W. 218.

The value of the property tied up need not be proved. Cameron v. Jones, 41 Tex. Civ. 4, 90 S. W. 1129.

A stipulation between the parties as to the basis on which goods are to be charged will bind them as to the rate of credit to be given for such as are returned. Collins v. Huffman (Wash.), 93 P. 220.

The holder of stock who has been restrained from selling it may show that he had a purchaser for it, notwithstanding it could not be sold without an order of court, which was not obtained and could not be

on account of the injunction. Slack v. Stephens, 19 Colo. App. 538, 76 P. 741.

The evidence must be restricted to damages caused by the injunction. Collins v. Huffman (Wash.), 93 P. 220.

367-34 Chicago Title & T. Co. v. Chicago, 209 Ill. 172, 70 N. E. 572.

367-36 Fidelity & D. Co. v. Tinsley, 30 Ky. L. R. 1095, 100 S. W. 272; Nielson v. Albert Lea, 87 Minn. 285, 91 N. W. 1113; Curphy v. Terrell, 89 Miss. 624, 42 S. 235; McLennon v. Fenner, 19 S. D. 492, 104 N. W. 218; Littleton v. Burgess (Wyo.), 91 P. 832. *Contra*, in federal courts. Tulluck v. Mulvane, 184 U. S. 497,; Missouri etc. R. Co. v. Elliott, 184 U. S. 530; Sullivan v. Cartier, 147 Fed. 222, 77 C. C. A. 448; Lindeberg v. Howard, 146 Fed. 467, 77 C. C. A. 23; National Society v. S. Co., 56 Misc. 627, 107 N. Y. S. 820 (applying the rule to an action in a state court on a bond given in a federal court).

368-37 Marks v. Club, 219 Ill. 417, 76 N. E. 582; Littleton v. Burgess (Wyo.), 91 P. 832.

The right to recover attorneys' fees in a case where the injunction was the sole relief sought, is not dependent upon proof of substantial damage where legal rights have been invaded. Weierhauser v. Cole, 132 Ia. 14, 109 N. W. 301.

The sum agreed to be paid, it seems, would be the best evidence of the value of an attorney's services. Mossman v. Thorson, 118 Ill. App. 574.

368-38 Miller v. Donovan, 13 Idaho 735, 92 P. 991 (stating the rule more broadly than the text); Chicago etc. R. Co. v. Sullivan, 26 Ky. L. R. 46, 80 S. W. 791.

369-39 Dempster v. Lansingh, 128 Ill. App. 388 (it is immaterial that the services performed in securing a dissolution of the writ would be necessary on a hearing on the merits). Collins v. Huffman (Wash.), 93 P. 220. See Littleton v. Burgess (Wyo.), 91 P. 832.

INJURIES TO PERSON [Vol. 7.]

Testimony of plaintiff, 375-4; *Declarations of injured person*, 375-4; *Declaration amounting to mere conclusion*, 377-9; *Judicial notice that pain was suffered*, 385-31; *Actions for wrongful death*, 406-99; *Persons abnormal or suffering from incurable disease*, 427-62; *Duration of ancestor's life*, 428-68.

374-2 *Contra*, where it appears that the medical expert was called in to examine the plaintiff with a view to qualifying as a witness on the trial. Comstock v. Georgetown Twp., 137 Mich. 541, 100 N. W. 788.

Where plaintiff's condition has been fully testified to, physician should not be permitted to give opinion as to whether plaintiff was simulating. McCormick v. R. Co., 141 Mich. 17, 104 N. W. 390. *Compare* Judd v. Caledonia Twp., 150 Mich. 480, 114 N. W. 346.

375-4 **Testimony of plaintiff** that he was injured and suffered is not only competent, but the jury can accept and credit his testimony based on his knowledge in preference to the evidence of "a whole college of physicians" that he was not injured. Southern R. Co. v. Tankersley, 3 Ga. App. 548, 60 S. E. 297.

Declarations of injured person that he was injured are admissible when part of the res gestae. Runnels v. R. Co. (Tex. Civ.), 107 S. W. 647; St. Louis etc. R. Co. v. Coats (Tex. Civ.), 103 S. W. 662. See also Nielsen v. Cedar Co. (Neb.), 98 N. W. 1090 (holding the exclusion of evidence of declarations not to be fatal error, inasmuch as the fact of the injury was otherwise fully established).

Conversation between plaintiff and conductor of car from which plaintiff was thrown, occurring immediately on re-boarding car, in which conductor asked plaintiff if she was hurt, to which she replied that she was, is part of the res gestae and admissible. Nixon v. R. Co. (Neb.), 113 N. W. 117.

Statement of plaintiff to companion that he was hurt, made immediately after arising from the fall in response to inquiry if he was hurt, is so connected with main fact as to be deemed a spontaneous expres-

sion, and is admissible. Lexington v. Fleharty, 74 Neb. 626, 104 N. W. 1056.

Conversation between plaintiff and her daughter when the daughter reached her mother immediately after the fall, not admissible. Potter v. Cave, 123 Ia. 98, 98 N. W. 569.

375-5 Mullin v. R. Co., 185 Mass. 522, 70 N. E. 1021; Davis v. R. Co. 145 S. C. 95, 58 S. E. 798; Waters Pierce O. Co. v. Deselms, 18 Okla. 107, 89 P. 212.

Evidence as to mangled condition of decedent, for whose wrongful death damages are sought, is admissible, the action being for punitive as well as compensatory damages. Brickman v. R. Co., 74 S. C. 306, 54 S. E. 553.

Injury sustained in collision, force of the collision and effect upon the cars are proper consideration to aid in determining particular manner in which the injuries were sustained and their nature and extent. Johnston v. R. Co., 45 Wash. 154, 87 P. 1125.

376-6 See also Heinmiller v. Winston, 131 Ia. 32, 107 N. W. 1102.

Plaintiff injured by runaway car. Evidence of other cars running away at same place held admissible. Mayer v. R. Co., 142 Mich. 459, 105 N. W. 888.

376-7 Kansas etc. R. Co. v. Morris, 80 Ark. 528, 98 S. W. 363; International etc. R. Co. v. Hugen (Tex. Civ.), 100 S. W. 1000.

376-8 Hutcheis v. R. Co., 128 Ia. 279, 103 N. W. 779; Robinson v. Stahl (N. H.), 67 A. 577.

377-9 Southern R. Co. v. Brown, 126 Ga. 1, 54 S. E. 911; Zoesch v. Paper Co. (Wis.), 114 N. W. 485.

Declaration amounting to mere conclusion. — Although the declaration in question may be part of the res gestae, if it is nothing more than the mere conclusion of the declarant as to the negligence of a co-employe, it should not be received. Dunn v. R. Co., 130 Ia. 580, 107 N. W. 616 (when the plaintiff had been injured by being struck by a heavy crow-bar hurled against him by a passing train, and the statement in question was to the effect that a co-employe had left the bar too near the track). And see "RES GESTAE," Vol. 11.

377-11 Kansas City R. Co. v. Matthews, 142 Ala. 298, 39 S. 207; Rothrock v. Cedar Rapids, 128 Ia. 252, 103 N. W. 475; Christopherson v. R. Co., 135 Ia. 409, 109 N. W. 1077 (declaration immediately after regaining consciousness, made in response to inquiry by attending physician).

377-12 Christopherson v. R. Co., supra, citing numerous cases. See White v. Marquette, 140 Mich. 310, 103 N. W. 698.

378-13 McBride v. R. Co., 125 Ga. 515, 54 S. E. 674; White v. R. Co., 123 Ga. 353, 51 S. E. 411; White v. Marquette, supra.

379-14 *Compare* Christopherson v. R. Co., supra.

379-15 Zipperlen v. R. Co. (Cal. App.), 93 P. 1049; Cincinnati etc. R. Co. v. Evans (Ky.), 110 S. W. 844; Illinois C. R. Co. v. Houchins, 31 Ky. L. R. 93, 101 S. W. 924; United R. & E. Co. v. Cloman (Md.), 69 A. 379; Union P. R. Co. v. Edmondson (Neb.), 110 N. W. 650.

Such declarations must be part of the res gestae; otherwise they cannot be received in evidence. Rouston v. R. Co. (Mich.), 115 N. W. 62.

380-16 Kemp v. R. Co., 122 Ga. 559, 50 S. E. 465; Fredenthal v. Brown (Or.), 95 P. 1114; Zentner v. Gaslight Co., 126 Wis. 196, 105 N. W. 911.

380-17 Atlantic C. L. R. Co. v. Crosby, 53 Fla. 400, 43 S. 318; Harrill v. R. Co., 132 N. C. 655, 44 S. E. 109; Gosa v. R. Co., 67 S. C. 347, 45 S. E. 810. See also Clark v. Van Vleck, 135 Ia. 194, 112 N. W. 648.

380-18 Declarations of agent of another company as to the incompetency of the motorman operating the street car on which plaintiff was injured are not admissible. Henize v. R. Co. (Ia.), 114 N. W. 534.

381-20 Forbes v. Davidson, 147 Ala. 702, 41 S. 312.

382-23 Ahern v. R. Co., 102 Minn. 435, 113 N. W. 1019. *Compare* MacFeat v. R. Co., 5 Penne. (Del.) 52, 62 A. 898; Dunn v. R. Co., 130 Ia. 580, 107 N. W. 616 (where the plaintiff had been injured by a crowbar lying near the track, struck by a passing train, and hurled

against him, it was improper to ask a physician whether the injury might have been caused by a crowbar "thrown by coming in contact with a swiftly moving object like a train," that the material question for the witness was whether the injury might have been caused by the impact, and not whether the bar might have been thrown by the train or some other force).

Physician who has never examined plaintiff's injuries, but is present at trial and hears part of plaintiff's testimony, cannot give his opinion concerning probability of person being injured in the manner testified to by plaintiff. Ottawa v. Green, 72 Kan. 214, 83 P. 616.

383-24 Chicago U. T. Co. v. Roberts, 229 Ill. 481, 82 N. E. 401; Boehm v. Detroit, 141 Mich. 277, 104 N. W. 626; Noller v. Wright, 138 Mich. 416, 101 N. W. 553; Beard v. R. Co., 143 N. C. 136, 55 S. E. 505; Parrish v. R. Co., 146 N. C. 125, 59 S. E. 348. See also Jones v. American Co., 137 N. C. 337, 49 S. E. 355. *Compare* Summerlin v. R. Co., 133 N. C. 550, 45 S. E. 898; Riser v. R. Co., 67 S. C. 419, 46 S. E. 47.

383-26 Nielson v. Cedar Co. (Neb.), 98 N. W. 1090; Brown v. Blaine, 41 Wash. 287, 83 P. 310. *Compare* Jacksonville El. Co. v. Batchis (Fla.), 44 S. 933.

Evidence of weight of injured person before the injury is competent. O'Dea v. R. Co., 142 Mich. 265, 105 N. W. 746.

384-27 St. Louis etc. R. Co. v. Hook, 83 Ark. 584, 104 S. W. 217; Southern I. R. Co. v. Davis, 32 Ind. App. 569, 69 N. E. 550; Federal B. Co. v. Reeves, 73 Kan. 107, 84 P. 560, 93 P. 627; Hines v. Kansas City, 120 Mo. App. 190, 96 S. W. 672; Dreyfus v. R. Co., 124 Mo. App. 585, 102 S. W. 53; Partello v. R. Co. (Mo. App.), 107 S. W. 473; Shoemaker v. Sonju, 15 N. D. 518, 108 N. W. 42.

Taking medicine to cure or relieve suffering, held admissible. Southern R. Co. v. Cunningham (Ala.), 44 S. 658.

In action by married woman for personal injuries, it is proper to show that she has been incapacitated by reason of her injuries from performing labor for the purpose of showing the nature and extent of her injuries. Bliss v. Beck (Neb.), 114 N. W. 162, *foll.* Pomerem Co. v. White, 70 Neb. 171, 97 N. W. 232, *dist.* Central City v. Engle, 65 Neb. 885, 91 N. W. 849.

Evidence that plaintiff gave birth to still born child one year after injury and had miscarriage three years after injury, held admissible. Chicago U. T. Co. v. Ertraghter, 228 Ill. 114, 81 N. E. 816.

Impaired vision. — Shaw v. Highland Co., 146 N. C. 235, 59 S. E. 676.

Injury to sexual organs, and inability to have sexual intercourse with wife, and that prior to the injury he had begotten children, may be shown. Deering H. Co. v. Barzak, 227 Ill. 71, 81 N. E. 1. See also Postal Tel. Co. v. Likes, 225 Ill. 249, 80 N. E. 136.

On second trial of personal injury action, competent for plaintiff to show condition of his health between first trial and second trial, as to improvement. Kircher v. Larchwood, 129 Ia. 554, 105 N. W. 834. See also W. Chicago R. Co. v. Dougherty, 209 Ill. 241, 70 N. E. 586 (third trial).

385-28 Loss of childbearing power is proper to be considered. Normile v. Wheeling Co., 57 W. Va. 132, 49 S. E. 1030.

Amputation of leg proper to be shown. Smart v. Kansas City, 208 Mo. 162, 105 S. W. 709.

385-29 Colorado Spr. & R. Co. v. Petit, 37 Colo. 326, 86 P. 121; Smith v. Whittlesey, 79 Conn. 189, 63 A. 1085; Bowring v. Iron Co., 5 Penne. (Del.) 594, 66 A. 369; Graboski v. L. Co. (Del.), 64 A. 74; Garrett v. R. Co. (Del.), 64 A. 254; Robinson v. Huber (Del.), 63 A. 873; Jemnieniski v. Lobdell C. Co., 5 Penne. (Del.) 385, 63 A. 935; Heidelbaugh v. R. Co. (Del.), 65 A. 587; Keokuk & H. B. Co. v. Netzel, 228 Ill. 253, 81 N. E. 864; Donk Bros. & Co. v. Ibil, 228 Ill. 233, 81 N. E. 857; Davis v. Min. Co., 20 S. D. 399, 107 N. W. 374; Sorensen v. Mach. Co., 129 Wis. 366, 109 N. W. 84.

Evidence of fainting spells after the injury is admissible. Renders v. R. Co., 144 Mich. 387, 108 N. W. 368. But there must be evidence of some causal connection with the

injury. Sloss-S. etc. Co. v. Vinzant (Ala.), 44 S. 1015.

Evidence that menstrual period of injured woman had become irregular after injury, held admissible. Cedartown v. Brooks, 2 Ga. App. 583, 59 S. E. 836.

385-31 Birmingham R. Co. v. Ellard, 135 Ala. 433, 33 S. 276. See also Mullin v. R. Co., 185 Mass. 522, 70 N. E. 1021. *Compare* Larsen v. Sedro-W. (Wash.), 94 P. 938.

Evidence of simulated lameness is not admissible where plaintiff does not claim that the injury occasioned lameness. Williams v. Lansing (Mich.), 115 N. W. 961.

Judicial notice will be taken that an injury to the hand resulting in the loss of two fingers causes pain. Bolton v. Ovitt, 80 Vt. 362, 67 A. 881. See also Kirkham v. Wheeler Co., 39 Wash. 415, 81 P. 869.

386-35 See also Donnelly v. R. Co., 131 Ill. App. 302. *Compare* Birmingham R. & C. Co. v. Enslen, 144 Ala. 343, 39 S. 74. *Contra*, Evarts v. R. Co., 3 Cal. App. 712, 86 P. 830, *cit.* Lange v. Schoettler, 115 Cal. 388, 47 P. 139; Green v. Pac. L. Co., 130 Cal. 435, 62 P. 747.

387-36 Birmingham R. Co. v. Moore (Ala.), 43 S. 841; Birmingham R. Co. v. Rutledge, 142 Ala. 195, 39 S. 338; Birmingham R. Co. v. Enslen, 144 Ala. 343, 39 S. 74; Robinson v. Halley, 124 Ia. 443, 100 N. W. 328; Battis v. R. Co., 124 Ia. 623, 100 N. W. 543; Federal B. Co. v. Reeves, 73 Kan. 107, 84 P. 560, 93 P. 627; Geiselman v. Schmidt (Md.), 68 A. 202; O'Dea v. R. Co., 142 Mich. 265, 105 N. W. 746; Gosa v. R. Co., 67 S. C. 347, 45 S. E. 810; St. Louis etc. R. Co. v. Garber (Tex. Civ.), 108 S. W. 742; St. Louis etc. R. Co. v. Boyer (Tex. Civ.), 97 S. W. 1070; Graves. v. Waitsfield (Vt.), 69 A. 137; Stevens v. Friedman, 58 W. Va. 78, 51 S. E. 132. *Compare* Goodwyn v. R. Co., 2 Ga. App. 470, 58 S. E. 688; Western & A. R. Co. v. Burnham, 123 Ga. 28, 50 S. E. 984.

Testimony that plaintiff "always complains of being sore in her lungs" is admissible as fairly importing that complaints testified to related to present suffering. Howe v. R. Co., 139 Mich. 638, 103 N. W. 185.

Complaints of plaintiff to his physician of the wound throbbing at night and loss of sleep, made during "actual treatment," are admissible. Gilmore v. T. & S. Co., 79 Conn. 498, 66 A. 4.

388-37 That plaintiff would cry out and weep as if in pain; otherwise manifest physical suffering and complain from time to time that his broken limb hurt him, is competent. Fishburn v. R. Co., 127 Ia. 483, 103 N. W. 481.

388-39 Fishburn v. R. Co., supra.

389-43 Atlanta etc. R. Co. v. Gardner, 122 Ga. 82, 49 S. E. 818.

Sufficient evidence of appearance or conduct of plaintiff, or of the particular circumstances under which the statements were made should be produced to make it, at least, probable to the court that the statements were the natural and spontaneous expressions of present feeling and not the result of a deliberate purpose. St. Louis etc. R. Co. v. Chaney (Kan.), 94 P. 126. No definite rule, however, applicable to all cases can be laid down as to the amount or character of preliminary evidence requisite in such cases; a wide discretion rests with the trial court. St. Louis etc. R. Co. v. Chaney, supra.

391-54 Descriptive or narrative statements of physical condition or feeling made in answer to a question or interrogation, and not part of the res gestae, are not admissible. Klingaman v. Fish Co., 19 S. D. 139, 102 N. W. 601.

Statements to physician as to past suffering not admissible. Gibler v. R. Co., 129 Mo. App. 93, 107 S. W. 1021.

Statements of injured party to another as to pain and injury after the occurrence alleged to have caused the injury are not res gestae as to the occurrences, and not admissible. Price v. Grazyll, 133 Wis. 623, 114 N. W. 100.

392-59 Testimony of physician as to flinching on the part of plaintiff during an examination is not admissible where it appears that the physician was called to make the examination for the purpose of

qualifying as a witness. Comstock v. Georgetown, 137 Mich. 541, 100 N. W. 788.

Exclamations uttered long after injury and after deciding to bring action, are admissible. McCormick v. R. Co., 141 Mich. 17, 104 N. W. 390.

392-60 Greinke v. R. Co., 234 Ill. 564, 85 N. E. 327; Comstock v. Georgetown, 137 Mich. 541, 100 N. W. 788; O'Dea v. R. Co., 142 Mich. 265, 105 N. W. 746.

393-61 Physician called not only to give treatment, but also to prepare for testifying, cannot testify to statements made to him by plaintiff as to injuries and feeling at time of first examination. Kath v. R. Co., 121 Wis. 503, 99 N. W. 217.

394-66 Shaw v. Highland Co., 146 N. C. 235, 59 S. E. 676; Bowen v. Seaboard Co. (N. C.), 60 S. E. 898; Galveston & C. R. Co. v. Holyfield (Tex. Civ.), 91 S. W. 353.

Testimony of injured person that he had no use of his foot, is not inadmissible as a conclusion. McDonald v. R. Co., 144 Mich. 379, 108 N. W. 85.

395-67 Southern R. Co. v. Hobbs (Ala.), 43 S. 844.

396-70 Mobile etc. R. Co. v. Walsh, 146 Ala. 295, 40 S. E. 560; Mason v. Macon, 123 Ga. 773, 51 S. E. 569; Federal B. Co. v. Reeves, 73 Kan. 107, 84 P. 560, 93 P. 627; Fulton v. R. Co., 125 Mo. App. 239, 102 S. W. 47; Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273; Bowen v. Seaboard R. Co. (N. C.), 60 S. E. 898; St. Louis etc. R. Co. v. Boyer (Tex. Civ.), 97 S. W. 1070; St. Louis etc. R. Co. v. Lowe (Tex. Civ.), 97 S. W. 1087; San Antonio Tr. Co. v. Flory (Tex. Civ.), 100 S. W. 200; Missouri etc. R. Co. v. Hibbitts (Tex. Civ.), 109 S. W. 228; Cunningham v. Neal (Tex. Civ.), 109 S. W. 455. See also Texas M. R. Co. v. Ritchey (Tex. Civ.), 108 S. W. 732.

Appearance of plaintiff's face as indicating pain and suffering; that he made complaints of pain, cried a great deal, etc., may be shown. Fishburn v. R. Co. (Ia.), 98 N. W. 380.

Whether an injury appeared recent or otherwise, and its description, may be testified to by a non-expert witness. Robinson v. Halley, 124 Ia. 443, 100 N. W. 328.

Testimony of plaintiff's husband that she could not walk as well six months after the injury as she could at the time of the trial relates to a fact within the observation of the witness, and should not be excluded as a conclusion. Schmitt v. Dubuque Co. (Ia.), 113 N. W. 820.

Testimony of non-expert to what effect medical treatment witnessed by witness had upon injured member of body is competent. Cleveland etc. R. Co. v. Hadley (Ind. App.), 82 N. E. 1025.

397-71 Barker v. Kalamazoo, 146 Mich. 257, 109 N. W. 427 (holding proper the exclusion of a testimony that plaintiff did not go out as much as before, but that witness could not say that it was wholly due to the accident).

397-73 Kline v. R. Co., 150 Cal. 741, 90 P. 125; Heinel v. R. Co. (Del.), 67 A. 173; Smithers v. R. Co. (Del.), 67 A. 167; Reiss v. R. Co. (Del.), 67 A. 153; Texas etc. R. Co. v. Clippenger (Tex. Civ.), 106 S. W. 155.

Testimony of father of injured son that "he was in awful pain and agony" held admissible. Boehm v. Detroit, 141 Mich. 277, 104 N. W. 626.

398-74 Cleveland R. Co. v. Hadley (Ind. App.), 82 N. E. 1025.

399-78 Southern R. Co. v. Hobbs (Ala.), 43 S. 844; Kansas City R. Co. v. Butler, 143 Ala. 262, 38 S. 1024; Vohs v. Shorthill & Co., 130 Ia. 538, 107 N. W. 417; Cumberland Tel. & T. Co. v. Overfield, 32 Ky. L. R. 421, 106 S. W. 242; Fletcher v. Dixon (Md.), 68 A. 875; Carlile v. Bentley (Neb.), 116 N. W. 772; Adler v. Lesser, 110 N. Y. S. 196; Klingaman v. Fish Co., 19 S. D. 139, 102 N. W. 601; Norfolk R. & L. Co. v. Spratley, 103 Va. 379, 49 S. E. 502. See also Cordiner v. Tract. Co., 5 Cal. App. 400, 91 P. 436.

Injury resulting in stiff ankle.—Medical expert may testify as to what effect the existing stiffness would have on plaintiff's ability to get around and work. Lewis v. Crane, 78 Vt. 216, 62 A. 60.

402-85 See Dix v. Ice Co. (N. J.), 68 A. 1101.

"Likely" held to be synonymous with "probably," or reasonably to be expected. Vohs v. Shorthill & Co., 130 Ia. 538, 107 N. W. 417. See also Faber v. C. Reiss Co., 124 Wis. 554, 102 N. W. 1049; Garard v. Mfrs. Co., 207 Mo. 242, 105 S. W. 767. *Compare* Kerr v. Grand Forks, 15 N. D. 294, 107 N. W. 197. "Liable" held to be synonymous with "probable." Hallum v. Omro, 122 Wis. 337, 99 N. W. 1051, citing numerous cases.

403-86 Boehm v. Detroit, 141 Mich. 277, 104 N. W. 626. See Gasink v. New Ulm, 92 Minn. 52, 99 N. W. 624.

403-88 *Compare* Fed. B. Co. v. Reeves, 73 Kan. 107, 84 P. 560 (holding that physician cannot testify to his conclusions of the permanency of an injury to his patient, based partly on the history of the injury detailed to him by a patient or other person and partially on his own examination. But see dissenting opinion).

Testimony of physician who had attended plaintiff, based upon his observation, as to time of ultimate recovery, is competent. Simone v. Rhode Island Co. (R. I.), 66 A. 202.

Before permitting the attending physician to testify to the extent of plaintiff's injuries, the injuries themselves should first be established by competent testimony. White v. R. Co. (Del.), 63 A. 931.

404-93 Eckels v. Muttschall, 230 Ill. 462, 82 N. E. 872.

Opinion on statements as to past symptoms as detailed by injured party, not proper. Gibler v. R. Co., 129 Mo. App. 93, 107 S. W. 1021.

Opinion of physician as to condition, based on statements made during examination by physician not called for treatment, is not admissible. Chicago U. T. Co. v. Giese, 229 Ill. 260, 82 N. E. 232.

405-96 Davis v. Adrian, 147 Mich. 300, 110 N. W. 1084.

What a skiagraph showed cannot be testified to by a physician; it should be produced. Elzig v. Bales (Ia.), 112 N. W. 540.

405-97 Birmingham R. & C. Co. v. Wright (Ala.), 44 S. 1037; Chicago Con. T. Co. v. Schritter, 222 Ill. 364, 78 N. E. 820, *aff.* 124 Ill. App. 578; Owensboro C. R. Co. v. Robertson, 31 Ky. L. R. 1047, 104 S. W. 707; Gulf etc. R. Co. v. Sauter (Tex. Civ.), 103 S. W. 201; Sorensen v. Mach. Co., 129 Wis 366, 109 N. W. 84; Pumorlo Co. v Merrill, 125 Wis. 102, 103 N. W. 464. See also Melone v. R. Co., 151 Cal. 113, 91 P. 522; Hannigan v. Wright, 5 Penne. (Del.) 537, 63 A. 234; Nashville etc. R. Co. v. Miller, 120 Ga. 453, 47 S. E. 959; Huggard v. Glucose S. R. Co., 132 Ia. 724, 109 N. W. 475.

Inability at times to collect her faculties, and mental confusion, may be shown. "It was as legitimate for this purpose to show that the injury was of such severity as to affect her mental condition as it would be to show its effect upon her physical functions, not as furnishing a substantive ground of recovery, but as showing the nature and extent of her physical hurt." Graves v. Waitsfield (Vt.), 69 A. 137, *cit.* Simkins v. Eddie, 56 Vt. 612.

Mental suffering of pregnant woman due to her fear and apprehension before the birth of the child that it would be deformed in consequence of the injury, permissible; but not so as to mental anxiety after the birth of the child and her prospective anxiety and disappointment on account of its deformity and diseased condition. Prescott v. Robinson (N. H.), 69 A. 522.

"The pain and suffering for which the law allows compensation is not confined to mere physical aches. It includes as well the mental anguish, the sense of loss or burden, the inconvenience and embarrassment which the person who is materially crippled or disabled in body or limb can never escape." Rice v. Council Bluffs, 124 Ia. 639, 100 N. W. 506.

Mere mental suffering, unconnected with any physical injury, not proper to be considered. Huston v. Freemansburg, 212 Pa. 548, 61 A. 1022. See also Harless v. R. Co., 123 Mo. App. 22, 99 S. W. 793. The mental anguish statute has reference only to telegraph companies. Taylor v. R. Co., 78 S. C. 552, 59 S. E. 641.

Mental suffering connected with and growing out of physical injury is a legitimate element to be considered in determining damages; but

sorrow and anguish endured as a result of the contemplation of the death of plaintiff's baby, conceived nearly seven months and born fourteen months after the injury, cannot be so considered. Sullivan v. R. Co. (Mass.), 83 N. E. 1091; Britt v. R. Co. (N. C.), 61 S. E. 601; McDermott v. Severe, 202 U. S. 600; Southern P. Co. v. Hetzer, 135 Fed. 272, 68 C. C. A. 26.

Mental anguish suffered while fastened in train wreck, on fire, is admissible. Louisville etc. R. Co. v. Brown, 32 Ky. L. R. 552, 106 S. W. 795. But anguish or wounded feelings of passenger arising solely from fact of having been carried past his destination is not proper item for consideration. Sappington v. R. Co., 127 Ga. 178, 56 S. E. 311.

Fright followed by a series of physical ills as its natural consequences and giving rise to nervous disturbances, and these in turn to physical troubles, may be shown and recovered for. Simone v. Rhode Island Co. (R. I.), 66 A. 202, citing and distinguishing numerous cases. *Compare* Porter v. R. Co., 73 N. J. L. 405, 63 A. 860.

Fright and nervousness resulting directly and naturally from the negligent act, and naturally and directly causing an impairment of health or loss of bodily power, may be considered. Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778. See also Stewart v. R. Co., 112 La. 764, 36 S. 676.

Mental anguish suffered by widow proper to be considered in an action for wrongful death of her husband. Brickman v. R. Co., 74 S. C. 306, 54 S. E. 553; Dobyns v. R. Co., 119 La. 72, 43 S. 934 (suffering due to deprivation of his companionship).

Sorrow, mental distress and bereavement of father, occasioned by wrongful death of son, may be considered. Kelly v. R. Co., 58 W. Va. 216, 52 S. E. 520. *Contra,* Bube v. R. Co., 140 Ala. 276, 37 S. 285; Byrd v. Exp. Co., 139 N. C. 273, 51 S. E. 851.

Under the New Hampshire statute providing that the mental and physical pain suffered by a decedent in consequence of the injury may be considered as an element of damage in connection with other elements allowed by law, fright or mental suffering preceding the injury but caused by the act immediately resulting therein, may be considered. Yeaton v. R. Co., 73 N. H. 285, 61 A. 522.

406-98 See also Chicago U. Tr. Co. v. Lawrence, 211 Ill. 373, 71 N. E. 1024, *aff.* 113 Ill. App. 269.

406-99 See also Bahr v. R. Co., 101 Minn. 314, 112 N. W. 267; Montgomery v. R. Co., 73 S. C. 503, 53 S. E. 987.

In actions for wrongful death, bereavement, mental suffering, etc., on the part of the surviving next of kin for whom the law allows the assessment of damages for injuries on account of the wrongful death, cannot be considered as elements of damages. Johnson Co. v. Carmen, 71 Neb. 682, 99 N. W. 502, *cit.* Anderson v. R. Co., 35 Neb. 95, 52 N. W. 840; Stell v. Kurtz, 28 Ohio St. 191.

407-2 Elba v. Bullard (Ala.), 44 S. 412; Birmingham R. Co. v. Wright (Ala.), 44 S. 1037; Bonneau v. R. Co. (Cal.), 93 P. 106; Bowing v. Iron Co., 5 Penne. (Del.) 594, 66 A. 369; Jemnienski v. Car Co., 5 Penne. (Del.) 385, 63 A. 935; Heinel v. R. Co. (Del.), 67 A. 173; Green v. Newark, 5 Penne. (Del.) 316, 62 A. 792; Heidelbaugh v. R. Co. (Del.), 65 A. 587; Graboski v. L. Co. (Del.), 64 A. 74; Garrett v. R. Co. (Del.), 64 A. 254; Hannigan v. Wright, 5 Penne. (Del.) 537, 63 A. 234; Robinson v. Huber (Del.), 63 A. 873; Lake Shore R. Co. v. Teeters, 166 Ind. 335, 74 N. E. 1014, *aff.* 77 N. E. 599; Federal B. Co. v. Reeves, 73 Kan. 107, 84 P. 560, 93 P. 627; Central C. Co. v. Booker, 32 Ky. L. R. 794, 107 S. W. 198; Lewless v. R. Co., 46 Mich. 531; 109 N. W. 1051; Olivier v. R. Co., 138 Mich. 242, 101 N. W. 530; Dillon v. R. Co., 73 N. H. 367, 62 A. 93; Clark v. Durham Co., 138 N. C. 77, 50 S. E. 518; Davis v. Min. Co., 20 S. D. 399, 107 N. W. 374; El Paso R. Co. v. Murphy (Tex. Civ.), 109 S. W. 489; Shaw v. Seattle, 39 Wash. 590, 81 P. 1057.

Inability to follow one's ordinary avocation, consequent upon an injury inflicted, may be proved to characterize the extent of the in-

jury. Smith v. Whittlesey, 79 Conn. 189, 63 A. 1085.

Action by unmarried woman for injuries alleged to have caused the postponement of marriage, proper for jury to consider plaintiff's incapacity to do work as housewife. Remey v. R. Co., 141 Mich. 116, 104 N. W. 420.

Impaired earning capacity of infant. South Omaha v. Sutliff, 72 Neb. 746, 101 N. W. 997.

Earning capacity of husband for whose wrongful death damages are asked by his widow, may be considered. Evarts v. R. Co., 3 Cal. App. 712, 86 P. 830.

Impairment of earning capacity need not be proved by clear and convincing evidence; preponderance of the evidence is enough. Rowe v. Whatcom Co., 44 Wash. 658, 87 P. 921.

408-7 Earning capacity depends upon several matters, such as the age, health, occupation or business, habits of industry, manner of living, etc., of the party, and they should be disclosed to the jury. Wallace v. Pa. Co., 219 Pa. 327, 68 A. 952.

409-8 Evidence as to character, continuance and extent of plaintiff's business after the injury is admissible on behalf of defendant. Burns v. Dunham Co., 148 Cal. 208, 82 P. 959.

Assistance rendered to decedent by his father may be shown on behalf of defendant, there being evidence that his earning capacity was small. Abel v. T. Co., 212 Pa. 329, 61 A. 915.

409-10 Inventory of personal property filed by administrator of decedent, and annual account, are not competent to show earning capacity of decedent. Cooper v. R. Co., 140 N. C. 209, 52 S. E. 932.

411-11 Action by infant for personal injuries, evidence of father's employment, and wages earned therein, admissible. Fishburn v. R. Co., 127 Ia. 483, 103 N. W. 481, s. c. (Ia.), 98 N. W. 380.

411-13 Mississippi C. R. Co. v. Hardy, 88 Miss. 732, 41 S. 505.

Where promotion is governed by fixed rules, such as in railway mail service where civil service obtains, a railway mail clerk who has passed his principal examination may show the salary which, but for the injury, he would be earning. Williams v. R. Co., 42 Wash. 597, 84 P. 1129.

414-21 Pecos etc. R. Co. v. Blasengame (Tex. Civ.), 93 S. W. 187; St. Louis etc. R. Co. v. Knowles (Tex. Civ.), 99 S. W. 867; Kansas City R. Co. v. Taylor (Tex. Civ.), 107 S. W. 889; Cook v. R. L. Co. (Wash.), 94 P. 189.

Illinois rule. — *Compare* Barnett etc. R. Co. v. Schlapka, 208 Ill. 426, 70 N. E. 343; West Chicago S. R. Co. v. Daugherty, 209 Ill. 241, 70 N. E. 586; Chicago & J. R. Co. v. Spence, 213 Ill. 220, 72 N. E. 796, *rev.* 115 Ill. App. 465.

415-23 See also Bettis v. R. Co., 131 Ia. 46, 108 N. W. 103.

415-24 Central of G. R. Co. v. Alexander, 144 Ala. 257, 40 S. 424; MacFeat v. R. Co., 5 Penne. (Del.) 52, 62 A. 898 (holding, however, that a question as to the decedent's "habits, with respect to industry, at the time of his death" was too general); Louisville etc. R. Co. v. Daniel, 28 Ky. L. R. 1146, 91 S. W. 691, Buffalo etc. Min. Co. v. Hodges, 30 Ky. L. R. 346, 98 S. W. 274; Buxton v. Ainsworth (Mich.), 116 N. W. 1094. See also Hammer v. Janowitz, 131 Ia. 20, 108 N. W. 109.

417-27 Elba v. Bullard (Ala.), 44 S. 412; Central of G. R. Co. v. Alexander, 144 Ala. 257, 40 S. 424; Reiter-C. Mfg. Co. v. Hamlin, 144 Ala. 192, 40 S. 280; Bonneau v. R. Co. (Cal.), 93 P. 106; Mason etc. L. Co. v. Macon, 123 Ga. 773, 51 S. E. 569; Wrightsville etc. R. Co. v. Gornto, 129 Ga. 204, 58 S. E. 769; Chicago C. R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; Gregory v. Slaughter, 30 Ky. L. R. 500, 99 S. W. 247; Bourke v. R. Co., 33 Mont. 267, 83 P. 470; Carlile v. Bentley (Neb.), 116 N. W. 772; Chicago etc. R. Co. v. Stibbs, 17 Okla. 97, 87 P. 293, citing and quoting from various cases; McCarthy v. R. Co., 211 Pa. 193, 61 A. 778. See also Southern R. Co. v. Howell, 135 Ala. 639, 34 S. 6; City El. R. Co. v. Smith, 121 Ga. 663, 49 S. E. 724; Loofburrow v. R. Co., 33 Utah 480, 94 P. 981; Lewes v. Crane, 78 Vt. 216, 62 A. 60; Southern R. Co. v. Stockdon, 106 Va. 693, 56 S. E. 713.

Offer of wages at time of injury is admissible as tending to show earn-

ing capacity. Montgomery v. R. Co., 73 S. C. 503, 53 S. E. 987.

Probable earnings based wholly on successful efforts of party not admissible. Haas v. R. Co., 128 Mo. App. 79, 106 S. W. 599.

That a parent has pending an action to recover the wages of his injured minor son is no reason for excluding evidence of the son's earning in an action by him for the same injury. McMahon v. Bangs, 5 Penne. (Del.) 178, 62 A. 1098.

418-28 Prouskevitch v. R. Co., 232 Ill. 136, 83 N. E. 545.

418-30 See Nevers Lumb. Co. v. Fields (Ala.), 44 S. 81.

419-34 Wages three or four months prior to injury may be inquired into. West Pratt C. Co. v. Andrews (Ala.), 43 S. 348.

Inquiry as to wages earned year prior to injury held proper. Bourke v. El. & P. Co., 33 Mont. 267, 83 P. 470.

Inquiry extending back twenty years, held proper, there being evidence that plaintiff still possessed some business capacity at time of injury. El Paso R. Co. v. Murphy (Tex. Civ.), 109 S. W. 489.

Limiting inquiry between date of injury and commencement of suit, is improper. Shoemaker v. Sonju, 15 N. D. 518, 108 N. W. 42.

420-36 *Compare* Ohio etc. T. Co. v. Wernke (Ind. App.), 84 N. E. 999.

421-37 Morrow v. Mfg. Co., 70 S. C. 242, 49 S. E. 573. *Compare* Central of Ga. R. Co. v. McNab (Ala.), 43 S. 222.

421-38 Mitchell v. R. Co. (Ia.), 114 N. W. 622; York v. Everton, 121 Mo. App. 640, 97 S. W. 604. *Compare* El Paso R. Co. v. Murphy (Tex. Civ.), 109 S. W. 489.

421-39 Mitchell v. R. Co. (Ia.), 114 N. W. 622, citing numerous cases; Spiking v. R. & P. Co., 33 Utah 313, 93 P. 838. See also Bartow v. R. Co., 73 N. J. L. 12, 62 A. 489 (holding it error to refuse to charge the jury that "as there is no definite proof of the amount of the loss of profits sustained by the plaintiff in his business, no damage can be allowed for his loss of profits"). See Mason v. R. Co. (N. J. L.), 68 A. 105; Chicago U. T. Co. v. Brethaner, 223 Ill. 521, 79 N. E. 287, *aff.* 125 Ill. App. 204.

Profits from buying and selling cattle, held proper to be shown. Jordan v. R. Co., 124 Ia. 177, 99 N. W. 693.

422-40 Evidence of past profits is not admissible as tending to show probable future profits, but for the injury. Mitchell v. R. Co. (Ia.), 114 N. W. 622.

Loss of profits in lunch business held to be within rule stated in text, and not admissible. Weir v. R. Co., 188 N. Y. 416, 81 N. E. 168.

423-42 City etc. R. Co. v. Smith, 121 Ga. 663, 49 S. E. 724; Lake Shore etc. R. Co. v. Teeters, 166 Ind. 335, 77 N. E. 599.

424-45 Amount of damages may be testified to by the injured party. Roundtree v. R. Co., 72 S. C. 474, 52 S. E. 231.

424-47 Reduction of ability to perform manual labor. — Physician familiar with the injury, and who describes its nature, is competent to testify in relation thereto. McDonald v. R. Co., 144 Mich. 379, 108 N. W. 85.

425-49 Testimony of witnessses shown by knowledge or experience to be qualified to give an opinion as to the pecuniary value to its parents of the services of a child of tender years from the age at the time of the injury to majority, over and above the cost of care, education, maintenance and support, is admissible. Rajnowski v. R. Co., 74 Mich. 20, 41 N. W. 847. But proof of the value of the services of such child is not an essential part of the case of a parent suing for the wrongful death of the child. Black v. R. Co., 146 Mich. 568, 109 N. W. 1052.

425-50 MacFeat v. R. Co., 5 Penne. (Del.) 52, 62 A. 898; Hammer v. Janowitz, 131 Ia. 20, 108 N. W. 109; Hagnes v. R. Co., 101 Me. 335, 64 A. 614; George B. Swift Co. v. Gaylord, 229 Ill. 330, 82 N. E. 299.

Shortening of life may be considered in determining the extent of the injury. Muncie P. Co. v. Hacker, 37 Ind. App. 194, 76 N. E. 770.

426-53 Howard v. McCabe (Neb.), 112 N. W. 305; Virginia etc. R. Co. v. Bailey, 103 Va. 205, 49 S. E. 33; Hodd v. Tacoma, 45

Wash. 436, 88 P. 842. See also O'Clair v. Rhode Island Co., 27 R. I. 448, 63 A. 238; MacGregor v. Rhode Island Co., 27 R. I. 85, 60 A. 761.

426-55 Southern R. Co. v. Cunningham (Ala.), 44 S. 658.

426-57 Loss of earnings. Pierce v. R. Co., 173 U. S. 1; American China D. Co. v. Boyd, 148 Fed. 258; Birmingham etc. R. Co. v. Wright (Ala.), 44 S. 1037; Valente v. R. Co., 151 Cal. 534, 91 P. 481; Messing v. R. Co., 5 Penne. (Del.) 526, 64 A. 247; McMahon v. Bangs, 5 Penne. (Del.) 178, 62 A. 1098; Calvert v. Springfield E. Co., 231 Ill. 290, 83 N. E. 184 (tables of Dr. Wigglesworth); Pittsburg R. Co. v. Ross (Ind.), 80 N. E. 845; Patton v. Sanborn, 133 Ia. 650, 110 N. W. 1032; Banks v. Braman, 195 Mass. 97, 80 N. E. 799; Howell v. R. Co., 136 Mich. 432, 99 N. W. 406; Horst v. Lewis (Neb.), 103 N. W. 460; Howard v. McCabe (Neb.), 112 N. W. 305; Notto v. R. Co. (N. J. L.), 69 A. 968 (*eit.* Camden & A. R. Co. v. Williams, 61 N. J. L. 646, 40 A. 634); O'Clair v. Rhode Island Co., 27 R. I. 448, 63 A. 238; MacGregor v. Rhode Island Co., 27 R. I. 85, 60 A. 761; Virginia etc. R. Co. v. Bailey, 103 Va. 205, 49 S. E. 33; Snell v. Jones (Wash.), 96 P. 4; Brown v. Blaine, 41 Wash. 287, 83 P. 310; Hodd v. Tacoma, 45 Wash. 436, 88 P. 842; Rhoades v. R. Co., 49 W. Va. 494, 39 S. E. 209, 87 Am. St. 826, 55 L. R. A. 170. See also Northern Ala. R. Co. v. Key (Ala.), 43 S. 794; Southern R. Co. v. O'Bryan, 119 Ga. 147, 45 S. E. 1000. *Compare* Atlantic etc. R. Co. v. Gardner, 122 Ga. 82, 49 S. E. 818.

Iowa code supplement of 1902, page 152, containing tables based upon the "actuaries and combined experience tables" and prepared pursuant to statute, is admissible. Clark v. Van Vleck, 135 Ia. 194, 112 N. W. 648.

Tables admissible to show life expectancy of female. Croft v. R. Co., 134 Ia. 411, 109 N. W. 723.

427-60 See Knott v. Peterson, 125 Ia. 404, 101 N. W. 173.

427-62 In the case of persons abnormal or suffering from incurable disease, life tables are not admissible. Colber v. Rhode Island Co. (R. I.), 67 A. 446.

427-63 Western & V. R. Co. v. Clark, 117 Ga. 548, 44 S. E. 1; South Omaha v. Sutliff, 72 Neb. 746, 101 N. W. 997; Bussey v. R. Co. (S. C.), 58 S. E. 1015. See also Central of Ga. R. Co. v. Minor, 2 Ga. App. 804, 59 S. E. 81; Croft v. R. Co., 134 Ia. 411, 109 N. W. 723. *Compare* Bettis v. R. Co., 131 Ia. 46, 108 N. W. 103.

428-64 See also Davis v. R. Co., 147 Mich. 479, 111 N. W. 76; Beattie v. Detroit, 137 Mich. 319, 100 N. W. 574. *Compare* Sterling v. Union C. Co., 142 Mich. 284, 105 N. W. 755.

428-66 Ft. Worth etc. R. Co. v. Spear (Tex. Civ.), 107 S. W. 613.

428-67 See also Messing v. R. Co., 5 Penne. (Del.) 526, 64 A. 247.

428-68 See also Knott v. Peterson, 125 Ia. 404, 101 N. W. 173. *Compare* St. Louis etc. R. Co. v. Hall (Tex. Civ.), 106 S. W. 194.

Evidence that plaintiff's ancestors were longlived is admissible. Sterling v. Union C. Co., 142 Mich. 284, 105 N. W. 755; Haynes v. R. Co., 101 Me. 335, 64 A. 614. See also Rincicotti v. Con. Co., 77 Conn. 617, 60 A. 115 (age of decedent's parents at time of death).

429-69 Berg v. Leather Co., 125 Wis. 262, 104 N. W. 60; Tucker v. Woolen Mills, 76 S. C. 539, 57 S. E. 626.

429-70 Central of Ga. R. Co. v. McNab (Ala.), 43 S. 222; Elba v. Bullard (Ala.), 44 S. 412; Woodward I. Co. v. Curl (Ala.), 44 S. 974; Jaeger v. Metcalf (Ariz.), 94 P. 1094; Heidelbaugh v. R. Co. (Del.), 65 A. 587; Garrett v. R. Co. (Del.), 64 A. 254; Robinson v. Huber (Del.), 63 A. 873; White v. R. Co. (Del.), 63 A. 931; Chicago C. R. Co. v. Heney, 218 Ill. 92, 75 N. E. 758; Donk Bros. Co. v. Thil, 228 Ill. 233, 81 N. E. 857; Cross v. R. Co. (Ky.), 110 S. W. 290; Stotler v. R. Co., 200 Mo. 107, 98 S. W. 509; Sotebier v. R. Co., 203 Mo. 702, 102 S. W. 651; Flaherty v. Tract. Co., 207 Mo. 318, 106 S. W. 15; Clark v. Tract. Co., 138 N. C. 77, 50 S. E. 518; Allen v. Tract. Co., 144 N. C. 288, 56 S. E. 942; Mullen v. R. Co. (Tex. Civ.), 92 S. W. 1000; Texas R. Co. v. Chippenger (Tex. Civ.), 106 S. W. 155; Norfolk R. & L. Co.

v. Spratley, 103 Va. 379, 49 S. E. 502; Shaw v. Seattle, 39 Wash. 590, 81 P. 1057. See also Sloss-S. & C. Co. v. Vinzant (Ala.), 44 S. 1015; Shoemaker v. Jackson, 128 Ia. 488, 104 N. W. 503; Storm v. Butte, 35 Mont. 385, 89 P. 726.

Hospital fees for nurse and ward, may be shown. Montgomery S. R. Co. v. Mason, 133 Ala. 508, 32 S. 261.

Expenses incurred by parent in nursing injured child. Simone v. Rhode Island Co. (R. I.), 66 A. 202; Johnson v. St. Paul Co., 131 Wis. 627, 111 N. W. 722.

Physician's bill is properly received in evidence where the evidence shows a contract with plaintiff to pay for the services. Burnham v. Rhode Island Co. (R. I.), 68 A. 421.

In an action by a married woman the value of medical services cannot be considered as an element of her damages, unless it is further shown that she has paid therefor, or that she has a separate estate which might become liable therefor. Pomerine Co. v. White, 70 Neb. 177, 98 N. W. 1040.

Expenses incurred for board and keep while disabled cannot be shown. Vedder v. Delaney, 122 Ia. 583, 98 N. W. 373.

Evidence by plaintiff of agreement to reimburse the county for expenses incurred in caring for plaintiff, under the charge of the officers of the poor is admissible. Vedder v. Delaney, supra.

Evidence that plaintiff's daughter, who had a family of her own and lived apart from her parents, came to plaintiff's home and nursed plaintiff, and that her services were worth $1.00 per day is sufficient to show that, as between plaintiff and her daughter, it was expected and intended that compensation should be made for the services rendered. Wissler v. Atlantic, 123 Ia. 11, 98 N. W. 131.

Value of nurse hire may be shown, though it appear that plaintiff's wife nursed him. Indianapolis & E. R. Co. v. Bennett, 39 Ind. App. 141, 79 N. E. 89.

That bills for such expenditures had been included in bankruptcy schedules filed by plaintiff, proved against his estate and his legal liability therefor discharged, is not ground for their exclusion. Sibley v. Nason, 196 Mass. 125, 81 N. E. 887.

Must be evidence of payment or liability for the expenditures, if any, before they are proper items of consideration. Jones & A. Co. v. George, 227 Ill. 64, 81 N. E. 4.

429-73 Chicago C. R. Co. v. Henry, 218 Ill. 92, 75 N. E. 758; Sotebier v. Tr. Co., 203 Mo. 702, 102 S. W. 651; Busch v. Robinson, 46 Or. 539, 81 P. 237; Northern Tex. Tr. Co. v. Mullins (Tex. Civ.), 99 S. W. 433; Normile v. Tr. Co., 57 W. Va. 132, 49 S. E. 1030.

430-75 Klingaman v. Fish & H. Co., 19 S. D. 139, 102 N. W. 601; Elzig v. Bales, 135 Ia. 208, 112 N. W. 540.

430-76 Schmitt v. Kurrus, 234 Ill. 578, 85 N. E. 261; Hobbs v. Marion, 123 Ia. 726, 99 N. W. 577; Vedder v. Delaney, 122 Ia. 583, 98 N. W. 373; Nelson v. R. Co., 113 Mo. App. 659, 88 S. W. 781; Storm v. Butte, 35 Mont. 385, 89 P. 726; Moran v. R. Co., 74 N. H. 500, 69 A. 884 (citing numerous cases); Brown v. White, 202 Pa. 297, 51 A. 962; Houston etc. R. Co. v. Garcia (Tex. Civ.), 90 S. W. 713; Missouri etc. R. Co. v. Morgan (Tex. Civ.), 108 S. W. 724. See also Ft. Worth etc. R. Co. v. Morris (Tex. Civ.), 101 S. W. 1038; Brown v. Blaine, 41 Wash. 287, 83 P. 310.

430-80 Dean v. R. & N. Co., 44 Wash. 564, 87 P. 824; Philby v. R. Co., 46 Wash. 173, 89 P. 468.

431-81 Davis v. Kornman, 141 Ala. 479, 37 S. 789; Johnston v. Beadle, 6 Cal. App. 251, 91 P. 1011. *Compare* Mississippi C. R. Co. v. Hardy, 88 Miss. 732, 41 S. 505; Dallas etc. R. Co. v. Summers (Tex. Civ.), 106 S. W. 891.

433-86 *Compare* Morrow v. Mfg. Co., 70 S. C. 242, 49 S. E. 573.

433-87 *Compare* Proper v. R. Co., 136 Mich. 352, 99 N. W. 283 (holding that the reception of evidence at the instance of defendant that decedent was a wealthy man, was, under the circumstances of that case, if error, harmless).

437-96 Louisville etc. R. Co. v. Collingsworth, 45 Fla. 403, 33 S. 513; Jones & A. Co. v. George, 227 Ill. 64, 81 N. E. 4; Monongahela

etc. Co. v. Hardshaw (Ind.), 81 N. E. 492; Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459.

438-97 Bahr v. R. Co., 101 Minn. 314, 112 N. W. 267.

438-2 Bahr v. R. Co., supra.

439-3 See also Lord v. R. Co., 74 N. H. 295, 67 A. 639; Portsmouth S. R. Co. v. Peed, 102 Va. 662, 47 S. E. 850. *Compare* Olivier v. R. Co., 138 Mich. 242, 101 N. W. 530 (holding that evidence that decedent left a family is immaterial).

Under the Massachusetts statute it is a condition precedent before any recovery can be had for wrongful death of a servant, that the decedent left either a widow or dependent next of kin. Bartley v. R. Co. (Mass.), 83 N. E. 1093.

Evidence of ill health of wife suing for wrongful death of husband, is competent. Evarts v. R. Co., 3 Cal. App. 712, 86 P. 830.

441-4 McCabe v. E. L. Co., 27 R. I. 272, 61 A. 667.

442-8 *Compare* Louisville etc. Co. v. Daniel, 122 Ky. 256, 28 Ky. L. R. 1146, 91 S. W. 691; Carlton v. R. Co., 128 Mo. App. 451, 106 S. W. 1100.

442-10 See also Bedenbaugh v. R. Co., 69 S. C. 1, 48 S. E. 53; Hunter v. Durand, 137 Mich. 53, 100 N. W. 191.

INSANITY [Vol. 7.]

Previous insanity, 464-64; *Physical and mental examination by expert,* 473-85; *Weight of opinion evidence,* 476-94; *Discharge from asylum,* 479-3; *Relation to pleadings,* 479-4; *Burden of proof and presumption,* 480-6.

446-2 Hodge v. Rombow (Ala.), 45 S. 678. See Wood v. Wood, 129 Ia. 255, 105 N. W. 517 (favor shown a son insufficient to warrant appointment of guardian).

446-3 P. v. Meringola, 113 App. Div. 488, 99 N. Y. S. 357. See Swygart v. Willard, 166 Ind. 25, 76 N. E. 755.

446-5 Intelligence shown in the commission of the crime, knowledge and recollection of it, are evidence to rebut a claim of epilepsy. P. v. Furlong, 187 N. Y. 198, 79 N. E. 978.

446-6 S. v. Jack, 4 Penne. (Del.) 470, 58 A. 833.

446-8 Masonic Assn. v. Pollard, 121 Ky. 348, 28 Ky. L. R. 301, 89 S. W. 219.

447-9 In re Dolbeer, 149 Cal. 227, 86 P. 695.

447-10 P. v. Fallon, 149 Cal. 287, 86 P. 689; S. v. Constantine (Wash.), 93 P. 317 (whole of a conversation admissible).

447-11 S. v. Speyer, 194 Mo. 459, 91 S. W. 1075 (letters).

447-12 See P. v. Willard, 150 Cal. 543, 89 P. 124.

447-14 Conway v. Murphy, 135 Ia. 171, 112 N. W. 764 (admissions as substantive evidence of insanity).

448-16 *Compare* Ames v. Ames, 75 Neb. 473, 106 N. W. 584 (declaration in verified answer as to mental condition, inadmissible).

448-17 Westfall v. Wait, 165 Ind. 353, 73 N. E. 1089.

449-19 See S. v. Constantine (Wash.), 93 P. 317.

Belief in spiritualism as evidence of insanity. — See Owen v. Crumbaugh, 228 Ill. 380, 81 N. E. 1044, and Scott v. Scott, 212 Ill. 597, 72 N. E. 708.

449-20 Groce v. Ter. (Ariz.), 94 P. 1108 (consulting a palmist); Curtis v. Kirkpatrick, 9 Idaho 629, 75 P. 760; In re Knox, 123 Ia. 24, 98 N. W. 468; Eades v. Owens, 24 Ky. L. R. 2328, 74 S. W. 186; Rogers v. S., 77 Vt. 454, 61 A. 489; Steward v. Steward, 124 Wis. 623, 102 N. W. 1079.

Acts and threats of a third person, communicated to defendant, are admissible upon the issue of insanity since knowledge of such facts may have affected his mind. S. v. Bradley, 120 La. 248, 45 S. 120.

Prescription by physician, of drugs used in treating insanity is not admissible. Ames v. Ames, 75 Neb. 473, 106 N. W. 584.

Conveyances made and business conversations with her attorney are competent. In re Miller, 27 Pa. C. C. 49.

Wrongful belief as to thefts by his brother from him, competent evidence. Dowie v. Sutton, 126 Ill. App. 47.

449-21 U. S. v. Chisholm, 149 Fed. 284, s. c. 153 Fed. 808; Denver R. Co. v. Scott, 34 Colo. 99, 81 P. 763 (expression of face and eyes); Swygart v. Willard, 166 Ind. 25, 76 N. E. 755; S. v. McGruder, 125 Ia. 741, 101 N. W. 646; Kempf v. Koppa, 74 Kan. 153, 85 P. 806 (wide latitude allowed).

Conduct and planning of defendant may of themselves so establish his sanity as to do away with the necessity of instructing on the subject of insanity. Bast v. C., 124 Ky. 747, 30 Ky. L. R. 967, 99 S. W. 978.

449-22 Barnett v. S. (Ala.), 39 S. 778 (that defendant worked as a carpenter and did his work well); P. v. Willard, 150 Cal. 543, 89 P. 124; S. v. Lyons, 113 La. 959, 37 S. 890.

451-25 Steward v. S., 124 Wis. 623, 102 N. W. 1079.

451-26 In re Knox, 123 Ia. 24, 98 N. W. 468; Smith v. Ryan (Ia.), 112 N. W. 8.

452-28 *Compare* Swygart v. Willard, 166 Ind. 25, 76 N. E. 755 (increase in drinking); S. v. Brown, 181 Mo. 192, 79 S. W. 1111 (insufficient to warrant an instruction on insanity).

452-29 Pratt v. S., 50 Tex. Cr. 227, 96 S. W. 8 (general deterioration). See Leaptrot v. S., 51 Fla. 57, 40 S. 616.

453-32 C. v. Johnson, 188 Mass. 382, 74 N. E. 939. See P. v. Buck, 151 Cal. 667, 91 P. 529; In re Dolbeer, 149 Cal. 227, 86 P. 695.

Proof must first be made that the disease is hereditary or transmissible. In re Myers, 184 N. Y. 54, 76 N. E. 920. *Compare* Dillman v. McDanel, 222 Ill. 276, 78 N. E. 591.

Such proof cannot be made by declarations of defendant. Braham v. S., 143 Ala. 28, 38 S. 919.

454-34 Dillman v. McDanel, 222 Ill. 276, 78 N. E. 591 (cannot go further back than to uncles and aunts); S. v. Van Tassel, 103 Ia. 6, 72 N. W. 497; Berry v. Trust Co., 96 Md. 45, 53 A. 720; Laros v. C., 84 Pa. 200; Rogers v. S., 77 Vt. 454, 61 A. 489. *Compare* C. v. Johnson, 188 Mass. 383, 74 N. E. 939.

Insanity cannot be inferred from a mere hereditary taint in the family, since it must be brought home to the very person whose capacity is in issue. Pringle v. Burroughs, 185 N. Y. 375, 78 N. E. 150.

454-36 S. v. Grendahl, 131 Ia. 602, 109 N. W. 121.

Finding of jury of mental incapacity is not admissible as to capacity of the person at a previous time. Packham v. Ludwig, 63 A. 1048, s. c. sub nom, Packham v. Glendmeyer, 103 Md. 416.

455-37 Nobles v. Hutton (Cal. App.), 93 P. 289; P. v. Ziegler, 142 Cal. 337, 75 P. 1090; S. v. Austin, 71 Ohio 317, 73 N. E. 317.

455-38 U. S. v. Chisholm, 149 Fed. 284; S. v. Jack, 4 Penne. (Del.) 470, 58 A. 833; Rogers v. Rogers (Del.), 66 A. 374.

456-42 Rogers v. Rogers, supra; Ireland v. White, 102 Me. 233, 66 A. 477.

457-43 King v. Gilson, 191 Mo. 307, 90 S. W. 367; Wooten v. S. (Tex. Cr.), 102 S. W. 416.

457-44 **On contestant** in a will case. In re Dolbeer, 149 Cal. 227, 86 P. 695.

458-45 Altig v. Altig (Ia.), 114 N. W. 1056; Chadwell v. Reed, 198 Mo. 359, 95 S. W. 227; Teter v. Teter, 59 W. Va. 449, 53 S. E. 779.

459-52 U. S. v. Chisholm, 149 Fed. 284; Porter v. S., 140 Ala. 87, 37 S. 81; P. v. Willard, 150 Cal. 543, 89 P. 124; P. v. Suesser, 142 Cal. 354, 75 P. 1093; S. v. Jack, 4 Penne. (Del.) 470, 58 A. 833; Carter v. S., 1 Ga. App. 254, 58 S. E. 532; S. v. Austin, 71 Ohio 317, 73 N. E. 218; C. v. Beckwith, 27 Pa. C. C. 481; Pollok v. S. (Tex. Cr.), 101 S. W. 231 (prosecution for slander); Sartin v. S. (Tex. Cr.), 103 S. W. 875; Nugent v. S., 46 Tex. Cr. 67, 80 S. W. 84; Rusk v. S. (Tex. Cr.), 110 S. W. 58; Fults v. S. (Tex. Cr.), 98 S. W. 1057.

460-54 C. v. Johnson, 188 Mass. 382, 74 N. E. 939; Hamblin v. S. (Neb.), 115 N. W. 850; Duthey v. S., 131 Wis. 178, 111 N. W. 222; S. v. Pressler (Wyo.), 92 P. 806.

460-55 In re Dolbeer, 149 Cal. 227, 86 P. 695; Rogers v. Rogers (Del.), 66 A. 374; Andrews v. Committee, 120 Ky. 718, 87 S. W. 1080, 90 S. W. 581; Ireland v. White, 102 Me. 233, 66 A. 477; Chadwell v. Reed, 198 Mo. 359, 95 S. W. 227; In

re Thomas, 4 Pa. C. C. 270; Batterton v. S. (Tex. Cr.), 107 S. W. 826 (competency of witness).

462-59 S. v. Jack, 4 Penne. (Del.) 470, 58 A. 833; S. v. Wetter, 11 Idaho 433, 83 P. 341; S. v. Mitchell, 130 Ia. 697, 107 N. W. 804; S. v. Austin, 71 Ohio 317, 73 N. E. 218; C. v. Beckwith, 27 Pa. C. C. 481.

Presumption of sanity "goes little if any further than to constitute a rule of practice to the effect that in absence of any evidence bearing upon the subject there is no issue to be submitted to the jury." Duthey v. S., 131 Wis. 178, 111 N. W. 222.

462-61 Rogers v. Rogers (Del.), 66 A. 374; In re Knox, 123 Ia. 24, 98 N. W. 468; Johnson v. Safe Dep. Co., 104 Md. 460, 65 A. 333; King v. Gilson, 191 Mo. 307, 90 S. W. 367 (continual incapacity to make a will after finding of insanity by a court); Beard v. R. Co., 143 N. C. 136, 55 S. E. 505; In re Thomas, 4 Pa. C. C. 270; Wooten v. S. (Tex. Cr.), 102 S. W. 416; S. v. Snell, 46 Wash. 327, 89 P. 931 (presumption applies after a finding of insanity by a jury).

463-62 S. v. Jack, 4 Penne. (Del.) 470, 58 A. 833; S. v. Austin, 71 Ohio 317, 73 N. E. 218; Sims v. S., 50 Tex. Cr. 563, 91 S. W. 579.

464-63 S. v. Kavanaugh, 4 Penne. (Del.) 131, 53 A. 335 (delirium tremens).

464-64 Previous insanity. — There is no presumption of previous insanity from a finding of existing insanity. In re Dolbeer, 149 Cal. 227, 86 P. 695.

464-65 Ireland v. White, 102 Me. 233, 66 A. 477.

465-66 Louisiana. — *Compare* S. v. Johnston, 118 La. 276, 42 S. 935.

465-67 P. v. Willard, 150 Cal. 543, 89 P. 124; P. v. Suesser, 142 Cal. 354, 75 P. 1093; S. v. Austin, 71 Ohio 317, 73 N. E. 218; McCullough v. S., 50 Tex. Cr. 132, 94 S. W. 1056; Stanfield v. S., 50 Tex. Cr. 69, 94 S. W. 1057; Fults v. S. (Tex. Cr.), 98 S. W. 1057.

467-70 Heningburg v. S. (Ala.), 45 S. 246; Denver etc. R. Co. v. Scott, 34 Colo. 99, 81 P. 763; Gorham v. Moore (Mass.), 84 N. E. 436; In re Cheney (Neb.), 110 N. W. 731. *Compare* Weber v. Min. Co. (Idaho), 94 P. 441.

New York rule. — Lay witnesses can only state their contemporary impressions as to the rationality or irrationality of the acts and declarations testified to by them. In re Myers, 184 N. Y. 54, 76 N. E. 920; P. v. Pekarz, 185 N. Y. 470, 78 N. E. 294; Schoenberg v. Ulman, 51 Misc. 83, 99 N. Y. S. 650; Schoenberg v. Surety Co., 52 Misc. 104, 101 N. Y. S. 798; In re Small, 118 App. Div. 502, 103 N. Y. S. 705; In re Bromer, 98 N. Y. S. 738; P. v. Silverman, 181 N. Y. 235, 73 N. E. 980.

Hypothetical questions improper. In re Dolbeer, 149 Cal. 227, 86 P. 695.

468-71 Vannest v. Murphy, 135 Ia. 123, 112 N. W. 236; Nelson v. Thompson (N. D.), 112 N. W. 1058; Duthey v. S., 131 Wis. 178, 111 N. W. 222; Hodge v. Rambow (Ala.), 45 S. 678; Braham v. S., 143 Ala. 28, 38 S. 919; Ireland v. White, 102 Me. 233, 66 A. 477 (testimony of physician admitted on this ground); S. v. Constantine (Wash.), 93 P. 317. See Gorham v. Moor (Mass.), 84 N. E. 436; Beard v. R. Co., 143 N. C. 136, 55 S. E. 505.

468-73 U. S. v. Chisholm, 153 Fed. 808; Birmingham etc. R. & P. Co. v. Randle, 149 Ala. 539, 43 S. 355; Loveman v. R. & P. Co., 149 Ala. 515, 43 S. 411; Byrd v. S., 76 Ark. 286, 88 S. W. 974; In re Dolbeer, 149 Cal. 227, 86 P. 695; Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69; Lawson v. S. (Ind.), 84 N. E. 974; Smith v. Ryan (Ia.), 112 N. W. 8; S. v. Nowells, 135 Ia. 53, 109 N. W. 1016 (opinion as to delirium of person making a dying declaration); Stutsman v. Sharpless, 125 Ia. 335, 101 N. W. 105; In re Selleck, 125 Ia. 678, 101 N. W. 453; Stafford v. Tartar, 29 Ky. L. R. 1184, 96 S. W. 1127; Wightman v. Lodge, 121 Mo. App. 252, 98 S. W. 829; Spencer v. Spencer, 31 Mont. 631, 79 P. 320; Howard v. Carter, 71 Kan. 85, 80 P. 61; In re Isaac (Neb.), 107 N. W. 1016; P. v. Silverman, 181 N. Y. 235, 73 N. E. 980; Lassas v. McCarty, 47 Or. 474, 84 P. 76; Atkins v. S. (Tenn.), 105 S. W. 353 (basis of opinion need not be shown

prior to the giving of the opinion); Betts v. S., 48 Tex. Cr. 522, 89 S. W. 413; Taylor v. S., 49 Tex. Cr. 7, 90 S. W. 647; Wells v. S., 51 Tex. Cr. 499, 98 S. W. 851; Fults v. S., 51 Tex. Cr. 502, 98 S. W. 1057; Henderson v. S., 49 Tex. Cr. 511, 93 S. W. 550; Rogers v. S., 77 Vt. 454, 61 A. 489.

In testifying to sanity rather than insanity witness is not limited to basing his opinion on facts already detailed. S. v. Hayden, 131 Ia. 1, 107 N. W. 929; Proctor v. Pointer, 127 Ga. 134, 56 S. E. 111; Glover v. S., 129 Ga. 717, 59 S. E. 816; Braham v. S., 143 Ala. 28, 38 S. 919; Porter v. S., 140 Ala. 87, 37 S. 81; Lucas v. McDonald, 126 Ia. 678, 102 N. W. 532; Heaston v. Krieg, 167 Ind. 101, 77 N. E. 805.

Cross-examination as to reason for opinion proper. S. v. Penna, 35 Mont. 535, 90 P. 787.

469-74 But see Reed v. S., 75 Neb. 509, 106 N. W. 649.

469-75 Chicago T. Co. v. Lawrence, 211 Ill. 373, 71 N. E. 1024; Hibbard v. Baker, 141 Mich. 124, 104 N. W. 399; Struth v. Decker, 100 Md. 368, 59 A. 727.

470-78 Brahan v. S., 143 Ala. 28, 38 S. 919; In re McKenna, 143 Cal. 580, 77 P. 461; Nobles v. Hutton (Cal. App.), 93 P. 289 (husband separated from wife for a year, competent); Huyck v. Rennie, 151 Cal. 411, 90 P. 929; P. v. Suesser, 142 Cal. 354, 75 P. 1093; Swygart v. Willard, 166 Ind. 25, 76 N. E. 755; S. v. Von Kutzleben (Ia.), 113 N. W. 484 (observation during trial insufficient); Kempf v. Koppa, 74 Kan. 153, 85 P. 806; S. v. Lyons, 113 La. 959, 37 S. 890; Packham v. Ludwig, 103 Md. 416, 63 A. 1048; Atkins v. S. (Tenn.), 105 S. W. 353; Hood v. S. (Tex. Cr.), 101 S. W. 229 (bare acquaintance insufficient); Sims v. S., 50 Tex. Cr. 563, 99 S. W. 555; Wells v. S., 50 Tex. Cr. 499, 98 S. W. 851.

471-79 Altig v. Altig (Ia.), 115 N. W. 1056. See Lyles v. S., 48 Tex. Cr. 119, 86 S. W. 763 (persons not experts may testify that deceased was rational at time of making dying declaration).

471-80 Question for the court. Braham v. S., 143 Ala. 28, 38 S. 919 (but jury determines weight of the evidence); Hamilton v. U. S., 26 App. Cas. (D. C.) 382.

471-81 Glover v. S., 129 Ga. 717, 59 S. E. 816; P. v. Pekarz, 185 N. Y. 470, 78 N. E. 294. See Braham v. S., 143 Ala. 28, 38 S. 919.

472-83 Porter v. S., 140 Ala. 87, 37 S. 81; In re Dolbeer, 149 Cal. 227, 86 P. 695; Hamilton v. U. S., 26 App. Cas. (D. C.) 382 (medical student incompetent); In re Miller, 27 Pa. C. C. 49.

472-84 Expert need not state ground on his opinion; this may be brought out on cross-examination. C. v. Johnson, 188 Mass. 382, 74 N. E. 939.

Opinions of experts are not to be received unless based upon facts testified to by themselves or by others. Rogers v. S., 77 Vt. 454, 61 A. 489.

473-85 C. v. Johnson, 188 Mass. 382, 74 N. E. 939.

Physical and mental examination by expert may be made, and statements made by the defendant, after being warned, are admissions, and not inadmissible upon the ground of compelling a defendant to give testimony against himself. P. v. Furlong, 187 N. Y. 198, 79 N. E. 978. See P. v. Meringola, 113 App. Div. 488, 99 N. Y. S. 357.

474-86 Yates v. S., 127 Ga. 813, 56 S. E. 1017 (hypothetical question unnecessary).

474-87 P. v. Griffith, 146 Cal. 339, 80 P. 68; C. v. Johnson, 188 Mass. 382, 74 N. E. 939; Duthey v. S., 131 Wis. 178, 111 N. W. 222.

475-89 Ince v. S., 77 Ark. 426, 93 S. W. 65; Hamblin v. S. (Neb.), 115 N. W. 850; Betts v. S., 48 Tex. Cr. 522, 89 S. W. 413.

476-91 See Struth v. Decker, 100 Md. 368, 59 A. 727.

476-93 Earp v. S. (Miss.), 38 S. 288 (expert may not state that insane people do not kill people for money). Whether insanity can be simulated may be stated by expert. Braham v. S., 143 Ala. 28, 38 S. 919.

476-94 Garrus v. Davis, 234 Ill. 326, 84 N. E. 924.

Weight of opinion evidence. — Value of opinions of non-experts is measured by the facts on which they are

based. Conway v. Murphy (Ia.), 112 N. W. 764; Reed v. S., 75 Neb. 509, 106 N. W. 649; Pollock v. S. (Tex. Cr.), 101 S. W. 231; Howard v. Carter, 71 Kan. 85, 80 P. 61; Lassas v. McCarty, 47 Or. 474, 84 P. 76; Kempf v. Koppa, 74 Kan. 153, 85 P. 806; Teter v. Teter, 59 W. Va. 449, 53 S. E. 779; Atkins v. S. (Tenn.), 105 S. W. 353. See also Ames v. Ames, 75 Neb. 473, 106 N. W. 584.

Should be received with caution. Atkins v. S. (Tenn.), 105 S. W. 353. See P. v. Nihell, 144 Cal. 200, 77 P. 916; P. v. Buck, 151 Cal. 667, 91 P. 529.

Not conclusive. — U. S. v. Chisholm, 149 Fed. 284, s. c. 153 Fed. 808; S. v. Humbles, 126 Ia. 462, 102 N. W. 409.

477-95 Barnett v. S. (Ala.), 39 S. 778; Vannest v. Murphy (Ia.), 112 N. W. 236; S. v. Penna, 35 Mont. 535, 90 P. 787; Reed v. S., 75 Neb. 509, 106 N. W. 649.

477-96 Sbarbero v. Miller (N. J. Eq.), 65 A. 472; Schoenberg v. Ulman, 51 Misc. 83, 99 N. Y. S. 650 (shifts burden of proof).

In California the commitment of a person to an asylum by a lunacy commission does not fix his status as a lunatic. P. v. Willard, 150 Cal. 543, 89 P. 124.

In West Virginia the jurisdiction of a justice is limited to the purpose of committing such person to a hospital for the insane and where he is not so committed the finding of the justice is inadmissible in a proceeding for the appointment of a committee. Karnes v. Johnston, 58 W. Va. 595, 52 S. E. 658.

Acquittal of defendant on a trial for homicide, the defense being insanity, raises a conclusive presumption that he is "manifestly dangerous," within the meaning of the statute. S. v. Snell, 46 Wash. 327, 89 P. 931.

478-97 Finding of insanity in a collateral proceeding not conclusive. S. v. Grendahl, 131 Ia. 602, 109 N. W. 121. See P. v. Willard, 150 Cal. 543, 89 P. 124.

478-98 In re Wright, 74 Kan. 406, 86 P. 460, 89 P. 678. But see Foran v. Healy, 73 Kan. 633, 85 P. 751, 86 P. 470.

Cannot be attacked collaterally. Packard v. Ulrich (Md.), 67 A. 246.

478-99 Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69; Logan v. Vanarsdall, 27 Ky. L. R. 822, 86 S. W. 981 (rebuttable by parol). Seaborn v. S. (Tex. Cr.), 90 S. W. 649.

In New York conclusive as to contracts and wills but not as to crimes or as between strangers. Schoenberg v. Ulman, 51 Misc. 83, 99 N. Y. S. 650; O'Reilley v. Sweeney, 54 Misc. 408, 105 N. Y. S. 1033 (conclusive as to competency to make a contract).

479-1 Judgment conclusive that a person "was a lunatic at the time, prima facie evidence of lunacy at a subsequent time, but raises no presumption that she was a lunatic at any previous time." Andrews v. Committee, 120 Ky. 718, 87 S. W. 1080, 90 S. W. 581.

479-3 Discharge from asylum Effect. — In California proceedings under Sec. 1766 Code Civ. Proc. are judicial in their nature and the judgment rendered is conclusive upon the status of the party, but proceedings under other sections are only prima facie evidence. Aldrich v. Barton (Cal.), 95 P. 900.

479-4 Rogers v. S., 77 Vt. 454, 61 A. 489.

Relation to pleadings — Necessity and effect. — No special plea is necessary, but insanity may be shown on a plea of not guilty. Such plea amounts to a bare denial; "it admits the act charged, but avers that there was no criminal intent accompanying the act, and therefore denies the crimes charged." S. v. Speyer, 207 Mo. 540, 106 S. W. 505; S. v. Howard, 30 Mont. 518, 77 P. 50.

479-5 Fact that the indictment charges an assault upon an imbecile female does not necessarily render her incompetent as a witness. S. v. Crouch, 130 Ia. 478, 107 N. W. 173; S. v. Simes, 12 Idaho 310, 85 P. 914.

480-6 Cuesta v. Goldsmith, 1 Ga. App. 48, 57 S. E. 983.

But a party having standing merely as the guardian of an insane person cannot offer such person as a witness. Hart v. Miller, 29 Ind. App. 222, 64 N. E. 239.

Burden of proof is upon the person objecting to the competency of the witness, to establish insanity by the

preponderance of evidence. Batterton v. S. (Tex. Cr.), 107 S. W. 826.
Presumption of regularity, that lunatic was present at the hearing, since officer is presumed to do his duty. Porter v. Asylum, 28 Ky. L. R. 796, 90 S. W. 263.
480-7 Vannest v. Murphy (Ia.), 112 N. W. 236 (weight of opinion evidence).
Degree of mental capacity necessary to enable a party to contract is for the court; whether the party has the required quantum is for the jury; opinions of witnesses incompetent upon both points. Nashville etc. R. Co. v. Brundige, 114 Tenn. 31, 84 S. W. 805.
480-8 S. v. Howard, 30 Mont. 518, 77 P. 50.

INSOLVENCY [Vol. 7.]

482-1 German S. Bk. v. Tr. Co., 27 Ky. L. R. 581, 85 S. W. 761; Floyd-J. v. Anderson, 30 Mont. 351, 76 P. 751; Mosely v. Johnson, 144 N. C. 257, 56 S. E. 922; Jensen v. Montgomery, 29 Utah 89, 80 P. 504.
482-2 Cleage v. Laidley, 149 Fed. 346, 79 C. C. A. 284 (insolvency presumed to continue as long as such a state of affairs usually continues under similar circumstances).
Insolvency of firm not presumed from prior insolvency of member. Jaquith v. Davenport (Mass.), 84 N. E. 125.
482-3 Martin v. Hertz, 224 Ill. 84, 79 N. E. 558.
483-4 Hawes v. Bank, 124 Ga. 567, 52 S. E. 922; Worthy v. Battle, 125 Ga. 415, 54 S. E. 667.
485-8 Campbell v. Park (Ia.), 101 N. W. 861; Nelson Mfg. Co. v. Shreve, 104 Mo. App. 474, 79 S. W. 488 (estimate of value of alleged insolvent's property admissible).
486-10 Campbell v. Park, 128 Ia. 181, 101 N. W. 861.
486-11 See Campbell v. Park, supra.
487-16 See Moseley v. Johnson, 144 N. C. 257, 56 S. E. 922.
491-24 Davis v. Yonge, 74 Ark. 161, 85 S. W. 90. But see Bolster v. Graves, 189 Mass. 301, 75 N. E. 714.
493-29 Fales v. Browning, 68 S. C. 13, 46 S. E. 545. *Compare* Halbert v. Pranke, 91 Minn. 204, 97 N. W. 976.
495-33 See Campbell v. Park, 128 Ia. 181, 101 N. W. 861, *cit.* S. v. Cadwell, 79 Ia. 432, 44 N. W. 700. *Compare* German-S. Bk. v. Tr. Co., 27 Ky. L. R. 581, 85 S. W. 761 (subsequent insolvency no evidence of prior insolvency).

INSURANCE [Vol. 7.]

Judicial notice of form of applications and of manner of preparing policies, 502-9; *Presumption as to change of beneficiary,* 505-22; *Apprehension of incendiarism,* 527-76; *Presumption of death,* 549-33.

499-1 Troy v. London, 145 Ala. 280, 39 S. 713; Lyford v. Ins. Co., 99 Me. 273, 58 A. 916; Ryan v. Ins. Co., 117 Mo. App. 688, 93 S. W. 347.
499-2 **The presumption in favor of the legality of a marriage** in fact applies to aid a woman who married in reliance on the validity of a divorce obtained by her spouse and for whose benefit he obtained insurance. Scott v. Scott, 25 Ky. L. R. 356, 77 S. W. 1122.
499-3 See Troy v. London, 145 Ala. 280, 39 S. 713.
500-4 **It is not presumed that a policy covered property** by reason of fraud; if it is not shown how it was included mistake will be presumed. Herzog v. Ins. Co., 36 Wash. 611, 79 P. 287.
Extent of interest. — If insurer is estopped to rely upon a clause in the policy forbidding a change of title, it has the burden of showing that insured's interest is of less value than the sum for which the property was insured. Continental Ins. Co. v. Thomasson, 27 Ky. L. R. 58, 84 S. W. 546.
500-5 Troy v. London, 145 Ala. 280, 39 S. 713.
It is presumed that an assignment once made in due form continues in full force, notwithstanding the assignor is in possession of the policy claiming it under a reassignment, the mere naked possession of it not

being evidence of ownership. Cuyler v. Wallace, 183 N. Y. 291, 76 N. E. 1, *rev.* s. c., 101 App. Div. 207, 91 N. Y. S. 690. Authority to assign a policy may be presumed in favor of action by the directors of an insurance company. Cass County v. Ins. Co., 188 Mo. 1, 86 S. W. 237.

500-6 Ownership shown by parol. Ozark Ins. Co. v. Hopson, 82 Ark. 603, 101 S. W. 171.

501-7 German Ins. Co. v. Gibbs (Tex. Civ.), 92 S. W. 1068 (declarations of insured after loss).

Declarations of insured are competent to show assignment of policy as against his executor. Ormond v. Ins. Co., 145 N. C. 140, 58 S. E. 997.

501-8 Insurer's by-laws are competent to show that a claimant of the proceeds of a policy was not qualified to be a beneficiary. Foss v. Peterson, 20 S. D. 92, 104 N. W. 915.

Evidence to show dependence of plaintiff on insured need not be very strong, the certificate designating plaintiff as such and all requirements having been met. Erickson v. Woodmen, 43 Wash. 242, 86 P. 584.

Insured may testify of his ownership of the building burned. Phoenix Ins. Co. v. McAtee, 34 Ind. App. 106, 70 N. E. 947.

Nature of an assignment of property may be proved—as that the deed was intended as security and that the debt secured was paid and the property reconveyed before loss. Burkhart v. Ins. Co., 11 Pa. Super. 280.

502-9 Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 55 N. E. 119; German Ins. Co. v. Goodfriend, 30 Ky. L. R. 218, 97 S. W. 1098; Thompson v. Ins. Co., 45 Wash. 482, 88 P. 941.

Parol contract of insurance shown. Pelican Ins. Co. v. Schildknecht, 32 Ky. L. R. 257, 108 S. W. 312. Proof of such a contract must be full and clear. Hartford F. Ins. Co. v. Whitman, 75 Ohio St. 312, 79 N. E. 459.

Judicial notice taken of the custom of insurers to require a formal application and an authenticated medical examination of the applicant. Taylor v. A. O. U. W., 101 Minn. 72, 111 N. W. 919. And of the manner in which policies are prepared, including the use of slips and pasters to indicate changes therein. Waters v. Annuity Co., 144 N. C. 663, 57 S. E. 437.

503-10 Delaware Ins. Co. v. Ins. Co., 126 Ga. 380, 55 S. E. 330.

503-12 Because oral contracts of insurance are unusual more than ordinarily convincing evidence must be adduced to show that they were made. Whitman v. Ins. Co., 128 Wis. 124, 107 N. W. 291.

Contract not shown. — Harriman v. Ins. Co., 43 Wash. 398, 86 P. 656; Whitman v. Ins. Co., 128 Wis. 124, 107 N. W. 291.

503-13 Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 55 N. E. 119.

504-15 See New York L. Ins. Co. v. Johnson, 24 Ky. L. R. 1867, 72 S. W. 762.

Proof of possession of policy. — New York L. Ins. Co. v. Johnson, supra. The presumption is that a policy was accepted as such, and in the absence of a verified plea denying its execution or a verification of the general issue the execution and delivery of the policy will be deemed admitted. Helbig v. Ins. Co. 120 Ill. App. 58.

504-16 Delivery and acceptance not proved. — Wood v. Yeomen (Ia.), 113 N. W. 825.

504-17 Wheaton v. Ins. Co., 20 S. D. 62, 104 N. W. 850.

504-18 Mutual L. Assur. Co. v. Giguere, 32 Can. Sup. 348; Amos-Richia v. Ins. Co., 152 Fed. 192; Waters v. Annuity Co., 144 N. C. 663, 57 S. E. 437.

Evidence that insured requested a new policy on different terms is not competent on the question of acceptance of the policy issued. Cauthen v. Ins. Co. (S. C.), 61 S. E. 428.

Due delivery of a policy is presumed where insured is shown to have had possession of it and its loss is proved. National M. F. Ins. Co. v. Sprague, 40 Colo. 344, 92 P. 227. And where policy is produced by a representative of insured. Mutual L. Ins. Co. v. Giguere, 32 Can. Sup. 348. Recital in policy that premium has been paid imports that policy was delivered. National M. F. Ins. Co. v. Sprague, 40 Colo. 344, 92 P. 227.

Effect of proving delivery. — Ray-

burn v. Casualty Co., 141 N. C. 425, 54 S. E. 283,138 N. C. 379, 50 S. E. 762; Waters v. Annuity Co., 144 N. C. 663, 57 S. E. 437; Hartford F. Ins. Co. v. Whitman, 75 Ohio St. 312, 79 N. E. 459; Amos-Richia v. Ins. Co., 152 Fed. 192.

There is no presumption, in the absence of special circumstances, that there is a variation between the policy and application because slips are pasted on the former. Their effect is for the jury. Waters v. Annuity Co., 144 N. C. 663, 57 S. E. 437.

Date of delivery of policy may be shown. — Haughton v. Ins. Co., 165 Ind. 32, 74 N. E. 613.

Custom of insurer as to delivering policies to local agents may be shown to establish delivery to insured. Payne v. Ins. Co., 141 Fed. 339, 72 C. C. A. 487.

On the issue of the acceptance and approval of an application contradictory endorsements thereon are admissible. Robinson v. Ins. Co., 144 Fed. 1005.

Understanding of agents of insurer and insured as to meaning of contract to renew policies executed by their principals, not sufficient evidence of mistake to justify reformation thereof. Barker v. Pullman Co., 134 Fed. 70, 67 C. C. A. 196.

Possession of an incomplete policy. Amos-Richia v. Ins. Co., 152 Fed. 192.

505-19 **Declarations** may be regarded in connection with letters from insurer to insured. Todd v. Ins. Co., 9 Pa. Super. 371.

505-20 **Previous delivery of a policy to another** by the agent who delivered the one in question may be shown. Sovereign Camp v. Carrington, 41 Tex. Civ. 29, 90 S. W. 921.

Renewal receipt executed by agent admissible. — McCullough v. Ins. Co., 2 Pa. Super. 233.

505-21 **Receipt for premium inadmissible** unless signed in representative capacity, agent representing both insurer and insured. Foreman v. Assn., 104 Va. 694, 52 S. E. 337.

505-22 Lyford v. Ins. Co., 99 Me. 273, 58 A. 916; More v. Ins. Co., 130 N. Y. 537, 29 N. E. 757 (no presumption of acceptance arises from silence after receipt of application); Hartford Ins. Co. v. Whitman, 75 Ohio St. 312, 79 N. E. 459 (proof must be full and clear).

Agency is presumed if insurer accepts application, issues policy and retains premium. Smith v. Ins. Co. (S. D.), 113 N. W. 94.

Agent's possession of an official premium receipt is evidence of his authority to receive payment. Lauze v. Ins. Co., 74 N. H. 334, 68 A. 31.

Presumption as to change of beneficiary. — Baker v. Baker, 110 App. Div. 660, 97 N. Y. S. 455.

Burden of proving intent to change beneficiary is upon the person who asserts rights of former. Barner v. Lyter, 31 Pa. Super. 435.

Authority of local agents may be shown by evidence of course of business between them and general agents in respect of like policies. St. Paul F. & M. Ins. Co. v. Stogner (Tex. Civ.), 98 S. W. 218.

Under some statutes a person who does any of the acts enumerated therein is presumed to be insurer's agent. Madden v. Ins. Co., 70 S. C. 295, 49 S. E. 855; Costello v. Ins. Co., 133 Wis. 361, 113 N. W. 639.

Agency shown. — Capital F. Ins. Co. v. Montgomery, 81 Ark. 508, 99 S. W. 687.

Evidence sufficient to carry question of contract to jury. Payne v. Ins. Co., 141 Fed. 339, 72 C. C. A. 487.

Agent's declarations that he had written insurance inadmissible to show contract. Torpey v. National L. I. Co., 29 Ky. L. R. 371, 92 S. W. 982.

The burden of showing non-observance of conditions in a policy negativing the effect of its delivery is upon insurer. Rayburn v. Casualty Co., 141 N. C. 425, 57 S. E. 437.

506-23 Helbig v. Ins. Co., 234 Ill. 251, 84 N. E. 897.

506-24 Kentucky Vermilion M. & C. Co. v. Ins. Soc., 146 Fed. 695, 77 C. C. A. 121; Mulrooney v. Ins. Co., 157 Fed. 598 (applying the rule to an indorsement); Northern Assur. Co. v. Assn., 183 U. S. 308; Connecticut F. Ins. Co. v. Buchanan, 141 Fed. 877, 73 C. C. A. 111, 4 L. R. A. (N. S.) 758; Meigs v. Assur. Co., 134 Fed. 1021, 68 C. C. A. 249; Wheeler v. Cas. Co., 129 Ga. 237, 58 S. E.

709; Masons Union L. I. Assn. v. Brockman, 20 Ind. App. 206, 50 N. E. 493; Kelsey v. Cas. Co., 131 Ia. 207, 108 N. W. 221; Grisham v. Ins. Co., 130 Mo. App. 57, 109 S. W. 96; Dakan v. Ins. Co., 125 Mo. App. 451, 102 S. W. 634; Collins v. Ins. Co., 32 Mont. 329, 80 P. 609; Lauze v. Ins. Co., 74 N. H. 334, 68 A. 31; Gleason v. Ins. Co., 73 N. H. 583, 64 A. 187; Langdon v. Ins. Co., 116 App. Div. 558, 101 N. Y. S. 914; Hammel v. Ins. Co., 4 Ohio C. C. (N. S.) 380; Gish v. Ins. Co., 16 Okla. 59, 87 P. 869; Deming Inv. Co. v. Ins. Co., 16 Okla. 1, 83 P. 918; Kentucky W. Mfg. Co. v. People's S. Co., 77 S. C. 92, 57 S. E. 676 (meaning of "fully insured"); Prince v. Ins. Co., 77 S. C. 187, 57 S. E. 766; McGrath v. Ins. Co., 74 S. C. 69, 54 S. E. 218; Bowen v. Ins. Co., 20 S. D. 103, 104 N. W. 1040 (binding receipt); Metropolitan L. Ins. Co. v. Hall, 104 Va. 572, 52 S. E. 345; Ferguson v. Ins. Co., 45 Wash. 209, 88 P. 128; Rief v. Cas. Co., 131 Wis. 368, 111 N. W. 502; Phoenix Ins. Co. v. Stahl, 72 Kan. 578, 83 P. 614; State L. Ins. Co. v. Johnson, 73 Kan. 567, 85 P. 597; Connecticut F. I. Co. v. Buchanan, 141 Fed. 877, 73 C. C. A. 111.

As between the original insurer and its reinsurer the books of the former are not conclusive evidence of the good standing of its members, and under an Illinois statute the reinsurer is liable to all members in such standing whether their records on the books are clear or not. Bolles v. Assn., 220 Ill. 400, 77 N. E. 198.

509-25 Mutual L. Ins. Co. v. Hargus (Tex. Civ.), 99 S. W. 580.

Proof that a similar mistake was made in writing another policy by the agent who wrote the policy in question is incompetent to show a mistake in the latter. Arnold v. Ins. Co., 116 App. Div. 60, 101 N. Y. S. 132.

Mistake not shown. Arkansas Ins. Co. v. Witham, 82 Ark. 226, 101 S. W. 721.

509-26 Declarations of insured provable after his death to show alterations in application, and as to whether delivery of policy was absolute or conditional. Waters v. Annuity Co., 141 N. C. 425, 57 S. E. 437.

Mistake in giving date in application may be shown. Madden v. Ins. Co., 70 S. C. 295, 49 S. E. 855.

510-28 See Prudential Ins. Co. v. Sullivan, 27 Ind. App. 30, 59 N. E. 873; Frost v. Ins. Co., 77 Vt. 407, 60 A. 803.

511-30 American C. Co. v. Assur. Co., 148 Fed. 77.

512-31 American Ins. Co. v. Meyers, 118 Ill. App. 484; Aetna Ins. Co. v. Strout, 16 Ind. App. 160, 44 N. E. 934; Wolverine L. Co. v. Ins. Co., 145 Mich. 558, 108 N. W. 1088.

Condition of property may be shown. Harris v. Ins. Co., 190 Mass. 361, 77 N. E. 493.

512-32 Bowditch v. Ins. Society, 193 Mass. 565, 79 N. E. 788, *appr.* Thomas v. Ins. Co., 162 Mass. 29, 37 N. E. 672, 44 Am. St. 323; Aetna Ins. Co. v. Brannon, 99 Tex. 391, 89 S. W. 1057.

513-34 A life policy is not varied by parol evidence showing that it was not procured for insured's benefit and that he did not pay the premiums. Hinton v. Ins. Co., 135 N. C. 314, 47 S. E. 474.

513-35 American Ins. Co. v. Meyers, 118 Ill. App. 484; Trow v. Ins. Co. (Vt.), 67 A. 821; Prudential Ins. Co. v. Alley, 104 Va. 356, 51 S. E. 812.

Insured may be required to produce his books for examination pursuant to the terms of an indemnity policy, the premium for which was based on the compensation paid employes. U. S. Cas. Co. v. Robins, 108 App. Div. 361, 95 N. Y. S. 726.

Evidence of the basis on which insured made a previous claim under a like policy issued by insurer is immaterial as affecting the construction of the policy sued upon. Continental Cas. Co. v. Johnson, 74 Kan. 129, 85 P. 545.

513-36 Barker v. Ins. Co., 136 Mich. 626, 99 N. W. 869 (meaning of "winterseason" as applied to saw mills); Carson v. Ins. Co., 1 Pa. Super. 572 (meaning of "pulmonary" diseases).

Custom must be pleaded or proof of it cannot be made. Girard L. Ins. Co. v. Ins. Co., 13 Phila. (Pa.) 90.

Proof of custom must be clear and harmonious. Girard L. I. Co. v. Ins. Co., supra.

513-37 **It may be presumed** that knowledge of insurer's special agents concerning the local use of terms was that of their non-resident principal, and that the policy was written with reference to such use thereof. Barker v. Ins. Co., 136 Mich. 626, 99 N. W. 869.

Well known custom of the place where contract was made to regard "noon" as twelve o'clock standard time, may be shown. Rochester G. Ins. Co. v. Peaslee G. Co., 27 Ky. L. R. 1155, 87 S. W. 1115.

514-38 Kentucky Vermillion M. & C. Co. v. Ins. Soc., 146 Fed. 695, 77 C. C. A., 121.

Custom of insured and knowledge of his purpose not to keep a safe as required by the policy may be shown to have been brought home to agent at time contract was delivered and before premium paid. Riley v. Ins. Co., 117 Mo. App. 229, 92 S. W. 1147.

514-40 Trow v. Ins. Co. (Vt.), 67 A. 821 (part of application inadmissible if balance unaccounted for).

Former policy admissible if renewal cannot be found, the only difference being as to dates. Edgefield Mfg. Co. v. Cas. Co., 78 S. C. 73, 58 S. E. 969.

Copy of policy admissible if insurer has failed to produce the original or one which could be shown to be such. Carr v. Ins. Co., 115 App. Div. 755, 101 N. Y. S. 158.

Notice to produce the policy must be given by insurer if he desires to use it to prove violations of conditions subsequent. Thompson v. Ins. Co., 77 S. C. 294, 57 S. E. 848.

Conflict between application and policy will be resolved in accordance with latter, it being, presumably, the last expression of the agreement. Harr v. Nobles (Neb.), 110 N. W. 713, *app.* Goodwin v. Society, 97 Ia. 226, 66 N. W. 157, 59 Am. St. 411, 32 L. R. A. 473.

Policy admissible. — Wheaton v. Ins. Co., 20 S. D. 62, 104 N. W. 850.

By-laws of a benefit society, if a part of the contract, may be offered by either party. Hayden v. Ins. Co., 136 Fed. 285, 69 C. C. A. 423.

The policy and proofs constitute a prima facie case of the existence of a contract. Helbig v. Ins. Co., 120 Ill. App. 58. They do not make such a case as to the amount of the loss. Lancashire Ins. Co. v. Lyon, 124 Ill. App. 491. In connection with an admission in the answer concerning date of death they make a prima facie case. Thaxton v. Ins. Co., 143 N. C. 33, 55 S. E. 419.

515-42 Tackman v. Brotherhood, 132 Ia. 64, 106 N. W. 350.

515-43 Fidelity Title & T. Co. v. Ins. Co., 213 Pa. 415, 63 A. 51.

515-45 **By-laws,** if not made part of the contract, are inadmissible as against provisions in latter. Young v. Assn., 126 Mo. App. 325, 103 S. W. 557 (reinsurer's by-laws); Gleason v. Ins. Co., 73 N. H. 583, 64 A. 187; Bruger v. Ins. Co., 129 Wis. 281, 109 N. W. 95.

Constitution of benefit society is the best evidence of its provisions. Masons' Union L. Ins. Assn. v. Brockman, 20 Ind. App. 206, 50 N. E. 493.

The records of a mutual company. Sup. Council v. Haas, 116 Ill. App. 587; Bagley v. Grand Lodge, 131 Ill. 498, 22 N. E. 487.

Application is best evidence of disclosures made to examining physician. Taylor v. Woodmen, 42 Wash. 304, 84 P. 867.

Copy of application. — Bruger v. Ins. Co., 129 Wis. 281, 109 N. W. 95. Must be properly authenticated. Aetna L. Ins. Co. v. Duparquet, 53 Misc. 581, 103 N. Y. S. 800.

515-47 Griffin v. Assn. Society, 119 Ky. 856, 84 S. W. 1164; Paquette v. Ins. Co., 193 Mass. 215, 79 N. E. 250; Custer v. Assn., 211 Pa. 257, 60 A. 776.

Under the Pennsylvania statute by-laws or regulations bearing on the contract are inadmissible if unattached to the policy. Mowry v. Society, 27 Pa. Super. 390.

The Kentucky statute. — American Guild v. Wyatt, 30 Ky. L. R. 632, 100 S. W. 266; Bankers F. Union v. Donahue (Ky.), 109 S. W. 878.

516-48 **Oral evidence** of statements in the application is inadmissible. Fidelity Title & T. Co. v. Ins. Co., 213 Pa. 415, 63 A. 51.

It will not be presumed that the policy and application were attached

if they are detached when offered as evidence. Mahon v. Ins. Co., 144 Pa. 409, 22 A. 876.

Compliance with the statute cannot be shown by proof of insurer's custom in attaching the papers and that the policy in suit bore evidence of having had the application attached to it; opinion evidence on the last point was incompetent. Custer v. Assn., 211 Pa. 257, 60 A. 776.

Breach of conditions or warranties in policy may be proved though application not attached to it. Kirkpatriek v. Acc. Co. (Ia.), 115 N. W. 1107; Barker v. Ins. Co., 188 Mass. 542, 84 N. E. 490, 74 N. E. 495.

Effect of Iowa statute, if not complied with, is to make the policy the sole instrument evidencing the contract. Rauen v. Ins. Co., 129 Ia. 725, 106 N. W. 198.

"Application" includes all statements in the paper so denominated, except the report of the medical examiner, considered necessary to form the basis of the contract. Paquette v. Ins. Co., 193 Mass. 215, 79 N. E. 250. If all the material portions of the paper designated as a "proposal" are embodied in the application, except the designation of the beneficiary, the application is admissible. Langdeau v. Ins. Co., 194 Mass. 56, 80 N. E. 452. A supplemental application must be attached to or endorsed on the policy, otherwise the original is not admissible. Fisher v. Assn., 188 Pa. 1, 41 A. 467. Writings made to secure fidelity bonds are applications within the meaning of such statutes. U. S. Fidelity & G. Co. v. Egg Shippers' Co., 148 Fed. 353, 78 C. C. A. 345.

Scope of statute. — Holden v. Ins. Co., 191 Mass. 153, 77 N. E. 309; Hews v. Society, 143 Fed. 850, 74 C. C. A. 676; Prudential Ins. Co. v. Alley, 104 Va. 356, 51 S. E. 812.

Defense of fraudulent conspiracy. Paquette v. Ins. Co., 193 Mass. 215, 79 N. E. 250.

516-49 Court of Honor v. Clark, 125 Ill. App. 490; Gardner v. Ins. Co., 31 Ky. L. R. 89, 101 S. W. 908; Metropolitan Ins. Co. v. Ford, 31 Ky. L. R. 513, 102 S. W. 876 (rejection of application for other insurance); Harris v. Ins. Co., 190 Mass. 361, 77 N. E. 493; Peck v. Ins. Co., 91 App. Div. 597, 87 N. Y. S. 210, 181 N. Y. 585, 74 N. E. 1122 (no opinion); Schofield v. Ins. Co., 79 Vt. 161, 64 A. 1107; Goldman v. Fidelity & D. Co., 125 Wis. 390, 104 N. W. 80 (employer's indemnity risk).

Burden not shifted by admissions of fact made in course of trial under a statute giving the right to open and close to party against whom judgment would go if no evidence offered. Palatine Ins. Co. v. Merc. Co. (N. M.), 82 P. 363.

519-50 Nabors v. Ins. Co., 84 Ark. 184, 105 S. W. 92; Haughton v. Ins. Co., 165 Ind. 32, 73 N. E. 592; Scott v. Ins. Co., 56 Misc. 545, 107 N. Y. S. 124; Schofield v. Ins. Co., 79 Vt. 161, 64 A. 1107; Rochester G. Ins. Co. v. Assn., 107 Va. 701, 60 S. E. 93.

Under the Maryland statute. — Mutual L. Ins. Co. v. Mullen (Md.), 69 A. 385.

Under the Ohio statute. — North Am. Acc. Ins. Co. v. Sickles, 2 Ohio C. C. (N. S.) 222.

520-51 Kentucky Vermillion M. & C. Co. v. Ins. Soc., 146 Fed. 695, 77 C. C. A. 121; Vincent v. Assn., 77 Conn. 281, 58 A. 963; Johnson v. Ins. Co., 120 Mo. App. 80, 96 S. W. 697.

Rule as affected by statutes. — Barker v. Ins. Co. (Mass.), 84 N. E. 490.

Order of proof. — Vincent v. Assn., 77 Conn. 281, 58 A. 963, *dist.* Hennessey v. Ins. Co., 74 Conn. 699, 52 A. 490.

The presumption of law that statements in the application are prima facie true has no other effect than to make it insurer's duty to proceed with the evidence of their untruthfulness; it is not to be regarded with the evidence in the final determination of the issues. Vincent v. Assn., 77 Conn. 281, 58 A. 963. *Contra*, Tackman v. Brotherhood, 132 Ia. 64, 106 N. W. 350.

521-55 Ajum Goolam Hossen & Co. v. Ins. Co., (1901) App. Cas. (Eng.) 362.

521-57 Arkansas Mut. F. Ins. Co. v. Stuckey, 85 Ark. 33, 106 S. W. 203; Denver L. Ins. Co. v. Crane, 19 Colo. App. 191, 73 P. 875 (the representations in the application being set up and relied upon in the an-

swer); Sinclair v. Surety Co., 132 Ia. 549, 107 N. W. 184 (applying the principle to a fidelity bond); Barker v. Ins. Co., 136 Mich. 626, 99 N. W. 869; Madden v. Ins. Co., 70 S. C. 295, 49 S. E. 855; First Nat. Bk. v. Cleland, 36 Tex. Civ. 478, 82 S. W. 337 (must show that fire occurred when iron safe clause required books to be kept in safe), *cit.* Allemania F. Ins. Co. v. Fred, 11 Tex. Civ. 311, 32 S. W. 243; Aetna Ins. Co. v. Fitze, 34 Tex. Civ. 214, 78 S. W. 370.

522-58 Mahoney v. Ins. Co., 3 Ohio N. P. (N. S.) 246.

522-61 Adams v. Ins. Co., 135 Ia. 299, 112 N. W. 651.

523-66 **Insured must show** that his violation of the terms of the policy did not contribute to the loss, it being provided by statute that a violation not having that effect will not bar a recovery. Krell v. Ins. Co., 127 Ia. 748, 104 N. W. 364.

523-67 Franklin L. Ins. Co. v. McAfee, 23 Ky. L. R. 676, 90 S. W. 216; Shoemaker v. Assur. Co., 75 Neb. 587, 106 N. W. 316; Bowen v. Ins. Co., 20 S. D. 103, 104 N. W. 1040.

524-68 Mutual I. Ins. Co. v. Perkins, 81 Ark. 87, 98 S. W. 709; Globe Mut. L. Ins. Co. v. Meyer, 118 Ill. App. 155; Cauthen v. Ins. Co. (S. C.), 61 S. E. 428. See Helbig v. Ins. Co., 120 Ill. App. 58.

A receipt for any premium subsequent to the first is prima facie evidence of the payment of previous premiums. Hanson v. Ins. Co. (Neb.), 113 N. W. 114.

A sworn denial of the execution of a receipt because of lack of authority of the officer to sign it at the time it was executed does not render the receipt inadmissible. United Moderns v. Pistole, 38 Tex. Civ. 422, 86 S. W. 377 (writ of error denied by supreme court).

A presumption that credit was extended arises from delivery of a policy acknowledging receipt of premium if payment of it is not demanded. Cauthen v. Ins. Co. (S. C.), 61 S. E. 428.

524-69 **A note or due bill** attached to the policy and bearing its date is admissible as part of the contract to show that credit was given for the premium. Globe Mut. L. I. Co. v. Meyer, 118 Ill. App. 155.

524-70 Supreme Council v. Haas, 116 Ill. App. 587; Sovereign Camp v. Cox (Ind. App.), 76 N. E. 888; Kidder v. Commandery, 192 Mass. 326, 78 N. E. 469; Gruwell v. Council, 126 Mo. App. 496, 104 S. W. 884 (the identical clause of the contract pleaded as a ground of forfeiture must be shown); Kinney v. Yeomen, 15 N. D. 21, 106 N. W. 44.

Weight of evidence. — Stand v. Giessman, 91 N. Y. S. 278.

Uncancelled receipt in insurer's possession for a premium which matured prior to death of insured is not of sufficient weight to justify the setting aside of a verdict. Hanson v. Ins. Co. (Neb.), 113 N. W. 114.

Payment or waiver thereof may be inferred by failure to repudiate the contract or by recognizing it. Mauck v. Ins. Co., 4 Penne. (Del.) 325, 54 A. 952.

525-71 Supreme Council v. Haas, 116 Ill. App. 587; Kinney v. Yeomen, 15 N. D. 21, 106 N. W. 44; Moore v. Everitt, 20 Pa. Super. 13.

Insurer's assessment book. — Moore v. Rohrbacker, 30 Pa. Super. 568; **Evidence of the making and payment of previous assessments** is competent to show the course of dealing and meaning of the contract. Moore v. Rohrbacker, 30 Pa. Super. 568.

Insurer must show the existence of an emergency authorizing it to increase assessments. Hicks v. Assn., 117 Tenn. 203, 96 S. W. 962.

526-72 Supreme Council v. Haas, 116 Ill. App. 587; Duffy v. Ins. Co., 142 N. C. 103, 55 S. E. 79; Van Etten v. Grand Lodge, 72 N. J. L. 61, 60 A. 210. See also Reynolds v. Casualty Co., 30 Pa. Super. 456; Seely v. Ins. Co., 73 N. H. 339, 61 A. 585, 72 N. H. 49, 55 A. 425.

Application of guaranty fund to premiums. — On insurer's failure to produce its books plaintiff may introduce such evidence as is available to show the condition of its guaranty fund and its availability to meet the demands of the policy in question. Sworn reports of insurer to state insurance departments, the admissions of its officers, expert testimony and standard mortality tables are competent. Provi-

dent etc. Soc. v. King, 216 Ill. 416, 75 N. E. 166.

By-law making certificate of officer conclusive evidence that notice was mailed is void, it not requiring that he certify of his knowledge. Duffy v. Ins. Co., 142 N. C. 103, 55 S. E. 79.

Mutual insurer's indebtedness to insured in excess of the sum due from him on account of dues and arising out of a loss insured against may be shown to defeat a claim of forfeiture. Freeman v. Ins. Co., 120 Mo. App. 532, 97 S. W. 225.

526-73 Sleight v. Council, 133 Ia. 379, 107 N. W. 183; Kinney v. Yeomen, 15 N. D. 21, 106 N. W. 44 (though good standing was alleged).

A reinsurer has the burden of showing under the Illinois laws of 1893, p. 124, that a member of the reinsured company was not in good standing therein. Brown v. Assn., 224 Ill. 576, 79 N. E. 949, *rev.* s. c. 124 Ill. App. 277, and *foll.* Bolles v. Assn., 220 Ill. 400, 77 N. E. 198.

A clear intention to enforce a forfeiture must be proved. Lane v. Yeomen, 125 Ill. App. 406.

Burden of proving reinstatement of member is on his beneficiary. Woodmen v. Jackson, 80 Ark. 419, 97 S. W. 673; Kennedy v. Fraternity, 36 Mont. 325, 92 P. 971.

Entries in books. — United Moderns v. Pistole, 38 Tex. Civ. 422, 86 S. W. 377.

Right of foreign insurer. — Gruwell v. Council, 126 Mo. App. 496, 104 S. W. 884; Loyal Americans v. McClanahan (Tex. Civ.), 109 S. W. 973.

Burden is on plaintiff to show that material changes have been made in defendant's by-laws since the certificate in suit was issued. United Moderns v. Rathbun, 104 Va. 736, 52 S. E. 552.

527-74 National F. Ins. Co. v. Lumb. Co., 119 Ill. App. 67; Lanier v. Ins. Co., 142 N. C. 14, 54 S. E. 786 (consent of beneficiary to cancellation of life policy must be shown); Waters v. Annuity Co., 144 N. C. 663, 57 S. E. 437.

527-75 Exemption of money from claims of creditors. — The burden is on the beneficiary of a life policy to show that the financial condition of insured justified the payment of premiums in excess of the sum fixed by a statute limiting the amount which may be annually expended for insurance and the proceeds of which shall not be subject to creditors' claims. Red River N. Bank v. DeBerry (Tex. Civ.), 105 S. W. 998.

527-76 Phoenix Ins. Co. v. McAtee, 33 Ind. App. 106, 70 N. E. 947.

Census reports of a foreign country inadmissible on question of age if apparently unreliable. Maher v. Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496.

Incumbrance on insured property. Smith v. Ins. Co. (S. D.), 113 N. W. 94.

Insured's state of health. — Perry v. Ins. Co., 143 Mich. 290, 106 N. W. 860.

Apprehension of incendiarism. — Contrary declarations prior to the application admissible. Donley v. Ins. Co., 184 N. Y. 107, 76 N. E. 914, *rev.* s. c. 100 App. Div. 69, 91 N. Y. S. 302. See also Wells v. Ins. Co., 117 App. Div. 346, 101 N. Y. S. 1059.

Insurer is bound by the testimony of its witness to the effect that another policy obtained by plaintiff is void. Nabors v. Ins. Co., 84 Ark. 184, 105 S. W. 92.

Evidence of an over-valuation of property covered by an open policy is immaterial unless the risk is shown to have been increased. Ins. Co. v. Osborn, 26 Ind. App. 88, 59 N. E. 181.

Non-medical witnesses may testify as to the healthy appearance of insured notwithstanding physicians have testified that he might have the disease alleged and yet be apparently healthful. Rondinella v. Ins. Co., 24 Pa. Super. 293; Baldi v. Ins. Co., 18 Pa. Super. 599.

Good faith of insured immaterial as to warranties. Glidden v. Guaranty Co. (Mass.), 84 N. E. 143; Perry v. Ins. Co., 143 Mich. 290, 106 N. W. 860; Collins v. Ins. Co., 32 Mont. 329, 80 P. 609, 1092; Schofield v. Ins. Co., 79 Vt. 161, 64 A. 1107. But see Keiper v. Society, 159 Fed. 206.

Occupation of insured. — Collins v. Ins. Co., 32 Mont. 329, 80 P. 609.

Materiality of warranty cannot be affected by evidence. Collins v. Ins. Co., supra.

Insurer is not precluded from showing transactions with deceased by the usual statute on that subject. Erickson v. Woodmen, 43 Wash. 242, 86 P. 584.

Intemperance. — Masons' Union L. Assn. v. Brockman, 26 Ind. App. 182, 59 N. E. 401.

Report of insurer's examining physician competent on question of insured's health at time policy issued. Perry v. Ins. Co., 143 Mich. 290, 106 N. W. 860.

Prior application to another insurer admissible to prove falsity of warranty as to age of insured. Taylor v. A. O. U. W., 101 Minn. 72, 111 N. W. 919.

530-77 Schofield v. Ins. Co., 79 Vt. 161, 64 A. 1107.

Certificates of death. — Krapp v. Ins. Co., 143 Mich. 369, 106 N. W. 1107; Keefe v. Assn., 37 App. Div. 276, 55 N. Y. S. 827. Such certificates are evidence only of the things required to be stated. McKinley v. Ins. Co., 6 Misc. 9, 26 N. Y. S. 63. See "RECORDS," Vol. 10, p. 733.

Evidence that insured's negligence caused the loss is immaterial in an action on a fire policy. German Ins. Co. v. Goodfriend, 30 Ky. L. R. 218, 97 S. W. 1098.

Credit for premium. — Cauthen v. Ins. Co. (S. C.), 61 S. E. 428.

Non-expert opinions as to the disease of which a person died are competent. Krapp v. Ins. Co., 143 Mich. 369, 106 N. W. 1107. But *compare* Grattan v. Ins. Co., 80 N. Y. 281.

531-78 See Netherlands E. Ins. Co. v. Barry, 103 App. Div. 581, 93 N. Y. S. 164.

Evidence insufficient to show a vested right in a life policy. Baker v. Baker, 110 App. Div. 660, 97 N. Y. S. 455.

532-79 Provident etc. Society v. Whayne, 29 Ky. L. R. 160, 93 S. W. 1049; Carson v. Ins. Co., 1 Pa. Super. 572.

Under statutes in some states a substantial, as contra-distinguished from a strict, compliance may be shown. Security Mut. Ins. Co. v. Berry, 81 Ark. 92, 98 S. W. 693.

532-81 Intent to deceive. — Rochester G. Ins. Co. v. Schmidt, 151 Fed. 681; Helm v. Ins. Co., 132 Ia. 177, 109 N. W. 605.

533-82 Application of insured to another insurer. — Speiser v. Ins. Co., 119 Wis. 530, 97 N. W. 207.

False statements made by insured, about the time the policy in question was applied for, are relevant as tending to prove a general plan to defraud. Provident etc. Society v. Whayne, 29 Ky. L. R. 160, 93 S. W. 1049.

534-85 Scott v. Ins. Co., 56 Misc. 545, 107 N. Y. S. 124.

Illness intermediate the medical examination and delivery of the policy may be shown, the latter providing that it should not take effect unless insured was in "sound health" on its date. Packard v. Ins. Co., 72 N. H. 1, 54 A. 287.

534-86 Habits of insured. — Addiction to the use of intoxicants for a long time prior to the making of the application may be shown, as may a plea of guilty to drunkenness. Langdean v. Ins. Co., 194 Mass. 56, 80 N. E. 452.

Remoteness. — Declarations concerning health made six or seven years before misrepresentations in the application are not too remote to be proved. Hews v. Society, 143 Fed. 850, 74 C. C. A. 676.

In Iowa a statute estops insurer by its examiner's report from setting up that insured was not in the condition of health required by the policy at the time of its delivery. See Roe v. Assn. (Ia.) 115 N. W. 500.

Evidence as to the appearance of a person in the early stage of Bright's disease is immaterial, it being well known that the disease does not affect the appearance of the afflicted in its early stage. Metropolitan L. I. Co. v. Betz (Tex. Civ.), 99 S. W. 1140.

Ability to attend to business and proof that insured did attend thereto is competent on the question of his being diseased or in need of medical help. Valentine v. Ins. Co., 106 App. Div. 487, 94 N. Y. S. 758.

535-88 Nophsker v. Council, 215 Pa. 631, 64 A. 788. See also Murphy v. Ins. Co., 205 Pa. 444, 55 A. 19.

Report of insurer's physician com-

petent on the question of insured's health at the time of examination. Perry v. Ins. Co., 143 Mich. 290, 106 N. W. 860.

Rejection by fraternal association is not competent to show that a misrepresentation was made in stating that no application for insurance had been rejected by any "company." Lyon v. United Moderns, 148 Cal. 470, 83 P. 804.

Cause for rejection of insured's application by another insurer may be shown to prove his good faith in giving a negative answer to a question on that point. Provident etc. Society v. Whayne, 29 Ky. L. R. 160, 93 S. W. 1049.

Proof of rejection of an application by another insurer of a person of the same name as insured must be accompanied by proof of identity. Fidelity Title & T. Co. v. Ins. Co., 213 Pa. 415, 63 A. 51. But it is held that identity of names is presumptive evidence of identity of persons. Spiegel v. Ins. Co., 96 N. Y. S. 201.

Insurer's reputation for accepting members regardless of the state of their health and insured's knowledge thereof may be proved on the issue as to the materiality of a representation respecting health. Home Circle Society v. Shelton (Tex. Civ.), 85 S. W. 320.

Proof of liability for assessment where policy lost. — See Moore v. Everitt, 20 Pa. Super. 13.

535-89 Denver L. Ins. Co. v. Crane, 19 Colo. App. 191, 73 P. 875 (demand for payment of premium); Ranta v. Supreme Tent, 97 Minn. 454, 107 N. W. 156 (of physician who investigated cause of death); Bange v. Legion of Honor, 128 Mo. App. 461, 105 S. W. 1092 (officer's knowledge of address of members); Wrightman v. Grand Lodge, 121 Mo. App. 252, 98 S. W. 829; Exchange Bank v. Ins. Co., 109 Mo. App. 654, 83 S. W. 534 (answer to former action on policy); Paddock-H. I. Co. v. Ins. Co., 118 Mo. App. 85, 93 S. W. 358 (seaworthiness); Jacoby v. Ins. Co., 10 Pa. Super. 366; Ulysses Elgin B. Co. v. Ins. Co., 20 Pa. Super. 384; Fidelity Title & T. Co. v. Ins. Co., 213 Pa. 415, 63 A. 51. Wheaton v. Ins. Co. 20 S. D. 62, 104 N. W. 850; Aetna Ins. Co. v. Brannon (Tex. Civ.), 91 S. W. 614 (statement that policy "was all right" not a conclusion).

Admissions by co-defendants do not bind insurer. Herzog v. Ins. Co., 36 Wash. 611, 79 P. 287.

Admissions. — Provident etc. Society v. King, 216 Ill. 416, 75 N. E. 166; National Council v. Dillon, 212 Ill. 320, 72 N. E. 367.

535-90 Woodmen v. Jackson, 80 Ark. 419, 97 S. W. 673; Bruger v. Ins. Co., 129 Wis. 281, 109 N. W. 95 (not conclusive though unqualified).

Declarations of the deceased father of insured concerning his age are competent though made at time application was made for policy. Mutual R. L. Ins. Co. v. Jay (Tex. Civ.), 109 S. W. 1116. Declarations of one claiming to be insured's beneficiary, as his affianced wife, are competent, as that the engagement had been broken. Grand Lodge v. Mackey (Tex. Civ.), 104 S. W. 907. An answer to the original complaint is not an admission of facts set up in an amended pleading. Moore v. Everitt, 20 Pa. Super. 13.

535-91 Ross-Lewin v. Ins. Co., 20 Colo. App. 262, 78 P. 305.

Declarations concerning intended action must be specific. Ross-Lewin v. Ins. Co., supra.

535-93 Rule as to declarations and the res gestae is not strictly observed when the former are made in explanation of declarant's physical condition; if not remote in point of time from the date of the policy they may be proved. Haughton v. Ins. Co., 165 Ind. 32, 73 N. E. 592. Declarations of insured not made in extremis or as part of the res gestae to a party in interest inadmissible to show who was his beneficiary. Grand Lodge v. Mackey (Tex. Civ.), 104 S. W. 907. Hospital records are not competent to prove declarations of insured as to the length of time her health had been bad. Metropolitan L. I. Co. v. Vojteck, 116 Ill. App. 271.

536-94 Masons' U. L. I. Assn. v. Brockman, 20 Ind. App. 206, 50 N. E. 493; Lindahl v. Court, 100 Minn. 87, 110 N. W. 358.

536-95 Hews v. Society, 143 Fed.

850, 74 C. C. A. 676; Denver L. I. Co. v. Crane, 19 Colo. App. 191, 73 P. 875; Taylor v. A. O. U. W., 101 Minn. 72, 111 N. W. 919; Ogden v. Woodmen (Neb.), 113 N. W. 524.

Admissions competent against executor. — Finn v. Ins. Co., 98 App. Div. 588, 90 N. Y. S. 697.

Agent's admissions. — Continental Ins. Co. v. Cummings, 98 Tex. 115, 81 S. W. 705. See "ADMISSIONS," Vol. 1, p. 348, and ante.

536-96 Masons' Union L. Assn. v. Brockman, 26 Ind. App. 182, 59 N. E. 401.

Insured's knowledge of his habits is presumed. — Langdeau v. Ins. Co., 194 Mass. 56, 80 N. E. 452.

A conclusive presumption of knowledge of the by-laws of a benefit society arises from the fact that they are made a part of the member's certificate. Loyde v. Woodmen, 113 Mo. App. 19, 87 S. W. 530; Sterling v. Pacific Jurisdiction, 28 Utah 505, 80 P. 375.

Agent's declarations of knowledge of plaintiff's uninsurability not competent unless part of the res gestae. Standard L. & A. Ins. Co. v. Holloway, 24 Ky. L. R. 1856, 72 S. W. 796.

537-97 Union L. Ins. Co. v. Jameson, 31 Ind. App. 28, 67 N. E. 199; Western T. Assn. v. Munson, 73 Neb. 858, 103 N. W. 688; Puls v. Grand Lodge, 13 N. D. 559, 102 N. W. 165; Nophsker v. Council, 215 Pa. 631, 64 A. 788.

537-98 Patterson v. Guarantee Co., 25 App. D. C. 46 (if part of the res gestae).

Narration to one not a physician inadmissible if not part of the res gestae. Travelers' P. Assn. v. Roth (Tex. Civ.), 108 S. W. 1039.

537-1 Mutual Reserve Ins. Co. v. Jay (Tex. Civ.), 101 S .W. 545.

537-2 Adams v. Ins. Co., 135 Ia. 299, 112 N. W. 651.

538-3 Krell v. Ins. Co., 127 Ia. 748, 104 N. W. 364, citing local cases; Prudential Ins. Co. v. Alley, 104 Va. 356, 51 S. E. 812.

538-4 Traders' Ins. Co. v. Dobbins, 114 Tenn. 227, 86 S. W. 383 (usage of retail hardware dealers to keep dynamite).

539-5 Boruszweski v. Assur. Co., 186 Mass. 589, 72 N. E. 250. Custom of insurer to send notice of time for payment of premium may be shown. Knoebel v. Ins. Co. (Wis.), 115 N. W. 1094; Bange v. Legion of Honor, 128 Mo. App. 461, 105 S. W. 1092. But see Baldwin v. Ins. Co., 107 Ky. 356, 54 S. W. 13, 92 Am. St. 362; Pellican Assur. Co. v. Schildknecht, 32 Ky. L. R. 1257, 108 S. W. 312.

Authority of agent's clerk may be shown by proof of the customary mode in which he transacted business. German F. I. Co. v. Tile Co., 15 Ind. App. 623, 43 N. E. 41; Provident Assur. Society v. Bailey, 118 Ky. 36, 80 S. W. 452.

539-10 Shawnee F. Ins. Co. v. Knerr, 72 Kan. 385, 83 P. 611.

The burden upon insured extends to all the facts essential to constitute proof of waiver—as that insurer's agent, who was also agent for insured, had in mind, when he acquired knowledge in the latter capacity and did the act alleged to be a waiver, the fact that he was acting for insurer. That fact may be shown by circumstantial evidence. Foreman v. Assn., 104 Va. 694, 52 S. E. 337.

Notice of other insurance is not to be presumed from the fact of mailing a duly stamped letter to insurer, receipt of which was denied. Home Ins. Co. v. Marple, 1 Ind. App. 411, 27 N. E. 633.

541-15 Arkansas Ins. Co. v. Witham, 82 Ark. 226, 101 S. W. 721 (notwithstanding a non-waiver agreement); Capital F. Ins. Co. v. Montgomery, 81 Ark. 508, 99 S. W. 687; Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 P. 61; Allen v. Assur. Co. (Idaho), 95 P. 829; Western U. Assn. v. Hankins, 221 Ill. 304, 77 N. E. 447 (offer to pay loss as fixed by adjuster waiver of right to appraisement); Prudential Ins. Co. v. Sullivan, 27 Ind. App. 30, 59 N. E. 873; St. Landry Co. v. Ins. Co., 113 La. 1053, 37 S. 967 (notwithstanding policy provides that all waivers must be written); Perry v. Ins. Co., 143 Mich. 290, 106 N. W. 860; Exchange Bank v. Ins. Co., 109 Mo. App. 654, 83 S. W. 534 (agent's offer to "knock off" is not a proposition to compromise); Dolan v. Royal Neighbors, 123 Mo. App. 147, 100 S. W. 498; Fire Assn. v. Masterson (Tex. Civ.), 83 S. W. 49; Frost v. Ins. Co., 77 Vt. 407,

60 A. 803 (it may be shown that restrictions in the policy upon the agent's authority to waive its conditions have been removed). It is otherwise under the North Carolina standard policy; a waiver must be shown by a writing on or attached to the policy. Black v. Ins. Co. (N. C.), 61 S. E. 672. And under a policy which provides that all waivers shall be indorsed thereon. St. Paul F. & M. Ins. Co. v. Penman, 151 Fed. 961, 81 C. C. A. 151; Northern Assur. Co. v. Assn., 183 U. S. 308; Western Assur. Co. v. Doull., 12 Can. Super. 446; Shannon v. Ins. Co., 2 Ont. (Can.) App. 396; Meigs v. Assur. Co., 134 Fed. 1021, 68 C. C. A. 249.

Knowledge or notice of a condition existing under a prior policy on the same property cannot be proved, though it and the policy sued upon were substantially alike. Kentucky Vermillion M. & C. Co. v. Ins. Society, 146 Fed. 695, 77 C. C. A. 121.

Expenditure of money in preparing additional proofs demanded by insurer may be proved to show waiver of a warranty. Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 P. 61.

Agent's knowledge of insured's condition. Rearden v. Ins. Co. (S. C.), 60 S. E. 1106.

Waiver of conditions. — Collins v. Ins. Co., 32 Mont. 329, 80 P. 609.

A limitation of the agent's authority to waive a provision of the policy cannot be shown unless knowledge of it is brought to insured. Fire Assn. v. Masterson (Tex. Civ.), 83 S. W. 49.

Order of proof. — Rearden v. Ins. Co. (S. C.), 60 S. E. 1106.

542-16 **Oral evidence** cannot be received to establish a waiver contrary to the terms of the policy. St. Paul Ins. Co. v. Penman, 151 Fed. 961, 81 C. C. A. 151; Gish v. Ins. Co., 16 Okla. 59, 87 P. 869. *Contra,* People's F. Ins. Assn. v. Goyne, 79 Ark. 315, 96 S. W. 365 (reviewing many cases).

Waiver of limitation for suing may be shown by correspondence concerning the claim between plaintiff and defendant's local and state agents, and between said agents themselves. Lynchburg C. M. Co. v. Ins. Co., 149 Fed. 954, 74 C. C. A. 464.

The customary time for remitting premiums by an agent may be proved to show that prompt payment was not insisted upon. Crowder v. Cas. Co., 115 Mo. App. 535, 91 S. W. 1016.

Proof of one transaction is immaterial. — Suess v. Ins. Co., 193 Mo. 564, 91 S. W. 1041.

Previous policies issued by insurer on the same risk, but for a higher premium rate, are inadmissible to show waiver of a clause in an existing policy. Columbian Exp. S. Co. v. Surety Co., 220 Ill 172, 77 N. E. 128.

Agreement for credit may be inferred from the dealings of the parties. Kelly v. Ins. Co., 106 App. Div. 352, 94 N. Y. S. 601; Cornell v. Ins. Co., 120 App. Div. 459, 104 N. Y. S. 999.

Knowledge of the truth of misrepresentations by insured as to his rejection by other insurers cannot be shown by proof of the existence of a bureau among insurance companies through which the members were supplied with notice of rejections unless there is evidence showing that the rejecting companies were served by such bureau. Provident etc. Society v. Whayne, 29 Ky. L. R. 160, 93 S. W. 1049.

Correspondence between the parties. Lynchburg C. M. Co. v. Ins. Co., 149 Fed. 954, 79 C. C. A. 464.

Evidence of custom generally is inadmissible against a distinct notice in the particular case. Brown v. Casualty Co., 207 Pa. 609, 56 A. 1125.

Waiver of iron safe clause. — Riley v. Ins. Co., 117 Mo. App. 229, 92 S. W. 1147.

543-17 Capital F. Ins. Co. v. Montgomery, 81 Ark. 508, 99 S. W. 687; Lyon v. United Moderns, 148 Cal. 470, 83 P. 804 (applying the rule to mutual fraternal societies where the application precedes membership); Allen v. Assur. Co. (Idaho), 95 P. 829; U. S. Health etc. Co. v. Clark (Ind. App.), 83 N. E. 760; Roe v. Assn. (Ia.), 115 N. W. 500 (ruled under statute); Gardner v. Ins. Co., 31 Ky. L. R. 69, 101 S. W. 908; Perry v. Ins. Co., 143 Mich. 290, 106 N. W. 860; Nute v. Ins. Co., 109 Mo. App. 585, 83 S.

W. 83; Pearlstine v. Ins. Co., 74 S. C. 246, 54 S. E. 372 (notwithstanding parol waivers prohibited); Smith v. Ins. Co. (S. D.), 113 N. W. 941 (over valuation); Continental Ins. Co. v. Cummings, 98 Tex. 115, 81 S. W. 705; Aetna Ins. Co. v. Brannon (Tex. Civ.), 91 S. W. 614; Home Circle Society v. Shelton (Tex. Civ.), 85 S. W. 320 (plaintiff illiterate).

Agent's knowledge of a fact may be shown by evidence, inter alia, that the fact was generally known in the locality in which he lived. Continental Ins. Co. v. Cummings, 98 Tex. 115, 81 S. W. 705, 95 S. W. 48. Knowledge acquired by an agent years before the policy was issued is immaterial unless it is shown to have been acquired by him as insurer's agent. Continental Ins. Co. v. Cummings, supra.

544-18 Wilder v. Casualty Co., 150 Fed. 92, 80 C. C. A. 46; Capital F. Ins. Co. v. Montgomery, 81 Ark. 508, 99 S. W. 687.

544-19 Home Ins. Co. v. Sylvester, 25 Ind. App. 207, 57 N. E. 991; Fire Assn. v. Yeagley, 34 Ind. App. 387, 72 N. E. 1035; Modern Woodmen v. Angle, 127 Mo. App. 94, 104 S. W. 297.

Partial explanation of terms of policy by agent may be shown, he having assumed to fully explain it. Hartford L. Ins. Co. v. Hope (Ind. App.), 81 N. E. 595.

544-20 Bowditch v. Ins. Society, 193 Mass. 565, 79 N. E. 788; Rinker v. Ins. Co., 214 Pa. 608, 64 A. 82 (notice of limitation on agent's power given applicants).

545-21 Rinker v. Ins. Co., supra (inability of applicant to read not being shown).

545-22 Banes v. Trust Co., 142 Fed. 957, 74 C. C. A. 127; German Am. Ins. Co. v. Hyman (Colo.), 94 P. 27; Schindler v. Guaranty Co., 109 N. Y. S. 723; Tolmie v. Fidelity & C. Co., 95 App. Div. 352, 88 N. Y. S. 717, 183 N. Y. 581, 76 N. E. 1110 (no opinion); German Am. Ins. Co. v. Hyman (Colo.), 94 P. 27; Warmeastle v. Ins. Co., 201 Pa. 302, 50 A. 941.

The circumstantial evidence necessary to establish the cause of death need not be of such a nature nor the circumstances so related to each other as not fairly and reasonably to permit any other conclusion than that death was so caused to be drawn from them; a mere preponderance of evidence is enough. Travelers' P. Assn. v. Roth (Tex. Civ.), 108 S. W. 1039, *appr.* Rippey v. Miller, 46 N. C. 479, 62 Am. Dec. 178, and *disappr.* Asbach v. R. Co., 74 Ia. 248, 37 N. W. 182; Neal v. R. Co., 129 Ia. 5, 105 N. W. 197, 2 L. R. A. (N. S.) 905, and R. Co. v. Rhoades, 64 Kan. 553, 68 P. 58. See "CIRCUMSTANTIAL EVIDENCE," Vol. 3, and that title, ante.

545-23 See Spalding v. Ins. Co., 10 Haw. 190.

546-24 Heagany v. Union, 143 Mich. 186, 106 N. W. 700.

547-25 Preferred Acc. Ins. Co. v. Fielding, 35 Colo. 19, 83 P. 1013; Central Acc. Ins. Co. v. Spence, 126 Ill. App. 32; Aetna L. I. Co. v. Milward, 118 Ky. 716, 82 S. W. 364; Noyes v. Assn., 190 Mass. 171, 76 N. E. 665; Hill v. Ins. Co., 209 Pa. 632, 59 A. 262; Keefer v. Ins. Co., 201 Pa. 448, 51 A. 366.

The burden is discharged when death by unexplained violent external means is shown. Preferred Acc. Ins. Co. v. Fielding, 35 Colo. 19, 83 P. 1013.

548-27 German Am. Ins. Co. v. Brown, 75 Ark. 251, 87 S. W. 135.

548-28 Schornak v. Ins. Co., 96 Minn. 299, 104 N. W. 1087.

548-29 Richmond C. Co. v. Assur. Co., 159 Fed. 985; German-Am. Ins. Co. v. Hyman (Colo.), 94 P. 27.

A reinsurer has the burden of showing that a particular case was not within its contract, an admission to that effect being qualified by a reference to its by-laws and constitution. Young v. Assn., 126 Mo. App. 325, 103 S. W. 557.

Exceptions and provisos.—See Sohier v. Ins. Co., 11 Allen (Mass.) 336; Kingsley v. Ins. Co., 8 Cush. (Mass.) 393 (a stipulation "on condition that the applicant take all risk from cotton wastes" held to be a proviso); Cassidy v. Assur. Co., 99 Me. 399, 59 A. 359.

549-30 Admitted seaworthiness at inception of policy is presumed to continue. Paddock H. I. Co. v. Ins. Co., 118 Mo. App. 85, 93 S. W. 358.

549-33 Presumption of death

arises after lapse of seven years without information concerning the absent person. Heagany v. Union, 143 Mich. 186, 106 N. W. 700. See "DEATH," Vol. 4, p. 38, and ante. Such presumption, based upon statute declaring it, is conclusive upon absentee and those claiming under him. New York Ins. Co. v. Chittenden, 134 Ia. 613, 112 N. W. 96. Presumption not sustained by the evidence because proper inquiries not made of relative of insured. Modern Woodmen v. Graber, 128 Ill. App. 585. In determining whether death is to be presumed it is proper to receive evidence of inquiries made for the missing man, the widely extended publication of an offer of reward for information of him and other like facts and circumstances. Modern Woodmen v. Gerdom (Kan.), 94 P. 788.

550-36 Continental Cas. Co. v. Todd, 82 Ark. 214, 101 S. W. 168; Noyes v. Assn., 190 Mass. 171, 76 N. E. 665; Garcelon v. Assn. 195 Mass. 531, 81 N. E. 201; Kephart v. Cas. Co. (N. D.), 116 N. W. 349; North Am. Acc. Ins. Co. v. Gulick, 1 Ohio C. C. (N. S.) 477.

550-37 Meadows v. Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. 427; Starr v. Ins. Co., 41 Wash. 199, 83 P. 113 (rule declared "by almost universal authority").

550-38 Campbell v. Cas. Co., 23 Ky. L. R. 1999, 60 S. W. 492, 66 S. W. 1033.

551-39 Supreme Lodge v. Lipscomb, 50 Fla. 406, 39 S. 637.

551-40 Preferred Acc. Ins. Co. v. Fielding, 35 Colo. 19, 83 P. 1013.

No presumption exists as between disease and accidental cause. Keefer v. Ins. Co., 201 Pa. 448, 51 A. 366; Taylor v. Assur. Corp., 208 Pa. 439, 57 A. 830.

552-41 National Union v. Fitzpatrick, 133 Fed. 694, 66 C. C. A. 524; Grand Lodge v. Banister, 80 Ark. 190, 96 S. W. 742; Ross-Lewin v. Ins. Co., 20 Colo. App. 262, 78 P. 305; Sovereign Camp v. Bridges (Ind. Ter.), 104 S. W. 672; Equitable L. I. Co. v. Hebert, 37 Ind. App. 373, 76 N. E. 1023; Tackman v. Brotherhood, 132 Ia. 64, 106 N. W. 350 (the presumption is to be considered in deciding the question; but see 520-51, ante); American Ben. Assn. v. Stough, 26 Ky. L. R. 1093, 83 S. W. 126; Ferris v. Loyal Americans (Mich.), 116 N. W. 445; Koring v. Ind. Co., 102 Minn. 31, 112 N. W. 1039; Lindahl v. Court, 100 Minn. 87, 110 N. W. 358; Cornell v. Ins. Co., 120 App. Div. 459, 104 N. Y. S. 999; Thaxton v. Ins. Co., 143 N. C. 33, 55 S. E. 419; Hildebrand v. United Artisans (Or.), 91 P. 542; Sovereign Camp v. Boehme (Tex. Civ.), 97 S. W. 847; Cady v. Cas. Co. (Wis.), 113 N. W. 967; Rohloff v. Assn., 130 Wis. 61, 109 N. W. 989.

The presumption of suicide arising from an admission in the proofs is not stronger than the general presumption against suicide, and does not change the burden of proof. Rohloff v. Assn., supra.

The presumption of law is reinforced by a coincident presumption of fact. Aetna L. Ins. Co. v. Milward, 118 Ky. 716, 82 S. W. 364.

Application and weight of presumption. — Travelers' Ins. Co. v. Nicklas, 88 Md. 470, 41 A. 906, Travelers' Ins. Co. v. Sheppard, 85 Ga. 802, 12 S. E. 18; Carnes v. Assn., 106 Ia. 281, 76 N. W. 683, 68 Am. St. 306; Burnham v. Cas. Co., 117 Mich. 142, 75 N. W. 445; Brown v. Ins. Co. (Tenn. Ch. App.), 57 S. W. 415, 51 L. R. A. 252. And whatever presumption exists may, in any case, be overcome, not only by oral testimony, but by reasonable deductions or inferences from the facts established. Travelers' Ins. Co. v. McConkey, 127 U. S. 661; Somerville v. Assn., 11 App. D. C. 417; Johns v. Assn., 90 Wis. 332, 63 N. W. 276, 41 L. R. A. 587; Agen v. Ins. Co., 105 Wis. 217, 80 N. W. 1020, 76 Am. St. 905; Clement v. Clement, 113 Tenn. 40, 81 S. W. 1249, 4 Cooley, Briefs on Ins. 2356; Supreme Tent v. King, 142 Fed. 678, 73 C. C. A. 668.

554-42 Supreme Tent v. King, supra; Lindahl v. Court, 100 Minn. 87, 110 N. W. 358; Hardinger v. Brotherhood, 72 Neb. 860, 101 N. W. 983, 103 N. W. 74; Rohloff v. Assn., 130 Wis. 61, 109 N. W. 989.

If circumstantial evidence is relied on the facts must show that there was no reasonable hypothesis of natural or accidental death. Koring v. Ind. Co., 102 Minn. 31, 112 N.

W. 1039; Lindahl v. Court, supra.

Lack of motive may be shown. National Union v. Fitzpatrick, 133 Fed. 694, 66 C. C. A. 524.

Suicide shown. — Supreme Tent v. King, 142 Fed. 678, 73 C. C. A. 668; Zearfoss v. Union, 102 Minn. 56, 112 N. W. 1044; Hardinger v. Mod. Brotherhood, 72 Neb. 860, 101 N. W. 983, 103 N. W. 74; White v. Ins. Co., 120 App. Div. 260, 105 N. Y. S. 87; Felix v. Ins. Co., 216 Pa. 95, 64 A. 903.

Suicide not shown. — Grand Lodge v. Banister, 80 Ark. 190, 96 S. W. 742; Ross-Lewin v. Ins. Co., 20 Colo. App. 262, 78 P. 305; Sovereign Camp v. Bridges (Ind. Ter.), 104 S. W. 672; Ferris v. Loyal Americans (Mich.), 116 N. W. 445; Kornig v. Ind. Co., 102 Minn. 31, 112 N. W. 1039; Rohloff v. Assn., 130 Wis. 61, 109 N. W. 989.

554-47 Kiesewetter v. Maccabees, 227 Ill. 48, 81 N. E. 19 (body found hanging with rope around neck and statement in proof).

555-48 Bode v. Ins. Co., 103 Mo. App. 289, 77 S. W. 116.

555-49 National Ben. Soc. v. Oldham, 70 Kan. 79, 78 P. 163.

558-54 Young v. Assn., 126 Mo. App. 325, 103 S. W. 557.

559-55 Actions on fidelity bonds. U. S. Fidelity & G. Co. v. Egg Shippers Co., 148 Fed. 353, 78 C. C. A. 345.

Demonstrative evidence. — Tackman v. Brotherhood, 132 Ia. 64, 106 N. W. 350.

Animals killed by lightning. — Freeman v. Ins. Co., 121 Mo. App. 532, 97 S. W. 225.

Absence of motive to commit suicide is a weighty circumstance. Kornig v. Ind. Co., 102 Minn. 31, 112 N. W. 1039.

Insured's habits may be shown on the question as to the cause of death. Furbush v. Cas. Co., 133 Mich. 479, 95 N. W. 551; 131 Mich. 234, 91 N. W. 135, 100 Am. St. 582; Grand Lodge v. Banister, 80 Ark. 190, 96 S. W. 742.

The pecuniary condition of insured may be proved on the issue of suicide. Fidelity & C. Co. v. Freeman, 109 Fed. 847, 48 C. C. A. 692, 54 L. R. A. 680; Furbush v. Cas. Co., supra; Kornig v. Ind. Co., 102 Minn. 31, 112 N. W. 1039; Cox v. Royal Tribe, 42 Or. 365, 71 P. 73, 95 Am. St. 752, 60 L. R. A. 620; Rohloff v. Assn., 130 Wis. 61, 109 N. W. 989.

Voluntary exposure to unnecessary danger. — Dillon v. Cas. Co., 130 Mo. App. 502, 109 S. W. 89, *cit.* Pacific Ins. Co. v. Snowden, 58 Fed. 342, 7 C. C. A. 264.

Death by accident shown. — Taylor v. Assur. Corp., 208 Pa. 439, 57 A. 830. See National Assn. v. Scott, 155 Fed. 92; Thomas v. Cas. Co. (Md.), 67 A. 259.

Admissions of insurer's physician competent to show cause of death. Ranta v. Supreme Tent, 97 Minn. 454, 107 N. W. 156.

Proofs of loss do not limit the details of fact or evidence to the circumstances set out therein. Noyes v. Assn., 190 Mass. 171, 76 N. E. 665.

Relevant facts. — Meily Co. v. Ins. Co., 148 Fed. 683, 79 C. C. A. 454. Insured's expressions of hopefulness. Provident etc. Soc. v. Whayne, 29 Ky. L. R. 160, 93 S. W. 1049. Prior state of his health. Cady v. Cas. Co. (Wis.), 113 N. W. 967. His res gestae declarations. Patterson v. Guar. Co., 25 App. D. C. 46.

560-57 Wilfulness in committing suicide need not be shown. Union C. L. I. Co. v. Hollowell, 14 Ind. App. 611, 43 N. E. 277.

Previous fires on the premises in question cannot be proved, it not being contended that insured caused them. Colonial Mut. F. I. Co. v. Ellinger, 112 Ill. App. 302.

Previous statements made by plaintiff. — Palatine Ins. Co. v. Mercantile Co. (N. M.), 82 P. 363.

560-60 Evidence of plaintiff's financial condition when the loss occurred is competent to rebut the charge of fraud. Palatine Ins. Co. v. Merc. Co. (N. M.), 82 P. 363.

561-61 Meily Co. v. Ins. Co., 148 Fed. 683, 79 C. C. A. 454.

561-65 U. S. L. Ins. Co. v. Vocke, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65 (the leading American case on the question). See fully "CORONER'S INQUEST," supra.

561-66 Aetna L. I. Co. v. Milward, 118 Ky. 716, 82 S. W. 354 (reviewing the cases on both sides); Boehme v. Woodmen, 36 Tex. Civ. 501, 85 S. W. 444.

Verdict of coroner's jury does not

necessarily make a prima facie case in favor of insurer. Grand Lodge v. Banister, 80 Ark. 190, 96 S. W. 742.

Findings of coroner, no jury being called, inadmissible. Kinney v. Yeomen, 15 N. D. 21, 106 N. W. 44.

561-67 Graham v. Ins. Co., 75 Ohio St. 374, 79 N. E. 930. See Western Underwriters' Assn. v. Hankins, 221 Ill. 304, 77 N. E. 447; Townsend v. Ins. Co., 86 App. Div. 323, 83 N. Y. S. 909, 178 N. Y. 634, 71 N. E. 140 (no opinion).

An award made pursuant to an alleged verbal submission may be discredited by either verbal or documentary evidence by one who denies that he was a party to it. Levy v. Ins. Co., 58 W. Va. 546, 52 S. E. 449. An award is conclusive until set aside. Mayer v. Ins. Co., 108 N. Y. S. 711. Insured has the right to present evidence to appraisers. Harth v. Ins. Co., 31 Ky. L. R. 180, 102 S. W. 242.

562-68 North British etc. Ins. Co. v. Edmundson, 104 Va. 486, 52 S. E. 350.

562-69 Rochester German Ins. Co. v. Schmidt, 151 Fed. 681; Helm v. Ins. Co., 132 Ia. 177, 109 N. W. 605; Phoenix Ins. Co. v. McAtee, 33 Ind. App. 106, 70 N. E. 947; Lundvick v. Ins. Co., 128 Ia. 376, 104 N. W. 429.

Cost is some evidence of value. Glaser v. Ins. Co., 49 Misc. 89, 93 N. Y. S. 524.

563-70 Lundvick v. Ins. Co., supra; Howerton v. Ins. Co., 105 Mo. App. 575, 80 S. W. 27.

564-71 Amount paid by insurer for loss of property is not conclusive evidence of its value as between insured and a third party in a suit brought for insurer's benefit in part. Verndon v. Elec. Co., 69 N. J. L. L. 598, 55 A. 99.

564-74 Furlong v. Ins. Co. (Ia.), 113 N. W. 1084 (inventories made by both parties); Wells W. Co. v. Ins. Co., 209 Pa. 488, 58 A. 894; Smith v. Ins. Co. (S. D.), 113 N. W. 94.

The verified proofs of loss may be used as a basis for testimony as to the value of the property. Bruger v. Ins. Co., 129 Wis. 281, 109 N. W. 95.

565-75 Testimony as to the value of goods destroyed is competent, at least where false swearing and fraud are set up, though it is based upon what witness saw in the store-house. Prudential Ins. Co. v. Alley, 104 Va. 356, 51 S. E. 812.

Loss under indemnity policy. — An employe whose fidelity has been guaranteed may testify of the amount collected for his employer. Supreme Ruling v. Surety Co., 114 App. Div. 689, 99 N. Y. S. 1033. Entries made by him in the course of his duties are admissible. Goldman v. Fidelity & D. Co., 125 Wis. 390, 104 N. W. 80; Bank v. Bank, 128 N. C. 366, 38 S. E. 908, 83 Am. St. 682; Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 71 N. W. 261, 64 Am. St. 475.

565-76 Starr v. Ins. Co., 41 Wash. 199, 83 P. 113.

Verified tax list rendered by insured inadmissible to contradict his testimony. German Mut. Ins. Co. v. Niewedde, 11 Ind. App. 624, 39 N. E. 534.

566-77 An adjustment is prima facie proof of the amount due. German Ins. Co. v. Gibbs (Tex. Civ.), 92 S. W. 1068.

566-78 Statements made in proofs over plaintiff's signature, if written without his knowledge and not read by him, may be contradicted. Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 P. 61.

567-81 Insurance Office v. Woolen M. Co., 72 Kan. 41, 82 P. 513 (combustion of wool); Travelers' Ins. Co. v. Bingham, 32 Ky. L. R. 233, 105 S. W. 894; Hildebrand v. United Artisans (Or.), 91 P. 542; Madden v. Ins. Co., 70 S. C. 295, 49 S. E. 855; Taylor v. Woodmen, 42 Wash. 304, 84 P. 867; Bloch v. Ins. Co. (Wis.), 112 N. W. 45 (cause of explosion).

Opinions of experts and non-experts. Metropolitan L. Ins. Co. v. Wagner (Tex. Civ.), 109 S. W. 1120.

A conclusion is not called for by a request to a witness to state the condition and facial expression of insured on a given day. U. S. Health & Acc. Ins. Co. v. Clark (Ind. App.), 83 N. E. 760.

Inquiry as to the habit of insured concerning the use of intoxicants does not call for conclusions from witnesses who have personal knowl-

edge thereof. Taylor v. Annuity Co., 145 N. C. 383, 59 S. E. 139.

Non-experts may testify whether they had seen or observed that a person had certain symptoms of disease. Illinois L. Ins. Co. v. De Lang, 30 Ky. L. R. 753, 99 S. W. 616.

Opinion must be based on knowledge or on facts and circumstances testified to by others. Kinney v. Yeomen, 15 N. D. 21, 106 N. W. 44. Opinions as to feasibility of removing goods from a building on fire are inadmissible. Ins. Co. v. Osborn, 26 Ind. App. 88, 59 N. E. 181.

Non-experts acquainted with the value of like property as that burned may testify of its value. Home Ins. Co. v. Sylvester, 25 Ind. App. 207, 57 N. E. 991; Tucker v. Ins. Co., 58 W. Va. 30, 51 S. E. 86; Glaser v. Ins. Co., 47 Misc. 89, 93 N. Y. S. 524; Helm v. Ins. Co., 132 Ia. 177, 109 N. W. 605. Owner may testify of opinion as to value of stock of goods. Smith v. Ins. Co. (S. D.), 113 N. W. 94.

A non-expert may not testify whether insured's conduct indicated that he had a certain disease. Taylor v. Woodmen, 42 Wash. 304, 84 P. 867. Nor as to the cause of a result if the facts may be given the jury in the usual manner. Continental Cas. Co. v. Todd, 82 Ark. 214, 101 S. W. 168. But he may testify as to the condition of insured's health at the time in question and performance by him of his duties. Fidelity T. & T. Co. v. Ins. Co., 213 Pa. 415, 63 A. 51.

The indicia of fire may be testified of. Ins. Office v. Woolen M. Co., 72 Kan. 41, 82 P. 513.

569-83 Wightman v. Grand Lodge, 121 Mo. App. 252, 98 S. W. 829.

569-84 Noyes v. Assn., 190 Mass. 171, 76 N. E. 665; Aetna L. I. Co. v. Milward, 118 Ky. 716, 82 S. W. 364.

570-88 Newton v. Ins. Co., 125 Wis. 289, 104 N. W. 107.

570-89 See Walker v. Assn., 142 Mich. 162, 105 N. W. 597; Preferred Acc. Ins. Co. v. Fielding, 35 Colo. 19, 83 P. 1013; Aetna L. I. Co. v. Milward, 26 Ky. L. R. 589, 82 S. W. 364, 68 L. R. A. 285; Jacoby v. Ins. Co., 10 Pa. Super. 366; Newton v. Ins. Co., 125 Wis. 289, 104 N. W. 107; Helm v. Ins. Co., 132 Ia. 177, 109 N. W. 605. See "Intent," Vol. 7, p. 580, and infra.

571-91 Copies of proofs are competent if the original is in possession of insurer and without the jurisdiction. Davis v. Ins. Co., 5 Pa. Super. 506.

571-96 Western Underwriters Assn. v. Hankins, 221 Ill. 304, 77 N. E. 447; Melancon v. Ins. Co., 116 La. 324, 40 S. 718.

Evidence excusing immediate notice. Edgefield Mfg. Co. v. Cas. Co., 78 S. C. 73, 58 S. E. 969.

572-99 Good faith of insured in valuing the property may be proved by showing the source of his information. German Am. Ins. Co. v. Brown, 75 Ark. 251, 87 S. W. 135.

572-1 Preferred Acc. Ins. Co. v. Fielding, 35 Colo. 19, 83 P. 1013 (by demanding proofs of a nature insurer was not entitled to); Penn Mut. L. I. Co. v. Norcross, 163 Ind. 379, 72 N. E. 132; Nicholas v. Ins. Co., 125 Ia. 262, 101 N. W. 115; Hays v. Assn., 127 Mo. App. 195, 104 S. W. 1141 (letter admissible though signature not proved); Exchange Bk. v. Ins. Co., 109 Mo. App. 654, 83 S. W. 534; Dobson v. Ins. Co., 86 App. Div. 115, 83 N. Y. S. 456, 179 N. Y. 557, 71 N. E. 1130 (no opinion).

Answer in a previous action. — Exchange Bk. v. Ins. Co., 109 Mo. App. 654, 83 S. W. 534.

573-2 Schilansky v. Ins. Co., 4 Penne. (Del.) 293, 55 A. 1014; Lancashire Ins. Co. v. Lyon, 124 Ill. App. 491; Com. Travelers v. Barnes, 72 Kan. 306, 82 P. 1099; American B. Assn. v. Stough, 26 Ky. L. R. 1093, 83 S. W. 126; Rosenberg v. Ins. Co., 209 Pa. 336, 58 A. 671; Tucker v. Ins. Co., 58 W. Va. 30, 51 S. E. 86. See Thaxton v. Ins. Co., 143 N. C. 33, 55 S. E. 419.

Error in admitting proofs for general purposes cured by testimony of witnesses who made them. Continental Cas. Co. v. Colvin (Kan.), 95 P. 565.

The rule is sometimes varied by stipulations in the policy to the effect that a written statement made as prescribed shall be prima facie evidence of its truth. See American S. Co. v. Pauly, 170 U. S. 160; Security

etc. Co. v. Aetna Ind. Co., 108 N. Y. S. 171.

Proofs may be part of the adjustment of the loss, and if so are prima facie proof of the amount of it. German Ins. Co. v. Gibbs (Tex. Civ.), 92 S. W. 1068.

Under a general denial. — See Paquette v. Ins. Co., 193 Mass. 215, 79 N. E. 250.

574-4 An inventory and ex parte appraisement are not admissible. Melancon v. Ins. Co., 116 La. 324, 40 S. 718.

575-6 Kiesewetter v. Maccabees, 227 Ill. 48, 81 N. E. 19; Wasey v. Ins. Co., 126 Mich. 119, 85 N. W. 459; Ferris v. Loyal Americans (Mich.), 116 N. W. 445; Felix v. Ins. Co., 216 Pa. 95, 64 A. 903.

575-7 Haughton v. Ins. Co., 165 Ind. 32, 73 N. E. 592; Krapp v. Ins. Co., 143 Mich. 369, 106 N. W. 1107 (under a clause in the policy); Siebelist v. Ins. Co., 19 Pa. Super. 221.

The proofs, when offered solely to show compliance with the policy, cannot be used by insurer, who has not offered any evidence, as a basis for non-suit because they show a breach of insured's statements in the application. Baldi v. Ins. Co., 30 Pa. Super. 213; Rondinella v. Ins. Co., 30 Pa. Super. 223. The first case *disappr.* Walther v. Ins. Co., 65 Cal. 417, 4 P. 413.

Admission which states that it is based on hearsay is not competent. Maher v. Ins. Co., 96 N. Y. S. 496, *foll.* Reed v. McCord, 18 App. Div. 381, 46 N. Y. S. 407, 160 N. Y. 330, 54 N. E. 737.

575-8 Barker v. Ins. Co. (Mass.), 84 N. E. 490. But see Triple T. B. Assn. v. Wheatley, 76 Kan. 251, 91 P. 59. Physician's statements not admissible if based on hearsay. Scott v. Ins. Co., 56 Misc. 545, 107 N. Y. S. 124.

Waiver of statute concerning confidential communications between physician and patient results from a stipulation in the policy that affidavit of former shall be a part of proofs of death and shall state cause of death and such other information as insurer shall require. The attending physician may testify to confidential disclosures made by insured concerning his last illness. Western T. Assn. v. Munson, 73 Neb. 858, 103 N. W. 688. Insured's waiver operates in favor of those who claim under him. Metropolitan etc. Co. v. Willis, 37 Ind. App. 48, 76 N. E. 560, *cit.* Adreveno v. Assn., 34 Fed. 870; Foley v. Royal Arcanum, 151 N. Y. 196, 45 N. E. 456, 56 Am. St. 621. And against them, Modern Woodmen v. Angle, 127 Mo. App. 94, 104 S. W. 297.

576-9 Metropolitan etc. Co. v. Wagner (Tex. Civ.), 109 S. W. 1120 (because of a stipulation in the policy).

Statement in physician's affidavit as to result of coroner's inquest inadmissible because hearsay. Wasey v. Ins. Co., 126 Mich. 119, 85 N. W. 459.

576-11 Craiger v. Woodmen (Ind. App.), 80 N. E. 429 (plaintiff denied that insured came to his death as found by the inquest). See Rohloff v. Assn., 130 Wis. 61, 109 N. W. 989.

An undertaker's report of death, not being required by law, is inadmissible, and if attached to the certified copy of the physician's report the whole may be excluded. Globe etc. Assn. v. Meyer, 118 Ill. App. 155.

576-13 U. S. Health & Acc. Ins. Co. v. Harvey, 129 Ill. App. 104 (value of time lost); Barker v. Ins. Co. (Mass.), 84 N. E. 490; Krapp v. Ins. Co., 143 Mich. 369, 106 N. W. 1107; Aetna L. Ins. Co. v. Pelham, 52 Misc. 658, 102 N. Y. S. 461; Baldi v. Ins. Co., 18 Pa. Super. 599; Rondinella v. Ins. Co., 18 Pa. Super. 613, 28 Pa. C. C. 517; Holleran v. Assur. Co., 18 Pa. Super. 573 (not conclusive on guardian); Rohloff v. Assn., 130 Wis. 61, 109 N. W. 989.

A preponderance of the evidence is not required to show that the proofs were made under a mistake of fact. Ferris v. Loyal Americans (Mich.), 116 N. W. 445.

The circumstances under which proofs were made may be shown. Metropolitan etc. Co. v. Thomas, 32 Ky. L. R. 770, 106 S. W. 1175.

577-15 Proof made by insurer's agent as required by it is competent evidence in favor of insured (Patterson v. United Artisans, 43 Or. 333, 72 P. 1095; Hildebrand v. United Artisans (Or.), 91 P. 542; Whigham v. Foresters, 44 Or. 543, 75 P. 1067), and he cannot be deprived of the

right to offer it by an admission of the sufficiency of the proofs. United Moderns v. Pistole, 38 Tex. Civ. 422, 86 S. W. 377 (writ of error denied by supreme court). See Puls v. Grand Lodge, 13 N. D. 559, 102 N. W. 165.

577-17 **An unconditional receipt is prima facie evidence** of payment and will be disregarded only for weighty reasons. Benseman v. Ins. Co., 13 Pa. Super. 363.

Payment to assignee. — Burden on assignor to show insurer's knowledge of fraudulent character of assignment. Vanderslice v. Ins. Co., 13 Pa. Super. 455.

578-18 **Dependence of designated beneficiary.** — If insurer has paid the amount due to the regularly designated beneficiary, the person who alleges that the beneficiary was not dependent on insured must show the fact. Kittredge v. Assn., 191 Mass. 23, 77 N. E. 648.

Payment to wrong person. — Morey v. Monk, 142 Ala. 175, 38 S. 265.

INTENT [Vol. 7.]

583-3 Walker v. U. S., 152 Fed. 111.

Gambling in grain. — The statute presumes and it was presumed in Soby v. P., 134 Ill. 66, 25 N. E. 109, that where a man keeps a place where gambling in grain is permitted, he must necessarily intend to permit it. Weare C. Co. v. P., 209 Ill. 528, 70 N. E. 1076.

584-5 U. S. v. Chisholm, 153 Fed. 808.

584-6 Rockford v. Barrett (S. D.), 115 N. W. 522.

584-7 McLeod v. S., 128 Ga. 17, 57 S. E. 83; Weare C. Co. v. P., 209 Ill. 528, 70 N. E. 1076; Hackney v. Raymond, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675 ("the obvious consequences"); P. v. Breen, 181 N. Y. 493, 74 N. E. 483.

585-9 S. v. Taylor, 57 W. Va. 228, 50 S. E. 247; S. v. Sheppard, 49 W. Va. 582, 39 S. E. 676.

588-17 Coleman v. Coleman, 216 Ill. 261, 74 N. E. 701; Cantwell v. S., 47 Tex. Cr. 521, 85 S. W. 18.

588-18 Johnson v. Wald, 93 Fed. 640, 35 C. C. A. 522. See Cincinnati T. W. Co. v. Matthews, 24 Ky. L. R. 2445, 74 S. W. 242.

589-19 S. v. Mills (Del.), 69 A. 841; S. v. Bennett, 128 Ia. 713, 103 N. W. 324.

591-23 Cleage v. Laidley, 149 Fed. 346, 79 C. C. A. 284.

591-24 S. v. Costa, 78 Vt. 198, 62 A. 38.

592-28 No. British etc. Ins. Co. v. Tye, 1 Ga. App. 380, 58 S. E. 110.

592-30 **Must be proved** beyond a reasonable doubt. S. v. Sparks (Neb.), 114 N. W. 598.

594-32 **The evidence** must go beyond showing the mere possibility of the essential intent. Cotton v. S. (Tex. Cr.), 105 S. W. 185, and local cases cited.

594-33 S. v. Truitt, 5 Penne. (Del.), 466, 62 A. 790; S. v. Di Guglielmo, 4 Penne. (Del.) 336, 55 A. 350.

595-35 Washington v. S. (Tex. Cr.), 103 S. W. 879; Castle v. S., 49 Tex. Cr. 1, 90 S. W. 32.

596-37 **Burden of proving intent** in civil action is on party who alleges its existence. Willett v. Froelich, 28 Ky. L. R. 798, 90 S. W. 572; In re Newcomb (N. Y.), 84 N. E. 950; Spead v. Tomlinson, 73 N. H. 46, 59 A. 376.

The legal presumption is that parties who make contracts for the future delivery of grain intend to perform them, and the burden is on him who avers that the illegal intention of one or more of them has made the contracts void to establish his allegation by plenary proof. Cleage v. Laidley, 149 Fed. 346, 79 C. C. A. 284, *cit.* Clews v. Jamieson, 182 U. S. 461; Pixley v. Boynton, 79 Ill. 351.

596-38 Smith v. S., 145 Ala. 17, 40 S. 957; Vest v. Speakman (Ala.), 44 S. 1017.

597-39 Cleage v. Laidley, supra; Bertelsen v. Bertelsen (Cal. App.), 94 P. 80; Eatman v. S., 48 Fla. 21, 37 S. 576; Dunbar v. Armstrong, 115 Ill. App. 549; Helm v. Ins. Co., 132 Ia. 177, 109 N. W. 605; S. v. Morin, 102 Me. 290, 66 A. 650; Sherman v. Sherman, 193 Mass. 400, 79 N. E. 774; Grout v. Stewart, 96 Minn. 230, 104 N. W. 966; Hackney v. Raymond, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; Wheeler v. Stock

Exch., 72 N. H. 315, 56 A. 754; Hill v. Page, 108 App. Div. 71, 95 N. Y. S. 465; Brown v. S., 127 Wis. 193, 106 N. W. 536.

Failure to expressly testify to intent in doing an act is not convincing where the person's conduct has been explicit. Wasmund v. Harm, 36 Wash. 170, 78 P. 777.

The intention of a party in executing a bill of sale cannot be testified to by him. Russell v. Haltom, 76 Ark. 506, 89 S. W. 471.

599-40 Cleage v. Laidley, 149 Fed. 346, 79 C. C. A. 284.

599-41 Brown v. S., 127 Wis. 193, 106 N. W. 536.

600-43 Duckett v. R. Co., 99 Mo. App. 444, 73 S. W. 926.

601-45 Dunbar v. Armstrong, 115 Ill. App. 549; Semler Mill. Co. v. Fyffe, 127 Ill. App. 514.

601-46 Rockford v. Barrett (S. D.), 115 N. W. 522; Winton v. McGraw, 60 W. Va. 98, 54 S. E. 506. See S. v. Davison (N. H.), 64 A. 761.

The usurious intentions of the parties to a contract may be shown, though it is free from ambiguity. Clemens v. Crane, 234 Ill. 215, 84 N. E. 884.

Oral testimony of the intent of parties to a written contract is admissible to show that they intended it as a wagering contract; it is immaterial that such testimony contradicts the writing. Wheeler v. Stock Exch., 72 N. H. 315, 56 A. 754.

The intention of the parties to a release of one joint wrong-doer may be shown by parol, its terms not being varied. El Paso etc. R. Co. v. Darr (Tex. Civ.), 93 S. W. 166 (writ of error denied by supreme court).

601-47 Bradford v. Assn., 26 App. D. C. 268.

603-48 Exceptions to general rule. — Brakefield v. Shelton, 76 Kan. 451, 92 P. 709; Jandt v. Potthast, 102 Ia. 223, 71 N. W. 216.

603-50 But see Hamilton v. Brew. Co., 129 Ia. 172, 105 N. W. 438.

Intent as to future action may be testified of by its president without producing records. New York etc. R. Co. v. Offield, 78 Conn. 1, 60 A. 740.

Declarations of members of a corporation. — Starr etc. Assn. v. Assn., 77 Conn. 83, 58 A. 467.

605-57 Lowrey v. Hawaii, 206 U. S. 206; P. v. Black, 147 Cal. 426, 81 P. 1099; Helm v. Brewster (Colo.), 93 P. 1101; S. v. Mills (Del.), 69 A. 841; Clemens v. Crane, 234 Ill. 215, 84 N. E. 884; Willett v. Froelich, 28 Ky. L. R. 798, 90 S. W. 572; Duckett v. R. Co., 99 Mo. App. 444, 73 S. W. 926; S. v. Beverly, 201 Mo. 550, 100 S. W. 463; S. v. Humphreys, 43 Or. 44, 70 P. 824.

The extent of the injury inflicted upon the party assaulted is material on the question of defendant's intent. Brown v. S., 142 Ala. 287, 38 S. 268.

606-58 Samaha v. Mason, 27 App. D. C. 470; Ham v. S., 122 Ga. 574, 50 S. E. 342; Bartlett v. Slusher, 215 Ill. 348, 74 N. E. 370; Weare Com. Co. v. P., 209 Ill. 528, 70 N. E. 1076; Portland v. Tel. Co. (Me.), 68 A. 1040; Rockford v. Barrett (S. D.), 115 N. W. 522; Lewis v. S., 48 Tex. Cr. 149, 86 S. W. 1027; S. v. Costa, 78 Vt. 198, 62 A. 38.

Evidence of any facts having probative force upon the issue is competent. Wheeler v. Stock Exch., 72 N. H. 315, 56 A. 754; Jamieson v. Wallace, 167 Ill. 388, 47 N. E. 762, 59 Am. St. 302; Sprague v. Warren, 26 Neb. 326, 41 N. W. 1113, 3 L. R. A. 679.

A judgment in attachment is admissible on the question of vendor-debtor's intent. Smith v. Birge, 126 Ill. App. 596.

Prohibited contract. — Bashinski v. S., 122 Ga. 164, 50 S. E. 54; Kessler v. Pearson, 126 Ga. 725, 55 S. E. 963.

607-61 Walker v. Hargear, 36 Wash. 672, 79 P. 472.

607-62 Hardin v. S. (Tex. Cr.), 103 S. W. 401; Fletcher v. C., 118 Ky. 351, 26 Ky. L. R. 227, 80 S. W. 1089; Weare Com. Co. v. P., 209 Ill. 528, 70 N. E. 1076; Bartlett v. Slusher, 215 Ill. 348, 74 N. E. 370.

The effectiveness of the act done is a proper matter of consideration by the jury. P. v. Strombeck, 145 Cal. 110 78 P. 472.

608-63 Woodmen v. Welch, 16 Okla. 188, 83 P. 547.

608-64 **Evidence of a defendant's customary manner** of discharging his duty is not always relevant to rebut evidence of his intent, especially if the performance of duty in the customary way would have disclosed the fraud he was a party to. Grunberg v. U. S., 145 Fed. 81, 76 C. C. A. 51.

609-69 S. v. Truitt, 5 Penne. (Del.) 466, 62 A. 790; S. v. Bennett, 128 Ia. 713, 105 N. W. 324.

Partial intoxication will not avail to disprove the specific intent. Brown v. S., 142 Ala. 287, 38 S. 268.

610-70 Brown v. S., supra (unless the intent involved is specific).

611-72 Thompson v. U. S., 144 Fed. 14, 75 C. C. A. 172.

612-74 Chitwood v. U. S., 153 Fed. 551; P. v. Barker, 144 Cal. 705, 78 P. 266; Starr etc. Assn. v. Assn., 77 Conn. 83, 58 A. 467; S. v. Mills (Del.), 69 A. 841; P. v. Moir, 207 Ill. 180, 69 N. E. 905; Bartlett v. Slusher, 215 Ill. 348, 74 N. E. 370; Smith v. Birge, 126 Ill. App. 596; Harris v. C., 25 Ky. L. R. 297, 74 S. W. 1044; King v. McCarthy, 54 Minn. 190, 55 N. W. 960; S. v. Davison (N. H.), 64 A. 761; In re Newcomb (N. Y.), 84 N. E. 950; S. v. Costa, 78 Vt. 198, 62 A. 38; Walker v. Hargear, 36 Wash. 672, 79 P. 472.

Stipulations in a contract, if of an unusual nature, may be looked upon with suspicion as a cover for the real intentions of the parties to it. Weare Com. Co. v. P. 209 Ill. 528, 70 N. E. 1076.

Declarations inconsistent with conduct are not entitled to much weight. P. v. Moir, 207 Ill. 180, 69 N. E. 905.

614-76 **Admissions and declarations** may be explained. S. v. Morin, 102 Me. 290, 66 A. 650. See "ADMISSIONS," Vol. 1, p. 348, and ante.

614-77 S. v. Bailey, 190 Mo. 257, 284, 88 S. W. 733.

615-81 **Servant's declarations** are inadmissible against master if not part of the res gestae, whether made prior or subsequent to the event. Conklin v. R. Co., 196 Mass. 302, 82 N. E. 23. See "ADMISSIONS," Vol. 1, p. 348, and ante.

616-82 Thompson v. U. S., 144 Fed. 14, 75 C. C. A. 172.

If there have been a series of similar transactions, statements made prior to the first of them may be proved though the statute has barred an action to recover thereon. Bartlett v. Slusher, 215 Ill. 348, 74 N. E. 370.

618-88 S. v. Atkins, 77 Vt. 215, 59 A. 826.

619-89 Julian v. Star Co., 209 Mo. 35, 107 S. W. 496 (twelve years before suit brought).

619-92 In re Newcomb (N. Y.), 84 N. E. 950 (declarations as to purposed change of domicile).

622-98 Conklin v. R. Co., 196 Mass. 302, 82 N. E. 23.

625-3 Western U. T. Co. v. Simmons (Tex. Civ.), 93 S. W. 686 (previous refusal to send message); S. v. Weisenberger, 42 Wash. 426, 85 P. 20.

626-5 Johnson v. S., 75 Ark. 427, 88 S. W. 905; S. v. McGann, 8 Idaho 40, 66 P. 823.

The sale of an article for a legitimate use cannot be shown to rebut evidence of intent shown by sales for a prohibited purpose. S. v. Costa, 78 Vt. 198, 62 A. 38.

627-6 Williamson v. U. S., 207 U. S. 425; Bryan v. U. S., 133 Fed. 495, 66 C. C. A. 369; Dillard v. U. S., 141 Fed. 303, 72 C. C. A. 451; Brown v. U. S., 142 Fed. 1, 73 C. C. A. 187; Chitwood v. U. S., 153 Fed. 551, Morris v. S., 144 Ala. 81, 39 S. 973; Qualey v. Ter., 8 Ariz. 45, 68 P. 546; Howard v. S., 72 Ark. 586, 82 S. W. 196; Johnson v. S., 75 Ark. 427, 88 S. W. 905; Storms v. S., 81 Ark. 25, 98 S. W. 678; Eatman v. S., 48 Fla. 21, 37 S. 576; Miller v. Smith, 7 Idaho 204, 61 P. 824; S. v. McGann, 8 Idaho 40, 66 P. 823; Hartford L. Ins. Co. v. Hope (Ind. App.), 81 N. E. 595; Sanderson v. S. (Ind.), 82 N. E. 525; Eacock v. S. (Ind.), 82 N. E. 1039; Jeffries v. U. S. (Ind. Ter.), 103 S. W. 761; S. v. Sheets, 127 Ia. 73, 102 N. W. 415; Helton v. C., 27 Ky. L. R. 137, 84 S. W. 574; Carpenter v. C., 29 Ky. L. R. 100, 92 S. W. 553; S. v. Johnson, 111 La. 935, 36 S. 30; S. v. High, 116 La. 79, 40 S. 538; S. v. Bailey, 190 Mo. 257, 280, 88 S. W. 733; Clark v. S. (Neb.), 113 N. W. 211; S. v. Sparks (Neb.), 113 N. W. 154; S. v. Sparks (Neb.), 114 N. W. 598;

S. v. Jackson (S. D.), 113 N. W. 880; Standard Oil Co. v. S., 117 Tenn. 618, 658, 100 S. W. 705; Leach v. S., 46 Tex. Cr. 507, 81 S. W. 733; Weatherford v. S., 51 Tex. Cr. 430, 103 S. W. 632.

629-7 P. v. Hoffman, 142 Mich. 531, 105 N. W. 838; S. v. Sparks, supra.

629-8 Miller v. Smith, 7 Idaho 204, 61 P. 824; Hartford L. Ins. Co. v. Hope (Ind. App.), 81 N. E. 595; Julian v. Star Co., 209 Mo. 35, 107 S. W. 496.

630-11 Bryan v. U. S., 133 Fed. 495, 66 C. C. A. 369.

630-12 Storms v. S., 81 Ark. 25, 982 S. W. 678; Eatman v. S., 48 Fla. 21, 37 S. 576; Leach v. S., 46 Tex. Cr. 507, 81 S. W. 733.

630-14 S. v. Sparks (Neb.), 113 N. W. 154.

630-15 Dillard v. U. S., 141 Fed. 303, 72 C. C. A. 451.

630-16 S. v. High, 116 La. 79, 40 S. 538.

630-17 Johnson v. S., 75 Ark. 427, 88 S. W. 905.

630-18 S. v. Sheets, 127 Ia. 73, 102 N. W. 415.

630-19 Brown v. U. S., 142 Fed. 1, 73 C. C. A. 187 (loans of national bank funds to insolvents); Chitwood v. U. S., 153 Fed. 551 (conversion of mail matter); Morris v. S., 144 Ala. 81, 39 S. 973 (changing name of debtor for purpose of defrauding creditors); Qualey v. Ter., 8 Ariz. 45, 68 P. 546 (falsifying corporate records); Jeffries v. U. S. (Ind. Ter.), 103 S. W. 761 (receiving stolen goods); S. v. Sparks (Neb.), 114 N. W. 598 (filing second claim for work for which payment had been made); S. v. Jackson (S. D.), 113 N. W. 880 (previous false reports to bank examiner); Weatherford v. S., 51 Tex. Cr. 430, 103 S. W. 632 (illegal prescriptions).

631-20 S. v. Sheets, 127 Ia. 73, 102 N. W. 415.

632-22 Hartford L. Ins. Co. v. Hope (Ind. App.), 81 N. E. 595.

632-24 Julian v. Star Co., 209 Mo. 35, 107 S. W. 496; Western U. T. Co. v. Simmons (Tex. Civ.), 93 S. W. 686 (refusal to transmit message).

633-30 P. v. Molineux, 168 N. Y. 264, 298, 61 N. E. 286, 62 L. R. A. 193.

Evidence of other wrongful acts is not competent against defendants not connected with them, or who are not shown to have knowledge of them. Miller v. U. S., 133 Fed. 337, 66 C. C. A. 399.

634-31 Herndon v. S. (Tex. Cr.), 99 S. W. 558.

635-34 P. v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

Accused may show that his intent, if he had any, was against another and different party. Smith v. S., 46 Tex. Cr. 267, 284, 81 S. W. 936.

639-41 P. v. Spriggs, 119 App. Div. 236, 104 N. Y. S. 539.

641-46 S. v. Jackson (S. D.), 113 N. W. 880 (limitation of one year not an abuse of discretion).

642-51 Storms v. S., 81 Ark. 25, 98 S. W. 678; Eatman v. S., 48 Fla. 21, 37 S. 576; Eacock v. S. (Ind.), 82 N. E. 1039; S. v. Jackson (S. D.), 113 N. W. 880.

INTEREST [Vol. 7.]

Presumption that interest was included in verdict, 644-4; *Unreasonable and vexatious delay,* 644-6; *Expert testimony inadmissible to show interest due,* 649-24.

644-4 Presumption that interest was included in verdict, where the party in whose favor the verdict was rendered was entitled to such. Blackwell etc. R. Co. v. Bebout (Okla.), 91 P. 877; Clements v. Mutersbaugh, 27 App. D. C. 165.

644-6 Unreasonable and vexatious delay established by evidence showing refusal to pay until the creditor shall do something not required to do. American etc. Co. v. Chair Co., 129 Ill. App. 548.

649-24 Expert testimony inadmissible to show interest due, where a jury is competent to assess the same. Clements v. Mutersbaugh, 27 App. D. C. 165.

INTERPRETER [Vol. 7.]

651-1 P. v. Salas, 2 Cal. App. 537, 84 P. 295.

652-4 Dobbins v. R. Co., 79 Ark. 85, 95 S. W. 794 (although witness can write, testimony may be taken by signs if considered the better way); Ralph v. S., 124 Ga. 81, 52 S. E. 298 (party under physical disability).

653-9 See John v. Judd, 13 Haw. 319; Kozlowski v. City, 113 Ill. App. 513.

656-20 S. v. Smith, 203 Mo. 695, 102 S. W. 526.

659-29 Felts v. Murphy, 201 U. S. 123.

659-31 Extrajudicial confession through interpreter is admissible where the interpretation thereof has been reduced to writing, signed by the accused and the interpreter testifies to the correctness of the interpretation. S. v. Banusik (N. J. L.), 64 A. 994.

660-33 Kelly v. Assn., 2 Cal. App. 460, 84 P. 321.

660-34 Davis v. Bank, 6 Ind. Ter. 124, 89 S. W. 1015 (an affidavit, made through an interpreter who is affiant's agent, is admissible to contradict or impeach affiant's testimony, although such interpreter was not sworn).

663-43 Yick Wo v. Underhill, 5 Cal. App. 519, 90 P. 967.

INTOXICATING LIQUORS [Vol. 7.]

Chemical composition of other liquors, 679-38; Transfer of license, 697-42; Intoxication prior to sales complained of, 703-77; Druggist's affidavit, 731-13.

675-5 Hop ale. — Rutherford v. S., 48 Tex. Cr. 431, 88 S. W. 810.

675-8 Lambie v. S. (Ala.), 44 S. 51; S. v. Carmody (Or.), 91 P. 446.

675-9 See Potts v. S., 50 Tex. Cr. 368, 97 S. W. 477.

676-10 Hoagland v. Canfield, 160 Fed. 146; Feddern v. S. (Neb.), 113 N. W. 127.

676-11 Lambie v. S. (Ala.), 44 S. 675 (whether "hop jack" or "hop ale" is beer and intoxicating, a question for the court); Potts v. S. (Tex. Cr.), 89 S. W. 835, 836, 50 Tex. Cr. 368, 97 S. W. 477; Cassens v. S., 48 Tex. Cr. 186, 88 S. W. 229; Sullivan v. S., 48 Tex. Cr. 201, 87 S. W. 150; Schwulst v. S. (Tex. Cr.), 108 S. W. 698 (that witness received what he supposed was beer and says, "I guess it was intoxicating," is insufficient); Bird v. S., 49 Tex. Cr. 205, 91 S. W. 791 (evidence insufficient).

677-17 Hoagland v. Canfield, 160 Fed. 146.

677-21 S. v. York, 74 N. H. 125, 65 A. 685; Wilcoxson v. S. (Tex. Cr.), 91 S. W. 581; Beaty v. S. (Tex Cr.), 110 S. W. 449. See also Donaldson v. S., 3 Ga. App. 451, 60 S. E. 115.

678-23 Nussbaumer v. S. (Fla.), 44 S. 712.

679-33 See also Nussbaumer v. S., supra.

679-35 A witness for the state may not testify that the liquid he himself bought at a sale other than that for which defendant is on trial did not taste like that shown to the jury as the liquid sold to the prosecutor. Swalm v. S., 49 Tex. Cr. 241, 91 S. W. 575.

679-38 Nussbaumer v. S. (Fla.), 44 S. 712; S. v. Costa, 78 Vt. 198, 62 A. 38.

Chemical composition of other liquors unidentified with liquor sold is inadmissible. Magill v. S. (Tex. Cr.), 103 S. W. 397. Thus, the percentage of alcohol in other medicines manufactured by defendant is inadmissible. S. v. Costa, supra.

Hearsay. — Testimony as to analysis made by another is hearsay. Uloth v. S., 48 Tex. Cr. 295, 87 S. W. 823.

680-40 Brighton v. Miles (Ala.), 44 S. 394; Nussbaumer v. S. (Fla.), 44 S. 712; S. v. Olsen, 95 Minn. 104, 103 N. W. 727; Feddern v. S. (Neb.), 113 N. W. 127 (that liquor tasted like beer); Beaty v. S. (Tex. Cr.), 110 S. W. 449; Wiginton v. S. (Tex. Cr.), 102 S. W. 1124 (or was similar to beer in color and taste is admissible); Porter v. S. (Tex. Cr.), 86 S. W. 1014 (that Ino and Frosty did not taste like beer and were not beer); Curtis v. S. (Tex. Cr.), 108 S. W. 380; Peepless v. S. (Tex. Cr.).

99 S. W. 1002; S. v. Good, 56 W. Va. 215, 49 S. E. 121.

Though witness neither smelled nor tasted the liquor, he may state that it was whiskey. Rice v. S. (Tex. Cr.), 107 S. W. 833.

680-42 See also Lambie v. S. (Ala.), 44 S. 51.

Freight bills as evidence of intoxicating properties. Thompson v. S. (Tex. Cr.), 97 S. W. 316.

681-43 But see Thompson v. S. (Tex. Cr.), 97 S. W. 316.

681-44 McRoberts v. S., 49 Tex. Cr. 288, 92 S. W. 804.

Amount drunk by prosecutor cannot be shown by defendant in the absence of evidence as to its effect. Henderson v. S., 49 Tex. Cr. 269, 91 S. W. 569.

Probable effect. — A statement of a witness as to the probable effect of a drink of liquor consumed by a dealer's patron is inadmissible. Young v. Beveridge (Neb.), 115 N. W. 766.

681-45 McRoberts v. S., 49 Tex. Cr. 288, 92 S. W. 804.

681-46 See infra, 682-49.

682-49 Murphy v. S. (Ala.), 45 S. 208; McRoberts v. S., supra. See also S. v. Gillespie (W. Va.), 59 S. E. 957.

682-53 But see Rutherford v. S., 48 Tex. Cr. 431, 88 S. W. 810.

682-54 See post 741-71. But see Isom v. S. (Tex. Cr.), 107 S. W. 350.

683-56 Tompkins v. S., 2 Ga. App. 639, 58 S. E. 1111 (whiskey).

684-58 P. v. Seeley, 105 App. Div. 149, 93 N. Y. S. 982, *aff.* in 183 N. Y. 544, 76 N. E. 1102.

684-60 But evidence of open sale of malt extract, inadmissible to show its non-intoxicating qualities. S. v. Costa, 78 Vt. 198, 62 A. 38.

Comparison with other liquors. Evidence excluded which showed the malt extract in question was used for same purpose as other medicines, that such other medicines contained a large per cent. of alcohol, and that a person could not become intoxicated on them or the extract in question. S. v. Costa, supra.

684-61 Rutherford v. S., 48 Tex. Cr. 431, 88 S. W. 810.

Preparation which could not be used as a beverage. Kincaid v. S., 49 Tex. Cr. 303, 92 S. W. 415.

684-62 Gaskins v. S., 127 Ga. 51, 55 S. E. 1045; Sullivan v. S., 48 Tex. Cr. 201, 87 S. W. 150. See also Mason v. S., 1 Ga. App. 534, 58 S. E. 139 and post 769-24.

Reasonable doubt. — Intoxicating quality must be shown beyond a reasonable doubt in criminal cases. Beaty v. S. (Tex. Cr.), 110 S. W. 449.

684-64 But see S. v. Files, 71 Kan. 862, 80 P. 948; S. v. Olsen, 95 Minn. 104, 103 N. W. 727 (where the court permitted the liquor to go into the jury-room with instruction that it should not be tasted).

685-65 S. v. York, 74 N. H. 125, 65 A. 685. See S. v. Good, 56 W. Va. 215, 49 S. E. 121.

685-67 But in Neal v. S. (Tex. Cr.), 102 S. W. 1139, it was held not error to admit the order for the election where the petition consisted of several papers attached together.

685-68 P. v. Hamilton, 143 Mich. 1, 106 N. W. 275.

686-69 Nicols v. C., 27 Ky. L. R. 1176, 87 S. W. 1072 (*rev.* 27 Ky. L. R. 690, 86 S. W. 513); Crigler v. C. (Ky.), 83 S. W. 587; S. v. Hitchcock, 124 Mo. App. 101, 101 S. W. 117; Davis v. S. (Tex. Cr.), 107 S. W. 828, 829; Cantwell v. S., 47 Tex. Cr. 521, 85 S. W. 18; Byrd v. S. (Tex. Cr.), 103 S. W. 863; Craddick v. S., 48 Tex. Cr. 385, 88 S. W. 347. See infra, "JUDICIAL NOTICE," 964-67.

Issuance of licenses by judge who canvassed votes raises a presumption that majority were in favor of licenses (S. v. Songer, 76 Ark. 169, 88 S. W. 903).

Presumption and burden of proof where state has shown election adopting prohibition. Holland v. S. (Tex. Cr.), 101 S. W. 1002.

686-70 See infra, "JUDICIAL NOTICE," 963-66.

686-71 S. v. Foreman, 121 Mo. App. 502, 97 S. W. 269; Fitze v. S. (Tex. Cr.), 85 S. W. 1156.

686-72 See also Fitze v. S., supra.

687-73 But see S. v. Songer, supra, 686-69.

687-74 Certificate of publication. Unless a proper certificate of publication is made, the state must prove

each and every step necessary to be had before the adoption of the local option law, and failure to show that notices were posted is fatal. McGovern v. S., 49 Tex. Cr. 35, 90 S. W. 502.

687-76 Holland v. S. (Tex. Cr.), 101 S. W. 1002 (publication in proper newspaper presumed).

687-77 See Hood v. S. (Tex. Cr.), 107 S. W. 848.

688-80 **Record of town meeting** competent and sufficient. S. v. Bollenbach, 98 Minn. 480, 108 N. W. 3.

688-82 Beaty v. S. (Tex. Cr.), 110 S. W. 449. *Compare* Gorman v. S. (Tex.), 106 S. W. 384.

689-84 S. v. O'Brien, 35 Mont. 482, 90 P. 514; S. v. Carmody (Or.), 91 P. 446; Fields v. S. (Tex. Cr.), 107 S. W. 857 (orders and decrees of commissioner ordering election and publication of result, admissible). See also S. v. Kline (Or.), 93 P. 237.

Proof of publication. — See also S. v. Oliphant, 128 Mo. App. 252, 107 S. W. 32; S. v. Haines (Mo. App.), 107 S. W. 36.

Testimony of commissioners inadmissible in absence of showing that records were lost or destroyed. S. v. Songer, 76 Ark. 169, 88 S. W. 903.

690-85 **Where provision for contesting** election is made, the defendant in a prosecution for violating the law cannot deny its validity. S. v. O'Brien, 35 Mont. 482, 90 P. 514.

But that notice of election was not published for time required, cannot be proved. S. v. O'Brien, supra.

Burden on defendant. — S. v. Kline (Or.), 93 P. 237.

691-92 S. v. Brown (Mo. App.), 109 S. W. 99. See also S. v. O'Brien, supra.

691-93 Wiginton v. S. (Tex. Cr.), 102 S. W. 1124.

693-12 *Compare* Whissen v. Furth, 73 Ark. 366, 84 S. W. 500.

693-13 Whissen v. Furth, supra; Hodges v. Court, 117 Ky. 619, 78 S. W. 177.

693-15 See also Carr v. Augusta, 124 Ga. 116, 52 S. E. 300.

694-22 See also City v. Jones, 31 Ky. L. R. 1203, 104 S. W. 970.

695-27 County of Moniteau v. Lewis, 123 Mo. App. 673, 100 S. W. 1107.

695-29 S. v. Madeira, 125 Mo. App. 508, 102 S. W. 1046 (sufficiency of notice to produce); S. v. Barnett, 110 Mo. App. 592, 85 S. W. 613; S. v. Walker (Mo. App.), 108 S. W. 615. See S. v. Barnett, 110 Mo. App. 584, 85 S. W. 615.

Parol evidence of license, admissible. Oldham v. S. (Tex. Cr.), 108 S. W. 667, *cit.* Henderson v. S. (Tex. Cr.), 39 S. W. 116. See also Joliff v. S. (Tex. Cr.), 109 S. W. 176.

696-31 S. v. Barnett, supra. See also White v. C., 107 Va. 901, 59 S. E. 1101. But see S. v. Barnett, supra; (an order of the court that a license issue is not evidence of its actual issuance), S. v. Madeira, 125 Mo. App. 508, 102 S. W. 1046 (not admissible to show actual delivery).

But not the testimony of a person not a revenue collector, who had examined the records. Biddy v. S. (Tex. Cr.), 107 S. W. 814. Apparently *contra*, Suggs v. S. (Tex. Cr.), 101 S. W. 999.

Examined copy, admissible, but not certificate of internal revenue officer showing issuance of license. Reed v. S. (Tex. Cr.), 108 S. W. 368.

697-42 **Transfer of license.** Burden of proving right to transfer license on party claiming such right. Hill v. Sheridan, 128 Mo. App. 415, 107 S. W. 426. The best evidence of the transfer is the license itself with the transfer endorsed thereon, and the best secondary evidence is the record of licenses by the city auditor. Oral evidence of the plaintiff is inadmissible. Hill v. Sheridan, 128 Mo. App. 415, 107 S. W. 426.

697-43 Weischelbaum v. Hayslip, 127 Ga. 417, 56 S. E. 413.

Where prohibition is the rule, the burden is on the plaintiff to show that the sale is lawful. Westheimer v. Habinck, 131 Ia. 643, 109 N. W. 189.

699-49 Frank v. Hillier (N. D.), 113 N. W. 1067.

700-56 See Garrigan v. Kennedy, 19 S. D. 11, 101 N. W. 1081.

700-57 Botwinis v. Allgood, 113 Ill. App. 188; Garrigan v. Kennedy, 19 S. D. 11, 101 N. W. 1081 (suicide of plaintiff's husband); Sullivan v. Conrad (Neb.), 112 N. W.

660. See Currier v. McKee, 99 Me. 364, 59 A. 442.

Question for jury. — Temme v. Schmidt, 210 Pa. 507, 60 A. 158; Triggs v. McIntyre, 215 Ill. 369, 74 N. E. 400, *aff.* 115 Ill. App. 257.

701-61 Woods v. Dailey, 211 Ill. 495, 71 N. E. 1068; Bristline v. Ney, 134 Ia. 172, 111 N. W. 422.

702-64 Howard v. McCabe (Neb.), 112 N. W. 305.

702-66 See Montross v. Alexander (Mich.), 116 N. W. 190.

702-68 Nor it would seem is it admissible as part of the plaintiff's case, though it was held harmless error in Mathre v. Devendorf, 130 Ia. 107, 106 N. W. 366.

Sale to minor. — Previous habits of intoxication may be shown as bearing on alleged shock to plaintiff's feelings. Bailey v. Briggs, 143 Mich. 303, 106 N. W. 863.

702-69 Kelly v. Malhoit, 115 Ill. App. 23.

Frequent previous drunkenness of the minor for whose death the action is brought, is admissible to show that the shock to plaintiff's feelings was less strong than it would otherwise have been. Bailey v. Briggs, 143 Mich. 303, 106 N. W. 863.

703-71 See Hilliker v. Farr, 149 Mich. 444 112 N. W. 1116; Pennington v. Gillespie (W. Va.), 61 S. E. 416 (evidence of sales by agent admitted).

703-75 But undelivered notice cannot be shown. Montross v. Alexander (Mich.), 116 N. W. 190.

703-77 Intoxication prior to sales complained of. — Evidence of habitual drunkenness on the part of the person to whom the illegal sales were made prior to the time stated in the declaration and continuance to the time of the sales complained of and knowledge on the part of the seller, admissible. Pennington v. Gillespie (W. Va.), 61 S. E. 416.

704-81 Montross v. Alexander (Mich.), 116 N. W. 190; Manzer v. Phillips, 139 Mich. 61, 102 N. W. 292 (testimony that plaintiff had children, reversible error).

Child dependent on plaintiff for support. Garrigan v. Kennedy, 19 S. D. 11, 101 N. W. 1081.

705-84 Sale to third party, inadmissible. Hilliker v. Farr, 149 Mich. 444, 112 N. W. 1116.

705-85 Merrinane v. Miller, 148 Mich. 412, 111 N. W. 1050.

707-91 That her children contribute to her support cannot be shown by plaintiff merely because she has been cross-examined as to her husband's earnings and business. Manzer v. Phillips, 139 Mich. 61, 102 N. W. 292.

707-92 That husband paid doctor's bills and funeral expenses occasioned by her son's death in an action of civil damages therefor, is inadmissible. Hilliker v. Farr, 149 Mich. 444, 112 N. W. 1116.

708-93 Garrigan v. Kennedy, 19 S. D. 11, 101 N. W. 1081.

708-94 Sufficiency of evidence to show actual damages. Garrigan v. Kennedy, supra.

708-95 Mathre v. Drug Co., 130 Ia. 111, 106 N. W. 368.

709-98 See also Mathre v. Drug Co., supra.

That children were unable to go to school, and since their father's death had been compelled to work, may be shown. Horst v. Lewis, 71 Neb. 365, 103 N. W. 460, *aff.* 98 N. W. 1046.

709-99 Plaintiff's ill health resulting from drunkenness of husband may be shown. Montross v. Alexander (Mich.), 116 N. W. 190.

709-1 Pennington v. Gillespie (W. Va.), 61 S. E. 416.

709-2 But presence of her children when plaintiff was informed of her husband's drunkenness has been held inadmissible in aggravation of damages. Manzer v. Phillips, 139 Mich. 61, 102 N. W. 292.

710-5 Young v. Beveridge (N. D.), 115 N. W. 766.

711-10 Price v. Wakeham (Tex. Cr.), 107 S. W. 132.

Burden on defendant to show good faith. — Farr v. Waterman (Tex. Civ.), 95 S. W. 65.

711-13 Emancipation of minor no defense. — Price v. Wakeham, supra.

Acquiescence of parent in sale to minor is a defense. Price v. Wakeham, supra.

712-15 Wakeham v. Price, (Tex. Civ.), 89 S. W. 1093.

712-17 Montross v. Alexander (Mich.), 116 N. W. 190.

714-21 But see Mathre v. Devendorf, 130 Ia. 107, 106 N. W. 366

(evidence of former suit held inadmissible).

714-23 Kelley v. Malhoit, 115 Ill. App. 23.

715-26 See ante, 705-85. Price v. Wakeham (Tex. Civ.), 107 S. W. 132 (bad character of plaintiff no defense).

720-50 But compliance with law with respect to the conditions precedent to opening a saloon must be proved by defendant. Jones v. Byington, 128 Ia. 397, 104 N. W. 473.

720-52 Sufficiency of affidavits. S. v. Jepson, 76 Kan. 644, 92 P. 600, 603.

725-76 Steinkuhler v. S. (Neb.), 109 N. W. 395; S. v. Barrett, 138 N. C. 630, 50 S. E. 506.

725-78 See also S. v. Kline (Or.), 93 P. 237.

Question for jury. — S. v. O'Brien, 35 Mont. 482, 90 P. 514. See also C. v. Price, 123 Ky. 163, 29 Ky. L. R. 593, 94 S. W. 32.

726-80 Lambie v. S. (Ala.), 44 S. 51. See also S. v. Storm, 74 Kan. 859, 86 P. 145.

On prosecution for maintaining a nuisance, it was held error to exclude evidence that defendant was selling under a license. Sopher v. S. (Ind.), 81 N. E. 913.

727-84 S. v. Nethken, 60 W. Va. 673, 55 S. E. 742.

727-85 S. v. Terry, 73 N. J. L. 554, 64 A. 113; S. v. Mulhern, 130 Ia. 46, 106 N. W. 267; S. v. Collins (R. I.), 67 A. 796; Devine v. C., 107 Va. 860, 60 S. E. 37.

Druggist license prima facie evidence that party selling is a druggist, and burden is on the state to disprove it. C. v. Byers (Ky.), 109 S. W. 895.

Possession of a druggist's permit is immaterial when intoxicating liquor is sold as a beverage, or where it is kept under circumstances which make the place a public nuisance. S. v. Giroux, 75 Kan. 695, 90 P. 249.

728-86 S. v. Gary, 124 Mo. App. 175, 101 S. W. 614.

728-87 Gaskins v. S., 127 Ga. 51, 55 S. E. 1045.

Presumption of ownership from delivery. — S v. Russell (Del.), 69 A. 839. See also Fisker v. S. (Fla.), 46 S. 422, and cases there cited.

729-92 And no accommodation loan or exchange of any commodity is a good defense. Sparks v. S. (Tex. Cr.), 99 S. W. 546.

But where served with lunch it was for the jury to say whether it was a sale or gift. Savage v. S., 50 Tex. Cr. 199, 88 S. W. 351. See also Barnes v. S. (Tex. Cr.), 88 S. W. 805.

730-4 Davis v. S., 145 Ala. 69, 40 S. 663 (contra by statute); S. v. Madeira, 125 Mo. App. 508, 102 S. W. 1046; Biddy v. S. (Tex. Cr.), 108 S. W. 689; Joliff v. S. (Tex. Cr.), 109 S. W. 176. But see Oldham v. S. (Tex. Cr.), 108 S. W. 667.

730-7 Though not made or verified by custodian. — S. v. Nippert, 74 Kan. 371, 86 P. 478; King v. S. (Tex. Cr.), 109 S. W. 182; Biddy v. S. (Tex. Cr.), 108 S. W. 689.

Constitutionality. — Admission of copy constitutional. S. v. Dowdy, 145 N. C. 432, 58 S. E. 1002; S. v. Toler, 145 N. C. 440, 58 S. E. 1005.

Sufficiency of copy. — S. v. Dowdy, supra; S. v. Toler, supra.

730-8 See Joliff v. S. (Tex. Cr.), 109 S. W. 176; Biddy v. S. (Tex. Cr.), 108 S. W. 689.

731-13 Druggist's affidavit required by law to be made and filed, that no sales had been made other than those shown in the prescriptions filed, is prima facie evidence of such sales. Edgar v. S. (Tex. Civ.), 102 S. W. 439.

732-15 See also S. v. Costa, 78 Vt. 198, 62 A. 38.

733-24 See infra, 752-28.

734-31 Hays v. S., 49 Tex. Cr. 369, 91 S. W. 585. See Oldham v. S. (Tex. Cr.), 108 S. W. 667; S. v. Costa, 78 Vt. 198, 62 A. 38.

But reason for defendant's refusal to take seventy-five cents found on table of his restaurant was held inadmissible. King v. S., 50 Tex. Cr. 321, 97 S. W. 488.

Gifts of whiskey in order to solicit business in violation of statute. Meadows v. S., 121 Ga. 362, 49 S. E. 268.

735-32 Donaldson v. S., 3 Ga. App. 451, 60 S. E. 115; S. v. Linder, 76 Ohio 463, 81 N. E. 753; Cross v. S., 49 Tex. Cr. 437, 94 S. W. 1015.

735-34 See Bonner v. S., 2 Ga. App. 711, 58 S. E. 1123; S. v. Ford, 76 Kan. 424, 91 P. 1066 (bills for liquors); S. v. Martel (Me.), 68 A.

454; Baughman v. S., 49 Tex. Cr. 33, 90 S. W. 166; S. v. Gillespie (W. Va.), 59 S. E. 957. See also Reynolds v. S., 52 Fla. 409, 42 S. 373. But see Harris v. S., 50 Tex. Cr. 411, 98 S. W. 842. *Compare* Myers v. S. (Tex. Cr.), 108 S. W. 392.

Letters ordering liquors and enclosing checks in payment, admissible. Goad v. S., 73 Ark. 625, 83 S. W. 935.

Evidence of receipt of packages, even where there was nothing to indicate their contents, held admissible. Goad v. S., supra.

Bills and Accounts. — S. v. Corn, 76 Kan. 416, 91 P. 1067.

736-36 S. v. Kennard, 74 N. H. 76, 65 A. 376; Roberts v. S. (Tex. Cr.), 107 S. W. 59.

737-46 C. v. Riley, 196 Mass. 60, 81 N. E. 881. See also Cantwell v. S., 47 Tex. Cr. 521, 85 S. W. 18 (revocation of instructions).

738-47 See also S. v. Barnett, 110 Mo. App. 584, 85 S. W. 615.

738-50 Guarreno v. S., 148 Ala. 637, 42 S. 833.

Wife—Authority presumed. — Trometer v. D. C., 24 App. D. C. 242.

739-57 Ellington v. S. (Tex. Cr.), 86 S. W. 330; Webb v. S. (Tex. Cr.), 86 S. W. 331.

739-64 Walker v. S., 49 Tex. Cr. 345, 94 S. W. 230; Jackson v. S. 49 Tex. Cr. 248, 91 S. W. 574. See also S. v. Dahlquist (N. D.), 115 N. W. 81 (receipt for goods signed by consignee's agent). *Compare* Cox v. S., 3 Ga. App. 609, 60 S. E. 283. But see Stanley v. S., 89 Miss. 63, 42 S. 284; Gorman v. S. (Tex. Cr.), 105 S. W. 200.

739-65 See also Biddy v. S. (Tex. Cr.), 108 S. W. 689 (testimony as to bar fixtures, admitted); S. v. Suiter, 78 Vt. 391, 63 A. 182 (paraphernalia on defendant's premises, admissible).

Paraphernalia found on premises of another person, but in same building in adjoining and connected room admitted where evidence showed close intimacy with such person. S. v. Suiter, supra.

That a place was a public resort and an unusual quantity of liquor was found there raises a presumption that liquor was kept for illegal sale. Bohstedt v. Teufel (Ia.), 106 N. W. 513.

Finding of empty flask-shaped bottles purporting to contain ginger, and statement of chemist that he had never seen medicinal ginger put up in bottles of such shape, held admissible. S. v. Krinski, 78 Vt. 162, 62 A. 37.

740-67 S. v. Thompson, 76 Kan. 365, 91 P. 79; Craddick v. S., 48 Tex. Cr. 385, 88 S. W. 347; Smith v. S. (Tex. Cr.), 107 S. W. 819; McNeely v. S., 49 Tex. Cr. 286, 92 S. W. 419; Frazier v. S. (Tex. Cr.), 105 S. W. 508; Harris v. S., 50 Tex. Cr. 411, 98 S. W. 842. See Henderson v. S. (Tex. Cr.), 107 S. W. 820; *Compare* Riggs v. S. (Tex. Cr.), 96 S. W. 25; Owens v. S. (Tex. Cr.), 96 S. W. 31; Thompson v. S. (Tex. Cr.), 97 S. W. 316.

Complaints to town marshal previous to prosecution are inadmissible. Brighton v. Miles (Ala.), 44 S. 394.

Conversation explanatory of receipt of letters ordering liquor, held admissible. Goad v. S., 73 Ark. 625, 83 S. W. 935.

Statements out of defendant's presence. — Brighton v. Miles (Ala.), 44 S. 394; S. v. Kennard, 74 N. H. 76, 65 A. 376; Marks v. S., 49 Tex. Cr. 274, 92 S. W. 414; Holmes v. S. (Tex.), 106 S. W. 1160; Pride v. S. (Tex. Cr.), 107 S. W. 819. *Compare* Lambie v. S. (Ala.), 44 S. 51; Henderson v. S., 50 Tex. Cr. 604, 101 S. W. 208.

741-68 But evidence of liquors belonging to another in defendant's house was admitted in Benson v. S. (Tex. Cr.), 101 S. W. 224.

741-71 S. v. Krinski, 78 Vt. 162, 62 A. 37 (wrangling of intoxicated persons).

741-72 Houtz v. P., 123 Ill. App. 445 (loud and profane language). *Compare* Biddy v. S. (Tex. Cr.), 108 S. W. 689.

742-77 Gorman v. S. (Tex. Cr.), 106 S. W. 384; Gorman v. S. (Tex. Cr.), 105 S. W. 200 (reputation as "blind tiger" inadmissible). But see S. v. Brooks, 74 Kan. 175, 85 P. 1013.

General reputation admissible to show character of house denounced by statute. Joliff v. S. (Tex. Cr.), 109 S. W. 176.

745-90 Smith v. S., 3 Ga. App. 326, 59 S. E. 934; Cohn v. S. (Tenn.), 109 S. W. 1149; S. v. Suiter, 78 Vt.

391, 63 A. 182; S. v. Krinski, 78 Vt. 162, 62 A. 37. See also "COMPETENCY," Vol. 3, p. 182, and cases supplementing.

745-91 See also S. v. Costa, 78 Vt. 198, 62 A. 38.

745-94 Collins v. S. (Ala.), 44 S. 571.

747-1 See Louisville & N. R. Co. v. C., 31 Ky. L. R. 683, 103 S. W. 349. See also ante, 742-77.

747-2 *Contra.* — Reed v. S. (Tex. Cr.), 108 S. W. 368, and see also Henderson v. S., 49 Tex. Cr. 269, 91 S. W. 569.

Sale of Peruna. — Stelle v. S., 77 Ark. 441, 92 S. W. 530.

748-6 *Compare* Kittrell v. S., 89 Miss. 666, 42 S. 609.

748-7 Holly v. Simmons, 38 Tex. Civ. 124, 85 S. W. 325.

749-8 **Admissibility** in mitigation of punishment. Scott v. S., 47 Tex. Cr. 176, 82 S. W. 656.

749-9 Louisville & N. R. Co. v. C., 31 Ky. L. R. 683, 103 S. W. 349; Ferguson v. S., 50 Tex. Cr. 155, 95 S. W. 111; State v. Smith, 61 W. Va. 329, 56 S. E. 528. And information or notice that liquor was intoxicating has been held admissible. Henderson v. S., 49 Tex. Cr. 269, 91 S. W. 569. See also supra, 747-1. But see Cantwell v. S., 47 Tex. Cr. 521, 85 S. W. 18.

749-10 Louisville & N. R. Co. v. C., 31 Ky. L. R. 683, 103 S. W. 349.

Evidence of other sales admitted as shedding light on bona fides of accused. Sweat v. S. (Ala.), 45 S. 588.

749-11 Ferguson v. S., 50 Tex. Cr. 155, 95 S. W. 111.

751-19 See supra, 711-13.

751-20 **Immaterial in action for breach of bond.** Krick v. Dow (Tex. Civ.), 84 S. W. 245.

752-25 Smothers v. Jackson (Miss.), 45 S. 982 (reputation as keeper of "Blind Tiger" inadmissible); Gorman v. S. (Tex. Cr.), 105 S. W. 200. See also supra, 742-77.

752-26 Goad v. S., 73 Ark. 625, 83 S. W. 935.

Bill and accounts to show kind of business, admissible in prosecution for keeping a nuisance. S. v. Corn, 76 Kan. 416, 91 P. 1067.

752-28 Park v. S. (Tex. Cr.), 98 S. W. 243; Walker v. S., 49 Tex. Cr. 345, 94 S. W. 230.

Possession of license by another party with whom defendant was doing business may be shown. Suggs v. S. (Tex. Cr.), 101 S. W. 999. But see Biddy v. S. (Tex. Cr.), 107 S. W. 814.

Subsequent payment of such tax inadmissible. Lane v. S., 49 Tex. Cr. 335, 92 S. W. 839.

Prima facie evidence. Hestand v. C., 28 Ky. L. R. 1315, 92 S. W. 12; Magee v. S. (Tex. Cr.), 98 S. W. 245. And see S. v. Martel (Me.), 68 A. 454; S. v. Nethken, 60 W. Va. 673, 55 S. E. 742. But see Uloth v. S., 48 Tex. Cr. 295, 87 S. W. 823.

752-29 Denton v. S. (Tex. Cr.), 105 S. W. 199.

752-30 Fox v. S. (Tex. Cr.), 109 S. W. 370. See Peyton v. S., 83 Ark. 102, 102 S. W. 1110 (mere certificate of internal revenue collector inadmissible to show license).

Such a statute constitutional. — S. v. Toler, 145 N. C. 440, 58 S. E. 1005; S. v. Dowdy, 145 N. C. 432, 58 S. E. 1002; King v. S. (Tex. Cr.), 109 S. W. 182.

Meaning of prima facie evidence under these statutes. S. v. Momberg, 14 N. D. 291, 103 N. W. 566.

753-33 Dillard v. S. (Ala.), 44 S. 537; McClure v. S., 148 Ala. 625, 42 S. 813; Kittrell v. S., 89 Miss. 666, 42 S. 609; Swalm v. S., 49 Tex. Cr. 241, 91 S. W. 575; S. v. Pierce, 111 Mo. App. 216, 85 S. W. 663. *Compare* Rice v. P., 40 Colo. 377, 90 P. 1031; Driver v. S., 48 Tex. Cr. 20, 85 S. W. 1056; S. v. Gillespie (W. Va.), 59 S. E. 957. See P. v. Seeley, 105 App. Div. 149, 93 N. Y. S. 982, *aff.* in 183 N. Y. 544, 76 N. E. 1102; Rutherford v. S., 48 Tex. Cr. 431, 88 S. W. 810; Devine v. C., 107 Va. 860, 60 S. E. 37. But see Smith v. S. (Tex. Cr.), 100 S. W. 953; Kehoe v. C., 28 Ky. L. R. 35, 88 S. W. 1107.

Other legitimate sales cannot be shown. Blasingame v. S., 47 Tex. Cr. 582, 85 S. W. 275.

Evidence of sales to other persons inadmissible. Devine v. C., 107 Va. 860, 60 S. E. 37.

Two sales constituting one transaction may be shown. S. v. O'Brien, 35 Mont. 482, 90 P. 514.

Under different counts.—Where there

were counts for selling and counts for keeping and exposing for sale without a license, evidence of other sales was held admissible. S. v. Barr, 78 Vt. 97, 62 A. 43.

754-36 Louisville etc. Co. v. C., 31 Ky. L. R. 683, 103 S. W. 349; S. v. Peterson, 98 Minn. 210, 108 N. W. 6; Morris v. S., 48 Tex. Cr. 562, 89 S. W. 832; Walker v. S., 49 Tex. Cr. 345, 94 S. W. 230; Carnes v. S. (Tex. Cr.), 103 S. W. 403; Childress v. S., 48 Tex. Cr. 617, 90 S. W. 30; Roach v. S., 47 Tex. Cr. 500, 84 S. W. 586. See also Goode v. S., 50 Fla. 461, 39 S. 461; Gorman v. S. (Tex.), 106 S. W. 384, and supra, 749-10. But see Holland v. S., 51 Tex. Cr. 142, 101 S. W. 1001. *Compare* McKinley v. S. (Tex.), 106 S. W. 342.

And a previous acquittal of making another sale does not render the evidence inadmissible. Stovall v. S. (Tex. Cr.). 97 S. W. 92.

But that defendant was subsequently convicted of selling intoxicating liquor and still continues to do so cannot be shown. Henderson v. S., 49 Tex. Cr. 478, 93 S. W. 551.

On prosecution for nuisance other sales are admissible. S. v. O'Malley, 132 Ia. 696, 109 N. W. 491.

Unlawfully keeping intoxicating liquor being a continuing offense, evidence is admissible that same condition existed, both before and after the day named (within reasonable limits), for the purpose of showing the intent with which the liquor was kept on the day set forth in the complaint. S. v. Collins (R. I.), 67 A. 796.

755-38 S. v. Costa, 78 Vt. 198, 62 A. 38 (prior sales admissible).

756-40 S. v. Baker (Or.), 92 P. 1076 (allowing female to remain in saloon contrary to statute).

756-42 Dillard v. S. (Ala.), 44 S. 537; Untreiner v. S., 146 Ala. 133, 41 S. 170; Scott v. S. (Ala.), 43 S. 181; Abrams v. S. (Ala.), 46 S. 464.

758-53 But presence of defendant in a place where law was violated four days after the prosecution was begun is irrelevant. S. v. Thompson, 76 Kan. 365, 91 P. 79.

759-62 Bills for liquor. — S. v. Corn, 76 Kan. 416, 91 P. 1066.

760-70 Myers v. S. (Tex. Cr.), 108 S. W. 392 (*over.* Parish v. S., 48 Tex. Cr. 578, 89 S. W. 830; Harris v. S., 50 Tex. Cr. 411, 97 S. W. 704 and Harris v. S. (Tex. Cr.), 100 S. W. 920); King v. S. (Tex. Cr.), 97 S. W. 488; S. v. Suiter, 78 Vt. 391, 63 A. 182. See also Ward v. S., 51 Fla. 133, 40 S. 177, and see supra, 745-90.

Evidence of ownership admissible, though unnecessary. Whitfield v. S., 2 Ga. App. 124, 58 S. E. 385.

Possession of unusual quantity of liquor raises a presumption of keeping for illegal sale. Bohstedt v. Teufel (Ia.), 106 N. W. 513.

Possession of other kinds of liquors may be shown as bearing on question whether the kind alleged was kept for illegal sale. S. v. Krinski, 78 Vt. 162, 62 A. 37 (possession of Jamaica ginger).

Statutory presumption of ownership from delivery (Goode v. S., 50 Fla. 461, 39 S. 461), and of guilt from possession, S. v. McIntyre, 139 N. C. 599, 52 S. E. 63.

Bottles and other articles from place charged to be a nuisance held admissible, even though contents of a part of them not shown to contain intoxicating liquor. S. v. Giroux, 75 Kan. 695, 90 P. 249. See also S. v. Collins (R. I.), 67 A. 796 (empty bottles on driveway); S. v. Files, 71 Kan. 862, 80 P. 948 (bottles of whiskey seized under warrant admitted); Reynolds v. S., 52 Fla. 409, 42 S. 373 (jugs smelling of whiskey found at defendant's place of business admissible).

Possession presumptive evidence of transportation, on prosecution for illegal transportation. S. v. Pope (S. C.), 60 S. E. 234. But may be rebutted. Vann v. S., 140 Ala. 122, 37 S. 158.

Liquor belonging to others. — Defendant cannot show that he kept liquor in storage for others. Donald v. S. (Miss.), 41 S. 4.

761-72 Weil v. S., 48 Tex. Cr. 603, 90 S. W. 644; King v. S., 51 Tex. Cr. 208, 97 S. W. 488; McKinley v. S., 47 Tex. Cr. 222, 82 S. W. 1042 (at express office).

On premises of another person. — S. v. Suiter, 78 Vt. 391, 63 A. 182.

761-73 S. v. Collins (R. I.), 67 A. 796.

761-74 S. v. Kennard (N. H.),

65 A. 376; S. v. Collins (R. I.), 67 A. 796; King v. S., 51 Tex. Cr. 208, 97 S. W. 488.

But possession of empty beer bottles, inadmissible. O'Shennessey v. S., 49 Tex. Cr. 600, 96 S. W. 790.

762-75 King v. S., 51 Tex. Cr. 208, 97 S. W. 488.

762-76 Baughman v. S., 49 Tex. Cr. 33, 90 S. W. 166 (shipments to defendant during the year). *Compare* Carnes v. S. (Tex. Cr.), 103 S. W. 403.

Subsequent to offense. — Finding liquor three days after sale, admissible. Starbuck v. S. (Tex. Cr.), 109 S. W. 162 (*cit.* Wagner v. S. (Tex. Cr.), 109 S. W. 169; Myers v. S. (Tex. Cr.), 108 S. W. 392, and stating that in the latter case Parish v. S., 48 Tex. Cr. 578, 89 S. W. 830, Harris v. S., 51 Tex. Cr. 564, 98 S. W. 842, and O'Shennessey v. S., 49 Tex. Cr. 600, 96 S. W. 790, are expressly overruled). See Myers v. S. (Tex. Cr.), 108 S. W. 392; Riggs v. S. (Tex. Cr.), 96 S. W. 25.

762-77 See S. v. Dahlquist (N. D.), 115 N. W. 81; S. v. Kiger (W. Va.), 61 S. E. 362.

763-78 S. v. Collins (R. I.), 67 A. 796; S. v. Costa, 78 Vt. 198, 62 A. 38.

763-81 S. v. O'Malley, 132 Ia. 696, 109 N. W. 491; Walker v. S., 49 Tex. Cr. 345, 94 S. W. 230; Holland v. S., 51 Tex. Cr. 142, 101 S. W. 1005. See Teague v. S., 51 Tex. Cr. 526, 102 S. W. 1141 (taking orders for whiskey within local option district, held admissible).

Prior sales, under an indictment for nuisance, admissible. S. v. Moore (Ia.), 106 N. W. 268; S. v. Wick, 130 Ia. 31, 106 N. W. 268.

763-82 Goode v. S., 50 Fla. 45, 39 S. 461 (the crime may be proved by showing systematic course of trade as well as a single act). And the state was allowed to prove in Joliff v. S. (Tex. Cr.), 109 S. W. 176, that persons other than the accused sold liquor at the house kept by accused, to show the house was kept for the purpose of selling such liquor.

764-85 Henderson v. S., 49 Tex. Cr. 269, 91 S. W. 569; S. v. Nethken 60 W. Va. 673, 55 S. E. 742.

765-97 Harris v. S., 51 Tex. Cr. 564 98 S. W. 842; Starnes v. S. (Tex. Cr.), 107 S. W. 550 (sale to witness). See also Deisher v. S. (Tex. Cr.), 96 S. W. 28 (testimony of minor as to payment).

Evidence confined to sale. — Guarreno v. S., 148 Ala. 637, 42 S. 833.

766-6 Mitchell v. S., 141 Ala. 90, 37 S. 407; Ledbetter v. S., 143 Ala. 52, 38 S. 836; Reynolds v. S., 52 Fla. 409, 42 S. 373; Walker v. S., 122 Ga. 747, 50 S. E. 994; Sowell v. S., 126 Ga. 105, 54 S. E. 916; Graves v. S., 127 Ga. 46, 56 S. E. 72; Southern Exp. Co. v. S., 1 Ga. App. 700, 58 S. E. 67; Donaldson v. S., 3 Ga. App. 451, 60 S. E. 115; Teasley v. S., 124 Ga. 794, 53 S. E. 102; Robinsou v. S., 125 Ga. 31, 53 S. E. 766; Dowdy v. C., 31 Ky. L. R. 33, 101 S. W. 338; Adams Exp. Co. v. C., 29 Ky. L. R. 224, 92 S. W. 932; Cable v. S. (Miss.), 38 S. 98; Price v. S. (Miss.), 38 S. 41; Harper v. S., 85 Miss. 338, 37 S. 956; Young v. S. (Tex. Cr.), 90 S. W. 1017; Givens v. S., 49 Tex. Cr. 267, 91 S. W. 1090; Smith v. S., (Tex. Cr.), 97 S. W. 499; Dupree v. S. (Tex. Cr.), 91 S. W. 578; Roberson v. S. (Tex. Cr.), 91 S. W. 578; Brunson v. S. (Tex. Cr.), 91 S. W. 582; Oldham v. S. (Tex. Cr.), 108 S. W. 667; Gaddis v. S. (Tex.), 106 S. W. 1155; Cantwell v. S., 47 Tex. Cr. 521, 85 S. W. 18; Blasingame v. S., 47 Tex. Cr. 582, 85 S. W. 275; Williams v. S., 48 Tex. Cr. 75, 85 S. W. 1144; Conk v. S. (Tex. Cr.), 89 S. W. 641; Hoyt v. S. (Tex. Cr.), 89 S. W. 1082; Sawyer v. S. (Tex. Cr.), 108 S. W. 394; Owens v. S. (Tex. Cr.), 96 S. W. 31; Potts v. S. (Tex. Cr.), 108 S. W. 660; Bittix v. S., 48 Tex. Cr. 232, 87 S. W. 348; Curtis v. S. (Tex. Cr.), 108 S. W. 380; Hays v. S., 49 Tex. Cr. 369, 91 S. W. 585; O'Neal v. S., 49 Tex. Cr. 297, 92 S. W. 417; Choran v. S., 49 Tex. Cr. 301, 92 S. W. 422; Lane v. S., 49 Tex. Cr. 335, 92 S. W. 839; Cooper v. S. (Tex. Cr.), 105 S. W. 1126; Human v. S. (Tex. Cr.), 107 S. W. 817, *cit.* Owens v. S. (Tex. Cr.), 107 S. W. 548; Morton v. S. (Tex. Cr.), 107 S. W. 549; Frazier v. S. (Tex. Cr.), 105 S. W. 508. See also Goode v. S., 50 Fla. 45, 39 S. 461; Weil v. S., 48 Tex. Cr. 603, 90 S. W. 644. *Compare* Kelly v. C., 26 Ky. L. R. 1038, 83 S. W. 99.

Evidence sufficient. — Fisher v. S. (Fla.), 46 S. 422; Gibbs v. U. S. (Ind. Ter.), 104 S. W. 583; Day v. C., 29 Ky. L. R. 807. 814, 816, 96 S. W. 508; S. v. Budworth (Minn.), 116 N. W. 486; S. v. Brown, 130 Mo. App. 214, 109 S. W. 99; S. v. Scanlon, 130 Mo. App. 395, 110 S. W. 16; S. v. Herring, 145 N. C. 418, 58 S. E. 1007; C. v. Pollak, 33 Pa. Super. 600; Goad v. S. (Tex. Cr.), 108 S. W. 680; Owens v. S., 47 Tex. Cr. 634, 96 S. W. 31; Loving v. S. (Tex. Cr.), 100 S. W. 154; Feagin v. S. (Tex. Cr.), 100 S. W. 776; Hall v. S. (Tex. Cr.), 109 S. W. 933; Dunn v. S., 48 Tex. Cr. 107, 86 S. W. 326; Brunson v. S. (Tex. Cr.), 91 S. W. 582; Nicholson v. S., 48 Tex. Cr. 223, 87 S. W. 343; Oldham v. S. (Tex. Cr.), 108 S. W. 667 (conspiracy to make sales).

Evidence insufficient. — Bonner v. S., 2 Ga. App. 711, 58 S. E. 1123; Harris v. S., 47 Tex. Cr. 588, 85 S. W. 1198; Bittix v. S., 48 Tex. Cr. 232, 87 S. W. 348; Tippit v. S. (Tex. Cr.), 109 S. W. 190; Gaston v. S. (Tex. Cr.), 102 S. W. 116; Loving v. S. (Tex. Cr.), 100 S. W. 154; Feagin v. S. (Tex. Cr.), 100 S. W. 776; King v. S. (Tex. Cr.), 109 S. W. 182; Lane v. S., 49 Tex. Cr. 335, 92 S. W. 839; Ferguson v. S., 50 Tex. Cr. 155, 95 S. W. 111; Sims v. S. (Tex. Cr.), 86 S. W. 1019; Chenowith v. S., 50 Tex. Cr. 238, 96 S. W. 19; Harris v. S., 47 Tex. Cr. 588, 85 S. W. 284.

Whether device or subterfuge. Turner v. S., 121 Ga. 172, 48 S. E. 906; Walker v. S., 49 Tex. Cr. 345, 94 S. W. 230; Noble v. C., 32 Ky L. R. 873, 105 S. W. 413; Lemore v. C., 32 Ky. L. R. 387, 105 S. W. 930 (subsequent borrowing money from party to whom defendant had given whiskey not a sale); S. v. Melton, 130 Mo. App. 262, 109 S. W. 858; Jones v. S. (Tex. Cr.), 107 S. W. 849; Scott v. S. (Tex. Cr.), 105 S. W. 796; Renfro v. S. (Tex. Cr.), 91 S. W. 576; Hays v. S., 47 Tex. Cr. 150, 83 S. W. 201.

Circumstantial evidence to establish sale is admissible. Starnes v. S. (Tex. Cr.), 107 S. W. 550; Johnson v. S. (Tex. Cr.), 107 S. W. 816. See also S. v. O'Malley, 132 Ia. 696, 109 N. W. 491.

Soliciting orders. — Bruce v. S. (Tex. Cr.), 92 S. W. 1092.

Delivery. — And until a sale is proved, evidence cannot be admitted of delivery of liquor to defendant. Brighton v. Miles (Ala.), 44 S. 394.

Payment in metal checks held sufficient to prove sale. Duke v. S., 146 Ala. 138, 41 S. 170.

Exchange of brandy for peaches held a sale. Barnes v. S. (Tex. Cr.), 88 S. W. 804.

767-7 S. v. Nelson, 14 N. D. 297, 103 N. W. 609; Jackson v. S., 49 Tex. Cr. 248, 91 S. W. 574; Roach v. S., 47 Tex. Cr. 500, 84 S. W. 586.

767-8 See also Ledbetter v. S., 143 Ala. 52, 38 S. 836.

767-15 Mills v. S., 148 Ala. 633, 42 S. 816.

767-16 P. v. Dietrich, 142 Mich. 527, 105 N. W. 1112. See also Collins v. S. (R. I.), 67 A. 796. *Contra*, Harding v. C., 105 Va. 858, 52 S. E. 832.

But must be prior to indictment. Vaughan v. S. (Tex. Cr.), 93 S. W. 741. See Bragg v. S., 126 Ga. 442, 55 S. E. 232 (evidence held insufficient to show a sale prior to finding of indictment).

Proof of sale prior to indictment and not within bar of statute, sufficient. Stelle v. S., 77 Ark. 441, 92 S. W. 530. See also DeArmon v. S. (Tex. Cr.), 97 S. W. 479; Pitts v. S., 124 Ga. 79, 52 S. E. 147, *cit.* Green v. S., 115 Ga. 254, 41 S. E. 642.

768-17 Sims v. S. (Tex. Cr.), 86 S. W. 1019. See also Lambie v. S. (Ala.), 44 S. 51; Stanley v. S., 89 Miss. 63, 42 S. 284; S. v. Gilsen, 114 Mo. App. 652, 90 S. W. 400 (evidence sufficient); Parker v. S., 48 Tex. Cr. 69, 85 S. W. 1155; Green v. S., 49 Tex. Cr. 204, 87 S. W. 1043 (evidence insufficient); Wolf v. S., 48 Tex. Cr. 54, 93 S. W. 742.

768-18 See also S. v. Williams, 20 S. D. 492, 107 N. W. 830; O'Shennessey v. S., 49 Tex. Cr. 600, 96 S. W. 790.

768-21 But evidence of sale to an agent of a disclosed principal will not support an indictment for selling to an agent as an individual. Barlow v. S., 127 Ga. 58, 56 S. E. 131.

768-22 Southern Exp. Co. v.

S., 1 Ga. App. 700, 58 S. E. 67. But this is not so in South Dakota. S. v. Williams, 20 S. D. 492, 107 N. W. 830.

769-24 Porter v. S. (Tex. Cr.), 86 S. W. 1014. See also Rice v. P., 40 Colo. 377, 90 P. 1031.

769-25 See also James v. S., 49 Tex. Cr. 334, 91 S. W. 227. But the evidence must show liquor sold is one judicially known as intoxicating or that the liquor sold was in fact intoxicating. Beaty v. S. (Tex. Cr.), 110 S. W. 449. See also Bird v. S., 49 Tex. Cr. 205, 91 S. W. 791.

769-26 Southern Exp. Co. v. S., 1 Ga. Ap. 700, 58 S. E. 67. See also Graham v. S., 121 Ga. 590, 49 S. E. 678.

770-35 S. v. Demoss, 74 Kan. 173, 85 P. 937 (proof of actual sales unnecessary). See Sopher v. S. (Ind.), 81 N. E. 913 (evidence held insufficient).

770-36 But see S. v. Poull, 14 N. D. 557, 105 N. W 717.

771-45 S. v. Suiter, 78 Vt. 391, 63 A. 182. See also S. v. Collins (R. I.), 67 A. 796. But see Patterson v. Batesville (Miss.), 37 S. 560.

771-46 Sawyer v. Blakely, 2 Ga. App. 159, 58 S. E. 399.

772-52 Birmingham v. P., 40 Colo. 362, 90 P. 1121; City v. Moran, 121 Mo. App. 682, 97 S. W. 948; S. v. Grant, 20 S. D. 164, 105 N. W. 97 (such evidence unexplained will justify conviction). See S. v. Madeira, 125 Mo. 508, 102 S. W. 1046; Smith v. S. (Tex. Cr.), 107 S. W. 353. But see Beane v. S., 72 Ark. 368, 80 S. W. 573; Kolman v. S., 2 Ga. App. 648, 58 S. E. 1070.

772-53 Duluth v. Abrahamson, 96 Minn. 39, 104 N. W. 682; Griffith v. S., 48 Tex. Cr. 575, 89 S. W. 832. See S. v. Meagher, 114 Mo. App. 266, 89 S. W. 595.

772-55 See also Cranfill v. S., 49 Tex. Cr. 397, 92 S. W. 846.

773-60 See also S. v. Barnett, 111 Mo. App. 688, 86 S. W. 572.

773-61 See also C. v. Price, 123 Ky. 163, 29 Ky. L. R. 593, 94 S. W. 32; S. v. Gary, 124 Mo. App. 175, 101 S. W. 614.

773-63 Krick v. Dow (Tex. Cr.), 84 S. W. 245. See also S. v. Hawkins, 96 Minn. 140, 104 N. W. 898; Ferguson v. S., 50 Tex. Cr. 155, 95 S. W. 111.

774-65 Rowe v. C., 24 Ky. L. R. 914, 70 S. W. 407.

775-75 Morgan v. C., 30 Ky. L. R. 139, 97 S. W. 411; S. v. Midkiff, 125 Mo. App. 397, 102 S. W. 590; Holland v. S. (Tex. Cr.), 101 S. W. 1002. See also City v. Jones, 31 Ky. L. R. 203, 104 S. W. 971.

Sale by agent sufficient. — S. v. O'Malley, 132 Ia. 696, 109 N. W. 491; Schwulst v. S. (Tex. Cr.), 108 S. W. 698.

775-76 McNulty v. S. (Ind. App.), 81 N. E. 109; Pecaria v. S., 48 Tex. Cr. 139, 90 S. W. 42; Sweeney v. S., 49 Tex. Cr. 226, 91 S. W. 575. See also Kittrell v S., 89 Miss. 666, 42 S. 609; S. v. Barnett, 111 Mo. App. 688, 86 S. W. 572.

775-77 S. v. Pierce, 111 Mo. App. 216, 85 S. W. 663.

775-78 McGovern v. S., 49 Tex. Cr. 35, 90 S. W. 502; Roberts v. S. (Tex. Cr.), 107 S. W. 59. See also City v. Jones, 31 Ky. L. R. 971, 104 S. W. 971 (suit on liquor dealer's bond).

776-80 See also Lambie v. S. (Ala.), 44 S. 51.

INTOXICATION [Vol. 7.]

777-1 Parker v. S. (Ala.), 45 S. 248; S. v. Sparegrove, 134 Ia. 599, 112 N. W. 83; S. v. Bennett, 128 Ia. 713, 105 N. W. 324; Henderson v. S., 49 Tex. Cr. 269, 91 S. W. 569; Pace v. S. (Tex. Cr.), 79 S. W. 531; S. v. Nethken, 60 W. Va. 673, 55 S. E. 742.

Sufficiency of observation is a question resting in discretion of court. Clarke v. R. Co., 92 Minn. 418, 100 N. W. 231.

777-2 C. v. Eyler, 217 Pa. 512, 66 A. 746.

777-3 Henderson v. S., 49 Tex. Cr. 269, 91 S. W. 569.

778-4 Parker v. S. (Ala.), 45 S. 248; Miller v. P., 216 Ill. 309, 74 N. E. 743; S. v. Trueman, 34 Mont. 249, 85 P. 1024; C. v. Eyler, 217 Pa. 512, 66 A. 746; Henderson v. S., supra.

778-5 Danley v. Hibbard, 222 Ill. 88, 78 N. E. 39; Seaborn v. C., 25

Ky. L. R. 2203; 80 S. W. 223; Bedenbaugh v. R. Co., 69 S. C. 1, 48 S. E. 53. See McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503.

778-6 Kozlowski v. Chicago, 113 Ill. App. 513.

778-7 Campbell v. Fidelity Co., 109 Ky. 661, 60 S. W. 492; Lambert v. Hamlin, 73 N. H. 138.

But habitual intemperance may be shown to prove neglect of duty as the proximate cause of injury. Texas etc. R. Co. v. Coutouria, 135 Fed. 465.

779-8 Sharpton v. R. Co., 72 S. C. 162, 51 S. E. 553.

780-12 Laws v. S., 144 Ala. 118, 42 S. 40; Byrd v. S., 76 Ark. 286, 88 S. W. 974; S. v. Truitt, 5 Penne. (Del.) 466, 62 A. 790 (assault to commit rape); S. v. Adams (Del.), 65 A. 510; Bliech v. P., 227 Ill. 80, 81 N. E. 36; S. v. Yates, 132 Ia. 475, 109 N. W. 1005; Norman v. C., 31 Ky. L. R. 1283, 104 S. W. 1024; Seaborn v. C., 25 Ky. L. R. 2203, 80 S. W. 223; C. v. McDonald, 187 Mass. 581, 73 N. E. 852 (embezzlement); Butler v. S. (Miss.), 39 S. 1005; S. v. Woodward, 191 Mo. 617, 90 S. W. 90; McCormick v. S., 66 Neb. 337, 92 N. W. 606. See P. v. Griffith, 146 Cal. 339, 80 P. 68; Miller v. P., 216 Ill. 309, 74 N. E. 743; Carney v. U. S. (Ind. Ter.), 104 S. W. 606; C. v. Eyler, 217 Pa. 512, 66 A. 746.

Insanity resulting from intoxication may be shown. — C. v. Parsons, 195 Mass. 560, 81 N. E. 291.

Mistake may be shown by evidence that defendant was intoxicated. Garrett v. S., 49 Tex. Cr. 235, 91 S. W. 577.

Inability to entertain specific intent. Offer must be made to show such degree of intoxication, or the evidence may be excluded. Ryan v. U. S., 26 App. D. C. 74.

JUDGMENTS [Vol. 7.]

Judgment in equity conclusive on trial at law, 852-90; *Exceptions to rules in civil cases,* 852-90; *Exceptions to rules in criminal cases in prosecution for perjury,* 852-90.

785-1 Page v. Garver, 5 Cal. App. 383, 90 P. 481; Crovatt v. Baker (Ga.), 61 S. E. 127; Connelly v. Omaha (Neb.), 112 N. W. 360.

785-2 Missouri Ins. Co. v. Lovelace (Ga.), 58 S. E. 93; McCullough v. Connelly (Ia.), 114 N. W. 301; School Twp. v. School Dist., 134 Ia. 349, 112 N. W. 5; Cotter v. R. Co., 190 Mass. 302, 76 N. E. 910; Corbett v. Craven, 193 Mass. 130, 82 N. E. 37, 78 N. E. 748; Couch v. Harp, 201 Mo. 457, 100 S. W. 9; Harris & Cole Bros. v. W. & L. Co., 114 Tenn. 328, 85 S. W. 897.

785-3 Brown v. Clark (Conn.), 68 A. 1001.

786-5 Gering v. School Dist., 76 Neb. 219, 107 N. W. 250; McLennon v. Fenner, 19 S. D. 492, 104 N. W. 218; Pereles v. Gross, 126 Wis. 122, 105 N. W. 217; Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119.

786-9 Field v. Field, 215 Ill. 496, 74 N. E. 443; Logan v. Flattau (N. J. Eq.), 67 A. 1007.

787-10 Diltmer v. Mierandorf, 129 Ia. 643, 106 N. W. 158; Clarke & Co. v. Doyle (N. D.), 116 N. W. 348; Bank v. Reed, 232 Ill. 238, 83 N. E. 820.

Presumption in favor of. — Chicago etc. R. Co. v. Grantham, 165 Ind. 279, 75 N. E. 265.

787-12 Murray v. Strong, 2 Alaska 517; Converse v. Bank, 79 Conn. 163, 64 A. 341.

787-13 Ely v. Ins. Co. (Ky.), 110 S. W. 265; Fitch v. Huntington, 125 Wis. 204, 102 N. W. 1066.

788-16 Strauss v. Strauss, 122 App. Div. 729, 107 N. Y. S. 842.

788-17 See In re Clark (Wis.), 115 N. W. 387.

789-24 McCullough v. Connelly (Ia.), 114 N. W. 301; Succession of Herber, 119 La. 1064, 44 S. 888; McPherson v. Swift (S. D.), 116 N. W. 76.

Collateral motion. — Decision is not a decision on the merits. Brown v. Beckwith, 58 W. Va. 140, 51 S. E. 977.

Burden of proof is upon the party denying the binding effect of a former judgment, to show that it was not upon the merits. Sweeney v. Waterhouse, 43 Wash. 613, 86 P. 946.

791-32 First Nat. Bk. v. Goldsmith (Ind. App.), 82 N. E. 799.

791-33 Missouri etc. Ind. Co. v. Lovelace, 1 Ga. App. 446, 58 S. E. 93; Farmers' & M. Assn. v. Caine, 224 Ill. 599, 79 N. E. 956.

791-34 Motes v. R. Co. (Ariz.), 89 P. 410.

792-35 Weisenborn v. Evans, 30 Ky. L. R. 781, 99 S. W. 629.

792-36 Richmond Mills v. Tel. Co., 123 Ga. 216, 51 S. E. 290; Watt v. Barnes (Ind. App.), 84 N. E. 158; Ex parte Corliss (N. D.), 114 N. W. 962; Carpenter v. Landry (Tex. Civ.), 101 S. W. 277.

793-37 Coram v. Ingersoll, 148 Fed. 169, 78 C. C. A. 303; Smith v. Cowell, 41 Colo. 178, 92 P. 20; Moore v. R. Co. (Tenn.), 109 S. W. 497.

793-39 Judgment on the pleadings is a judgment on the merits. Bailey v. Indemnity Co., 5 Cal. App. 740, 91 P. 416.

793-40 Succession of Herber, 119 La. 1064, 44 S. 888.

793-41 Jenkins v. Purcell, 29 App. D. C. 209; Jones v. Hubbard, 193 Mo. 147, 90 S. W. 1137; Robbins v. Hubbard (Tex. Civ.), 108 S. W. 773.

But a compromise judgment in a suit brought by one citizen in the interests of all, is not binding upon them. Board of Super. v. Buckley, 85 Miss. 713, 38 S. 104.

795-47 Kellogg v. Maloney, 152 Fed. 405; San Gabriel Bk. v. Lake View Co., 4 Cal. App. 630, 86 P. 727; Tootle v. McClellan (Ind. Ter.), 103 S. W. 766; Watson v. McHenry (Md.), 68 A. 606; Standard S. Co. v. Merritt, 48 Misc. 498, 96 N. Y. S. 181; Meyerhoffer v. Baker, 121 App. Div. 797, 106 N. Y. S. 718; Weisinger v. Rosenberg, 108 N. Y. S. 1065; Turnage v. Joyner, 145 N. C. 81, 58 S. E. 757.

796-48 Pence v. Long, 38 Ind. App. 63, 77 N. E. 961.

797-49 Counter claim pleaded by defaulting party is not res adjudicata. No. Baltimore C. v. Altpeter (Wis.), 113 N. W. 435.

797-50 Wyman v. Embree (Neb.), 110 N. W. 537.

797-52 Watson v. McHenry (Md.), 68 A. 606.

797-53 Judgment of dismissal after trial on issue joined by general denial. Fluker v. De Grange, 117 La. 331, 41 S. 591.

Burden of proof is upon the party relying upon the plea of res judicata, to prove that the matter in issue was in fact litigated. Griffen v. Keese, 187 N. Y. 454, 80 N. E. 367; Gering v. School Dist., 76 Neb. 219, 107 N. W. 250; Draper v. Medlock, 122 Ga. 234, 50 S. E. 113; Harris v. Securities Co., 129 Ga. 241, 58 S. E. 831; Moore v. R. Co. (Tenn.), 109 S. W. 497; Grand Val. Irr. Co. v. Imp. Co., 37 Colo. 483, 86 P. 324 (preponderance of evidence); Laguna Dist. v. Martin Co., 5 Cal. App. 166, 89 P. 993 (also to show that no change in the facts has occurred); Ex parte Stevenson (Okla.), 94 P. 1071.

798-54 Fowler v. Davis, 1 Ga. App. 549, 57 S. E. 939; Wilcoxen v. Wilcoxen, 230 Ill. 93, 82 N. E. 584; Harrington v. Harrington, 189 Mass. 281, 75 N. E. 632; Douglas v. Smith, 75 Neb. 169, 106 N. W. 173.

798-55 St. Louis etc. R. Co. v. R. Co., 152 Fed. 849; Gunter v. R. Co., 200 U. S. 273; Drinkard v. Oden (Ala.), 43 S. 578; Briggs v. Manning, 80 Ark. 304, 97 S. W. 289; Nemo v. Farrington (Cal. App.), 94 P. 874; In re Bell (Cal.), 95 P. 372; Smith v. Cowell, 41 Colo. 178, 92 P. 20; Booth & Co. v. Mohr & Sons, 125 Ga. 472, 54 S. E. 147; McLendon v. Shumate, 128 Ga. 526, 57 S. E. 886; Thompson v. Hemingway, 218 Ill. 46, 75 N. E. 791; Kidder v. Walker, 121 Ill. App. 546; Peacock v. Pub. Co., 114 Ill. App. 463; Chicago etc. R. Co. v. Grantham, 165 Ind. 279, 75 N. E. 265; Van Camp v. Huntington, 39 Ind. App. 28, 78 N. E. 1057; Jackson v. Morgan, 167 Ind. 528, 78 N. E. 633; Crockett v. Crockett, 132 Ia. 388, 106 N. W. 944; Brashears v. Frazier, 30 Ky. L. R. 647, 99 S. W. 342; Harvin v. Blackman, 121 La. —, 46 S. 525; Aetna Ins. Co. v. Trembley, 101 Me. 585, 65 A. 22; Slingluff v. Hubner, 101 Md. 652, 61 A. 326; Hill v. McConnell (Md.), 68 A. 199; Cotter v. R. Co., 190 Mass. 302, 76 N. E. 910; Corbett v. Craven, 193 Mass. 30, 78 N. E. 748, *aff.*, 82 N. E. 36; Kaufer v. Ford, 100 Minn. 49, 110 N. W. 364; Alexander v. Thompson, 101 Minn. 5, 111 N. W. 385; Thornton v. Natchez, 88 Miss. 1, 41 S. 498; Barber Co. v. Field (Mo. App.),

97 S. W. 179; Pond v. Huling, 125 Mo. App. 474, 101 S. W. 115; Summet v. Brokerage Co., 208 Mo. 501, 106 S. W. 614; First Nat. Bk. v. Gibson, 74 Neb. 232, 104 N. W. 174, 105 N. W. 1081; Pierson v. Hughes, 102 N. Y. S. 528; Maasch v. Grauer, 123 App. Div. 669, 108 N. Y. S. 54; Spring Hill I. Co. v. Irrig. Co., 42 Wash. 379, 85 P. 6 (suggested modification); Spokane L. & W. Co. v. Madsen, 46 Wash. 640, 91 P. 1; Tio v. Brown, 131 Wis. 573, 111 N. W. 679. *Compare* Shiveley v. Min. Co., 5 Cal. App. 236, 89 P. 1073.

Affirmance on other grounds still leaves a question expressly determined by the lower court as res judicata. Russell v. Russell, 134 Fed. 840, 67 C. C. A. 436.

801-56 Van Camp v. Huntington, 39 Ind. App. 28, 78 N. E. 1057.

802-58 Roberts v. Leutzke, 39 Ind. App. 577, 78 N. E. 635; O'Brien v. Allen, 42 Wash. 393, 85 P. 8.

802-59 Arcadia Mfg. Co. v. Fisher, 120 La. 1076, 46 S. 28; Winnipiseogee Mfg. Co. v. Laconia, 74 N. H. 82, 65 A. 378.

802-60 Wilkinson v. Lehman (Ala.), 43 S. 857; Bank of Visalia v. Smith, 146 Cal. 398, 81 P. 542 (under Code Civ. Proc. § 1911); Georgia R. & Bg. Co. v. Wright, 124 Ga. 596, 53 S. E. 251; Kelly & Jones Co. v. Moore, 128 Ga. 683, 58 S. E. 181; School Twp. v. School Dist., 134 Ia. 349, 112 N. W. 5; Bleakley v. Barclay, 75 Kan. 462, 89 P. 906; McManus v. Scheeley, 118 La. 744, 43 S. 394; P. v. Bank, 104 App. Div. 219, 93 N. Y. S. 521; Potash v. Land Co., 48 Misc. 402, 95 N. Y. S. 571; Martin v. Rock Co., 103 N. Y. S. 947; Meyerhoffer v. Baker, 121 App. Div. 797, 106 N. Y. S. 718; Weisinger v. Rosenberg 108 N. Y. S. 1065.

804-61 Connolly v. Dammann, 232 Ill. 175, 83 N. E. 531; Sbarbero v. Miller (N. J. Eq.), 65 A. 472; In re Locust Ave., 185 N. Y. 115, 77 N. E. 1012; Eisenberg v. Thorne, 49 Misc. 617, 96 N. Y. S. 1020; Rothstein v. Steinbulger, 52 Misc. 552, 102 N. Y. S. 470; Carter v. Carter, 14 N. D. 66, 103 N. W. 425; Heilner v. Smith, 49 Or. 14, 88 P. 299; Mosteller v. Holborn (S. D.), 114 N. W. 693; Seifen v. Racine, 129 Wis. 343, 109 N. W. 72.

Judgment in bar urged as a defense to the prosecution of a second action upon the same claim, concludes the parties as to all matters offered in relation to the claim or which might have been offered, but where the second action is upon a different claim, the prior judgment is an estoppel only as to those points upon the determination of which the verdict was rendered. Kirven v. Chemical Co., 77 S. C. 493, 58 S. E. 424; Lincoln Trust Co. v. Nathan, 122 Mo. App. 319, 99 S. W. 484; Grand Val. Irrig. Co. v. Imp. Co., 37 Colo. 483, 86 P. 324; American Radiator Co. v. New York, 123 App. Div. 483, 107 N. Y. S. 1098; Werckmeister v. Tob. Co., 138 Fed. 162; Delaware etc. R. Co. v. Kutter, 147 Fed. 51, 77 C. C. A. 315; Linton v. Guaranty Co., 147 Fed. 824; Water L. & G. Co. v. City, 160 Fed. 41; Blackford v. Wilder, 28 App. D. C. 535.

804-64 Excelsior Coal Co. v. Gildersleeve, 160 Fed. 47; Lowe v. Ozmun, 3 Cal. App. 387, 86 P. 729; Horner v. Bell, 105 Md. 113, 66 A. 39; Hering v. Mosher, 144 Mich. 152, 107 N. W. 917; Brown v. McKie, 185 N. Y. 303, 78 N. E. 64.

Non-essential recital in a judgment is prima facie evidence of the fact recited after the lapse of forty years. S. v. Ortiz, 99 Tex. 475, 90 S. W. 1084, *aff.* 86 S. W. 45.

805-68 Kaskell v. Friend, 196 Mass. 198, 81 N. E. 962; Deneen v. R. Co., 150 Mich. 235, 113 N. W. 1126.

807-70 In re Bump. (Cal.), 92 P. 643; Smith v. Cowell, 41 Colo. 178, 92 P. 20; Sevier v. Bowling, 30 Ky. L. R. 217, 97 S. W. 806; McPherson v. Swift (S. D.), 116 N. W. 76.

Dismissal "without prejudice" is not a judgment on the merits. Budlong v. Budlong (Wash.), 94 P. 478, nor is a dismissal by agreement at plaintiff's cost. Couch v. Harp, 201 Mo. 457, 100 S. W. 9.

Dismissal as to certain defendants. Judgment rendered thereafter is not binding on them. Dittmer v.

Mierandorf, 129 Ia. 643, 106 N. W. 158, and a dismissal of one of two counts is not conclusive as to the other. Lemon v. Bank, 131 Ia. 79, 108 N. W. 104.

Dismissal on ground that summons did not have attached thereto a copy of the cause of action, is not on the merits. Macon & B. R. Co. v. Walton, 127 Ga. 294, 56 S. E. 419.

Dismissal on hearing is a determination upon the merits. Mayer v. Kornegay (Ala.), 44 S. 839; Pond v. Huling, 125 Mo. App. 474, 101 S. W. 115. See Cohen v. Bachrach, 56 Misc. 524, 107 N. Y. S. 61.

808-71 Robinson v. Foundry Co., 159 Fed. 131.

Presumed to have been dismissed on the merits, but parol evidence is admissible to rebut this presumption. Stratton v. Park Com., 145 Fed. 436.

809-74 Presumption that voluntary dismissal was upon the merits. In re Ward (Mich.), 116 N. W. 23. See American H. B. Assn. v. Assn., 114 Ill. App. 136.

811-76 Dismissal of some of the counts without objection by defendant, no bar. Crossman v. Griggs, 188 Mass. 156, 74 N. E. 358.

811-79 S. v. Bellflower (Mo. App.), 108 S. W. 117.

814-87 Crovatt v. Baker, 130 Ga. 507, 61 S. E. 127; Old Wayne Assn. v. McDonough, 164 Ind. 321, 73 N. E. 703.

Appeal from judgment and issue of supersedeas bond, will not prevent the judgment being treated as final. Boynton v. Lumb. Co., 84 Ark. 203, 105 S. W. 77.

814-88 In re Harrington, 127 Cal. 124, 81 P. 546; Larkins v. Assn., 221 Ill. 428, 77 N. E. 678; Corbett v. Craven, 193 Mass. 30, 78 N. E. 748, *aff.* 82 N. E. 31. See Zerulla v. Lodge, 223 Ill. 518, 79 N. E. 160.

815-89 Bunker v. Bunker, 140 N. C. 18, 52 S. E. 237.

Interlocutory judgment is conclusive except as to such matters as are reserved. Gates v. Paul, 127 Wis. 628, 107 N. W. 492.

816-90 Decree for alimony subject to future modification, not a final decree. Freund v. Freund (N. J. Eq.), 63 A. 576. See Israel v. Israel, 148 Fed. 576, 79 C. C. A. 32.

817-91 M'Caslin v. Mach. Co., 139 Fed. 393; Milam v. Coley, 144 Ala. 535, 39 S. 511; Posey v. Gamble, 148 Ala. 660, 41 S. 416; Daniel Bros. v. Jordan, 146 Ala. 229, 40 S. 940; Sims v. R Co. (Ala.), 46 S. 494; Norris v. Hay, 149 Cal. 695, 87 P. 380; Sill v. Pate, 230 Ill. 39, 82 N. E. 356; Steeher v. P., 217 Ill. 348, 75 N. E. 501; School Twp. v. School Dist., 134 Ia. 349, 112 N. W. 5; Brandon v. Ard, 74 Kan. 424, 87 P. 366; Jones v. Jones, 31 Ky. L. R. 183, 101 S. W. 980; Combs v. Coal Co., 32 Ky. L. R. 601, 106 S. W. 815; Monroe v. Mattox, 27 Ky. L. R. 575, 85 S. W. 748; Duffee v. R. Co., 191 Mass. 563, 77 N. E. 1036; Wood v. Smith, 193 Mo. 130, 91 S. W. 85; Sawyer v. Walker, 204 Mo. 133, 102 S. W. 544; McLaren v. Imp. Co., 126 Mo. App. 254, 102 S. W. 1105; Coleman v. Reynolds, 207 Mo. 463, 105 S. W. 1070; Bristow v. Thackston, 187 Mo. 332, 86 S. W. 94; Butte L. & I. Co. v. Merriman, 32 Mont. 402, 80 P. 675; Hutchins v. Berry, 74 N. H. 225, 66 A. 1046; Clark v. Durland, 104 App. Div. 615, 93 N. Y. S. 249; Fisher v. L. & T. Co., 138 N. C. 90, 50 S. E. 592; Milhiser & Co. v. Leatherwood, 140 N. C. 231, 52 S. E. 782; In re Hess, 27 Pa. Super. 498; Town of Richmond v. James, 27 R. I. 154, 61 A. 54; Mitchell v. Cleveland, 76 S. C. 432, 57 S. E. 33; S. v. Coughran, 19 S. D. 271, 103 N. W. 31; McKinley v. Wilson (Tex. Civ.), 96 S. W. 112; Cocke v. R. Co. (Tex. Civ.), 103 S. W. 407; Parlin & O. Co. v. Vawter (Tex. Civ.), 88 S. W. 407; Storms v. Munday (Tex. Civ.), 101 S. W. 258; Slaughter v. Cooper (Tex. Civ.), 107 S. W. 897; Johnson v. Shuey, 40 Wash. 22, 82 P. 123; Smith v. White (W. Va.), 60 S. E. 404.

"Where two or more defendants make issues with the plaintiff a judgment in favor of the defendants settles between them no fact that might have been but was not, put in issue by a proper pleading." Whitesell v. Strickler, 167 Ind. 602, 78 N. E. 845; Giblin v. Lumb. Co., 131 Wis. 261, 111 N. W. 499. See Gulling v. Bank, 28 Nev. 450, 89 P. 25.

When co-plaintiffs or co-defendants of a party do in fact, though not in

form occupy the attitude of adversaries, the judgment is conclusive. Comstock v. Keating, 115 Mo. App. 372, 91 S. W. 416.

Offer of former judgment in evidence must be expressly limited to such defendants as were parties to the prior action. Ryan v. Young, 147 Ala. 660, 41 S. 954.

819-94 Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119.

820-96 In re Bell (Cal.), 95 P. 372, Perkins v. Goddin, 111 Mo. 429, 85 S. W. 936; Harris & C. Bros. v. W. & L. Co., 114 Tenn. 328, 85 S. W. 897.

Presumption is that a judgment is conclusive against a party only in the capacity in which he sues. Sbarbero v. Miller (N. J. Eq.), 65 A. 472.

But a judgment against a plaintiff suing under a trade name, is conclusive against him as an individual. Clark Bros. v. Wyche, 126 Ga. 24, 54 S. E. 909.

821-98 Jefferson H. & P. Co. v. Westinghouse Co., 139 Fed. 385, 71 C. C. A. 481 (must have acted openly); Rumford C. Wks. v. Chemical Co., 148 Fed. 862; Champlin v. Butler, 124 Ill. App. 41; Montgomery v. Alden, 133 Ia. 675, 108 N. W. 234; Parsons v. Urie, 104 Md. 238, 64 A. 927; Pew v. Johnson, 35 Mont. 173, 88 P. 770; In re Alexander, 214 Pa. 369, 63 A. 799; Kolpack v. Kolpack, 128 Wis. 169, 107 N. W. 457.

822-99 Lingle v. Chicago, 221 Ill. 519, 77 N. E. 924; Thompson v. Hemenway, 218 Ill. 46, 75 N. E. 791, *aff.* 227 Ill. 146, 81 N. E. 52; Murphy v. Cole (Md.), 68 A. 615; Southern Elec. Co. v. S. (Miss.), 44 S. 785.

Payment of the attorney employed does not make the third person a participant, necessarily. City of Mankato v. Paving Co., 142 Fed. 329, 73 C. C. A. 439.

Witness interested in the result, is bound. — American B. Co. v. Loeb, 47 Wash. 447, 92 P. 282.

Deposition given by a person does not render him a party. Cornett v. Moore, 30 Ky. L. R. 280, 97 S. W. 380.

824-1 Warren Featherbone Co. v. DeCamp, 154 Fed. 198 (principal and agent. But see Northwestern Bk. v. Silberman, 154 Fed. 809); Walden v. Walden, 128 Ga. 126, 57 S. E. 323; Cecil v. Robertson, 32 Ky. L. R., 357, 105 S. W. 926 (committee of lunatics); McDevitt v. Bryant, 104 Md. 187, 64 A. 931; Francis v. Hazlett, 192 Mass. 137, 78 N. E. 405 (stockholders in bank concluded by action against bank); Von Etten v. Bank (Neb.), 113 N. W. 163; McCreary v. Creighton (Neb.), 107 N. W. 240; O'Donaghue v. Smith, 184 N. Y. 365, 77 N. E. 621; Jacob v. Oyster Bay, 109 App. Div. 630, 96 N. Y. S. 626 (principal and agent); Lighton v. Syracuse, 112 App. Div. 589, 98 N. Y. S. 792; Ex parte Corliss (N. D.), 114 N. W. 962 (receiver represents creditor); Galveston etc. R. Co. v. Gillespie (Tex. Civ.), 106 S. W. 707 (statutory representative).

Relator in mandamus proceedings represents the people at large. City Council v. Walker (Ala.), 45 S. 586; Kaufer v. Ford, 100 Minn. 49, 110 N. W. 364.

825-4 Busse v. Schaeffer, 128 Ia. 319, 103 N. W. 947 (property right involved).

825-5 P. v. Wilson, 6 Cal. App. 122, 91 P. 661 (contestant in election case and the people); Greenfield Gas Co. v. Trees, 165 Ind. 209, 75 N. E. 2 (relator in mandamus proceedings); McLellan v. Rosser, 116 La. 801, 41 S. 97; Perkins v. Goddin, 111 Mo. 429, 85 S. W. 936; Womach v. St. Joseph, 201 Mo. 467, 100 S. W. 443.

825-6 Henry v. Heldmaier, 226 Ill. 152, 80 N. E. 705; Olmstead v. Rawson, 188 N. Y. 517, 81 N. E. 456; Stuart v. County, 40 Wash. 267, 82 P. 270.

Lis pendens — See Boynton v. Lumber Co., 84 Ark. 203, 105 S. W. 77; Calkin v. Bank, 20 S. D. 466, 107 N. W. 675; Latta v. Wiley (Tex. Civ.), 92 S. W. 431; Bank v. Doherty, 42 Wash. 317, 84 P. 872; Dent v. Pickens, 59 W. Va. 274, 53 S. E. 154.

Wife bound by judgment in trespass to try title where her husband was a party, if a claim of homestead would have afforded no defense. Breath v. Flowers (Tex. Civ.), 95 S. W. 26. See Gustin v. Crockett, 44 Wash. 536, 87 P. 839.

827-7 Page v. Garver, 5 Cal. App. 383, 90 P. 481; Davidson v.

Baldwin, 2 Cal. App. 733, 84 P. 238; Schuler v. Ford, 10 Idaho 739, 80 P. 219; Shields v. Sorg, 129 Ill. App. 266; Keith v. Ray, 231 Ill. 213, 83 N. E. 152 (administrator of deceased party); Mundell v. Greeley, 76 Kan. 797, 92 P. 1117; Power v. Snow, 75 Kan. 182, 88 P. 1083; O'Sullivan v. Douglass, 124 Ky. 243, 30 Ky. L. R. 366, 98 S. W. 990; Succession of Theriot, 120 La. 383, 45 S. 285; Minnesota D. Co. v. Johnson (Minn.), 107 N. W. 740; Jones v. Hubbard, 193 Mo. 147, 90 S. W. 1137; City of Carthage v. Weesner, 116 Mo. App. 118, 92 S. W. 178 (assignee bound); American S. Co. v. Transit Co., 120 Mo. App. 410, 97 S. W. 184 (bailor and bailee); Womach v. St. Joseph, 201 Mo. 467, 100 S. W. 443 (husband not in privity with wife in action to recover for injury to wife); Summet v. Brokerage Co., 208 Mo. 501, 106 S. W. 614; Canterbury v. Kansas City, 129 Mo. App. 1, 108 S. W. 574; Butterfly v. Deering, 102 App. Div. 395, 92 N. Y. S. 675; Kosower v. Sandler, 49 Misc. 443, 98 N. Y. S. 65; Gilman v. Carpenter (S. D.), 115 N. W. 659; Davenport v. Bearden (Tex. Civ.), 108 S. W. 474; S. v. Ortiz, 99 Tex. 475, 90 S. W. 1084, *aff.* 86 S. W. 45; Tio v. Brown, 131 Wis. 573, 111 N. W. 679; Ryan v. Malone (Wis.), 114 N. W. 517.

829-8 See Baker v. Cartersville, 127 Ga. 221, 56 S. E. 249 (judgment on validity of city bonds); Board of Commrs. v. S. (Okla.), 91 P. 699 (same).

Decrees in probate proceedings. — In re McVay (Idaho), 93 P. 28; Baker v. R. S. & L. Co., 32 Ky. L. R. 982, 107 S. W. 704; Appeal of Mudgett (Me.), 69 A. 575; In re Goldsticker, 192 N. Y. 35, 84 N. E. 581; In re Pearce (Tex. Civ.), 96 S. W. 1094; Mecker v. Winyer (Wash.), 92 P. 883.

830-10 Leigh v. Brake-Beam Co., 224 Ill. 76, 79 N. E. 318; Bradford v. Abbott, 127 Ill. App. 6; Scovel v. Levy, 118 La. 982, 43 S. 642; Gering v. School Dist. (Neb.), 107 N. W. 250; McArthur v. Griffith (N. C.), 61 S. E. 519; Mahoning Valley R. Co. v. Van Alstine, 77 Ohio St. 395, 83 N. E. 601; Sanford v. King, 19 S. D. 334, 103 N. W. 28; Vulcan Iron Wks. v. Lumb. Co., 39 Wash. 435, 81 P. 913; Bird v. Winyer, 44 Wash. 264, 87 P. 259.

Course of action need not be the same. — Teel v. Dunnihoo, 230 Ill. 476, 82 N. E. 844; Chicago Title etc. Co. v. Moody, 233 Ill. 634, 84 N. E. 656. *Contra,* Missouri Ins. Co. v. Lovelace, 1 Ga. App. 446, 58 S. E. 93; Stitt v. Lumb. Co., 101 Minn. 93, 111 N. W. 948.

831-11 Werckmeister v. Tob. Co., 138 Fed. 162; Bagley v. Exting. Co., 150 Fed. 284, 80 C. C. A. 172; Emerson v. Min. & M. Co., 149 Cal. 50, 85 P. 122; Laws v. Newkirk, 39 Colo. 78, 88 P. 861; In re Nichols, 62 A. 610, s. c. sub nom Nichols v. Wentz, 78 Conn. 429; Chicago v. Mecartney, 216 Ill. 377, 75 N. E. 117; Scottish-A. Mtg. Co. v. Buneckley, 88 Miss. 641, 41 S. 502; Tootle v. Buckingham, 190 Mo. 183, 88 S. W. 619; Mercer Co. v. Omaha (Neb.), 107 N. W. 565; S. v. R. Co. (Neb.), 114 N. W. 422; Vogt v. Vogt, 119 App. Div. 518, 104 N. Y. S. 164; In re Lappe, 215 Pa. 607, 64 A. 607; Wylie v. Langhorne (Tex. Civ.), 101 S. W. 527; Petriey Bros. v. Light Co. (Wis.), 114 N. W. 808; Pereles v. Gross, 126 Wis. 122, 105 N. W. 217.

Issue not raised by the pleadings, may be conclusively settled by the judgment, where the parties agree to that effect. Engel v. Sontag, 110 N. Y. S. 933.

832-12 Sharp v. Zeller, 114 La. 549, 38 S. 449; Eisenberg v. Thorne, 49 Misc. 617, 96 N. Y. S. 1020; Stockley v. Cissna (Tenn.), 104 S. W. 792.

832-13 Krause v. Nolte, 217 Ill. 298, 75 N. E. 362; Elkhart P. Co. v. Fulkerson, 39 Ind. App. 219, 75 N. E. 283; Jackson v. Thomson, 215 Pa. 209, 64 A. 421.

833-14 Gilcreast v. Bartlett, 74 N. H. 29, 64 A. 767.

833-15 Woman's Assn. v. Fordyce, 74 Ark. 621, 86 S. W. 417; Halliday v. Bank, 128 Ga. 639, 58 S. E. 169; Gouwens v. Gouwens, 222 Ill. 223, 78 N. E. 597; Frank v. Miller, 116 App. Div. 855, 102 N. Y. S. 277.

834-16 S. v. Leavenworth, 75 Kan. 787, 90 P. 237; Roach v. Curtis, 115 App. Div. 765, 101 N. Y. S. 333; Bradburn v. Roberts (N. C.), 61 S. E. 617.

834-17 Wadly v. Leggitt, 82 Ark. 262, 101 S. W. 720 (outstanding title acquired after a trial in ejectment); Lighton v. Syracuse, 188 N. Y. 499, 81 N. E. 464.

834-18 Meeker v. Shuster, 4 Cal. App. 294, 87 P. 1102; Brown v. Banks (Fla.), 44 S. 1011; Chicago etc. R. Co. v. Grantham, 165 Ind. 279, 75 N. E. 265; Houseman v. Nav. Co., 214 Pa. 552, 64 A. 379; Stockley v. Cissna (Tenn.), 104 S. W. 792.

834-20 Remilliard v. Authier, 20 S. D. 290, 105 N. W. 626.

836-21 Jacob v. Warehouses, 109 N. Y. S. 1015.

837-26 See Snowhill v. Glass Co., 39 Ind. App. 240, 77 N. E. 412; Case Mfg. Co. v. Moore, 144 N. C. 527, 57 S. E. 213.

837-27 See Van Camp v. Huntington, 39 Ind. App. 28, 78 N. E. 1057.

838-33 Stuke v. Glaser, 223 Ill. 316, 79 N. E. 105 (proponents bound but not contestants); In re Goldstieker, 192 N. Y. 35, 84 N. E. 581; Smith v. Ryan, 116 App. Div. 397, 101 N. Y. S. 1011 (only presumptive evidence of due execution so far as real property is concerned).

839-38 Page v. Page, 189 Mass. 85, 75 N. E. 92; Converse v. Ayer (Mass.), 84 N. E. 98; Freund v. Freund (N. J. Eq.), 63 A. 756; Strickland v. Salt Co. (N. J. Eq.), 64 A. 982; Strauss v. Strauss, 122 App. Div. 729, 107 N. Y. S. 842; Stilwell v. Smith, 219 Pa. 36, 67 A. 910.

Entitled to presumption of validity. Gottlieb v. Grain Co., 87 App. Div. 380, 84 N. Y. S. 413, *aff.* 181 N. Y. 563, 74 N. E. 117.

840-39 Harris v. Balk, 198 U. S. 215; Forrest v. Fey, 218 Ill. 165, 75 N. E. 789; Baltimore etc. R. Co. v. Freeze (Ind.), 82 N. E. 761; Tootle v. Buckingham, 190 Mo. 183, 88 S. W. 619.

841-41 Attestation by deputy clerk, improper. — S. v. Foreman, 121 Mo. 502, 97 S. W. 269.

841-42 Britton v. Chamberlain, 234 Ill. 246, 84 N. E. 895; Hagan v. Snider (Tex. Civ.), 98 S. W. 213; Wolf v. King (Tex. Civ.), 107 S. W. 617 (necessity of certificate of judge).

Full Christian name of clerk need not appear in the certificate. Old Wayne etc. Assn. v. McDonough, 164 Ind. 321, 73 N. E. 703.

842-47 No presumption that justice of peace had jurisdiction, but this must be proved. Bick v. Lanham, 123 Mo. App. 268, 100 S. W. 530. And see Geduld v. R. Co., 55 Misc. 239, 105 N. Y. S. 110.

842-48 See Bick v. Lanham, supra.

842-51 Orient Ins. Co. v. Rudolph, 69 N. J. Eq. 570, 61 A. 26.

843-52 *Compare* In re Culp, 2 Cal. App. 70, 83 P. 89; Forrest v. Fey, 218 Ill. 165, 75 N. E. 789.

843-54 Cooper v. Brazelton, 135 Fed. 476, 68 C. C. A. 188; Old Wayne Ins. Co. v. McDonough, 204 U. S. 8; In re Culp, supra; Field v. Field, 215 Ill. 496, 74 N. E. 443 (and of the subject-matter); Forrest v. Fey, 218 Ill. 165, 75 N. E. 789; Tootle v. McClellan (Ind. Ter.), 103 S. W. 766; Cuykendall v. Doe, 129 Ia. 453, 105 N. W. 698; Fall v. Fall (Neb.), 113 N. W. 175; Olmsted v. Olmsted, 190 N. Y. 458, 86 N. E. 569.

Judgment in rem. — It must appear that the res was within the jurisdiction of the foreign court. Ely v. Ins. Co. (Ky.), 110 S. W. 265.

844-57 Roberts v. Leutzke, 39 Ind. App. 577, 78 N. E. 635; S. v. Webber, 96 Minn. 422, 105 N. W. 490; Anthony v. Wilson (N. J. L.), 65 A. 988; Johnston v. Ins. Co., 104 App. Div. 550, 93 N. Y. S. 1052.

Presumption cannot be indulged when it appears, from the pleadings or evidence that jurisdiction was lacking. Old Wayne Ins. Co. v. McDonough, 204 U. S. 8.

Failure of officer who served process to state all facts necessary to obtain jurisdiction does not overcome the presumption. Hodge v. Registry Co., 54 Misc. 442, 105 N. Y. S. 1067.

Presumption from the fact that the court had a judge, clerk, and seal, that it was a court of general jurisdiction and had jurisdiction in the case. Old Wayne Assn. v. McDonough, 164 Ind. 321, 73 N. E. 703; Christiansen v. Kriesel (Wis.), 113 N. W. 980.

844-59 Forsyth v. Barnes, 228 Ill. 326, 81 N. E. 1028; Orient Ins.

Co. v. Rudolph, 69 N. J. Eq. 570, 61 A. 26.

845-60 See Spiker v. Society, 140 Mich. 225, 103 N. W. 611, 104 N. W. 670.

846-62 El Capitan Co. v. Lees (N. M.), 86 P. 924 (misnomer of defendant corporation no defense).

846-63 See Harrison v. Paper Co., 140 Fed. 385, 72 C. C. A. 405.

847-64 Gunning System v. Buffalo, 157 Fed. 249; Covington v. Bank, 198 U. S. 100.

Jurisdiction of the state court is open to attack. — Cooper v. Brazelton, 135 Fed. 476, 68 C. C. A. 188.

848-67 Palatine Ins. Co. v. O'Brien (Md.), 68 A. 484; Thornton v. Natchez, 88 Miss. 1, 41 S. 498.

848-69 Karrick v. Wetmore, 25 App. D. C. 415; Tootle v. McClellan (Ind. Ter.), 103 S. W. 766; Weyburn v. Watkins, 90 Miss. 728, 44 S. 145; Vennum v. Mertens, 119 Mo. App. 461, 95 S. W. 292; Fall v. Fall, 75 Neb. 104, 106 N. W. 412; Orient Ins. Co. v. Rudolph, 69 N. J. Eq. 570, 61 A. 26; Gleason v. Ins. Co., 189 N. Y. 100, 81 N. E. 777.

849-70 Alaska Co. v. Debney, 2 Alaska 303.

849-72 In re Neidnig, 123 App. Div. 894, 108 N. Y. S. 478 (judgment in the nature of a police regulation of a foreign country has no extraterritorial effect.

849-76 Mexican R. Co. v. Chantry, 136 Fed. 316, 69 C. C. A. 454; Kessler v. Cork Co., 158 Fed. 744; Alaska Co. v. Debney, 2 Alaska 303; In re Neidnig, 56 Misc. 216, 107 N. Y. S. 590, *rev.* 123 App. Div. 894, 108 N. Y. S. 478.

851-80 Seaboard R. Co. v. O'Quin, 124 Ga. 357, 52 S. E. 427; Micks v. Mason, 145 Mich. 212, 108 N. W. 707; Adams v. Sigman, 89 Miss. 844, 43 S. 877; Myers v. Casualty Co., 123 Mo. App. 682, 101 S. W. 124; Frierson v. Jenkins, 72 S. C. 341, 51 S. E. 862.

851-82 Powell v. Wiley, 125 Ga. 823, 54 S. E. 732 (judgment of acquittal inadmissible).

851-85 Adams v. Sigman, 89 Miss. 844, 43 S. 877.

851-86 U. S. v. Donaldson-S. Co., 142 Fed. 300; S. v. Corron, 73 N. H. 434, 62 A. 1044.

852-88 City of Seattle v. Saulez, 47 Wash. 365, 92 P. 140. See Cooke v. Loper (Ala.), 44 S. 78.

852-90 Judgment in equity conclusive on a trial at law, where the other requirements are met. Bruner v. Finley, 217 Pa. 127, 66 A. 159; Van Camp v. Huntington, 39 Ind. App. 28, 78 N. E. 1057; Everett v. Jordan, 146 Ala. 690, 40 S. 386.

Converse is also true. — Smith v. Cowell, 41 Colo. 178, 92 P. 20.

Exceptions to rules in civil cases. The rules of res judicata do not apply to statutory new trials in ejectment. Weigel v. Green, 221 Ill. 187, 77 N. E. 574.

Exceptions to rules in criminal cases exist in prosecutions for perjury, since conviction for perjury cannot be had upon the uncorroborated testimony of one witness. S. v. Sargood (Vt.), 68 A. 49.

852-91 Benj. Schwarz Sons v. Kennedy, 142 Fed. 1027; St. Louis etc. R. Co. v. R. Co., 152 Fed. 849; Mogenson v. Zubler, 36 Colo. 235, 84 P. 981. *Compare* Bandy v. Cates (Tex. Civ.), 97 S. W. 710; Haggart v. Kansas City (Kan.), 94 P. 789.

Presumption that the status continues as of the time when the decree was rendered. Mayer v. Kornegay (Ala.), 44 S. 839. But evidence of a change in conditions is admissible. Froelicher v. Marine Wks., 121 La., 46 S. 570.

Prima facie case of identity of person and subject matter where the record relied upon is produced and the alleged facts appear with reasonable certainty. Moore v. R. Co. (Tenn.), 109 S. W. 497.

852-92 Gulling v. Bank, 28 Nev. 450, 82 P. 800.

853-93 Delaware etc. R. Co. v. Kutter, 147 Fed. 51, 77 C. C. A. 315; Gering v. School Dist. (Neb.), 107 N. W. 250; Gulling v. Bank, 28 Nev. 450, 89 P. 25; Hubbard v. Gould, 74 N. H. 25, 64 A. 668; Manchester Assn. v. Porter, 106 Va. 528, 56 S. E. 337.

Opinion of court in the former case may be looked at. Carson v. Lumb. Co., 142 Fed. 893; Horine v. Wende, 29 App. D. C. 415; Moore v. R. Co. (Tenn.), 109 S. W. 497.

854-94 Holford v. James, 136 Fed. 553, 69 C. C. A. 263 (where the

issues did not appear in the entry of judgment and the pleadings had been destroyed); Gorham v. New Haven, 79 Conn. 670, 66 A. 505; O'Connor v. Byrne, 86 App. Div. 627, 83 N. Y. S. 665, *aff.* 180 N. Y. 556, 73 N. E. 1131; Pennebaker v. Parker, 33 Pa. Super. 458.

854-95 Stone v. R. Co., 75 Kan. 600, 90 P. 251.

855-96 Irvin v. Spratein, 127 Ga. 240, 55 S. E. 1037; Harris v. Securities Co., 129 Ga. 241, 58 S. E. 831. See Cambridge v. Foster, 195 Mass. 411, 81 N. E. 278.

855-97 Reeves & Co. v. Lamm Bros., 135 Ia. 201, 112 N. W. 642.

855-98 Hooper v. Pierce (Ala.), 44 S. 108.

Amendment disallowed by the court is admissible in rebuttal to show that the plaintiffs endeavored to raise the question in issue by their pleadings but were not allowed to do so. Draper v. Medlock, 122 Ga. 234, 50 S. E. 113.

856-99 Benj. Schwarz Sons v. Kennedy, 142 Fed. 1027; Draper v. Medlock, supra.

856-1 Fowler v. Stebbins, 136 Fed. 365, 69 C. C. A. 209; Hofferberth v. Nash, 50 Misc. 328, 98 N. Y. S. 684.

856-2 Fowler v. Stebbins, supra (evidence admissible by party to apply a description in the pleadings to himself); Haines v. West (Tex.), 105 S. W. 1118, *aff.* 102 S. W. 436.

856-5 Murphy v. Bank, 82 Ark. 131, 100 S. W. 894.

857-7 Ex parte Von Vetsera (Cal. App.), 93 P. 1036; Miller v. Buckley, 85 Miss. 706, 38 S. 99; Ex parte Stevenson (Okla.), 94 P. 1071.

857-8 Russell v. Houston, 115 Tenn. 536, 91 S. W. 192.

857-9 Standard Supply Co. v. Merritt, 48 Misc. 498, 96 N. Y. S. 181.

857-11 Smith v. Lumb. Co., 140 N. C. 375, 53 S. E. 233.

Plea in bar necessary. P. v. R. Co., 149 Mich. 122, 112 N. W. 716.

857-12 Shannon v. Mastin (Mo. App)., 108 S. W. 1116; Standard Supply Co. v. Merritt, 48 Misc. 498, 96 N. Y. S. 181 (need not be pleaded except when used in bar); Bonanza Min. Co. v. Min. Co., 29 Utah 159, 80 P. 736; Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119.

In equity, evidence of former adjudication is admissible only after it has been alleged in the bill or set up in the plea or answer. Evans v. Woodsworth, 213 Ill. 404, 72 N. E. 1082.

858-15 Richstein v. Welch (Mass.), 83 N. E. 417.

858-16 *Compare* Weatherwax Lumb. Co. v. Ray, 38 Wash. 545, 80 P. 775.

859-19 Swing v. Gutter Co., 78 Ark. 246, 93 S. W. 978.

859-20 But see Swing v. Gutter Co., supra.

859-22 Old Wayne Ins. Co. v. McDonough, 204 U. S. 8.

859-25 *Compare* Splane v. Splane, 29 Pa. Super. 185 (applying California law).

860-27 Page v. Garver, 5 Cal. App. 383, 90 P. 481; Waterbury Bank v. Reed, 231 Ill. 246, 83 N. E. 188 (conclusive where nothing to the contrary appears in the record); Francis v. Lilly, 124 Ky. 230, 30 Ky. L. R. 391, 98 S. W. 996; Steves v. Smith (Tex. Civ.), 107 S. W. 141. See Eminence Land Co. v. L. & C. Co., 187 Mo. 420, 86 S. W. 145.

860-30 Thomas v. Virden, 169 Fed. 418; Prichard v. Sigafus, 103 App. Div. 535, 93 N. Y. S. 152. See International etc. R. Co. v. Brisenio (Tex. Civ.), 92 S. W. 998.

861-32 Blake Tobacco Co. v. Posluszsy, 31 Pa. Super. 602.

861-36 Light v. Scholl, 32 Pa. Super. 133 (within court's discretion); Groninger v. Acker, 32 Pa. Super. 124.

Defense on merits need not be shown to obtain a vacation, where the judgment is alleged to be void because of want of jurisdiction of the person. Flowers v. King, 145 N. C. 235, 58 S. E. 1074.

862-38 Case need not be sent to the jury although the evidence is conflicting. Augustine v. Wolf, 215 Pa. 558, 64 A. 777.

864-48 Steves v. Smith (Tex. Civ.), 107 S. W. 141.

865-52 Evans v. Woodsworth, 213 Ill. 404, 72 N. E. 1082. See Mahoney v. Ins. Co., 133 Ia. 570, 110 N. W. 1041.

Affirmative proof by plaintiff of due diligence at former trial, necessary. Citizens Ins. Co. v. Herpolsheimer (Neb.), 111 N. W. 606; Eugler v.

Knoblaugh (Mo. App.), 110 S. W. 16.
867-65 Whitman v. Hitt, 75 Ark. 461, 87 S. W. 1032.
867-66 See Gottlieb v. Grain Co., 87 App. Div. 380, 84 N. Y. S. 413, *aff.* 181 N. Y. 563, 74 N. E. 1117.
868-69 Janvier v. Culbreth, 5 Penne. (Del.) 505, 63 A. 309.

JUDICIAL NOTICE [Vol. 7.]

Geological formation, 890-47; *Uses of common tools,* 890-47; *That a city in a sister state is incorporated and a county seat,* 891-51; *Deadly character of weapon,* 893-57; *Financial status of persons or countries,* 893-57; *Value of commodities,* 906-25; *Existence of only two telegraph companies,* 945-82; *Location of town with reference to railroads,* 1017-39; *City park,* 1020-57.

880-5 Ball v. Flora, 26 App. D. C. 394.
883-16 *Contra,* P. v. Blair (Mich.), 108 N. W. 772.
883-17 Rome & L. Co. v. Keel, 3 Ga. App. 769, 60 S. E. 468 (where an alleged fact is contrary to the laws of physics. See infra, 893-61). See S. v. Elec. Co. (Or.), 95 P. 722. *Contra,* P. v. R. Co., 145 Mich. 140, 108 N. W. 772, *foll.* Griffing v. Gibb, 2 Black (U. S.) 519. See also Tutwiler etc. Co. v. Farrington, 144 Ala. 157, 39 S. 898; Smith v. Grand Lodge, 124 Mo. App. 181, 101 S. W. 662 (court cannot judicially notice that the A. O. U. W. is a fraternal insurance society where an allegation to this effect is denied by allegation that it is an old line company). *Compare* S. v. Norcross, 132 Wis. 534, 112 N. W. 40.
884-22 See Rome R. & L. Co. v. Keel, 3 Ga. App. 769, 60 S. E. 468.
885-27 See Harris v. R. Co. (Ala.) 44 S. 962.
886-31 Warnock v. Itawis, 38 Wash. 144, 80 P. 297.
887-36 Waters-P. O. Co v. Deselms, 18 Okla. 107, 89 P. 212. See Hoagland v. Canfield, 160 Fed. 146; Moran v. R. Co. (N. H.), 69 A. 884.
889-42 Loveman v. R. Co., 149 Ala. 515, 43 S. 411. *Contra,* Davis v. R. Co., 136 N. C. 115, 48 S. E. 591; Deans v. R. Co., 107 N. C. 686, 12 S. E. 77, 22 Am. St. 902; Lloyd v. R. Co., 118 N. C. 1010, 24 S. E. 805, 54 Am. St. 764.
Value of physician's services may be determined by jury from their general knowledge. Moran v. R. Co., supra (discussing cases).
Distance in which train can be stopped. — See infra 942-63.
889-43 But see Harris v. R. Co. (Ala.), 44 S. 962.
889-44 But see Vannest v. Murphy, 135 Ia. 123, 112 N. W. 236; Morehead v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340, and "EXPERT AND OPINION EVIDENCE."
890-45 See Waters-P. O. Co. v. Deselms, 18 Okla. 107, 89 P. 212.
890-47 Hoagland v. Canfield, 160 Fed. 146; Ex parte Berry, 147 Cal. 523, 82 P. 44; Capital Tract. Co. v. Brown, 29 App. D. C. 473; S. v. R. Co., 48 Fla. 114, 37 S. 652; Wolfe v. R. Co., 2 Ga. App. 499, 58 S. E. 899; Chicago v. Duffy, 117 Ill. App. 261, 277; Wabash R. Co. v. Thomas, 117 Ill. App. 110; Sun Ins. Off. v. Woolen Mill, 72 Kan. 41, 82 P. 513; San Antonio etc. R. Co. v. Mertuik (Tex. Civ.), 102 S. W. 153; Southern R. Co. v. Blanford, 105 Va. 373, 54 S. E. 1. See Null v. Williamson, 166 Ind. 537, 78 N. E. 76.
Well-known geological formation underlying City of Chicago judicially noticed in Chicago v. Duffy, 117 Ill. App. 261.
What cigarettes are, judicially noticed in Kappes v. Chicago, 119 Ill. App. 436.
Uses of common tools. — The uses of the common universal tools are judicially noticed, and hence that a scythe is a proper tool to mow weeds. Post v. R. Co., 121 Mo. App. 562, 97 S. W. 233.
891-48 See Harper F. Co. v. Exp. Co., 144 N. C. 639, 57 S. E. 458.
891-51 That a city in a sister state is incorporated and a county seat may be judicially noticed. Phillips v. Lindley, 112 App. Div. 283, 98 N. Y. S. 423, *aff.* in 188 N. Y. 614, 81 N. E. 1173 (noticing that Chillicothe, Ohio, is a city and the county seat of Ross county).

892-52 See also Auten v. Board, infra, 908-34.

892-54 Am. Sulph. Pulp Co. v. Paper Co., 157 Fed. 660; P. v. Board, 122 Ill. App. 40. See Dumphy v. Stock Yards Co., 118 Mo. App. 506, 523, 95 S. W. 301.

892-55 See Smith v. Grand Lodge, 124 Mo. App. 181, 101 S. W. 662; S. v. Norcross, 132 Wis. 534, 112 N. W. 40.

892-56 Ruthstrow v. Peterson, 72 Kan. 679, 83 P. 825; Ehrsam v. Jackman, 73 Kan. 435, 446, 85 P. 559, 91 P. 486 (how much flour may be extracted from different grades of wheat). See Guinn v. Court, 28 Ky. L. R. 759, 90 S. W. 274; S. v. Jockey Club (Mo.), 92 S. W. 185.

893-57 St. Louis v. Theater Co., 202 Mo. 690, 100 S. W. 627. See Ward v. S. (Ala.), 39 S. 923 (condition of county roads); Tex. etc. R. Co. v. Langham (Tex. Civ.), 95 S. W. 686.

Deadly character of weapon. — Court does not know judicially that an ax is a deadly weapon. Bush v. S. (Tex. Cr.), 107 S. W. 348.

Financial status of persons or countries. — Financial condition of litigants, as to their solvency or insolvency is not a matter for judicial notice even though they may be large corporations engaged in supplying public necessities. S. v. Clements (Mont.), 95 P. 845, and the same is true as to foreign countries, so that the court does not know the market value of their bonds. Hebblethwaite v. Flint, 115 App. Div. 597, 101 N. Y. S. 43.

893-58 Chicago etc. R. Co. v. Salem, 166 Ind. 71, 76 N. E. 631.

893-60 See Kohr v. R. Co., 117 Mo. App. 302, 92 S. W. 1145; Norwick Ins. Soc. v. R. Co., 46 Or. 123, 78 P. 1025.

893-61 Sun Ins. Off. v. Woolen Mill, 72 Kan. 41, 82 P. 513 (recognized scientific facts and principles); Whitman v. Log Co. (Mich.), 116 N. W. 614 (that when specific gravity of log becomes greater than water it sinks); Dunphy v. Stock Yards, 118 Mo. App. 506, 523, 95 S. W. 301 (but court should be careful not to assume knowledge of natural facts and laws that are beyond the scope of common positive knowledge); Morton v. R. Co., 48 Or. 444, 87 P. 151, 1046. See Seufferle v. Macfarland, 28 App. D. C. 94.

Gravity and friction — operation of railway. — *Contra*, Rome R. & L. Co. v. Keel, 3 Ga. App. 769, 60 S. E. 468.

894-62 Putnam v. R. Co. (Tex. Civ.), 94 S. W. 1102 (that no fruit is growing on peach and apple trees on Jan. 10th).

896-67 See Scarborough v. Woodill (Cal. App.), 93 P. 383 (infra, 906-27).

896-68 But see South Pasadena v. L. & W. Co. (Cal.), 93 P. 490 (noticing that Pasadena and South Pasadena are located in a comparatively arid region where there is little if any water not already applied to some extremely valuable public or private use and that water sources in that vicinity are in great demand and command a high price when they can be purchased at all); Elser v. Gross Point, 223 Ill. 230, 79 N. E. 27.

896-70 See Orvik v. Casselman, 15 N. D. 34, 105 N. W. 1105 (infra, 927-28).

897-75 Falkenean Const. Co. v. Ginley, 131 Ill. App. 399 (and that considerable light would shine through at a large opening from the street, two hours before sunset); Dayton etc. Co. v. Marshall, 36 Ind. App. 491, 75 N. E. 824.

898-78 Milk. — That a 3 per cent. butter fat test for milk is not unreasonably high. St. Louis v. Dairy Co., 190 Mo. 507, 89 S. W. 627. *Compare* St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611.

That formaldehyde placed in milk as a preservative is not injurious can not be judicially noticed. St. Louis v. Schuler, 190 Mo. 524, 89 S. W. 621.

Electricity; dangerous qualities judicially noticed. — Warren v. R. Co., 141 Mich. 298, 104 N. W. 613; DeKallands v. Tel. Co. (Mich.), 116 N. W. 564.

That kerosene is a product of crude petroleum. — Moeckel v. Cross Co., 190 Mass. 280, 76 N. E. 447.

Explosives. — Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46 (dynamite used as explosive is intrinsically dangerous).

Rough on rats is not judicially known to contain arsenic, nor does the court know that this name is everywhere applied to the same substance. S. v. Blydenburg, 135 Ia. 264, 112 N. W. 634.

899-81 But "hop-ale" or "hop-jack" are not judicially known to be malt liquor. Daniel v. S., 149 Ala. 44, 43 S. 22.

899-86 Fears v. S., 125 Ga. 740, 54 S. E. 661; Tompkins v. S., 2 Ga. App. 639, 58 S. E. 1111; S. v. York, 74 N. H. 125, 65 A. 685; Wilcoxson v. S. (Tex. Cr.), 91 S. W. 581.

900-87 Hoagland v. Canfield, 160 Fed. 146.

900-91 Lambie v. S. (Ala.), 44 S. 51.

901-92 S. v. Carmody (Or.), 91 P. 446. See Hoagland v. Canfield, 160 Fed. 146; White v. Manning (Tex. Cr.), 102 S. W. 1160.

902-4 Mussbanner v. S. (Fla.), 44 S. 712; S. v. Piner, 141 N. C. 760, 53 S. E. 305. See Hall v. S., 122 Ga. 142, 50 S. E. 59.

902-9 San Antonio etc. R. Co. v. Mertink (Tex. Civ.), 102 S. W. 153. See Laturen v. Drug Co., 93 N. Y. S. 1035; Ex parte Hawley (S. D.), 115 N. W. 93, and infra, 908-34.

Telephone. — Its nature, operation and ordinary uses are facts of general scientific knowledge of which courts will take notice as part of public contemporary history. Western U. T. Co. v. Rowell (Ala.), 45 S. 73; Wolfe v. R. Co., 97 Mo. 473, 11 S. W. 49, 10 Am. St. 331, 3 L. R. A. 539.

903-10 Milk test.— That a prescribed test is not a proper one can not be judicially noticed. St. Louis v. Dairy Co., 190 Mo. 507, 89 S. W. 627.

Electrical therapeutics.— The court has no judicial knowledge as to the merits or efficacy of a device advertised to cure by thermal electricity, nor whether it is capable of producing an electric current. Macomber v. Board (R. I.), 65 A. 263.

904-12 Baker v. Mfg. Co., 146 Fed. 744, 77 C. C. A., 234; Am. Sulph. Pulp Co. v. Paper Co., 157 Fed. 660 (only so far as it is a matter of common knowledge).

905-20 McDonald v. S. 2 Ga. App. 633, 58 S. E. 1067.

That a nickel is a current coin of the value of five cents. Barddell v. S., 144 Ala. 54, 39 S. 975; Sims v. S., 1 Ga. App. 776, 57 S. E. 1029.

That a quarter is a twenty-five cent piece.— Sims v. S., supra.

906-22 McDonald v. S., 2 Ga. App. 633, 58 S. E. 1067.

906-23 McDonald v. S., supra (that the face value is presumptively the commercial value). See Barddell v. S., 144 Ala. 54, 39 S. 975.

National bank notes are part of the currency of the United States and their value will be judicially noticed. Joiner v. S., 124 Ga. 102, 52 S. E. 76. But see Goodman v. P., 228 Ill. 154, 160, 81 N. E. 830.

906-25 See Joiner v. S., 124 Ga. 102, 52 S. E. 76; Ector v. S., 120 Ga. 543, 48 S. E. 315.

Value of commodities.— In a criminal prosecution for receiving stolen cotton it was held that where no allegation of the value of the cotton was made the court could not take notice that cotton was a thing of value. Wright v. S., 1 Ga. App. 158, 57 S. E. 1050.

906-27 See Scarborough v. Woodill (Cal. App.), 93 P. 383 (noticing the flora and climatic conditions of the country for the purpose of determining whether certain trees on a boundary line were natural timber or ornamental trees); International etc. R. Co. v. Voss (Tex. Civ.), 109 S. W. 984 (number of times Johnson grass goes to seed in a season, not noticed).

Plant diseases.— That trees and plants are subject to destructive communicable diseases. Ex parte Hawley (S. D.), 115 N. W. 93.

907-28 See McLean v. R. Co., infra, 934-43.

907-29 See Sun Ins. Off. v. Woolen Mill, 72 Kan. 41, 82 P. 513.

Texas fever.— See S. v. Asbell, 74 Kan. 397, 86 P. 457.

That horses are frightened sometimes at unusual objects is judicially known. Baltimore etc. R. Co. v. Slaughter, 167 Ind. 330, 79 N. E. 186.

908-31 Difference between races. Wolfe v. R. Co., 2 Ga. App. 499, 58 S. E. 899 (negro and Caucasian).

908-32 Whether a woman who has borne children can tell the dif-

ference between a prematurely born and a full grown child, the court has no judicial knowledge. Bessemer etc. Co. v. Doak (Ala.), 44 S. 627.

908-34 *Compare* Macomber v. Board, supra, 903-10.

Effect of Morphine.— That 1-10 of a grain taken every four hours could not have a poisonous effect. Laturen v. Drug Co., 93 N. Y. S. 1035.

That milk is necessary food for the young and the infirm and that disease germs are disseminated through impure milk, and that adulterated or diluted milk is not wholesome and nutritious. St. Louis v. Schuler, 190 Mo. 524, 535, 89 S. W. 621. *Compare* St. Louis v. Schuler, 190 Mo. 507, 89 S. W. 621, (supra, 898-78); St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611.

Vaccination. — Auten v. Board, 83 Ark. 431, 104 S. W. 130. See also 892-52.

Sanitation. — Court's judicial knowledge of sanitation is too limited to be opposed to that of the law makers on matters as to which even the learned differ. Logan v. Childs, 51 Fla. 238, 41 S. 197.

909-37 Hoagland v. Canfield, 160 Fed. 146.

909-39 But see Dunphy v. Stock Yards, 118 Mo. App. 506, 523, 95 S. W. 301.

That pain is suffered from a severe injury. — Bolton v. Ovitt, 80 Vt. 362, 67 A. 881.

909-41 See Wolfe v. R. Co., 2 Ga. App. 499, 58 S. E. 899.

909-42 Waters O. P. Co. v. Deselms, 18 Okla. 107, 89 P. 212 (common practice of lighting fires with coal oil).

911-48 Worden v. Cole, 74 Kan. 226, 86 P. 464 (railways).

Of cities.— Salient facts of the geography of the incorporated cities of the state will be noticed. Agnew v. Pawnee City (Neb.), 113 N. W. 236.

911-49 Harper Furn. Co. v. Exp. Co., 144 N. C. 639, 57 S. E. 458 (infra, 933-40).

911-50 Rivers referred to in laws. S. v. R. Co., 141 N. C. 846, 54 S. E. 294.

911-51 Tidal streams.— That the Passaic river is a tidal stream. McCarter v. Water Co., 70 N. J. Eq. 525, 61 A. 710.

That the flow of the small streams of the state grows less year by year, judicially noticed. Andrews v. Weckerman, 144 Mich. 199, 107 N. W. 870.

912-55 Seufferle v. Macfarland, 28 App. D. C. 94.

913-56 See Chicago v. Kubler, 133 Ill. App. 520.

913-58 Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447; P. v. Board, 122 Ill. App. 40; Terrell v. Paducah, 28 Ky. L. R. 1237, 92 S. W. 310 (Tennessee river); McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351 (all tidal waters and large rivers); S. v. Norcross, 132 Wis. 534, 112 N. W. 40.

914-59 Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447. See P. v. Board, 122 Ill. App. 40, holding that the navigability of streams is a question of fact which is a proper subject for judicial notice only in the case of streams whose navigability is well known.

914-60 But see S. v. Norcross, 132 Wis. 534, 112 N. W. 40, *dist.* S. v. Carpenter, 68 Wis. 165, 31 N. W. 730, 60 Am. Rep. 848.

914-62 See McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351.

915-65 See P. v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718 (noticing that Kingston and Woodstock are only ten miles apart); Johnson v. R. Co., 140 N. C. 574, 53 S. E. 362.

915-68 Blood v. Morrin, 140 Fed. 918 (that Buffalo and St. Louis are more than one hundred miles apart); Harper Furn. Co. v. Exp. Co., 144 N. C. 639, 57 S. E. 458 (infra, 933-40).

915-69 See Harper Furn. Co. v. Exp. Co., supra, and infra, 933-40.

916-72 Frank & S. v. Gupp, 104 Va. 306, 51 S. E. 358. See Western U. T. Co. v. Rowell (Ala.), 45 S. 73; Frederick v. Goodbee, 120 La. 783, 45 S. 606; Cumberland Tel. Co. v. R. Co., 117 La. 199, 41 S. 492.

917-73 Boer war—years during which it was in progress judicially noticed. Dowie v. Sutton, 227 Ill. 183, 81 N. E. 395.

917-75 Separation of Methodist Episcopal Church into two branches, the articles of separation and the territory assigned to each branch.

Malone v. Lacroix, 143 Ala. 657, 41 S. 734. See also Goode v. McPherson, 51 Mo. 126.

917-76 See S. v. Toole, 32 Mont. 4, 79 P. 403.

917-77 Kentucky etc. Mfg. Co. v. Adams, infra, 934-44.

918-83 Of Cities. — Salient facts of history of incorporated cities of state will be noticed. Agnew v. Pawnee City (Neb.), 113 N. W. 236.

919-87 Foreign Wars. — See supra, 917-73.

919-88 Day v. Smith, 87 Miss. 395, 39 S. 526.

920-98 Day v. Smith, supra (de facto government).

922-11 Admissible without preliminary proof since the court takes notice of their authenticity and reliability. Valente v. R. Co., 151 Cal. 534, 91 P. 481; Stephens v. Elliott, 36 Mont. 92, 92 P. 45.

922-14 Ex parte Berry, 147 Cal. 523, 82 P. 44 (automobile); Brown v. Spreckels, 14 Haw. 399; Sun Ins. Off. v. Woolen Mill, 72 Kan. 41, 82 P. 513. See McDonald v. S., 2 Ga. App. 633, 58 S. E. 1067 (greenback), and supra, 905-20.

The popular meaning of words in common use is judicially noticed. Knight v. Land Co. (Fla.), 45 S. 1025 (that "dip" is the popular name for the crude pine gum as dipped up from places cut into the trees to collect it for the manufacture of turpentine and resin); S. v. Maloney, 115 La. 498, 39 S. 539 (pool room).

Hawaiian words. — Courts of the territory of Hawaii take judicial notice of the "ordinary usual and well known meaning of Hawaiian words," and can consult standard dictionaries or other authorities. John II v. Judd, 13 Haw. 319, 325.

923-15 S. v. Wilhite, 132 Ia. 226, 109 N. W. 730 (may receive in evidence standard medical works defining medical terms).

924-16 See Bond v. Kidd, 122 Ga. 812, 50 S. E. 934.

925-19 Bond v. Kidd, supra.

925-21 See S. v. Maloney, 115 La. 498, 39 S. 539.

925-22 "F. O. B." — Kilmer v. Scale Co., 36 Ind. App. 568, 76 A. 271; Hurst v. Mfg. Co., 73 Kan. 422, 85 P. 551; Vogt v. Schienebeck, 122 Wis. 491, 100 N. W. 820, 106 Am. St. 989, 67 L. R. A. 756.

"R. L. D." as used in records of U. S. revenue collector's office judicially known to mean "retail liquor dealer." S. v. Nippert, 74 Kan. 371, 86 P. 478.

"O. N." — That O. N. in a freight bill meant "order notify." Alabama etc. R. Co. v. Power Co. (Miss.), 46 S. 254.

That "Pres." means president. — Griffin v. Erskine, 131 Ia. 444, 109 N. W. 13.

926-23 McDonald v. S. (Fla.), 46 S. 176 (Jno. means John).

927-25 Hull v. Croft, 132 Ill. App. 509.

927-28 O'Brien Lumb. Co. v. Wilkinson, 123 Wis. 272, 101 N. W. 1050. See Wamser v. B. K. Co., 109 App. Div. 53, 95 N. Y. S. 1051 (custom of business men to wear watch in vest pocket); Waters-P. O. Co. v. Deselms, 18 Okla. 107, 89 P. 212; Clement v. Graham, 78 Vt. 290, 63 A. 146.

System of designating time. — That "standard" or "railroad" time is the system for designating time which has been in use in North Dakota since territorial days. Orvik v. Casselman, 15 N. D. 34, 105 N. W. 1105.

Customs of business. — See infra, 933-39, 935-46 et seq.

929-31 See Schultz v. Ford Bros., infra 937-50.

929-32 *Contra.* — Butler v. Min. Co., 1 Alaska 246.

929-33 Parkersville v. Wattier, 48 Or. 332, 86 P. 775, *cit.* Isaacs v. Barber, 10 Wash. 124, 38 P. 871, 45 Am. St. 772, 30 L. R. A. 665, and *over.* Lewis v. McClure, 8 Or. 274. See Crawford Co. v. Hathaway, 67 Neb. 325, 358, 93 N. W. 781.

929-34 See Malone v. La Croix, supra, 917-75.

What "Martinism" is will not be noticed judicially where its adoption is alleged to be a departure from the tenets of the Baptist Church. Jarrell v. Sproles, 20 Tex. Civ. 387, 49 S. W. 904.

931-38 See South Pasadena v. L. & W. Co. (Cal.), 93 P. 490 (supra 896-68).

Sunday labor. — McCain v. S., 2 Ga. App. 389, 58 S. E. 550.

Political parties. — That there is but

one republican party. S. v. Board, 167 Ind. 276, 78 N. E. 1016.

Where under the statute regulating primary elections a party to be entitled to hold such election must have cast 10,000 votes for governor at the last election, the court knows judicially that the Democratic party cast more than that number of votes. S. v. Flynn, 119 Mo. App. 712, 94 S. W. 543, *cit.* In re Denny, 156 Ind. 104, 59 N. E. 359, 51 L. R. A. 722.

Labor unions.— Objects which naturally pertain to labor union, judicially noticed (Lawlor v. Merritt, 78 Conn. 630, 63 A. 639); but not the compact or principles by which the members are bound. Birmingham R. Co. v. Crampton (Ala.), 39 S. 1020.

Inferiority of negro race.— In determining whether calling a man a negro is an actionable wrong the court may, without violating the principle of civil and political equality, judicially recognize, as a social fact of common knowledge, that the negro race is in mind and morals inferior to the Caucasian. Wolfe v. R. Co., 2 Ga. App. 499, 58 S. E. 899.

Common use of telephone.— Western U. T. Co. v. Rowell (Ala.), 45 S. 73; Wolfe v. R. Co., 97 Mo. 473, 11 S. W. 49, 10 Am. St. 331, 3 L. R. A. 539. See also S. v. R. Co., 51 Fla. 578, 40 S. 875.

Automobiles. — Ex parte Berry, 147 Cal. 523, 82 P. 44.

Evil of gambling on horse races.— See S. v. Maloney, 115 La. 498, 39 S. 539.

933-39 *Compare* Ex parte Berry, supra.

General custom among carriers of transporting sample trunks as personal baggage. Fleishman M. Co. v. R. Co., 76 S. C. 237, 56 S. E. 974.

933-40 Harper Furn. Co. v. Exp. Co., 144 N. C. 639, 57 S. E. 458 (noticing the railway connections between Lenoir, N. C., and Erie, Pa., the geographical situation of the latter, and that fourteen days is too long a time for the carrying of goods by express between such points).

934-43 McLean v. R. Co., 203 U. S. 38; S. v. R. Co., 48 Fla. 114, 37 S. 652; King v. Heleliilii, 5 Haw. 16; Denegre v. Walker, 114 Ill. App. 234 (character of improvements made in business center of Chicago and that many of such buildings are erected under long term leases). See Crawford Co. v. Hathaway, 67 Neb. 325, 358, 93 N. W. 781.

934-44 Kentucky etc. Mfg. Co. v. Adams, 32 Ky. L. R. 823, 106 S. W. 1198 (that in 1898 the country had not recovered from the panic of 1893, and that values of realty were low, but that in 1902 the country was recovering and prices had risen). Hawley v. Von Lauken, 75 Neb. 597, 106 N. W. 456.

Financial depression and disturbance of October, 1907, judically noticed. Germania Ins. Co. v. Potter, 109 N. Y. S. 435.

935-46 Knight v. Land Co. (Fla.), 45 S. 1025; P. v. R. Co., 233 Ill. 378, 84 N. E. 368 (that grain coming to Chicago by any railroad may be transferred by means of the belt roads to any warehouse in the city); Ayer & L. Tie Co. v. Keown, 29 Ky. L. R. 110, 93 S. W. 588 (business of loading railroad ties on barges for exportation); Harper Furn. Co. v. Exp. Co., 144 N. C. 639, 57 S. E. 458 (express business). See supra, 927-28, 928-29, 933-39.

Custom of life insurance companies to require signed application and medical examination before issuing policy — judicially noticed. Taylor v. Grand Lodge, 101 Minn. 72, 111 N. W. 919. See also Waters v. Annuity Co., 144 N. C. 663, 57 S. E. 437.

Custom of voluntary associations to keep records of their proceedings. Norwich Ins. Soc. v. R. Co., 46 Or. 123, 78 P. 1025 (of master mechanics associations).

936-48 See Lewis H. Co. v. Sup. Co., 59 W. Va. 75, 52 S. E. 1017.

Custom in foreign state. — The customary business hours in a foreign jurisdiction cannot be judicially noticed. Columbian Bkg. Co. v. Bowen (Wis.), 114 N. W. 451 (business hours in Chicago for presentment of negotiable instrument, not noticed).

937-50 See Schultz v. Ford Bros., 133 Ia. 402, 109 N. W. 614.

938-51 See Knight v. Land Co. (Fla.), 45 S. 1025.

Professions. — The general duties and character of professions are judicially noticed. O'Reilly v. Erlanger, 108. App. Div. 318, 95 N. Y. S. 760.

939-53 Elkhart H. Co. v. Turner (Ind.). 84 N. E. 812.

941-55 *Compare* 945-83 (authority of street car conductor).

941-57 San Antonio etc. R. Co. v. Mertink (Tex. Civ.), 102 S. W. 153. But see Chicago etc. R. Co. v. Dwer, 213 Ill. 26, 72 N. E. 758.

Fare between different points not noticed. Missouri etc. R. Co. v. Lightfoot (Tex. Civ.), 106 S. W. 395.

941-58 Harper Furn. Co. v. Exp. Co., 144 N. C. 639, 57 S. E. 458.

Dangerous rate of speed. — Court does not know judicially that a rate of fifty or fifty-five miles per hour is a dangerous rate of speed. Tex. etc. R. Co. v. Langham (Tex. Civ.), 95 S. W. 686.

941-61 Foley v. R. Co., 193 Mass. 332, 79 N. E. 765. See U. S. v. Adair, 152 Fed. 737; Wabash R. Co. v. Thomas, 117 Ill. App. 110; Grand Trunk R. Co. v. S. (Ind. App.), 82 N. E. 1017 (switching); Harper Furn. Co. v. Exp. Co., 144 N. C. 639, 57 S. E. 458, and supra, 933-39.

That grain is usually transported in cars. Atchison etc. R. Co. v. P., 128 Ill. App. 38.

941-62 P. v. R. Co., 233 Ill. 378, 84 N. E. 368 (see supra, 935-46).

942-63 Concussions and jerks. — Foley v. R. Co., 193 Mass. 332, 79 N. E. 765; Partelow v. R. Co., 196 Mass. 42, 81 N. E. 894; Hawk v. R. Co. (Mo. App.), 108 S. W. 1119. *Compare* Rome R. & L. Co. v. Keel, supra, 893-61.

Spark arresters. — Babbitt v. R. Co., 108 App. Div. 74, 95 N. Y. S. 429.

That maintenance of switch lanterns or targets at railroad sidings tends to promote safety of employes and the public. Southern R. Co. v. Blanford, 105 Va. 373, 54 S. E. 1.

Relative efficiency of airbrake used alone and in connection with reverse lever. See Harris v. R. Co. (Ala.), 44 S. 962.

Distance in which train could have been stopped—court does not know that train going at rate of twenty to twenty-five miles an hour can be stopped within eighty or ninety yards. Southern R. Co. v. Gullatt (Ala.), 43 S. 577. See also Thornton v. R. Co., 24 Ky. L. R. 854, 70 S. W. 53; Tulcy v. R. Co., 134 Mass. 499. But see *contra* Davis v. R. Co., 136 N. C. 115, 48 S. E. 591.

943-65 See Harper Furn. Co. v. Exp. Co., 144 N. C. 639, 57 N. E. 458.

943-66 *Contra.* — Goodman v. P., 228 Ill. 154, 81 N. E. 830 (refusing to notice that the Chicago Great Western R. Co. owned or operated a railroad although its corporate character was alleged).

943-67 Worden v. Cole, 74 Kan. 226, 86 P. 464; Patterson v. R. Co. (Kan.), 94 P. 138; McCullen v. R. Co., 146 N. C. 568, 60 S. E. 506; Missouri etc. R. Co. v. Lightfoot (Tex. Civ.), 106 S. W. 395; Texas C. R. Co. v. Marrs, 100 Tex. 530, 101 S. W. 1177; Texas etc. R. Co. v. Walker (Tex. Civ.), 95 S. W. 743. But see Pierce v. R. Co. (Tex. Civ.), 108 S. W. 979.

944-71 But see Worden v. Cole, 74 Kan. 226, 86 P. 464.

945-77 Where the tracks of several companies lie in close proximity to one another along a city street the court cannot judicially notice the ownership of a particular track. Pierce v. R. Co. (Tex. Civ.), 108 S. W. 979.

945-78 But see Atlanta etc. R. Co. v. R. Co., 125 Ga. 529, 54 S. E. 736 (noticing that one company was the successor, by legislation, of another).

945-82 Existence of only two telegraph companies in the state is not judicially known. S. v. R. Co. (Fla.), 40 S. 875.

945-83 Indianapolis St. R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978 (that street railway is carrier of passengers); Kleffman v. R. Co., 104 App. Div. 416, 93 N. Y. S. 741 (construction of an ordinary horse car). See Spiking v. R. Co., 33 Utah 313, 93 P. 838 (purpose of fenders).

That conductor has charge of the movements of a street car, judicially noticed. Kohr v. R. Co., 117 Mo. App. 302, 92 S. W. 1145.

The stopping at street crossings to let off and take on passengers and that such stopping is an invitation to ride to all persons desiring to

do so, even though the car is crowded. Baskett v. R. Co., 123 Mo. App. 725, 101 S. W. 138.

Failure to provide adequate accommodations and over-crowding of street cars is a matter of common knowledge which is judicially noticed. Capital Tract Co. v. Brown, 29 App. D. C. 473.

946-85 Craps is judicially known to be a game played with dice. Sims v. S., 1 Ga. App. 776, 57 S. E. 1029, noticing also the meaning of the terms "shooting" used in connection with such game.

Draw poker is judicially known to be a gambling game. Shreveport v. Bowen, 116 La. 522, 40 S. 859.

947-89 See St. Louis v. Dairy Co., 190 Mo. 507, 89 S. W. 621 (supra, 897-78); Empire R. Corp. v. Sayre, 107 App. Div. 415, 95 S. W. 371.

947-90 Campbell v. County, 146 Ala. 703, 41 S. 407 (repeal of statute by constitution); S. v. Briscoe (Del.), 67 A. 154; Doss v. Board, 117 La. 450, 41 S. 720; Moynihan v. Holyoke, 193 Mass. 26, 78 N. E. 742; Empire R. Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. S. 371; Clement v. Graham, 78 Vt. 290, 63 A. 146. See Consumers C. Co. v. Connolly, 31 Can. Sup. 244.

948-91 Jordan v. McDonnell (Ala.), 44 S. 101; Perry v. Morris (Ind. Ter.), 104 S. W. 571; Worden v. Cole, 74 Kan. 226, 86 P. 464; Milliken v. Dotson, 117 App. Div. 527, 102 N. Y. S. 564; El Paso etc. R. Co. v. Smith (Tex. Civ.), 108 S. W. 988.

949-92 But see International etc. R. Co. v. Hall, 35 Tex. Civ. 545, 81 S. W. 82.

950-98 See Chesapeake etc. Canal v. R. Co., 99 Md. 570, 58 A. 34.

951-5 Combs v. C., 31 Ky. L. R. 822, 104 S. W. 270 (prohibiting sale of liquor); Ball v. C., 30 Ky. L. R. 600, 99 S. W. 326 (same); Crigler v. C., 27 Ky. L. R. 918, 87 S. W. 276.

953-14 N. Y. etc. R. Co. v. Offield, 78 Conn. 1, 60 A. 740.

954-20 Townsend v. Trustees, 97 App. Div. 316, 89 N. Y. S. 982 (noticing colonial and earlier laws affecting title to realty).

955-24 Equitable etc. Assn. v. King, 48 Fla. 252, 37 S. 181; Loyal M. L. v. Brewer, 75 Kan. 729, 90 P. 247. See infra, 958-36.

The decisions of another state are not judicially noticed. Southern Exp. Co. v. Owens, 146 Ala. 412, 41 S. 752. *Compare* Missouri etc. R. Co. v. Wise, infra, 957-31.

956-28 Leathe v. Thomas, 218 Ill. 246, 75 N. E. 810; McKnight v. R. Co., 33 Mont. 40, 82 P. 661; Hunt v. Monroe, 32 Utah 440, 91 P. 269.

957-31 Laws of Arkansas adopted by act of Congress as the law of Indian Territory, are judicially noticed. Missouri etc. R. Co. v. Wise (Tex.), 109 S. W. 112, *aff.* 106 S. W. 465 (which, however, holds that the construction previously placed on such laws by the Arkansas supreme court cannot be judicially noticed). See also Red River Nat. Bk. v. De Berry (Tex. Civ.), 105 S. W. 998; Bink v. S., 48 Tex. Cr. 598, 89 S. W. 1075.

958-33 Elliott v. Garvin (Ind. Ter.), 104 S. W. 878. But see Porter v. U. S. (Ind. Ter.), 104 S. W. 855.

958-35 Courts of District of Columbia are courts of the United States within the meaning of this rule. Moore v. Pywell, 29 App. D. C. 312 (recognizing the distinction laid down in Hanley v. Donoghue, 116 U. S. 1, between cases coming from the state courts and those beginning in a federal court).

That in the local law of Porto Rico the distinction between law and equity does not obtain. Garzot v. de Rubio, 209 U. S. 283, 304.

958-36 Southern Exp. Co. v. Owens, 146 Ala. 412, 41 S. 752; Ryan v. Salmon Co. (Cal.), 95 P. 862; Clark v. Realty Co., 115 Ill. App. 150; Crane v. Blackman, 126 Ill. App. 631; Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178; Varner v. Inter St. Exch. (Ia.), 115 N. W. 1111 (the failure to prove such laws cannot be cured on appeal by citing the reports of the decisions of such foreign courts); Cumberland Tel. Co. v. R. Co., 117 La. 199, 41 S. 492; Smith v. Aultman, 120 Mo. App. 462, 96 S. W. 1034; Snuffer v. Karr, 197 Mo. 182, 94 S. W. 983; McKnight v. R. Co., 33 Mont. 40, 82 P. 661; White v.

Richison (Tex. Civ.), 94 S. W., 202; App v. App, 106 Va. 253, 55 S. E. 672.

Laws of Cuba not judicially noticed. Crosby v. R. Co., 158 Fed. 144.

958-37 Southern Exp. Co. v. Owens, 146 Ala. 412, 41 S. 752.

958-38 *Contra.* — Cumberland Tel. Co. v. R. Co., 117 La. 199, 41 S. 492, *over.* Graham v. Williams, 21 La. Ann. 594.

959-42 Frank & S. v. Gump, 104 Va. 306, 51 S. E. 358.

959-43 Basis of foreign laws. Banco de Sonora v. Cas. Co., 124 Ia. 576, 100 N. W. 532, 104 Am. St. 367.

960-50 With Indian tribes. Reservation created thereby, and that title to land therein is in the Indians as a tribe. Peano v. Brennan, 20 S. D. 342, 106 N. W. 409.

960-54 The Matterhorn, 128 Fed. 863, 63 C. C. A. 331.

961-57 Report of the commission from whom the Tenement House Act emanated may be noticed in determining the legislative intent. P. v. Butler, 109 N. Y. S. 900, *cit.* Tenement House Dept. v. Moeschen, 179 N. Y. 325, 331, 72 N. E. 231, 103 Am. St. 910, 70 L. R. A. 704.

Long continued practical construction given a law by the officers affected thereby is judicially noticed. Copper Queen Min. Co. v. Board, 9 Ariz. 383, 84 P. 511 (by territorial board of equalization). *Compare* Griner v. Baggs, infra, 983-80.

962-61 See cases cited under 908-34 and 931-38.

963-66 Local option law. — Local adoption noticed. Bass v. S., 1 Ga. App. 728, 790, 57 S. E. 1054. See also Moore v. S., 126 Ga. 414, 55 S. E. 327; Irby v. S. (Miss.), 44 S. 801.

964-67 Local option. — S. v. O'Brien, 35 Mont. 482, 90 P. 514; Allen v. S. (Tex. Cr.), 98 S. W. 869 (appellate court); Craddick v. S., 48 Tex. Cr. 385, 88 S. W. 347. *Compare* Combs v. C., 31 Ky. L. R. 822, 104 S. W. 270; Ball v. C., 30 Ky. L. R. 600, 99 S. W. 326.

But the continuance of the law, after adoption, for four years as provided by the general law is judicially noticed. S. v. Hall (Mo. App.), 108 S. W. 1077.

965-71 But the succession, by legislative action, of one railroad corporation to the properties of another is judicially noticed. Atlanta etc. R. Co. v. R. Co., 125 Ga. 529, 798, 52 S. E. 320.

967-80 S. v. Custer (R. I.), 66 A 306.

967-83 Mayes v. Palmer, 206 Mo. 293, 103 S. W. 1140.

968-90 See Ga. Bkg. Co. v. Wright, 125 Ga. 589, 54 S. E. 52.

968-91 S. v. Mutty (Wash.), 82 P. 118. See Copper Queen Min. Co. v. Board, 9 Ariz. 383, 84 P. 511.

970-6 *Compare* Phillips v. Lindley, supra, 891-51.

970-7 Trotta v. Johnson, 28 Ky. L. R. 851, 90 S. W. 540 (that United States and Italy are at peace).

971-11 Election precinct where established by the county court which may change its boundaries biennially cannot be noticed judicially. S. v. Carmody (Or.), 91 P. 441.

971-12 But when not established by public act they cannot be noticed. S. v. Carmody, supra.

971-13 Crow v. Roane (Ark.), 110 S. W. 801; Merritt v. County, 3 Cal. App. 168, 84 P. 675; Huxford v. Pine Co., 124 Ga. 181, 52 S. E. 439; Cooper v. S., 2 Ga. App. 730, 59 S. E. 20; Atchison etc. R. Co. v. Paxton, 75 Kan. 197, 88 P. 1082; S. v. R. Co., 141 N. C. 846, 54 S. E. 294.

971-14 Topeka v. Cook, 72 Kan. 595, 84 P. 376.

972-17 Huxford v. Pine Co., 124 Ga. 181, 52 S. E. 439; Moore v. S., 126 Ga. 414, 55 S. E. 327.

Class of county. — Alameda County v. Dalton, 148 Cal. 246, 82 P. 1050.

973-20 Crossen v. Sumner, 125 Ga. 291, 54 S. E. 181; Brownsville v. Arbuckle, 30 Ky. L. R. 414, 99 S. W. 239; Missouri etc. R. Co. v. Lightfoot (Tex. Civ.), 106 S. W. 395.

De facto county seat judicially noticed. — Board v. S. (Okla.), 91 P. 699.

Of Foreign County. — See supra, 891-51.

973-23 *Contra.* — Brownsville v. Arbuckle, 30 Ky. L. R. 414, 99 S. W. 239.

973-24 Huxford v. Pine Co., 124 Ga. 181, 52 S. E. 439.

That a new county was formerly embraced within the limits of another county, judicially noticed. Parker v. S., 126 Ga. 443, 55 S. E. 329.

973-25 S. v. Schnitger (Wyo.), 95 P. 698.

974-31 Board v. Berry (W. Va.), 59 S. E. 169.

976-38 Frederick v. Goodbee, 120 La. 783, 45 S. 606 (members of President's cabinet); S. v. Schnitger (Wyo.), 95 P. 698 (members of state legislature).

977-43 See Mayes v. Palmer, 206 Mo. 293, 103 S. W. 1140.

977-44 Commissioners to take depositions in other states.— Palmer v. Fogg, 35 Me. 368, 58 Am. Dec. 708.

978-49 But courts are not compelled to notice who are de facto officers. Williams v. Finch, 148 Ala. 674, 41 S. 834.

979-50 Mayes v. Palmer, 206 Mo. 293, 103 S. W. 1140 (circuit judge to fill unexpired term).

979-52 Ryan v. Young, 147 Ala. 660, 41 S. 954 (even though he has been displaced by a successor); Williams v. Finch, 148 Ala. 674, 41 S. 834.

980-61 Aultman Mach. Co. v. Burchett, 15 Okla. 490, 83 P. 719. See S. v. Schnitger (Wyo.), 95 P. 698.

981-64 Ex parte Bargagliotti, 6 Cal. App. 333, 92 P. 96 (sheriff).

981-66 Ryan v. Young, 147 Ala. 660, 41 S. 954.

Signature of any officer who is authorized to make a certificate may be noticed. S. v. Hopkins, 118 La. 99, 42 S. 660 (signature of assistant coroner).

982-72 Pardee v. Schanzlen, 3 Cal. App. 597, 86 P. 812; McDonald v. P., 123 Ill. App. 346 (seal and signature); Brown Mfg. Co. v. Gilpin, 120 Mo. App. 130, 96 S. W. 669.

983-80 Practices of the departments of the state government are judicially noticed. Griner v. Baggs (Ga. App.), 61 S. E. 147 (of commissioner of agriculture). *Compare* Copper Queen Min. Co. v. Board, supra, 961-57.

984-81 S. v. Toole, 32 Mont. 4, 79 P. 403. See Merritt v. County, 3 Cal. App. 168, 84 P. 675.

984-82 S. v. Norwalk, 77 Conn. 257, 58 A. 759 (volume in which secretary of state binds up the engrossed legislative bills which have become laws). See Atlanta etc. R. Co. v. R. Co., 124 Ga. 125, 52 S. E. 320 (of secretary of state); P. v. R. Co., 145 Mich. 140, 108 N. W. 772, and supra, 961-57.

A letter of the commissioner of general land office in the course of his official business is a public document and judicially noticed. So. P. R. Co. v. Lipman, 148 Cal. 480, 83 P. 445.

985-83 Records of tax proceedings cannot be judicially noticed. Auditor-Gen. v. Clifford, 143 Mich. 626, 107 N. W. 287.

Report of state tax commissioners judicially noticed. Jeffersonville v. Bridge Co. (Ind.), 83 N. E. 337, *cit.* Kirby v. Lewis, 39 Fed. 66.

Reports to corporation commissioners by railroad companies, being public records, are judicially noticed. Staton v. R. Co., 144 N. C. 135, 56 S. E. 794.

986-84 Ferrell v. Ellis, 129 Ia. 614, 105 N. W. 993; Gannett v. Tel. Co., 55 Misc. 555, 106 N. Y. S. 3; Page v. McClure, 79 Vt. 83, 64 A. 451.

986-85 Ferrell v. Ellis, supra; Parker Co. v. Kan. City, 73 Kan. 722, 726, 85 P. 781 (that Kansas City is only city in state with population of 50,000). See P. v. Earl (Colo.), 94 P. 294.

986-86 Ruckert v. Richter, 127 Mo. App. 664, 106 S. W. 1081.

986-88 S. v. Schnitger (Wyo.), 95 P. 698.

987-92 Bank of L. v. Fulgham, 151 Cal. 234, 90 P. 936; Merritt v. County, 3 Cal. App. 168, 84 P. 975; Stanford v. Bailey, 122 Ga. 404, 50 S. E. 161; Payton v. McPhaul, 128 Ga. 510, 58 S. E. 50; Williams v. S., 2 Ga. App. 629, 58 S. E. 1071.

988-97 Payton v. McPhaul, supra. See Bank of L. v. Fulgham, supra; Kimball v. McKee, 149 Cal. 435, 86 P. 1089.

988-4 Brannan v. Henry, 142 Ala. 698, 39 S. 92; Worden v. Cole, 74 Kan. 226, 86 P. 464.

989-7 Merritt v. County, 3 Cal. App. 168, 84 P. 675.

990-10 Davis v. S (Wis.), 115 N. W. 150. See Kimball v. McKee, 149 Cal. 435, 86 P. 1089.

990-14 Nurnberger v. U. S. 156 Fed. 721 (land office); Kimball v. McKee, supra (of land office); Wabash R. Co. v. Campbell, 219 Ill. 312, 76 N. E. 346 (federal quarantine regulations relating to cattle); S. v. R. Co., 141 N. C. 846, 54 S. E. 294 (of department of agriculture regulating transportation of cattle). See Griner v. Baggs, supra, 983-80.

991-15 See Nagle v. U. S., 145 Fed. 302, 76 C. C. A. 181.

991-18 S. v. Swiggart, 118 Tenn. 556, 102 S. W. 75. See S. v. Schnitger (Wyo.), 95 P. 698.

992-21 Erford v. Peoria, 229 Ill. 546, 82 N. E. 374.

993-22 But see Erford v. Peoria, supra.

993-26 S. v. Ricksecker, 73 Kan. 495, 85 P. 547; S. v. Toole, 32 Mont. 4, 79 P. 403; Bosworth v. R. Co., 26 R. I. 309, 58 A. 982.

994-29 Bosworth v. R. Co., supra (ordering out militia to suppress strike).

995-34 That judicial district extends over two counties (S. v. Lu Sing, 34 Mont. 31, 85 P. 521), or the number of counties in a judicial circuit (S. v. Pope, 110 Mo. App. 520, 85 S. W. 633).

997-40 McMullan v. Long (Ala.), 39 S. 777 (date of beginning and length of session); Edwards v. S., 123 Ga. 542, 51 S. E. 630; Fry v. Radzinski, 219 Ill. 526, 76 N. E. 694; S. v. Pope, 110 Mo. App. 520, 85 S. W. 633; S. v. Lu Sing, 34 Mont. 31, 85 P. 521.

When the supreme court appoints the terms the order is equivalent to a statute and is judicially noticed. Board v. S. (Okla.), 91 P. 699.

When the commencement only is fixed by law the date of adjournment cannot be noticed. Felt v. Cook, 31 Utah 299, 87 P. 1092.

998-42 Rules of district courts of state not noticed. Powell v. Lumb. Co., 12 Idaho 723, 88 P. 97 (*cit.* Dours v. Cozentree, McGloin (La.) 257; Bowen v. Webb, 34 Mont. 61, 85 P. 739.

998-43 *Contra.* — Johnson-W. Co. v. Wright, 28 App. D. C. 375.

998-44 See Wyatt v. Arnott (Cal. App.), 94 P. 86.

999-48 But a written report by the grand jury, not being authorized by law, cannot be noticed. Chicago etc. Coal Co. v. P., 114 Ill. App. 75, 99.

999-50 Withaup v. U. S., 127 Fed. 530, 62 C. C. A. 328; Pavlicek v. Roessler, 121 Ill. App. 219 (appraisement of widow's award); S. v. Simpson, 166 Ind. 211, 76 N. E. 544, 1005.

1000-51 McNish v. S., 47 Fla. 69, 36 S. 176; S. v. Kesner, 72 Kan. 87, 82 P. 720 (journal entry in same case at previous term).

1000-52 Withaup v. U. S., 127 Fed. 530, 62 C. C. A. 328; McNish v. S., supra.

1001-58 See In re Holt, 15 Haw. 580; Reed v. Bank, 135 Ill. App. 165 (on scire facias to revive judgment), *aff.* in 232 Ill. 238, 83 N. E. 820; Edgar v. McDonald (Tex. Civ.), 106 S. W. 1135.

In contempt proceedings the court takes notice of its own orders and actions in the matter out of which the alleged contempt arises, and the facts constituting the contempt where the contempt was committed in its presence. Ferriman v. P., 128 Ill. App. 230 (*cit.* 3 Encyc. of Ev. 442); S. v. Thomas, 74 Kan. 360, 86 P. 499 (violation of injunction). See also Wilson v. Calculagraph Co., 153 Fed. 961.

Appointment of receiver. — When application therefor is mere incident of an action the court will take notice, without proof, of the facts and circumstances brought out in the main action. Waters-P. O. Co. v. S. (Tex. Civ.), 105 S. W. 851.

1002-60 Garnishment proceedings after judgment. — Baze v. Mfg. Co. (Tex. Civ.), 94 S. W. 460; Sawyer v. Bank, 41 Tex. Civ. 486, 93 S. W. 151.

1003-61 But see Young Hin v. Hackfeld, 16 Haw. 427, 430.

1003-62 Former jeopardy. — McNish v. S., 47 Fla. 69, 36 S. 176.

1003-63 Withaup v. U. S., 127 Fed. 530, 62 C. C. A. 328; Murphy v. Bank, 82 Ark. 131, 100 S. W. 894 (on plea res judicata); Estudillo v. L. & T. Co., 149 Cal. 556, 87 P. 19 (even though it is between the same parties); McNish v. S., 47 Fla. 69, 36 S. 176; In re Ollschlager (Or.), 89 P. 1049; Byrd v. S. (Ky.), 103 S. W. 863; Demars v. Hickey, 13 Wyo. 371, 80 P. 521, 81

P. 705. See Cumberland Tel. Co. v. R. Co., infra, 1004-66.

1004-65 *Compare* Board v. S. (Okla.), 91 P. 699.

1004-66 Files v. Jackson, 84 Ark. 587, 106 S. W. 950 (that tax sales in 1873 for taxes of 1872 were illegal). But in Cumberland Tel. Co. v. R. Co., 117 La. 199, 41 S. 492, the court expressly overrules Graham v. Williams, and other similar cases which hold that the record of other cases in which foreign law has been determined can be judicially noticed.

1004-68 Buhman v. Nickels, 1 Cal. App. 266, 95, P. 177; Brashears v. Frazier (Ky.), 110 S. W. 826 (in an action for wrongfully prosecuting another action in the same court, the disposition of the first action adverse to the plaintiff in the second action was judicially noticed by the trial court on demurrer, though not pleaded, and by the court on appeal). See Edgar v. McDonald (Tex. Civ.), 106 S. W. 1135; Sawyer v. Bank, 41 Tex. Civ. 486, 93 S. W. 151. But see Estudillo v. L. & T. Co., 149 Cal. 556, 87 P. 19.

As a guide to the exercise of its discretion in the disposition of a judgment which is clearly erroneous the appellate court may take notice of its records of other cases but not to reverse a judgment unimpeachable on the face of its own record. In re Trans. Pen. Cases, 46 Misc. 579, 92 N. Y. S. 322.

1005-71 Wilson v. Calculagraph Co., 153 Fed. 961; Gallagher v. U. S., 144 Fed. 87, 75 C. C. A. 245 (that a witness in the case at bar had testified differently in another case before the court); Hancock v. Glass Co., 37 Ind. App. 351, 75 N. E. 659; Edgar v. McDonald (Tex. Civ.), 106 S. W. 1135. See Seymour v. Berg, 127 Ill. App. 370; Waterbury Bank v. Reed. 231 Ill. 246, 83 N. E. 188; Culver v. F. D. Co., 149 Mich. 630, 113 N. W. 9; Sawyer v. Bank, 41 Tex. Civ. 486, 93 S. W. 151.

1006-74 In re Ollschlager (Or.), 89 P. 1049.

1007-76 See Bank v. Reed, 232 Ill. 238, 83 N. E. 820; Waterbury Nat. Bk. v. Reed, 231 Ill. 246, 83 N. E. 188.

1007-78 Hunter v. Lissner, 1 Ga. App. 1, 58 S. E. 54 (bankruptcy proceedings), *cit.* Boynton v. Ball, 121 U. S. 457.

1007-79 See Southern P. R. Co. v. Lipman, 148 Cal. 480, 83 P. 445.

1008-84 Peycke v. Shinn, 68 Neb. 343, 347, 94 N. W. 135.

1008-86 McNish v. S., 47 Fla. 69, 36 S. 176; S. v. Richardson, 48 Or. 309, 85 P. 225. See Richardson v. S., 47 Tex. Cr. 592, 85 S. W. 282.

1009-87 Glos v. Greiner, 226 Ill. 546, 80 N. E. 1055; S. v. Campbell, 210 Mo. 203, 109 S. W. 706 (prosecuting attorney); S. v. Guglielmo, 46 Or. 250, 79 P. 577, 80 P. 103.

1010-95 *Contra.*— Perry v. Bush, 46 Fla. 242, 35 S. 225.

1010-99 Glover v. Morris, 122 Ga. 768, 50 S. E. 956.

1011-1 Brunson v. S. (Ala.), 39 S. 569; Wyatt v. Arnott (Cal. App.), 94 P. 86 (election of certain person as judge pursuant to governor's proclamation, to fill unexpired term); Perry v. Bush, 46 Fla. 242, 35 S. 225; S. v. Pope, 110 Mo. App. 520; 85 S. W. 633; Mayes v. Palmer, 206 Mo. 293, 103 S. W. 1140.

1011-2 Glover v. Morris, 122 Ga. 768, 50 S. E. 956; N. W. Port Huron Co. v. Zickrick (S. D.), 115 N. W. 525.

1011-7 Weber v. Powers, 114 Ill. App. 411; Nolan v. R. Co. (Okla.), 91 P. 1128 (supreme court licenses all attorneys and therefor judicially knows who are licensed attorneys).

1012-10 S. v. Kinney (S. D.), 113 N. W. 77.

1012-15 S. v. Guglielmo, 46 Or. 250, 75 P. 577, 80 P. 103 (of deputy district attorney); S. v. Kinney (S. D.), 113 N. W. 77 (clerk).

1013-17 See S. v. Campbell, 210 Mo. 203, 109 S. W. 706; S. v. Kinney, supra.

1013-20 See Harper Furn. Co. v. Exp. Co., 144 N. C. 639, 57 S. E. 458.

1013-23 See S. v. Arthur, 129 Ia. 235, 105 N. W. 422.

1013-26 Atchison etc. R. Co. v. Paxton, 75 Kan. 197, 88 P. 1082.

1014-28 See Davis v. S. (Wis.), 115 N. W. 150.

1015-31 Missouri etc. R. Co. v. Lightfoot (Tex. Civ.), 106 S. W. 395.

1015-34 Anniston E. G. Co. v. Elwell, 144 Ala. 317, 42 S. 45; Du-

pree v. S., 148 Ala. 620, 42 S. 1004; S. v. Meyer, 135 Ia. 507, 113 N. W. 322; C. v. Salawick, 28 Pa. Super. 330. See S. v. R. Co., 141 N. C. 846, 141 S. E. 294.

1016-36 See Lowville R. Co. v. Elliot, 115 App. Div. 884, 101 N. Y. S. 328.

1017-39 Scott v. S., 75 Ark. 142, 86 S. W. 1004 (that an offense committed five miles east of a county seat town was committed within the county); Cleveland etc. R. Co. v. Miller (Ind. App.), 81 N. E. 517; Atchison etc. R. Co. v. Paxton, 75 Kan. 197, 88 P. 1082 (incorporated towns). See S. v. Arthur, 129 Ia. 235, 105 N. W. 422; S. v. R. Co., 141 N. C. 846, 54 S. E. 294.

Location on railroad.— That a particular town was not on a railroad, judicially noticed (Green v. Drug Co. (Ala.), 43 S. 216); also that certain towns are points on a railroad between other towns. Lowville R. Co. v. Elliot, 115 App. Div. 884, 101 N. Y. S. 328.

1018-42 Dupree v. S., 148 Ala. 620, 42 S. 1004; S. v. Arthur, 129 Ia. 235, 105 N. W. 422.

1018-43 Johnson v. R. Co., 104 Mo. App. 588, 78 S. W. 275 (that Independence, Mo., and Argentine, Kan., are suburbs and in fact part of Kansas City although the latter suburb is across the state line); Harper Furn. Co. v. Exp. Co., 144 N. C. 639, 57 S. E. 438 (see supra, 933-40). See Lowville R. Co. v. Elliot, 115 App. Div. 884, 101 N. Y. S. 328.

1018-46 Kolman v. S., 124 Ga. 63, 52 S. E. 82; Topeka v. Cook, 72 Kan. 595, 84 P. 376 (whether certain streets are in or out of the city boundaries). See Ingersoll v. Davis, 14 Wyo. 120, 82 P. 867. But see In re New York, 48 Misc. 602, 96 N. Y. S. 554.

1019-49 S. v. Rogers, 31 Mont. 1, 77 P. 293.

1019-51 Gruber v. R. Co., 53 Misc. 522, 105 N. Y. S. 216 (the appellate court sitting in New York City may notice the location and direction of the streets and avenues of that city). See Chicago v. Kubler, 133 Ill. App. 520.

1020-57 **That a named park is** within the limits of a certain city is not a matter for judicial notice. Edwards v. City, 124 Ga. 78, 52 S. E. 297.

1020-58 S. v. Rogers, 31 Mont. 1, 77 P. 293.

1020-59 C. v. Tpk. Co., 30 Ky. L. R. 1235, 100 S. W. 871; Bode v. S. (Neb.), 113 N. W. 996. *Contra*, City of Paris v. Tucker (Tex.), 104 S. W. 1046. But see Houston v. Dooley (Tex. Civ.), 89 S. W. 797.

Where made a public act a charter must be judicially noticed. Austin v. Forbis, 99 Tex. 234, 89 S. W. 405.

1021-60 Bessemer v. Carroll (Ala.), 45 S. 419; S. v. Matthews (Ala.), 45 S. 307; Frost v. Clements (Ala.), 45 S. 203; Satterfield v. C., 105 Va. 867, 52 S. E. 979 (especially where the jurisdiction of the mayor's court extends outside the city limits).

1022-61 But see Agnew v. Pawnee City (Neb.), 113 N. W. 236; S. v. Ricksecker, 73 Kan. 495, 85 P. 547; Brownsville v. Arbuckle, 30 Ky. L. R. 414, 99 S. W. 239.

1022-62 Welch v. Shumway, 232 Ill. 54, 83 N. E. 549.

The Illinois statute does not require notice to be taken of the extent of territory included in a village. P. v. Pederson, 220 Ill. 554, 77 N. E. 251.

1023-68 Gardner v. S., 80 Ark. 264, 97 S. W. 48; Hill v. City, 125 Ga. 697, 54 S. E. 354 (neither supreme court nor any other than a municipal court can notice municipal ordinances); Cordatos v. Chicago, 129 Ill. App. 471; P. v. Garden Co., 233 Ill. 290, 84 N. E. 230; Canton v. Madden, 120 Mo. App. 404, 96 S. W. 699; St. Louis v. Lessing, 190 Mo. 464, 89 S. W. 611; New York v. Trust Co., 104 App. Div. 223, 93 N. Y. S. 937; P. v. Ahearn, 109 N. Y. S. 249.

1025-72 Hill v. City, 125 Ga. 697, 54 S. E. 354; Steiner v. S. (Neb.), 110 N. W. 723; Galen Hall Co. v. Atlantic City (N. J.), 68 A. 1092.

1025-73 Hill v. City, supra (on certiorari); Canton v. Madden, 120 Mo. App. 20, 96 S. W. 699; Sachs v. Lyons, 53 Misc. 640, 103 N. Y. S. 149. *Contra*, Galen Hall Co. v. Atlantic City, supra.

On a trial de novo the appellate court must notice judicially all matters which the trial court was com-

pelled to notice, but on an appeal to a still higher court where no trial de novo is had a different rule prevails and ordinances must be embodied in the record. Steiner v. S. (Neb.), 110 N. W. 723, *dist.* Foley v. S., 42 Neb. 233, 60 N. W. 574.

1026-76 Elkhart v. Turner (Ind.), 84 N. E. 812.

1026-79 Seals of private corporations are not judicially noticed. Griffing Bros. v. Winfield, 53 Fla. 589, 43 S. 687.

1027-83 Atlanta etc. R. Co. v. R. Co., 124 Ga. 125, 52 S. E. 320 (charter of railroad of record in office of secretary of state); C. v. R. Co., 31 Ky. L. R. 859, 104 S. W. 290 (incorporating railway companies); Chicago etc. R. Co. v. Liebel, 27 Ky. L. R. 716, 86 S. W. 549 (same); American L. W. Co. v. Bearse, 194 Mass. 596, 80 N. E. 623.

When created by public act of legislature the existence of corporations is judicially noticed. S. v. Briscoe (Del.), 67 A. 154.

1027-84 See Fuller v. Trans. Co., 16 Haw. 1 (railroad).

1029-86 Heffelfinger v. R. Co., 140 Fed. 75.

1030-95 See S. v. Elec. Co. (Or.), 95 P. 722.

1031-5 Merritt v. County, 3 Cal. App. 168, 84 P. 675. See S. v. Board, 34 Mont. 426, 87 P. 450.

1031-6 Merritt v. County, supra.

1031-9 Baker v. Mfg. Co., 146 Fed. 744, 77 C. C. A. 234; John II Estate v. Judd, 13 Haw. 319, 325.

Standard medical works may be admitted in evidence to aid court's memory and understanding of medical terms. S. v. Wilhite, 132 Ia. 226, 109 S. W. 730.

1033-21 But see S. v. Board, 34 Mont. 426, 87 P. 450.

1033-22 Satterfield v. C., 105 Va. 867, 52 S. E. 979; Clement v. Graham, 78 Vt. 290, 63 A. 146; Page v. McClure, 79 Vt. 83, 64 A. 451; O'Brien Lumb. Co. v. Wilkinson, 123 Wis. 272, 101 N. W. 1050 (usage). See Goodman v. P., 228 Ill. 154, 81 N. E. 830.

1034-23 Sun Ins. Off. v. Woolen Mill, 72 Kan. 41, 82 P. 513; Taylor v. Grand Lodge, 101 Minn. 72, 111 N. W. 919 (where universal custom of requiring signed application before issuance of life insurance policy is judicially noticed, evidence that the application was signed is unnecessary); Bolton v. Ovitt (Vt.), 67 A. 881. See Goodman v. P., 228 Ill. 154, 81 N. E. 830.

1034-25 Spiking v. R. Co., 33 Utah 313, 93 P. 838. See Hoagland v. Canfield, 160 Fed. 146.

1034-27 Moynihan v. Holyoke, 193 Mass. 26, 78 N. E. 742. But see S. v. Norcross, 132 Wis. 534, 112 N. W. 40.

1035-30 But see Wabash R. Co. v. Campbell, 219 Ill. 312, 76 N. E. 346.

KIDNAPING [Vol. 8.]

Burden of proving consent, 2-6.

1-3 S. v. Leuth, 128 Ia. 189, 103 N. W. 345 (proof of detaining a person for ransom is sufficient proof of intent to kidnap). But see S. v. Holland, 120 La. 429, 45 S. 380, holding that under the statute motive or intent was immaterial.

Harbouring a runaway child is not kidnaping. Soper v. Crutcher, 29 Ky. L. R. 1080, 96 S. W. 907.

2-4 S. v. Leuth, 128 Ia. 189, 103 N. W. 345; S. v. Altemus, 76 Kan. 718, 92 P. 594; S. v. Harrison, 145 N. C. 408, 59 S. E. 867.

2-6 Burden of proving consent of the child's custodian is on defendant. S. v. Burnett, 142 N. C. 577, 55 S. E. 72.

3-10 S. v. Sager, 99 Minn. 54, 108 N. W. 812.

4-12 Arrington v. S., 3 Ga. App. 30, 59 S. E. 207.

KNOWLEDGE [Vol. 8.]

6-1 Notice of Unrecorded deed. Burden of proof on person claiming under. Sheldon v. Powell, 31 Mont. 249, 78 P. 491.

Burden is on carrier to show that shipper had knowledge of restrictive provision of contract of shipment signed by him. Chicago etc. R. Co. v. Igo, 130 Ill. App. 373; Cleveland etc R. Co. v. Shoot, 130 Ill. App. 139.

7-2 Contents of deed. — Grantor

presumed to know. Kaaihue v. Crabbe, 3 Haw. 768.

8-8 Non-resident business man presumed to know local customs. Gould v. Chair Co., 147 Ala. 629, 41 S, 675. See also Bacon v. Blessing, 122 Ga. 369, 50 S. E. 139.

8-9 Bacon v. Blessing, supra; Consolidated S. & R. Co. v. Gonzales (Tex. Civ.), 109 S. W. 946; Bowles v. Rice, 107 Va. 51, 57 S. E. 575.

8-10 Steidtmann v. Lay Co., 234 Ill. 84, 84 N. E. 640.

9-12 The custom of banks of a place is binding on parties who deal with a bank there, whether they are aware of its existence or not. San Francisco Nat. Bk. v. Bank, 5 Cal. App. 408, 90 P. 558. See also Plover Sav. Bk. v. Moodie, 135 Ia. 685, 110 N. W. 29 (custom as to presentment of checks).

9-14 But see Citizens' Bk. v. Chambers, 129 Ia. 414, 105 N. W. 692.

10-18 Westchester F. Ins. Co. v. Ocean View Co., 106 Va. 633, 56 S. E. 584.

12-23 Persons dealing with a municipality are bound to take notice of its ordinances. Hope v. Alton, 214 Ill. 102, 73 N. E. 406.

15-36 West Pratt Coal Co. v. Andrews (Ala.), 43 S. 348; Sneed v. Gas Co., 149 Cal. 704, 87 P. 376 (deceased's knowledge of the dangers of electricity); Southern C. O. Co. v. Skipper, 125 Ga. 368, 54 S. E. 110; Bush & H. v. McCarty, 127 Ga. 308, 56 S. E. 430; Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69; Mims v. Brooks, 3 Ga. App. 247, 59 S. E. 711; Sovereign Camp v. Carrington, 41 Tex. Civ. 29, 90 S. W. 921.

16-38 Franke v. Hanly, 215 Ill. 216, 74 N. E. 130.

18-42 Adams Exp. Co. v. C., 29 Ky. L. R. 231, 92 S. W. 935; Foreman v. Assn., 104 Va. 694, 52 S. E. 337; Earp v. Lilly, 217 Ill. 582, 75 N. E. 552.

20-45 Continental Ins. Co. v. Cummings (Tex. Civ.), 95 S. W. 48.

Knowledge of dissolution of partnership may be brought home by showing general reputation. Bush & H. v. McCarty, 127 Ga. 308, 56 S. E. 430; Mims v. Brooks, 3 Ga. App. 247, 59 S. E. 711.

22-52 See D. C. v. Duryee, 29 App. D. C. 327.

23-56 Ryan v. U. S., 26 App. D. C. 74; S. v. Calhoun, 75 Kan. 259, 88 P. 1079 (other forgeries admissible to show guilty knowledge); P. v. Dolan, 186 N. Y. 4, 78 N. E. 569, *over.* P. v. Dolan, 111 App. Div. 600, 97 N. Y. S. 929 (uttering other forged instruments); Juretich v. P., 223 Ill. 484, 79 N. E. 181, (former use of confidence game admissible to show guilty knowledge). See The King v. Mahukaliilii, 5 Haw. 96 (possession of other forged papers).

In prosecution for blackmail former conspiracies may be shown to establish knowledge. Eacock v. S., 169 Ind. 488, 82 N. W. 1039.

In trial for receiving embezzled railroad tickets, the receipt of other embezzled property may be shown to prove guilty knowledge. Gassenheimer v. U. S., 26 App. D. C. 432.

Receiving stolen goods. — Lipsey v. P., 227 Ill. 364, 81 N. E. 348; Jeffries v. U. S. (Ind. Ter.), 103 S. W. 761; Buechert v. S., 165 Ind. 523, 76 N. E. 111.

Similar acts of accomplice to be admissible must be connected with the accused by other than the accomplice's testimony. S. v. Kelliher (Or.), 88 P. 867.

LANDLORD AND TENANT

[Vol. 8.]

29-1 Gabel v. Page (Cal. App.), 92 P. 749.

Presumption as to extent of lease from failure to explain ambiguity. Isabella G. M. Co. v. Glenn, 37 Colo. 165, 86 P. 349.

30-3 See United M. etc. I. Co. v. Roth, 122 App. Div. 628, 107 N. Y. S. 511.

34-20 Donaldson v. Strong, 195 Mass. 429, 81 N. E. 267.

34-21 See Wilson v. Wilson, 30 Ky. L. R. 695, 99 S. W. 319.

35-28 Ventura Hotel Co. v. Brew. Co. (Ky.), 109 S. W. 354.

36-30 In rebuttal of the presumption that the tenant held over on new terms proposed in the notice, it may be shown that he refused to assent to such terms or made a counter proposition, notwithstanding he remained in possession. Appleton W. Co. v. Appleton, 132 Wis. 563, 113 N. W. 44; Gallo-

way v. Kerby, 9 Ill. App. 501; Lasher v. Heist, 126 Ill. App. 82.

39-45 The person who drew a lease may testify of its contents if its loss has been shown. Hedstrom v. U. T. Co. (Cal. App.), 94 P. 386.

39-46 Lease admissible against assignee if he has been furnished with a copy and has paid rent under it. Landt v. McCullough, 218 Ill. 607, 75 N. E. 1069, 121 Ill. App. 328.

39-48 Hayes v. Atlanta, 1 Ga. App. 25, 57 S. E. 1087. Eagle Tube Co. v. Holsten, 110 N. Y. S. 242.

An unsigned draft of a cropping contract which has been read to defendant and with which he expressed satisfaction, is admissible, with other evidence, to prove the contract. Morgan v. Tims (Tex. Civ.), 97 S. W. 832.

An undelivered lease. — Charlton v. R. E. Co., 67 N. J. Eq. 629, 60 A. 192.

All the lease must be offered, including indorsements. Wallace v. Dorris, 218 Pa. 534, 67 A. 868.

The rule that, where a tenant enters upon the occupancy of premises under a void lease, its provisions will regulate "the terms on which the tenancy subsists in all respects, except as to the duration of the term," (Laughran v. Smith, 75 N. Y. 205; Coudert v. Cohn, 118 N. Y. 309, 23 N. E. 298, 16 Am. St. 761, 7 L. R. A. 69), has no application except to the parties to such an instrument. Fink v. S. B. Co., 110 N. Y. S. 248.

40-49 A receipt for rent, though it provides for the execution of a formal lease, will be enforced as a lease. Feust v. Craig, 107 N. Y. S. 637.

40-53 Walker Ice Co. v. Am. S. & W. Co., 185 Mass. 463, 473, 70 N. E. 937 (it may be shown by parol that plaintiff was tenant at will); Tobey v. Mattimore, 54 Misc. 23, 104 N. Y. S. 393.

40-54 Pankau v. Morrissey, 224 Ill. 177, 79 N. E. 643.

41-57 Gabel v. Page, 6 Cal. App. 67, 92 P. 749; Price v. Thompson (Ga. App.), 60 S. E. 800. See Newell v. Taylor, 74 S. C. 8, 54 S. E. 212.

42-61 A comtemporaneous parol contract may be shown by which the lease was not to be operative between the parties to it. Metzger v. Roberts, 5 Ohio C. C. (N. S.) 344. But it is held that it cannot be shown that a grant was made upon a condition that would defeat its operative effect. Morris v. Healy, 46 Wash. 686, 91 P. 186.

Acceptance of others as tenants. Cooley v. Collins, 186 Mass. 507, 71 N. E. 979.

43-63 Knoepker v. Redel, 116 Mo. App. 62, 92 S. W. 171; Metzger v. Roberts, 5 Ohio C. C. (N. S.) 344.

46-77 Receipt of part of the crops raised on land by an occupier is not prima facie evidence that it was leased if the right of occupancy was denied and the owner was asserting by legal steps his right to the whole of the crops. Myer v. Roberts (Or.), 89 P. 1051.

47-79 The statutory presumption that an oral lease of certain kinds of property, in the absence of local usage, is for one year unless it is otherwise expressed, has no application where a tenant under a written lease stipulated orally for permission to remain a definite time, less than one year, after expiration of the formal lease. Gabel v. Page (Cal. App.), 92 P. 749.

47-81 Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. 636; Dagett, v. Champney, 122 App. Div. 254, 106 N. Y. S. 892; Rohboch v. McCargo, 6 Pa. Super. 134; Lipper v. Bouve, 6 Pa. Super. 452; Harding v. Seeley, 148 Pa. 20, 23 A. 1118.

49-85 Ambrose v. Hyde, 145 Cal. 555, 79 P. 64.

50-88 Local usage.—Shute v. Bills, 191 Mass. 433, 78 N. E. 96.

50-91 Dominick v. Kane, 4 Ohio N. P. (N. S.) 583. Walker Ice Co. v. Am. S. & W. Co., 185 Mass. 463, 70 N. E. 937.

50-92 Lease is full evidence in favor of a married woman. Ewing v. Cottman, 9 Pa. Super. 444.

Alterations appearing on the face of the lease need not be sustained by the testimony of two witnesses in order that it may be received. Yeager v. Cassidy, 12 Pa. Super. 232.

50-93 Peaks v. Cobb, 192 Mass. 196, 77 N. E. 881.

Secondary evidence of the contents of a lease is admissible if the adverse party cannot be expected to have it in his possession and he does

not show he could have produced it if notice to do so had been given. Cooley v. Collins, 186 Mass. 507, 71 N. E. 979.

50-94 Correspondence concerning the renewal of a lease, had before expiration of the term, is admissible. Wallace v. Dorris, 218 Pa. 534, 67 A. 868.

51-95 Morning Star v. Querens, 142 Ala. 186, 37 S. 825; Thompson F. & M. Co. v. Glass, 136 Ala. 648, 33 S. 811; Johnston v. Mulcahy, 4 Cal. App. 547, 88 P. 491; Dodd v. Pasch, 5 Cal. App. 686, 91 P. 166 (term of tenancy); Kenyon v. Manley, 125 Ill. App. 615; Willis v. Weeks, 129 Ia. 525, 105 N. W. 1012; Jackson B. Co. v. Wagner, 117 La. 875, 42 S. 356; Vanderberg v. Kan. City Co., 126 Mo. App. 600, 105 S. W. 17; Creighton v. Ladley, 6 Phila. (Pa.) 209.

Actual consideration may be shown by parol. — Suderman-D. Co. v. Rogers (Tex. Civ.), 104 S. W. 193.

51-96 Slaughter v. Johnson, 128 Ill. App. 417; DeFriest v. Bradley, 192 Mass. 346, 78 N. E. 467; Walker Ice Co. v. Am. Co., 185 Mass 463, 473, 70 N. E. 937.

51-97 Proof may be made of a parol agreement to perform a condition precedent: Cavanagh v. Beer Co. (Ia.), 113 N. W. 856.

52-99 Naughton v. Elliott, 68 N. J. Eq. 259, 59 A. 869; Suderman-D. Co. v. Rogers (Tex. Civ.), 104 S. W. 193.

52-2 Conclusion of witness as to the property covered by a lease is incompetent. Kasower v. Sandler, 96 N. Y. S. 734.

53-4 Bristol Hotel Co. v. Pegram, 49 Misc. 535, 98 N. Y. S. 512.

Evidence of a custom.—Prigg v. Preston, 28 Pa. Super. 272.

54-6 Morningstar v. Querens, 142 Ala. 186, 37 S. 825; Gandy v. Wiltse (Neb.), 112 N. W. 569; Hallenbeek v. Chapman, 71 N. J. L. 477, 58 A. 1096; s. c. 72 N. J. L. 201, 63 A. 498.

54-8 Daly v. Piza, 105 App. Div. 496, 94 N. Y. S. 154; Greene v. Ker, 48 Misc. 609, 95 N. Y. S. 569.

The allowance made in the lease for repairs is conclusive as to the extent of the lessor's liability therefor. Faron v. Jones, 49 Misc. 47, 96 N. Y. S. 316.

55-9 Leeming v. Duryea, 49 Misc. 240, 97 N. Y. S. 355. See Morningstar v. Querens, 142 Ala. 186, 37 S. 825.

An admission of liability to make repairs does not result from making them at tenant's request. Dalton v. Gibson, 192 Mass. 1, 77 N. E. 1035.

57-16 A parol agreement made at the time a lease was executed may be shown where lessee attempts to use the lease in violation of such agreement. Phillips G. & O. Co. v. P. Co., 213 Pa. 183, 62 A. 830.

57-17 Schweig v. M. L. Co., 54 Misc. 223, 104 N. Y. S. 371; Yinger v. Youngman, 30 Pa. Super. 139.

The evidence of fraud relied upon for recovery independently of the lease must be clear, precise and indubitable, Sacks v. Schimmel, 3 Pa. Super. 426. As must the evidence to show a collateral agreement. Yinger v. Youngman, 30 Pa. Super. 139; Fidelity T. Co. v. Kohn, 27 Pa. Super. 374; Replogle v. Singer, 19 Pa. Super. 442 (suit for reformation).

58-19 But see Tobey v. Mattimore, 54 Misc. 231, 104 N. Y. S. 393.

58-20 Natelsohn v. Reich, 50 Misc. 585, 99 N. Y. S. 327.

59-23 Swigert v. Hartzell, 20 Pa. Super. 56. In Pine Beach Inv. Co. v. C. A. Co., 106 Va. 810, 56 S. E. 822, the original draft of the lease contained the words "bars or buffets"; the words "bars or" were erased by the lessor, who, before the lease was consummated, expressed the opinion that "buffet" carried with it the right to sell liquor. Proof of these facts was held proper.

59-24 O'Neill v. Ogden, 32 Utah 162, 89 P. 464 (local usage to explain meaning of "lodge use" or "lodge purposes").

59-26 Swigert v. Hartzell, 20 Pa. Super. 56.

60-27 Boice v. Zimmerman, 3 Pa. Super. 181.

60-28 Landt v. Schneider, 31 Mont. 15, 77 P. 307.

61-29 Lauderdale v. King (Mo. App.), 109 S. W. 852.

61-34 Hinsdale v. McCune (Ia.), 113 N. W. 478.

63-40 Proof of an oral lease to take effect on expiration of written

lease is proper. Gabel v. Page, 6 Cal. App. 67, 92 P. 749.

63-41 Wilson v. Gas Co., 75 Kan. 499, 89 P. 897 (manner and terms of paying rent). To same effect is Haight v. Cohen, 123 App. Div. 707, 108 N. Y. S. 502.

63-44 Geer v. Boston etc. Co., 126 Mo. App. 173, 103 S. W. 151.

63-45 Ventura Hotel Co. v. Brew. Co. (Ky.), 109 S. W. 354; Hermitage Co. v. Roos, 110 N. Y. S. 976.

64-50 See Drouin v. Wilson, 80 Vt. 335, 67 A. 825; Wood v. Montelecone, 118 La. 1005, 43 S. 657.

Lessor has the burden of showing the exercise of due diligence to relet the premises for the benefit of the lessee, his neglect in that respect being set up in the latter's answer. Woodbury v. Sparrell (Mass.), 84 N. E. 441.

64-51 Notice to the landlord of the condition of the premises may be shown by proof that a part of the premises similar to the part in question had previously been found defective. Hanselman v. Broad, 113 App. Div. 447, 99 N. Y. S. 404.

Negligence in making repairs. Blickley v. Luce, 148 Mich. 233, 111 N. W. 752.

65-57 Proof of the issue of an ex parte injunction restraining the tenant from using the premises shows an eviction. Pfund v. Herlinger, 10 Phila. (Pa.) 13.

66-59 Palmer v. Ingram, 2 Ga. App. 200, 58 S. E. 362; Devers v. May, 124 Ky. 387, 30 Ky. L. R. 528, 99 S. W. 255.

Value of a tenancy at will. — Hayes v. Atlanta, 1 Ga. App. 25, 57 S. E. 1087.

Burden of proof is on lessor who has evicted tenants from mine to show the amount and value of the ore which he and his lesses removed during term of plaintiff's lease. Isabella G. M. Co. v. Glenn, 37 Colo. 165, 86 P. 349.

Special damages are also recoverable if they necessarily resulted from the lessor's act. Herpolsheimer v. Christopher, 76 Neb. 355, 111 N. W. 359, 9 L. R. A. (N. S.) 1127.

67-61 Special value of the premises, over the stipulated rent, to the lessee may be proved. Devers v. May, 124 Ky. 387, 30 Ky. L. R. 528 99 S. W. 255.

67-63 Hayes v. Atlanta, 1 Ga. App. 25, 57 S. E. 1087.

69-69 See Lauderdale v. King, 130 Mo. App. 236, 109 S. W. 852.

70-72 Devers v. May, 124 Ky. 387, 30 Ky. L. R. 528, 99 S. W. 255.

The lessor may prove a tender of possession to the lessee a few days after his right thereto accrued and that the lessee was in a situation to accept it. Huntington E. P. Co. v. Parsons (W. Va.), 57 S. E. 253.

Burden of proving matter in mitigation of damages is upon the party who asserts its existence. The evidence must cover all the elements involved. Huntington E. P. Co. v. Parsons, supra.

71-81 See Streit v. Fay, 230 Ill. 319, 82 N. E. 648.

72-84 Burden is on lessor to show existence of all the statutory conditions giving right to use a summary remedy for collection of rent. Palethorp v. Schmidt, 12 Pa. Super. 214.

73-87 Burden of showing that tenant had authority to sell crop on which landlord claims a lien is upon an intervenor who sets up the fact. Antone v. Miles (Tex. Civ.), 105 S. W. 39, and local cases cited.

73-89 An agreement as to the rent to be paid for a subsequent term is an admission as to the rental value for the preceding term. Dickinson v. Imp. Co., 77 Ark. 570. 92 S. W. 21.

74-93 In re Young, 16 Phila. (Pa.) 215.

75-96 Termination of tenancy by damage to building. — On the question whether the premises have been so damaged as to be unfit for occupancy, the amount paid the lessor by insurers may be proven. Expert opinions are admissible to show what effect upon a stock of dry goods the premises would have in the condition in which they were left by the fire. Testimony as to the condition of the walls and what has been done to secure their safety is also competent. It may be shown that precautions taken were called for by reason of the fire in an adjoining building. Meyer D. Co. v. Madden (Tex. Civ.), 99 S. W. 723.

75-97 Gabel v. Page, 6 Cal. App. 618, 92 P. 749.

75-98 See Bloom v. Wanner 25

Ky. L. R. 1646, 77 S. W. 930 (mailing notice).

76-2 Gardiner v. Bair, 10 Pa. Super. 74; Rohbock v. McCargo, 6 Pa. Super. 134; Lipper v. Bouve, 6 Pa. Super. 452.

76-6 **Proof of the agreement as to surrender** must be clear and explicit; it may be established by a fair and full preponderance of the evidence. The statute of frauds is not involved. Rohbock v. McCargo, 6 Pa. Super. 134.

Time to vacate. — Evidence as to the time in which a lessee could procure similar premises is incompetent where he has stipulated to vacate in a reasonable time after notice. Cooper v. Gambill, 146 Ala. 184, 40 S. 827.

76-7 Stott v. Chamberlain (S. D.), 114 N. W. 683 (under a statute).

77-8 Gerhart R. Co. v. Brecht, 109 Mo. App. 25, 84 S. W. 216; Dagett v. Champney, 122 App. Div. 254, 106 N. Y. S. 892; White v. Berry, 24 R. I. 74, 52 A. 682; Com-Wharf Co. v. Boston, 194 Mass. 460, 80 N. E. 645; Stott v. Chamberlain (S. D.), 114 N. W. 683.

Lessor may testify of his purpose or intention in taking possession of and reletting premises abandoned by the lessee. Higgins v. Street (Okla.), 92 P. 153.

An unauthorized entry upon the premises after their abandonment, and an attempt by the lessor to relet them in his own name, tends strongly to show an acceptance of the surrender, but is not conclusive. But, it seems, that an actual reletting of the premises by the lessor in his own name to another tenant for a different period than they were leased to defendant for, would be conclusive evidence of acceptance of the surrender. Feust v. Craig, 107 N. Y. S. 637, *cit.* Gray v. Dairy Co., 9 App. Div. 115, 41 N. Y. S. 73, 162 N. Y. 388, 56 N. E. 903, 76 Am. St. 327, 49 L. R. A. 580; Crane v. Edwards, 80 App. Div. 333, 80 N. Y. S. 747. It has been said in another case that the acceptance of a surrender has never been found, as a matter of law, to arise from a mere attempt to relet the premises. Dorrance v. Bonesteel, 51 App. Div. 129, 64 N. Y. S. 307.

Admissions made in another action are competent to show acceptance of a surrender of the premises. Hillman v. DeRosa, 46 Misc. 261, 92 N. Y. S. 67.

78-11 Feust v. Craig, 107 N. Y. S. 637; Pascoe Ap. House v. Eno, 35 Pa. Super. 337.

78-12 Dagett v. Champney, 122 App. Div. 254, 106 N. Y. S. 892; Feust v. Craig, supra; Underhill v. Collins, 132 N. Y. 269, 30 N. E. 576; Gardiner v. Bair, 10 Pa. Super. 74.

Non-occupancy by persons and goods of business property is evidence of abandonment. Parnass v. Ryerson, 128 Ill. App. 489.

Abandonment of oil and gas lease. Rawlings v. Armel, 70 Kan. 778, 79 P. 683. See "ABANDONMENT," Vol. 1, and ante.

LARCENY [Vol. 8.]

86-1 S. v. Stewart (Del.), 67 A. 786; S. v. Wolf (Del.), 66 A. 739; S. v. Carr, 4 Penne. (Del.) 523, 57 A. 370; Franklin v. S., 3 Ga. App. 342, 59 S. E. 835; Whitsel v. S., 49 Tex. Cr. 42, 90 S. W. 505; Wilson v. S. (Tex. Cr.), 100 S. W. 153; S. v. Blay, 77 Vt. 56, 58 A. 794 (uncorroborated extra-judicial confessions insufficient); Topolewski v. S., 130 Wis. 244, 109 N. W. 1037.

86-3 Celender v. S. (Ark.), 109 S. W. 1024; S. v. Wolf (Del.), 66 A. 739; S. v. West (Idaho), 95 P. 949; Francis v. S., 87 Miss. 493, 39 S. 897; S. v. Lockhart, 188 Mo. 427, 87 S. W. 457; Rios v. S. (Tex. Cr.), 101 S. W. 988; Winchester v. S. (Tex. Cr.), 85 S. W. 1073; Bogan v. S. (Tex. Cr.), 95 S. W. 131; Johnson v. S., 50 Tex. Cr. 68, 94 S. W. 900.

87-5 Wilburn v. Ter., 10 N. M. 402, 62 P. 968.

89-8 S. v. Johnson, 36 Wash. 294, 78 P. 903 (sufficient to sustain a conviction).

89-9 S. v. Smith, 190 Mo. 706, 90 S. W. 440.

89-10 Bailey v. S., 50 Tex. Cr. 398, 97 S. W. 694.

89-12 Dimmick v. U. S., 135 Fed. 257, 70 C. C. A. 141; Ray v. S. (Ga. App.), 60 S. E. 816; Sheffield v. S., 1 Ga. App. 135, 57 S. E. 969; S. v. Broxton, 118 La. 126, 42 S. 721; C.

v. Dingman, 26 Pa. Super. 615; S. v. Langford, 74 S. C. 460, 55 S. E. 120; S. v. Glover (S. D.), 113 N. W. 625; Harrold v. S., 46 Tex. Cr. 568, 81 S. W. 728, Rucker v. S., 51 Tex. Cr. 222, 101 S. W. 804; Franks v. S., 48 Tex. Cr. 211, 87 S. W. 148; Burch v. S., 49 Tex. Cr. 13, 90 S. W. 168; Nelson v. S., 48 Tex. Cr. 471, 88 S. W. 807; Byrd v. S., 49 Tex. Cr. 279, 93 S. W. 114; Hooten v. S. (Tex. Cr.), 108 S. W. 651.

90-13 Lipsey v. P., 227 Ill. 364, 81 N. E. 348; S. v. Johnson, 36 Wash. 294, 78 P. 903.

90-14 S. v. Wells, 33 Mont. 291, 83 P. 476 (information from defendant's accomplices concerning the whereabouts of stolen property is admissible).

91-16 C. v. Fritch, 9 Pa. C. C. 164; Counts v. S., 48 Tex. Cr. 629, 89 S. W. 972 (on prosecution for theft of an appearance bond, evidence that defendant and the principal in the bond had been living together in adultery was not admissible).

91-17 S. v. Baird, 13 Idaho 29, 88 P. 233; S. v. Soper, 207 Mo. 502, 106 S. W. 3.

92-19 S. v. Allen, 34 Mont. 403, 87 P. 177; S. v. Hamilton, 77 S. C. 383, 57 S. E. 1098 (possession of stolen property and its sale for much less than its real value is evidence from which guilt may be inferred); Bink v. S., 48 Tex. Cr. 598, 89 S. W. 1075.

92-20 Dimmick v. U. S., 135 Fed. 257, 70 C. C. A. 141.

92-21 P. v. Horton (Cal. App.), 93 P. 382; Roquemore v. S., 50 Tex. Cr. 542, 99 S. W. 547.

93-23 Wiley v. S., 3 Ga. App. 120, 59 S. E. 438; Pool v. S., 51 Tex. Cr. 596, 103 S. W. 892.

93-24 S. v. Carr, 4 Penne. (Del.) 523, 57 A. 370; Hilscher v. S., 48 Tex. Cr. 357, 88 S. W. 227.

94-28 P. v. Horton (Cal. App.), 93 P. 382; S. v. Allen, 34 Mont. 403, 87 P. 177; Ter. v. Livingston (N. M.), 84 P. 1021.

95-29 S. v. Wolf (Del.), 66 A. 739.

96-30 S. v. Wolf, supra; Miller v. P., 229 Ill. 376, 82 N. E. 391.

96-31 S. v. Crooke, 129 Mo. App. 490, 107 S. W. 1104

98-36 S. v. Bailey (W. Va.), 60 S. E. 785.

99-37 Jones v. S. (Ark.), 108 S. W. 223; Collier v. S. (Fla.), 45 S. 752; S. v. McKinney, 76 Kan. 419, 91 P. 1068; Armstead v. S., 48 Tex. Cr. 304, 87 S. W. 824; Selph v. S., 49 Tex. Cr. 18, 90 S. W. 174; Pool v. S. (Tex. Cr.), 103 S. W. 892.

100-38 Crossland v. S., 77 Ark. 537, 92 S. W. 776; Collier v. S. (Fla.), 45 S. 752; Peters v. S., 49 Tex. Cr. 365, 91 S. W. 224.

100-40 S. v. Wolf (Del.), 66 A. 739; Miller v. P., 229 Ill. 376, 82 N. E. 391; S. v. McClain, 130 Ia. 73, 106 N. W. 376; Ter. v. Livingston (N. M.), 84 P. 1021; Blair v. Ter., 15 Okla. 549, 82 P. 653; C. v. Berney, 28 Pa. Super. 61 (inference does not arise after the lapse of two months); C. v. Frew, 3 Pa. C. C. 492.

101-42 Echols v. S., 147 Ala. 700, 41 S. 298; S. v. Wells, 33 Mont. 291, 83 P. 476.

105-51 Perry v. S., 38 Colo. 23, 87 P. 796 (proper identification question for jury); S. v. James, 194 Mo. 268, 92 S. W. 679, (after identification it is the province of jury to determine the ownership); McDaniel v. S., 49 Tex. Cr. 47, 90 S. W. 504. See P. v. Peltin, 1 Cal. App. 612, 82 P. 980.

106-53 McDonald v. S., 2 Ga. App. 633, 58 S. E. 1067.

106-54 Miller v. Ter., 9 Ariz. 123, 80 P. 321 (identity of a colt's mother).

106-55 S. v. Walker, 194 Mo. 253, 92 S. W. 659.

108-61 Crossland v. S., 77 Ark. 537, 92 S. W. 776 (method of obtaining the property competent to overcome presumption).

108-63 Lanier v. S., 126 Ga. 586, 55 S. E. 496 (statements or declarations made by accused when first asked for an explanation); S. v. Grubb, 201 Mo. 585, 99 S. W. 1083; Brittain v. S. (Tex. Cr.), 105 S. W. 817; Pool v. S., 48 Tex. Cr. 478, 88 S. W. 350.

115-76 S. v. Grubb, supra.

117-82 Martin v. S., 76 Ark. 615, 88 S. W. 962; McGaha v. S., 76 Ark. 615, 88 S. W. 983; P. v. Meyers, 5 Cal. App. 674, 91 P. 167; S. v. Bartlett, 128 Ia. 518, 105 N. W. 59; Todd v. C., 29 Ky. L. R. 473, 93 S. W. 631; S. v. Soper, 207 Mo. 502, 106 S. W. 3;

Ter. v. Livingston (N. M.), 84 P. 1021; Slaughter v. S. (Tex. Cr.), 105 S. W. 198.

118-85 Sparks v. Ter., 146 Fed. 371.

119-87 S. v. Wright, 199 Mo. 161, 97 S. W. 874; C. v. Dingman, 26 Pa. Super. 615.

119-88 S. v. Carr, 4 Penne. (Del.) 523, 57 A. 370.

121-93 Clampitt v. U. S., 6 Ind. Ter. 92, 89 S. W. 666; P. v. Sekeson, 111 App. Div. 490, 97 N. Y. S. 917; P. v. Smilie, 118 App. Div. 611, 103 N. Y. S. 348; Wesley v. S. (Tex. Cr.), 85 S. W. 802; Topolewski v. S., 130 Wis. 244, 109 N. W. 1037.

121-94 Stapleton v. S., 80 Ark. 617, 97 S. W. 296; Ryan v. U. S., 26 App. D. C. 74; Ray v. S. (Ga. App.), 60 S. E. 816; Young v. U. S. (Ind. Ter.), 103 S. W. 771; Ter. v. Livingston (N. M.), 84 P. 1021; Hurst v. Ter., 16 Okla. 600, 86 P. 280.

122-95 Thrash v. S., 79 Ark. 347, 96 S. W. 360 (changing ear marks on a hog and offering to buy same when found, is sufficient evidence of intent); S. v. Wolf (Del.), 66 A. 739; Simmons v. S., 2 Ga. App. 638, 58 S. E. 1066; P. v. Moss, 113 App. Div. 329, 99 N. Y. S. 138; P. v. Burnham, 119 App. Div. 302, 104 N. Y. S. 725; Canaday v. S. (Tex. Cr.), 87 S. W. 346; Flagg v. S., 51 Tex. Cr. 602, 103 S. W. 855; Womack v. S., 48 Tex. Cr. 148, 86 S. W. 1015; S. v. Eddy, 46 Wash. 494, 90 P. 641.

123-96 Crockford v. S., 73 Neb. 1, 102 N. W. 70.

124-98 Worthington v. S. (Tex. Cr.), 109 S. W. 187. But see Aldrich v. S., 224 Ill. 622, 80 N. E. 320.

125-1 Kennon v. S., 46 Tex. Cr. 359, 82 S. W. 518.

126-3 Miller v. Ter., 9 Ariz. 123, 80 P. 321; Collier v. S. (Fla.), 45 S. 752; S. v. Bailey (W. Va.), 60 S. E. 785; Stoddard v. S., 132 Wis. 520, 112 N. W. 453.

128-7 Towns v. S., 167 Ind. 315, 78 N. E. 1012; Malone v. S. (Ind.), 81 N. E. 1099; Bradley v. S., 165 Ind. 397, 75 N. E. 873; C. v. Clancy, 187 Mass. 191, 72 N. E. 842; S. v. Force, 100 Minn. 396, 111 N. W. 297; S. v. McGee, 188 Mo. 401, 87 S. W. 452; S. v. Lockhart, 188 Mo. 427, 87 S. W. 457; S. v. McCarthy, 36 Mont. 226, 92 P. 521; Ter. v. Meredith (N. M.), 91 P. 731; P. v. Kellogg, 105 App. Div. 505, 94 N. Y. S. 617.

128-8 Kegans v. S. (Tex. Cr.), 95 S. W. 122.

129-12 Richardson v. S. (Tex. Cr.), 103 S. W. 852.

130-13 Impecunious circumstances of defendant before commission of crime, admissible. Dimmick v. U. S., 135 Fed. 257, 70 C. C. A. 141; P. v. Peltin, 1 Cal. App. 612, 82 P. 980; S. v. Wells, 33 Mont. 291, 83 P 476

130-16 An offer to pay the prosecutor the value of the stolen property is admissible, as showing that accused believed prosecutor to be the owner as well as accused's guilty participation in the crime. Seaborn v. S. (Tex. Cr.), 90 S. W. 649; Armstead v. S., 48 Tex. Cr. 304, 87 S. W. 824.

Payment to avoid arrest and inconvenience caused thereby, while at the same time protesting his innocence, is competent. Sowles v. S. (Tex. Cr.), 105 S. W. 178.

131-18 Turning an animal loose on the range after it has been rebranded through an alleged mistake does not constitute a return of the property. Thorne v. S. (Tex. Cr.), 107 S. W. 831.

132-23 S. v. Allen, 34 Mont. 403, 87 P. 177; Penrice v. S. (Tex. Cr.), 105 S. W. 797; Watters v. S. (Tex. Cr.), 94 S. W. 1038.

132-24 See Dimmick v. U. S., 135 Fed. 257, 70 C. C. A. 141; S. v. Strodemier, 40 Wash. 608, 82 P. 915.

132-25 Lanier v. S., 126 Ga. 586, 55 S. E. 496; S. v. Allen, 34 Mont. 403, 87 P. 177; C. v. Frew, 3 Pa. C. C. 492 (incompetent to prove defendant's innocence); S. v. White, 77 Vt. 241, 59 A. 829; S. v. Blay, 77 Vt. 56, 58 A. 794.

132-26 S. v. Stewart (Del.) 67 A. 786; S. v. Grubb, 201 Mo. 585, 99 S. W. 1083; Seaborn v. S. (Tex. Cr.), 90 S. W. 649 (self-serving declarations, inadmissible).

133-28 Nixon v. S. (Tex. Cr.), 93 S. W. 555; Rose v. S. (Tex. Cr.), 106 S. W. 143; Topolewski v. S., 130 Wis. 244, 109 N. W. 1037. *Contra,* Hurst v. Ter., 16 Okla. 600, 86 P. 280.

Non-consent of an under-clerk need not be proved when the ownership

is alleged in the person having entire charge of the freight department. King v. S. (Tex. Cr.), 100 S. W. 387.

135-33 Jones v. P., 33 Colo. 161, 79 P. 1013 (proven by other witnesses).

135-34 S. v. Bjelkstrom, 20 S. D. 1, 104 N. W. 481. See George v. U. S., 6 Ind. Ter. 155, 89 S. W. 1121. (exclusion of testimony of third persons that they heard the owner delegate authority to accused to take the property from the possession of another, held error).

135-36 Jones v. P., 33 Colo. 161, 79 P. 1013 (picking a drunken person's pockets); S. v. Faulk (S. D.), 116 N. W. 72, Jordan v. S. (Tex. Cr.), 104 S. W. 900 (death of owner before trial).

136-37 Vought v. S. (Wis.), 114 N. W. 518 (unlawful diversion of town funds by town officers involves the element of non-consent on the part of the town).

136-38 S. v. Baird, 13 Idaho 29, 88 P. 233; Bryan v. S., 49 Tex. Cr. 196, 91 S. W. 580; Byrd v. S., 49 Tex. Cr. 279, 93 S. W. 114; S. v. Eddy, 46 Wash. 494, 90 P. 641.

Corporate property. — It is sufficient to allege ownership in the superintendent and to prove that he was in full control of all the company's business and property and was in possession of the property when stolen. Barnes v. S., 46 Tex. Cr. 513, 81 S. W. 735.

137-40 Anglin v. S. (Tex. Cr.), 107 S. W. 835 (money).

138-47 S. v. Mintz, 189 Mo. 268, 88 S. W. 12.

139-48 Ter. v. Smith, 12 N. M. 229, 78 P. 42 (a certificate of the recorded brand must be shown, where the title is sought to be established by brand); Seaborn v. S. (Tex. Cr.), 90 S. W. 649.

139-49 S. v. Wolfley, 75 Kan. 406, 89 P. 1046, 93 P. 337.

139-50 Hurst v. Ter., 16 Okla. 600, 86 P. 280 (under statute unrecorded brands are competent to prove ownership).

139-51 The rule does not apply when due diligence has been used by the owner in getting his brand recorded. Ter. v. Meredith (N. M.), 91 P. 731.

140-55 Hasley v. S., 50 Tex. Cr. 45, 94 S. W. 899 (failure to prove alleged value, reversible error).

141-57 S. v. Stanley, 123 Mo. App. 294, 100 S. W. 678.

141-58 Joiner v. S., 124 Ga. 102, 52 S. E. 151; S. v. Faulk (S. D.), 116 N. W. 72; Sowles v. S. (Tex. Cr.), 105 S. W. 178; Gibson v. S. (Tex. Cr.), 100 S. W. 776.

142-59 Echols v. S., 147 Ala. 700, 41 S. 298; Cummings v. S. (Tex. Cr.), 106 S. W. 363; Keipp v. S., 51 Tex. Cr. 417, 103 S. W. 392.

143-61 Glover v. S., 146 Ala. 690, 40 S. 354; Keipp v. S., supra.

143-62 S. v. McDermet (Ia.), 115 N. W. 884.

144-66 S. v. Connor, 74 Kan. 898, 87 P. 703 (one witness sufficient to take case to jury).

145-68 S. v. Grubb, 201 Mo. 585, 99 S. W. 1083; Trevenio v. S., 48 Tex. Cr. 207, 87 S. W. 1162. But see Pool v. S., 48 Tex. Cr. 478, 88 S. W. 350.

147-79 Howard v. S., 3 Ga. App. 659, 60 S. E. 328 (railroad car); Warren v. S. (Tex. Cr.), 105 S. W. 817.

147-80 Time of theft must be shown to be anterior to the finding of indictment. S. v. Carr, 4 Penne. (Del.) 523, 57 A. 370; McDaniel v. S., 49 Tex. Cr. 47, 90 S. W. 504.

148-81 Thomas v. S., 51 Tex. Cr. 329, 101 S. W. 797; S. v. Hier, 78 Vt. 488, 63 A. 877 (burden is on defendant to establish by a preponderance of the evidence).

LEADING QUESTIONS [Vol. 8.]

150-2 Davis v. Millings, 141 Ala. 378, 37 S. 737; Gibson v. S., 47 Tex. Cr. 489, 83 S. W. 1119; Fire Assn. v. Masterson (Tex. Civ.), 83 S. W. 49; Missouri etc. R. Co. v. Hendricks (Tex. Civ.), 108 S. W. 745.

151-3 Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139.

152-4 Anniston Mfg. Co. v. R. Co., 145 Ala. 351, 40 S. 965; Prather v. R. Co., 221 Ill. 190, 77 N. E. 430; Ft. Worth etc. R. Co. v. Jones, 38 Tex. Civ. 129, 85 S. W. 37; Missouri etc. R. Co. v. Hendricks (Tex. Civ.), 108 S. W. 745; Cleveland v. Taylor (Tex. Civ.), 108 S.

W. 1037; Norfolk & W. R. Co. v. Briggs, 103 Va. 105, 48 S. E. 521.

152-5 Continental Ins. Co. v. Cummings (Tex. Civ.), 95 S. W. 48.

152-6 Bryan Press Co. v. R. Co. (Tex. Civ.), 110 S. W. 99. See El Paso R. Co. v. Ruckman (Tex. Civ.), 107 S. W. 1158.

152-7 Fulgham v. Carter, 142 Ala. 227, 37 S. 932; Emanuel v. Cas. Co., 47 Misc. 378, 94 N. Y. S. 36; St. Louis S. R. Co. v. Lowe (Tex. Civ.), 97 S. W. 1087; Moore v. S., 49 Tex. Cr. 499, 96 S. W. 321; Coons v. S., 49 Tex. Cr. 256, 91 S. W. 1085; Brock v. Moderns, 36 Tex. Civ. 12, 81 S. W. 340; I. & G. N. R. Co. v. Dalwigh, 92 Tex. 655, 51 S. W. 500; Bryan Press Co. v. R. Co. (Tex. Civ.), 110 S. W. 99 (the last two cases treat the statement of the rule as given in the text as a modification of the rule at common law); Missouri etc. R. Co. v. Steele (Tex. Civ.), 110 S. W. 171; I. & G. N. R. Co. v. Drought (Tex. Civ.), 100 S. W. 1011.

152-8 Greene v. Hereford, (Ariz.), 95 P. 105; Lukenbach v. Seiple, 72 N. J. L. 476, 63 A. 244; Gulf etc. R. Co. v. Tullis, 41 Tex. Civ. 219, 91 S. W. 317; Cunningham v. Neal (Tex. Civ.), 109 S. W. 455; Scago v. White (Tex. Civ.), 100 S. W. 1015; St. Louis etc. R. Co. v. Conrad (Tex. Civ.), 99 S. W. 209; Godsoe v. S. (Tex. Cr.), 108 S. W. 388; U. S. Gypsum Co. v. Shields (Tex. Civ.), 106 S. W. 724; Garrett v. S. (Tex. Cr.), 106 S. W. 389; Ft. Worth etc. R. Co. v. Walker (Tex. Civ.), 106 S. W. 400.

152-9 Williamson Iron Co. v. McQueen, 144 Ala. 265, 40 S. 306; Hein v. Mildebrandt (Wis.), 115 N. W. 121. See Williams v. Norton (Vt.), 69 A. 146.

153-15 Bolton v. S., 146 Ala. 691, 40 S. 409; Denison & S. R. Co. v. Powell, 35 Tex. Civ. 454, 80 S. W. 1054.

153-17 Moore v. S., 49 Tex. Cr. 499, 96 S. W. 321; Hunter v. Malone (Tex. Civ.), 108 S. W. 709.

153-18 Winkham v. P. (Colo.), 93 P. 478; Chicago & A. R. Co. v. Walker, 118 Ill. App. 397; S. v. Walker, 133 Ia. 489, 110 N. W. 925; S. v. Barrett, 117 La. 1086, 42 S. 513; Reed v. Mattapan Co. (Mass.), 84 N. E. 469 (in court's discretion); S. v. Newman, 93 Minn. 393, 101 N. W. 499; Hackney v. Raymond, 75 Neb. 793, 106 N. W. 1016; Blair v. S., 72 Neb. 501, 101 N. W. 17 (to a reasonable extent); P. v. Sexton, 187 N. Y. 495, 80 N. E. 396; S. v. Cambron, 20 S. D. 282, 105 N. W. 241; Burch v. S., 49 Tex. Cr. 13, 90 S. W. 168; Missouri etc. R. Co. v. McAnaney, 36 Tex. Civ. 76, 80 S. W. 1062 (though witness professes friendship for party who called him, if his answers are evasive); Littler v. Dielmann (Tex. Civ.), 106 S. W. 1137; S. v. Dalton, 43 Wash. 278, 86 P. 590.

A witness called under misapprehension and who has misled the party calling him may be asked leading questions. Zilver v. Graves, 106 App. Div. 582, 94 N. Y. S. 714.

154-19 Thomasson v. S., 80 Ark. 364, 97 S. W. 297; Wickham v. P. (Colo.), 93 P. 478; Gray v. Kelley, 190 Mass. 184, 76 N. E. 724 (aged witness whose recollection was exhausted); DeKremen v. Clothier, 109 App. Div. 481, 96 N. Y. S. 525; Gulf etc. R. Co. v. Hall, 34 Tex. Civ. 535, 80 S. W. 133.

155-21 S. v. Waters, 132 Ia. 481, 109 N. W. 1013; Roberson v. S. (Tex. Cr.), 109 S. W. 160 (prosecutrix talked so low that it was necessary to repeat questions).

155-22 S. v. Drake, 128 Ia. 539, 105 N. W. 54.

155-23 S. v. Hazlett, 14 N. D. 490, 105 N. W. 617.

155-25 S. v. Simes, 12 Idaho 310, 85 P. 914 (to feeble or simple-minded person).

155-26 S. v. Drake, 128 Ia. 539, 105 N. W. 54; Bannen v. S., 115 Wis. 317, 91 N. W. 107.

156-27 S. v. Megorden, 49 Or. 259, 88 P. 306 (one witness aged 18 years, the other 14, both testifying of the killing of their mother by their father).

156-28 Kozik v. Czapiewski (Wis.), 116 N. W. 640; Craddick v. S., 48 Tex. Cr. 385, 88 S. W. 347.

157-33 Mabry v. Randolph (Cal. App.), 94 P. 403; McCann v. P., 226 Ill. 562, 80 N. E. 1061; P. v. Hodge, 141 Mich. 312, 104 N. W. 599; DeKremen v. Clothier, 109 App. Div. 481, 96 N. Y. S. 525.

158-36 But see Collins v. Gleason C. Co. (Ia.), 115 N. W. 497; St.

Louis S. R. Co. v. Crabb (Tex. Civ.), 80 S. W. 408.

159-39 S. v. Harris (R. I.), 69 A. 506.

159-42 Busch v. Robinson, 46 Or. 539. 81 P. 237.

160-43 **Rule of the text does not apply** where the name of the party sought to be identified is not proved and there is no testimony to show that he was named as alleged. Brown v. S. (Tex. Cr.), 109 S. W. 188.

Leading questions should not be reiterated after a positive answer has been given. Briggs v. P., 219 Ill. 330, 76 N. E. 499.

160-49 Corkery v. O'Neill, 9 Pa. Super. 335.

Error in permitting answers to leading questions is not cured because witness reiterates the matter testified to without objection. Ft. Worth etc. R. Co. v. Jones (Tex. Civ.), 85 S. W. 37.

160-50 Hilton v. Santelman, 129 Ill. App. 109.

161-51 Rainey v. Potter, 120 Fed. 651, 57 C. C. A. 113; Barlow v. Hamilton (Ala.), 44 S. 657; Western U. Tel. Co. v. Westmorland (Ala.), 43 S. 790; Scott v. S., 75 Ark. 142, 86 S. W. 1004; Plumlee v. R. Co. (Ark.), 109 S. W. 515; Beaudrot v. S., 126 Ga. 579, 55 S. E. 592; Colley v. Williams, 122 Ga. 841, 50 S. E. 917; Georgia etc. R. Co. v. Sasser (Ga. App.), 61 S. E. 505; Lyles v. S., 130 Ga. 295, 60 S. E. 578; McBride v. R. & E. Co., 125 Ga. 515, 54 S. E. 674; Holmes v. Clisby, 121 Ga. 241, 48 S. E. 934 (answers to leading interrogatories may be read in court's discretion); Barker v. S., 1 Ga. App. 286, 57 S. E. 989; McLean v. Lewiston, 8 Idaho 472, 69 P. 478; Chicago & A. R. Co. v. Walker, 118 Ill. App. 397; Purcell Mills v. Bell (Ind. Ter.), 104 S. W. 944; S. v. Drake, 128 Ia. 539, 105 N. W. 54; Breiner v. Nugent (Ia.), 111 N. W. 446; S. v. Bursaw, 74 Kan. 473, 87 P. 183; Gray v. Kelley, 190 Mass. 184, 76 N. E. 724; S. v. Bateman, 198 Mo. 212, 94 S. W. 843; S. v. Knost, 207 Mo. 18, 105 S. W. 616; S. v. Woodward, 191 Mo. 617, 90 S. W. 90; Ter. v. Meredith (N. M.), 91 P. 731; P. v. Way, 119 App. Div. 344, 104 N. Y. S. 277; S. v. Cambron, 20 S. D. 282, 105 N. W. 241; Missouri etc. R. Co. v. Hendricks (Tex. Civ.), 108 S. W. 745; Johnson v. S., 133 Wis. 453, 113 N. W. 674.

Abuse of discretion shown.— S. v. Hazlett, 14 N. D. 490, 105 N. W. 617; Lyon v. Grand Rapids, 121 Wis. 609, 99 N. W. 311.

Refusal to permit a leading question must stand upon at least as high a footing as the discretion to permit it, being in itself the normal rule. Luckenbach v. Sciple, 72 N. J. L. 476, 63 A. 244.

161-52 P. v. Weber, 149 Cal. 325, 86 P. 671; Shaffer v. U. S., 24 App. D. C. 417; Phinazee v. Bunn, 123 Ga. 230, 51 S. E. 300; Maguire v. P., 219 Ill. 16, 76 N. E. 67; Indianapolis & E. R. Co. v. Bennett, 39 Ind. App. 141, 79 N. E. 389; Bess v. C., 118 Ky. 858, 82 S. W. 576; Luckenbach v. Sciple, 72 N. J. L. 476, 63 A. 244; Denison & S. R. Co. v. Powell, 35 Tex. Civ. 454, 80 S. W. 1054; Norfolk & W. R. Co. v. Briggs, 103 Va. 105, 48 S. E. 521; Richmond etc. R. Co. v. Rubin, 102 Va. 809, 47 S. E. 834.

LEGITIMACY (Vol. 8.)

163-1 Grant v. Stimpson, 79 Conn. 617, 66 A. 166; Buckner v. Buckner, 120 Ky. 596, 87 S. W. 776; Bowman v. Little, 101 Md. 273, 61 A. 223, 657, 1084; Kennington v. Catoe, 68 S. C. 470, 47 S. E. 719; Pooler v. Smith, 73 S. C. 102, 52 S. E. 967. *Compare* Osborne v. McDonald, 159 Fed. 791.

165-2 **"Strict proof"** required where establishment of marriage would bastardize issue of subsequent marriage. Bowman v. Little, 101 Md. 273, 61 A. 223, 657, 1084.

165-3 Osborne v. McDonald, 159 Fed. 791; Brisbin v. Huntington, 128 Ia. 166, 103 N. W. 144.

165-4 McAllen v. Alonzo (Tex. Civ.), 102 S. W. 475.

166-9 Yool v. Ewing (1904), 1 Ir. R. 434; Mayer v. Davis, 119 App. Div. 96, 103 N. Y. S. 943, *aff.* in 122 App. Div. 393, 106 N. Y. S. 1041 (husband dead before birth).

Only proof of non-intercourse can bastardize where presumption of intercourse is raised by fact of oppor-

tunity. Gordon v. Gordon, (1903) Pr. Div. 141.

166-10 But see Ezidore v. Curean, 113 La. 839, 37 S. 773; Bowman v. Little, 101 Md. 273, 61 A. 223, 657, 1084.

167-11 *Compare* Wallace v. Wallace (Ia.), 114 N. W. 527.

168-12 Wallace v. Wallace, supra (divorce proceeding); Wallace v. Wallace (N. J. L.), 67 A. 612.

169-16 Godfrey v. Rowland, 16 Haw. 377; C. L. Hopkins v. Chung Wa, 4 Haw. 650 (even though child shows an admixture of blood); Canaan v. Avery, 72 N. H. 591, 58 A. 509.

169-17 Unlawful intercourse not presumed from mere opportunity. S. v. Breeden (Ind. App.), 83 N. E. 1020.

170-18 Kennington v. Catoe, 68 S. C. 470, 47 S. E. 719.

170-19 Presumption of continuation of marriage versus presumption of legitimacy. — The presumption of the continuation of a marriage will yield to the presumption of the validity of a second marriage, and the legitimacy of the children thereof after a long desertion by the husband of the first marriage. In re Wile, 6 Pa. Super. 435; Lewis v. Sizemore, 25 Ky. L. R. 1354, 78 S. W. 122; In re Kelly, 46 Misc. 541, 95 N. Y. S. 57; In re McCausland, 213 Pa. 189, 62 A. 780.

170-21 Godfrey v. Rowland, 16 Haw. 377; In re Wile, 6 Pa. Super. 435.

171-23 Godfrey v. Rowland, supra; Sergent v. Mfg. Co., 112 Ky. 888, 66 S. W. 1036.

171-27 Brisbie v. Huntington, 128 Ia. 166, 103 N. W. 144 (insufficient acknowledgment).

Presumption of paternity from subsequent marriage. — In jurisdiction where statute declares that if a man who has a child by a woman and afterwards marries her and recognizes the child, it shall be legitimate, the marriage of a man to an unmarried woman who has had a child born out of lawful wedlock creates some presumption that it was his child, though not as strong as in case of a child born out of lawful wedlock. Stein v. Stein, 32 Ky. L. R. 664, 106 S. W. 860. Such statutes sometimes make such recognition a legitimation of the child, in which case the contrary cannot be shown. Where they do not, however, the presumption of paternity, and hence of legitimacy, arising from such recognition is at least as strong as in the case of a child born in lawful wedlock. Breidenstein v. Bertram, 198 Mo. 328, 95 S. W. 828; Davenport v. Davenport, 116 La. 1009, 41 S. 240; Moore v. Flack (Neb.), 108 N. W. 143. *Compare* Miller v. Pennington, 218 Ill. 220, 75 N. E. 919 (what is sufficient acknowledgment under statute); Townsend v. Menely, 37 Ind. App. 127, 74 N. E. 274; Houghton v. Dickinson, 196 Mass. 389, 82 N. E. 481 (sufficiency of acknowledgment).

A will recognizing illegitimate son which is retained by testator's brother, until after testator's death, is not a "public acknowledgment" under the statute. In re De Laveaga, 142 Cal. 158, 75 P. 790 (*disappr.* dicta in In re Jessup, 81 Cal. 408, 21 P. 976,, 22 P. 742-1028.

172-31 McCalman v. S., 121 Ga. 491, 49 S. E. 609 (but see dissenting opinion); Esch v. Grane, 72 Neb. 719, 101 N. W. 978. But see Land v. S., 84 Ark. 199, 105 S. W. 90 (exhibit of child to show paternity in bastardy proceedings). *Contra*, Shailer v. Bullock, 75 Conn. 65, 61 A. 65; Higley v. Bostick, 79 Conn. 97, 63 A. 786.

Mere presence of child not error. Johnson v. S., 133 Wis. 453, 113 N. W. 674.

172-33 Wallace v. Wallace (Ia.), 114 N. W. 527; C. v. Reed, 5 Phila. (Pa.) 528. *Contra*, by statute in bastardy cases. Evans v. S., 165 Ind. 369, 75 N. E. 651 (discussion of history of common law rule).

174-37 Evans v. S., supra (by statute); Wallace v. Wallace, supra.

174-41 But husband's deposition of non-intercourse before marriage is competent to show illegitimacy. The Poulett Peerage App. Cas. (1903) 395.

175-43 But on an issue as to whether plaintiff was the widow of intestate she is not a competent witness to show the marriage. Bowman v. Little, 101 Md. 273 61 A. 223, 657, 1084.

175-44 Hardin v. Hardin, 27 Ky. L. R. 899, 87 S. W. 284.
"Reputed" defined. McBride v. Sullivan (Ala.), 45 S. 902.
175-45 In re Kelley, 46 Misc. 541, 95 N. Y. S. 57.
176-47 In re Kelley, supra.

LIBEL AND SLANDER [Vol. 8.]

189-1 Whittaker v. McQueen, 32 Ky. L. R. 1094, 108 S. W. 236.
189-4 Publication not shown.— Konkle v. Haven, 144 Mich. 667, 108 N. W. 98. Defendant's wife not shown to have published slander. Konkle v. Haven, 140 Mich. 472, 103 N. W. 850; Buckwalter v. Gossow, 75 Kan. 147, 88 P. 742.
Making a letter-press copy of a libelous message is not a publication of it, not being shown that the copyist read the contents. Western U. T. Co. v. Cashman, 149 Fed. 367.
Plaintiff may name the person who told him of the utterance of the alleged slanderous words. Patterson v. Frazier (Tex. Civ.), 93 S. W. 146. But such testimony has been said to be immaterial. Proctor v. Pointer, 127 Ga. 134, 56 S. E. 111.
Publication to husband and wife of slander of latter shown. Schultz v. Guldenstein, 144 Mich. 636, 108 N. W. 96.
189-5 And so of a postal card.— Logan v. Hodges, 146 N. C. 38, 59 S. E. 349.
191-15 Briggs v. Brown (Fla.), 46 S. 325; Brinsfeld v. Howeth (Md.), 68 A. 566 (admissions do not show a cause of action); Overton v. White, 117 Mo. App. 576, 93 S. W. 363 (in pleading may be explained). See "Admissions," Vol. 1, p. 348, and ante. But see Buckwalter v. Gossow, 75 Kan. 147, 88 P. 742.
Withdrawal of plea of general issue. Geringer v. Novak, 117 Ill. App. 160.
192-18 If publication made in a foreign language plaintiff must show the correctness of the translation as pleaded. Romano v. De Vito, 191 Mass. 457, 78 N. E. 105.
192-23 Briggs v. Brown (Fla.), 46 S. 325.
193-24 Patterson v. Frazer (Tex. Civ.), 93 S. W. 146.
194-31 See Kloths v. Hess, 126 Wis. 587, 106 N. W. 251; Lee v. Crump, 146 Ala. 655, 40 S. 609; Miller v. Nuckolls, 77 Ark. 64, 91 S. W. 759.
All the words pleaded as defamatory need not be proved if part of them constitute a cause of action. Dubois v. Robbins, 115 Ill. App. 372.
194-33 See Tingley v. Times-Mirror Co., 151 Cal. 1, 89 P. 1097, quoting from Childers v. San Jose Mercury P. & P. Co., 105 Cal. 284, 38 P. 903, 45 Am. St. 40. But see Carpenter v. Pub. Co., 111 App. Div. 266, 97 N. Y. S. 478.
195-34 Tingley v. Times-M. Co., 151 Cal. 1, 89 P. 1097; Bohan v. Pub. Co., 1 Cal. App. 429, 82 P. 634; Donahoe v. Pub. Co., 4 Penne (Del.), 166, 55 A. 337; Todd v. Pub. Co. (Del.), 66 A. 97; Washington T. Co. v. Downey, 26 App. D. C. 258; Briggs v. Brown (Fla.), 46 S. 325; Abraham v. Baldwin, 52 Fla. 151, 42 S. 591; Sparks v. Bedford (Ga. App.), 60 S. E. 809; Conwisher v. Johnson, 127 Ill. App. 602; Lodge v. Hampton, 116 Ill. App. 414; S. v. Cooper (Ia.), 116 N. W. 691; Vial v. Larson, 132 Ia. 208, 109 N. W. 1007; Sheibley v. Ashton, 130 Ia. 195, 106 N. W. 618; Berger v. Pub. Co., 132 Ia. 290, 109 N. W. 784; Pennsylvania I. Wks. v. Mach. Co., 29 Ky. L. R. 861, 96 S. W. 551; Shockey v. McCauley, 101 Md. 461, 61 A. 583; Cairnes v. Pelton, 103 Md. 40, 63 A. 105; Farley v. Pub. Co., 113 Mo. App. 216, 87 S. W. 565; Paxton v. Woodward, 31 Mont. 195, 78 P. 215; Sheibley v. Fales, 75 Neb. 823, 106 N. W. 1032; Crane v. Bennett, 177 N. Y. 106, 69 N. E. 274; C. v. Swallow, 8 Pa. Super. 539, 580; Moore v. Pub. Co., 8 Pa. Super. 152; Stewart v. Press Co., 1 Pa. C. C. 247; Patterson v. Frazer (Tex. Civ.), 93 S. W. 146; Chambers v. Leiser, 43 Wash. 285, 86 P. 627. But see Western U. T. Co. v. Cashman, 149 Fed. 367.
Legal malice is shown under the Pennsylvania statute of 1901 by establishing the publication of a libelous article of a person named, or if it is so written as that it may reasonably be taken to refer to a particular person. Binder v. News Co., 33 Pa. Super. 411.

196-35 Sparks v. Bedford (Ga. App.), 60 S. E. 809.

196-36 Bohan v. Pub. Co., 1 Cal. App. 429, 82 P. 634; Todd v. Pub. Co. (Del.), 66 A. 97; Jensen v. Damm, 127 Ia. 555, 103 N. W. 798; Butler v. Gazette Co., 119 App. Div. 767, 104 N. Y. S. 637.

197-37 Cornelius v. S., 145 Ala. 65, 40 S. 670; C. v. Swallon, 8 Pa. Super. 539, 580; C. v. Rovinanek, 12 Pa. Super. 86.

197-38 Tingley v. Times-M. Co., 151 Cal. 1, 89 P. 1097; Berger v. Pub. Co., 132 Ia. 290, 109 N. W. 784; Paxton v. Woodward, 31 Mont. 195, 78 P. 215.

In Alabama, contrary to the rule elsewhere (See "INTENT," Vol. 7, p. 580, and ante), a party cannot testify of his intent in doing or saying a thing. Vest v. Speakman (Ala.), 44 S. 1017. Intent may be testified of by defendant in a criminal action for libel. C. v. Scouten, 25 Pa. C. C. 138.

197-40 Berger v. Pub. Co., 132 Ia. 290, 109 N. W. 784.

198-41 Donahoe v. Pub. Co., 4 Penne (Del.), 166, 55 A. 337; Carpenter v. Pub. Co., 111 App. Div. 266, 97 N. Y. S. 478.

198-42 Thomas v. Bradbury (1906), 2 K. B. (Eng.), 627, 642; Todd v. Pub. Co. (Del.), 66 A. 97; S. v. Lomack, 130 Ia. 79, 106 N. W. 386; Berger v. Pub. Co., 132 Ia. 290, 109 N. W. 784; Brinsfield v. Howeth (Md.), 68 A. 566; Moore v. Pub. Co., 8 Pa. Super. 152; Stewart v. Press Co., 1 Pa. C. C. 247.

A defendant who has pleaded fair comment may be questioned concerning his state of mind (Plymouth M. Soc. v. Assn. (1906) 1 K. B. (Eng.) 403; Thomas v. Bradbury (1906), 2 K. B. (Eng.) 627), as he may be where privilege is pleaded. White v. Assn. (1905), 1 K. B. (Eng.) 653.

Deliberation of defendant in publishing the substance of a clipping from another paper may be shown. Morning Union v. Butler, 151 Fed. 188.

198-44 Thomas v. Bradbury (1906) 2 K. B. (Eng.) 627; Lee v. Crump, 146 Ala. 655, 40 S. 609; Julian v. Star Co., 209 Mo. 35, 107 S. W. 496.

Remoteness.— Threat by owner of nearly all the stock of a newspaper twelve years before publication of libel, competent matter of proof; the remoteness affected only the weight to be given the evidence. Julian v. Star Co., supra.

199-47 Paxton v. Woodward, 31 Mont. 195, 78 P. 215 (threats to revoke a teacher's certificate).

200-48 In an action by a pastor against members of his church testimony of its financial condition and the number of members added during his pastorate is immaterial. Konkle v. Haven, 140 Mich. 472, 103 N. W. 850.

The special manner in which the libelous matter was published may be regarded. Thomas v. Bradbury (1906) 2 K. B. (Eng.) 627.

Expressions and demeanor of defendant as a witness and the terms of a subsequent apology are relevant matters. Thomas v. Bradbury, supra.

200-50 Donahoe v. Pub. Co., 4 Penne. (Del.) 166, 55 A. 337; McHugh v. Ambrose (Ia.), 113 N. W. 1080; Sheibley v. Fales (Neb.), 116 N. W. 1035; Neafie v. Hoboken Co. (N. J. L.), 68 A. 146.

200-51 Subsequent publication of full report of a trial may be shown for the purpose of proving intention to make a fair report of all the proceedings, including the pleadings, only a part of which were published. Meriwether v. Publishers (Mo.), 109 S. W. 750.

Age of adult defendant immaterial where he is before the jury. Gillis v. Powell, 129 Ga. 403, 58 S. E. 1051.

200-54 Disregard of specific instructions given by proprietor of newspaper and his absence at the time the publication was made may be proved. C. v. Rovinanek, 12 Pa. Super. 86.

201-55 C. v. Swallow, 8 Pa. Super. 539.

The circumstances under which a press association sent out news is immaterial in an action against a publisher who gave it currency regardless of such circumstances. Post Pub. Co. v. Butler, 137 Fed. 723, 71 C. C. A. 309.

The acts, expressions and conduct of plaintiff, the circumstances surrounding him and general rumors

and representation concerning him may be proved. Donahoe v. Pub. Co., 4 Penne (Del.) 166, 55 A. 337.

201-56 Butler v. Gazette Co., 119 App. Div. 767, 104 N. Y. S. 637.

201-58 Harms v. Proehl (Minn.), 116 N. W. 587.

202-59 Yager v. Bruce, 116 Mo. App. 473, 93 S. W. 307; C. v. Swallow, 8 Pa. Super. 539; Coates v. Wallace, 4 Pa. Super 253; S. v. Lomack, 130 Ia. 79, 106 N. W. 386.

202-60 The honest belief of defendant may be inquired into although the answers to the questions may incidentally prove the truth of the alleged libel. McKergow v. Comstock, 11 Ont. L. R. (Can.) 637.

202-61 A witness may not testify as to the effect upon his mind of information given before he wrote the libel; the facts upon which to base probable cause for his action were the subject of proof. Moore v. Pub. Co., 8 Pa. Super. 152.

202-63 But see Ott v. Pub. Co., 40 Wash. 308, 82 P. 403. *Compare* 300-37, infra.

203-67 See Crafer v. Hooper, 194 Mass. 68, 80 N. E. 2.

203-69 Earley v. Winn, 129 Wis. 281, 109 N. W. 633.

204-70 *Contra*, S. v. Conklin, 47 Or. 509, 84 P. 482.

205-73 But see Overton v. White, 117 Mo. App. 576, 93 S. W. 363.

205-74 Cornelius v. S., 145 Ala. 65, 40 S. 670.

206-76 Earley v. Winn, supra (unsworn statements of others or current rumors).

207-79 Collins v. News Co., 6 Pa. Super. 330.

Failure to investigate may be excused by showing that investigation would have been futile. Butler v. Gazette Co., 119 App. Div. 767, 104 N. Y. S. 637. Such failure does not conclusively show liability. Sheibley v. Fales (Neb.), 116 N. W. 1035.

207-80 Elimination of matter derogatory to plaintiff before publication of the article in question cannot be proved. Tingley v. Times-M. Co., 151 Cal. 1, 89 P. 1097; Todd v. Pub. Co., 9 Ohio C. C. (N. S.) 249, 260; C. v. Swallow, 8 Pa. Super. 539, 585; Collins v. News. Co., 6 Pa. Super. 330.

209-89 Tingley v. Times-M. Co., supra.

210-93 Andrus v. Harris, 110 N. Y. S. 819.

211-95 S. v. Lomack, 130 Ia. 79, 106 N. W. 385; Andrus v. Harris, 110 N. Y. S. 819.

211-96 Shockey v. McCauley, 101 Md. 461, 61 A. 583.

215-13 Record of church trial of plaintiff on charges made the basis of the suit for slander is inadmissible. Harms v. Proehl (Minn.), 116 N. W. 587.

215-14 Harms v. Proehl, supra.

217-18 Malice of defendant's wife is immaterial if she was not concerned in the publication. Konkle v. Haven, 144 Mich. 667, 108 N. W. 98.

217-21 Whittaker v. McQueen, 32 Ky. L. R. 1094, 108 S. W. 236; Yager v. Bruce, 116 Mo. App. 473, 93 S. W. 307.

The answer, if not sustained, may be regarded by the jury on the question of defendant's good faith. Reynolds v. Vinier, 109 N. Y. S. 293.

218-24 Proctor v. Pointer, 127 Ga. 134, 56 S. E. 111.

Exemplary damages are not to be awarded because of failure to support a plea of justification. Yager v. Bruce, 116 Mo. App. 473, 93 S. W. 307.

220-27 Abraham v. Baldwin, 52 Fla. 151, 42 S. 591; Sheibley v. Fales (Neb.), 116 N. W. 1035; Logan v. Hodges, 146 N. C. 38, 59 S. E. 349; Collins v. News Co., 6 Pa. Super. 330; Coates v. Wallace, 4 Pa. Super. 253; Mulderig v. Times, 215 Pa. 470, 64 A. 636.

220-28 Denver P. W. Co. v. Holloway, 34 Colo. 432, 83 P. 131; Abraham v. Baldwin, 52 Fla. 151, 42 S. 591; German Sav. Bk. v. Fritz, 135 Ia. 44, 109 N. W. 1008; Vial v. Larson, 132 Ia. 208, 109 N. W. 1007; Schultz v. Guldenstein, 144 Mich. 636, 108 N. W. 96; Howarth v. Barlow, 113 App. Div. 510, 99 N. Y. S. 457; Gattis v. Kilgo, 140 N. C. 106, 52 S. E. 249; Echard v. Morton, 26 Pa. Super. 579; C. v. McClure, 1 Pa. C. C. 207; Gatewood v. Garrett, 106 Va. 552, 56 S. E. 335; Chambers v. Leiser, 43 Wash. 285, 86 P. 627. See Yager v. Bruce, 116 Mo. App. 473, 93 S. W. 307.

221-31 But knowledge of the falsity must be shown. Shultz v. Gul-

denstein, 144 Mich. 636, 108 N. W. 96.

222-33 Trimble v. Morrish (Mich.), 116 N. W. 451.

Opinions concerning the privileged character of the publication are inadmissible. Briggs v. Brown (Fla.), 46 S. 325.

222-35 Myers v. Hodges, 53 Fla. 197, 44 S. 357.

222-36 Sunley v. Ins. Co., 132 Ia. 123, 109 N. W. 463.

222-37 Myers v. Hodges, 53 Fla. 197, 44 S. 357; Sheftall v. R. Co., 123 Ga. 589, 51 S. E. 646; Crafer v. Hooper, 194 Mass. 68, 80 N. E. 2; Mulderig v. Times, 215 Pa. 470, 64 A. 636.

Malice not shown by publication. Trimble v. Morrish (Mich.), 116 N. W. 451.

223-39 Myers v. Hodges, 53 Fla. 197, 44 S. 357; Trimble v. Morrish supra; C. v. McClure, 1 Pa. C. C. 207.

Declining to name confidential informant is not cause for inferring malice on the part of the maker of a qualifiedly privileged communication. Trimble v. Morrish, supra.

224-42 Ladwig v. Heyer (Ia.), 113 N. W. 767 (in the absence of a plea of the truth).

Failure to plead the truth of the charges is an admission of their falsity. Brinsfield v. Howeth (Md.), 68 A. 566.

225-45 Oles v. Times, 2 Pa. Super. 130 (in general the whole libel must be proved to be true); Sacchetti v. Fehr, 217 Pa. 475, 66 A. 742; Reynolds v. Holland, 46 Wash. 537, 90 P. 648.

225-46 Bennett v. Crumpton, 1 Ga. App. 476, 58 S. E. 104. Oles v. Times, 2 Pa. Super. 130.

225-47 Geringer v. Novak, 117 Ill. App. 160; Corning v. Dollmeyer, 123 Ill. App. 188; Schultz v. Guldenstein, 144 Mich. 636, 108 N. W. 96; Bennett v. Crumpton, 1 Ga. App. 476, 58 S. E. 104.

227-49 A preponderance of the evidence is sufficient. Sacchetti v. Fehr, 217 Pa. 475, 66 A. 742.

227-52 C. v. McClure, 1 Pa. C. C. 207. See also Abraham v. Baldwin, 52 Fla. 151, 42 S. 591. *Compare* 233-77 et seq.

228-53 Coates v. Wallace, 4 Pa. Super. 253

229-59 Whittaker v. McQueen, 32 Ky. L. R. 1094, 108 S. W. 236.

231-66 Bennett v. Crumpton, 1 Ga. App. 476, 58 S. E. 104.

231-69 Tingley v. Times-M. Co. 151 Cal. 1, 89 P. 1097; Lodge v. Hampton, 116 Ill. App. 414; S. v. Lomack, 130 Ia. 79, 106 N. W. 386; Berger v. Pub. Co., 132 Ia. 290, 109 N. W. 784; Saunders v. Pub. Co., 107 App. Div. 84, 94 N. Y. S. 993.

If the facts of the alleged libel are severable evidence in support of a portion of it is admissible. Farbenfabriken v. Beringer, 158 Fed. 802; McKergow v. Comstock, 11 Ont. L. R. (Can.), 637.

232-70 See Shipp v. Patton, 29 Ky. L. R. 480, 93 S. W. 1033, qualifying earlier cases.

234-78 Abraham v. Baldwin, 52 Fla. 151, 42 S. 591, *over.* Schultz v. Ins. Co., 14 Fla. 73, and Williams v. Dickenson, 28 Fla. 90, 113, 9 S. 847; Bennett v. Crumpton, 1 Ga. App. 476, 58 S. E. 104. Fleming v. Wallace, 116 Tenn. 20, 91 S. W. 47.

235-81 Daily v. Herald Co., 151 Fed. 114; Ladwig v. Heyer (Ia.), 113 N. W. 767; Julian v. Star Co., 209 Mo. 35, 107 S. W. 496; C. v. Swallow, 8 Pa. Super. 539, 607.

235-82 Conwisher v. Johnson, 127 Ill. App. 602.

235-83 Line v. Spies, 139 Mich. 484, 102 N. W. 993.

236-86 Ladwig v. Heyer (Ia.), 113 N. W. 767.

237-91 Proctor v. Pointer, 127 Ga. 134, 56 S. E. 111; Schaefer v. Schoenborn, 101 Minn. 67, 111 N. W. 843.

238-92 Kloths v. Hess, 126 Wis. 587, 106 N. W. 531.

Witness' understanding of words of obvious meaning cannot have effect on jury. Brown v. Wintsch, 110 Mo. App. 264, 84 S. W. 196. It cannot be shown to aid an innuendo or enlarge the meaning of the words used. Line v. Spies, 139 Mich. 484, 102 N. W. 993.

238-93 Julian v. Star Co., 209 Mo. 35, 107 S. W. 496.

239-95 All who heard the words must be shown to have had knowledge of circumstances rendering them non-slanderous. Kloths v. Hess, 126 Wis. 587, 106 N. W. 531.

241-3 Green v. Miller, 33 Can. Sup. 193.

241-4 Sheftall v. R. Co., 123 Ga. 589, 51 S. E. 646.
242-8 Brinsfield v. Howeth (Md.), 68 A. 566.
244-11 Corr v. Assn., 177 N. Y. 131, 69 N. E. 288; Bianci v. Star Co., 46 Misc. 486, 95 N. Y. S. 28.
244-13 Farley v. Pub. Co., 131 Mo. App. 216, 87 S. W. 565 (pictures of plaintiff published by mistake).
245-15 Goldsborough v. Orem, 103 Md. 671, 64 A. 36; Clark v. Am. Co., 203 Pa. 346, 53 A. 237.
245-16 Ellis v. Pub. Co. (Mass.), 84 N. E. 1018.
245-18 P. v. Parr, 42 Hun (N. Y.) 313.
247-26 Goldsborough v. Orem, supra.
249-32 Donahoe v. Pub. Co., 4 Penne. (Del.) 166, 55 A. 337; Todd v. Pub. Co. (Del.), 66 A. 97; Sparks v. Bedford (Ga. App.), 60 S. E. 809; Slater v. Walter, 148 Mich. 650, 112 N. W. 682; Paxton v. Woodward, 31 Mont. 195, 78 P. 215; Butler v. Hoboken P. Co., 73 N. J. L. 45, 73 A. 272.
250-33 Sunley v. Ins. Co., 132 Ia. 123, 109 N. W. 463; Saunders v. Pub. Co., 107 App. Div. 84, 94 N. Y. S. 993.
250-34 Sunley v. Ins. Co., supra. **Specific proof of injury** to reputation is unnecesary. The jury may pass upon it from all the evidence. Belo v. Fuller, 84 Tex. 450, 19 S. W. 616, 31 Am. St. 75; Rosenbaum v. Roche (Tex. Civ.), 101 S. W. 1164.
250-38 But see Sheftall v. R. Co., 123 Ga. 589, 51 S. E. 646.
251-39 Geringer v. Novak, 117 Ill. App. 160.
It is presumed that a statute forbidbing telegraph operators to disclose the contents of messages has been observed. Western U. T. Co. v. Cashman, 149 Fed. 367.
253-49 Harriman v. Nonpariel Co., 132 Ia. 616, 110 N. W. 33.
253-50 Corning v. Dollmeyer, 123 Ill. App. 188.
254-53 Smith v. Hubbell, 142 Mich. 637, 106 N. W. 547.
254-55 **Abandonment of employment** because of physical illness resulting from a publication libelous per se cannot be shown. Butler v. Hoboken P. Co., 73 N. J. L. 45, 73 A. 272.
255-62 Washington T. Co. v. Downey, 26 App. D. C. 258; Smith v. Hubbell, 151 Mich. 59, 114 N. W. 865. But *compare* Woodhouse v. Powles, 43 Wash. 617, 86 P. 1063.
255-66 Brinsfield v. Howeth (Md.), 68 A. 566.
257-70 Binder v. News Co., 33 Pa. Super. 411.
257-71 Ellis v. Pub. Co. (Mass.), 84 N. E. 1018; Neafie v. Hoboken P. Co. (N. J. L.), 68 A. 146; Price v. Clapp (Tenn.), 105 S. W. 864.
257-72 Tingley v. Times-M. Co., 151 Cal. 1, 89 P. 1097.
Defendant's capacity for mental suffering and the sources whence the same came cannot be shown by evidence offered on cross-examination, as to family ties, past history and occupation, public controversies and litigation, those subjects not having been testified of in the direct examination. Tingley v. Times-M. Co., supra.
257-73 **Bad character is not cause for refusing damages** for injured feelings. McArthur v. Pub. Co., 148 Mich. 556, 112 N. W. 126.
257-74 **Orphaned condition** and dependence of plaintiff upon her own exertions may be proved to show the extent of mental suffering, the apprehension of loss of employment being a probable factor of that suffering. Proof of poverty as an independent fact is improper. Washington T. Co. v. Downey, 26 App. D. C. 258.
257-75 Smith v. Hubbell, 142 Mich. 637, 106 N. W. 547.
258-76 **Effect of libel upon plaintiff's family and friends** when the matter was discussed is not a subject for evidence. Sheftall v. R. Co., 123 Ga. 589, 51 S. E. 646.
258-77 **Plaintiff's appearance** when told of the slander may be proved. Brown v. Wintsch, 110 Mo. App. 264, 84 S. W. 196.
Physical conditions indicating mental suffering may be proved. Finger v. Pollack, 188 Mass. 208, 74 N. E. 317.
258-78 Saunders v. Pub. Co., 107 App. Div. 84, 94 N. Y. S. 993; Crane v. Bennett, 177 N. Y. 106, 69 N. E. 274, 101 Am. St 722.

Exemplary damages rest upon proof either of express malice or recklessness or carelessness. Butler v. Gazette Co., 119 App. Div. 767, 104 N. Y. S. 637.

259-79 Todd v. Pub. Co. (Del.), 66 A. 97.

Clear proof of express malice must be made to justify exemplary damages. Donahoe v. Pub. Co., 4 Penne. (Del.), 166, 55 A. 337.

259-81 Binder v. News Co., 33 Pa. Super. 411 (and that he has a family).

259-82 **Plaintiff may show what offices** he has held in church, state and corporations. Saunders v. Pub. Co., 107 App. Div. 84, 94 N. Y. S. 993.

260-85 Geringer v. Novak, 117 Ill. App. 160; Cairnes v. Pelton, 103 Md. 40, 63 A. 105.

261-90 *Contra*, Tingley v. Times-M. Co., 151 Cal. 1, 89 P. 1097.

262-93 Geringer v. Novak, 117 Ill. App. 160 (the evidence must be confined to a time reasonably near the doing of the wrong.

264-4 Vest v. Speakman (Ala.), 44 S. 1017; Butler v. Hoboken P. Co., 73 N. J. L. 45, 73 A. 272.

265-11 **If a newspaper article** formed part of the subject matter of a conversation material to the cause it is admissible. Geringer v. Novak, 117 Ill. App. 160.

265-12 Lodge v. Hampton, 116 Ill. App. 414; Berger v. Pub. Co., 132 Ia. 290, 109 N. W. 784.

An anonymous letter referred to in the newspaper article complained of is not admissible. Lodge v. Hampton, 116 Ill. App. 414.

Part of printed matter may be excluded if it bears no relation to the libelous part. S. v. Williams, 74 Kan. 180, 85 P. 938.

266-13 Bergen v. Pub. Co., 132 Ia. 290, 109 N. W. 784; Craig v. Warren, 99 Minn. 246, 109 N. W. 231.

269-26 But see American Pub. Co. v. Gamble, 115 Tenn. 663, 686, 90 S. E. 1005.

270-34 Pier v. Speer, 73 N. J. L. 633, 64 A. 161.

270-35 Dowie v. Priddle, 216 Ill. 553, 75 N. E. 243; Corning v. Dollmeyer, 123 Ill. App. 188.

The evidence must relate to character as it was prior to the wrong. Earley v. Winn., 129 Wis. 291, 109 N. W. 633.

271-37 New York etc. Pub. Co. v. Simon, 147 Fed. 224, 77 C. C. A. 366.

273-41 Earley v. Winn, supra.

274-43 Yager v. Bruce, 116 Mo. App. 473, 497, 93 S. W. 307.

274-47 Burkhart v. North Am. Co., 214 Pa. 39, 63 A. 410 (professional reputation); Clark v. North Am. Co., 203 Pa. 346, 53 A. 237.

277-53 **Attack may be indirect,** as by slurs and insinuations in cross-examination and other covert ways. Clark v. North Am. Co., supra.

278-57 Smitley v. Pinch, 148 Mich. 670, 112 N. W. 686.

Particular traits of character are not provable by plaintiff except as the evidence meets the accusation—as where larceny is charged, honor in business dealings, and payment of debts. Yager v. Bruce, 116 Mo. App. 473, 93 S. W. 307.

279-60 Dowie v. Priddle, 216 Ill. 553, 75 N. E. 243; Corning v. Dollmeyer, 123 Ill. App. 188; Smithley v. Pinch, 148 Mich. 670, 112 N. W. 686; Yager v. Bruce, 116 Mo. App. 473, 93 S. W. 307; Pier v. Speer, 73 N. J. L. 633, 64 A. 161; Stewart v. Press Co., 1 Pa. C. C. 247; Earley v. Winn, 129 Wis. 291, 109 N. W. 633.

Indictments for misdemeanors of a different nature than that of which plaintiff was accused cannot be shown. Register Co. v. Stone, 31 Ky. L. R. 458, 102 S. W. 800.

279-61 See Register Co. v. Stone, supra.

280-65 See Tingley v. Times-M. Co. (Cal.), 89 P. 1097.

281-73 Clark v. North Am. Co., 203 Pa. 346, 53 A. 237; C. v. Swallow, 8 Pa. Super. 539, 605.

282-74 **Church trial.**— Defendant may show that he heard the accusations made by him at a church trial. Harms v. Proehl (Minn.), 116 N. W. 587.

283-77 Tingley v. Times-M. Co., 151 Cal. 1, 89 P. 1097.

283-78 Tingley v. Times-M. Co., supra.

285-81 Harms v. Proehl (Minn.), 116 N. W. 587.

287-89 Patterson v. Frazer (Tex. Civ.), 93 S. W. 146.

287-92 Cornelius v. S., 145 Ala. 65, 40 S. 670.

288-97 Murray v. Galbraith (Ark.), 109 S. W. 1011.

289-98 Ladwig v. Heyer (Ia.), 113 N. W. 767; Meriwether v. Publishers (Mo.), 109 S. W. 750; Earley v. Winn, 129 Wis. 291, 109 N. W. 633; Kloths v. Hess, 126 Wis. 587, 106 N. W. 531. But see Yazoo etc. R. Co. v. Rivers (Miss.), 46 S. 705, holding that proof of what was said in a conversation other than that in question is improper.

The circumstances attending other publications and the mode and extent of their repetition may be shown. Register Co. v. Worten (Ky.), 111 S. W. 693.

289-99 Vest v. Speakman (Ala.), 44 S. 1017; Tingley v. Times-M. Co., 151 Cal. 1, 89 P. 1097; Berger v. Pub. Co., 132 Ia. 290, 109 N. W. 784; Register Co. v. Worten, supra; Gambrill v. Schooley, 95 Md. 260, 52 A. 500, 63 L. R. A. 427; Smith v. Hubbell, 142 Mich. 637, 106 N. W. 547; Crane v. Bennett, 177 N. Y. 106, 69 N. E. 274.

290-1 Blodgett v. News Co. (Ia.), 113 N. W. 821; Julian v. Star Co., 209 Mo. 35, 107 S. W. 496; Yager v. Bruce, 116 Mo. App. 473, 93 S. W. 307 (made while discussing a proposition for settlement negotiations for a compromise not pending).

290-2 Cain v. Shutt (Md.), 66 A. 24.

291-3 Paxton v. Woodward, 31 Mont. 195, 78 P. 215.

292-4 Roberts v. S., 51 Tex. Cr. 27, 100 S. W. 150 (six months after words complained of were spoken).

293-6 Register Co. v. Worten (Ky.), 111 S. W. 693.

293-7 Ladwig v. Heyer (Ia.), 113 N. W. 767.

Articles published at different times are sufficiently related if they deal with the same general subject — as the unworthiness of plaintiff to hold office. Julian v. Star Co., 209 Mo. 35, 107 S. W. 496.

295-13 Price v. Clapp (Tenn.), 105 S. W. 864.

295-15 Dubois v. Robbins, 115 Ill. App. 372.

296-22 Blodgett v. News Co. (Ia.), 113 N. W. 821; Register Co. v. Worten (Ky.), 111 S. W. 693.

297-25 Register Co. v. Worten (Ky.), 111 S. W. 693.

299-35 Elus v. Pub. Co. (Mass.), 84 N. E. 1018; Neafie v. Hoboken P. Co., 72 N. J. L. 340, 62 A. 1129.

300-37 Post Pub. Co. v. Butler, 137 Fed. 723, 71 C. C. A. 309.

In Massachusetts punitive damages are not allowed; but a manifestation of malevolent motives may enhance compensation for injured feelings. Hence the prompt publication of a complete retraction may be shown though the effect be to substantially reduce the damages. Ellis v. Pub. Co. (Mass.), 84 N. E. 1018. *Compare* Ott v. Pub. Co., 40 Wash. 308, 82 P. 403.

300-41 An offer to retract, made before trial, may be shown on the question of good faith. Dalziel v. Pub. Co., 52 Misc. 207, 102 N. Y. S. 909, *dist.* Turton v. N. Y. Rec. Co., 144 N. Y. 144, 38 N. E. 1009, on the ground that the offer in that case was made to an attorney not authorized to entertain it. Such an offer is not within the rule which bars evidence of admissions made by way of compromise. Dalziel v. Pub. Co., supra.

301-44 In the absence of proof of a demand for a retraction a statute limiting plaintiff's recovery to special damages is not operative. Post Pub. Co. v. Butler, 137 Fed. 723, 71 C. C. A. 309.

301-45 Crane v. Bennett, 177 N. Y. 106, 69 N. E. 274; Kloths v. Hess, 126 Wis. 587, 106 N. W. 531.

305-58 Dalziel v. Pub. Co., 52 Misc. 207, 102 N. Y. S. 909.

305-59 Similar publications cannot be shown if the matter is published as of the writer's own knowledge; neither can it be proved that it was received from a correspondent. Berger v. Pub. Co., 132 Ia. 290, 109 N. W. 784.

306-60 Dalziel v. Pub. Co., supra.

306-61 Carpenter v. Ashley, 148 Cal. 422, 83 P. 444 (purporting to be repetitions of defendant's statement).

306-65 Butler v. Gazette Co., 119 App. Div. 767, 104 N. Y. S. 637, *cit.* Palmer v. Pub. Co., 31 App. Div. 210, 52 N. Y. S. 539; Palmer v.

Matthews, 162 N. Y. 100, 56 N. E. 501.

308-73 Lambright v. S., 9 Ohio C. C. (N. S.) 151, *dist.* Bowers v. S., 29 Ohio St. 542, because ruled under a different statute.

308-75 See Coulter v. Stuart, 2 Yerg. (Tenn.) 225, as explained in Fleming v. Wallace, 116 Tenn. 20, 91 S. W. 47, where there is a discussion of the general subject.

310-82 Hygienic etc. Co. v. Way, 35 Pa. Super. 229.

Defendant may be compelled to give the names of persons to whom it sent a circular and the name of its informant as to the matter of which the circular stated it had been "advised" because of the bearing such information would have on the questions of bona fides and privilege. Massey-H. Co. v. DeLaval S. Co., 11 Ont. L. R. (Can.) 227. The principal *aff.* by the divisional court, 11 Ont. L. R. (Can.) 591. See Plymouth Mut. Soc. v. Pub. Assn., (1906) 1 K. B. (Eng.) 403.

310-83 McKergow v. Comstock, 11 Ont. L. R. (Can.) 637; Pickford v. Talbott, 28 App. D. C. 498; Dowie v. Priddle, 216 Ill. 553, 75 N. E. 243.

311-85 Watt v. Watt (1905), App. Cas. (Eng.) 117; McKergow v. Comstock, 11 Ont. L. R. (Can.) 637.

316-97 Donahoe v. Pub. Co., 4 Penne. (Del.), 166, 55 A. 337.

LIMITATION OF ACTIONS
[Vol. 8.]

Burden of showing effect of acknowledgement, 322-7; Burden of proving bar under foreign statute, 328-21.

319-1 Swing v. Gutter Co., 78 Ark. 246, 93 S. W. 978.

320-2 Schell v. Weaver, 225 Ill. 159, 80 N. E. 95, *cit.* Encyc. of Ev., *aff.* 128 Ill. App. 106; Moffitt v. Farwell, 123 Ill. App. 528; Van Burg v. Van Engen, 76 Neb. 816, 107 N. W. 1006; Porter v. Separator Co., 115 App. Div. 333, 100 N. Y. S. 888; McAllen v. Alonzo (Tex. Civ.), 102 S. W. 475; Houston etc. R. Co. v. Grossman (Tex. Civ.), 89 S. W. 312; Green v. Dodge, 79 Vt. 73, 64 A. 499; Goodyear Shoe Co. v. Baker (Vt.), 69 A. 160. *Compare* Lamberida v. Barnum (Tex. Civ.), 90 S. W. 698.

320-3 Gatlin v. Vant, 6 Ind. Ter. 254, 91 S. W. 38; Hendrick v. Miller, 32 Ky. L. R. 1030, 107 S. W. 731; Green Co. v. Howard, 32 Ky. L. R. 243, 105 S. W. 897; Ryan v. Bank, 103 Md. 428, 63 A. 1062; Ingersoll v. Davis, 14 Wyo. 120, 82 P. 867.

321-4 Owsley v. Boles, 30 Ky. L. R. 1016, 99 S. W. 1157; Holden v. Cooney, 110 N. Y. S. 1030 (clearly preponderating evidence necessary); Scott v. Christenson, 46 Or. 417, 80 P. 731, *aff.* 89 P. 376.

321-5 Ryan v. Bank, 103 Md. 428, 63 A. 1062; Murphy v. Walsh, 113 App. Div. 428, 99 N. Y. S. 346.

322-7 Burden of showing effect of acknowledgment.— When an acknowledgment is shown, presumably it relates to an entire demand, and the burden is on the acknowledging party to show its relation to a part only. Chicago v. Franklin, 119 Ill. App. 384.

323-9 Morgan v. Kirkpatrick, 2 Pa. C. C. 262 (evidence held sufficient).

323-10 Sartor v. Wells, 39 Colo. 84, 89 P. 797 (parol evidence sufficient to prove new promise). See Disney v. Healy, 73 Kan. 326, 85 P. 287.

324-13 Breaux v. Broussard, 116 La. 215, 40 S. 639; Church v. Stevens, 56 Misc. 573, 107 N. Y. S. 310; Paine v. Dodds, 14 N. D. 189, 103 N. W. 931.

324-15 Elcan v. Childers, 40 Tex. Civ. 193, 89 S. W. 84.

327-18 Dignowity v. Sullivan (Tex. Civ.), 109 S. W. 428 (not necessary to show precise periods during which defendant visited the state).

327-19 Phillips v. Lindley, 112 App. Div. 283, 98 N. Y. S. 423.

328-21 Burden of proving bar under foreign statute is upon defendant. Wojtylak v. Coal Co., 188 Mo. 260, 87 S. W. 506.

328-22 Clifford v. Duffy, 56 Misc. 667, 107 N. Y. S. 809.

331-29 Crow v. Crow, 124 Mo. App. 120, 100 S. W. 1123, *cit.* Gardner v. Early, 78 Mo. App. 350; Goddard v. Williamson, 72 Mo. 131; Phillips v. Mahan, 52 Mo. 197;

Smith v. Zimmerman, 51 Mo. App. 519.

331-30 Crow v. Crow, supra; *cit.* Gardner v. Early, supra; Goddard v. Williamson, supra; Phillips v. Mahan, supra; Smith v. Zimmerman, supra.

335-45 Atwood v. Laumers, 97 Minn. 214, 106 N. W. 310.

LOST INSTRUMENTS [Vol. 8.]

Reservation of lien not presumed, 346-17; Recitals as evidence of contents, 358-74.

343-2 Young v. P., 221 Ill. 51, 77 N. E. 536; Choctaw etc. R. Co. v. McAlester (Ind. Ter.), 104 S. W. 821; Interstate Inv. Co. v. Bailey, 29 Ky. L. R. 468, 93 S. W. 578; Lancaster v. Lee, 71 S. C. 280, 51 S. E. 139; Nelson v. Mfg. Co. (S. D.), 105 N. W. 630.

343-3 Carpenter v. Jones, 76 Ark. 163, 88 S. W. 871; Brasch v. Timber Co., 80 Ark. 425, 97 S. W. 445; Nemo v. Farrington (Cal. App.), 94 P. 874; Houston v. S., 124 Ga. 417, 52 S. E. 757; Hiss v. Hiss, 228 Ill. 414, 81 N. E. 1056.

345-10 Martin v. Organ Co. (Ala.), 44 S. 112; Kenady v. Gilkey, 81 Ark. 147, 98 S. W. 969; Houghtalling v. Houghtalling (Ia.), 112 N. W. 197; Lloyd v. Simons, 97 Minn. 315, 105 N. W. 902.

Forgery. — Where affidavit of forgery is made, party relying upon a lost instrument must show the execution and genuineness of it. Bentley v. McCall, 119 Ga. 530, 46 S. E. 645.

Presumption of grant from long possession. — Flanagan v. Mathieson, 70 Neb. 223, 97 N. W. 287.

345-12 Embree v. Emmerson, 37 Ind. App. 16, 74 N. E. 44-1110 (where there was no allegation that the note was lost before maturity). Jenkins v. Emmons, 117 Mo. App. 1, 94 S. W. 812.

345-13 **No presumption that a lost note** was payable at a bank in the state. Embree v. Emmerson, 37 Ind. App. 16, 74 N. E. 1110.

345-15 Choctaw etc. R. Co. v. McAlester (Ind. Ter.), 104 S. W. 821.

Private papers. — Where the execution of a lost deed is shown, it will be presumed that it was sufficient to convey land, and that all necessary formalities were complied with. Laird v. Murray (Tex. Civ.), 111 S. W. 780.

346-17 **Reservation of lien.** — No presumption that a deed contained an express reservation of a vendor's lien. Laird v. Murray, supra.

346-18 Bentley v. McCall, 119 Ga. 530, 46 S. E. 645; Hutchins v. Murphy, 146 Mich. 621, 110 N. W. 52 (evidence held insufficient); Lloyd v. Simons, 97 Minn. 315, 105 N. W. 902; Haworth v. Haworth, 123 Mo. App. 303, 100 S. W. 531; Bright v. Allan, 203 Pa. 386, 53 A. 248; Garrett v. Spradling, 39 Tex. Civ. 60, 88 S. W. 293; Jones v. Neal (Tex. Civ.), 98 S. W. 417 (record admissible though deed was not entitled to record; Texas L. & W. Co. v. Walker (Tex. Civ.), 105 S. W. 545 (acknowledgment by married woman); Carter v. Wood, 103 Va. 68, 48 S. E. 553.

Sales and resales of land under the title represented by the lost document, and general reputation of ownership are circumstances to be considered. Guffey Co. v. Hooks (Tex. Civ.), 106 S. W. 690.

Recital in an ancient deed of an antecedent deed, consistent with its own provisions, will, after the lapse of a long period, be presumptive proof of the former existence of such deed. Havens v. Land Co., 47 N. J. Eq. 365, 20 A. 497.

346-19 See Bentley v. McCall, 119 Ga. 530, 46 S. E. 645.

347-20 Lloyd v. Simons, 97 Minn. 315, 105 N. W. 902.

347-21 Martin v. Organ Co. (Ala.,), 44 S. 112; Hogg v. Combs, 29 Ky. L. R. 559, 93 S. W. 670; Haworth v. Haworth, 123 Mo. App. 303, 100 S. W. 531. See Houghtalling v. Houghtalling (Ia.), 112 N. W. 197.

348-24 See S. v. Ortiz, 99 Tex. 475, 90 S. W. 1087 (raid by hostile Indians).

350-35 Embree v. Emerson, 37 Ind. App. 16, 74 N. E. 44.

352-36 Bower v. Cohen, 126 Ga. 35, 54 S. E. 918; Turner v. Elliott, 127 Ga. 338, 56 S. E. 434.

352-37 Interstate Inv. Co. v. Bailey, 29 Ky. L. R. 468, 93 S. W. 578.

352-38 Alabama C. Co. v. Meador, 143 Ala. 336, 39 S. 216.
353-41 Bower v. Cohen, 126 Ga. 35, 54 S. E. 918 (predecessor in title should search for lost deed); Liles v. Liles, 183 Mo. 326, 81 S. W. 1101 (circumstances may excuse this).
353-42 Alabama C. Co. v. Meador, 143 Ala. 336, 39 S. 216. But see Stark v. Burke, 131 Ia. 684, 109 N. W. 206.
355-56 See Inlow v. Hughes, 38 Ind. App. 375, 76 N. E. 763 (lost will).
355-57 Jones v. Ballou, 139 N. C. 526, 52 S. E. 254.
356-59 Inlow v. Hughes, supra (attorney who drew a will may testify as to its provisions); Interstate Inv. Co. v. Bailey, 29 Ky. L. R. 468, 93 S. W. 578.
357-68 Arbuckle v. Matthews, 73 Ark. 27, 83 S. W. 326.
358-74 **Recitals.** — Recitals in documents, even in ancient deeds, are ordinarily of no evidentiary value as against strangers. Davis v. Moyles, 76 Vt. 25, 56 A. 174.
359-77 Testimony of grantee held insufficient in this case. Houghtalling v. Houghtalling (Ia.), 112 N. W. 197.
359-80 Hogg v. Combs, 29 Ky. L. R. 559, 93 S. W. 670; Jenkins v. Emmons, 117 Mo. App. 1, 94 S. W. 812 (party can testify as to the fact and circumstances of its loss).
359-81 Kenady v. Gilkey, 81 Ark. 147, 98 S. W. 969; Nemo v. Farrington (Cal. App.), 94 P. 874; Campbell v. Mfg. Co., 52 Fla. 632, 43 S. 874 (more liberal rule applies where the document was an ancient one); Lloyd v. Simons, 97 Minn. 315, 105 N. W. 902; Garland v. Bank, 11 N. D. 374, 92 N. W. 452.
Importance of the document largely determines the degree of proof of its existence and contents. Carter v. Wood, 103 Va. 68, 48 S. E. 553.
Less degree of proof necessary, apparently, where the writing is only incidental, and is not the basis of the action. S. v. Leasia, 45 Or. 410, 78 P. 328.
360-82 Garland v. Bank, 11 N. D. 374, 92 N. W. 452.
360-83 Nemo v. Farrington (Cal. App.), 94 P. 874; Lloyd v. Simons, 97 Minn. 315, 105 N. W. 902; Capell v. Fagan, 30 Mont. 507, 77 P. 55.
362-92 *Compare* Inlow v. Hughes, 38 Ind. App. 375, 76 N. E. 763 (two witnesses necessary to prove the execution of a lost will); Michell v. Low, 213 Pa. 526, 63 A. 246 (same).
363-95 Embree v. Emmerson, 37 Ind. App. 16, 74 N. E. 44 (as proof of execution).

MALICE [Vol. 8.]

365-1 Brennan v. United Hatters, 73 N. J. L. 729, 65 A. 165.
366-9 **Malicious prosecution.** Simmons v. Gardner (Wash.), 89 P. 887.
Libel and slander. — Vial v. Larson, 132 Ia. 208, 109 N. W. 1007; German Sav. Bank v. Fritz, 135 Ia. 44, 109 N. W. 1008; Chambers v. Leiser, 43 Wash. 285, 86 P. 627.
False imprisonment. — Steinbergen v. Miller, 29 Ky. L. R. 1132, 96 S. W. 1101.
366-11 See supra, "Homicide."
366-12 Todd v. Printing Co. (Del.), 66 A. 97; Abraham v. Baldwin, 51 Fla. 151, 42 S. 591; Berger v. Pub. Co., 132 Ia. 290, 109 N. W. 784; Gendron v. St. Pierre, 73 N. H. 419, 62 A. 966.
366-13 Jones v. R. Co., 29 Ky. L. R. 945, 96 S. W. 793; Sundmaker v. Goudet, 113 La. 887, 7 S. 865; Smith v. League, 121 App. Div. 600, 106 N. Y. S. 251; Ton v. Stetson, 43 Wash. 471, 86 P. 668 (notice not necessarily inferred from prima facie case of want of probable cause).
366-16 Chicago Tract. Co. v. Mahoney, 230 Ill. 562, 82 N. E. 868.
366-17 **Rule in Alabama is contra.** Vandiver v. Waller, 143 Ala. 411, 39 S. 136.
Servant of corporation, defendant in an action for malicious prosecution, may testify that he believed the act of the plaintiff amounted to a misdemeanor. East v. R. Co., 115 App. Div. 683, 101 N. Y. S. 364.
367-25 Johnson v. S. (Miss.), 37 S. 926. For cases dealing with the notes in this section see supra, "Homicide."
368-28 Pitts v. S., 140 Ala. 70, 37 S. 101; S. v. Atkins, 77 Vt. 215, 59 A. 826.
372-53 Vandiver & Co. v. Waller, 143 Ala. 411, 39 S. 136.
Prior and subsequent publication of

similar articles evidence of malice in action for libel. Tingley v. Times-M. Co., 151 Cal. 1, 89 P. 1097.
375-78 Mills v. Larrance, 217 Ill. 446, 75 N. E. 555.
376-79 Todd v. Ptg. Co. (Del.), 66 A. 97.
376-80 Morning Union Co. v. Butler, 151 Fed. 188, 80 C. C. A. 464.
376-86 Brown v. S., 37 Ala. 408, 38 S. 268.
377-94 False imprisonment. Oates v. McGlaun, 145 Ala. 656, 39 S. 607.
377-4 Repetition of slander evidence of malice.— Vest v. Speakman (Ala.), 44 S. 1017; Ladwig v. Heyer (Ia.), 113 N. W. 767.
378-11 Collateral crimes admissible to prove malice.— Sanderson v. S. (Ind.), 82 N. E. 525.
380-24 Cook v. Proskey, 138 Fed. 273, 70 C. C. A. 563; Sehon v. Whitt, 29 Ky. L. R. 691, 92 S. W. 280; Schroeder v. Blum, 74 Neb. 60, 103 N. W. 1073; Pittsburgh etc. R. Co. v. Hdw. Co., 143 N. C. 54, 55 S. E. 422.
380-25 Rea v. Schow (Tex. Civ.), 93 S. W. 706 (plaintiff may show that he had a lien on property sued for to rebut allegation of malice).

MALICIOUS MISCHIEF [Vol. 8.]

382-2 Holder v. S., 127 Ga. 51, 56 S. E. 71.
382-3 Actual possession of the dwelling injured is sufficient and the right of possession cannot be inquired into. Perry v. S. (Ala.), 43 S. 18.
382-4 S. v. Leasman (Ia.), 114 N. W. 1032.
382-5 S. v. Martin, 141 N. C. 832, 53 S. E. 874. See Moody v. S., 127 Ga. 821, 56 S. E. 993.
The extent of the injury must be such as to impair the utility or diminish the value of such property. Davis v. R. Co., 61 W. Va. 246, 56 S. E. 400.
383-7 Holder v. S., 127 Ga. 51, 56 S. E. 71.
383-8 S. v. Graeme, 130 Mo. App. 138, 108 S. W. 1131; C. v. Schaffer, 32 Pa. Super. 375.
An intentional injury or destruction of property without cause sufficiently shows the malice. S. v. Roscum, 128 Ia. 509, 104 N. W. 800.
383-9 Ross v. S. (Tex. Cr.), 108 S. W. 697. See C. v. Lipshutz, 30 Pa. C. C. 245.
384-15 Time, place and circumstances of the act may be shown for the purpose of disproving malice. McClurg v. S., 2 Ga. App. 624, 58 S. E. 1064.
386-26 C. v. Shaffer, 32 Pa. Super. 375.

MALICIOUS PROSECUTION [Vol. 8.]

Degree of proof, 392-1; *Declaration of complainant to magistrate,* 402-45; *Presumptions — acquittal,* 409-81; *Grand jury docket,* 421-38; *Documentary evidence — Rules of Board of Health,* 422-48.

392-1 Deering v. Gebhard, 57 Misc. 451, 108 N. Y. S. 715; Coleman v. Brown, 110 N. Y. S. 701; Robitzek v. Daum, 220 Pa. 61, 69 A. 96.
Degree of proof.— Actual guilt must be established beyond a reasonable doubt, while probable cause may be shown by proof of such circumstances as would lead a careful and conscientious man to believe that plaintiff was guilty. Martin v. Corscadden, 34 Mont. 308, 86 P. 33.
392-3 Stanford v. Grocery Co., 143 N. C. 419, 55 S. E. 815; Conner v. Wetmore, 110 App. Div. 440, 96 N. Y. S. 999.
392-4 Martin v. Corscadden, 34 Mont. 308, 86 P. 33.
396-19 Erratum.— For the word "admissible" in the original text, substitute "inadmissible."
Evidence of a debtor and creditor account showing plaintiff's claim of right to embezzled money is inadmissible in absence of evidence of knowledge of account by defendant. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320.
396-20 Shannon v. Simms, 146 Ala. 673, 40 S. 574 (even though the

affidavit on which warrant issued was void).

Notwithstanding an acquittal the plaintiff's actual guilt may be shown. Mack v. Sharp, 138 Mich. 448, 101 N. W. 631.

397-22 See Merrell v. Dudley, 139 N. C. 57, 51 S. E. 777; Conner v. Wetmore, 110 App. Div. 440, 96 N. Y. S. 999; Malich v. Josephson, 50 Misc. 315, 98 N. Y. S. 671.

397-24 Bartlett v. Jenkins, 150 Mich. 682, 114 N. W. 679 (defendant may be asked whether he paid counsel and as to time and amount of judgment).

397-26 Goode v. Eslow, 151 Mich. 48, 114 N. W. 859.

397-27 Van Meter v. Bass (Cal.), 90 P. 637; Baker v. Langley, 3 Ga. App. 751, 60 S. E. 371; Flickinger v. Taffee, 149 Mich. 678, 113 N. W. 311; Mundal v. R. Co., 92 Minn. 26, 99 N. W. 273, 100 N. W. 363; Gurden v. Stevens, 146 Mich. 489, 109 N. W. 856; Martin v. Corscadden, 34 Mont. 308, 86 P. 33; Schroeder v. Blum, 74 Neb. 60, 103 N. W. 1073; Putnam v. Stalker (Or.), 91 P. 363; McDonald v. Schroeder, 28 Pa. Super. 128; Haas v. Powers, 130 Wis. 406, 110 N. W. 205.

397-28 Self serving declarations to counsel not relevant to issue of probable cause.— Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320.

398-31 Thurkettle v. Frost, 137 Mich. 649, 100 N. W. 283; Shea v. Lumb. Co., 97 Minn. 41, 105 N. W. 552; Carp v. Ins. Co., 203 Mo. 295, 101 S. W. 78.

399-35 *Compare* Nickelson v. Lumb. Co., 39 Wash. 569, 81 P. 1059.

400-37 Baker v. Moore, 29 Pa. Super. 301.

Malice may be inferred from reckless charge.— Smith v. League, 121 App. Div. 600, 106 N. Y. S. 251.

400-38 Pierce v. Doolittle, 103 Ia. 333, 106 N. W. 751; McDonald v. Schroeder, 214 Pa. 411, 63 A. 1024.

Inferred from want of probable cause.— Jones v. R. Co., 29 Ky. L. R. 945, 96 S. W. 793.

401-40 Stanford v. Grocery Co., 143 N. C. 419, 55 S. E. 815.

401-41 Wyatt v. Burdette (Colo.), 95 P. 336; Martin v. Corscadden, 34 Mont. 308, 86 P. 33; Merrell v. Dudley, 139 N. C. 57, 51 S. E. 777; Smith v. League, 121 App. Div. 600, 106 N. Y. S. 251; Evans v. R. Co., 105 Va. 72, 53 S. E. 3.

Want of probable cause alone is not sufficient to establish malice.— Farmers M. F. Assn. v. Stewart, 167 Ind. 544, 79 N. E. 490; Ton v. Stetson, 43 Wash. 471, 86 P. 668. See Van Meter v. Bass, 40 Colo. 78, 90 P. 637.

401-42 Wyatt v. Burdette (Colo.), 95 P. 336; Pierce v. Doolittle, 130 Ia. 333, 106 N. W. 751; Vorhes v. Buchwald (Ia.), 112 N. W. 1105; Davis v. McMillan, 142 Mich. 390, 105 N. W. 862. See Shattuck v. Simonds, 191 Mass. 506, 78 N. E. 122.

402-44 Miller v. Runkle (Ia.), 114 N. W. 611.

402-45 Martin v. Corscadden, 34 Mont. 308, 86 P. 33.

Declarations of complaint to magistrate in taking out warrant and causing arrest are admissible as part of res gestae (Stanford v. Grocery Co., 143 N. C. 419, 55 S. E. 815. See Fetzer v. Burlew, 114 App. Div. 650, 99 N. Y. S. 1100); but not his statement to the magistrate immediately before case was called that he desired the prosecution dismissed. Rutherford v. Dyer, 146 Ala., 665, 40 S. 974.

403-49 Craigin v. De Pape, 159 Fed. 691; Wyatt v. Burdette (Colo.), 95 P. 336; Sasse v. Rogers (Ind. App.), 81 N. W. 590; Farmer v. Norton, 129 Ia. 88, 105 N. W. 371; Sehon v. Whitt, 29 Ky. L. R. 691, 92 S. W. 280; Thurkettle v. Frost, 137 Mich. 649, 100 N. W. 283; Putnam v. Stalker (Or.), 91 P. 363; Baker v. Moore, 29 Pa. Super. 301.

Advice of counsel no protection for one who acts maliciously and where the acts proven are consistent with the innocence of accused. Gurden v. Stevens, 146 Mich. 489, 109 N. W. 856.

403-51 Cascarella v. Grocer Co., 151 Mich. 15, 114 N. W. 857; Missouri etc. R. Co. v. Groseclose (Tex. Civ.), 110 S. W. 477; Evans v. R. Co., 105 Va. 72, 53 S. E. 3 (burden on defendant to show he was in good faith guided by advice of counsel).

403-52 Evans v. R. Co., supra.

404-56 Florida etc. R. Co. v. Groves (Fla.), 46 S. 294.

404-57 Cook v. Proskey, 138 Fed.

273, 70 C. C. A. 563; Cook v. Bartlett, 115 App. Div. 829, 100 N. Y. S. 1032.

Advice of Justice of Peace. — But see Cook v. Bartlett, supra; Fetzer v. Burlew, 114 App. Div. 650, 99 N. Y. S. 1100. *Compare* Gurden v. Stevens, 164 Mich. 489, 109 N. W. 856.

408-78 *Contra,* Cobbey v. Journal Co. (Neb.), 113 N. W. 224 (only prima facie evidence).

408-79 *Contra,* Skeffington v. Eylward, 105 Minn. 244, 105 N. W. 638.

408-80 Skeffington v. Eylward, supra; McDonald v. Schroeder, 214 Pa. 411, 63 A. 1024.

409-81 Miller v. Runkle (Ia.), 114 N. W. 611.

Acquittal does not raise a presumption of lack of probable cause. Morgan v. Stewart, 144 N. C. 424, 57 S. E. 149.

409-83 Jones v. R. Co., 29 Ky. L. R. 945, 96 S. W. 793; Putnam v. Stalker (Or.), 91 P. 363. See Stanford v. Grocery Co., 143 N. C. 419, 55 S. E. 815.

409-84 See Stanford v. Grocery Co., supra.

410-86 Equitable L. Assur. Society v. Lester (Tex. Civ.), 110 S. W. 499.

411-89 See Smith v. League, 121 App. Div. 600, 106 N. Y. S. 251.

412-92 Florida etc. R. Co. v. Groves (Fla.), 46 S. 294 (both want of probable cause and malice must be proved); Kalaukoa v. Henry, 11 Haw. 430; Sasse v. Rogers (Ind. App.), 81 N. E. 590; Davis v. McMillan, 142 Mich. 390, 105 N. W. 862; Staton v. Mason, 119 App. Div. 437, 104 N. Y. S. 155; Stanford v. Grocery Co., 143 N. C. 419, 55 S. E. 815; Gaither v. Carpenter, 143 N. C. 240, 55 S. E. 625; Railroad Co. v. Hardware Co., 143 N. C. 54, 55 S. E. 422; Railroad Co. v. Hardware Co., 138 N. C. 174, 50 S. E. 571; Simmons v. Gardner, 46 Wash. 282, 89 P. 887. See Healey v. Aspinwall, 195 Mass. 453, 81 N. E. 256; Nickelson v. Lumb. Co., 39 Wash. 569, 81 P. 1059.

412-93 Jones v. R. Co., 29 Ky. L. R. 945, 96 S. W. 793; Garther v. Carpenter, 143 N. C. 240, 55 S. E. 625; Moore v. Bank, 140 N. C. 293, 52 S. E. 944.

413-96 *Contra,* Davis v. McMillan, 142 Mich. 390, 105 N. W. 862.

414-97 Schultz v. Cemetery, 190 N. Y. 276, 83 N. E. 41; Berkowich v. Kommel, 107 N. Y. S. 119.

415-2 Bartlett v. Jenkins, 150 Mich. 682, 114 N. W. 678; Berkowich v. Kommel, 107 N. Y. S. 119; Halberstadt v. Ins. Co., 110 N. Y. S. 188 (dismissed because accused becomes fugitive from justice for a period rendering prosecution impossible is not sufficient); Hoskins v. Coal Co. (Pa.), 68 A. 843; Evans v. Atlantic Co., 105 Va. 72, 53 S. E. 3.

Mode of termination may be either by acquittal, dismissal or refusal of prosecutor to proceed further, though a termination brought about by fraud of the accused, or by a compromise with accuser or by any act or procurement on his part is not sufficient. Halberstadt v. Ins. Co., 108 N. Y. S. 188.

415-4 Rutherford v. Dyer, 146 Ala. 673, 40 S. 974; Davis v. McMillan, 142 Mich. 390, 105 N. W. 862; Moore v. Bank, 140 N. C. 293, 52 S. E. 944.

415-5 Hackler v. Miller (Neb.), 114 N. W. 274.

416-7 Shannon v. Simms, 146 Ala. 673, 40 S. 574; Schroeder v. Blum, 74 Neb. 60, 103 N. W. 1073.

418-21 Carp v. Ins. Co., 203 Mo. 295, 101 S. W. 78.

419-25 Rutherford v. Dyer, 146 Ala. 673, 40 S. 974.

419-26 Rutherford v. Dyer, supra.

421-37 Lamprey v. Hood, 73 N. H. 384, 62 A. 380.

Transcript of justice's proceedings is competent evidence, where it shows prosecution was dismissed by counsel for state, though it does not show that the charge had been judicially investigated and prosecution ended. Rutherford v. Dyer, 146 Ala. 673, 40 S. 974.

421-38 Martin v. Corseadden, 34 Mont. 308, 86 P. 33 (recital in justice's docket that there were no grounds for complaint and judgment entered for costs, inadmissible).

The grand jury docket showing a termination of the investigations of the grand jury without the indictment of plaintiff, admissible. Shannon v. Simms, 146 Ala. 673, 40 S. 574.

422-42 See Carp. v. Ins. Co., 203 Mo. 295, 101 S. W. 78.

Illegality of the complaints or defects in the judgment in the alleged malicious action cannot be used to defeat the action for damages. Hackler v. Miller (Neb.), 114 N. W. 274.

422-48 Rules of state board of health. — A certified copy of a publication containing the rules of the state board of health admissible to show a particular rule and that plaintiff had notice and knowledge of the rule. Pierce v. Doolittle, 103 Ia. 333, 106 N. W. 751.

423-51 Provident Sav. Soc. v. Johnson, 30 Ky. L. R. 1031, 99 S. W. 1159.

424-59 Where the good faith of the justice is called into question in issuing warrant he may testify in relation thereto though his opinion of plaintiff's guilt is thereby disclosed.. Gurden v. Stevens, 146 Mich. 489, 109 N. W. 856.

426-70 Shannon v. Simms, 146 Ala. 673, 40 S. 574.

Size of plaintiff's family admissible to show character and extent of his mental suffering. Flickinger v. Taffee, 149 Mich. 678, 113 N. W. 311.

428-78 Carp v. Ins. Co., 203 Mo. 295, 101 S. W. 78.

429-80 Martin v. Corscadden, 34 Mont. 308, 86 P. 33.

429-86 Carp v. Ins. Co., 203 Mo. 295, 101 S. W. 78; Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320.

430-87 Carp v. Ins. Co., supra; Faroux v. Cornwell, 40 Tex. Civ. 529, 90 S. W. 537.

MAPS [Vol. 8.]

433-11 Dickinson v. Smith (Wis.), 114 N. W. 133.

434-14 In re Central R. Co. (N. J.), 65 A. 905.

435-17 Atlanta etc. R. Co. v. R. Co., 125 Ga. 529, 54 S. E. 736 (plat admissible when accompanied by affidavit by surveyor that it is correct); Butt v. R. Co. (N. C.), 61 S. E. 601. See City of Peru v. Bartels, 214 Ill. 515, 73 N. E. 755 (plat inadmissible where maker testifies that it is incorrect); Austin v. Whitcher, 135 Ia. 733, 110 N. W. 910; Camden v. City, 119 App. Div. 84, 103 N. Y. S. 971.

Maps shown to be accurate are admissible to illustrate testimony of witnesses even though not made by persons who made the surveys upon the ground. Portland & S. R. Co. v. Ladd, 47 Wash. 88, 91 P. 573.

Map made from notes of another, which witness did not know to be correct, is inadmissible. Hays v. Ison, 24 Ky. L. R. 1947, 72 S. W. 733.

A statute giving party in ejectment proceedings the right to have survey of premises made and to recover costs therefor if successful does not modify the rule giving litigant the right to introduce maps of the premises together with the testimony of surveyors explanatory thereof. Lenoir v. Bank, 87 Miss. 559, 40 S. 5.

435-18 Dickinson v. Smith (Wis.), 114 N. W. 133.

Map fifty years old and produced from proper custody, is competent to prove boundary. Cravath v. Baylis, 113 App. Div. 666, 99 N. Y. S. 973.

Evidence of age. — The mere date on the map is not sufficient evidence of age, without a showing as to who placed the date upon it. Bower v. Cohen, 126 Ga. 35, 54 S. E. 918.

436-20 Bower v. Cohen, 126 Ga. 35, 54 S. E. 918; Davis v. Clinton, 25 Ky. L. R. 2021, 79 S. W. 259.

An ancient map proves itself when it comes from custody which court deems proper and is itself free from any indication of fraud or invalidity. In re Webster, 106 App. Div. 360, 94 N. Y. S. 1050.

Maps found in volumes in possession of a historical society, purporting to be of a survey made over 100 years ago and referred to in old deeds, are admissible as ancient documents. Burns v. U. S., 160 Fed. 631.

437-24 Hisler v. S., 52 Fla. 30, 42 S. 692; Smith v. S., 68 N. J. L. 609; 54 A. 411, Butt v. R. Co. (N. C.), 61 S. E. 601; City of Spokane v. Patterson, 46 Wash. 93, 89 P. 402.

Correctness of map should first be determined by the court before admitting it. West v. S., 53 Fla. 77, 43 S. 445.

MARRIAGE [Vol. 8.]

License presumed from celebration, 467-72.

441-1 Darling v. Dent, 82 Ark. 76, 100 S. W. 747; Lynch v. Knoop, 118 La. 611, 43 S. 252; Pooler v. Smith, 73 S. C. 102, 52 S. E. 967.

441-2 Travers v. Reinhardt, 205 U. S. 423. *Compare* Hearne v. S., 50 Tex. Cr. 431, 97 S. W. 1050, holding that though there be no ceremony, yet if the parties agree to live as husband and wife and do live professedly in that relation, proof of these facts beyond a reasonable doubt is sufficient in a prosecution for bigamy.

441-3 Tison v. S., 125 Ga. 7, 53 S. E. 809.

441-4 Snowman v. Mason, 99 Me. 490, 59 A. 1019.

In criminal cases marriage should be proved by person solemnizing, by persons present and who can identify parties, by production and proof of marriage record and identity, or by some other mode equally direct and clear. Whittit v. Miller, 1 Haw. 139.

442-6 In re Thompson, 91 L. T. (Eng.), 680; Travers v. Reinhardt, 205 U. S. 423; Eames v. Woodson, 120 La. 1031, 46 S. 13; Plattner v. Plattner, 116 Mo. App. 405, 91 S. W. 457; In re Hines, 10 Pa. Super. 124; C. v. Haylow, 17 Pa. Super. 541; In re Janney, 12 Pa. C. C. 550; In re Thewles, 217 Pa. 307, 66 A. 519; Nelson v. Carlson (Wash.), 94 P. 477. See Pourier v. McKenzie, 147 Fed. 287; Klipfel v. Klipfel, 41 Colo. 40, 92 P. 26; Pegg v. Pegg (Ia.), 115 N. W. 1027 (an agreement to be husband and wife, followed by cohabitation, presumptively establishes a common-law marriage); Cramsey v. Sterling, 111 App. Div. 568, 97 N. Y. S. 1082.

443-7 Sorenson v. Sorenson (Neb.), 103 N. W. 455.

443-8 Murchison v. Green, 128 Ga. 339, 57 S. E. 709; Plattner v. Plattner, 116 Mo. App. 405, 91 S. W. 457.

444-13 S. v. Wilson, 5 Penne. (Del.) 77, 62 A. 227.

445-14 Osborne v. McDonald, 159 Fed. 791; Smith v. Fuller (Ia.), 108 N. W. 765, s. c. 115 N. W. 912; Moore v. Flack (Neb.), 108 N. W. 143; In re Green, 5 Pa. C. C. 605.

445-15 Osborne v. McDonald, 159 Fed. 791.

446-16 Pegg v. Pegg (Ia.), 115 N. W. 1028; Weidenhoft v. Primm (Wyo.), 94 P. 453.

447-18 Sparks v. Ross (N. J. Eq.), 65 A. 977.

447-19 Klipfel v. Klipfel, 41 Colo. 40, 92 P. 26 (merely circumstances from which marriage may be inferred in absence of contrary evidence). But see Smith v. Bank, 115 Tenn. 12, 89 S. W. 392, holding that where persons had lived as husband and wife for more than twenty-five years, deceased, if living, would be estopped from denying a legal marriage, and in proceedings by woman to enforce her marital rights, a lawful marriage will be presumed as against the administrator.

448-22 But compare Smith v. Fuller (Ia.), 108 N. W. 765, holding that where evidence almost conclusively showed common-law marriage, the fact that both parties married again without divorce, the wife however after the absence of the husband for over seven years, was not conclusive against the common-law marriage. See also Smith v. Fuller (Ia.), 115 N. W. 912.

448-24 Klipfel v. Klipfel, 41 Colo. 40, 92 P. 26.

448-26 Bowman v. Little, 101 Md. 273, 61 A. 223, 657. And see Supp. opinion, 61 A. 1084.

Inconclusive evidence of former marriage not sufficient to overcome presumption arising from cohabitation and reputation. In re Seibert, 1 Pa. C. C. 229.

450-28 Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451; In re Imboden, 111 Mo. App. 220, 86 S. W. 263; Bell v. Clarke, 45 Misc. 272, 92 N. Y. S. 163; Weidenhoft v. Primm (Wyo.), 94 P. 453.

But slight circumstance will show such change and raise a presumption of marriage. Edelstein v. Brown, 35 Tex. Civ. 625, 95 S. W. 1126. But see Klipfel v. Klipfel, 41 Colo. 40, 92 P. 26. *Contra,* Darling v. Dent, 82 Ark. 76, 100 S. W. 747 (holding that it will not be presumed that the relation continued illicit, but that the matter is merely one for proof).

450-32 **Burden of proof is on party** who seeks to show a change in the relation. Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451.

451-33 Drawdy v. Hesters, supra; Mick v. Mart (N. J. Eq.), 65 A. 851.

452-35 Mick v. Mart, supra; Wertzel v. Lodge, 11 Pa. C. C. 269; In re Bergdoll, 20 Pa. C. C. 577.

Actual marriage must be shown. Hunt v. Cleveland, 6 Pa. C. C. 592.

453-37 Beehtel v. Barton, 147 Mich. 318, 110 N. W. 935; In re Thewlis, 217 Pa. 307, 66 A. 519. See Geiger v. Ryan, 133 App. Div. 722, 108 N. Y. S. 13.

A statute providing that cohabitation subsequent to the death of the former spouse makes the marriage valid, leaves no room for presumption of continuance of the meretricious relation. Smith v. Fuller (Ia.), 108 N. W. 765, 115 N. W. 912. See also Turner v. Turner, 189 Mass. 373, 75 N. E. 612.

455-42 Murchison v. Green, 128 Ga. 339, 57 S. E. 709.

A ceremonial marriage and cohabitation having been shown, the law raises a powerful presumption of legality, and places every burden on one trying to show its invalidity. Sparks v. Ross (N. J. Eq.), 65 A. 977.

456-43 Murchison v. Green, supra.

458-49 Murchison v. Green, supra (illegality must be shown by clear, distinct, positive and satisfactory proof; Eames v. Woodson, 120 La. 1031, 46 S. 13; Sparks v. Ross (N. J. Eq.), 65 A. 977; Potter v. Potter, 45 Wash. 401, 88 P. 625.

459-50 In re Thewlis, 217 Pa. 307, 66 A. 519.

459-51 Stoutenborough v. Rammel, 123 Ill. App. 487; In re Wile, 6 Pa. Super. 435.

459-52 **The last marriage is presumptively valid** and necessitates proof that the former marriage has not been dissolved by death or divorce. In re Colton, 129 Ia. 542, 105 N. W. 1008. But proof of a second marriage does not raise a presumption of the illegality of the first. Hallums v. Hallums, 74 S. C. 407, 54 S. E. 613. But see Resnick v. Resnick, 126 Ill. App. 132; Bowman v. Little, 101 Md. 273, 61 A. 223, 1084; In re Thewlis, 217 Pa. 307, 66 A. 519.

460-53 Murchison v. Green, 128 Ga. 339, 57 S. E. 709; Smith v. Fuller (Ia.), 108 N. W. 765, 115 N. W. 912; Gilroy v. Brady, 195 Mo. 205, 93 S. W. 279; In re McCausland, 213 Pa. 189, 62 A. 780.

463-56 Colored Knights of P. v. Tucker (Miss.), 46 S. 51; In re Thewlis, 217 Pa. 307, 66 A. 519. But see In re Colton, 129 Ia. 542, 105 N. W. 1008 (it must first be shown that there were some grounds of divorce), *foll.* Ellis v. Ellis, 58 Ia. 720, 13 N. W. 65; Hallums v. Hallums, 74 S. C. 407, 54 S. E. 613; Hammond v. Hammond (Tex. Civ.), 94 S. W. 1067 (holding that there is no legal presumption of divorce in such case).

464-57 In re Wile, 6 Pa. Super. 435; In re Thewlis, 217 Pa. 307, 66 A. 519.

464-58 Colored Knights of P. v. Tucker (Miss.), 46 S. 51.

464-61 Haw v. Kuhia, 10 Haw. 440; S. v. Thompson, 31 Utah 228, 87 P. 709.

465-62 Smith v. Fuller (Ia.), 115 N. W. 912; Richardson v. S., 103 Md. 112, 63 A. 317 (prosecution for bigamy); S. v. Thompson, 31 Utah 228, 87 P. 709; Massucco v. Tomasi, 80 Vt. 186, 67 A. 551 (such testimony is better than record).

Anyone who knows the facts may prove the marriage. — Sellers v. Page, 127 Ga. 633, 56 S. E. 1011.

Common-law marriage may be shown by testimony of witnesses present when contract was entered into. In re Imboden, 111 Mo. App. 220, 86 S. W. 263.

466-64 Resnick v. Resnick, 126 Ill. App. 132.

466-66 Stodenmeyer v. Hart (Ala.), 46 S. 488; Southern R. Co. v. Brown, 126 Ga. 1, 54 S. E. 911; In re Janney, 12 Pa. C. C. 550.

In a prosecution for bigamy, testimony of defendant's alleged wife competent to prove marriage. Richardson v. S., 103 Md. 112, 63 A. 317.

467-67 In re Luce, 3 Pa. Super. 289. *Contra,* Crane v. Stafford, 217 Ill. 21, 75 N. E. 424; Weidenhoft v. Primm (Wyo.), 94 P. 453. See "Transactions with Deceased Persons," Vol. 12, p. 676.

467-68 In re Miller, 34 Pa. Super. 385.

467-72 **License presumed from celebration** of marriage ceremony. Godfrey v. Rowland, 16 Haw. 377. See also Haw v. Waipa, 10 Haw. 442.

468-73 S. v. Thompson, 31 Utah 228, 87 P. 709.

A minister's certificate not admissible to prove marriage in prosecution for crim. con. unless it purports to be a copy of the record which the law requires him to keep. Whittit v. Miller, 1 Haw. 139.

469-76 Eames v. Woodson, 120 La. 1031, 46 S. 13; Broadrick v. Broadrick, 25 Pa. Super. 225.

469-77 Snowman v. Mason, 99 Me. 490, 59 A. 1019; Bowman v. Little, 101 Md. 273, 61 A. 223, 657, 1084 (such fact cannot be proved by declarations of the parties which would bastardize their issue). S. v. Thompson, 31 Utah 228, 87 P. 709.

469-78 Wigley v. Solicitor, (1902) Prob. Div. 233; Haw. v. Waipa, 10 Haw. 442 (without producing license or authority of celebrant).

471-82 Smith v. Fuller (Ia.), 108 N. W. 765, 115 N. W. 912.

473-85 Smith v. Fuller, supra; In re Imboden, 111 Mo. App. 220, 86 S. W. 263; Topper v. Perry, 197 Mo. 531, 95 S. W. 203; C. v. Haylow, 17 Pa. Super. 541; Perrine v. Kohr, 20 Pa. Super. 36.

Declarations of parties sufficient to establish fact of marriage. Smith v. Fuller (Ia.), 108 N. W. 765, 115 N. W. 912.

473-86 Murphy v. S., 122 Ga. 149, 50 S. E. 48. But see Tison v. S., 125 Ga. 7, 53 S. E. 809.

474-88 Murphy v. S., supra (bigamy).

475-91 C. v. Haylow, 17 Pa. Super. 541; In re Seibert, 1 Pa. C. C. 229, 18 Phila. (Pa.) 5.

476-93 **To characterize cohabitation, declarations** of the parties made during the period of cohabitation are admissible as part of the res gestae, but otherwise such declarations are hearsay, though the declarant be dead. Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451. But see In re Cotton, 129 Ia. 542, 105 N. W. 1008.

477-2 Nelson v. Carlson (Wash.), 94 P. 477. But see Drawdy v. Hesters, supra, 476-93.

478-3 In re Moore, 9 Pa. C. C. 338, 19 Phila. (Pa.) 211. *Contra,* Topper v. Perry, 197 Mo. 531, 95 S. W. 203 (cases collected and discussed). See also In re Imboden, 111 Mo. App. 220, 86 S. W. 263 (holding that oral and written declarations of alleged husband, though not made in presence of wife, are competent to rebut evidence of marriage. But his conduct as single man toward other women, inadmissible).

478-7 In re Moore, 9 Pa. C. C. 338, 19 Phila. (Pa.) 211.

479-9 Smith v. Fuller (Ia.), 108 N. W. 765, 115 N. W. 912 (fact that parties joined in deed as husband and wife, admissible); Imboden v. Union Co., 123 Mo. App. 555, 107 S. W. 400.

479-10 Travers v. Reinhardt, 205 U. S. 423; Stodenmeyer v. Hart (Ala.), 46 S. 488 (letter addressed to woman in which she is recognized as wife); Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451; Cobb v. Makee, 1 Haw. 85; Bartee v. Edmunds, 29 Ky. L. R. 872, 96 S. W. 535; In re Imboden, 111 Mo. App. 220, 86 S. W. 263; Plattner v. Plattner, 116 Mo. App. 405, 91 S. W. 457.

In action for dower cohabitation and reputation may be sufficient to establish marriage. McFadden v McFadden, 32 Pa. Super. 535; Smith v. Fuller (Ia.), 108 N. W. 765, 115 N. W. 912.

General reputation may be used to show marriage (Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451); but not when a ceremonial marriage is claimed. Bowman v. Little, 101 Md. 273, 61 A. 223, 657, 1084.

481-12 Bowman v. Little, supra.

481-15 Stodenmeyer v. Hart (Ala.), 46 S. 488 (transactions in which alleged husband held himself out as unmarried, may be shown on cross examination to disprove marriage).

Unchaste character of woman may be shown to negative assertion of marriage by her. Bell v. Clarke, 45 Misc. 272, 92 N. Y. S. 163.

482-17 Nelson v. Carlson (Wash.) 94 P. 477.

482-18 Schneider v. Rabb (Tex. Civ.), 100 S. W. 163 (must be established by preponderance).

484-25 Vazakas v. Vazakas, 109

N. Y. S. 568 (where plaintiff is only witness).

486-33 W. v. S., (1905) Prob. Div. 231.

486-34 **Statement by wife, together with her refusal to submit to medical inspection, held sufficient.** W. v. S., supra.

486-35 **Examination ought not to be required** where the testimony of the plaintiff, standing alone, is persuasive to the mind of the court. Christman v. Christman, 7 Pa. C. C. 595.

MASTER AND SERVANT [Vol. 8.]

Burden of proving existence of special dangers, 520-88; *Burden of showing injury not the result of risk assumed,* 520-88; *Burden of proving obedience to order as cause of injury,* 525-9; *Burden of showing negligence of fellow servant as defense,* 533-46; *Injuries to third persons—burden of proof,* 547-37.

495-13 Smith v. Williams, 123 Mo. App. 479, 100 S. W. 55; Walker v. Mfg. Co., 131 Wis. 542, 111 N. W. 694.

496-19 Walker v. Mfg. Co., supra.

497-28 Wilson v. Alexander, 115 Tenn. 125, 88 S. W. 935.

498-34 **Action for injuries to** third persons. Burns v. Paint Co. (Mich.), 116 N. W. 182.

Actions for injuries. Tutwiler etc. Iron Co. v. Farrington, 144 Ala. 157, 39 S. 898; Larson v. Bridge Co., 40 Wash. 224, 82 P. 294.

Actions for damages for wrongful discharge. — Chaet v. Goldberg, 110 N. Y. S. 817.

Burden of proving nature of employment is upon the party alleging the same. Howell v. Atkinson, 3 Ga. App. 58, 59 S. E. 316.

Burden of proving engagement in master's business. — Yazoo etc. R. Co. v. Slaughter (Miss.), 45 S. 873.

Burden of showing modification of original contract. — Glaser v. Alumni, 97 N. Y. S. 984.

Presumption as to employment. — As between employment and independent contractual relation, the former is presumed. Kampmann v. Rothwell (Tex. Civ.), 107 S. W. 120.

498-38 Gould v. McCrae, 14 Ont. L. R. (Can.) 194.

498-42 King v. R. Co., 140 N. C. 433, 53 S. E. 237.

499-43 Woods v. Shumard, 115 La. 451, 38 S. 416.

500-56 King v. R. Co., 140 N. C. 433, 53 S. E. 237.

514-59 Williams v. Crane (Mich.), 116 N. W. 554; Hinchman v. Car Co., 151 Mich. 214, 115 N. W. 48; Eubanks v. Alspaugh, 139 N. C. 520, 52 S. E. 207; Mobile etc. R. Co. v. Hayden, 116 Tenn. 672, 94 S. W. 940.

518-77 Tenzer v. Gilmore, 114 Mo. App. 210, 89 S. W. 341; Milage v. Woodward, 186 N. Y. 252, 78 N. E. 873; Graff v. Blumberg, 53 Misc. 296, 103 N. Y. S. 184; Monroe v. Proctor, 51 Misc. 632, 100 N. Y. S. 1021; San Antonio Pub. Co. v. Moore (Tex. Civ.), 101 S. W. 867; Pacific Exp. Co. v. Walters (Tex. Civ.), 93 S. W. 496.

520-88 Bowring v. Iron Co., 5 Penne. (Del.) 594, 66 A. 369; Christiansen v. Tank Works, 223 Ill. 142, 79 N. E. 97; Atoka Min. Co. v. Miller (Ind. Ter.), 104 S. W. 555; Hardy v. R. Co. (Ia.), 115 N. W. 8; Charlton v. R. Co., 200 Mo. 413, 98 S. W. 529; Goodwin v. Mills Co. (S. C.), 61 S. E. 390; Galveston etc. R. Co. v. Fitzpatrick (Tex. Civ.), 91 S. W. 355.

Burden of proving existence of special dangers not apparent to observation, or that special skill was required to enable one to safely do certain work, is upon servant. Hicks v. Paper Co., 74 N. H. 154, 65 A. 1075.

Burden of showing injury not the result of risk assumed is on servant. Evansville Gas etc. Co. v. Raley, 38 Ind. 342, 76 N. E. 548, 78 N. E. 254.

522-89 Meier v. Way Co. (Ia.), 111 N. W. 420; Charlton v. R. Co., 200 Mo. 413, 98 S. W. 529; Cook v. Lumb. Co. (Wash.), 94 P. 189; De Mase v. Nav. Co., 40 Wash. 108, 82 P. 170; Walker v. Mfg. Co., 131 Wis. 542, 111 N. W. 694.

522-90 See Boyd v. Taylor, 195 Mass. 272, 81 N. E. 277.

523-95 King v. Iron Co. (Ala.), 42 S. 27; Goodwin v. Mills Co. (S. C.), 61 S. E. 390.

Presumption of incapacity of infant to comprehend risk. — Goodwin v. Mills Co. (S. C.), 61 S. E. 390.

523-99 King v. Iron Co., 143 Ala. 632, 42 S. 27; Bare v. Coke Co., 61 W. Va. 28, 55 S. E. 907.

523-1 Lamb v. R. Co., 217 Pa. 564, 66 A. 762.

524-4 Wallis v. R. Co., 77 Ark. 556, 95 S. W. 446; Choctaw etc. R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244; Williams v. Min. Co., 37 Colo. 62, 86 P. 337; Bowring v. Iron Co., 5 Penne. (Del.) 594, 66 A. 369; Crawford v. Lumb. Co., 12 Idaho 678, 87 P. 998; Chicago etc. R. Co. v. Bryan, 37 Ind. App. 487, 75 N. E. 678; Madden v. Coal Co., 133 Ia. 699, 111 N. W. 57; Arenschield v. R. Co., 128 Ia. 677, 105 N. W. 200; Martin v. Light Co., 131 Ia. 724, 106 N. W. 359; Calloway v. Pack. Co., 129 Ia. 1, 104 N. W. 721 (must show knowledge or that the conditions were such that ignorance was inexcusable); Cumberland T. Co. v. Graves, 31 Ky. L. R. 972, 104 S. W. 356; Urquhart v. Smith Co., 192 Mass. 257, 78 N. E. 410; Moylon v. McDonald Co., 188 Mass. 499, 74 N. E. 929; McDonald v. Steel Co., 140 Mich. 401, 103 N. W. 829; Nord v. Min. Co., 33 Mont. 464, 84 P. 1116; Stevens v. Elliott, 36 Mont. 92, 92 P. 45; Grimm v. Power Co. (Neb.), 114 N. W. 769; Freemont v. R. Co, 111 App. Div. 831, 98 N. Y. S. 179; Strong v. R. Co.,121 App. Div. 391, 106 N. Y. S. 85; Graves v. Stickley Co., 109 N. Y. S. 256; Hunt v. Paper Co.,100 App. Div. 119, 91 N. Y. S. 279; Industrial Lumb. Co. v. Bireus (Tex. Civ.), 105 S. W. 831; Galveston etc. R. Co. v. Parish (Tex. Civ.), 93 S. W. 682; Hoff v. Fertilizer Co. (Wash.), 94 P. 109; Gauthier v. Wood (Wash.), 94 P. 654; Prior v. Eggert, 39 Wash. 481, 81 P. 929 (preponderance of evidence necessary). *Contra.* — Burden of proving want of knowledge on plaintiff. B. Swift Co. v. Gaylord, 299 Ill. 330, 82 N. E. 299; Dunbar v. R. Co., 79 Vt. 474, 65 A. 528; Bolton v. Ovitt, 80 Vt. 362, 67 A. 881; McDuffee v. R. Co. (Vt.), 69 A. 124.

525-9 Burden of proving obedience to order as cause of injury is on employe. Tuckett v. Laundry, 30 Utah 273, 84 P. 500.

526-17 Implied promise sufficient. Huggard v. Refin. Co., 132 Ia. 724, 109 N. W. 475.

526-21 Morden etc. Works v. Fries, 288 Ill. 246, 81 N. E. 862 (and that such promise was the inducement).

527-24 Mollhoff v. R. Co., 15 Okla. 540, 82 P. 733 (presumption that co-employes are fellow-servants; burden on servant to show that co-employe was vice-principal).

527-25 *Compare* Spring & Coal Co. v. Buzis, 115 Ill. App. 196, holding that the burden is upon the master of showing the existence of the relation.

530-39 Meier v. Way Co. (Ia.), 111 N. W. 420.

533-44 Wilkinson G. Co. v. Dickinson, 35 Ind. 230, 73 N. E. 957.

533-45 Southern P. Co. v. Hetzer, 135 Fed. 272, 68 C. C. A. 26.

533-46 First Nat. Bank v. Chandler, 144 Ala. 286, 39 S. 822; Willsinson Glass Co. v. Dickinson, 35 Ind. 230, 73 N. E. 957; McGuire v. R. Co., 215 Pa. 618, 64 A. 825.

Burden of showing negligence of fellow servant as defense rests upon defendant. Mobile etc. R. Co. v. Hicks (Miss.), 46 S. 360. See Creola Lumb. Co. v. Mills, 149 Ala. 474, 42 S. 1019; Walker v. Sawmill Co., 76 Ark. 436, 88 S. W. 988; Hendrix v. Mills, 138 N. C. 169, 50 S. E. 561; Pearsall v. R. Co., 189 N. Y. 474, 82 N. E. 752.

534-48 First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S. 822.

535-56 Curtis v. Car Co., 73 N. H. 516, 63 A. 400.

535-61 Southern Pac. Co. v. Hetzer, 135 Fed. 272, 68 C. C. A. 26; El Paso etc. R. Co. v. Smith (Tex. Civ.), 108 S. W. 988; Gulf etc. R. Co. v. Hays, 40 Tex. Civ. 162, 89 S. W. 29.

536-63 Young v. Gaslight Co., 133 Wis. 9, 113 N. W. 59.

536-64 See Gulf etc. R. Co. v. Hays, 40 Tex. Civ. 162, 89 S. W. 29.

Declarations as showing notice of incompetency. — Declarations of a master mechanic inadmissible to show defendant's notice of servant's incompetency. McClure v. R. Co., 146 Mich. 459, 109 N. W. 847.

536-67 King v. Iron Co., 143 Ala. 632, 42 S. 27.

536-68 See Hodde v. Mfg. Co., 193 Mass. 237, 79 N. E. 252.

537-69 Southern P. Co. v. Hetzer, 135 Fed. 272, 68 C. C. A. 26; Date v. Glucose Co., 104 App. Div. 207, 93 N. Y. S. 249.

Specific acts admissible where employer had knowledge of incompetency or by reasonable diligence ought to have had. Dossett v. Lumb. Co., 40 Wash. 276, 82 P. 273; Southern P. Co. v. Hetzer, 135 Fed. 272, 68 C. C. A. 26.

537-70 Rush v. Murphy Co., 135 Ia. 376, 112 N. W. 814 (act of casual neglect on part of servant not sufficient to show negligence of principal).

537-71 First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S. 822.

537-72 Young v. Gaslight Co., 133 Wis. 9, 113 N. W. 59.

537-73 Trend v. R. Co., 149 Mich. 338, 112 N. W. 977; Young v. Gaslight Co., supra.

538-79 Peeno v. Cordage Co., 32 Ky. L. R. 1313, 108 S. W. 349.

538-81 Ft. Worth etc. R. Co. v. Finley (Tex. Civ.), 110 S. W. 531.

540-93 Coughlan v. R. Co. (Del.), 67 A. 148.

541-98 Written rules admissible on behalf of plaintiff to show that he was acting within the scope of his employment (Wilson v. R. Co. (R. I.), 69 A. 364), or to show defendants negligence, Galveston etc. R. Co. v. Garrett (Tex. Civ.), 98 S. W. 932.

541-4 Virginia etc. Coke Co. v. Tomlinson, 104 Va. 249, 51 S. E. 362 (employes' testimony that they had never heard any one warned inadmissible).

541-5 Co-employe may testify that plaintiff was warned by defendant's foreman as to danger. Louisville etc. R. Co. v. Anderson (Ala.), 43 S. 566.

541-6 Looney v. R. Co., 200 U. S. 480; Bates Machine Co. v. Crowley, 115 Ill. App. 540; Baltimore etc. R. Co. v. Walker (Ind. App.), 84 N. E. 730; Eliot v. R. Co., 204 Mo. 1, 102 S. W. 532; Galveston etc. R. Co. v. Smith (Tex. Civ.), 93 S. W. 184; Missouri etc. R. Co. v. Lynch, 40 Tex. Civ. 543, 90 S. W. 511. But see El Paso Mach. Co. v. DeGuereque (Tex. Civ.), 101 S. W. 814. See also Galveston etc. R. Co. v. Roberts (Tex. Civ.), 91 S. W. 375; La Bee v. Logging Co., 47 Wash. 57, 91 P. 560.

Master presumed to have knowledge of structural defects in appliances furnished. Stine v. Smith Co., 219 Pa. 145, 67 A. 990. See Allen v. Coal Co., 212 Pa. 54, 61 A. 572.

542-7 Feeney v. Mfg. Co., 189 Mass. 336, 75 N. E. 733; Price v. Oil Co., 41 Tex. Civ. 47, 90 S. W. 717; Merrill v. R. Co., 29 Utah 264, 81 P. 85.

Fact that safe place was not furnished is prima facie evidence of negligence. Fowler Pack. Co. v. Enzenperger (Kan.), 94 P. 995; Kansas Mfg. Co. v. Stark (Kan.), 95 P. 1047.

542-8 Cryder v. R. Co., 152 Fed. 417; Jefferys v. Lumb. Co., 157 Fed. 932; Byers v. Steel Co., 159 Fed. 347; Carnegie Steel Co. v. Byers, 149 Fed. 667; Southern R. Co. v. Carr, 153 Fed. 106; Looney v. R. Co., 200 U. S. 480; Northern P. Co. v. Dixon, 139 Fed. 737, 71 C. C. A. 555; Tutwiler etc. Iron Co. v. Farrington, 144 Ala. 157, 39 S. 898; Birmingham Mill Co. v. Rockhold, 143 Ala. 115, 42 S. 96; St. Louis etc. R. Co. v. Wells, 82 Ark. 372, 101 S. W. 738; Chicago etc. R. Co. v. Murray, 85 Ark. 600, 109 S. W. 549; Bowring v. Iron Co., 5 Penne. (Del.) 594, 66 A. 369; Jemnienski v. Car W. Co., 5 Penne. (Del.) 385, 63 A. 935; Vinson v. Mills, 2 Ga. App. 53, 58 S. E. 413; Chicago etc. R. Co. v. O'Donnell, 114 Ill. App. 345; Chicago etc. R. Co. v. Kimmel, 221 Ill. 547, 77 N. E. 936; Adams v. R. Co., 38 Ind. 607, 78 N. E. 687; Huggard v. Ref. Co., 132 Ia. 724, 109 N. W. 475; Davis v. Mfg. Co., 116 La. 1070, 41 S. 318; Lehman v. Heating Co. (Minn.), 116 N. W. 352; Cederburg v. R. Co., 101 Minn. 100, 111 N. W. 953; Shore v. Bridge Co., 111 Mo. App. 278, 86 S. W. 905; Bebe v. Transit Co., 206 Mo. 419, 103 S. W. 1019; Wojtylak v. Coal Co., 188 Mo. 260, 87 S. W. 506; Dunphy v. Stockyards, 118 Mo. App. 506, 95 S. W. 301; Kremer v. Mfg. Co., 120 Mo. App. 247, 96 S. W. 726; Purcell v. Shoe Co., 187 Mo. 276, 86 S. W. 121; Trigg v. Lumb. Co., 187 Mo. 227, 86

S. W. 222; Hamel v. Mfg. Co., 73 N. H. 386, 62 A. 592; Smith v. R. Co., 73 N. H. 325, 61 A. 359; Carney v. Dock Co., 191 N. Y. 301, 84 N. E. 62; Ross v. Mills, 140 N. C. 115, 52 S. E. 121; Fredenthal v. Brown (Or.), 95 P. 1114; Finn v. R. Co. (Or.), 93 P. 690; Lewis v. R. Co. (Pa.), 69 A. 821; Hughes v. Mfg. Co., 214 Pa. 282, 63 A. 692; Wilson v. R. Co. (R. I.), 69 A. 368; Nashville etc. R. Co. v. Hayes, 117 Tenn. 680, 99 S. W. 362; Galveston etc. R. Co. v. Parish (Tex. Civ.), 93 S. W. 682; Galveston etc. R. Co. v. Smith (Tex.), 98 S. W. 240; Kiley v. R. Co., 80 Vt. 536, 68 A. 713; Virginia etc. Coke Co. v. Kiser, 105 Va. 695, 54 S. E. 889; Norfolk R. Co. v. McDonald, 106 Va. 207, 55 S. E. 554. See Meyers v. Cypress Co., 118 La. 805, 43 S. 448; Hendrix v. Mills, 138 N. C. 169, 50 S. E. 561. But see St. Jean v. Woolen Co. (R. I.), 69 A. 604 (holding that proof of the automatic starting of machine excused the servant from proof of the latent defect or negligence which caused it). See also Petrarca v. Mfg. Co., 27 R. I. 265, 61 A. 648.

Burden of showing ignorance of defects — when rule not applicable. The burden is on a servant seeking to recover for injuries sustained by defective appliances to show that he did not know or could not have known of such defects; rule not applicable where injury results in death. Moseley v. Min. Co. (Ky.), 109 S. W. 306. *Contra,* St. Louis etc. R. Co. v. Standifer, 81 Ark. 275, 99 S. W. 81; Klebe v. Distilling Co., 207 Mo. 480, 105 S. W. 1057; Eliot v. R. Co., 204 Mo. 1, 102 S. W. 532.

542-9 Carnegie Steel Co. v. Byers, 149 Fed. 667; Looney v. R. Co., 200 U. S. 480; Northern R. Co. v. Dixon, 139 Fed. 737, 71 C. C. A. 555; McDonnell v. Nav. Co., 143 Fed. 480, 74 C. C. A. 500; Jeffreys v. Lumb. Co., 157 Fd. 952; St. Louis etc. R. Co. v. Hill, 79 Ark. 76, 94 S. W. 914; St. Louis etc. R. Co. v. Wells, 82 Ark. 372, 101 S. W. 738; McDonald v. Timber Co. (Cal. App.), 94 P. 376; Thompson v. Const. Co., 148 Cal. 35, 82 P. 367; Elkton etc. Mill Co. v. Sullivan, 41 Colo. 241, 92 P. 679; Bowring v. Iron Co., 5 Penne. (Del.) 594, 66 A. 369; Butler v. Frazee, 25 App. D. C. 392; National Biscuit Co. v. Wilson (Ind.), 82 N. E. 916; Rush v. Murphy Co., 135 Ia. 376, 112 N. W. 814; Bergman v. Altman, 127 Ia. 693, 104 N. W. 280; S. F. Dana & Co. v. Blackburn, 28 Ky. L. R. 695, 90 S. W. 237; Vissman v. R. Co., 28 Ky. L. R. 429, 89 S. W. 502; Levins v. Bancroft, 114 La. 105, 38 S. 72; Gans Salvage Co. v. Byrnes, 102 Md. 230, 62 A. 155; Bamford v. Hammond Co., 191 Mass. 479, 78 N. E. 115; Curtin v. R. Co., 194 Mass. 260, 80 N. E. 522; Fuller v. R. Co., 141 Mich. 66, 104 N. W. 414; Cederberg v. R. Co., 101 Minn. 100, 111 N. W. 953; Eliot v. R. Co., 204 Mo. 1, 102 S. W. 532; Beebe v. Transit Co., 206 Mo. 419, 103 S. W. 1019; Deckerd v. R. Co., 111 Mo. 117, 85 S. W. 982; Hicks v. Paper Co. (N. H.), 65 A. 1075; Andrews v. Reiners, 112 App. Div. 378, 98 N. Y. S. 658; Stackpole v. Wray, 99 App. Div. 262, 90 N. Y. S. 1045; Fallon v. Mertz, 110 App. Div. 755, 97 N. Y. S. 417; Rend v. N. Y. & T. S. S. Co., 187 N. Y. 382, 80 N. E. 206; Jones v. R. Co., 144 N. C. 79, 56 S. E. 556; Shaw v. Mfg. Co., 143 N. C. 131, 55 S. E. 433; Horton v. R. Co., 145 N. C. 132, 58 S. E. 993; Rush v. Power Co. (Or.), 95 P. 193; Finn v. R. Co. (Or.), 93 P. 690; Allen v. Coal Co., 212 Pa. 54, 61 A. 572; Lewis v. R. Co. (Pa.), 69 A. 821; Venbuvr v. Mills, 27 R. I. 89, 60 A. 770; Green v. Power Co., 75 S. C. 102, 55 S. E. 125; Galveston etc. R. Co. v. Garven (Tex. Civ.), 109 S. W. 426; Norfolk R. Co. v. McDonald, 106 Va. 207, 55 S. E. 554; Newhouse v. R. Co. (W. Va.), 59 S. E. 1071. See Binewicz v. Haglin, 103 Minn. 297, 115 N. W. 271; Croce v. Buckley, 115 App. Div. 354, 100 N. Y. S. 898. But see Moit v. R. Co., 153 Fed. 354; St. Louis etc. R. Co. v. Standifer, 81 Ark. 275, 99 S. W. 81; Pittsburg etc. R. Co. v. Campbell, 116 Ill. App. 356; Mobile etc. R. Co. v. Hicks (Miss.), 46 S. 360; St. Clair v. R. Co., 122 Mo. App. 519, 99 S. W. 775; Lee v. R. Co., 112 Mo. App. 372, 87 S. W. 12; Keenan v. Elevator Co., 108 N. Y. S. 952; Ferrick v. Eidlitz, 123 App. Div. 587, 108 N. Y. S. 28; Ristan v. Coe Co.,

120 App. Div. 478, 104 N. Y. S. 1059; Gorman v. Milliken, 42 Misc. 336, 86 N. Y. S. 699; Haggblad v. R. Co., 117 App. Div. 838, 102 N. Y. S. 1039; Van Suwegen v. R. Co., 110 N. Y. S. 959 (holding that negligence will be presumed under the doctrine res ipsa loquitur); Hemphill v. Lumb. Co., 141 N. C. 487, 54 S. E. 420; Stewart v. R. Co., 141 N. C. 253, 53 S. E. 877; and Louisville etc. R. Co. v Jones, 50 Fla. 225, 39 S. 485; Atlanta etc. R. Co. v. McManus, 1 Ga. App. 302, 58 S. E. 258; King v. R. Co., 1 Ga. App. 88, 58 S. E. 252 (holding that where the negligent thing complained of existed independently of the acts of the plaintiff or of a fellow servant a presumption arises as to defendant's negligence upon proof of injury; Murray v. R. Co. (Ky.), 110 S. W. 334; McGowan v. Nelson, 36 Mont. 67, 92 P. 40; Bussey v. R. Co., 78 S. C. 352, 58 S. E. 1015; Galveston etc. R. Co. v. Harris (Tex. Civ.), 107 S. W. 108 (holding that where it is shown that a servant was free from fault upon the happening of an injury a presumption of defendant's negligence arises).

543-10 Franke v. Hanly, 215 Ill. 216, 74 N. E. 130; McCarthy v. Coal Co., 231 Ill. 473, 83 N. E. 957 (evidence of dangerous condition of a coal mine for several days prior to the action admissible); Dean v. R. Co., 199 Mo. 386, 97 S. W. 910; Reich v. Mfg. Co., 120 App. Div. 445, 104 N. Y. S. 1069; Walker v. Paper Co., 111 App. Div. 19, 97 N. Y. S. 521; Davis v. Min. Co., 20 S. D. 399, 107 N. W. 374; Hansen v. Lumb. Co., 41 Wash. 349, 83 P. 102. See Southern Coke Co. v. Swinney, 149 Ala. 405, 42 S. 808; Bundy v. Lumb. Co., 149 Cal. 772, 87 P. 622; Stratton etc. Co. v. Ellison (Colo.), 94 P. 303; Hotchkiss R. Co. v. Bruner (Colo.), 94 P. 331; Finley v. R. Co., 31 Ky. L. R. 740, 103 S. W. 343; Black Diamond etc. Co. v. Price (Ky.), 108 S. W. 345; Lamb v. R. Co., 217 Pa. 564, 66 A. 762.

543-13 Brunger v. Paper Co., 6 Cal. App. 691, 92 P. 1043. But see Dunbar v. R. Co., 79 Vt. 474, 65 A. 528. And see Culver v. R. Co., 144 Mich. 254, 107 N. W. 908.

543-14 Silva v. Davis, 191 Mass. 47, 77 N. E. 525. See Burns v. Crow, 123 App. Div. 251, 107 N. Y. S. 944; Wren v. Mfg. Co., 122 App. Div. 289, 106 N. Y. S. 710; St. Louis etc. R. Co. v. Arnold, 39 Tex. Civ. 131, 87 S. W. 173; Lay v. Coke Co. (W. Va.), 61 S. E. 156.

543-16 Erickson v. McNeeley, 41 Wash. 509, 84 P. 3.

543-17 See Bokamp v. R. Co., 123 Mo. App. 270, 100 S. W. 689.

543-19 Steve v. Lumb. Co., 13 Idaho 384, 92 P. 363; McCarthy v. Coal Co., 231 Ill. 473, 83 N. E. 957; Virginia etc. C. Co. v. Knight, 106 Va. 674, 56 S. E. 725.

544-20 Stratton etc. Co. v. Ellison (Colo.), 94 P. 303 (direction of foreman to plaintiff's co-employe to remove cause of injury prior to accident); Dutro v. R. Co., 111 Mo. 258, 86 S. W. 915 (statement of co-employe to foreman admissible to show notice).

544-21 Union P. R. Co. v. Edmondson (Neb.), 110 N. W. 650; Young v. R. Co., 75 S. C. 190, 55 S. E. 225.

544-24 Christopherson v. R. Co., 135 Ia. 409, 109 N. W. 1077.

544-26 Servant's violation of rules is presumptive evidence of contributory negligence. — Erickson v. Slate Co., 100 Me. 107, 60 A. 708.

546-27 Stewart v. R. Co., 141 N. C. 253, 53 S. E. 877.

547-37 Injuries to third persons. Burden of proof. — In an action by a third person for injuries burden is upon plaintiff to show by a fair preponderance of evidence that the act complained of was done by defendant's servants. Halsch v. Connell Co., 49 Misc. 525, 97 N. Y. S. 983.

547-39 Broadstreet v. Hall, 168 Ind. 192, 80 N. E. 145.

MATERIALITY [Vol. 8.]

549-1 "Evidence offered in a cause or a question propounded, is material when it is relevant and goes to the substantial matters in dispute or has a legitimate and effective influence or bearing on the decision of the case." Porter v. Valentine, 18 Misc. 213, 41 N. Y. S. 507.

MAYHEM [Vol. 8.]

552-1 Neblett v. S., 47 Tex. Cr. 573, 85 S. W. 813. See Green v. S. (Ala.), 44 S. 194.

554-12 Attempt. — Act held insufficient to show intent. Dahlberg v. P., 225 Ill. 485, 80 N. E. 310.

MECHANICS' LIENS [Vol. 8.]

Account no proof of delivery of materials, 562-25.

559-13 Chicago L. & C. Co. v. Garmer, 132 Ia. 282, 109 N. W. 780.

560-15 Nashville etc. R. Co. v. Moore, 148 Ala. 63, 41 S. 984 (husband as wife's agent); Parke Co. v. Oil Co., 147 Cal. 490, 82 P. 51; Snyder v. Sparks, 73 Neb. 804, 103 N. W. 662; Seattle L. Co. v. Sweeney, 43 Wash. 1, 85 P. 677.

561-17 Madary v. Smartt, 1 Cal. App. 498, 82 P. 561 (counters and partitions as "repairs and alterations"). See Tuck v. Mfg. Co., 127 Ga. 729, 56 S. E. 1001; Wera v. Bowerman, 191 Mass. 458, 78 N. E. 102.

That the structure is a permanent part of the realty. Stevenson v. Woodward, 3 Cal. App. 754, 86 P. 990.

562-25 **The verified account filed** for the purpose of securing a mechanic's lien is no evidence of the delivery of the material, or state of delivery. Searle & C. Lumb. Co. v. Jones (Neb.), 114 N. W. 783.

563-27 Madary v. Smartt, 1 Cal. App. 498, 82 P. 561.

564-28 Wolf Co. v. R. Co., 29 Pa. Super. 439; Wees v. Elbon, 61 W. Va. 380, 56 S. E. 611. See Boland v. Webster, 126 Mo. App. 591, 105 S. W. 34; Guarantee B. & L. Assn. v. Connor, 216 Pa. 543, 65 A. 1089. A substantial compliance is sufficient. Salter v. Goldberg (Ala.), 43 S. 571; Nofziger Lumb. Co. v. Shafer, 2 Cal. App. 219, 83 P. 284; Este v. R. Co., 27 Pa. Super. 521; Knudson-J. Co. v. Brandt, 44 Wash. 68, 87 P. 43; Wees v. Elbon, 61 W. Va. 380, 56 S. E. 611; U. S. Blowpipe Co. v. Spencer, 61 W. Va. 191, 56 S. E. 345.

Where payment is pleaded defendant is entitled to introduce an itemized account of payments made, although he did not file such account. Easterling v. Shaifer (Miss.), 38 S. 230.

565-30 Grant v. Cement Co., 58 W. Va. 162, 52 S. E. 36.

566-33 Winton v. Benore, 28 Pa. Super. 27.

567-36 Collins v. R. Co., 29 Pa. Super. 547.

568-42 Knudson-J. Co. v. Brandt, 44 Wash. 68, 87 P. 43.

568-45 Evidence is admissible to show sufficiency of notice as to description of property. Union Lumb. Co. v. Simons, 150 Cal. 751, 89 P. 1077.

Amount of land necessary. — Union Lumb. Co. v. Simons, supra.

569-46 Eccles Lumb. Co. v. Martin, 31 Utah 241, 87 P. 713.

569-47 See Rider-E. E. Co. v. Fredericks, 25 Pa. Super. 72.

570-48 Where materials are sold on personal credit of owner or contractor it raises a question of fact as to waiver of lien. Scott Mfg. Co. v. Morgan, 217 Pa. 367, 66 A. 566. See Central Lumb. Co. v. L. & G. Co., 84 Ark. 560, 105 S. W. 583.

MENTAL AND PHYSICAL STATES [Vol. 8.]

572-1 Altig v. Altig (Ia.), 114 N. W. 1056.

573-11 Finger v. Pollock, 188 Mass. 208, 74 N. E. 317 (that plaintiff cried).

573-13 Anger. — White v. White 76 Kan. 82, 90 P. 1087.

573-14 Montgomery R. Co. v. Shanks, 139 Ala. 489, 37 S. 166 (that plaintiff cried); Barlow v. Hamilton (Ala.), 44 S. 657; St. Louis etc. R. Co. v. Boyer (Tex. Civ.), 97 S. W. 1070 (to prove existence of physical injury).

573-22 Kansas City etc. R. Co. v. Matthews, 142 Ala. 298, 39 S. 207; Patterson v. Corporation, 25 App. D. C. 46.

573-23 Macon R. & L. Co. v. Mason, 123 Ga. 773, 51 S. E. 569. See City of Aurora v. Plummer, 122 Ill. App. 143.

574-26 Birmingham L. & P. Co. v. Rutledge, 142 Ala. 195, 39 S. 338; Indianapolis St. R. Co. v. Haverstick, 35 Ind. App. 281, 74 N. E. 34; Patton v. Sanborn, 133 Ia.

650, 110 N. W. 1032; City of Iola v. Farmer, 72 Kan. 620, 84 P. 386; Weeks v. R. Co., 190 Mass. 563, 77 N. E. 654; Stevens v. Friedman, 58 W. Va. 78, 51 S. E. 132.

Fact that such complaints were made, may be shown. — O'Dea v. R. Co., 142 Mich. 265, 105 N. W. 746.

575-28 Kansas City etc. R. Co. v. Butler, 143 Ala. 262, 38 S. 1024; Fishburn v. R. Co., 127 Ia. 483, 103 N. W. 481; McHugh v. Transit Co., 190 Mo. 85, 88 S. W. 853; Western Acc. Assn. v. Munson, 73 Neb. 858, 103 N. W. 688; St. Louis etc. R. Co. v. Boyer (Tex. Civ.), 97 S. W. 1070; Sheldon v. Wright, 80 Vt. 298, 67 A. 807.

577-39 Kansas City etc. R. Co. v. Butler, 143 Ala. 262, 38 S. 1024; Stevens v. Friedman, 58 W. Va. 78, 51 S. E. 132; Sheldon v. Wright, 80 Vt. 298, 67 A. 807.

577-41 McHugh v. Transit Co., 190 Mo. 85, 88 S. W. 853.

577-42 Birmingham etc. R. Co. v. Moore (Ala.), 43 S. 841; City of Chicago v. McNally, 221 Ill. 14, 81 N. E. 23; Pittsburg etc. R. Co. v. Coll, 37 Ind. App. 232, 76 N. E. 816; Indiana Tr. Co. v. Jacobs, 167 Ind. 85, 78 N. E. 325; Shade v. R. T. & B. Co., 119 Ky. 592, 84 S. W. 733; O'Dea v. R. Co., 142 Mich. 265, 105 N. W. 746; Orlando v. R. Co., 109 App. Div. 356, 95 N. Y. S. 898.

578-47 Chicago City R. Co. v. Mauger, 128 Ill. App. 512; O'Dea v. R. Co., supra. But declarations during an examination had at the instance of the adverse party, are competent. City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23.

579-52 McCormick v. R. Co., 141 Mich. 17, 104 N. W. 390.

579-54 Western U. T. Co. v. Rowell (Ala.), 45 S. 73.

579-55 Gilmore v. Am. T. & S. Co., 79 Conn. 498, 66 A. 4; Orlando v. R. Co., 109 App. Div. 356, 95 N. Y. S. 898. *Contra*, Gibler v. R. Co., 129 Mo. App. 93, 107 S. W. 1021.

580-56 Goodwyn v. R. Co., 2 Ga. App. 470, 58 S. E. 688.

580-58 Hardin v. R. Co. (Tex. Civ.), 88 S. W. 440.

580-59 City of Aurora v. Plummer, 122 Ill. App. 143; Shade v. R., T. & B. Co., 27 Ky. L. R. 224, 84 S. W. 733.

582-76 Ditto v. Slaughter, 28 Ky. L. R. 1164, 92 S. W. 2 (on issue of duress).

582-77 Goodwyn v. R. Co., 2 Ga. App. 470, 58 S. E. 688; O'Dea v. R. Co., 142 Mich. 265, 105 N. W. 746; Sheldon v. Wright, 80 Vt. 298, 67 A. 807 (that he could not travel on the leg as well as formerly).

583-81 Barlow v. Hamilton (Ala.), 44 S. 657; Fleckinger v. Taffee, 149 Mich. 678, 113 N. W. 311.

583-83 Vannest v. Murphy, 135 Ia. 123, 112 N. W. 236 (because the matter could not be reproduced or described to the jury).

583-84 Binkley v. S., 51 Tex. Cr. 54, 100 S. W. 780 (facts on which opinion of capacity to form criminal intent is based).

584-85 Illinois Ins. Co. v. DeLang, 124 Ky. 569, 30 Ky. L. R. 753, 99 S. W. 616; Kirby v. W. U. Tel. Co., 77 S. C. 404, 58 S. E. 10.

584-89 Doherty v. Courtney, 150 Cal. 606, 89 P. 434; Swygart v. Willard, 167 Ind. 25, 76 N. E. 755; Lucas v. McDonald, 126 Ia. 678, 102 N. W. 532 (to continued rationality but not to unsoundness of mind); Howard v. Carter, 71 Kan. 85, 80 P. 61.

584-90 See Ames v. Ames, 75 Neb. 473, 106 N. W. 584 (whether a person was able to converse intelligently is for the jury to determine, a witness having given the conversations on which the issue was based).

584-92 First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S. 822 (that a boy was a wide-awake and attentive servant); Citizen's R. Co. v. Robertson, 41 Tex. Civ. 324, 91 S. W. 609 (but whether sufficient intelligence existed to warrant a certain action, is a question for the jury).

585-99 Kuhlman v. Weiben, 129 Ia. 188, 105 N. W. 445.

585-1 Swygart v. Willard, 167 Ind. 25, 76 N. E. 754 (whether habit of intemperance had grown).

585-2 Roberts v. S., 123 Ga. 146, 51 S. E. 374; Jones v. S., 47 Tex. Cr. 515, 85 S. W. 5; Till v. S., 132 Wis. 242, 111 N. W. 1109 (that a person was "worried" and "acted stupid").

586-6 Hill v. S., 146 Ala. 51, 41 S. 621 (whether another person was

joking); White v. White, 76 Kan. 82, 90 P. 1087. But see Stevens v. Larwill, 110 Mo. App. 140, 84 S. W. 113 (prejudice against another).

586-9 Supreme Lodge v. Jones, 113 Ill. App. 241; Duerler Mfg. Co. v. Eichhorn (Tex. Civ.), 99 S. W. 715; Davis v. R. Co., 31 Utah 307, 88 P. 2.

586-10 Southern R. Co. v. Hobbs (Ala.), 43 S. 844; Kline v. R. Co., 150 Cal. 741, 90 P. 125; Illinois Ins. Co. v. DeLang, 124 Ky. 569, 30 Ky. L. R. 753, 99 S. W. 616 (what symptoms existed); San Antonio Co. v. Flory (Tex. Civ.), 100 S. W. 200.

586-11 Macon R. & L. Co. v. Mason, 123 Ga. 773, 51 S. E. 569 (headache); St. Louis etc. R. Co. v. Boyer (Tex. Civ.), 97 S. W. 1070.

587-16 Walker v. S., 147 Ala. 699, 41 S. 878 (conscious).

587-19 San Antonio Tr. Co. v. Flory (Tex. Civ.), 100 S. W. 200 (that injured person could not lift anything).

587-20 City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23.

587-21 Jacobs v. S., 146 Ala. 103, 42 S. 70 (condition in which prosecutor was found shortly after the assault); McIlwain v. Gaebe, 128 Ill. App. 209.

MINES AND MINERALS [Vol. 8.]

592-2 In absence of proof of existence of custom, presumption is that Federal law governed location at the time. Anderson v. Caughey, 3 Cal. App. 22, 84 P. 223.

595-16 Whether citizenship provable by hearsay, quaere. — Stewart v. Gold Co., 29 Utah 443, 82 P. 475.

596-17 Steele v. R. Co., 148 Fed. 678, 78 C. C. A. 412; Charlton v. Kelly, 2 Alaska 532; New England Oil Co. v. Congdon (Cal.), 92 P. 180; Daggett v. Min. Co., 149 Cal. 357, 86 P. 968; Lockhart v. Farrell, 31 Utah 155, 86 P. 1077.

596-18 Recital in location notice. — Fox v. Myers (Nev.), 86 P. 793.

Posting notice at given point is evidence that locator claims discovery at that point. Fox. v. Myers, supra.

Opinion of experienced miners, based on facts as to sufficiency of discovery to justify development, competent. Cascaden v. Bortolis, 162 Fed. 267.

597-23 Londonderry Min. Co. v. Min. Co., 38 Colo. 480, 88 P. 455; Bismark Min. Co. v. Gold Co. (Idaho), 95 P. 14; Ford v. Campbell (Nev.), 92 P. 206; Slothower v. Hunter, 15 Wyo. 189, 88 P. 36.

Defective original declaratory statement, in connection with amended statement, admissible to show attempt on part of locator to comply with the law. Butte Min. Co. v. Barker, 35 Mont. 327, 89 P. 302.

599-28 Improvements on one of a group of claims. — Upton v. Min. Co. (N. M.), 89 P. 275.

599-29 See Frederick v. Klauser (Or.), 96 P. 679.

599-31 Mistake in affidavit of labor may be corrected by extrinsic evidence. Bismark Min. Co. v. Gold Co. (Idaho), 95 P. 14.

600-32 Wailes v. Davies, 158 Fed. 667; Gear v. Ford, 4 Cal. App. 556, 88 P. 600. *Compare* Upton v. Min. Co. (N. M.), 89 P. 275; Fredericks v. Klauser (Or.), 96 P. 679.

600-34 See Ford v. Campbell (Nev.), 92 P. 206.

601-43 Brown v. Gurney, 201 U. S. 184; McWilliams v. Winslow, 34 Colo. 341, 82 P. 538; Lozar v. Neill (Mont.), 96 P. 343.

601-44 Healey v. Rupp, 37 Colo. 25, 86 P. 1015; Lockhart v. Farrell, 31 Utah 155, 86 P. 1077. See also Porter v. Tonopah Co., 146 Fed. 385, 76 C. C. A. 657; Lozar v. Neill, supra.

Location notice or certificate, when recorded, is prima facie evidence. Bismark Min. Co. v. Gold Co. (Idaho), 95 P. 14.

603-51 Sharkey v. Candiani, 48 Or. 112, 85 P. 219.

604-55 Patent raises conclusive presumption that there is an apex of a vein within the patented ground, but no presumption that it is the apex of the vein in dispute. Grand Cent. Min. Co. v. Min. Co., 29 Utah 490, 83 P. 648.

605-58 See also Uinta etc. Transp. Co. v. Min. Co., 141 Fed. 563, 73 C. C. A. 35.

605-59 Noyes v. Clifford (Mont.), 94 P. 842.

606-62 See Ware v. White (Ark.), 108 S. W. 831.

606-64 See also Upton v. Min. Co. (N. M.), 89 P. 275.
607-65 Grand Cent. Min. Co. v. Min. Co., 29 Utah 490, 83 P. 648.
607-67 Lawson v. Min. Co., 207 U. S. 1; Grand Cent. Min. Co. v. Min. Co., 29 Utah 490, 83 P. 648; Red. M. G. M. Co. v. Clays, 30 Utah 242, 83 P. 841.

MONEY COUNTS [Vol. 8.]

620-15 But see Cairbre v. McQuillan, 151 Mich. 590, 115 N. W. 737 (letters acknowledging receipt of money are competent evidence).
622-23 Aetna I. Co. v. Ladd, 135 Fed. 636, 68 C. C. A. 274; Lincoln v. Hemenway, 80 Vt. 530, 69 A. 153.
622-24 Johnson v. Bemis, 3 Cal. App. 82, 84 P. 441; Bolanos v. Zumeta, 108 N. Y. S. 1014 (that the loan was to a partnership of which the defendant was a member rather than to defendant individually).
623-28 Young v. Anthony, 119 App. Div. 612, 104 N. Y. S. 87 (that relations were such as would tend to show a gift rather than a loan).
623-29 Fallon v. Vandesand (Wis.), 116 N. W. 176.
625-39 Hathaway v. County, 103 App. Div. 179, 93 N. Y. S. 436; Mings v. Const. Co. (Tex. Civ.), 106 S. W. 192.
625-43 See Fry v. Talbott, 106 Md. 43, 66 A. 664.
626-49 Mings v. Const. Co., supra.
627-53 See Fallon v. Vandesand (Wis.), 116 N. W. 176 (plaintiff's statements showing that the payment was a gift).
627-54 Harr v. Roome, 28 App. D. C. 214.
Where money paid by mistake. Morrison v. Morrison, 101 Me. 131, 63 A. 392.
629-59 Smith v. Bank, 2 Cal. App. 337, 84 P. 348; Harr v. Roome, 28 App. D. C. 214; Citizens' Bk. v. Rudisill (Ga. App.), 60 S. E. 818; First Nat. Bk. v. Pickens (Ind. Ter.), 104 S. W. 947; McAvoy & M. v. C., 27 Pa. Super. 271. See Simmoneli v. White Star Line (R. I.), 66 A. 836; Principe v. White Star Line (R. I.), 68 A. 476.
629-60 March v. Union, 79 Conn. 7, 63 A. 291; Mulligan v. Harlam, 46 Misc. 571, 92 N. Y. S. 765 (action sustained where money was received through fraud of third person).
630-63 Manning v. Fallon (N. J.), 66 A. 903.
630-64 Harr v. Roome, 28 App. D. C. 214.

MORTALITY TABLES [Vol. 8.]

633-1 Cusick v. Boyne, 1 Cal. App. 643, 82 P. 985 (to determine value of a life estate); Croft v. R. Co., 132 Ia. 411, 109 S. W. 723 (admissible to show expectancy of a female).
634-3 See Nobrega v. Nobrega, 14 Haw. 152.
634-4 Southern Pacific Co. v. Cavin, 144 Fed. 348, 75 C. C. A. 350; Southern R. Co. v. Cunningham (Ala.), 44 S. 658; Birmingham etc. Co. v. Wright (Ala.), 44 S. 1037; McMahon v. Bangs, 5 Penne. (Del.), 178, 62 A. 1098; A. K. & N. R. Co. v. Gardner, 122 Ga. 82, 49 S. E. 818 (inadmissible unless earning capacity is established); Pittsburg etc. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033; Pittsburg etc. Co. v. Ross (Ind.), 80 N. E. 845; Patton v. Sanborn, 133 Ia. 650, 110 N. W. 1032; Illinois Cent. R. Co. v. Houchins, 121 Ky. 526, 28 Ky. L. R. 499, 89 S.W. 530; Illinois Cent. R. Co. v. Morris, 28 Ky. L. R. 956, 90 S. W. 979; Louisville B. & I. Co. v. Hart, 122 Ky. 731, 29 Ky. L. R. 310, 92 S. W. 951; Banks v. Braman, 195 Mass. 97, 80 N. E. 799; Sledge v. Weldon L. Co., 140 N. C. 459, 53 S. E. 295 (prima facie evidence of life expectancy under statute); Colbert v. R. I. Co. (R. I.), 67 A. 446 (inadmissible when injured party is abnormal or has an incurable disease); Texas N. O. R. Co. v. Kelley (Tex. Civ.), 80 S. W. 1073; International etc. Co. v. Brandon, 37 Tex. Civ. 371, 84 S. W. 272; Virginia etc. R. Co. v. Bailey, 103 Va. 205, 49 S. E. 33.
Admissible after permanent character of injury has been established. Messing v. R. Co., 5 Penne. (Del.) 526, 64 A. 247; Knott v. Peterson, 125 Ia. 404, 101 N. W. 173; Howard v. McCabe (Neb.), 112 N. W. 305; MacGregor v. R. I. Co., 27 R. I. 85, 60 A. 761; O'Clair v. R. I. Co.,

27 R. I. 448, 63 A. 238; Hyland v. Tel. Co., 70 S. C. 315, 49 S. E. 879 (statutory tables); Brown v. Blaine, 41 Wash. 287, 83 P. 310; Hodd v. Tacoma, 45 Wash. 436, 88 P. 842.

634-5 Ward v. Kjoebeunharn, 144 Fed. 524 (when precedent proof has brought him within the class of selected lives tabulated); Kansas City R. Co. v. Morris, 80 Ark. 528, 98 S. W. 363; St. Louis etc. R. Co. v. Hitt, 76 Ark. 227, 88 S. W. 908, 990; Valente v. R. Co., 151 Cal. 534, 91 P. 481; Calvert v. S. E. L. & P. Co., 231 Ill. 290, 83 N. E. 185; Knott v. Peterson, 125 Ia. 404, 101 N. W. 173; Illinois Cent. R. Co. v. Cane, 28 Ky. L. R. 1018, 90 S. W. 1061; Philip v. Heraty, 135 Mich. 446, 100 N. W. 186; Reynolds v. N. E. L. Co., 26 R. I. 457, 59 A. 393; Memphis St. R. Co. v. Berry, 118 Tenn. 581, 102 S. W. 85; N. & W. R. Co. v. Spencer, 104 Va. 657, 52 S. E. 310.

635-7 Horst v. Lewis, 71 Neb. 370, 103 N. W. 460.

635-8 Cusick v. Boyne, 1 Cal. App. 643, 82 P. 985; Memphis S. R. Co. v. Berry, 118 Tenn. 581, 102 S. W. 85 (deceased in advanced stage of dropsy); So. Kan. etc. R. Co. v. Sage (Tex. Civ.), 80 S. W. 1038.

635-9 Horst v. Lewis, supra; Colbert v. R. I. Co. (R. I.), 67 A. 446.

636-10 International etc. Co. v. Brandon, 37 Tex. Civ. 371, 84 S. W. 272; International etc. Co. v. Aten (Tex. Civ.), 81 S. W. 346.

637-17 Southern R. Co. v. Cunningham (Ala.), 44 S. 658; Illinois Cent. R. Co. v. Houchins, 28 Ky. L. R. 499, 89 S. W. 530.

639-19 Valente v. R. Co., 151 Cal. 534, 91 P. 481; Stephens v. Elliott, 36 Mont. 92, 92 P. 45.

639-21 Clark v. Van Vleck, 135 Ia. 194, 112 N. W. 648 (*cit.* Encyc. of Ev.).

641-28 Stephens v. Elliott, supra.

641-29 Valente v. R. Co., supra (discretionary with the court).

642-33 Farrell v. R. Co., 123 Ia. 690, 99 N. W. 578; Sterling v. Carbide Co., 142 Mich. 284, 105 N. W. 755; Merrinane v. Miller, 148 Mich. 412, 111 N. W. 1050; Omaha v. Sutliffe, 72 Neb. 746, 101 N. W. 997; Texas etc. R. Co. v. Higgins (Tex. Civ.), 99 S. W. 200.

643-34 Louisville etc. R. Co. v. Anderson (Ala.), 43 S. 566; Iseminger v. Y. H. W. & P. Co., 209 Pa. 615, 59 A. 64.

Opinions of experts on the expectancy of life beyond that given in the mortality tables based upon such tables and the longevity of party's father and grandfather, whom he resembled, is admissible. Hamilton v. R. Co., 135 Mich. 95, 97 N. W. 392.

643-35 Bettis v. R. Co., 131 Ia. 46, 108 N. W. 103.

MORTGAGES [Vol. 8.]

655-1 Gibbons v. Mill Co., 37 Colo. 96 86 P. 94; Smith v. Hope, 51 Fla. 541, 41 S. 69; Okuu v. Kaiaikawaha, 7 Haw. 311. See Gore v. Glover, 49 Misc. 473, 96 N. Y. S. 969; Smith v. Pfluger, 126 Wis. 253, 105 N. W. 476.

Although fraud is not alleged. Gibbons v. Mill Co., supra.

658-6 Holman v. Ketcham (Ala.), 45 S. 206. See Owen v. Mulkey, 84 Ark. 623, 106 S. W. 937; Hereford v. Benton, 20 Colo. App. 500, 80 P. 499; Stewart v. Hoffman, 31 Mont. 184, 81 P. 3; First Nat. Bk. v. Stewart (N. M.), 86 P. 622.

To show fraudulent character parol evidence admissible to prove statements made by mortgagor to mercantile agency as to his financial condition. Bruce v. Bruce (Tex. Civ.), 89 S. W. 435; Walsh v. Taitt, 142 Mich. 127, 105 N. W. 544.

660-15 See Harris v. Staples (Tex. Civ.), 89 S. W. 801.

664-37 See Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060 (conditional delivery).

666-46 See Winston v. Farrow (Ala.), 40 S. 53.

666-48 See Schmidt v. Rankin, 193 Mo. 254, 91 S. W. 78.

668-53 True intention of parties may be shown and that by mutual mistake after acquired goods were omitted from the description. White Co. v. Carroll (N. C.), 61 S. E. 196.

672-76 Wilson v. Johnson (Ala.), 44 S. 539.

674-86 Ketchen v. Schuster (N. M.), 89 P. 261.

678-84 See Boswell v. Bank (Wyo.), 92 P. 624.

679-8 Ilfeld v. Ziegler, 40 Colo. 401, 91 P. 825.

679-9 Baker v. Hutchinson, 147 Ala. 636, 41 S. 809.

680-11 Nolen v. Farrow (Ala.), 45 S. 183. See Pritchard v. Hooker, 114 Mo. App. 605, 90 S. W. 415.

In replevin to recover property mortgaged to plaintiff, burden of proof on plaintiff to show that his mortgagor had title to mortgaged property. Martin Bros. v. Com. Co. (Ia.), 105 N. W. 996.

681-13 See G. D. Mashburn & Co. v. Dannenberg Co., 117 Ga. 567, 44 S. E. 97.

683-23 Gilroy v. Everson Co., 118 App. Div. 733, 103 N. Y. S. 620.

684-29 Van Gordon v. Goldamer (N. D.), 113 N. W. 609.

686-38 See Pinson v. Campbell, 124 Mo. App. 260, 101 S. W. 620.

691-74 Linkemann v. Knepper, 226 Ill. 473, 80 N. E. 1009; Guarantee etc. Co. v. Edwards (Ind. Ter.), 104 S. W. 624; Laub v. Romans (Ia.), 113 N. W. 427; Keeline v. Clarke, 132 Ia. 360, 106 N. W. 257; Clark v. McDowell (Ky.), 109 S. W. 887; In re Schmidt, 114 La. 78, 38 S. 26; Conover v. Palmer, 123 App. Div. 817, 108 N. Y. S. 480; Hesser v. Brown, 40 Wash. 688, 82 P. 934; Sahlin v. Gregson, 46 Wash. 452, 90 P. 592; Smith v. Pfluger, 126 Wis. 253, 105 N. W. 476. See Hilt v. Griffin (Kan.), 90 P. 808.

692-76 Gibbs v. Haughowout, 207 Mo. 384, 105 S. W. 1067.

693-77 Smith v. Smith, (Ala.), 45 S. 168; Shreve v. McGowin, 143 Ala. 665, 42 S. 94; Meeker v. Shuster, 4 Cal. App. 294, 87 P. 1102; Anglo Cal. Bk. v. Cerf, 147 Cal. 384, 81 P. 1077; Keeline v. Clark, 132 Ia. 360, 106 N. W. 257; Laub v. Romans, 131 Ia. 427, 105 N. W. 102; Kinkead v. Peet (Ia.), 114 N. W. 616; Krebs v. Lanser, 133 Ia. 241, 110 N. W. 443 (that title was taken as security for money advanced to purchase the property); Leach v. Grube, 147 Mich. 348, 110 N. W. 1076; Harral v. Smith (Neb.), 112 N. W. 337; Kramer v. Wilson, 49 Or. 333, 90 P. 183. See Tappen v. Eshelman, 164 Ind. 338, 73 N. E. 688; Miller v. Miller. 101 Md. 600, 61 A. 210; Jennings v. Demmon, 194 Mass. 108, 80 N. E. 471.

Extrinsic evidence is proper to determine the extent, nature and terms of an obligation. Hurd v. Chase, 100 Me. 561, 62 A. 660.

That deed to wife through third person was intended to be a mortgage. But proof must be clear and convincing, in view of rule that conveyance from husband to wife, so far as not based on consideration, is presumed to be intended as a gift. Wilson v. Terry, 70 N. J. Eq. 231, 62 A. 310.

697-85 See McCusker v. Geiger, 195 Mass. 46, 80 N. E. 648.

700-89 Shreve v. McGowin, 143 Ala. 665, 42 S. 94; De Bartlett v. De Wilson, 52 Fla. 497, 42 S. 189. See Jennings v. Demmon, 194 Mass. 108, 80 N. E. 471.

700-90 Jennings v. Demmon, supra.

700-91 Belinski v. Brew. Co., 124 Ill. App. 45; Hubbard v. Cheney, 76 Kan. 222, 91 P. 793; Borders v. Allen (Ky.), 110 S. W. 240; Graham v. Fisher (Ky.), 110 S. W. 386; Stitt v. Co., 96 Minn. 27. 104 N. W. 561; Wagg v. Herbert (Okla.), 92 P. 250; Welborn v. Dixon, 70 S. C. 108, 49 S. E. 232; Bernardy v. Mortg. Co., 20 S. D. 193, 105 N. W. 737; Duerden v. Solomon, 33 Utah 468, 94 P. 978; Lynch v. Ryan, 132 Wis. 271, 111 N. W. 707; Smith v. Pfluger, 126 Wis. 253, 105 N. W. 476. See Shreve v. McGowin, 143 Ala. 665, 42 S. 94; De Bartlett v. De Wilson, 52 Fla. 497, 42 S. 189. *Contra,* Nevins v. Nevins, 117 App. Div. 236, 101 N. Y. S. 1091; Crockett v. Waller, 29 Ky. L. R. 1155, 96 S. W. 860 (in absence of allegation of fraud or mistake).

701-92 See Campbell v. S. & E. Co., 70 N. J. Eq. 40, 62 A. 319.

701-93 Dabney v. Smith, 38 Wash. 40, 80 P. 199.

702-98 Abrams v. Abrams, 74 Kan. 888, 88 P. 70.

703-1 See Gardner v. Welch (S. D.), 110 N. W. 110.

704-2 See Cady v. Burgess, 147 Mich. 523, 108 N. W. 414.

705-3 Wilson v. Terry (N. J.), 65 A. 983 (entries in diary).

705-8 Miller v. Harris, 117 App. Div. 395, 102 N. Y. S. 604.

706-11 Lemke v. Lemke (Neb.),

111 N. W. 138. See Smith v. Smith (Ala.), 45 S. 168; Samuelson v. Mickey, 73 Neb. 852, 103 N. W. 671.

708-13 See Moyr v. Dodson, 212 Pa. 344, 61 A. 937; McGaughey v. Bank, 41 Tex. Civ. 191, 92 S. W. 1003; Kane v. Quillan, 104 Va. 309, 51 S. E. 353.

711-24 See White v. Redenbaugh (Ind. App.), 82 N. E. 110.

714-39 Hays v. Emerson, 75 Ark. 551, 87 S. W. 1027; Belinski v. Co., 124 Ill. App. 45; Cady v. Burgess, 144 Mich. 523, 108 N. W. 414; Lowry v. Carter (Tex. Civ.), 102 S. W. 930; Irvin v. Johnson (Tex. Civ.), 98 S. W. 405; Johnson v. Scrimshire (Tex. Civ.), 93 S. W. 712; Goodbar & Co. v. Bloom (Tex. Civ.), 96 S. W. 657; Fridley v. Somerville, 60 W. Va. 272, 54 S. E. 502.

715-40 Harper v. Co. (Ala.), 43 S. 360; Reynolds v. Blanks, 78 Ark. 527, 94 S. W. 694; Renton v. Gibson, 148 Cal. 650, 84 P. 186; Rankin v. Rankin, 216 Ill. 132, 74 N. E. 763; Deadman v. Yantis, 230 Ill. 243, 82 N. E. 592; Hill v. Viele, 128 Ill. App. 5; Betts v. Betts, 132 Ia. 72, 106 N. W. 928; Stitt v. Lumb. Co., 96 Minn. 27, 104 N. W. 561; Wilson v. Terry, 70 N. J. Eq. 231, 62 A. 310; Hall v. O'Connell (Or.), 95 P. 717; Irvin v. Johnson (Tex. Civ.), 98 S. W. 405; Reynolds v. Reynolds, 42 Wash. 107, 84 P. 579; Way v. Mayhugh, 57 W. Va. 175; 50 S. E. 724. See Wadleigh v. Phelps, 149 Cal. 627, 87 P. 93.

718-41 Butsch v. Smith, 40 Colo. 64, 90 P. 61.

724-65 See Reynolds v. Reynolds, 42 Wash. 107, 84 P. 579.

728-93 Preston v. Albee, 120 App. Div. 89, 105 N. Y. S. 33. But see Stoddard v. Lyon, 18 S. D. 207, 99 N. W. 1116 (when execution of note is denied, possession by mortgagee is not sufficient proof of execution).

729-1 But see Preston v. Albee, supra (recording is presumptive evidence of delivery).

733-24 In foreclosure proceedings parol evidence is proper to show that mortgagee had agreed as part of consideration to pay a prior mortgagee. Barton v. Assn., 29 Ky. L. R. 330, 93 S. W. 9.

735-33 Openshaw v. Rickmeyer (Tex. Civ.), 102 S. W. 467.

736-40 See Huntington v. Knecland, 187 N. Y. 563, 80 N. E. 1111.

747-87 Ferguson v. Boyd (Ind.), 81 N. E. 71.

756-18 Brownell v. Oviatt, 215 Pa. 514, 64 A. 670; O'Hara v. Corr, 210 Pa. 341, 59 A. 1099.

762-42 Ward v. Ward, 144 Fed. 308.

764-52 See Bruce v. Wanzer, 18 S. D. 155, 99 N. W. 1102.

768-76 See Eakle v. Hagan, 101 Md. 22, 60 A. 615.

773-93 See Dawson v. Orange, 78 Conn. 96, 61 A. 101.

777-15 But see Windet v. Russell (Ala.), 43 S. 788.

777-16 See Higbee v. Daeley, 15 N. D. 339, 109 N. W. 318.

782-31 See Smith v. Kirkland, 89 Miss. 647, 42 S. 285.

782-36 Jobert v. Wagner, 147 Mich. 409, 110 N. W. 942. See Hewitt v. Price, 204 Mo. 31, 102 S. W. 647.

783-37 See Franklin v. Jameson, 15 N. D. 613, 109 N. W. 56.

MUNICIPAL CORPORATIONS

[Vol. 8.]

Irregularities in adoption of ordinance, 838-98; *Damages from change of grade — value of other abutting property,* 840-5; *Presumption as to settlement for grade changes,* 844-19; *Damages from change of grade — Burden of showing failure to comply with law,* 844-19.

802-3 Charter or certificate of incorporation best evidence. — Dick v. S. (Md.), 68 A. 286.

803-4 Board v. Berry (W. Va.), 59 S. E. 169.

804-8 But see Dick v. S., supra, holding that though character is best evidence secondary evidence of general reputation is admissible.

808-18 Town of Canton v. Madden, 120 Mo. App. 404, 96 S. W. 699; Sachs v. Lyons, 53 Misc. 640, 103 N. Y. S. 149; International etc. R. Co. v. Hall, 35 Tex. Civ. 545, 81 S. W. 82.

808-19 Town of Canton v. Madden, supra.

808-20 P. v. R. Co., 232 Ill. 292,

83 N. E. 839; Gage v. Wilmette, 229 Ill. 428, 82 N. E. 656; Schmidt v. Indianapolis, 168 Ind. 631, 80 N. E. 632; Cox v. Mignery, 126 Mo. App. 669, 105 S. W. 675.

809-21 P. v. R. Co., supra; Gage v. Wilmette, supra; Ringelstein v. Chicago, 128 Ill. App. 483; North Jersey R. Co. v. City (N. J.), 67 A. 1072.

809-22 Ringelstein v. Chicago, supra; Gage v. Wilmette, supra (clear and strong case must be shown); North Jersey R. Co. v. City, supra.

810-25 P. v. R. Co., 232 Ill. 292, 83 N. E. 839; Cox v. Mignery, 126 Mo. App. 669, 105 S. W. 675.

812-29 City of Rome v. Water Co., 113 App. Div. 547, 100 N. Y. S. 357.

813-31 Cox v. Mignery, supra.

817-43 City of Grafton v. R. Co. (N. D.), 113 N. W. 598.

818-45 City of Grafton v. R. Co., supra.

823-60 Illinois etc. R. Co. v. Kief, 111 Ill. App. 354.

824-65 Southern R. Co. v. Weatherlow (Ala.), 44 S. 1019; Chicago etc. R. Co. v. Wilson, 225 Ill. 50, 80 N. E. 56, *aff.* judgment 128 Ill. App. 88; Ft. Worth etc. R. Co. v. Hawes (Tex. Civ.), 107 S. W. 556. But see International etc. R. Co. v. Hall, 35 Tex. Civ. 545, 81 S. W. 82, holding that such book is not admissible unless proved to have been authorized by city council.

825-66 Southern R. Co. v. Weatherlow (Ala.), 44 S. 1019; Illinois etc. R. Co. v. Warriner, 132 Ill. App. 301; judgment *aff.* 229 Ill. 91, 82 N. E. 246. See Brighton v. Miles (Ala.), 44 S. 394; Illinois etc. R. Co. v. Minnihan, 129 Ill. App. 432 (pamphlet insufficient not purporting to have been published by authority).

825-67 **Under the Texas statute.** Texarkana etc. R. Co. v. Frugia (Tex. Civ.), 95 S. W. 563. See also City of H. v. Stewart, 40 Tex. Civ. 499, 90 S. W. 49.

828-74 See Mendel v. Dist., 121 Wis. 80, 98 N. W. 932.

829-75 See Mendel v. Dist., supra. *Compare* Mitchiner v. Tel. Co., 70 S. C. 522, 50 S. E. 190, holding that where the existence of a quarantine is in question, testimony is admissible to prove the same without introducing the ordinance authorizing it.

831-81 Kidson v. Bangor, 99 Me. 139, 58 A. 900.

837-97 Cox v. Mignery, 126 Mo. App. 669, 105 S. W. 675.

838-98 **Irregularities in adoption of ordinance.** — Where the journal contains irregularities with respect to the mode, manner and time of the adoption of ordinances, parol evidence is admissible to aid the same. Chicago etc. R. Co. v. Wilson, 128 Ill. App. 88, judgment *aff.* 225 Ill. 50, 80 N. E. 56.

840-5 Town of Eutaw v. Botnick (Ala.), 43 S. 739 (evidence of value immediately after). But see Richardson v. City (Ia.), 113 N. W. 928.

Damages from change of grade, value of other abutting property before and since change may be shown. Mayor v. Tower (Ga.), 59 S. E. 434.

841-9 Richardson v. City (Ia.), 113 N. W. 928.

Cost of filling. — Mayor etc. v. Daley, 2 Ga. App. 355, 58 S. E. 540.

Cost of wall. — Town of Eutaw v. Botnick (Ala.), 43 S. 739; Richardson v. City (Ia.), 113 N. W. 928.

843-13 See Town of Eutaw v. Botnick, supra.

843-14 Mayer etc. v. Tower (Ga.), 59 S. E. 434, *cit.* Hurt v. Atlanta, 100 Ga. 274, 28 S. E. 65.

844-15 Mayor etc. v. Tower, supra; Richardson v. City (Ia.), 113 N. W. 928.

844-19 **Damages from change of grade.** — Burden of showing failure to comply with law is upon plaintiff alleging damages because of change of grade. Bernstein v. Mt. Vernon, 109 App. Div. 899, 96 N. Y. S. 458.

NEGLIGENCE [Vol. 8.]

Burden of proving contributory negligence when shown by plaintiff's pleadings, 858-13; *Violation of ordinance,* 870-47.

851-1 Wood v. R. Co., 5 Penne. (Del.) 369. 64 A. 246; Pittsburg etc.

R. Co. v. Simons (Ind. App.), 76 N. E. 883; Cincinnati etc. R. Co. v. Zachary, 32 Ky. L. R. 678, 106 S. W. 842; Kearns v. R. Co., 139 N. C. 470, 52 S. E. 131; Byrd v. Exp. Co., 139 N. C. 273, 51 S. E. 851; Brewster v. City, 142 N. C. 9, 54 S. E. 784; Ahern v. Melvin, 21 Pa. Super. 462; Missouri etc. R. Co. v. Greenwood, 40 Tex. Civ. 252, 89 S. W. 810. See Scott v. D. C., 27 App. D. C. 413.

851-2 Wistrom v. Redlick, 6 Cal. App. 671, 92 P. 1048; Wood v. R. Co., 5 Penne. (Del.) 369, 64 A. 246; Scott v. D. C., supra; Pittsburg etc. R. Co. v. Simons (Ind. App.), 76 N. E. 883; Missouri etc. R. Co. v. Greenwood, supra.

852-4 Swift & Co. v. O'Brien, 127 Ill. App. 26.

852-5 Leonard v. Min. Co., 148 Fed. 827, 78 C. C. A. 517; Waters-P. Oil Co. v. Kinsel, 79 Ark. 608, 96 S. W. 342; MacFeat v. R. Co., 5 Penne. (Del.) 52, 62 A. 898 (death by being struck by train while awaiting transportation at a station); Graboski v. Leather Co. (Del.), 64 A. 74; Garrett v. R. Co. (Del.), 64 A. 254; Robinson v. Huber (Del.), 63 A. 873; Hannigan v. Wright, 5 Penne. (Del.) 537, 63 A. 234; Little v. Tel. Co. (Del.), 67 A. 169; Talmadge v. R. Co., 125 Ga. 400, 54 S. E. 128; Fletcher v. Kelly, 37 Ind. App. 254, 76 N. E. 813; Diamond etc. Coal Co. v. Cuthbertson, 166 Ind. 290, 76 N. E. 1060; Siemonsma v. R. Co. (Ia.), 115 N. W. 230; Harris v. Lumb. Co., 115 La. 973, 40 S. 374; Allen v. Bainbridge, 145 Mich. 366, 108 N. W. 732 (damages from fire set on adjoining premises); Powers v. R. Co., 143 Mich. 379, 106 N. W. 1117; McGrath v. Transit Co., 197 Mo. 97, 94 S. W. 872; Lovell v. R. Co., 121 Mo. App. 466, 97 S. W. 193; Candle v. Kirkbridge, 117 Mo. App. 412, 93 S. W. 868; Luecke v. Graham, 123 Mo. App. 212, 100 S. W. 505; Lincoln Tract. Co. v. Shepherd, 74 Neb. 369, 104 N. W. 882, 107 N. W. 764; Wright v. R. Co., 74 N. H. 128, 65 A. 687; Cunningham v. Dady, 191 N. Y. 152, 83 N. E. 689; Lane v. Contract. Co., 110 N. Y. S. 91; Morhard v. R. Co., 111 App. Div. 353, 98 N. Y. S. 124; Phillips v. Tract. Co., 8 Pa. Super. 210; Jones Bros. v. R. Co., 9 Pa. Super. 65; Allen v. Warwick, 9 Pa. Super. 507; Beaty v. R. Co. (Tex. Civ.), 91 S. W. 365; Smith v. R. Co., 33 Utah 129, 93 P. 185.

854-7 Armour v. Carlas, 142 Fed. 721, 74 C. C. A. 53; Missouri etc. R. Co. v. Wilhoit, 160 Fed. 440; Choctaw etc. R. Co. v. Donghty, 77 Ark. 1, 91 S. W. 768; Little Rock etc. Co. v. Doyle, 79 Ark. 378, 96 S. W. 353; Wistrom v. Redlick (Cal. App.), 92 P. 1048; MacFeat v. R. Co., 5 Penne. (Del.) 52, 62 A. 898; City of Indianapolis v. Mullally, 38 Ind. App. 125, 77 N. E. 1132; Wamsley v. R. Co. (Ind. App.), 82 N. E. 490; Stephens v. Car Co., 38 Ind. App. 414, 78 N. E. 335; Louisville Tract. Co. v. Short (Ind. App.), 83 N. E. 265; Fletcher v. Kelly, 37 Ind. App. 254, 76 N. E. 813; Roberts v. Elec. Co., 37 Ind. App. 664, 76 N. E. 323; New Castle Bridge Co. v. Doty, 37 Ind. App. 84, 76 N. E. 557; City of Indianapolis v. Keeley, 167 Ind. 516, 79 N. E. 499; Mississippi Cent. R. Co. v. Hardy, 88 Miss. 732, 41 S. 505; Underwood v. R. Co., 125 Mo. App. 490, 102 S. W. 1045; Stotter v. R. Co., 200 Mo. 107, 98 S. W. 509; Von Trebra v. Gaslight Co., 209 Mo. 648, 108 S. W. 559; Lattimore v. Power Co., 128 Mo. App. 37, 106 S. W. 543; Harrington v. R. Co. (Mont.), 95 P. 8; Nord v. Min. Co., 33 Mont. 464, 84 P. 1116; Birsch v. Elec. Co., 36 Mont. 574, 93 P. 940; Vertrees v. County (Neb.), 115 N. W. 863; Stewart v. R. Co., 141 N. C. 253, 53 S. E. 877; Goforth v. R. Co., 144 N. C. 569, 57 S. E. 209; Jackson K. & S. Co. v. Hathaway, 7 Ohio C. C. (N. S.), 242; Jackson v. R. Co. (Or.), 93 P. 356; Phillips v. Tract. Co., 8 Pa. Super. 210; Houston etc. R. Co. v. Anglin, 99 Tex. 349, 89 S. W. 966; Texas etc. R. Co. v. Conway (Tex. Civ.), 98 S. W. 1070; Houston etc. R. Co. v. Anglin (Tex. Civ.), 99 S. W. 897; Beaty v. R. Co. (Tex. Civ.), 91 S. W. 365; Houston etc. R. Co. v. Davenport (Tex. Civ.), 110 S. W. 150; Galveston etc. R. Co. v. Conuteson (Tex. Civ.), 111 S. W. 187; Smith v. R. Co., 33 Utah 129, 93 P. 185; Hickey v. R. Co., 29 Utah 392, 82 P. 29; Norman v. Bellingham, 46 Wash. 205, 89 P. 559. See Lewin v. Pauli, 19 Pa. Super. 447.

858-13 But where plaintiff's pleadings or evidence show prima facie negligence on his part, he has the burden of meeting this prima facie case. Galveston etc. R. Co. v. Conuteson, supra; Cahill v. Stone & Co. (Cal.), 96 P. 84; Harrington v. R. Co. (Mont.), 95 P. 8; Jackson v. R. Co. (Or.), 93 P. 356; Nord v. Min. Co., 33 Mont. 464, 84 P. 1116. *Contra*, Choctaw etc. R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768; Cahill v. Stone & Co., supra; Harrington v. R. Co., supra; Jackson v. R. Co., supra; Missouri etc. R. Co. v. Plunkett (Tex. Civ.), 103 S. W. 663; Texas etc. R. Co. v. Conway (Tex. Civ.), 98 S. W. 1070; Galveston etc. R. Co. v. Conuteson (Tex. Civ.), 111 S. W. 187; Houston etc. R. Co. v. Davenport (Tex. Civ.), 110 S. W. 150. And see Pereira v. Sand Co. (Or.), 94 P. 835; Allen v. Warrick, 9 Pa. Super. 507; Lewin v. Pauli, 19 Pa. Super. 447; Smith v. R. Co., 33 Utah 129, 93 P. 185.

859-16 Baltimore etc. R. Co. v. Ayers, 119 Ill. App. 108; Calloway v. Pack. Co., 129 Ia. 1, 104 N. W. 721; Buchholtz v. Radcliffe, 129 Ia. 27, 105 N. W. 336; Cahill v. R. Co. (Ia.), 115 N. W. 216; Wright v. R. Co., 74 N. H. 128, 65 A. 687; Lane v. Contract. Co., 110 N. Y. S. 91; Meaney v. Horowitz, 115 App. Div. 572, 100 N. Y. S. 975; Axelrod v. R. Co., 109 App. Div. 87, 95 N. Y. S. 1072; Baxter v. R. Co., 190 N. Y. 439, 83 N. E. 469.

864-34 Freedom from contributory negligence. — Action by personal representative — less evidence required than in the case of a living person. Axelrod v. R. Co., supra.

866-36 Negligence. — Kearns v. R. Co., 139 N. C. 470, 52 S. E. 131; Woods v. R. Co., 104 Va. 650, 52 S. E. 371.

Contributory negligence. — Wistrom v. Redlick, 6 Cal. App. 671, 92 P. 1048; Cartlich v. R. Co., 129 Mo. App. 721, 108 S. W. 584; El Paso etc. R. Co. v. Kitt (Tex. Civ.), 90 S. W. 678.

867-38 Kearns v. R. Co., 139 N. C. 470, 52 S. E. 131; Byrd v. Exp. Co., 139 N. C. 273, 51 S. E. 851.

867-39 Due care presumed. Grimm v. Power Co. (Neb.), 114 N. W. 769.

867-41 Logue v. R. Co., 102 Me. 34, 65 A. 522; Cunningham v. Dady, 191 N. Y. 152, 83 N. E. 689; Kennedy v. Williamsport, 11 Pa. Super. 91.

868-42 The Quebec etc. R. Co. v. Julien, 37 Can. Sup. 632; North Jersey St. R. Co. v. Purdy, 142 Fed. 955, 74 C. C. A. 125; Wood v. R. Co., 5 Penne. (Del.) 369, 64 A. 246; Everett v. Foley, 132 Ill. App. 438; Brown v. Ice Co. (Mo. App.), 109 S. W. 1032; Elliott v. R. Co., 111 N. Y. S. 358; Martin v. McCrary, 115 Tenn. 316, 89 S. W. 324.

Burden of proof strictly speaking not changed. — "Res ipsa loquitur" does not dispense with the rule that he who alleges negligence must prove it. It is simply a mode of proving negligence, and does not change burden of proof. Cunningham v. Dady, 191 N. Y. 152, 83 N. E. 689; Lyles v. Carbonating Co., 140 N. C. 25, 52 S. E. 233; Ross v. Mills, 140 N. C. 115, 52 S. E. 121; Everett v. Foley, 132 Ill. App. 438. See Brown v. Ice Co. (Mo. App.), 109 S. W. 1032.

869-44 Haigh v. Elevator Co., 123 App. Div. 376, 107 N. Y. S. 936.

869-45 Minahan v. R. Co., 138 Fed. 37, 70 C. C. A. 463; Cincinnati etc. R. Co. v. Coal Co., 139 Fed. 528, 71 C. C. A. 316; Leonard v. Min. Co., 148 Fed. 827, 78 C. C. A. 517; Wood v. R. Co., 5 Penne. (Del.) 369, 64 A. 246; Garrett v. R. Co. (Del.), 64 A. 254; Robinson v. Huber (Del.), 63 A. 873; Little v. Tel. Co. (Del.), 67 A. 169; Rush v. Murphy Co., 135 Ia. 376, 112 N. W. 814; Frederickson v. Towboat Co., 101 Me. 406, 64 A. 666; Renders v. R. Co., 144 Mich. 387, 108 N. W. 368; Meaney v. Horowitz, 115 App. Div. 572, 100 N. Y. S. 975; Isley v. Bridge Co., 141 N. C. 220, 53 S. E. 841; Kissock v. Tract. Co., 15 Pa. Super. 103; Connolly v. League (Pa.), 69 A. 1125; Southern R. Co. v. Moore (Va.), 61 S. E. 747. See McCormick etc. Co. v. Gabris, 130 Ill. App. 624; Jones v. Levy, 50 Misc. 624, 98 N. Y. S. 206.

870-47 Von Trebra v. Gaslight Co., 209 Mo. 648, 108 S. W. 559; Lincoln Tract. Co. v. Shepherd, 74 Neb. 369, 374, 107 N. W. 764. See Canadian P. R. Co. v. Boisseau, 32 Can. Sup. 424.

Failure to keep lookout. — Colorado etc. R. Co. v. Charles, 36 Colo. 221, 84 P. 67.

Violation of ordinance. — The violation of a duty of care imposed by a valid ordinance constitutes rebuttable evidence of negligence. Shellaberger v. Fisher, 143 Fed. 937, 75 C. C. A. 9; Chicago etc. R. Co. v. Freeman, 125 Ill. App. 318.

871-48 Wood v. R. Co., 5 Penne. (Del.) 369, 64 A. 246; Adams v. Hospital, 122 Mo. App. 675, 99 S. W. 453; Eaton v. R. Co., 109 N. Y. S. 419.

872-49 Cunningham v. Dady, 191 N. Y. 152, 83 N. E. 689.

872-50 Bowley v. Mangruin, 3 Cal. App. 229, 84 P. 996; Sauer v. Brew. Co., 3 Cal. App. 127, 84 P. 425; Independent Brew. Assn. v. Schaller, 128 Ill. App. 533; Illinois S. Co. v. Zalnowski, 118 Ill. App. 209; Luecke v. Graham, 123 Mo. App. 212, 100 S. W. 505; Peters v. Light Co. (Va.), 61 S. E. 745; Bice v. Elec. Co. (W. Va.), 59 S. E. 626. See Quincy Gas etc. Co. v. Schmitt, 123 Ill. App. 647; Louisville Co. v. Owens, 32 Ky. L. R. 283, 105 S. W. 435; Todd v. R. Co., 126 Mo. App. 684, 105 S. W. 671; McGowan v. Nelson, 36 Mont. 67, 92 P. 40.

874-53 Peters v. Light Co. (Va.), 61 S. E. 745. See Illinois S. Co. v. Zolnowski, 118 Ill. App. 209.

874-54 Sauer v. Brew. Co., 3 Cal. App. 127, 84 P. 425 (two travelers upon a highway); McGrath v. Transit Co., 197 Mo. 97, 94 S. W. 872; Crane v. Miller, 108 N. Y. S. 1015; Robinson v. Subway Co., 53 Misc. 593, 103 N. Y. S. 717. See Laurence v. Elevator Co., 55 Misc. 257, 105 N. Y. S. 360.

878-64 See Peters v. Light Co., supra.

879-65 North Jersey etc. R. Co. v. Purdy, 142 Fed. 955, 74 C. C. A. 125; Field v. Winheim, 123 Ill. App. 227; Duhme v. Packet Co., 107 App. Div. 237, 94 N. Y. S. 1102.

Where train is derailed. — Western Md. R. Co. v. Shivers, 101 Md. 391, 61 A. 618. See Quebec etc. R. Co. v. Julien, 37 Can. Sup. 632; Minahan v. R. Co., 138 Fed. 37, 70 C. C. A. 463.

Sudden stoppage of car producing personal injury. — Todd v. R. Co., 126 Mo. App. 684, 105 S. W. 671.

Elevator falling. — Field v. Winheim, 123 Ill. App. 227; Edwards v. Bldg. Co., 27 R. I. 248, 61 A. 646.

883-72 Maxim inapplicable. — Isley v. Bridge Co., 141 N. C. 220, 53 S. E. 841 (fall of iron from trolley in a mill by reason of breakage of chain).

884-73 Cincinnati etc. R. Co. v. Coal Co., 139 Fed. 528, 71 C. C. A. 316; St. Louis etc. R. Co. v. Dawson, 77 Ark. 434, 92 S. W. 27; Talmadge v. R. Co., 125 Ga. 400, 54 S. E. 128; Martin v. McCrary, 115 Tenn. 316, 89 S. W. 324.

885-75 Presumption of negligence arises from other fire. — See Sampson v. Hughes, 147 Cal. 62, 81 P. 292.

No presumption of negligence arises from fire. — Ulrich v. Stephens (Wash.), 93 P. 206.

886-76 Gurdon etc. R. Co. v. Calhoun (Ark.), 109 S. W. 1017; Papazian v. Baumgartner, 49 Misc. 244, 97 N. Y. S. 399; McNulty v. Ludwig, 109 N. Y. S. 703 (fall of sign overhanging sidewalk); Higgins v. Ruppert, 108 N. Y. S. 919 (falling of merchandise consisting of bundle of steel rods upon customer in a store); Anderson v. Drygoods Co. (Wash.), 95 P. 325 (basket from overhead carrier system in store falls on customer).

Caving in of improperly filled trench. — Cunningham v. Dady, 119 App. Div. 89, 103 N. Y. S. 852.

887-78 Scharff v. Const. Co., 115 Mo. App. 157, 92 S. W. 126; Lubelsky v. Silverman, 49 Misc. 133, 96 N. Y. S. 1056.

888-83 Fitzgerald v. Goldstein, 56 Misc. 677, 107 N. Y. S. 614; Elliott v. R. Co., 111 N. Y. S. 358.

Where specific negligence is alleged, the rule of res ipsa loquitur is inapplicable. Tighe v. R. Co. (Mo. App.), 107 S. W. 1034; Kennedy v. R. Co., 128 Mo. App. 297, 107 S. W. 16; McGrath v. Transit Co., 197 Mo. 97, 94 S. W. 872; Todd v. R. Co., 126 Mo. App. 684, 105 S. W. 671.

889-87 Doctrine not applicable in case of trespasser or mere licensee. McLain v. R. Co., 121 Ill. App. 614.

890-89 Cryden v. R. Co., 152 Fed. 417; Lane v. Contract. Co., 110 N. Y. S. 91.

896-6 Norris v. Anthony, 193 Mass. 225, 79 N. E. 258; Harrington v. R. Co. (Mont.), 95 P. 8 (*cit.* cases pro and con).
897-10 City of Indianapolis v. Keeley, 167 Ind. 516, 79 N. E. 499. *Compare* Harrington v. R. Co., supra.
898-11 But see Stotler v. R. Co., 200 Mo. 107, 98 S. W. 509, citing many cases and holding that where a plaintiff was left by her injuries as though dead and had no knowledge of the affair she was entitled to the presumption of due care arising from the instinct of love of life.
898-12 A. M. Rothschild & Co. v. Levy, 118 Ill. App. 78.
898-13 Rollins v. R. Co., 139 Fed. 639, 71 C. C. A. 615; C. & E. etc. R. Co. v. Heerey, 203 Ill. 492, 68 N. E. 74; Elgin etc. R. Co. v. Hoadley, 122 Ill. App. 165; Ellis v. Oil Co., 133 Ia. 11, 110 N. W. 20; Grimm v. Power Co. (Neb.), 114 N. W. 769; Stewart v. R. Co., 141 N. C. 253, 53 S. E. 877.
Presumption does not relieve plaintiff of proof of negligence on defendant's part or that the injury in question was caused by such negligence. Powers v. R. Co., 143 Mich. 379, 106 N. W. 1117.
899-15 Cahill v. Stone & Co. (Cal.), 96 P. 84; Wilkinson v. Coke Co. (W. Va.), 61 S. E. 875 (infant over age of 14 presumed to be sensible of danger and to have power to avoid it). *Compare* Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583 (holding that a child under seven years of age is incapable of contributory negligence); Chicago etc. R. Co. v. Freeman, 125 Ill. App. 318 (holding that a child between the age of five and six years cannot be guilty of contributory negligence); Tucker v. Mills, 76 S. C. 539, 57 S. E. 626 (holding that an infant between the age of seven and fourteen years is presumed incapable of committing contributory negligence).
900-17 Dormer v. Pav. Co., 16 Pa. Super. 407.
901-20 Schaller v. Assn., 225 Ill. 492, 80 N. E. 334; Nigro v. Willson, 50 Misc. 656, 99 N. Y. S. 344.
903-26 Elgin etc. R. Co. v. Hoadley, 220 Ill. 462, 77 N. E. 151.
904-28 Baxter v. R. Co., 190 N. Y. 439, 83 N. E. 469 (in an action for wrongful death, freedom from contributory negligence may be shown by circumstantial evidence).
904-29 Elgin etc. R. Co. v. Hoadley, supra.
905-35 Odegard v. Lumb. Co., 130 Wis. 659, 110 N. W. 809.
907-37 McClosky v. Borough, 4 Pa. Super, 181.
907-39 Funston v. Hoffman, 232 Ill. 360, 83 N. E. 917.
912-57 Gray v. Siegel-C. Co., 187 N. Y. 376, 80 N. E. 201.
913-61 Gray v. Siegel-C. Co., supra.
913-62 See also Brunger v. Paper Co., 6 Cal. App. 691, 92 P. 1043.
914-67 Davidson v. U. S., 142 Fed. 315, 73 C. C. A. 425; Lake v. Furnace Co., 160 Fed. 887; Ft. Smith L. & T. Co. v. Soard, 79 Ark. 388, 96 S. W. 121; St. Louis etc. R. Co. v. Plumlee, 78 Ark. 147, 95 S. W. 442; Diamond R. Co. v. Harryman, 41 Colo. 415, 92 P. 922; Scott v. Dist., 27 App. D. C. 413; City of Aurora v. Plummer, 122 Ill. App. 143; Louisville etc. R. Co. v. Morton, 28 Ky. L. R. 355, 89 S. W. 243; Ziehm v. Power Co., 104 Md. 48, 64 A. 61; Beverly v. R. Co., 194 Mass. 450, 80 N. E. 507 (inadmissible to show defective condition, but admissible to show that improvements were practically possible); Pribbeno v. R. Co. (Neb.), 116 N. W. 494; Matteson v. R. Co., 218 Pa. 527, 67 A. 847; Fick v. Jackson, 3 Pa. Super. 378; McKenzie v. Boutwell, 79 Vt. 383, 65 A. 99. But see Brunger v. Paper Co., 6 Cal. App. 691, 92 P. 1043.
929-18 Glassman v. Surpless, 53 Misc. 586, 103 N. Y. S. 789.
930-27 Diamond R. Co. v. Harryman (Colo.), 92 P. 922; Chicago etc. R. Co. v. Johnson, 128 Ill. App. 20.
932-30 See Union Tract. Co. v. Sullivan, 38 Ind. App. 513, 76 N. E. 116.
933-33 See Hayes v. Brandt, 80 Ark. 592, 98 S. W. 368.
936-43 Pribbeno v. R. Co. (Neb.), 116 N. W. 494; Fick v. Jackson, 3 Pa. Super. 378.
937-47 Spencer v. Bruner, 126 Mo. App. 94, 103 S. W. 578; Obermeyer v. Mfg. Co., 120 Mo. App.

59, 96 S. W. 673 (expert testimony). *Compare* Ziehm v. Power Co., 104 Md. 48, 64 A. 61 (an action for injuries by reason of defectively insulated wire, holding that a refusal to admit evidence as to insulation of wires used by others was correct, no proper fonndation having been laid). See Randall v. Ahearn, 34 Can. Sup. 698.

939-60 Bresee v. Tract. Co., 149 Cal. 131, 85 P. 152; Pullman Co. v. Schaffner, 126 Ga. 609, 55 S. E. 933; Calcaterra v. Iovaldi, 123 Mo. App. 347, 100 S. W. 675 (inadmissible although a defense was that the act in question was an accident, the court doubting correctness of rule). See Damren v. Trask, 102 Me. 39, 65 A. 513.

945-88 Bresee v. Tract. Co., supra.

947-3 The Elgin etc. R. Co. v. Brown, 129 Ill. App. 62.

948-9 Warren v. Porter, 144 Mich. 699, 108 N. W. 435.

949-21 Lake v. Furnace Co., 160 Fed. 887; Chicago etc. R. Co. v. Egan, 159 Fed. 40; National B. Co. v. Wilson (Ind. App.), 78 N. E. 251 (usuage of others not the sole criterion).

951-32 Standard Oil Co. v. Parrish, 145 Fed. 829, 76 C. C. A. 405; Chicago etc. R. Co. v. Sugar, 117 Ill. App. 578.

953-37 Inadmissible when foreign to issue. — Wabash R. Co. v. Keeler, 127 Ill. App. 265; City of Gibson v. Murray, 120 Ill. App. 296.

954-40 Payne v. Cleveland, 4 Ohio C. C. (N. S.) 37.

954-44 Closser v. Washington, 11 Pa. Super. 112 (where plans and photographs were in evidence).

955-45 Garberg v. Samuels, 27 R. I. 359, 62 A. 211.

955-46 Whalen v. Rosnosky, 195 Mass. 545, 81 N. E. 282; Lewes v. Crane, 78 Vt. 216, 62 A. 60.

955-47 Hamner v. Janowitz, 131 Ia. 20, 108 N. W. 109; Erickson v. Steel & W. Co., 193 Mass. 119, 78 N. E. 761; Wofford v. Mills, 72 S. C. 346, 51 S. E. 918. See McGinnis v. Prtg. Co., 122 Mo. App. 227, 99 S. W. 4.

955-48 Due diligence of carrier in tracing lost goods, opinion of witnesses incompetent. Burress v. R. Co. (S. C.), 60 S. E. 692; Moody v. R. Co. (S. C.), 60 S. E. 711.

NEW PROMISE [Vol. 8.]

Sufficiency of evidence, 959-10.

957-1 Aebi v. Bank, 123 Wis. 73, 102 N. W. 329 (signing duplicate check does not waive laches in presenting original). See Steger v. Jackson, 31 Ky. L. R. 434, 102 S. W. 329.

958-2 Davis v. Davis, 98 Me. 135, 56 A. 588.

959-9 Nathan v. Leland, 193 Mass. 576, 79 N. E. 793 (letter stating the promise, sufficient); Mandell v. Levy, 47 Misc. 147, 93 N. Y. S. 545 (recognition of a moral duty to pay evidenced by letter, insufficient; there must be a clear intention to pay); Meyer v. Bartels, 56 Misc. 621, 107 N. Y. S. 778 (part payment of the debt does not renew obligation to pay balance due).

959-10 Sufficiency of evidence. A new promise must be clear, unequivocal, and without qualification or condition. Torrey v. Kraus (Ala.), 43 S. 184; Moore v. Trounstine, 126 Ga. 116, 54 S. E. 810 (letter insufficient); Mordaunt v. Monroe, 124 Ill. App. 306; Stern v. Bradner-S. Co., 225 Ill. 430, 80 N. E. 307; Brooks v. Paine, 25 Ky. L. R. 1125, 77 S. W. 190; Sundling v. Willey, 19 S. D. 293, 103 N. W. 38 (promise to pay as soon as possible is not conditional).

NEW TRIAL [Vol. 8.]

Newly obtained evidence, 992-75.

964-6 McMahon v. Ice Co. (Ia.), 114 N. W. 203 (to show that evidence was not considered); Green v. Assn. (Mo.), 109 S. W. 715; Lee v. R. I. Co. (R. I.), 66 A. 835; G. H. & S. A. R. Co. v. Roberts (Tex. Civ.), 91 S. W 375; Marcy v. Parker, 78 Vt. 73, 62 A. 19; Pickens v. Lumb. Co., 58 W. Va. 11, 50 S. E. 872.

967-9 Jones v. R. Co., 32 Ky. L. R. 1371, 108 S. W. 865; Flynt v. Taylor (Tex. Civ.), 91 S. W. 864.

967-10 City of Battle Creek v. Haak, 139 Mich 514, 102 N. W. 1005; Ewing v. Lunn (S. D.), 115 N. W. 527 (to show juror was intoxicated). *Contra,* Foley v. Northrup (Tex. Civ.), 105 S. W. 229 (statutes provide that the court may hear the evidence of jurors in open court, in support of a motion for a new trial, for the misconduct of the jury).
968-11 *Contra,* King v. Elton, 2 Cal. App. 145, 83 P. 261.
969-14 But see Hoyt v. Hoyt (Ia.), 115 N. W. 222.
970-17 Hoyt v. Hoyt, supra (influence of another jury).
975-29 Birmingham R. & E. Co. v. Mason, 144 Ala. 387, 39 S. 590; Birmingham R. L. & P. Co. v. Clemons, 142 Ala. 160, 37 S. 925; Strand v. Garage Co. (Ia.), 113 N. W. 488; Goodwin v. Blanchard, 73 N. H. 550, 64 A. 22.
978-36 Callahan v. R. Co., 158 Fed. 988.
979-40 Dralle v. Reedsburg (Wis.), 115 N. W. 819 (that they were informed of foreman's communication with the judge out of court).
980-44 P. v. Feld, 149 Cal. 464, 86 P. 1100.
981-46 Alabama Lumb. Co. v. Cross (Ala.), 44 S. 563 (intoxicated juror); Camak v. Brooks (Ga.), 60 S. E. 456; Grantz v. Deadwood, 20 S. D. 495, 107 N. W. 832.
982-47 Austin v. Smith (Ia.), 109 N. W. 289.
983-49 Callahan v. R. Co., 158 Fed. 988; Merritt v. Bunting, 107 Va. 174, 57 S. E. 567.
983-50 Scott v. Tubbs (Colo.), 95 P. 540.
983-51 Midgley v. Bergerman, 30 Utah 17, 83 P. 466.
984-53 Birmingham etc. Co. v. Turner (Ala.), 45 S. 671; Piercy v. Piercy, 149 Cal. 163, 86 P. 507 (misconduct of plaintiff); Hoyt v. Hoyt (Ia.), 115 N. W. 222; Pace v. City (Ia.), 115 N. W. 888; Ayrhart v. Wilhelmy, 135 Ia. 290, 112 N. W. 782; Phares v. Krhut, 76 Kan. 238, 91 P. 52 (misconduct of party in selecting the jury); Fields v. Dewitt, 71 Kan. 676, 81 P. 467 (reading newspaper account of trial not misconduct for which a new trial should be granted); Shepard v. R. Co., 101 Me. 591, 65 A. 20 (bias of jurors must be shown; it cannot be inferred from surrounding circumstances); Goss v. Goss, 102 Minn. 346, 113 N. W. 690; Balder v. Furnace Co. (Minn.), 114 N. W. 948; Jung v. Brewing Co., 95 Minn. 367, 104 N. W. 233; Green v. R. Assn. (Mo.), 109 S. W. 715; St. Louis B. & T. Co. v. Cartan Co., 204 Mo. 565, 103 S. W. 519; Hoskovec v. R. Co. (Neb.), 115 N. W. 312 (consideration of extrinsic evidence is misconduct); Douglas v. Smith, 75 Neb. 169, 106 N. W. 173; Wessel v. Bishop, 76 Neb. 74, 107 N. W. 220 (indiscretion of a juror, insufficient to avoid verdict); Root v. Coyle, 15 Okla. 574, 82 P. 648; City of Lawton v. McAdams, 15 Okla. 412, 83 P. 429; Easterly v. Gater, 17 Okla. 93, 87 P. 853; McGill Bros. v. Air Line Co., 75 S. C. 177, 55 S. E. 216 (claim agent's entertainment of juror during and after trial is sufficient ground for a new trial); Missouri etc. R. Co. v. Hawkins (Tex. Civ.), 109 S. W. 221; Beaumont Tract. Co. v. Dilworth (Tex. Civ.), 94 S. W. 352 (misconduct of counsel in argument to jury).
986-56 Blair v. Paterson (Mo. App.), 110 S. W. 615 (juror over age limit accepted without objection); Rapp v. Becker, 4 Ohio C. C. (N. S.) 139; Blassingame v. Laurens (S. C.), 61 S. E. 96; Heasley v. Nichols, 38 Wash. 485, 80 P. 769 (a party waives nothing by accepting a juror that conceals his unfitness). But see Atlantic etc. R. Co. v. Bunn, 2 Ga. App. 305, 58 S. E. 538.
986-60 Soper v. Crutcher, 29 Ky. L. R. 1080, 96 S. W. 907; Gibney v. Transit Co., 204 Mo. 704, 103 S. W. 43 (juror was one of defendant's striking employes); Sansouver v. Dye Wks. (R. I.), 68 A. 545; Senterfeit v. Shealey, 71 S. C. 259, 51 S. E. 142 (relationship of juror to a party, which is unknown to juror at the time of examination is not sufficient ground for a new trial).
988-64 Hill v. Ellinghouse (Mont.), 93 P. 345.
989-65 St. Louis etc. R. Co. v. Block, 79 Ark. 179, 95 S. W. 155; Hall v. Jensen (Idaho), 93 P. 962;

O'Neil v. Lindsey, 41 Wash. 649, 84 P. 603.

990-69 Southern R. Co. v. Dickens (Ala.), 43 S. 121 (failure of justice to certify the whole record to appellate court whereby the plaintiff was misled); Plumlee v. R. Co., 85 Ark. 488, 109 S. W. 515; Le Tourneux v. Gilliss, 1 Cal. App. 546, 82 P. 627; Todd v. Banning, 118 Ill. App. 676; Blair v. Blair, 125 Ill. App. 341; Oglebay v. Trust Co. (Ind. App.), 82 N. E. 494; Manion v. R. Co. (Ind. App.), 80 N. E. 166; Renshaw v. Dignan, 128 Ia. 722, 105 N. W. 209; Patton v. Sanborn, 133 Ia. 650, 110 N. W. 1032; Jones v. R. Co., 32 Ky. L. R. 1371, 108 S. W. 865; Ray v. Arnett, 32 Ky. L. R. 562, 106 S. W. 828; Strand v. R. Co., 101 Minn. 85, 112 N. W. 987, 111 N. W. 958; Village of Pillager v. Hewitt, 98 Minn. 265, 107 N. W. 815; O'Neil v. Printz, 115 Mo. App. 215, 91 S. W. 174; Hill v. Ellinghouse (Mont.), 93 P. 345; Pennington Bk. v. Bauman (Neb.), 116 N. W. 669; Hapgoods v. Lusch, 123 App. Div. 27, 107 N. Y. S. 334; Roenbeck v. R. Co., 123 App. Div. 606, 108 N. Y. S. 80; Gulf etc. R. Co. v. Hays, 40 Tex. Civ. 162, 89 S. W. 29; Flynt v. Taylor (Tex. Civ.), 91 S. W. 864; Daugherty v. Templeton (Tex. Civ.), 110 S. W. 553; Massucco v. Tomassi, 78 Vt. 188, 62 A. 57 (sickness and death considered accidental causes); Clemans v. Western, 39 Wash. 290, 81 P. 824; Woods v. Nav. Co., 40 Wash. 376, 82 P. 401; Harden v. Card, 15 Wyo. 217, 88 P. 217.

991-71 Wells v. Gallagher, 144 Ala. 363, 39 S. 747; Rauer v. Bradbury, 3 Cal. App. 256, 84 P. 1007; Campbell v. Campbell, 129 Ia. 317, 105 N. W. 583.

991-72 Soper v. Crutcher, 29 Ky. L. R. 1080, 96 S. W. 907; Emmet v. Perry, 100 Me. 139, 60 A. 872; Houston L. P. Co. v. Hooper (Tex. Civ.), 102 S. W. 133.

992-74 McDonald v. P., 123 Ill. App. 346; Whipple v. McCormick (R. I.), 68 A. 428; Struntz v. Hood, 44 Wash. 99, 87 P. 45.

992-75 Mark v. Shoup, 2 Alaska 66; Chase v. Alaska etc. Co., 2 Alaska 82; C. S. I. R. Co. v. Fogelsong (Colo.), 94 P. 356; Chambless v. Melton, 127 Ga. 414, 56 S. E. 414; Illinois S. Co. v. Ferguson, 129 Ill. App. 396; Burk v. Glass Co. (Ind. App.), 81 N. E. 88; Robins v. M. W. of A., 127 Ia. 444, 103 N. W. 375; S. v. Stanley (Ia.), 104 N. W. 284; Emmet v. Perry, 100 Me. 139, 60 A. 872; Roberts v. Bank, 149 Mich. 507, 112 N. W. 1129; Storch v. Rose (Mich.), 116 N. W. 402; Parker-W. Co. v. T. Co. (Mo. App.), 109 S. W. 1073; Vandeventer Co v. Warren Co., 127 Mo. App. 312, 105 S. W. 653; S. v. Speritus, 191 Mo. 24, 90 S. W. 459; Spencer v. Spencer, 31 Mont. 631, 79 P. 320; O'Hara v. R. Co., 102 App. Div. 398, 92 N. Y. S. 777; Popadinec v. R. Co., 109 App. Div. 850, 96 N. Y. S. 913; P. v. Patrick, 182 N. Y. 131, 74 N. E. 843; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Davis v. Ter., 15 Okla. 462, 82 P. 507; Bleakley v. Adelman, 31 Pa. C. C. 159; El Paso etc. R. Co. v. Barrett (Tex. Civ.), 101 S. W. 1025; Sexton v. S., 48 Tex. Cr. 497, 88 S. W. 348; Missouri etc. R. Co. v. Sloan (Tex. Civ.), 91 S. W. 241; Houston etc. R. Co. v. Davenport (Tex. Civ.), 110 S. W. 150; Wright v. Agelasto, 104 Va. 159, 51 S. E. 191; Brennan v. Seattle, 39 Wash. 640, 81 P. 1092; Dumontier v. Stetson, 39 Wash. 264, 81 P. 683.

Newly obtained evidence, though not newly discovered, as the testimony of a witness who had been adjudged insane prior to the beginning of the suit and at the time of the trial was in a state sanitarium, but subsequently was found capable of giving testimony, is so similar to newly discovered testimony as to be governed by substantially the same rules. Cuesta v. Goldsmith, 1 Ga. App. 48, 57 S. E. 983.

993-77 McClendon v. McKissack, 143 Ala., 188, 38 S. 1020; Smith v. B. R. L. & P. Co., 147 Ala. 702, 41 S. 307; Central of Ga. R. Co. v. Geopp (Ala.), 45 S. 65; Louisville etc. R. Co. v. Church (Ala.), 46 S. 457; Marks v. Shoup, 2 Alaska 66; Tillar v. Liebke, 78 Ark. 324, 95 S. W. 769; Lynch v. McGhan (Cal. App.), 93 P. 1044; Colorado Spgs. C. Co. v. Soper, 38 Colo. 126, 88 P. 161; C. S. I. R. Co. v. Fogelsong (Colo.), 94 P. 356; Murphy v. Meacham, 1 Ga. App. 155 57 S. E. 1046; Brown v.

S., 127 Ga. 285, 56 S. E. 417; Hall v. Jensen (Idaho), 93 P. 962; Karsten v. Winkelman, 126 Ill. App. 418; Gregory v. Gregory, 129 Ill. App. 96; McDonald v. P., 122 Ill. 325, 78 N. E. 609, 126 Ill. App. 263; City of Chicago v. McNally, 227 Ill. 14, 81 N. E. 23; Nehring v. Richer, 126 Ill. App. 262; Shirk v. Township (Ia.), 114 N. W. 884; Renshaw v. Dignan, 128 Ia. 722, 105 N. W. 209; Arnd v. Aylesworth (Ia.), 111 N. W. 407; Marengo Bk. v. Kent (Ia.), 112 N. W. 767; Strong v. Moore, 75 Kan. 437, 89 P. 895; Cudahy Pack. Co. v. Hays, 74 Kan. 124, 85 P. 811; Crigler v. Newman, 29 Ky. L. R. 27, 91 S. W. 706; Gay v. Steele, 29 Ky. L. R. 248, 92 S. W. 590; Todd v. C., 29 Ky. L. R. 473, 93 S. W. 631; Hall v. Roberts, 29 Ky. L. R. 851, 96 S. W. 555; Flint v. R. Co., 29 Ky. L. R. 1149, 97 S. W. 736; Berger v. Oil Co., 31 Ky. L. R. 613, 103 S. W. 245; Strand v. R. Co., 101 Minn. 85, 111 N. W. 958; Vandeventer Co. v. Warren Co., 127 Mo. App. 312, 105 S. W. 653, 112 N. W. 987; Devoy v. Transit Co., 192 Mo. 197, 91 S. W. 140; S. v. Speritus, 191 Mo. 24, 90 S. W. 459; In re Colbert, 31 Mont. 461, 80 P. 248; Martin v. Corscadden, 34 Mont. 308, 86 P. 33; Kraus v. Clark (Neb.), 116 N. W. 164; Hancock v. Beasley (N. M.), 91 P. 735; O'Hara v. R. Co., 102 App. Div. 398, 92 N. Y. S. 777; Hagen v. R. Co., 100 App. Div. 218, 91 N. Y. S. 914; Wheeling C. Co. v. Armstrong, 97 N. Y. S. 960; Froment v. Mugler, 51 Misc. 68, 99 N. Y. S. 877; Flock v. Kaufman, 107 N. Y. S. 752; Romaine v. Village, 120 App. Div. 501, 105 N. Y. S. 256; Gay v. Mitchell, 146 N. C. 509, 60 S. E. 426; Crenshaw v. R. Co., 140 N. C. 192, 52 S. E. 731; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Hurst v. Ter., 16 Okla. 600, 86 P. 280; Bleakley v. Adelman, 31 Pa. C. C. 159; Hill v. R. Co. (R. I.), 66 A. 836; Hahn v. Dickinson, 19 S. D. 373, 103 N. W. 642; In re McClellan, 20 S. D. 498, 107 N. W. 681; Grigsby v. Wolven, 20 S. D. 623, 108 N. W. 250; Belton etc. Co. v. Henry (Tex. Civ.), 99 S. W. 1032; Upson v. Campbell (Tex. Civ.), 99 S. W. 1129; Texas etc. R. Co. v. Scarborough (Tex. Civ.), 108 S. W. 804; Daugherty v. Templeton (Tex. Civ.), 110 S. W. 553; Houston etc. R. Co. v. Davenport (Tex. Civ.), 110 S. W. 150; St. Louis etc. R. Co. v. Wiggins (Tex. Civ.), 107 S. W. 899; Halbert v. R. Co. (Tex. Civ.), 107 S. W. 592; Neal v. Whitlock (Tex. Civ.), 101 S. W. 284; Texas C. P. Co. v. McMillan (Tex. Civ.), 87 S. W. 846; St. Louis etc. R. Co. v. Ross (Tex. Civ.), 89 S. W. 1105; Douglas v. Walker (Tex. Civ.), 92 S. W. 1026; Johnson v. Scrimshire (Tex. Civ.), 93 S. W. 712; Reynolds v. Hassam, 80 Vt. 501, 68 A. 645; Taylor v. St. Clair, 79 Vt. 536, 65 A. 655; Wright v. Agelasto, 104 Va. 159, 51 S. E. 191; Taliafero v. Shepherd, 107 Va. 56, 57 S. E. 585; Goodrich v. Kimble (Wash.), 95 P. 1084; Collins v. Bacon, 38 Wash. 80, 80 P. 268; Haner v. R. Co. (Wash.), 81 P. 98; Binns v. Emery, 45 Wash. 215, 88 P. 133; Stewart v. Doak, 58 W. Va. 172, 52 S. E. 95; Bosler v. Coble, 14 Wyo. 423, 84 P. 895; Harden v. Card, 15 Wyo. 217, 88 P. 217.

996-78 Wells, Fargo Co. v. Gunn, 33 Colo. 217, 79 P. 1029; Taylor v. Larter (Ind. App.), 82 N. E. 96; Boreing v. Wilson (Ky.), 108 S. W. 914; Burgess v. Grief, 31 Ky. L. R. 215, 101 S. W. 984; Cahill v. Mullins, 31 Ky. L. R. 72, 101 S. W. 336; Bunker v. N. O. of F., 97 Minn. 361, 107 N. W. 392; Nugent v. Pack. Co., 208 Mo. 480, 106 S. W. 648; S. v. Williams, 199 Mo. 137, 97 S. W. 562; In re Colbert, 31 Mont. 461, 80 P. 248; Jessen v. Wilhite, 74 Neb. 608, 104 N. W. 1064; Butler v. R. I. Co. (R. I.), 68 A. 426; Grigsby v. Wolven (S. D.), 108 N. W. 250; In re McClellan, 20 S. D. 498, 111 N. W. 540; Comoli v. S., 78 Vt. 423, 63 A. 186.

996-79 Grigsby v. Wolven, supra.

996-81 King v. Gilson, 206 Mo. 264, 104 S. W. 52.

997-83 O'Neill v. Bank, 34 Mont. 521, 87 P. 970.

997-84 Ward v. Ward, 149 Fed. 204, 79 C. C. A. 162; Richardson v. Lowe, 149 Fed. 625, 79 C. C. A. 317; Weston v. Montgomery, 2 Haw. 309; Louisville etc. R. Co. v. Vinyard, 39 Ind. App. 628, 79 N. E. 384; Arenschield v. R. Co., 128 Ia. 677, 105 N. W. 200; Strong v. Moore, 75 Kan.

437, 89 P. 895; Todd v. C., 29 Ky. L. R. 473, 93 S. W. 631; Kidder v. Maynard, 75 Neb. 246, 106 N. W. 172; O'Hara v. R. Co., 102 App. Div. 398, 92 N. Y. S. 777; Froment v. Mugler, 51 Misc. 68, 99 N. Y. S. 877; Rosenthal v. Realty Co., 53 Misc. 265, 103 N. Y. S. 194; Crenshaw v. R. Co., 140 N. C. 192, 52 S. E. 731; Libby v. Barry, 15 N. D. 286, 107 N. W. 972; Bleakley v. Adelman, 31 Pa. C. C. 159; Geer v. R. Co. (R. I.), 67 A. 449; Wilson v. Alexander, 115 Tenn. 125, 88 S. W. 935; Western U. Tel. Co. v. Hardison (Tex. Civ.), 101 S. W. 541; Binns v. Emery, 45 Wash. 215, 88 P. 133; Bosler v. Coble, 14 Wyo. 423, 84 P. 895.

997-85 C. S. I. R. Co. v. Fogelsong (Colo.), 94 P. 356; Button v. Button (Conn.), 67 A. 478; Denmond v. Hillyer, 129 Ga. 698, 59 S. E. 806; Laing v. Laing, 10 Haw. 183; Lerna v. Wood, 122 Ill. App. 542; Illinois S. Co. v. Ferguson, 129 Ill. App. 396; Donahue v. S., 165 Ind. 148, 74 N. E. 996; Bucholtz v. Radcliffe, 129 Ia. 27, 105 N. W. 336; Hawk v. Mulhall, 133 Ia. 695, 110 N. W. 1026; Clements v. Stapleton (Ia.), 113 N. W. 546; Illinois etc. R. Co. v. Wilson, 31 Ky. L. R. 789, 103 S. W. 364; Bunker v. N. O. of F., 97 Minn. 361, 107 N. W. 392; Hanson v. Bailey, 96 Minn. 274, 104 N. W. 969; McDonald v. Smith, 101 Minn. 476, 112 N. W. 627; S. v. Speritus, 191 Mo. 24, 90 S. W. 459; Devoy v. Transit Co., 192 Mo. 197, 91 S. W. 140; In re Colbert, 31 Mont. 461, 80 P. 248; Martin v. Corscadden, 34 Mont. 308, 86 P. 33; In re Winch (Neb.), 112 N. W. 293; Dickinson v. Aldrich (Neb.), 112 N. W. 293; Hanson v. Ins. Co. (Neb.), 113 N. W. 114; St. Paul H. Co. v. Faulhaber (Neb.), 109 N. W. 762; Kraus v. Clark (Neb.), 116 N. W. 164; Hancock v. Beasley (N. M.), 91 P. 735; Romaine v. Village, 120 App. Div. 501, 105 N. Y. S. 256; Neidlinger v. Const. Co., 124 App. Div. 26, 109 N. Y. S. 717; Chaet v. Goldberg, 110 N. Y. S. 817; Prinzi v. Cataldo, 110 N. Y. S. 1054 (discovery of a receipt); O'Hara v. R. Co., 102 App. Div. 398, 92 N. Y. S. 777; Hagen v. R. Co., 100 App. Div. 218, 91 N. Y. S. 914; Flock v. Kaufman, 107 N. Y. S. 752 (cumulative evidence of probative force is ground for granting a new trial); Aden v. Doub, 146 N. C. 10, 59 S. E. 162; McHugh v. Ter., 17 Okla. 1, 86 P. 433; Bleakley v. Adelman, 31 Pa. C. C. 159; Lee v. R. I. Co. (R. I.), 66 A. 635; McDonald v. Spinning Co. (R. I.), 67 A. 451; Heath v. Cook (R. I.), 68 A. 427; Shepard v. R. Co., 27 R. I. 135, 61 A. 42; Wardlaw v. Oil Mill, 74 S. C. 368, 54 S. E. 658; Smith v. Ins. Co. (S. D.), 113 N. W. 94; Texas N. O. R. Co. v. Scarborough (Tex.), 108 S. W. 804; Foss v. Smith, 79 Vt. 434, 65 A. 553; Taylor v. St. Clair, 79 Vt. 536; 65 A. 655; Wilson v. Keckley, 107 Va. 592, 59 S. E. 383; Pierson v. Pierce, 42 Wash. 164, 84 P. 731; Anderson v. Lumb. Co., 131 Wis. 34, 110 N. W. 788; Mueller v. Pew, 127 Wis. 288, 106 N. W. 840.

998-86 Richardson v. Lowe, 149 Fed. 625, 79 C. C. A. 317; Smith v. Birmingham Co., 147 Ala. 702, 41 S. 307; Geter v. Coal Co. (Ala.), 43 S. 367; Marks v. Shoup, 2 Alaska 66; Chase v. A. F. & L. Co., 2 Alaska 82; Long v. McDaniel, 76 Ark. 292, 88 S. W. 964; Plumlee v. R. Co., 85 Ark. 488, 109 S. W. 515; Shaufelberger v. Mattix, 85 Ark. 193, 107 S. W. 380; Wood v. Moulton, 146 Cal. 317, 80 P. 92; Patterson v. R. Co., 147 Cal. 178, 81 P. 531; In re Walker, 148 Cal. 162, 82 P. 770; In re Doolittle (Cal.), 94 P. 240; Walker v. Frost, 148 Cal. 162, 82 P. 770; P. v. Davis, 1 Cal. App. 8, 81 P. 716; C. S. I. R. Co. v. Fogelsong (Colo.), 94 P. 356; Andrew v. Carithers, 124 Ga. 515, 52 S. E. 653; Georgia R. & B. Co. v. Adams, 127 Ga. 408, 56 S. E. 409; Bunn v. Hargraves, 3 Ga. App. 518, 60 S. E. 223; DeVane v. R. Co. (Ga. App.), 60 S. E. 1079; Weston v. Montgomery, 2 Haw. 309; Hall v. Jensen (Idaho), 93 P. 962; Pratt v. Davis, 118 Ill. App. 161; Karsten v. Winkelman, 126 Ill. App. 418; Martinatis v. P., 223 Ill. 117, 79 N. E. 55; Cassidy v. Johnson (Ind. App.), 84 N. E. 835; Ray v. Baker, 165 Ind. 74, 74 N. E. 619; Indianapolis etc. Co. v. Edwards, 36 Ind. App. 202, 74 N. E. 533; Farrel v. R. Co. (Ia.), 114 N. W. 1063; Hemmer v. Burger, 127 Ia. 614, 103 N. W. 957; S. v. Stanley (Ia.), 104 N. W. 284; Renshaw v. Dignan, 128 Ia. 722, 105 N. W. 209; Arenschield v. R. Co., 128 Ia. 677, 105 N. W.

200; Hanousek v. Marshalltown, 130 Ia. 550, 107 N. W. 603; Bousman v. Stanford, 71 Kan. 648, 81 P. 184 (evidence obtained by an operation); Strong v. Moore, 75 Kan. 437, 89 P. 895; S. v. Lackey, 72 Kan. 95, 82 P. 527; Cahill v. Mullins, 31 Ky. L. R. 72, 101 S. W. 336; Metropolitan L. Ins. Co. v. Ford, 31 Ky. L. R. 513, 102 S. W. 876; Mobile & O. R. Co. v. Caldwell, 32 Ky. L. R. 447, 106 S. W. 236; Illinois Cent. R. Co. v. Colly, 27 Ky. L. R. 713, 86 S. W. 538; City of Dayton v. Hirth, 27 Ky. L. R. 1209, 87 S. W. 1136; Slusher v. Hopkins, 28 Ky. L. R. 347, 89 S. W. 244; Todd v. C., 29 Ky. L. R. 473, 93 S. W. 631; Torian v. Terrell, 29 Ky. L. R. 306, 93 S. W. 10; Hall v. Roberts, 29 Ky. L. R. 851, 96 S. W. 555; Phoenix Ins. Co. v. Wintersmith, 30 Ky. L. R. 369, 98 S. W. 987; Louisville & N. R. Co. v Ueltschi, 31 Ky. L. R. 931, 104 S. W. 320; Tew v. Webster (Minn.), 114 N. W. 647; Parker-W. Co. v. Transfer Co. (Mo. App.), 109 S. W. 1073; S. v. Speritus, 191 Mo. 24, 90 S. W. 459; In re Colbert, 31 Mont. 461, 80 P. 248; Parkins v. R. Co. (Neb.), 113 N. W. 265; St. Paul H. Co. v. Faulhaber (Neb.), 109 N. W. 762; Kraus v. Clark (Neb.), 116 N. W. 164; Cheever v. Scottish etc. Co., 86 App. Div. 331, 83 N. Y. S. 732; Aden v. Doub, 146 N. C. 10, 59 S. E. 162; Gay v. Mitchell, 146 N. C. 509, 60 S. E. 426; Bleakley v. Adelman, 31 Pa. C. C. 159; Whipple v. McCormick (R. I.), 68 A. 428; Shepard v. R. Co., 27 R. I. 135, 61 A. 42; Hahn v. Dickinson, 19 S. D. 373, 103 N. W. 642; In re McClellan (S. D.), 111 N. W. 540; Dowell v. Dergfield, 39 Tex. Civ. 635, 87 S. W. 1051; St. Louis etc. R. Co. v. Ross (Tex. Civ.), 89 S. W. 1105; Cain v. Corley (Tex. Civ.), 99 S. W. 168; St. Louis etc. R. Co. v. Wiggins (Tex. Civ.), 107 S. W. 899; Houston L. P. Co. v. Hooper (Tex. Civ.), 102 S. W. 133; Texas N. O. R. Co. v. Scarborough (Tex.), 108 S. W. 804; Foss v. Smith, 79 Vt. 434, 65 A. 553; Shannon v. Tacoma, 41 Wash. 220, 83 P. 186; Stewart v. Doak, 58 W. Va. 172, 52 S. E. 95.

Newly discovered evidence, though cumulative, is not ground for denying a new trial, where the verdict rests alone on the unsupported and contradictory evidence of the prevailing party. Schnitzler v. Bed Co., 47 Misc. 356, 93 N. Y. S. 1119.

999-87 McDonald v. P., 123 Ill. App. 346; Cheever v. Scottish etc. Co., 86 App. Div. 331, 83 N. Y. S. 732; Tyler v. S., 48 Tex. Cr. 611, 90 S. W. 33.

1000-88 McDonald v. P., 123 Ill. App. 346; City of Dayton v. Hirth, 27 Ky. L. R. 1209, 87 S. W. 1136; S. v. Speritus, 191 Mo. 24, 90 S. W. 459; J. McCreery Co. v. Bank, 104 N. Y. S. 959 (unwilling witnesses out of the jurisdiction of the court is sufficient excuse); Tyler v. S., 48 Tex. Cr. 611, 90 S. W. 33; Brennan v. Seattle, 39 Wash. 640, 81 P. 1092 (witnesses being employes of defendant is a sufficient excuse).

1002-89 Million v. Million, 31 Ky. L. R. 1156, 104 S. W. 768 (existence of receipt discovered).

1002-91 Midgley v. Bergerman, 30 Utah 17, 83 P. 466; Paul v. Salt Lake (Utah), 95 P. 363 (priest's influence on jurors); Wilson v. Keckley, 107 Va. 592, 59 S. E. 383.

1003-92 Arkadelphia Lumb. Co. v. Posey, 74 Ark. 377, 85 S. W. 1127; P. v. Sing Yow, 145 Cal. 1, 78 P. 235; Dysart-C. M. Co. v. Reed, 114 Mo. App. 296, 89 S. W. 591; Paul v. Salt Lake (Utah), 95 P. 363.

1003-93 Marks v. Shoup, 2 Alaska 66; Chase v. A. F. & L. Co., 2 Alaska 82; P. v. Fitzgerald, 1 Cal. App. 507, 82 P. 555; P. v. Sing Yow, 145 Cal. 1, 78 P. 235; Wood v. Moulton, 146 Cal. 317, 80 P. 92; Miller v. Thigpen, 125 Ga. 113, 54 S. E. 194; Lang v. Yearwood, 127 Ga. 155, 56 S. E. 305; Bunn v. Hargraves, 3 Ga. App. 518, 60 S. E. 223; Rogers v. Daniels, 116 Ill. App. 515; S. v. Lackey, 72 Kan. 95, 82 P. 527; Louisville B. & L. Co. v. Hart, 29 Ky. L. R. 310, 92 S. W. 951; McBurnie v. Stelsly, 29 Ky. L. R. 1192, 97 S. W. 42; Northrup v. Hayward, 102 Minn. 307, 109 N. W. 241; S. v. Speritus, 191 Mo. 24, 90 S. W. 459; Libby v. Barry, 15 N. D. 286, 107 N. W. 972; Bleakley v. Adelman, 31 Pa. C. C. 159; Hilscher v. S., 48 Tex. Cr. 357, 88 S. W. 227; Gulf etc. R. Co. v. Hays, 40 Tex. Civ. 162, 89 S. W. 29; Flynt

v. Taylor (Tex. Civ.), 91 S. W. 864; Jones v. Neal (Tex. Civ.), 98 S. W. 417; Houston L. P. Co. v. Hooper (Tex. Civ.), 102 S. W. 133; Wilson v. Keckley, 107 Va. 592, 59 S. E. 383; Seattle Lumb. Co. v. Sweeney, 43 Wash. 1, 85 P. 677.

NON EST FACTUM [Vol. 9.]

1-1 Walsh v. Marvel, 130 Ill. App. 305 (verified plea destroys presumption which might otherwise attach to act of corporate officer executing assignment for corporation).

1-2 Landt v. McCullough, 130 Ill. App. 515.

1-3 Martin v. Organ Co. (Ala.), 44 S. 112; Feagan v. Barton (Tex. Civ.), 93 S. W. 1076.

Burden of proving execution of note given by defendant corporation's president, and his apparent or express authority therefor, is on plaintiff. Elkhart H. Co. v. Turner (Ind.), 84 N. E. 812.

2-4 Proof of signature and of the authority of a corporation officer to sign the company's name is necessary before instrument is admissible (Elkhart H. Co. v. Turner, supra); especially in case of a verified plea of non est factum. Walsh v. Marvel, 130 Ill. App. 305; Dreeben v. Bank (Tex.), 99 S. W. 850.

2-5 See Walsh v. Marvel, supra.

NOVATION [Vol. 9.]

6-1 Hargadine Co. v. Goodman (Fla.), 45 S. 995; Jan Ban v. Tsen Yim, 15 Haw. 433; Miles v. Bowers, 49 Or. 429, 90 P. 905. See Lemon v. Little (S. D.), 114 N. W. 1001.

7-2 Evidence of other transactions is not admissible to show novation in a particular case. Held v. Caldwell-E. Co., 97 App. Div. 301, 89 N. Y. S. 954.

Declarations of creditor, after the contract is alleged to have been made, that he looked to another than the original debtor for his pay, are not admissible. Wierman v. Sugar Co., 142 Mich. 422, 106 N. W. 75.

7-3 Sherer v. Rubedew, 11 Idaho 536, 83 P. 512.

7-4 First Nat. Bk. v. Fish, 2 Alaska 344; Wyss-T. v. Brew. Co., 216 Pa. 435, 65 A. 811; Chenoweth v. Assn., 59 W. Va., 653, 53 S. E. 559.

8-5 Holloway v. Shoe Co., 151 Fed. 216; Lane & Co. v. Oilcloth Co., 103 App. Div. 378, 92 N. Y. S. 1061; Globe Ins. Co. v. Wayne, 75 Ohio St. 451, 80 N. E. 13.

Insufficient facts to warrant implication of novation.— Amer. Mtg. Co. v. Rawlings, 127 Ga. 82, 56 S. E. 110; Osborne Co. v. West (Ia.), 103 N. W. 118; Sucker State D. Co. v. Loewer, 114 La. 403, 38 S. 399; Draggo v. Sugar Co., 144 Mich. 195, 107 N. W. 911; Fitzgerald v. Assn., 143 Mich. 171, 106 N. W. 853 (tug company's prior debts); Davis v. Dunn, 121 Mo. App. 490, 97 S. W. 226; Bandman v. Finn, 103 App. Div. 322, 92 N. Y. S. 1096; Miles v. Bowers, 49 Or. 429, 90 P. 905 (hotel company's debt); Midwoods Co. v. Assn. (R. I.), 67 A. 61; Hemrich Brew. Co. v. Kitsap Co., 45 Wash. 454, 88 P. 838.

9-6 La Bauque v. Tel. Co., 36 Can. Sup. 18; Bank of Yolo v. Bank, 3 Cal. App. 561, 86 P. 820; Hargadine Co. v. Goodman (Fla.), 45 S. 995; Palmetto Mfg. Co. v. Parker, 123 Ga. 798, 51 S. E. 714; Simmons v. Oil Co. (N. J. Eq.), 63 A. 258; Inman v. Burt Co., 108 N. Y. S. 210; Held v. Caldwell-E. Co., 97 App. Div. 301, 89 N. Y. S. 954; Clark v. R. Co., 138 N. C. 25, 50 S. E. 446; Miles v. Bowers, 49 Or. 429, 90 P. 905; Gimbell & Sons v. King (Tex.), 95 S. W. 7; Chenoweth v. Assn., 59 W. Va. 653, 53 S. E. 559.

9-7 Palmetto Mfg. Co. v. Parker, 123 Ga. 798, 51 S. E. 714; Lane & Co. v. Oilcloth Co., 103 App. Div. 378, 92 N. Y. S. 1061; Globe Ins. Co. v. Wayne, 75 Ohio St. 451, 80 N. E. 13.

NUISANCE [Vol. 9.]

12-1 Town of Vernon v. Wedgeworth, 148 Ala. 490, 42 S. 749; Davis v. R. Co., 102 Md. 371, 62 A. 572; C. v. Cassell, 1 Pa. Super. 476; Chesapeake & O. R. Co. v. Whitlow, 104 Va. 90, 51 S. E. 182; Jeremy Imp. Co. v. C., 106 Va. 482, 56 S. E. 224.

Convincing proof required to abate a nuisance where the result is to

destroy valuable property held under specific authority of law. Jeremy Imp. Co. v. C., supra.

Cemetery not nuisance per se and evidence must clearly prove it a nuisance before an injunction will issue to prevent use of land for that purpose. Payne v. Wayland, 131 Ia. 659, 109 N. W. 203.

12-5 Over v. Dehne, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883.

13-11 Tedeseki v. Berger (Ala.), 43 S. 960.

13-12 Kerbaugh v. Caldwell, 151 Fed. 194; U. S. v. Luce, 141 Fed. 385; Town of Vernon v. Wedgeworth, 148 Ala. 490, 42 S. 749; Over v. Dehne, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883; S. v. Schaefer, 45 Wash. 9, 87 P. 949.

14-14 U. S. v. Luce, supra.

15-20 Town of Vernon v. Wedgeworth, supra.

17-23 Acts of others contributing to the nuisance are no defense if a nuisance exists without such contribution. Jeremy Imp. Co. v. C., 106 Va. 482, 56 S. E. 224.

17-24 C. v. R. Co., 7 Pa. Super. 234.

18-25 Atty.-Gen. v. Corporation, (1904) 1 Ch. D. 673.

19-30 Perrin v. Stockyards Co., 119 La. 83, 43 S. 938.

19-31 Rushmer v. Polsue, (1906) 1 Ch. D. 234.

19-32 C. v. Yost, 11 Pa. Super. 323.

19-33 Remsberg v. Cement Co., 73 Kan. 66, 84 P. 548.

21-39 King v. R. Co., 88 Miss. 456, 42 S. 204; Laird v. Atlantic Co. (N. J.), 67 A. 387.

21-41 Holbrook v. Griffis, 127 Ia. 505, 103 N. W. 479.

22-48 Laird v. Atlantic Co., supra.

23-53 Hartman v. Pittsburg Co., 2 Pa. Super. 123; Hartman v. Pittsburg Co., 23 Pa. Super. 360; Hartman v. Pittsburg Co., 11 Pa. Super. 438.

23-55 Payne v. Wayland, 131 Ia. 659, 109 N. W. 203; Davis v. R. Co., 102 Md. 371, 62 A. 572.

Injunction may be denied where evidence showed that the occasional injury of plaintiff depended upon the direction of the wind and was not considerable. Bentley v. Cement Co., 48 Misc. 457, 96 N. Y. S. 831.

24-56 Ehrlick v. C., 31 Ky. L. R. 401, 102 S. W. 289. *Compare* Huber v. C., 31 Ky. L. R. 320, 102 S. W. 291 (pool room).

24-58 Town of Vernon v. Wedgeworth, 148 Ala. 490, 42 S. 749; Bly v. Edison Co., 111 App. Div. 170, 97 N. Y. S. 592. See Meek v. LaTour, 2 Cal. App. 261, 83 P. 300.

25-61 See City of Huntington v. Stemeh (Ind.), 77 N. E. 407; Van Veghten v. Power Co., 103 App. Div. 130, 92 N. Y. S. 956. But see Taylor v. R. Co., 145 N. C. 400, 59 S. E. 129.

26-70 Continuance after request for removal warrants punitive damages. Yazoo R. Co. v. Sanders, 87 Miss. 607, 40 S. 163.

OBJECTIONS [Vol. 9.]

36-5 Diamond B. Coal Co. v. Cuthbertson, 166 Ind. 290, 76 N. E. 1060; Murphy v. R. Co., 125 Mo. App. 269, 102 S. W. 64. See O'Brien v. R. Co., 55 Misc. 228, 105 N. Y. S. 238. But see Waddell v. R. Co., 113 Mo. App. 680, 88 S. W. 765 (holding that an objection immediately after the improper answer would be considered as a motion to strike out).

37-7 Johnson v. Beadle (Cal. App.), 91 P. 1011.

37-8 S. v. Barrington, 198 Mo. 23, 95 S. W. 235.

38-9 J. G. Hutchinson & Co. v. Morris (Mo. App.), 110 S. W. 684. See Indianapolis etc. Co. v. Hall, 166 Ind. 557, 76 N. E. 242.

Failure to move to strike out allegations in complaint waives the right to object to introduction of evidence in support of the same. Milhous v. R. Co., 72 S. C. 442, 52 S. E. 41.

38-11 J. G. Hutchinson & Co. v. Morris (Mo. App.), 110 S. W. 684.

39-13 Joseph v. R. Co. (Mo. App.), 107 S. W. 1055.

Cross-examination as to permanence of injuries waives right to object to the introduction of life tables. O'Donnell v. Rhode Island Co. (R. I.), 66 A. 578.

40-17 O'Brien v. Knotts, 165 Ind. 308, 75 N. E. 594; S. v. Jackson, 79 Vt. 504, 65 A. 657.

40-19 Southern C. & C. Co. v. Swinney (Ala.), 42 S. 808.
41-22 Seamster v. S., 74 Ark. 579, 86 S. W. 434; Palatine Ins. Co. v. Merc. Co. (N. M.), 82 P. 363. See Paterson v. R. Co., 95 Minn. 57, 103 N. W. 621; Abbott v. Min. Co., 111 Mo. App. 550, 87 S. W. 110.
42-24 McCaffery v. R. Co., 192 Mo. 144, 90 S. W. 816; Beadle v. Paine, 46 Or. 424, 80 P. 903.
44-33 Jaquith v. Shumway, 80 Vt. 556, 69 A. 157; Kenney Presby. Home v. Kenney (Wash.), 88 P. 108.
45-36 Marshall v. S. (Fla.), 44 S. 742; Hinkle v. Smith, 127 Ga. 437, 53 S. E. 464; Graham v. R. Co., 234 Ill. 483, 84 N. E. 1070; Delmoe v. Long, 35 Mont. 139, 88 P. 778; Cane Hill etc. Co. v. R. Co. (Tex. Civ.), 95 S. W. 751.
45-37 Mugge v. Jackson, 50 Fla. 235, 39 S. 157; Meekins v. R. Co., 136 N. C. 1, 48 S. E. 501.
But on trial de novo objections cannot be made which were waived on trial below. Imboden v. St. L. Trust Co., 111 Mo. App. 220, 86 S. W. 263.
45-39 Robertson v. Sebastian, 30 Ky. L. R. 883, 99 S. W. 933. See Sparks v. Taylor (Tex. Civ.), 87 S. W. 740.
46-41 Thompson v. S. (Fla.), 46 S. 842; International H. Co. v. Campbell (Tex. Civ.), 96 S. W. 93.
47-42 Southern C. & C. Co. v. Swinney (Ala.), 42 S. 808; Birmingham etc. R. Co. v. Turner (Ala.), 45 S. 671; Moss v. S. (Ala.), 44 S. 598; West Pratt Coal Co. v. Andrews (Ala.), 43 S. 348; Giffen v. Fruit Co., 5 Cal. App. 50, 89 P. 855; Martin v. Corscadden, 34 Mont. 308, 86 P. 33; Herbert v. Herbert, 20 S. D. 85, 104 N. W. 911.
48-43 Southwestern Alabama R. Co. v. Maddox, 146 Ala. 539, 41 S. 9; Birmingham etc. R. Co. v. Taylor (Ala.), 44 S. 580; Remington Mach. Co. v. Candy Co. (Del.), 66 A. 465; Oxford Junction S. Bk. v. Cook, 134 Ia. 185, 111 N. W. 805; C. v. Johnson (Mass.), 85 N. E. 188; Blake v. Meyer, 110 App. Div. 734, 97 N. Y. S., 424; Smith v. League, 121 App. Div. 600, 106 N. Y. S. 251; Cullinan v. Horan, 116 App. Div. 711, 102 N. Y. S. 132; Western U. Tel. Co. v. Simmons (Tex. Civ.), 93 S. W. 686.
48-44 Skinner Mfg. Co. v. Douville (Fla.), 44 S. 1014. See Theodore L. Co. v. Lyon, 148 Ala. 668, 41 S. 682.
49-46 Birmingham etc. R. Co. v. Turner (Ala.), 45 S. 671; Swygart v. Willard, 166 Ind. 25, 76 N. E. 755.
49-48 Terry v. Williams, 148 Ala. 468, 41 S. 804; Patton v. Bank, 124 Ga. 965, 53 S. E. 664.
49-49 Flanagan M. & E. Co. v. Adams, 115 Mo. App. 542, 90 S. W. 1035; Speer v. S. (Tex. Cr.), 97 S. W. 469; Holly St. L. Co. v. Beyer (Wash.), 93 P. 1065; El Paso etc. R. Co. v. Darr (Tex. Civ.), 93 S. W. 166.
49-51 Mickle v. U. S., 6 Ind. Ter. 557, 98 S. W. 349; S. v. Speyer, 207 Mo. 540, 106 S. W. 505; Einstein v. Lumb. Co., 118 Mo. App. 184, 94 S. W. 296; Dallas etc. R. Co. v. Ely (Tex. Civ.), 91 S. W. 887.
50-52 P. v. James, 5 Cal. App. 427, 90 P. 561 (to hypothetical question); Sims v. S. (Fla.), 44 S. 737; Marshall v. S. (Fla.), 44 S. 742; Hoodless v. Jernigan, 51 Fla. 211, 41 S. 194; Pittman v. S., 51 Fla. 94, 41 S. 385; Graham v. R. Co., 234 Ill. 483, 84 N. E. 1070; Mickle v. U. S., 6 Ind. Ter. 557, 98 S. W. 349; Andrews v. R. Co., 129 Ia. 162, 105 N. W. 404; Duff v. Bailey, 29 Ky. L. R. 919, 96 S. W. 577; Day v. C. (Ky.), 96 S. W. 510; Berry v. Evans, 28 Ky. L. R. 22, 89 S. W. 12; Moore v. Kersey, 28 Ky. L. R. 1030, 90 S. W. 1073 (objection — proof of conveyance of land); S. v. Speyer, 207 Mo. 540, 106 S. W. 505; Spaulding v. City, 122 Mo. App. 65, 97 S. W. 545; Thornton T. Merc. Co. v. Bretherton, 32 Mont. 80, 80 P. 10; S. v. Lawrence, 28 Nev. 440, 82 P. 614; Houston etc. R. Co. v. Bath, 40 Tex. Civ. 270, 90 S. W. 55; Jones v. Neal (Tex. Civ.), 98 S. W. 417; Tex. etc. R. Co. v. Warner (Tex Civ.), 93 S. W. 489; Mullen v. R. Co. (Tex. Civ.), 92 S. W. 1000; Holly St. L. Co. v. Beyer (Wash.), 93 P. 1065.
50-53 But where purpose of preliminary questions is understood by court and counsel, an objection even before offer has been made is not premature. P. v. Smilie, 118 App. Div. 611, 103 N. Y. S. 348.
Objection before completion of question is ineffective as to an answer not made until the question was com-

plete. Redus v. R. Co., 148 Ala. 665, 41 S. 634.

50-54 Where extraneous testimony is necessary to show defect in offered document, objection thereto should be overruled until such testimony has been introduced. Hoodless v. Jernigan, 51 Fla. 211, 41 S. 194; Wilson v. Johnson, 51 Fla. 370, 41 S. 395.

50-58 Baltimore etc. R. Co. v. S. (Md.), 69 A 439.

51-60 First Nat. Bk. v. Miller, 48 Or. 587, 87 P. 892; Kane v. Sholars, 41 Tex. Civ. 154, 90 S. W. 937. See International Coal Min. Co. v. R. Co., 152 Fed. 557.

51-62 Holly St. Land Co. v. Beyer (Wash.), 93 P. 1065.

52-64 Capital Lumb. Co. v. Barth, 33 Mont. 94, 81 P. 994; Interational H. Co. v. Campbell (Tex. Civ.), 96 S. W. 93.

52-65 Buchanan v. Mach. Co. (N. D.), 116 N. W. 335.

52-66 See "DEPOSITIONS," and Columbus R. Co. v. Patterson, 143 Fed. 245, 73 C. C. A. 603; Mississippi Lumb. Co. v. Smith (Ala.), 44 S. 475; P. v. Gilhooley, 108 App. Div. 234, 95 N. Y. S. 636; Ivey v. Cotton Mills, 143 N. C. 189, 55 S. E. 613 (objection to form of notice to take deposition); First Nat. Bk. v. Miller, 48 Or. 587, 87 P. 892.

52-67 Adams v. Ins. Co., 135 Ia. 299, 112 N. W. 651.

53-71 Cooper v. Bower (Kan.), 96 P. 59; Davis v. Camera Co., 105 App. Div. 96, 93 N. Y. S. 844; Bjorkegren v. Kirk, 53 Misc. 560, 103 N. Y. S. 994; In re Manhattan Bridge, 108 N. Y. S. 366; Caccia v. Isecke, 123 App. Div. 779, 108 N. Y. S. 542.

A motion to strike out is not necessary where testimony is erroneously admitted over objection. Tracey v. Reid, 111 App. Div. 396, 97 N. Y. S. 1074.

54-72 Louisville etc. R. Co. v. Williamson, 29 Ky. L. R. 1165, 96 S. W. 1130; Bailey v. City, 189 Mo. 503, 87 S. W. 1182; Schultz v. R. Co., 181 N. Y. 33, 73 N. E. 491.

55-75 Clark v. Durland, 104 App. Div. 615, 93 N. Y. S. 249.

55-76 See Clemens v. S. (Miss.), 45 S. 834.

56-79 In re Small, 118 App. Div. 502, 103 N. Y. S. 705.

56-80 Remington Mach. Co. v. Candy Co. (Del.), 66 A. 465; Galveston etc. R. Co. v. Janert (Tex. Civ.), 107 S. W. 963 . *Contra*, Root v. R. Co., 195 Mo. 348, 92 S. W. 621.

57-83 S. v. Dahlquist (N. D.), 115 N. W. 81; S. v. Mills (S. C.), 60 S. E. 664.

59-91 Davidson S. S. Co. v. U. S., 142 Fed. 315, 73 C. C. A. 425; Birmingham etc. R. Co. v. Landrum (Ala.), 45 S. 198; S. v. Lawrence, 28 Nev. 440, 82 P. 614.

59-93 Patton v. S. (Ala.), 46 S. 862; West Branch S. Bk. v. Haines (Ia.), 112 N. W. 552.

61-96 Merrill v. Worthington (Ala.), 46 S. 477; Hammond etc. R. Co. v. Antonio (Ind. App.), 83 N. E. 766. See Chapman v. Chapman, 74 Neb. 388, 104 N. W. 880; Austin v. Forbis, 99 Tex. 234, 89 S. W. 405 (objection to statement of agent held sufficient).

61-97 Southern R. Co. v. Dickens (Ala.), 44 S. 402; Renders v. R. Co., 144 Mich. 387, 108 N. W. 368; Gurski v. Doscher, 112 App. Div. 345, 98 N. Y. S. 588; Kansas City etc. Co. v. Taylor (Tex. Civ.), 107 S. W. 889.

61-98 Davidson S. S. Co. v. U. S., 142 Fed. 315, 73 C. C. A. 425; City of Charleston v. Newman, 130 Ill. App. 6; Rice v. S., 51 Tex. Cr. 255, 103 S. W. 1156; Sheldon v. Wright, 80 Vt. 298, 67 A. 807; Vagts v. Utman, 125 Wis. 265, 104 N. W. 88.

Where objection was interrupted by court and not completed it is insufficient. Williams v. S., 123 Ga. 138, 51 S. E. 322.

62-99 Sanders v. Davis (Ala.), 44 S. 979 (*cit.* Encyc. of Ev.); Nevers Lumb. Co. v. Fields (Ala.), 44 S. 81; Chicago etc. R. Co. v. Rathneau, 225 Ill. 278, 80 N. E. 119.

63-1 Western U. T. Co. v. Wells, 50 Fla. 474, 39 S. 838; Willett v. Morse (N. J.), 60 A. 362.

63-2 Moore v. S. (Ala.), 45 S. 656; Braham v. S., 143 Ala. 28, 38 S. 919; Lewis v. S. (Fla.), 45 S. 998; Mugge v. Jackson, 50 Fla. 235, 39 S. 157; Chicago etc. R. Co. v. Rathneau 225 Ill. 278, 80 N. E. 119.

63-3 Harris v. Hirsch, 121 App. Div. 767, 106 N. Y. S. 631.
65-5 Donk Bros. Coal Co. v. Tetheringtón, 128 Ill. App. 256.
65-6 P. v. James, 5 Cal. App. 427, 90 P. 561; Pittman v. S., 51 Fla. 94, 41 S. 385; Chicago Tr. Co. v. Core, 223 Ill. 58, 79 N. E. 108; S. v. Winslow, 102 Me. 399, 66 A. 1019; S. v. Mizis, 48 Or. 165, 85 P. 611.
67-10 In absence of offer as to what testimony would be a general objection may be sustained. International Co. v. McKeever (S. D.), 109 N. W. 642.
68-13 C. v. Johnson (Mass.), 85 N. E. 188; Logan v. Field, 192 Mo. 54, 90 S. W. 127; Gulf etc. R. Co. v. Tullis, 41 Tex. Civ. 219, 91 S. W. 317; Texas etc. R. Co. v. Powell, 34 Tex. Civ. 575, 86 S. W. 21; St. Louis etc. R. Co. v. Frazier (Tex. Civ.), 87 S. W. 400; Field v. Field, 39 Tex. Civ. 1, 87 S. W. 726; Pecos etc. R. Co. v. Evans (Tex. Civ.), 93 S. W. 1024; Tuttle v. Moody, 100 Tex. 240, 97 S. W. 1037; Wandelohr v. Bank (Tex. Civ.), 106 S. W. 413; Sullivan v. Fant (Tex. Civ.), 110 S. W. 507; International etc. R. Co. v. Cuneo (Tex. Civ.), 108 S. W. 714; Goodloe v. Goodloe (Tex. Civ.), 105 S. W. 533.
68-15 But see Campbell v. S., 124 Ga. 432, 52 S. E. 914.
71-22 McCleskey & W. v. Howell, 147 Ala. 573, 42 S. 67.
71-23 P. v. Hart (Cal.), 94 P. 1042; Ft. Collins etc. R. Co. v. France, 41 Colo. 512, 92 P. 953; Eisiminger v. Stanton (Mo. App.), 107 S. W. 460; S. v. Crone, 209 Mo. 316, 108 S. W. 555; Buchanan v. Mach. Co. (N. D.), 116 N. W. 335. See First Nat. Bk. v. Hilliboe (N. D.), 114 N. W. 1085.
72-26 Sparks v. Ter., 146 Fed. 371, 76 C. C. A. 594.
72-27 Dillard v. Min. Co. (Or.), 94 P. 966.
73-29 McCleskey & W. v. Howell, 147 Ala. 573, 42 S. 67; Platt v. Rowand (Fla.), 45 S. 32; Page & Son v. Grant, 127 Ia. 249, 103 N. W. 124.
73-30 Mugge v. Jackson, 50 Fla. 235, 39 S. 157; Chicago etc. R. Co. v. Foster, 225 Ill. 278, 80 N. E. 762; Hasper v. Weitcamp, 167 Ind. 371, 79 N. E. 191; Renders v. R. Co., 144 Mich. 387, 108 N. W. 368; J. G. Hutchinson & Co. v. Morris (Mo.), 110 S. W. 684; Stoner v. Royar, 200 Mo. 444, 98 S. W. 601; O'Flynn v. Butte (Mont.), 93 P. 643. See Sneed v. Electric Co., 149 Cal. 704, 87 P. 376. But see Norman P. S. Co. v. Ford, 77 Conn. 461; 59 A. 499; In re Cheney (Neb.), 110 N. W. 731.
73-31 Spaulding v. City, 122 Mo. App. 65, 97 S. W. 545.
73-32 Stoner v. Royar, 200 Mo. 444, 98 S. W. 601; Gearty v. Mayor, 183 N. Y. 233, 76 N. E. 12. See S. v. Butler, 114 La. 596, 38 S. 466.
73-33 Michigan Paper Co. v. Electric Co., 141 Mich. 48, 104 N. W. 387; Armour & Co. v. Ross, 75 S. C. 201, 55 S. E. 315; McQueen v. Bank, 20 S. D. 378, 107 N. W. 208 (objection that evidence tended to create prejudice in minds of the jury against the defendant, and sympathy for the plaintiff, and was clearly irrelevant, insufficient).
74-34 S. v. Ruck, 194 Mo. 416, 92 S. W. 706; Latimer v. R. Co., 126 Mo. App. 70, 103 S. W. 1102; Missouri etc. R. Co. v. Mitchell (Tex. Civ.), 90 S. W. 716.
74-35 Dean v. R. Co., 199 Mo. 386, 97 S. W. 910; Rice v. S., 51 Tex. Cr. 255, 103 S. W. 1156.
74-37 Curry v. S., 50 Tex. Cr. 158, 94 S. W. 1058.
74-38 Page & Son v. Grant, 127 Ia. 249, 103 N. W. 124; Noyes v. Clifford (Mont.), 94 P. 842.
75-42 Alabama etc. R. Co. v. Bonner (Ala.), 39 S. 619; National Society v. Surety Co., 56 Misc. 627, 107 N. Y. S. 820.
75-43 Williams v. S., 168 Ind. 87, 79 N. E. 1079.
75-45 Alabama etc. R. Co. v. Bonner, supra.
76-47 Chicago C. R. Co. v. Foster, 226 Ill. 288, 80 N. E. 762.
77-51 Moore v. S. (Ala.), 45 S. 656.
78-54 Levering v. Miller, 127 Ill. App. 235; S. v. Speyer, 207 Mo. 540, 106 S. W. 505; S. v. Gilson, 114 Mo. App. 652, 90 S. W. 400.
80-60 Dillard v. Min. Co. (Or.), 94 P. 966 (incompetent, irrelevant and immaterial).
80-62 Richardson v. Agnew, 46 Wash. 117, 89 P. 404.

82-72 Brooks v. S., 146 Ala. 153, 41 S. 156; Thomas v. Williamson, 51 Fla. 332, 40 S. 831; Renders v. R. Co., 144 Mich. 387, 108 N. W. 368; Eisiminger v. Stanton (Mo. App.), 107 S. W. 460; Norfolk R. Co. v. Sutherland, 105 Va. 545, 54 S. E. 465. But see Interstate Coal Co. v. Clintwood, 105 Va. 574, 54 S. E. 593. Use of a memorandum.— Moynahan v. Perkins, 36 Colo. 481, 85 P. 1132.

83-75 Baltimore etc. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523; Pecos etc. R. Co. v. Evans (Tex. Civ.), 93 S. W. 1024.

83-76 Landis Mach. Co. v. Konantz (N. D.), 116 N. W. 333.

84-78 Thomas v. Williamson, 51 Fla. 332, 40 S. 831; Pittman v. S., 51 Fla. 94, 41 S. 385.

85-82 Thomas v. Williamson, supra.

88-94 But an objection "that the same is not authenticated as required for the authentication of foreign records under the laws of this state or by act of Congress in such cases made and provided," is sufficient without specifying particular defect. Chapman v. Chapman, 74 Neb. 388, 104 N. W. 880.

88-98 Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767; Michigan Paper Co. v. Electric Co., 141 Mich. 48, 104 N. W. 387.

89-1 Carpenter v. Dressler, 76 Ark. 400, 89 S. W. 89.

90-5 Dorais v. Doll, 33 Mont. 314, 83 P. 884.

90-6 Ft. Collins etc. R. Co. v. France, 41 Colo. 512, 92 P. 953; Texas R. Co. v. Warner (Tex. Civ.), 93 S. W. 489. See Chicago City R. Co. v. Lowitz, 217 Ill. 24, 75 N. E. 755.

92-10 P. v. James, 5 Cal. App. 427, 90 P. 561; Bird v. Min. Co., 2 Cal. App. 674, 84 P. 256; Orr v. Bradley, 126 Mo. App. 146, 103 S. W. 1149; Bragg v. R. Co., 192 Mo. 331, 91 S. W. 527; Odegard v. Lumb. Co., 130 Wis. 659, 110 N. W. 809.. See Frigstad v. R. Co., 101 Minn. 40, 111 N. W. 838.

92-11 Chicago Tract. Co. v. Roberts, 131 Ill. App. 476; Bragg v. R. Co., 192 Mo. 331, 91 S. W. 527.

93-12 P. v. Bowers, 1 Cal. App. 501, 82 P. 553; City of Chicago v. Saldman, 225 Ill. 625, 80 N. E. 349; S. v. Megorden, 49 Or. 259, 88 P. 306.

93-14 Norfolk R. Co. v. Sutherland, 105 Va. 545, 54 S. E. 465.

94-19 Norfolk R. Co. v. Sutherland, supra.

95-21 Willoughby v. Ball, 18 Okla. 535, 90 P. 1017. See St. Louis etc. R. Co. v. Rollins (Tex. Civ.), 89 S. W. 1099.

96-24 Ft. Collins etc. R. Co. v. France, 41 Colo. 512, 92 P. 953; Vagts v. Utman, 125 Wis. 265, 104 N. W. 88.

96-26 See Morgan v. Foran, 120 App. Div. 185, 104 N. Y. S. 1084 (objection to testimony as being a "personal communication inadmissible under §829 of the code" is sufficient).

96-27 Rose v. S., 144 Ala. 114, 42 S. 21.

96-28 Brooks v. S., 146 Ala. 153, 41 S. 156; Campbell v. S., 124 Ga. 432, 52 S. E. 914; S. v. Harris, 199 Mo. 716, 98 S. W. 457; S. v. Brown, 209 Mo. 413, 107 S. W. 1068. See S. v. Barrington, 198 Mo. 23, 95 S. W. 235.

97-30 See Trammel & L. v. Guffey (Tex. Civ.), 94 S. W. 104.

98-32 See S. v. Gadsen, 70 S. C. 430, 50 S. E. 16.

99-39 Wilson v. Godkin, 142 Mich. 631, 105 N. W. 1121; Brown v. Brown (Neb.), 108 N. W. 180; Vagts v. Utman, 125 Wis. 265, 104 N. W. 88.

99-41 Northern Tex. Tract. Co. v. Caldwell (Tex. Civ.), 99 S. W. 869.

100-43 Ft. Collins etc. R. Co. v. France, 41 Colo. 512, 92 P. 953; Lincoln Supply Co. v. Graves, 73 Neb. 214, 102 N. W. 457.

100-44 Pratt v. Seamans (Colo.), 95 P. 929; McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997; Cady Lumb. Co. v. Wilson (Neb.), 114 N. W. 774; Hildebrand v. United Artisans (Or.), 91 P. 542 (objection to qualifications does not include objection to hypothesis for question to expert), *cit.* Encyc. of Ev. Vol. 9, pp. 106-109; S. v. Poole, 42 Wash. 192, 84 P. 727; Richmond Ice Co. v. Ice Co., 103 Va. 465, 49 S. E. 650.

But court may sustain objection although the evidence is not objectionable on ground stated, but is objectionable on other grounds. Town of Eutaw v. Botnick (Ala.), 43 S. 739.

101-45 Henry v. Brown. 143 Ala.

446, 39 S. 325; Elliott v. Howison, 146 Ala. 568, 40 S. 1018; Patton v. Bank, 124 Ga. 965, 53 S. E. 664; Elgin etc. Tract. Co. v. Hench, 132 Ill. App. 535; Gurski v. Doscher, 112 App. Div. 345, 98 N. Y. S. 588.

102-46 S. v. Cary, 76 Conn. 342, 56 A. 632; Dickens v. S., 50 Fla. 17, 38 S. 909; Chicago C. R. Co. v. Foster, 226 Ill. 288, 80 N. E. 762; Mississippi etc. R. Co. v. Hardy, 88 Miss. 732, 41 S. 505; McCaffery v. R. Co., 192 Mo. 144, 90 S. W. 816.

103-50 Hill v. S., 146 Ala. 51, 41 S. 621.

But where the irrelevancy is clearly apparent an objection as irrelevant is improperly overruled. Gearty v. Mayor, 183 N. Y. 233, 76 N. E. 12.

103-51 Hill v. S., 146 Ala. 51, 41 S. 621.

103-52 Jewell Belting Co. v. Mfg. Co., 121 Ill. App. 13.

104-55 Southern R. Co. v. Dickens (Ala.), 44 S. 402; Page & Son v. Grant, 127 Ia. 249, 103 N. W. 124; Van Camp v. City, 130 Ia. 716, 107 N. W. 933 (city map); Clifford Bkg. Co. v. Donovan, 195 Mo. 262, 94 S. W. 527.

104-60 Southern R. Co. v. Dickens (Ala.), 44 S. 402; Merchants etc. Bk. v. Dowdy, 230 Ill. 199, 82 N. E. 606; Smith v. Hubbell, 142 Mich. 637, 106 N. W. 547; S. v. Nelson, 39 Wash. 221, 81 P. 721.

105-64 P. v. Silvers, 6 Cal. App. 69, 92 P. 506.

106-68 Hildebrand v. United Artisans (Or.), 91 P. 542, *cit.* Encyc. of Ev. Vol. 9, p. 106.

106-70 Chicago U. Tract. Co. v. Roberts, 229 Ill. 481, 82 N. E. 401; S. v. Megorden, 49 Or. 259, 88 P. 306.

107-74 See Nat. Bk. v. Hilliboe (N. D.), 114 N. W. 1085.

107-75 Conklin v. Yates, 16 Okla. 266, 83 P. 910.

107-79 Freund v. Greene, 139 Fed. 703 (variance); Paine v. Willson, 146 Fed. 488, 77 C. C. A. 44; Southern Coal Co. v. Swinney (Ala.), 42 S. 808; Elliott v. Howison, 146 Ala. 568, 40 S. 1018; P. v. Long (Cal. App.), 93 P. 387; Seerie v. Brewer, 40 Colo. 299, 90 P. 508; S. v. Carey, 76 Conn. 342, 56 A. 632; Sims v. S. (Fla.), 44 S. 737; Harrison v. S., 125 Ga. 267, 53 S. E. 958; Mississippi etc. R. Co. v. Hardy, 88 Miss. 732, 41 S. 505; Trenton Iron Co. v. Tassi, 56 Misc. 659, 107 N. Y. S. 580; S. v. Dahlquist (N. D.), 115 N. W. 81; Herbert v. Herbert, 20 S. D. 85, 104 N. W. 911; Clayton v. S. (Tex. Cr.), 103 S. W. 848; Western U. T. Co. v. Simmons (Tex. Civ.), 93 S. W. 686; Spiking v. R. Co., 33 Utah 313, 93 P. 838.

109-80 Bradley R. E. Co. v. Robbins (Ind. Ter.), 103 S. W. 777.

109-81 Elliott v. Howison, 146 Ala. 568, 40 S. 1018; Dorough v. Harrington, 148 Ala. 305, 42 S. 557; Donaldson v. P., 33 Colo. 333, 80 P. 906; Patton v. Bank, 124 Ga. 965, 53 S. E. 664; Cady Lumb. Co. v. Wilson (Neb.), 114 N. W. 774; Northern etc. Tract. Co. v. Caldwell (Tex. Civ.), 99 S. W. 869. But see City of Eutaw v. Botnick, supra, 100-44.

109-82 S. v. Blodgett (Or.), 92 P. 820; Holman v. Edson (Vt.), 69 A. 143; Boland v. R. Co., 48 Misc. 523, 96 N. Y. S. 262.

110-84 Southwestern etc. R. Co. v. Maddox, 146 Ala. 539, 41 S. 9; Dickens v. S., 142 Ala. 49, 39 S. 14; Ard v. Crittenden (Ala.), 39 S. 675; Franklin v. S., 145 Ala. 669, 39 S. 979; Southern R. Co. v. Leard, 146 Ala. 349, 39 S. 449; Arellanes v. Arellanes (Cal.), 90 P. 1059; MacFeat v. R. Co., 5 Penne. (Del.) 52, 62 A. 898; Platt v. Rowand (Fla.), 45 S. 32; Lewis v. S. (Fla.), 45 S. 998; Aughey v. Windrem (Ia.), 114 N. W. 1047; Sutton v. Tel. Co. (Ky.), 110 S. W. 874; Biggs & Co. v. Langhammer, 102 Md. 94, 63 A. 198; Darrin v. Wittingham (Md.), 68 A. 269; Pontier v. S. (Md.), 68 A. 1059; Howe v. R. Co., 139 Mich. 638, 103 N. W. 185 (motion to strike out is not good as an objection to a question); S. v. Bateman, 198 Mo. 212, 94 S. W. 843; Lutz v. R. Co., 123 Mo. App. 499, 100 S. W. 46; Thomas v. R. Co., 125 Mo. App. 131, 100 S. W. 1121; Flannagan Mills v. Adams, 115 Mo. App. 542, 90 S. W. 1035; Cullinan v. Horan, 116 App. Div. 711, 102 N. Y. S. 132; Hamlin v. Hamlin, 117 App. Div. 493, 102 N. Y. S. 571; Blowers v. R. Co., 70 S. C. 377, 50 S. E. 19; Western U. Tel. Co. v. Simmons (Tex. Civ.), 93 S. W. 686; Childress v. S. (Tex. Cr.), 103 S. W. 864.

110-85 Tutwiler Coal Co. v. Nichols, 145 Ala. 666, 39 S. 762.
111-86 Excelsior Coal Co. v. Gildersleeve, 160 Fed. 47; Paine v. Willson, 146 Fed. 488, 77 C. C. A. 44; Union Sav. Bk. v. Rinaldo, 6 Cal. App. 637, 92 P. 873 (affidavit of publication although objectionable because not certified by secretary of corporation); Lettler v. Robinson, 38 Ind. 104, 77 N. E. 1145; Wells v. Blackman, 121 La. — , 46 S. 437; Ehrlich v. Weber, 114 Tenn. 711, 88 S. W. 188.
112-91 Andrews v. R. Co., 129 Ia. 162, 105 N. W. 404; Joseph v. R. Co. (Mo. App.), 107 S. W. 1055; Lennox v. R. Co., 104 App. Div. 110, 93 N. Y. S. 230; El Paso etc. R. Co. v. Darr (Tex. Civ.), 93 S. W. 166.
113-92 Donk Bros. Coal Co. v. Thil, 228 Ill. 233, 81 N. E. 857; Langley v. Rouss, 106 App. Div. 225, 94 N. Y. S. 108.
114-96 Moody & Co. v. Rowland (Tex.), 99 S. W. 1112.
116-2 Field v. Field, 39 Tex. Civ. 1, 87 S. W. 726.
116-3 Excelsior Coal Co. v. Gildersleeve, 160 Fed. 47; Patton v. Bank, 124 Ga. 965, 53 S. E. 664; Frank v. Berry, 128 Ia. 223, 103 N. W. 358; Succession of Zebriska, 119 La. 1076, 44 S. 893; C. v. Johnson (Mass.), 85 N. E. 188 (photograph with writing on back); S. v. Madeira, 125 Mo. App. 508, 102 S. W. 1046; Einstein v. Lumb. Co., 118 Mo. App. 184, 94 S. W. 296 (deed); Clopton v. Clopton, 11 N. D. 212, 91 N. W. 46; Kane v. Sholars, 41 Tex. Civ. 154, 90 S. W. 937; Abee v. Bargas (Tex. Civ.), 100 S. W. 191 (certificate of clerk attached to abstract of judgment).
119-10 Dorough v. Harrington, 148 Ala. 305, 42 S. 557; Patton v. Bank, 124 Ga. 965, 53 S. E. 664; Frank v. Berry, 128 Ia. 223, 103 N. W. 358; Dick v. S. (Md.), 68 A. 286; S. v. Madeira, 125 Mo. App. 508, 102 S. W. 1046; Campbell v. Beard, 57 W. Va. 501, 50 S. E. 747.
119-11 Cullinan v. Horan, 116 App. Div. 711, 102 N. Y. S. 132; First Nat. Bk. v. Miller, 48 Or. 587, 87 P. 892.
120-12 Patton v. Bank, supra.
120-13 First Nat. Bk. v. Miller, supra; Campbell v. Beard, supra.
120-16 Wade v. Goza, 78 Ark. 7, 96 S. W. 388.
121-17 Wade v. Goza, supra.
121-19 Littler v. Robinson, 38 Ind. App. 104, 77 N. E. 1145 (parol evidence to prove ownership and location of real estate).
122-21 International H. Co. v Campbell (Tex. Civ.), 96 S. W. 93.
123-24 Millard v. Millard, 221 Ill. 86, 77 N. E. 595; Childress v. S. 51 Tex. Cr. 455, 103 S. W. 864; Weidenhoft v. Primm (Wyo.), 94 P. 453.
124-28 Adams v. S., 49 Tex. Cr. 361, 91 S. W. 225.
124-29 Franklin v. S., 145 Ala. 669, 39 S. 979; Day v. C. (Ky.), 96 S. W. 510; Pontier v. S. (Md.), 68 A. 1059; S. v. Bateman (Mo.), 94 S. W. 843; S. v. Pyles, 206 Mo. 626, 105 S. W. 613; S. v. Sykes, 191 Mo. 62, 89 S. W. 851; S. v. Harris, 199 Mo. 716, 98 S. W. 457; Speer v. S., 50 Tex. Cr. 273, 97 S. W. 469; Powell v. S., 50 Tex. Cr. 592, 99 S. W. 1005. But see Rex v. Brooks, 11 Ont. L. R. (Can.) 525 (failure of counsel to object to a deposition held not a waiver).
126-36 Kerbaugh v. Caldwell, 151 Fed. 194; Theodore Land Co. v. Lyon, 148 Ala. 668, 41 S. 682 (objection to two questions one of which was proper); Woodstock Iron Wks. v. Stockdale, 143 Ala. 550, 39 S. 335; Mallory v. Brademyer, 76 Ark. 538, 89 S. W. 551; P. v. Pembroke, 6 Cal. App. 482, 92 P. 668; Elizabeth Spencer's Appeal, 77 Conn. 638, 60 A. 289; Lewis Robinson Co. v. Hutchinson, 127 Ga. 789, 56 S. E. 998; Johnson v. S., 125 Ga. 243, 54 S. E. 184; Campbell v. S., 124 Ga. 432, 52 S. E. 914 (series of questions); Martin v. City, 126 Ga. 577, 55 S. E. 499; Park v. S., 126 Ga. 575, 55 S. E. 489; Darrin v. Whittingham (Md.), 68 A. 269; Smith v. Humphreys, 104 Md. 285, 65 A. 57; Baltimore etc. R. Co. v. Whitehill, 104 Md. 295, 64 A. 1033; Logan v. Field, 192 Mo. 54, 90 S. W. 127; Gulf etc. R. Co. v. Tullis 41 Tex. Civ. 219, 91 S. W. 317; Texas etc. R. Co. v. Powell (Tex. Civ.), 86 S. W. 21; St. Louis etc. R. Co. v. Frazier (Tex. Civ.), 87 S. W. 400; Field v. Field, 39 Tex. Civ. 1, 87 S. W. 726; Pecos etc. R. Co. v. Evans-S.-B. Co. (Tex. Civ.), 93 S. W. 1024; Tuttle v. Moody (Tex.), 97 S. W. 1037; Wan-

delohr v. Bank (Tex. Civ.), 106 S. W. 413; Sullivan v. Fant (Tex. Civ.), 110 S. W. 507; International etc. R. Co. v. Cuneo (Tex. Civ.), 108 S. W. 714; Goodloe v. Goodloe (Tex. Civ.), 105 S. W. 533; Thomas v. C., 106 Va. 855, 56 S. E. 705; City of Spokane v. Costello, 42 Wash. 182, 84 P. 652. See Rose v. S., 144 Ala. 114, 42 S. 21.

Where several articles are offered in evidence and part are admissible a general objection to their admission will be overruled. C. v. Karamarovic, 218 Pa. 405, 67 A. 650.

Objection to testimony of two witnesses is too broad even where one is clearly incompetent. Dorais v. Doll, 33 Mont. 314, 83 P. 884.

127-37 Thornton Merc. Co. v. Bretherton, 32 Mont. 80, 80 P. 10; Galveston etc. R. Co. v. Janert (Tex. Civ.), 107 S. W. 963; S. v. Hood (W. Va.), 59 S. E. 971.

But where entire book is offered a general objection is sufficient. Offer should include only admissible portion. Geneva Springs v. Steele, 111 App. Div. 706, 97 N. Y. S. 996.

127-38 Louisville R. Co. v. Britton, 145 Ala. 654, 39 S. 585; Fricker v. Mfg. Co., 124 Ga. 165, 52 S. E. 65; S. v. Crofford, 133 Ia. 1, 478, 110 N. W. 921; Boylan v. McMillan (Ia.), 114 N. W. 630; Potomac B. Wks. v. Barber, 103 Md. 509, 63 A. 1068; P. v. Gillette, 191 N. Y. 107, 83 N. E. 680; Cobb v. Dunlevie (W. Va.), 60 S. E. 384. See J. Kessler Co. v. Ellis, 27 Ky. L. R. 1042, 87 S. W. 798.

128-39 Spaulding v. City, 122 Mo. App. 65, 97 S. W. 545; S. v. Dahlquist (N. D.), 115 N. W. 81.

128-43 Converse v. Bank, 79 Conn. 603, 65 A. 1065; Star Assn. v. Assn., 77 Conn. 83, 58 A. 467; Fox v. Erbe, 100 App. Div. 343, 91 N. Y. S. 832.

130-49 People's Nat. Bk. v. Haralson, 1 Ga. App. 311, 57 S. E. 991; Logan v. Field, 192 Mo. 54, 90 S. W. 127; Schaubuch v. Dillemuth (Va.), 60 S. E. 745.

130-50 Joseph Taylor C. Co. v. Dawes, 220 Ill. 145, 77 N. E. 131.

131-52 Stamper v. C., 30 Ky. L. R. 579, 99 S. W. 304.

131-53 See Bjorkegren v. Kirk, 53 Misc. 560, 103 N. Y. S. 994.

132-58 But see Sullivan v. Fant (Tex. Civ.), 110 S. W. 507.

133-61 In re Manhattan Bridge, 108 N. Y. S. 366. See Hoogewerff v. Flack, 101 Md. 371, 61 A. 184 (objections to books of account not waived by questions concerning same put to objector by his own counsel).

134-63 See Main v. Radney (Ala.), 39 S. 981.

134-64 Spotswood v. Spotswood, 2 Cal. App. 711, 89 P. 362; Chany v. Hotchkiss, 79 Conn. 104, 63 A. 947; Baltimore etc. R. Co. v. S. (Md.), 69 A. 439; Richardson v. Agnew, 46 Wash. 117, 89 P. 404 (objection insufficient but eivdence excluded as hearsay).

135-68 Mogenson v. Zubler, 36 Colo. 235, 84 P. 981.

135-69 Comrs. v. Erwin, 140 N. C. 193, 52 S. E. 785.

OBSTRUCTING JUSTICE [Vol. 9.]

139-9 S. v. Murphy (Del.), 66 A. 335.

143-25 Tedford v. P., 219 Ill. 23, 76 N. E. 60.

143-26 S. v. Bringgold, 40 Wash. 12, 82 P. 132.

OFFENSES AGAINST POSTAL LAWS [Vol. 9.]

146-1 U. S. v. White, 150 Fed. 379.

146-4 Shepard v. U. S., 160 Fed. 584.

A letter received in the regular course of mail, removed and opened by inspector with permission of addressee and without delivery to him, and afterwards replaced in mail as a decoy, is still mail matter and admissible in evidence to prove embezzlement. Ennis v. U. S., 154 Fed. 842.

147-6 Rumble v. U. S., 143 Fed. 772, 75 C. C. A. 30; Brooks v. U. S., 146 Fed. 223, 76 C. C. A. 58; Walker v. U. S., 152 Fed. 111; U. S. v. Marrin, 159 Fed. 767; Shepard v. U. S., 160 Fed. 584.

147-8 Intent may be shown by letters other than those upon which the indictment is based. Brooks v. U. S., 146 Fed. 223, 76 C. C. A. 581.

148-13 See People's Bk. v. Gilson, 140 Fed. 1.

OFFER OF EVIDENCE [Vol. 9.]

152-2 Holland v. Williams, 126 Ga. 617, 55 S. E. 1023.

Counsel need not state purpose of evidence unless requested to do so. Dunman v. Murphey (Tex. Civ.), 107 S. W. 70.

153-3 Holland v. Williams, 126 Ga. 617, 55 S. E. 1023; Marcum v. Hargis, 31 Ky. L. R. 1117, 104 S. W. 693; Moss v. R. Co. (Tex. Civ.), 103 S. W. 221.

153-4 Moss v. R. Co., supra.

155-7 Pickford v. Talbott, 28 App. D. C. 498; Weske v. Tract. Co., 117 Ill. App. 298; Goyette v. Keenan, 196 Mass. 416, 82 N. E. 427; Hicks v. Hicks, 142 N. C. 231, 55 S. E. 106; Bernhardt v. Dutton, 146 N. C. 206, 59 S. E. 651; Ireland v. Ward (Or.), 93 P. 932.

156-8 Weske v. Tract. Co., 117 Ill. App. 298; Millington v. O'Dell (Ind. App.), 73 N. E. 949; Neff v. Ins. Co., 39 Ind. App. 250, 73 N. E. 1041; Goyette v. Keenan (Mass.), 82 N. E. 427; Hicks v. Hicks, supra; Barnes v. Nav. Co. (Or.), 89 P. 371; Ireland v. Ward (Or.), 93 P. 932; Dunbar v. R. Co., 79 Vt. 474, 65 A. 528.

156-9 Eaton v. Blackburn, 49 Or. 22, 88 P. 303.

157-12 Mebius & D. Co. v. Mills, 150 Cal. 229, 88 P. 917.

158-13 Mebius & D. Co. v. Mills, supra.

158-14 Rose v. Doe, 4 Cal. App. 680, 89 P. 135.

A proper question to which the offered evidence is responsive is essential to raise question upon ruling excluding the testimony. Indianapolis Co. v. Hall, 166 Ind. 557, 76 N. E. 242.

159-15 Rose v. Doe, 4 Cal. App. 680, 89 P. 135.

160-18 Hibbets v. Threlkeld (Ia.), 114 N. W. 1045; Harrington v. Min. Co., 33 Mont. 330, 84 P. 467; Zeller v. Leiter, 114 App. Div. 148, 99 N. Y. S. 624.

161-20 Lichtenstein v. Peck, 110 N. Y. S. 410.

161-23 Judy v. Buck, 72 Kan. 106, 82 P. 1104; Marcum v. Hargis, 31 Ky. L. R. 1117, 104 S. W. 693; Logan v. McMullen, 4 Cal. App. 154, 87 P. 285; Marshall v. Marshall, 71 Kan. 313, 80 P. 629; Judy v. Buck, 72 Kan. 106, 83 P. 1104; Louisville etc. R. Co. v. Williamson, 29 Ky. L. R. 1165, 96 S. W. 1130; Siebert v. Hatcher, 205 Mo. 83, 102 S. W. 962; Pier v. Speer, 73 N. J. L. 633, 64 A. 161; Madson v. Rutten (N. D.), 113 N. W. 872; Barnes v. Nav. Co. (Or.), 89 P. 371; McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503; Norman v. Hopper, 38 Wash. 415, 80 P. 551.

Court's refusal to hear statement of counsel as to what he expects to prove by a witness whose testimony is excluded on ground of his incompetency is error. Imboden v. Trust Co., 111 Mo. App. 220, 86 S. W. 263; Ehrhardt v. Stevenson, 128 Mo. App. 476, 106 S. W. 1118.

164-25 Eaton v. Blackburn (Or.), 88 P. 303.

164-27 Nevers Lumb. Co. v. Fields (Ala.), 44 S. 81.

165-28 An offer to prove a legal conclusion such as insolvency is properly rejected on objection of opposite party. Martin v. Hertz, 224 Ill. 84, 79 N. E. 558.

165-29 Hallwood Cash R. Co. v. Prouty (Mass.), 82 N. E. 6.

165-31 O'Sullivan v. Griffith (Cal.), 95 P. 873; Riddle v. Gibson, 29 App. D. C. 237; Bowden v. Bowden, 125 Ga. 107, 53 S. E. 606; Court of Honor v. Dinger, 123 Ill. App. 406; Flynn v. Coolidge, 188 Mass. 214, 74 N. E. 342; Kittanning Borough v. Gas Co., 35 Pa. Super. 167; McQuiggan v. Ladd, 79 Vt. 90, 64 A. 503; Delmar Oil Co. v. Bartlett (W. Va.), 59 S. E. 634; Wood v. Town (Wis.), 115 N. W. 810.

167-33 Radel v. Lesher, 137 Fed. 719, 70 C. C. A. 411; Stanley v. Beckham, 153 Fed. 152. See Aughey v. Windrem (Ia.), 114 N. W. 1047.

167-34 Stanley v. Beckham, supra.

168-35 Millington v. Odehl, 35 Ind. App. 225, 73 N. E. 949; Judy v. Buck, 72 Kan. 106, 82 P. 1104; Hager v. Donovan, 75 Kan. 43, 88 P. 637; Hart v. Brierley, 189 Mass. 598, 76 N. E. 286; Siebert v. Hatcher, 205 Mo. 83, 102 S. W. 962; Blondell v. Bolander (Neb.), 114 N. W. 574; Bernhardt v. Dutton, 146 N. C. 206, 59 S. E. 651; Burns v. R. Co., 213 Pa. 280, 62 A. 845; Evans v. Scott (Tex. Civ.), 97 S. W. 116.

169-36 *Compare* Field v. Schuster, 26 Pa. Super. 82.

169-37 Hager v. Donovan, 75 Kan. 43, 88 P. 637; Lenfest v. Robbins, 101 Me. 176, 63 A. 729.

169-39 Hager v. Donovan, 75 Kan. 43, 88 P. 637.

170-40 See Sanford v. Millikin, 144 Mich. 311, 107 N. W. 884.

171-41 Oldham v. Ramsner, 149 Cal. 540, 87 P. 18; Bowden v. Bowden, 125 Ga. 107, 53 S. E. 606; Hart v. Bruerley, 189 Mass. 598, 76 N. E. 289; Lewis Co. v. Montgomery, 59 W. Va. 75, 52 S. E. 1017.

171-42 Bain v. Bain (Ala.), 43 S. 562; Logan v. McMullin, 4 Cal. App. 154, 87 P. 285; Oldham v. Ramsner, 149 Cal. 540, 87 P. 18; American Theater Co. v. Siegel, 220 Ill. 145, 77 N. E. 588; Ross v. S. (Ind.), 82 N. E. 781; Borden v. Lynch, 34 Mont. 503, 87 P. 609; Burns v. R. Co., 213 Pa. 280, 62 A. 845. But see Keats v. Gas Co., 29 Pa. Super. 480; Gorham v. Moor (Mass.), 84 N. E. 436.

173-43 Martin v. Hertz, 224 Ill. 84, 79 N. E. 558.

173-44 Canada-A. etc. Co. v. Flanders, 145 Fed. 875, 76 C. C. A. 1; Hart v. Brierley, 189 Mass. 598, 76 N. E. 286.

Separate instrument should be offered separately, but a collective offer and admission, where party had an opportunity to object to each instrument separately, is not a reversible error. Lee v. Giles, 124 Ga. 494, 52 S. E. 806.

174-46 Indianapolis Co. v. Hall, 166 Ind. 557, 76 N. E. 242; Keeler v. Schott, 1 Pa. Super. 458; Jacoby v. Ins. Co., 10 Pa. Super 171.

Offer including some immaterial matters should not preclude proof of material matters. In re Young, 33 Utah 382, 94 P. 731.

175-47 Boyer v. Ins. Co., 1 Cal. App. 54, 81 P. 671; Keeler Co. v. Schott, 1 Pa. Super. 458; Jacoby v. Ins. Co., 10 Pa. Super. 171; Rogers v. Chester (R. I.), 69 A. 848.

176-49 Rogers v. Chester, supra.

177-50 Security Tr. Co. v. Robb, 142 Fed. 78, 73 C. C. A. 302; Board v. Lovejoy, 143 Mich. 557, 107 N. W. 276.

Where portion of document is offered and adverse party seeks to have all of it in evidence he must specify what bearing the suppressed portion has upon the case. Rogers v. Chester, supra.

OFFICERS [Vol. 9.]

184-11 Barry v. Smith, 191 Mass. 78, 77 N. E. 1099 (public officer's testimony is competent to prove that he is such officer); S. v. Twining, 73 N. J. L. 3, 63 A. 402.

185-14 See Howland v. Prentice, 143 Mich. 347, 106 N. W. 1105.

188-29 Wilson v. Tye, 31 Ky. L. R. 491, 102 S. W. 856.

189-30 P. v. Davidson, 2 Cal. App. 100, 83 P. 161.

190-33 Mahon v. S., 46 Tex. Cr. 234, 79 S. W. 28.

192-42 A written resignation delivered to an officer authorized to receive it, or to fill the vacancy is prima facie, but not conclusive evidence of an intention to resign. S. v. Budworth (Minn.), 116 N. W. 486.

197-57 Martin v. Dist., 93 Minn. 409, 101 N. W. 952; Day v. Smith, 87 Miss. 395, 39 S. 526; Conner v. Nevada, 188 Mo. 148, 86 S. W. 256; Remington v. S., 116 App. Div. 522, 101 N. Y. S. 952; Craft v. Lent, 53 Misc. 481, 103 N. Y. S. 366; In re Webster, 106 App. Div. 360, 94 N. Y. S. 1050; Christ v. Fent, 16 Okla. 375, 84 P. 1074.

198-60 Porter v. S., 124 Ga. 297, 52 S. E. 283; Lauve v. Wilson, 114 La. 699, 38 S. 522.

199-63 Stoy v. Indiana Co., 166 Ind. 316, 76 N. E. 1057; Barry v. Smith, 191 Mass. 78, 77 N. E. 1099.

201-73 Smith v. Bogaskie, 58 Misc. 243, 109 N. Y. S. 598.

202-75 See P. v. Davidson, 2 Cal. App. 100, 83 P. 161; Denver v. Spencer, 34 Colo. 270, 82 P. 590; P. v. Carr, 231 Ill. 502, 83 N. E. 269.

204-83 S. v. O'Neill, 114 Mo. App. 611, 90 S. W. 410.

Proof of falsity of a notary's certificate puts the burden on him to show that he acted in good faith. Blacs v. C., 29 Ky. L. R. 908, 96 S. W. 802. See Phillips v. Eggert, 133 Wis. 318, 113 N. W. 686.

207-98 Aultman T. Co. v. Burchett, 15 Okla. 490, 83 P. 719.

210-9 See U. S. v. Pierson, 145 Fed. 814, 76 C. C. A. 390.
214-24 See Nagle v. U. S., 145 Fed. 302, 76 C. C. A. 181.
215-27 See U. S. v. Pierson, supra.
216-33 U. S. v. Pierson, supra.
227-76 S. v. Leeper, 146 N. C. 655, 61 S. E. 585.

ORDER OF PROOF [Vol. 9.]

Statutory regulation, 234-6.

232-1 Wendling Lumb. Co. v. Glenwood Co. (Cal.), 95 P. 1029; Moody v. Peirano, 4 Cal. App. 411, 88 P. 380; Bashore v. Mooney, 4 Cal. App. 276, 87 P. 553; In re Dolbeer, 149 Cal. 227, 86 P. 695; Sheridan v. Patterson, 34 Colo. 267, 82 P. 539; Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 P. 61; Treasury Tunnel Co. v. Gregory, 38 Colo. 212, 88 P. 445; San Miguel Min. Co. v. Bonner, 33 Colo., 207, 79 P. 1025; Dannelly v. Russ (Fla.), 45 S. 496; Southern R. Co. v. Clay (Ga.), 61 S. E. 226; Standard Cotton Mills v. Cheatham, 125 Ga. 649, 54 S. E. 650; Tinkle v. Wallace, 166 Ind. 382, 79 N. E. 355; Cook v. S. (Ind.), 82 N. E. 1047; Miller v. Springfield, 6 Ind. Ter. 115, 89 S. W. 1011; Fritz v. Chicago Co. (Ia.), 114 N. W. 193; Van Camp v. City, 130 Ia. 716, 107 N. W. 933; S. v. Seligman, 127 Ia. 415, 103 N. W. 357; McBride v. Steinweden, 72 Kan. 508, 83 P. 822; Morena v. Winston, 194 Mass. 378, 80 N. E. 473; Blickley v. Luce, 148 Mich. 233, 111 N. W. 752; S. v. Dilts, 191 Mo. 665, 90 S. W. 782; S. v. Taylor, 202 Mo. 1, 100 S. W. 41; Butte Min. Co. v. Barker, 35 Mont. 327, 89 P. 302, 90 P. 177; Noyes v. Clifford (Mont.), 94 P. 842; Union P. R. Co. v. Edmondson (Neb.), 110 N. W. 650; Petersburg S. Dist. v. Peterson, 14 N. D. 344, 103 N. W. 756; Baldi v. Ins. Co., 30 Pa. Super. 213; Anderton v. Blais (R. I.), 65 A. 602; Tucker v. R. Co. R. I.), 69 A. 850; Bolton v. Tel. Co., 76 S. C. 529, 57 S. E. 543; St. Louis R. Co. v. Cassidy (Tex. Civ.), 107 S. W. 628; Pocahontas Co. v. Williams, 105 Va. 708, 54 S. E. 868; S. v. Gohl, 46 Wash. 408, 90 P. 259; Richardson v. Agnew, 46 Wash. 117 89 P. 404; Rowe v. Whatcom, 44 Wash. 658, 87 P. 921; Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777; Howard v. Beldenville, 129 Wis. 98, 108 N. W. 48.
234-2 Cook v. S. (Ind.), 82 N. E. 1047. But see Brown v. S., 88 Miss. 166, 40 S. 737 (holding that defendant cannot be controlled in the order of introduction of his testimony).
234-3 Penn v. R. Co., 129 Ga. 856, 60 S. E. 172; Todd v. Crail, 167 Ind. 48, 77 N. E. 402; Gulf etc. R. Co. v. Matthews (Tex. Civ.), 89 S. W. 983; Howard v. Beldenville, 129 Wis. 98, 108 N. W. 48.
234-4 In re Dolbeer, 149 Cal. 227, 86 P. 695; Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 P. 61; Richbourg v. Rose, 53 Fla. 173, 44 S. 69; Bridger v. Bank, 126 Ga. 821, 56 S. E. 97; Brooke v. Lowe, 122 Ga. 358, 50 S. E. 146; Tinkle v. Wallace, 166 Ind. 382, 79 N. E. 355; McBride v. Steinweden, 72 Kan. 508, 89 P. 822; Louisville R. Co. v. Beard, 28 Ky. L. R., 921, 90 S. W. 944; Brockmiller v. Industrial Wks., 148 Mich. 642, 112 N. W. 688; Gross v. Watts, 206 Mo. 373, 104 S. W. 30; Noyes v. Clifford (Mont.), 94 P. 842; Butte Min. Co. v. Barker, 35 Mont. 327, 89 P. 302, 90 P. 177; Madson v. Rutten (N. D.), 113 N. W. 872; Southern R. Co. v. Stockdon, 106 Va. 693, 56 S. E. 713; Richardson v. Agnew, 46 Wash. 117, 89 P. 404.
234-5 S. v. Seligman, 127 Ia. 415, 103 N. W. 357.
234-6 Loder v. Jayne, 142 Fed. 1010; Bashore v. Mooney, 4 Cal. App. 276, 87 P. 553; Moody v. Peirano, 4 Cal. App. 411, 88 P. 380; Treasury Tunnel Co. v. Gregory, 38 Colo. 212, 88 P. 445; Richbourg v. Rose, 53 Fla. 173, 44 S. 69; Dannelly v. Russ (Fla.), 45 S. 496; Standard Cotton Mills v. Cheatham, 125 Ga. 649, 54 S. E. 650; Southern R. Co. v. Clay (Ga.), 61 S. E. 226; Todd v. Crail, 167 Ind. 48, 77 N. E. 402; McBride v. Steinweden, 72 Kan. 508, 83 P. 822; Kibby v. Gibson, 72 Kan. 375, 83 P. 968; Pharr v. Shadel, 115 La. 92, 38 S. 914; Brockmiller v. Industrial Wks. 148 Mich. 642, 112 N. W. 688 Gross v. Watts, 206 Mo. 373, 104 S. W. 30; Noyes v. Clifford (Mont.), 94 P. 842; Union P. R. Co. v. Edmondson (Neb.), 110 N. W. 650; Petersburg S. Dist. v. Peterson,

N. D. 344, 103 N. W. 756; Baldi v. Ins. Co., 30 Pa. Super, 213; Anderton v. Blais (R. I.), 65 A. 602; St. Louis R. Co. v. Cassidy (Tex. Civ.), 107 S. W. 628; Pocahontas Co. v. Williams, 105 Va. 708, 54 S. E. 863; Richardson v. Agnew, 46 Wash. 117, 89 P. 404; Rowe v. Whatcom Co., 44 Wash. 658, 87 P. 921; Howard v. Beldenville, 129 Wis. 98, 108 N. W. 48; Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777.

Rebuttal testimony may be received although properly it should be brought out before plaintiff rested. Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 P. 61; International R. Co. v. McVey (Tex. Civ.), 102 S. W. 172.

Statutory regulation.— Deposition of plaintiff may be read after several witnesses have testified for her in chief, even though the statute expressly provides that no person shall testify for himself in chief, an ordinary action, after introducing testimony for himself in chief, nor in an equitable action after taking other testimony for himself in chief, where her deposition was taken before such witnesses testified. Cumberland T. T. Co. v. Overfield, 32 Ky. L. R. 421, 106 S. W. 242.

235-8 Owen v. Tel. Co., 126 Wis. 412, 105 N. W. 924.

236-9 Campbell v. R. Co., 95 Minn. 375, 104 N. W. 547; Yazoo R. Co. v. Grant, 86 Miss. 565, 38 S. 502.

236-10 Owen v. Tel. Co., supra.

236-11 Baum v. Palmer, 165 Ind. 513, 76 N. E. 108.

Admission of evidence in rebuttal. Court in its discretion may permit plaintiff on rebuttal to offer evidence to support his cause of action. Moody v. Peirano, 4 Cal. App. 411, 88 P. 380.

236-13 Wendling Co. v. Glenwood (Cal.), 95 P. 1029.

It is no abuse of discretion to refuse to receive evidence to disprove contributory negligence, before any evidence has appeared in support of that issue. Owen v. Tel. Co., 126 Wis. 412, 105 N. W. 924.

When a litigant knows from the pleading, and otherwise that his adversary will attempt to defeat his claim by denying its existence he may offer evidence of admissions or corroborative declarations made by such adversary against his own interest, without previously examining him relative thereto, and before he has testified at the trial. Atlas Lumb. Co. v. Flint, 20 S. D. 118, 104 N. W. 1046.

237-14 Sheridan v. Patterson, 34 Colo. 267, 82 P. 539; Blickley v. Luce, 148 Mich. 233, 111 N. W. 752; Hall v. Wagner, 111 App. Div. 70, 97 N. Y. S. 570; Bunnell v. Kintner, 27 Pa. Super. 605; International R. Co. v. McVey (Tex. Civ.), 102 S. W. 172.

238-18 Evidence in chief should be offered in opening. Morehead v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340; Multnomah Co. v. Towing Co., 49 Or. 204, 89 P. 389.

Reopening case for further evidence. Bynum v. Brady, 82 Ark. 603, 100 S. W. 66; Western U. Tel. Co. v. Hanley, 85 Ark. 263, 107 S. W. 1168; In re Dolbeer, 149 Cal. 227, 86 P. 695; Wilson v. Johnson, 51 Fla. 370, 41 S. 395; Standard Cotton Mills v. Cheatham, 125 Ga. 649, 54 S. E. 650; Watson v. Barnes, 125 Ga. 733, 54 S. E. 723; Southern R. Co. v. Clay (Ga.), 61 S. E. 226; Hock v. Magerstadt, 124 Ill. App. 140; P. v. Weimers, 225 Ill. 17, 80 N. E. 45; Tinkle v. Wallace, 167 Ind. 382, 79 N. E. 355; Todd v. Crail, 167 Ind. 48, 77 N. E. 402; Miller v. Springfield Co., 6 Ind. Ter. 115, 89 S. W. 1011; McBride v. Steinweden, 72 Kan. 508, 83 P. 822; Louisville R. Co. v. Beard, 28 Ky. L. R. 921, 90 S. W. 944; Morena v. Winston, 194 Mass. 378, 80 N. E. 473; Blickley v. Luce, 148 Mich. 233, 111 N. W. 752; Gross v. Watts, 206 Mo. 373, 104 S. W. 30; S. v. Miles, 199 Mo. 530, 98 S. W. 25; S. v. Dilts, 191 Mo. 665, 90 S. W. 782; Willett v. Morse (N. J.), 60 A. 362; Minard v. R. Co., 74 N. J. L. 39, 64 A. 1054; Standard Co. v. Merritt, 48 Misc. 498, 96 N. Y. S. 181; Potsdam Co. v. Potsdam, 112 App. Div. 810, 99 N. Y. S. 551; Petersburg S. Dist. v. Peterson, 14 N. D. 344, 103 N. W. 756; Jones v. Wright (Tex. Civ.), 92 S. W. 1010; St. Louis R. Co. v. Johnson (Tex.), 94 S. W. 162; St. Louis R. Co. v. Cassidy (Tex. Civ.), 107 S. W. 628; Gulf R. Co. v. Matthews

(Tex. Civ.), 89 S. W. 983; Wilkie v. Richmond Co., 105 Va. 290, 54 S. E. 43; Howard v. Beldenville Co., 129 Wis. 98, 108 N. W. 48. But see Lewis v. Helm, 40 Colo. 17, 90 P. 97.

After a motion for nonsuit has been submitted the court in its discretion may grant or refuse permission to plaintiff to introduce additional evidence. Richardson v. Agnew, 46 Wash. 117, 89 P. 404; Brooke v. Lowe, 122 Ga. 358, 50 S. E. 146; Terry v. Williams, 148 Ala. 468, 41 S. 804. But see Pittsburg G. Co. v. Roquemore (Tex. Civ.), 88 S. W. 449.

When by reason of accident, inadvertance or even because of a mistake as to the necessity for doing so to make out a prima facie case, the plaintiff has omitted to introduce evidence the court will on motion reopen case to prevent a nonsuit. Penn v. R. Co., 129 Ga. 856, 60 S. E. 172.

While motion for a directed verdict is being argued court may in its discretion reopen case for further evidence. Bridger v. Bank, 126 Ga. 821, 56 S. E. 97.

Plaintiff may recall witness for further testimony where defendant offers no proof on its part. Brockmiller v. Industrial Wks., 148 Mich. 642, 112 N. W. 688; Dorr Cattle Co. v. R. Co., 128 Ia. 359, 103 N. W. 1003.

240-24 Security Tr. Co. v. Robb, 142 Fed. 78, 73 C. C. A. 302.

241-27 Southern R. Co. v. Leard, 146 Ala. 349, 39 S. 449; White v. R. Co. (Del.), 63 A. 931; Ross v. S. (Ind.), 82 N. E. 781.

241-28 Treasury Tunnel Co. v. Gregory, 38 Colo. 212, 88 P. 445; Chicago v. Seldman, 129 Ill. App. 282; Butte Min. Co. v. Barker, 35 Mont. 327, 89 P. 302, 90 P. 177. See Bashore v. Mooney, 4 Cal. App. 276, 87 P. 553.

Conspiracy. — Declarations of defendant may be admitted before prima facie case of conspiracy has been proven if made relevant by subsequent evidence. Loder v. Jayne, 142 Fed. 1010; Cook v. S. (Ind.), 82 N. E. 1047.

242-32 Rowe v. Whatcom, 44 Wash. 658, 87 P. 921. But see Baum v. Palmer, 165 Ind. 513, 76 N. E. 108.

243-33 Flint Mfg. Co. v. Beckett, 167 Ind. 491, 79 N. E. 503.

243-36 Henry v. Frohlichstein, 149 Ala. 330, 43 S. 126; Bashore v. Mooney, 4 Cal. App. 276, 87 P. 380; Dannelly v. Russ (Fla.), 45 S. 496 (links in chain of title); Southern R. Co. v. Stockdon, 106 Va. 693, 56 S. E. 713 (ordinance).

244-38 Fritz v. Chicago (Ia.), 114 N. W. 193.

245-40 Southern R. Co. v. Laird, 146 Ala. 349, 39 S. 449.

251-61 S. v. Kesner, 72 Kan. 87, 82 P. 720; S. v. Gohl, 46 Wash. 408, 90 P. 259.

251-63 See Cook v. S. (Ind.), 82 N. E. 1047.

OWNERSHIP [Vol. 9.]

257-1 Jaquith Co. v. Shumway, 80 Vt. 556, 69 A. 157.

Where ownership is undisputed slight evidence will sustain it. City of La Porte v. Henry (Ind. App.), 83 N. E. 655.

257-2 In re Diamond, 158 Fed. 370 (bankruptcy proceedings); Churchill v. More, 4 Cal. App. 219, 88 P. 291; City of La Porte v. Henry, supra; United S. M. Co. v. Mach. Co. (Mass.), 83 N. E. 412; Hannis Dist. Co. v. Court (W. Va.), 59 S. E. 1051.

257-4 South & Lane v. Bank (Ga. App.), 60 S. E. 1087; Adams v. Connelly, 118 Ill. App. 441; Massachusetts Nat. Bk. v. Snow, 187 Mass. 159, 72 N. E. 959; First Nat. Bk. v. Sprout (Neb.), 110 N. W. 713; Gandy v. Bissell, 72 Neb. 356, 100 N. W. 803; Price v. Bank, 14 Okla. 268, 79 P. 105; Myrick Bros. v. Jackson, 42 Tex. Civ. 143, 99 S. W. 143.

Though endorsed by holder his possession is prima facie evidence of his ownership. Hughes v. Black (Ala.), 39 S. 984; Gumaer v. Jackson, 37 Colo. 39, 86 P. 885; Carolina etc. Co. v. Mach. Co., 3 Ga. App. 732, 60 S. E. 375.

259-6 See Tullis v. McClary, 128 Ia. 493, 104 N. W. 505.

260-9 **Joint deposit of bonds. Presumption** of co-ownership. Ger-

ting v. Wells, 103 Md. 624, 64 A. 298, 433.

260-10 Checks payable to cash. Cleary v. Glass Co., 54 Misc. 537, 104 N. Y. S. 831.

260-12 Ware v. Souders, 120 Ill. App. 209.

Consigned goods in transitu. — Consignee is presumed to have ownership necessary to bring action for conversion until contrary is shown. Missouri R. Co. v. Implement Co., 73 Kan. 295, 85 P. 408, 87 P. 80.

262-16 McAfee v. Montgomery, 21 Ind. App. 196, 51 N. E. 957.

263-17 Direct testimony is not a conclusion. — Roscoe v. Jefferson, 142 Ala. 705, 38 S. 246; Lipschitz v. Halperin, 53 Misc. 280, 103 N. Y. S. 202; Hawley v. Bond, 20 S. D. 215, 105 N. W. 464 (cases collected). But see Cate v. Fife, 80 Vt. 404, 68 A. 1.

263-18 Waters v. Davis, 145 Fed. 912, 76 C. C. A. 444; North American Restaurant v. McElligott, 227 Ill. 317, 81 N. E. 388 (evidence as to name on signs and bills of fare admissible); City of La Porte v. Henry (Ind. App.), 83 N. E. 655; Bunke v. Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66 (showing that wires lead from defendant's terminal and that defendant was the only telephone company in the city, sufficient to show ownership of wires in defendant); Jaquith Co. v. Shumway, 80 Vt. 556, 69 A. 157 (bill of sale and books of corporation admitted to corroborate testimony of witness).

The register of a ship is merely prima facie evidence of ownership. Post v. Schooner, 1 Haw. 286.

Where ownership of street car tracks is admitted it will be presumed that the use of such tracks is exclusive and that cars running thereon are owned by the company owning such tracks. Jennings v. R. Co., 121 App. Div. 587, 106 N. Y. S. 279.

Name on wagon raises presumption of ownership. United Brewers' Co. v. Bass, 121 Ill. App. 299. See also Hennessey v. Baugh, 29 Pa. Super. 310.

Registration of automobile. — Statute providing for registration of automobile by owner or person in control raises presumption that at the time of an accident the person in whose name an automobile was registered was the owner or in control. C. v. Sherman, 191 Mass. 439, 78 N. E. 98.

264-19 Declarations by former vendor in disparagement of title are competent against party claiming under him. Campbell v. Eichorst, 122 Ill. App. 609; Remy v. Lilly, 22 Ind. App. 109, 53 N. E. 387.

PARENT AND CHILD [Vol. 9.]

272-1 See Breidenstein v. Bertram, 198 Mo. 328, 95 S. W. 828; In re Tully, 54 Misc. 184, 105 N. Y. S. 858; Champion v. McCarthy, 288 Ill. 87, 81 N. E. 808.

272-2 Newsome v. Bunch, 144 N. C. 15, 56 S. E. 509; Ex parte Davidge, 72 S. C. 16, 51 S. E. 269; Parker v. Wiggins (Tex. Civ.), 86 S. W. 788.

272-5 Ex parte Davidge, supra.

272-6 Taylor v. Taylor, 103 Va. 750, 50 S. E. 273.

273-8 Peese v. Gellerman (Tex. Civ.), 110 S. W. 196.

273-10 Harrist v. Harrist (Ala.), 43 S. 962; Richards v. McHan, 129 Ga. 275, 58 S. E. 839; In re Tully, 54 Misc. 184, 105 N. Y. S. 858; Ex parte Davidge, 72 S. C. 16, 51 S. E. 269; Peese v. Gellerman (Tex. Civ.), 110 S. W. 196.

274-11 Taylor v. Taylor, 103 Va. 750, 50 S. E. 273.

274-13 Parker v. Wiggins (Tex. Civ.), 86 S. W. 788; Peese v. Gellerman, supra.

275-14 Peese v. Gellerman, supra.

275-15 Peese v. Gellerman, supra. See Parker v. Wiggins, supra.

276-17 Richards v. McHan, 129 Ga. 275, 58 S. E. 839; Looney v. Martin, 123 Ga. 209, 51 S. E. 304; Terry v. Johnson, 73 Neb. 653, 103 N. W. 319.

276-18 Peese v. Gellerman (Tex. Civ.), 110 S. W. 196.

281-34 Singer v. R. Co., 119 Mo. App. 112, 95 S. W. 944.

281-35 Vanatta v. Carr, 229 Ill. 47, 82 N. E. 267.

281-36 Donk v. Rezloff, 229 Ill. 194, 82 N. E. 214; Bristor v. R. Co., 128 Ia. 479, 103 N. W. 357; McMorrow v. Dowell, 116 Mo. App. 289, 90

S. W. 728; Livesley v. Heise, 48 Or. 147, 85 P. 509; Harper v. Utsey (Tex. Civ.), 97 S. W. 508; Weese v. Yokum (W. Va.), 59 S. E. 514.

Emancipation may be inferred from circumstances such as permitting a child to leave home and shift for himself. McMorrow v. Dowell, supra.

282-38 See Harper v. Utsey, supra.

282-40 Evidence to prove intent of child to support parents is admissible in suit by father for death of son. Dean v. R. Co., 38 Wash. 565, 80 P. 842.

283-42 Merrill v. Hussey, 101 Me. 439, 64 A. 819.

283-44 *Contra,* Switt v. Mohnson, 138 Fed. 867, 71 C. C. A. 619; Smith v. Gilbert, 80 Ark. 525, 98 S. W. 115.

284-47 McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728.

284-48 As to what must be proved in criminal cases, see Jackson v. S., 1 Ga. App. 723, 58 S. E. 272; Mays v. S., 123 Ga. 507, 51 S. E. 503; Brown v. S., 122 Ga. 568, 50 S. E. 378.

296-96 McLeod v. McLeod, 145 Ala. 269, 40 S. 414.

297-98 Nobles v. Hutton (Cal. App.), 93 P. 289; Sinclair v. Higgins, 46 Misc. 136, 93 N. Y. S. 195.

297-1 Hessian v. Patten, 154 Fed. 829; Sanders v. Gurley (Ala.), 44 S. 1022; Dolberry v. Dolberry (Ala.), 44 S. 1018; McLeod v. McLeod, supra; Becker v. Schwerdtle, 6 Cal. App. 462, 92 P. 398; Bonsal v. Randall, 192 Mo. 525, 91 S. W. 475; Cooper v. Moore, 55 Misc. 102, 104 N. Y. S. 1049; Powers v. Powers, 46 Or. 479, 80 P. 1058; Vaughn v. Vaughn, 217 Pa. 496, 66 A. 745.

297-2 McLeod v. McLeod, supra.

298-3 Nobles v. Hutton (Cal. App.), 93 P. 289; Sinclair v. Higgins, 46 Misc. 136, 93 N. Y. S. 195.

298-4 Couch v. Couch, 148 Ala. 332, 42 S. 624; Nobles v. Hutton, supra.

301-12 Whaley v. Boyer, 99 Minn. 397, 109 N. W. 596.

302-13 Mullins v. Mullins, 27 Ky. L. R. 1048, 87 S. W. 764.

302-16 Kennedy v. McCann, 101 Md. 643, 61 A. 625. But see Moore v. Scruggs. 131 Ia. 692, 109 N. W. 205.

303-19 Spann v. Hellen, 114 La. 336, 38 S. 248.

307-32 See Palm v. Ivorson, 117 Ill. App. 535; Maher v. Benedict, 123 App. Div. 579, 108 N. Y. S. 228.

PAROL EVIDENCE [Vol. 9.]

Weight of evidence required to show a modification of agreement by parol, 360-41; *Books of account,* 423-46; *Escrow agreement,* 453-92.

321-1 Contract required by special statute to be in writing is, of course, covered by the rule. Griggs v. School Dist (Ark.), 112 S. W. 215.

321-3 Edmonds v. Bank, 215 Pa. 547, 64 A. 671.

322-4 North Am. Co. v. Samuels, 146 Fed. 48, 76 C. C. A. 506; Southeastern Co. v. Farnham, 148 Fed. 619, 78 C. C. A. 641; Tillar v. Wilson, 79 Ark. 256, 96 S. W. 381; Smith v. Caldwell, 78 Ark. 333, 95 S. W. 467; Dodd v. Pasch, 5 Cal. App. 686, 91 P. 166; Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916; Hopkins v. Merrill, 79 Conn. 626, 66 A. 174; Porter v. Sims Co. (Fla.), 46 S. 420; McNair v. Adams (Fla.), 45 S. 492; Branan v. Warfield, 3 Ga. App. 275, 60 S. E. 325;; Bowen v. Waxelbaum, 2 Ga. App. 521, 58 S. E. 784; Smith v. Green, 128 Ga. 90, 57 S. E. 98; Townsend v. Product Co., 127 Ga. 342, 56 S. E. 436; P. v. Griesbach, 127 Ill. App. 462; Sinnickson v. Perkins, 137 Ill. App. 10; s. c. 231 Ill. 492, 83 N. E. 194; Nobles v. Fickes, 230 Ill. 594, 82 N. E. 950; Electric Storage Co. v. R. Co. (Ia.), 116 N. W. 144; Bounanni v. Monument Co., 131 Ia. 304, 108 N. W. 524; City Bank v. Green, 130 Ia. 384, 106 N. W. 942; Chariton Ice Co. v. Ice Co., 129 Ia. 523, 105 N. W. 1014; Flynn v. Butler, 189 Mass. 377, 75 N. E. 730; Toole v. Crafts, 196 Mass 397, 82 N. E. 22; Strong v. Cotton Co. (Mass.), 83 N. E. 328; Budro v. Burgess (Mass.), 83 N. E. 318; Bowditch v. Ins. Co., 193 Mass. 565, 79 N. E. 788; Goebel v. Look (Mich.), 116 N. W. 1078; Lewis v. Muse, 130 Mo. App. 194, 108 S. W. 1107; Tate v. R. Co. (Mo. App.), 110

S. W. 622; Rowland v. R. Co., 124 Mo. App. 605, 102 S. W. 19; Lauze v. Ins. Co. (N. H.), 68 A. 31; Northeastern Tel. Co. v. Hepburn (N. J. Eq.), 65 A. 747; Ramsey v. Shipbuilding Co. (N. J. Eq.), 65 A. 461; Butler v. De Villiers, 107 N. Y. S. 125; Watson v. Lamb, 75 Ohio St. 481, 79 N. E. 1075; Buxton v. Mere. Co., 18 Okla. 287, 90 P. 19; Deming Co. v. Ins. Co., 16 Okla. 1, 83 P. 918; Sutherlin v. Bloomer (Or.), 93 P. 135; San Antonio etc. R. Co. v. Timon (Tex. Civ.), 99 S. W. 418; Williams v. R. Co. (Tex. Civ.), 96 S. W. 1099; Morrison v. Hazzard, 99 Tex. 583, 92 S. W. 33; Gilbert v. Husted (Wash.), 96 P. 835; Pitman v. Erskine (Wash.), 94 P. 921; Broadway Hospital v. Decker, 47 Wash. 586, 92 P. 445; Ferguson v. Ins. Co., 45 Wash. 209, 88 P. 128; Myers v. Taylor (W. Va.), 61 S. E. 358; Duty v. Sprinkle (W. Va.), 60 S. E. 882; Rief v. Casualty Co., 131 Wis. 368, 111 N. W. 502.

324-6 See Gandy v. Weckerly, 220 Pa. 285, 69 A. 858.

325-8 U. S. v. Fidelity Co., 152 Fed. 596; Taylor v. Southerland (Ind. Ter.), 104 S. W. 874; Wells v. Blackman, 121 La. —, 46 S. 437; Grisham v. Ins. Co. (Mo. App.), 109 S. W. 96; Dexter v. Macdonald, 196 Mo. 373, 95 S. W. 359; Wightman v. Ins. Co., 119 App. Div. 496, 104 N. Y. S. 214; Garrison v. Kress (Okla.), 91 P. 1130; Perkiomen R. Co. v. Bromer, 217 Pa. 263, 66 A. 359; Kansas City B. Co. v. Spies (Tex. Civ.), 109 S. W. 432; Home Gas Co. v. Glass Co. (W. Va.), 61 S. E. 329.

Sealed instrument presumed to work a merger of other writings not under seal. Kidd v. Tract. Co., 74 N. H. 160, 66 A. 127.

325-9 Hallenbeek v. Chapman, 72 N. J. L. 201, 63 A. 498.

326-11 Mears v. Smith (Mass.), 85 N. E. 165; Stanton v. Granger, 109 N. Y. S. 134.

326-13 Brassel v. Fisk (Ala.), 45 S. 70; Hutchins v. Langley, 27 App. D. C. 234.

It has been said that "the rule applies with more force in a court of law than in one of equity." Trout v. R. Co., 107 Va. 576, 59 S. E. 394.

326-14 Greve v. Oil Co. (Cal. App.), 96 P. 904; In re Shield, 134 Ia. 559, 111 N. W. 963; P. v. Messer, 148 Mich. 168, 111 N. W. 854 (a criminal action); Glidden v. Town, 74 N. H. 207, 66 A. 117; Shreve v. Crosby, 72 N. J. L. 491, 63 A. 333; Charles v. R. Co., 78 S. C. 36, 58 S. E. 927 (writing collateral to the issues).

327-15 **Creditor** of a partner is bound. Haag v. Burns (S. D.), 115 N. W. 104.

328-16 Good v. Coal Co. (Ind. Ter.), 104 S. W. 613; Bright v. Ins. Co. (Wash.), 92 P. 779.

328-19 **Fact** that a surety agreement operated for the benefit of a third person (plaintiff), who did not personally assent thereto at the time of its inception, but subsequently furnished materials to the obligor (defendant), does not prevent the rule from applying. U. S. Gypsum Co. v. Gleason (Wis.), 116 N. W. 238.

328-20 Current v. Muir, 99 Minn. 1, 108 N. W. 870.

329-24 Baker v. Cotney (Ala.), 43 S. 786; Thomas v. Johnston, 78 Ark. 574, 95 S. W. 468; Smith v. Smith (Ga.), 61 S. E. 114; Pennington v. Avera, 124 Ga. 147, 52 S. E. 324; Warner v. Marshall, 166 Ind. 88, 75 N. E. 582; Capital City v. Moody, 135 Ia. 444, 110 N. W. 903; Inman Mfg. Co. v. Cereal Co., 133 Ia. 71, 110 N. W. 287; State Bk. v. Hoskins, 130 Ia. 339, 106 N. W. 764; Willis v. Weeks, 129 Ia. 525, 105 N. W. 1012; Lemmert v. Lemmert, 103 Md. 57, 63 A. 380; Weissenfels v. Cable, 208 Mo. 515, 106 S. W. 1028; Lutheran Church v. Gardner, 28 Pa. Super. 82; Provident Bk. v. Hartnett (Tex. Civ.), 100 S. W. 1024; Herman v Dunman (Tex. Civ.), 95 S. W. 80. See Long v. Furnas, 130 Ia. 504, 107 N. W. 432.

330-25 Carroll v. Hutchinson, 2 Ga. App. 60, 58 S. E. 309; Bowen v. Waxelbaum, 2 Ga. App. 521, 58 S. E. 784; Byrd v. Fertilizer Co., 127 Ga. 30, 56 S. E. 86; Crooker v. Hamilton, 3 Ga. App. 190, 59 S. E. 722; Andrews v. Church Co., 1 Ga. App. 560, 58 S. E. 130; Williams v. Gottschalk, 231 Ill. 175, 83 N. E. 141; Kelsey v. Ins. Co., 131 Ia. 207, 108 N. W. 221; Jackson Brew. Co. v.

Wagner, 117 La. 875, 42 S. 356; Waldo v. Jacobs (Mich.), 116 N. W. 371; Superior Drill Co. v. Carpenter, 150 Mich. 262, 114 N. W. 67 (statements of agent); Wallace v. Kelly, 148 Mich. 336, 111 N. W. 1049; Haas v. Malto Co., 148 Mich. 358, 111 N. W. 1059; Day L. Co. v. Leather Co., 141 Mich. 533, 104 N. W. 797; Weddington v. Ins. Co., 141 N. C. 234, 54 S. E. 271; Smith v. R. Co. (Tex. Civ.), 105 S. W. 528; Ferguson v. Ins. Co., 45 Wash. 209, 88 P. 128; Peirson v. Pierce, 42 Wash. 164, 84 P. 731; Buffalo Pitts Co. v. Shriner, 41 Wash. 146, 82 P. 1016; Nielson v. Siberian Co., 40 Wash. 194, 82 P. 292; Midland S. Co. v. Drug Co., 127 Wis. 242, 106 N. W. 115.

331-26 Hendricks v. Webster, 159 Fed. 927; Bachman v. Clyde, 152 Fed. 403; Lower v. Hickman, 80 Ark. 505, 97 S. W. 681; Capps v. Edwards (Ga.), 60 S. E. 455; Flemming v. Satterfield (Ga. App.), 61 S. E. 518; Crankshaw v. Mfg. Co., 1 Ga. App. 363, 58 S. E. 222; Smith v. Piano Co., 194 Mass. 193, 80 N. E. 527; Middleworth v. Ordway, 191 N. Y. 404, 84 N. E. 291; Janvey v. Loketz, 122 App. Div. 411, 106 N. Y. S. 690; Guthrie etc. R. Co. v. Rhodes (Okla.), 91 P. 1119; Blassingame v. Larens (S. C.), 61 S. E. 96; Prince v. Ins. Co., 77 S. C. 187, 57 S. E. 766; Metropolitan Ins. Co. v. Hall, 104 Va. 572, 52 S. E. 345; Home Gas Co. v. Glass Co. (W. Va.), 61 S. E. 329; Loree v. Mfg. Co. (Wis.), 114 N. W. 449.

332-29 Southeastern Co. v. Farnham, 148 Fed. 619, 78 C. C. A. 641; Warburton v. Trust Co., 158 Fed. 969; First Nat. Bk. v. Ins. Co., 147 Fed. 519, 77 C. C. A. 215; Lefkovits v. Bank (Ala.), 44 S. 613; Brennard Mfg. Co. v. Merc. Co., 148 Ala. 666, 41 S. 671; Pearson v. Dancer, 144 Ala. 427, 39 S. 474; Main v. Radney (Ala.), 39 S. 981; Barry Mach. Co. v. Thompson, 83 Ark. 283, 104 S. W. 137; Johnson Co. v. Hughes, 83 Ark. 105, 103 S. W. 184; Steele v. Realty Co. (Cal App.), 96 P. 105; Kullman Co. v. Mfg. Co. (Cal.), 96 P. 369; Kinsel v. Ballon (Cal.), 91 P. 620; Commercial Bk. v. Pott, 150 Cal. 358, 89 P. 431; Pierce v. Edwards, 150 Cal. 650, 89 P. 600; Knight-C. Co. v. Buck (Colo.), 95 P. 283; Doyle v. Nesting, 37 Colo. 522, 88 P. 862; Whitehead v. Emmerich, 38 Colo. 13, 87 P. 790; Dejon v. Street, 79 Conn. 333, 65 A. 145; Biggers v. Mfg. Co., 124 Ga. 1045, 53 S. E. 674; Ross v. Griebel, 136 Ill. App. 399; Cochran v. Zachery (Ia.), 115 N. W. 486; Doolittle v. Murray, 134 Ia. 536, 111 N. W. 999; Houts v. Brass Works, 134 Ia. 484, 110 N. W. 166; Chapman v. Chapman, 132 Ia. 5, 109 N. W. 300; Sperrier v. Bullard, 131 Ia. 123, 107 N. W. 1036; Mosnat v. Uchytil, 129 Ia. 274, 105 N. W. 519; Doty v. Dickey, 29 Ky. L. R. 900, 96 S. W. 544; Mears v. Smith (Mass.), 85 N. E. 165; McCuskèr v. Geger, 195 Mass. 46, 80 N. E. 648; Ballard v. Brown (Miss.), 46 S. 137; Grisham v. Ins. Co. (Mo. App.), 109 S. W. 96; International Co. v. Lewis (Mo. App.), 108 S. W. 1118; Albright v. Ins. Co. (Neb.), 113 N. W. 793; Gandy v. Wiltse (Neb.), 112 N. W. 569; Alexander v. Ferguson, 73 N. J. L. 479, 63 A. 998; Finucane Co. v. Board, 190 N. Y. 76, 82 N. E. 737; Garrison v. Kress (Okla.), 91 P. 1130; Page v. Geiser Mfg. Co., 17 Okla. 110, 87 P. 851; Haag v. Burns (S. D.), 115 N. W. 104; Schriner v. Dickinson, 20 S. D. 432, 107 N. W. 536 (inadmissible to show that one of the parties was acting as agent for an undisclosed principal); Bowen v. Ins. Co., 20 S. D. 103, 104 N. W. 1040; Johnson v. Ins. Co. (Tenn.), 107 S. W. 688; Paris v. Burks (Tex.), 105 S. W. 174; Thompson v. Fitzgerald (Tex. Civ.), 105 S. W. 334; International R. Co. v. Griffith (Tex. Civ.), 103 S. W. 225; Robertson v. Warren (Tex. Civ.), 100 S. W. 805; Buckeye Buggy Co. v. Montana Stables, 43 Wash. 49, 85 P. 1077; Sylvester v. S., 46 Wash. 585, 91 P. 15.

Reservation cannot be shown by parol. Cobb v. Johnson, 126 Ga. 618, 55 S. E. 935; Ord v. Waller (Tex. Civ.), 107 S. W. 1166; Suderman-D. Co. v. Rogers (Tex. Civ.), 104 S. W. 193; Carter v. Childress (Tex. Civ.), 99 S. W. 714; Hubenthal v. R. Co., 43 Wash. 677, 86 P. 955.

333-30 Fox v. Land Co., 37 Colo. 203, 86 P. 344; Boylan v. Cameron, 126 Ill. App. 432; Taber v. City, 190 Mass. 101, 76 N. E. 727; Chicago etc. R. Co. v. Lane. 150 Mich. 162, 113

N. W. 22; New York Ins. Co. v. Wolfson, 124 Mo. App. 286, 101 S. W. 162; Hallenbeck v. Chapman, 72 N. J. L. 201, 63 A. 498; Gardner v. Welch (S. D.), 110 N. W. 110; Kansas City R. Co. v. Spies (Tex. Civ.), 109 S. W. 432; Trout v. R. Co., 107 Va. 576, 59 S. E. 394.

333-31 Columbia Mill v. Russell Co., 89 Miss. 437, 42 S. 233.

334-32 Torbert v. Montague, 38 Colo. 325, 87 P. 1145 (blank indorsement); Allen v. Ruland, 79 Conn. 405, 65 A. 138; Baumeister v. Kuntz, 53 Fla. 340, 42 S. 886 (statute fixing status of a party as an endorser); McAlpine v. Millen (Minn.), 116 N. W. 583.

334-34 Bullard v. Hudson, 125 Ga. 393, 54 S. E. 132 (that words describing lands were not in a note when it was executed); Nichols v. Borning, 37 Ind. App. 109, 76 N. E. 776; Hendrix v. Letourneau (Ia.), 116 N. W. 729 (written memorandum never signed); Birely v. Dodson (Md.), 68 A. 488; Sheldon v. Assn., 73 N. J. L. 115, 62 A. 189.

335-36 Birely v. Dodson, supra. See Jost v. Wolf, 130 Wis. 37, 110 N. W. 232.

In equity. — O'Brien v. Brew. Co., 69 N. J. L. 117, 61 A. 437.

335-37 Cook v. Sterling, 150 Fed. 766, 80 C. C. A. 502; Williams v. Moore, 3 Ga. App. 756, 60 S. E. 372; Creveling v. Banta (Ia.), 115 N. W. 598; Deming Inv. Co. v. Wallace, 73 Kan. 291, 85 P. 139; Minneapolis Mach. Co. v. Otis (Neb.), 110 N. W. 550; Sheldon v. Assn., 73 N. J. L. 115, 62 A. 189; Electrical Co. v. Greenberg, 56 Misc. 514, 107 N. Y. S. 110; Rochford v. Barrett (S. D.), 115 N. W. 522.

Rule inapplicable in an action for deceit. Duffy v. Meyer, 122 App. Div. 838, 107 N. Y. S. 672.

337-38 State L. Ins. Co. v. Johnson, 73 Kan. 567, 85 P. 597; Lilienthal v. Herren, 42 Wash. 209, 84 P. 829.

338-41 Salmen v. Peterson, 121 La. —, 46 S. 616.

Mere failure to read, insufficient. Branan v. Warfield, 3 Ga. App. 275, 60 S. E. 325.

338-42 **Insurance cases.** — A party (insured) may show by parol that the answers to questions were not written by him and that he did not actually know the contents of the application when he signed it. Modern Woodmen v. Angle, 127 Mo. App. 94, 104 S. W. 297. See Mutual Ins. Co. v. Hargus (Tex. Civ.), 99 S. W. 580.

338-43 Hinkley v. Pipe Line Co., 132 Ia. 396, 107 N. W. 629; Bonewell v. Jacobson, 130 Ia. 170, 106 N. W. 614; McCusker v. Geiger, 195 Mass. 46, 80 N. E. 648; Sawyer v. Walker, 204 Mo. 133, 102 S. W. 544; Elgin Jewelry Co. v. Withaup, 118 Mo. App. 126, 94 S. W. 572; Ex parte Cain (Okla.), 93 P. 974; American C. Co. v. Thompson (Tex. Civ.), 110 S. W. 777; Butler v. Anderson (Tex. Civ.), 107 S. W. 656; Mars v. Morris (Tex. Civ.), 106 S. W. 430; Karner v. Ross (Tex. Civ.), 95 S. W. 46; Winton v. McGraw, 60 W. Va. 98, 54 S. E. 506.

339-45 U. S. Gypsum Co. v. Shields (Tex. Civ.), 106 S. W. 724 (where a clause in contract stated that there were no verbal statements varying the terms).

339-50 **Contract against public policy** will not be enforced and "the parties cannot by reducing some unobjectional parts of it to writing prevent the reception of parol evidence to show the entire agreement although it may be inconsistent with the written paper." Twentieth Century Co. v. Quilling, 130 Wis. 318, 110 N. W. 174. See Trout v. R. Co., 107 Va. 576, 59 S. E. 394 (stipulation void because a release from liability for negligence).

340-58 McConnell v. Camors Co., 152 Fed. 321.

340-59 Clemens v. Crane, 234 Ill. 215, 84 N. E. 884; France v. Munro (Ia.), 115 N. W. 577.

341-62 See Smith v. Bowen (Tex. Civ.), 100 S. W. 796.

341-63 Lane v. Trust Co., 10 Ohio C. C. (N. S.), 512.

342-68 Acme Food Co. v. Tousey, 148 Mich. 697, 112 N. W. 484.

342-73 Price v. Stanbra (Wash.), 88 P. 115.

Consent to alterations may be shown by parol. S. v. Baird, 13 Idaho 126, 89 P. 298.

343-74 Toole v. Crafts, 196 Mass. 397, 82 N. E. 22; Northwest Thresher Co. v. Hulburt (Minn.), 115 N. W.

159; Kansas City B. Co. v. Spies (Tex. Civ.), 109 S. W. 432.

Writing evidentiary merely, mistake need not have been pleaded to authorize reception of parol evidence. Martin v. Ferguson, 31 Ky. L. R. 1095, 104 S. W. 698.

343-75 Opinshaw v. Rickmeyer (Tex. Civ.), 102 S. W. 467.

343-77 Dillard v. Jones, 229 Ill. 119, 82 N. E. 206.

345-88 M'Connell v. Camors Co., 152 Fed. 321; Roquemore v. Iron Works (Ala.), 44 S. 557; St. Louis etc. R. Co. v. Wynne Co., 81 Ark. 373, 99 S. W. 375; Brosty v. Thompson, 79 Conn. 133, 64 A. 1; McCommons v. Williams (Ga.), 62 S. E. 230; Martin v. Thrower, 3 Ga. App. 784, 60 S. E. 825; Hall v. Barnard (Ia.), 116 N. W. 604; Chicago Tel. Co. v. Tel. Co., 134 Ia. 252, 111 N. W. 935; Denis v. Tilton, 120 La. 226, 45 S. 112; West End Mfg. Co. v. Warren Co. (Mass.), 84 N. E. 488; Leavitt v. Fiberloid, 196 Mass. 440, 82 N. E. 682; Picard v. Beers (Mass.), 81 N. E. 246; Electrical Co. v. Standard Co., 151 Mich. 662, 115 N. W. 982; Bell v. Darst, 146 Mich. 143, 109 N. W. 275; Harrison W. Co. v. Brown, 145 Mich. 621, 108 N. W. 1109; St. Anthony Co. v. Mill Co. (Minn.), 116 N. W. 935; Official Catalogue Co. v. Weber, 130 Mo. App. 646, 109 S. W. 1071; Fairbanks M. & Co. v. Burgert (Neb.), 116 N. W. 35; De Laval v. Jelinek (Neb.), 109 N. W. 169; Cooper v. Payne, 186 N. Y. 334, 78 N. E. 1076; Studwell v. Bush Co., 111 N. Y. S. 293; Taylor v. Elmira Co., 104 Misc. 363, 104 N. Y. S. 557; De Jonge v. Printz, 49 Misc. 112, 96 N. Y. S. 750; Ivey v. Cotton Mills, 143 N. C. 189, 55 S. E. 613; Smith Premier Co. v. Hardware Co., 143 N. C. 97, 55 S. E. 417; Turner v. Abbott, 116 Tenn. 718, 94 S. W. 64; Armstrong v. Wilson (Tex. Civ.), 109 S. W. 955; Davis v. Sisk (Tex. Civ.), 108 S. W. 472; Landrum v. Stewart (Tex. Civ.), 111 S. W. 769; Dunnett v. Gibson, 74 Vt. 439, 63 A. 141; Agnew v. Baldwin (Wis.), 116 N. W. 641. See Weir v. Long, 145 Ala. 328, 39 S. 974.

346-89 Where defendant admits existence of an obligation not evidenced by the writing, but alleges performance, parol evidence is admissible to disprove such allegation. Williams v. Walden, 124 Ga. 913, 53 S. E. 564.

347-91 Texas etc. R. Co. v. Coggin (Tex. Civ.), 99 S. W. 1052 (place of delivery of cattle under shipping contract). But see International R. Co. v. Griffith (Tex. Civ.), 103 S. W. 225.

347-93 Smith Premier Co. v. Hardware Co., 143 N. C. 97, 55 S. E. 417; Evans v. Freeman, 142 N. C. 61, 54 S. E. 847.

Date payment is due. — Fresno Canal Co. v. Hart (Cal.), 92 P. 1010; Leffler Co. v. Dickerson, 1 Ga. App. 63, 57 S. E. 911; Thompson v. Fitzgerald (Tex. Civ.), 105 S. W. 334.

Price of lots sold and the character of buildings to be erected may be shown. Lanvoigt v. Paul, 27 App. D. C. 423.

347-94 Crook v. Fidanque, 110 N. Y. S. 198.

347-95 Peterson v. Chaix, 5 Cal. App. 525, 90 P. 948; Kelsey v. Ins. Co., 131 Ia. 207, 108 N. W. 221; Evans v. Freeman, 142 N. C. 61, 54 S. E. 847.

347-96 Gemmer v. Hunter, 35 Ind. App. 501, 74 N. E. 586; Hallenbeck v. Chapman, 72 N. J. L. 201, 63 A. 498; Official Catalogue Co. v. Weber, 130 Mo. App. 646, 109 S. W. 1071; Koons v. Car Co., 203 Mo. 227, 101 S. W. 49.

348-97 Cooper v. Payne, 186 N. Y. 334, 78 N. E. 1076; Studwell v. Bush, 111 N. Y. S. 293; M'Keige v. Carroll, 120 App. Div. 521, 105 N. Y. S. 342; Taylor v. Elmira Co., 54 Misc. 363, 104 N. Y. S. 557; Teague v. Ricks (Tex. Civ.), 100 S. W. 794. See De Laval v. Jelinek (Neb.), 109 N. W. 169.

348-98 See Farrington v. Stuckey (Ind. Ter.), 104 S. W. 647; Electrical Co. v. Standard Co., 151 Mich. 662, 115 N. W. 982; Harrison W. Co. v. Brown, 145 Mich. 621, 108 N. W. 1109; Buxton v. Merc. Co., 18 Okla. 287, 90 P. 19; Victor Safe Co. v. O'Neil (Wash.), 93 P. 214.

348-2 See Mulcahy v. Diedonne (Minn.), 115 N. W. 636.

349-3 Brosty v. Thompson, 79 Conn. 133, 64 A. 1 (conduct and language of the parties and the surrounding circumstances).

349-4 U. S. v. Fidelity Co., 152

Fed. 596; Peterson v. Chaix, 5 Cal. App. 525, 90 P. 948.

349-5 See Dunnett v. Gibson, 78 Vt. 439, 63 A. 141.

350-7 Broadway Hospital v. Decker, 47 Wash. 586, 92 P. 445; Agnew v. Baldwin (Wis.), 116 N. W. 641 (but where the part required by law to be in writing is so evidenced, other portions of the contract not required to be in writing may be shown by parol).

350-9 Brosty v. Thompson, 79 Conn. 133, 64 A. 1; Official Catalogue Co. v. Weber, 130 Mo. App. 646, 109 S. W. 1071.

350-10 Roquemore v. Iron Works (Ala.), 44 S. 557; Levin v. Knitting Co., 78 Conn. 338, 61 A. 1073; McNair etc. Co. v. Adams (Fla.), 45 S. 492; Wells v. Coal Co. (Ia.), 114 N. W. 1076; Van Meter v. Poole (Mo. App.), 110 S. W. 5; Davies v. Hotchkiss, 112 N. Y. S. 233; Williams v. Salmond (S. C.), 61 S. E. 79; Earle v. Owings, 72 S. C. 362, 51 S. E. 980; Landrum v. Stewart (Tex. Civ.), 111 S. W. 769; Trout v. R. Co., 107 Va. 576, 59 S. E. 394.

352-11 Brown v. Hobbs (N. C.), 60 S. E. 716; Bourne v. Sherrill, 143 N. C. 381, 55 S. E. 799; New York Ins. Co. v. Thomas (Tex. Civ.), 104 S. W. 1074. See Beld v. Darst, 146 Mich. 143, 109 N. W. 275 (case decided on another point).

Collateral agreement a condition precedent. Manhattan Co. v. Gluck, 52 Misc. 652, 101 N. Y. S. 528.

352-12 Schweig v. Manhattan Co., 54 Misc. 233, 104 N. Y. S. 371; Perkiomen R. Co. v. Bromer, 217 Pa. 263, 66 A. 359.

352-13 Perkiomen R. Co. v. Bromer, supra; Fidelity Co. v. Harder, 212 Pa. 96, 61 A. 880; Miller v. Wise, 33 Pa. Super. 589; Yinger v. Youngman, 30 Pa. Super. 139.

352-14 Gandy v. Weckerly (Pa.), 69 A. 858; Phillips Co. v. Plate Glass Co., 213 Pa. 183, 62 A. 830. See Scientific American v. Creighton, 32 Pa. Super. 140.

353-16 Crilly v. Gallice, 148 Fed. 835, 78 C. C. A. 525.

353-20 Green v. Booth (Miss.), 44 S. 784; Blair v. Minzesheimer, 108 N. Y. S. 799; Somerset Co. v. John (Pa.), 68 A. 843 (agreement that when a mortgage fell due certain claims of mortgagor against mortgagee should be adjusted); New York Ins. Co. v. Thomas (Tex. Civ.), 104 S. W. 1074; Trout v. R. Co., 107 Va. 576, 59 S. E. 394.

353-21 Loxley v. Studebacker (N. J. L.), 68 A. 98 (full discussion of this principle); Hallenbeck v. Chapman, 72 N. J. L. 201, 63 A. 498.

354-22 Barr Carrier Co. v. Merc. Co., 82 Ark. 219, 101 S. W. 408; Drinkwater v. Hollar (Cal. App.), 91 P. 664; Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060; Cavanaugh v. Beer Co. (Ia.), 113 N. W. 856; McKnight v. Parsons (Ia.), 113 N. W. 858; Hinsdale v. McCune (Ia.), 113 N. W. 478; McCormick v. Merritt (Ia)., 105 N. W. 428; Hill v. Hall, 191 Mass. 253, 77 N. E. 831; Dodd v. Kemnitz, 74 Neb. 634, 104 N. W. 1069; Waters v. Security Co., 144 N. C. 663, 57 S. E. 437; Hodge v. Smith, 130 Wis. 326, 110 N. W. 192. See Gilroy v. Everson, 118 App. Div. 733, 103 N. Y. S. 620 (general conversations inadmissible; rule applied with great caution).

Enumeration of conditions precedent will not be presumed to be exhaustive and others may be shown by parol. Golden v. Meier, 129 Wis. 14, 107 N. W. 27.

355-24 Creveling v. Banta (Ia.), 115 N. W. 598 (deed given to grantee to be delivered to a third person in escrow).

355-25 Hamlin v. Hamlin, 192 N. Y. 164, 85 N. E. 805, 117 App. Div. 493, 102 N. Y. S. 571.

357-28 Roquemore v. Iron Works (Ala.), 44 S. 557; Dorough v. Harrington, 148 Ala. 305, 42 S. 557; Von Berg v. Goodman (Ark.), 109 S. W. 1006; American Food Co. v. Halstead, 165 Ind. 633, 76 N. E. 251; Fleming Bros. v. Linder (Ia.), 109 N. W. 771; Way v. Greer (Mass.), 81 N. E. 1002; Haight v. Cohen, 123 App. Div. 707, 108 N. Y. S. 502; Margolys v. Mollenick, 98 N. Y. S. 849; Phillips v. Tile Mfg. Co. (Pa.), 69 A. 589; Jost v. Wolf, 130 Wis. 37, 110 N. W. 232.

Parol agreement proved to alter a written contract must be an executed agreement. Pearsall v. Henry

(Cal.), 95 P. 154; Page v. Mfg. Co., 17 Okla. 110, 87 P. 851, but this rule does not apply where the new agreement is in substitution of the old one. Pearsall v. Henry (Cal.), 95 P. 154.

Admissible although the parties contracted not to vary the contract by any subsequent contract. Gilbert Co. v. Husted (Wash.), 96 P. 835.

358-32 Porter v. Sims Co. (Fla.), 46 S. 420.

359-34 Schmidt v. Musson (S. D.), 107 N. W. 367.

359-36 Moody v. Atkins, 146 Ala. 684, 40 S. 305.

359-39 **Oral lease** to take effect on the expiration of a written one, may be shown. Gabel v. Page, 6 Cal. App. 618, 92 P. 749.

359-40 Pearsall v. Henry (Cal.), 95 P. 154.

360-41 **Weight of evidence required.** — Presumption that work commenced under a written contract is prosecuted to the end for such compensation as is provided therein can only be overcome by the same amount of evidence required to modify a contract on the ground of an omission by fraud or mistake, i. e., clear proof is required. Phillips v. Tile Mfg. Co. (Pa.), 69 A. 589.

360-43 But see Fleming Bros. v. Linder (Ia.), 109 N. W. 771; Taylor v. Finnigan, 189 Mass. 568, 76 N. E. 203.

360-45 Gum v. Tibbs, 134 Ill. App. 280; American Food Co. v. Halstead, 165 Ind. 633, 76 N. E. 251.

360-48 Steidtmann v. Lay Co., 234 Ill. 84, 84 N. E. 640; Garfield v. Motor Car Co., 189 Mass. 395, 75 N. E. 695.

361-49 Noyes v. Marlott, 156 Fed. 753; Tribble v. S., 147 Ala. 699, 41 S. 183; Hale Bros. v. Milliken (Cal. App.), 90 P. 365; Leonhart v. Assn., 5 Cal. App. 19, 89 P. 847; Birely & Sons v. Dodson (Md.), 68 A. 488; Stearns v. R. Co., 148 Mich. 271, 111 N. W. 769 (express contract excluding a custom); Ramsey v. Shipbuilding Co. (N. J. Eq.), 65 A. 461; Savage v. Mills Co., 48 Or. 1, 85 P. 69.

362-51 Southern R. Co. v. Cofer (Ala.), 43 S. 102; Steidtmann v. Lay Co., 234 Ill. 84, 84 N. E. 640; O'Neill v. Ogden Aerie, 32 Utah 162, 89 P. 464.

362-53 Kentucky Min. Co. v. Ins. Soc., 146 Fed. 695, 77 C. C. A. 121; Obenauer v. Solomon (Mich.), 115 N. W. 696 (inadmissible where the phrase is not shown to have a local or customary meaning).

363-65 Hallenbeck v. Chapman, 72 N. J. L. 201, 63 A. 498. *Compare* Rock Isand Wks. v. Hdw. Co., 147 Ala. 581, 41 S. 806.

365-79 **Admissions** of grantor competent to show existence of a deed. Vincent v. Means, 207 Mo. 709, 106 S. W. 8.

365-81 **Parol evidence** inadmissible to sustain a contract which appears on its face to be illegal. Hill v. Hill, 74 N. H. 288, 67 A. 406.

366-91 *Compare* Mears v. Smith (Mass.), 85 N. E. 165.

367-92 Allen v. Assur. Co. (Idaho), 95 P. 829; Roe v. Ins. Assn. (Ia.), 115 N. W. 500 (insurance contract); Nichols & S. Co. v. Maxson, 76 Kan. 607, 92 P. 545; Cain v. Bourman, 118 La. 82, 42 S. 654 (admissible against a person who is a privy); Hilton v. Hanson, 101 Me. 21, 62 A. 797 (contract under seal); Gish v. Ins. Co., 16 Okla. 59, 87 P. 869.

Waiver at time of entering into the contract cannot be shown. Johnson v. Ins. Co. (Tenn.), 107 S. W. 688.

Inadmissible in the face of an express, contrary provision in an insurance policy. Black v. Ins. Co. (N. C.), 61 S. E. 672.

367-93 Hester v. Gairdner, 128 Ga. 531, 58 S. E. 165; Hall v. Barnard (Ia.), 116 N. W. 604; Aultman Co. v. Greenlee, 134 Ia. 368, 111 N. W. 1007; Allen v. Rees (Ia.), 110 N. W. 583; Yore v. Meshew, 146 Mich. 80, 109 N. W. 35; Bade v. Hibberd (Or.), 93 P. 364; Jost v. Wolf, 130 Wis. 37, 110 N. W. 232.

Statement of consideration cannot be contradicted where it is of a contractual nature and is more than a mere acknowledgment. Kramer v. Gardner (Minn.), 116 N. W. 925; Sturmdorf v. Saunders, 117 App. Div. 762, 102 N. Y. S. 1042.

369-3 **To apply a payment.** Parol evidence is admissible to show to which obligation a payment was

applied. Wilcox v. Sergeant (Ga. App.), 60 S. E. 810.

369-9 Payment by a third person and not by the maker, may be shown. Succession of Bagley, 120 La. 922, 45 S. 942.

369-10 Albert v. R. Co., 107 Va. 256, 58 S. E. 575.

Contradictory parol agreement cannot be shown. — Newell v. Lamping, 45 Wash. 304, 88 P. 195.

Parol contemporaneous agreement will not be specifically enforced, where the deed in question appears to be complete. Waters v. Waters, 124 Ga. 349, 52 S. E. 425.

Facts necessary to make the contract enforcible cannot be shown. Dillard v. Sanders (Tex. Civ.), 97 S. W. 108.

Description of the property must be such, that it can be identified without resort to parol evidence. Willmon v. Peck, 5 Cal. App. 665, 91 P. 164.

370-12 Gottfried v. Bray, 208 Mo. 652, 106 S. W. 639. See Chambers v. Roseland (S. D.), 112 N. W. 148 (purpose of parol evidence is not to supply omissions and cure defects which render a contract fatally uncertain; Crawford v. Workman (W. Va.), 61 S. E. 319.

370-14 Allen v. Treat (Wash.), 94 P. 102.

Contemporaneous agreement inadmissible. Bass v. Sanborn, 119 Mo. App. 103, 95 S. W. 955.

370-15 Jacobs v. Parodi, 50 Fla. 541, 39 S. 833; Dillard v. Jones, 229 Ill. 119, 82 N. E. 206.

370-19 De Laval v. Steadman, 6 Cal. App. 651, 92 P. 877.

Action to enjoin proceedings at law on a note; parol evidence rule not strictly applied whenever an inquiry into the object and purpose of a writing is to be made. O'Brien v. Brew. Co., 69 N. J. L. 117, 61 A. 437.

371-20 Hannon v. Espalla, 148 Ala. 313, 42 S. 443; Novelty Mfg. Co. v. Wiseberg, 126 Ga. 800, 55 S. E. 923; Blake v. Miller, 135 Ia. 1, 112 N. W. 158; Rester v. Powell, 120 La. 406, 45 S. 372; Zerr v. Klug, 121 Mo. App. 286, 98 S. W. 822; Green Island Co. v. Laundry Co., 110 N. Y. S. 508; Sellars v. R. Co., 77 S. C. 361, 57 S. E. 1102; Smith v. R. Co. (Tex.), 108 S. W. 819; Brazelton & J. v. Johnson (Tex. Civ.), 108 S. W. 770. See Bent v. Trimboli, 81 W. Va. 509, 56 S. E. 881 (letters and plat admissible).

372-21 Hendricks v. Webster, 159 Fed. 927; Soudan Planting Co. v. Stevenson, 83 Ark. 163, 102 S. W. 1114; Hawley v. Kafitz, 148 Cal. 393, 83 P. 248; In re Evans, 117 Mo. App. 629, 93 S. W. 922; Strother v. Cooperage Co., 116 Mo. App. 518, 92 S. W. 758; Wheeler v. Moore (Neb.), 111 N. W. 120; Wehrenberg v. Seiferd, 109 N. Y. S. 896; Gish v. Ins. Co., 16 Okla. 59, 87 P. 869; Hermann v. McIver (Tex. Civ.), 111 S. W. 766; Grout v. Moulton, 79 Vt. 122, 64 A. 453; Bartlett Co. v. Land Co. (Wash.), 94 P. 900; Moran Bros. v. Casualty Co. (Wash.), 94 P. 106; Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895.

373-22 City of Roanoke v. Blair, 107 Va. 639, 60 S. E. 75.

373-23 Lowrey v. Hawaii, 206 U. S. 206; Hamilton Coal Co. v. Coal Co., 160 Fed. 75; Boyd v. Lloyd (Ark.), 110 S. W. 596; Massey Bros. v. Dixon, 81 Ark. 337, 99 S. W. 383; Prowers v. Nowles (Colo.), 94 P. 347; Slusher v. Slusher, 31 Ky. L. R. 570, 102 S. W. 1188; Schuster v. Snawder, 31 Ky. L. R. 254, 101 S. W. 1194; Chesapeake Brew. Co. v. Goldberg (Md.), 69 A. 37; Ivey v. Cotton Mills, 143 N. C. 189, 55 S. E. 613; Edmunds v. Bank, 215 Pa. 547, 64 A. 671; Clayton v. Court, 58 W. Va. 253, 52 S. E. 103.

374-26 Crittenden v. Cobb, 156 Fed. 535; Pearsall v. Henry (Cal.), 95 P. 154; Jersey Island Co. v. Whitney, 149 Cal. 269, 86 P. 691; Shafer v. Sloan, 3 Cal. App. 335, 85 P. 162; Leffler Co. v. Dickerson, 1 Ga. App. 63, 57 S. E. 911; Warner v. Marshall, 166 Ind. 88, 75 N. E. 582; McSurley v. Venters, 31 Ky. L. R. 963, 104 S. W. 365; City of Versailles v. Brown, 29 Ky. L. R. 1223, 96 S. W. 1108; Chesapeake Brew. Co. v. Goldberg (Md.), 69 A. 37; Fullam v. Cloth Co., 196 Mass. 474, 82 N. E. 711; Toole v. Crafts, 196 Mass. 397, 82 N. E. 22; New Amsterdam Co. v. Mesker, 128 Mo. App. 183, 106 S. W. 561; Great Western Co. v. Belcher, 127 Mo. App. 133, 104 S. W. 894; Nichols v. Tel. Co., 110 N. Y. S. 325; Middleworth v.

Ordway, 191 N. Y. 404, 84 N. E. 291; Gravity Canal Co. v. Sisk (Tex. Civ.), 95 S. W. 724; Trow v. Ins. Co. (Vt.), 67 A. 821; Albert v. R. Co., 107 Va. 256, 58 S. E. 575; Causten v. Barnette (Wash.), 96 P. 225; Bank v. Catzen (W. Va.), 60 S. E. 499; Winton v. McGraw, 60 W. Va. 98, 54 S. E. 506; Loree v. Mfg. Co. (Wis.), 114 N. W. 449.

Circumstances leading to the passage of a statute authorizing the contract. Old Colony R. Co. v. City, 188 Mass. 234, 75 N. E. 134.

Declarations of mortgagee. Jones v. Norris (N. C.), 60 S. E. 714.

Peculiar circumstances, known to both parties, may be shown. Hale Bros. v. Milliken, 5 Cal. App. 344, 90 P. 365.

377-27 Middleworth v. Ordway, 191 N. Y. 404, 84 N. E. 291.

377-38 Noyes v. Marlott, 156 Fed. 753; Leffler v. Ins. Co., 143 Fed. 814, 74 C. C. A. 488; Griggs v. Dist. (Ark.), 112 S. W. 215; Wheeler v. Fidelity Co., 129 Ga. 237, 58 S. E. 709; Fairbanks, M. & Co. v. Guilfoyle (Ky.), 110 S. W. 233.

377-39 Hamilton Coal Co. v. Coal Co., 160 Fed. 75; U. S. v. Steel Co., 205 U. S. 105; San Miguel Co. v. Stubbs, 39 Colo. 359, 90 P. 842. McSurley v. Venters, 31 Ky. L. R. 963, 104 S. W. 365; Morrison v. Tel. Co., 110 N. Y. S. 801; Lambert Co. v. Carmody, 79 Conn. 419, 65 A. 141 (to determine whether a sale or lease was intended); Semon Bache Co. v. Coppes Co., 35 Ind. App. 351, 74 N. E. 41; Ditchey v. Lee, 167 Ind. 267, 78 N. E. 972; Garfield & P. Co. v. Coal Co. (Mass.), 84 N. E. 1020; Smith v. Piano Co., 194 Mass. 193, 80 N. E. 527; American C. Co. v. Thompson (Tex. Civ.), 110 S. W. 777; Pine Beach v. Amusement Co., 106 Va. 810, 56 S. E. 822; Moran Co. v. Casualty Co. (Wash.), 94 P. 106.

Terms "more or less" and "about" do not disclose an ambiguity which may be explained by parol. Peterson v. Chaix, 5 Cal. App. 525, 90 P. 948.

378-44 See Louisville etc. Co. v. Higginbotham (Ala.), 44 S. 872; Johnston v. Mulcahy, 4 Cal. App. 547, 88 P. 491.

379-45 Beardmore v. Barry, 118 App. Div. 334, 103 N. Y. S. 353; West v. Hermann (Tex. Civ.), 104 S. W. 428.

379-46 Lindblom v. Fallett, 145 Fed. 805, 76 C. C. A. 369; Brackett Co. v. Grocery Co., 127 Ga. 672, 56 S. E. 762 ("Texas red rust proof oats"); Kitzman v. Carl, 133 Ia. 340, 110 N. W. 587; Obenauer v. Solomon, 151 Mich. 570, 115 N. W. 696 (term "the dock" may be explained by evidence of the declarations of the parties); New Amsterdam Co. v. Mesker, 128 Mo. App. 183, 106 S. W. 561; Lossing v. Cushman, 123 App. Div. 693, 108 N. Y. S. 368; Trow v. Ins. Co. (Vt.), 67 A. 821.

380-50 Lowrey v. Hawaii, 206 U. S. 206; Harten v. Loffler, 29 App. D. C. 490; McLean Coal Co. v. Bloomington, 234 Ill. 90, 84 N. E. 624; Carter & D. v. Childress (Tex. Civ.), 99 S. W. 714; Shenandoah Co. v. Clarke, 106 Va. 100, 55 S. E. 561; Causten v. Barnette (Wash.), 96 P. 225; Winton v. McGraw, 60 W. Va. 98, 54 S. E. 506.

380-54 Dalhoff Co. v. Maurice (Ark.), 110 S. W. 218; O'Brien v. Peck (Mass.), 84 N. E. 325.

381-56 Weir v. Long, 145 Ala. 328, 39 S. 974; Riley-W. Co. v. Canning Co., 129 Mo. App. 325, 108 S. W. 628; Kampmann v. McCormick (Tex. Civ.), 99 S. W. 1147.

381-57 Ramsey v. Pilcher (Ga.), 61 S. E. 538.

381-59 Martin v. Thrower, 3 Ga. App. 784, 60 S. E. 825.

Where no ambiguity exists, it cannot be shown that one clause of a contract was only inserted as security for the performance of the rest. Burton v. O'Neill, 126 Ga. 805, 55 S. E. 933.

382-61 Fidelity Co. v. News Co., 31 Ky. L. R. 725, 103 S. W. 297; Shreve v. Crosby, 72 N. J. L. 491, 63 A. 333; Marshall v. R. Co., 73 S. C. 241, 53 S. E. 417; Earle v. Owings, 72 S. C. 362, 51 S. E. 980. See Doolittle v. Murray & Co., 134 Ia. 536, 111 N. W. 999.

383-64 Whipple v. Geddis, 25 App. D. C. 333 ("certain existing incumbrances"); Beardmore v. Barry, 118 App. Div. 334, 103 N. Y. S. 353 ("more or less"); Williams v. Gridley, 96 App. Div. 525, 96 N. Y.

S. 978 ("as soon as possible"); Kentucky Mfg. Co. v. Supply Co., 77 S. C. 92, 57 S. E. 676 ("fully insured"); Reagan v. Bruff (Tex. Civ.), 108 S. W. 185; West v. Hermann (Tex. Civ.), 104 S. W. 428; City of Roanoke v. Blair, 107 Va. 637, 60 S. E. 75 ("east").

Word used in a statute cannot be explained by extrinsic evidence and the court may interpret it on demurrer. Purdom Co. v. Knight, 129 Ga. 590, 59 S. E. 433 ("season").

385-95 San Miguel Co. v. Stubbs, 39 Colo. 359, 90 P. 842 ("heart of yellow pine"); Ramsey v. Pilcher (Ga.), 61 S. E. 538 ("Savannah specifications"); Wolverine Lumb. Co. v. Ins. Co., 145 Mich. 558, 108 N. W. 1088 (where it was necessary to apply ordinary words to the peculiar facts); Sholl v. Prince Line, 109 App. Div. 591, 96 N. Y. S. 368 ("without time limit"); Edmonds v. Bank, 215 Pa. 547, 64 A. 671 (work which is "properly brickwork"); Trow v. Ins. Co. (Vt.), 67 A. 821.

To show that term "addition" applied to a building subsequently erected. Prudential Ins. Co. v. Alley, 104 Va. 356, 51 S. E. 812.

387-42 Davis v. Dodge, 110 N. Y. S. 787 ("entire business services"); Lovering v. Miller, 218 Pa. 212, 67 A. 209 ("regular season"—in theatrical contract); Schultz v. Fur. Co., 46 Wash. 555, 90 P. 917 ("busy" and "dull" season).

Expert evidence admissible. Daniel v. Bkg. Co., 124 Ga. 1063, 53 S. E. 573 ("basis" and "returns").

388-43 Grout v. Moulton, 79 Vt. 122, 64 A. 453 (satisfactory demonstration).

388-45 See Moran Bolt Co. v. Car Co., 210 Mo. 715, 109 S. W. 47 (parties must be shown to have been familiar with the technical meaning). *Contra*, Steidtmann v. Lay Co., 234 Ill. 84, 84 N. E. 640.

389-74 Buffington v. McNally, 192 Mass. 198, 78 N. E. 309.

390-92 Western Union Tel. Co. v. Merritt (Fla.), 46 S. 1024 (telegram); Griffin v. Erskine, 131 Ia. 444, 109 N. W. 13.

391-5 See S. v. Nippert, 74 Kan. 371, 86 P. 478.

391-6 Burnette v. Young, 107 Va. 184, 57 S. E. 641.

392-11 Emerson v. Stratton, 107 Va. 303, 58 S. E. 577 (that land was sold in gross and not by the acre).

393-17 Alabama Const. Co. v. Equipment Co. (Ga.), 62 S. E. 160 (that time was of the essence).

394-26 Tompkins v. Oil Co., 160 Fed. 303; Crittenden v. Cobb, 156 Fed. 535; Little Rock Co. v. Gunnels, 82 Ark. 286, 101 S. W. 729; McLamb & Co. v. Lambertson (Ga. App.), 62 S. E. 107; Emerson v. Knight (Ga.), 60 S. E. 255; Martin v. Ferguson, 31 Ky. L. R. 590, 103 S. W. 257; Boyes v. Masters, 17 Okla. 460, 89 P. 198; Rouseville v. Cornplanter, 29 Pa. Super. 214; Staub v. Hampton, 117 Tenn. 706, 101 S. W. 776; Cockrell v. Egger (Tex. Civ.), 99 S. W. 568; Houston Transf. Co. v. Lee (Tex. Civ.), 97 S. W. 842.

396-30 Patent ambiguity cannot be made certain by parol proof of intention, but the surrounding circumstances may be shown. Reynolds v. Lawrence, 147 Ala. 216, 40 S. 576. And see Riley-W. Co. v. Canning Co., 129 Mo. App. 325, 108 S. W. 628.

396-32 Maydwell v. Lumb. Co., 159 Fed. 936 (contract for "another cargo" of ties, held sufficiently definite and certain).

396-34 Davis v. Horne (Fla.), 45 S. 476; Martin v. Kitchin, 195 Mo. 477, 93 S. W. 780.

396-35 Gorham v. Settegast (Tex. Civ.), 98 S. W. 665.

397-36 Bergen v. Co-operative Co. (Ind. App.), 84 N. E. 833; Strong v. Gin Co. (Mass.), 83 N. E. 328.

398-41 North Am. Co. v. Samuels, 146 Fed. 48, 76 C. C. A. 506; Hill v. McCoy, 1 Cal. App. 159, 81 P. 1015 ("Abbey Ranch"); Harten v. Loffler, 29 App. D. C. 490; Read Phosphate Co. v. Weichselbaum Co., 1 Ga. App. 420, 58 S. E. 122; Walden v. Walden, 128 Ga. 126, 57 S. E. 323; Bennett v. Palmer, 128 Ill. App. 626; Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691 (two descriptions in same deed irreconcilable); Toole v. Crafts, 196 Mass. 397, 82 N. E. 22; Smith v.

Piano Co., 194 Mass. 193, 80 N. E. 527; Miller v. Supply Co., 150 Mich. 292, 114 N. W. 61; Lauderdale v. King, 130 Mo. App. 236, 109 S. W. 852 (to determine which of two parcels of land was meant); Ranney v. Byers, 219 Pa. 332, 68 A. 971 ("Byers Place"); Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895.

399-42 Fireman's Ins. Co. v. Ins. Co., 2 Cal. App. 690, 84 P. 253; Buffington v. McNally, 192 Mass. 198, 78 N. E. 309; Kimball v. Waterman, 73 N. H. 348, 61 A. 595; Staub v. Hampton, 117 Tenn. 706, 101 S. W. 776; Bank v. Catzen (W. Va.), 60 S. E. 499.

399-43 United R. Co. v. Wehr & Co., 103 Md. 323, 63 A. 475 (property "which you have for sale").

399-44 Brannan v. Henry, 142 Ala. 698, 39 S. 92; In re Garnier, 147 Cal. 457, 82 P. 68; Clayton v. Lemen, 233 Ill. 435, 84 N. E. 691; McFarland v. Stansifer, 36 Ind. App. 486, 76 N. E. 124; Richstein v. Welch (Mass.), 83 N. E. 417.

399-47 Haskell v. Friend, 196 Mass. 198, 81 N. E. 962.

400-51 **Field notes of surveyor** — extrinsic evidence admissible to apply the description. Selkirk v. Watkins (Tex. Civ.), 105 S. W. 116.

400-52 St. Louis etc. R. Co. v. Payne (Tex. Civ.), 104 S. W. 1077.

400-53 Rix v. Smith, 145 Mich. 203, 108 N. W. 691; Warner v. Sapp (Tex. Civ.), 97 S. W. 125.

To locate point of beginning. Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340.

400-54 Delaware etc. R. Co. v. Gleason, 159 Fed. 383.

401-60 Cumberledge v. Brooks (Ill.), 85 N. E. 197; Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275.

402-65 Herbert v. Steele (N. H.), 68 A. 411.

403-69 **But a person** cannot show that he is a party to the contract, in contradiction of the terms. Vanderberg v. Gas Co., 126 Mo. App. 600, 105 S. W. 17.

Where an instrument purports to be made by certain persons, parol evidence is inadmissible to show that another person who signed the instrument intended to be bound thereby. Brown v. O'Byrne (Ala.), 45 S. 129.

404-74 Walker v. Miller, 139 N. C. 448, 52 S. E. 125.

405-76 Rhomberg v. Avenarius, 135 Ia. 176, 112 N. W. 548; Wuertz v. Braun, 113 App. Div. 459, 99 N. Y. S. 340.

405-77 Ottumwa Mill Co. v. Manchester (Ia.), 115 N. W. 911.

405-78 Western Grocer Co. v. Lackman, 75 Kan. 34, 88 P. 527; Dunbar Co. v. Martin, 53 Misc. 312, 103 N. Y. S. 91; Birmingham v. Regnery, 33 Pa. Super. 54.

406-79 Russell v. Cotton Mills (Ala.), 39 S. 712; Mudge v. Varney, 146 N. C. 147, 59 S. E. 540.

406-80 Hart v. Lewis Co. (Ga.), 61 S. E. 26.

408-86 Fitzgerald Oil Co. v. Supply Co., 3 Ga. App. 212, 59 S. E. 713; Kilpatrick v. Trading Co., 110 N. Y. S. 381.

408-87 Rankin v. Bank (Okla.), 93 P. 536. *Contra*, where the writing is a negotiable instrument. New York L. Ins. Co. v. Martindale, 75 Kan. 142, 88 P. 559.

410-90 See Schuster v. Snawder, 31 Ky. L. R. 254, 101 S. W. 1194.

410-92 **Incomplete contract** may be aided by parol. Official Cat. Co. v. Weber, 130 Mo. App. 646, 109 S. W. 1071.

Fraud may be shown. Sheldon v. Assn., 73 N. J. L. 115, 62 A. 189.

411-95 Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. 163.

412-2 Hester v. Gairdner, 128 Ga. 531, 58 S. E. 165; Flynn v. Butler, 189 Mass. 377, 75 N. E. 730; Janvey v. Loketz, 122 App. Div. 411, 106 N. Y. S. 690 (prior conversations).

413-3 Doty v. Dickey, 29 Ky. L. R. 900, 96 S. W. 544.

413-7 Taylor v. Vail (Vt.), 66 A. 820 (natural tendency and former plans of assignor may be shown).

416-17 Townsend v. Product Co., 127 Ga. 342, 56 S. E. 436; Doolittle v. Murray Co., 134 Ia. 536, 111 N. W. 999; McNaughton v. Wahl, 99 Minn. 92, 108 N. W. 467.

Rule applies only to parties or their privies. — Bright v. Ins. Co. (Wash.), 92 P. 779.

417-19 Elgin Jewelry Co. v. Withaup & Co., 118 Mo. App. 126, 94 S. W. 572.

Conditional delivery. — See Gilroy

v. Everson H. Co., 118 App. Div. 733, 103 N. Y. S. 620.

417-20 See Hall v. Barnard (Ia.), 116 N. W. 604.

419-27 McGuire v. Gerstley, 204 U. S. 489; U. S. Gypsum Co. v. Gleason (Wis.), 116 N. W. 238.

420-33 **Subsequent agreement.** Fleming Bros. v. Linder (Ia.), 109 N. W. 771.

420-34 **Surrounding circumstances** admissible to show that conditions precedent were not met. Crawford v. Owens (S. C.), 60 S. E. 236.

423-46 **Books of account,** though admitted to prove delivery of goods, are considered as private memoranda of the plaintiff and he can show, by parol that credit was given to a third person. Pettey v. Benoit, 193 Mass. 233, 79 N. E. 245.

423-47 Inman & Co. v. R. Co., 159 Fed. 960; International R. Co. v. Griffith (Tex. Civ.), 103 S. W. 225.

Custom may be shown to explain an ambiguity. Southern R. Co. v. Cofer (Ala.), 43 S. 102.

Statement that goods were received in apparent good order, may be contradicted. Foley v. R. Co., 96 N. Y. S. 182.

423-48 Pennsylvania Co. v. Loftis, 72 Ohio St. 288, 74 N. E. 179 (a coupon ticket).

Ambiguity may be explained. Sellars v. R. Co., 77 S. C. 361, 57 S. E. 1102.

424-50 Bachman v. Clyde Co., 152 Fed. 403 (prior conversation inadmissible).

425-51 **To show true nature of transaction.** that a loan was intended. S. v. Bank (Ia.), 113 N. W. 500.

427-62 First Nat. Bk. v. Ins. Co., 147 Fed. 519, 77 C. C. A. 215; Jersey Island Co. v. Whitney, 149 Cal. App. 269, 86 P. 509, 691. *Compare* Wright v. Anderson, 191 Mass. 148, 77 N. E. 704.

Intention of parties cannot be shown. Capital City Co. v. Moody (Ia.), 110 N. W. 903.

Accord and satisfaction. — Rowland v. R. Co., 124 Mo. App. 605, 102 S. W. 19; Sutherlin v. Bloomer (Or.), 93 P. 135.

428-66 Blassingame v. Laurens (S. C.), 61 S. E. 96. See Gates v. O'Gara, 145 Ala. 665, 39 S. 729.

429-67 Ramsey v. Shipbuilding Co. (N. J. Eq.), 65 A. 461; Thompson v. Fitzgerald (Tex. Civ.), 105 S. W. 334.

430-70 See McKeige v. Carroll, 120 App. Div. 521, 105 N. Y. S. 342.

431-76 Ramsey v. Pilcher (Ga.), 61 S. E. 538 ("Savannah specifications"); Lossing v. Cushman, 123 App. Div. 693, 108 N. Y. S. 368 (to show the understanding of the parties).

432-83 Stewart v. Bridge Co. (Md.), 69 A. 708.

432-84 Brassel v. Fisk (Ala.), 45 S. 70; Taylor v. Southerland (Ind. Ter.), 104 S. W. 874; Sanborn v. Loud, 150 Mich. 154, 113 N. W. 309; Weissenfels v. Cable, 208 Mo. 515, 106 S. W. 1028; Northeastern Tel. Co. v. Hepburn (N. J. Eq.), 65 A. 747; Lindly v. Lindly (Tex. Civ.), 109 S. W. 467.

434-85 Trout v. R. Co., 107 Va. 576, 59 S. E. 394.

435-90 Ballard v. Brown (Miss.), 46 S. 137; Paris Grocer Co. v. Burks (Tex.), 105 S. W. 174; Trout v. R. Co., 107 Va. 576, 59 S. E. 394; Sylvester v. S., 46 Wash. 585, 91 P. 15.

436-91 *Compare* Edison etc. Co. v. Foundry Co., 194 Mass. 258, 80 N. E. 479.

437-94 Williams v. Smith, 128 Ga. 306, 57 S. E. 801; Hamlin v. Hamlin, 192 N. Y. 164, 84 N. E. 805, 117 App. Div. 493, 102 N. Y. S. 571.

437-96 See Drinkwater v. Hollar, 6 Cal. App. 117, 91 P. 664.

437-97 State Bank v. Hoskins, 130 Ia. 339, 106 N. W. 764; Coward v. Boyd (S. C.), 60 S. E. 311; Ord v. Waller (Tex. Civ.), 107 S. W. 1166; Carter & D. v. Childress (Tex. Civ.), 99 S. W. 714; Hubenthal v. R. Co., 43 Wash. 677, 86 P. 955; Mahaffey v. Lumb. Co., 61 W. Va. 571, 56 S. E. 893.

438-2 Creveling v. Banta (Ia.), 115 N. W. 598; Butler v. Anderson (Tex. Civ.), 107 S. W. 656; Mars v. Morris (Tex. Civ.), 106 S. W. 430.

439-6 **To show its existence.** Vincent v. Means, 207 Mo. 709, 106 S. W. 8.

439-9 Openshaw v. Rickmeyer (Tex. Civ.), 102 S. W. 467.

439-10 *Contra,* King v. Thompson, 58 W. Va. 455, 52 S. E. 487.

440-14 Dunn v. Taylor (Tex. Civ.), 107 S. W. 952.

440-15 Schmidt v. Musson (S. D.), 107 N. W. 367 (as to time and conditions of delivery).

440-16 Morton v. Morton, 82 Ark. 492, 102 S. W. 213 (of a consideration and payment thereof); Herrin v. Abbe (Fla.), 46 S. 183; McLendon Bros. v. Finch, 2 Ga. App. 421, 58 S. E. 690; Goette v. Sutton, 128 Ga. 179, 57 S. E. 308; Allen v. Rees (Ia.), 110 N. W. 583; Yore v. Meshew, 146 Mich. 80, 109 N. W. 35.

441-18 Tompkins v. Oil Co., 160 Fed. 303; Brannan v. Henry, 142 Ala. 694, 39 S. 92 (to apply the description); Nichols v. Tel. Co., 110 N. Y. S. 325; Morrison v. Tel. Co., 110 N. Y. S. 801 (prior conversations); St. Louis etc. R. Co. v. Payne (Tex. Civ.), 104 S. W. 1077; Clayton v. Court, 58 W. Va. 253, 52 S. E. 103.

Understanding of the parties admissible. Kitzman v. Carl, 133 Ia. 340, 110 N. W. 587.

To rebut presumption that land was sold by the acre and not in gross. Emerson v. Stratton, 107 Va. 303, 58 S. E. 577.

441-19 Ruley v. Min. Co. (Cal.), 93 P. 194; Hawley v. Kafitz, 148 Cal. 393, 83 P. 248; Smith v. Smith (Ga.), 61 S. E. 114 Wehrenberg v. Seiferd, 109 N. Y. S. 896; Bernardy v. Morg. Co., 20 S. D. 193, 105 N. W. 737; West v. Hermann (Tex. Civ.), 104 S. W. 428.

Patent ambiguity cannot be made certain by parol proof of intention. Reynolds v. Lawrence, 147 Ala. 216, 40 S. 576.

441-20 McSurley v. Venters, 31 Ky. L. R. 963, 104 S. W. 365; Fayter v. North, 30 Utah 156, 83 P. 742 (to determine the meaning of "privileges and appurtenances"); Shenandoah Co. v. Clarke, 106 Va. 100, 55 S. E. 561; Winton v. McGraw, 60 W. Va. 98, 54 S. E. 506; Bank v. Catzen (W. Va.), 60 S. E. 499.

441-21 **Will.** — Parol evidence is inadmissible to show that a deed was intended as a will. Noble v. Fickes, 230 Ill. 594, 82 N. E. 950.

442-23 Krebs v. Lanser, 133 Ia. 241. 110 N. W. 443.

443-26 Williams v. Smith, 128 Ga. 306, 57 S. E. 801.

444-28 Krebs v. Lanser, supra.

445-33 Hornet v. Dumbeck, 39 Ind. App. 482, 78 N. E. 691; Richstein v. Welch (Mass.), 83 N. E. 417; Staub v. Hampton, 117 Tenn. 706, 101 S. W. 776.

445-35 Haskell v. Friend, 196 Mass. 198, 81 N. E. 962.

446-37 **To locate point of beginning.** — Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340.

446-40 Bergen v. Co-Operative Co. (Ind. App.), 84 N. E. 833.

447-44 Hinton v. Moore, 139 N. C. 44, 51 S. E. 787.

447-46 Rix v. Smith, 145 Mich. 203, 108 N. W. 691; Warner v. Sapp (Tex. Civ.), 97 S. W. 125.

448-47 Cumberledge v. Brooks (Ill.), 85 N. E. 197; Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275.

448-49 Hamilton v. Blackburn (Tex. Civ.), 95 S. W. 1094 (inadmissible where the purpose is not merely to aid field notes).

448-50 Delaware R. Co. v. Gleason, 159 Fed. 383; Herbert v. Steele (N. H.), 68 A. 411.

449-55 Walker v. Miller, 139 N. C. 448, 52 S. E. 125.

To show capacity in which a person signed. Hart v. Lewis (Ga.), 61 S. E. 26 ("executor").

Misnomer may be corrected on the strength of parol evidence under the Texas statute. Cobb v. Bryan (Tex. Civ.), 97 S. W. 513.

449-57 Turtle v. Steamship Co., 154 Fed. 146; Wightman v. Ins. Co., 119 App. Div. 496, 104 N. Y. S. 214 (prior conversations).

Prior negotiations are merged. Haas v. Malto-G. Co., 148 Mich. 358, 111 N. W. 1059.

450-59 Mears v. Smith (Mass.), 85 N. E. 165.

450-62 Spurrier v. Bullard, 131 Ia. 123, 107 N. W. 1036.

450-65 Turtle v. Steamship Co., supra.

451-72 Spurrier v. Bullard, 131 Ia. 123, 107 N. W. 1036; Mears v. Smith (Mass.), 85 N. E. 165; Loxley v. Studebacker (N. J. L.), 68 A. 98; Nielson v. Siberian Co., 40 Wash. 194, 82 P. 292.

Admissible when not inconsistent.

Wells v. Coal Co. (Ia.), 114 N. W. 1076.

451-73 Prior parol agreement under which services were alleged to have been rendered, admissible. Levin v. Knitting Co., 78 Conn. 338, 61 A. 1073.

451-75 Hendrix v. Letourneau (Ia.), 116 N. W. 729 (written contract never signed).

451-76 Electrical Co. v. Greenberg, 56 Misc. 514, 107 N. Y. S. 110.

452-78 Martin v. Thrower, 3 Ga. App. 784, 60 S. E. 825; Picard v. Beers, 195 Mass. 419, 81 N. E. 246.

Custom or usage. — Garfield v. Motor Car Co., 189 Mass. 395, 75 N. E. 695.

Agreement not subsequently to compete with employer. Turner v. Abbott, 116 Tenn. 718, 94 S. W. 64.

453-90 Hannon v. Espalla, 148 Ala. 313, 42 S. 443; Blake v. Miller, 135 Ia. 1, 112 N. W. 158; Ivey v. Cotton Mills, 143 N. C. 189, 55 S. E. 613.

453-91 Daniel v. Bkg. Co., 124 Ga. 1063, 53 S. E. 573; Davis v. Dodge, 110 N. Y. S. 787 ("entire business service"); Schultz v. Fur Co., 46 Wash. 555, 90 P. 917 ("busy" season).

453-92 Escrow agreement cannot be varied by parol evidence. Womble v. Wilbur, 3 Cal. App. 535, 86 P. 916.

454-93 Sinnickson v. Perkins, 231 Ill. 492, 83 N. E. 194; Great Western Co. v. Belcher, 127 Mo. App. 133, 104 S. W. 894; U. S. Gypsum Co. v. Gleason (Wis.), 116 N. W. 238.

454-94 Mudge v. Varney, 146 N. C. 147, 59 S. E. 540.

455-96 U. S. Gypsum Co. v. Gleason, supra.

Contract of the employe for whose conduct the bond was given may be shown by parol, in an action on the bond. Germania Ins. Co. v. Lange, 193 Mass. 67, 78 N. E. 746.

455-97 Lefkovits v. Bank (Ala.), 44 S. 613. *Compare* Fidelity Co. v. Harden, 212 Pa. 96, 61 A. 880 (prior inducing agreement may be shown).

456-2 Great Western Co. v. Belcher, 127 Mo. App. 133, 104 S. W. 894.

456-3 Apparent joint maker may show that he is a surety. Windhorst v. Bergendahl (S. D.), 111 N. W. 544.

456-4 Smith v. Caldwell, 78 Ark. 333, 95 S. W. 467; Dodd v. Pasch, 5 Cal. App. 686, 91 P. 166; Mageon v. Alkire (Colo.), 92 P. 720; Smith v. Green, 128 Ga. 90, 57 S. E. 98 (rent-contract); Slaughter v. Johnson, 128 Ill. App. 417; Ross v. Griebel, 136 Ill. App. 399; Kenyon v. Manley, 125 Ill. App. 615; Jackson Brew. Co. v. Wagner, 117 La. 875, 42 S. 356; Goebel v. Look (Mich.), 116 N. W. 1078; Lewis v. Muse, 130 Mo. App. 194, 108 S. W. 1107. See Waldo v. Jacobs (Mich.), 116 N. W. 371; Gandy v. Wiltse (Neb.), 112 N. W. 569.

458-7 Hallenbeck v. Chapman, 72 N. J. L. 201, 63 A. 498.

Reservation of property cannot be shown. Suderman-D. Co. v. Rogers (Tex. Civ.), 104 S. W. 193.

Condition which would defeat a lease cannot be shown. Morris v. Lumb. Co. (Wash.), 91 P. 186.

459-8 Schweig v. Manhattan Co., 54 Misc. 233, 104 N. Y. S. 371; Williams v. Salmond (S. C.), 61 S. E. 79.

461-29 Condition precedent, may be shown. Cavanaugh v. Beer Co. (Ia.), 115 N. W. 856; Hinsdale v. McCune, 135 Ia. 682, 113 N. W. 478.

462-34 See Hallenbeck v. Chapman, 72 N. J. L. 201, 63 A. 498.

463-38 Taylor v. Finnigan, 189 Mass. 568, 76 N. E. 203; Haight v. Cohen, 123 App. Div. 707, 108 N. Y. S. 502.

Oral lease to take effect on the expiration of a written one may be shown. Gabel v. Page, 6 Cal. App. 618, 92 P. 749.

463-40 Prior negotiations. — Pine Beach v. Amusement Co., 106 Va. 810, 56 S. E. 822.

463-42 O'Neill v. Ogden Aerie, 32 Utah 162, 89 P. 464 (evidence of local custom).

463-44 Chesapeake Brew. Co. v. Goldberg (Md.), 69 A. 37 (interpretation of words "now are").

464-45 Wheeler v. Moore (Neb.), 111 N. W. 120; Hermann v. McIver (Tex. Civ.), 111 S. W. 766 (intention inadmissible).

464-46 Sale or lease. — Lambert Co. v. Carmody, 79 Conn. 419, 65 A. 141.

464-47 Lauderdale v. King, 130 Mo. App. 236, 109 S. W. 852 (to apply description); Cockrell v. Egger (Tex. Civ.), 99 S. W. 568.
464-49 As to parties, see Brown v. O'Byrne (Ala.), 45 S. 129.
465-53 Perry v. Bates, 115 App. Div. 337, 100 N. Y. S. 881.
465-55 Robertson v. Warren (Tex. Civ.), 100 S. W. 805.
466-59 Baker v. Cotney (Ala.), 43 S. 786; White Co. v. Carroll (N. C.), 61 S. E. 196; Blake v. Lowry (Tex. Civ.), 93 S. W. 521; Bartlett Est. Co. v. Land Co. (Wash.), 94 P. 900.
467-61 McCusker v. Geiger (Mass.), 80 N. E. 648.
468-62 Conditional delivery may be shown. Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060.
468-64 O'Brien v. Brew. Co., 69 N. J. Eq. 117, 61 A. 437.
469-65 Usury in chattel mortgage. France v. Munro (Ia.), 115 N. W. 577.
469-67 Lane v. Trust Co., 10 Ohio C. C. (N. S.) 512.
469-71 Moody v. Atkins, 146 Ala. 684, 40 S. 305 (extending time of payment).
470-73 Phipps v. Willis (Or.), 96 P. 866.
Prior conversation inadmissible where no ambiguity alleged. Smith v. R. Co. (Tex. Civ.), 105 S. W. 528.
470-76 Jones v. Norris (N. C.), 60 S. E. 714 (declarations of mortgagee).
470-77 Ladd v. Dist. Co., 147 Ala. 173, 40 S. 610.
Real object of a mortgagee may be shown and that it was given for a purpose not disclosed in the condition. Campbell v. Shipbuilding Co., 70 N. J. Eq. 40, 62 A. 319.
470-79 Wells v. Foss (Vt.), 69 A. 155 (that a mortgage was given not only to secure a note but also to secure the mortgagee for becoming bail by way of recognizance).
470-81 Collateral parol agreement, may be shown. Somerset Co. v. John (Pa.), 68 A. 843.
471-83 Read Phosphate Co. v. Weichselbaum, 1 Ga. App. 420, 58 S. E. 122; S. v. Jackson, 128 Ia. 543, 105 N. W. 51.
471-84 Walden v. Walden, 128 Ga. 126, 57 S. E. 323; Smith v. R. Co. (Tex.), 108 S. W. 819.
471-85 Davis v. Horne (Fla.), 45 S. 476.
471-86 Hendricks v. Webster, 159 Fed. 927.
471-87 Emerson v. Knight (Ga.), 60 S. E. 255; Hester v. Gairdner, 128 Ga. 531, 58 S. E. 165; Boyes v. Masters, 17 Okla. 460, 89 P. 198.
471-89 Legal inferences cannot be rebutted by parol. McAlpine v. Millen (Minn.), 116 N. W. 583.
472-94 Haag v. Burns (S. D.), 115 N. W. 104.
473-1 Causten v. Barnette (Wash.), 96 P. 225.
475-12 Murphy v. Black, 148 Ala. 675, 41 S. 877; Steele v. Realty Co. (Cal. App.), 96 P. 105; Jersey Island Co. v. Whitney, 149 Cal. 269, 86 P. 509, 691; Dejon v. Street, 79 Conn. 333, 65 A. 145; Perry v. Shoe Co., 129 Ga. 560, 59 S. E. 216; Barfield v. Saunders, 116 La. 136, 40 S. 593; Waters v. Phelps (Neb.), 116 N. W. 783; Green v. Green (N. J.), 68 A. 1070 ("Mem. of the disposition" of household effects of the deceased acquiesced in for 20 years); Bowen v. Ins. Co. (S. D.), 104 N. W. 1040 (binding insurance receipt).
476-13 Savage v. Mills Co., 48 Or. 1, 85 P. 69 (ambiguity may be explained).
477-18 Willoughby v. Hannon (Ala.), 47 S. 241; Batson v. Ins. Co. (Ala.), 46 S. 578; Hartford Ins. Co. v. Sherman, 123 Ill. App. 202; New York Ins. Co. v. Wolfston, 124 Mo. App. 286, 101 S. W. 162; Strawn v. R. Co., 120 Mo. App. 135, 96 S. W. 488; Reedy Elev. Co. v. Berman, 107 N. Y. S. 59; Duffy v. Meyer, 122 App. Div. 838, 107 N. Y. S. 672; House v. Holland (Tex. Civ.), 94 S. W. 153; Brixen v. Jorgensen, 33 Utah 97, 92 P. 1004; Lazier v. Cady, 44 Wash. 339, 87 P. 344. See Murphy v. Black, 148 Ala. 675, 41 S. 877 (foundation must be laid); Fidelity Co. v. Tinsley, 30 Ky. L. R. 1095, 100 S. W. 272; Holcomb-L. Co. v. Kaufman, 29 Ky. L. R. 1006, 96 S. W. 813; Smith v. Allmon, 74 S. C. 502, 54 S. E. 1014.
479-33 Indorsement of payment on a note, may be explained. McCaffrey v. Burkhardt, 97 Minn. 1, 105 N. W. 971.
480-36 Brown v. Mill. Co., 150 Cal. 376, 89 P. 86; California Pack-

ers' Co. v. Merritt (Cal. App.), 92 P. 509; Wegmann v. Rothwell, 121 Mo. App. 413, 99 S. W. 59. See Sawyer v. Walker, 204 Mo. 133, 102 S. W. 544.

482-40 Allen v. Ruland, 79 Conn. 405, 65 A. 138; Pennsylvania C. Co. v. Thompson (Ga.), 61 S. E. 829; Budro v. Burgess (Mass.), 83 N. E. 318.

Statement of consideration, is contractual. Tate v. R. Co. (Mo. App.), 110 S. W. 622.

Release given to one of two joint wrongdoers, may be explained. El Paso etc. R. Co. v. Darr (Tex. Civ.), 93 S. W. 166.

484-47 Jersey Isl. Co. v. Whitney, 149 Cal. 269, 86 P. 509, 691.

484-51 Pierce v. Edwards, 150 Cal. 650, 89 P. 600.

485-52 Leonhart v. Assn., 5 Cal. App. 19, 89 P. 847 (custom).

Sale cannot be shown to have been a mortgage, where the language used is definite and certain and such proof involves evidence of prior agreements. Doolittle v. Murray, 134 Ia. 536, 111 N. W. 999.

486-53 Commercial Bk. v. Potts, 150 Cal. 358, 89 P. 431.

487-54 Porter v. Sims (Fla.), 46 S. 420; Stonehill W. Co. v. Lupo, 110 N. Y. S. 408.

Bill of parcels does not embody the contract and parol evidence is admissible to explain it. North Pack. Co. v. Lynch, 196 Mass. 204, 81 N. E. 891.

487-55 Rule applies only to parties and privies. Good & Co. v. Coal Co. (Ind. Ter.), 104 S. W. 613.

487-56 Though goods delivered corresponded to a sample, parol evidence is admissible to show noncompliance with specifications. West End Mfg. Co. v. Warren Co. (Mass.), 84 N. E. 488.

488-58 Brennard Mfg. Co. v. Merc. Co., 148 Ala. 666, 41 S. 671; Knight-C. Co. v. Buck (Colo.), 95 P. 283; Biggers v. Mfg. Co., 124 Ga. 1045, 53 S. E. 674; Doolittle v. Murray, 134 Ia. 536, 111 N. W. 999; Columbia Mill v. Russell, 89 Miss. 437, 42 S. 233; Carlin & Co. v. Fraser, 105 Va. 216, 53 S. E. 145; Buckeye B. Co. v. Stables, 43 Wash. 49, 85 P. 1077.

488-64 Fairbanks, M. & Co. v. Burgert (Neb.), 116 N. W. 35; Blair v. Minzesheimer, 108 N. Y. S. 799; Brown v. Hobbs (N. C.), 60 S. E. 716; Bourne v. Sherrill, 143 N. C. 381, 55 S. E. 799.

488-66 Agreement not to sell goods to other merchants in the same town inadmissible. Main v. Radney (Ala.), 39 S. 981.

489-68 Houghton Imp. Co. v. Doughty, 14 N. D. 331, 104 N. W. 516.

489-69 Florence W. Wks. v. Mfg. Co., 145 Ala. 677, 40 S. 49; Chicago Tel. Co. v. Tel. Co., 134 Ia. 252, 111 N. W. 935 (contract incomplete on its face); Leavitt v. Fiberloid Co., 196 Mass. 440, 82 N. E. 682; Fairbanks, M. & Co. v. Burgert (Neb.), 116 N. W. 35; Louis De Jonge & Co. v. Printz, 49 Misc. 112, 96 N. Y. S. 750.

489-70 Barry etc. Co. v. Thompson, 83 Ark. 283, 104 S. W. 137; Johnson etc. Co. v. Hughes, 83 Ark. 105, 103 S. W. 184; Arden Lumb. Co. v. Supply Co., 83 Ark. 240, 103 S. W. 185; Lower v. Hickman, 80 Ark. 505, 97 S. W. 681; Kullman Co. v. Mfg. Co. (Cal.), 96 P. 369; Elec. Storage Co. v. R. Co. (Ia.), 116 N. W. 144; Scholl v. Killorin, 190 Mass. 493, 77 N. E. 382; Day L. Co. v. Leather Co., 141 Mich. 533, 104 N. W. 797; McNaughton v. Wohl, 99 Minn. 92, 108 N. W. 467.

491-73 Nichols & S. Co. v. Berning, 37 Ind. App. 109, 76 N. E. 776; Lilienthal v. Herren, 42 Wash. 209, 84 P. 829.

Mistake. — Northwest Thresher Co. v. Hulburt (Minn.), 115 N. W. 159.

Alteration. — Price v. Staubra (Wash.), 88 P. 115.

492-75 Bonewell & Co. v. Jacobson, 130 Ia. 170, 106 N. W. 614; U. S. Gypsum Co. v. Shields (Tex. Civ.), 106 S. W. 724.

492-77 Weir v. Long, 145 Ala. 328, 39 S. 974; St. Louis etc. R. Co. v. Wynn, 81 Ark. 373, 99 S. W. 376; West End Mfg. Co. v. Warren Co. (Mass.), 84 N. E. 488; Leavitt v. Fiberloid Co., 196 Mass. 440, 82 N. E. 682; Electrical A. Co. v. Standard Co. (Mich.), 115 N. W. 982; St. Anthony E. Co. v. Mill Co. (Minn.), 116 N. W. 935; Cooper v. Payne, 186 N. Y. 334, 78 N. E. 1076; Crook v. Fidanque, 110 N. Y. S. 198.

493-78 See Victor S. Co. v. O'Neill (Wash.), 93 P. 214.
494-87 Duplicate copies differing, parol evidence admissible to show which contains the true agreement. Bowman v. Poppenberg, 53 Misc. 373, 103 N. Y. S. 245.
494-90 McCaskey Co. v. Green, 57 Misc. 549, 109 N. Y. S. 970.
495-92 Porter v. Sims Co. (Fla.), 46 S. 420.
495-95 *Compare* Jost v. Wolf, 130 Wis. 37, 110 N. W. 232.
496-99 Massey Bros. v. Dixon Bros., 81 Ark. 337, 99 S. W. 383; Nichols & S. Co. v. Maxson, 76 Kan. 607, 92 P. 545; Rester v. Powell, 120 La. 406, 45 S. 372.
Practical construction by the parties. McLean Coal Co. v. Bloomington, 234 Ill. 90, 84 N. E. 624.
Intention. — Prowers v. Nowles (Colo.), 94 P. 347.
496-2 Shafer v. Sloan, 3 Cal. App. 335, 85 P. 162; Lambert Co. v. Carmody, 79 Conn. 419, 65 A. 141 (to explain whether a sale or lease was intended); Garfield & P. Co. v. Coal Co. (Mass.), 84 N. E. 1020; Fullam v. Cloth. Co., 196 Mass. 474, 82 N. E. 711.
496-4 Brackett & Co. v. Grocery Co., 127 Ga. 672, 56 S. E. 762.
496-5 Grout v. Moulton, 79 Vt. 122, 64 A. 453.
497-8 Little Rock Co. v. Gunnels, 82 Ark. 286, 101 S. W. 729; Miller v. Supply Co., 150 Mich. 292, 114 N. W. 61 (reference to another contract allowed); United R. Co. v. Wehr, 103 Md. 323, 63 A. 475.
497-9 Hill v. McCoy, 1 Cal. App. 159, 81 P. 1015; McFarland v. Stansifer, 36 Ind. App. 486, 76 N. E. 124; Kimball v. Waterman, 73 N. H. 348, 61 A. 595.
498-11 North Am. Co. v. Samuels, 146 Fed. 48, 76 C. C. A. 506; In re Garnier, 147 Cal. 457, 82 P. 68.
500-23 Russell v. Cotton Mills (Ala.), 39 S. 712 (inadmissible to prove that a corporation was to be bound by an agreement not purporting to be signed by it).
501-25 Capps v. Edwards (Ga.), 60 S. E. 455.
501-26 Hinkley v. Pipe Line Co., 132 Ia. 396, 107 N. W. 629; Metropolitan Co. v. Webster, 193 Mo. 351, 92 S. W. 79.

PARTIES AND PERSONS INTERESTED AS WITNESSES

[Vol. 9.]

506-4 Cobb v. Cobb, 4 Pa. Super. 273; In re Stewart, 15 Pa. C. C. 380.
507-7 Sutherland v. S., 121 Ga. 190, 48 S. E. 915.
507-10 Wong Din v. U. S., 135 Fed. 702, 68 C. C. A. 340; Larsen v. Chicago U. T. Co., 131 Ill. App. 286; Mansfield v. R. Co., 132 Ill. App. 552; Platner v. Ryan (N. J.), 69 A. 1007 (it is so provided by statute).
507-11 Shelton v. S., 144 Ala. 106, 42 S. 30; S. v. Bursaw, 74 Kan. 473, 87 P. 183; Donner v. S., 72 Neb. 263, 100 N. W. 305.
508-14 Donner v. S., supra.
509-16 Miller v. Ter., 149 Fed. 330, 79 C. C. A. 268 (contribution of money to aid in the prosecution and purpose of so doing); Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276; Atlantic etc. R. Co. v. Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769; Taylor v. S., 121 Ga. 348, 49 S. E. 303; S. v. Cook, 13 Idaho 45, 88 P. 240 (attempt by one witness to induce another not to testify); S. v. Koller, 129 Ia. 111, 105 N. W. 391; Louisville R. Co. v. Williams (Ky.), 109 S. W. 874; Buxton v. Ainsworth (Mich.), 116 N. W. 1094; Schon v. Harlan, 56 Misc. 518, 107 N. Y. S. 113; P. v. Wenzel, 189 N. Y. 275, 285, 82 N. E. 130; Miller v. Ter., 15 Okla. 422, 85 P. 239; Lowry v. S. (Tex. Cr.), 110 S. W. 911; Owens v. S. (Tex. Cr.), 96 S. W. 31 (inquiry by witness of prosecutor as to what latter testified to before grand jury).
509-17 Isaac v. U. S. (Ind. Ter.), 104 S. W. 588.
509-18 Frank v. Symons, 35 Mont. 56, 88 P. 561; Platner v. Ryan (N. J.), 69 A. 1007; Hirsh v. Tel. Co., 92 N. Y. S. 794.
509-20 Buxton v. Ainsworth (Mich.), 116 N. W. 1094.
509-21 Stevens v. L. Co., 13 Idaho 384, 92 P. 363.
509-22 Teston v. S., 50 Fla. 137, 39 S. 787.
509-23 Miller v. Ter., 149 Fed. 330, 79 C. C. A. 268 (and capacity in which he was retained).
510-24 Murray v. Iron Wks. Co., 4 Cal. App. 41, 87 P. 202; Chicago City R. Co. v. Smith, 226 Ill. 178,

80 N. E. 716; Gulf etc. R. Co. v. Hays (Tex. Civ.), 89 S. W. 29; Norfolk R. Co. v. Birchfield, 105 Va. 809, 54 S. E. 879. See Chicago etc. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050.

510-25 Pecos etc. R. Co. v. Harrington (Tex. Civ.), 99 S. W. 1050.

510-27 P. v. Harper, 145 Mich. 402, 108 N. W. 689.

511-28 Capitol C. Co. v. Holtzman, 27 App. D. C. 125. So held. Vindicator G. M. Co. v. Firstbrook, 36 Colo. 498, 86 P. 313; Jaquinto v. Bauer, 104 App. Div. 56, 93 N. Y. S. 388; Bates v. S. (Ga. App.), 61 S. E. 888.

511-36 Henrietta Co. v. Martin, 221 Ill. 460, 77 N. E. 902, 122 Ill. App. 354; Ellis v. R. Co. (Mo. App.), 111 S. W. 839; S. v. Constantine (Wash.), 93 P. 317.

512-37 Smith v. S., 79 Ark. 25, 94 S. W. 918; Hayes v. S., 126 Ga. 95, 54 S. E. 809; S. v. Rosa, 71 N. J. L. 316, 58 A. 1010.

512-39 Harrell v. S., 121 Ga. 607, 49 S. E. 703.

512-40 Briscoe v. R. Co., 118 Mo. App. 668, 95 S. W. 276.

513-44 McCowan v. Northeastern Co., 41 Wash. 675, 84 P. 614.

514-46 Christiansen v. Tank Works, 223 Ill. 142, 79 N. E. 97; Henrietta Co. v. Martin, 221 Ill. 460, 77 N. E. 902, 122 Ill. App. 354.

518-57 Ripperdan v. Weldy, 149 Cal. 667, 87 P. 276.

519-62 Hayes v. S., 126 Ga. 95, 54 S. E. 809; Georgia etc. R. Co. v. Stanley, 1 Ga. App. 487, 57 S. E. 1042; Norfolk R. Co. v. Birchfield, 105 Va. 809, 54 S. E. 879; Miller v. Ter., 15 Okla. 422, 85 P. 239; Louisville etc. R. Co. v. Sherrell (Ala.), 44 S. 631.

519-64 Goss v. Goss, 102 Minn. 346, 113 N. W. 690.

519-65 National etc. Co. v. Fagan, 115 Ill. App. 590; Creeping Bear v. S., 113 Tenn. 322, 87 S. W. 653.

520-67 Gracz v. Anderson (Minn.), 116 N. W. 1116; Goss v. Goss, supra.

520-68 Contra to the text is Taylor v. S., 121 Ga. 348, 49 S. E. 303.

520-69 Birmingham etc. Co. v. Rutledge, 142 Ala. 195, 39 S. 338. The issues in the case do not limit the questions which may be put to determine the interest of a witness. Vindicator Co. v. Firstbrook, 36 Colo. 498, 86 P. 313. But *compare* Lowsit v. L. Co., 38 Wash. 290, 80 P. 431, *foll.* Iverson v. McDonnell, 36 Wash. 73, 78 P. 202. See also Gracz v. Anderson (Minn.), 116 N. W. 1116.

521-73 S. v. Spaugh, 200 Mo. 571, 98 S. W. 55; C. v. Miller, 31 Pa. Super. 317.

PARTITION [Vol. 9.]

524-3 Joyce v. Dyer, 189 Mass. 64, 75 N. E. 81.

524-6 Ming v. Olster, 195 Mo. 460, 92 S. W. 898 (certified copy of deed of partition).

524-7 Seawell v. Young, 77 Ark. 309, 91 S. W. 544.

525-10 Ming v. Olster, supra.

526-11 Seawell v. Young, supra.

526-14 Carroll v. Fulton, 148 Ala. 671, 41 S. 741; Fischer v. Langlotz, 114 App. Div. 903, 100 N. Y. S. 578; Hyde v. Britton, 41 Wash. 277, 83 P. 307.

527-15 Heard v. Cherry, 29 Ky. L. R. 106, 92 S. W. 551 (title from state need not be proved).

528-17 Shetterly v. Axt, 37 Ind. App. 687, 76 N. E. 901; Breidenstein v. Bertram, 198 Mo. 328, 95 S. W. 828 (heir not mentioned in will).

530-27 See Cooper v. Trout, 31 Ky. L. R. 444, 102 S. W. 798.

532-36 Mead v. Mead, 31 Ky. L. R. 70, 101 S. W. 330 (affidavit of party and three witnesses held insufficient); Bowles v. Wood, 90 Miss. 742, 44 S. 169 (evidence held sufficient); Field v. Leiter (Wyo.), 90 P. 378.

532-37 Mead v. Mead, supra.

533-40 Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

PARTNERSHIP [Vol. 9.]

Bill heads, 544-20; *Declarations not acquiesced in by other partners,* 545-22.

538-1 Russell v. Bellinger, 146 Ala. 679, 40 S. 132; Butts v. Cooper (Ala.), 44 S. 616; Clark v. Hoffman,

28 Ill. App. 422; Briggs v. Kohl, 132 Ill. App. 484; Wiggins v. Markham, 131 Ia. 102, 108 N. W. 113; Norton v. Brink, 75 Neb. 566, 106 N. W. 668; Bristol Co. v. Skapple (N. D.), 115 N. W. 841; Clifton v. C. Co. (Tex. Civ.), 87 S. W. 182. See Russell v. Billinger, 146 Ala. 679, 40 S. 132; Mitchell v. Whaley, 29 Ky. L. R. 125, 92 S. W. 556; Chase v. Angell, 148 Mich. 1, 108 N. W. 1105; Tuite v. Tuite (N. J.), 66 A. 1090; Ovam v. Peirce (N. J. L.), 67 A. 1053; Davidson v. Copeland, 77 S. C. 108, 57 S. E. 620; Lellman v. Mills, 15 Wyo. 149, 87 P. 985.

538-2 Dorough v. Harrington, 148 Ala. 305, 42 S. 557; Rector v. Robins, 74 Ark. 437, 86 S. W. 667; Ramsay v. Meade, 37 Colo. 465, 86 P. 1018; Jones v. Purnell, 5 Penne. (Del.) 444, 62 A. 149; Leeds v. Townsend, 228 Ill. 451, 81 N. E. 1069; Morgart v. Smouse, 103 Md. 463, 63 A. 1070; Berry v. Pelneault, 188 Mass. 413, 74 N. E. 917; McDonald v. Campbell, 96 Minn. 87, 104 N. W. 760; Lefevre v. Silo, 112 App. Div. 464, 98 N. Y. S. 321; Providence Co. v. Browning, 72 S. C. 424, 52 S. E. 117; Bentley v. Brossard, 33 Utah 396, 94 P. 736; Tamblyn v. Scott, 111 Mo. App. 46, 85 S. W. 918; Boreing v. Wilson (Ky.), 108 S. W. 914. See Roberts v. Adams Co. (Ky.), 110 S. W. 314; Miller v. Simpson, 107 Va. 476, 59 S. E. 378. *Contra,* Brotherton v. Gilchrist, 144 Mich. 274, 107 N. W. 890; Agnew v. Montgomery, 72 Neb. 9, 99 N. W. 820.

541-8 Chase v. Angell, 148 Mich. 1, 108 N. W. 1105. See Norris v. Anthony, 193 Mass. 225, 79 N. E. 258; Michigan Shoe Co. v. Paul, 149 Mich. 695, 113 N. W. 310.

541-9 Stitt v. Lumb. Co., 98 Minn. 52, 107 N. W. 824. See Norton v. Brink, 75 Neb. 566, 106 N. W. 668; Butts v. Cooper (Ala.), 44 S. 616.

542-14 Bartholomew v. Shepperd (Tex. Civ.), 93 S. W. 218. See Ramsay v. Meade, 37 Colo. 465, 86 P. 1018.

542-15 Bartleson v Feidler, 149 Fed. 299; Nevers Lumb. Co. v. Fields (Ala.), 44 S. 81; Briggs v. Kohl, 132 Ill. App. 484; Gay v. Ray, 189 Mass. 112, 75 N. E. 138; Beckwith v. Mace, 140 Mich. 157, 103 N. W. 559; Reisman v. Silver, 48 Miss. 399, 95 N. Y. S. 483; In re Dusenbery, 106 App. Div. 235, 94 N. Y. S. 107; Gertner v. Merker, 104 N. Y. S. 873; Barth v. Paul, 50 Misc. 600; 99 N. Y. S. 425; Hoskins v. Bank (Tex. Civ.), 107 S. W. 598; Mitchell v. Jensen, 29 Utah 346, 81 P. 165; Coons v. Coons, 106 Va. 572, 56 S. E. 576. See American Bond. Co. v. Eusey (Md.), 65 A. 921; Houfek v. Held Co., 75 Neb. 210, 106 N. W. 171.

To prove partnership evidence is proper to show the acts, conduct and declarations of the alleged partners. Jones v. Purnell, 5 Penne. (Del.) 444, 62 A. 149.

543-17 Paris Merc. Co. v. Hunter, 74 Ark. 615, 86 S. W. 808; Phillips v. Mires, 2 Cal. App. 274, 83 P. 300; Blaisdell v. Burns, 13 Haw. 507; Clark v. Hoffman, 128 Ill. App. 422; Duncan Coal Co. v. Duncan Co., 29 Ky. L. R. 1249, 97 S. W. 43; Howard v. Yates, 32 Ky. L. R. 1081, 107 S. W. 738; Michigan Shoe Co. v. Paul, 149 Mich. 695, 113 N. W. 310; Daugherty v. Burgess, 118 Mo. App. 557, 94 S. W. 594; Reilly R. & S. Co. v. Gallagher, 108 N. Y. S. 655; Ludowieg v. Talcott, 47 Misc. 77, 93 N. Y. S. 621; Bartholomew v. Shepperd (Tex. Civ.), 93 S. W. 218; Jackson v. Haynie, 106 Va. 365, 56 S. E. 148. See Headley v. Rice, 29 Ky. L. R. 1102, 96 S. W. 903; Chlopeck v. Chlopeck, 47 Wash. 256, 91 P. 966.

544-18 Jenkins v. Jenkins, 81 Ark. 68, 98 S. W. 685; Briggs v. Kohl, 132 Ill. App. 484; Morback v. Young (Or.), 94 P. 35; Bentley v. Brossard, 33 Utah 396, 94 P. 736; Boreing v. Wilson (Ky.), 108 S. W. 914. See Breinig v. Sparrow, 39 Ind. App. 702, 80 N. E. 40.

544-19 Frankel v. Hillier (N. D.), 113 N. W. 1067.

544-20 Rector v. Robins, 74 Ark. 437, 86 S. W. 667; Hubbard v. Mulligan, 34 Colo. 236, 82 P. 783; Davidson v. Waxelbaum, 2 Ga. App. 432, 58 S. E. 687; Franklin v. Hoadley, 115 App. Div. 538, 101 N. Y. S. 374. See Bailey v. Fritz, 75 Ark. 463, 88 S. W. 569; Brinson v. Brinson, 3 Ga. App. 223, 59 S. E. 711.

545-22 H. Kahn Co. v. Bowden Co., 80 Ark. 23, 96 S. W. 126. See Thomas v. Mosher, 128 Ill. App. 479; Daniel v. Lanee, 29 Pa. Super. 454; Providence Mach. Co. v. Browning, 70 S. C. 148, 49 S. E. 325.
545-24 Davidson v. Waxelbaum, 2 Ga. App. 432, 58 S. E. 688.
547-30 Bell v. Daugherty, 30 Ky. L. R. 853, 99 S. W. 922. *Contra*, Grey v. Callan, 133 Ia. 500, 110 N. W. 909.
548-33 Gay v. Ray, 189 Mass. 112, 75 N. E. 138; Drewry Co. v. McDougall, 145 N. C. 285, 59 S. E. 73.
550-38 See Mitchell v. Jensen, 29 Utah 346, 81 P. 164.
550-43 Garbarino v. Howard (Colo.), 95 P. 933.
551-46 Jones v. Purnell, 5 Penne. (Del.) 444, 62 A. 149; McDonald v. Campbell, 96 Minn. 87, 104 N. W. 760.
551-47 McDonald v. Campbell, 96 Minn. 87, 104 N. W. 760. See Brotherton v. Gilchrist, 144 Mich. 274, 107 N. W. 890.
552-49 See Hurd v. Fleck, 34 Colo. 262, 82 P. 485.
556-61 See Adams v. Long, 114 Ill. App. 277; Bentley v. Brossard, 33 Utah 396, 94 P. 736 (distinction between "Mining and Trading Partnerships").
557-62 See Powell Hdw. Co. v. Mayer, 110 Mo. 14, 83 S. W. 1008. See Third Nat. Bk. v. Faults Co., 115 Mo. App. 42, 90 S. W. 755 (firm carrying mail is non-trading partnership).
559-67 Rector v. Robins, 74 Ark. 437, 86 S. W. 667; s. c. 102 S. W. 209. See Morback v. Young (Or.), 94 P. 35.
559-68 Fay v. Walsh, 190 Mass. 374, 77 N. E. 44; Morback v. Young, supra.
560-74 Jenkins v. Jenkins, 81 Ark. 68, 98 S. W. 685.
560-78 Jenkins v. Jenkins, supra.
562-85 See Brotherton v. Gilchrist, 144 Mich. 274, 107 N. W. 890.
564-92 But see Lee v. Kirby, 80 Ark. 366, 97 S. W. 298.
564-94 See Brinson v. Brinson, 3 Ga. App. 223, 59 S. E. 711.
569-16 See Sanford v. Embry, 151 Fed. 977.

Reissue, 583-6; *Division of application*, 583-6; *Ex parte tests*, 615-6; *Suits under* § 4915, 619-19; *Omission of element*, 652-53.

582-4 See Ex parte Samstag, 133 O. G. 1188; Ex parte Green, 130 O. G. 299.
583-5 See In re Booth Bros., 128 O. G. 1291; In re Setter, 126 O. G. 3421; Siebert v. Bloomberg, 124 O. G. 628.
583-6 See Ex parte Dilg, 132 O. G. 1837; Ex parte Midgley, 127 O. G. 1577; Ex parte Myers, 123 O. G. 1663; Ex parte Wentzel, 131 O. G. 941; Ex parte Westinghouse, 131 O. G. 1420; Ex parte McKee, 130 O. G. 980; Cutler v. Leonard, 136 O. G. 438; Ex parte Tribon, 127 O. G. 2815; Ex parte Hess, 126 O. G. 3041.
Reissue. — See In re Heroult, 29 App. D. C. 42. And see Ex parte Heitt, 126 O. G. 1067; In re Ams, 29 App. D. C. 91; In re Hoey, 28 App. D. C. 416.
Division of application. — In re Frasch, 27 App. D. C. 25.
584-11 See In re U. S. Stand. V. Mach. Co., 130 O. G. 1486; Ex parte Newman, 135 O. G. 1122.
585-14 Distinction between public use and interference proceedings, as to using testimony taken in former on hearing in latter. Ex parte Wenzelmann, 132 O. G. 232.
588-25 Field v. Coleman, 131 O. G. 1686; Dukesmith v. Carrington v. Turner, 125 O. G. 348.
Discretion of Examiner of Interferences. — Young v. Townsend v. Thullen, 134 O. G. 1804.
589-27 Braunstein v. Holmes, 30 App. D. C. 328; Sobey v. Holselaw, 28 App. D. C. 65; Orcutt v. McDonald, 27 App. D. C. 228; Lowrie v. Taylor, 27 App. D. C. 522; Smith v. Foley, 136 O. G. 850; Duff v. Latshaw, 31 App. D. C. 255, 136 O. G. 658; Durker v. Mirquist, 136 O. G. 229; Gibbons v. Peller, 28 App. D. C. 530. *Compare* Larkin v. Richardson, 28 App. D. C. 471.
589-28 Weeks v. Dale, 30 App. D. C. 498; Lewis v. Cronemeyer, 29 App. D. C. 174; Richards v. Burkholder, 29 App. D. C. 485; Shuman v. Beall, 27 App. D. C. 324; French

v. Halcomb, 26 App. D. C. 307; McKnight v. Pohle, 30 App. D. C. 92; Rolfe v. Hoffman, 26 App. D. C. 336; Kreag v. Geen, 124 O. G. 1208.

590-29 Jansson v. Larsson, 30 App. D. C. 203.

590-31 Cutler v. Leonard, 31 App. D. C. 297, 136 O. G. 438; De Ferranti v. Lyndmark, 30 App. D. C. 417 (*foll.* Paul v. Hess, 24 App. D. C. 462); Fenner v. Blake, 30 App. D. C. 507; Bliss v. McElroy, 29 App. D. C. 120; Andrews v. Nilson, 27 App. D. C. 451; Laas v. Scott, 26 App. D. C. 354.

591-33 *Compare* In re LaCroix, 30 App. D. C. 299.

591-34 Howell v. Hess, 30 App. D. C. 194; Duryea v. Rice, 28 App. D. C. 423; Lotz v. Kenny, 31 App. D. C. 205, 135 O. G. 1801.

591-35 Lotz v. Kenny, supra.

592-37 McArthur v. Mygatt, 31 App. D. C. 514, 136 O. G. 661, s. c. 132 O. G. 1585; Parkes v. Lewis, 28 App. D. C. 1; Hamm v. Black, 132 O. G. 841; Poe v. Scharf, 130 O. G. 1309; Fordyce v. Stoetzel, 130 O. G. 2372; Gibbons v. Peller, 124 O. G. 624.

Diligence. — Sufficiency of proof. Woods v. Poor, 29 App. D. C. 397; O'Connell v. Schmidt, 27 App. D. C. 77; Mead v. Davis, 31 App. D. C. 590; Wickers v. McKee, 29 App. D. C. 4; Rose v. Clifford, 31 App. D. C. 195, 135 O. G. 1361.

Total abandonment of experiments. Richards v. Burkholder, 29 App. D. C. 485. *Compare* Gordon v. Wentworth, 31 App. D. C. 150, 135 O. G. 1125. See also Marconi v. Shoemaker, 131 O. G. 1939.

Proof of work on machines not embodying the invention in issue and not necessary for the development of it, is not sufficient. Kilbourn v. Hirner, 124 O. G. 1841.

Proof of property, held competent but insufficient. — Woods v. Poor, 126 O. G. 391.

Experimental device. — Moore v. Hewitt, 125 O. G. 2047.

592-38 Wickers v. McKee, 29 App. D. C. 4; Wickers v. Upham, 29 App. D. C. 30; Munster v. Ashworth, 29 App. D. C. 84; Robinson v. McCormick, 29 App. D. C. 98; Gibbons v. Peller, 28 App. D. C. 530; Fowler v. Boyce, 27 App. D. C. 48; Fowler v. Dyson, 27 App. D. C. 52; Bourn v. Hill, 27 App. D. C. 291; Sherwood v. Drewson, 29 App. D. C. 161 (*foll.* Blackford v. Wilder, 21 App. D. C. 1, 104 O. G. 578); Burson v. Vogel, 29 App. D. C. 388 (*appr.* Mergenthaler v. Scudder, 11 App. D. C. 264); Howell v. Hess, 30 App. D. C. 194. *Compare* O'Connell v. Schmidt, 27 App. D. C. 77.

Success of test of devices by junior party as against patentee, embracing the invention in issue, must be established beyond reasonable doubt. Lewis v. Cronemeyer, 29 App. D. C. 174, citing numerous cases.

593-39 Henry v. Doble, 27 App. D. C. 33, *aff.* 122 O. G. 1398.

593-41 See Richards v. Burkholder, 128 O. G. 2529; Ibersole v. Durkin, 132 O. G. 842.

593-42 Gordon v. Wentworth, 130 O. G. 2065.

Practicability. — Marconi v. Shoemaker, 131 O. G. 1939.

594-43 Bliss v. McElroy, 29 App. D. C. 120, *aff.* 122 O. G. 2687; Robinson v. Thresher, 28 App. D. C. 22. *Compare* Suberger v. Russel, 26 App. D. C. 344.

594-45 See Alexander v. Blackman, 26 App. D. C. 541.

Disclosure must be proved beyond reasonable doubt. — Anderson v. Wells, 27 App. D. C. 115.

595-46 See Robinson v. McCormick, 29 App. D. C. 98, 128 O. G. 3289; Kreag v. Geen, 28 App. D. C. 437, 127 O. G. 1581.

595-48 See Marconi v. Shoemaker, 131 O. G. 1939.

596-49 Hopkins v. Peters v. Dement, 134 O. G. 1050; Martin v. Goodman v. Dyson v. Lattig, 134 O. G. 1297.

Taking testimony as to inoperativeness not proper prior to determination of motion to dissolve. Barber v. Wood, 127 O. G. 1991. *Compare* Clement v. Browne v. Stroud, 126 O. G. 2189.

596-52 See Wickers v. Wenniwinn, 129 O. G. 2501.

599-57 Latshaw v. Duff v. Kaplan, 130 O. G. 980; Newell v. Clifford v. Rose, 125 O. G. 665. See Cutler v. Hall, 135 O. G. 449.

Reopening to print testimony refused. — Parker v. Corkhill, 130 O. G. 2067.

601-61 Dunbar v. Schellenger, 29 App. D. C. 129, 128 O. G. 2837, *aff.*

121 O. G. 2663. See Dunbar v. Schellenger, 125 O. G. 348.

601-62 Rule amended. — 129 O. G. 2078.

Discretion of Examiner of Interferences, not reviewable except for clear abuse. Keith v. Lundquist, 128 O. G. 2835; Lowry v. Ruping, 135 O. G. 652.

604-70 Rhodes v. Rhodes, 132 O. G. 680.

605-71 Subpoena duces tecum not authorized. In re Outcalt, 149 Fed. 228.

Patent office has no power to compel the attendance of witnesses, nor to enforce the production of evidence of any kind. Bay State B. Co. v. Mfg. Co., 127 O. G. 1580.

605-72 Albers B. Mill Co. v. Forrest, 131 O. G. 1419; Peak v. Bush, 129 O. G. 1268.

605-73 See Lacroix v. Tyberg, 149 Fed. 782.

606-74 See Munster v. Ashworth, 29 App. D. C. 84.

606-76 Dyson v. Land v. Dunbar v. Browne, 133 O. G. 1679; Dyson v. Land v. Dunbar v. Browne, 130 O. G. 1690 (following rule stated in Andrews v. Nilson, 111 O. G. 1038, and citing various cases); Jansson v. Larsson, 30 App. D. C. 203.

607-78 Smith v. Emerson v. Sanders, 133 O. G. 1433; Johnston v. Ereckson v. Barnard, 131 O. G. 2419; Floyd v. Rohlfing, 133 O. G. 992.

Amendment after testimony taken. Green v. Farley, 132 O. G. 235; Smith v. Ingram, 131 O. G. 2420.

607-80 See Marconi v. Shoemaker, 131 O. G. 1939.

608-81 Beall v. Lyon, 127 O. G. 3215. *Compare* Corey v. Eiseman, 126 O. G. 3421.

Rule amended to read "upon motion duly made and granted." 129 O. G. 2077.

Such testimony held competent only to discredit witness. Hewitt v. Weintraub, 134 O. G. 1561.

610-85 Kinsman v. Strohm, 125 O. G. 1699. See Gould v. Barnard, 132 O. G. 1071.

610-86 Sandage v. Dean v. Wright v. McKenzie, 130 O. G. 981. See Gold v. Gold, 133 O. G. 993. Dyson v. Land v. Dunbar v. Browne, 130 O. G. 1690.

611-87 Wide range allowable on cross-examination of party to proceeding. Jansson v. Larsson, 132 O. G. 477, *aff.* 30 App. D. C. 203.

Where cross-examination suspended, because of illness of witness, counsel refusing consent to postponement, direct examination should be excluded. Munster v. Ashworth, 29 App. D. C. 84, 128 O. G. 2089, *aff.* 128 O. G. 2085.

611-89 Gueniffet v. Victorsohn, 30 App. D. C. 432; Fowler v. McBerty, 27 App. D. C. 41; Fowler v. Boyce, 27 App. D. C. 48; Fowler v. Boyce, 27 App. D. C. 55; Neth v. Ohmer, 27 App. D. C. 319; Lowrie v. Taylor, 27 App. D. C. 522; Phillips v. Sensenich, 132 O. G. 677; Johnson v. Mueser, 29 App. D. C. 61 (*cit.* Allen v. U. S., 26 App. D. C. 8, *aff.* sub nom., Lowry v. Allen, 203 U. S. 476); Dixon v. Graves, 127 O. G. 1993. And see Dunbar v. Schellenger, 125 O. G. 348; Weintraub v. Hewitt v. Rogers, 126 O. G. 2589; Clement v. Browne v. Stroud, 126 O. G. 2589. See Clement v. Browne v. Stroud, 126 O. G. 2189.

612-91 Hamm v. Black, 132 O. G. 841.

612-93 Sufficiency of testimony to establish disclosure. Weeks v. Dale, 30 App. D. C. 498, 135 O. G. 218.

Testimony based solely on memory not sufficient. — Smith v. Foley v. Anderson v. Smith, 136 O. G. 847, *aff.* 136 O. G. 850.

612-94 Parkes v. Lewis, 28 App. D. C. 1; Phillips v. Sensenich, 132 O. G. 677; Burson v. Vogel, 29 App. D. C. 388, *dist.* Hammond v. Basch, 24 App. D. C. 469.

613-99 Goolman v. Hobart, 31 App. D. C. 286, 135 O. G. 1123.

614-1 *Compare* Ebersole v. Durkin, 132 O. G. 842; Bay State B. Co. v. Mfg. Co., 127 O. G. 1580.

614-3 See Bossart v. Pohl, 31 App. D. C. 218, 135 O. G. 453.

615-6 Ex parte tests. — Marconi v. Shoemaker, 131 O. G. 1939.

615-8 See also In re Garrett, 27 App. D. C. 19. *Compare* Robinson v. Thresher, 123 O. G. 2627; Gordon v. Wentworth, 130 O. G. 2065.

615-9 Pym v. Hadaway, 129 O. G. 480.

615-10 Dunbar v. Schellenger,

125 O. G. 348; Goolman v. Hobart, 31 App. D. C. 286, 135 O. G. 1123.

616-11 Durkee v. Minquist, 136 O. G. 229; Dunbar v. Schellenger, 125 O. G. 348; Burson v. Vogel, 125 O. G. 2361; French v. Halcomb, 26 App. D. C. 307. *Compare* Turnbull v. Curtis, 27 App. D. C. 567; Gibbons v. Peller, 28 App. D. C. 530.

616-12 Sherwood v. Drewsen, 124 O. G. 1205.

618-13 Wickers v. McKee, 29 App. D. C. 4; Taylor v. Lowrie, 27 App. D. C. 527.

618-17 Kilbourn v. Hirner, 29 App. D. C. 54; Johnson v. Mueser, 29 App. D. C. 61; Bauer v. Crone, 26 App. D. C. 352; Ries v. Kirkegaard, 30 App. D. C. 199; Parkes v. Lewis, 28 App. D. C. 1; Bourn v. Hill, 27 App. D. C. 291; Turnbull v. Curtis, 27 App. D. C. 567.

619-18 In re Clunies, 28 App. D. C. 18. See also Wickers v. McKee, 29 App. D. C. 4. *Compare* In re Schraubstadter, 26 App. D. C. 351.

619-19 See In re Wickers & Furlong, 29 App. D. C. 71.

Suits under § 4915. — Richards v. Meisner, 162 Fed. 485 (striking out such evidence taken under decision in same case in 155 Fed. 135).

Novelty must be matter of doubt in order that the fact that the device may have displaced others by reason of manifest superiority may be considered material. Millett v. Allen, 27 App. D. C. 70.

620-20 Stafford v. Morris, 161 Fed. 113. *Compare* Consolidated R. & C. Co. v. Adams Co., 161 Fed. 343; Quincey Min. Co. v. Krause, 151 Fed. 1012, 81 C. C. A. 290. See also United S. & C. Co. v. Beattie, 149 Fed. 736, 79 C. C. A. 442.

620-23 Keasbey & M. Co. v. American Co., 145 Fed. 490, 74 C. C. A. 510; Consolidated R. Co. v. Adams Co., 161 Fed. 343; Stafford v. Morris, 161 Fed. 113.

621-24 Gillette v. Sendelbach, 146 Fed. 758, 77 C. C. A. 55. *Compare* Laas v. Scott, 161 Fed. 132.

623-36 Baker v. Mfg. Co., 146 Fed. 744, 77 C. C. A. 234; Stafford v. Morris, 161 Fed. 113, *cit.* American S. P. Co. v. Paper Co., 157 Fed. 660; New York B. Co. v. Rubber Co., 137 U. S. 445.

624-39 See American S. P. Co. v. Paper Co., supra.

624-40 Bonsall v. Peddie & Co., 161 Fed. 564; Thomas v. R. Co., 149 Fed. 753, 79 C. C. A. 89.

625-44 Superior Drill Co. v. Plow Co., 160 Fed. 504; Leona Garment Co. v. Jenks, 160 Fed. 693; Robinson v. Car Co., 150 Fed. 331, 80 C. C. A. 127; Los Angeles Organ Co. v. Aeolian Co., 143 Fed. 880, 75 C. C. A. 88.

626-50 Stafford v. Morris, 161 Fed. 113; N. Y. B. & P. Co. v. Sierer, 149 Fed. 756; West Disinfect. Co. v. Frank, 149 Fed. 423, 79 C. C. A. 359.

627-51 Connors v. Ormsby, 148 Fed. 13, 78 C. C. A. 181.

627-52 American S. Pulp Co. v. Paper Co., 157 Fed. 660.

627-56 Clark v. Lawrence Co., 160 Fed. 512.

627-57 American S. etc. Co. v. Denning Co., 160 Fed. 125.

628-60 See Western T. Co. v. Rainear, 156 Fed. 49.

629-62 Buser v. Mach. Co., 151 Fed. 478, 81 C. C. A. 16; United S. & C. Co. v. Beattie, 149 Fed. 736, 79 C. C. A. 442.

Evidence must be clear and satisfactory to judicial mind. Sipp E. & M. Co. v. Atwood-M. Co., 142 Fed. 149, 73 C. C. A. 367.

630-66 Stuart v. Auger Co., 149 Fed. 748, 79 C. C. A. 60.

630-67 New England M. Co. v. Stertevant Co., 150 Fed. 131, 80 C. C. A. 85; Columbus Chain Co. v. Chain Co., 148 Fed. 622, 78 C. C. A. 394.

631-70 American C. Co. v. Mills, 149 Fed. 743, 79 C. C. A. 449.

632-78 B. F. Avery & Sons v. Plow Wks., 148 Fed. 214, 78 C. C. A. 110.

633-80 Louden Mach. Co. v. Janesville T. Co., 148 Fed. 686, 78 C. C. A. 548. See American S. etc. Co. v. Denning W. Co., 160 Fed. 125; Hotel etc. Co. v. Lorraine Co., 160 Fed. 467; American etc. Mfg. Co. v. Adams Co., 161 Fed. 556; American G. T. Co. v. Choate, 159 Fed. 140; Houghton v. Whittier M. Wks., 153 Fed. 740, 83 C. C. A. 84.

633-82 Stafford v. Morris, 161 Fed. 113; O'Rourke etc. Const. Co. v. McMullen, 160 Fed. 933.

634-84 St. Louis etc. Mach. Co. v. American Mach. Co., 156 Fed. 574, 84 C. C. A. 340. See American

etc. Mfg. Co. v. Adams Co., 161 Fed. 556.

634-85 See Consol. R. T. Co. v. Firestone Co., 151 Fed. 237, 80 C. C. A. 589; Comptograph Co. v. Acc. Co., 145 Fed. 331, 76 C. C. A. 205.

635-86 Bullock Mfg. Co. v. General El. Co., 149 Fed. 409, 79 C. C. A. 229; Voigtmann v. Weis Co., 148 Fed. 848, 78 C. C. A. 538; Kuhn v. Check Co., 157 Fed. 235; Wills v. Storage Co., 147 Fed. 525. See also Bonsall v. Peddin & Co., 161 Fed. 564; Fielding v. Crowse Co., 154 Fed. 377, 83 C. C. A. 331.

Successful results. — American G. Co. v. Mfg. Co., 151 Fed. 595, 81 C. C. A. 139.

637-90 See In re Garrett, 27 App. D. C. 19; In re Thurston, 26 App. D. C. 315.

638-93 H. C. Cook Co. v. Mfg. Co., 145 Fed. 348, 76 C. C. A. 222.

638-95 Clark v. Lawrence Co., 160 Fed. 512.

639-97 **Cross-examination** of complainant's expert by whom prima facie case merely is made, cannot be extended to defensive matter concerning the question of novelty. Aeolian Co. v. Simpson-C. Co., 157 Fed. 320.

640-7 American W. Mach. Co. v. Type Co., 151 Fed. 576, 81 C. C. A. 120.

641-8 Clark v. Blk. Co., 149 Fed. 1001, 79 C. C. A. 511.

641-11 Columbus Chain Co. v. Chain Co., 148 Fed. 622, 78 C. C. A. 394, *foll.* Barbed Wire Patent, 143 U. S. 275; Buser v. Mach. Co., 151 Fed. 478, 81 C. C. A. 16.

642-12 United S. & C. Co. v. Beattie, 149 Fed. 736, 79 C. C. A. 442.

642-15 See Williams v. R. Co., 161 Fed. 571.

642-16 Hillard v. Fisher Co., 159 Fed. 439; Westinghouse etc. Mfg. Co. v. Power Co., 156 Fed. 582, 84 C. C. A. 348.

644-20 Bell v. MacKinnon, 149 Fed. 205, 79 C. C. A. 163.

644-23 See Westinghouse etc. Co. v. Montgomery P. Co., 153 Fed. 890, 82 C. C. A. 636.

645-24 **Abandonment of device.** United Shoe etc. Co. v. Greenman, 153 Fed. 283, 82 C. C. A. 581. See also Buser v. Mach. Co., 151 Fed. 478. 81 C. C. A. 16.

645-25 **Device not practically operative.** Van Epps v. Box Co., 143 Fed. 869, 75 C. C. A. 77.

647-35 Bradley v. Eccles, 144 Fed. 90, 75 C. C. A. 248.

Proof of constant use not necessary. Los Angeles A. A. Co. v. Aeolian Co., 143 Fed. 880, 75 C. C. A. 88.

Experimental use. — American Car Co. v. Mills, 149 Fed. 743, 79 C. C. A. 449.

648-36 James E. Tompkins Co. v. Mattress Co., 159 Fed. 133.

648-37 **Eight years of inaction as proof of abandonment.** — Universal etc. Co. v. Comptograph Co., 146 Fed. 981, 77 C. C. A. 227.

Describing but not claiming invention. Kinnear Mfg. Co. v. Wilson, 142 Fed. 970, 74 C. C. A. 232.

652-51 See Kampfe v. Razor Co., 149 Fed. 778.

652-53 Victor T. Mach. Co. v. Grapho. Co., 151 Fed. 601, 81 C. C. A. 145.

Omission of element. — Edison G. Elec. Co. v. Crouse-H. Co., 152 Fed. 437, 81 C. C. A. 579.

652-54 See American S. etc. Co. v. Denning W. Co., 160 Fed. 108.

653-56 National etc. Stamp Co. v. New England Co., 151 Fed. 19, 80 C. C. A. 485; Robins C. Belt Co. v. Mach. Co., 145 Fed. 923, 76 C. C. A. 461.

655-68 See Shelby S. & T. Co. v. Delaware Co., 151 Fed. 64, *aff.* 160 Fed. 928.

656-69 Societie Fabriques v. Lueders, 142 Fed. 753, 74 C. C. A. 15; Gray v. Grinberg, 147 Fed. 732. See Miller v. Whitney Wks., 160 Fed. 501; O'Rourke Eng. Con. Co. v. McMullen, 150 Fed. 338.

Proof of threatened infringement. Gray v. Grinberg (C. C. A.), 159 Fed. 138.

In suit under § 4918, actual conflict must be shown. Donner v. Plate Co., 160 Fed. 971.

656-70 **Process and product.**— Downes v. Div. Co., 150 Fed. 122, 80 C. C. A. 76.

657-73 Union Match Co. v. Match Co., 162 Fed. 148; Superior Drill Co. v. Plow Co., 160 Fed. 504; Hardison v. Brinkman, 156 Fed. 962; Western T. Co. v. Raincar, 156 Fed. 49.

658-78 U. S. Fastener Co. v. Caesar 160 Fed. 943. See Ironclad

Mfg. Co. v. Mfg. Co., 143 Fed. 512, 74 C. C. A. 372; Lidge-Wood Mfg. Co. v. Lambert Co., 150 Fed. 364; Blamire v. Sheldon Wks., 149 Fed. 780; Friedberger A. Mfg. Co. v. Chapin, 151 Fed. 264.

Distinction between combination and aggregation. — American C. Mach. Co. v. Helmstetter, 142 Fed. 978, 74 C. C. A. 240.

Interchangeability of parts not always conclusive test of infringement. Columbia Wire Co. v. Kokomo Co., 143 Fed. 116, 74 C. C. A. 310. *Compare* Ball Bearing Co. v. R. Co., 147 Fed. 721.

658-79 Scott v. Lazell, 160 Fed. 472; Cameron S. T. Co. v. Saratoga Spgs., 159 Fed. 453; Indiana Mfg. Co. v. Mach. Co., 154 Fed. 365, 83 C. C. A. 343.

659-85 See Cimiotti Co. v. Bowsky, 143 Fed. 508, 74 C. C. A. 617.

659-87 See Cumming v. Baker, 144 Fed. 395, 75 C. C. A. 373.

660-90 Lichtensteni v. Phipps, 161 Fed. 578; American C. Co. v. Mills, 162 Fed. 147; Westinghouse etc. Mfg. Co. v. Mfg. Co., 159 Fed. 154. *Compare* Morton Trust Co. v. Car Co., 161 Fed. 546.

660-94 St. Louis etc. Mach. Co. v. Mach. Co., 161 Fed. 725; Earll v. R. Co., 157 Fed. 241; Karfiol v. Rothner, 151 Fed. 777. See Hall Signal Co. v. General Co., 153 Fed. 907, 82 C. C. A. 653; Scott v. Laas, 150 Fed. 764, 80 C. C. A. 500.

662-2 McSherry Mfg. Co. v. Mfg. Co., 160 Fed. 948; Force v. Mfg. Co., 143 Fed. 894, 75 C. C. A. 102. See P. P. Mast & Co. v. Drill Co., 154 Fed. 45, 83 C. C. A. 157.

663-4 Canda Bros. v. Iron Co., 152 Fed. 178, 81 C. C. A. 420. See McSherry Mfg. Co. v. Mfg. Co., 160 Fed. 948.

663-6 Force v. Mfg. Co., 143 Fed. 894, 75 C. C. A. 102. *Compare* Brennan v. Mfg. Co., 162 Fed. 472 (*dist.* Garretson v. Clark, 111 U. S. 120). See also Dowagiac Mfg. Co. v. Drill Co., 162 Fed. 479.

664-8 **Profits** not proper in an action at law for damages. Portland G. M. Co. v. Hermann, 160 Fed. 91; Brown v. Lanigon, 148 Fed. 838, 78 C. C. A. 528.

664-10 See Mackie-L. Mfg. Co. v. Cazier, 157 Fed. 88, 84 C. C. A. 591, *aff.* 138 Fed. 654, 71 C. C. A. 104.

664-11 See P. P. Mast & Co. v. Drill Co., 154 Fed. 45, 83 C. C. A. 157.

665-12 **Collusion.** — P. P. Mast & Co. v. Drill Co., supra.

666-15 McCune v. R. Co., 154 Fed. 63, 83 C. C. A. 175, citing several cases.

666-19 P. P. Mast & Co. v. Drill Co., supra.

667-23 *Compare* Canda Bros. v. Iron Co., 152 Fed. 178, 81 C. C. A. 420.

668-28 **Laches** as defense. Safety Car. etc. Co. v. Consol. etc. Co., 160 Fed. 476; Germer S. Co. v. Twentieth Century Co., 157 Fed. 842; Hillard v. Fisher B. T. Co., 151 Fed. 34.

Ineligibility of assignment for record not matter of defense. Delaware etc. Tube Co. v. Tube Co., 160 Fed. 928, *aff.* 151 Fed. 64.

Discontinuance of infringement prior to commencement of suit. See Deere & W. Co. v. Mfg. Co., 153 Fed. 177, 82 C. C. A. 351.

Non-user as defense. — See Continental P. B. Co. v. Bag Co., 150 Fed. 741, 80 C. C. A. 407; U. S. Fastener Co. v. Bradley, 149 Fed. 222, 79 C. C. A. 180.

669-29 Wold v. Thayer, 148 Fed. 227, 78 C. C. A. 350. *Compare* St. Louis etc. Mach. Co. v. Mach. Co., 161 Fed. 725.

669-32 See Lincoln Iron Wks. v. McWhirter Co., 142 Fed. 967, 74 C. C. A. 229.

PAUPERS [Vol. 9.]

673-6 Town of Ripton v. Brandon (Vt.), 67 A. 541.

674-9 Washington Co. v. Polk Co. (Ia.), 113 N. W. 833; Village of Hewitt v. County (Minn.), 114 N. W. 261.

675-11 Washington Co. v. Polk Co., supra.

677-20 Inhab. of Whately v. Hatfield, 196 Mass. 393, 82 N. E. 48.

681-32 Bernard Tp. v. Bedminster Tp., 74 N. J. L. 92, 64 A. 960. Assessment of tax by assessor against a person is not admissible on question of residence. City of Rock-

land v. Union, 100 Me. 67, 60 A. 705.
686-48 Town of Jericho v. Huntington, 79 Vt. 329, 65 A. 87.

PAYMENT [Vol. 9.]

700-1 Sanguinetti v. Pelligrini, 2 Cal. App. 294, 83 P. 293; Int. Harvester Co. v. Smith, 51 Fla. 220, 40 S. 840; Lasswell v. Gahan, 122 Ill. App. 513; Haspar v. Weitcamp, 167 Ind. 371, 79 N. E. 191; Delana v. Voss (Ia.), 114 N. W. 1076; Toms Creek Coal Co. v. Skeene, 28 Ky. L. R. 962, 90 S. W. 993; Greenburg v. Sauls (Miss.), 45 S. 569; Stewart v. Graham (Miss.), 46 S. 245; Wessel v. Bishop, 76 Neb. 74, 107 N. W. 220; Gravert v. Goothard (Neb.), 115 N. W. 559; Bossi v. Baehr (Wis.), 113 N. W. 433.
701-3 Janvier v. Culbreth, 5 Penne. (Del.) 505, 63 A. 309.
705-31 Indiana Tr. Co. v. Assn., 36 Ind. App. 685, 74 N. E. 633. But see Tulley v. Bank, 18 Ind. App. 240, 47 N. E. 850. *Compare* In re Miller, 33 Pa. Super. 20.
706-34 Fitzgerald v. Coleman, 114 Ill. App. 25 (burden on party contradicting its recitals). But see McGahren v. Ins. Co., 28 Pa. Super. 47.
707-39 Virginia-C. Chem. Co. v. McNair, 139 N. C. 326, 51 S. E. 949; Baughman v. Lowe (Ind. App.), 83 N. E. 225. See also Bank v. Ringo, 72 Kan. 122, 83 P. 119; Citizens Bk. v. Kretschmar (Miss.), 44 S. 930; Weller v. Gordon Co., 7 Ohio C. C. (N. S.) 303; Matlock v. Scheuerman (Or.), 93 P. 823; Cochrane v. Slomkowski, 29 Pa. Super. 385. But failure to use due diligence in collection operates as payment where such lack of diligence causes loss to the debtor. Herron v. Mawby, 5 Cal. App. 39, 89 P. 872.
707-40 American Malt. Co. v. Brew. Co., 194 Mass. 89, 80 N. E. 526. *Compare* Hoar v. Ins. Co., 118 App. Div. 416, 103 N. Y. S. 1059.
Checks. — Meyer v. Doherty (Wis.), 113 N. W. 671.
Acceptance of bill of exchange. Keck v. S., 12 Ind. App. 119, 39 N. E. 899.
Where note is made to third person. Beach v. Huntsman (Ind. App.), 83 N. E. 1033.
708-41 Wipperman v. Hardy, 17 Ind. App. 142, 46 N. E. 537; Lee v. Larkin, 109 N. Y. S. 480.
Checks. — Cox v. Hayes, 18 Ind. App. 220, 47 N. E. 844.
708-42 American Malt. Co. v. Brew. Co., 194 Mass. 89, 80 N. E. 526; McLean v. Griot, 118 App. Div. 100, 103 N. Y. S. 129; In re Van Haagen, 8 Pa. C. C. 84.
708-44 Beach v. Huntsman (Ind. App.), 83 N. E. 1033.
708-46 McLean v. Griot, supra.
709-48 Berger v. Waldbaum, 46 Misc. 4, 93 N. Y. S. 352; Doty v. Jameson, 29 Ky. L. R. 507, 93 S. W. 638.
710-50 Rosenstock v. Desar, 109 App. Div. 10, 95 N. Y. S. 1064 (certificate of deposit); Love v. Love, 72 Kan. 658, 83 P. 201.
711-51 Janvier v. Culbreth, 5 Penne. (Del.) 505, 63 A. 309 (lapse of eighteen years raises no presumption of payment); Cobb v. Houston, 117 Mo. App. 645, 94 S. W. 299 (by statute); Roberts v. Powell, 210 Pa. 594, 60 A. 258; Haynes v. Blanchard, 194 Mass. 244, 80 N. E. 504.
712-53 Berger v. Waldbaum, 46 Misc. 4, 93 N. Y. S. 352.
713-60 Differs from statute of limitations. — See note 89, p. 719.
714-61 P. v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343.
715-62 Puls v. R. Co., 54 Misc. 303, 104 N. Y. S. 374 (admission in papers on motion to vacate).
715-63 In re Kohler, 18 Pa. C. C. 184.
716-69 Allison v. Wood, 104 Va. 765, 52 S. E. 559.
718-82 Budd v. Conard, 2 Phila. (Pa.) 175.
719-86 In re Haven, 215 Pa. 549, 64 A. 779.
719-89 Cobb v. Houston, 117 Mo. App. 645, 94 S. W. 299.
720-93 *Compare* Brown v. Larry (Ala.), 44 S. 841.
Homestead. — Shaffer v. Chernyk, 130 Ia. 686, 107 N. W. 801.
720-94 See Epply v. Von Phul, 7 Ohio C. C. (N. S.) 449.
As between secured and unsecured claims. — Fremont County v. Bank (Ia.), 115 N. W. 925; Bank v. Refining Co., 27 Ky. L. R. 645, 85 S. W. 1103. But see Campbell Glass Co. v. Mill Co., 130 Mo. App. 474, 110 S. W. 24.

721-95 Winston v. Farrow (Ala), 40 S. 53; Fremont County v. Bank (Ia.), 115 N. W. 925; Honeye v. Henkel, 115 La. 1066, 40 S. 460; Campbell Glass Co. v. Mill Co., 130 Mo. App. 474, 110 S. W. 25; Stanwix v. Leonard, 109 N. Y. S. 804; Fisher v. Hwd. Co. (Tex. Civ.), 103 S. W. 655.

721-97 Epply v. Von Puhl, 7 Ohio C. C. (N. S.) 449.

722-6 Iowa-M. L. Co. v. Conner (Ia.), 112 N. W. 820 (deed which was to be given after payment); Cobb v. Holloway (Mo. App.), 108 S. W. 109; Booth v. Schrider, 48 Or. 561, 87 P. 888, *aff.* 90 P. 1002.

726-24 *Compare* Shirts v. Rooker, 21 Ind. App. 420, 52 N. E. 629.

726-25 **Note of creditor to third person.** — Booth v. Schriber, 48 Or. 561, 87 P. 888, *aff.* 90 P. 1002.

726-26 Bailey v. Robinson, 123 Ill. App. 611.

726-29 Van Name v. Barber, 115 App. Div. 593, 100 N. Y. S. 987.

730-45 See Janvier v. Culbreth, 5 Penne. (Del.) 505, 63 A. 309.

730-47 Janvier v. Culbreth, supra; Supreme Tribe v. Hall, 24 Ind. App. 316, 56 N. E. 780. *Compare* Coulter v. Barker, 98 Minn. 68, 107 N. W. 823; Dick v. Marvin, 188 N. Y. 426, 81 N. E. 162 (cases discussed).

Mortgage on debtor's farm relevant. — Haspar v. Weitcamp, 167 Ind. 371, 79 N. E. 191.

731-48 Haspar v. Weitcamp, supra.

731-50 Janvier v. Culbreth, 5 Penne. (Del.) 505, 63 A. 309.

731-51 But see Janvier v. Culbreth, supra.

731-53 *Compare* Janvier v. Culbreth, supra.

733-61 In re Williamson, 12 Phila. (Pa.) 144.

734-62 Connelly v. Sullivan, 119 Ill. App. 469.

735-63 Scranton v. Campbell (Tex. Civ.), 101 S. W. 285.

PEDIGREE [Vol. 9.]

738-2 Scott v. Herrell, 27 App. D. C. 395.

739-4 Mutual Ins. Co. v. Jay (Tex. Civ.), 101 S. W. 545.

739-7 Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808; Taylor v. Lodge, 101 Minn. 72, 111 N. W. 919; In re Fail, 56 Misc. 217, 107 N. Y. S. 224; In re McClellan, 20 S. D. 498, 107 N. W. 681; Kirby v. Hayden (Tex. Civ.), 99 S. W. 746; Overby v. Johnston (Tex. Civ.), 94 S. W. 131.

740-8 Cox v. Brice, 159 Fed. 378; Scheidegger v. Terrell, 149 Ala. 338, 43 S. 26; Scott v. Herrell, 27 App. D. C. 395; Drawdy v. Hesters (Ga.), 60 S. E. 451; Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808; Taylor v. Lodge, 101 Minn. 72, 111 N. W. 919; In re Fail, 56 Misc. 217, 107 N. Y. S. 224; Layton v. Kraft, 111 App. Div. 842, 98 N. Y. S. 72; In re McClellan, 20 S. D. 498, 107 N. W. 681; Kirby v. Hayden (Tex. Civ.), 99 S. W. 746.

740-9 Fuller v. Cole, 33 Pa. Super. 563; Kirby v. Hayden (Tex. Civ.), 99 S. W. 746.

741-13 Scheidegger v. Terrell, 149 Ala. 338, 43 S. 26; Mist v. Kapiolani, 13 Haw. 523; Bernard v. Bedminster, 74 N. J. L. 92, 64 A. 960; Lowenfeld v. Ditchett, 114 App. Div. 56, 99 N. Y. S. 724; Layton v. Kraft, 111 App. Div. 842, 98 N. Y. S. 72; Overby v. Johnston (Tex. Civ.), 94 S. W. 131.

741-14 Layton v. Kraft, 111 App. Div. 842, 98 N. Y. S. 72.

742-16 Scheidegger v. Terrell, supra; Overby v. Johnston, supra.

743-17 Hoyt v. Lightbody, 98 Minn. 189, 108 N. W. 843; Gorham v. Settegast (Tex. Civ.), 98 S. W. 665.

743-18 Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808.

743-19 Poulett's Peerage, (1903) App. Cas. (Eng.) 395; Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808 (relationship of parent and child).

744-21 Cox v. Brice, 159 Fed. 378; Taylor v. Lodge, 101 Minn. 72, 111 N. W. 919; Mutual Ins. Co. v. Jay (Tex. Civ.), 109 S. W. 1116; Overby v. Johnston (Tex. Civ.), 94 S. W. 131; Kirby v. Boaz, 41 Tex. Civ. 282, 91 S. W. 642.

745-22 In re McClellan, 20 S. D. 498, 107 N. W. 681; Kirby v. Hayden (Tex. Civ.), 99 S. W. 746; Kirby v. Boaz, 41 Tex. Civ. 282, 91 S. W. 642.

Contra, Rule that self-serving declarations of deceased persons are inadmissible, held not to apply in

cases of pedigree. Topper v. Perry, 197 Mo. 531, 544, 95 S. W. 203.

745-23 In re McClellan, supra. Affidavit of stranger on information and belief not admissible. Bernard Tp. v. Bedminster, 74 N. J. L. 92, 64 A. 960.

745-25 Mist v. Kapiolani, 13 Haw. 523; Rollins v. R. Co., 73 N. J. L. 64, 62 A. 929; Layton v. Kraft, 111 App. Div. 842, 98 N. Y. S. 72; Wren v. Howland, 33 Tex. Civ. 87, 75 S. W. 894.

Ancient deeds. — Webb v. Ritter, 60 W. Va. 193, 54 S. E. 484.

Copies. — Bryant v. McKinney, 29 Ky. L. R. 951, 96 S. W. 809.

746-26 Wigley v. Solicitor, (1902) Pro. D. (Eng.) 233; In re Fail, 56 Misc. 217, 107 N. Y. S. 224; Layton v. Kraft, 111 App. Div. 842, 98 N. Y. S. 72; Arnold v. Life Co., 20 Pa. Super. 61.

747-27 Kirby v. Boaz, 41 Tex. Civ. 282, 91 S. W. 642.

747-30 Ancestor voting at election where negroes were not permitted to vote, held evidence of general reputation that he was a white person. Gilliland v. Board, 141 N. C. 482, 54 S. E. 413.

748-31 Private catalogue not admissible. — L. & N. R. Co. v. Frazee, 24 Ky. L. R. 1273, 71 S. W. 437.

PENALTIES [Vol. 9.]

751-10 U. S. v. R. Co., 157 Fed. 893; Waters-P. Oil Co. v. S. (Tex. Civ.), 106 S. W. 918.

751-11 Atchison R. Co. v. P., 227 Ill. 270, 81 N. E. 342.

752-12 Engel v. R. Co., 55 Misc. 203, 105 N. Y. S. 80.

752-13 U. S. v. R. Co., 157 Fed. 893.

PERJURY [Vol. 9.]

754-1 C. v. Schweiter, 29 Ky. L. R. 417, 93 S. W. 592; P. v. Ellenbogen, 114 App. Div. 182, 99 N. Y. S. 897 (letter-press copy of officer's authority).

754-2 Boren v. U. S., 144 Fed. 801, 75 C. C. A. 531; Clay v. S. (Tex. Cr.), 107 S. W. 1129.

754-3 Goslin v. C., 28 Ky. L. R. 683, 90 S. W. 223; Komp v. S., 129 Wis. 20, 108 N. W. 46.

754-4 P. v. Collins, 6 Cal. App. 492, 92 P. 513; S. v. Mercer, 101 Md. 535, 61 A. 220; Trevinio v. S., 48 Tex. Cr. 350, 88 S. W. 356 (oath translated by interpreter); Lamar v. S., 49 Tex. 563, 95 S. W. 509; Komp v. S., supra.

755-5 Rex. v. Drummond, 10 Ont. L. R. (Can.) 546; Curtis v. S., 46 Tex. Cr. 480, 81 S. W. 29.

755-10 Foreman v. S., 47 Tex. Cr. 179, 85 S. W. 809; Adams v. S., 49 Tex. Cr. 361, 91 S. W. 225; Hambright v. S., 49 Tex. Cr. 162, 91 S. W. 232.

756-12 Askew v. S., 3 Ga. App. 79, 59 S. E. 311; S. v. Gordon, 196 Mo. 185, 95 S. W. 420; P. v. Davis, 122 App. Div. 569, 107 N. Y. S. 426; McVicker v. S. (Tex. Cr.), 107 S. W. 834.

756-13 P. v. Collins, 6 Cal. App. 492, 92 P. 513; S. v. Hoel (Kan.), 94 P. 267; S. v. Miller, 26 R. I. 282, 58 A. 882; Busby v. S., 48 Tex. Cr. 83, 86 S. W. 1032.

756-14 P. v. Chadwick, 4 Cal. App. 63, 87 P. 384 (time and place of forging immaterial); P. v. Collins, 6 Cal. App. 492, 92 P. 513; Wilkinson v. P., 226 Ill. 135, 80 N. E. 699; S. v. Mercer, 101 Md. 535, 61 A. 220; Christy v. Rice (Mich.), 116 N. W. 200; S. v. Harris, 145 N. C. 456, 59 S. E. 115; S. v. Cline, 146 N. C. 640, 61 S. E. 522; Field v. S., 9 Ohio C. C. (N. S.) 245.

756-15 P. v. Chadwick, supra; S. v. Harris, supra; Busby v. S., 48 Tex. Cr. 83, 86 S. W. 1032.

757-16 Wilkinson v. P., 226 Ill. 135, 80 N. E. 699.

758-22 S. v. Pratt, 20 S. D. 440, 112 N. W. 152; Manning v. S., 46 Tex. Cr. 326, 81 S. W. 957.

759-25 Holmgren v. U. S., 156 Fed. 439 (unnecessary to show malicious intent); Blevins v. S. (Ark.), 107 S. W. 393; Askew v. S., 3 Ga. App. 79, 59 S. E. 311 (must prove that action is not barred by statute of limitations); S. v. Roche (Ia.), 114 N. W. 1034; S. v. Smith, 47 Or. 485, 83 P. 865.

759-26 Wechsler v. U. S., 158 Fed. 579.

760-29 P. v. Smith, 3 Cal. App. 68, 84 P. 452; Nance v. S., 126 Ga.

95, 54 S. E. 932; Parham v. S., 3 Ga. App. 468, 60 S. E. 123; Stamper v. C., 30 Ky. L. R. 992, 100 S. W. 286; Howell v. C., 31 Ky. L. R. 983, 104 S. W. 685; Sweat v. C., 29 Ky. L. R. 1067, 96 S. W. 843; P. v. Sturgis, 110 App. Div. 1, 96 N. Y. S. 1046; S. v. Smith, 47 Or. 485, 83 P. 685; S. v. Pratt, 20 S. D. 440, 112 N. W. 152; Kelley v. S., 51 Tex. Cr. 507, 103 S. W. 189; Conant v. S., 51 Tex. Cr. 610, 103 S. W. 897 (accomplice not credible witness); Holt v. S., 48 Tex. Cr. 559, 89 S. W. 838; Grady v. S., 49 Tex. Cr. 3, 90 S. W. 38; S. v. Rutledge, 37 Wash. 523, 79 P. 1123. See Holmgren v. U. S., 156 Fed. 579. But see Kelley v. S., 51 Tex. Cr. 507, 103 S. W. 189.

760-30 Cook v. U. S., 26 App. D. C. 427; Billingsley v. S., 49 Tex. Cr. 620, 95 S. W. 520; S. v. Sargood, 80 Vt. 415, 68 A. 49.

762-34 Nance v. S., 126 Ga. 95, 54 S. E. 932; Stamper v. C., 30 Ky. L. R. 992, 100 S. W. 286. See S. v. Pratt, 20 S. D. 440, 112 N. W. 152 (presumptive evidence must be overcome).

763-37 Nance v. S., supra.

764-39 Parham v. S., 3 Ga. App. 468, 60 S. E. 123; S. v. Gordon, 196 Mo. 185, 95 S. W. 420.

764-42 Stanley v. S. (Tex. Cr.), 95 S. W. 1076.

765-44 P. v. Chadwick, 4 Cal. App. 63, 87 P. 384, 389; Leaptrot v. S., 51 Fla. 57, 40 S. 616; Martinatis v. P., 223 Ill. 117, 79 N. E. 55; S. v. Smith, 47 Or. 485, 83 P. 865; Foreman v. S., 47 Tex. Cr. 179, 85 S. W. 809; Stanley v. S. (Tex. Cr.), 95 S. W. 1076; Komp v. S., 129 Wis. 20, 108 N. W. 46.

766-45 S. v. Gordon, 196 Mo. 185, 95 S. W. 420.

767-47 S. v. Gordon, supra.

767-49 Nurnberger v. U. S., 156 Fed. 721; S. v. Hoel (Kan.), 94 P. 267; S. v. Smith, 47 Or. 485, 83 P. 865 (circumstances impute fraudulent intent); S. v. Sargood, 80 Vt. 415, 68 A. 49 (ignorance of materiality of statements no excuse). See Lamar v. S., 49 Tex. Cr. 563, 95 S. W. 509; Weems v. S. (Tex. Cr.), 95 S. W. 513.

768-52 P. v. Elenbogen, 114 App. Div. 182, 99 N. Y. S. 897.

769-54 Boren v. U. S., 144 Fed. 801, 75 C. C. A. 531.

769-55 P. v. Nichols, 108 App. Div. 362, 95 N. Y. S. 736.

PHOTOGRAPHS [Vol. 9.]

To show value, 771-4; *Evidentiary weight,* 771-4; *Use of magnifying glass,* 771-4.

770-1 Porter v. Buckley, 147 Fed. 140.

771-2 Kansas City R. Co. v. Morris, 80 Ark. 528, 98 S. W. 363.

771-3 Hupfer v. Dist. Co., 127 Wis. 306, 106 N. W. 831; Porter v. Buckley, supra.

771-4 To show value. — Conrad v. Richter, 13 Pa. C. C. 478; Willis v. S., 49 Tex. Cr. 139, 90 S. W. 1100; Foss v. Smith, 79 Vt. 434, 65 A. 553.

Evidentiary weight. — Higgs v. R. Co. (N. D.), 114 N. W. 722.

Use of magnifying glass. — S. v. Wallace, 78 Conn. 677, 63 A. 448.

772-5 Stone v. R. Co., 99 Me. 243, 59 A. 56; Babb v. Paper Co., 99 Me. 298, 59 A. 290; C. v. Tucker, 189 Mass. 457, 76 N. E. 127; McKarren v. R. Co., 194 Mass. 179, 80 N. E. 477 (cases collected and discussed).

773-6 S. v. Rogers, 129 Ia. 229, 105 N. W. 455.

774-11 Willis v. S., 49 Tex. Cr. 139, 90 S. W. 1100.

774-13 McKarren v. R. Co., 194 Mass. 179, 80 N. E. 477; Davis v. City, 147 Mich. 300, 110 N. W. 1084 (of sore caused by injury).

775-16 Chicago R. Co. v. Smith, 226 Ill. 178, 80 N. E. 716; Elzig v. Bales, 135 Ia. 208, 112 N. W. 540.

To show normal condition. — McIlwain v. Gaebe, 128 Ill. App. 209.

777-18 Kansas C. S. R. Co. v. Morris, 80 Ark. 528, 98 S. W. 633; MacFeat v. R. Co., 5 Penne. (Del.) 52, 62 A. 898; Illinois S. R. Co. v. Hayner, 225 Ill. 613, 80 N. E. 316; Sample v. R. Co., 233 Ill. 564, 84 N. E. 643; Chicago v. Hutchinson, 129 Ill. App. 239; New York etc. R. Co. v. Robbins, 38 Ind. App. 172, 76 N. E. 804; Huntington L. Co. v. Beaver, 37 Ind. App. 4, 73 N. E.

1002; Louisville etc. R. Co. v. Brown, 32 Ky. L. R. 552, 106 S. W. 795 (photograph of railroad wreck admitted); Kirkpatrick v. R. Co. (Mo.), 109 S. W. 682; Higgs v. R. Co. (N. D.), 114 N. W. 722; Smith v. R. Co., 80 Vt. 208, 67 A. 535.

Photographs showing only part of scene. I. S. R. Co. v. Hayer, 128 Ill. App. 315.

777-19 McKarren v. R. Co., 194 Mass. 179, 80 N. E. 477; Thompson v. R. Co. (Tex. Civ.), 106 S. W. 910; Accousi v. Furn. Co. (Tex. Civ.), 87 S. W. 861 (sufficiently identified when sworn to be correct by injured party); Smith v. R. Co., 80 Vt. 208, 67 A. 535; Hebbe v. Town, 121 Wis. 668, 99 N. W. 442.

778-20 Higgs v. R. Co. (N. D.), 114 N. W. 722; Miller v. City, 93 N. Y. S. 227, 104 App. Div. 33. But see Columbia etc. Co. v. S. (Md.), 65 A. 625.

778-21 Porter v. Buckley, 147 Fed. 140; C. & E. I. R. Co. v. Crose, 214 Ill. 602, 73 N. E. 865; S. v. Rogers, 129 Ia. 229, 105 N. W. 455.

Party may show change in conditions. — Sample v. R. Co., 233 Ill. 564, 84 N. E. 643.

779-22 Babb v. Paper Co., 99 Me. 298, 59 A. 290.

779-24 Willis v. S., 49 Tex. Cr. 139, 90 S. W. 1100.

779-25 Inaccessible documents. In re McClellan, 20 S. D. 498, 107 N. W. 681.

780-28 Willis v. S., 49 Tex. Cr. 139, 90 S. W. 1100.

781-29 S. v. Roberts, 28 Nev. 350, 82 P. 100.

781-30 S. v. Bailey, 79 Conn. 589, 65 A. 951; S. v. Powell, 5 Penne. (Del.) 24, 61 A. 966; S. v. Roberts, 28 Nev. 350, 82 P. 100; Young v. S., 49 Tex. Cr. 207, 92 S. W. 841.

Photographs of wearing apparel, etc. — C. v. Tucker, 189 Mass. 457, 76 N. E. 127.

781-31 See S. v. Roberts, supra.

781-32 P. v. Grill, 151 Cal. 592, 91 P. 515; Gibson v. S. (Tex. Cr.), 110 S. W. 41; Newcomb v. S., 49 Tex. Cr. 550, 95 S. W. 1048.

782-33 Photographs of assumed situations. — P. v. Mahatch, 148 Cal. 200, 82 P. 779.

PHYSICAL EXAMINATION

[Vol. 9.]

785-1 American etc. Co. v. Jankus, 121 Ill. App. 267; Felsch v. Babb, 72 Neb. 736, 101 N. W. 1011.

786-4 American etc. Co. v. Jankus, supra; Felsch v. Babb, supra; Missouri etc. R. Co. v. Lynch, 40 Tex. Civ. 543, 90 S. W. 511; Sheldon v. Wright, 80 Vt. 298, 67 A. 807.

786-5 St. Louis etc. R. Co. v. Smith, 38 Tex. Civ. 507, 86 S. W. 943.

786-6 Houston etc. R. Co. v. Anglin, 99 Tex. 349, 89 S. W. 966.

791-30 Gore v. Gore, 103 App. Div. 168, 93 N. Y. S. 396. See Christman v. Christman, 7 Pa. C. C. 595.

792-32 See Christman v. Christman, supra.

792-35 Gore v. Gore, supra.

793-40 Johnston v. S. P. Co., 150 Cal. 535, 89 P. 348; Cedartown v. Brooks, 2 Ga. App. 583, 59 S. E. 836; Dickinson v. R. Co., 74 Kan. 863, 86 P. 150; Clark v. Borough, 23 Pa. C. C. 555; Hess v. R. Co., 7 Pa. C. C. 565.

794-41 Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583; Kellyville C. Co. v. Moreland, 121 Ill. App. 410; Richardson v. Nelson, 123 Ill. App. 550; Chicago v. McNally, 128 Ill. App. 375; Diamond Glue Co. v. Wietzychowski, 125 Ill. App. 277 (examination after trial).

798-50 See Johnston v. R. Co., 150 Cal. 535, 89 P. 348.

799-53 Houston etc. R. Co. v. Anglin, 99 Tex. 349, 89 S. W. 966 (*foll.* Chicago R. Co. v. Langston, 92 Tex. 709, 50 S. W. 574, and *dist.* Austin etc. R. Co. v. Cluck, 97 Tex. 172, 77 S. W. 403).

800-58 But see Johnston v. R. Co., supra.

800-59 Melone v. R. Co., 151 Cal. 113, 91 P. 522; Western G. Mfg. Co. v. Schoeninger (Colo.), 94 P. 342; Brown v. R. Co., 12 N. D. 61, 95 N. W. 153.

802-62 Brown v. R. Co., supra. See Houston etc. R. Co. v. Anglin, 99 Tex. 349, 89 S. W. 966.

803-64 Malone v. R. Co., supra.

803-66 Western G. Mfg. Co. v. Schoeninger, supra; Clark v. Borough, 23 Pa. C. C. 555 (electric

tests permitted); Hess v. R. Co., 7 Pa. C. C. 565.

804-67 Atchison T. etc. R. Co. v. Palmore, 68 Kan. 545, 75 P. 509.

807-73 But see Houston etc. R. Co. v. Anglin, 99 Tex. 349, 89 S. W. 966.

807-75 Fuller v. Transit Co., 16 Haw. 1; St. Louis etc. R. Co. v. Smith, 38 Tex. Civ. 507, 86 S. W. 943.

809-83 See Orlando v. R. Co., 109 App. Div. 356, 95 N. Y. S. 898 (counter affidavits).

809-86 Orlando v. R. Co., supra.

809-91 Johnston v. R. Co., 150 Cal. 535, 89 P. 348; Clark v. Borough, 23 Pa. C. C. 555.

810-93 Western G. Mfg. Co. v. Schoeninger (Colo.), 94 P. 342.

810-94 Western G. Mfg. Co. v. Schoeninger, supra; Hess v. R. Co., 7 Pa. C. C. 565.

810-97 Goldenberg v. Zirinsky, 100 N. Y. S. 251, 114 App. Div. 827.

811-98 Landau v. Citron, 47 Misc. 354, 93 N. Y. S. 1111; Clark v. Borough, 23 Pa. C. C. 555.

811-99 Sheldon v. Wright, 80 Vt. 298, 67 A. 807 (judges room). See Fordyce v. Key, 74 Ark. 19, 84 S. W. 797.

811-1 Fordyce v. Key, supra.

811-3 Cedartown v. Brooks, 2 Ga. App. 583, 59 S. E. 836. *Compare* Chicago v. Shreve, 128 Ill. App. 462.

811-4 Illinois etc. R. Co. v. Downs, 122 Ill. App. 545. But see Chicago v. McNally, 128 Ill. App. 375.

813-9 Missouri etc. R. Co. v. Lynch, 40 Tex. Civ. 543, 90 S. W. 511.

813-12 Tirpak v. Hoe, 53 Misc. 532, 103 N. Y. S. 795. See Wood v. Hoffman, 106 N. Y. S. 940, 56 Misc. 660.

813-13 Goldenberg v. Zirinsky, 114 App. Div. 827, 100 N. Y. S. 251; Potter v. Village, 112 App. Div. 91, 98 N. Y. S. 186; Pitt v. Dunlap, 54 Misc. 115, 105 N. Y. S. 846.

813-14 Potter v. Village, supra (not merely in presence of such physician).

814-15 Orlando v. R. Co., 109 App. Div. 356, 95 N. Y. S. 898.

814-17 Orlando v. R. Co., supra; Tirpak v. Hoe, 53 Misc. 532, 103 N. Y. S. 795. See Wood v. Flagg, 121 App. Div. 636, 106 N. Y. S. 308.

815-18 Goldenberg v. Zirinsky, supra.

816-29 See Pitt v. Dunlap, supra.

PHYSICIANS AND SURGEONS [Vol. 9.]

On mandamus against state board, 822-6; *Similar results in treatment of others,* 836-48.

821-4 See S. v. Bresee (Ia.), 114 N. W. 45.

822-5 S. v. Heffernan (R. I.), 65 A. 284. But see C. v. Porn, 196 Mass. 326, 81 N. E. 305.

822-6 Kettles v. P., 221 Ill. 221, 77 N. E. 472; S. v. Doerring, 194 Mo. 398, 92 S. W. 489; P. v. Somme, 120 App. Div. 20, 104 N. Y. S. 946; C. v. Clymer, 30 Pa. Super. 61. See Ter. v. Lotspeich (N. M.), 94 P. 1025; S. v. Lawson, 40 Wash. 455, 82 P. 750.

Practicing dentistry without a license. — S. v. Doerring, 194 Mo. 398, 92 S. W. 489; S. v. Hicks, 143 N. C. 689, 57 S. E. 441.

On mandamus against state board. Arwine v. Board, 151 Cal. 499, 91 P. 319.

824-8 Leggatt v. Gerrick, 35 Mont. 91, 88 P. 788. But see Brunswick v. Hurley, 131 Ill. App. 235.

825-10 Brooks v. S., 146 Ala. 153, 41 S. 156.

826-12 **Insolvency of patients.**— Laurel County v. Pennington, 26 Ky. L. R. 124, 80 S. W. 820.

826-13 See Cotnam v. Wisdom, 83 Ark. 601, 104 S. W. 164; Pryor v. Milburn, 51 Misc. 596, 101 N. Y. S. 34.

827-14 Laurel County v. Pennington, supra; Hall v. R. Co., 27 R. I. 525, 65 A. 278.

828-15 Hall v. R. Co., supra.

828-16 Weldon v. Tract. Co., 27 Pa. Super. 257.

829-20 Cotnam v. Wisdom, 83 Ark. 601, 104 S. W. 164.

829-22 Marshall v. Bahnsen, 1 Ga. App. 485, 57 S. E. 1006.

829-23 Cotnam v. Wisdom, supra; Morrell v. Lawrence, 203 Mo. 363, 101 S. W. 571.

830-25 Sills v. Cochems, 36 Colo. 524, 85 P. 1007; Marshall v. Bahn-

sen, 1 Ga. App. 485, 57 S. E. 1006; Morrell v. Lawrence, 203 Mo. 363, 101 S. W. 571.

830-27 Best McAuslan, 27 R. I. 107, 60 A. 774.

830-29 Duggar v. Pitts, 145 Ala. 358, 39 S. 905.

831-31 Best v. McAuslan, supra. But see Marshall v. Bahnsen, 1 Ga. App. 485, 57 S. E. 1006 (value of services is question for jury).

831-32 Coyne v. Baker, 2 Cal. App. 640, 84 P. 269; Vandenberg v. Slagh, 150 Mich. 225, 114 N. W. 72.

831-35 Thomas v. Dabblemont, 31 Ind. App. 146, 67 N. E. 463.

832-36 Vandenberg v. Slagh, supra.

833-40 Wood v. Wyeth, 106 App. Div. 21, 94 N. Y. S. 360; Dye v. Corbin, 59 W. Va. 266, 53 S. E. 147. See Grainger v. Still, 187 Mo. 197, 85 S. W. 1114; Logan v. Weltmer, 180 Mo. 322, 79 S. W. 655.

834-43 Champion v. Kieth, 17 Okla. 204, 87 P. 845.

Death immediately following an operation. — Staloch v. Holm, 100 Minn. 276, 111 N. W. 264.

836-46 Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N. S.) 609.

836-48 Ball v. Skinner, 134 Ia. 298, 111 N. W. 1022; Shockley v. Tucker, 127 Ia. 456, 103 N. W. 360; Grainger v. Still, 187 Mo. 197, 85 S. W. 1114; Willard v. Norcross (Vt.), 69 A. 942; Sheldon v. Wright, 80 Vt. 298, 67 A. 807.

Similar results in treatment of others. — Shockley v. Tucker, 127 Ia. 456, 103 N. W. 360.

840-54 Willard v. Norcross, supra; Froman v. Ayars, 42 Wash. 385, 85 P. 14.

844-65 Hodgins v. Banting, 12 Ont. L. R. (Can.) 117. See Peterson v. Wells, 41 Wash. 693, 84 P. 608.

845-69 See Sheldon v. Wright, 80 Vt. 298, 67 A. 807.

846-72 Longan v. Weltner, 180 Mo. 322, 79 S. W. 655; Sheldon v. Wright, supra. See Peterson v. Wells, supra.

849-76 Grainger v. Still, 187 Mo. 197, 85 S. W. 1114; Logan v. Weltner, 180 Mo. 322, 79 S. W. 655.

849-77 Grainger v. Still, supra.

850-78 See Logan v. Field, 192 Mo. 54, 90 S. W. 127.

851-87 Cost of resetting a fractured bone. — Albertson v. Lewis, 132 Ia. 243, 109 N. W. 705.

852-88 Beadle v. Paine, 46 Or. 424, 80 P. 903; Sauers v. Smits (Wash.), 95 P. 1097.

PLEDGES [Vol. 9.]

854-1 Wehner v. Bauer, 160 Fed. 240 (evidence held sufficient to show contract of pledge).

854-2 Spires v. Phosphate Co. (Ga. App.), 61 S. E. 300. *Compare* King v. Sullivan (Tex. Civ.), 92 S. W. 51.

857-11 Sequeira v. Collins (Cal.), 95 P. 876.

POSITIVE AND NEGATIVE EVIDENCE [Vol. 9.]

865-2 Cox v. Tract. Co., 214 Pa. 223, 63 A. 599. See Indianapolis etc. R. Co. v. Taylor, 39 Ind. App. 592, 80 N. E. 436.

865-3 Wood v. S., 1 Ga. App. 684, 58 S. E. 271; Grabill v. Ren, 110 Ill. App. 587; Chicago etc. R. Co. v. Louderback, 125 Ill. App. 323. See also Riley v. R. Co., 36 Mont. 545, 93 P. 948.

866-5 Bryson v. Biggs, 32 Ky. L. R. 159, 104 S. W. 982.

866-7 Cotton v. R. Co., 99 Minn. 366, 109 N. W. 835.

867-10 Richards v. Burkholder, 29 App. D. C. 485; Jacobs v. S., 1 Ga. App. 519, 57 S. E. 1063; Idaho etc. Co. v. Kalanquin, 8 Idaho 101, 66 P. 933; Grabill v. Ren, 110 Ill. App. 587; Illinois C. R. Co. v. Hamill, 128 Ill. App. 152; Missouri etc. R. Co. v. McCoy (Ind. Ter.), 104 S. W. 620; In re Wharton, 132 Ia. 714, 109 N. W. 492; S. v. Green, 115 La. 1041, 40 S. 451; St. Louis etc. R. Co. v. Berry (Tex. Civ.), 93 S. W. 1107.

867-11 Rich v. R. Co., 149 Fed. 79, 78 C. C. A. 663; White v. R. Co. (Del.), 63 A. 931; Queen Anne's R. Co. v. Reed, 5 Penne. (Del.) 226, 59 A. 860; Chicago etc. R. Co. v. Eganolf, 112 Ill. App. 323; Hoffard v. R. Co. (Ia.), 116 N. W. 446; Railroad Co. v. Brock, 69 Kan. 448, 77 P. 86; Ives v. R. Co., 128 Wis.

357, 107 N. W. 452. See Louisville etc. R. Co. v. Molloy, 32 Ky. L. R. 745, 107 S. W. 217.

868-13 Van Salvellergh v. Tract. Co., 132 Wis. 166, 111 N. W. 1120; Wickham v. R. Co., 95 Wis. 23, 69 N. W. 982.

When rule not applicable. — Wood v. S., 1 Ga. App. 684, 58 S. E. 271, *cit.* Weeks v. S., 79 Ga. 36, 3 S. E. 323; Atlanta etc. R. Co. v. Johnson, 66 Ga. 260; Cobb v. S., 27 Ga. 648. See also Phillips v. S., 1 Ga. App. 687, 57 S. E. 1079, and cases cited.

868-14 Van Salvellergh v. Tract. Co., 132 Wis. 166, 111 N. W. 1120.

868-15 Louisville etc. R. Co. v. Molloy, 32 Ky. L. R. 745, 107 S. W. 217; S. v. Green, 115 La. 1041, 40 S. 451; Cotton v. R. Co., 99 Minn. 366, 109 N. W. 835; Stotler v. R. Co., 200 Mo. 107, 98 S. W. 509; Van Salvellergh v. Tract. Co., supra. See Hornstein v. R. Co., 195 Mo. 440, 92 S. W. 884; Butler v. R. Co., 117 Mo. App. 354, 93 S. W. 877; Winterbottom v. R. Co., 217 Pa. St. 574, 66 A. 864.

869-17 See Montijo v. Sherer (Cal. App.), 92 P. 512; Lanning v. R., 196 Mo. 647, 94 S. W. 491.

869-18 Riley v. R. Co., 36 Mont. 545, 93 P. 948.

PRESUMPTIONS [Vol. 9.]

Business status, 895-67; *Presumptions of continuance of an action at law,* 909-21.

880-8 City of Indianapolis v. Keeley, 167 Ind. 516, 79 N. E. 499 (public policy and social conveniences); City of Plattsmouth v. Murphy, 74 Neb. 749, 105 N. W. 293 (knowledge of the law); Sheldon v. Wright, 80 Vt. 298, 67 A. 807 (''temporary conveniences'').

880-9 Rodan v. Transit Co., 207 Mo. 392, 105 S. W. 1061.

880-10 Haynie v. Pack. Co., 126 Mo. App. 88, 103 S. W. 581; Tull v. R. Co. (Tex. Civ.), 87 S. W. 910; Jones v. R. Co. (Tex. Civ.), 105 S. W. 1007; Moore v. Hanscom (Tex. Civ.), 103 S. W. 665, 106 S. W. 876.

881-11 P. v. Wong Sang Lung, 3 Cal. App. 221, 84 P. 843 (*cit.* Code Civ. Proc. § 1959); Sears v. Vaughan, 230 Ill. 572, 82 N. E. 881; Rodan v. Transit Co., 207 Mo. 392, 105 S. W. 1061.

882-16 **''True'' and ''dry'' presumptions.** — Sheldon v. Wright, 80 Vt. 298, 67 A. 807.

882-17 City of Indianapolis v. Keeley, 167 Ind. 516, 79 N. E. 499.

883-18 City of Indianapolis v. Keeley, supra. Sowders v. R. Co., 127 Mo. App. 119, 104 S. W. 1122.

885-25 See Miller v. Canton, 112 Mo. App. 322, 87 S. W. 96; Rodan v. Transit Co., 207 Mo. 392, 105 S. W. 1061; Savage v. R. I. Co., 28 R. I. 391, 67 A. 633; City Council v. Earle (S. C.), 60 S. E. 1117 (''presumptions fade in the presence of facts'').

887-28 P. v. Siemsen (Cal.), 95 P. 863; Tackman v. Brotherhood, 132 Ia. 64, 106 N. W. 350; Sheldon v. Wright, 80 Vt. 298, 67 A. 807; In re Cowdry, 77 Vt. 359, 60 A. 141. See Valente v. R. Co., 151 Cal. 534, 91 P. 481.

887-29 P. v. Siemsen, supra.

887-30 U. S. v. Richards, 149 Fed. 443. See P. v. Linares, 142 Cal. 17, 75 P. 308. *Contra,* C. v. Sinclair, 195 Mass. 100, 80 N. E. 799.

889-34 See Sheldon v. Wright, 80 Vt. 298, 67 A. 807.

889-35 Halbig v. Ins. Co., 234 Ill. 251, 84 N. E. 897.

891-39 **This language is also used in statutes.** — See Vance v. S., 128 Ga. 661, 57 S. E. 889.

892-44 Dalton v. U. S., 154 Fed. 461, 83 C. C. A. 271; Coffman v. Christenson, 102 Minn. 460, 113 N. W. 1064.

892-45 Bowman v. Little, 101 Md. 273, 61 A. 1084.

892-46 *Compare* Kerr v. U. S. (Ind. Ter.), 104 S. W. 809.

894-55 Smith v. Fuller (Ia.), 108 N. W. 765.

894-56 Muir v. Chandler (N. D.), 113 N. W. 1038.

894-57 Fortune v. Hall, 122 App. Div. 250, 106 N. Y. S. 787; S. v. Faulk (S. D.), 116 N. W. 72.

When illiteracy presumed. Interstate Co. v. Clintwood, 105 Va. 574, 54 S. E. 593.

894-62 In re Ricard, 97 Md. 608, 55 A. 384.

895-67 **Legal divorce.** — Ham-

mond v. Hammond (Tex. Civ.), 94 S. W. 1067.

Business status. — Grossman v. Lieb, 110 N. Y. S. 386.

895-72 Wabash R. Co. v. De Tar, 141 Fed. 932, 73 C. C. A. 166; City of Indianapolis v. Keeley, 167 Ind. 516, 79 N. E. 499; Rodan v. Transit Co., 207 Mo. 392, 105 S. W. 1061; Cahill v. R. Co., 205 Mo. 393, 103 S. W. 532; Savage v. R. I. Co., 28 R. I. 391, 67 A. 633.

895-73 Stambaugh v. Lung, 232 Ill. 373, 83 N. E. 922; Lowden v. Pennsylvania Co. (Ind. App.), 82 N. E. 941; Wieters v. Hart, 67 N. J. Eq. 507, 63 A. 241; Southern R. Co. v. Gossett (S. C.), 60 S. E. 956.

Natural and probable consequences. S. v. Truitt, 5 Penne. (Del.) 466, 62 A. 790.

897-77 Merchants Exch. v. Sanders, 74 Ark. 16, 84 S. W. 786; Long Bell Lumb. Co. v. Nyman, 145 Mich. 477, 108 N. W. 1019; Mishkind-F. Co. v. Sidorsky, 189 N. Y. 402, 82 N. E. 448; Beard v. R. Co., 143 N. C. 136, 55 S. E. 505; Reeves & Co. v. Martin (Okla.), 94 P. 1058; Opet v. Denzer (Tex. Civ.), 93 S. W. 527; Pink Front Store v. Mistrot (Tex. Civ.), 90 S. W. 75.

Reply letter. — American Bond. Co. v. Ensey, 105 Md. 211, 65 A. 921; Western U. Tel. Co. v. Troth (Ind. App.), 84 N. E. 727 (rebuttable). But the mere receipt of a letter, not a reply letter is not evidence that it was signed by the person whose signature purports to be upon it. Beard v. R. Co., 143 N. C. 136, 55 S. E. 505.

899-82 Davidson Co. v. U. S., 142 Fed. 315, 73 C. C. A. 425; Sherrod v. Ins. Co., 139 N. C. 167, 51 S. E. 910 (rebuttable); Judge v. Assn., 10 Ohio C. C. (N. S.) 473.

900-89 Banker's C. Co. v. Bank, 127 Ga. 326, 56 S. E. 429; Fountain City Co. v. Lindquist (S. D.), 114 N. W. 1098.

900-90 Ward v. Morr Co., 119 Mo. App. 83, 95 S. W. 964; Reynolds v. Casualty Co., 30 Pa. Super. 456.

901-93 Long Bell Lumb. Co. v. Nyman, 145 Mich. 477, 108 S. W. 1019; Reeves & Co. v. Martin (Okla.), 94 P. 1058; Beeman v. Lodge, 215 Pa. 627, 64 A. 792.

901-95 Beeman v. Lodge, supra.

901-96 Cagliostro v. Indelli, 53 Misc. 44, 102 N. Y. S. 918.

902-99 Judge v. Assn., 10 Ohio C. C. (N. S.), 473.

906-14 Viertel v. Viertel (Mo.), 111 S. W. 579. See Alabama Bk. v. Parker, 146 Ala. 513, 40 S. 987; Fire Assn. v. LaGrange (Tex. Civ.), 109 S. W. 1134.

Recognized by statute — Thornton-T. Co. v. Bretherton, 32 Mont. 80, 80 P. 10 (Code Civ. Proc. § 3266, cl. 32, and applied to book accounts by this case).

907-15 Brooks v. U. S., 146 Fed. 223, 76 C. C. A. 581; Trumbull v. Board, 140 Mich. 529, 103 N. W. 993.

908-17 Pressure of gas in a well. Moore v. Gas Co. (W. Va.), 60 S. E. 401.

909-20 Erford v. City, 229 Ill. 546, 82 N. E. 374.

909-21 Presumptions of continuance of an action at law. — Williams v. Ellis, 101 Me. 247, 63 A. 818.

909-22 Bergener v. Lippold, 128 Ill. App. 590; Boogni v. Imp. Co., 111 La. 1063, 36 S. 129; Sanford v. Milliken, 144 Mich. 311, 107 N. W. 884.

910-27 Marsters v. Oil Co., 49 Or. 374, 90 P. 151.

911-32 See S. v. Jackson, 128 Ia. 543, 105 N. W. 51.

912-33 Anglo-C. Bk. v. Field, 146 Cal. 644, 80 P. 1080; S. v. Chittenden, 127 Wis. 468, 107 N. W. 500; Weidenhoft v. Primm (Wyo.), 94 P. 453.

Citizenship. — S. v. Jackson, 79 Vt. 504, 65 A. 657.

912-34 Stoutenborough v. Rammel, 123 Ill. App. 487.

912-36 Gibson v. Brown, 214 Ill. 330, 73 N. E. 578.

914-45 See Cate v. Fife, 80 Vt. 404, 68 A. 1.

914-47 Stafford etc. R. Co. v. Mfg. Co., 80 Conn. 37, 66 A. 775.

915-51 Cover v. Hatten (Ia.), 113 N. W. 470; In re Colton, 129 Ia. 542, 105 N. W. 1008; S. v. Jackson, 79 Vt. 504, 65 A. 657.

915-54 Brooks v. U. S., 146 Fed. 223, 76 C. C. A. 581.

916-63 In re Dolbeer, 149 Cal. 227, 86 P. 695 (insanity); German Bk. v. Columbia Co., 27 Ky. L. R. 581, 85 S. W. 761 (insolvency).

917-65 Cleage v. Laidley, 149 Fed. 346, 79 C. C. A. 284; Ames v. Kruzner, 1 Alaska 598; Henshall v. Marsh, 151 Cal. 289, 90 P. 693; Choctaw R. Co. v. McAlester (Ind. Ter.), 104 S. W. 821; Creeden v. Mahoney, 193 Mass. 402, 79 N. E. 776; Hendricks v. Calloway (Mo.), 111 S. W. 60.

No presumption of negligence. Sheldon v. Wright, 80 Vt. 298, 67 A. 807.

No legal presumption that an unimpeached witness has testified truly. Houser v. P., 210 Ill. 253, 71 N. E. 416.

920-68 White v. Bates, 234 Ill. 276, 84 N. E. 906.

921-72 U. S. v. Richards, 149 Fed. 443; U. S. v. Cole, 153 Fed. 801; Harrison v. S., 144 Ala. 20, 40 S. 568; S. v. Stewart (Del.), 67 A. 786; S. v. Wolf (Del.), 66 A. 739; S. v. Snyder (Ia.), 115 N. W. 225; Keeton v. C., 32 Ky. L. R. 1164, 108 S. W. 315; S. v. Wilson, 130 Mo. App. 151, 108 S. W. 1086.

923-80 S. v. Samuels (Del.), 67 A. 164.

923-81 Strickland v. S. (Ala.), 44 S. 90; P. v. Linares, 142 Cal. 17, 75 P. 308; Flynn v. P., 222 Ill. 303, 78 N. E. 617; Gow v. Bingham, 57 Misc. 66, 107 N. Y. S. 1011.

925-88 *Contra.* — Kurz v. Doerr; 180 N. Y. 86, 72 N. E. 926 (action for damage for an assault).

926-90 Kerr v. U. S. (Ind. Ter.), 104 S. W. 809; S. v. Kelley, 191 Mo. 680, 90 S. W. 834.

928-96 U. S. v. Manthei, 2 Alaska 459; Sylvester v. Willson, 2 Alaska 325; City of Chicago v. Condell, 124 Ill. App. 64; Martel v. Oil Syndicate, 118 La. 391, 42 S. 975; Stull v. Masilonka, 74 Neb. 309, 104 N. W. 188; Burke v. Kaltenbach, 109 N. Y. S. 225; Broadway Tr. Co. v. Manheim, 47 Misc. 415, 95 N. Y. S. 93; Sutton v. Jenkins (N. C.), 60 S. E. 643; Settle v. Settle, 141 N. C. 553, 54 S. E. 445; Pearson v. Breeden (S. C.), 60 S. E. 706; Carter v. Skillman (Va.), 60 S. E. 775; Morrison v. Berlin, 37 Wash. 600, 79 P. 1114.

Judgment by confession. — Bowman v. Powell, 127 Ill. App. 114.

Presence of lunatic at hearing of inquest. Porter v. Asylum, 28 Ky. L. R. 796, 90 S. W. 263.

929-1 Welsh v. Koch, 4 Cal. App. 571, 88 P. 604; Medlin v. Lumb. Co., 128 Ga. 115, 57 S. E. 232; O'Neill v. Potvin, 13 Idaho 721, 93 P. 20, 257; Horn v. Horn, 234 Ill. 268, 84 N. E. 904; U. S. Ins. Co. v. Clark (Ind. App.), 83 N. E. 760; Chicago etc. R. Co. v. Grantham, 165 Ind. 279, 75 N. E. 265; McDevitt v. Connell (N. J. Eq.), 63 A. 504; Settle v. Settle, 141 N. C. 553, 54 S. E. 445; Carter v. Skillman (Va.), 60 S. E. 775.

931-3 Cohen v. Lodge, 144 Fed. 266; Horn v. Metzger, 234 Ill. 240, 84 N. E. 893; Spangle v. Spangle (Ind. App.), 83 N. E. 720; Burke v. Kaltenbach, 109 N. Y. S. 225.

931-4 Knapp v. Wallace (Or.), 92 P. 1054.

931-5 Old Wayne Life Assn. v. McDonough, 204 U. S. 8, *rev.* 164 Ind. 321, 73 N. E. 703; Johnson v. Hunter, 147 Fed. 133, 77 C. C. A. 359; Alaska Co. v. Debney, 2 Alaska 303; Franklin v. Crow, 128 Ga. 458, 57 S. E. 784; Moore v. Hanscom (Tex. Civ.), 103 S. W. 665, judgment *mod.*, 106 S. W. 876.

932-6 Cohen v. Lodge, 152 Fed. 357; Illinois etc. R. Co. v. Hasenwinkle, 232 Ill. 224, 83 N. E. 815; S. v. Cary (Wis.), 112 N. W. 428.

933-11 Fitch v. Gentry, 29 Ky. L. R. 210, 92 S. W. 586; Roberts v. Asylum, 31 Ky. L. R. 477, 102 S. W. 818; Kaylor v. Hiller, 77 S. C. 393, 58 S. E. 2; Moore v. Hanscom (Tex. Civ.), 103 S. W. 665, judgment *mod.*, 106 S. W. 876.

934-16 Briggs v. Manning, 80 Ark. 304, 97 S. W. 289; Welsh v. Koch, 4 Cal. App. 571, 88 P. 604; Farmer's Co. v. Canal Co., 37 Colo. 512, 86 P. 1042; Johnson v. Grace (Tex. Civ.), 94 S. W. 1064; Berryman v. Biddle (Tex. Civ.), 107 S. W. 922.

935-17 Wallace v. Adams, 143 Fed. 716, 74 C. C. A. 540; County Bk. v. Jack, 148 Cal. 437, 83 P. 705; Harrow v. Grogan, 219 Ill. 288, 76 N. E. 350; Roberts v. Asylum, 31 Ky. L. R. 477, 102 S. W. 818 (lost record); Johnson v. Grace (Tex. Civ.), 94 S. W. 1064; Humphrey v. Irrig. Co. (Tex. Civ.), 93 S. W. 180;

Rye v. Petroleum Co. (Tex. Civ.), 95 S. W. 622.

936-18 Cohen v. Lodge, 152 Fed. 357.

937-21 Harbert v. Durden, 116 Mo. App. 612, 92 S. W. 746.

937-23 Hearn v. Ayres, 77 Ark. 497, 92 S. W. 768; Bedingfield v. Bank (Ga. App.), 61 S. E. 30.

938-24 Stoneman v. Bilby (Tex. Civ.), 96 S. W. 50.

938-25 Affidavit for continuance. Stone v. R. Co., 75 Kan. 600, 90 P. 251.

939-28 Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767; Ruckert v. Richter, 127 Mo. App. 664. 106 S. W. 1081; Katz v. Schreckinger, 52 Misc. 160, 101 N. Y. S. 743; Carpenter v. Pirner, 107 N. Y. S. 875 (municipal court); Carter v. Skillman (Va.), 60 S. E. 775.

But jurisdiction appearing the same presumptions are indulged as in a court of general jurisdiction. Jones v. Leeds (Ind. App.), 83 N. E. 526.

941-33 New York Inst. v. Crockett, 117 App. Div. 269, 102 N. Y. S. 412.

941-35 Briggs v. Manning, 80 Ark. 304, 97 S. W. 289; Strobel v. Clark, 128 Mo. App. 48, 106 S. W. 585.

941-36 Ford v. Ford, 117 Ill. App. 502.

941-38 Sylvester v. Willson, 2 Alaska 325.

942-40 Ex parte Cox (Tex. Cr.), 109 S. W. 369.

942-43 Geduld v. R. Co., 55 Misc. 239, 105 N. Y. S. 110.

942-46 Old Wayne Assn. v. McDonough, 204 U. S. 8; Alaska Co. v. Debney, 2 Alaska 303; Roberts v. Leutzke, 39 Ind. App. 577, 78 N. E. 635; S. v. Weber, 96 Minn. 422, 105 N. W. 490; Anthony v. Wilson (N. J. L.), 65 A. 988; Johnston v. Ins. Co., 104 App. Div. 550, 93 N. Y. S. 1052; Hodge v. Registry Co., 54 Misc. 442, 105 N. Y. S. 1067; Christinsen v. Kriesel (Wis.), 113 N. W. 980.

943-47 Geduld v. R. Co., 55 Misc. 239, 105 N. Y. S. 110.

944-51 Erhardt v. Ballen, 150 Fed. 529, 80 C. C. A. 271; Pardee v. Schanzlin, 3 Cal. App. 597, 86 P. 812; Shepard v. Mace, 148 Cal. 270, 82 P. 1046; Woods v. Sargent (Colo.), 95 P. 932; Frost v. Board (Colo.), 95 P. 289; Montgomery v. S., 53 Fla. 115, 42 S. 894; Williams v. Smith, 128 Ga. 306, 57 S. E. 801; Roenheld v. Chicago, 131 Ill. App. 76; City of Peoria v. Bank, 224 Ill. 43, 79 N. E. 296; S. v. Pitkin (Ia.), 114 N. W. 550; Hegan v. City, 32 Ky. L. R. 1082, 107 S. W. 809; Eversole v. Asylum, 30 Ky. L. R. 989, 100 S. W. 300; Wood v. Frickie, 120 La. 180, 45 S. W. 96; Day v. Smith, 87 Miss. 395, 39 S. 526; S. v. Ferry, 208 Mo. 622, 106 S. W. 1005; In re Sheriff (N. J.), 69 A. 305; Craft v. Lent, 53 Misc. 481, 103 N. Y. S. 366; Remington v. S., 116 App. Div. 522, 101 N. Y. S. 952; Empire Realty Co. v. Sayre, 107 App. Div. 415, 95 N. Y. 371; In re Webster, 106 App. Div. 360, 94 N. Y. S. 1050; Board v. Gregory, 15 Okla. 208, 81 P. 422; Christ v. Fent, 16 Okla. 375, 84 P. 1074; Goodnough M. Co. v. Galloway, 48 Or. 239, 84 P. 1049 (trustee in bankruptcy); C. v. Hughes, 33 Pa. Super. 90; Houseman v. Nav. Co., 214 Pa. 552, 64 A. 379; S. v. Matejousky (S. D.), 115 N. W. 96; Waterhouse v. Corbett (Tex. Civ.), 96 S. W. 651; Thatcher v. Matthews (Tex.), 105 S. W. 317; City of Houston v. Stewart (Tex. Civ.), 90 S. W. 49; City of San Antonio v. Tobin (Tex. Civ.), 101 S. W. 269.

Ordinary's signing of the minutes of his court, presumed. Floyd v. Ricketson, 129 Ga. 668, 59 S. E. 909.

Authority of secretary of a corporation. Bliss v. Harris, 38 Colo. 72, 87 P. 1076.

Compliance with statutory provisions. S. v. Switzer (Neb.), 112 N. W. 297.

Clerk of Court. — S. v. Harter, 131 Ia. 199, 108 N. W. 232.

946-54 Montgomery v. S. (Fla.), 45 S. 879; Louisville etc. R. Co. v. Schwab, 31 Ky. L. R. 1313, 106 S. W. 110; Gehlert v. Quinn, 35 Mont. 451, 90 P. 168.

947-59 See Drenen v. P., 222 Ill. 592, 78 N. E. 937.

948-62 See Muir v. Chandler (N. D.), 113 N. W. 1038.

948-63 S. v. Pitkin (Ia.), 114 N. W. 550; Brown v. Hannah (Mich.), 115 N. W. 980; Houseman

v. Nav. Co., 214 Pa. 552, 64 A. 379.

949-64 Patterson v. Drake, 126 Ga. 478, 55 S. E. 175; Smithers v. Lowrance, 100 Tex. 77, 93 S. W 1064; Maffi v. Stephens (Tex. Civ.), 93 S. W. 158.

951-72 Baltimore etc. R. Co. v. Troth (Ind. App.), 84 N. E. 529; Hegan v. City, 32 Ky. L. R. 1082, 107 S. W. 809 (retroactive assessment); Bandow v. Wolven, 20 S. D. 445, 107 N. W. 204.

955-89 S. v. Matejousky (S. D.), 115 N. W. 96 (state's attorney).

955-91 Day v. Smith, 87 Miss. 395, 39 S. 526 (clerk of probate court).

Clerk of grand jury. — S. v. Pitkin (Ia.), 114 N. W. 550.

955-95 Erhardt v. Ballin, 150 Fed. 529, 80 C. C. A. 271.

956-98 S. v. Ferry Co., 208 Mo. 622, 106 S. W. 1005.

956-2 Frost v. Board (Colo.), 95 P. 289; Floyd v. Rieketson, 129 Ga. 668, 59 S. E. 909 (ordinary).

956-3 Louisville etc. R. Co. v. Schwab, 31 Ky. L. R. 1313, 105 S. W. 110.

956-5 Officers of land office of the state. Houseman v. Nav. Co., 214 Pa. 552, 64 A. 379.

Land commissioner. — Smithers v. Lowrance (Tex. Civ.), 91 S. W. 606.

956-6 Pardee v. Schanzlin, 3 Cal. App. 597, 86 P. 812.

957-14 S. v. Switzer (Neb.), 112 N. W. 297.

957-15 Christ v. Fent, 16 Okla. 375, 84 P. 1074; Thatcher v. Matthews (Tex.), 105 S. W. 317; Waterhouse v. Corbett (Tex. Civ.), 96 S. W. 651.

958-16 County Clerk. — In re Sheriff (N. J.), 69 A. 305.

958-17 Town of Manitou v. Bank, 37 Colo. 344, 86 P. 75.

958-18 Choctaw etc. R. Co. v. Newton, 140 Fed. 225, 71 C. C. A. 655; Robinson v. Ins. Co., 144 Fed. 1005; The Luckenbach, 144 Fed. 980; Murray v. Joseph, 146 Fed. 260; Hartford Ins. Co. v. Sherman, 123 Ill. App. 202; Western U. Tel. Co. v. McClelland, 38 Ind. App. 578, 78 N. E. 672; Fowler Pack. Co. v. Enzenperger (Kan.), 94 P. 995; Green v. Brooks, 215 Pa. 492, 64 A. 672; Standard Oil Co. v. S., 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015.

Failure to produce defective coupling. — Galveston etc. R. Co. v. Young (Tex. Civ), 100 S. W. 993.

960-24 Isabella Min. Co. v. Glenn, 37 Colo. 165, 86 P. 349 (office map); Williams v. Bank, 49 Or. 492, 90 P. 1012.

961-25 Notice must be given. Rochester Ins. Co. v. Assn., 107 Va. 701, 60 S. E. 93.

961-26 Wilson v. Griswold, 79 Conn. 18, 63 A. 659.

964-36 Pennsylvania R. Co. v. Durkee, 147 Fed. 99, 78 C. C. A. 107.

964-38 Davis v. S. (Ga. App.), 61 S. E. 843.

965-42 Alexander v. Blackman, 26 App. Cas. (D. C.) 541; Closson v. Bligh (Ind. App.), 83 N. E. 263; Iberia Co. v. Thorgeson, 116 La. 218, 40 S. 682; Green v. Brooks, 215 Pa. 492, 64 A. 672; Texas etc. R. Co. v. Harrington (Tex. Civ.), 98 S. W. 653; Nichols v. R. Co. (W. Va.), 59 S. E. 968. See Morgan v. S., 124 Ga. 442, 52 S. E. 748.

No presumption arises. Richter v. Solomon, 104 N. Y. S. 405; Ferrari v. R. Co., 118 App. Div. 155, 103 N. Y. S. 134.

Rule stated. — S. v. Callahan (N. J.), 69 A. 957.

967-45 Macon R. Co. v. Mason, 123 Ga. 773, 51 S. E. 569; Chicago Tract. Co. v. Arnold, 131 Ill. App. 599; Brewster v. S., 40 Tex. Civ. 1, 88 S. W. 858.

On the second trial of a case, testimony explaining the failure to call a certain witness at the first trial, is admissible. McDonald v. R. Co., 144 Mich. 379, 108 N. W. 85.

967-46 Southern R. Co. v. Osborn, 39 Ind. App. 333, 78 N. E. 248, 79 N. E. 1067.

968-48 Mutual Ind. Co. v. Perkins, 81 Ark. 87, 98 S. W. 709; Naughton Co. v. Exchange, 49 Misc. 227, 97 N. Y. S. 387.

969-52 S. v. Jahrans, 117 La. 286, 41 S. 575; Walker v. Dickey (Tex. Civ.), 98 S. W. 658; Aragon Coffee Co. v. Rogers, 105 Va. 51, 52 S. E. 843.

Depositions. — Belknap Co. v. Sleeth (Kan.), 93 P. 580.

Failure to answer interrogatories.

Locust v. Randle (Tex. Civ.), 102 S. W. 946.

971-55 Tuggle v. S., 127 Ga. 290, 56 S. E. 406; Blackman v. Andrews, 150 Mich. 322, 114 N. W. 218.

971-57 Southern Exp. Co. v. Electric Co., 126 Ga. 472, 55 S. E. 254.

972-60 No inference of guilt may be drawn. — P. v. Smith, 114 App. Div. 513, 100 N. Y. S. 259.

972-61 S. v. Skillman (N. J.), 70 A. 83.

973-64 Tanger v. R. Co., 104 N. Y. S. 681.

973-65 P. v. McGovern, 105 App. Div. 296, 94 N. Y. S. 662.

973-67 Wood v. Tract. Co., 1 Cal. App. 474, 82 P. 547; United R. Co. v. Cloman (Md.), 69 A. 379.

975-75 Warth v. Loewenstein, 219 Ill. 222, 76 N. E. 379.

975-76 S. v. Callahan (N. J.), 69 A. 957.

975-77 Ferrari v. R. Co., 118 App. Div. 155, 103 N. Y. S. 134.

976-78 See S. v. Constantine (Wash.), 93 P. 317.

976-80 Grace Co. v. Larson, 129 Ill. App. 290. See S. v. Constantine, supra.

978-83 Mastin v. Noble, 157 Fed. 506.

PRINCIPAL AND AGENT.

[Vol. 10.]

6-1 Elbersole v. Assn., 147 Ala. 177, 41 S. 150; Pease v. Fink, 3 Cal. App., 371, 85 P. 657; Hunt v. Johnson (Ind. Ter.), 104 S. W. 841; Wood-B. v. Van Cliff, 107 N. Y. S. 88; Rumble v. Cummings (Or.), 95 P. 1111; Day v. Fay, 59 W. Va. 65, 52 S. E. 1013.

Change of relation. — Burden on party affirming. Bergner v. Bergner, 219 Pa. 113, 67 A. 999.

6-2 Elbersole v. Assn., supra; Rumble v. Cummings, supra; Wills v. R. Co. (Tex. Civ.), 92 S. W. 273; Scarritt-C. v. Hudspenth (Okla.), 91 P. 843.

Evidence insufficient. — Tyler Ice Co. v. Coapland (Tex. Civ.), 99 S. W. 133.

6-3 See also Pease v. Fink, 3 Cal. App. 371, 85 P. 657.

7-7 Noble v. Barney, 124 Ga. 960, 53 S. E. 463.

8-14 Dunham v. Salmon, 130 Wis. 164, 109 N. W. 959.

8-16 Goodyear v. Williams, 73 Kan. 192, 85 P. 300.

9-18 See also Belcher v. Assn., 47 N. J. L. 833, 67 A. 399; Bantz v. Adams, 131 Wis. 152, 111 N. W. 69.

9-22 Strayhorn v. McCall, 78 Ark. 209, 95 S. W. 455.

10-26 Kilborn v. Ins. Co., 99 Minn. 176, 108 N. W. 861.

11-32 See also Thompson v. Murphy, 60 W. Va. 42, 53 S. E. 908.

11-39 See also Fritz v. G. & E. Co. (Ia.), 114 N. W. 193 (order of proof in discretion of court).

12-40 Jones v. Waterman, 4 Cal. App. xiii, 87 P. 469; Thompson v. Mills (Tex. Civ.), 101 S. W. 560.

12-41 Robinson v. Green (Ala.), 43 S. 797; Jones v. Waterman, supra; Woodward v. Cave (S. C.), 61 S. E. 82; Blowers v. R. Co., 74 S. C. 221, 54 S. E. 368.

13-44 See also Waco Mill Co. v. Allis-C. Co. (Tex. Civ.), 109 S. W. 224.

14-48 Beekman Lumb. Co. v. Kittrell, 80 Ark. 228, 96 S. W. 988; First Nat. Bk. v. Elevator Co. (Minn.), 114 N. W. 265; Colloty v. Schuman, 73 N. J. L. 92, 66 A. 933; Steuerwald v. Jackson, 123 App. Div. 569, 108 N. Y. S. 41; apparently *Contra*, Hensley v. McDonald, 32 Ky. L. R. 1333, 108 S. W. 362.

15-49 Irvin v. Cohen, 109 N. Y. S. 169.

15-52 Smiley v. Hooper, 147 Ala. 646, 41 S. 660; Gambill v. Fugua, 148 Ala. 448, 42 S. 735; Eagle Iron Co. v. Baugh, 147 Ala. 613, 41 S. 663; Beekman Lumb. Co. v. Kittrell, 80 Ark. 228, 96 S. W. 988; Peace v. Fink, 3 Cal. App. 371, 85 P. 657; Ham v. Brown, 2 Ga. App. 71, 58 S. E. 316; Goodyear v. Williams, 73 Kan. 192, 85 P. 300; Smith v. Ohler, 31 Ky. L. R. 1275, 104 S. W. 995; Payton v. Woolen Mills, 28 Ky. L. R. 1303, 91 S. W. 719; Edmiston v. Hurley, 30 Ky. L. R. 557, 99 S. W. 259; Gragg v. Ins. Co., 32 Ky. L. R. 988, 107 S. W. 321; Superior D. Co. v. Carpenter, 150 Mich. 262, 114 N. W. 67; Fitzgerald v. Kimball, 76 Neb. 236, 107 N. W. 227; Ryle v.

Assn., 74 N. J. L. 840, 67 A. 87; Standard Oil Co v. Linol (N. J.), 68 A. 175; Stouerwald v. Jackson, 123 App. Div. 569, 108 N. Y. S. 41; Weltman v. Kotlar, 108 N. Y. S. 952; Sanford v. Fountain, 49 Misc. 301, 99 N. Y. S. 234; Woodward v. Cave (S. C.), 61 S. E. 82; Sullivan v. Fant (Tex. Civ.), 110 S. W. 507; Merrill v. O'Bryan (Wash.), 93 P. 917. See also Gervais v. McCarthy, 35 Can. Sup. 14.

If part of res gestae, they are admissible. — Lowden v. Wilson, 233 Ill. 340, 84 N. E. 245.

18-53 Martin v. Johnson (Fla.), 44 S. 949; Fitzgerald v. Kimball, 76 Neb. 236, 107 N. W. 227; Ryle v. Assn., 74 N. J. L. 840, 67 A. 87.

18-54 Payton v. Woolen Mills, 28 Ky. L. R. 1303, 91 S. W. 719.

19-56 Eagle Iron Co. v. Baugh, 147 Ala. 613, 41 S. 663; Kelley v. Assn., 2 Cal. App. 462, 84 P. 321; Ham v. Brown, 2 Ga. App. 71, 58 S. E. 316; Sullivan v. Fant (Tex. Civ.), 110 S. W. 507. See also Gambill v. Fuqua, 148 Ala. 448, 42 S. 735; Carey v. Wolff, 72 N. J. L. 510, 63 A. 270.

20-61 Chicago v. Cox, 145 Fed. 157, 76 C. C. A. 127; Schiffer v. Anderson, 146 Fed. 457, 76 C. C. A. 667; Nat. Bank v. Schirm, 3 Cal. App. 696, 86 P. 981; Cable Co. v. Walker, 127 Ga. 65, 56 S. E. 108; Cudahy Pack. Co. v. Hays, 74 Kan. 124, 85 P. 811; Nicola v. Hurst, 30 Ky L. R. 851, 99 S. W. 917; Westheimer v. Loan Co., 195 Mass. 510, 81 N. E. 289; Huse v. Supply Co., 121 Mo. App. 89, 97 S. W. 990; Louisville etc. R. Co. v. Bohan, 116 Tenn. 271, 94 S. W. 84; Three States Lumb. Co. v. Blanks, 118 Tenn. 627, 102 S. W. 79; Austin v. Nuchols (Tex. Civ.), 94 S. W. 336 (also admissible in this case as part of res gestae). See also Aetna I. Co. v. Tract. Co., 147 Fed. 95, 78 C. C. A. 262; Arnold v. Adams (Ga. App.), 60 S. E. 815; Payton v. Woolen Mills, 28 Ky. L. R. 1303, 91 S. W. 719; Smith v. Ohler, 31 Ky. L. R. 1275, 104 S. W. 995; P. v. Terwilliger, 110 N. Y. S. 1034; Brickell v. Mfg. Co. (N. C.), 60 S. E. 905; Stroud v. Columbia Co. (S. C.), 60 S. E. 963; Sullivan v. Fant (Tex. Civ.), 110 S. W. 507. But see International G. N. R. Co. v. Carr (Tex. Civ.), 91 S. W. 858. *Compare* Miller v. McKenzie, 126 Ga. 746, 55 S. E. 952; Ga. R. & E. Co. v. Harris, 1 Ga. App. 714, 57 S. E. 1076; Rice v. James, 193 Mass. 458, 79 N. E. 807; Gardner v. R. Co., 113 App. Div. 133, 98 N. Y. S. 1034; McKeige v. Carroll, 120 App. Div. 521, 105 N. Y. S. 342; Ohly v. Memdham, 104 N. Y. S. 413.

Receipts given by agent admissible. Robinson v. Sresovich, 5 Haw. 618.

But fact of agency must first be established. Hill v. Barner (Cal. App.), 96 P. 111; McDonough v. R. Co., 191 Mass. 509, 78 N. E. 141; Stengel v. Sergeant (N. J. Eq.), 68 A. 1106; Standard Oil Co. v. Linol (N. J. L.), 68 A. 174; Shesler v. Patton, 114 App. Div. 846, 100 N. Y. S. 286; Putnam v. Safe Dep. Co., 191 N. Y. 166, 83 N. E. 789; Gulf etc. R. Co. v. Batte (Tex. Civ.), 107 S. W. 632; Munson v. McGregor (Wash.), 94 P. 1085.

Admission of fellow servant. Cooper v. Daniels Co., 29 Ky. L. R. 1172, 96 S. W. 1100.

Statements of foreman. — See Stecher v. Steadman, 78 Ark. 381, 94 S. W. 41; Gray Tie Co. v. Clark, 30 Ky. L. R. 409, 98 S. W. 1000. See also Bundy v. Sierra Lumb. Co., 149 Cal. 772, 87 P. 622; Gray Lumb. Co. v. Harris, 127 Ga. 693, 56 S. E. 252.

Brakeman's statement. — St. Louis etc. Co. v. Frazar (Tex. Civ.), 97 S. W. 325.

Declarations outside the issue, inadmissible. Western U. Tel. Co. v. Woodard, 84 Ark. 323, 105 S. W. 579.

Statements outside scope of duties, inadmissible. Trainor v. Schutz, 98 Minn. 213, 107 N. W. 812; Thompson v. Murphy, 60 W. Va. 42, 53 S. E. 908. See also Gould v. Cates, 147 Ala. 629, 41 S. 675.

Self-serving declarations. — Shelbyville W. Co. v. McDade, 29 Ky. L. R. 119, 92 S. W. 568.

For a full discussion of this subject see the title "Admissions," Vol. 1.

20-62 John G. Brew. Co. v. Peterson, 130 Ia. 301, 106 N. W. 741; Payton v. Woolen Mills, 28 Ky. L. R. 1303, 91 S. W. 719. But see Ga. R. & E. Co. v. Harris, 1 Ga.

App. 714, 57 S. E. 1076; Fleishman v. Ballou, 131 Ill. App. 564.

20-63 Arnold v. Adams (Ga. App.), 60 S. E. 815; Ham v. Brown, 2 Ga. App. 71, 58 S. E. 316 (admissions as to husband's agency); Horner v. Beasley, 105 Md. 193, 65 A. 820.

Letters. — Gragg v. Ins. Co., 32 Ky. L. R. 988, 107 S. W. 321; Peycke v. Shinn, 76 Neb. 364, 107 N. W. 386; Ontario Bk. v. Loomis, 189 N. Y. 578, 82 N. E. 436, *rev.*113 App. Div. 890, 100 N. Y. S. 1133.

21-68 Bradstreet v. McKamey (Ind. App.), 83 N. E. 773; Darrin v. Whittingham (Md.), 68 A. 269; Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958; Phillips v. Mfg. Co. (Mo. App.), 107 S. W. 471; Young v. Anthony, 119 App. Div. 612, 104 N. Y. S. 87; Bautz v. Adams, 131 Wis. 152, 111 N. W. 69; Black L. Lumb. Co. v. Const. Co. (W. Va.), 60 S. E. 409.

The fact of agency.—Cable Co. v. Walker, 127 Ga. 65, 56 S. E. 108. See Tate v. Aitken (Cal. App.), 90 P. 836.

21-69 Robinson v. Green (Ala.), 43 S. 797.

22-70 Pease v. Fink, 3 Cal. App. 371, 85 P. 657. See also Rice v. James, 193 Mass. 458, 79 N. E. 807.

24-72 Murphy v. Coffin Co. (Ala.), 43 S. 212; Noble v. Burney, 124 Ga. 960, 53 S. E. 463; Broadstreet v. McKamey (Ind. App.), 83 N. E. 773; Norden v. Duke, 113 App. Div. 99, 99 N. Y. S. 30; Brennan v. Dansby (Tex. Civ.), 95 S. W. 700.

24-73 *Compare* Wierman v. Sugar Co., 142 Mich. 422, 106 N. W. 75.

25-75 Elliott v. Bankston (Ala.), 45 S. 173; Pease v. Fink, 3 Cal. App. 371, 85 P. 87; Ham v. Brown, 2 Ga. App. 71, 58 S. E. 316; Collins v. Crews, 3 Ga. App. 238, 59 S. E. 727.

26-77 Blowers v. R. Co., 74 S. C. 221, 54 S. E. 368; Fielder v. Const. Co. (W. Va.), 60 S. E. 402.

27-82 Thompson v. Murphy, 60 W. Va. 42, 53 S. E. 908.

28-83 McGraw v. O'Neil, 123 Mo. App. 691, 101 S. W. 132. See also supra, "EXPERT AND OPINION EVIDENCE," 699-7.

28-84 Western U. Tel. Co. v. Heathcoat (Ala.), 43 S. 117. *Compare* Fritz v. G. & E. Co. (Ia.), 114 N. W. 193; Rice v. James, 193 Mass. 458, 79 N. E. 807; Waco Mill E. Co. v. Allis-C. Co. (Tex. Civ.), 109 S. W. 224. But see supra, 12-41.

28-85 Rumble v. Cummings (Or.), 95 P. 1111. *Compare* Gould v. Cates Co., 147 Ala. 629, 41 S. 675.

29-86 Pease v. Fink, 3 Cal. App. 371, 85 P. 657. See also Loy v. McClure, 124 Mo. App. 689, 101 S. W. 1148.

29-89 **Evidence sufficient.** — Coles v. Bank, 100 N. Y. S. 1060. See also Ladenburg v. Dry Goods Co., 83 Ark. 440, 104 S. W. 145; Brockman etc. Co. v. Pound, 77 Ark. 364, 91 S. W. 183; Brady v. Min. Co. (Cal. App.), 94 P. 85; Curry v. King (Cal.), 92 P. 662; Cripple Creek v. Marshall, 41 Colo. 126, 91 P. 1108; Bailey v. Lumb. Co., 1 Ga. App. 398, 58 S. E. 120; Sanford v. Swift (Ind. Ter.), 104 S. W. 846; S. v. Dickson (Mo.), 111 S. W. 817; Montgomery v. Hundley, 205 Mo. 138, 103 S. W. 527; Raike v. Rubber Co., 127 Mo. App. 480, 105 S. W. 1100; Fitzgerald v. Kimball, 76 Neb. 236, 107 N. W. 227; Howard v. Omaha (Neb.), 108 N. W. 158; Grout v. Moultin, 79 Vt. 122, 64 A. 453; Hein v. Mildebrandt (Wis.), 115 N. W. 121; Bleser v. Stedl (Wis.), 115 N. W. 337; Abrahams v. Freres, 129 Wis. 235, 107 N. W. 656.

Evidence insufficient. — Naughton v. Exchange, 49 Misc. 227, 97 N. Y. S. 387; Bender v. Apollo Co., 101 N. Y. S. 75; Miller v. Harris, 117 App. Div. 395, 102 N. Y. S. 604. See also Hackney v. Perry (Ala.), 44 S. 1029; Hunt v. Johnson (Ind. Ter.), 104 S. W. 841; Hensley v. McDonald, 32 Ky. L. R. 1333, 108 S. W. 362; Loy v. McClure, 124 Mo. App. 689, 101 S. W. 1148; Stengel v. Sergeant (N. J.), 68 A. 1106; Gieger v. Levin, 110 N. Y. S. 203; Miller v. Harris, 110 N. Y. S. 1138; *aff.* 117 App. Div. 395, 102 N. Y. S. 604; Watkins v. Campbell, 100 Tex. 542, 101 S. W. 1078; Vallentine v. Carter (Wash.), 94 P. 932; Steel v. Lawyer (Wash.), 91 P. 958.

31-91 But see Dennis v. Young, 85 Ark. 252, 107 S. W. 994.

31-94 See also Seattle Shoe Co.

v. Packard, 43 Wash. 527, 86 P. 845.

32-99 Jones v. Richards, 50 Misc. 645, 98 N. Y. S. 698.

33-3 Piur v. Mangus (Neb.), 107 N. W. 222.

33-4 Sanford v. Fountain, 49 Misc. 301, 99 N. Y. S. 234; Harvester Co. v. Campbell (Tex. Civ.), 96 S. W. 93; Skirvin v. Obrien (Tex. Civ.), 95 S. W. 696 (evidence insufficient).

Evidence sufficient. — Tate v. Aitken, 5 Cal. App. 505, 90 P. 837; Johnson v. Ogren, 102 Minn. 8, 112 N. W. 894.

Evidence insufficient. — Finklestein v. Fabyik, 107 N. Y. S. 67; Rumble v. Cummings (Or.), 95 P. 1111; Teagarden v. Patten (Tex. Civ.), 107 S. W. 909; Vallentine v. Carter (Wash.), 94 P. 932.

33-5 Thompson v. Murphy, 60 W. Va. 42, 53 S. E. 908. See Ilfeld v. Ziegler, 40 Colo. 401, 91 P. 825; Finch v. Gillespie, 122 App. Div. 858, 107 N. Y. S. 418; Russell v. Mach. Co. (N. D.), 116 N. W. 611.

33-6 Black Lick Lumb. Co. v. Const. Co. (W. Va.), 60 S. E. 409.

33-7 Pease v. Fink, 3 Cal. App. 371, 85 P. 657; Sill v. Pate, 230 Ill. 39, 82 N. E. 356; Belcher v. Assn., 74 N. J. L. 833, 67 A. 399; Groscup v. Downey (Md.), 65 A. 930; Drill Co. v. Carpenter, 150 Mich. 262, 114 N. W. 67; Rumble v. Cummings (Or.), 95 P. 1111; Sterling v. De Laune (Tex. Civ.), 105 S. W. 1169; Suderman v. Rogers (Tex. Civ.), 104 S. W. 193; Thompson v. Murphy, 60 W. Va. 42, 53 S. E. 908; Wills v. R. Co. (Tex. Civ.), 92 S. W. 273. See Mins v. Brook, 3 Ga. App. 247, 59 S. E. 711; Goodyear v. Williams, 73 Kan. 192, 85 P. 300.

33-8 See also Russell v. Mach. Co. (N. D.), 116 N. W. 611.

33-9 Rice v. R. Co., 195 Mass. 507, 81 N. E. 285.

Evidence insufficient. — Norden v. Duke, 113 App. Div. 99, 99 N. Y. S. 30; Suderman v. Rogers (Tex. Civ.), 104 S. W. 193.

37-20 Rosenthal v. Mining Co., 157 Fed. 83.

Evidence insufficient. — Hubbard v. Cook, 153 Fed. 554.

37-22 Hildreth v. Tie Co., 32 Ky. L. R. 1212, 108 S. W. 255.

PRINCIPAL AND SURETY
[Vol. 10.]

Parol proof to show consent to alterations, 53-25; *Parol proof to show wrongful delivery,* 53-32.

49-6 Sinclair v. Surety Co., 132 Ia. 549, 107 N. W. 184.

49-7 Patnode v. Descheres, 15 N. D. 100, 106 N. W. 573; Reakirt v. Besuden, 3 Ohio N. P. 646.

49-8 McKenzie v. Barrett (Tex. Civ.), 98 S. W. 229.

50-11 Crosby v. Woodbury, 37 Colo. 1, 89 P. 34.

50-12 Crosby v. Woodbury, supra.

51-18 S. v. O'Neill, 114 Mo. App. 611, 90 S. W. 410.

52-20 Davies Co. Bk. v. Wright (Ky.), 110 S. W. 361.

53-25 Doyle v. Nesting, 37 Colo. 522, 88 P. 862; McGuire v. Gerstley, 26 App. D. C. 193, *aff.* 204 U. S. 489.

Parol proof to show consent to alterations. — S. v. Baird, 13 Idaho 126, 89 P. 298.

53-32 Parol proof to show wrongful delivery. — School Dist. v. Lapping, 100 Minn. 139, 110 N. W. 849.

54-34 Gibson v. Wallace, 147 Ala. 322, 41 S. 960 (wife may show by parol that she signed as surety and not as principal); Hart v. Bank, 32 Ky. L. R. 338, 105 S. W. 934.

Apparent joint maker. — Nat. Bk. v. Dutcher, 128 Ia. 413, 104 N. W. 497; Jennings v. Moore, 189 Mass. 197, 75 N. E. 214.

55-36 Kaufman v. Barbour, 98 Minn. 158, 107 N. W. 1128.

55-38 Western Bank v. Gibbs (Tex. Civ.), 96 S. W. 947.

55-39 Collins v. Gray, 3 Cal. App. 723, 86 P. 983; Windhorst v. Bergendahl (S. D.), 111 N. W. 544.

57-42 Return by administrator. Bailey v. McAlpin, 122 Ga. 616, 50 S. E. 388.

58-44 Opet v. Denzer (Tex. Civ.), 93 S. W. 527.

59-45 Bailey v. McAlpin, 122 Ga. 616, 50 S. E. 388.

59-49 Brillion Lumb. Co. v. Barnard, 130 Wis. 284, 111 N. W. 483.

61-54 Statement in sheriff's return. — Phillips v. Eggert, 133 Wis. 318, 113 N. W. 686.

63-68 Chapman v. Pendleton, 26 R. I. 573, 59 A. 928.

64-72 A plea of guilty. — Paducah v. Jones, 31 Ky. L. R. 1203, 104 S. W. 971.
64-75 Henry v. Heldmaier, 226 Ill. 152, 80 N. E. 705; Beh v. Bay, 127 Ia. 246, 103 N. W. 119.
68-92 See Briggs v. Manning, 80 Ark. 304, 97 S. W. 289; S. v. Goggin, 191 Mo. 482, 90 S. W. 379.
69-1 Ruggles v. Bernstein, 188 Mass. 232, 74 N. E. 366.
70-12 Paducah v. Jones, 31 Ky. L. R. 1203, 104 S. W. 971.
71-16 Stevens v. Carroll, 131 Ia. 170, 105 N. W. 653 (action on official bond); Thompson v. Chaffee, 39 Tex. Civ. 567, 89 S. W. 285.
71-18 See Comstock v. Keating, 115 Mo. App. 372, 91 S. W. 416.

PRIVILEGED COMMUNICATIONS [Vol. 10.]

97-2 Matter of Myer, 184 N. Y. 54, 76 N. E. 920, *rev.* 100 App. Div. 512, 91 N. Y. S. 1104; Krapp v. Ins. Co., 143 Mich. 369, 106 N. W. 1107.
97-3 All the cases cited herein so far as 159-21 recognize the rule except as is otherwise stated.
98-4 The common law rule is in force in Rhode Island. Banigan v. Banigan, 26 R. I. 454, 59 A. 313.
99-10 Smith v. L. Co. (N. C.), 60 S. E. 717.
Financial condition of patient. — Smart v. Kansas City, 208 Mo. 162, 105 S. W. 709.
99-11 Olson v. Court, 100 Minn. 117, 110 N. W. 374.
102-14 Dambmann v. R. Co., 55 Misc. 60, 106 N. Y. S. 221.
105-23 S. v. Bennett (Ia.), 110 N. W. 150.
106-26 Colorado etc. R. Co. v. Fogelsong (Colo.), 94 P. 356.
107-33 Woods v. Lisbon (Ia.), 116 N. W. 143.
Presence of patient's wife. — Murphy v. Board, 2 Cal. App. 468, 83 P. 557.
109-39 Woods v. Lisbon (Ia.), 116 N. W. 143; S. v. Winnett (Wash.), 92 P. 904.
109-40 S. v. Winnett, supra.
111-45 Assistants in the hospital. Smart v. Kansas City, 208 Mo. 162, 105 S. W. 709.
Physician in charge of hospital records. — Smart v. Kansas City, supra. See 121-85, infra.
Treatment of patient not essential. Smart v. Kansas City, supra; Beave v. T. Co. (Mo.), 111 S. W. 52.
112-49 Union P. R. Co. v. Thomas, 152 Fed. 365; Colorado M. R. Co. v. McGarry, 41 Colo. 398, 92 P. 915.
113-52 S. v. Winnett (Wash.), 92 P. 904.
114-58 Union P. R. Co. v. Thomas, supra.
115-60 Physician in charge of defendant's hospital. — McRae v. Erickson, 1 Cal. App. 326, 82 P. 209.
118-72 Green v. Assn. (Mo.), 109 S. W. 715; Obermeyer v. Mfg. Co., 120 Mo. App. 59, 96 S. W. 673.
119-78 Green v. Assn. (Mo.), 109 S. W. 715.
120-79 Union P. R. Co. v. Thomas, 152 Fed. 365.
Liberal construction is to be given the statute. — McRae v. Erickson, 1 Cal. App. 326, 82 P. 561.
121-85 S. v. Blydenburg, 135 Ia. 264, 112 N. W. 634.
Admissibility of death certificates. Krapp v. Ins. Co., 143 Mich. 369, 106 N. W. 1107. See 111-45, ante.
123-90 Long v. Inv. Co., 135 Ia. 398, 110 N. W. 26; Matter of Myer, 184 N. Y. 54, 76 N. E. 920.
123-93 Smith v. L. Co. (N. C.), 60 S. E. 717.
128-12 See Beard v. R. Co., 143 N. C. 136, 55 S. E. 505.
130-19 Benjamin v. Tupper Lake, 110 App. Div. 426, 97 N. Y. S. 512; Travis v. Haan, 119 App. Div. 138, 103 N. Y. S. 973; Smith v. L. Co. (N. C.), 60 S. E. 717.
131-22 Mental competency.— Boyle v. Robinson, 129 Wis. 567, 109 N. W. 623.
132-24 Anderson v. R. Co., 103 Minn. 184, 114 N. W. 744, *dist.* LeMere v. McHale, 30 Minn. 410, 15 N. W. 682.
133-27 P. v. Brecht, 120 App. Div. 769, 105 N. Y. S. 436.
137-33 Hartley v. Calbreath, 127 Mo. App. 559, 106 S. W. 570.
138-34 Hartley v. Calbreath, supra.
138-38 Matter of Myer, 184 N. Y. 54, 76 N. E. 920, 100 App. Div. 512, 91 N. Y. S. 1104.
139-42 S. v. Bennett (Ia.), 110 N. W. 150.

139-44 Long v. Inv. Co., 135 Ia. 398, 110 N. W. 26; Olson v. Court, 100 Minn. 117, 110 N. W. 374; Sovereign Camp v. Gramdon, 64 Neb. 39, 89 N. W. 448; In re Parker (Neb.), 111 N. W. 119.

Administrator cannot waive. — Scott v. Smith (Ind. App.), 82 N. E. 556.

140-46 Winters v. Winters, 102 Ia. 53, 71 N. W. 184, 63 Am. St. 428.

142-59 Metropolitan L. Ins. Co. v. Brubaker (Kan.), 96 P. 62; Modern Woodmen v. Angle, 127 Mo. App. 194, 104 S. W. 297.

143-60 Stipulation waiving the privilege under the code of New York should be signed both by the party and his attorneys. Geis v. Geis, 116 App. Div. 362, 101 N. Y. S. 845.

Statute requiring waiver at the trial.— Clifford v. R. Co., 188 N. Y. 349, 80 N. E. 1094.

143-61 Elliott v. City, 198 Mo. 593, 96 S. W. 1023; Williams v. R. Co., 42 Wash. 597, 84 P. 1129.

144-63 Long v. Inv. Co., 135 Ia. 398, 110 N. W. 26; Elliott v. City, supra; Marquardt v. R. Co., 110 N. Y. S. 657; Seaman v. Mott, 110 N. Y. S. 1040.

By calling one of two attending physicians. — Morris v. R. Co., 148 N. Y. 88, 42 N. E. 410.

144-64 Seaman v. Mott, supra (treatment of disease).

147-70 S. v. Bennett (Ia.), 110 N. W. 150.

149-71 Hillary v. R. Co. (Minn.), 116 N. W. 933.

149-72 McAllister v. R. Co. (Minn.), 116 N. W. 917; Noelle v. L. & S. Co., 47 Wash. 519, 92 P. 372 (two judges dissented).

149-73 McAllister v. R. Co., supra.

150-75 Union P. R. Co. v. Thomas, 152 Fed. 365.

152-86 Bringing action on account of a physical ailment. — Union P. R. Co. v. Thomas, 152 Fed. 365, *cit.* Williams v. Johnson, 112 Ind. 273, 13 N. E. 872; McConnell v. Osage, 80 Ia. 293, 45 N. W. 550, 8 L. R. A. 778; Green v. Nebagamain, 113 Wis. 508, 89 N. W. 520. To same effect is Smart v. City, 208 Mo. 162, 105 S. W. 709.

154-91 Waiver irrevocable. — Lissak v. Crocker, 119 Cal. 442, 51 P. 668; Elliott v. City, 198 Mo. 593, 96 S. W. 1023; P. v. Bloom, 109 N. Y. S. 344; Marquardt v. R. Co., 110 N. Y. S. 657.

Consent may be withdrawn. — Ross v. R. Co., 101 Minn. 122, 111 N. W. 951.

155-94 Marquardt v. R. Co., supra; Powers' v. R. Co., 105 App. Div. 358, 94 N. Y. S. 184.

156-99 Lindahl v. Court, 100 Minn. 87, 110 N. W. 358.

159-20 Dambmann v. R. Co., 55 Misc. 60, 106 N. Y. S. 221; Jones v. R. Co., 3 N. Y. S. 253, 21 N. Y. St. 169, *aff.* without opinion, 121 N. Y. 683, 24 N. E. 1098.

159-21 Dambmann v. R. Co., supra.

160-22 Dambmann v. R. Co., supra.

165-41 The rule as stated in the text is recognized by all the cases cited herein so far as 200-59.

169-51 Lurty v. Lurty, 107 Va. 466, 59 S. E. 405.

176-71 Jacobs v. U. S., 161 Fed. 694; Rudd v. Dewey (Ia.), 116 N. W. 1062; Cole v. S., 51 Tex. Cr. 89, 101 S. W. 218.

180-86 S. v. Bell (Mo.), 111 S. W. 24; Hearne v. S., 50 Tex. Cr. 431, 97 S. W. 1050.

184-97 Connella v. Ter., 16 Okla. 365, 86 P. 72, *cit.* S. v. Buffington, 20 Kan. 599, 27 Am. Rep. 193; Jaquith v. Davidson, 21 Kan. 251.

187-3 Lindhal v. Court, 100 Minn. 87, 110 N. W. 358.

188-10 S. v. Harness, 10 Idaho 18, 76 P. 788; Illinois L. Ins. Co. v. DeLang, 30 Ky. L. R. 753, 99 S. W. 616.

189-11 Jacobs v. U. S., 161 Fed. 694.

189-13 S. v. Luper (Or.), 95 P. 811.

Acts done by wife of accused. — Gosselin v. The King, 33 Can. Sup. 255. (Two judges dissented).

190-15 Lurty v. Lurty, 107 Va. 466, 59 S. E. 405.

196-37 C. v. Everson, 29 Ky. L. R. 760, 96 S. W. 60, *cit.* Rex v. Simons, 6 C. & P. (Eng.) 540; Gannon v. P., 127 Ill. 507, 21 N. E. 525, 11 Am. St. 147; Bank v. Hutchinson, 62 Kan. 9, 61 P. 443; Allison v. Barlow, 3 Coldw. (Tenn.) 414, 91 Am. Dec. 291; S. v. Center, 35 Vt. 378.

196-43 Wickes v. Walden, 228 Ill. 56, 81 N. E. 798.

200-59 Jacobs v. U. S., 161 Fed. 694.

205-80 Holmes v. Horn, 120 Ill. App. 359; S. v. Blydenburg, 135 Ia. 264, 112 N. W. 634; Grik v. Stumpf, 110 N. Y. S. 712, and cases herein cited, down to 330-31.

Inadmissible to contradict client's testimony. — Hardin v. S., 51 Tex. Cr. 559, 103 S. W. 401.

208-86 In re Ruos, 159 Fed. 252.

209-87 Ehrhardt v. Stevenson, 128 Mo. App. 476, 106 S. W. 1118; In re Young, 33 Utah 382, 94 P. 731.

Privilege continues after decease of client. Fox v. Spears, 78 Ark. 71, 93 S. W. 560.

213-8 In re Padelford, 21 Pa. C. C. 130.

214-14 Temple v. Phelps, 193 Mass. 297, 79 N. E. 482.

221-43 Mueller v. Batcheler, 131 Ia. 650, 109 N. W. 186.

222-45 In re Huffman (Mo. App.), 111 S. W. 848; Mackel v. Bartlett, 33 Mont. 123, 82 P. 795; O'Connor v. Padget (Neb.), 116 N. W. 1131; Smart v. Lodge, 6 Ohio C. C. (N. S.) 15; Swayne v. Swayne, 19 Pa. Super. 160.

224-49 Jolls v. Keegan, 4 Penne. (Del.), 21, 55 A. 340.

224-50 In re Huffman (Mo. App.), 111 S. W. 848.

224-53 And so of an attorney employed by prosecutor to assist in a criminal case. Pinson v. Campbell, 124 Mo. App. 260, 101 S. W. 621.

226-55 Prosecuting attorney. — S. v. Blydenburg, 135 Ia. 264, 112 N. W. 634.

227-59 S. v. Bell (Mo.), 111 S. W. 24 (attorney of accused husband considered his wife's attorney).

228-67 Attorney's testimony.— Mackel v. Bartlett, 33 Mont. 123, 82 P. 795.

228-68 Hansen v. Kline (Ia.), 113 N. W. 504; Gulf etc. R. Co. v. Gibson (Tex. Civ.), 93 S. W. 469.

230-73 Termination of relation. Hardy v. Martin, 150 Cal. 341, 89 P. 111.

231-75 Hansen v. Kline (Ia.), 113 N. W. 504.

232-78 Hansen v. Kline (Ia.), 113 N. W. 504.

234-83 Smart v. Lodge, 6 Ohio C. C. (N. S.) 15.

237-95 Aaron v. U. S., 155 Fed. 833.

238-99 Yardley v. S., 50 Tex. Cr. 644, 100 S. W. 399.

239-8 Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808; Kissack v. Bourke, 132 Ill. App. 360; In re Simmons, 48 Misc. 484, 96 N. Y. S. 1103; S. v. Falsetta, 43 Wash. 159, 86 P. 168.

240-10 Foreman v. Archer, 130 Ia. 49, 106 N. W. 372; Rester v. Powell, 120 La. 406, 45 S. 372; In re Eckler, 110 N. Y. S. 650.

241-11 Under the Minnesota statute. — Hillary v. R. Co. (Minn.), 116 N. W. 933.

242-15 Atlantic etc. R. Co. v. C. Co. (N. C.), 61 S. E. 185.

242-16 In re Ruos, 159 Fed. 252.

244-21 Communications concerning personal matters. — Herrin v. Abbe (Fla.), 46 S. 183.

245-25 In re Huffman (Mo. App.), 111 S. W. 848.

247-31 Champion v. McCarthy, 228 Ill. 87, 81 N. E. 808; Mueller v. Batcheler, 131 Ia. 650, 109 N. W. 186; O'Connor v. Padget (Neb.), 116 N. W. 1131.

248-32 Gick v. Stumpf, 110 N. Y. S. 712.

Statement of grantor to attorney drawing deed. — Fox v. Spears, 78 Ark. 71, 93 S. W. 560.

267-86 Missouri etc. R. Co. v. Williams (Tex. Civ.), 96 S. W. 1087.

268-94 McCune v. Scott, 18 Pa. Super. 263.

271-12 Myers v. Kenyon (Cal. App.), 93 P. 888; Bankers etc. Assn. v. Nachod, 120 App. Div. 732, 105 N. Y. S. 773.

279-59 May be required to identify document he witnessed. In re Ruos, 159 Fed. 252.

285-70 Nixon v. Goodwin, 3 Cal. App. 358, 85 P. 169.

285-76 Fact that advice was given may be shown by attorney. Nixon v. Goodwin, supra.

286-77 Bischoff v. C., 29 Ky. L. R. 770, 96 S. W. 538.

287-81 In re Jones (Del.), 70 A. 15.

288-87 Dukes v. Davis, 30 Ky. L. R. 1348, 101 S. W. 390.

288-89 Temple v. Phelps, 193 Mass. 297, 79 N. E. 482.

291-2 Hardy v. Martin, 150 Cal.

341, 89 P. 111; Boyle v. Robinson, 129 Wis. 567, 109 N. W. 623.

292-3 Strickland v. Mills, 74 S. C. 16, 54 S. E. 220.

294-11 Mitchell v. Bromberger, 2 Nev. 345, 100 Am. Dec. 550; Stern v. Daniel, 47 Wash. 96, 91 P. 552.

294-12 Mueller v. Batcheler, 131 Ia. 650, 109 N. W. 186; McCune v. Scott, 18 Pa. Super. 263; Swayne v. Swayne, 19 Pa. Super. 160; Kirchner v. Smith, 61 W. Va. 434, 58 S. E. 614.

297-20 McCune v. Scott, supra; Swayne v. Swayne, supra; Kirchner v. Smith, supra.

298-23 In re Young, 33 Utah 382, 94 P. 731.

Contents of a former will. — In re Young, supra.

299-24 In re Domminci, 151 Cal. 181, 90 P. 448 (construction of will); Doherty v. O'Callaghan, 157 Mass. 90, 31 N. E. 726, 34 Am. St. 258, 17 L. R. A. 188.

308-50 Supplee v. Hall, 75 Conn. 17, 52 A. 407.

316-63 In re Burnette, 73 Kan. 609, 85 P. 575; In re Elliott, 73 Kan. 151, 84 P. 750.

317-66 In re Green, 102 Me. 455, 67 A. 317.

319-75 Gick v. Stumpf, 110 N. Y. S. 712.

320-78 In re Burnette, 73 Kan. 609, 85 P. 575; In re Elliott, 73 Kan. 151, 84 P. 750; Pinson v. Campbell, 124 Mo. App. 260, 101 S. W. 621.

321-86 Ehrhardt v. Stevenson, 128 Mo. App. 476, 106 S. W. 1118.

324-94 Testimony compulsorily given before a grand jury. — In re Cravath, 58 Misc. 154, 110 N. Y. S. 454.

327-12 Waiver may be withdrawn. — Herpolsheimer v. Ins. Co. (Neb.), 113 N. W. 152.

330-31 S. v. Louanis, 79 Vt. 463, 65 A. 532.

349-31 In re Reid, 155 Fed. 933.

355-66 See 356-72.

In Canada. — Elmsley v. Miller, 10 Ont. L. R. (Can.) 343.

The rule in England. — Southwark W. Co. v. Quick, (1878) 3 Q. B. D. 315; Learoyd v. Banking Co., (1893) 1 Ch. 686.

356-72 Virginia Co. v. Knight, 106 Va. 674, 56 S. E. 725.

Reports made by employes. — Ex parte Schoepf, 74 Ohio St. 1, 77 N. E. 276; Cully v. R. Co., 35 Wash. 241, 77 P. 202; Davenport v. R. Co., 166 Pa. 480, 31 A. 245. See also supra, "DEPOSITIONS," 420-95, 421-99.

In England. — Collins v. London Co., 68 L. T. (Eng.) 831.

357-77 Ex parte Parker, 74 S. C. 466, 55 S. E. 122.

358-82 Interstate Com. v. Harriman, 157 Fed. 432; In re Edris, 25 Pa. C. C. 377.

PUBLIC LANDS [Vol. 10.]

368-1 Nurnberger v. U. S., 156 Fed. 721; Van Gesner v. U. S., 153 Fed. 46, 82 C. C. A. 180.

368-5 Stanford v. Bailey, 122 Ga. 404, 50 S. E. 161.

368-8 Houseman v. International Co., 214 Pa. 552, 64 A. 379; Sanford v. Terrell (Tex.), 87 S. W. 655; Hood v. Pursley, 39 Tex. Civ. 475, 87 S. W. 870. See 411-93.

369-14 U. S. v. Laam, 149 Fed. 581; Rogers v. Clark (Minn.), 116 N. W. 739; Warner Co. v. Morrow, 48 Or. 258, 86 P. 369.

370-17 Bradshaw v. Edelen, 194 Mo. 640, 92 S. W. 691; Warner Co. v. Morrow, supra.

371-20 Warner Co. v. Morrow, supra.

371-25 Is fair evidence of title. Covington v. Berry, 76 Ark. 460, 88 S. W. 1005.

371-26 Demars v. Hickey, 13 Wyo. 371, 80 P. 521.

372-27 Smyth v. Saigling (Tex. Civ.), 110 S. W. 550; Demars v. Hickey, supra.

372-29 Rogers v. Clark Co. (Minn.), 116 N. W. 739.

373-32 Kerns v. Lee, 142 Fed. 985.

374-35 Oregon etc. R. Co. v. Stalker (Idaho), 94 P. 56.

376-44 Conflicting presumptions. Ayers v. U. S., 42 Ct. Cl. 385.

376-45 U. S. v. Collett, 159 Fed. 932.

378-48 Recital in a patent. — Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340.

378-51 Register's certificate. — Ayers v. U. S., 42 Ct. Cl. 385.

381-69 Receiver's receipt. — Thompson v. Basler, 148 Cal. 646, 84 P. 161.

384-75 Gertgens v. O'Connor, 191 U. S. 237; Harvey v. Hollis, 160 Fed. 531; McKenna v. Atherton, 160 Fed. 547; Ayers v. U. S., 42 Ct. Cl. 385; Old Dominion Copper Co. v. Haverly (Ariz.), 90 P. 333; White v. Whitcomb, 13 Idaho, 490, 90 P. 1080; Barringer v. Davis (Ia.), 112 N. W. 208; Rogers v. Clark (Minn.), 116 N. W. 739; Lamson v. Coffin, 102 Minn. 493, 114 N. W. 248; Kennedy v. Dickie, 34 Mont. 205, 85 P. 982; Greenameyer v. Coate, 18 Okla. 160, 88 P. 1054; Parryman v. Cunningham, 16 Okla. 94, 82 P. 822; Smith v. McClain, 39 Tex. Civ. 152, 87 S. W. 212.

Recitals in decisions. — Parryman v. Cunningham, supra.

Decision not conclusive (Osborn v. Froyseth (Minn.), 116 N. W. 1113); nor as to matters of law generally. McKenna v. Atherton, 160 Fed. 547; Ayers v. U. S., 42 Ct. Cl. 385.

385-76 Knapp v. Patterson (Tex. Civ.), 87 S. W. 391. See Old Dominion Copper Co. v. Haverly (Ariz.), 90 P. 333, and cases cited.

Jurisdiction must be shown. — Pacific Stock Co. v. Isaacs (Or.), 96 P. 460.

385-79 See James v. Germania Co., 107 Fed. 597, 46 C. C. A. 476; LeMarchel v. Teagarden, 152 Fed. 662; Smith v. McClain, 39 Tex. Civ. 152, 87 S. W. 212.

385-81 See Osborn v. Froyseth (Minn.), 116 N. W. 1113; Kennedy v. Dickie, 34 Mont. 205, 85 P. 982; Cagle v. Dunham, 14 Okla. 610, 78 P. 561; Greenameyer v. Coate, 18 Okla. 160, 88 P. 1054.

Ex parte hearing. — Miller v. Margerie, 149 Fed. 694, 79 C. C. A. 382.

386-82 Kennedy v. Dickie, 34 Mont. 205, 85 P. 982.

386-84 Small v. Rakestraw, 196 U. S. 403.

Must be pleaded. — Pacific Stock Co. v. Isaacs (Or.), 96 P. 460.

387-85 Howey v. Holles, 160 Fed. 531.

387-86 **Townsite trustee** in Alaska is within the principle. Miller v. Margerie, 149 Fed. 694, 79 C. C. A. 382.

388-87 **Register's tract book.** — Nurnberger v. U. S., 156 Fed. 721.

Abbreviations in register's tract book may be explained. Nurnberger v. U. S., supra. See "Abbreviations," Vol. 1, p. 23, and ante.

388-88 **Will not be overturned** after the lapse of fifty years. LeMarchel v. Teagarden, 152 Fed. 662.

In Texas. — Smithers v. Lowrance, 100 Tex. 77, 93 S. W. 1064; Wilkins v. Clawson (Tex. Civ.), 110 S. W. 103.

388-90 Howard v. Perrin, 200 U. S. 71; Boynton v. Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20 (under the statute copies are as effective as the originals); Pardee v. Schanzlin, 3 Cal. App. 597, 86 P. 812; Smithers v. Lowrance, 100 Tex. 77, 93 S. W. 1064; Sylvester v. S., 46 Wash. 585, 91 P. 15.

389-91 Howdashell v. Krenning, 103 Va. 30, 48 S. E. 491; Virginia Co. v. Keystone Co., 101 Va. 723, 45 S. E. 291. See 408-82.

Loss of original patent or inability to produce it must be shown. Covington v. Berry, 76 Ark. 460, 88 S. W. 1005; Boynton v. Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20.

390-94 **Certificate of the land commissioner.** — Smithers v. Lowrance, 100 Tex. 77, 93 S. W. 1064.

391-95 Trimble v. Burroughs (Tex. Civ.), 95 S. W. 614.

391-98 Flynt v. Taylor (Tex. Civ.), 91 S. W. 864.

392-2 Stewart v. Lead Belt Co., 200 Mo. 281, 98 S. W. 767.

392-3 Pacific Stock Co. v. Isaacs (Or.), 96 P. 460.

394-7 **Official survey** is not open to collateral attack. Kneeland v. Korter, 40 Wash. 359, 82 P. 608.

Map and field notes. — Goodson v. Fitzgerald, 40 Tex. Civ. 619, 90 S. W. 898.

394-8 Bradshaw v. Edelen, 194 Mo. 640, 92 S. W. 691.

394-9 U. S. v. Mfg. Co., 196 U. S. 573.

395-13 **A notice card.** — Slaughter v. Cooper (Tex. Civ.), 107 S. W. 897.

396-19 **Parol proof.** — P. v. Christian, 144 Mich. 247, 107 N. W. 919.

397-27 **Indefinite description.** Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340.

400-39 **Evidence of cancellation.** Smithers v. Lowrance, 100 Tex. 77, 93 S. W. 1064.

400-44 Eastern Co. v. Brosnan, 147 Fed. 807; Johnson v. S. Co., 2 Alaska 224; North Hempstead v. Eldridge, 111 App. Div. 789, 98 N. Y. S. 157.

401-48 See McCorkell v. Herron, 128 Ia. 324, 103 N. W. 988.

Absence enforced by the law does not show abandonment. Huffman v. Smyth, 47 Or. 573, 84 P. 80. See "ABANDONMENT," Vol. 1, p. 1, and ante, p. 1.

401-49 Barringer v. Davis (Ia.), 112 N. W. 208.

402-53 Iowa R. L. Co. v. Fehring, 126 Ia. 1, 101 N. W. 120.

403-56 State of Illinois, 30 L. D. 128; S. v. R. Co., 30 L. D. 120.

A state patent to swamp land. Moulierre v. Coco, 116 La. 845, 41 S. 113.

403-57 White v. L. Co., 100 Minn. 16, 110 N. W. 371.

404-60 See Boyle v. S., 33 L. D. 56.

A federal patent. — Kerns v. Lee, 142 Fed. 985.

405-62 Robert L. Sheppard, 32 L. D. 474.

405-63 Gray Eagle Oil Co. v. Clarke, 31 L. D. 303.

405-69 Chauvin v. Com., 121 La. ——, 46 S. 38, *cit.* Rogers v. Emigrant Co., 164 U. S. 559; R. Co. v. Tibbs, 112 La. 51, 36 S. 223.

405-70 Boyle v. S., 33 L. D. 56.

406-73 Boyle v. S., supra; Mary E. Coffin, 32 L. D. 124; State of Minnesota, 32 L. D. 65; State of Illinois, 30 L. D. 128; Cook v. S., 33 L. D. 47.

407-75 State of Illinois, 30 L. D. 128.

407-78 School Land, 31 L. D. 212, *cit.* Barden v. R. Co., 154 U. S. 288, 320; Winscott v. R. Co., 17 L. D. 274; Aspen Con. Min. Co. v. Williams, 27 L. D. 1; Magruder v. R. Co., 28 L. D. 174.

408-82 Houseman v. International Co., 214 Pa. 552, 64 A. 379; Smithers v. Lowrance, 100 Tex. 77, 93 S. W. 1064; Holt v. Cave, 38 Tex. Civ. 62, 85 S. W. 309.

Absence of a seal immaterial. — San Augustine County v. Madden, 39 Tex. Civ. 257, 87 S. W. 1056. See 389-91.

Fraud in obtaining a patent will not be presumed. Waring v. Loomis (Wash.), 93 P. 1088; Henshall v. Marsh, 151 Cal. 289, 90 P. 693.

409-83 Bealmear v. Hutchins, 148 Fed. 545, 78 C. C. A. 231; Worcester v. Kitts (Cal. App.), 96 P. 325; Houston v. S., 124 Ga. 417, 52 S. E. 757; Witt v. Middleton, 27 Ky. L. R. 831, 86 S. W. 968; Chauvin v. Com., 121 La. ——, 46 S. 38; Frellsen v. Crandell, 120 La. 712, 45 S. 558.

Recitals in patents are presumed to be true. — Boynton v. Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20; Warner Valley Co. v. Morrow, 48 Or. 258, 86 P. 369.

410-87 See Haynes v. S., 100 Tex. 426, 100 S. W. 912.

411-92 Bealmear v. Hutchins, 134 Fed. 257; Fuller v. Keesee, 31 Ky. L. R. 1099, 104 S. W. 700; Morgan v. Armstrong (Tex. Civ.), 102 S. W. 1164.

In North Carolina. — Walker v. Carpenter, 144 N. C. 674, 57 S. E. 461; Bowser v. Westcott, 145 N. C. 56, 58 S. E. 748 (two judges dissented). See Lumber Co. v. Coffey, 144 N. C. 560, 57 S. E. 344; Smithers v. Lowrance, 100 Tex. 77, 93 S. W. 1064; Morgan v. Armstrong (Tex. Civ.), 102 S. W. 1164; S. v. Jadwin (Tex. Civ.), 85 S. W. 490.

411-95 In Texas. — Williams v. Barnes (Tex. Civ.), 111 S. W. 432, doubting Lamkin v. Matsler, 32 Tex. Civ. 218, 73 S. W. 970, and Bumpass v. McLendon (Tex. Civ.), 101 S. W. 491. See Bieber v. Lambert (Cal.), 93 P. 94.

411-97 Corrigan v. Fitzsimmons, 97 Tex. 595, 80 S. W. 989; Stolley v. Lilwall, 38 Tex. Civ. 48, 84 S. W. 689. But see Knippa v. Brown (Tex. Civ.), 82 S. W. 658.

413-7 Possession under a sale. Jones v. Wright, 98 Tex. 457, 84 S. W. 1053; Williams v. Barnes (Tex. Civ.), 111 S. W. 432.

413-8 An abandoned survey. Fuller v. Keesee, 31 Ky. L. R. 1099, 104 S. W. 700.

414-13 Wilkins v. Clawson (Tex. Civ.), 110 S. W. 103.

415-15 Frasier v. Gibson, 140 N. C. 272, 52 S. E. 1035.

Corrections in the original field notes. Ward v. Forrester (Tex. Civ.), 87 S. W. 751.

415-16 Entries made in a surveyor's book. — Asher v. Brashear, 28 Ky. L. R. 1012, 90 S. W. 1060.

415-19 Waiver of rule concerning surveys not shown. General Propri-

etors v. Force (N. J. Eq.), 68 A. 914.
417-33 Stanford v. Bailey, 122 Ga. 404, 50 S. E. 161.
419-41 Jones v. Wright (Tex. Civ.), 92 S. W. 1010.
419-45 Phares v. Gleason, 73 Kan. 604, 85 P. 572; Spencer v. Smith, 74 Kan. 142, 85 P. 573; True v. Brandt, 72 Kan. 502, 83 P. 826; Perry v. Rutherford, 39 Tex. Civ. 477, 87 S. W. 1054.
420-46 Date of deed from state. Patton v. Terrell (Tex.), 105 S. W. 1115.
A lease of school land. — Trimble v. Burroughs (Tex. Civ.), 95 S. W. 614.
Cancellation of lease of public lands. Bradford v. Brown, 37 Tex. Civ. 323, 84 S. W. 392; Trimble v. Burroughs (Tex. Civ.), 95 S. W. 614.
420-47 Settlement shown. — Smith v. Florence (Tex. Civ.), 96 S. W. 1096.
420-50 Smith v. Hughes, 39 Tex. Civ. 113, 86 S. W. 936.
420-51 The invalidity of a prior entry. — Frasier v. Gibson, 140 N. C. 272, 52 S. E. 1035.
Priority of settlement. — Christisen v. Bartlett (Kan.), 95 P. 1130.
423-59 Surghemor v. Taliaferro (Tex. Civ.), 98 S. W. 648.
423-60 Recitals in ancient deeds. S. v. Bruni, 37 Tex. Civ. 2, 83 S. W. 209, and cases cited. Writ of error denied by supreme court.
424-62 Grant by the King of Spain shown. S. v. Ortiz, 99 Tex. 475, 90 S. W. 1084.
427-80 Herrick v. Boquillas, 200 U. S. 96.
436-24 Character of adjacent land. — U. S. v. Basic Co., 121 Fed. 504, 57 C. C. A. 624; U. S. v. Rossi, 133 Fed. 380, 66 C. C. A. 442; Lynch v. U. S., 138 Fed. 535, 71 C. C. A. 59.
An expert miner may give his opinion of the value of land for placer mining purposes. Anderson v. U. S., 152 Fed. 87, 81 C. C. A. 311; Lynch v. U. S., 138 Fed. 535, 71 C. C. A. 59.
436-25 Lynch v. U. S., supra; Anderson v. U. S., 152 Fed. 87, 81 C. C. A. 311.
436-29 U. S. v. Homestake Co., 117 Fed. 481, 54 C. C. A. 303; S. v. Shevlin-C. Co., 102 Minn. 470, 113 N. W. 634.
Defendant's good faith. — Anderson v. U. S., 152 Fed. 87, 81 C. C. A. 311.
437-32 Carroll v. U. S., 154 Fed. 425; Krause v. U. S., 147 Fed. 442, 78 C. C. A. 642.
437-33 Altenberg v. Fogarty, 31 L. D. 112.
439-44 Evans v. Dawes, 35 L. D. 332.
442-53 Harkrader v. Goldstein, 31 L. D. 87; Purtle v. Steffee, 31 L. D. 400.
443-54 Fred Lidgett, 35 L. D. 371.
443-61 Long period of abandonment. — Chesser v. O'Neil, 30 L. D. 294.
444-65 Proof of service of notice by mail. — Schmiedt v. Enderson, 35 L. D. 307.
444-67 Judgment in divorce suit. — Jacoby v. Kubal, 31 L. D. 382.
445-69 McKeand v. Waring, 35 L. D. 147.
Judicial notice. — Hallquist v. Cotton, 35 L. D. 625.
448-89 State of Illinois, 30 L. D. 128.

PUBLIC POLICY [Vol. 10.]

Burden of proof, 452-6.

452-6 A party who asserts that a particular contract is against public policy has the burden of proving the same. James Quirk Mill. Co. v. R. Co., 98 Minn 22, 107 N. W. 742.

QUO WARRANTO [Vol. 10.]

454-1 P. v. Stratton, 33 Colo. 464, 81 P. 245; C. v. Heller, 31 Pa. C. C. 267.
458-9 S. v. R. Co. (Neb.), 114 N. W. 422.

RAILROADS [Vol. 10.]

Indictment for running trains at unsafe rate of speed, 576-94.

467-1 St. Louis etc. R. Co. v. Chapman, 140 Fed. 129; Seaboard etc. R. Co. v. Smith, 53 Fla. 375, 43 S. 235. *Contra,* St. Louis etc. R. Co. v. Standifer, 81 Ark. 275, 99 S. W. 81; St. Louis R. Co. v. Gra-

ham, 83 Ark. 61, 102 S. W. 700; Gainsville etc. R. Co. v. Austin, 127 Ga. 120, 56 S. E. 254.

In Mississippi and Georgia statutes make an injury inflicted by the running of trains prima facie evidence of negligence. See Combs v. R. Co. (Miss.), 46 S. 168; Bryson v. R. Co., 3 Ga. App. 407, 59 S. E. 1124; Harden v. R. Co., 3 Ga. App. 344, 59 S. E. 1122.

467-2 Virginia etc. R. Co. v. Hawk, 160 Fed. 348; Southern R. Co. v. Stewart (Ala.), 45 S. 51; Jones v. R. Co., 121 La. ——, 46 S. 61; Johnson v. P. Co. (Mass.), 83 N. E. 874; Duffy v. R. Co., 144 N. C. 26, 56 S. E. 557; Harbert v. R. Co., 78 S. C. 537, 59 S. E. 644; Whitney v. R. Co. (Tex. Civ.), 110 S. W. 70.

468-3 Simkoff v. R. Co., 190 N. Y. 256, 83 N. E. 15, 118 App. Div. 918, 103 N. Y. S. 1142; Kearns v. R. Co., 139 N. C. 470, 52 S. E. 131; Kunz v. R. & N. Co. (Or.), 93 P. 141; Weaver v. R. Co., 75 S. C. 49, 56 S. E. 657; Rogers v. R. Co., 32 Utah 367, 90 P. 1075.

468-5 Starett v. R. Co. (Ky.), 110 S. W. 282.

468-6 Wabash R. Co. v. De Tar, 141 Fed. 932, 73 C. C. A. 166; Atchison etc. R. Co. v. Baumgartner, 74 Kan. 148, 85 P. 822; Missouri etc. R. Co. v. Wall (Tex. Civ.), 110 S. W. 453; Rogers v. R. Co., 32 Utah 367, 90 P. 1075.

Weight of presumption. — Wabash R. Co. v. De Tar, 141 Fed. 932, 73 C. C. A. 166.

468-7 Choctaw etc. R. Co. v. Baskins, 78 Ark. 355, 93 S. W. 757; Wade v. R. Co., 220 Pa. 578, 69 A. 1112; Schwarz v. R. Co., 218 Pa. 187, 67 A. 213; Hanna v. R. Co., 213 Pa. 157, 62 A. 643; Bracken v. R. Co., 32 Pa. Super. 22.

468-8 Rollins v. R. Co., 139 Fed. 639, 71 C. C. A. 615; Bressler v. R. Co., 74 Kan. 256, 86 P. 472; Southern R. Co. v. Hansbrough, 107 Va. 733, 60 S. E. 58.

469-9 Wabash R. Co. v. De Tar, 141 Fed. 932, 73 C. C. A. 166; St. Louis etc. R. Co. v. Chapman, 140 Fed. 129; Mockowik v. R. Co., 196 Mo. 550, 94 S. W. 256; Schmidt v. R. Co., 191 Mo. 215, 90 S. W. 136; Wade v. R. Co., 220 Pa. 578, 69 A. 1112; Southern R. Co. v. Hansbrough, 107 Va. 733, 60 S. E. 58.

Presumption of negligence arises when it is conclusively shown that the colliding train was plainly visible to the injured person and he had opportunity to avoid it. Carlson v. R. Co., 96 Minn. 504, 105 N. W. 555.

469-10 Grand Trunk R. Co. v. Hainer, 36 Can. Sup. 180; St. Louis R. Co. v. Sparks, 81 Ark. 187, 99 S. W. 73; Hutson v. R. Co., 150 Cal. 701, 89 P. 1093 (the words "to your satisfaction" should not be used in the instructions); Central R. Co. v. North, 129 Ga. 106, 58 S. E. 647; Lowden v. Pennsylvania Co. (Ind. App.), 82 N. E. 941 (under laws of 1899, ch. 41); Warmsley v. R. Co. (Ind. App.), 82 N. E. 490; Hollins v. R. Co., 119 La. 418, 44 S. 159; Kelsall v. R. Co., 196 Mass. 554, 82 N. E. 674; Yazoo etc. R. Co. v. Landrum, 89 Miss. 399, 42 S. 675; Slotler v. R. Co., 200 Mo. 107, 98 S. W. 509; Boyd v. R. Co. (Tex.), 108 S. W. 813; Ft. Worth etc. R. Co. v. Morris (Tex. Civ.), 101 S. W. 1038.

470-11 Rich v. R. Co., 149 Fed. 79, 78 C. C. A. 663.

470-12 Chicago etc R. Co. v. Gill, 132 Ill. App. 310; Rietveld v. R. Co., 129 Ia. 249, 105 N. W. 515; Hamblin v. R. Co., 195 Mass. 555, 81 N. E. 258; Wright v. R. Co., 74 N. H. 128, 65 A. 687; Shum v. R. Co. (Vt.), 69 A. 945 (deaf person).

473-15 Elgin etc. R. Co. v. Hoadley, 220 Ill. 462, 77 N. E. 151; Davis v. R. Co., 30 Ky. L. R. 172, 946, 97 S. W. 1122, 99 S. W. 930; Louisville etc. R. Co. v. Taylor, 31 Ky. L. R. 1142, 104 S. W. 776.

474-20 St. Louis etc. R. Co. v. Hitt, 76 Ark. 227, 88 S. W. 908, 990; Minot v. R. Co., 74 N. H. 230, 66 A. 825.

475-21 Banderob v. R. Co., 133 Wis. 249, 113 N. W. 738.

476-23 Louisville etc. R. Co. v. Taylor, supra; Southern R. Co. v. Winchester, 32 Ky. L. R. 19, 105 S. W. 167; Gulf etc. R. Co. v. Garrett (Tex. Civ.), 99 S. W. 162.

476-25 Such evidence probably admissible. — McDermott v. Severe, 25 App. D. C. 276, *cit.* Wabash R. Co. v. McDaniels, 107 U. S. 454; Texas & P. R. Co. v. Behymer, 189 U. S. 468; Grand Trunk R. Co. v. Richardson, 91 U. S. 454; Weaver v. R. Co., 3 App. D. C. 436, 448.

478-32 Number of persons killed

at the crossing in a given time cannot be shown. Tiffin v. R. Co., 78 Ark. 55, 93 S. W. 564.

478-33 Missouri etc. R. Co. v. Nesbit (Tex. Civ.), 97 S. W. 825.

478-34 Southern R. Co. v. Hobbs (Ala.), 43 S. 844; Matteson v. S. P. Co., 6 Cal. App. 318, 92 P. 101 (rehearing denied by supreme court); Hamblin v. R. Co., 195 Mass. 555, 81 N. E. 258; Stotler v. R. Co., 204 Mo. 619, 103 S. W. 1; Weiss v. R. Co. (N. J.), 69 A. 1087; Rogers v. R. Co., 32 Utah 367, 90 P. 1075; Teakle v. R. Co., 32 Utah 276, 90 P. 402.

478-35 Southern R. Co. v. Stutts, 144 Fed. 948, 75 C. C. A. 588; Central R. Co. v. Hyatt (Ala.), 43 S. 867; Kansas etc. R. Co. v. Wayt, 80 Ark. 382, 97 S. W. 656; Harrison v. R. Co. (Miss.), 46 S. 408; Combs v. R. Co. (Miss.), 46 S. 168; Mann v. R. Co., 123 Mo. App. 486, 100 S. W. 566; Duggan v. R. Co., 74 N. H. 250, 66 A. 829; Houston etc. R. Co. v. Finn (Tex. Civ.), 107 S. W. 94, *aff.* 109 S. W. 918.

479-36 Central R. Co. v. Hyatt (Ala.), 43 S. 867; Annapolis etc. R. Co. v. S., 104 Md. 659, 65 A. 434; Porter v. R. Co., 199 Mo. 82, 97 S. W. 880; International etc. R. Co. v. Edwards, 100 Tex. 22, 93 S. W. 106.

479-38 International etc. R. Co. v. Munn (Tex. Civ.), 102 S. W. 442; Teakle v. R. Co., 32 Utah 276, 90 P. 402.

479-39 Combs v. R. Co. (Miss.), 46 S. 168; Missouri etc. R. Co. v. Nesbit (Tex. Civ.), 97 S. W. 825; Houston etc. R. Co. v. Ramsey (Tex. Civ.), 97 S. W. 1067.

479-40 Houston etc. R. Co. v. O'Donnell, 99 Tex. 636, 92 S. W. 409.

479-41 See Teakle v. R. Co., 32 Utah 276, 90 P. 402.

480-42 **Experiment.** — Harrison v. R. Co. (Miss.), 46 S. 408; Wheeling etc. R. Co. v. Parker, 9 Ohio C. C. (N. S.) 28, 29 Ohio C. C. 1. See Schweinfurth v. R. Co., 60 Ohio St. 215, 54 N. E. 89. See supra, "EXPERIMENTS."

480-43 Lynch v. R. Co., 208 Mo. 1, 106 S. W. 68.

480-46 Hale v. R. Co., 190 Mass. 84, 76 N. E. 656; Mann v. R. Co., 123 Mo. App. 486, 100 S. W. 566; International etc. R. Co. v. Munn (Tex. Civ.), 102 S. W. 442.

Appliances in use. — Aurora etc. R. Co. v. Gary, 123 Ill. App. 163.

481-47 **Physical incapacity** of defendant's employes may be shown. Missouri etc. R. Co. v. Nesbit (Tex. Civ.), 97 S. W. 825.

481-50 Horton v. R. Co. (Tex. Civ.), 103 S. W. 467.

482-51 Matteson v. S. P. Co., 6 Cal. App. 318, 92 P. 101 (rehearing denied by supreme court); Stotler v. R. Co., 204 Mo. 619, 103 S. W. 1; Kunz v. R. & N. Co. (Or.), 93 P. 141; Horton v. R. Co. (Tex. Civ.), 103 S. W. 467. See 485-70.

Irregular time of train. — Wrightsville etc. R. Co. v. Gornto, 129 Ga. 204, 58 S. E. 769.

482-52 Chesapeake etc. R. Co. v. Vaughn, 30 Ky. L. R. 215, 97 S. W. 774; Lang v. R. Co., 115 Mo. App. 489, 91 S. W. 1012.

482-53 Louisville etc. R. Co. v. Davis, 29 Ky. L. R. 846, 96 S. W. 533; Southern R. Co. v. Stockdon, 106 Va. 693, 56 S. E. 713. See Hutson v. R. Co., 150 Cal. 701, 89 P. 1093 (*cit.* Erie R. Co. v. Kane, 118 Fed. 223, 55 C. C. A. 129; R. Co. v. Honston, 95 U. S. 697); Stotler v. R. Co., 204 Mo. 619, 103 S. W. 1.

482-56 Belt R. Co. v. Mamthei, 116 Ill. App. 330; Louisville & N. R. Co. v. Onan (Ky.), 110 S. W. 380; Haley v. R. Co., 197 Mo. 15, 93 S. W. 1120.

483-57 Stotler v. R. Co., 204 Mo. 619, 103 S. W. 1.

483-58 McNamara v. R. Co., 126 Mo. App. 152, 103 S. W. 1093.

483-60 Chicago etc. R. Co. v. Bunch, 82 Ark. 522, 102 S. W. 369.

483-63 Chicago City R. Co. v. Rohe, 118 Ill. App. 322; Rietveld v. R. Co., 129 Ia. 249, 105 N. W. 515; Mockowik v. R. Co., 196 Mo. 550, 94 S. W. 256.

484-64 Louisville & N. R. Co. v. Taylor, 31 Ky. L. R. 1142, 104 S. W. 776; Stotler v. R. Co., 204 Mo. 619, 103 S. W. 1.

484-67 But see Jackson v. R. Co., 32 Can. Sup. 245.

485-69 Graves v. R. Co. (N. J.), 69 A. 971.

Negative testimony. — Stotler v. R. Co., supra.

485-70 St. Louis etc. R. Co. v. Sparks, 81 Ark. 187, 99 S. W. 73; Louisville & N. R. Co. v. Taylor, 31

Ky. L. R. 1142, 104 S. W. 776; Maysville etc. R. Co. v. Willis, 31 Ky. L. R. 1249, 104 S. W. 1016.

Plaintiff's habitual negligence in approaching the crossing where the injury occurred is incompetent except to show his familiarity with it. Wheeling etc. R. Co. v. Parker, 9 Ohio C. C. (N. S.) 28, 29 Ohio C. C. 1; Baltimore & O. R. Co. v. Van Horn, 21 Ohio C. C. 337.

487-74 See Texarkana etc. R. Co. v. Frugia (Tex. Civ.), 95 S. W. 563 (writ of error denied by supreme court).

Evidence of plaintiff's drunkenness on other occasions is immaterial. Starett v. R. Co. (Ky.), 110 S. W. 282.

487-75 Chicago & A. R. Co. v. Johnson (Tex. Civ.), 111 S. W. 758.

488-78 See Chesapeake & O. R. Co. v. Vaughn, 30 Ky. L. R. 215, 97 S. W. 774; Metzler v. R. Co., 28 Pa. Super. 180.

488-80 Louisville & N. R. Co. v. Hubbard, 148 Ala. 45, 41 S. 814 (erection of signposts). See Metzler v. R. Co., 28 Pa. Super. 180.

488-81 Atchison etc. R. Co. v. Pitts, 123 Ill. App. 607.

488-82 Thomasson v. R. Co., 72 S. C. 1, 51 S. E. 443; Weaver v. R. Co., 75 S. C. 49, 56 S. E. 657.

489-86 Delaware & H. Co. v. Larnard, 161 Fed. 520; Southern R. Co. v. Douglass, 144 Ala. 351, 39 S. 268; Charleston etc. R. Co. v. Camp, 3 Ga. App. 232, 59 S. E. 710 (crossing blocked; evidence part of res gestae); Aurora etc. R. Co. v. Gary, 123 Ill. App. 163; Chicago etc. R. Co. v. Hirsch, 132 Ill. App. 656; Rietveld v. R. Co., 129 Ia. 249, 105 N. W. 515; Cincinnati etc. R. Co. v. Champ, 31 Ky. L. R. 1054, 104 S. W. 988; Harbert v. R. Co., 78 S. C. 537, 59 S. E. 644.

Abandonment of street by defendant prior to the injury may be shown. Gulf etc. R. Co. v. Garrett (Tex. Civ.), 99 S. W. 162.

Non-prosecution of defendant for obstructing street cannot be shown. Gulf etc. R. Co. v. Garrett, supra.

Time required to pass over a crossing. — Stokes v. R. Co., 104 Va. 817, 52 S. E. 855.

490-87 Rich v. R. Co., 149 Fed. 79, 78 C. C. A. 663 (absence of light on tender); Matteson v. S. P. Co., 6 Cal. App. 318, 92 P. 101 (rehearing denied by supreme court); Southern R. Co. v. Goddard, 28 Ky. L. R. 523, 89 S. W. 675; Banderob v. R. Co., 133 Wis. 249, 113 N. W. 738.

490-89 St. Louis etc. R. Co. v. Graham, 83 Ark. 61, 102 S. W. 700.

490-91 Chesapeake & O. R. Co. v. Wilson, 31 Ky L. R. 500, 102 S. W. 810; Lang v. R. Co., 115 Mo. App. 489, 91 S. W. 1012; Stokes v. R. Co., 104 Va. 817, 52 S. E. 855. See Houston etc. R. Co. v. O'Donnell, 99 Tex. 636, 92 S. W. 409.

491-92 Louisville & N. R. Co. v. Hubbard, 148 Ala. 45, 41 S. 814; Cherry v. R. Co., 121 La. —, 46 S. 596; Wheeling etc. R. Co. v. Parker, 9 Ohio C. C. (N. S.) 28, 29 Ohio C. C. 1 (records of company competent for plaintiff).

491-95 Southern R. Co. v. Weatherlow (Ala.), 44 S. 1019; Tiffin v. R. Co., 78 Ark. 55, 93 S. W. 564; Wamsley v. R. Co. (Ind. App.), 82 N. E. 490; Louisville & N. R. Co. v. Berry (Ky.), 111 S. W. 370; Davis v. R. Co., 34 Pa. Super. 388; Metzler v. R. Co., 28 Pa. Super. 180.

492-96 Tiffin v. R. Co., 78 Ark. 55, 93 S. W. 564.

492-1 Chicago etc. R. Co. v. Johnson (Tex. Civ.), 111 S. W. 758.

492-2 Louisville & N. R. Co. v. Berry (Ky.), 111 S. W. 370.

492-3 Cincinnati etc. R. Co. v. Champ, 31 Ky. L. R. 1054, 104 S. W. 988; Louisville & N. R. Co. v. Taylor, 31 Ky. L. R. 1142, 104 S. W. 776; Cherry v. R. Co., 121 La. ——, 46 S. 596; Line v. R. Co., 143 Mich. 163, 106 N. W. 719; Haley v. R. Co., 197 Mo. 15, 93 S. W. 1120 (unsafe rate of speed not excused because of existence of steep grade beyond); Mann v. R. Co., 123 Mo. App. 486, 100 S. W. 566; St. Louis etc. R. Co. v. Summers (Tex. Civ.), 111 S. W. 211. See Hartman v. R. Co., 132 Ia. 582, 110 N. W. 10; Schwarz v. R. Co., 218 Pa. 187, 67 A. 213.

493-4 Defendant's time table. Schwarz v. R. Co., 218 Pa. 187, 67 A. 213.

The nature of the injuries sustained. Wheeling etc. R. Co. v. Parker, 9 Ohio C. C. (N. S.) 28, 29 Ohio C. C. 1.

493-5 Porter v. Buckley, 147 Fed. 140, 78 C. C. A. 138; Little Rock etc.

Co. v. Hicks, 79 Ark. 248, 96 S. W. 385; Seaboard etc. R. Co. v. Smith, 53 Fla. 375, 43 S. 235; Chicago City R. Co. v. Hyndshaw, 116 Ill. App. 367; Chicago C. R. Co. v. Rohe, 118 Ill. App. 322; Line v. R. Co., 143 Mich. 163, 106 N. W. 719; Lynch v. R. Co., 208 Mo. 1, 106 S. W. 68; Stotler v. R. Co., 200 Mo. 107, 98 S. W. 509; King v. R. Co. (Mo.), 109 S. W. 671. But see Southern R. Co. v. Weatherlow (Ala.), 44 S. 1019.

Opinion not entitled to much weight. Northern P. Co. v. Hayes, 87 Fed. 129, 30 C. C. A. 576; Keiser v. R. Co., 212 Pa. 409, 61 A. 903; Cook v. Mill Co., 41 Wash. 314, 83 P. 419.

493-6 Lynch v. R. Co., 208 Mo. 1, 106 S. W. 68.

494-10 Louisville & N. R. Co. v. Taylor, 31 Ky. L. R. 1142, 104 S. W. 776 .

494-12 Louisville & N. R. Co. v. Goulding, 52 Fla. 327, 42 S. 854.

495-14 Charleston etc. R. Co. v. Camp, 3 Ga. App. 232, 59 S. E. 710; Hartman v. R. Co., 132 Ia. 582, 110 N. W. 10; Illinois C. R. Co. v. Caley, 28 Ky. L. R. 336, 89 S. W. 234; Davis v. R. Co., 30 Ky. L. R. 172, 97 S. W. 1122, 30 Ky. L. R. 946, 99 S. W. 930; Wheeling etc. R. Co. v. Parker, 9 Ohio C. C. (N. S.) 28, 29 Ohio C. C. 1; Schwarz v. R. Co., 218 Pa. 187, 67 A. 213; Davis v. R. Co., 34 Pa. Super. 388; Osteen v. R. Co., 76 S. C. 368, 57 S. E. 196.

Inefficiency of signal. — Metcalf v. R. Co., 78 Conn. 614, 63 A. 633; Cincinnati etc. R. Co. v. Champ, 31 Ky. L. R. 1054, 104 S. W. 988.

The kind of signal given may be shown. Southern R. Co. v. Hobbs (Ala.), 43 S. 844.

Testimony of trainmen as to giving signals must be positive. Chesapeake & O. R. Co. v. Wilson, 31 Ky. L. R. 500, 102 S. W. 810.

495-15 *Contra*, if the rate of speed is high and the gates are not properly operated. Bracken v. R. Co., 32 Pa. Super. 22.

496-16 Cincinnati etc. R. Co. v. Champ, 31 Ky. L. R. 1054, 104 S. W. 988.

496-17 Bracken v. R. Co., supra.

496-18 Rogers v. R. Co. (N. J. L.), 68 A. 148.

496-19 Chicago & A. R. Co. v. Wright, 120 Ill. App. 218; Aurora etc. R. Co. v. Gary, 123 Ill. App. 163; Illinois C. R. Co. v. Coley, 38 Ky. L. R. 336, 89 S. W. 234; Davis v. R. Co., 34 Pa. Super. 388; St. Louis S. R. Co. v. Moore (Tex. Civ.), 107 S. W. 658 (writ of error denied by supreme court). But see Giacomo v. R. Co., 196 Mass. 192, 81 N. E. 899; Hodgin v. R. Co., 143 N. C. 93, 55 S. E. 413.

497-21 Chicago etc. R. Co. v. Wright, 120 Ill. App. 218; McNamara v. R. Co., 126 Mo. App. 152, 103 S. W. 1093.

497-27 *Compare* Giacomo v. R. Co., 196 Mass. 192, 81 N. E. 899.

498-28 Delaware & H. Co. v. Larnard, 161 Fed. 520; Riley v. R. Co., 36 Mont. 545, 93 P. 948; Shafer v. R. Co. (N. J. L.), 66 A. 1072; Bracken v. R. Co., 32 Pa. Super. 22.

The existence of gates, the fact that they were open and unattended, it being unusual to have an attendant at night, may be shown, not to prove negligence in the failure to operate the gates, but to illustrate the condition under which the accident occurred and throw light upon plaintiff's alleged contributory negligence. Rogers v. R. Co. (N. J. L.), 68 A. 148.

498-31 Erie R. Co. v. Farrell, 147 Fed. 220, 77 C. C. A. 446; Seaboard etc. R. Co. v. Smith, 53 Fla. 375, 43 S. 235; Charleston etc. R. Co. v. Camp, 3 Ga. App. 232, 59 S. E. 710; Wamsley v. R. Co. (Ind. App.), 82 N. E. 490; Kunz v. R. & N. Co. (Or.), 94 P. 504; Southern R. Co. v. Stockdon, 106 Va. 693, 56 S. E. 713.

498-32 St. Louis etc. R. Co. v. Tomlinson, 78 Ark. 251, 94 S. W. 613; Chesapeake & O. R. Co. v. Vaughn, 30 Ky. L. R. 215, 97 S. W. 774; Southern R. Co. v. Winchester, 32 Ky. L. R. 19, 105 S. W. 167; Eppstein v. R. Co., 197 Mo. 720, 94 S. W. 967; Texarkana etc. R. Co. v. Frugia (Tex. Civ.), 95 S. W. 563 (writ of error denied by supreme court); Galveston etc. R. Co. v. Vollrath, 40 Tex. Civ. 46, 89 S. W. 279.

The distance of the whistling post from the crossing may be shown. Defendant's rules are immaterial unless they tend to show that such post was placed where required by law. Walker v. R. Co., 193 Mo. 453, 92 S. W. 83.

498-36 Objection must be specific and be seasonably made. Stot-

ler v. R. Co., 200 Mo. 107, 98 S. W. 509.

498-37 See Texarkana etc. R. Co. v. Frugia (Tex. Civ.), 95 S. W. 563 (writ of error by supreme court).

499-38 Gulf etc. R. Co. v. Garrett (Tex. Civ.), 99 S. W. 162.

It is presumed that ordinances regulating the speed trains are reasonable. Kunz v. R. & N. Co. (Or.), 94 P. 504.

499-39 See Grand Trunk R. Co. v. Hainer, 36 Can. Sup. 180.

499-40 See Grand Trunk R. Co. v. Hainer, supra.

499-41 Southern R. Co. v. Weatherlow (Ala.), 44 S. 1019; Southern R. Co. v. Mouchet, 3 Ga. App. 266, 59 S. E. 927; Stotler v. R. Co., 200 Mo. 107, 98 S. W. 509; Bracken v. R. Co., 32 Pa. Super. 22; Texarkana etc. R. Co. v. Frugia (Tex. Civ.), 95 S. W. 563 (writ of error denied by supreme court).

Ordinance admissible if defendant has knowledge of it. Southern R. Co. v. Stockdon, 106 Va. 693, 56 S. E. 713.

499-43 **Ordinance admissible** though not pleaded. Louisville & N. R. Co. v. Brew. Co. (Ala.), 43 S. 723.

499-44 Kelsall v. R. Co., 196 Mass. 554, 82 N. E. 674; Ellington v. R. Co., 96 Minn. 176, 104 N. W. 827.

It is negligence in some cases. — Kelsall v. R. Co., 196 Mass. 554, 82 N. E. 674; Stotler v. R. Co., 200 Mo. 107, 98 S. W. 509; Harbert v. R. Co., 78 S. C. 537, 59 S. E. 644; Drawdy v. R. Co., 78 S. C. 374, 58 S. E. 980. See Kunz v. R. & N. Co. (Or.), 94 P. 504.

499-45 Cleveland etc. R. Co. v. Dukeman, 130 Ill. App. 105.

In Texas the violation of the statute is negligence per se as to persons using a crossing, but as to those near a crossing without purpose to use it, it is evidentiary only. Missouri etc. R. Co. v. Saunders (Tex.), 106 S. W. 321.

500-46 See Texarkana etc. R. Co. v. Frugia (Tex. Civ.), 95 S. W. 563 (writ of error denied by supreme court). *Compare* 489-86, supra.

500-47 St. Louis S. R. Co. v. Graham, 83 Ark. 61, 102 S. W. 700; Giacomo v. R. Co., 196 Mass. 192, 81 N. E. 899.

500-49 Southern R. Co. v. Douglass, 144 Ala. 351, 39 S. 268; Rogers v. R. Co. (N. J. L.), 68 A. 148; Schwarz v. R. Co., 218 Pa. 187, 67 A. 213.

501-51 Stotler v. R. Co., 200 Mo. 107, 98 S. W. 509.

501-52 Rich v. R. Co., 149 Fed. 79, 78 C. C. A. 663; Keiser v. R. Co., 212 Pa. 409, 61 A. 903.

In some courts the rule stated in the text does not prevail. Cleveland etc. R. Co. v. Wuest (Ind. App.), 83 N. E. 620, *cit.* Ohio etc. R. Co. v. Buck, 130 Ind. 300, 30 N. E. 19; Cleveland etc. R. Co. v. Schneider (Ind. App.), 82 N. E. 538; Riley v. R. Co., 36 Mont. 545, 93 P. 948. See Rogers v. R. Co. (N. J. L.), 68 A. 148.

Not negative. — Schwarz v. R. Co., 218 Pa. 187, 67 A. 213.

Negative evidence has been held to outweigh the positive testimony of defendant's employes. Stotler v. R. Co., 200 Mo. 107, 98 S. W. 509.

501-53 King v. R. Co. (Mo.), 109 S. W. 671.

502-55 Texas M. R. v. Byrd (Tex. Civ.), 110 S. W. 199.

Number of crossings between stations may be shown and their nature. Missouri etc. R. Co. v. Malone (Tex. Civ.), 110 S. W. 958.

502-58 Missouri etc. R. Co. v. Malone, supra.

503-59 Marks v. R. Co., 88 Va. 1, 13 S. E. 299.

503-60 *Contra*, Missouri etc. R. Co. v. Malone, supra.

A person injured while using the track as a walkway at a place where people were accustomed to walk may show that signals were not given, not to establish negligence per se, but to show that prudence required warning to be given, the engine being without a headlight. Morrow v. R. Co. (N. C.), 61 S. E. 621.

Defective appliances and incompetent management may be shown in an action by a trespasser where the situation required defendant to maintain a lookout. Louisville & N. R. Co. v. Berry (Ky.), 111 S. W. 370, *dist.* Brown v. R. Co., 97 Ky. 228, 30 S. W. 639.

503-63 St. Louis etc. R. Co. v.

Summers (Tex. Civ.), 111 S. W. 211.

504-64 Macon & B. R. Co. v. Parker, 127 Ga. 471, 56 S. E. 616. See also Charleston R. Co. v. Camp, 3 Ga. App. 232, 59 S. E. 710. *Compare* Southern R. Co. v. Flynt, 2 Ga. App. 162, 58 S. E. 374.

Injuries at a private crossing. — Chesapeake & O. R. Co. v. Wilson, 31 Ky. L. R. 500, 102 S. W. 810. *Compare* Hartman v. R. Co., 132 Ia. 582, 110 N. W. 10; Annapolis etc. R. Co. v. S., 104 Md. 659, 65 A. 434.

505-67 Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692.

Consent to use of track cannot be presumed. Bailey v. R. Co., 220 Pa. 516, 69 A. 998.

505-68 Davis v. R. Co., 30 Ky. L. R. 72, 97 S. W. 1122.

505-69 Alabama etc. R. Co. v. Guest, 144 Ala. 373, 39 S. 654; St. Louis etc. R. Co. v. Sparks, 81 Ark. 187, 99 S. W. 73; Macon & B. R. Co. v. Parker, 127 Ga. 471, 56 S. E. 616; Teakle v. R. Co., 32 Utah 276, 90 P. 402.

Defendant's knowledge of public user. — Eppstein v. R. Co., 197 Mo. 720, 94 S. W. 967.

506-71 Missouri etc. R. Co. v. Bratton (Ark.), 108 S. W. 518; Pittsburgh etc. R. Co. v. Simons, 168 Ind. 33, 79 N. W. 911; International etc. R. Co. v. Ploeger (Tex. Civ.), 93 S. W. 226, *aff.* 93 S. W. 722.

506-73 Adams v. R. Co., 83 Ark. 300, 103 S. W. 725; McGuire v. R. Co., 120 Ill. App. 111; Louisville etc. R. Co. v. Woolfork, 30 Ky. L. R. 569, 99 S. W. 294 (bridge without footway plank); Prince v. R. Co., 30 Ky. L. R. 469, 99 S. W. 293 (switchyard). But *compare* the last case with Louisville & N. R. Co. v. Goulding, 52 Fla. 327, 42 S. 854.

507-74 Bailey v. R. Co., 220 Pa. 516, 69 A. 998 (custom of employe to use track).

507-76 Burden is on trespasser. Adams v. R. Co., 83 Ark. 300, 103 S. W. 725; Burde v. R. Co., 123 Mo. App. 629, 100 S. W. 509.

508-78 Chicago etc. R. Co. v. Bunch, 82 Ark. 522, 102 S. W. 369.

508-79 Parol testimony and photographs are admissible. — Missouri etc. R. Co. v. Williams (Tex. Civ.), 109 S. W. 1126.

509-83 See Pittsburgh etc. R. Co. v. Warrum (Ind. App.), 82 N. E. 934.

509-85 Gendreau v. R. Co., 99 Minn. 38, 108 N. W. 814.

509-86 Feency v. R. Co., 123 Mo. App. 420, 99 S. W. 477. See Fay v. R. Co., 131 Wis. 639, 111 N. W. 683. But see Illinois C. R. Co. v. Martin (Ky.), 110 S. W. 815 (acts or omissions of deceased engineer cannot be shown).

509-87 Charleston etc. R. Co. v. Camp, 3 Ga. App. 232, 59 S. E. 710.

Failure to give statutory signals for crossings. — Where animals on adjacent highways and not at crossings are frightened the statute governing signals and slackening speed at crossings has no application. Southern R. Co. v. Flynt, 2 Ga. App. 162, 58 S. E. 374.

510-88 Louisville & N. R. Co. v. Blackaby (Ky.), 111 S. W. 317; Baker v. R. Co., 144 N. C. 36, 56 S. E. 553.

510-92 Feency v. R. Co., 123 Mo. App. 420, 99 S. W. 477; Baker v. R. Co., 144 N. C. 36, 56 S. E. 553.

The unreliability of the horse may be shown by defendant. Johnson v. R. Co. (Tex. Civ.), 100 S. W. 206.

513-15 Dunham v. R. Co., 126 Mo. App. 643, 105 S. W. 21; Golden v. R. Co., 84 Mo. App. 59.

513-18 St. Louis S. R. Co. v. Heintz, 82 Ark. 459, 102 S. W. 221 (as against licensee operating railroad); Kennedy v. R. Co. (Neb.), 114 N. W. 165; Fowles v. R. Co., 73 S. C. 306, 53 S. E. 534; Gulf etc. R. Co. v. Simpson, 41 Tex. Civ. 125, 91 S. W. 874; Martin v. R. Co., 15 Wyo. 493, 89 P. 1025.

514-19 Kansas C. R. Co. v. Lewis, 80 Ark. 396, 97 S. W. 56 (rule under the laws of Indian Territory); Denver etc. R. Co. v. Coulter (Colo.), 92 P. 906; Gibson v. R. Co. (Ia.), 113 N. W. 927. See Canadian P. R. Co. v. Eggleston, 36 Can. Sup. 641.

Where the evidence is circumstantial. — Gibson v. R. Co. (Ia.), 113 N. W. 927. In Oregon the rule is that such evidence is sufficient if it establishes the more probable hypothesis. Meier v. R. Co. (Or.), 93 P. 691.

514-20 Kansas City R. Co. v. Wayt, 80 Ark. 382, 97 S. W. 656; Central R. Co. v. Hughes, 127 Ga.

593, 56 S. E. 770; Western etc. R. Co. v. Clark, 2 Ga. App. 346, 58 S. E. 510; Miller v. R. Co. (S. D.), 111 N. W. 553.

515-22 Bacon v. R. Co., 12 Ont. L. R. (Can.) 196; Louisville & N. R. Co. v. Brew. Co. (Ala.), 43 S. 723; Lane v. R. Co., 78 Ark. 234, 95 S. W. 460; Mobile & O. R. Co. v. Morrow, 30 Ky. L. R. 83, 97 S. W. 389; Trontwine v. R. Co., 32 Ky. L. R. 5, 105 S. W. 142; Southern R. Co. v. Murray (Miss.), 44 S. 785.

516-23 Southern R. Co. v. Murray, supra.

517-26 Western & A. R. Co. v. Clark, 2 Ga. App. 346, 58 S. E. 510; Miller v. R. Co. (S. D.), 111 N. W. 553.

517-27 Louisville & N. R. Co. v. Brew. Co. (Ala.), 43 S. 723; Little Rock etc. Co. v. Hicks, 79 Ark. 248, 96 S. W. 385; Colorado & S. R. Co. v. Webb, 36 Colo. 224, 85 P. 683.

That the train was behind time may be shown. Southern R. Co. v. Puryear, 127 Ga. 88, 56 S. E. 73.

518-28 Louisville & N. R. Co. v. Brew. Co., supra.

518-29 Colorado etc. R. Co. v. Webb, 36 Colo. 224, 85 P. 683; Miller v. R. Co. (S. D.), 111 N. W. 553; Texas etc. R. Co. v. Langham (Tex. Civ.), 95 S. W. 686.

518-31 *Contra*, Miller v. R. Co. (S. D.), 111 N. W. 553.

519-33 Meier v. R. Co. (Or.), 93 P. 691; Texas C. R. Co. v. Pruitt (Tex. Civ.), 110 S. W. 966.

519-37 In Texas. — Texas C. R. Co. v. Pruitt (Tex. Civ.), 110 S. W. 966; International etc. R. Co. v. Seiders (Tex. Civ.), 110 S. W. 997.

520-38 Gibson v. R. Co. (Ia.), 113 N. W. 927.

520-40 Cleveland etc. R. Co. v. Miller (Ind. App.), 81 N. E. 517.

522-47 Toledo etc. R. Co. v. Delliplane, 119 Ill. App. 122; Wabash R. Co. v. Pickrell, 72 Ill. App. 601; Meier v. R. Co. (Or.), 93 P. 691.

522-48 Sowders v. R. Co., 127 Mo. App. 119, 104 S. W. 1122.

523-51 St. Louis etc. R. Co. v. Heintz, 82 Ark. 459, 102 S. W. 221. *Contra*, Central R. Co. v. Turner, 145 Ala. 441, 46 S. 355; Young v. R. Co., 88 Miss. 446, 40 S. 870. See St. Louis etc. R. Co. v. Ewing (Ark.), 107 S. W. 191.

Such facts are not evidence of negligence. — Denver etc. R. Co. v. Coulter (Colo.), 92 P. 906; Martin v. R. Co., 15 Wyo. 493, 89 P. 1025; Atchison etc. R. Co. v. Adcock, 38 Colo. 369, 88 P. 180.

523-52 International etc. R. Co. v. Carr (Tex. Civ.), 91 S. W. 858.

523-53 Louisville & N. R. Co. v. Brew. Co. (Ala.), 43 S. 723.

523-54 Failure to post notice shown. — St. Louis etc. R. Co. v. Ewing, 85 Ark. 53, 107 S. W. 191.

523-55 Young v. R. Co., 88 Miss. 446, 40 S. 870; Texarkana etc. R. Co. v. Bell (Tex. Civ.), 101 S. W. 1167.

523-56 Heise v. R. Co. (Ia.), 114 N. W. 180.

Failure to give signals immaterial as to a hunting dog trailing around a public crossing. Fowles v. R. Co., 73 S. C. 306, 53 S. E. 534.

524-58 Heise v. R. Co., supra.

524-60 Hogwe v. R. Co., 146 Ala. 384, 41 S. 425; Western R. Co. v. Stone, 145 Ala. 663, 39 S. 723; Anson v. R. Co. (Tex. Civ.), 94 S. W. 94 (it may be shown that train was behind time).

525-65 Jonesboro etc. R. Co. v. Guest, 81 Ark. 267, 99 S. W. 71; Central R. Co. v. Hughes, 127 Ga. 593, 56 S. E. 770.

525-70 Gilpin v. R. Co., 197 Mo. 319, 94 S. W. 869.

Burden of proof. — Gilpin v. R. Co., 197 Mo. 319, 94 S. W. 869.

526-71 Gilpin v. R. Co., supra.

526-72 Brown v. R. Co., 127 Mo. App. 614, 106 S. W. 551.

Contributory negligence. — Chicago A. R. Co. v. Nevitt, 122 Ill. App. 505.

526-73 Missouri etc. R. Co. v. Tolbert, 100 Tex. 483, 101 S. W. 206.

526-74 But see Nashville etc. R. Co. v. Russell (Ky.), 110 S. W. 317 (general use on other roads).

528-85 Hogwe v. R. Co., 146 Ala. 384, 41 S. 425.

Proof of killing another animal shortly before competent to show condition of engineer's mind. Central R. Co. v. Cox, 124 Ga. 143, 52 S. E. 161.

529-1 Atlanta etc. R. Co. v. Hudson, 2 Ga. App. 352, 58 S. E. 500.

530-2 Colorado & S. R. Co. v. Webb, 36 Colo. 224, 85 P. 683; Atlanta etc. R. Co. v. Hudson, 2 Ga. App. 352, 58 S. E. 500; Ft. Worth

etc. R. Co. Hudgens (Tex. Civ.), 94 S. W. 378. *Contra*, where the animal is allowed to run on the owner's land, though he has knowledge of the defect in the fence. Baltimore etc. R. Co. v. Seitzinger, 116 Ill. App. 55.

530-3 Ft. Worth etc. R. Co. v. Hudgens (Tex. Civ.), 94 S. W. 378; Houston etc. R. Co. v. Nussbaum (Tex. Civ.), 94 S. W. 1101.

530-4 Not contributory negligence. — Little Rock etc. R. Co. v. Hicks, 79 Ark. 248, 96 S. W. 385.

530-5 Hogwe v. R. Co., 146 Ala. 384, 41 S. 425; Central R. Co. v. Turner, 145 Ala. 441, 40 S. 355; Kansas City R. Co. v. Lewis, 80 Ark. 396, 97 S. W. 56.

The result of experiments. — Atlanta etc. R. Co. v. Hudson, 2 Ga. App. 352, 58 S. E. 500.

530-6 Lane v. R. Co., 78 Ark. 234, 95 S. W. 460; Mobile & O. R. Co. v. Morrow, 30 Ky. L. R. 83, 97 S. W. 389. But see Western R. Co. v. Stone, 145 Ala. 663, 39 S. 723.

531-9 Texarkana etc. R. Co. v. Bell (Tex. Civ.), 101 S. W. 1167. See Hogwe v. R. Co., 146 Ala. 384, 41 S. 425.

531-10 Louisville & N. R. Co. v. Vinyard, 39 Ind. App. 628, 79 N. E. 384; Toledo etc. R. Co. v. Sullivan (Ind. App.), 83 N. E. 1024; Helverson v. R. Co (Ia.), 116 N. W. 699; Hawley v. R. Co., 49 Or. 509, 90 P. 1106; Morgan v. R. Co. (Tex. Civ.), 110 S. W. 978.

532-11 Burden is on defendant to show plaintiff's negligence in caring for the burned property. St. Louis etc. R. Co. v. Clements, 82 Ark. 3, 99 S. W. 1106.

532-12 St. Louis etc. R. Co. v. Dawson, 77 Ark. 434, 92 S. W. 27; Southern R. Co. v. Elliott, 129 Ga. 705, 59 S. E. 786; Shipman v. R. Co. (Neb.), 110 N. W. 535; Ross v. R. Co. (Tex. Civ.), 103 S. W. 708; Gulf etc. R. Co. v. Blakeney (Tex. Civ.), 106 S. W. 1140; Morgan v. R. Co. (Tex. Civ.), 110 S. W. 978.

534-13 Cincinnati etc. R. Co. v. Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533; Babbitt v. R. Co., 108 App. Div. 74, 95 N. Y. S. 429; Hawley v. R. Co., 49 Or. 509, 90 P. 1106.

Presumption of negligence may arise from other facts as the collision of trains, fire resulting therefrom. Cincinnati etc. R. Co. v. Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533.

535-16 Stewart v. R. Co. (Ia.), 113 N. W. 764; Shipman v. R. Co. (Neb.), 110 N. W. 535; Union R. R. Co. v. Fickenscher (Neb.), 110 N. W. 561.

536-17 Woodward v. R. Co., 145 Fed. 577, 75 C. C. A. 591; Toledo etc. R. Co. v. Star Co., 146 Fed. 953, 77 C. C. A. 203; Florida etc. R. Co. v. Welch, 53 Fla. 145, 44 S. 250; Southern R. Co. v. Thompson, 129 Ga. 367, 58 S. E. 1044; Chicago etc. R. Co. v. Hill, 130 Ill. App. 218; Stewart v. R. Co. (Ia.), 113 N. W. 764, Cincinnati etc. R. Co. v. Falconer, 30 Ky. L. R. 152, 97 S. W. 727; St. Louis S. R. Co. v. Starks (Tex. Civ.), 109 S. W. 1003.

Statutory presumption applies whether the origin of the fire is admitted or not. Illinois C. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833.

537-18 Southern R. Co. v. Thompson, 129 Ga. 367, 58 S. E. 1044; St. Louis etc. R. Co. v. Noland, 75 Kan. 691, 90 P. 273; Continental Ins. Co. v. R. Co., 97 Minn. 467, 107 N. W. 548 (a valuable opinion on the general subject); Union P. R. Co. v. Murphy, 76 Neb. 545, 107 N. W. 757; Rollins v. R. Co., 73 N. J. L. 64, 62 A. 929; Lumber Co. v. R. Co., 143 N. C. 324, 55 S. E. 781; Smith v. R. Co., 33 Utah 129, 93 P. 185; Firemen's Ins. Co. v. R. Co., 46 Wash. 635, 91 P. 13.

537-21 Chicago etc. R. Co. v. Hill, 130 Ill. App. 218; Clark v. R. Co., 149 Mich. 400, 112 N. W. 1121; Rollins v. R. Co., 73 N. J. L. 64, 62 A. 929; Goodman v. R. Co. (N. J.), 68 A. 63; Lumber Co. v. R. Co., 143 N. C. 324, 55 S. E. 781; Ross v. R. Co. (Tex. Civ.), 103 S. W. 708; Gulf etc. R. Co. v. Blakeney (Tex. Civ.), 106 S. W. 1140. But see Albany & N. R. Co. v. Wheeler, 3 Ga. App. 414, 59 S. E. 1116.

539-22 Woodward v. R. Co., 145 Fed. 577, 75 C. C. A. 591; Toledo etc. R. Co. v. Star Co., 146 Fed. 953, 77 C. C. A. 203; Illinois C. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833; Cincinnati etc. R. Co. v. Falconer, 30 Ky. L. R. 152, 97 S. W. 727; Continental Ins. Co. v. R. Co., 97 Minn. 467, 107 N. W. 548; St. Louis

etc. R. Co. v. Starks (Tex. Civ.), 109 S. W. 1003; Bryan Press Co. v. R. Co. (Tex. Civ.), 110 S. W. 99. See Southern R. Co. v. Thompson, 129 Ga. 367, 58 S. E. 1044.

539-23 Woodward v. R. Co., 145 Fed. 577, 75 C. C. A. 591; Toledo etc. R. Co. v. Star Co., 146 Fed. 953, 77 C. C. A. 203.

Quantum of evidence. — The proof to overcome the statutory presumption of negligence need not constitute a preponderance of the evidence; it is sufficient if of weight equal to the implied presumption of negligence and the evidence offered by plaintiff. St. Louis etc. R. Co. v. Starks (Tex. Civ.), 109 S. W. 1003. *Contra*, Stewart v. R. Co. (Ia.), 113 N. W. 764.

539-24 Southern R. Co. v. Elliott, 129 Ga. 705, 59 S. E. 786; Chicago etc. R. Co. v. Hill, 130 Ill. App. 218; Illinois C. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833; Continental Ins. Co. v. R. Co., 97 Minn. 467, 107 N. W. 548.

540-26 Louisville & N. R. Co. v. Sherrell (Ala.), 44 S. 631; Stewart v. R. Co. (Ia.), 113 N. W. 764; St. Louis etc. R. Co. v. Starks (Tex. Civ.), 109 S. W. 1003; Gulf etc. R. Co. v. Blakeney (Tex. Civ.), 106 S. W. 1143. But see Woodward v. R. Co., 145 Fed. 577, 75 C. C. A. 591.

540-27 Burden on defendant.— Smith v. R. Co., 33 Utah 129, 93 P. 185.

541-28 Southern R. Co. v. Thompson, 129 Ga. 367, 58 S. E. 1044; Diggs v. R. Co. (Mo. App.), 110 S. W. 9. See Blunck v. R. Co. (Ia.), 115 N. W. 1013.

541-29 Southern R. Co. v. Dickens (Ala.), 44 S. 402; Woodward v. R. Co. (N. D.), 111 N. W. 627.

541-31 See Knott v. R. Co., 142 N. C. 238, 55 S. E. 150.

541-32 Toledo etc. R. Co. v. Sullivan (Ind. App.), 83 N. E. 1024; Helverson v. R. Co. (Ia.), 116 N. W. 699; St. Louis etc. R. Co. v. Noland, 75 Kan. 691, 90 P. 273; Big River L. Co. v. R. Co., 123 Mo. App. 394, 101 S. W. 636; Staples v. R. Co., 74 N. H. 499, 69 A. 890; Babbitt v. R. Co., 108 App. Div. 74, 95 N. Y. S. 429; Bryan Press Co. v. R. Co. (Tex. Civ.), 110 S. W. 99; Smith v. R. Co., 80 Vt. 208, 67 A. 535.

542-33 St. Louis etc. R. Co. v. Dawson, 77 Ark. 434, 92 S. W. 27; Continental Ins. Co. v. R. Co., 97 Minn. 467, 107 N. W. 548; Tapley v. R. Co., 129 Mo. App. 88, 107 S. W. 470; Gibbs v. R. Co., 104 Mo. App. 276, 78 S. W. 836; Union P. R. Co. v. Murphy, 76 Neb. 545, 107 N. W. 757.

542-34 Cincinnati etc. R. Co. v. Falconer, 30 Ky. L. R. 152, 97 S. W. 727.

542-35 Monte Ne R. Co. v. Phillips, 80 Ark. 292, 96 S. W. 1060; Illinois C. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833. See Big River L. Co. v. R. Co., 123 Mo. App. 394, 101 S. W. 636; Finkelston v. R. Co., 94 Wis. 270, 68 N. W. 1005, *appr.* in Clark v. R. Co., 149 Mich. 400, 112 N. W. 1121.

542-36 Cleveland etc. R. Co. v. Hayes, 167 Ind. 454, 79 N. E. 448; Big River L. Co. v. R. Co., 123 Mo. App. 394, 101 S. W. 636.

542-37 Smith v. R. Co., 80 Vt. 208, 67 A. 535.

542-38 Big River L. Co. v. R. Co., supra; Smith v. R. Co., 80 Vt. 208, 67 A. 535. See Florida etc. R. Co. v. Welch, 53 Fla. 145, 44 S. 250, *disappr.* Read v. Nichols, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130.

543-40 Hitchner Wall Paper Co. v. R. Co., 158 Fed. 1011.

543-43 Fleming v. Pullen (Tex. Civ.), 97 S. W. 109 (unless the facts on which the conclusion is based are stated).

543-47 Louisville & N. R. Co. v. Sherrell (Ala.), 44 S. 631; Southern R. Co. v. Elliott, 129 Ga. 705, 59 S. E. 786; Cleveland etc. R. Co. v. Hayes, 167 Ind. 454, 79 N. E. 448; Toledo etc. R. Co. v. Sullivan (Ind. App.), 83 N. E. 1024; Chesapeake & O. R. Co. v. Richardson, 30 Ky. L. R. 786, 99 S. W. 642; Continental Ins. Co. v. R. Co., 97 Minn. 467, 107 N. W. 548. But *compare* Smith v. R. Co., 3 N. D. 17, 53 N. W. 173, and see criticism of it in 2 Thompson, Neg. 796, and disapproval in Continental Ins. Co. v. R. Co., supra. The opinion in the latter case is valuable.

544-48 Louisville & N. R. Co. v. Sherrell (Ala.), 44 S. 631; Toledo etc. R. Co. v. Sullivan (Ind. App.), 83 N. E. 1024; Continental Ins. Co. v. R. Co., supra; Smith v. R. Co., 80 Vt. 208, 67 A. 535.

544-49 Hitchner Wall Paper Co. v. R. Co., 158 Fed. 1011; Toledo etc. R. Co. v. Sullivan (Ind. App.), 83 N. E. 1024; Goodman v. R. Co. (N. J.), 68 A. 63; Bryan Press Co. v. R. Co. (Tex. Civ.), 110 S. W. 99. See Cleveland etc. R. Co. v. Hayes, 167 Ind. 454, 79 N. E. 448.

544-51 Woodward v. R. Co., 145 Fed. 577, 75 C. C. A. 591 (inspection at various times within a month may be shown); Goodman v. R. Co. (N. J.), 68 A. 63.

The use made of the engine. — Alabama etc. R. Co. v. Clark, 145 Ala. 459, 39 S. 816.

545-54 Woodward v. R. Co., 145 Fed. 577, 75 C. C. A. 591.

545-57 Cincinnati etc. R. Co. v. Falconer, 30 Ky. L. R. 152, 97 S. W. 727; Smith v. R. Co., 80 Vt. 208, 67 A. 535.

546-59 St. Louis etc. R. Co. v. Dawson, 77 Ark. 434, 92 S. W. 27.

Conclusion not admissible. — Bryan Press Co. v. R. Co. (Tex. Civ.), 110 S. W. 99. (No reference is made to the case cited to the contrary in the corresponding note of the Encyclopedia). See also Birmingham etc. Co. v. Martin, infra, 547-70.

Expert evidence is not needed on the issue of ordinary care in operating an engine. Bryan Press Co. v. R. Co., supra.

546-61 Morgan v. R. Co. (Tex. Civ.), 110 S. W. 978; St. Louis etc. R. Co. v. Nowland, 75 Kan. 691, 90 P. 273.

546-62 Toledo etc. R. Co. v. Star Co., 146 Fed. 953, 77 C. C. A. 203; Babbitt v. R. Co., 108 App. Div. 74, 95 N. Y. S. 429; Jacobs v. R. Co., 107 App. Div. 134, 94 N. Y. S. 954, 186 N. Y. 586, 79 N. E. 1108 (no opinion).

Weight of expert testimony. Jackson v. R. Co., 32 Can. Sup. 245. See Continental Ins. Co. v. R. Co., 97 Minn. 467, 107 N. W. 548.

546-67 Morgan v. R. Co. (Tex. Civ.), 110 S. W. 978 (writ of error denied by supreme court); Monte Ne R. Co. v. Phillips, 80 Ark. 292, 96 S. W. 1060.

547-70 *Compare* "EXPERT AND OPINION EVIDENCE," supra, 527-38. See also Birmingham etc. Co. v. Martin, 148 Ala. 8, 42 S. 618. See supra, 546-59.

547-71 Alabama etc. R. Co. v. Clark, 145 Ala. 459, 39 S. 816; Continental Ins. Co. v. R. Co., 97 Minn. 467, 107 N. W. 548. But see Woodward v. R. Co., 145 Fed. 577, 75 C. C. A. 591.

547-77 Hitchner Wall Paper Co. v. R. Co., 158 Fed. 1011.

548-80 McMahon v. R. Co., 2 Cal. App. 400, 84 P. 350; Knott v. R. Co., 142 N. C. 238, 55 S. E. 150; Hawley v. R. Co., 49 Or. 509, 90 P. 1106; Smith v. R. Co., 80 Vt. 208, 67 A. 535.

548-83 Jacobs v. R. Co., 107 App. Div. 134, 94 N. Y. S. 954, 186 N. Y. 586, 79 N. E. 1108 (no opinion); Babbitt v. R. Co., 108 App. Div. 74, 95 N. Y. S. 429; Missouri etc. R. Co. v. Miller (Tex. Civ.), 110 S. W. 549. But see Louisville & N. R. Co. v. Vinyard, 39 Ind. App. 628, 79 N. E. 384.

549-84 Toledo etc. R. Co. v. Star Co., 146 Fed. 953, 77 C. C. A. 203.

549-86 Knott v. R. Co., 142 N. C. 238, 55 S. E. 150; Fleming v. Pullen (Tex. Civ.), 97 S. W. 109.

550-87 Whitehurst v. R. Co., 146 N. C. 588, 60 S. E. 648; *cit.* Johnson v. R. Co., 140 N. C. 581, 53 S. E. 362; Knott v. R. Co., supra.

550-88 Birmingham etc. Co. v. Martin, 148 Ala. 8, 42 S. 618. See Farley v. R. Co., 149 Ala. 557, 42 S. 747; Whitehurst v. R. Co., 146 N. C. 588, 60 S. E. 648.

Cinders may be received to rebut testimony that none of their size could escape. Cincinnati etc. R. Co. v. Cecil, 28 Ky. L. R. 830, 90 S. W. 585.

550-89 Whitehurst v. R. Co., supra.

550-90 Barker v. Collins (Del.), 63 A. 686.

551-94 McMahon v. R. Co., 2 Cal. App. 400, 84 P. 350, *cit.* Liverpool Ins. Co. v. S. P. Co., 125 Cal. 434, 441, 58 P. 55; Hawley v. R. Co., 49 Or. 509, 90 P. 1106.

Purposes for which competent. — Testimony as to other fires caused by other engines is competent to show at what distance from the right-of-way sparks emitted had fallen and to contradict the testimony of experts on that point. Whitehurst v. R. Co., 146 N. C. 588, 60 S. E. 648.

552-95 Smith v. R. Co., 80 Vt. 208, 67 A. 535.

553-96 Birmingham etc. Co. v. Martin, 148 Ala. 8, 42 S. 618; Florida etc. R. Co. v. Welch, 53 Fla. 145, 44 S. 250; Chesapeake & O. R. Co. v. Richardson, 30 Ky. L. R. 786, 99 S. W. 642; Big River L. Co. v. R. Co., 123 Mo. App. 394, 101 S. W. 636; Henderson v. R. Co., 144 Pa. 461, 22 A. 851, 27 Am. St. 652, 16 L. R. A. 299; Morgan v. R. Co. (Tex. Civ.), 110 S. W. 978; Hoskinson v. R. Co., 66 Vt. 618, 30 A. 24; Smith v. R. Co., 80 Vt. 208, 67 A. 535.

555-99 Farley v. R. Co., 149 Ala. 557, 42 S. 747; Illinois C. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833; Fleming v. Pullen (Tex. Civ.), 97 S. W. 109; Morgan v. R. Co. (Tex. Civ.), 110 S. W. 978.

555-1 Train dispatcher's sheet competent. Hitchner Wall Paper Co. v. R. Co., 158 Fed. 1011; Big River L. Co. v. R. Co., 123 Mo. App. 394, 101 S. W. 636.

556-3 Florida etc. R. Co. v. Welch, 53 Fla. 145, 44 S. 250.

556-4 Identification of engine by its whistle is proper. Whitehurst v. R. Co., 146 N. C. 588, 60 S. E. 648.

557-9 Smith v. R. Co., 80 Vt. 208, 67 A. 535.

558-13 Tapley v. R. Co., 129 Mo. App. 88, 107 S. W. 470. See Big River L. Co. v. R. Co., supra, 553-96.

559-14 Tapley v. R. Co., 129 Mo. App. 88, 107 S. W. 470, *cit.* Campbell v. R. Co., 121 Mo. 340, 25 S. W. 936, 42 Am. St. 530, 25 L. R. A. 175; Gibbs v. R. Co., 104 Mo. App. 280, 78 S. W. 836; Jacobs v. R. Co., 107 App. Div. 134, 94 N. Y. S. 954, 186 N. Y. 586, 79 N. E. 1108 (no opinion).

560-17 Jacobs v. R. Co., 107 App. Div. 134, 94 N. Y. S. 954, aff. 186 N. Y. 586, 79 N. E. 1108 (no opinion).

560-18 Hitchner Wall Paper Co. v. R. Co., 158 Fed. 1011.

560-19 Smith v. R. Co., 80 Vt. 208, 67 A. 535.

Evidence of othr fires is inadmissible unless it connects defendant with them. Hawley v. R. Co., 49 Or. 509, 90 P. 1106.

561-25 Smith v. R. Co., 80 Vt. 208, 67 A. 535.

562-29 Morgan v. R. Co. (Tex. Civ.), 110 S. W. 978.

562-31 But see Hitchner W. P. Co. v. R. Co., 158 Fed. 1011. See Smith v. R. Co., 33 Utah 129, 93 P. 185.

563-33 Lost profits. — Johnson v. R. Co., 140 N. C. 574, 53 S. E. 362.

563-36 Diggs v. R. Co. (Mo. App.), 110 S. W. 9.

563-39 St. Louis etc. R. Co. v. Noland, 75 Kan. 691, 90 P. 273; Wiggins v. R. Co., 129 Mo. App. 369, 108 S. W. 574; Union P. R. Co. v. Murphy, 76 Neb. 545, 107 N. W. 757.

Tenant's damages. — Blunck v. R. Co. (Ia.), 115 N. W. 1013.

564-44 But see Texas etc. R. Co. v. Langham (Tex. Civ.), 95 S. W. 686; Pierce v. R. Co. (Tex. Civ.), 108 S. W. 979.

568-59 Sample v. R. Co., 233 Ill. 564, 84 N. E. 643; Metzler v. R. Co., 28 Pa. Super. 180.

569-64 International etc. R. Co. v. Munn (Tex. Civ.), 102 S. W. 442.

570-66 Train sheets are not conclusive evidence of the movement of trains. Staples v. R. Co., 74 N. H. 499, 69 A. 890.

570-67 Rules which do not tend to fix the standard of duty owing by defendant's employes to others are not admissible. Continental Ins. Co. v. R. Co., 97 Minn. 467, 107 N. W. 548, *foll.* Fonda v. R. Co., 71 Minn. 438, 449, 74 N. W. 166, 70 Am. St. 341.

572-74 But see Louisville & N. R. Co. v. Taylor, 31 Ky. L. R. 1142, 104 S. W. 776.

573-76 Illinois C. R. Co. v. Bethea, 88 Miss. 119, 40 S. 813.

574-81 Hollins v. R. Co., 119 La. 418, 44 S. 159 (the liability may be joint).

574-84 Western R. Co. v. Cleghorn, 143 Ala. 392, 39 S. 133.

A folder inadmissible. — Chicago etc. R. Co. v. Weber, 219 Ill. 372, 76 N. E. 489.

A certified copy of a lease. — Chicago etc. R. Co. v. Weber, 219 Ill. 372, 76 N. E. 489.

Ownership of stock. — Pennsylvania Co. v. Rossett, 116 Ill. App. 342.

576-94 An indictment for running trains at unsafe rate of speed must be sustained by proof that defendant so ran them habitually and

failed to give the necessary warnings. It may be shown that a watchman was placed at the crossing in question in pursuance of an extra-official demand of the authorities. Cincinnati etc. R. Co. v. C., 31 Ky. L. R. 1113, 104 S. W. 771.

RAPE [Vol. 10.]

579-1 Age of male sixteen, in Illinois. — Hurd's Stat. 1903, ch. 38, par. 237; Schramm v. P., 220 Ill. 16, 77 N. E. 117.

579-2 Payne v. C. (Ky.), 110 S. W. 311; S. v. Fisk, 15 N. D. 589, 108 N. W. 485.

579-3 No presumption of consent. The King v. Erickson, 5 Haw. 159.

579-4 P. v. Morris, 3 Cal. App. 1, 84 P. 631; S. v. Fowler, 13 Idaho 317, 89 P. 757; P. v. Murphy, 145 Mich. 524, 108 N. W. 1009; S. v. Zempel (Minn.), 115 N. W. 275; Raisback v. S. (Tex. Cr.), 110 S. W. 916; Scott v. S., 51 Tex. Cr. 5, 100 S. W. 159.

580-8 P. v. Howard, 143 Cal. 316, 76 P. 1116; P. v. Rivers, 147 Mich. 643, 111 N. W. 201; Taylor v. S., 50 Tex. Cr. 362, 97 S. W. 94.

581-9 Young v. S., 49 Tex. Cr. 434, 93 S. W. 743.

581-10 Posey v. S., 143 Ala. 54, 38 S. 1019.

581-11 Vanderford v. S., 126 Ga. 753, 55 S. E. 1025; Rucker v. P., 224 Ill. 131, 79 N. E. 606; Payne v. C. (Ky.), 110 S. W. 311; P. v. Murphy, 145 Mich. 524, 108 N. W. 1009; S. v. Zempel (Minn.), 115 N. W. 275; S. v. Cowing, 99 Minn. 123, 108 N. W. 851; Perez v. S., 50 Tex. Cr. 34, 94 S. W. 1036; Brown v. S., 127 Wis. 193, 106 N. W. 536.

582-12 Vanderford v. S., 126 Ga. 753, 55 S. E. 1025; Rahke v. S., 168 Ind. 615, 81 N. E. 584; S. v. Cowing, 99 Minn. 123, 108 N. W. 851; Perez v. S., supra.

582-13 Posey v. S., 143 Ala. 54, 38 S. 1019; Rahke v. S., supra; S. v. Crouch, 130 Ia. 478, 107 N. W. 173; S. v. Smith, 203 Mo. 695, 102 S. W. 526; S. v. Welch, 191 Mo. 179, 89 S. W. 945.

584-17 S. v. Stevens, 133 Ia. 684, 110 N. W. 1037; Payne v. C. (Ky.), 110 S. W. 311; S. v. Mehojovich, 118 La. 1013, 43 S. 660; Hubert v. S., 74 Neb. 220, 104 N. W. 276, 106 N. W. 774; Robertson v. S. (Tex. Cr.), 102 S. W. 1130; Ross v. S. (Wyo.), 93 P. 299.

584-18 P. v. Murphy, 145 Mich. 524, 108 N. W. 1009; S. v. Zempel (Minn.), 115 N. W. 275; S. v. Cowing, 99 Minn. 123, 108 N. W. 851; Vaughn v. S. (Neb.), 110 N. W. 992; Perez v. S., 50 Tex. Cr. 34, 94 S. W. 1036.

585-19 Rahke v. S., 168 Ind. 615, 81 N. E. 584; Payne v. C. (Ky.), 110 S. W. 311; S. v. Smith, 203 Mo. 695, 102 S. W. 526; Robertson v. S. (Tex. Cr.), 102 S. W. 1130.

586-20 S. v. Cunningham, 5 Penne. (Del.) 294, 63 A. 30; Rahke v. S., supra; S. v. Bricker (Ia.), 112 N. W. 645; S. v. Johnson, 133 Ia. 38, 110 N. W. 170; S. v. Blackburn (Ia.), 110 N. W. 275; S. v. Stevens, 133 Ia. 684, 110 N. W. 1037; Payne v. C. (Ky.), 110 S. W. 311; S. v. Mehojovich, 118 La. 1013, 43 S. 660; S. v. Smith, 203 Mo. 695, 102 S. W. 526; Robertson v. S. (Tex. Cr.), 102 S. W. 1130; Ross v. S. (Wyo.), 93 P. 299.

586-21 Griffin v. S. (Ala.), 46 S. 481; Leedom v. S. (Neb.), 116 N. W. 496; Brown v. S. (Tex. Cr.), 106 S. W. 368. But see C. v. Howe, 35 Pa. Super. 554. *Contra,* Lake v. C. (Ky.), 104 S. W. 1003.

587-22 Sanders v. S., 148 Ala. 603, 41 S. 466; Trimble v. Ter., 8 Ariz. 273, 71 P. 932; Fields v. S., 2 Ga. App. 41, 58 S. E. 327; S. v. Neil, 13 Idaho 539, 90 P. 860, 91 P. 318; S. v. Fowler, 13 Idaho 317, 89 P. 757; Jeffries v. S., 89 Miss. 643, 42 S. 801; S. v. Bateman, 198 Mo. 212, 94 S. W. 843; S. v. Wertz, 191 Mo. 569, 90 S. W. W. 838; Adams v. S. (Tex. Cr.), 105 S. W. 197; S. v. Griffin, 43 Wash. 591, 86 P. 951.

588-23 Griffin v. S. (Ala.), 46 S. 481; S. v. Sebastian (Conn.), 69 A. 1054; Ter. v. Schilling, 17 Haw. 249, 265; S. v. Andrews, 130 Ia. 609, 105 N. W. 215; S. v. Barkley, 129 Ia. 484, 105 N. W. 506. But see Younger v. S. (Neb.), 114 N. W. 170.

589-24 In re Kelley, 28 Nev. 491, 83 P. 223; Adams v. S. (Tex. Cr.), 105 S. W. 197; Chambless v. S., 49 Tex. Cr. 354, 94 S. W. 220.

Books and papers of the accused, found on the ground where offense was committed shortly after its commission, held admissible as res gestae. Fletcher v. C., 123 Ky. 571, 96 S. W. 855; Lyon v. C. (Ky.), 96 S. W. 857.

589-25 Rule not applicable where child is too young to testify. P. v. Bianchino, 5 Cal. App. 633, 91 P. 112.

590-26 P. v. Bianchino, supra; P. v. Gonzalez, 6 Cal. App. 255, 91 P. 1013; S. v. Miller, 191 Mo. 587, 90 S. W. 767; S. v. Werner (N. D.), 112 N. W. 60; Smith v. S. (Tex. Cr.), 106 S. W. 1161.

591-27 S. v. Oswalt, 72 Kan. 84, 82 P. 586; S. v. Goodale (Mo.), 109 S. W. 9; S. v. Miller, 191 Mo. 587, 90 S. W. 767; Vaughn v. S. (Neb.), 110 N. W. 992; S. v. Werner (N. D.), 112 N. W. 60. *Contra,* Cowles v. S. (Tex. Cr.), 102 S. W. 1128; S. v. Griffin, 43 Wash. 591, 86 P. 951.

592-28 Fields v. S., 2 Ga. App. 41, 58 S. E. 327; S. v. Fowler, 13 Idaho 317, 89 P. 757; S. v. Zempel (Minn.), 115 N. W. 275; S. v. Wertz, 191 Mo. 569, 90 S. W. 838; In re Kelley, 28 Nev. 491, 83 P. 223; Turman v. S., 50 Tex. Cr. 7, 95 S. W. 533; Young v. S., 49 Tex. Cr. 434, 93 S. W. 743.

592-29 Fields v. S., 2 Ga. App. 41, 58 S. E. 327; S. v. Zempel (Minn.), 115 N. W. 275; S. v. Brannan, 206 Mo. 636, 105 S. W. 602.

593-30 S. v. Cowing, 99 Minn. 123, 108 N. W. 851; In re Kelley, 28 Nev. 491, 83 P. 223; Young v. S., 49 Tex. Cr. 434, 93 S. W. 743.

594-31 S. v. Blackburn (Ia.), 114 N. W. 531 (medical works not admissible).

595-34 Renfroe v. S., 84 Ark. 16, 104 S. W. 542; P. v. Ah Lean (Cal. App.), 95 P. 380; Schuette v. P., 33 Colo. 325, 80 P. 890; S. v. Sebastian (Conn.), 69 A. 1054; S. v. Campbell (Mo.), 109 S. W. 706; Shults v. S., 49 Tex. Cr. 351, 91 S. W. 786; S. v. Conlin, 45 Wash. 478, 88 P. 932; Grabowski v. S., 126 Wis. 447, 105 N. W. 805.

595-35 S. v. Crouch, 130 Ia. 478, 107 N. W. 173; S. v. Palmberg, 199 Mo. 233, 97 S. W. 566; Jamison v. S., 117 Tenn. 58, 67, 94 S. W. 675; Battles v. S. (Tex. Cr.), 109 S. W. 195; S. v. Willett, 78 Vt. 157, 62 A. 48; S. v. Mobley, 44 Wash. 549, 87 P. 815; Grabowski v. S., 126 Wis. 447, 105 N. W. 805.

596-36 S. v. Oswalt, 72 Kan. 84, 82 P. 586. But see S. v. Stone, 74 Kan. 189, 85 P. 808; P. v. Brown, 142 Mich. 622, 106 N. W. 149; S. v. Lawrence, 74 Ohio St. 38, 77 N. E. 266; Cecil v. Ter., 16 Okla. 197, 82 P. 654; Jamison v. S., 117 Tenn. 58, 67, 94 S. W. 675. *Contra,* S. v. Palmberg, 199 Mo. 233, 97 S. W. 566; Leedom v. S. (Neb.), 116 N. W. 496.

597-38 S. v. Norris, 127 Ia. 683, 104 N. W. 282; S. v. Campbell (Mo.), 109 S. W. 706; Grabowski v. S., 126 Wis. 447, 105 N. W. 805.

597-39 P. v. Davis, 6 Cal. App. 229, 91 P. 810; S. v. Callahan, 100 Minn. 63, 110 N. W. 342; Loar v. S. (Neb.), 107 N. W. 229; Bawcom v. S., 49 Tex. Cr. 417, 94 S. W. 462.

598-40 P. v. Darr, 3 Cal. App. 50, 84 P. 457; P. v. Ah Lung, 2 Cal. App. 278, 83 P. 296; S. v. Sebastian (Conn.), 69 A. 1054; Wistrand v. P., 218 Ill. 323, 75 N. E. 891; S. v. Ralston (Ia.), 116 N. W. 1058; S. v. Zempel (Minn.), 115 N. W. 275; Dunmore v. S., 86 Miss. 788, 39 S. 69; S. v. Campbell (Mo.), 109 S. W. 706; S. v. Mathews, 202 Mo. 143, 100 S. W. 420; S. v. Bateman, 198 Mo. 212, 94 S. W. 843; S. v. Wertz, 191 Mo. 569, 90 S. W. 838; S. v. Miller, 191 Mo. 587, 90 S. W. 767; Leedom v. S. (Neb.), 116 N. W. 496; Cecil v. Ter., 16 Okla. 197, 82 P. 654; Bawcom v. S., 49 Tex. Cr. 417, 94 S. W. 462; Smith v. S. (Tex. Cr.), 106 S. W. 1161; Curry v. S., 50 Tex. Cr. 158, 94 S. W. 1058; Bradshaw v. S., 49 Tex. Cr. 165, 94 S. W. 223.

598-41 S. v. Ralston (Ia.), 116 N. W. 1058; Dickey v. S., 86 Miss. 525, 38 S. 776; S. v. Kelley, 191 Mo. 680, 90 S. W. 834.

598-42 Dickey v. S., supra; S. v. Mathews, 202 Mo. 143, 100 S. W. 420; Cecil v. Ter., 16 Okla. 197, 82 P. 654.

599-43 S. v. Waters, 132 Ia. 481, 109 N. W. 1013.

599-44 S. v. Palmberg, 199 Mo. 233, 97 S. W. 566; Bradshaw v. S., 49 Tex. Cr. 165, 94 S. W. 223.

599-45 S. v. Palmberg, supra; S. v. Danforth, 73 N. H. 215, 60 A. 839.

600-47 Parker v. S., 3 Ga. App. 336, 59 S. E. 823; Fields v. S., 2 Ga. App. 41, 58 S. E. 327; Allen v. S.

(Miss.), 45 S. 833; S. v. Goodale (Mo.), 109 S. W. 9; S. v. Welch, 191 Mo. 179, 89 S. W. 945; S. v. Conlin, 45 Wash. 478, 88 P. 932.

601-48 P. v. Ah Lung, 2 Cal. App. 278, 83 P. 296; S. v. Ralston (Ia.), 116 N. W. 1058; S. v. Bricker, 135 Ia. 343, 112 N. W. 645; S. v. Johnson, 133 Ia. 38, 110 N. W. 170; S. v. Stevens, 133 Ia. 684, 110 N. W. 1037; S. v. Waters, 132 Ia. 481, 109 N. W. 1013; S. v. Crouch, 130 Ia. 478, 107 N. W. 173; Harris v. S. (Neb.), 114 N. W. 168; Burk v. S. (Neb.), 112 N. W. 573; Fitzgerald v. S. (Neb.), 110 N. W. 676; Klawitter v. S., 76 Neb. 49, 107 N. W. 121; Austin v. S., 51 Tex. Cr. 327, 101 S. W. 1162; S. v. Jonas (Wash.), 92 P. 899; Lam Yee v. S., 132 Wis. 527, 112 N. W. 425.

602-49 S. v. Blackburn (Ia.), 114 N. W. 531; P. v. Ryno, 148 Mich. 137, 111 N. W. 740; S. v. Barrick, 60 W. Va. 576; S. v. Detwiler, 60 W. Va. 583.

603-50 Harris v. S. (Neb.), 114 N. W. 168. But see Burk v. S. (Neb.), 112 N. W. 573.

604-51 S. v. Blackburn (Ia.), 114 N. W. 531.

605-54 Griffin v. S. (Ala.), 46 S. 481; S. v. Gereke, 74 Kan. 196, 86 P. 160, 87 P. 759; Jamison v. S., 117 Tenn. 58, 67, 94 S. W. 675. But see S. v. Blackburn (Ia.), 114 N. W. 531.

605-56 Renfroe v. S., 84 Ark. 16, 104 S. W. 542; S. v. Smith, 18 S. D. 341, 100 N. W. 740.

606-57 P. v. Ah Lean (Cal. App.), 95 P. 380; P. v. Fong Chung, 5 Cal. App. 587, 91 P. 105.

606-58 Elliott v. S., 49 Tex. Cr. 432, 93 S. W. 742.

606-62 Sims v. S., 146 Ala. 109, 41 S. 413; Tuttle v. S., 83 Ark. 379, 104 S. W. 135; Anderson v. S., 77 Ark. 37, 90 S. W. 846; P. v. Ah Lung, 2 Cal. App. 278, 83 P. 296; S. v. Truitt, 5 Penne. (Del.) 466, 62 A. 790; Scott v. S., 3 Ga. App. 479, 60 S. E. 112; Fields v. S., 2 Ga. App. 41, 58 S. E. 327; S. v. Neil, 13 Idaho 539, 90 P. 860, 91 P. 318; Newman v. P., 223 Ill. 324, 79 N. E. 80; Rahke v. S., 168 Ind. 615, 81 N. E. 584; Payne v. C. (Ky.), 110 S. W. 311; S. v. Platner, 196 Mo. 128, 93 S. W. 403; Cotton v. S. (Tex. Cr.), 105 S. W. 185; Bourland v. S., 49 Tex. Cr. 197, 93 S. W. 115; Castle v. S., 49 Tex. Cr. 1, 90 S. W. 32.

607-63 Tuttle v. S., 83 Ark. 379, 104 S. W. 135; P. v. Bowman, 6 Cal. App. 749, 93 P. 198; Scott v. S., 3 Ga. App. 479, 60 S. E. 112; Fields v. S., 2 Ga. App. 41, 58 S. E. 327; Horseford v. S., 124 Ga. 784, 53 S. E. 322; S. v. Niel, 13 Idaho 539, 90 P. 860, 91 P. 318; Payne v. C. (Ky.), 110 S. W. 311; Bowman v. C., 31 Ky. L. R. 828, 104 S. W. 263; Gibson v. C. (Ky.), 104 S. W. 351; Cotton v. S. (Tex. Cr.), 105 S. W. 185; Washington v. S. (Tex. Cr.), 103 S. W. 879; Warren v. S. (Tex. Cr.), 103 S. W. 888; Bawcom v. S., 49 Tex. Cr. 417, 94 S. W. 462; Bourland v. S., 49 Tex. Cr. 197, 93 S. W. 115; Hudson v. S., 49 Tex. Cr. 24, 90 S. W. 177; Castle v. S., 49 Tex. Cr. 1, 90 S. W. 32; Woodson v. C., 107 Va. 895, 59 S. E. 1097.

608-65 Sims v. S., 146 Ala. 109, 41 S. 413.

609-66 S. v. Johnson, 133 Ia. 38, 110 N. W. 170; Childress v. S., 51 Tex. Cr. 455, 103 S. W. 864.

609-68 Pitnam v. S., 148 Ala. 612, 42 S. 993; S. v. Waters, 132 Ia. 481, 109 N. W. 1013; Boyd v. S., 50 Tex. Cr. 138, 94 S. W. 1053.

610-70 Ross v. S. (Wyo.), 93 P. 299.

RATIFICATION [Vol. 10.]

612-4 Cowan v. Mfg. Co., 141 Mich. 87, 104 N. W. 377; Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257; Belcher v. Assn., 74 N. J. L. 833, 67 A. 399; Sanford v. Fountain, 49 Misc. 30, 99 N. Y. S. 234; Sword v. Reformed Con., 29 Pa. Super. 626; Quale v. Hazel, 19 S. D. 483, 104 N. W. 215; Spirvin v. O'Brien (Tex. Civ.), 95 S. W. 696; Sterling v. DeLaune (Tex. Civ.), 105 S. W. 1169.

613-9 Smith v. Bank, 120 Mo. App. 527, 97 S. W. 247; Hall v. R. Co., 27 R. I. 525, 65 A. 278.

614-13 Lamkin & F. v. Ledoux, 101 Me. 581, 64 A. 1048. See Louden Mfg. Co. v. Milmine, 14 Ont. L. R. (Can.) 532.

615-16 See Fidelity Tr. Co. v.

Butler, 28 Ky. L. R. 1268, 91 S. W. 676.

617-30 Central etc. Co. v. Globe T. Co. (Tex. Civ.), 99 S. W. 1144.

619-39 Conklin v. R. Co., 196 Mass. 302, 82 N. E. 23; Steffens v. Nelson, 94 Minn. 365, 102 N. W. 871; Thompson v. Murphy (W. Va.), 53 S. E. 908.

622-51 Ilfeld v. Ziegler, 40 Colo. 401, 91 P. 825; Russell v. Mach. Co. (N. D.), 116 N. W. 611.

REASONABLE DOUBT [Vol. 10.]

626-3 Parham v. S., 147 Ala. 57, 42 S. 1; Gregory v. S., 148 Ala. 566, 42 S. 829; Davis v. S. (Ala.), 44 S. 561; S. v. Harmon (Del), 60 A. 866; S. v. Adams (Del.), 65 A. 510; S. v. Uzzo (Del.), 65 A. 775; S. v. Tyre (Del.), 67 A. 199; S. v. Temple, 194 Mo. 228, 237, 92 S. W. 494, 869; S. v. King (Wash.), 94 P. 663.

626-4 Smith v. S., 142 Ala. 14, 39 S. 329. *Contra*, S. v. Grant, 20 S. D. 164, 105 N. W. 97. *Compare* Leonard v. S. (Ala.), 43 S. 214; Howard v. S. (Ala.), 44 S. 95 (holding such instructions argumentative); P. v. Hoffman, 142 Mich. 531, 105 N. W. 838.

626-5 S. v. Bell, 5 Penne. (Del.) 192, 62 A. 147; S. v. Wilson, 5 Penne. (Del.) 77, 62 A. 227; S. v. Powell, 5 Penne. (Del.) 24, 61 A. 966; S. v. Brown, 5 Penne. (Del.) 339, 61 A. 1077; S. v. Johns (Del.), 65 A. 763; S. v. Honey (Del.), 65 A. 764; S. v. Cephus (Del.), 67 A. 150; S. v. Stewart (Del.), 67 A. 786; S. v. Mills (Del), 69 A. 841.

Requiring "substantial and well founded" doubt is erroneous. Frazier v. S., 117 Tenn. 430, 100 S. W. 94. *Compare* Hampton v. S., 50 Fla. 55, 39 S. 421.

626-6 Little v. S., 145 Ala. 662, 39 S. 674; Brown v .S., 148 Ala. 657, 43 S. 101; Schwantes v. S., 127 Wis. 160, 106 N. W. 237. *Compare* Gordon v. S., 147 Ala. 42, 41 S. 847.

626-8 Shirley v. S., 144 Ala. 35, 40 S. 269. See Toliver v. S., 142 Ala. 3, 38 S. 801.

626-9 Roszczyniala v. S., 125 Wis. 414, 104 N. W. 113.

626-11 Brown v. S., 142 Ala. 287, 38 S. 268.

Possibility of innocence. — Proper to charge that if jury believes beyond reasonable doubt that defendant is guilty they must convict though it is possible that he is innocent. Parham v. S., 147 Ala. 57, 42 S. 1. See also S. v. Spaugh, 200 Mo. 571, 98 S. W. 55; Ter. v. Price (N. M.), 91 P. 733.

Additional definitions. — U. S. v. Richards, 149 Fed. 443; U. S. v. Green, 146 Fed. 803; Neilson v. S., 146 Ala. 283, 40 S. 221; Patterson v. S., 146 Ala. 39, 41 S. 157; Creagh v. S., 149 Ala. 8, 43 S. 112; Dempsey v. S., 83 Ark. 81, 102 S. W. 704; Tetterton v. C., 28 Ky. L. R. 146, 89 S. W. 8; Wylie v. S. (Tex. Cr.), 109 S. W. 186.

626-12 U. S. v. Richards, 149 Fed. 443; U. S. v. Dexter, 154 Fed. 890; Perovich v. U. S., 205 U. S. 86 (circumstantial evidence); Little v. S., 145 Ala. 662, 39 S. 674; Brown v. S., 148 Ala. 657, 43 S. 101; Larimore v. S., 84 Ark. 606, 107 S. W. 165; S. v. Johns (Del.), 65 A. 763; McBeth v. S., 122 Ga. 737, 50 S. E. 931; S. v. Snyder (Ia.), 115 N. W. 225; Watkins v. C., 29 Ky. L. R. 1273, 97 S. W. 740; Ball v. C., 30 Ky. L. R. 600, 99 S. W. 326; Mann v. C. (Ky.), 110 S. W. 243; Keeler v. S., 73 Neb. 441, 103 N. W. 64.

Proof beyond all doubt is not necessary. — Shirley v. S., 144 Ala. 35, 40 S. 269; Gordon v. S., 147 Ala. 42, 41 S. 847; Mills v. S., 148 Ala. 633, 42 S. 816.

627-14 S. v. Mills (Del.), 69 A. 841.

628-16 Boyd v. S. (Ala.), 43 S. 204; Leonard v. S. (Ala.), 43 S. 214.

628-17 Howard v. S. (Ala.), 44 S. 95. *Compare* Boyd v. S., supra; Leonard v. S., supra.

628-18 Leonard v. S., supra; Ter. v. Livingston (N. M.), 84 P. 1021; Frazier v. S., 117 Tenn. 430, 100 S. W. 94.

Proof of each element. — Lucas v. S., 75 Neb. 11, 105 N. W. 976.

Every material allegation. — S. v. Fleetwood (Del.), 65 A. 772; S. v. Cephus (Del.), 67 A. 150; Steinkuhler v. S. (Neb.), 109 N. W. 395.

629-22 Sanity. — S. v. Pressler (Wyo.), 92 P. 806 (rules in various jurisdictions collected and discussed). *Contra*, Rusk v. S. (Tex. Cr.), 110 S. W. 58.

629-24 Venue. — Green v. S. (Ga. App.), 61 S. E. 234; Cooper v. S.,

2 Ga. App. 730, 59 S. E. 20; Keeler v. S., 73 Neb. 441, 103 N. W. 64; S. v. Dickerson, 77 Ohio St. 34, 82 N. E. 969.

Statute of limitations. — Battles v. S. (Tex. Cr.), 109 S. W. 195 (rape).

629-26 U. S. v. Green, 146 Fed. 803; Griffin v. S. (Ala.), 43 S. 197; Way v. S. (Ala.), 46 S. 273; Williams v. S., 123 Ga. 138, 51 S. E. 322; S. v. Hutchings, 30 Utah 319, 84 P. 893; Colbert v. S., 125 Wis. 423, 104 N. W. 61; Schwantes v. S., 127 Wis. 160, 106 N. W. 237.

Hypothesis of guilt should flow naturally from facts proven. Neilson v. S., 146 Ala. 683, 40 S. 221.

630-27 One single fact may raise reasonable doubt. — Walker v. S. (Ala.), 45 S. 640.

630-28 Colbert v. S., 125 Wis. 423, 104 N. W. 61.

631-30 Mere evidentiary facts need not be proven beyond a reasonable doubt. Butt v. S., 81 Ark. 173, 98 S. W. 723.

Corroborating evidence. — Lasater v. S., 77 Ark. 468, 94 S. W. 59.

631-31 S. v. Fisk (Ind.), 83 N. E. 995.

632-34 Allen v. S., 148 Ala. 588, 42 S. 1006; S. v. Reeder, 72 S. C. 223, 51 S. E. 702.

632-35 *Contra.* — Lawson v. S. (Ala.), 46 S. 259.

632-36 Browne v. U. S., 145 Fed. 1, 76 C. C. A. 31 (refusal to charge that good character alone may raise reasonable doubt is not error); Taylor v. S., 148 Ala. 565, 42 S. 997; McCall v. S. (Fla.), 46 S. 321; Nelms v. S., 123 Ga. 575, 51 S. E. 588; Eacock v. S. (Ind.), 82 N. E. 1039; Sweet v. S., 75 Neb. 263, 106 N. W. 31; P. v. Jackson, 182 N. Y. 66, 74 N. E. 565; Niezorawski v. S., 131 Wis. 166, 111 N. W. 250. See also Teague v. S., 144 Ala. 42, 40 S. 312.

632-37 Ransom v. S., 2 Ga. App. 826, 59 S. E. 101.

633-39 Duthey v. S., 131 Wis. 178, 111 N. W. 222.

633-40 P. v. Casey, 231 Ill. 261, 83 N. E. 278.

634-41 In contempt proceedings for violation of an injunction the charge need not be proven beyond a reasonable doubt. Flannery v. P., 225 Ill. 62, 80 N. E. 60.

634-42 P. v. Sullivan, 218 Ill. 419, 75 N. E. 1005 (disbarment proceedings).

REBUTTAL [Vol. 10.]

635-1 Miller v. Springfield Co., 6 Ind. Ter. 115, 89 S. W. 1011.

636-2 Bunnell v. Kintner, 27 Pa. Super. 605.

637-3 Stephens v. Elliott (Mont.), 92 P. 45; Auten v. Bennett, 183 N. Y. 496, 76 N. E. 609.

Where defendant has announced that he will introduce no testimony, plaintiff may introduce, in chief, evidence of a rebuttal character. Brockmiller v. Industrial Wks., 148 Mich. 642, 112 N. W. 688.

637-4 Wendling Lumb. Co. v. Glenwood Co. (Cal.), 95 P. 1029.

639-8 See Meyer Drug Co. v. Madden (Tex. Civ.), 99 S. W. 723.

640-14 Miller v. Springfield Co., 6 Ind. Ter. 115, 89 S. W. 1011; Louisville etc. R. Co. v. Beard, 28 Ky. L. R. 921, 90 S. W. 944; Union R. Co. v. Hunton, 114 Tenn. 609, 88 S. W. 182; Meyer Drug Co. v. Madden (Tex. Civ.), 99 S. W. 723.

Evidence not strictly rebuttal or surrebutal may be excluded where its admission would open up entire case. Hallwood Co. v. Rollins, 73 N. H. 390, 62 A. 380.

641-15 Hoggson v. Sears, 77 Conn. 587, 60 A. 133; Louisville etc. R. Co. v. Beard, 28 Ky. L. R. 921, 90 S. W. 944.

643-19 Burke v. Pence, 206 Mo. 315, 104 S. W. 23; City of McCook v. McAdams, 76 Neb. 1, 106 N. W. 988. See American Car Co. v. Water Co., 218 Pa. 519, 67 A. 861.

643-20 Alabama etc. R. Co. v. Bonner (Ala.), 39 S. 619; Best v. Wohlford (Cal.), 94 P. 98; Dalton v. P., 224 Ill. 333, 79 N. E. 669; S. v. Speritus, 191 Mo. 24, 90 S. W. 459. See Kirby Lumb. Co. v. Chambers (Tex. Civ.), 95 S. W. 607.

643-21 Roberts v. Electric Co., 37 Ind. App. 664, 76 N. E. 895; Crosby v. Wells, 73 N. J. L. 790, 67 A. 295. See Auten v. Bennett, 183 N. Y. 496, 76 N. E. 609.

645-23 Bennett v. Susser, 191 Mass. 329, 77 N. E. 884.

Admission of evidence on a purely collateral question does not necessitate admission of evidence to rebut it. Pichon v. Martin, 35 Ind. App. 167, 73 N. E. 1009.

646-30 Stanley v. Beckham, 153 Fed. 152; Cooke v. Loper (Ala.), 44 S. 78; Moody v. Peirano, 4 Cal. App.

411, 88 P. 380; Wm. Grace Co. v. Larson, 227 Ill. 101, 81 N. E. 44 (rebuttal to contradict expert testimony); Burke v. Pence, 206 Mo. 315, 104 S. W. 23; Bunnell v. Kintner, 27 Pa. Super. 605; Dutton v. R. Co., 32 Pa. Super. 630; American Car Co. v. Water Co., 218 Pa. 519, 67 A. 861; Meyer Drug Co. v. Madden (Tex. Civ.), 99 S. W. 723; St. Louis etc. R. Co. v. Parks, 40 Tex. Civ. 480, 90 S. W. 343; St. Louis etc. R. Co. v. Smith, 38 Tex. Civ. 507, 86 S. W. 943; Smith v. S., 46 Tex. Cr. 267, 81 S. W. 936 (showing animus of defendant); Willard v. Noreross (Vt.), 69 A. 942; Green v. Dodge, 79 Vt. 73, 64 A. 499; Rowe v. R. Co., 44 Wash. 658, 87 P. 921; Bazelon v. Lyon, 128 Wis. 337, 107 N. W. 337.

646-31 Weaver v. S., 83 Ark. 119, 102 S. W. 713; Sampson v. Hughes, 147 Cal. 62, 81 P. 292; Mussellam v. R. Co., 31 Ky. L. R. 908, 104 S. W. 337.

646-32 Auten v. Bennett, 183 N. Y. 496, 76 N. E. 609; Bade v. Hibberd (Or.), 93 P. 364; Willard v. Noreross (Vt.), 69 A. 942; Green v. Dodge, 79 Vt. 73, 64 A. 499; Anderson v. Lumb. Co., 131 Wis. 34, 110 N. W. 788.

647-34 See Patterson v. R. Co., 147 Cal. 178, 81 P. 531.

648-36 Longino v. Tract. Co., 120 La. 803, 45 S. 732.

Where prima facie case has been impeached. — Wade v. R. Co. (Tex. Civ.), 110 S. W. 84.

648-37 Morehead v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340.

648-38 Gosdin v. Williams (Ala.), 44 S. 611; Cross v. S., 147 Ala. 125, 41 S. 875; Higgins v. R. Co., 5 Cal. App. 748, 91 P. 344; In re Dolbeer, 149 Cal. 227, 86 P. 695; Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 P. 61; Southern R. Co. v. Clay (Ga.), 61 S. E. 226; Standard C. Mills v. Cheatham, 125 Ga. 649, 54 S. E. 650; Lo Toon v. Ter., 16 Haw. 351; Gottmanshausen v. Wolfing, 127 Ill. App. 485; Floto v. Floto, 233 Ill. 605, 84 N. E. 712; Tinkle v. Wallace, 167 Ind. 382, 79 N. E. 355; Pharr v. Shadel, 115 La. 92, 38 S. 914; S. v. Crane, 202 Mo. 54, 100 S. W. 422; S. v. Brooks, 202 Mo. 106, 100 S. W. 416; Minard v. R. Co., 74 N. J. L. 39, 64 A. 1054; Hall v. Wagner, 111 App. Div. 70, 97 N. Y. S. 570; Petersburg Dist. v. Peterson, 14 N. D. 344, 103 N. W. 756; Pease v. Magill (N. D.), 115 N. W. 260; Bolton v. Tel. Co., 76 S. C. 529, 57 S. E. 543; Schott v. Swan (S. D.), 114 N. W. 1005; International etc. R. Co. v. McVey (Tex. Civ.), 102 S. W. 172; St. Louis R. Co. v. Cassidy (Tex. Civ.), 107 S. W. 628; Howard v. Lumb. Co., 129 Wis. 98, 108 N. W. 48; Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777.

653-50 Floto v. Floto, 233 Ill. 605, 84 N. E. 712.

655-57 Illinois S. Co. v. Ferguson, 129 Ill. App. 396.

656-59 Wysong v. R. Co., 74 S. C. 1, 54 S. E. 214.

RECEIVERS [Vol. 10.]

661-17 **The unsupported statement** of plaintiff on information and belief, when denied explicitly by affidavit of defendant does not warrant the appointment of a receiver. Weber v. Wallerstein, 111 App. Div. 700, 97 N. Y. S. 852; Henderson v. Reynolds, 168 Ind. 522, 81 N. E. 494.

RECEIVING STOLEN GOODS [Vol. 10.]

666-1 Boyd v. S. (Ala.), 43 S. 204; S. v. Pray (Nev.), 94 P. 218. See Moss v. S., 143 Ala. 86, 39 S. 830 (value must be shown); Booker v. S. (Ala.), 44 S. 56 (control over the property); C. v. Kroniek (Mass.), 82 N. E. 39 (purchase for himself or third person); P. v. Jaffe, 185 N. Y. 497, 78 N. E. 169.

Knowledge that the property was stolen. Minor v. S. (Fla.), 45 S. 818; S. v. Pray (Nev.), 94 P. 218.

Ownership of goods must be shown as alleged. Aldrich v. P., 225 Ill. 610, 80 N. E. 320.

666-4 See S. v. Feiss, 74 N. J. L. 633, 66 A. 418 (owner may testify as to value of goods).

667-5 See Miller v. S., 165 Ind. 566, 76 N. E. 245; S. v. Ozias (Ia.), 113 N. W. 761.

667-7 But see Lipsey v. P., 227 Ill. 364, 81 N. E. 348.

667-11 S. v. Nelson, 27 R. I. 31, 60 A. 589.

669-15 S. v. Ozias (Ia.), 113 N. W. 761.
669-17 S. v. Brown, 72 N. J. L. 354, 60 A. 1117.
669-19 Sexton v. S., 49 Tex. Cr. 253, 92 S. W. 37.
670-22 S. v. Kosky, 191 Mo. 1, 90 S. W. 454. See Thrash v. S., 79 Ark. 347, 96 S. W. 360.
670-23 Boyd v. S. (Ala.), 43 S. 204.
671-24 S. v. Speritus, 191 Mo. 24, 90 S. W. 459.
671-26 Gallaher v. S., 78 Ark. 299, 95 S. W. 463; C. v. Phelps, 192 Mass. 591, 78 N. E. 741. See P. v. Jaffe, 112 App. Div. 516, 98 N. Y. S. 486.
671-28 C. v. Phelps, 192 Mass. 591, 78 N. E. 741. See Golden v. S., 2 Ga. App. 440, 58 S. E. 557.
671-29 Minor v. S. (Fla.), 45 S. 818; S. v. Levich, 128 Ia. 372, 104 N. W. 334; S. v. Kosky, 191 Mo. 1, 90 S. W. 454.
673-35 Lipsey v. P., 227 Ill. 364, 81 N. E. 348; S. v. Levich, 128 Ia. 372, 104 N. W. 334; Bluchert v. S., 165 Ind. 523, 76 N. E. 111. See Gassenheimer v. U. S., 26 App. D. C. 432.
674-37 See Lipsey v. P., supra.
674-38 Beuchert v. S., 165 Ind. 523, 76 N. E. 111; S. v. Levich, 128 Ia. 372, 104 N. W. 334.
674-41 Beuchert v. S., supra.
675-50 Dalton v. S. (Tex. Cr.), 103 S. W. 935.

RECOGNIZANCES [Vol. 10.]

678-2 C. v. Lamar, 32 Pa. Super. 200 (insufficient defense).
678-3 Ter. v. Sellers, 15 Okla. 419, 82 P. 575.
680-9 Hollister v. U. S., 145 Fed. 773, 76 C. C. A. 337.
680-12 Hollister v. U. S., supra.
681-13 Mason v. Terrell, 3 Ga. App. 348, 60 S. E. 4; Baker v. S. (Tex. Cr.), 111 S. W. 735.
682-20 Hollister v. U. S., 145 Fed. 773, 76 C. C. A. 337.
682-22 Davis v. S. (Tex. Cr.), 106 S. W. 1169.
684-33 C. v. Gray, 26 Pa. Super. 110.
686-42 See Moore v. S. (Tex. Cr.), 106 S. W. 358.
686-43 *Compare* Wellmaker v. Terrell, 3 Ga. App. 791, 60 S. E. 464.
687-48 See Moore v. S., supra, 686-42. But see S. v. Holt, 145 N. C. 450, 59 S. E. 64.
688-51 Perkins v. Terrell, 1 Ga. App. 250, 58 S. E. 133. See Bird v. Terrell, 128 Ga. 386, 57 S. E. 777; Woodring v. S. (Tex. Cr.), 108 S. W. 371.

RECORDS [Vol. 10.]

School register, 716-1; *Abstract and index of deeds,* 730-67; *Certificate of increase of capital stock of foreign corporation,* 808-90; *Sworn copy of certified copy,* 862-51; *Photographic copy,* 864-58; *Genuineness of seal,* 897-22; *Schedules of rates filed with interstate commerce commission,* 1008-29.

716-1 **School register** required by law to be kept by teachers, showing names and ages of pupils, open to the public, is an official register and competent as such to prove the facts properly recorded therein. Levels v. R. Co., 196 Mo. 606, 94 S. W. 275. See also Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055.
Land office tract book. — Nurnberger v. U. S., 156 Fed. 721. See Allen v. Kidd (Mass.), 84 N. E. 122.
716-2 *Compare* McInerney v. U. S., 143 Fed. 729, 74 C. C. A. 655.
716-4 See McInerney v. U. S., infra, 742-16; Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055. But see Big Thompson etc. Co. v. Mayne (Colo.), 91 P. 44; Gorham v. Settegast (Tex. Civ.), 98 S. W. 665; infra, 740-8.
716-5 McInerney v. U. S., infra, 742-16 (and the discussion therein). See Priddy v. Boice, supra. *Compare* Big Thompson etc. Co. v. Mayne, supra.
720-19 Big Thompson etc. Co. v. Mayne, supra; In re Jones, 130 Ia. 177, 106 N. W. 610; Allen v. Kidd (Mass.), 84 N. E. 122. *Compare* P. v. Lindley, 37 Colo. 476, 86 P. 352.
Police record of city lights not burning on particular nights, made up

from report telephoned in either by policemen or any person observing the fact, is not official, and not competent to prove the facts shown thereby. Taylor v. Jackson, 151 Mich. 639, 115 N. W. 977.

721-22 Wilson v. Johnson (Ala.), 44 S. 539; Dutton v. Stoughton, 79 Vt. 361, 65 A. 91.

722-25 See Globe M. L. Ins. Co. v. Meyer, infra, 733-77; Washington Sem. v. Borough, 18 Pa. Super. 555. *Compare* **Scott v. Williams,** infra, 736-90.

723-28 See Maher v. Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496.

723-29 Big Thompson etc. Co. v. Mayne, supra, 720-19. See Ex parte Von Vetsera (Cal. App.), 93 P. 1036.

724-35 *Compare* Reeder v. Jones (Del.), 65 A. 571.

725-38 See Jonesboro & R. Co. v. Board, 80 Ark. 316, 97 S. W. 281 (board of directors of levy district).

725-39 *Compare* Allen v. Kidd (Mass.), 84 N. E. 122; Dickenson v. Smith (Wis.), 114 N. W. 133.

725-41 Grafton v. R. Co. (N. D.), 113 N. W. 598.

727-47 Nelson v. S. (Ala.), 43 S. 966 (record of marriage licenses). See Reeder v. Jones (Del.), 65 A. 571 (record of licenses); Keller v. Harrison (Ia.), 116 N. W. 327; Camp v. League (Tex. Civ.), 92 S. W. 1062 (county surveyor's field notes).

Eminent domain proceedings. — Mendocino County v. Peters, 2 Cal. App. 24, 82 P. 1122.

728-53 Houston v. Stewart, 40 Tex. Civ. 499, 90 S. W. 49; Wilkinson v. Linkous (W. Va.), 61 S. E. 152. See Gayle v. Comrs. (Ala.), 46 S. 261.

729-56 C. v. Tryon, 31 Pa. Super. 146.

729-61 Ripon v. Brandon, 80 Vt. 234, 67 A. 541, *dist.* Hubbard v. Moore, 67 Vt. 532, 32 A. 465.

729-62 Ripton v. Brandon, supra.

730-67 Abstract and index of deeds competent secondary evidence. Einstein v. Lumb. Co. (Mo. App.), 111 S. W. 859.

732-73 Kolodrianski v. Locom. Co. (R. I.), 69 A. 505 (of city).

732-75 Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055; Nolt v. Crow, 22 Pa. Super. 113.

732-76 Ball v. Flora, 26 App. D. C. 394.

733-77 In re Goodrich, (1904) Prob. D. (Eng.) 138 (competent to prove date as well as fact of birth; *disappr.* In re Wintle, L. R. 9 Eq. 373); Murray v. Supreme Hive, 112 Tenn. 664, 80 S. W. 827.

An undertaker's report not being required by law is inadmissible. Globe M. L. Ins. Co. v. Meyer, 118 Ill. App. 155.

Foreign record. — See Perrung v. Assn., infra, 1037-61.

733-79 See Maher v. Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496.

734-80 Finer v. Nichols, 122 Mo. App. 497, 99 S. W. 808 (by statute). *Compare* Rohloff v. Assn., 130 Wis. 61, 109 N. W. 989.

By statute. — Vanderbilt v. Mitchell (N. J.), 67 A. 97.

735-87 S. v. Dowdy, 145 N. C. 432, 58 S. E. 1002. See S. v. Schaeffer, 74 Kan. 390, 86 P. 477; S. v. Nippert, 74 Kan. 371, 86 P. 478.

As privileged communications. — See Meyer v. Ins. Co., infra, 1007-25, and "PRIVILEGED COMMUNICATIONS."

735-89 In re McClellan, 20 S. D. 498, 107 N. W. 681 (enlistment records of British army).

736-90 Scott v. Williams, 74 Kan. 448, 87 P. 550. See Austin v. Whitcher, 135 Ia. 733, 110 N. W. 910; Camp v. League (Tex. Civ.), 92 S. W. 1062 (county surveyor's field notes). *Compare* Keller v. Harrison (Ia.), 116 N. W. 327.

736-93 See McInerney v. U. S., infra, 742-16.

738-96 Post v. Lady Jane, 1 Haw. 286.

738-98 Layton v. Kraft, 111 App. Div. 842, 98 N. Y. S. 72. See Casley v. Mitchell, 121 Ia. 96, 96 N. W. 725.

739-2 See Gorham v. Settegast (Tex. Civ.), 98 S. W. 665.

740-5 But see Franklin v. R. Co., 74 S. C. 332, 54 S. E. 578.

740-7 Census. — Gregory v. Woodbery, 53 Fla. 566, 43 S. 504.

740-8 Census report. — Competent only to prove facts of public nature. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201.

Census list or roll as distinguished from census report not competent to prove facts of private nature. Camp-

bell v. Everhart, supra (*cit.* as in accord, Edwards v. Logan, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257, and as *contra,* Flora v. Anderson, 75 Fed. 217); Gorham v. Settegast (Tex. Civ.), 98 S. W. 665 (original roll incompetent to prove existence of persons named therein, their family relationship, ages, or other matters of pedigree). But see Levels v. R. Co., 196 Mo. 606, 94 S. W. 275; and *contra,* Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055 (copies of original lists certified by United States Secretary of Interior held competent to show ages of members of family), *dist.* Hegler v. Faulkner, 153 U. S. 109, and *appr.* Flora v. Anderson, supra; Murray v. Supreme Hive, 112 Tenn. 664, 80 S. W. 827. *Compare* Maher v. Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496, holding certified copy of census of Ireland incompetent to prove age on the grounds that it was contradictory on its face and that it was hearsay under the principle discussed in "RECORDS," p. 733, n 79.

741-12 S. v. R. Co., 141 N. C. 846, 54 S. E. 294.

741-15 See Washington Sem. v. Borough, 18 Pa. Super. 555.

742-16 A ship's manifest delivered to the immigration office (pursuant to act of Congress requiring the ship's commander and agent to report to the inspection officers the name, nationality, last residence and destination of alien immigrants) and kept as a record of such office is a public record and competent evidence of the facts shown thereby relating to the name, sex, age nationality, last residence, destination and occupation of persons landed from the ship. McInerney v. U. S., 143 Fed. 729, 74 C. C. A. 655, *cit.* Richardson v. Mellish, 2 Bing. (Eng.) 229 as holding same under similar statute.

742-17 See U. S. v. Hempstead, 153 Fed. 483; Big Thompson etc. Co. v. Mayne (Colo.), 91 P. 44; McClure v. County, 19 Colo. 122, 34 P. 763. *Compare* Rio Grande Co. v. Catlin (Colo.), 94 P. 323.

Government inspector's report. — Illinois C. R. Co. v. Holt, 29 Ky. L. R. 135, 92 S. W. 540.

742-18 Chemical analysis — report of state chemist. See "ADULTERATION," Vol. 1, p. 616, n. 1, and matter supplementary thereto, supra.

Report of state inspector of mines. Certified copy competent, by statute. Andricus v. Coal Co., 28 Ky. L. R. 704, 90 S. W. 233 (action for injuries to miner).

743-19 *Compare* cases under 740-7, supra.

745-27 Certificates of election. See Fleener v. Johnson, 38 Ind. App. 334, 77 N. E. 366, and "ELECTIONS."

745-28 *Compare* Trimble v. Borroughs, 41 Tex. Civ. 554, 95 S. W. 614.

746-32 See Flynt v. Taylor (Tex. Civ.), 91 S. W. 864; Trimble v. Borroughs, 41 Tex. Civ. 554, 95 S. W. 614.

746-34 The date of making the record. — Mansfield v. Johnson, 51 Fla. 239, 40 S. 196.

750-53 But see S. v. Costa, 78 Vt. 198, 62 A. 38.

751-60 *Compare* Nurnberger v. U. S., 156 Fed. 721.

754-73 Embree v. Emerson, 37 Ind. App. 16, 74 N. E. 44, 1110.

754-74 Tucker v. Duncan, 224 Ill. 453, 79 N. E. 613.

755-77 To show recordation. Brucke v. Hubbard, 74 S. C. 144, 54 S. E. 249. *Compare* infra, 919-35.

756-80 Cobb v. Dunlevie (W. Va.), 60 S. E. 384.

757-85 Veatch v. Gray, 41 Tex. Civ. 145, 91 S. W. 324; Jones v. Neal (Tex. Civ.), 98 S. W. 417; Townsend v. Downer, 32 Vt. 183.

757-86 Ammons v. Dwyer, 78 Tex. 639, 15 S. W. 1049.

759-94 *Compare* McInerney v. U. S., 143 Fed. 729, 74 C. C. A. 655.

The indictment is proper part of the judgment roll of former conviction introduced for impeachment. Ball v. U. S., 147 Fed. 32, 78 C. C. A. 126.

761-99 *Compare* Dowd v. S. (Tex. Cr.), 108 S. W. 389.

761-2 See Mansfield v. Johnson, 51 Fla. 239, 40 S. 196.

764-14 Toombs v. Spratlin, 127 Ga. 766, 57 S. E. 59.

764-15 *Compare* S. v. Call, 100 Me. 403, 61 A. 833.

765-21 *Compare* 880-23, infra.

766-23 But see Sellers v. Page, 127 Ga. 633, 56 S. E. 1011 (original

record of court trying the case is competent).

768-32 Blocker v. Owensboro (Ky.), 110 S. W. 369.

775-65 *Compare* Palmer v. Parker, infra, 793-20.

778-75 Clerk's personal memorandum book not competent. — Ex parte Von Vetsera (Cal. App.), 93 P. 1036.

778-76 See Mansfield v. Johnson, 51 Fla. 239, 40 S. 196.

778-77 Cockrell v. Schmitt (Okla.), 94 P. 521; Gibson v. Holmes, 78 Vt. 110, 62 A. 11. *Compare* Ex parte Von Vetsera, supra.

779-78 Cockrell v. Schmitt (Okla.), 94 P. 521. *Compare* Teague v. Swasey (Tex. Civ.), 102 S. W. 458.

780-81 See McInerney v. U. S., 143 Fed. 729, 735, 74 C. C. A. 655. *Compare* Warburton v. Gourse, 193 Mass. 203, 79 N. E. 270.

785-98 See East Coast Co. v. E. Y. Co. (Fla.), 45 S. 826.

786-1 Ormond v. Shaw (Ala.), 39 S. 108 (assessment records).

787-8 See In re Pearson, 19 Phila. (Pa.) 128; In re Pearson, 51 Pa. C. C. 330.

788-10 Beall v. Chatham (Tex. Civ.), 94 S. W. 1086 (bankruptcy proceedings). See Sims v. S. (Fla.), 44 S. 737; In re Pearson, 19 Phila. (Pa.) 59.

789-12 See In re Pearson, supra.

789-15 *Compare* Chicago etc. R. Co. v. Grantham, 165 Ind. 279, 75 N. E. 265, and infra, 894-2.

790-16 See Palmer v. Parker, infra, 793-20.

792-19 Patterson v. Drake, 126 Ga. 478, 55 S. E. 175. See Sims v. S. (Fla.), 44 S. 737; Pontier v. S. (Md.), 68 A. 1059.

793-20 Palmer v. Parker, 52 Fla. 389, 42 S. 398, *cit.* Clem v. Meserole, 44 Fla. 234, 32 S. 815, 103 Am. St. 145; Patterson v. Drake, supra; In re Pearson, 19 Phila. (Pa.) 59.

A statute dispensing with the necessity for producing the remainder of the record in the case of judgments "rendered and entered in the circuit courts" does not apply to an abstract of a justice's judgment filed with clerk of the circuit court although it thus becomes a judgment of the latter court. Palmer v. Parker, supra.

794-25 See Palmer v. Parker, supra, 793-20.

798-40 See Flynt v. Taylor, infra, 801-54.

799-42 Smithers v. Lowrance, 100 Tex. 77, 93 S. W. 1064 (statement of the custodian to the witness who makes the copy is not hearsay and is sufficient to identify the records) *over.* 91 S. W. 606. *Compare* 803-66, infra.

799-43 See Nelson v. S., 149 Ala. 26, 43 S. 966.

799-44 Tully v. Lewitz, 50 Misc. 350, 98 N. Y. S. 829. See Layton v. Kraft, 111 App. Div. 842, 98 N. Y. S. 72.

800-46 S. v. Bringgold, 40 Wash. 12, 82 P. 132.

801-54 But see Flynt v. Taylor (Tex. Civ.), 91 S. W. 864. *Compare* Lorenz v. U. S., 24 App. D. C. 337; Murphy v. Cady, 145 Mich. 33, 108 N. W. 493 (copy of ancient document admissible without proof of authenticity of original).

801-55 Waterbury Nat. Bk. v. Reed, 231 Ill. 246, 83 N. E. 188; S. v. Kesner, 72 Kan. 87, 82 P. 720. See supra, "JUDICIAL NOTICE," 1007-76.

802-59 See Ryan v. Young, 147 Ala. 660, 41 S. 954.

802-60 Junior v. S., infra, 803-67.

802-62 See Carp v. Ins. Co., infra, 803-66.

802-63 See Swygart v. Willard, infra, 803-66; S. v. Bringgold, 40 Wash. 12, 82 P. 132.

803-66 Carp v. Ins. Co., 203 Mo. 295, 101 S. W. 78 (witness must have personal knowledge, attorney in case competent to identify pleadings, judgment and verdict. See S. v. Bringgold, supra (certification by custodian necessary only where a record is attempted to be proved as a record). *Compare* 799-42, supra.

Affidavits from files in another case held sufficiently identified by witness not the custodian. Swygart v. Willard, 166 Ind. App. 25, 76 N. E. 755.

803-67 Junior v. S., 76 Ark. 483, 89 S. W. 467.

807-82 Hagan v. Holderby (W. Va.), 57 S. E. 289.

807-83 Pontier v. S. (Md.), 68 A. 1059.

807-85 See Frugia v. Truehart (Tex. Civ.), 106 S. W. 736 (recorder's certified abstract of deeds held competent secondary evidence); Houston v. Stewart, 40 Tex. Civ. 499, 90 S. W. 49.

808-86 Wilkins v. Clawson (Tex. Civ.), 110 S. W. 103.

808-88 See Smithers v. Lowrance, 100 Tex. 77, 93 S. W. 1064.

808-90 Certificate of increase of capital stock of foreign corporation when made by secretary of state of foreign state under his seal as required by the law of such state is admissible though not under the great seal of the state and not authenticated as provided by the act of Congress. Person & R. Co. v. Lipps, 219 Pa. 99, 67 A. 1081.

809-91 P. v. R. Co., 231 Ill. 514, 83 N. E. 193.

Claims against the county filed with auditor. McGuire v. County, 133 Ia. 636, 111 N. W. 34.

809-93 See S. v. Junkin (Neb.), 113 N. W. 256.

But parol evidence of matters not included in the record is not excluded by this rule. Phillips v. Welts, 40 Wash. 501, 82 P. 737 (minutes of county commissioners); and see "Parol Evidence," Vol. 9.

810-2 Highway by user provable by user. Harriman v. Moore, 74 N. H. 277, 67 A. 225.

811-10 Action of grand jury. Elliott v. S., 1 Ga. App. 113, 57 S. E. 972.

812-21 Clawson v. Wilkins (Tex. Civ.), 93 S. W. 1086. See Butt v. Mastin, 143 Ala. 321, 39 S. 217.

814-31 But see Cullinan v. Horan, 116 App. Div. 711, 102 N. Y. S. 132.

814-33 Southern R. Co. v. Leard, 146 Ala. 349, 39 S. 449. See Ripton v. Brandon, 80 Vt. 234, 67 A. 541.

815-35 Robbins v. Hubbard (Tex. Civ.), 108 S. W. 773.

816-45 Hagan v. Holderby (W. Va.), 57 S. E. 289 (qualification of receiver). But see S. v. Call, infra, 835-18.

Rules of court must be proved by record thereof. Caicago C. R. Co. v. Gregory, 123 Ill. App. 259.

But a motion orally made at the trial to amend pleadings may be proved by parol. Dickman v. MacDonald, 50 Misc. 531, 99 N. Y. S. 429.

Action of grand jury. — See supra, 811-10.

819-50 Mullenary v. Burton, 3 Cal. App. 263, 84 P. 159 (date of commencement).

819-51 Goslin v. C., 28 Ky. L. R. 683, 90 S. W. 223.

919-52 Where pleadings may be oral. — See Ruemer v. Clark, 121 App. Div. 231, 105 N. Y. S. 659.

820-56 Sherman v. S., 2 Ga. App. 148, 58 S. E. 393 (warrant of arrest).

820-61 See Patterson v. Drake, 126 Ga. 478, 55 S. E. 175.

825-87 Filing and docketing of claim best shown by the docket entries. Gillespie v. Campbell (Ala.), 43 S. 28.

827-96 Davis v. S., 90 Miss. 56, 43 S. 81.

827-97 Cooke v. Loper (Ala.), 44 S. 78; S. v. Ireland, 89 Miss. 763, 42 S. 797. But see Ruemer v. Clark, 121 App. Div. 231, 105 N. Y. S. 659.

829-2 See Kelly v. Moore, 22 App. D. C. 9.

829-4 Am. Sur. Co. v. Wood, 2 Ga. App. 641, 58 S. E. 1116 (that returns of administrator had been filed and then withdrawn); Breeden v. Martens (S. D.), 112 N. W. 960. But see Brusseau v. Brick Co., 133 Ia. 245, 110 N. W. 577; Griffin v. R. Co., 115 Mo. App. 549, 91 S. W. 1015.

830-6 Woodal v. S., 145 Ala. 662, 39 S. 718; Williams v. S., 149 Ala. 4, 43 S. 720 (divorce); Joyce v. Joyce, 80 Conn. 88, 67 A. 374.

Appointment to office. — S. v. Twining, 73 N. J. L. 3, 62 A. 402. See "Officers."

831-8 See In re Colton, 129 Ia. 542, 105 N. W. 1008.

832-11 See Massuco v. Tomasi, 80 Vt. 180, 67 A. 551.

Swearing of witness. — Goslin v. C., 28 Ky. L. R. 683, 90 S. W. 223.

834-12 See Joyce v. Joyce, 80 Conn. 88, 67 A. 374; S. v. Matlack, 5 Penne. (Del.) 401, 64 A. 259; C. v. Dill, 156 Mass. 226, 30 N. E. 1016; Cullinan v. Horan, 116 App. Div. 711, 102 N. Y. S. 132; Massuco v. Tomasi, supra.

834-13 Dickman v. MacDonald, 50 Misc. 531, 99 N. Y. S. 429. See Leaptrot v. S., 51 Fla. 57, 40 S. 616

(testimony of juror on his voir dire).

834-14 **But a mere abstract** of the testimony given before a coroner, made by the latter pursuant to law is not the best evidence — any witness who heard the testimony may relate it. Green v. S., 124 Ga. 343, 52 S. E. 431.

835-18 See Joyce v. Joyce, 80 Conn. 88, 67 A. 374; Massuco v. Tomasi, 80 Vt. 180, 67 A. 551.

Plea of guilty orally made. — S. v. Call, 100 Me. 403, 61 A. 833.

Fact of voting. — S. v. Matlack, 5 Penne. (Del.) 401, 64 A. 259.

835-20 Wilson v. Wood, 127 Ga. 316, 56 S. E. 457 (witness must have examined all of the record or so much thereof as is pertinent to the inquiry); In re Colton, 129 Ia. 542, 105 N. W. 1008 (testimony of custodian unnecessary — any witness having sufficient capacity and experience to make the search may testify). See Reeder v. Jones (Del.), 65 A. 571. But see Buxton v. Merc. Co., 18 Okla. 287, 90 P. 19.

The lack of administration. — Wilson v. Wood, 127 Ga. 316, 56 S. E. 457.

Official custodian. — Stamper v. C., 30 Ky. L. R. 992, 100 S. W. 286.

836-24 In re Colton, 129 Ia. 542, 105 N. W. 1008.

836-27 Cullinan v. Horan, 116 App. Div. 711, 102 N. Y. S. 132.

837-32 Brasch v. T. Co., 80 Ark. 425, 97 S. W. 445; Davis v. Montgomery, 205 Mo. 271, 103 S. W. 779.

839-37 See Brasch v. T. Co., supra.

839-39 Felix v. Caldwell, 235 Ill. 159, 85 N. E. 228; Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767 (adoption proceedings); Moulierre v. Coco, 116 La. 845, 41 S. 113 (proces verbal); Eminence Land & Min. Co. v. Land Co., 187 Mo. 420, 86 S. W. 145; Day v. S., 51 Tex. Cr. 324, 101 S. W. 806 (bail bond).

840-43 Patterson v. Drake, 126 Ga. 478, 55 S. E. 175 (execution).

841-48 Davis v. Montgomery, infra, 862-51.

841-50 Kinney v. Howard, 133 Ia. 94, 110 N. W. 282.

Action of park commissioners. City of Denver v. Spencer, 34 Colo. 270, 82 P. 590.

842-52 See Ex parte Von Vetsera (Cal. App.), 93 P. 1036; Cockrell v. Schmitt, supra, 778-77 and 779-78.

842-53 See S. v. True, 116 Tenn. 294, 95 S. W. 1028.

843-57 See Ex parte Von Vetsera (Cal. App.), 93 P. 1036; S. v. True, supra.

845-65 **The previous existence,** though not the contents, of an alleged judicial record may be proved by the testimony of a witness that the clerk of the court had read to him the record of such proceeding. Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767.

846-70 Kinard v. S., 1 Ga. App. 146, 58 S. E. 263; Mahan v. S., 1 Ga. App. 534, 58 S. E. 265.

847-76 See Sims v. S. (Ala.), 46 S. 493; Grabill v. S. (Tex. Cr.), 97 S. W. 1046; McGill v. Fuller Co., 45 Wash. 615, 88 P. 1038.

848-83 Williamson v. York, 33 Tex. Civ. 369, 77 S. W. 266. See Cox v. McDonald, 118 Ga. 414, 45 S. E. 401.

Variance in copy and affidavit held immaterial. Williams v. Cessna (Tex. Civ.), 95 S. W. 1106.

Affidavit is conclusive and cross-examination of affiant is not permissible. Glos v. Garrett, 219 Ill. 208, 76 N. E. 373.

849-88 **The custodian's failure** to find a complaint in a former case after search, warrants the introduction of secondary evidence. Porch v. S., 50 Tex. Cr. 335, 99 S. W. 102.

851-97 *Compare* Patterson v. Drake, 126 Ga. 475, 55 S. E. 175.

Where there is no issue as to the existence or contents of the record or document in question the showing of search need not be so strong. Porch v. S., supra.

853-11 See Meyer v. Ins. Co., infra, 1007-25.

855-16 See Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767.

Lost pleadings. — Robbins v. Hubbard (Tex. Civ.), 108 S. W. 773.

856-24 See Glos v. Wheeler, 229 Ill. 272, 82 N. E. 234; Clawson v. Wilkins (Tex. Civ.), 93 S. W. 1086 (competent only as secondary evidence).

860-38 See Schradin v. R. Co., 103 N. Y. S. 73 (newspaper copies of legislative acts).

861-45 By statute. — Chicago etc. R. Co. v. Weber, 219 Ill. 372, 76 N. E. 489. See also Mandel v. Land Co., 154 Ill. 177, 40 N. 462, 45 Am. St. 124, 27 L. R. A. 313; Grand Lodge v. Young, 123 Ill. App. 628.

861-48 See Foster v. P., 121 Ill. App. 165; S. v. Schaeffer, 74 Kan. 390, 86 P. 477; S. v. Nippert, 74 Kan. 371, 86 P. 478; First Nat. Bk. v. Miller, 48 Or. 587, 87 P. 892.

861-50 *Compare* Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767; Davis v. Montgomery, 205 Mo. 271, 103 S. W. 979.

862-51 See Ruddock Co. v. Peyret, 113 La. 867, 37 S. 858.

Sworn copy of certified copy held competent secondary evidence. Davis v. Montgomery, 205 Mo. 271, 103 S. W. 979.

862-52 See Williams v. Cessna (Tex. Civ.), 95 S. W. 1106. But see Preston v. Hirsch, 5 Cal. App. 485, 90 P. 965.

862-53 Mansfield v. Johnson, infra, 874-1; Trimble v. Borroughs, 41 Tex. Civ. 554, 95 S. W. 614. But see Ruddock Co. v. Peyret, 113 La. 867, 37 S. 858.

Copy of record of copy. — Preston v. Hirsch, 5 Cal. App. 485, 90 P. 965.

863-56 Certified copy of transcript on appeal competent secondary evidence of the lost original record below. Louisville etc. R. Co. v. Fowler, 29 Ky. L. R. 905, 96 S. W. 568.

864-58 Smithers v. Lowrance, 100 Tex. 77, 93 S. W. 1064; Wolf v. King (Tex. Civ.), 107 S. W. 617. See S. v. Schaeffer, 74 Kan. 390, 86 P. 477; S. v. Nippert, 74 Kan. 371, 86 P. 478.

Photographic copy of foreign record, the correctness of which is shown, is competent secondary evidence, at least for the purpose of verifying the correctness of a sworn copy. In re McClellan, 20 S. D. 498, 107 N. W. 681 (foreign enlistment records).

864-60 Kelly v. Moore, 22 App. D. C. 9 (will on file with register of probate court).

864-61 S. v. Nippert, 74 Kan. 371, 86 P. 478. *Compare* supra, 861-48. See Wolf v. King (Tex. Civ.), 107 S. W. 617.

865-64 Impeaching correctness of copy by oral testimony is not permissible where the original is also present in court. Glos v. Holmes, 228 Ill. 436, 81 N. E. 1064.

866-73 Kelly v. Moore, 22 App. D. C. 9; In re McClellan, 20 S. D. 498, 107 N. W. 681 (of custodian).

866-74 Glos v. Holmes, supra.

867-79 Mansfield v. Johnson, 51 Fla. 239, 40 S. 196; Austin v. Whitcher, 135 Ia. 733, 110 N. W. 910; Davenport v. Davenport, 80 Vt. 400, 68 A. 49. See Pearce v. Min. Co. (Wash.), 92 P. 773. But see Carpenter v. Dressler, 76 Ark. 400, 89 S. W. 89; Ruddock Co. v. Peyret, 113 La. 867, 37 S. 858. But see Rohloff v. Assn., 130 Wis. 61, 109 N. W. 989.

Record of marks and brands. — Seaborn v. S. (Tex. Cr.), 90 S. W. 649.

869-80 Keller v. Harrison (Ia.), 116 N. W. 327. See Campbell v. Mfg. Co., 53 Fla. 632, 43 S. 874; Thomas v. Williamson, 51 Fla. 332, 40 S. 831; S. v. Dowdy, 145 N. C. 432, 58 S. E. 1002; First Nat. Bk. v. Miller, 48 Or. 587, 87 P. 892; Montgomery v. R. Co., 73 S. C. 503, 53 S. E. 987.

871-87 Preliminary filing and notice. — Burton v. S., 51 Tex. Cr. 196, 101 S. W. 226; Lamar v. S., 49 Tex. Cr. 563, 95 S. W. 509.

873-92 Ayers v. Deering Co., 76 Kan. 149, 90 P. 794; Milwaukee Ex. Co. v. Gordon (Mont.), 95 P. 995. See Wilcox v. Bergman, 96 Minn. 219, 104 N. W. 955.

873-95 Flynt v. Taylor (Tex. Civ.), 91 S. W. 864. *Compare* Murphy v. Cady, 145 Mich. 33, 108 N. W. 493.

Ancient instruments. — Murphy v. Cady, 145 Mich. 33, 108 N. W. 493. But see "ANCIENT DOCUMENTS."

873-96 Andrieus v. Coal Co., 28 Ky. L. R. 704, 90 S. W. 233; Vanderbilt v. Mitchell (N. J.), 67 A. 97 (certificates of birth); Burton v. S., 51 Tex. Cr. 196, 101 S. W. 226 (county clerk); Lamar v. S., 49 Tex. Cr. 563, 95 S. W. 509 (county clerk).

874-97 See S. v. Dowdy, 145 N. C. 432, 58 S. E. 1002.

874-99 See Sylvester v. S., 46 Wash. 585, 91 P. 15.

875-1 Mansfield v. Johnson, 51 Fla. 239, 40 S. 196 (certified copy of record of judgment in one county recorded in another may be proved

by certified copy of latter record).

875-6 Letter received by state treasurer. — Trimble v. Borroughs, 41 Tex. Civ. 554, 95 S. W. 614.

875-7 Montgomery v. R. Co., 73 S. C. 503, 53 S. E. 987; Cobb v. Dunlevie (W. Va.), 60 S. E. 384. See infra, 930-90.

Erratum. — "Authorized" should read "unauthorized."

875-8 Globe Ins. Co. v. Meyer, 118 Ill. App. 155.

877-17 Butt v. Mastin, 143 Ala. 321, 39 S. 217 (by statute); Smithers v. Lowrance, 100 Tex. 77, 93 S. W. 1064. See Sylvester v. S., 46 Wash. 585, 91 P. 15. *Compare* Preston v. Hirsch, 5 Cal. App. 485, 90 P. 965.

As secondary evidence only. — Covington v. Berry, 76 Ark. 460, 88 S. W. 1005 (to prove lost patent); Carpenter v. Smith, 76 Ark. 447, 88 S. W. 976 (same); Carpenter v. Dressler, 76 Ark. 400, 89 S. W. 89 (same).

878-18 Trimble v. Borroughs, 41 Tex. Civ. 554, 95 S. W. 614. See Slaughter v. Cooper (Tex. Civ.), 107 S. W. 897. *Compare* 807-85 and 808-86, supra.

878-19 Trimble v. Borroughs, supra (letter — also a copy of letter sent by commissioner to treasurer); Kirby v. Hayden (Tex. Civ.), 99 S. W. 746. See Flynt v. Taylor (Tex. Civ.), 91 S. W. 864 (letters to commissioner).

879-25 P. v. Wiemers, 225 Ill. 17, 89 N. E. 45 (competent only as secondary evidence after accounting for original plat from which record is made); Becker v. Fillingham, 209 Mo. 578, 108 S. W. 41. See Austin v. Whitcher, 135 Ia. 733, 110 N. W. 910. *Compare* Stewart v. Land Co., 200 Mo. 281, 98 S. W. 767.

879-27 Montgomery v. R. Co., 73 S. C. 503, 53 S. E. 988.

879-28 See Montgomery v. R. Co., supra, 875-7.

880-32 Kinard v. S., 1 Ga. App. 146, 58 S. E. 263; Seaborn v. S. (Tex. Cr.), 90 S. W. 649.

880-33 Blocker v. Owensboro (Ky.), 110 S. W. 369. *Compare* supra, 765-21 et seq.

881-34 Bruce v. Wanzer, 20 S. D., 277, 105 N. W. 282 (discretionary).

881-35 See Lorenz v. U. S., 24 App. D. C. 337.

881-37 Carp v. Ins. Co., 203 Mo. 295, 101 S. W. 78.

883-46 See Gage v. Chicago, 225 Ill. 218, 80 N. E. 127 (pen changes in a printed blank).

884-52 East Coast Co. v. E. Y. Co. (Fla.), 45 S. 826.

884-56 Hubbard v. Swofford, 209 Mo. 495, 108 S. W. 15.

885-59 Hubbard v. Swofford, supra (the omission of the "(L. S.)" in certified copy will be presumed to be the mistake of the recorder).

886-68 *Contra*, Globe Ins. Co. v. Meyer, 118 Ill. App. 155.

889-81 See Jordan v. McDonnell (Ala.), 44 S. 101 (certificate in name of clerk "per" the deputy held sufficient).

889-82 See "JUDICIAL NOTICE," Vol. 7, p. 980, notes 57 and 58.

891-88 Smallwood v. Kimball, 129 Ga. 49, 58 S. E. 640 (*foll.* Sellers v. Page, 127 Ga. 633, 56 S. E. 1011; and Lay v. Shepard, 112 Ga. 111, 37 S. E. 132).

It must affirmatively appear from the certificate, where the judge of the court of ordinary certifies the copy, that there is no other clerk. Smallwood v. Kimball, supra; Sellers v. Page, supra.

891-90 See Williams v. Cessna (Tex. Civ.), 95 S. W. 1106.

894-2 Chicago etc. R. Co. v. Grantham, 165 Ind. 279, 75 N. E. 265 (certificate that the copy contains a "full and complete copy of the complaint, answer, reply and judgment" in the cause is sufficient).

895-5 Brecker v. Fillingham, 209 Mo. 578, 108 S. W. 41 (copy of map certified to be true copy "so far as it goes into detail" is not admissible). *Compare* Ormond v. Shaw (Ala.), 39 S. 108; Shelton v. R. Co. (Mo. App.), 110 S. W. 627.

"Abstract" or "extract". — Where the matter certified appears to be a copy of the record and not a mere statement of the officer, the fact that it is called an "abstract" or "extract" in the certificate does not render it inadmissible. Scheidegger v. Terrell, 149 Ala. 338, 39 S. 172.

897-21 See Jordan v. McDowell (Ala.), 44 S. 101.

897-22 Genuineness of seal may be proved or disproved by comparison with other genuine impressions. Loring v. Jackson (Tex. Civ.), 95 S. W. 19.

898-30 See S. v. Kniffen, 44 Wash. 485, 87 P. 837.

902-45 The certificate may properly state the particular record from which the copy is taken and is therefore prima facie evidence of this fact. Mansfield v. Johnson, 51 Fla. 239, 40 S. 196.

902-47 See East Coast Co. v. E. Y. Co. (Fla.), 45 S. 826. *Compare* Ormond v. Shaw (Ala.), 39 S. 108; Brecker v. Fillingham, supra, 895-5.

904-54 First Nat. Bk. v. Miller, infra, 912-92.

904-55 Foster v. P., infra, 904-56.

904-56 But see Foster v. P., 121 Ill. App. 165.

905-58 Hagan v. Holderby (W. Va.), 57 S. E. 289.

906-62 Pontier v. S. (Md.), 68 A. 1059 (of decree of court to prove its recovery).

912-89 Peeples v. Woolen Mills (Tex. Civ.), 90 S. W. 61.

912-91 Certified transcript of justice's docket. — Patterson v. Drake, 126 Ga. 478, 55 S. E. 175.

912-92 Original documents sent up with the transcript may be proved by a certified or by a sworn copy. First Nat. Bk. v. Miller, 48 Or. 587, 87 P. 892.

913-96 Louisville etc. R. Co. v. Fowler, supra, 863-56.

913-98 Mansfield v. Johnson, 51 Fla. 239, 40 S. 196; Peeples v. Woolen Mills (Tex. Civ.), 90 S. W. 61 (execution and return).

914-5 See supra, 891-88, and infra, 1029-23.

914-9 Jordan v. McDonnell (Ala.), 44 S. 101.

919-34 Kinard v. S., 1 Ga. App. 146, 58 S. E. 263 (original in possession of adverse party); Mahan v. S., 1 Ga. App. 534, 58 S. E. 265 (same).

919-35 *Compare* supra, 755-77.

920-37 Execution and delivery of original deed need not be proved. Cunningham v. Cunningham, 75 Conn. 64, 53 A. 318.

921-51 Hong Quon v. Sam, 14 Haw. 276; Bruce v. Wanzer, 20 S. D. 277, 105 N. W. 282.

923-52 Crawford v. McDonald, 84 Ark. 415, 106 S. W. 206; Patterson v. Drake, 126 Ga. 478, 55 S. E. 175; Ming v. Olster, 195 Mo. 460, 92 S. W. 898.

923-54 Sims v. Scheussler, 2 Ga. App. 466, 58 S. E. 693.

Original in possession of adverse party. — Kinard v. S., 1 Ga. App. 146, 58 S. E. 263; Mahan v. S., 1 Ga. App. 534, 58 S. E. 265.

925-64 Ming v. Olster, 195 Mo. 460, 92 S. W. 898.

Affidavit of forgery. — Bentley v. McCall, 119 Ga. 530, 46 S. E. 645.

926-67 See Hong Quon v. Sam, 14 Haw. 276.

926-72 Copy of record of sister state. — See infra, 1034-42.

Existence or genuineness of original need not be proved. Sims v. Scheussler, 2 Ga. App. 466, 58 S. E. 693. *Compare* Dyson v. Knight, infra, 935-19.

926-73 Bentley v. McCall, 119 Ga. 530, 46 S. E. 645; Robbins v. Hubbard (Tex. Civ.), 108 S. W. 773.

927-75 *Compare* Dyson v. Knight, infra, 935-19.

927-76 Ming v. Olster, 195 Mo. 460, 92 S. W. 898; Chrast v. O'Connor, 41 Wash. 360, 83 P. 238. See Bruce v. Wanzer, 20 S. D. 277, 105 N. W. 282.

930-89 Mansfield v. Johnson, 51 Fla. 239, 40 S. 196.

930-90 Bower v. Cohen, 126 Ga. 35, 54 S. E. 918; Ball v. Loughridge, 30 Ky. L. R. 1123, 100 S. W. 275; Belcher v. Polly, 32 Ky. L. R. 623, 106 S. W. 818; Cobb v. Dunlevie (W. Va.), 60 S. E. 384. See supra, 875-7 et seq.

931-92 Alaska Exp. Co. v. Northern Co., 152 Fed. 145.

Recording of translation of a private instrument being unauthorized a copy of such record is inadmissible. West v. Oil Co. (Tex. Civ.), 102 S. W. 927.

932-98 Williamson v. York, 33 Tex. Civ. 369, 77 S. W. 266 (certified copy of record of certified copy).

933-7 Bower v. Cohen, 126 Ga. 35, 54 S. E. 918; Belcher v. Polly, 32 Ky. L. R. 623, 106 S. W. 818.

934-11 Cole v. Ward (S. C.), 61 S. E. 108.

935-19 But the existence of an original deed must be proved in such case before the copy is competent. Dyson v. Knight (Ga.), 61 S. E. 468.
936-21 See supra, 878-19.
936-26 *Compare* West v. Oil Co. (Tex. Civ.), 102 S. W. 927.
937-28 Williams v. Steele (Tex. Civ.), 108 S. W. 155.
For other cases under this and succeeding notes under the heading "JUDICIAL RECORDS," see supra, "JUDGMENTS."
Bankruptcy proceedings, — rule applies. Eidelstein v. U. S., 149 Fed. 636, 79 C. C. A. 328.
939-29 Hare v. Shaw, 84 Ark. 32, 104 S. W. 931; P. v. Crowe, 130 Ill. App. 349; Warburton v. Gourse, 193 Mass. 203, 79 N. E. 270; Becker v. Linton (Neb.), 114 N. W. 928; Davis v. Ragland (Tex. Civ.), 93 S. W. 1099; Nichols v. Doak (Wash.), 93 P. 919; Chappell v. Chappell, 45 Wash. 652, 89 P. 166. See Owens v. Gage (Tex.), 106 S. W. 880.
943-44 Gilman v. Heitman (Ia.), 113 N. W. 932.
945-55 See Hollenbeck v. Glover, 128 Ga. 52, 57 S. E. 108.
945-59 Carpenter v. Auditor, 144 Mich. 251, 107 N. W. 878.
949-78 Lutcher v. Allen (Tex. Civ.), 95 S. W. 572.
950-80 Aldrich v. Barton (Cal.), 95 P. 900; In re Davis, 151 Cal. 318, 86 P. 183; Medlin & L. v. Lumb. Co., 128 Ga. 115, 57 S. E. 232; Baltimore etc. R. Co. v. Freeze (Ind.), 82 N. E. 761; Moore v. Hanscom (Tex. Civ.), 103 S. W. 665, judgment *mod.*, 106 S. W. 876.
950-82 Bliss v. Caille Bros. Co., 149 Mich. 601, s. c. sub nom. Bliss v. Tyler, 113 N. W. 317; S. v. Murry (S. C.), 60 S. E. 928.
951-83 Southern Lumb. Co. v. Ward, 16 Okla. 131, 85 P. 459.
951-86 Waterman v. Bash, 46 Wash. 212, 89 P. 556.
Record silent as to service of process. Weaver v. Webb, 3 Ga. App. 726, 60 S. E. 367.
952-93 Francis v. Lilly, 30 Ky. L. R. 391, 98 S. W. 996 (in a direct proceeding recital of service is rebuttable).
953-96 Briggs v. Manning, 80 Ark. 304, 97 S. W. 289.
953-1 Johnson v. Hunter, 147 Fed. 133, *rev.* 127 Fed. 219, 77 C. C. A. 359 (no presumption that additional evidence was presented where recited facts are insufficient).
954-4 Davis v. Ragland (Tex. Civ.), 93 S. W. 1099.
955-11 Warburton v. Gourse, 193 Mass. 203, 79 N. E. 270.
956-20 Horn v. Metzger, 234 Ill. 240, 84 N. E. 893.
961-71 Denial of existence of record. — Rainey v. Ridgway (Ala.), 43 S. 843.
961-72 White v. Martin, 2 Alaska 495; In re McVay, 14 Idaho 56, 93 P. 28; Appeal of Mudgett (Me.), 69 A. 575; Desloge v. Tucker, 196 Mo. 587, 94 S. W. 283; Jenkins v. Morrow (Mo. App.), 109 S. W. 1051; Murphy v. Sisters (Tex. Civ.), 97 S. W. 135.
963-83 Ruoff v. Fitzgerald, 128 Mo. App. 639, 106 S. W. 1110.
964-88 Albie v. Jones (Ark.), 109 S. W. 222.
965-90 Ruoff v. Fitzgerald, supra (appearance and confession of judgment).
965-93 Siger v. Shaffer, 9 Ohio C. C. (N. S.) 267 (to show that entry of judgment was really made within the time prescribed by law).
967-13 Choate v. R. Co., 143 Ala. 316, 39 S. 218; Hartzfeld v. Taylor, 207 Mo. 236, 105 S. W. 599. *Compare* Getzendaner v. R. Co. (Tex. Civ.), 102 S. W. 161.
968-15 See Collier v. Parish, 147 Ala. 526, 41 S. 772; Stephens v. Council, 132 Ia. 490, 107 N. W. 614.
972-51 Jordan v. McDonnell (Ala.), 44 S. 101.
973-54 Tomlinson v. Bennett, 145 N. C. 279, 59 S. E. 37 (what a complaint which was never filed would have been).
975-62 Irvin v. Sprattin, 127 Ga. 240, 55 S. E. 1037; Hubbard v. Gould, 74 N. H. 454, 64 A. 668; Pennebaker v. Parker, 33 Pa. Super. 458; Manchester v. Porter, 106 Va. 528, 56 S. E. 337.
978-72 See "JUDGMENTS."
978-73 Old Wayne Assn. v. McDonough, 204 U. S. 8.
979-74 See Grider v. Corbin, 116 App. Div. 818, 102 N. Y. S. 181.
979-75 Roberts v. Leutzke, 39 Ind. App. 577, 78 N. E. 635.

979-76 Recital of jurisdiction acquired by publication of summons conclusive. Leman v. MacLennan, 7 Ohio C. C. (N. S.) 205.

979-77 Eminent domain. — Recorded proceedings of corporation to condemn land, cannot be varied by parol. Post v. R. Co., 80 Vt. 551, 69 A. 156.

984-96 But see Barber Pav. Co. v. O'Brien, 128 Mo. App. 267, 107 S. W. 25.

Omitted facts may be shown by parol. Wheat v. Van Tine, 149 Mich. 314, 112 N. W. 933.

984-98 Fogg v. Sewer Co., 74 N. J. Eq. 362, 66 A. 609.

987-14 Purpose of assessments as recited in resolutions of directors. Hewel v. Hogin, 3 Cal. App. 248, 84 P. 1002.

988-15 See Rose v. Kadisho, 215 Pa. 69, 64 A. 401.

989-26 Rose v. Kadisho, supra.

990-27 Jenkins v. Lumb. Co., 120 La. 549, 45 S. 435.

992-42 Wade v. Lumb. Co., 51 Fla. 628, 638, 41 S. 72; Cox v. Mignery, 126 Mo. App. 669, 105 S. W. 675.

994-56 Presence of supervisors who did not vote cannot be shown. Howland v. Prentice, 143 Mich. 347, 106 N. W. 1105.

Judgment of board of supervisors. Panola County v. Carrier (Miss.), 45 S. 426.

994-60 Minutes of school meeting not conclusive. — Tucker v. McKay (Mo. App.), 111 S. W. 867.

997-75 Record of clerk of drainage commission. — P. v. Arnold, 231 Ill. 502, 83 N. E. 269.

997-76 Dunn v. Youmans, 224 Ill. 34, 79 N. E. 321.

997-77 See Foster v. Meyers, 117 La. 216, 41 S. 551.

1000-91 Evansville etc. R. Co. v. Broermann (Ind. App.), 80 N. E. 972. But see City of Covington v. Regenthal (Ky.), 109 S. W. 341 (recorded plat may be explained, although no allegation of mistake was made in the pleadings, where it forms no part of the pleadings in the action).

1001-92 Board v. Taylor, 133 Ia. 453, 108 N. W. 927.

1002-4 Ambiguity as to which of two lots was sold for taxes and on which of the two the taxes were paid, may be explained by parol. McCash v. Penrod, 131 Ia. 631, 109 N. W. 180.

1003-9 Chapman v. Zobelein (Cal.), 92 P. 188.

1004-15 Grimes v. Ellyson, 130 Ia. 286, 105 N. W. 418 (record of service of notice cannot be aided by extrinsic evidence).

1005-17 Jordan v. McDonnell (Ala.), 44 S. 101.

1006-19 See Jordan v. McDonnell (Ala.), 44 S. 101.

1006-20 Jordan v. McDonnell, supra (certificate and name of clerk "per" deputy clerk held sufficient).

1006-21 Jordan v. McDonnell, supra.

1006-22 *Compare* Seymour v. DuBois, 145 Fed. 1003.

1007-25 Internal revenue records privileged. — Meyer v. Ins. Co., 127 Wis. 293, 106 N. W. 1087, *cit.* Boske v. Comingore, 177 U. S. 459; In re Comingore, 96 Fed. 552. *Contra*, S. v. Schaeffer, 74 Kan. 390, 86 P. 477 (sworn copy inadmissible); S. v. Nippert, 74 Kan. 371, 86 P. 478 (same); and see "RECORDS," Vol. 10, p. 735, n. 87, and matter supplementary thereto, supra.

1007-26 See Brecker v. Fillingham, 209 Mo. 578, 108 S. W. 41; S. v. Dowdy, 145 N. C. 432, 58 S. E. 1002. *Compare* Ayres v. Deering Co., 76 Kan. 149, 90 P. 794.

1008-29 See Lorenz v. U. S., 24 App. D. C. 337 (effect on competency of letters on file in such offices).

Schedules of rates filed with interstate commerce commission. — Shelton v. R. C. (Mo. App.), 110 S. W. 627. See also Griffin v. R. Co., 115 Mo. App. 549, 91 S. W. 1015.

Pension vouchers. — Certified copy admissible. Murphy v. Cady, 145 Mich. 33, 108 N. W. 493.

1009-30 *Compare* Nurnberger v. U. S., 156 Fed. 721.

1011-37 U. S. v. Pierson, 145 Fed. 814, 76 C. C. A. 390 (amendment of March 2, 1895, ch. 177, U. S. Comp. St. 1901, p. 671, requiring certification by secretary or assistant secretary, has no application to transcripts already made).

1012-41 U. S. v. Pierson, 145 Fed. 814, 74 C. C. A. 390.

1015-54 *Compare* Milwaukee Ex. Co. v. Gordon (Mont.), 95 P. 995.

1015-57 See Van Deventer v. Mortimer, 56 Misc. 650, 107 N. Y. S. 564.

1019-76 Strecker v. Railson (N. D.), 111 N. W. 612.

1020-78 Van Deventer v. Mortimer, 56 Misc. 650, 107 N. Y. S. 564.

1021-81 Strecker v. Railson (N. D.), 111 N. W. 612.

1021-82 See Van Deventer v. Mortimer, 56 Misc. 650, 107 N. Y. S. 564.

1023-92 *Compare* Seymour v. Du Bois, 145 Fed. 1003.

1024-99 Chapman v. Chapman, 74 Neb. 388, 104 N. W. 880; Hagan v. Snider (Tex. Civ.), 98 S. W. 213; Wolf v. King (Tex. Civ.), 107 S. W. 617.

1025-5 But see Britton v. Chamberlain, 234 Ill. 246, 84 N. E. 895.

1028-15 See Britton v. Chamberlain, supra (certified by a justice of the supreme court of New York).

1028-19 See Britton v. Chamberlain, supra.

1029-23 Brown v. Baxter (Kan.), 94 P. 155.

1032-30 Wolf v. King (Tex Civ.), 107 S. W. 617.

1032-33 Milwaukee Ex. Co. v. Gordon (Mont.), 95 P. 995. See El Paso etc. R. Co. v. Harris (Tex Civ.), 110 S. W. 145.

Statute relating to foreign countries does not apply to sister states. Van Deventer v. Mortimer, 56 Misc. 650, 107 N. Y. S. 564 (holding that §§ 952, 953 Code Civ. Proc. have no reference to sister states which are governed entirely by the act of Congress).

Statute has no application to courts of limited jurisdiction, whose records must be proved by the common law methods. Strecker v. Railson (N. D.), 111 N. W. 612.

Statute in terms applying only to foreign records construed to apply to records of sister state. Ayres v. Deering Co., 76 Kan. 149, 90 P. 794, *cit.* Case v. Huey, 26 Kan. 553.

Where clerk of court is also county clerk, under a statute providing for admission of copies of court records certified by the clerk, his certificate must be made as clerk of the court with the seal thereof and show the record to be one of the court and not of the county, otherwise the copy must be certified as prescribed by act of Congress. S. v. Kniffen, 44 Wash. 485, 86 P. 837.

The general statute governing use of certified copies of records does not apply to sister or foreign states, at least where there is a special statute governing the latter. Ayres v. Deering Co., 76 Kan. 149, 90 P. 794.

1033-34 Scott v. Herrell, 27 App. D. C. 395.

1033-36 But see S. v. Kniffen, 1032-33, supra.

1033-37 Strecker v. Railson (N. D.), 111 N. W. 612.

1033-38 Gordon Bros. v. Wageman (Neb.), 108 N. W. 1067. See Van Deventer v. Mortimer, 56 Misc. 650, 107 N. Y. S. 564.

1034-41 Wilcox v. Bergman, 96 Minn. 219, 104 N. W. 955.

1034-42 Force and effect of such record and copy in the sister state must be shown. Wilcox v. Bergman, supra.

1036-48 Wilcox v. Bergman, supra, 1034-42.

1036-50 Milwaukee Gold Ex. Co. v. Gordon (Mont.), 95 P. 995.

1036-51 Milwaukee Gold Ex. Co. v. Gordon, supra.

1036-57 See Milwaukee Gold Ex. Co. v. Gordon, supra.

1037-61 Pirrung v. Assn., 104 App. Div. 571, 93 N. Y. S. 575 (vital statistics).

1038-64 In re Pearson, 5 Pa. C. C. 330.

1039-68 In re McClellan, 20 S. D. 498, 107 N. W. 681; Wolf v. King (Tex. Civ.), 107 S. W. 617.

1039-70 See Gautier Steel Co. Ltd., 2 Pa. C. C. 399.

1041-83 See Gautier Steel Co. Ltd., supra.

1043-89 Scott v. Herrell, 27 App. D. C. 395. *Compare* Ayres v. Deering Co., supra, 1032-33.

1043-91 See Van Deventer v. Mortimer, supra, 1032-33.

REFERENCES [Vol. 11.]

3-1 New York practice. — Johnson v. Min. Co., 58 Misc. 353, 110 N. Y. S. 1098; Russell v. McDonald, 110 N. Y. S. 950; Northrop v. Butler, 110 N. Y. S. 815; Sullivan v. McCann, 108 N. Y. S. 909; Neal v. Gilleran,

123 App. Div. 639, 108 N. Y. S. 118; Lustgarten v. Harlam, 56 Misc. 606, 107 N. Y. S. 612; Kindberg v. Chapman, 115 App. Div. 154, 100 N. Y. S. 686. Applicable to suits in equity as well as at law. Roomie v. Smith, 123 App. Div. 416, 107 N. Y. S. 1088. **Proceedings to review tax assessments,** held proper to order reference. P. v. Feitner, 53 Misc. 334, 104 N. Y. S. 794, *aff.* 105 N. Y. S. 1136.

3-4 Speakman v. Vest (Ala.), 45 S. 667; Smith v. Kunert (N. D.), 115 N. W. 76. *Compare* Russell v. Alt, 72 Idaho 789, 88 P. 416.

9-21 Jones & Co. v. Gilbert, 117 App. Div. 775, 102 N. Y. S. 983. See Baldwin v. Patriek, 39 Colo. 347, 91 P. 828.

10-23 See Atlantic Tr. Co. v. Osgood, 155 Fed. 700.

11-29 Jones & Co. v. Gilbert, supra.

20-51 Waiver of objection. — In re Hirseh, 116 App. Div. 367, 101 N. Y. S. 893.

23-62 Greenville v. Earle (S. C.), 60 S. E. 1117.

34-91 Morris v. Lemp, 13 Idaho 116, 88 P. 761. *Compare* Guarantee Co. v. Edwards (Ind. Ter.), 104 S. W. 624.

REFORMATION OF INSTRUMENTS [Vol. 11.]

38-2 Griffin v. Societe, 53 Fla. 801, 44 S. 342.

40-10 Biermen v. College, 20 Pa. Super. 133.

41-16 Moran Mfg. Co. v. Car Co., 210 Mo. 715, 109 S. W. 47.

44-39 Rundle v. Bohrer, 222 Ill. 475, 78 N. E. 831.

45-46 Miller v. Stuart (Md.), 68 A. 273.

45-48 Kinyon v. Cunningham, 146 Mich. 430, 109 N. W. 675.

45-50 Dougherty v. Dougherty, 204 Mo. 228, 102 S. W. 1099; Redding v. Lumb. Co., 127 Mo. App. 625, 106 S. W. 557.

46-59 Bower v. Bowser, 49 Or. 182, 88 P. 1104.

46-63 Scheuer v. Chloupek, 130 Wis. 72, 109 N. W. 1035.

46-64 Pennsylvania. — Bierman v. College, 20 Pa. Super. 133.

46-66 Cox v. Beard, 75 Kan. 369, 89 P. 671.

46-69 When scrivener acts solely for the grantee his mistake is the mistake of the grantee and is not mutual. Dougherty v. Dougherty, 204 Mo. 288, 102 S. W. 1099.

47-76 Turner v. Todd, 85 Ark. 62, 107 S. W. 181.

47-79 Bushert v. Stevenson (Ia.), 113 N. W. 916.

48-94 *Compare* Kinyon v. Cunningham, 146 Mich. 430, 109 N. W. 675.

49-96 Indian R. Mfg. Co. v. Wooten (Fla.), 46 S. 185.

51-8 Home & Farm Co. v. Freitas (Cal.), 96 P. 308.

52-16 Mitchell Mfg. Co. v. Kempner, 84 Ark. 349, 105 S. W. 880.

54-18 Home & Farm Co. v. Freitas, supra; Redding v. Lumb. Co., 127 Mo. App. 625, 106 S. W. 557; Moran Mfg. Co. v. Car Co., 210 Mo. 715, 109 S. W. 47; Brown v. Gwin, 197 Mo. 499, 95 S. W. 208.

55-21 Griffin v. Societe, 53 Fla. 801, 44 S. 342; Foster v. Miller, 132 Ill. App. 464; Kinyon v. Cunningham, 146 Mich. 430, 109 N. W. 675.

58-36 Additional rules as to sufficiency. — Western L. Co. v. Thibodeau, 159 Fed. 370; Turner v. Todd, 85 Ark. 62, 107 S. W. 181; Bushert v. Stevenson (Ia.), 113 N. W. 916; Coggins v. Carey, 106 Md. 204, 66 A. 673; Baker v. Montgomery (Neb.), 110 N. W. 695; Bank v. Shaw, 218 Pa. 612, 67 A. 875; Gailey v. Plaster Co., 34 Pa. Super. 533; Bierman v. College, 20 Pa. Super. 133. Isner v. Nydegger (W. Va.), 60 S. E. 793.

58-37 Horne v. Lumb. Co. (Fla.), 45 S. 1016; Miller v. Stuart (Md.), 68 A. 273.

59-39 Smith v. Owens (W. Va.), 59 S. E. 762; Isner v. Nydegger (W. Va.), 60 S. E. 793.

59-42 National Bk. v. Shaw, 218 Pa. 612, 67 A. 875.

65-70 Home & Farm Co. v. Freitas (Cal.), 96 P. 308; Lanfer v. Moppin (Tex. Civ.), 99 S. W. 109.

67-71 Bushert v. Stevenson (Ia.), 113 N. W. 916; Moran Mfg. Co. v. Car Co., 210 Mo. 715, 109 S. W. 47; Gailey v. Plaster Co., 34 Pa. Super. 533; National Bk. v. Shaw, 218 Pa. 612, 67 A. 875; Isner v. Nydegger (W. Va.), 60 S. E. 793.

74-23 Fresno Canal Co. v. Hart (Cal.), 92 P. 1010.

82-60 Collection of premiums after apparent date of expiration may be shown in action to reform policy so as to make it run for longer term. Flickinger v. Ins. Co. (Ia.), 113 N. W. 824.

86-83 Baker v. Montgomery (Neb.), 110 N. W. 695; Gailey v. Plaster Co., 34 Pa. Super. 533.

90-8 Home & Farm Co. v. Freitas (Cal.), 96 P. 308.

REFRESHING MEMORY
[Vol. 11]

Stenographic report read to one's own witness, 152-89.

95-2 Moore & McF. v. Lumb. Co., 82 Ark. 485, 102 S. W. 385; R. R. Sizer Co. v. Melton, 129 Ga. 143, 58 S. E. 1055; Hawaii v. Haug, 10 Haw. 94; Hawaii v. Toyotaro, 11 Haw. 195; Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 81 N. E. 392, *rev.* judgment, 125 Ill. App. 277; Lindenbaum v. R. Co. (Mass.), 84 N. E. 129; Meriwether v. R. Co., 128 Mo. App. 647, 107 S. W. 434.

97-3 Eberson v. Inv. Co., 130 Mo. App. 296, 109 S. W. 62; Josias v. Nivois, 56 Misc. 557, 107 N. Y. S. 15.

99-4 Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 81 N. E. 392, *rev.* judgment, 125 Ill. App. 277; Callman v. Brickenfeld, 108 N. Y. S. 1070.

99-5 Hawaii v. Haug, 10 Haw. 94; Hawaii v. Toyotaro, 11 Haw. 195; Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 81 N. E. 392, *rev.* judgment, 125 Ill. App. 277.

99-7 Diamond Glue Co. v. Wietzychowski, supra; Lindenbaum v. R. Co. (Mass.), 84 N. E. 129. See Smith v. Ins. Co. (S. D.), 113 N. W. 94.

101-8 Eberson v. Inv. Co., 130 Mo. App. 296, 109 S. W. 62. See Madunkeunk D. & I. Co. v. Clothing Co., 102 Me. 257, 66 A. 537.

102-9 Athens Car & Coach Co. v. Elsbree, 19 Pa. Super. 618.

104-11 See Keipp v. S., 51 Tex. Cr. 417, 103 S. W. 392.

105-14 Proctor & Co. v. Oil Co., 128 Ga. 606, 57 S. E. 879; R. R. Sizer Co. v. Melton, 129 Ga. 143, 58 S. E. 1055.

Must say that writing was a true statement. — Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 81 N. E. 392, *rev.* judgment, 125 Ill. App. 277.

106-16 S. v. Collins, 27 R. I. 419, 67 A. 796.

109-21 Proctor & G. Co. v. Oil Co., 128 Ga. 606, 57 S. E. 879; Meriwether v. R. Co., 128 Mo. App. 647, 107 S. W. 434; Eberson v. Inv. Co., 130 Mo. App. 296, 109 S. W. 62. See Callman v. Bruckenfeld, 108 N. Y. S. 1070.

111-26 See Powell v. Ins. Co., 2 Pa. Super. 151.

111-29 See Bass v. S., 1 Ga. App. 728, 790, 57 S. E. 1054.

112-30 P. v. Duncan (Cal. App.), 96 P. 414; Pool v. S., 51 Tex. Cr. 596, 103 S. W. 892.

115-33 Proctor & G. Co. v. Oil Co., 128 Ga. 606, 57 S. E. 879; Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 81 N. E. 392, 125 Ill. App. 277; Dorrance v. Power Co., 233 Ill. 354, 84 N. E. 269; Eberson v. Inv. Co., 130 Mo. App. 296, 109 S. W. 62; Hill v. Exp. Co., 74 N. J. L. 338, 68 A. 94; Josias v. Nivois, 56 Misc. 557, 107 N. Y. S. 15; Owen v. Rothermel, 21 Pa. Super. 561. See Galveston etc. R. Co. v. Solcher (Tex. Civ.), 110 S. W. 545.

117-35 Owen v. Rothermel, supra.

118-37 Eberson v. Inv. Co., supra.

120-42 Magill v. S., 51 Tex. Cr. 357, 103 S. W. 397.

121-43 Mahoney v. R. Co. (Vt.), 69 A. 652.

124-50 Stevens v. Worcester, 196 Mass. 45, 81 N. E. 907.

125-51 Burson v. Vogel, 29 App. D. C. 388; Spencer v. S., 132 Wis. 509, 112 N. W. 462.

126-54 Pool v. S., 51 Tex. Cr. 596, 103 S. W. 892.

126-55 Powell v. Ins. Co., 2 Pa. Super. 151.

126-56 Burson v. Vogel, supra; Lindenbaum v. R. Co. (Mass.), 84 N. E. 129; Spencer v. S., 132 Wis. 509, 112 N. W. 462.

128-59 Madunkeunk D. & I. Co. v. Clothing Co., 102 Me. 257, 66 A. 537; Eberson v. Inv. Co., 130 Mo.

App. 296, 109 S. W. 62; Meriwether v. R. Co., 128 Mo. App. 647, 107 S. W. 434; Hammond v. Decker (Tex. Civ.), 102 S. W. 453; St. Louis etc. R. Co. v. Wills (Tex. Civ.), 102 S. W. 733; Magill v. S., 51 Tex. Cr. 357, 103 S. W. 397; Keipp v. S., 51 Tex. Cr. 417, 103 S. W. 392.

131-62 Smith v. Pickands, 148 Mich. 558, 112 N. W. 122; Wagonseller v. Brown, 7 Pa. C. C. 663; Hammond v. Decker (Tex. Civ.), 102 S. W. 453. See Tabor v. S. (Tex. Cr.), 107 S. W. 1116.

133-63 Tabor v. S., supra. See Owen v. Rothermel, 21 Pa. Super. 561.

133-64 Owen v. Rothermel, supra.

135-68 See Wagonseller v. Brown, 7 Pa. C. C. 663.

Summary of inventory preserved in compliance with the terms of an insurance policy may be referred to in an action on the policy by a witness testifying to the contents of such inventory, the latter having been lost. Arkansas etc. Ins. Co. v. Woolverton, 82 Ark. 476, 102 S. W. 226.

135-69 Hawaii v. Haug, 10 Haw. 94; Hawaii v. Toyotaro, 11 Haw. 195. See Meriwether v. R. Co., 128 Mo. App. 647, 107 S. W. 434.

137-71 See Furlong & M. v. Ins. Co. (Ia.), 113 N. W. 1084.

140-74 Smith v. Ins. Co. (S. D.), 113 N. W. 94; St. Louis etc. R. Co. v. Wills (Tex. Civ.), 102 S. W. 733; Mahoney v. R. Co. (Vt.), 69 A. 652.

143-77 R. R. Sizer Co. v. Melton, 129 Ga. 143, 58 S. E. 1055; Meriwether v. R. Co., 128 Mo. App. 647, 107 S. W. 434; Hill v. Exp. Co., 74 N. J. L. 338, 68 A. 94.

143-79 Price lists of merchandise. — Keipp v. S., 51 Tex. Cr. 417, 103 S. W. 392.

Testimony before grand jury. Magill v. S., 51 Tex. Cr. 357, 103 S. W. 397.

List of property. — Smith v. Ins. Co. (S. D.), 113 N. W. 94, *cit.* Encyc. of Ev., p. 564.

Clinical record. — Lindenbaum v. R. Co. (Mass.), 84 N. E. 129.

Diary phonographic. — Burson v. Vogel, 29 App. D. C. 388.

Documents set forth in pleading — petition. — Hammond v. Decker (Tex. Civ.), 102 S. W. 453.

152-88 Mahoney v. R. Co. (Vt.), 69 A. 652.

152-89 Stenographic report read to one's own witness. — Mahoney v. R. Co. (Vt.), 69 A. 652. But see Bass v. S., 1 Ga. App. 728, 790, 57 S. E. 1054.

157-2 Tabor v. S. (Tex. Cr.), 107 S. W. 1116.

RELEASE [Vol. 11.]

160-1 Dalton v. R. Co. (Cal. App.), 94 P. 868.

161-2 Stewart v. Leonard (Me.), 68 A. 638; Chicago etc. R. Co. v. Williams (Tex. Civ.), 99 S. W. 141; Wallace v. Skinner, 15 Wyo. 233, 88 P. 221. See Ross v. R. Co., 17 Phila. (Pa.) 361; Probate Court v. Enright, 79 Vt. 416, 65 A. 530.

161-5 See Wallace v. Skinner, supra.

164-13 But see Ryan v. Becker (Ia.), 111 N. W. 426.

166-21 Illinois etc. R. Co. v. Vaughn (Ky.), 111 S. W. 707; Kansas City etc. R. Co. v. Chiles, 86 Miss. 361, 38 S. 498.

167-23 See Ross v. R. Co., 17 Phila. (Pa.) 361.

168-26 See Creshkoff v. Schwartz, 53 Misc. 576, 103 N. Y. S. 782.

168-27 Pacific Co. v. Webb, 157 Fed. 155, 84 C. C. A. 603; Loveman v. R. Co., 149 Ala. 515, 43 S. 411; Gulf etc. R. Co. v. Huyett (Tex. Civ.), 108 S. W. 502.

Releases of prior injuries are incompetent to show that party knew what he was signing. Illinois S. Co. v. Ferguson, 129 Ill. App. 396.

RELEVANCY [Vol. 11.]

Fraud—rules relaxed, 203-84.

173-1 S. v. Sebastian, 80 Conn. 1, 69 A. 1054 ("one fact is relevant to another fact whenever, according to the common course of events, the existence of the one, taken alone or in connection with other facts, renders the existence of the other certain or more probable"); Crosby v. Wells, 73 N. J. L. 790, 67 A. 295.

174-3 Moody v. Peirano, 4 Cal. App. 411, 88 P. 380 (principle rec-

ognized in Cal. Code Civ. Proc., § 1870 (15).

174-4 S. v. Sebastian, supra; Tifton etc. R. Co. v. Butler (Ga. App.), 60 S. E. 1087; Crosby v. Wells, supra; S. v. Ryder, 80 Vt. 422, 68 A. 652; Kirchner v. Smith, 61 W. Va. 434, 58 S. E. 614.

176-7 Moody v. Peirano, 4 Cal. App. 411, 88 P. 380; Todd v. Ins. Co., 2 Ga. App. 789, 59 S. E. 94; Louisville R. Co. v. Ellerhorst (Ky.), 110 S. W. 823; Shepherd v. Tract. Co. (Neb.), 113 N. W. 627.

176-9 Strickland v. S. (Ala.), 44 S. 90; Parker v. S. (Ala.), 45 S. 248; Knight v. Land Co. (Fla.), 45 S. 1025; Jackson v. Gallagher, 128 Ga. 321, 57 S. E. 750; Cromwell v. Norton, 193 Mass. 291, 79 N. E. 433; P. v. McAdoo, 117 App. Div. 438, 102 N. Y. S. 656; Bowick v. Mfg. Co., 69 S. C. 360, 48 S. E. 276 (evidence not responsive to the allegations of the complaint); Guthrie v. Lyon (Tex. Civ.), 98 S. W. 432; Yellow Pine Oil Co. v. Noble (Tex. Civ.), 97 S. W. 332.

177-10 Martin v. Piano Co. (Ala.), 44 S. 112; Martin v. Knight (N. C.), 61 S. E. 447.

178-11 Healey v. Bartlett, 73 N. H. 110, 59 A. 617.

178-12 S. v. Sebastian, 80 Conn. 1, 69 A. 1054.

179-13 S. v. Sebastian, supra (term has regard to other factors besides mere lapse of time).

181-20 Moody v. Peirano, 4 Cal. App. 411, 88 P. 380; Nugent v. Watkins, 129 Ga. 382, 58 S. E. 888 ("evidence which tends to establish the issue is admissible even if not of itself sufficient for that purpose").

Need not tend to sustain all of the allegation of the declaration. Ellis v. Durkee, 79 Vt. 341, 65 A. 94.

182-21 See Allen v. Ruland, 79 Conn. 405, 65 A. 138.

183-22 Context may be looked at to determine the relevancy of offered testimony. Lambie v. S. (Ala.), 44 S. 51.

185-26 C. v. Tucker, 189 Mass. 457, 76 N. E. 127; Campbell v. Transfer Co., 95 Minn. 375, 104 N. W. 547.

185-27 C. v. Brown, 23 Pa. Super. 470.

185-28 C. v. Johnson (Mass.), 85 N. E. 188.

187-31 Leathers v. Geitz, 135 Ia. 145, 112 N. W. 191; Aetna Ins. Co. v. R. Co., 123 Mo. App. 513, 100 S. W. 569.

188-32 Brusseau v. Brick Co., 133 Ia. 245, 110 N. W. 577.

188-33 Louisville R. Co. v. Ellerhorst (Ky.), 110 S. W. 823.

189-35 Furlong & M. v. Ins. Co. (Ia.), 113 N. W. 1084 (inventory admissible as foundation for the testimony of the witness making it).

191-41 Smiley v. Hooper, 147 Ala. 646, 41 S. 660; Vollmer C. Co. v. Rogers, 13 Idaho 564, 92 P. 579 (books of accounts admissible to explain promissory notes and receipts); Churchill v. Mace, 148 Mich. 456, 111 N. W. 1034; Wilson v. Moss, 79 S. C. 120, 60 S. E. 313 (to show circumstances under which a partnership was created); San Antonio Tr. Co. v. Haines (Tex. Civ.), 100 S. W. 788; Sheldon v. Wright, 80 Vt. 298, 67 A. 807 (to render expert evidence intelligible). But see Oates v. S., 51 Tex. Cr. 449, 103 S. W. 859.

192-42 Page v. Hazelton, 74 N. H. 252, 66 A. 1049; Hall v. R. Co., 27 R. I. 525, 65 A. 278 (explanation of why a bill rendered was made out to a third person instead of the defendant. See S. v. Harrison, 145 N. C. 408, 59 S. E. 867.

Depreciated market value. — Reason for may be shown. Robertson v. Warren (Tex. Civ.), 100 S. W. 805.

193-43 Chitwood v. U. S., 153 Fed. 551, 82 C. C. A. 505; Tifton etc. R. Co. v. Butler (Ga. App.), 60 S. E. 1087.

193-44 Gehlert v. Quinn, 35 Mont. 451, 90 P. 168.

194-46 McGuire v. County, 133 Ia. 636, 111 N. W. 34.

195-53 Shepherd v. Tract. Co. (Neb.), 113 N. W. 627.

199-66 Gillespie v. Campbell, 149 Ala. 193, 43 S. 28; Chicago etc. R. Co. v. Johnson, 128 Ill. App. 20; S. v. Moore (Kan.), 95 P. 409 (criminal action); Heblich v. Slater, 217 Pa. 404, 66 A. 655 (amount paid another attorney in the same case inadmissible in an action for services rendered); Hollen v. Crim (W. Va.), 59 S. E. 172.

200-68 Maurice v. Hunt, 80 Ark. 476, 97 S. W. 664; Marshall v. Bahnsen, 1 Ga. App. 485, 57 S. E. 1006.

200-69 Di Giorgio Co. v. R. Co., 104 Md. 693, 65 A. 425 (requisition for cars presented at a time subsequent to the transaction in question, irrelevant upon the issue of negligence); Hamsy v. Mudarri, 195 Mass. 418, 81 N. E. 266 (habits of intoxication inadmissible to prove intoxication at a particular time); Goyette v. Keenan, 196 Mass. 416, 82 N. E. 427; Merritt v. S. (Tex. Civ.), 94 S. W. 372.

202-72 Moody v. Peirano, 4 Cal. App. 411, 88 P. 380.

203-84 **Fraud.** — Where fraud is alleged, the rules are relaxed, and evidence is admissible which in other actions might be regarded as too remote. Dantzler v. Cox, 75 S. C. 334, 55 S. E. 774.

204-99 C. v. Johnson (Mass.), 85 N. E. 188.

210-40 Wallingford v. R. Co., 32 Ky. L. R. 1049, 107 S. W. 781; Hilliker v. Farr, 149 Mich. 444, 112 N. W. 1116.

211-43 Gunn v. Mumford, 74 N. J. L. 601, 65 A. 989.

211-44 Johnson v. S., 128 Ga. 71, 57 S. E. 84; Page v. Hazelton, 74 N. H. 252, 66 A. 1049 (evidence which might have been excluded as being too remote); Tinsley v. Tel. Co., 72 S. C. 350, 51 S. E. 913; O'Neal v. Weisman, 39 Tex. Civ. 592, 88 S. W. 290.

REMOVAL OF CAUSES [Vol. 11.]

216-3 **Recital in deed.** — Fact that defendant described himself as a resident of South Dakota in a deed executed by him is strong evidence tending to show him a citizen of that state. Jones v. Subera, 150 Fed. 462.

216-4 Harton v. Hawley, 155 Fed. 491.

216-5 International Bk. v. Scott, 159 Fed. 58; Baltimore & O. R. Co. v. Davis, 149 Fed. 191, 79 C. C. A. 139 (where plaintiff testified that he was at home and lived in a certain town, this was sufficient proof of citizenship to give the federal court jurisdiction).

217-9 Harton v. Hawley, 155 Fed. 491.

217-10 Harton v. Hawley, supra. *Contra*, Jones v. Subera, 150 Fed. 464.

REPLEVIN [Vol. 11.]

222-1 Austin v. Terry, 38 Colo. 407, 88 P. 189 (where parties claim under same vendor); Staunton v. Smith (Del.), 65 A. 593; Nat. Bank v. Thuet, 124 Ill. App. 501; Daniels v. Taubenblatt, 120 La. 345, 45 S. 273; Frank v. Symons, 35 Mont. 56, 88 P. 561. See Steckman v. Bank, 126 Mo. App. 664, 105 S. W. 674.

Claim of lien set up by defendant must be proved where plaintiff has shown ownership and right to possession. Kebabian v. Exp. Co., 27 R. I. 564, 65 A. 271. See also Pease v. Magill (N. D.), 115 N. W. 260.

Property must be identified as that owned by plaintiff. Daniels v. Taubenblatt, 120 La. 345, 45 S. 273; Ellis v. Whitney (Tex. Civ.), 111 S. W. 159.

223-2 Clark v. Anderson (Me.), 68 A. 633; Fagan Iron Wks. v. Realty Co., 109 N. Y. S. 740.

223-4 **Rightful possession** is presumed to continue to the time the goods were taken by the defendant. Sanford v. Millikin, 144 Mich. 311, 107 N. W. 884.

224-6 Richbourg v. Rose, 53 Fla. 176, 44 S. 69.

A prima facie case is made out, as against one claiming under a lien, by showing a right to possession. McCarty v. Key, 87 Miss. 248, 39 S. 780.

225-7 Shinn v. Plott, 82 Ark. 260, 101 S. W. 742.

225-8 Lundee v. Talbot, 83 Ark. 315, 103 S. W. 731 (burden on mortgagee to show circumstances bringing property within the mortgage); State Bk. v. Bank, 18 Okla. 10, 89 P. 206; Murdouch v. Tuten, 76 S. C. 502, 57 S. E. 547.

225-9 Martin Bros. v. Lisan, 129 Ia. 573, 105 N. W. 996.

226-11 **Actual possession sufficient** where property is taken wrongfully. Taylor v. Brown, 49 Or. 423, 90 P. 673. *Compare* Murray v. Lyons (Tex. Civ.), 95 S. W. 621.

227-16 Richbourg v. Rose, 53 Fla.

173, 44 S. 69; Martin Bros. v. Lisan, 129 Ia. 573, 105 N. W. 996 (mortgagee).

227-17 See Churchill v. More, 4 Cal. App. 219, 88 P. 290; Judy v. Buck, 72 Kan. 106, 82 P. 1104; First Nat. Bk. v. Yoeman, 17 Okla. 613, 90 P. 412.

229-20 Griswold v. Nichols, 126 Wis. 401, 105 N. W. 815.

Inventory of administratrix. — Austin v. Terry, 38 Colo. 407, 88 P. 189.

229-22 Richbourg v. Rose, 53 Fla. 173, 44 S. 69; Idaho Min. Co. v. Green, 14 Idaho 249, 93 P. 954.

230-28 Hyde v. Elmer (N. M.), 88 P. 1132.

232-30 American Fountain Co. v. Drug Co. (Ia.), 111 N. W. 534.

233-32 Indiana Tract. Co. v. Bick (Ind. App.), 81 N. E. 617.

234-36 Churchill v. More, 4 Cal. App. 219, 88 P. 290.

235-37 Brown v. Lewis (Or.), 92 P. 1058.

238-46 See Strauss v. Reen, 17 Phila. (Pa.) 89. But see Sanford v. Millikin, 144 Mich. 311, 107 N. W. 884.

238-47 Idaho Min. Co. v. Green, 14 Idaho 249, 93 P. 954.

Joint defendants. — Swope v. Crawford, 16 Pa. Super. 474.

238-48 Idaho Min. Co. v. Green, supra. But see Anderson C. Co. v. Bartley, 102 Me. 492, 67 A. 567. *Compare* Staunton v. Smith (Del.), 65 A. 593.

Defendant must connect himself with the title of a third person set up as a defense. Kebabian v. Exp. Co., 27 R. I. 564, 66 A. 201.

239-52 Staunton v. Smith (Del.), 65 A. 593; Hyde v. Elmer (N. M.), 88 P. 1132.

240-54 Bowen v. King, 146 N. C. 385, 59 S. E. 1044.

240-57 Hyde v. Elmer (N. M.), 88 P. 1132; Bowen v. King, supra.

241-59 See Murdouch v. Tuten, 76 S. C. 502, 57 S. E. 547.

241-60 Rents received by defendant may be shown. — Cummings v. Lumb. Co., 130 Mo. App. 557, 109 S. W. 68.

242-64 Staunton v. Smith (Del.), 65 A. 593.

243-66 McDonough v. Reilly, 131 Ill. App. 553; Cummings v. Lumb. Co., 130 Mo. App. 557, 109 S. W. 68 (depreciation due to injury).

243-68 Gregory v. Woodbery, 53 Fla. 566, 43 S. 504 (affected by statute).

244-71 Staunton v. Smith (Del.), 65 A. 593.

246-74 See Gilroy v. Everson-H. Co., 118 App. Div. 733, 103 N. Y. S. 620.

246-76 Blaul & Sons v. Wandel (Ia.), 114 N. W. 899.

247-82 See Aultman v. Richardson, 10 Ind. App. 413, 38 N. E. 532.

248-83 But burden is on principal, or surety on replevin bond, to show why identical property is not redelivered. Kaminsky v. Harrigan, 2 Ga. App. 332, 58 S. E. 497.

248-87 See Mounts v. Murphy, 31 Ky. L. R. 1192, 104 S. W. 978 (damages for the withholding).

251-90 Hoek v. Magerstadt, 124 Ill. App. 140 (dismissal for failure to prosecute).

253-97 Mounts v. Murphy, supra.

254-1 Where action is dismissed for want of jurisdiction, ownership may be shown in mitigation. Robinson v. Teeter, 10 Ind. App. 698, 38 N. E. 222.

256-8 Martin v. Hertz, 224 Ill. 84, 79 N. E. 558.

RESCISSION [Vol. 11.]

259-10 Ptacek v. Pisa, 231 Ill. 522, 83 N. E. 221; Planing Mill Co. v. Schaefer, 30 Ky. L. R. 623, 99 S. W. 341; Clark v. Gulesian (Mass.), 84 N. E. 94; White v. Remick (Mass.), 84 N. E. 113 (breach of agreement not sublet); Peet v. City, 101 Minn. 518, 112 N. W. 1003.

259-13 Krebs Hop Co. v. Livesley (Or.), 92 P. 1084.

260-14 Abbott v. Dow, 133 Wis. 533, 113 N. W. 960.

260-16 Murray v. Davies (Kan.), 94 P. 283; Moore v. Assn., 121 App. Div. 335, 106 N. Y. S. 255.

260-20 Kelley v. R. Co. (Ala.), 45 S. 906.

Cannot set up defense amounting to rescission without offering to place party in statu quo. Hinchman v. Motor Car Co., 151 Mich. 214, 115 N. W. 48.

260-22 Root Co. v. Foundry Co., 51 Misc. 627, 101 N. Y. S. 104.
260-24 American Ed. Co. v. Taggert, 124 Ill. App. 567.
261-25 Seddon v. Salt Co., (1905) 1 Ch. D. (Eng.) 326; American Ed. Co. v. Taggert, 124 Ill. App. 567; Modern Woodmen v. Vincent (Ind. App.), 82 N. E. 475; Moore v. Assn., 121 App. Div. 335, 106 N. Y. S. 255; Central Bureau v. Pratt, 111 N. Y. S. 561; City Nat. Bk. v. Bank (Tex. Civ.), 105 S. W. 338.
Mere negotiation with view of rectifying the fraud is not a waiver of right to rescind. Murray v. Davies (Kan.), 94 P. 283.
262-33 Rescission may be shown by circumstances or course of conduct which clearly discloses the intention of the parties. Davenport v. Crowell, 79 Vt. 419, 65 A. 557.
263-36 Vezey v. Rashleigh, (1904) 1 Ch. D. (Eng.) 634.
265-43 Long v. Athol, 196 Mass. 497, 82 N. E. 665.
265-45 Long v. Athol, supra.
266-50 Where defendant asks for rescission. Isner v. Nydegger (W. Va.), 60 S. E. 793.
267-53 American Ed. Co. v. Taggert, 124 Ill. App. 567; Goggins v. Risley, 13 Pa. Super. 316.
267-54 American Ed. Co. v. Taggert, supra.
268-57 Goggins v. Risley, supra. **Clearest and most satisfactory evidence required.** Isner v. Nydegger (W. Va.), 60 S. E. 793; Kincaid v. Price, 82 Ark. 20, 100 S. W. 76.
268-58 Isner v. Nydegger, supra.
269-60 Goggins v. Risley, supra.
269-62 Goggins v. Risley, supra.
270-64 Isner v. Nydegger, supra.
270-66 Admissibility of evidence. — Evidence that plaintiff acted on mistake and evidence as to what was in plaintiff's mind, admissible. Long v. Athol, 196 Mass. 497, 82 N. E. 665.

RESCUE [Vol. 11.]

274-5 S. v. Sutton (Ind.), 84 N. E. 824 (affidavit of officer sufficient to show accused's knowledge of lawful custody).
277-12 Fluty v. C., 32 Ky. L. R. 89, 105 S. W. 138.

RES GESTAE [Vol. 11.]

289-4 Illinois etc. R. Co. v. Houchins, 31 Ky. L. R. 93, 101 S. W. 924.
290-7 Schlater v. Le Blanc, 121 La. —, 46 S. 921 ("the shibboleth, res gestae, is put to such indiscriminate service that it is to be approached with a feeling of despair").
293-25 Soto v. Ter. (Ariz.), 94 P. 1104.
294-30 Soto v. Ter., supra. See Malone v. R. Co. (Tex. Civ.), 109 S. W. 430.
294-32 Robinson v. Stahl, 74 N. H. 310, 67 A. 577.
297-44 Soto v. Ter., supra.
299-48 Pittsburgh etc. R. Co. v. Haislup, 39 Ind. App. 394, 79 N. E. 1035; Malone v. R. Co., supra.
299-52 Baker v. S., 85 Ark. 300, 107 S. W. 983 (must be an emanation); Pittsburgh etc. R. Co. v. Haislup, supra; United R. Co. v. Cloman (Md.), 69 A. 379; Robinson v. Stahl, 74 N. H. 310, 67 A. 577; Fredenthal v. Brown (Or.), 95 P. 1114; Richards v. C., 107 Va. 881, 59 S. E. 1104.
301-54 Lyles v. S., 130 Ga. 294, 60 S. E. 578; Cincinnati etc. Co. v. Haines, 8 Ohio C. C. (N. S.) 77 ("expressions to be part of the res gestae must be automatic, involuntary and must not involve intellectual processes and matters of inference and deduction"); S. v. Way, 76 S. C. 91, 56 S. E. 653; Malone v. R. Co. (Tex. Civ.), 109 S. W. 430.
302-59 S. v. Kelleher, 201 Mo. 614, 100 S. W. 470; S. v. Way, supra.
303-60 But see Fredenthal v. Brown (Or.), 95 P. 1114.
305-63 Lyles v. S., 130 Ga. 294, 60 S. E. 578; Illinois C. R. Co. v. Houchins, 31 Ky. L. R. 93, 101 S. W. 924.
306-65 Soto v. Ter. (Ariz.), 94 P. 1104; Beal-D. Co. v. Carr, 85 Ark. 479, 108 S. W. 1053; Zipperlen v. R. Co. (Cal. App.), 93 P. 1049; Illinois C. R. Co. v. Houchins, supra; Malone v. R. Co. (Tex. Civ.), 109 S. W. 430.
308-68 Mitchell v. S., 82 Ark. 324, 101 S. W. 763 (self-serving statement).

308-69 *Compare* Illinois C. R. Co. v. Cotter, 31 Ky. L. R. 679, 103 S. W. 279; Robinson v. Stahl, 74 N. H. 310, 67 A. 577.

309-71 Clark v. Van Vleck, 135 Ia. 194, 112 N. W. 648; S. v. Kelleher, 201 Mo. 614, 100 S. W. 470; S. v. Murphy (N. D.), 115 N. W. 84; S. v. Way, 76 S. C. 91, 56 S. E. 653; Travelers Assn. v. Roth (Tex. Civ.), 108 S. W. 1039.

314-78 See Beal-D. Co. v. Carr, 85 Ark. 479, 108 S. W. 1053.

315-80 See Herrington v. S., 130 Ga. 307, 60 S. E. 572.

315-83 S. v. Rutledge, 135 Ia. 581, 113 N. W. 461.

316-84 **Declarations of a person incompetent** as a witness because of youth, admissible. Beal-D. Co. v. Carr, 85 Ark. 479, 108 S. W. 1053 (full discussion of the principle); Soto v. Ter. (Ariz.), 94 P. 1104.

321-99 Schlater v. Le Blanc, 121 La. —, 46 S. 921.

321-2 Clark v. Van Vleck, 135 Ia. 194, 112 N. W. 648; S. v. Way, 76 S. C. 91, 56 S. E. 653.

326-13 Chicago U. Tract. Co. v. Daly, 129 Ill. App. 519; S. v. Kelleher, 201 Mo. 614, 100 S. W. 470.

328-16 See Fredenthal v. Brown (Or.), 95 P. 1114.

328-17 International etc. R. Co. v. Hugen (Tex. Civ.), 100 S. W. 1000.

330-20 Missouri etc. R. Co. v. Williams (Tex. Civ.), 109 S. W. 1126.

333-24 Paris etc. R. Co. v. Calvin (Tex. Civ.), 103 S. W. 428, *aff.* 106 S. W. 879.

334-34 Soto v. Ter. (Ariz.), 94 P. 1104.

335-37 Lyles v. S., 130 Ga. 294, 60 S. E. 578; Clark v. Van Vleck, 135 Ia. 194, 112 N. W. 648; S. v. Lewis (Ia.), 116 N. W. 606; S. v. Howard, 120 La. 311, 45 S. 260; Malone v. R. Co. (Tex. Civ.), 109 S. W. 430.

338-40 Kennedy v. C., 30 Ky. L. R. 1063, 100 S. W. 242.

339-41 **Statement of foreman** who did not see the accident, inadmissible although made immediately thereafter on reaching the place. St. Louis etc. R. Co. v. Briscoe (Tex. Civ.), 100 S. W. 989.

341-45 Peacock v. S. (Tex. Cr.), 107 S. W. 346.

342-46 St. Louis etc. R. Co. v. Schuler (Tex. Civ.), 102 S. W. 783. See Kehan v. R. Co., 28 App. D. C. 108.

343-48 Kehan v. R. Co., supra; Kinner v. Boyd (Ia.), 116 N. W. 1044; S. v. Howard, 120 La. 311, 45 S. 260; Clement v. Beers, 110 N. Y. S. 99.

343-49 P. v. Long (Cal. App.), 93 P. 387; S. v. Howard, 120 La. 311, 45 S. 260.

345-57 S. v. Kennedy, 207 Mo. 528, 106 S. W. 57.

348-66 Kinner v. Boyd (Ia.), 116 N. W. 1044.

349-70 Chicago C. R. Co. v. McDonough, 221 Ill. 69, 77 N. E. 577. See Cincinnati etc. Co. v. Haines, 8 Ohio C. C. (N. S.) 77.

352-79 Galveston etc. R. Co. v. Mitchell (Tex. Civ.), 107 S. W. 374; Zoesch v. Paper Co. (Wis.), 114 N. W. 485 (how an explosion occurred). **Statements by third persons** present at the time of the injury admissible. St. Louis etc. R. Co. v. Schuler (Tex. Civ.), 102 S. W. 783.

352-82 Illinois C. R. Co. v. Cotter, 31 Ky. L. R. 679, 103 S. W. 279; Zoesch v. Paper Co., supra.

356-92 **Admissible.** — St. Louis etc. R. Co. v. Coats (Tex. Civ.), 103 S. W. 662; International etc. R. Co. v. Hugen (Tex. Civ.), 100 S. W. 1000.

357-93 Malone v. R. Co. (Tex. Civ.), 109 S. W. 430.

357-96 Missouri etc. R. Co. v. Williams (Tex. Civ.), 109 S. W. 1126 (ten minutes).

358-5 P. v. Davis, 6 Cal. App. 229, 91 P. 810 (statement of accused made to prosecutrix, of his relations with other girls); Bradley v. S. (Tex. Cr.), 111 S. W. 733.

358-6 S. v. Porter (Mo.), 111 S. W. 529.

364-40 See Smith v. P., 39 Colo. 202, 88 P. 1072.

365-42 Price v. Grzyll, 133 Wis. 623, 114 N. W. 100.

363-53 Grant v. U. S., 28 App. D. C. 169; Herrington v. S., 130 Ga. 307, 60 S. E. 572; S. v. Lewis (Ia.), 116 N. W. 606.

370-59 S. v. Kelleher, 201 Mo. 614, 100 S. W. 470.

370-60 Tinsley v. S. (Tex. Cr.), 106 S. W. 347.

370-61 Baker v. S., 85 Ark. 300, 107 S. W. 983.
372-76 Prayer for forgiveness of assailant. Herrington v. S., 130 Ga. 307, 60 S. E. 572.
377-94 Huff v. S., 51 Tex. Cr. 550, 103 S. W. 629.
378-96 S. v. Ryder, 80 Vt. 422, 68 A. 652.
381-5 S. v. Ryder, supra.
381-6 May v. U. S., 157 Fed. 1; O'Connor Co. v. Gillaspy (Ind.), 83 N. E. 738; S. v. Ryder, supra.
382-8 See Legris v. Marcotte, 129 Ill. App. 67.
383-11 Young v. Beveridge (Neb.), 115 N. W. 766; S. v. Ryder, 80 Vt. 422, 68 A. 652.
385-17 Glover v. Tel. Co., 78 S. C. 502, 59 S. E. 526.
386-21 Napier v. Elliott (Ala.), 44 S. 552 (also statement of the scrivener).
386-23 Robertson v. Kennedy (Mich.), 116 N. W. 413.
387-32 McIntosh v. Fisher, 125 Ill. App. 511 (declarations of deceased grantor before and after delivery, admissible).
389-41 Homestead. — Steves v. Smith (Tex. Civ.), 107 S. W. 141.
391-52 Morris v. McClellan (Ala.), 45 S. 641.
Prosecution for illegal sale of liquor. — Dulin v. S. (Tex. Cr.), 108 S. W. 696.
All circumstances showing the nature and force of an explosion. Knight v. Donnelly (Mo. App.), 110 S. W. 687.
392-56 Chicago Tract. Co. v. Mahoney, 230 Ill. 562, 82 N. E. 868.
393-57 O'Connor v. Gillaspy (Ind.), 83 N. E. 738.
393-58 S. v. Harris (R. I.), 69 A. 506.
394-59 Declarations by other participants admissible. — S. v. Jones, 77 S. C. 385, 58 S. E. 8 (riot).
395-61 Young v. S., 149 Ala. 16, 43 S. 100.
396-62 S. v. Kennedy, 207 Mo. 528, 106 S. W. 57.
398-68 Atlantic etc. R. Co. v. Crosby, 52 Fla. 400, 43 S. 318 (declaration of mother of plaintiff assuming the blame for the accident).
399-71 Montgomery Tract. Co. v. Fitzpatrick, 149 Ala. 511, 43 S. 136, 9 L. R. A. (N. S.) 851.
399-73 Sterns Coal Co. v. Evans (Ky.), 111 S. W. 308.
400-78 Nelson v. S., 51 Tex. Cr. 349, 101 S. W. 1012.
401-79 S. v. Baker, 209 Mo. 444, 108 S. W. 6; Fay v. S. (Tex. Cr.), 107 S. W. 55.
402-86 Renfroe v. S., 84 Ark. 16, 104 S. W. 542 (second assault on same person).
402-87 P. v. Colmey, 117 App. Div. 462, 102 N. Y. S. 714, *aff.* 188 N. Y. 573, 80 N. E. 1115.
403-88 Tabor v. S. (Tex. Cr.), 107 S. W. 1116 (fact that other articles were taken from the person robbed and had not been recovered, may be shown).
403-93 S. v. Baker, 209 Mo. 444, 108 S. W. 6.
404-94 Lahue v. S., 51 Tex. Cr. 159, 101 S. W. 1008.
404-96 Fleming v. S. (Ala.), 43 S. 219.
404-97 McCombs v. S. (Ala.), 43 S. 965; McCoy v. S. (Miss.), 44 S. 814 (no conspiracy need be shown).
405-98 See Morello v. P., 226 Ill. 388, 80 N. E. 903.
405-1 Statements of a third person to the deceased just prior to the homicide. Hull v. S., 50 Tex. Cr. 607, 100 S. W. 403.
406-3 Deal v. S., 82 Ark. 58, 100 S. W. 75 (remote threats, not shown to refer to deceased, inadmissible).
406-4 Pate v. S. (Ala.), 43 S. 343 (actions of accused immediately after the homicide); S. v. Rutledge, 135 Ia. 581, 113 N. W. 461 (declarations of defendant admissible though favorable to himself); S. v. Harris (R. I.), 69 A. 506 (assault with deadly weapon); Bice v. S., 51 Tex. Cr. 133, 100 S. W. 949.
408-11 S. v. Murphy (N. D.), 115 N. W. 84.
408-12 Chilcott v. Colonization Co., 45 Wash. 148, 88 P. 113.
409-15 In an action for commissions. — Fritz v. Elevator Co. (Ia.), 114 N. W. 193.
410-18 In re McDowell (Mich.), 115 N. W. 972.
410-22 Gulf etc. R. Co. v. Batte (Tex. Civ.), 107 S. W. 632 (statement of buyer to a third person, made immediately after the sale, that he had bought the cattle, for a specified price, are res gestae).
412-31 Collision of boats. — State-

ments made immediately preceding. The Theodore Roosevelt, 154 Fed. 155; Multnomah County v. Towing Co., 49 Or. 204, 89 P. 389.

413-37 Lacks v. Bank, 204 Mo. 455, 102 S. W. 1007.

414-45 Keel v. Ins. Co. (Okla.), 94 P. 177; Cobb v. Dunlevie (W. Va.), 60 S. E. 384. See Helbig v. Ins. Co., 234 Ill. 251, 84 N. E. 897; Moritz v. Herskovitch, 46 Wash. 192, 89 P. 560.

416-52 Book entries recorded in the presence of the parties, admissible. Wiggins v. Wilson, 123 Ill. App. 663.

417-54 See St. Louis etc. R. Co. v. Watkins (Tex. Civ.), 100 S. W. 162.

418-58 City of Cedartown v. Brooks, 2 Ga. App. 583, 59 S. E. 836; Chicago C. R. Co. v. Mauger, 128 Ill. App. 512; Patton v. Town, 133 Ia. 650, 110 N. W. 1032; St. Louis etc. R. Co. v. Chaney (Kan.), 94 P. 126 (verbal acts); Federal B. Co. v. Reeves (Kan.), 93 P. 627; Geiselman v. Schmidt, 106 Md. 580, 68 A. 202; Nixon v. R. Co. (Neb.), 113 N. W. 117; Dublin Gas & E. Co. v. Frazier (Tex. Civ.), 103 S. W. 197; El Paso etc. R. Co. v. Polk (Tex. Civ.), 108 S. W. 761; Travelers' Assn. v. Roth (Tex. Civ.), 108 S. W. 1039; Rummels v. R. Co. (Tex. Civ.), 107 S. W. 647; Sheldon v. Wright, 80 Vt. 298, 67 A. 807.

418-59 St. Louis etc. R. Co. v. Garber (Tex. Civ.), 108 S. W. 742.

425-81 Hyvonen v. Iron Co., 103 Minn. 331, 115 N. W. 161; St. Louis etc. R. Co. v. Watkins (Tex. Civ.), 100 S. W. 162.

425-82 Conklin v. R. Co., 196 Mass. 302, 82 N. E. 23. See Chicago Tract. Co. v. Brethauer, 223 Ill. 521, 79 N. E. 287.

425-83 See Conklin v. R. Co., supra.

425-85 Ft. Wayne etc. Co. v. Crosbie (Ind.), 81 N. E. 474; Meier v. Johnson (Ia.), 111 N. W. 420; Moseley v. Min. Co. (Ky.), 109 S. W. 306; United R. Co. v. Cloman (Md.), 69 A. 379.

427-86 Southern R. Co. v. Reeder (Ala.), 44 S. 699.

427-88 Maller v. R. Co., 122 App. Div. 463, 106 N. Y. S. 784.

429-92 Glover v. Tel. Co., 78 S. C. 502, 59 S. E. 526 (statements of messenger boy admissible as res gestae of delivery of telegram though not admissible to prove its contents).

429-93 Gillespie v. Bank (Okla.), 95 P. 220; Fredenthal v. Brown (Or.), 95 P. 1114.

430-96 Rouston v. R. Co., 151 Mich. 237, 115 N. W. 62 (statement made eighteen hours previous and at a place five miles away). See Conklin v. R. Co., 196 Mass. 302, 82 N. E. 23.

431-99 Rouston v. R. Co., supra.

432-1 Zipperlen v. R. Co. (Cal. App.), 93 P. 1049; Illinois C. R. Co. v. Houchins, 31 Ky. L. R. 93, 101 S. W. 924; Cincinnati etc. R. Co. v. Evans (Ky.), 110 S. W. 844.

Engineer in charge of hoisting machinery at a mine. Hyvonen v. Iron Co., 103 Minn. 331, 115 N. W. 167.

432-3 Colorado etc. R. Co. v. McGarry, 41 Colo. 398, 92 P. 915; Louisville etc. R. Co. v. Davis, 32 Ky. L. R. 580, 106 S. W. 304; International etc. R. Co. v. Munn (Tex. Civ.), 102 S. W. 442 (half hour).

433-9 Chicago etc. Co. v. Daly, 129 Ill. App. 519.

434-11 Chicago C. R. Co. v. McDonough, 221 Ill. 69, 77 N. E. 577.

435-21 United R. Co. v. Cloman (Md.), 69 A. 379.

437-31 Conklin v. R. Co., 196 Mass. 302, 82 N. E. 23.

RESTRAINT OF TRADE [Vol. 11.]

442-11 See McConnell v. Camors Co., 152 Fed. 321, 81 C. C. A. 429.

443-14 My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540.

REWARDS [Vol. 11.]

445-3 Couch v. S., 14 N. D. 361, 103 N. W. 942.

RIOT AND UNLAWFUL ASSEMBLY [Vol. 11.]

452-5 Croy v. S. (Ga. App.), 61 S. E. 847; Stanfield v. S., 1 Ga. App. 532, 57 S. E. 953.

453-7 Stanfield v. S., supra.

454-8 S. v. Seeley (Or.), 94 P. 37.

ROBBERY [Vol. 11.]

Evidence incriminating others, 470-27.

457-1 Lipscomb v. S., 130 Wis. 238, 109 N. W. 986. See McDuffie v. S. (Fla.), 46 S. 721.
462-14 Lipscomb v. S., supra.
464-16 Williams v. C. (Ky.), 110 S. W. 339.
466-21 Boyd v. S. (Ala.), 45 S. 591; S. v. Finn, 199 Mo. 597, 98 S. W. 9; Tabor v. S. (Tex. Cr.), 107 S. W. 1116.
470-27 **Evidence incriminating others** who were placed in such relation to the prosecutor that they might have been the guilty parties is admissible. Chancey v. S., 50 Tex. Cr. 85, 96 S. W. 12.
472-30 P. v. Sullivan, 144 Cal. 471, 77 P. 1000. See Walker v. S., 50 Tex. Cr. 223, 96 S. W. 35.
473-31 P. v. Castile, 3 Cal. App. 485, 86 P. 745.
475-40 P. v. Sullivan, 144 Cal. 471, 77 P. 1000; P. v. Salas, 2 Cal. App. 537, 84 P. 295; C. v. McManiman, 27 Pa. Super. 304; Tabor v. P. (Tex. Cr.), 107 S. W. 1116; Chancey v. S., 50 Tex. Cr. 85, 96 S. W. 12.
476-41 McDuffee v. S. (Fla.), 46 S. 721.
476-42 Steward v. P., 224 Ill. 434, 79 N. E. 636; S. v. Parkhurst, 74 Kan. 672, 87 P. 703.
477-43 O'Donnell v. P., 224 Ill. 218, 79 N. E. 639.
479-49 **Evidence in rebuttal of alibi** held competent. Smith v. P., 39 Colo. 202, 88 P. 1072; S. v. Finn, 199 Mo. 597, 98 S. W. 9.

SALES [Vol. 11.]

Seller's reliance upon alleged fraudulent promise—burden of proof, 568-22; Action for price—burden of proving gift, 577-51; Breach of contract of sale—burden of proving defense, 602-51; Burden of showing rescission of continuing contract, 617-13; Rescission by buyer—burden of proof, 622-35.

488-6 **Retention of possession** by the vendor is presumptive proof that the transaction is merely an executory agreement to sell. Barber v. Andrews (R. I.), 69 A. 1.
494-23 **Drunkenness.** — Swan v. Talbot (Cal.), 94 P. 238.
510-12 **Parol evidence inadmissible.** — De Laval etc. Co. v. Steadman, 6 Cal. App. 651, 92 P. 877; Northwest T. Co. v. Hulburt, 103 Minn. 276, 115 N. W. 159. A warranty not expressed in a bill of sale cannot be established by parol. Barry etc. Co. v. Thompson, 83 Ark. 283, 104 S. W. 137; McNaughton v. Wahl, 99 Minn. 92, 108 N. W. 467; Agnew v. Richardson, 7 Haw. 9. See also Lombard Co. v. Paper Co., 101 Me. 114, 63 A. 555.
513-18 M'Connell v. Camors, 152 Fed. 321, 81 C. C. A. 429; Roquemore v. Iron Wks. (Ala.), 44 S. 557.
514-22 But see B. F. Sturtevant Co. v. Dugan, 106 Md. 587, 68 A. 351.
514-24 S. D. Childs v. Paraphernalia H. (Neb.), 114 N. W. 941; Greenwood G. Co. v. Elev. Co., 77 S. C. 219, 57 S. E. 867.
516-28 **Parol evidence** to identify subject-matter. Miller v. Supply Co., 150 Mich. 292, 114 N. W. 61.
516-30 Hall v. Barnard (Ia.), 116 N. W. 604.
516-31 Hall v. Barnard, supra.
519-36 I. F. Bailey Co. v. Lumb. Co., 1 Ga. App. 398, 58 S. E. 120; Springer v. Brew. Co., 126 Ga. 321, 55 S. E. 53. See Kohl v. Bradley, 130 Wis. 301, 110 N. W. 265.
521-45 **Presumption of law.** Long B. Lumb. Co. v. Nyman, 145 Mich. 477, 108 N. W. 1019.
522-48 **Telephone communications.** Star B. Co. v. Faucet Co. (Mo. App.), 109 S. W. 802.
524-57 **Telephone conversations.** Conkling v. Oil Co. (Ia.), 116 N. W. 822.
526-61 See infra, 615-10.
Burden of showing performance of condition precedent. — International H. Co. v. Dillon, 126 Ga. 672, 55 S. E. 1034.
527-64 See Brown Bros. v. Korns, 134 Ia. 699, 112 N. W. 195.
528-72 Joy v. Cale, 124 Mo. App. 569, 102 S. W. 30.
528-75 Schiller v. Blyth, 15 Wyo. 304, 88 P. 648.
530-81 Clevenger v. Lewis (Okla.), 95 P. 230.

531-86 Brooks v. Camak, 130 Ga. 213, 60 S. E. 456.
531-91 Brooks v. Camak, supra.
543-17 Hutchinson Lumb. Co. v. Dickerson, 127 Ga. 328, 56 S. E. 491.
545-25 See Depew v. Hdw. Co., 121 App. Div. 28, 105 N. Y. S. 390.
562-4 **The protest of a note** not conclusive evidence of insolvency. Rex Buggy Co. v. Ross, 80 Ark. 388, 97 S. W. 291.
568-21 **Mere failure to perform** executory agreement which is a part of the consideration of a sale not in itself proof of fraud. J. Blane & Sons v. Wandel (Ia.), 114 N. W. 899.
568-22 **Seller's reliance upon fraudulent promise—burden of proof.** Where goods were sold, the buyer promising to do certain acts which he failed to do, the burden was upon the seller to prove that but for such promise the sale would not have been made. J. Blane & Sons v. Wandel, supra.
569-23 Ayres v. Farwell, 196 Mass. 349, 82 N. E. 35. See J. Blane & Sons v. Wandel, supra.
573-37 Texas etc. Lumb. Co. v. Rose (Tex. Civ.), 103 S. W. 444.
573-38 Brinn v. Cohen, 107 N. Y. S. 37 (delivery must be shown). See Main v. Simmons, 2 Ga. App. 821, 59 S. E. 85; Brown v. Grossman, 108 N. Y. S. 653; Harris V. Gill, 102 N. Y. S. 665.
574-39 **Burden of proof on buyer.** Smith v. Pickands, 148 Mich. 558, 112 N. W. 122.
575-45 **The retention of an invoice and account.** — Hamilton-B. Shoe Co. v. Merc. Co., 80 Ark. 438, 97 S. W. 284.
576-47 Lattner v. Tel. Co. (Ia.), 112 N. W. 653; Helm v. Loveland (Ia.), 113 N. W. 1082.
576-48 **Acceptance must be shown.** Inman Mfg. Co. v. Cereal Co., 133 Ia. 71, 110 N. W. 287.
576-50 **The terms and conditions of the sale.** — Drake Coal Co. v. Croze, 149 Mich. 60, 112 N. W. 715.
Evidence must show debt due and payable. — Inman Mfg. Co. v. Cereal Co., 133 Ia. 71, 110 N. W. 287.
After prima facie case has been shown, burden of proceeding shifts to defendant to establish a plea of recoupment. Gem Knitting Mills v. Box Co., 3 Ga. App. 709, 60 S. E. 365; Am. Theater Co. v. Siegel, 221 Ill. 145, 77 N. E. 588.
577-51 Gem Knitting Mills v. Box Co., supra.
Action for price—burden of proving gift. — Where an action is brought for the price of goods alleged to have been sold and delivered the burden is upon the defendant to establish a defense that such goods were a gift. Merritt v. Bush, 122 Ill. App. 189.
579-61 W. F. Main & Co. v. Jarrett, 83 Ark. 426, 104 S. W. 163.
580-65 See Kitchin v. Clark, 120 Ill. App. 105.
581-66 Norfolk etc. R. Co. v. Duke, 107 Va. 764, 60 S. E. 96.
581-67 See Norfolk etc. R. Co. v. Duke, 107 Va. 764, 60 S. E. 96 (difficulty of procuring labor).
581-68 Norfolk etc. R. Co. v. Duke, supra.
581-69 S. D. Childs Co. v. Paraphernalia H. (Neb.), 114 N. W. 941.
Evidence admissible showing necessity for immediate shipment. Gorham v. R. Co. (Tex. Civ.), 106 S. W. 930.
585-76 See North P. Lumb. Co. v. Carroll (Wash.), 93 P. 212.
587-91 Fountain City D. Co. v. Lindquist (S. D.), 114 N. W. 1098; Wheeling Mold etc. Co. v. Iron Co. (W. Va.), 57 S. E. 826. See Garvin v. Music Co., 31 Ky. L. R. 1182, 104 S. W. 964.
589-96 Hillman v. Hulett, 149 Mich. 289, 112 N. W. 918. See Central T. Groc. Co. v. Tobacco Co. (Tex. Civ.), 99 S. W. 1144 (reasons for special price).
590-1 Tuttle-C. Coal Co. v. Fuel Co. (Ia.), 113 N. W. 827.
590-3 See Tuttle-C. Coal Co. v. Fuel Co., supra.
591-4 Cleveland v. Rowe, 99 Minn. 444, 109 N. W. 817.
594-11 Brown v. Mfg. Co., 210 Mo. 260, 109 S. W. 22.
597-23 Avil Pub. Co. v. Bradford, 121 Mo. App. 577, 97 S. W. 238.
601-49 Schon-K. etc. Co. v. Snow (Colo.), 96 P. 182.
602-51 **Breach of contract of sale—burden of proving defense.** Star B. Co. v. Faucet Co. (Mo. App.), 109 S. W. 802.
603-58 Crowley v. Mfg. Co., 100 Minn. 178, 110 N. W. 969.
603-59 Brody v. Birnbaum, 108 N. Y. S. 581.

Price current lists. — See Orr v. Kenny, 150 Mich. 159, 114 N. W. 228; Moseley v. Johnson, 144 N. C. 257, 274, 56 S. E. 922.

Efforts made in the open market by the buyer to procure goods may be shown. Talcott v. Freedman, 149 Mich. 577, 113 N. W. 13.

Evidence of loss sustained by reason of having to buy goods to take the place of those contracted for, inadmissible. Pierce v. Waller (Tex. Civ.), 102 S. W. 1173.

Market price — burden of proof. Orr v. Kenny, 150 Mich. 159, 114 N. W. 228.

604-61 Evidence as to cost of repairing. — Marbury Lumb. Co. v. Mfg. Co., 32 Ky. L. R. 739, 107 S. W. 200.

605-63 *Contra*, Taussig v. Land Co., 124 Mo. App. 209, 101 S. W. 602.

606-66 Walnut R. Merc. Co. v. Cohn, 79 Ark. 338, 96 S. W. 413.

607-73 Pitman v. Queensware Co. (Tex. Civ.), 106 S. W. 724, *aff.* 108 S. W. 1165.

608-78 Pitman v. Queensware Co., supra.

614-3 As showing value of goods sold under a warranty, the breach of which is alleged, evidence is admissible showing the price received by the buyer on a resale. Petrified Bone M. Co. v. Rogers, 150 Fed. 445.

615-9 See Elmore v. Booth, 83 Ark. 47, 102 S. W. 393.

615-10 Excelsior Coal Co. v. Gildersleeve, 160 Fed. 47; Brooks v. Camak, 130 Ga. 213, 60 S. E. 456.

616-11 Excelsior Coal Co. v. Gildersleeve, supra; Elmore v. Booth, 83 Ark. 47, 102 S. W. 393; Wyandotte etc. Co. v. Bruner, 147 Mich. 400, 110 N. W. 949; Prizer etc. Co. v. Peaslee, 99 Minn. 275, 109 N. W. 232; Clevenger v. Lewis (Okla.), 95 P. 230; Miller v. Mach. Co., 220 Pa. 181, 69 A. 598; Dunham v. Salmon, 130 Wis. 164, 109 N. W. 959.

617-13 Burden of showing rescission of continuing contract. — A continuing contract of sale, once shown to exist is presumed to continue to exist, burden of showing discontinuance upon party alleging the same. Fruit D. Co. v. Le Seno, 147 Mich. 149, 110 N. W. 526.

621-33 U. S. Gypsum Co. v. Shields (Tex.), 108 S. W. 1165; Compagnie etc. Co. v. Mfg. Co. (Tex. Civ.), 107 S. W. 651.

622-35 Burden of showing fraud of seller. — Lyon v. Lindblad, 145 Mich. 588, 108 N. W. 969.

Rescission by buyer — burden of proof on buyer. — Muncie Wheel etc. Co. v. Finch, 150 Mich. 274, 113 N. W. 1107.

SALVAGE [Vol. 11.]

636-14 Merritt Co. v. Tice, 118 App. Div. 123, 103 N. Y. S. 333.

637-22 No fixed rule based on value of property salved and character of services rendered. The Indian, 159 Fed. 20.

639-24 The S. C. Schenk, 158 Fed. 54; The Western Star, 157 Fed. 489.

640-28 The Devonian, 150 Fed. 831; The Western Star, supra.

641-34 The Pelican, 158 Fed. 183.

641-36 The Western Star, supra.

644-53 *Compare* The S. C. Schenk, 158 Fed. 54.

SCIRE FACIAS [Vol. 11.]

646-1 See Goodfellow v. S. (Tex. Cr.), 110 S. W. 755.

647-5 But see Day v. S., 51 Tex. Cr. 324, 101 S. W. 806.

649-15 See Weaver v. Webb, 3 Ga. App. 726, 60 S. E. 367; Waterbury Nat. Bk. v. Reed, 231 Ill. 246, 83 N. E. 188; Henry v. Lumb. Co. (Tex. Civ.), 102 S. W. 749.

651-21 Weaver v. Webb, supra. See Leonard v. Weymouth, 193 Mass. 479, 79 N. E. 787.

SEALS [Vol. 11.]

655-1 Pardee v. Schanzlin, 3 Cal. App. 597, 86 P. 812; Brown Mfg. Co. v. Gilpin, 120 Mo. App. 130, 96 S. W. 669.

656-7 But see Milwaukee etc. Co. v. Gordon (Mont.), 95 P. 995 (holding there is no presumption that a seal used by the secretary of a territory is the great seal of the territory; therefore the fact must affirmatively appear).

656-13 See "RECORDS," 884-56.

659-22 See Langley v. Owens, 52 Fla. 302, 42 S. 457.

659-23 See Bancroft v. Haines, 13 Pa. C. C. 116.

660-26 Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 S. 687.
661-28 Griffing Bros. Co. v. Winfield, supra; New York L. Ins. Co. v. Rhodes (Ga. App.), 60 S. E. 828.

SEDUCTION [Vol. 11.]

668-1 Clemons v. Seba (Mo. App.), 111 S. W. 522; Greenman v. O'Riley, 144 Mich. 534, 108 N. W. 421.
670-7 Breiner v. Nugent (Ia.), 111 N. W. 446.
676-33 But see Taylor v. Daniel, 30 Ky. L. R. 377, 98 S. W. 986 (illegitimate child).
677-37 Greenman v. O'Riley, supra.
682-58 Breiner v. Nugent, supra; Anderson v. Aupperle (Or.), 95 P. 330.
684-63 Breiner v. Nugent, supra.
687-73 Clemons v. Seba (Mo. App.), 111 S. W. 522.
687-74 See Clemons v. Seba, supra.
689-80 Sramek v. Shlenar, 73 Kan. 450, 85 P. 566.
692-93 Willhite v. S., 84 Ark. 67, 104 S. W. 531; Kerr v. U. S. (Ind. Ter.), 104 S. W. 809; S. v. Drake, 128 Ia. 539, 105 N. W. 54.
692-96 S. v. Dolan, 132 Ia. 196, 109 N. W. 609; Russell v. S. (Neb.), 110 N. W. 380.
692-97 Kerr v. U. S., supra (unchastity proven is presumed to continue).
692-99 S. v. Bennett (Ia.), 110 N. W. 150.
693-8 S. v. Raynor, 145 N. C. 472, 59 S. E. 344.
694-9 Rex v. Daun, 12 Ont. L. R. (Can.) 227; S. v. Ring, 142 N. C. 516, 55 S. E. 194.
694-12 Whatley v. S., 144 Ala. 68, 39 S. 1014; S. v. Bennett (Ia.), 110 N. W. 150; S. v. Raynor, 145 N. C. 472, 59 S. E. 344.
694-13 Willhite v. S., 84 Ark. 67, 104 S. W. 531.
694-16 Weaver v. S., 142 Ala. 33, 39 S. 341; Jeter v. S. (Tex. Cr.), 106 S. W. 371.
694-17 Weaver v. S., supra.
695-22 P. v. Tibbs, 143 Cal. 100, 76 P. 904.
695-24 S. v. Dolan, 132 Ia. 196, 109 N. W. 609; S. v. Nugent, 134 Ia. 237, 111 N. W. 927.
695-29 S. v. Bennett (Ia.), 110 N. W. 150.
696-30 Washington v. S., 124 Ga. 423, 52 S. E. 910; S. v. Whitley, 141 N. C. 823, 53 S. E. 820.
696-33 Weaver v. S., 142 Ala. 33, 39 S. 341; Whatley v. S., 144 Ala. 68, 39 S. 1014; Willhite v. S., 84 Ark. 67, 104 S. W. 531; Faulkner v. S. (Tex. Cr.), 109 S. W. 199; Jeter v. S. (Tex. Cr.), 106 S. W. 371.
696-34 S. v. Waterman, 75 Kan. 253, 88 P. 1074.
696-35 Whatley v. S., supra; S. v. Kincaid, 142 N. C. 657, 55 S. E. 647.
696-37 Russell v. S. (Neb.), 110 N. W. 380. But see S. v. Sortviet, 100 Minn. 12, 110 N. W. 100.
696-39 Rex v. Daun, 12 Ont. L. R. (Can.) 227; Cooper v. S. (Ark.), 109 S. W. 1023.
697-41 Russell v. S. (Neb.), 110 N. W. 380; S. v. Raynor, 145 N. C. 472, 59 S. E. 344; Holmes v. S. (Tex. Cr.), 102 S. W. 408.
697-44 See Taylor v. S., 31 Tex. Cr. 422, 106 S. W. 366.
699-61 P. v. Tibbs, 143 Cal. 100, 76 P. 904.
701-75 But see P. v. Tibbs, supra.
701-76 But see S. v. Whitley, 141 N. C. 823, 53 S. E. 820. *Contra*, Ex parte Vandiveer, 4 Cal. App. 650, 88 P. 993.
701-80 Knight v. S., 147 Ala. 93, 41 S. 850; Jeter v. S. (Tex. Cr.), 106 S. W. 371.
701-81 Nolan v. S., 48 Tex. Cr. 436, 88 S. W. 242.
701-82 But see Anderson v. Aupperle (Or.), 95 P. 330.
702-88 Hatton v. S. (Miss.), 46 S. 708.
703-94 S. v. Slattery, 74 N. J. Eq. 241, 65 A. 866 (immaterial on account of statutory provision).
703-95 Nolan v. S., supra.
704-4 *Contra.* — Williams v. S., 90 Miss 319, 45 S. 146.

SEQUESTRATION [Vol. 11.]

Action on replevin bond, 712-24.

711-20 Hurlbut v. Gainor (Tex. Civ.), 103 S. W. 409.
712-24 In an action on a replevin bond the amount of rent collected by principal may be shown.

Wandelohr v. Bank (Tex. Civ.), 106 S. W. 413.

714-34 See Rea v. Schow Bros. (Tex. Civ.), 93 S. W. 706.

SERVICE [Vol. 11.]

Definition and requirements, 717-6.

716-3 **Place of service** as well as manner and time, must be shown where service was made by an individual, since the presumption which exists in favor of an officer that he made the service within his county, does not attach. Lynch v. West (W. Va.), 60 S. E. 606.

717-6 Unaugst v. Southwick (Neb.), 113 N. W. 989. See Hooper v. McDade, 1 Cal. App. 733, 82 P. 1116.

718-9 Mahan v. McManus (Tex. Civ.), 102 S. W. 789.

Burden of proof is upon the person alleging illegality of service, to show the service was made outside the jurisdiction of the officer. McDonald v. Cawhorn (Ala.), 44 S. 395.

721-17 National Metal Co. v. Copper Co., 9 Ariz. 192, 80 P. 397; s. c. 89 P. 535; S. v. Court, 42 Wash. 521, 85 P. 256. See Buck v. Hawley, 129 Ia. 406, 105 N. W. 688.

In California. — Berentz v. Oil Co., 148 Cal. 577, 84 P. 47 (contable — certificate insufficient).

Verification. — Return, to be effective, must be verified. Berentz v. Development Co. (Cal. App.), 84 P. 45.

Age of server must appear as of the time of service. French v. Ajax Co., 44 Wash. 697, 87 P. 360.

722-19 Strobel v. Clark, 128 Mo. App. 48, 106 S. W. 585; Cornwall v. Bottling Co., 128 Mo. App. 163, 106 S. W. 591; Regent Realty Co. v. Pack. Co., 112 Mo. App. 271, 86 S. W. 880; Coal Co. v. Water Co., 25 Pa. Super. 628; Talbott v. Oil Co., 60 W. Va. 423, 55 S. E. 1009; Philadelphia Sav. Soc. v. Purcell, 24 Pa. Super. 205.

723-20 Matchett v. Luebig, 20 S. D. 169, 105 N. W. 170.

723-21 Cooke v. Haungs, 113 Ill. App. 501; Unaugst v. Southwick (Neb.), 113 N. W. 989.

Ex parte affidavits may be used to impeach the returns. Johnson v. Carpenter (Neb.), 108 N. W. 161 (in revivor proceedings).

Conclusive unless traversed. — Mayerson v. Cohen, 123 App. Div. 646, 108 N. Y. S. 59; Mann v. Meryash, 107 N. Y. S. 599.

727-26 See Meyer v. Wilson, 166 Ind. 651, 76 N. E. 743; Reich v. Cochran, 102 N. Y. S. 827. *Compare* Smoot v. Judd, 184 Mo. 508, 83 S. W. 481.

728-27 Tyler v. Davis, 37 Ind. App. 557, 75 N. E. 3 (in the absence of fraud); Claryville etc. Co. v. C., 32 Ky. L. R. 1157, 107 S. W. 327 (official character of server cannot be contradicted).

729-29 Mann v. Meryash, 107 N. Y. S. 599; Sills v. Machson, 104 N. Y. S. 770; Marin v. Potter, 15 N. D. 284, 107 N. W. 970 (general denial by defendant in an affidavit, insufficient); Unaugst v. Southwick (N. D.), 113 N. W. 989; Matchett v. Liebig, 20 S. D. 169, 105 N. W. 170.

Evidence held sufficient. Hogan v. Gault, 104 N. Y. S. 410; Pfotenhauer v. Brooker, 101 N. Y. S. 762.

730-31 Stuart v. Cole (Tex. Civ.), 92 S. W. 1040 ("publisher" comes within the terms "editor, proprietor, or manager").

732-43 Harbert v. Durden, 116 Mo. App. 512, 92 S. W. 746.

732-46 *Compare* Stuart v. Cole, supra.

732-47 Zahorka v. Geith, 129 Wis. 498, 109 N. W. 553.

733-48 Weaver v. Webb, 3 Ga. App. 726, 60 S. E. 367; Harbert v. Durden, 116 Mo. App. 512, 92 S. W. 746.

In the absence of a recital service will be presumed in a court of general jurisdiction. Clark v. Neves, 76 S. C. 484, 57 S. E. 614.

734-49 See French v. Ajax Co., 44 Wash. 697, 87 P. 360.

734-51 Morse v. U. S., 29 App. D. C. 433 (order of publication). See Town of Point Pleasant v. Greenlee (W. Va.), 60 S. E. 601.

736-52 Waterbury Bk. v. Read, 231 Ill. 246, 83 N. E. 188; Knapp v. Wallace (Or.), 92 P. 1054; Steves v. Smith (Tex. Civ.), 107 S. W. 141; Town of Point Pleasant v. Greenlee (W. Va.), 60 S. E. 601. *Com-*

pare Davis v. Montgomery, 205 Mo. 271, 103 S. W. 979.

738-54 Stuart v. Cole (Tex. Civ.), 92 S. W. 1040.

739-58 **Parol evidence** admissible to prove actual service, which does not appear of record. Jones v. Gunn, 149 Cal. 687, 87 P. 577.

SETOFF AND COUNTERCLAIM [Vol. 11.]

740-2 Marshall v. Trerise, 33 Mont. 28, 81 P. 400; Simonoff v. Horwitz, 95 N. Y. S. 522; Liberty Co. v. Stoner, 178 N. Y. 219, 70 N. E. 501.

741-3 McKeige v. Carroll, 120 App. Div. 521, 105 N. Y. S. 342.

743-7 **The verified answer** of the defendant is admissible in evidence against him. Talbot v. Laubheim, 188 N. Y. 421, 81 N. E. 163.

SHIPS AND SHIPPING [Vol. 11.]

748-14 **Loss of vessel** by charterer, burden on him to negative negligence. Swenson v. Snare T. Co., 160 Fed. 459.

748-18 See Peck v. U. S., 152 Fed. 524.

753-48 Boston v. Ocean S. Co. (Mass.), 83 N. E. 1116.

753-50 **Identity of vessel.** — The Ramleh, 157 Fed. 769.

754-60 The Henry O. Barrett, 161 Fed. 481.

755-64 **Presumption not conclusive.** — In re Eastern D. Co., 159 Fed. 541.

758-89 **Presumption not overcome.** Dowgate S. Co. v. Arbuckle, 158 Fed. 179.

758-90 Pacific C. Co. v. Yukon Tr. Co., 155 Fed. 29, 83 C. C. A. 625; The Fri, 154 Fed. 333, 83 C. C. A. 205.

758-91 **Bill of lading** as best evidence of contract of carriage. The Eva D. Rose, 151 Fed. 704, *mod.* 153 Fed. 912.

759-94 **Damage to cargo**—burden on ship as to sea perils. The Folmina, 153 Fed. 364, 82 C. C. A. 440.

761-97 The Ninfa, 156 Fed. 512.

767-20 Minneapolis S. Co. v. Manistee Tr. Co., 156 Fed. 424.

767-22 I. C. Levy v. Gibson (Ga.), 61 S. E. 484. See Deslions v. La Compagnie, 210 U. S. 95.

SIMILAR TRANSACTIONS [Vol. 11.]

770-2 Wiggs v. S. W. T. T. Co. (Tex. Civ.), 110 S. W. 179.

775-8 Sucker St. D. Co. v. Wirtz (N. D.), 115 N. W. 844.

778-12 *Compare* Campagnie Des Metaux v. Mfg. Co. (Tex. Civ.), 107 S. W. 651.

780-18 Martin v. Logan, 30 Ky. L. R. 799, 99 S. W. 648.

786-32 Sabine Tel. Co. v. Oliver (Tex. Civ.), 102 S. W. 925. See Missouri etc. R. Co. v. Parrott (Tex. Civ.), 96 S. W. 950.

787-34 **Similar occurrence** held admissible to bring home to master knowledge. J. Taylor Coal Co. v. Dawes, 220 Ill. 145, 77 N. E. 131.

791-41 Gibson v. Seney (Ia.), 116 N. W. 325; Campagnie DesMetaux U. v. Mfg. Co. (Tex. Civ.), 107 S. W. 651. See Hyman v. Kirt (Mich.), 116 N. W. 536.

795-49 Stewart v. Wright, 147 Fed. 321, 77 C. C. A. 499; McGuire v. Iowa Co., 133 Ia. 636, 111 N. W. 34.

797-53 Atlanta I. & C. Co. v. Mixon, 126 Ga. 457, 55 S. E. 237.

799-55 S. v. Sebastian, 80 Conn. 1, 69 A. 1054; Ryan v. U. S., 26 App. D. C. 74; Raymond v. C., 29 Ky. L. R., 96 S. W. 515; C. v. Parsons, 195 Mass. 560, 81 N. E. 291; S. v. McNamara (Mo.), 110 S. W. 1067; S. v. Hazlett (N. D.), 113 N. W. 374, *dist.* S. v. Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518; Roberts v. S., 51 Tex. Cr. 27, 100 S. W. 150; Lightfoot v. S. (Tex. Cr.), 106 S. W. 345; Smith v. S., 51 Tex. Cr. 427, 105 S. W. 501; Hinson v. S., 51 Tex. Cr. 102, 100 S. W. 939; Davis v. S. (Wis.), 115 N. W. 150.

Evidence held admissible to identify defendant. Dillard v. S. (Ala.), 44 S. 537; Abrams v. S. (Ala.), 46 S. 464; Morse v. C. (Ky.), 111 S. W. 714.

As corroborating proof, held admissible. Smothers v. S. (Neb.), 116 N. W. 152; S. v. Routzahn (Neb.), 115 N. W. 759.

800-56 Thomas v. U. S., 156 Fed. 897, 84 C. C. A. 477; Sanderson v. S. (Ind.), 82 N. E. 525; Greenwell v. C., 30 Ky. L. R. 1282, 100 S. W. 852; S. v. Spaugh, 200 Mo. 571, 98 S. W. 55; S. v. Dickerson, 77 Ohio St. 34, 82 N. E. 969; C. v. Levinson, 34 Pa. Super. 286; S. v. Sargood, 80 Vt. 415, 68 A. 51.

801-57 Williamson v. U. S., 207 U. S. 425; Ray v. S. (Ga.), 60 S. S. E. 816.

Kidnaping. — S. v. Holland, 120 La. 429, 45 S. 380.

801-58 Thomas v. U. S., 156 Fed. 897, 84 C. C. A. 477; U. S. v. Dexter, 154 Fed. 890; Storms v. S., 81 Ark. 25, 98 S. W. 678; Alsobrook v. S., 126 Ga. 100, 54 S. E. 805; Eacock v. S. (Ind.), 82 N. E. 1039; S. v. Johnson, 133 Ia. 38, 110 N. W. 170; Clark v. S. (Neb.), 113 N. W. 804; P. v. Weinseimer, 117 App. Div. 603, 102 N. Y. S. 579, *aff.* 190 N. Y. 537, 83 N. E. 1129; S. v. Jackson (S. D.), 113 N. W. 880; Gorman v. S. (Tex. Cr.), 106 S. W. 384; Lynne v. S. (Tex. Cr.), 111 S. W. 729; S. v. Louanis, 79 Vt. 463, 65 A. 532; S. v. Mobley, 44 Wash. 549, 87 P. 815. See P. v. McPherson, 6 Cal. App. 266, 91 P. 1098.

802-59 P. v. Robertson, 6 Cal. App. 514, 92 P. 498; Gassenheimer v. U. S., 26 App. D. C. 432; Chamberlain v. S. (Neb.), 115 N. W. 555.

803-60 P. v. Levin, 119 App. Div. 233, 104 N. Y. S. 647; S. v. Roberts, 201 Mo. 702, 100 S. W. 484; S. v. Sparks (Neb.), 113 N. W. 154.

804-63 Woodward v. S., 84 Ark. 119, 104 S. W. 1109; Lipsey v. P., 227 Ill. 364, 81 N. E. 348; Jeffries v. U. S. (Ind. Ter.), 103 S. W. 761.

805-65 Renfroe v. S., 84 Ark. 16, 104 S. W. 542.

805-66 S. v. Anderson, 120 La. 331, 45 S. 267; Nelson v. S., 51 Tex. Cr. 349, 101 S. W. 1012.

806-67 Griggs v. U. S., 158 Fed. 572; P. v. Harben, 5 Cal. App. 29, 91 P. 398; S. v. Newman, 34 Mont. 434, 87 P. 462; S. v. Routzahn (Neb.), 115 N. W. 759; S. v. Deliso (N. J.), 69 A. 218; P. v. Neff, 191 N. Y. 210, 83 N. E. 971; Holland v. S., 51 Tex. Cr. 142, 101 S. W. 1005. *Compare* Curtis v. S. (Tex. Cr.), 108 S. W. 380.

807-70 P. v. Hoffman, 142 Mich. 531, 105 N. W. 838; S. v. Sparks (Neb.), 114 N. W. 598, 113 N. W. 154; C. v. Valverdi, 218 Pa. 7, 66 A. 877; Penrice v. S. (Tex. Cr.), 105 S. W. 797.

812-76 Odegard v. Lumb. Co., 130 Wis. 659, 110 N. W. 809.

812-77 *Compare* Hammerschlag Mfg. Co. v. Struthers-W. Co., 154 Fed. 326, 83 C. C. A. 198.

818-91 Aurora v. Plummer, 122 Ill. App. 143.

818-92 See Brucker v. Tel. Co., 30 Ky. L. R. 1162, 100 S. W. 240.

819-93 Yore v. Newton, 194 Mass. 250, 80 N. E. 472. See Leonhart v. Assn., 5 Cal. App. 19, 89 P. 847.

819-97 *Compare* Funston v. Hoffman, 232 Ill. 360, 83 N. E. 917.

820-6 Lamb v. R. Co., 217 Pa. 564, 66 A. 762 (condition of roof of building).

821-8 Aurora v. Plummer, 122 Ill. App. 143.

SODOMY [Vol. 11.]

826-3 S. v. Gage (Ia.), 116 N. W. 596.

827-4 S. v. Gage, supra.

829-11 **In Hawaii** jury may convict on uncorroborated testimony of accomplice. Republic v. Edwards, 11 Haw. 571.

832-23 **Profert of animal** refused. Richardson v. S., 49 Tex. Cr. 391, 94 S. W. 1016.

SPACE AND DISTANCE [Vol. 11.]

Expert opinion as to distances at which gases will ignite, 840-26.

837-15 P. v. Helm (Cal.), 93 P. 99 (opinion as to width of bicycle tracks admissible); Augusta R. E. Co. v. Arthur, 3 Ga. App. 513, 60 S. E. 213.

837-16 Buxton v. Ainsworth (Mich.), 116 N. W. 1094.

That platform space would be crowded by a given number of persons. Beverly v. R. Co., 194 Mass. 450, 80 N. E. 507; Standley v. R. Co., 121 Mo. App. 537, 97 S. W. 244 (opinion as to whether space left by bridge was large enough to carry off water, competent). *Compare* S. v. Hunskor (N. D.), 114 N. W. 996.

838-20 Arkansas R. Co. v. Sanders, 81 Ark. 604, 99 S. W. 1109.
839-21 See Chicago C. R. Co. v. Hagenback, 228 Ill. 290, 81 N. E. 1014.
839-23 See Hoagland v. Canfield, 160 Fed. 146. *Contra*, Lynch v. R. Co., 208 Mo. 1, 106 S. W. 68.
840-25 Lynch v. R. Co., supra.
840-26 **Expert opinion as to distances at which gases will ignite.** Waters-P. Oil Co. v. Snell (Tex. Civ.), 106 S. W. 170.

SPECIAL ASSESSMENT [Vol. 11.]

Assessment resisted on ground of prior improvement, 882-10.

847-4 In re Avenue D., 122 App. Div. 416, 106 N. Y. S. 889, order *aff.* 84 N. E. 956.
848-5 **On appeal.** — New York etc. R. Co. v. Hammond (Ind.), 83 N. E. 244.
848-6 Kirtland v. Parker (N. J.), 68 A. 913.
849-7 **Assessment presumed to be on basis of benefits.** — See New York etc. R. Co. v. Hammond (Ind.), 83 N. E. 244.
853-16 See Chicago etc. Tract. Co. v. Oak Park, 225 Ill. 9, 80 N. E. 42.
859-39 But see New York etc. R. Co. v. Hammond, supra.
869-63 See Snydacker v. Hammond, 225 Ill. 154, 80 N. E. 93.
879-5 Clark v. Chicago, 229 Ill. 363, 82 N. E. 370; Wiemers v. P., 225 Ill. 82, 80 N. E. 68; City of Ex. Springs v. Ettenson, 120 Mo. App. 215, 96 S. W. 701.
880-6 City of Ex. Springs v. Ettenson, supra.
880-9 Board v. Offenhauser, 84 Ark. 257, 105 S. W. 265; Beckett v. Morse, 4 Cal. App. 228, 87 P. 408; Flinn v. Strauss, 4 Cal. App. 245, 87 P. 414; City of Ex. Springs v. Ettenson, supra.
882-10 **Assessment resisted on ground of prior improvement—Burden of proof.** — Where an owner resists payment on ground of prior paving, the burden is upon him to show that the improvement was permanently done and by authority of city officials. Chester City v. Evans, 32 Pa. Super. 641.
898-95 Flinn v. Strauss, 4 Cal. App. 245, 87 P. 414; Wiemers v. P., 225 Ill. 82, 80 N. E. 68.
908-27 City of East St. Louis v. Davis, 233 Ill. 553, 84 N. E. 674.
910-32 City of East St. Louis v. Davis, supra.
911-37 Board v. Offenhauser, 84 Ark. 257, 105 S. W. 265 (burden upon attacking party of showing that ordinance was not duly passed).
920-94 City of East St. Louis v. Davis, supra.

SPECIFIC PERFORMANCE [Vol. 11.]

926-6 Hildreth v. Duff, 148 Fed. 676, 78 C. C. A. 410; Jones v. Patrick, 145 Fed. 440; McNichol v. Townsend (N. J.), 67 A. 938; Roberts v. Braffett, 33 Utah 51, 92 P. 789; Creecy v. Grief (Va.), 61 S. E. 769; Colonna Co. v. Colonna (Va.), 61 S. E. 770. See Bradley Co. v. Robbins (Ind. Ter.), 103 S. W. 777; Boam v. Greenman, 147 Mich. 106, 110 N. W. 508. See 943-91.
927-8 Roberts v. Braffett, 33 Utah 51, 92 P. 789; Colonna Co. v. Colonna, supra.
927-10 Stafford v. Richard, 121 La. —, 46 S. 107. See Horn v. Graffagnino, 121 La. —, 46 S. 305.
927-12 But see Witte v. Koerner, 123 App. Div. 824, 108 N. Y. S. 560.
933-44 Newell v. Lamping, 45 Wash. 304, 88 P. 195.
934-49 Downing v. Ernst, 40 Colo. 137, 92 P. 230.
935-54 Kirk v. Middlebrook, 201 Mo. 245, 100 S. W. 450.
935-55 Williams v. Oil Co., 144 Cal. 619, 78 P. 28; Albert v. R. Co., 107 Va. 256, 58 S. E. 575. See Sylliaasen v. Hanson (Wash.), 94 P. 187.
935-57 Balkwill v. Spencer, 45 Wash. 600, 88 P. 1029.
936-58 See Kessler v. Pruitt, 14 Idaho 175, 93 P. 965.
938-66 Creecy v. Grief (Va.), 61 S. E. 769.
939-68 Ranson v. Ranson, 233 Ill. 369, 84 N. E. 210.
941-81 See Schreiber v. Elkin, 118 App. Div. 244, 103 N. Y. S. 330.
941-82 See Riggins v. Trickey (Tex. Civ.), 102 S. W. 918.

943-88 Portland Iron Wks. v. Willett, 49 Or. 245, 89 P. 421, 90 P. 1000.
943-89 Rosewald v. Middlebrook, 188 Mo. 58, 86 S. W. 200.
943-90 Bounds v. City (Tex. Civ.), 105 S. W. 56.
943-91 McCullough v. Sutherland, 153 Fed. 418; Jones v. Patrick, 145 Fed. 440; Standard v. Standard, 223 Ill. 255, 79 N. E. 92; White v. White, 231 Ill. 298, 83 N. E. 234; Ranson v. Ranson, 233 Ill. 369, 84 N. E. 210; Bichel v. Oliver (Kan.), 95 P. 396; Baldwin v. Baldwin, 73 Kan. 39, 84 P. 568; Bell v. Whitesell (W. Va.,) 60 S. E. 879. See Pickett v. Michaels, 120 App. Div. 357, 105 N. Y. S. 411 (corporate stock).
Where defendant denies a contract of sale, the burden is on the plaintiff to establish a written agreement. Bradley Co. v. Robbins (Ind. Ter.), 103 S. W. 777. See Cobb v. Johnson (Tex.), 108 S. W. 811.
943-92 Bichel v. Oliver (Kan.), 95 P. 396; Boam v. Greenman, 147 Mich. 106, 110 N. W. 508; Detroit etc. R. Co. v. Hartz, 147 Mich. 354, 110 N. W. 1089; West v. R. Co., 49 Or. 436, 90 P. 666.
944-93 Young v. Crawford, 82 Ark. 33, 100 S. W. 87. See Logue v. Langan, 151 Fed. 455, 81 C. C. A. 271.
945-94 Redman Bros. v. Mays, 129 Ga. 435, 59 S. E. 212; Kirk v. Middlebrook, 201 Mo. 245, 100 S. W. 450; Rosenwald v. Middlebrook, 188 Mo. 58, 86 S. W. 200.
945-95 Rau v. Rau (Neb.), 113 N. W. 174; Holt v. Tuite, 188 N. Y. 17, 80 N. E. 364. See Haren v. Block, 9 Ohio C. C. (N. S.) 328.
946-96 Portland Iron Wks. v. Willett, 49 Or. 245, 89 P. 421, 90 P. 1000. See Wright v. Organ Co., 148 Fed. 209, 79 C. C. A. 183.

SPOLIATION [Vol. 11.]

950-5 Grace Co. v. Larson, 129 Ill. App. 290.
955-10 Mastin v. Noble, 157 Fed. 506.
963-22 See Tuggle v. S., 127 Ga. 290, 56 S. E. 406; Shields v. Electric Co., 1 Ga. App. 172, 57 S. E. 980.
966-29 See Davis v. S. (Ga. App.), 61 S. E. 843.
967-32 See S. v. Constantine (Wash.), 93 P. 317.
967-33 Choctaw etc. R. Co. v. Newton, 140 Fed. 225, 71 C. C. A. 655; Robinson v. Ins. Co., 144 Fed. 1005; The Lukenbach, 144 Fed. 980; Hartford Ins. Co. v. Sherman, 123 Ill. App. 202; Western U. Tel. Co. v. McClellan, 38 Ind. App. 578, 78 N. E. 672; Fowler Packing Co. v. Enzenperger (Kan.), 94 P. 995; Green v. Brooks, 215 Pa. 492, 64 A. 672; Standard Oil Co. v. S., 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015. See Tuggle v. S., 127 Ga. 290, 56 S. E. 406; Shields v. Elec. Co., 1 Ga. App. 72, 57 S. E. 980.
968-34 Wilson v. Griswold, 79 Conn. 18, 63 A. 659. See Isabella Min. Co. v. Glenn, 37 Colo. 165, 86 P. 349; Williams v. Bank, 49 Or. 492, 90 P. 1012, 91 P. 443; Rochester Ins. Co. v. Assn., 107 Va. 701, 60 S. E. 93.
971-41 Galveston etc. R. Co. v. Young (Tex. Civ.), 100 S. W. 993 (failure to produce a coupling alleged to have been defective). See Grace Co. v. Larson, 129 Ill. App. 290.

STAMP ACTS [Vol. 11.]

985-19 See Sandford v. Embry, 151 Fed. 977, 81 C. C. A. 167.
985-21 Wade v. Foss, 96 Me. 230, 52 A. 762; Wade v. Curtis, 96 Me. 309, 52 A. 762; Davis v. Evans, 133 N. C. 320, 45 S. E. 643.